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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 330583

**In The Court Of Appeals
The State Of Washington
Division III**

JOSEPH LETTRICK,

Appellant/Plaintiff,

v.

KRISTINA JOHNSON,

Respondent/Defendant.

BRIEF OF APPELLANTS

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ASSIGNMENTS OF ERROR

Assignment of Error 1

The Trial Court erred in denying Appellant (hereinafter “Mr. Lettrick”) a new trial and an order for Judgment Notwithstanding the Verdict (JNOV) pursuant to CR 50 and CR 59, on December 9, 2014, after the jury disregarded the evidence and found in its verdict that Respondent (hereinafter “Ms. Johnson”) was not negligent, at all, in causing injuries to Mr. Lettrick, despite Ms. Johnson’s admission that she was accelerating backwards, without looking backwards, and that she did not see what she was backing into. See CP 1444-1501. Additionally, the Trial Court also erred in denying Mr. Lettrick a new trial because the jury’s verdict was contrary to law. See id.

Assignment of Error 2

The Trial Court further erred by not allowing Dr. Brian O’Grady’s deposition testimony to be read at trial, basing its decision on cumulativeness. See CP 701-10, 1421, 1423. The court made its decision in contravention of CR 32(a), ER 402, ER 403, and ER 804. Dr. O’Grady’s testimony should have been allowed at trial because he was a treating doctor and the surgeon who actually performed the surgery on Mr. Lettrick, having specific and personal knowledge of Mr. Lettrick’s subject condition and surgery, and especially when Dr. O’Grady’s unavailability

was in accordance with CR 32, because he was unavailable both before and during trial and lived in the state of Texas, which is more than 20 miles outside of the county. See CP 85, 104-45, 223, 302, 701-04, 705-10, 1421, 1423.

Assignment of Error 3

Finally, the Trial Court erred in awarding Ms. Johnson medical records fees of \$1,288.01 for the totality of medical records she obtained, when it should have only awarded costs for the portions she used at trial. See CP 1427-43. The Trial Court awarded costs for all medical records Ms. Johnson obtained, contrary to established case law, even when she only used a few pages from the voluminous medical record, and even though Mr. Lettrick had already previously provided Ms. Johnson copies of medical records. See CP 1436-37.

Issues Pertaining to Assignment of Error 1

Whether the Trial Court may sustain a jury verdict when the verdict is contrary to law and not supported by the evidence presented at trial, or whether it must grant a motion for judgment notwithstanding the verdict (JNOV) opposing the jury's verdict, pursuant to CR 59(a)(7) and CR 59(a)(9).

Whether it is negligent to back up a vehicle without looking backwards and watching where one is driving.

Whether reliance on backup sensors on a vehicle absolve a person's duty to look back while backing a vehicle.

Whether the rules of the road apply to a busy private parking lot of a large department store frequented by the public.

Issues Pertaining to Assignment of Error 2

Whether the Trial Court improperly denied the reading of the prior deposition testimony of Dr. Brian O'Grady, a treating provider with first-hand, personal knowledge of a surgery performed, under CR 32(a), when this treating provider was on vacation and unavailable for trial and residing outside of the county more than 20 miles away in Texas.

Whether it was abuse of discretion to deny the reading of a treating provider's deposition testimony at trial, basing the denial on cumulativeness, when the treating provider possessed personal knowledge of the party's condition, surgery, and treatment.

Issues Pertaining to Assignment of Error 3

Whether a party may recover costs for medical records under RCW 4.84.010(5) for the entirety of the medical records obtained, or whether costs must be limited and proportionate to the medical records actually admitted and used at trial.

Whether a party may recover costs for obtaining medical records under RCW 4.84.010(5) when the opposing party had already previously provided it with copies of the medical records.

STATEMENT OF FACTS

This appeal arises from a claim for injuries and damages caused by a motor vehicle collision in which Respondent, Kristina Johnson, negligently backed into Appellants, Joseph Lettrick's, vehicle. On March 30, 2011, Respondent Kristina Johnson was backing out of a parking stall in a Costco parking lot and hit the rear of the vehicle driven by Appellant Joseph Lettrick. CP 32, 560-61, 1325; VRP 241, 325-26. Mr. Lettrick had backed his car completely out of his stall, waited a few seconds before shifting his vehicle into drive, and was hit from behind while shifting into drive. CP 553-556, 560-61, 1500; VRP 241. Ms. Johnson backed out of her stall, continuing to back without continuing to look back and failed to see Mr. Lettrick's vehicle. CP 1486, 1488-89; VRP 325-26, 335. Ms. Johnson drove a large Ford Expedition SUV while Mr. Lettrick drove a small Honda Civic sedan. CP 32, 556; VRP 317.

Ms. Johnson's testimony at trial was that she did not continue to look back as she backed her vehicle out of the parking stall and that she never saw Mr. Lettrick's vehicle until after the collision when she pulled back into her parking stall and exited her vehicle. CP 1475-76, 1486, 1488-89; VRP 325-

27, 335. Ms. Johnson was not all the way out of her parking stall at the time of the collision. CP 1354-55, 1474-75; VRP 326. Ms. Johnson admitted at trial during direct examination that she was not completely out of her parking stall and was not looking back when the collision occurred:

- Q. **You weren't completely out of your stall?**
A. **I was not.**
Q. **Do you think 50 percent of your vehicle was still within the stall?**
A. **Yes.**
Q. Were you shocked there was an impact?
A. I was.
Q. Tell us what happened with the sensor when you were backing up?
A. Well, the sensor went from – I heard it, and we hit. There was no, um, reaction time available. It just was all at the same time pretty much.
Q. So, basically the first thing you heard on the signal was the beep and then hit?
A. Correct.
Q. There wasn't the pulse?
A. No.
Q. It didn't give you any warning?
A. No.
Q. **Were you looking back to the back of your vehicle when this accident happened?**
A. **No.**

CP 1475-76; VRP 326-27 (emphasis added). Ms. Johnson during direct admitted that even though she was only 50 percent out of her stall she had already turned around to look forward and was going to back the remaining 50 percent without looking where she was going:

- Q. **So, had you shifted back to turn around so that you could engage the car to go,** because you talked about the fact you put your arm behind the arm rest and was turning back to look back?

- A. **Right.**
Q. Okay, so explain that.
A. So, I was still backing out but had-- I guess, yeah. **I was getting ready to finish backing out, put it in drive and go forward.**

VRP 327 (emphasis added). Ms. Johnson again admitted that she had not been looking back as she pulled her vehicle out of the parking stall during cross-examination:

- Q. Okay. You just said that by the time – **by the time of impact you were already starting to face forward.**
A. **I had turned my body forward.**
Q. Okay.
A. **Yes.**
Q. **You were no longer looking backward?**
A. **Correct.**

CP 1486; VRP 337 (emphasis added). Ms. Johnson further admitted that she was still backing her vehicle at the time of the collision:

- Q. **You were still moving at the time of this impact though?**
A. **Yes.**
...
Q. **Was your foot on the gas at the time of impact?**
A. **I would say, yes, most likely. I was backing out.** So, if not pushing on the gas, at least hovering over the gas like you do when you're backing out.

CP 1486, 1493; VRP 337, 344 (emphasis added). Ms. Johnson testified that she backed her vehicle without continuing to look back and did not see Mr. Lettrick's vehicle until after she hit it, pulled back into her parking stall and exited her vehicle.
CP 1474-76, 1486, 1488-89; VRP 325-27, 335.

Mr. Lettrick suffered a permanent and progressive neck injury requiring surgery. CP 83-84, 108-32, 575-80, 583-86. All medical experts and treating providers agree that Mr. Lettrick was injured as a result of the collision of March 30, 2011. CP 85-145, 179-84. However, Ms. Johnson's medical expert disputed the extent of Mr. Lettrick's injury caused by the collision of March 30, 2011. CP 181-83. Mr. Lettrick's herniated disk was surgically repaired on August 16, 2011, with an Anterior Cervical Discectomy and Fusion. CP 132-33, 583-86. While this resolved most of Mr. Lettrick's pain, he still suffers from stiffness in his neck, needs additional care, is apprehensive of any physical activity, and has a reasonably high likelihood of requiring additional surgery. CP 587-98.

Procedural History

Mr. Lettrick filed a Summons and Complaint in this case on June 8, 2012. CP 1. This case went to trial on Monday, October 6, 2014, and trial concluded late afternoon on Friday, October 10, 2014. See CP 1413-25. Counsel for Mr. Lettrick submitted a motion to the Trial Court to allow the deposition testimony of Dr. O'Grady to be read at trial, and it was denied by the Trial Court on October 9, 2014. CP 1421, 1423. At the conclusion of the trial, the jury's verdict was for the Defendant, finding that Ms. Johnson was not negligent, at all, in causing Mr. Lettrick's injuries. CP 1411, 1425. The Trial Court awarded Defendant costs,

including \$1,288.01 in medical records costs, and entered judgment on November 14, 2014. Mr. Lettrick filed a Motion for Judgment Notwithstanding the Verdict (JNOV) and For a New Trial, but it was denied by the Trial Court in correspondence dated December 9, 2014. CP 1444-51, 1519. Plaintiff appealed the Trial Court's decision. CP 1520-21.

SUMMARY OF ARGUMENT

The Trial Court erred in not granting Mr. Lettrick's Motion for Judgment Notwithstanding the Verdict after the jury ignored the evidence and did not follow the law, finding in their verdict that Ms. Johnson was not the least bit negligent in causing the collision and the injuries to Mr. Lettrick when she backed her vehicle without continuing to look back. At trial, Ms. Johnson admitted she did not look back as she backed out of her parking stall and did not see Mr. Lettrick's car before the collision. No reasonable juror with knowledge of the evidence that was presented at trial should have completely absolved Ms. Johnson of *all* negligence.

The Trial Court also erred in not allowing Dr. O'Grady's deposition testimony at trial when it was allowed under the court rules. Given that Dr. O'Grady was unavailable for trial and residing in Texas, over 20 miles outside of the county, the court rules allowed his deposition to be used at trial under CR 32(a). Further, as Mr. Lettrick's surgeon and

treating provider, Dr. O'Grady had very personal and specialized knowledge of Mr. Lettrick's condition, which could not be cumulative and was very relevant to Mr. Lettrick's case.

Finally, the Trial Court erred in awarding Ms. Johnson the totality of the medical records fees she requested, even though she only used a small portion of the records at trial. Parties are only entitled to costs for medical records that are actually used at trial, and thus Ms. Johnson should have only recovered a de minimis portion of the costs for medical records, proportionate to the de minimis amount of records actually used at trial. Alternatively, Ms. Johnson should not have been granted any costs for medical records, given that Mr. Lettrick had already provided her with copies of his medical records.

ARGUMENT

Standard of Review

This Court applies the same standard as the Trial Court in reviewing a motion for judgment notwithstanding the verdict (JNOV). Aluminum Co. of America v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 529, 998 P.2d 856 (2000) (citations omitted). A JNOV "is appropriate if, when viewing the material evidence most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party..."

Wright v. Engum, 124 Wn.2d 343, 356, 878 P.2d 1198 (1994) (citing Hizey v. Carpenter, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992) (quoting Industrial Indem. Co. of Northwest, Inc. v. Kallevig, 114 Wn.2d 907, 915-16, 792 P.2d 520, (1990))); see also Aluminum Co. of America v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 529, 998 P.2d 856 (2000). In a motion for JNOV, “no element of discretion is involved.” Aluminum Co. of America v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 529, 998 P.2d 856 (2000) (citing Davis v. Early Constr. Co., 63 Wn.2d 252, 254-55, 386 P.2d 958 (1963)). Therefore, the inquiry on appeal is limited to whether the evidence presented was sufficient to sustain the jury’s verdict and denial of a motion for JNOV is “inappropriate only when it is clear that the evidence and reasonable inferences are insufficient to support the jury’s verdict.” Wright v. Engum, 124 Wn.2d at 356.

The standard of review for an order denying a motion for a new trial is abuse of discretion. Aluminum Co. of America, 140 Wn.2d at 537. In a case where the proponent of a new trial argues that the jury did not base its verdict on the evidence, the appellate courts look to the record to determine whether there was sufficient evidence to support the verdict reached. Palmer v. Jensen, 132 Wn.2d 193, 197-98, 937 P.2d 597 (1997) (citations omitted). Moreover, it is abuse of discretion for a court not to

order a new trial when the verdict is contrary to the evidence. Palmer v. Jensen, 132 Wn.2d at 198, 203 (citations omitted).

A. The Trial Court Abused Its Discretion When It Did Not Grant Mr. Lettrick a Judgment Notwithstanding the Verdict or a New Trial When the Evidence Showed that Ms. Johnson Was Negligent in Backing Her Vehicle Up Without Continuing to Look Back

A Trial Court should enter a judgment notwithstanding the verdict when there is not substantial evidence to support a jury's verdict. The court rules provide that:

If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against any party on any claim... that cannot under the controlling law be maintained without a favorable finding on that issue...

CR 50(a)(1). It is appropriate for a Trial Court to grant a motion for judgment as a matter of law "when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915,

32 P.3d 250 (2001) (citing Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997)).

The Trial Court abused its discretion in refusing to grant Mr. Lettrick a new trial, when Mr. Lettrick did not have a fair trial for several reasons. The court may vacate the jury's verdict and grant a new trial for many enumerated reasons, including when "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law." CR 59(a)(7).

First, Mr. Lettrick should have been granted a new trial because the jury disregarded the law and the evidence in formulating its verdict absolving Ms. Johnson of all negligence. Second, Mr. Lettrick should have been granted a new trial because the jury's verdict suggested that they disregarded the great weight of the evidence, indicating prejudice and misconduct by the jury. Due to the actions of the jury and their verdict, "substantial justice has not been done" in Mr. Lettrick's case. CR 59(a)(9). Finally, the Trial Court abused its discretion when it excluded Dr. O'Grady's deposition testimony despite that he had very relevant, personal knowledge of Mr. Lettrick's injuries and causation, and even though it was allowed by the court rules.

- 1. The jury's verdict absolving Ms. Johnson of all negligence was contrary to the law and evidence in this case, which showed**

that Ms. Johnson negligently backed her vehicle without continuing to look back

A Trial Court has no discretion and must grant a motion for judgment notwithstanding the verdict when there is not substantial evidence to support the verdict. In ruling on a motion for judgment notwithstanding the verdict, the Trial Court exercises no discretion. Douglas v. Freeman, 117 Wn.2d 242, 247, 814 P.2d 1160 (1991). A Trial Court should grant a motion for judgment notwithstanding the verdict “if it concludes, as a matter of law, there is no evidence or reasonable inference to support a verdict in favor of a nonmoving party.” Thomas v. Wilfac, Inc., 65 Wn. App. 255, 259, 828 P.2d 597 (Div. 3 1992). A JNOV motion “can be granted when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the verdict can rest.” Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d at 915 (citing State v. Hall, 74 Wn.2d 726, 727, 446 P.2d 323 (1968)). There is “substantial evidence” if it is “sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d at 915 (citing Brown v. Superior Underwriters, 30 Wn. App. 303, 306, 632 P.2d 887 (1980)). A Trial Court must accept the truth of the nonmoving party’s evidence and view all reasonable inferences in the light most favorable to the nonmoving party. Douglas v. Freeman, 117 Wn.2d at 247. Ultimately,

an issue is a question for the jury “only when there is justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict.” Douglas v. Freeman, 117 Wn.2d at 247. Finally, it is abuse of discretion for a court not to order a new trial when the verdict is contrary to the evidence. Palmer v. Jensen, 132 Wn.2d at 203.

2. The jury’s verdict is not supported by substantial evidence, which strongly suggests that the jury’s verdict was likely the result of prejudice or misconduct because it disregarded the law and evidence in its verdict

The Trial Court should have overturned the jury’s verdict and found that the Defendant was negligent based on the facts presented. Evidence is substantial when it is enough to “convince an unprejudiced, thinking mind of the truth of the declared premise.” Lian v. Stalick, 106 Wn. App. 811, 824, 25 P.3d 467 (2001) (quoting Nord v. Shoreline Sav. Ass’n, 116 Wn.2d 477, 486, 805 P.2d 800 (1991)). While negligence is generally a question of fact for the jury, it may be decided as a matter of law by the Trial Court in certain instances. Thomas v. Wilfac, Inc., 65 Wn. App. at 261. Courts have held that an issue may be a question of law for the court “when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion.” Mathers v. Stephens, 22 Wn.2d 364, 370, 156 P.2d 227 (1945). If the jury verdict

is not supported by substantial evidence, then a Trial Court may withdraw the issue from the jury or grant a judgment notwithstanding the verdict. Tusnadi v. Frodle, 8 Wn. App. 239, 242, 505 P.2d 165 (Div. 1 1973) (Defendant's judgment notwithstanding the verdict on issue of Plaintiff's contributory negligence in her use of dimly lit stairs was reversed when it was not supported by substantial evidence); Elmer v. Vanderford, 74 Wn.2d 546, 550, 445 P.2d 612 (1968) (Remanded for a new trial after jury found no contributory negligence on Plaintiff's part, despite substantial evidence to suggest Plaintiff's motor scooter's brakes were faulty and other facts suggesting he was going faster than he claimed); see also Rockefeller v. Standard Oil Co. of California, 11 Wn. App. 520, 521, 523 P.2d 1207 (Div. 1 1974).

Ms. Johnson was negligent in backing out of her parking stall without continuing to look back. A person is negligent when three elements are met: 1) a legal duty owed by the defendant to the plaintiff, 2) breach of that duty, and 3) injury to the plaintiff proximately caused by the breach. Miller v. Likins, 109 Wn. App. 140, 144, 34 P.3d 835 (Div. 1 2001). The court appropriately instructed the jury on the elements of negligence, including general negligence as "the failure to exercise ordinary care... the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do

some act that a reasonably careful person would have done under the same or similar circumstances.” WPI 10.01.

The law provides for duties and precautions to be taken when backing a vehicle, and Ms. Johnson breached those duties. Those duties included “[e]very person has a duty to see what would be seen by a person exercising ordinary care.” WPI 12.06. The law further provides that a “driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic.” RCW 46.61.605(1). Courts have clarified that a person “must not only look backward when he commences his operation, but he *must continue to look backward* in order that he may not collide with or injure those lawfully using such street or highway.” Cleveland v. Grays Harbor Dairy Products, 193 Wn. 122, 125-26, 74 P.2d 909 (1938) (emphasis added) (citing Jellum v. Grays Harbor Fuel Co., 160 Wn. 585, 295 P. 939, 941 (1931) and Taulborg v. Andresen, (Neb.) 228 N.W. 528, 531, 67 A.L.R. 642). In case of any doubt over whether these and other rules of the road apply in a parking lot, the Washington Attorney General issued an opinion on the matter, concluding that “any section of the motor vehicle laws wherein the term ‘public highway’ is employed should have application wherever people are accustomed to congregate in automobiles in numbers sufficient to constitute a use by the public.” 1963-64 Wash. Att’y Gen. Op. No. 25

(May 23, 1963). Lastly, statutory violations may be considered by the trier of fact as proof of negligence. See RCW 5.40.050.

Here, given the facts presented at trial, it was abuse of discretion for the Trial Court to deny Mr. Lettrick's motion for Judgment Notwithstanding the Verdict when there was insufficient evidence to support the verdict. Mr. Lettrick presented evidence to support his contention that Ms. Johnson was negligent in backing her vehicle. See CP 1444-51, 1474-76, 1486, 1488-89; VRP 325-27, 335, 337. Ms. Johnson did not rebut this contention and admitted that she did not continue to look backward as she backed her vehicle. CP 1413-25, 1475-76, 1486, 1489; VRP 325-27, 337. This caused Ms. Johnson's vehicle to impact Mr. Lettrick's vehicle and cause him injuries. CP 502-04, 548-64, 575-85. Throughout trial the evidence supported one conclusion: Ms. Johnson did not act as a prudent person would, because she did not look backward while backing her vehicle. CP 1413-25, 1475-76; VRP 325-27, 337. According to all of the facts and evidence, Ms. Johnson was negligent.

In this case, Ms. Johnson breached her duty to others by not taking care to continue to look behind her vehicle as she backed out of the parking stall to avoid hitting other vehicles or pedestrians. VRP 325-27, 337. Ms. Johnson admitted in testimony numerous times that she was not looking back at the time of the collision and did not see what was there to

be seen. CP 1413-25, 1475-76, 1486, 1489; VRP 325-27, 335, 337. Ms. Johnson breached her duty to exercise ordinary care to avoid a collision or follow the rules of the road. Ms. Johnson failed to follow the rules of the road when she backed her vehicle out of its parking stall without continuing to look back, contrary to the law. See RCW 46.61.605 (1); see also Cleveland v. Grays Harbor Dairy Products, 193 Wn. 122, 125-26, 74 P.2d 909 (1938). Those rules do apply to large private parking lots frequented by the public, and Ms. Johnson violated them. *See* 1963-64 Wash. Att’y Gen. Op. No. 25 (May 23, 1963). The jury should have found Ms. Johnson negligent when she violated the law by backing her vehicle without continuing to look back.

3. The jury’s verdict was contrary to law, which requires that people who back their vehicles in a reasonable manner while continuing to look back to look out for people or vehicles

The jury’s verdict in this case is contrary to Washington State law, which requires that drivers continue to look back as they back their vehicles to watch out for other people and vehicles. Backing up without looking in violation of RCW 46.61.605 provides proof of negligence. Courts have provided that drivers have a duty to see what would be seen by a person exercising ordinary care, specifically applying it to cases where there is a positive duty to look, such as with disfavored drivers

entering a street or intersection, or where one is about to traverse a place of known danger, or where the danger is so clearly apparent that it could not escape the attention of a reasonably prudent person. Smith v. Manning's, Inc., 13 Wn.2d 573, 578, 126 P.2d 44 (1942). Ultimately, in order to comply with Washington's statutory "limitations on backing," which require a driver to back up safely and without interfering with traffic, a driver must look, and continue to look, behind their vehicle to assure that they will back up safely and without interfering with traffic. See RCW 46.61.605. The Washington Supreme Court long ago clarified that in order to comply with the statutory limitations on backing, a person "must not only look backward when he commences his operation, but he *must continue to look backward* in order that he may not collide with or injure those lawfully using such street or highway." Cleveland v. Grays Harbor Dairy Products, 193 Wn. 122, 125-26, 74 P.2d 909 (1938) (emphasis added) (citing Jellum v. Grays Harbor Fuel Co., 160 Wn. 585, 295 P. 939, 941 (1931) and Taulborg v. Andresen, (Neb.) 228 N.W. 528, 531, 67 A.L.R. 642). Again, a person must continue to look back when backing their vehicle out of a parking stall, even if it is a parking lot on private property, otherwise the person must be deemed negligent when their failure to look results in a collision. See RCW 46.61.605(1); see also

Cleveland v. Grays Harbor Dairy Products, 193 Wn. at 125-26; see also 1963-64 Wash. Att’y Gen. Op. No. 25 (May 23, 1963).

The Jury should have found Ms. Johnson negligent under the law, the facts, and the jury instructions given, or, at the very least, contributorily negligent. Ms. Johnson admitted that she looked back only before backing up out of her parking stall and did not continue looking back as she backed her vehicle out of its stall. CP 1475-76, 1486, 1493; VRP 326-27, 337, 344. She admitted that she was looking forward at the time of collision, even though she had her foot on the gas going backwards, and that she intended on backing the remainder of the distance without looking. VRP 327, 337. She further admitted that she did not see what was there to be seen and was still moving with her foot on the gas when she struck Mr. Letrick’s vehicle. VRP 335. Drivers have a duty to look, especially when they are entering an intersection or traversing a place of known danger—such as a busy store parking lot. A reasonably prudent person would look back, and continue looking back, while backing out of a parking stall to avoid crashing into another vehicle and to avoid running over pedestrians. It is common sense, but it is also the law in Washington State, which the jury disregarded in coming to its verdict absolving Ms. Johnson from all negligence. CP 1411, 1425. The jury

verdict is contrary to Washington state law, and this Court should not let it stand when it is contrary to long established law.

B. The Trial Court Should Have Allowed Dr. Brian O’Grady’s Deposition Testimony to be Read at Trial Because It Was Allowed Under the Court Rules

The Trial Court should have allowed Plaintiff to use Dr. Brian O’Grady’s deposition testimony at trial because it was allowed under the court rules. The court rules allow witness deposition testimony to be used at trial when the witness lives out of the county and more than 20 miles from the place of trial. See CR 32(a). Courts have clarified that “the admissibility of deposition is governed by CR 32; CR 32(a)(3) provides that when certain defined instances of unavailability exist, a witness’ deposition may be admitted as a substitute for his testimony.” Hammond v. Braden, 16 Wn. App. 773, 774-75, 559 P.2d 1357 (Div. 2 1977) (Deposition of a doctor was taken to preserve his testimony prior to his leaving on vacation). Courts have further held that “where an attorney is within the rules, he is free to try his case in his own manner,” even if the Plaintiff chooses to introduce a deposition instead of a live witness because it is more favorable to his client, he is free to do so because it is his “tactical prerogative to introduce the doctor’s deposition under CR

32(a)(3), rather than produce the doctor for live testimony.” Bertsch v. Brewer, 97 Wn.2d 83, 89-90, 640 P.2d 711 (1982).

If a witness is unavailable, even the rules of evidence provide an exception to the hearsay rule to allow such testimony. Under ER 804, if a witness is unavailable at trial, and the party against whom the testimony is offered had an opportunity and similar motive to develop the witness’s testimony by direct, cross or redirect examination, the hearsay exception applies. ER 804(b)(1); Kinsman v. Englander, 167 P.3d 622, 624 (Div. 2 2007).

Here, the Trial Court should have allowed Appellant Mr. Lettrick wide latitude to read Dr. O’Grady’s deposition into the record at trial. Dr. O’Grady was living in Texas, and thus met the standard set forth in CR 32(a)(3)(B), which allows deposition testimony to be used if the witness lives out of the county over 20 miles away from the place of trial. It was Mr. Lettrick’s prerogative to choose to read a witness’s deposition testimony at trial if it is within the rules. See Bertsch v. Brewer, 97 Wn.2d 83, 89-90, 640 P.2d 711 (1982).

C. The Trial Court Erred by Awarding Defendant the Entirety of the Requested Costs for Medical Records, When She Only Used a Small Portion of the Records at Trial

Generally, a prevailing party may recover costs for medical records under RCW 4.84.010(5), but costs for medical records may only be recovered for portions of the medical records obtained that were admitted into evidence. RCW 4.84.010(5); Andrews v. Burke, 55 Wn. App. 622, 630-31, 779 P.2d 740 (1989).

In this case, although voluminous medical records from Kadlec and Physicians Immediate Care may have been obtained by Ms. Johnson, only a few pages were admitted into evidence by Ms. Johnson and actually used at trial. Ms. Johnson cannot expect to recover the entire cost for voluminous Kadlec medical records in the amount of \$661.62 (more than half of the record fees awarded) when they only admitted and used a page or two as substantive evidence. Claimants may only recover a pro rata share of the cost of the medical records they actually admitted and used as evidence.

CONCLUSION

Mr. Lettrick requests that this court reverse the Trial Court and remand this case for trial for all of Mr. Lettrick's claims, and for a determination of the extent of Mr. Lettrick's damages, to include

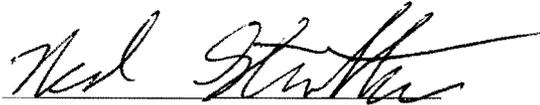
attorneys' fees and costs. The Trial Court should have granted Mr. Lettrick's Motion for Judgment Notwithstanding the Verdict and for a New Trial after the jury came back with a verdict absolving Ms. Johnson of all negligence, contrary to the facts and contrary to law. Additionally, this Court should reverse the trial's court's decision not allowing the deposition testimony of Dr. Brian O'Grady when it was well within the court rules. Finally, this Court should reverse the Trial Court's judgment awarding Defendant costs for the entirety of the medical records obtained and limit recovery to costs only for medical records admitted at trial, in accordance with state law.

Dated this 16 day of July, 2015.

Respectfully submitted,



Brian J. Anderson WSBA# 39061



Ned Stratton WSBA #42299

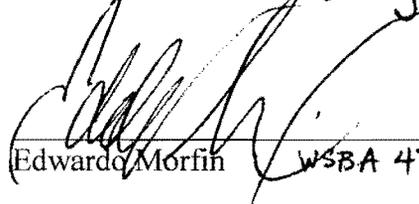
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CERTIFICATE OF SERVICE

I certify that on the 16th day of July, 2015, I caused a true and correct copy of BRIEF OF APPELLANTS to be served on the following in the manner indicated below:

Counsel for Respondents	via	<input type="checkbox"/> U.S. Mail
Ken Miller, WSBA #10946		<input checked="" type="checkbox"/> Hand Delivery
MILLER, MERTENS & COMFORT, PLLC		<input type="checkbox"/> Express Mail
1020 North Center Parkway, Suite B		<input type="checkbox"/> E-Mail
Kennewick, WA 99336		

Dated this 16th day of July, 2015.



Edwardo Morfin WSBA 47831