

NO. 34491-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RECEIVED
R APR 11 2007 D

MARTHA E. GRAHAM

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

Appellant

v.

MARK JENKINS, CITY OF TACOMA

Respondent/Cross Appellant

APPELLANT/CROSS RESPONDENT'S REPLY BRIEF

EISENHOWER & CARLSON, PLLC

By P. Craig Beetham, WSBA # 20139
Stuart C. Morgan, WSBA # 26368
Attorneys for Appellants

EISENHOWER & CARLSON, PLLC

1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, Washington 98402
Telephone: (253) 572-4500

COPY

TABLE OF CONTENTS

REPLY TO RESPONDENT’S BRIEF

	Page
I. <u>ARGUMENT IN REPLY</u>	1
A. The trial court did abuse its discretion in allowing Defendant/Respondent to replace its orthopedic expert at the eleventh hour and in allowing Dr. Brandt Bede’s testimony at trial	1
B. The trial court did abuse its discretion in admitting Exhibit 94 and in allowing Dr. Wendy Marlowe to testify at trial	12
1. Defendants did not produce Mr. Marlow	16
2. Dr. Marlow in fact did provide expert testimony.....	17
3. Respondents hide behind claim that plaintiff withheld Dr. Majovski’s opinion	18
4. Respondents claim harmless error	21
5. Trial court discretion and impeachment	23
C. The trial court did abuse its discretion by admitting Exhibit 112, Plaintiff’s social security records	24
D. The trial court did err in finding Ms. Graham did not sustain lost wages or an impairment of future earning capacity as a result of the motor vehicle accident	30
E. The trial court’s findings and conclusions as to causation are not supported by substantial evidence and the court did err in its damage award	34

RESPONSE TO RESPONDENT’S CROSS-APPEAL

	Page
II. <u>A. ANALYSIS</u>	44
1. The Respondents Fail to Articulate With Any Clarity Ms. Graham’s allegedly late-disclosed witnesses referred to in Respondents’ Cross Appeal.....	44
2. The trial court did not err in not allowing Defendants to call Plaintiff’s witness, Tim Moebes	45
3. The trial court did not err in declining to set aside an Order in which counsel for the Respondent refused to participate in.....	47
4. The trial court did not err in granting Plaintiff’s post-trial motion to admit the social security administrations “Red Book” publication	48
III. <u>CONCLUSION</u>	50

TABLE OF AUTHORITIES

Cases – Washington

<u>Barci v. Intalco Aluminum Corp.</u> , 11 Wn. App. 342, 349-50, 522 P.2d 1159 ((1974)	2, 3, 4
In <u>Dempere v. Nelson</u> , 76 Wn. App. 403, 406, 886 P.2d 219 (1994), <i>review denied</i> , 126 Wn.2d 1015 (1995)	5, 6
<u>Kramer v. J.I. Casae Mfg.</u> , 62 Wn. App. 544, 552, 815 P.2d 798 (1991)	5, 6, 7
<u>Lampard v. Roth</u> , 38 Wn. App. 198, 202, 684 P.2d 1353 (1984)	5
<u>Landmark Development Co. V. City of Roy</u> , 138Wn.2d 561, 573, 980 P.2d 1234 (1999).....	37
<u>Miller v. Peterson</u> , 42 Wn.App. 822, 825, 714 P.2d 695 (1986) (quoting <u>Barci v. Intalco Aluminum Corp.</u> , 11 Wn. App. 342, 349-50, 522 P.2d 1159 ((1974)).....	2
<u>State v. Gillette</u> , 27 Wn. App. 815, 824-25, 621 P.2d 764 (1980)	28

Statutes

WAC 296-20-280.....	46
---------------------	----

Other

Pierce County Local Rule 3(b)(2).....	25
Washington Court Rules, ER 703	26, 28, 29
Washington Court Rules, ER 902	29
Washington Court Rules, ER 904	26, 27
Washington Court Rules, ER 1005.....	29

I. ARGUMENT IN REPLY

A. Assignment of Error Issue No. 1: The Trial Court Abused Its Discretion In Allowing Defendant/Respondent To Replace Its Orthopedic Expert At The Eleventh Hour And In Allowing Dr. Brandt Bede To Testify At Trial.

The trial committed reversible error not once but twice by pretrial rulings allowing Respondents to switch orthopedic experts shortly before trial. On May 6, 2005, the court denied Plaintiff's Motion to exclude Dr. Brandt Bede as Respondents' medical expert. RP 612. On June 12, 2005, another hearing was held regarding the exclusion of Dr. Bede as a trial witness. Again, the trial court denied Plaintiff's motion. RP 912. A short synopsis of the issue is in order.

On November 17, 2004, Respondents had named Dr. Michael Battaglia as their orthopedic expert. CP 22-26.

In January of 2005, Dr. Battaglia examined Ms. Graham and issued an IME report in January 2005. RP 494. Plaintiff's counsel circulated Dr. Battaglia's report to all Ms. Graham's expert witnesses: Dr. Lawrence Majovski, Ph.D., Cloie Johnson, Dr. Theodore Becker, and several of Ms. Graham's health care providers: Dr. Petra Peper, Dr. Marshall Craig, and Dr. Steven Brack.

Respondents/Cross Appellants confirmed Dr. Battaglia as their expert on April 1, 2005, when they submitted their list of witnesses and exhibits for trial. CP 124-129.

On April 18, 2005, *without any forewarning* to Ms. Graham, Defendants named Dr. Brandt Bede as their new orthopedic expert

replacing Dr. Battaglia. CP 352-353

This eleventh-hour substitution of Dr. Bede was untimely, without good cause and done for improper tactical purposes. Ms. Graham had spent months preparing her case in light of Dr. Battaglia's examination and report. Her attorneys and experts relied upon this fact in preparation for trial. CP 468-484. Dr. Bede never saw or met with Ms. Graham. RP 304. Dr. Bede issued his report on May 26, 2005, just before trial started, too late for Ms. Graham to obtain an orthopedic expert to offer rebuttal testimony to Dr. Bede.

Ms. Graham's two motions to exclude Dr. Bede should have been granted by the trial court. CP 493-498. Respondents have several responses in *Respondent's Brief*. First, the Respondents state that a trial court's evidentiary rulings are reviewed for an abuse of discretion. Appellants' have thoroughly cited the legal authority for the exclusion of Dr. Bede in her Appellant's Brief. Respondents cite to Miller v. Peterson, 42 Wn.App. 822, 825, 714 P.2d 695 (1986) (quoting Barci v. Intalco Aluminum Corp., 11 Wn. App. 342, 349-50, 522 P.2d 1159 ((1974))), as setting for the criteria as to discovery violations.

Respondents cite Barci for the proposition that "[c]hief among these concerns is prejudice to the opposing party. Barci, 11 Wn. App. at 350. The trial court's rulings were prejudicial to Ms. Graham.

First, there was not a good faith attempt by Respondents to comply with the rules of discovery when they named Dr. Bede on April 18, 2005. Ms. Graham filed her Complaint on December 2, 2003. CP 4. Dr.

Battaglia was identified on Defendants' November 19, 2004 primary witness disclosure list. CP 25. Jettisoning him on April 18th, months after the witness disclosure deadline, was not good faith compliance with the court rules. Respondents have three responses: (1) that Dr. Bede was disclosed on April 18, 2005, two months before trial; and in a diversionary fashion they state (2) Ms. Graham was late with witnesses too; and (3) there is no prejudice to Ms. Graham.

The fact that Dr. Bede was disclosed on April 18, 2005 tramples over the fact that Respondents ignored their case schedule obligations to disclose all their witnesses by January 2005. CP 15. Respondents make no attempt to address the first factor in the Barci case: the presence or absence of good faith attempts to comply with the rules of discovery. Respondents further gloss over the fact that Ms. Graham was unable to obtain Dr. Bede's deposition until May 27, 2005, a few weeks before trial.

With regard to Plaintiff's "late" disclosures, *all* of Ms. Graham's witnesses who testified at trial were named by January 10, 2005. CP 27. Ms. Graham was prejudiced by the trial court's refusal to exclude Dr. Bede. Plaintiff's witnesses, expert and treating doctors, received, reviewed, and were prepared to testify with regard to Dr. Battaglia's January 2005 IME of Ms. Graham. Dr. Battaglia's report was so ludicrously dreadful Ms. Graham elected not to even take his deposition, electing instead to vigorously cross-examine Dr. Battaglia at trial. Respondents acknowledge Ms. Graham could not take Dr. Bede's deposition until May 27, 2005, a few weeks before trial. Ms. Graham had

already submitted her Trial Witness and Exhibit List. CP 599. Ms. Graham did not have an orthopedic expert retained. CP 599. Rather, Ms. Graham was left with her personal treating health care providers, who of course do not do full record reviews, or prepare as forensic experts. Moreover, most of Ms. Graham's treating care providers, who provided trial testimony by way of deposition testimony conducted primary in early April 2005, *before* Dr. Bede was named. These providers did not have access to Dr. Bede's report or deposition. Their respective depositions and trial testimony incorporated Dr. Battaglia's IME report. Finally, and contrary to the assertions of Defendants that it would not be so, Dr. Bede's testimony differed qualitatively from that of Dr. Battaglia's. Indeed, there was a court order precluding Dr. Bede from launching into a biomechanics analysis of the accident. CP 912-913. Dr. Battaglia's report makes no mention of biomechanics or relating Ms. Graham's injuries to biomechanical factors. Dr. Bede at trial launched into substantial biomechanical testimony, over the objections of Plaintiff. RP 272-285.

Even Respondents' own authority, Barci, 11 Wn. App. 342, 349, 350, 522 P.2d 1159 (1974) supports Appellant's position. In Barci the medical doctor in that case was not disclosed until shortly before trial, and the Court of Appeals reversed the trial court's exclusion of the witness. However, in that case, the court found that the non-disclosure delay *did not result from tactical reasons*. The proponent of the medical expert "had considerable difficulty finding a medical expert to testify on their behalf." Barci, 11 Wn. App. at 349. Moreover, the court further held that where

pretrial discovery rules have been violated, the trial court should not exclude testimony *unless there is a showing of intentional or tactical nondisclosure, of willful violation of a court order . . .*” *Id* at 351.

Next Respondent alleges that Appellant’s three cases of Dempere, Kramer and Lampard, are “not remotely analogous to the facts of our case.” However, Respondents do not analyze how these three cases of Appellant do not apply. Appellant contends that they do apply. In Lampard, Plaintiff failed to comply with court orders regarding discovery and disclosure of witnesses. Lampard v. Roth, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984). The Lampard court noted that failure to comply with an order compelling discovery constitutes a willful failure to comply with discovery rules. *The court should exclude testimony if there is a showing of intentional or tactical nondisclosure.* Lampard 38 Wn. App. at 202. Contrary to Respondents’ assertion in their brief, the Court of Appeals ruled that the trial court abused its discretion in failing to exclude the testimony of witnesses not properly disclosed prior to trial. *Id.* at 202. In the present case, the switch from Dr. Battaglia to Dr. Bede shortly before trial was willful, intentional, and prejudicial to Ms. Graham.

In Dempere v. Nelson, 76 Wn. App. 403, 406, 886 P.2d 219 (1994), *review denied*, 126 Wn.2d 1015 (1995), 13 days before trial one of the parties disclosed an additional expert witness. The other party objected to the disclosure noting the prejudice of conducting additional discovery just before trial and the prejudice of trying to find countering experts and the attendant delay. *Id.* at 220. The Dempere court held that the

proponent of the expert failed to disclose the expert *as required by the case schedule and the pretrial order. A trial court does not abuse its discretion when it excludes witnesses for a willful violation of a discovery order. Id. at 406.* Similarly, in this case, Respondents violated the discovery order by then naming Dr. Bede on April 18, 2005, with him not available for deposition until May 27, 2005. Respondent's actions were without reasonable excuse, and should be deemed willful.

Respondents next claim Kramer v. J.I. Casae Mfg., 62 Wn. App. 544, 552, 815 P.2d 798 (1991) is not analogous to this case. Kramer is "analogous" to undisclosed expert cases and the Kramer court actually states so. Id. at 551. The court stated: "And when willful non-compliance substantially prejudices the opponent's ability to prepare for trial, the exclusion of evidence is not an abuse of discretion." Kramer at 552. In the present case, Respondents did not comply with the courts orders regarding disclosure. This was prejudicial to Ms. Graham.

Next, Respondents state that their reasons to substitute Dr. Battaglia with Dr. Bede were valid, and the trial court did not commit error in allowing the substitution. *Respondent's Brief* at 9. Initially, the Respondents attempt to divert the issue of their willful and intentional violation of the court orders with pointing the finger at Ms. Graham's "late" disclosures. Counsel for Ms. Graham *timely* named her primary witnesses on October 25, 2004 by name, then named certain experts by expertise: an economist, a voc-life care planner, and neuro-psychologist. CP 19-21. Actually, Respondents did the same thing on their witness

disclosure with unnamed experts, with the notable exception of Dr. Battaglia, their orthopedic expert. CP 25-26. Then on January 10, 2005, timely under the case schedule, Ms. Graham put names to her designated experts: economist Dr. Silberberg, voc-life care plan expert Cloie Johnson, and neuro-psychologist Dr. Majovski. CP 27-28. Ms. Graham did not call one witness at trial that was not disclosed on her January 2005 witness list.

In stark contrast, Respondents did not comply with the court's case schedule deadline in January 2005 for naming witnesses. For example, on April 1, 2005, they named Dr. Allen Tencer, a biomechanical expert on accident dynamics. CP 125. Dr. Tencer just "shows up" on Respondents Witness and Exhibit list for trial. Respondents still listed an unnamed "psychiatrist" as a potential expert. CP 125. Then, on April 18, 2005, Respondents switch Dr. Battaglia with Dr. Bede without forewarning or Court approval. CP 451. Again, no witness was called to trial by Ms. Graham that was not disclosed by January 10, 2005.

At the May 6, 2005 hearing on Ms. Graham's Motion to exclude Dr. Bede, Respondents stood before the Court alleging Dr. Battaglia was unavailable. The Court inquired *twice* to the Respondents' counsel about Dr. Battaglia's availability for a preservation deposition:

MS. HOMAN (Of counsel for Respondents): "Everybody in our office knew about the difficulty that Mr. Walker [former City attorney on the case] was having scheduling Dr. Battaglia's deposition." RP 12:24

"Dr. Battaglia has some rather Draconian scheduling and cancellation policies and we encountered huge difficulties trying to schedule him for a deposition. Dr. Bede is here. Dr.

Battaglia is in San Diego and this is proving somewhat problematic.” RP 13:6

COURT: “What is the difficulty in getting a preservation deposition in California?” RP 18:1

MS. HOMAN: “As I understand it, Dr. Battaglia requires scheduling eight weeks in advance. On April 15 the trial date in this matter was changed until June 20th. I don’t even know what his availability is.” RP 18.4

COURT: Has the attempt been made as to whether this Battaglia person can be deposed? RP 20:1

MS. HOMAN: “I was not personally dealing with that. Mr. Walker, as well as a paralegal in our office is dealing with that. As I understand it, he is currently not available. I will have to go back to my office to confirm that.” V RP 20:7

Based upon these representations by Respondents to the Court, the Court ruled that Dr. Bede’s testimony would be allowed at trial. CP 612. But such representations were misrepresentations. Respondents’ response is to throw out a plethora of extraneous issues. Respondents claim that Dr. Battaglia has a strict scheduling policy “not consistent” with the Court’s trial schedule and that he could not appear as a witness. CP 850. Ms. Graham has a number of responses.

First, Respondents acknowledge they contacted OMAC in early November to obtain the services of an orthopedist. CP 680,871. Respondents named Dr. Michael Battaglia as their primary witness November 22, 2004. “He was defendants’ selection based upon his credentials” CP 871. “We were aware that Dr. Battaglia maintained a practice in California” CP 871. So by Respondents’ own admissions, Dr. Battaglia was “their guy” for the last eight (8) months before that and

they knew he was an out-of-state expert residing in California. Presumably, they knew, or should have known about his deposition and trial policies in November of 2004. So Respondents bear the risk of retaining an out-of-state expert, and they were in a clear position to know about his scheduling policies.

But the interesting item omitted by Respondents is that Dr. Battaglia's own policies permitted a preservation deposition *in Seattle*. In their Response to the May 6, 2005 Motion, Respondents submitted Dr. Battaglia's "Hourly Fee Schedule" as Exhibit 5 to the trial court. CP 884. In Respondents' **own exhibit** of his "policies" the following is stated:

Depositions can be scheduled in Seattle without commitment to a half day [fee] if they are scheduled while I am in the city of Seattle doing exams if the deposition begins after 5:30 p.m.

Respondents do not dispute that Dr. Battaglia had appointment dates in May and June in Seattle, Tacoma and Everett. Respondents weakly respond that OMAC does not handle the depositions of its doctors. CP 851. But overlooked was that Dr. Battaglia was available for depositions following those appointments in Seattle and Tacoma. We can only presume they never inquired about a preservation deposition. Ms. Graham would add that *nothing* is contained in Dr. Battaglia's policies in Exhibit 5 about an eight-week requirement for trial. CP 884. Exhibit 5 only speaks of such a requirement for depositions. CP 884.

Next, even if this Court accepts the Respondents position on Dr. Battaglia's eight-week "policy", on April 15, 2005 the trial court

continued the trial date to June 20, 2005. Respondents had more than eight weeks to make arrangements for trial or a preservation deposition. CP 666. Respondents produced nothing to the trial court regarding any attempt at arrangements for Dr. Battaglia's trial testimony or deposition.

Fourth, the Respondents failed to put forth any foundation as to Dr. Battaglia's unavailability for a preservation deposition – no declaration from Dr. Battaglia regarding his alleged unavailability. When asked by the Court on May 6th 2005 if an attempt had been made to whether Dr. Battaglia could be deposed, Respondents counsel replied that she was not “personally dealing with that . . . I would have to go back to my office to confirm that.” RP p. 20.

Where was the Respondents' obligation to produce their own witness for trial? Respondents could have issued a trial subpoena. PCLR 45 states in part:

Where an expert witness will, with reasonable probability, be called as a witness at the trial of any case, the party planning to call such a witness shall cause a subpoena to be issued and served upon such witness not later than sixty (60) days prior to the trial date

Ms. Graham was content to *not* take Dr. Battaglia's deposition, and elected to simply deal with Dr. Battaglia at trial on cross-examination. Thus, the late switch to Dr. Bede was prejudicial to Ms. Graham's trial preparation.

The test for exclusion is clear: the court must consider whether the sanction is based upon intentional nondisclosure, willful violation of a

court order, or other unconscionable conduct. *In re Foster*, 55 Wn.App. 545, 779 P.2d 262 (1989).

Dr. Battaglia was completely available and making trips to Washington throughout the spring and early summer of 2005. CP 666-667, 681. At the hearing on Ms. Graham's motion to exclude Dr. Bede, the Court simply denied Ms. Graham's motion without any findings. CP 5. Ms. Graham's attorneys and experts spent a significant amount of time preparing Ms. Graham's case based on Dr. Battaglia's examination and written opinion. Substituting Dr. Bede at the eleventh hour forced Ms. Graham to try and prepare for an entirely new expert and without an expert rebuttal expert.

Next, Respondents/Cross Appellants claimed Dr. Bede's opinion would be "the same" as Dr. Battaglia's. CP 802. But this was not true at trial. Unlike Dr. Battaglia, Dr. Bede never met or evaluated Ms. Graham. Unlike Dr. Battaglia's January 2005 IME report, Dr. Bede testified regarding biomechanics or "mechanism of injury" to minimize Ms. Graham's injuries before the Court. RP 270-285.

Even if Dr. Bede's testimony were allowable, though, it does not provide for enough evidence to support the Findings of Fact and Conclusions of Law challenged here and in light of all the other evidence presented as analyzed herein.

Indeed, Respondents argue that even if the trial court did abuse its discretion in allowing Dr. Bede to substitute for Dr. Battaglia, the error was harmless. Incredibly, Respondents argue that "the trial court did not

rely upon Dr. Bede's testimony in making those Findings of Fact (nos. 25, 27, 29, and 33, and Conclusions of Law nos. 6,7,8,9, and 11)." *Respondents' Brief* at 13. Respondents go further: "Rather, the trial court relied on the testimony of Plaintiff's witness, Dr. Brack." *Respondents' Brief* at 13. This assertion is false, because, as with Dr. Bede, *nowhere* does the trial court cite to Dr. Brack's testimony either. There was no oral or written ruling by the Court. If Dr. Bede is irrelevant and was not relied upon by the trial court, then given Appellants' position that the trial court committed reversible error in allowing his testimony, his exclusion is not prejudicial to the Respondents. RP at 488-489.

B. The Trial Court Abused Its Discretion In Admitting Exhibit 94 And In Allowing Dr. Wendy Marlow To Testify.

One of Ms. Graham's claims for damages, identified in her Complaint for Damages, was that she sustained physical *and mental* damages. CP 6. Dr. Lawrence Majovski, a neuro-psychologist was retained to assess Ms. Graham's emotional and psychological disposition. RP 355-356, 364. On November 2, 2004, Dr. Majovski conducted the evaluation of Ms. Graham. RP 364. The psychological evaluation consisted of reviewing the records of Ms. Graham's treating health care providers, conducting a psychological assessment of Ms. Graham, which includes an interview and tests. RP 366. As an additional tool for the evaluation, Dr. Majovski used a formal testing inventory, the *clinical* MMPI-II. RP 1062. There are nine specific types of MMPI-II settings, the clinical being one. Dr. Majovski selected the clinical version of the

MMPI-II because he was assessing her emotional personality function. RP 1023. It is up to clinician which version of the MMPI-II is appropriate RP 1019. It is just one tool, not to be used alone, in assessing the patient. RP 1020. Dr. Majovski, who has thirty years of experience, selected the clinical MMPI-II setting as most appropriate for Ms. Graham's assessment. RP 382. RP 1062.

Dr. Majovski testified at trial that Ms. Graham has a manic-depressive disorder ... "depressive state." RP 383. Dr. Majovski further testified that Ms. Graham suffers from pain disorder relating to her lower back injury [from the accident]. RP 384, 393. Dr. Majovski provided a third diagnosis, that Ms. Graham suffered from an adjustment disorder with both anxious mood and depressed features relating to the accident. RP 384. Dr. Majovski opined on the basis of psychological probability he believed Ms. Graham was not presently employable as a result of her injuries from the motor vehicle accident. RP 394.

Respondents never named a neuro-psychologist expert. So Respondents sought to discredit Dr. Majovski with "back-door" litigation tactics at trial. The trial court committed reversible error by acceding to Respondents' tactics. First, the trial court committed reversible error by allowing Dr. Wendy Marlow, a Seattle neuro-psychologist, to be called as Respondent's expert witness to rebut Dr. Majovski's use of the clinical MMPI-II. Dr. Marlow was *never* disclosed as an expert witness prior to her testimony on June 28, 2005, a week after trial started on June 21, 2005. Second, the court committed further reversible error by admitting

Exhibit 94, a “Personal Injury Interpretative Report - MMPI-II” never disclosed by Respondents *at any time* prior to June 27, 2005, which was purportedly offered under the guise of “impeachment by contradiction.”

During the cross-examination of Dr. Majovski, Respondents offered Exhibit 94, their MMPI-II “forensic version” as “impeachment against Dr. Majovski’s use of the “clinical” version of the MMPI-II, Exhibit 93. Respondents argued their undisclosed Exhibit 94 should be admitted as impeachment *and substantive* evidence – “Impeachment by Contraction.” RP 425-426, 497-498, 1030-1034. Ms. Graham objected to the admission of Exhibit 94. RP 426. Ms. Graham also submitted “Plaintiff’s Motion and Memorandum to Exclude Exhibit No. 94 and to Strike Defense Counsel’s Testimonial Commentary About the Same from the Record.” CP 930. Initially, the trial court seemed to agree with Ms. Graham, but deferred ruling. RP 428. The court acknowledged the surprise and lateness of Exhibit 94. RP 426.

The court required a foundation from the person who generated Exhibit 94 version of the MMPI-II and required that Respondents produce that person to the court. RP 426. Respondents named their expert: Dr. Wendy Marlow, who was retained by Respondents on June 14, 2005, less than a week before trial.¹ RP 657. Ms. Graham objected to Dr. Marlow’s testimony. RP 431-432, 440-443.

¹ Actually, Dr. Marlow was retained over a month after the original trial date of May 2, 2005, which trial date had to be “bumped” until the June 21, 2005 because of the criminal law docket. January 10, 2005 was the deadline for naming rebuttal witnesses.

Before considering Exhibit 94, the court stated: “I have to have that person here. . . This is not the kind of thing I can accomplish over the phone. Also comes in the middle of trial. . . If the person can’t do it [appear in court], then the argument is ended.” RP 446-447. The court went on to say: [Dr. Marlow] is going to have to come down so that counsel can talk to her and then she’s going to have to testify for a couple of hours.” RP 449. But Respondents could not produce Dr. Marlow until July 7, 2005. The court stated: “I think she has to come in or she doesn’t make it.” RP 494. Inexplicably, the court then reversed course: “I don’t care that the ultimate testimony in court is by telephone.” RP 495, which is ultimately how Dr. Marlow testified. RP 655.

Once Respondents now got Dr. Marlow before the court by telephone, they were on to their second back-door tactic, impeaching Dr. Majovski with Exhibit 94, generated by Dr. Marlow as referenced above, offering it as impeachment and substantive evidence. RP 432, 497.

The trial court erroneously allowed surprise impeachment and substantive evidence (Exhibit 94 and Dr. Marlow). This was reversible error on both counts. Respondents have several responses in *Brief of Respondents*.

1. That Defendants produced Dr. Marlow.
2. Dr. Marlow did not prepare an expert opinion and did not testify as to Plaintiff’s psychological condition.
3. Allegedly that Plaintiff “refused all discovery requests” regarding Dr. Majovski’s opinion and, therefore, the lateness in disclosing Dr. Marlow and Exhibit 94 was “created by Plaintiff.”

4. Admitting Dr. Marlow's testimony and Exhibit 94 was harmless error.
5. The decision to admit evidence is within the trial court's discretion.

1. Defendants Did Not Produce Dr Marlow.

Glossing over Ms. Graham's objections regarding surprise and non-compliance with court rules, Respondent's initial response to Dr. Marlow is that they produced her for cross-examination. *Brief of Respondent's page 17.*

On May 6, 2005, a hearing was held before Judge Sergio Armijo. CP No. 1 RP May 6, 2005. Part of Ms. Graham's motion asked the court to exclude any "unnamed" psychiatrist or psychologist Respondent may offer at trial. Respondents answered in open court that day: "We're not asking to name a neuro-psychologist . . . But at this point in time, there's no neuro-psychologist to be named or offered by the defendant." CP No. 1 RP, May 6, 2005 at 9. The Court ruled: "The psychiatrist issue has been resolved." RP, May 6, 2005 at 20.

Dr. Marlow was retained June 14, 2005, six days before trial. CP 657 - *and still Respondents did not disclosure Dr. Marlow or Exhibit 94 to Ms. Graham's attorneys.* Dr. Marlow spoke with Respondent's counsel on June 16, 2005 about the case. CP 658. Still, Dr. Marlow was not disclosed to Ms. Graham, even though Dr. Marlow faxed a copy of the Exhibit 94, her scored version of the MMPI-II regarding Ms. Graham to Respondents on June 16, 2005. Exhibit 94.

Respondents never disclosed Dr. Marlow prior to June 27, 2005, after trial started. Counsel for Ms. Graham was never able to meet her, let alone take her deposition. Instead, the court allowed Dr. Marlow, on shortened notice, to testify telephonically, which was prejudicial. This was testimony by ambush in circumvention of court rules, and it was reversible error by the trial court.

2. Dr. Marlow In Fact Did Provide Expert Testimony.

Respondents attempt to get around the disclosure requirement of the rules by claiming that “Dr. Marlow did not prepare an expert opinion and did not testify as to Plaintiff’s psychological condition. *Respondent’s Brief at 17*. This is a deceptive argument. Initially, if Respondents are conceding Dr. Marlow is not offering an expert opinion, she is of no value to the court and her testimony should have been excluded. But this was a smokescreen; she was offering expert testimony, first as impeachment against Dr. Majovksi’s use of the clinical version of the MMPI-II versus her choice of a “forensic” MMPI-II setting. Second, Dr. Marlow is clearly offering expert testimony regarding Ms. Graham through her Exhibit 94, an exhibit she generated. As an expert she states that: (1) in a lawsuit case a “forensic” MMPI-II is the correct norm rather than the clinical version Dr. Majovski chose to run to evaluate Ms. Graham’s psychological assessment at the time, and in which he spent several hours with her. CP 659. Dr. Marlow generated Exhibit 94, the forensic version. CP 661 The Court should look carefully at the opinions generated by Exhibit 94, programmed by Dr. Marlow. She takes the raw data information (scoring

sheet) from Dr. Majovski's November 2, 2004 MMPI-II, and runs the data through the forensic version of the MMPI-II. Then this report opines in part, the subject (Ms. Graham): Exhibit 94 page 3.

“Unrealistic claims of virtue”
“Conscious attempts to influence the outcome of litigation”
“Presents with a “somatic reactivity”
“Her physical complaints may not be traceable to actual organic changes”
“She may exhibit a Pollyannaish” attitude toward life.”

Exhibit 94 offers several pages of opinion attacking Ms. Graham from this non-disclosed witness. This expert testimony came from someone who never reviewed any of Ms. Graham's medical records. CP 664. Never reviewed Dr. Majovski's deposition, or for that matter any health care provider's deposition. CP 664. She never met Ms. Graham. CP 666. She acknowledges that if she was truly doing a full psychological evaluation of a patient, she would meet with the patient, and conduct an assessment much like Dr. Majovski did. CP 667. All she offers is her opinion, disagreeing with Dr. Majovski's use of the clinical version of the MMPI-II. CP 669. Importantly, she admits that the MMPI-II, *any MMPI-II*, is to be taken in conjunction with other tools - interview, status assessment – all things she did not do. CP 672.

3. Respondents Hide Behind Claim that Plaintiff Withheld Dr. Majovski's Opinion.

Respondents acknowledge that Dr. Marlow and Exhibit 94 were late disclosures, but assert that the court “understood the reason for Defendants' late disclosure” alleging Dr. Majovski's MMPI-II test was

“withheld until just a few days prior to trial.” *Respondent’s Brief* at 18. Of course, there is no citation to the record by Respondents for this assertion as to what the court “understood.” Respondents cannot avoid the truth: they withheld Dr. Marlow as a witness and Exhibit 94 until a week into trial. They avoid their own non-disclosure by creating a smokescreen about Ms. Graham’s alleged non-disclosure. On October 25, 2004, Ms. Graham filed her Primary Witness List. CP 157 and indicated she would be calling a neuro-psychologist to support her claim of personal injuries, physical and mental injuries. CP 6. On November 2, 2004, Dr. Lawrence Majovski conducted a psychological assessment of Ms. Graham. CP 1007. Exhibit #93. He issued no report. CP 1058. He had no opinion as to Ms. Graham on November 2nd as he needed to review her records. CP 1058. Dr. Majovski was then named as an expert witness for the Plaintiff on *January 10, 2005, five months before trial.* CP 170. Per the court rules, the nature of his testimony was listed as:

“This expert is expected to testify as to the nature and extent of plaintiff’s injuries and losses and as to the neurological and/or psychological care that Plaintiff may require in the future as related to her injuries.” CP 170.

This is a common and simple description of anticipated testimony offered in witness disclosures. Indeed, such a description is of the exact kind used by Respondents in first disclosing two experts – for expert Neil J. Beaton, CPA and expert William B. Skilling, M.A., CP 176,177.

In Plaintiff’s Trial Witness and Exhibit List of March 28, 2005, it was further stated that Dr. Majovski was expected to testify as follows:

“This expert is expected to testify as to the nature and extent of plaintiff’s injuries and losses as they relate to the MVA, depression from her loss of life(style) from the MVA, and as to the neurological and/or psychological care that Plaintiff may require in the future as related to her injuries, and that her “psychological past” is not a factor in her current psychological state resulting from the MVA.” CP 36-42, 192.

Despite the timely disclosure of Dr. Majovksi, Respondent did not issue a Notice for Oral Deposition and Subpoena Duces Tecum on April 6, 2005, as they had for eight other witnesses previously named by Plaintiff. Respondents did not ask for Dr. Majovski’s deposition until May 16, 2005, just a few weeks from trial, by way of a letter. CP 653. Instead of giving plaintiff time to get dates of availability from Dr. Majovski, they filed a motion to shorten time on May 19, 2005 and a motion to compel on May 20, 2005. CP 617-621 Dr. Majovski was deposed on June 9, 2005, just weeks before trial started, due to Respondents own disregard. CP. 426.

Dr. Majovski’s file contained a computer generated MMPI-II actuarial report for Ms. Graham generated from a questionnaire during her November 2, 2005 psychological assessment. The report is confidential, not to be released according to Dr. Majovski. CP 1024. The MMPI-II is simply a *tool* for the clinician. CP 1011-1013.

Following Dr. Majovski’s deposition, and copying his entire file, Respondents ran to retain Dr. Marlow on June 14, 2005. Then Dr. Marlow took the raw data from Ms. Graham’s confidential questionnaire, scored it using a forensic MMPI-II, and on June 16, 2005 faxed this report, Exhibit 94, to Respondents, who withheld all knowledge of Dr. Marlow and

Exhibit 94 from Ms. Graham's counsel and the Court. Dr. Majovski testified that it is extremely unprofessional and unethical to run raw data without permission of the patient. CP 430.

There was no withholding of Dr. Majovski's opinion or documents. The withholding that occurred was Respondent's game of hide and seek with Dr. Marlow and Exhibit 94. The Court became a party to this scheme and committed reversible error by allowing Dr. Marlow to testify and admitting Exhibit 94. Moreover, the trial court's ruling contravened an earlier court ruling. CP No. 1 RP May 6, 2005 precluding Respondents from calling such an expert witness.

4. Respondents Claim Harmless Error.

Respondents claim that even if the Court did abuse its discretion in admitting the testimony of Dr. Marlow and Exhibit 94, the error was harmless as the trial court did not rely on Dr. Marlow's testimony or Exhibit 94 in making any of its findings of fact or conclusions of law. *Respondent's Brief* at 20. Ms. Graham has several responses.

First, Ms. Graham's Complaint for Personal Injuries states: that ". . . plaintiff sustained personal injuries, both physical *and mental*." CP 6. The overwhelming testimony at trial was that the accident, and resulting back surgeries necessitated by the accident, were psychologically damaging to Ms. Graham. Dr. Majovski testified that Ms. Graham suffered an adjustment disorder and pain disorder resulting from the accident and consequent surgeries; she was struggling mentally from coping with her pain and loss of life[style]. CP 383. Her treating psychologist, Dr. Petra

Peper testified that Ms. Graham suffers from psychological distress secondary to the physical pain and restrictions in her life stemming from the accident. CP No. 81 CP No. 5: Dep. of Dr. Peper. Drs: Alikhan, Craig, and Martin all concur. CP No, 78 CP No. 2: Dep. of Dr. Lawrence Martin, CP No.79 CP No. 3: Dep. of Dr. Inayat Alikhan, and CP No. 80 CP No. 4: Dep. of Dr. Marshall Craig. Dr. Marlow never met Ms. Graham, did not conduct a psychological assessment with Ms. Graham, and she did not review any of Ms. Graham's records. RP 664-666. The overwhelming weight of the evidence is that Ms. Graham suffered emotional and psychologically. There is **not** substantial evidence to support Conclusions of Law #8, #9, #10, and #11 that Ms. Graham did not so suffer. Exclude Dr. Marlow and Exhibit 94 and Ms. Graham's psychological state, as supported by herself, her treating doctors and Dr. Majovski, is undisputed.

Next, Respondents' argument about the Court not citing to Exhibit 94 in any of its Findings of Fact and Conclusions of Law supports reversing the Court's decision. *Respondents wrote* the Findings of Fact and Conclusions of Law. CP 1305-1324. The Court stated that it had not decided if it was going to render a decision orally or whether in a letter from the *adjusted* Findings of Fact and Conclusions of Law. RP 910. Actually, the trial court did neither. On January 10, 2006, without an oral or written ruling, the Court just signed the *Defendants'* version with only one minor change. So of course, the court did not cite Dr. Marlow or Exhibit 94: Defendants wrote the Findings and Conclusions.

The admission of Exhibit 94 and Dr. Marlow was error. Exhibit 94 offers several pages of substantive evidence. This is not “harmless error” simply because Dr. Marlow and Exhibit 94 are not expressly cited on the Findings of Fact and Conclusions of law as drafted by Respondents, and which were simply signed off on by the trial court.

5. Trial Court Discretion And Impeachment.

Respondents state that the trial court’s decision to admit evidence is within the trial court’s discretion. Ms. Graham has already cited in Appellant’s Opening Brief where the trial court’s discretion is not unfettered. Respondents are the ones who did not adhere to the court rules with regard to Dr. Marlow and Exhibit 94.

The Court ruled that Respondent could not call a neuropsychologist. *Id.*, at 20. In addition, PCLR 3(b)(2) *Exchange of Exhibit and Witness Lists*, provides that the parties shall exchange (A) lists of the witnesses whom each party expects to call at trial; (B) lists of the exhibits that each party expects to offer at trial, except for exhibits to be used for impeachment purposes. Any witness or exhibit not listed may not be used at trial, unless the court orders otherwise for good cause and subject to such conditions as justice requires. It is undisputed that Respondent did not identify Dr. Marlow as a witness before trial. There is not “impeachment’ exception under the rule for bringing in Dr. Marlow. As for Exhibit 94, although Respondents claim it is for impeachment purposes, it was offered as impeachment and *substantive* evidence. RP 1031. Exhibit 94 is replete with substantive opinions regarding Martha

Graham and her psychological state. It was reversible error not to exclude Dr. Marlow and Exhibit 112.

C. The Trial Court Did Abuse Its Discretion By Admitting Exhibit 112, Plaintiff's Social Security Records

On June 29, 2005, during direct examination of Respondents' vocational expert, William Skilling, Respondents introduced an unauthenticated and incomplete file of Ms. Graham's Social Security Administration ("SSA") records. RP 758, 1116-1118, 1182. These records were not produced prior to trial, nor listed on Respondents/Cross Appellants' Amended Witness and Exhibit List or as an ER 904 submission. Appendix 2 to *Appellant's Opening Brief*. Ms. Graham objected to the SSA exhibit and testimony on several grounds: inadmissible hearsay, failure to disclose an exhibit on Defendants' ER 904 and Joint Statement of Evidence, unauthenticated, and failure of expert Skilling to produce such records at his deposition in April of 2005. Appendix 3 to *Appellant's Opening Brief*, RP 758, 1116-1118, 1182. The Court admitted the SSA documents, Exhibit 112, based upon nothing more than an expert's "reliance" upon the documents for his testimony, presumably ER 703. RP 760, 1182. The Court abused its discretion and committed reversible error in admitting Exhibit 112.

Respondents in *Respondent's Brief* acknowledge that Ms. Graham signed a release several months before trial so that Respondents could obtain her SSA file. *Respondent's Brief* at 22. Respondent's gloss over the fact that they did not identify the SSA records on their Witness and

Exhibit List, Joint Statement of Evidence, or ER 904 submission. Respondents certainly could have listed such records. Rather than draw attention to their omission to list the SSA records in their exhibit lists and ER 904, Respondents put forth several feeble arguments. First, Respondent alleges the SSA records were admitted without objection. *Respondent's Brief* at page 22. Here is what really happened.

During the cross-examination of Respondent's vocational expert, William Skilling, the following colloquy took place:

Q [Defense Counsel, MS. ELOFSON] When did the Social Security Disability [of Ms. Graham] hearing occur?

A [Skilling] June 4, 2001.

Q What was the decision of the administrative law judge in that case?

A The decision was –

MR. BEETHAM [co-counsel for Ms. Graham]: Your Honor, I'm going to object. It is inadmissible hearsay.

MS. ELOFSON: Your Honor, he's an expert. He's entitled to rely upon material that may be inadmissible but is part of the record.

MR. BEETHAM: He's testifying as to inadmissible out-of-court statements as to what others, judges, letters, or attorneys are going to say. It is inadmissible hearsay.

MS. ELOFSON: What they are is Social Security records which we obtained by stipulation, signed by Ms. Graham, allowing us to obtain them for purposes of this trial. These are out-of-court statements of the declarant, primarily –of a party opponent, Ms. Graham. So they are not hearsay as to that. Plus, it is the decision of another court. This is a public record. That is not hearsay.

MR. BEETHAM: Your Honor, you're not going to find Social Security records under ER 904 submissions. You're not going to find Social Security records on their Joint Statement of Records. You're not going to find, as least that I have seen, any authenticity to these records. Mr. Skilling did not produce them at his deposition when I took it back in April, so they are

inadmissible hearsay. They are not even in the Joint Statement of Evidence.

MR. BEETHAM: . . . There is no authenticity to them. I don't know that this is a complete representation of her file from the SSA. Again, there is the surprise. It is part of the continuing MO here to bring the stuff in at the midnight hour. There is no authenticity to know this is a complete and representative file. Certainly I have never had the opportunity to depose Mr. Skilling about his reliance upon the documents. . . . It is inadmissible hearsay.

COURT: I think they are admissible. It forms the basis for this gentleman's opinion. He relied on it. I think it is admissible. . .

Respondents did not follow up with the Court's ruling on June 29, 2005 to offer the SSA records into evidence. They offered the records a week later on July 5, 2005. RP 1181. Because the Court had already ruled that they were admissible, *see colloquy above*, the objections were preserved. As this Court can plainly see, (1) there were several objections by Ms. Graham's counsel to Exhibit 112, and (2) the Court ruled *twice* they were admissible, presumably under ER 703, although this is never stated to be the basis by Respondents or the Court.

Respondents try to twist the record by stating that Ms. Graham's objections were only to the testimony of William Skilling and the actual records. Again, Ms. Graham would refer the Court to the colloquy above between counsel and the trial court. Ms. Graham forcefully argued against admission of Exhibit 112. The Court just as clearly admitted them over objection on July 5, 2005. RP.

Respondents cited case, State v. Gillette, 27 Wn. App. 815, 824-25, 621 P.2d 764 (1980) actually supports Ms. Graham's position to exclude Exhibit 112. Defendants in that case raised several evidentiary

issues. They first contend the court erroneously permitted an expert to base his opinions in part on the *published studies of other experts*. [Emphasis added]. The Court held that under ER 703, experts may base the opinion on hearsay if “of a type reasonably relied upon by experts in the particular field.” *Id. at 824*. Ms. Graham’s SSA records certainly were not public records. Exhibit 112 does not come in as a hearsay exception through an expert. ER 703 provides that an expert can rely upon reports, or published studies, empirical data, to form his opinion *if of a type reasonably relied upon by experts in the particular field*. Ms Graham’s SSA file, Exhibit 112 is not published studies or empirical data, and is certainly not relied upon by experts in a particular field for anything.

Respondents do not even address that section of Appellants’ Brief regarding the Court’s abuse of discretion and commitment of reversible error in admitting Exhibit 112. Exhibit 112 was not properly authenticated, ER 1005, and is not self-authenticating as Respondent’s counsel seems to think as a “public” record, is not a “document under seal” or “certified” as correct by any official custodian. ER 902. A person’s SSA records are *confidential records* that require the written permission of that person to release anything from them. The trial court did not even address authentication and foundation in its rulings. This was unreliable and prejudicial evidence. Ms. Graham, in fact, proved in her Motion to Supplement the SSA records, dated October 27, 2005, that Exhibit 112 was indeed only partial records, as she personally obtained additional

certified documents proving that the SSA was at all times aware of her work status and her back injury. CP 1037-1045 & 1123-1142.

Respondent's expert, William Skilling, was given an unauthenticated, incomplete SSA file of Ms. Grahams, and then relied upon the inadmissible hearsay contained in that file to form an opinion regarding Ms. Graham's employability and disability. Ms. Graham properly objected to Exhibit 112. The Court twice admitted the SSA records over counsel's objections. The record could not be clearer.

Next, Respondents contend there is an insufficient record on appeal because Appellants' did not include Exhibit 112 in their designation of clerks papers and exhibits. Appellants have provided this Court the entire verbatim report of proceedings that contain the trial court's ruling on the issue. RP 757-767, 767-818, 1181-82. It is undisputed that Exhibit 112 is unauthenticated, inadmissible hearsay. And it is undisputed that Exhibit 112 is Ms. Graham's personal SSA file, albeit an *incomplete* file.

Next, Respondent's claim that "[u]nder Washington law, the appellate court should not review Plaintiff's arguments concerning Exhibit 112." But Respondent's provide no authority for that position. There is not an insufficient record. Both Respondents and Appellant have supplemented the designation of clerks papers and exhibits. Exhibit 112, as referenced above, is now in the record. In effect, then, Respondents have NO response to the trial court's error in admitting Exhibit 112.

Finally, Respondents claim that even if the court did abuse its discretion in admitting the SSA records, it was harmless error. This is not true. Respondents' consistent position at trial was that Ms. Graham could not support a wage loss claim because she was disabled from working due to a bipolar condition according to the SSA. See Respondents' Findings of Fact #38-68, and Conclusions of Law #11.

The salient issue is somewhat confusing because of the sequence of events. Ms. Graham was diagnosed with bipolar in 1995. RP 598. But she had worked for the South Kitsap School District teaching from 1995-99, until she remarried and relocated with her new husband. RP 954. Her bipolar condition became worse because of multiple stressors in her life thereafter. RP 954. She applied for SSA benefits. Ms. Graham was told for two years (1999-2001) by the SSA that she was not disabled due to bipolarism. In June of 2001, an administrative appeal of her two rejections by the SSA was heard. However, in August of 2001, she obtained a full-time job at Peninsula High School teaching English. RP 958. Then, in late September of 2001, she was awarded benefits from the SSA for her bipolar condition. Ms. Graham advised the SSA she did not need the benefits because she had obtained a job and, obviously, was not disabled. RP 960. She was told by the SSA to continue accepting the benefits under the Ticket to Work, or Trial Work Period, program for a period of nine months, in a rolling 60-month period. CP 1278, Then, when her physical condition worsened from the injuries she sustained in the motor vehicle accident to the point where she could not longer *physically* work due to

pain issues, she left teaching at the end of April 2002 to undergo back surgery. RP 961. Because she did not complete the nine months under the Ticket to Work, or Trial Work Period, program she was eligible to continue collecting SSA disability benefits *without reapplying*. CP 1209-1297. Respondents agree with this basic background regarding the SSA Ticket to Work/Trial Work program. *Respondents' Brief* at 32. Ms. Graham testified concerning these events *because the Respondent* introduced Exhibit 112. Respondents are the ones who put the whole bipolar/cannot work subject at issue, not Ms. Graham.

The Court abused its discretion and committed reversible error in admitting Exhibit 112. It is these records which are the only foundational basis for those Findings of Fact and Conclusions of Law related thereto.

D. The Trial Court Erred By Finding Ms. Graham Did Not Sustain Lost Wages Or An Impairment Of Future Earning Capacity As A Result Of The Injuries She Sustained In The Motor Vehicle Accident.

The Court entered Conclusions of Law No's. 10 and 11 based on the argument that Ms. Graham's pre-existing bipolar condition rendered her disabled since 1999, pursuant to a SSA determination issued September 27, 2001. Because Ms. Graham was "disabled" and was receiving a SSDI benefits, the Court concluded that Ms. Graham failed to sustain any wage loss or impairment of future earning capacity as a result of the accident. CP 1323-1324. Def. Conclusions of Law No. 11. These findings of fact and conclusions of law not only are unsupported by the substantial weight of evidence but the scant evidence on which they are

based, Exhibit 112, should never have been admitted, constituting reversible error.

Respondents put forth several arguments in response. First, Respondents suggest that Ms. Graham is “asking the court to weigh the evidence and to believe her version of the evidence.” *Respondents’ Brief* at 33. What Ms. Graham has put forth is that the findings of facts and conclusions of law adopted by the Court regarding lost wages and future earnings, *as drafted by the Respondents*, without either an oral or written ruling by the trial court, *are not* supported by substantial evidence.

Ms. Graham was working as a substitute teacher at the time of the accident. RP 623. She obtained a full time teaching job after the accident. As a result of her injuries she was unable to continue working. RP 632. Respondents’ position at trial, adopted by the Court in the Findings, was a “temporal” argument that Ms. Graham’s injuries were limited to those damages between March 23, 2001, the date of the accident and October 9, 2001, the last time she was seen at Harbor Physical Therapy. Exh. 18. Initially, even Respondents’ own expert economist found she suffered economic loss of wages in his testimony. So to claim that she did not suffer any wage loss contravenes Respondents’ own expert. RP 853. Ms. Graham’s expert, Dr. Eugene Silberberg found that Ms. Graham suffered \$133,872 in past earnings and lost benefits, and \$367,633 for future earnings and benefits, and \$525,470 in future medical costs. RP 686-693.

But more importantly, the heart of the issue is that there *is not* substantial evidence to support the conclusion that Ms. Graham’s injuries

were resolved by October 9, 2001, or that her subsequent back surgeries were unrelated to the motor vehicle accident. The undisputed testimony at trial is that Ms. Graham's back pain issues *never* resolved between October 9, 2001, and when she presented herself at Urgent Care in Gig Harbor on March 4, 2002 for *increased*, and excruciating back pain. RP 724-729 (Testimony of Ms. Graham); RP 459-464 (Testimony of Kris Keller; Exhibit 19 (Urgent Care records); Even the trial court inquired about Ms. Graham's pain during this period when she was not seeing a physical therapist, but was taking medications and other measures for her back pain while continuing to work at Peninsula High School. Consider this colloquy between the Court and Kris Keller, Ms. Graham's daughter and an emergency room nurse:

THE COURT: Did you tell us that prior to the accident you never heard her [her mother Marty Graham] complain of the symptoms which she now complains about following the accident?

WITNESS: I never heard her complain of back or leg pain. Never.

THE COURT: Leg weakness, stumbling, lack of balance, neck pain, mid-back pain, low back pain?

WITNESS: No.

THE COURT: After the accident, try to focus on the first year after the accident. Surgery occurs a few months after the accident?

WITNESS: Several months, yes.

THE COURT: She has some pain right after the accident.

WITNESS: Yes.

THE COURT: Was there a period of three, four, five months where the pain subsided or went away or was substantially reduced? Do you remember that period?

WITNESS: I don't remember her having – I remember her trying to just deal with it, deal with it.

THE COURT: Never a period in which the pain had substantially gone away and she looked -- felt a little better for two, three, five-month period?

WITNESS: No. RP 486.

There is no substantial evidence to support any finding that Ms. Graham's accident related back pain *ever* resolved prior to her back surgeries. In fact, the evidence supports that Ms. Graham's chronic persistent lower back pain is causally related to the accident. It follows that her wage loss claims are supported by the preponderance of evidence. Respondents do not seriously dispute that in her present physical condition at the time of trial she is not capable of working.

This issue turns on the causation issue regarding Dr. Brack and Dr. Bede. By Respondents' own analysis, if causation is established through Dr. Brack and Ms. Graham's other health care providers, then she is entitled to a new trial to establish her wage loss and impaired future earnings claims. The issue is analyzed below.

With regard to Conclusion of Law No. 11, no matter how many ways the Respondents try to twist the facts, Ms. Graham cannot be said to be unemployable because of her bipolar condition. Ms. Graham was bipolar for years and successfully employed. Exh. 80. Ms. Graham *was employed* as a successful teacher from 1995-99. RP 589-593 and Exh. 47 & 81. She was employed at the time of the accident on March 23, 2001, and it was during this very same time frame, August 2001, that she obtained her dream job teaching English at Gig Harbor High School. RP

626, Exh. 48 & 80. The SSA decision to award her disability benefits based upon her bipolar condition did not come out until the end of September 2001, after she had obtained her teaching contract and had been teaching for about a month. Exh. 48 & 80. It is undisputed that she called the SSA to report her job and to advise she did not need the benefits. RP 959-960.

It is undisputed, including by Respondents' own expert, William Skilling and by Respondents themselves in *Respondents' Brief*, that under the SSA's Ticket to Work, or Trial Work Period, program to reintegrate disabled workers back into the workforce, Ms. Graham could continue to collect SSA disability for a period of nine months, in a rolling 60-month period. RP 809-810. Thus it cannot be said that Ms. Graham could not sustain a lost wages or impairment of future earning capacity because she was "totally disabled from work" – *she was working*, and successfully until her accident-related back pain forced her from her job. RP 961.

At the time of the accident Ms. Graham was working; and at the time of the SSA disability ruling she was working. Conclusions of Law No.'s 10 and 11 cannot then follow.

E. The Court's total award of \$65,000.00 for Ms. Graham's claim for negligence is not supported by substantial evidence.

The Court found that the cost for Ms. Graham's medical treatment for injuries caused by the motor vehicle accident was only \$4,674.88, and entered judgment for a total award of \$65,000.00. Such a finding and award given the severity of Ms. Graham's special and general damages is

not supported by substantial evidence. Respondents/Cross-Appellants admit liability for the accident. Appendix 1 to *Appellant's Opening Brief*. Respondents' liability was the proximate cause of Ms. Graham's economic and non-economic damages proven at trial.

As identified by both parties, this Court's standard of review in this case is a two-step process in which this Court first determines if the trial court's findings of fact were supported by substantial evidence in the record. Landmark Development Co. v. City of Roy, 138 Wn.2nd 561, 573, 980 P.2d 1234 (1999). The Respondent admits that the trial court did not rely on any testimony from its only medical expert, Dr. Bede, for any of the Findings of Fact. Br. of Resp't. at 14 stating, "[n]owhere does the trial court cite to Dr. Bede's testimony as support [sic] the Findings of Fact."

At the same time, though, the Respondent asserts the trial court relied on Respondent's cross-examination of Dr. Brack as support for the Findings of Fact. Br. of Resp't. at 13 stating, "[r]ather, the trial court relied on the testimony of Plaintiff's witness, Dr. Brack." This assertion is false because, as with Dr. Bede, nowhere does the trial court cite to Dr. Brack's testimony [cross-examination or otherwise] as support for its Findings of Fact. The Respondent cannot have it both ways by then luring this Court into believing that the trial court relied on the cross-examination of Dr. Brack. This illustrates two very important problems with the Respondent's position on appeal:

1. It illuminates the overriding problem with the trial court's missing foundations for the Findings of Fact it signed; and

2. It demonstrates the extraordinary lengths at which the Respondent must stretch in hopes that this Court will not reverse and remand this case for a new trial.

The Respondent sets out certain excerpts of its cross-examination of Dr. Brack at pages 36-42 of its Brief in arguing that the trial court did not err in entering Conclusions of Law 6 through 11 and did not err in the damage award. Br. of Resp't. at 36-42. First, like the Findings of Fact signed by the Trial Court, Conclusions of Law 6 through 11 contain no indication of what evidence the trial court relied upon in entering those conclusions of law and, as the respondent must admit, Conclusions of Law are reviewed *de novo*.

The record establishes that the trial court understood Dr. Brack's opinion to be that to which he testified on direct examination and in his Declaration which was admitted into evidence in this case. Exh. 88

Dr. Brack had reviewed Ms. Graham's medical history, conducted an examination of her, and reviewed the radiological studies. On direct examination, Dr. Brack testified as follows:

Q: After reviewing Ms. Graham's previous medical history and conducting an examination of her, reviewing the studies, the MRI of March 14, 2002, did you come to any impression or conclusions of Ms. Graham's condition at that time?

A: Yes.

Q: What were those impressions?

A: The initial impression was that she had chronic persistent low back pain. For me to categorize it as chronic would be an individual that has pain usually on a daily basis that extends beyond six to nine months. Her injury was probably about a year old at that time. It would be causally related to the motor vehicle accident because she did not have any preexisting complaints until the accident.

Q: Was there – what was your second impression?

A: No. 2, she did have multilevel degenerative disk disease. This was pre-existing the car accident but aggravated by the car accident.

Q: Did you make a third impression?

A: Yes.

Q: What was that?

A: Third one was a right L4/5 foraminal disc protrusion or bulge that was causally related to the motor vehicle accident.

RP at 70. [Emphasis added].

Ms. Graham further invites this court to review the re-direct examination of Dr. Brack, where Dr. Brack reviewed the very medical records on which the Respondent so heavily relies. RP at 161-165. Dr. Brack was first asked if he had any reason to doubt Ms. Graham's description of pain to him. His response was a definitive, "no." RP at 154. Dr. Brack saw Ms. Graham 20-25 times. Id. During re-direct examination, Dr. Brack reviewed Dr. Golan's medical records. RP at 155, 158. He reviewed the records from Apple Physical Therapy. RP at 160. He reviewed the medical records from Harbor Physical Therapy. RP at 162. In fact the following colloquy illustrates the flawed methodology of Respondent's position:

Q: Dr. Brack, based on my interaction with you just here in the past few minutes, is it a fair characterization to say that Ms. Graham reported low back pain in April of 2001 shortly after the motor vehicle accident?

A: Yes.

Q: She continues with physical therapy at Apple Physical Therapy where she reported the same symptoms?

A: Yes.

Q: There were subjective and objective findings with Apple Physical Therapy ---

A: Yes.

Q: --in 2001 that were consistent with your subjective and objective findings with Ms. Graham?

A: Yes.

Q: From your review of her continuation of physical therapy with Harbor Physical Therapy and on into October of 2001, Ms. Graham also reported the same chronic and persistent lower back pain that you diagnosed; is that right?

A: Yes.

Q: Subsequently, you saw her a few months later in April of 2002; is that correct?

A: Yes.

Q: Ms. Graham made the same reports to you at that time?

A: Yes.

Q: Given your review of these documents, Doctor, is it fair to say that your previous assumptions that you made in April 2002 regarding Ms. Graham's chronic and persistent lower back pain remain true assumptions?

A: Yes.

Q: Does it cause you to have the same opinion that that chronic and persistent lower back pain is causally related to the motor vehicle accident?

A: Yes.

Q: What about the other two impressions, Dr. Brack, you made in April of 2002 and testified that they remain the same today, given what we have discussed here this afternoon, are those opinions the same?

A: Yes.

Q: It is still your opinion, then, Dr. Brack, that the right L4/L5 foraminal disc herniation is causally related to the motor vehicle car crash of March 23rd, 2001; is that right?

A: That is correct.

Q: It is still your opinion, Dr. Brack – I want to get this straight – the multilevel degenerative disc disease which was asymptomatic prior to the motor vehicle crash but symptomatic after the motor vehicle crash is causally related, was aggravated by the motor vehicle crash; is that correct.

A: **That's correct.** RP at 163,64. [Emphasis added].

Respondent's counsel on re-cross then confirms that, based on the review of the records, Dr. Brack's opinion, in fact, had not changed. In fact, the following colloquy completely illustrates the fancy linguistic footwork of the Respondent:

Q: [By Respondent's Counsel]: Your opinion on causation is based on an assumption; is that correct?

A: The history information. **It still seems to be correct.**
RP at 168.

Ms. Graham's daughter, and an RN, Ms. Kehler testified her mother's back pain was chronic. RP at 461 (stating, "I would say it [Ms. Graham's] pain has been severe. It has been chronic.").

The Court also engaged in its own inquiry of Ms. Kehler:

THE COURT: Never a period in which the pain had substantially gone away and she looked – felt a little better for a two, three, four, five month period?

THE WITNESS: No.

THE COURT: Between the accident and say the operation?

THE WITNESS: No.

THE COURT: No such period that you recall?

THE WITNESS: No.

RP at 489.

Additionally, the trial Court's comments made during a colloquy during Ms. Kehler's testimony indicate that the trial court understood Dr. Brack's opinions to be those stated on direct examination. :

Q: Did you observe Dr. Brack perform any testing of your mom during those visits?

A: I did. I saw him perform testing, non-invasive testing in the office. Then he also had asked her to – she had other testing. Dr. Iyengar in Tacoma performed a discogram at his request. I was with her at that appointment as well.

Q: Did you – during these visits with Dr. Brack, did you hear Dr. Brack express any opinions to your mom or you as to what was causing her pain?

A: Yes, I did.

Q: What did he say?

. . . [Respondent's objection and colloquy re: same]

THE COURT: I think you're wrong. I was wrong once in 1902. This relates to the right of the doctor or other person to testify concerning statement by the person being treated or relating stuff. **Besides that, I think it is cumulative because the doctor has already come in and rendered his opinion.**"

RP at 464-470 [Emphasis added].

Clearly, if the Court did not considered Dr. Brack's opinion to be that Ms. Graham's physical problems were the result of the automobile accident, the Court would have allowed Ms. Kehler's testimony as it would not have been cumulative. It is difficult, if not impossible, to determine what parts of the record support the Findings of Facts that were signed by the trial Court below.

For example, Finding of Fact No. 27 states, "Ms. Graham had degenerative disk disease in her spine which predated and was unrelated to

the motor vehicle accident of March 23, 2001.” FOF at page 8 of 17. Finding of Fact No. 27 contains no indication as to what evidence the trial court relied upon for that finding at all and is erroneous in light of Dr. Brack’s opinion to the contrary. There is no evidence, let alone substantial evidence, to support Finding of Fact No. 27 which is probably the most central finding to the Respondent’s case. As a result, reversible error has been committed.

Actually, numerous medical records of Ms. Graham were admitted that pre-date the accident, and none of the records reflect that she had *ever* had any problems with her back or spine. Respondent confirmed on cross examination of Ms. Kehler that prior to the motor vehicle accident, Ms. Graham was not experiencing any physical limitations. RP at 475.

This Court will not find one document that pre-dates this auto-accident, or see one word of testimony, that indicates Ms. Graham had ever had any pain in her back. This Court will not find testimony from one witness at the trial of this matter that states that Ms. Graham’s back pain was neither chronic nor persistent *since* the auto accident or that it was not causally related to the auto accident for which the Respondent admits liability. Yet, the trial court enters Finding of Fact No. 27 which states the opposite of the evidence.

Again notably, Finding of Fact No. 25 states that Exhibit 63, p. 14 is the only support for it. However, in truth the actual record, under “CLINICAL FINDINGS/INDICATIONS”, states that, based on the MRI, Ms. Graham was suffering from “Low back and right buttock and leg

pain.” And, “...suspicious for lumbar radiculopathy.” The portion of the MRI that is cited as support for the Finding states, “[m]ild disc degeneration is also present at these levels.” Finding of Fact No. 25 states further that this was the first MRI Ms. Graham had since the March 23, 2001 crash. Disregarded, however, is the fact that approximately three weeks after the motor vehicle accident, on April 13, 2001, Ms. Graham presented to Good Samaritan emergency room in excruciating back pain, wherein the record states **“low back pain radiating into right leg since MVA of 3/23/01.”** She had lumbar x-rays with three views in which the “clinical information” states, “three weeks post motor vehicle accident with low back pain.” And Diagnosis: “Acute lumbar strain and muscle spasm.” Exhibit 65, p. 8.

On April 11, 2002 Dr. Brack, upon an examination of Ms. Graham, and review of her MRI, opined that Ms. Graham suffered from chronic persistent lower back pain causally related to the accident; multi-level degenerative disc disease aggravated by the accident, and a disc hernia related to the accident. Ex. 20, RP 70-73, 163-164, 170-171. There is no serious dispute that Ms. Graham’s subsequent surgeries, on May 22, 2002 and then on July 25, 2002 rendered her incapable of work as a teacher. Dr. Brack described it as “failed back surgery syndrome.” Ex. 20. Dr. Brack opined that Ms. Graham was totally physically disabled and could not be gainfully employed. Ex. 20, RP 107, 115. Dr. Brack time and time again reiterated causation in the medical records. Ex. 20 Also, Dr. Theodore Becker, following a six-hour physical capacities examination of Ms.

Graham on February 4, 2004, concurred that Ms. Graham's accident-related back injuries left her unemployable. RP 541-544.

Finding of Fact No. 33 states at each of Ms. Graham's follow up visits with Dr. Brack, he recorded a "normal objective examination, having found no neurological deficits." Finding of Fact No. 33 cites to Exhibit No. 68, pages 13-17 as its support. Page 13 of Exhibit No. 68 is a February 5, 2004 visit. What Page 13 of Exhibit No. 68 does state:

Plan: I think this individual is fixed and stable and can now resolve her claim. From the standpoint of long-term treatment she will require medication for pain control. This will allow her to maintain her activities of daily living and walking. She could probably be considered a Category 5 according to the WAC 296-20-280 rating with Labor & Industry.

Notably, Category 5 of WAC 296-20-280 is the *complete opposite* of Finding of Fact No. 33. Category 5 of WAC 296-20-280 states:

Moderate low back impairment, with moderate **continuous** or marked intermittent **objective clinical findings of such impairment, with moderate X-ray findings and with mild but significant motor loss objectively demonstrated by atrophy and weakness of a specific muscle or muscle group.** [Emphasis added].

Ms. Graham's own treating doctors, who met her, took records of her treatment, and prescribed treatment for her, concur: **she did not have any back pain prior to the accident, and her degenerative disc disease was asymptomatic and aggravated by the accident itself.** [Emphasis added]. Ms. Graham can never work again as a teacher as a result of this accident. Her lost wages in the sum of \$127,845.00, and lost future

earnings in the sum of \$373,116.00 RP 693. Future medical services and commodities to cope the rest of her life with a “failed back” come to \$475,470.00. RP 697. She is entitled to a significant award for pain and suffering – which is constant, and daily.

RESPONSE TO RESPONDENT’S CROSS-APPEAL

A. **ANALYSIS:** In their Cross Appeal, the Respondents assign “conditional” error to the trial court. Br. of Resp’t at 44-50. Ms. Graham asserts these are “conditional” errors because, according to Respondents, these errors are only errors if this Court agrees with Ms. Graham’s position on this appeal, “If the Court of Appeals reverses the trial court’s ruling . . .”, “if the trial court did err, then it erred as to both parties.” Br. of Resp’t at 44-45. The Respondents cite no authority for the assertion that a trial court can commit “conditional” error. As a result, this Court should deny Respondents’ Cross Appeal. Moreover, as noted in her briefing to this Court, Ms. Graham’s position in this matter is that the errors committed by the trial court warrant reversal of the court’s decision and remand of the case for a new trial. If this Court decides to consider Respondents’ Cross Appeal, Ms. Graham offers the following arguments in opposition to the same.

1. The Respondents Fail to Articulate With Any Clarity Ms. Graham’s allegedly late-disclosed witnesses referred to in Respondents’ Cross Appeal.

The Respondents’ first conditional Assignment of Error in their Cross Appeal is that, “[t]he trial court erred in denying Defendant’s Motion to Exclude Plaintiff’s late disclosed witnesses.” Br. of Resp’t at

44-45. The Respondents argue that if this Court reverses the trial court's ruling that allowed the Respondent's admittedly late disclosed witness, Dr. Bede² to testify then this Court should reverse the trial court's ruling "allowing Plaintiff's late-disclosed witnesses to testify." Br. of Resp't at 44-45. Notably, the Respondents fail to identify of Ms. Graham's witnesses to whom the Respondents refer. This makes it a practically impossibility for Ms. Graham to respond to this Assignment of Error in any substantive manner. Ms. Graham asserts that this Assignment of Error should be denied for that very reason. Moreover, Respondents' should not be allowed to correct this error in their final reply brief as Ms. Graham will have no meaningful opportunity to respond in writing should Respondents identify witnesses to whom they are referring. Finally, because Respondents provide no substantive argument as to how the trial court has erred in this regard, this Assignment of Error should be denied.

2. The trial court did not err in preventing the Respondent from calling Tim Mobes as a witness. Mr. Mobes was Ms. Graham's accident reconstructionist who was listed until the Respondents finally admitted liability.

The Respondents' next Assignment of Error is that the trial court erred "in denying Defendants' ability to call *Plaintiff's* expert witness at trial[.]" Br. of Resp't at 44. In order for this Court to have a full picture

² One wonders why Respondents even make this argument when Respondents admit and assert that the trial court did not rely on Dr. Bede's testimony. Br. of Resp't at 13 stating, "[h]owever, the trial court did not rely on Dr. Bede's testimony in making those Findings of Fact."

of this issue, it is necessary to re-trace the steps of why Mr. Mobes was listed as a witness in the first place.

The Respondents' failed to admit liability in the case for nearly a year and a half after the case was filed on September 24, 2003. In the early stages of the lawsuit, the Respondents had named Officer J. Kristofferson as a "forensic specialist" to opine about the accident. The Respondents were refusing to admit liability. As a result, Ms. Graham felt it necessary to obtain an expert witness for purposes of accident reconstruction – Mr. Mobes.³

In their Final Witness List, dated April 1, 2005, for trial though, the Respondents listed Allan Tencer (in addition to Dr. Bede). CP 406 The intent was clearly for Mr. Tencer to testify about the "biomechanics" of the motor vehicle accident and Ms. Graham's injuries. Like Dr. Bede, Mr. Tencer had been untimely disclosed and was not a proper rebuttal witness. On May 6, 2005, the court ordered that Respondents, because of their own late disclosure, could call Mr. Tencer as a rebuttal witness only. An argument then ensued after the Respondents indicated their intent to call Mr. Tencer in their case in chief. This resulted in the "Motion to Clarify" filed by Ms. Graham. CP 612 Ms. Graham's "Motion to Clarify" was granted on May 20, 2005. CP 1388-1389

³ Ms. Graham respectfully encourages this Court to review her "Motion to Exclude Undisclosed and Untimely Witnesses" filed with the trial court on April 28, 2005. CP 354 - 493. It is worth noting in that Motion that Ms. Graham suggested it would be reversible error for the Court to allow the testimony of Dr. Bede and Mr. Tencer. *Motion* at 3

The gravamen of the Respondents' real complaint in this matter is that they wanted an expert to testify regarding the speed of the impact, despite the fact that they had admitted liability on February 22, 2005. They never listed Mr. Tencer and sought to do so at the 11th hour of the case, on April 1, 2005. The Respondents state in their brief that the fact of the matter is that the Respondents truly sought to call Mr. Mobes as a witness for the express purpose of impeaching him. Br. of Resp't at 45-46. Mobes had no information that Respondent Mark Jenkins could not have testified to. This was simply an elaborate legal tactic to attempt to impeach Mr. Mobes with all of the information supplied to the Respondents by Mr. Tencer – this is notably the very same tactic that Respondents used with Dr. Marlowe. Although Dr. Marlowe was saved for the middle of trial. The Respondents further provide no argument as to why Mr. Graham was not allowed to protect expert witness Tim Mobes under the Mothershead case and its progeny.

3. The trial court did not err in declining to set aside an Order in which counsel for the Respondent refused to participate in

Respondents' next Assignment of Error is that the trial court erred by not setting aside an Order in which the trial court allowed the Respondents to present Dr. Bede at trial. Br. of Resp't. at 46-48. One must question why the Respondents would assert that it was error for the trial court to enter an order denying Ms. Graham's Motion to exclude a Respondent's witness but, nonetheless, Respondents make the argument. In response, Ms. Graham invites this Court to review the trial court's

Memorandum of Journal Entry, specifically at 10:14 a.m. on June 10, 2005, when this even occurred and where the trial court stated in part:

Court takes short recess on this matter to allow counsel to read and prepare order. Back on the record on this matter. ONLY present is Atty. Beetham. **Atty. Homan left court room and did not stay as requested by court.** CP 914-915.

Respondents should not be heard to complain about an Order that was entered when Respondents' counsel voluntarily left in contravention to the trial court's directive to stay in the courtroom until entry of the subject Order. The Respondents further cite no authority for the proposition that it is an abuse of trial court discretion to enter an Order that is not reviewed by one counsel after that counsel has left the courtroom despite the trial court's instructions to the counsel to remain in the Courtroom.

Moreover, one wonders why the Respondents seek this relief when they admit that the trial court did not rely on the testimony of Dr. Bede in signing the Findings of Fact submitted by the Respondents to the Court.

4. The trial court did not err in admitting the SSA Red-Book post-trial

Respondents' last Assignment of Error is that the "trial court erred in admitting 'The Red Book' post trial." Br. of Resp't at 48-49. In the same breath, Respondents state that the decision to reopen a case rests in the trial court's discretion. More importantly,

though, the Respondents assert that they “do not challenge the court’s decision to reopen the case for relevant evidence.” Br. of Resp’t at 48. One must ask, then, why are the parties and the Court spending time addressing this issue?

Respondents' assert that the evidence that was admitted was not relevant and was misleading. ER 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probably than it would be without the evidence.”

The Respondents do an excellent job of setting out the testimony at trial involving Ms. Graham’s interactions with the SSA. Resp’t Br. at 48. The Respondents are forced to admit, as a result, that an issue they created is an issue of fact that is “of consequence to the determination of the action” and, therefore, is relevant. It was the Respondents that sprung Ms. Graham’s social security records on the court and Plaintiff in mid-stream of trial, and it is the Respondents who made numerous arguments attempting to preclude Ms. Graham’s claims against them based on Ms. Graham’s relationship with the SSA. The Respondents cannot now be heard to complain that after springing this on everyone mid-trial, that Ms. Graham should not be able to offer a treatise, published by the Social Security Administration regarding the very

issues on which the Respondents have spent their case-in-chief attacking Ms. Graham. CP 1123 - 1142

As with the other Assignments of Error asserted by the Respondents, this too is a red-herring. The Respondents cite to no authority which holds that the trial court erred as they suggest. This Assignment of Error should be denied.

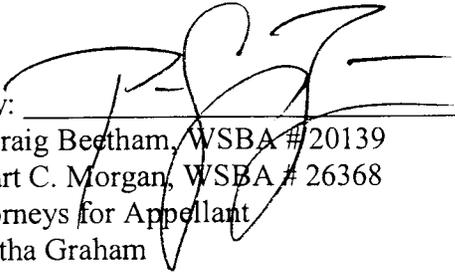
The unrefuted and unrebutted testimony at the trial of this matter was that Ms. Graham was part of the “ticket to work” or “trial work period” program wherein the SSA provided the ability of persons on disability to work and receive benefits until a period of months was established of a work history and then the benefits would be discontinued. CP 1130-1134 Ms. Graham never made it to that point because of the injuries she sustained in the collision for which the Respondents ultimately admitted liability.

III. CONCLUSION

Based on the foregoing arguments and authority, Plaintiff Martha Graham respectfully requests this court to reverse the trial court's February 3, 2006 Judgment limiting Ms. Graham's damages to \$65,000.00, and remand to the trial court to enter findings that Ms. Graham's special damages were, and enter new findings regarding Ms. Graham's general damages, and enter judgment for same.

RESPECTFULLY SUBMITTED this 11th day of April, 2007.

EISENHOWER & CARLSON, PLLC

By: 
P. Craig Beetham, WSBA # 20139
Stuart C. Morgan, WSBA # 26368
Attorneys for Appellant
Martha Graham

Subscribed and sworn to me on this 11th day of April, 2007.



Marsha J. Reidburn
Print Name: MARSHA J REIDBURN
NOTARY PUBLIC for the State of WA.
Residing at Alicia
My appointment expires: 8-31-08