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COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

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MARTHA A. GRAHAM, *Appellant*

v.

MARK JENKINS & CITY OF TACOMA, *Respondent*

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**BRIEF OF RESPONDENTS**

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## I. STATEMENT OF FACTS<sup>1</sup>

On March 23, 2001, Sgt. Mark Jenkins of the Tacoma Police Department rear-ended Plaintiff Martha Graham in stop-and-go traffic. FOF 2, 4. Jenkins was traveling at less than ten miles per hour at the time of impact and the impact caused minimal damage to Ms. Graham's vehicle. FOF 5, 6.

Ms. Graham suffered cervical and lumbar sprains, as diagnosed by her physician. FOF 7. She underwent physical therapy through October 9, 2001. FOF 12, 19. At her second to last physical therapy appointment, the therapist noted that Plaintiff's sacroiliac and lumber mobility was "within normal limits" and that her "SI dysfunction was resolved." FOF 17. As of her last physical therapy appointment, Ms. Graham's medical bills totaled \$4,674.88. FOF 20.

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<sup>1</sup> The Statement of Facts is taken from the trial court's unchallenged findings of fact, which are verities on appeal, and from Plaintiff's direct testimony at trial. Appellant Martha Graham challenged only the following findings of fact: 25, 27, 29, 33, 43, 47, 48, 49, 51, 52, 53, 54, and 55. Opening Brief of Appellant, page 1. The remainder of the trial court's findings of fact are unchallenged and are therefore verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

In the spring of 2002, Ms. Graham reported an onset of back symptoms. FOF 21. Her employer documented that “[i]n the spring, she began having severe back pain.” FOF 24. She underwent back surgery in May 2002. She had a second back surgery July 2002. FOF 31.

Since 1995, Ms. Graham had also been suffering from bipolar affective disorder II, the same year she began teaching in the South Kitsap School District. FOF 38. Following a suicide attempt in 1997, she was also diagnosed with alcohol dependence. FOF 39. In 1999, Ms. Graham visited a neurologist and told the neurologist that she was having difficulty teaching and was having memory problems. The neurologist diagnosed a mild cognitive impairment. FOF 41. At the end of the 1999 school year, Ms. Graham quit her teaching position and applied for employee disability benefits, indicating on her application that she was totally disabled by her bipolar disorder and that she did not anticipate she would ever return to work. FOF 42, 44.

Ms. Graham also applied for social security disability benefits based on her bipolar condition. Her original application was turned down but after an appeal and a hearing, she was

awarded a complete and permanent disability by the Social Security Administration.

## II. STANDARD OF REVIEW

“When a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports its findings of fact and, if so, whether the findings support the trial court’s conclusions of law.” Keever & Assocs. v. Randall, 129 Wn. App. 733, 737, 119 P.3d 926 (2005). Evidence may be substantial even if there are other interpretations of the evidence. Sherrell v. Selfors, 73 Wn. App. 596, 600-01, 871 P.2d 168, review den., 125 Wn.2d 1002, 886 P.2d 1134 (1994). The appellate court will view the evidence in the light most favorable to the prevailing party and defer to the trial court regarding witness credibility and conflicting testimony. Weyerhaeuser v. Tacoma-Pierce County Health Dep’t, 123 Wn. App. 59, 65, 96 P.3d 460 (2004). If substantial evidence supports the trial court’s findings of fact, the appellate court will uphold them, even if there is contradicting evidence. Org. to Pres. Agric. Lands v. Adams County, 128 Wn.2d 869, 882, 913 P.2d 793 (1996).

### III. ANALYSIS

#### A. The trial did not abuse its discretion in admitting Dr. Bede's testimony.

##### 1. The trial court was within its discretion in allowing both sides to present late-disclosed witnesses.

Plaintiff argues that the trial court erred in allowing Dr. Bede to testify because Dr. Bede was not disclosed by the date provided in the case schedule.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1977). With regard to alleged discovery violations, "it is an abuse of discretion to exclude testimony as a sanction absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct. Fred Hutchinson Cancer Research Ctr. v. Holman, 107 Wn.2d 693, 706, 732 P.2d 974 (1987).

In making its decision, the trial court will consider:

(a) the presence or absence of good faith attempts by the proponent of the witness to comply with the rules of discovery, (b) the availability or discoverability of the witness at an earlier time, (c) the circumstances of the proponent at the time of the securing of the witness, i.e., whether a physical injury or illness had progressed to a point where diagnosis and/or prognosis was possible and/or whether the passage of time had made the consequences of the acts of the

parties discernible to an expert witness at an earlier time, (d) the materiality of the proposed testimony to the proponent, (e) the extent of surprise to the opponent, (f) the availability of opportunity to the opponent to depose the witness, (g) the availability of opportunity to the opponent to prepare for cross-examination, (h) the opportunity to the opponent to secure contradicting witnesses, (i) the prejudice presented to a proponent or opponent's case if a continuance is granted, (j) the impact upon both parties of the expenses of delay, and (k) the ability of an imposition of costs upon a proponent to remedy any hardship imposed upon an opponent by the late calling of a witness.

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). Chief among these concerns is prejudice to the opposing party. Barci, 11 Wn. App. at 350.

For example, in Barci, the plaintiff disclosed a physician as an expert witness 10 or 11 days before trial. The doctor was made available for a discovery deposition only after trial had begun. The trial court excluded the doctor as a witness at the trial. The Court of Appeals reversed, applying the above factors, and holding that where discovery rules have been violated, the proper course is a sanction under CR 37, rather than exclusion.

Similarly, in Fred Hutchinson, 107 Wn2d 693, the Court of Appeals held that, under the above factors, the trial court was within its discretion to allow the testimony of two expert witnesses who were not disclosed until after the start of the trial.

In this case, Dr. Bede was disclosed on April 18, 2005, which was a month prior to discovery cutoff and over two months prior to trial. He was deposed by Plaintiff on May 27, 2005, at defendants' expense. Although Dr. Bede's disclosure was not in compliance with the date for expert witness disclosure as established by PCLR 5, Plaintiff also failed to disclose her witnesses and their opinions within that deadline. Plaintiff specifically rejected the possibility of a continuance as a remedy. Plaintiff has also failed to identify any prejudice that resulted from the late disclosure of Dr. Bede. Therefore, the trial court did not abuse its discretion in allowing a late-disclosed expert to testify.

**2. Plaintiff's cited cases do not support her argument.**

Plaintiff argues that the trilogy of Dempere v. Nelson, 76 Wn. App. 403, 886 P.2d 219 (1994), Kramer v. J.I. Case Mfg., Co., 62 Wn. App. 544, 815, P.2d 798 (1991), and Lampard v. Roth, 38 Wn. App. 198, 684 P.2d 1353 (1984), all require the striking and/or

exclusion of any undisclosed witnesses, expert or otherwise. Br. of App. 32. However, these cases are not remotely analogous to the facts of our case. Even if the court were to apply these three cases to the facts of our case, each case supports the trial court's decision to allow both parties' late-disclosed witnesses to testify, noting that there was no prejudice to the parties. See, Dempere, 76 Wn. App. 403 (Appellate court held that the trial court was within its discretion to exclude expert witness disclosed 13 days prior to trial when opposing party had no ability to conduct any discovery concerning the witness and could not obtain its own expert in the field); Kramer, 62 Wn. App. 544, (trial court within its discretion to limit plaintiff's presentation of alternative theories of liability disclosed just before trial and defendant had not had opportunity to do discovery concerning these theories or obtain rebuttal experts); Lampard, 38 Wn. App. at 201, (trial court should have excluded two expert witnesses first identified "[t]oward the end of trial" in violation of multiple pre-trial orders specifically directing plaintiff to disclose the names of expert witnesses).

In our case, Dr. Bede was disclosed on April 18, 2005, over eight weeks prior to the beginning of trial. Plaintiff conducted a discovery deposition of Bede on May 27, 2005, almost a month

before trial, at Defendants' expense. While Bede's disclosure occurred after the date for disclosure of primary witnesses, many of Plaintiff's expert disclosures also were untimely under that rule. The trial court was well within its discretion to rule that neither side's belatedly disclosed experts would be excluded.

**3. Plaintiff's argument that defendant misled the trial court is specious.**

Plaintiff also asserts that the trial court erred in allowing Bede to testify because the defendant's reasons for the late disclosure were untrue. Plaintiff made the same baseless allegation to the trial court and trial court specifically rejected the argument.

Plaintiff brought a motion to exclude Dr. Bede on the basis of late disclosure. In response, defendant brought a motion to exclude Plaintiff's witnesses, whose disclosure had not complied with the case schedule, arguing that if the court was going to exclude defendant's witnesses for late disclosure, Plaintiff's late-disclosed experts should also be excluded. Defendant pointed out that Plaintiff's witnesses, Dr. Silberberg (economist), Cloie Johnson (life care planner), and Tim Moebes (accident reconstructionist) had not been included in Plaintiff's primary witness disclosure. CP 182,

186. In addition, Plaintiff repeatedly refused to provide Dr. Majovski's opinion and the basis of his opinion. As late as March 18, 2005, Plaintiff had stated in interrogatory answers that it was "premature for plaintiff to disclose Majovski's opinion," and the opinion was never provided by Plaintiff. CP 90.

At the hearing on the cross-motions to exclude, the court observed that "there is still a month, month and a half time before trial." The court ruled that given the fact that trial was still six weeks away, both Dr. Bede (Defendant's witness) and Dr. Majovski (Plaintiff's witness) would be allowed to testify, and the parties would be allowed to depose each other's witness. Plaintiff deposed Dr. Bede on May 27, 2005. Defendant was finally allowed to depose Dr. Majovski on June 9, 2005, after bringing a motion to compel.

Plaintiff accuses the defendant of misrepresenting to the court that Dr. Battaglia, the orthopedic who performed Plaintiff's IME, was unable to testify at deposition or trial in conformance with the court's schedule. Plaintiff asserts that Dr. Battaglia was, in fact, readily available to testify and that Defendants' statements to the trial court regarding Dr. Battaglia's difficult schedule were false. Plaintiff's accusations are based on the fact that Plaintiff's private

investigator was able to obtain examination appointments with Dr. Battaglia by telephoning a service called Objective Medical Assessments Corporation (OMAC), which coordinates the scheduling of IMEs for various doctors.

However, appointment dates were never the issue. The issue was deposition and trial dates, which are not handled by OMAC. OMAC does not schedule depositions for any of the doctors, including Battaglia. Depositions are handled by the individual doctors through their own offices. (See Affidavit of Marla Hughes, CP 870-74.) The phone calls made by Plaintiff's private investigator to OMAC were completely irrelevant.

In fact, Dr. Battaglia's schedules depositions according to his written policy, a copy of which was provided to the trial court. CP 884. That policy clearly states that depositions (preservation or discovery) must be scheduled 8 weeks in advance through Dr. Battaglia's private office, and may be subject to nonrefundable prepayment. CP 884. Plaintiff's counsel objected to Battaglia's policy and contended that Battaglia's policies rendered Battaglia "unavailable." CP 886, 890. Because of Battaglia's difficult policies, and the concern that Plaintiff would claim that defendants'

witness was unavailable for deposition, defendants decided to use a local orthopedic, Dr. Bede. CP 529.

When Plaintiff brought her motion to exclude Bede, defendants pointed out that no rule prohibits defendant from naming a different expert, subject to the timeliness rule of PCLR 5. Defendants explained, however, that the reason behind the change was Battaglia's difficult schedule and defendants did not want to be in the position of having no medical expert for trial. The court ruled that the late-disclosed experts for both sides, including Dr. Bede, would be allowed to testify.

Plaintiff then renewed her motion to exclude, this time claiming that the Defendants had misled the trial court. Plaintiff made the same allegations that she makes here: that Battaglia was available to testify all along and that defendant concocted the unavailability scenario. The trial court ruled, "I'm not going to find that the City, the defendant, has purposely misled the Court. I don't find that." CP VRP May 6, 2005 at 21. This court should likewise reject Plaintiff's specious argument.

Finally, Defendants were not prevented by any rule from changing an expert witness pre-trial, except the rule regarding timing of disclosure. Plaintiff continually argues that the change was improper but never cites to a rule or case supporting that assertion. The trial court was within its discretion to allow Dr. Bede to testify.

**4. Even if the trial court did abuse its discretion in allowing Dr. Bede to testify, the error was harmless because the trial court did not rely on Dr. Bede's testimony in any of its Findings of Facts.**

A party challenging the trial court's finding of facts has the burden of showing that they are not supported by the records. Colwell v. Etzell, 119 Wn. App. 432, 81 P.3d 8985 (2003). "The appellant has the burden of perfecting the record so that the court has before it all the evidence relevant to the issue." State v. Alexander, 70 Wn. App. 608, 612, 854 P.2d 1105 (1993) (quoting In re Marriage of Haugh, 56 Wn. App. 1,6, 790 P.2d 1266 (1990)). If the party challenging the finding of fact fails to provide all "evidence relevant" to the finding of fact that party disputes, the finding of fact will be a verity on appeal. Alexander, 70 Wn. App. at 612.

Plaintiff argues that even if the trial court was correct in allowing Dr. Bede to testify, Dr. Bede's testimony was not sufficient to support certain of the Findings of Fact of the trial court. Br. of App. at 34-35. The findings and conclusions are identified in Plaintiff's Assignments of Error as Findings of Fact nos. 25, 27, 29 and 33, and Conclusions of Law nos. 6,7,8,9, 10, and 11.

However, the trial court did not rely on Dr. Bede's testimony in making those Findings of Fact. Plaintiff incorrectly argues that the trial court's Findings of Fact 25, 27, 29 and 33 were based on the testimony of Br. Bede. Rather, the trial court relied on the testimony of Plaintiff's witness, Dr. Brack. The trial court also relied on exhibits that the Plaintiff has failed to make part of the record on appeal. The Findings of Fact challenged by Plaintiff provide:

25. Ms. Graham had an MRI of her lower back on March 14, 2002 which showed degenerative disk disease in the form of mild diffuse disc protrusions at L2-3, 3-4, 4-5, 5-S1 and central accentuation at L4-5, which may have represented a small extruded disc. Exhibit 63, p. 14. This is the first MRI done on plaintiff's back since the accident of March 23, 2001. Exhibit 63, p. 14.

27. Ms. Graham had degenerative disc disease in her spine which predated and was unrelated to the motor vehicle accident of March 23, 2001.

29. On May 22, 2002, Dr. Brack operated on plaintiff's back. During this procedure, he did a right L4-5 microdiskectomy to remove the portion of the L4-5 disk that was subligamentously herniated. Upon completion of the microdiskectomy, Dr. Brack found that the right L4-5 nerve root was still compressed, likely because of plaintiff's degenerate disk disease. Consequently, Dr. Brack also did a right L5-S1 foraminotomy to decompress the nerve root. Exhibit 68, p. 25.

33. The plaintiff continued to see Dr. Brack for follow up and management of her back from August of 2002 through February of 2004. At each of these visits, Dr. Brack recorded a normal objective examination, having found no neurologic deficits. Exhibit 68, p. 13 – 17.

Nowhere does the trial court cite to Dr. Bede's testimony as support the Findings of Fact. Instead, the Findings rely on Exhibit 63, Ms. Graham's medical records from Auburn Multicare Clinic, and on Exhibit 68, her medical records from Dr. Steven Brack. However, Plaintiff failed to include those records in the record on review and failed to present any argument why Dr. Brack's testimony or Dr. Brack's records do not support the trial court's findings.<sup>2</sup> Nor does Plaintiff identify any of the other evidence presented at trial, which supports the challenged findings. Instead, Plaintiff is content merely to support her argument by setting forth her own version of

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<sup>2</sup> Plaintiff not only failed to include the medical records in the record on review, Plaintiff chose not to provide any of the trial exhibits in the appellate record.

the facts and cite to the portions of the record that are most favorable to her. This is inappropriate. The appellant challenging a Finding of Fact must identify the parts of the record that support that Finding, and present argument as to why that evidence is insufficient. The appellate court then reviews that evidence in the light most favorable to the party in whose favor the findings were entered. Marriage of Gillespie, 89 Wn. App. 390, 404, 948 P.2d 1338 (1992).

Even if Plaintiff had proceeded to argue in her brief why the records do not support the trial court's findings, Plaintiff has failed to provide Dr. Brack's records for the appellate court. These exhibits are not part of the record on appeal, making it impossible for the court to evaluate Plaintiff's argument. Under Alexander and RAP 9.2(a), the Findings of Fact are verities.

**B. The trial court was within its discretion in allowing Dr. Wendy Marlow to testify and lay a foundation for exhibit 94.**

**1. The trial court acknowledged that the late disclosure of exhibit 94 was caused by Plaintiff's late disclosure of the MMPI-2.**

Plaintiff hired Dr. Majovski as a psychological expert for purposes of trial. VRP 1040-41. Majovski testified that he was hired for "forensic purposes" and that as a part of his evaluation of

the Plaintiff, he administered the Minnesota Multiphasal Personality Test- 2(MMPI-2). VRP 370-71; 394-95; 1040-41. Her test answers had been scored using a computer program, which generated an interpretive report. The interpretive report prepared by Majovski was admitted as exhibit 93. VRP 1008-10.

On cross-examination, Majovski admitted that his interpretive report had been produced using clinical norms rather than forensic norms, even though he had been hired for forensic purposes. VRP 425. Defendants then offered exhibit 94, which was also a computer-generated interpretive report, but this interpretive report had been scored using the forensic norms. The forensic report provided a different a different profile of Ms. Graham's personality and mental/emotional health than the clinical report created by Majovski. VRP 1036-42, 1053-54.

Plaintiff objected to exhibit 94 on the basis that it had not been previously disclosed. VRP 426. The court reserved ruling on the admissibility of the exhibit but did state that a proper foundation would need to be provided by "the person who ran it through the computer to see if they ran it through the right computer." VRP 427. In addition, the court expressed its concern that Plaintiff be

allowed to go over the exhibit with the witness, Dr. Majovski, so that he could be prepared to answer questions regarding the exhibit. VRP 428.

Defendants produced Dr. Wendy Marlow to lay the foundation. Dr. Marlow did not prepare an expert opinion and did not testify as to Plaintiff's psychological condition. VRP 445. Dr. Marlow was called merely to lay the foundation for defendants' exhibit 94, as requested by the trial court. Dr. Marlow confirmed that four days prior to trial, she rescored Ms. Graham's MMPI-2 using the forensic norms.

In her brief, Plaintiff seems confused by the trial court's apparent initial concern that exhibit 94 was disclosed too late, and the trial court's subsequent decision to go ahead and admit the exhibit. The explanation for the court's change of heart is easily explained. During argument about admission of exhibit 94, the court learned that the MMPI-2 results and Dr. Majovski's interpretive report were prepared in November 2004. VRP 1007. Nevertheless, Plaintiff had repeatedly refused discovery requests for any and all reports, insisting that no reports existed, and refused all discovery requests concerning the opinion of Dr. Majovski and the basis of the opinion. VRP 428, CP 981. Prior to trial, Plaintiff

continually stated that the opinion was only available through deposition, even though Plaintiff had identified 18 expert witnesses and defendants did not want to go to the expense of deposing all the experts just to learn the substance of an expert's opinion. CP 311. Even without defendant's numerous discovery requests, the rules obligated Plaintiff to provide the substance of Majovski's opinion by the date of the witness disclosure. PCLR 5(d)(3).

When the trial court learned that the existence of the MMPI-2 report had been withheld from Defendants until June 9, 2005, less than two weeks before trial, the court understood the reason for Defendants' late disclosure of its impeachment evidence. The affidavit of Jean Homan accurately sets out the chronology that led to the court's decision. CP 944-1001. Because Plaintiff withheld the MMPI-2 until just a few days prior to trial, the court decided to allow defendant to lay a foundation for exhibit 94 and offer it into evidence.

The decision to admit evidence is within the discretion of the trial court. Stenson, 132 Wn.2d at 701. The trial court abuses its discretion in admitting evidence if there is no tenable basis for its

decision. Fox v. Mahoney, 106 Wn. App. 226, 230, 22 P.3d 839 (2001) (citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The trial court was within its discretion to allow Dr. Marlow to provide foundation for exhibit 94. In the pre-trial witness lists, as well as the joint statement of evidence, defendant reserved the right to call any witness necessary to lay a foundation. CP 168. Plaintiff claimed the same right in her witness and exhibit lists. See e.g. CP 564. Therefore, Plaintiff should not complain that a foundational witness was called. As for the late disclosure of the witness and the exhibit, as the trial court indicated, Plaintiff created the circumstances surrounding the late disclosure by failing to provide Majovski's opinion and the MMPI-2 report earlier, in response to discovery requests. The trial court was within its discretion to allow Dr. Marlow to provide a foundation for exhibit 94, and was within its discretion in admitting exhibit 94.

**2. Even if the trial 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.**

An error is harmless unless there is a substantial likelihood that it affected the outcome of the trial. Rice v. Janovich, 109

Wn.2d 48, 63, 742 P.2d 1230 (1987). Absent a showing of prejudice to the outcome of the trial, an error does not constitute grounds for reversal. Carnation Co., Inc. v. Hill, 115 Wash. 2d 184, 186-87, 796 P.2d 416 (1990); Brown v. Spokane Cy. Fire Protec. Dist.1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983); 14 L. Orland & K. Tegland, Wash. Prac., Trial Practice § 220 (4th ed. 1986).

In this case, the trial court did not cite to exhibit 94 in any of its Findings of Fact and Conclusions of Law. Nevertheless, Plaintiff argues that without exhibit 94 and Dr. Marlow's foundational testimony for the exhibit, there is no basis for Conclusions of Law 8, 9, 10 and 11. Br. of App. at 39-40. This is inaccurate. The challenged Conclusions of Law state:

8. Plaintiff failed to establish by a preponderance of the evidence that any of the treatment rendered by her healthcare providers after October 9, 2001 was for injuries sustained as a result of the motor vehicle accident of March 23, 2001.

9. The cost for medical treatment for injuries caused by the motor vehicle accident of March 23, 2001 is \$4,674.88.

10. Plaintiff failed to establish by a preponderance of the evidence that she sustained any wage loss or impairment of earning capacity as a result of the motor vehicle accident.

11. Ms. Graham was determined to be totally disabled from work by her psychologist, her psychiatrist and Administrative Law Judge Krainess, for conditions unrelated to this motor vehicle accident and the onset of this disability preceded the motor vehicle accident. Consequently, plaintiff had no impairment of earning capacity attributable to the motor vehicle accident.

Plaintiff fails to demonstrate how the admission of Dr.

Marlow's foundational testimony and the admission of exhibit 94 influenced any of the identified conclusions of law. Exhibit 94, the forensic interpretive report of Ms. Graham's MMPI-2 psychological exam, does not have any apparent relationship to these Conclusions of Law. Certainly, the forensic MMPI-2 was not determinative of whether Ms. Graham established that the surgeries on her back were for conditions caused by the motor vehicle accident (COL 8), and the MMPI-2 was completely irrelevant to the cost of back treatment prior to surgery (COL 9). Similarly, the forensic MMPI-2 report was not relevant to whether Ms. Graham met her burden as a Plaintiff to establish her wage loss claim by a preponderance of the evidence (COL 10) and the forensic MMPI-2 report prepared in 2005 has absolutely nothing to do with the ALJ's determination in 2001 that Ms. Graham was incapable of work (COL 11).

Therefore, even if the trial court abused its discretion in admitting exhibit 94 and Dr. Marlow's foundational testimony for the exhibit, the error was harmless as exhibit 94 had no discernible effect on the Conclusions of Law challenged by Plaintiff.

**C. The trial court did not abuse its discretion by admitting exhibit 112, Plaintiff's social security records.**

Months before trial, Plaintiff had signed a stipulation allowing defendants to obtain her social security records but the records were difficult to obtain and slow to arrive. VRP 760. The records arrived on Friday, June 24, 2005, the third day of trial and were provided to Plaintiff the same day. VRP 759- 760. Those records included Ms. Graham's application for social security disability, her requests for reconsideration, her notice of appeal, her pre-hearing statement submitted to the administrative law judge (ALJ), and the ALJ's written opinion granting Ms. Graham's complete and permanent disability based on her bipolar condition. The records were admitted into evidence, without objection, on July 5, 2005. VRP 1181-82.

**1. The Plaintiff has failed to provide the appropriate record.**

Plaintiff contends it was error for the trial court to admit the records. The appellate court should not consider Plaintiff's argument concerning admission of exhibit 112 because Plaintiff has not included exhibit 112 in the record on appeal. "The appellant has the burden of perfecting the record so that the court has before it all the evidence relevant to the issue." State v. Alexander, 70 Wn. App. 608, 612, 854 P.2d 1105 (1993) (quoting In re Marriage of Haugh, 56 Wn. App. 1, 6, 790 P.2d 1266 (1990)). See also Morris v. Woodside, 101 Wn.2d 812, 815, 682 P.2d 905 (1984); RAP 9.2(b). If the party challenging the finding of fact fails to provide all "evidence relevant" to the finding of fact that party disputes, the finding of fact will be a verity on appeal. In re Discipline of Haskell, 136 Wn.2d 300, 311, 962 P.2d 813 (1998); Alexander, 70 Wn. App. at 612; Morris, 101 Wn.2d at 815.

For example, in Bulzomi v. Dep't of Labor & Ind., 72 Wn. App. 522, 864 P.2d 996 (1994), the appellant made three assignments of error. Two were based on proposed jury instructions and the third was based on a proposed jury verdict form, none of which was included in the appellate record. The

appellate court pointed out that it was the appellant's burden to provide the court with all of the relevant evidence. Bulzomi, 72 Wn. App. at 525, citing State v. Vasquez, 66 Wn. App. 573, 583, 832 P.2d 883 (1992). The court stated that "an insufficient record on appeal precludes review." Bulzomi, 72 Wn. App. at 525, citing Allmeier v. Univ. of Wash., 42 Wn. App. 465, 472-73, 712 P.2d 306 (1985), review denied, 105 Wn.2d 1014 (1986). The court held that Bulzomi had failed to provide an adequate record.

In this case, Plaintiff objects to the admission of exhibit 112, and contends that Findings of Fact 43, 47, 48, 49, 51, 52, 53, 54, and 55, which cite to exhibit 112, are therefore unsupported by substantial evidence. However, Plaintiff has failed to include exhibit 112 in the record on review. Plaintiff contends that the exhibit contains hearsay and only partial records, but the court cannot evaluate those arguments without reviewing the actual exhibit. Under Washington law, the appellate court should not review Plaintiff's arguments concerning exhibit 112.

In addition, Plaintiff has failed to provide this Court with those portions of the record, apart from exhibit 112, which support Findings of Fact 43, 47, 48, 49, 51, 52, 53, 54, and 55. Instead, she merely states that without exhibit 112, there is insufficient

evidence. This is inadequate. It is incumbent on Plaintiff to cite to relevant parts of the record as support for her argument rather than asking the court to assume “an obligation to comb the record with a view toward constructing arguments for counsel as to . . . why the evidence does not support those findings.” In re Estate of Lint, 135 Wn.2d 518, 533, 957 P.2d 755 (1998). This Court cannot evaluate Plaintiff’s argument without combing the clerk’s papers and verbatim report of proceedings to locate what other evidence may support the challenged findings. Following that, this Court would be required to formulate Plaintiff’s argument for her. The Court should hold that the failure to provide the appropriate record, and failure to cite to the relevant evidence in the portion of the record that was provided, precludes appellate review of the trial court’s decision to admit exhibit 112.

**2. The social security records were admitted without objection.**

Even if the Court decides to review the admissibility of exhibit 112, the Court should affirm the trial court’s admission of exhibit 112 because Plaintiff did not object to the admission of the evidence at trial.

It is well settled that a party cannot appeal the admission of evidence unless the party makes a timely and specific objection to the admission of the evidence at trial. State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995); see also, State v. Hancock, 44 Wn. App. 297, 303, 721 P.2d 1006 (1986); RAP 2.5(a) (an "appellate court may refuse to review any claim of error which was not raised in the trial court"). In addition, Evidence Rule 103 expressly prohibits basing an appeal on the admission of evidence unless a timely objection has been made, stating the specific ground of the objection.

In this case, when defendant offered the social security records as evidence, ***Plaintiff specifically stated that there was no objection:***

MS. ELOFSON: Your Honor, I now offer the original Social Security Administration records. I'm going to remove the tabs.

MR. BEETHAM: No objection.

MS. ELOFSON: Her attorneys have looked at it.

THE COURT: Is there an actual transcript of the hearing in there?

MS. ELOFSON: There is not. Just a letter decision.

VRP 1181-82. Likewise, the trial court's Exhibit Record reflects that the social security records, exhibit number 112, were admitted

without objection. Exhibit Record, page 9. Ms. Graham is precluded from claiming that the trial court erred in admitting evidence when Ms. Graham did not object to the admission at trial.

**3. Plaintiff cites to an objection to a witness's testimony, not an objection to entering the records into evidence.**

Despite the lack of objection to admission of exhibit 112 as documented by the record, Plaintiff contends that she did object to the admission of the social security records. However, the objection she points to is her objection to the testimony of defendant's expert vocational rehabilitation counselor, not defendant's submission of the social security records.

Ms. Graham's social security records arrived on Friday, June 24, 2005, which was the third day of trial. The records were provided to Plaintiff the same day. VRP 760. That day the records were also provided to defense expert, William Skilling, a vocational rehabilitation counselor. Mr. Skilling had been retained by the defense to prepare an opinion regarding Ms. Graham's ability to work. VRP 749. Mr. Skilling testified on June 29, 2005. He testified that that in forming his opinion, he reviewed many, many records, including the social security records that had recently

arrived. VRP 749-50. Mr. Skilling testified that it was his opinion that Ms. Graham was already fully disabled by her bipolar condition before the automobile accident with the defendant. VRP 752.

While Mr. Skilling was testifying, defense counsel questioned him about the social security records he had reviewed. VRP 757. Plaintiff's counsel objected that the social security records were inadmissible hearsay. VRP 758. Defense counsel argued that whether the records themselves were admissible or not, the defense expert was allowed to rely upon them. VRP 758. See also, ER 703 (An expert may reasonably rely on facts and data made known to him but those "facts and data need not be admissible in evidence"); State v. Gillette, 27 Wn. App. 815, 824-25, 621 P.2d 764 (1980). The court agreed. The court stated that "it forms the basis of this gentleman's opinion. He relied on it." VRP 160. To ensure that there was no prejudice to Plaintiff, the trial court ruled that Plaintiff could recall Mr. Skilling and do a second cross-examination of Skilling after Plaintiff's counsel had further opportunity to review the social security records. The court

stated, "I am going to permit the testimony subject to counsel bringing this person back once he reads the records."<sup>3</sup> VRP 760-61.

Thus, it is clear from the record that the objection Plaintiff points to was an objection to Skilling's testimony, and the trial court's ruling on that objection went only to Skilling's testimony. The trial court's specific ruling was "I am going to permit the testimony . . ." VRP 760-61. The social security records were not offered into evidence during Mr. Skilling's testimony and the court did not rule on the admissibility of the social security records as evidence while Mr. Skilling was on the stand. The objection Plaintiff points to is not related to the actual admission of exhibit 112.

In addition, Plaintiff had clear notice at trial of just when exhibit 112 would be offered into evidence. During the morning session on July 5, 2005, defendants had the clerk mark the entire packet of social security records as exhibit 112. Defense counsel handed the packet to Plaintiff's counsel, who responded, "I anticipate you're going to offer those for admission." VRP 1142.

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<sup>3</sup> Plaintiff chose to not to re-examine Mr. Skilling. Instead, plaintiff chose to recall her witness, Cloie Johnson, to rebut Mr. Skilling's testimony concerning the social security disability. VRP 1094.

Defense counsel stated, "I am." VRP 1142. Plaintiff's counsel asked for time to review this copy of the records and defense counsel suggested that she wait until after lunch to offer the exhibit as evidence. VRP 1142. When the exhibit was offered after lunch, Plaintiff's counsel stated there was no objection to the exhibit. VRP 1181-82.

If Plaintiff wanted to object to the admission of exhibit 112, she was required to do so when the records were offered, so that the trial court might know the basis of the objection and so defendant could have responded to the objections. Avendano-Lopez, 79 Wn. App. at 710 (citing Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); Lewis H. Orland & Karl B. Tegland, 2 Wash. Prac. 483 (4th ed. 1991)). Because Plaintiff's counsel stated on the record that there was no objection, the trial court did not hear any argument in favor of or in opposition to admission of the social security records. Plaintiff's objection to the admission of the records, now that the case is on appeal, comes too late and should not be considered by the Court.

**4. E ven if the trial court did abuse its discretion in admitting the social security records, the error was harmless.**

Finally, even if the trial court did abuse its discretion in admitting the social security records, the error was harmless because Plaintiff testified on both direct and cross examination concerning the contents of the social security records. Her testimony corroborated and authenticated the records.

Ms. Graham testified that she first applied for social security benefits in June or July of 1999, after quitting her teaching job. VRP 954, FOF 42. At the same time, she also applied for benefits from a disability policy provided by the school district. VRP 954-55, 962. She sought the benefits on the basis of her bipolar condition. VRP 955. The SSI benefits were denied, and Ms. Graham reapplied. VRP 956. The benefits were denied again and Ms. Graham then retained an attorney to help her pursue her SSI benefits on the basis of her bipolar disorder. VRP 956. The attorney represented Ms. Graham at a hearing on her SSI benefits in June 2001. VRP 958. Ms. Graham confirmed that she testified at the hearing that she was disabled because of her bipolar condition:

THE COURT: Did you attend the Social Security administration hearing on disability for bipolar in the summer of 2001?

THE WITNESS: Yes.

THE COURT: Did you testify?

THE WITNESS: Yes.

THE COURT: Did you tell the people there you were disabled by virtue of your bipolar in 2001, the summer?

THE WITNESS: Yes, I did.

VRP 964. In August of 2001, Plaintiff accepted a teaching job with Gig Harbor High School. VRP 971. The next month, in September 2001, she was awarded a total disability by the Social Security Administration. VRP 1163. The benefits were retroactive to 1999. VRP 964. Ms. Graham learned that her SSI benefits would be discontinued if she worked for longer than nine months. VRP 960. Ms. Graham worked for eight months and then quit her job. VRP 1165. At the time of trial, Ms. Graham was continuing to receive the SSI benefits. VRP 964.

Therefore, even if the trial court abused its discretion in admitting the social security records, such error was harmless and did not affect the outcome of the trial because Ms. Graham testified concerning the events contained in the records. Essentially the

same information was provided by Ms. Graham as was contained in the records. In addition, other witnesses called by both the Plaintiff (e.g. Cloie Johnson, Kris Kehler) and the defendants (e.g. William Skilling) testified to the facts that were contained in exhibit 112. Therefore, it cannot be said that the outcome of the trial would have been any different had the records themselves been excluded. Thus, if it was error to admit the records, the error was harmless.

**D. The trial court did not 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.**

Plaintiff argues that Conclusions of Law 10 and 11 are “unsupported by the substantial weight of evidence” and constitute reversible error by the trial court. Essentially, Plaintiff asks the court to weigh the evidence and to believe her version of the evidence. The challenged conclusions provide:

10. Plaintiff failed to establish by a preponderance of the evidence that she sustained any wage loss or impairment of earning capacity as a result of the motor vehicle accident.

11. Ms. Graham was determined to be totally disabled from work by her psychologist, her psychiatrist and Administrative Law Judge Krainess, for conditions unrelated to this motor vehicle accident and the onset of this disability preceded the motor

vehicle accident. Consequently, plaintiff had no impairment of earning capacity attributable to the motor vehicle accident.

Again, Plaintiff has failed to identify the portions of the record which support the trial court's Conclusions, has failed to indicate which Findings of Fact support the conclusions, and has failed to present argument why that support is inadequate. Instead, Plaintiff asks this Court to adopt her view of the evidence. However, evidence may be substantial even if there are other interpretations of the evidence. Sherrell v. Selfors, 73 Wn. App. 596, 600-01, 871 P.2d 168, review den., 125 Wn.2d 1002, 886 P.2d 1134 (1994).

Plaintiff contends that Conclusions 10 and 11 are based on "scant evidence" which "never should have been admitted. Br. of App. at 42. Presumably Plaintiff is referring to exhibit 112, the social security records. Those records were properly admitted, but even without them, there is ample evidence in the record to support the trial court's conclusions. For example, William Skilling testified that Ms. Graham's bipolar condition was what prevented her from working, not her back condition. Economic expert Neil Beaton testified that Ms. Graham had not suffered an impairment of her earning capacity. VRP 856-59. Ms. Graham's own surgeon rated her back impairment at only moderate, not disabling. VRP 754-55.

Ms. Graham's testimony also supports Conclusions 10 and 11. The automobile accident did not happen till April 2001. However, Ms. Graham quit teaching at the end of the 1998-1999 school year, did not teach at all during the 1999-2000 school year, and worked for only nine days during the 2000-2001 school year. During the summer of 2001, she appeared before the ALJ and testified that she was unable to work because of her bipolar condition. Her doctors corroborated that she was having great difficulty teaching. FOF 41, 57. She completed disability applications with American Fidelity Assurance Company on which she indicated that she did not anticipate that she would ever return to work because of her bipolar condition. FOF 44. The evidence, when viewed in the light most favorable to defendants, overwhelmingly supports the trial court's conclusions that Plaintiff failed to establish her wage loss and impairment of earning claims.

Plaintiff also claims that it is logically impossible for the trial court to concur with the ALJ that Ms. Graham was incapable of working because Ms. Graham actually worked for eight months after the ALJ's disability determination. However, Plaintiff fails to acknowledge that this work attempt was not ultimately successful and she did not complete her contract for the school year. She was

not offered a contract for the following year. FOF 58, 60. At the end of her eight months of teaching, Ms. Graham's treating psychiatrist and her treating psychologist indicated that she was permanently and totally disabled by her bipolar condition and had been that way for some time. FOF 62, 63.

Plaintiff also contends that the trial court ignored undisputed testimony in reaching its conclusions. Br. of App. at 43. However, the undisputed testimony is Ms. Graham's own self-serving statements, which the trier of fact can choose to disbelieve. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Though Plaintiff fails to challenge relevant Findings of Fact, and fails to acknowledge the parts of the record that contain evidence supporting Conclusions 10 and 11, these conclusions are amply supported. The trial court did not err.

**E. The court's findings and conclusions as to causation are supported by substantial evidence and the court did not err in its damage award.**

Plaintiff asserts that conclusions 6 through 11 are not supported by substantial evidence and consequently, the court committed reversible error in awarding only \$65,000 in damages. Plaintiff tries to advance this argument by parsing through the record and ignoring the testimony and evidence that supports the

court's conclusions. As demonstrated herein, Plaintiff's contentions are without merit.

The court's award of \$65,000 is based on its findings as to the nature and extent of the injuries caused by the accident. In its findings and conclusions, the trial court found that, as a result of the accident, the Plaintiff sustained a cervical, thoracic and lumbar strain and that the injuries she sustained in the accident were resolved by October of 2001. Findings of Fact 7 – 20; Conclusions of Law 5 and 8. At trial, as she does on appeal, the Plaintiff argued that the spinal surgeries she had in 2002 were treatment for injuries she sustained in the accident. The trial court rejected her arguments, finding that Plaintiff had failed to prove her contentions by a preponderance of evidence. Conclusions of Law 6 – 8. Given the testimony of Dr. Brack, the court could not have reached any other conclusion.

On direct examination, Dr. Brack testified that he did not treat the Plaintiff until April of 2002, more than a year after the subject accident. RP 65, lines 10-11; RP 128. lines 23-25. See also, generally, RP 65 – 69. He also testified that, as a result of his initial assessment of the Plaintiff, it was his opinion that she had chronic, persistent low back pain and that this pain was causally

related to the accident. RP 70, lines 5-12. Dr. Brack defined “chronic and persistent” as pain that occurs “on a daily basis that extends beyond six to nine months.” RP 70, lines 5-8. See also RP 71, lines 4-10. He further testified that his opinion as to causation was based on his understanding that she did not have preexisting back pain before the accident and her back pain was persistent after the accident. RP 71, lines 11-17. See also RP 126, lines 15-25; RP 127, lines 1-6.

On cross examination, however, when Dr. Brack was presented with the information contained in medical records from other healthcare providers, he disavowed his opinion on causation. For example, Dr. Brack testified that prior to forming his opinion on causation, he did not know that the Plaintiff’s physical therapist had diagnosed the Plaintiff with a lumbar strain and had found the lumbar dysfunction to be resolved as of September 17, 2001. RP 133, lines 9-25; RP 134, lines 1-11. Similarly, Dr. Brack testified that, at the time he formed his opinion on causation, he did not have or review the information contained in the records from Dr. Golan, Plaintiff’s primary care physician. RP 135 – 137. Moreover, prior to forming his opinion on causation, Dr. Brack did not know that Dr. Golan’s record reflected the absence of a radiculopathy

and a complete absence of back complaints or symptoms by October of 2001. RP 137-139. Further, at the time he formulated his opinion about causation, Dr. Brack did not know that Plaintiff had told multiple healthcare providers that the back pain for which she ultimately saw Dr. Brack began in *March of 2002, some six months after she stopped physical therapy*. RP 139-141 (testimony regarding Exhibit 69, which reflects that on March 4, 2002, Plaintiff reported to Urgent Care physician that symptoms began three days before her visit to Urgent Care); RP 141 (testimony regarding Exhibit 62, which reflects that on March 11, 2002, Plaintiff reported to physical therapist that symptoms had begun one and one half weeks before appointment with physical therapist); RP 141-143 (testimony regarding Exhibit 65, which reflects that Plaintiff went to emergency room and reported that the symptoms which began in March of 2002 were getting worse). After reviewing and considering all of this information – information he admittedly did not have when he formed his opinion on causation - Dr. Brack testified that he could not say that the conditions he treated were caused by the motor vehicle accident:

A Assuming on her history or her subjective complaints she had pain for a year, on that assumption, with the discogram you would have to say that the degenerative disc disease at L3/4 was causally related to the car accident.

Q That's based on the assumption that none of the things I have shown you in the medical records actually exist?

A That's correct.

Q So if you remove that assumption, you can't say on a more probable than not basis that the condition or the aggravation of her condition at L3/L4 was caused by the motor vehicle accident.

...

Q **If you take away the assumption that the pain was chronic and persistent, and instead base your opinion on the medical records, you can't say on a more probable than not basis the L3/L4 area of her spine was aggravated by the accident; is that true?**

A **That's correct.**

Q You can't say – taking away that assumption that it was chronic and persistent – you can't say on a more probable than not basis that the herniation itself was caused by the motor vehicle accident, can you?

A That's correct.

Q If you take away the assumption that it was both chronic and persistent, you can't say the compression of the L5 root, which you corrected with the foraminotomy, was caused by the motor vehicle accident of March 2001, can you?

A That's correct.

RP 143, line 25; RP 144, lines 1-12; RP 148, lines 7-23 (emphasis added).

On redirect, Plaintiff tried to rehabilitate Dr. Brack, but to no avail. On redirect, Plaintiff simply asked Dr. Brack to revert to his original assumptions (that the symptoms had been chronic and persistent since the date of the accident), *assumptions that cross examination had already demonstrated were contrary to Plaintiffs' medical records*. RP 153, lines 8-13 ("Q. If those assumptions are not removed, Doctor, and continue to be, in fact correct, is your opinion still the same as to your initial diagnosis in April of 2002 of Ms. Graham with regard to causation to the motor vehicle accident? A. Yes."). See also RP 163-164. Moreover, on redirect, Dr. Brack couched his opinion in terms of "possible" and maybe. RP 157, lines 2-6 ("possible" for symptoms to wax and wane); lines 10-17 (unable to explain change in symptomology); RP 161, lines 9-18 ("it would appear so"). On recross-examination, however, Dr. Brack

again conceded that the Plaintiff's other medical records were contrary to her claims and inconsistent with his opinion on causation. See, RP 165, lines 8-19; RP 166, lines 11-25; RP 167, lines 1-22.

In light of Dr. Brack's waffling on the issue of causation, the trial court had no choice but to conclude that Plaintiff had failed to carry her burden of proof. See Thiel v. Dept. of Labor & Indus., 56 Wn.2d 259, 263, 352 P.2d 185 (1960) ("When Dr. Borchardt retracted his indispensable testimony: that the exposure to aluminum paint was the most probable cause of the workman's death, and admitted that it was not the most probable cause, he left the claimant's case without any factual foundation."). Moreover, "[t]o remove medical issues from the realm of speculation, the medical testimony must demonstrate that the alleged negligence "probably" or "more likely than not" caused the harmful condition leading to the injury. It is not enough that the defendant's conduct "might have" or "possibly did" cause the injury." (internal citations omitted) Conrad v. Alderwood Manor, 119 Wn. App. 275, 282, 78 P.3d 177 (2003).

Plaintiff argues that she herself testified that her pain was chronic and persistent and intimates that her testimony provided the necessary foundation for Dr. Brack's opinion on causation, as expressed on direct examination. Opening Brief of Appellant, p. 45-46. Plaintiff misses the point. "As interested testimony, the [the trier of fact] could reject it, draw inferences from all the existing circumstances, and accept other evidence[.] The weight and credibility of the testimony of the parties, whether interested or not, were for [the trier of fact] to determine." Cowan v. Jensen, 79 Wn.2d 844, 847, 490 P.2d 436 (1971).

In this case, the trier of fact was the court. As the trier of fact, the court was free to give little or no weight to Plaintiff's testimony on this issue, particularly given that her testimony was contrary to her medical records. Further, once Dr. Brack reviewed Plaintiff's other medical records on cross examination; he repudiated his opinion on causation. Consequently, the court's conclusions that Plaintiff failed to carry her burden were supported by substantial evidence, as was the damage award based on those conclusions.

## CROSS -APPEAL

### **A. Assignments of error of Cross-Appellants.**

1. The trial court erred in denying Defendant City of Tacoma Motion to Exclude Plaintiff's late disclosed witnesses. Defendant seeks review of this order to the extent that the appellate court reviews Plaintiff's Motion to Exclude, which was heard the same day.
2. The trial court erred in denying the Defendants' ability to call Plaintiff's expert witness at trial when the witness had already been disclosed, the witness had been deposed, and Defendant had expressly reserved the right to call any witnesses on Plaintiff's witness list.
3. The trial court erred in denying Defendant's motion to set aside Order Denying Plaintiff's Motion to Exclude Defense Witness, W. Brandt Bede, M.D. and for Further Sanctions, on which Plaintiff's counsel inserted language without the knowledge and consent of defense counsel.
4. The trial court erred in granting Plaintiff's post-trial motion to admit as evidence "The Red Book," published by the Social Security Administration because it was irrelevant and contradictory to Plaintiff's testimony at trial.

### **B. Argument relating to assignments of error.**

1. **If the trial court erred in excluding Dr. Bede for late-disclosure, the trial court erred in not excluding Plaintiff's late-disclosed witnesses.**

If the Court of Appeals reverses the trial court's ruling allowing Defendant's late-disclosed witness to testify, Defendants ask the Court to reverse the trial court's ruling allowing the Plaintiff's late-disclosed witnesses to testify. As the trial court heard many

times at many different motions, both sides failed to disclose experts according to the case schedule. However, both sides' witnesses were disclosed in plenty of time before trial to allow discovery and prepare for trial. Nevertheless, Plaintiff contends the trial court's ruling was error. The trial court did not err. However, if the trial court did err, then it erred as to both parties.

**2. The court erred in preventing Defendants from calling Plaintiff's witness, Tim Moebes.**

Plaintiff's accident reconstructionist, Tim Moebes, was disclosed by Plaintiff and deposed by Defendants. CP 564. Defendants repeatedly claimed the right to call witnesses disclosed by Plaintiff. When Plaintiff decided to drop Moebes from her Witness, Defendants indicated that they would call Moebes. Plaintiff complained that Defendants should not be allowed to call Moebes and brought a Motion to Clarify the court's ruling of May 6, 2005.

At the Motion to Clarify, without citation to legal authority, the trial court granted Plaintiff's motion and denied Defendants the ability to call Moebes. However, under Washington law, a party is allowed to call the witnesses of opposing party and is allowed to impeach that witness. See e.g., State v. Winters, 54 Wn.2d 707, 708, 344 P.2d 526 (1959) ("The testimony was properly admitted

because a party is not bound by the testimony of his own witness but may prove the facts to be otherwise"). "Nothing in the test of Rule 607 itself prevents a party from calling a witness for the unabashed purpose of impeaching the witness." Karl Tegland, Handbook on Washington Evidence, at 290 (2004 ed.). However, the court will generally curb abuses of the rule by holding that a party may not call a witness for the primary purpose of impeaching the witness with evidence that would otherwise be inadmissible. *Id.*

In this case, Moebes would have testified to the 8 - 15 mile per hour speed of Jenkins' vehicle at the time of the accident. CP 576. However, because Defendants were precluded from calling Moebes, Plaintiff argued at closing that no one knew how fast the Jenkins car was going at the time of collision. Moebes had material information and the trial court erred in ruling that Defendants could not call Plaintiff's witness, Tim Moebes.

**3. The trial court erred in not setting aside an order on which Plaintiff's counsel had inserted language without defense counsel's approval.**

When Plaintiff moved, for a second time, to exclude defense expert Dr. Bede, the trial court denied the motion. Defense counsel handed the original to Judge Armijo, and a copy to Plaintiff's counsel, who said that he needed additional time to review it.

Defense counsel left the courtroom, and after defense had left, Plaintiff's counsel added language to the order. The language added to the order purported to limit the scope of Dr. Bede's testimony regarding causation at trial. See Defendants' Supplemental Designation to Clerk's Papers, Order Granting Motion, May 19, 2005. Defense counsel's first notice of the added language was when a copy was received in the mail from the judge's judicial assistant.

Thereafter, the case was reassigned to Judge Steiner and at pre-trial motions on June 21, 2005, defense counsel raised the issue of the inserted language. VRP 17. Judge Steiner declined to strike the language added to the order by Plaintiff's counsel until reviewing a transcript of the hearing before Judge Armijo. VRP 26. After Judge Steiner had reviewed the transcript of what Judge Armijo had actually said, and while Dr. Bede was testifying, plaintiff's counsel objected, asserting that Bede's testimony violated the order. VRP 270. However, Judge Steiner correctly ruled that Dr. Bede's testimony regarding the mechanics of the injury was standard, run-of-the-mill testimony for orthopedists. "They're asking the same orthopedic questions that you and I have asked in a hundred cases." VRP 280. The judge ruled that this was not

biomechanical testimony but was "standard orthopedic testimony."  
VRP 280-81.

While the trial court correctly interpreted Judge Armijo's ruling and allowed Dr. Bede to testify as to causation, if this Court remands the case for retrial, Defendants ask the court to strike the language inserted by Plaintiff's counsel from the order signed by Judge Armijo.

**4. The trial court erred in admitting "The Red Book" post-trial.**

The decision to reopen a case rests in the sound discretion of the trial court. Fuller v. Ostruske, 48 Wn.2d 802, 808, 296 P.2d 996 (1956). The Defendants do not challenge the court's decision to reopen the case for relevant evidence. However, the evidence presented by Plaintiff after reopening the case was not relevant and was misleading. Additionally, it is evidence which could have been obtained pre-trial by Plaintiff. The trial court erred in admitting it.

At trial, Plaintiff testified at trial the basis of her SSI disability changed between June, 2001 (when she testified at her hearing) and August, 2001 (when she accepted a job). She stated she changed the basis of her disability with a single phone call to SSA, and the trial court allowed her to supplement the record with

documentation from SSA that the basis of the disability had indeed changed. Unable to get that documentation, Plaintiff offered "The Red Book," which outlines various SSA programs, including trial work periods. See Exhibit A to Affidavit of Attorney [Craig Beetham] in Strict Reply to Plaintiff's Cross Motion to Supplement Social Security Disability Information.

However, Plaintiff did not even attempt to establish that the 2005 Red Book admitted into evidence bears any resemblance to the Red Book of 2001, in effect when Plaintiff says she called the SSA. Moreover, there is no evidence to suggest that Plaintiff was ever involved in a "trial work" period. Plaintiff testified that she was involved in a separate program called the "Ticket to Work" program, even though the "Ticket to Work" program did not exist in Washington until 2004, three years after Plaintiff allegedly participated in it. Plaintiff argued that the Red Book discusses the "trial work program," and asked the court to simply *assume* that all testimony presented at trial about the "Ticket to Work" program was really about a "trial work" period. Such an assumption is unwarranted and is contrary to the evidence. The trial court erred in admitting the Red Book.

**IV. CONCLUSION**

The trial court gave Plaintiff every opportunity to present her best case, even going so far as to reopen the case and submit additional evidence weeks after the trial had ended. At practically every turn, the trial court told Plaintiff that she could take all the time she wanted in preparing and presenting her evidence. The trial court heard many days of testimony and received volumes of evidence, and concluded that based on the evidence, her damages totaled \$65,000. Ample evidence supports the trial court's findings. That evidence, taken in the light most favorable to Defendants, overwhelmingly supports the trial courts findings. Defendants respectfully request the Court of Appeals affirm the trial court.

However, if the Court reverses the trial court, Defendants ask the Court to also reverse the trial court's rulings identified in Defendants Assignments of Error so that Defendants are not prejudiced on retrial.

DATED this 5 day of February, 2007.

ELIZABETH A. PAULI, City Attorney

By:   
MARGARET A. ELOFSON  
WSBA# 23038  
Attorney for Respondents

NO. 34491-2-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

---

MARTHA A. GRAHAM, *Appellant*

v.

MARK JENKINS & CITY OF TACOMA, *Respondent*

---

**AFFIDAVIT OF SERVICE OF  
BRIEF OF RESPONDENTS**

---

ELIZABETH A. PAULI, City Attorney

MARGARET A. ELOFSON  
Assistant City Attorney  
Attorney for Respondents  
WSBA# 23038

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COPY

STATE OF WASHINGTON     )  
  ) ss.  
COUNTY OF PIERCE     )

Margaret A. Elofson, being first duly sworn on oath, deposes  
and states:

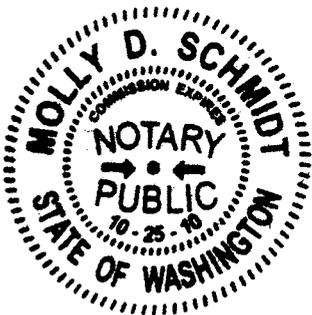
I am a citizen of the United States, over the age of eighteen  
and competent to be a witness herein.

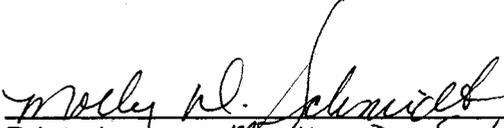
On the 5th day of February, 2007, I delivered a copy of the  
*BRIEF OF RESPONDENTS*, the original of which was filed in Court  
of Appeals, Division II, at Tacoma, Cause No. 34491-2-II, and this  
*AFFIDAVIT OF SERVICE* to:

P. Craig Beetham  
Stuart C. Morgan  
Eisenhower & Carlson  
Wells Fargo Plaza  
1201 Pacific Avenue, Suite 1200  
Tacoma, WA 98402

  
MARGARETA. ELOFSON

SUBSCRIBED AND SWORN to before me this 5th day of  
February, 2007.



  
Printed name: Molly D. Schmidt  
NOTARY PUBLIC in and for the State  
of Washington, Residing at Pierce County  
My commission expires: 10.25.06