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STATE OF WASHINGTON
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NO. ~~62~~033-9-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

MAUREEN BLAIR, and
KENNETH E. BLAIR, Appellants

v.

TA-SEATTLE EAST #176
dba TRAVELCENTERS OF AMERICA, Respondents

BRIEF OF APPELLANT

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I. INTRODUCTION

This is a case in which Ms. Blair, a long haul truck driver, stopped at Defendants' truck stop to fuel up. As she walked around her vehicle to the fuel pump, she slipped in a diesel spill that had not been cleaned up by Defendants, and Ms. Blair fell hard. She has suffered special damages in excess of \$150,000 and will never be able to return to her chosen profession of driving truck; she has permanent injuries which have required substantial medical care and promise to require additional care for years to come.

In early 2007, through the discovery process, Ms. Blair's medical providers were identified and their medical records were obtained. The Case Scheduling Order required disclosure of Possible Primary Witnesses on Monday, May 21, 2007. On May 21, 2007, defendants disclosed their Primary List of Possible Witnesses, which included the proper identification of each of Ms. Blair's medical providers. On May 25, 2007, plaintiffs' counsel sent a letter to defense counsel naming possible witnesses. Plaintiffs' disclosure of 15 witnesses was made on July 11, 2007. Plaintiffs' disclosure included the following language: "Plaintiff reserves the right to call as witnesses at trial any primary or rebuttal witnesses, including expert witnesses, disclosed by Defendant, or otherwise identified during the course of discovery" something plaintiffs' counsel had made known to defense counsel in May, then again with the disclosures in July, and again in August.

In August, defendants objected to plaintiffs' late disclosure of witnesses and sought to have it struck. On August 14, 2007, the trial court entered an order which partially struck plaintiffs' witness list. On September 21, 2007, the trial court then denied, without comment, plaintiffs' motion for clarification of the August 14, 2007, order. On October 15, 2007, the trial court entered and order striking plaintiffs' designation of witnesses from defendants' witness list and awarding

terms of \$500. On June 30, 2008, the trial court granted summary judgment in favor of defendants, this appeal followed.

II. ASSIGNMENTS OF ERROR

Assignments of Error (in reverse chronological order).

1. The trial court erred in entering the order of June 30, 2008, granting Summary Judgment in favor of defendants.
2. The trial court erred in entering the order of October 15, 2007, granting defendants' Motion to Strike Witnesses and awarding terms of \$500.
3. The trial court erred in entering the order of August 14, 2007, granting, in part, the defendants' motion to strike plaintiffs' disclosure of possible primary witnesses.

Issues Pertaining to Assignments of Error

1. Plaintiffs notified defendants of 17 possible witnesses in May, and completed formal and complete notification on July 11, including again reserving the right to call any witness listed by defendants. In August, defense moved to strike plaintiffs' witness list. Without argument and with no record other than the written order, the trial court struck some of plaintiffs' witnesses. In October, after plaintiffs submitted a Witness and Exhibit List which included the names of two medical witnesses who had been identified on defendants' witness list, defendants moved to strike plaintiffs' listing of the two witnesses. Again, without argument and with no record other than the written order, the trial court struck the two medical witnesses and awarded terms. Did the striking of the witnesses without evaluation of the

Burnet factors constitute error on the part of the trial court? (Assignments of Error 2 and 3)

2. In May, July, and August of 2007, plaintiffs notified defendants of their intent to call any witness listed by defendants. Plaintiffs' attempts to schedule depositions of witnesses so named were rejected by defendants. Defendants then objected to those witnesses being listed in the Witness and Exhibit List. Should plaintiffs be able to call, at trial, witnesses who were initially listed in defendants' witness list and who were listed by plaintiffs on the Witness and Exhibit list? (Assignment of Error 2.)

3. The trial court had struck several of plaintiffs' witnesses, including medical providers; however the medical records were still available for admission to trial. Defendants moved for dismissal of the case "because plaintiffs cannot present expert medical testimony to prove causation or damages." Was it error for the trial court to grant the defendants' motion to dismiss or summary judgment? (Assignment of Error 1.)

III. STATEMENT OF THE CASE

This case involves the injuries sustained by Maureen Blair when she slipped and fell at the TA TravelCenter in North Bend. Ms. Blair, a long haul truck driver, stopped at Defendants' truck stop to fuel up. As she walked around her vehicle to the fuel pump, she slipped in a puddle of diesel that had not been cleaned up and fell. She has suffered special damages in excess of \$150,000 and will never be able to return to her chosen profession of driving truck; she has permanent injuries

which have required substantial medical care and promise to require additional care for years to come. (CP 119.) The case was initially set for trial in Kent with Judge Gain (CP 32) and was later transferred to Seattle.

The Order Setting Civil Case Schedule directed that disclosure of possible primary witnesses be made by May 21, 2007; July 16, 2007, was designated as the deadline for setting a motion for a change in trial date; the parties were to exchange witness and exhibit lists and documentary exhibits on October 1, 2007; the Joint Statement of Evidence was due on October 16, 2007; and the trial was scheduled for October 22, 2007. (CP 33.) Discovery commenced and defendants received the signed answers to the first set of interrogatories and requests for production on January 19, 2007. Defendants also sought and obtained plaintiff's medical records. (CP 2.)

On or about May 21, 2007, pursuant to the case scheduling order, defendants disclosed their possible primary witnesses to plaintiffs. (CP 84 - 91.) The disclosed witnesses included each of plaintiff's medical providers (CP 86 - 89) in addition to their own consulting expert, Dr. William J. Wilson (CP 89). On May 25, 2007, plaintiffs sent a letter to defendants advising of 17 possible witnesses (CP 94). Also in May, plaintiffs advised defendants of their intent to reserve the right to call any witness listed by defendants. (CP anticipated 311¹) In June, 2007, plaintiffs moved to continue the trial, a motion which was opposed by defendants (CP 1). On July 11, 2007, plaintiffs provided a complete disclosure of possible primary witnesses, which included a reservation of "the right to call as witnesses at trial any primary or rebuttal witnesses, including expert witnesses, disclosed by Defendant, or otherwise identified during the course of discovery." (CP 101 -2.)

¹ Certain pages of the Clerks Papers are being supplemented contemporaneously with the filing of this brief, therefore in order to cite to them anticipated page numbers are being used.

On July 11, 2007, defendants objected to plaintiffs' motion to continue the trial, in which they argue that "[t]he discovery cutoff is nearly two months away. The parties have plenty of time to conduct the necessary limited discovery and prepare for the October trial." (CP 3.)

On July 13, 2007, the trial court denied plaintiffs' motion to continue the trial. (CP 15.)

Three weeks later, defendants moved to strike plaintiffs' disclosure of possible primary witnesses. On August 3, 2007, defendants state:

With discovery cutoff and trial rapidly approaching, defendant will suffer prejudice if plaintiffs are allowed to call witnesses that were not previously disclosed to testify. Defendant has inadequate time to conduct the necessary discovery and then identify and prepare its own witnesses to rebut testimony offered by witnesses named by plaintiffs. Defendant requests that this Court strike Plaintiff's Disclosure of Possible Primary Witnesses and preclude any witnesses listed in the untimely disclosure from testifying at trial.

(CP 17-8.)

On August 9, 2007, plaintiffs once again moved the trial court to continue the trial date, stating:

This is a case that deserves to be fully prepared and properly presented to a jury, each side deserves to have sufficient time to complete discovery and finish preparations for the case. While it may be true that the sins of the attorney are visited upon client, in this case, the undersigned did not willfully refuse to comply with the case schedule; rather a collision of events beyond the undersigned's control left him struggling but attempting to piece together the ability to comply. Witnesses names were provided within a few days of the deadline, and a formal disclosure of witnesses was provided the self-same day that defense counsel announced that there was "plenty of time" to complete the necessary discovery. Time has apparently proven otherwise.

At this point in the discovery, the parties are just scheduling the deposition of several witnesses, but no depositions have been taken and additional records have been requested which have not yet been received.

CP 105.

That same day, plaintiffs also objected to defendants' motion to strike witnesses; plaintiffs noted that there had been no contact from defendants from the date of May's incomplete initial disclosure to the date of July's full disclosure. Plaintiffs further relied on Burnet as a basis to oppose the striking of witnesses. (CP 116.)

On August 14, 2007, the court partially granted defendants' motion to strike stating:

Witness #11 on plaintiff's disclosure of possible primary witnesses is stricken. Of the remaining 14 witnesses plaintiff shall select 7 to be called as witnesses and notify defendant by August 17, 2007 which 7 are to be called. The motion to strike 7 of the 14 witnesses is granted. Plaintiff shall pay defendant \$750.00 in terms.

CP 207.

On September 13, 2007, plaintiffs asked the court for clarification of the August 14, 2007, order. (CP 226.) Defendants objected to the motion for clarification. (CP 237.) On September 21, 2007, the court signed an order prepared by defendants, stating:

The Court being otherwise fully advised in premises;

It is hereby ORDERED that Plaintiffs' Motion for Clarification is DENIED.

CP 257.

No further clarification, direction or comment was offered by the court.

On October 1, 2007, plaintiffs filed their Witness and Exhibit List (CP 266), which included in the listed witnesses two medical providers who had been disclosed as possible primary witnesses for the defendants (Dr. Owen Higgs and Keith Drury, PT) (CP 267). Plaintiffs had notified defendants of their intent to call witnesses who had been listed by defendants and efforts to arrange the deposition of these two witnesses throughout August were rebuffed by defendants. (CP anticipated 310.) On October 4, 2007, defendants filed a motion to strike "Additional Witnesses

Named in Plaintiffs' Witness and Exhibit List". (CP 258.) Plaintiffs pointed to the *Burnet* factors (CP 322) as well as KCLR 16 as being supportive of allowing the listing of the witnesses (CP 230, anticipated 322).

On October 15, 2007, the trial court entered an order that stated:

Now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that Defendant TravelCenters of America's Motion to Strike Additional Witnesses Named in Plaintiffs' Witness and Exhibit List is GRANTED, and plaintiffs are prohibited from calling Dr. Owen Higgs, and Keith Drury, PT, as witnesses at trial.

It is further ORDERED, ADJUDGED, AND DECREED that Defendant TravelCenters of America is granted terms in the amount of \$500.00 for the reason set forth bellow:

Plaintiff has violated the Court's order by adding 2 additional witnesses that they were prohibited from adding due to untimely disclosure.

CP 278.

On October 12, 2007, defendants then filed a Motion to Dismiss Case Because Plaintiffs Cannot Present Expert Medical Testimony To Prove Causation or Damages. (CP 280.) Plaintiffs responded noting for the trial court that defendants' motion was based *solely* on plaintiffs' ability to prove causation and damages and pointing to the trial court that the medical records were still available to establish causation and damages. (CP 291.) Plaintiffs noted that the records would be admissible through ER 803, and that the information in the records was sufficient to establish both causation and damages. (CP 292.)

On June 30, 2008, the trial court entered an order granting summary judgment in favor of defendants. (CP 307.) This appeal followed.

IV. ARGUMENT

- 1) The trial court abused its discretion by striking identified witnesses.

Standard of Review and Rule

A trial court's decision to exclude witnesses is reviewed for an abuse of discretion. (*Lancaster v. Perry*, 127 Wn. App. 826, 830, 113 P.3d 1 (2005); *Burnet v. Spokane Ambulance*, 131 Wn. 2d 484, 494, 933 P.2d 1036 (1997); *State v. Willis*, 151 Wn. 2d 255, 262, 87 P.3d 1164 (2003).) However, when it is an expert witness that is being excluded the standard is more rigorous. (*Fred Hutchinson Cancer Research Ctr. V Holman*, 107 Wn.2d 693, 706, 732 P. 2d 974 (1987), *Peluso v Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 67, 155 P.3d 978 (Div. 3, 2007).) The heightened standard was discussed at length in *Burnet*.

The *Burnet* Court pointed out that a trial court's discretion should not be disturbed on appeal absent an abuse of that discretion, that is reasons which are unreasonable or untenable. Citing other cases, the *Burnet* Court stated:

Those reasons should, typically, be clearly stated on the record so that meaningful review can be had on appeal. When the trial court "chooses one of the harsher remedies allowable under CR 37(b), . . . it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed," and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial. [Citation omitted.] We have also said that "'it is an abuse of discretion to exclude testimony as a sanction [for noncompliance with a discovery order] absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.'" [citation omitted.]

Burnet, at 494.

The *Burnet* factors are a tri-prong test: 1) whether a lesser sanction would have sufficed; 2)

whether the disobedience was willful; and 3) whether it substantially prejudiced the other party. "The failure to support a decision to exclude a witness with these essential findings is an abuse of discretion." (*Peluso*, at 67-8.)

In the 2006 case *Mayer v. Sto Indus., Inc.*, 156 Wn. 2d 677, 132 P.3d 115 (2006), the Supreme Court offered this teaching about *Burnet* and its proper application, saying they held

that the reference in *Burnet* to the "harsher remedies allowable under CR 37(b)" applies to such remedies as dismissal, default, and the exclusion of testimony - sanctions that affect a party's ability to present its case - but does not encompass monetary compensatory sanctions under CR 26(g) or CR 37(b)(2). [citations omitted.]

Mayer, at 690.

Application

In the instant case, the court reviewed the matter without oral argument and made no record, save the orders themselves. The *record is empty*, there is nothing showing that the trial court considered the sufficiency of a lesser sanction; there are *no finding* as to willfulness or prejudice to the other party. The result places this case on footing strikingly similar to that found in *Peluso* wherein the Court stated:

Here, the court effectively excluded Ms. Peluso's medical testimony. It refused to extend the case schedule order because the discovery deadlines had already passed.[Citation omitted.] But it made no findings that a lesser sanction was not available, or that the violation here was willful, or that substantial prejudice resulted from any of this. See *Mayer*, 156 Wash.2d at 688, 132 P.3d 115. We are constrained by case authority, then, to hold that the trial judge abused his discretion.

Peluso, at 68.

A. The August 14 order.

A review of the facts leading up to the August 14 order reveals that the Court had entered an Order Setting Civil Case Schedule, which contained various deadlines, including a date for disclosing a list of possible primary witnesses. By the time that date arrived, discovery was being undertaken and plaintiff's medical providers and their records were part of that discovery. The medical providers and their records were sufficiently known that defendants listed the providers as possible primary witnesses. Plaintiffs' disclosure of possible primary witnesses was late, it was due on May 21, 2007 and the initial, though incomplete, disclosure was sent on May 25; final, complete disclosure occurred on July 11, 2007. Though case schedule deadlines had passed, discovery remained open into September. In June, plaintiffs moved the trial court to continue the trial date, something defendants objected to, stating (on July 11) that the parties had "plenty of time" to complete discovery. Yet after receiving plaintiffs' witness disclosure, defendants did almost nothing for three weeks², and then they moved to strike the disclosure and claimed there was insufficient time to prepare for the witnesses.

About the time defendants moved the trial court to strike the plaintiffs' witness disclosure, plaintiffs began trying to arrange a deposition of two medical providers whom defendants had listed as possible primary witnesses; however, defendants "declined to schedule" the depositions at that time. Subsequent phone calls resulted in similar refusals to cooperate in scheduling the depositions.

(CP anticipated 311)

² "almost nothing" because they did send a fax to plaintiffs' counsel wanting to set up a deposition date for Mr. and Mrs. Blair. Plaintiffs' counsel's staff called the next day to schedule the deposition but had to leave a message. It took another week before defense counsel or his staff returned her call. (CP 130.)

On August 14, 2007, without oral argument and without a record, the trial court signed an order prepared by defense counsel. The court did not make a finding of willful disobedience on the part of plaintiff; nor was there any finding of prejudice, nor any apparent consideration of the sufficiency of any lesser sanction.

Plaintiffs submit any finding of willfulness would have been inappropriate given the record before the court: in addition to plaintiffs having tried to continue the trial, plaintiffs' counsel set forth a detailed statement of the complications and problems he had been facing that contributed to the delay in full disclosure of witnesses (*see*: CP 128 - 30). Similarly, there was no finding of prejudice, nor could one have credibly been made given defense counsel's bold statements of having "plenty of time" the same day that full disclosure of the witnesses was completed.

Without considering the *Burnet* factors, the trial court abused its discretion in imposing the severe sanction of striking witnesses.

B. The October 15 order.

The facts surrounding the entry of the October order are even more strong in favor of the plaintiffs; for in addition to the facts that existed for the August order there was the following.

Notice of plaintiffs' intent to potentially call defendants' listed witnesses at trial was initially given in May. The notice was given again in July, and multiple times in August (CP anticipated 311); which means that by the time the trial court entered the order, defendants' had been on notice for approximately five months of plaintiffs' reservation and intent. Further, as noted above, throughout August, plaintiffs had been attempting to schedule depositions of the two medical providers, with the efforts being rejected by defendants.

Given the dispute between counsel as to whether plaintiffs should be able to name and call witnesses which had been named as potential witnesses by defendants, plaintiffs sought a motion to clarify (urging the trial court to specifically state, by way of clarification, that plaintiffs may name and call these witnesses). The August 14 order was silent on the issue of plaintiffs calling witnesses named by defendants, even though it was directly raised as an issue in the briefing.

The Motion for Clarification also raised King County Local Rule (KCLR)16 as additional authority for the proposition of one party being able to call witnesses who had been named by the other party.

The 2006 version of KCLR 16(a)(4) provides, *inter alia*:

In cases governed by a Case Schedule pursuant to LR 4, the parties shall exchange, not later than 21 days before the scheduled trial date: (A) lists of the witnesses whom each party expects to call at trial Any witness or exhibit not listed may not be used at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires.

Subsection 5 of that rule requires an additional disclosure to the Court:

(5) Joint Statement of Evidence. In cases governed by a Case Schedule pursuant to LR 4 the parties shall file, not later than 5 court days before the scheduled trial date, a Joint Statement of Evidence, so entitled, containing (A) a list of the witnesses whom each party expects to call at trial and (B) a list of the exhibits that each party expects to offer at trial. The Joint Statement of Evidence shall contain a notation for each exhibit as to whether all parties agree as to the exhibit's authenticity or admissibility.

The Official Comment to KCLR 16 provides additional illumination to the meaning of this rule. It states, in relevant part:

A party wishing to present the testimony of a witness who has been listed by another party may not rely on the listing party to obtain the witness's attendance at trial. Instead, a subpoena should be served on the witness, unless the party is willing to risk the witness's failure to appear.

Reading these in harmony, it is apparent that the drafters of these rules intended to allow parties to call witnesses who were initially listed by an opposing party. Such an understanding would also be consistent with principles of fairness and justice.

Further support for this proposition can be found in *Allied Financial Services, Inc. v. Mangum*, 72 Wn. App. 164, 864 P.2d 1, 871 P.2d 1075 (1994), a pre-*Burnet* case which seems to be the inverse of the case at bar. In *Mangum*, the court refused to allow Mr. and Mrs. Mangum to call any witnesses at trial because they failed to provide a witness list at any time before trial, including the list required by KCLR 16, and then relied on KCLR 16 to be able to call witnesses identified by the opposing party. The Mangums failed to supply any reason for their noncompliance and the Court of Appeals affirmed the trial court's ruling prohibiting the calling of witnesses holding that "in order to call witnesses at trial, LR 16(a)(3) requires a party to list 'any' and all witnesses, including those listed by the opposing party, unless the court orders otherwise for good cause." *Mangum* at 168.

In the instant case, plaintiffs disclosed a witness list, made a specific reservation of rights to call witnesses named by the defendants, tried to get defense counsel to cooperate in the setting of the depositions of the two witnesses that defendants named and who plaintiffs wanted to call at trial. Further, the witnesses sought to be called by plaintiffs were not surprise witnesses ... they had been fully disclosed in discovery, their records had been produced and reviewed; in short, they were so well known that defendants had them listed as possible primary witnesses.

Other cases which are illustrative of the points above as to both the August 14 and the October 15 orders include: *Lancaster v. Perry*, 127 Wn. App. 826, 113 P.3d 1 (2005) (witness excluded unnamed experts who "will conduct a CR 35 Examination of the Plaintiff", but a CR 35

examination was not requested by defendant); and *Dempere v Nelson*, 76 Wn. App. 403, 886 P.2d 219 (1994) (expert excluded when disclosed just 13 days before trial).

Lancaster is distinguishable in that the expert who was excluded was never fully identified and the substance of the testimony was never provided. Perry listed three professionals who were “likely” to be requested to do the CR 35 evaluation; but Perry never sought the CR 35 evaluation of Lancaster. In the case at bar, the witnesses were identified in discovery and their records and opinions had been provided (CP 2). Thus, *Lancaster* is illustrative in its distinction.

The same is true for *Dempere*. The disclosure of primary witnesses was made, the pre-trial conference required list of witnesses was made, and then just 13 days prior to trial, a new, previously undisclosed expert was added to the witness list. The trial court excluded the expert. Here again, the witnesses were so well known that defendants listed them as their possible primary witnesses. Depositions of the two witnesses were sought by plaintiffs. There was no credible claim of surprise or prejudice.

The Supreme Court in *Rivers v. Conf. of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2001) offered this guidance:

The court in *Burnet* held that sanctions imposed by a trial court is a matter of judicial discretion to be exercised in light of the particular circumstances, [footnote omitted] but that the sanction imposed should be proportional to the nature of the discovery violation and the surrounding circumstances. [footnote omitted.] That decision establishes a gauge for determining disproportionate sanctions. The court stated that even if the trial court had considered other options, the sanctions were still too severe considering the length of time (18 months) before trial was scheduled to begin, [footnote omitted] the severe injury to plaintiff, and the absence of a finding that the plaintiffs willfully disregarded a trial court order. [footnote omitted.]

Rivers, at 695.

So, too, in the instant case, the sanction of the excluding of expert witnesses is too severe,

especially in light of the fact that they had been fully discovered, along with their reports, they had been disclosed as possible primary witnesses for the party who now seeks to exclude them and their depositions had been stopped by the unwillingness to cooperate in setting a deposition by the party who now seeks to exclude them.

The trial court erred and abused its discretion by making no findings and imposing a sanction that was too harsh. This matter should be remanded for trial with instructions regarding the striking of witnesses.

- 2) Summary Judgment should not have been granted in favor of defendants.

Standard of Review

Summary judgement orders are reviewed de novo and are proper if, after reviewing all the documents on file, there is no genuine issue about any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c); *Lybbert v. Grant County*, 141 Wn. 2d 29, 34, 1 P.3d 1124 (2000). All facts and inferences are viewed in a light most favorable to the nonmoving party. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). Summary judgment is proper when reasonable persons could only reach the conclusion that the nonmoving party is unable to establish any facts that would support and essential element of its claim. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

Tukwila School Dist. No. 406 v. City, 140 Wn. App. 735, 738, 167 P.3d 1167, 1170 (2007).

Application.

Defendants moved the trial court to dismiss the action or for summary judgment on the *sole* basis that “plaintiffs cannot [prove causation and damages] without presenting expert testimony from plaintiff Blair’s treating physicians, or other medical experts....” (CP 281.)

Plaintiffs objected to the motion noting first that given the limited scope of the defendants’

motion “duty and breach will not be discussed, they are not challenged and are deemed, for purposes of this motion, as having been proved.” (CP 292.) Plaintiffs then note “[w]hile the Court’s Orders preclude the testimony of the witnesses, it does not restrict the admission of medical records, which are properly admissible under ER 803.” (CP 292.) Plaintiffs attached portions of plaintiff Maureen Blair’s deposition and records from Dr. Colburn and Dr. McManus to establish causation and reasonableness of treatment. (referenced at CP 294 - 301, attached at CP anticipated 336 - 358).

Dr. McManus states in his records:

Therefore I conclude that the proximate cause of Ms. Blair’s need for surgery of the left hip is due to the accident of 5/12/03.

Ms. Blair is not permanent and stationary. She will have permanent impairment which cannot yet be determined.

(CP anticipated 355)

Doctor Colburn’s records also substantiate causation, on May 25, 2006 he states:

I previously expressed the opinion that her condition was the result of the related injury as aggravating a preexisting but historically asymptomatic degenerative joint disease and I think that some apportionment of this impairment rating is indicated. Of her current impairment, I think one fourth is due to the preexisting condition and three fourths related to the industrial injury event of 5/12/03. This would make her net impairment related to the injury event as 15% whole person.

CP anticipated 342.

Doctor Colburn, on March 1, 2006, gives the opinion, “based on reasonable medical probability” that Mrs. Blair’s diagnoses was degenerative joint disease of the left hip “related to the 05/12/03 injury as an aggravation of a previously asymptomatic degenerative joint disease.”

(CP anticipated 339 - 340)

Plaintiffs have produced evidence sufficient to take this matter to trial. The trial court erred in granting summary judgment. This matter should be remanded for trial.

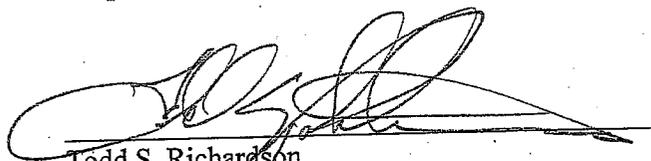
V. CONCLUSION

The trial court abused its discretion in entering the orders of August 14 and October 15. The matter should be remanded with instructions regarding allowing the witnesses to testify.

Further, the trial court erred in granting summary judgment in favor of the defendants. There is sufficient evidence before the court to reverse the ruling and remand for trial.

November 14, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Todd S. Richardson', written over a horizontal line.

Todd S. Richardson
Attorney for Appellants
WSBA #30237

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 NOV 14 PM 4:00

Court of Appeals No. 62033-9-1

MAUREEN BLAIR, et vir.,

Plaintiffs

vs

AFFIDAVIT PURSUANT TO
GR 17(a) (2)

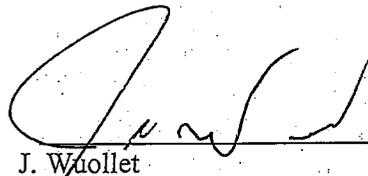
TA-SEATTLE EAST #176 dba
TRAVELCENTERS OF AMERICA, et al.,
Defendants

J. Wuollet declares and states:

1. I am employed with Seattle Legal and submit this declaration pursuant to GR 17 (a) (2) as recipient of **Brief of Appellant** received for filing with the Court in this matter.

2. I have examined the document. The **Brief of Appellant** consists of eighteen (18) page(s), including the signature page, and this Declaration page. It is completed and legible.

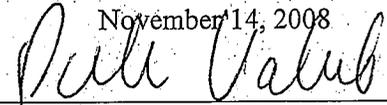
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



J. Wuollet

SIGNED OR ATTESTED BEFORE ME

November 14, 2008



Peter A. Valente

Notary Public in and for the State of
Washington, County of King

My appointment expires June 7, 2012