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NO. 62033-9-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MAUREEN T. BLAIR and KENNETH E. BLAIR,

Appellants,

v.

TA - SEATTLE EAST #176,
d/b/a TRAVELCENTERS OF AMERICA,

Respondent.

BRIEF OF RESPONDENT

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I. SUMMARY

Mrs. Blair's hip-injury claim was dismissed for lack of expert medical testimony to prove causation or to prove that treatments for which she sought damages had been necessary and that charges for the treatment were reasonable. The trial court did not abuse its discretion, either in entering its August 14, 2007 order limiting Mrs. Blair to seven witnesses, or its October 15, 2007 order striking Dr. Owen Higgs and Keith Duruy, P.T., as witnesses. Even if the Superior Court abused its discretion in striking Dr. Higgs and Mr. Duruy, Mrs. Blair made no offer of proof that they would have expressed opinions supportive of the causation and damages elements of her claim. Thus, any error in striking those witnesses cannot be shown to have prejudiced Mrs. Blair, and is harmless.

Mrs. Blair could not have proven causation through hearsay opinions in unsworn reports of two non-testifying Idaho physicians, J. C. Colburn and Gerald McManus. The reports were of exams done in connection with Mrs. Blair's Idaho workers' compensation claim. Statements in the reports were not admissible for their truth, because Mrs. Blair had never disclosed either physician as an expert witness and neither had been deposed, because neither physician's statement had been made for purposes of medical diagnosis or treatment, and because the statements at issue were ones made by the physicians rather than to them.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Has Mrs. Blair shown that, but for orders limiting the number of people she could disclose as possible witnesses and striking two health care provider witnesses she tried to add three weeks before trial, she would have presented admissible expert opinion testimony to support her allegations that the injuries for which she claimed damages had been caused by a fall on TravelCenters' premises and that the treatment for which she sought damages had been medically necessary and that the providers' charges therefor were reasonable?

2. Did the trial court abuse its discretion by entering:

(a) the August 14, 2007, order limiting Mrs. Blair to seven witnesses of her choosing as a sanction for violating the scheduling order that required her to disclose possible trial witnesses as required by, and by the times specified in, King County Local Rule 26(b)(1)-(3), and

(b) the October 15, 2007 order striking from Mrs. Blair's Local Rule 16(a)(4) expected witness list Owen Higgs, M.D., and Keith Duruy, P.T., neither of whom she had previously listed as possible trial witnesses?

3. Are the unsworn out-of-court written statements by non-testifying and non-treating physicians that Mrs. Blair quotes at page 16 of her opening brief, admissible under "ER 803" to prove causation?

III. COUNTERSTATEMENT OF THE CASE

A. Injury and Claim.

In May 2003, Maureen Blair, then a 54-year-old¹ truck driver working for Swift Transportation², allegedly slipped on spilled diesel fuel and fell on the pavement at a North Bend truck stop owned by TravelCenters of America. CP 4-5 (Complaint, ¶¶ 4-5). Mrs. Blair sued TravelCenters in King County in May 2006. CP 359-366.³ As her counsel described her injury claim to the Superior Court:

The injuries suffered in the fall lit up a previously asymptomatic degenerative condition in her hip, which led to Mrs. Blair having to undergo a complete hip replacement on the left side. Mrs. Blair has undergone over \$150,000.00 worth of medical treatment and has lost the ability to continue to drive [a] truck and thereby has lost her future income.

CP 292.

B. Case Scheduling Order.

Upon filing of Mrs. Blair's complaint, a case scheduling order was issued pursuant to King County Local Civil Rule 4. CP 367-371. The order established a number of deadlines for the lawsuit. Each deadline

¹ Mrs. Blair's date of birth was April 4, 1949. CP 144.

² CP 346.

³ Ms. Blair's husband, Kenneth, is also a plaintiff but, because his claim is purely a derivative one for loss of consortium, CP 7 (¶ 12), and for the sake of simplicity, TravelCenters relates the facts and presents its arguments as if Ms. Blair were the sole plaintiff.

was mandated by a local civil rule that the order cited by number. CP 369. Pursuant to Local Rule 26(b)(1), the scheduling order gave the parties until May 21, 2007 to disclose to each other their *possible* primary lay and expert witnesses. CP 369.⁴ Local Rule 26(b)(3) requires that a disclosure of witnesses include names, addresses, and brief descriptions of each witness' knowledge and, as to potential expert witnesses, summaries of opinions and the bases therefor. Local Rule 26(b)(4) provides that:

Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires.

Local Rule 26 "sets a minimum level of disclosure that will be required in all cases. . ." LR 26 (comment).

C. TravelCenters' Timely Disclosure of Possible Defense Witnesses.

TravelCenters served its initial disclosure of possible lay and expert witnesses on May 21, 2007. CP 419-426. TravelCenters' possible lay witnesses included Rhonda Wolfe and Susan Courtright, who had been working at the truck stop on the day in 2003 when Mrs. Blair fell. CP 420. TravelCenters named certain possible defense experts, and disclosed their anticipated opinions. CP 424-425. TravelCenters listed as possible nonexpert witnesses more than 30 health care providers who had treated or

⁴ The comment to LR 26 explains that "[t]his rule does not require a party to disclose which persons the party intends to call as witnesses at trial, only those whom the party might call as witnesses. . ."

seen Mrs. Blair. They included Dr. Owen Higgs, a Richland physician, CP 422(c)⁵; Keith Duruy, an Idaho physical therapist, CP 423(f); Dr. J.C. Colburn, an Idaho physician, CP 423(j); and Dr. J. Gerald McManus, another Idaho physician, CP 424(m).

D. Failure of Mrs. Blair to Timely Disclose Possible Witnesses.

Mrs. Blair did not meet the May 21 witness disclosure deadline. Her counsel, Todd Richardson, did send defense counsel a May 25 letter stating that “[w]e have been working on our witness list, however, there is a substantial amount of information that must be tracked down regarding these witnesses that we have not been able to obtain.” CP 134. With the letter was a list of 16 names that the letter said were of “witnesses we will be disclosing.” CP 135. Following the 16 names was the descriptive phrase “former employees of [TravelCenters’ truck stop].” CP 135. Mr. Richardson’s letter to defense counsel promised to “provide you with additional information on these witnesses next week.” CP 134.

In June, 2007, Mrs. Blair moved for a continuance of the trial date, citing turmoil in her counsel’s officing situation and a busy trial schedule, but not citing a need for more time to identify and disclose possible

⁵ Dr. Higgs performed Mrs. Blair’s 2005 hip replacement surgery. See CP 348 (mistakenly referring to “Dr. Higgins” as the surgeon who would be performing the surgery), and CP 341 (mistakenly referring to Mrs. Blair’s surgeon as “Dr. Biggs”).

witnesses. CP 108-116. TravelCenters opposed a continuance, CP 1-5, and the Honorable Harry J. McCarthy denied the motion, CP 15-16.

Mrs. Blair also did not serve a disclosure of witnesses by the July 2, 2007 deadline for disclosing possible additional lay and expert witnesses. Despite the promise that M. Richardson's May 25 letter had made to provide defense counsel "with additional information on these witnesses next week," CP 134, no new information about who Mrs. Blair's witnesses might be provided to the defense until defense counsel was served on July 11 with a purported LR 26 witness disclosure. CR 429-434. It listed 15 people, with addresses for most. Two were TravelCenter employees (Ms. Wolfe and Ms. Courtright, both of whom TravelCenters had disclosed as possible defense witnesses in its May 21 disclosure, see CP 420). CP 433. The other 13 were described as truck drivers, including one named "Jim," CP 431 (No. 11), for eight of whom the address given was "c/o Swift Transportation" in Lewiston, Idaho. CP 430-433. Ms. Blair also asserted that she "reserves the right to call as witnesses any primary or rebuttal witnesses, including expert witnesses, disclosed by Defendant, or otherwise identified during the course of discovery." CP 433-434.

E. Motion to Strike Mrs. Blair's Late Disclosure of Possible Witnesses; Partial Reprieve.

On August 3, 2007, TravelCenters moved to strike Ms. Blair's July 11 witness disclosure as untimely. CP 17-25. Judge McCarthy was unwilling to go that far. He entered instead an order limiting Ms. Blair to seven witnesses (except "Jim") and gave her until August 17 to decide who they would be. CP 216-217. Mrs. Blair did not request, either before or after the August 14 order was entered, permission to include on her second-chance witness disclosure anyone she had not listed on the July 11.

F. Mrs. Blair's Second-Chance Disclosure of Seven Possible Witnesses.

Given a second chance list to disclose possible witnesses on August 17, Mrs. Blair served a list of seven people, again naming Ms. Wolfe and Ms. Courtright, CP 440, plus five of the 13 truck drivers who had been on her July 11 list, CP 440-441. Mrs. Blair again purported to "reserve the right" to call anyone whom TravelCenter had listed, but without indicating who, if anyone, she had in mind and without indicating whether she proposed to call them as fact or expert witnesses. CP 442. Defense counsel promptly notified Mrs. Blair's counsel that TravelCenters did not agree that she could call for her case in chief someone who was on its witness list but not hers. CP 444.

G. Denial of Mrs. Blair's Request to Add Unspecified Additional Witnesses to Her Second-Chance List of Seven.

After the September 4 discovery cutoff date passed, and with trial scheduled to begin October 22, Ms. Blair filed two motions relating to witnesses on September 13. One sought permission to add (not substitute) a new fact witness, "Rusty" Wellbourne. CP 218-225. TravelCenters opposed that motion, citing, among other things, prejudice to its ability to prepare for the October 22 trial. CP 246-253.

Mrs. Blair's other September 13 motion, CP 226-236, asked Judge McCarthy to "clarify" his August 14 order to allow her to call, in addition to the seven witnesses she had listed on August 17, anyone whom TravelCenters had disclosed as a possible defense witness in May. CP 231-233. Mrs. Blair did not specify who on TravelCenters' LR 26(b)(1) list she wanted to call, nor did she suggest that she wanted to call any of TravelCenters' possible witnesses as an expert for her case.

On September 21, 2007, Judge McCarthy denied Mrs. Blair's motions to add Ms. Wellbourne as a witness, CP 254-255, and for "clarification," CP 256-257. Mrs. Blair assigns error to neither ruling.

H. Attempt by Mrs. Blair to Add New Witnesses Just Before Trial; Defense Motion to Strike.

Pursuant to King County Local Rule 16(a)(4), the case scheduling order required the parties to serve on each other a list of *expected* trial

witnesses and exhibits no later than 21 days before trial.⁶ CP 369. The parties did so on October 2, 2007. TravelCenters listed three persons: Susan Courtright, as well as Vince Magano and Brian Rogers, two other company managers. CP 465-469. Each had been on TravelCenters' LR 26(b)(1) disclosure of possible witnesses (see CP 420-421).

Mrs. Blair's expected witness list was 11 names long. CP 266-267. The first seven names on it were ones she had listed on August 17. CP 266-267 (compare CP 439-442). No problem there. Numbers 8 and 9 were Dr. Higgs and the Idaho physical therapist, Keith Duruy. CP 467. Mrs. Blair did not state the substance of any opinions she expected Dr. Higgs or Mr. Duruy to express.⁷ Numbers 10 and 11 were Mrs. Blair and Mr. Blair. CP 267.

Two days after receiving Mrs. Blair's 11-names list of expected trial witnesses, TravelCenters filed a motion, CP 258-265, asking that Dr. Higgs and Mr. Duruy be stricken. CP 262.⁸ Mrs. Blair protested that striking them would be too harsh a sanction. CP 325-330. On October 15,

⁶ Under that rule, which was recodified in 2008 as LR 4(j), parties were required to "exchange, no later than 21 days before the scheduled trial date: (A) lists of the witnesses whom each party expects to call at trial . . ."

⁷ LR 16(a)(4) did not require disclosure of expected opinions, but the local rules presume that anyone listed as an *expected* trial witness 21 days before trial has been among witnesses disclosed earlier as *possible* trial witnesses pursuant to LR 26(b)(1) or (2) – see LR 26(b)(4) – in which case expected opinions would have been disclosed as well, because of the requirements of LR 26(b)(3)(C).

⁸ TravelCenters did not make an issue of the fact that Mrs. Blair had added herself and her husband to the witnesses listed on August 17.

Judge McCarthy granted TravelCenters' motion to strike and imposed \$500 in terms for Mrs. Blair's violation of the August 14 order. CP 277-279.

I. Defense Motion to Dismiss for Lack of Expert Causation and Damages Witnesses to Support Mrs. Blair's Case.

TravelCenters then moved to dismiss on the ground that Mrs. Blair lacked medical expert opinion testimony necessary to prove causation and that the medical care she had received had been reasonably necessary and that the charges for that care had been reasonable. CP 280-290.

J. Argument by Mrs. Blair that Unsworn Written Reports of Non-Treating Physicians Who She Had Never Listed as Possible Trial Witnesses Would Prove Causation and Avoid Summary Judgment.

In response to TravelCenters' motion to dismiss, Mrs. Blair complained about the striking of Dr. Higgs and Mr. Duruy, CP 292, but contended that she could nonetheless prove a causal connection between her 2003 fall and her need for the 2005 hip replacement surgery through statements in "records" of Dr. R. C. Colburn and Dr. J. Gerald McManus. CP 292, 298, 300-302 (referring, CP 332-333, to what are CP 338-340, 341-343, and 346-358 for appeal). Mrs. Blair did not claim she also could prove that medical treatment for which she sought damages was reasonably necessary and that charges for it had been reasonable.

Mrs. Blair had never listed either Dr. McManus or Dr. Colburn as a possible or expected trial witness, let alone as an expert witness.

TravelCenters had disclosed both Idaho physicians as among 34 possible *nonexpert* health care provider witnesses, CP 423-424, but had had no reason to depose them because Mrs. Blair never listed them. Even in her response to TravelCenters' motion to dismiss, Mrs. Blair did not represent that she wanted to call either Idaho physician to testify in person, or that either was willing to travel to Seattle to do so. She contended only that their *reports* were admissible to prove causation. CP 292, 298, 300-301.

Dr. McManus' report indicates that he had been consulted in late 2004 for an "orthopedic second opinion examination," CP 346, concerning Mrs. Blair's need for hip replacement surgery.⁹ He apparently was retained by a company named ESIS, Inc., because his report was made to ESIS. CP 346-358. (ESIS apparently was the adjuster for ACE American Insurance Company, the insurer of Swift Transportation, Mrs. Blair's employer. See CP 149.) Dr. McManus' report stated that:

[Nearly all scientific and imaging data suggests that [Mrs. Blair's] problems are unrelated to the 5/12/03 injury, [but] I cannot escape the fact that the chronological history strongly points to the accident. While I believe most of the facts are explained in the context of RDHD and that the accident was likely unrelated, there is a considerable element of uncertainty. Additionally, there is a principle in Workmen's Compensation cases that benefit of the doubt be given to the patient in cases of uncertainty.

CP 355. Dr. McManus added that "even absent the injury she would have

⁹ See CP 348 (3d -5th paragraphs) and CP 355 (under "Treatment Recommendations").

had to have the surgery at some point in time and . . . her ultimate impairment will be primarily due to the underlying disease process.” Id.

Dr. Colburn’s reports, also made to ESIS, Inc., indicate that he saw Mrs. Blair in October 2005, February 2006, and May 2006, for “independent medical evaluation[s]” of her ability to resume work. CP 338-340, 341-343.¹⁰ Dr. Colburn examined and spoke with Mrs. Blair and reviewed unspecified “medical information.” CP 340 (last paragraph). His last (May 25, 2006) report opined that Mrs. Blair could return to work with some restrictions and that she had some permanent partial physical impairment “related to the 5/12/03 industrial injury event,” CP 342.

Mrs. Blair’s response to TravelCenters’ motion to dismiss argued that “medical records” are admissible under “ER 803,” CP 292, and referred to the “doctors’ reports” as “business records,” CP 295 (line 7). She did not specify which subprovision(s) of ER 803 she was referring to, and did not present evidence or assert that she had had a physician-patient relationship with either Dr. Colburn or Dr. McManus.

In addition to opposing dismissal, Ms. Blair moved to stay proceedings while she sought review of Judge McCarthy’s orders concerning witnesses, CP 484-487, asserting that “[i]t is clear that the

¹⁰ See CP 343 (reference to “Idaho Industrial Commission form”). Idaho Code § 72-433 requires a claimant to submit to examination when requested by the employer or ordered by the Idaho Industrial Commission.

plaintiff is fatally prejudiced . . .” as a result of her inability to call medical providers at trial. CP 486. At no time did Mrs. Blair make an offer of proof as to what Dr. Higgs and/or Mr. Duruy’s testimony would be. She did not show or represent that either witness would give opinion testimony supporting the causation or damages elements of her claim. Nor did Mrs. Blair represent to the trial court that she had retained Dr. Higgs and/or Mr. Duruy and secured their agreement to travel to Seattle and testify as experts for her at trial and that she could make them available for discovery and/or preservation depositions in advance of trial.

K. Dismissal and Appeal.

On November 16, 2007, Judge McCarthy stayed trial and consideration of TravelCenters’ motion to dismiss while Mrs. Blair sought discretionary review. CP 304-306.¹¹ After Ms. Blair failed to obtain review, Judge McCarthy granted TravelCenters’ motion for summary dismissal. CP 307-309. Ms. Blair timely appealed. CP 499-503.

IV. STANDARD OF REVIEW

TravelCenters agrees with Mrs. Blair that orders granting summary judgment are reviewed *de novo*. A trial court ruling summarily dismissing a complaint may be affirmed on any ground supported by the record,

¹¹ Citing the refusal of counsel for Mrs. Blair to engage in mediation, Judge McCarthy had continued the trial to November 20 by order entered on October 17. CP 488.

whether or not the ground was considered by the trial court. Int'l Broth. of Elec. Workers, Local Union No. 46 v. TRIG Elec. Const. Co., 142 Wn.2d 431, 435, 13 P.3d 622 (2000); Laue v. Estate of Elder, 106 Wn. App. 699, 710, 25 P.3d 1032 (2001), rev. denied, 145 Wn.2d 1036 (2002).

TravelCenters agrees with Mrs. Blair that orders limiting the number of witnesses or striking witnesses for noncompliance with court orders relating to disclosure of witnesses are reviewed for abuse of discretion. An appellant bears the burden of showing that the trial court's discretion was abused. Childs v. Allen, 125 Wn. App. 50, 58, 105 P.3d 411 (2004), rev. denied, 155 Wn.2d 1005 (2005). As explained in part V-B-1-a below, TravelCenters does not agree with Mrs. Blair that the trial court's August 14 and October 15, 2007 orders relating to witnesses are subject to review for abuse of discretion based on Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1990).

V. ARGUMENT

A. Mrs. Blair Fails to Show that She Would Have Been Able to Prove Causation and Damages If She Had Been Allowed to Add Dr. Higgs and Mr. Duruy as Witnesses Three Weeks Before Trial.

As explained in section B below, Judge McCarthy's orders striking witnesses were not abuses of his discretion. However, unless those orders are why Mrs. Blair could not present evidence necessary to get her case past summary judgment and to a jury, it does not matter whether those

orders were entered, let alone whether entering them was an abuse of discretion, because there was no demonstrable prejudice to Mrs. Blair. Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983) (Error without prejudice is not grounds for reversal, and error will not be considered prejudicial unless it affects, or presumptively affects, the outcome).

When Mrs. Blair was given the chance to disclose up to seven witnesses despite her noncompliance with the case scheduling order and King County Local Rule 26(b)(1) and (2), she chose to list two TravelCenters truck stop employees and five fellow truck drivers. CP 137-142. The only witnesses Mrs. Blair ever listed and who could have been qualified to testify as experts with respect to any medical issues were Dr. Higgs and Keith Duruy, P.T. But Mrs. Blair did not disclose either of them until she served her Local Rule 16(a)(4) list of expected trial witnesses three weeks before trial, and Local Rule 26(b)(4) prohibits the calling of any witness not disclosed as required by LR 26(b)(1)-(3) – and thus well before the discovery cutoff date – absent a showing of good cause. Mrs. Blair did not show good cause.

But even if one overlooks Mrs. Blair's failure to show good cause, there is no basis in the record for this Court to conclude that Dr. Higgs and/or Mr. Duruy would have expressed opinions to support her causation

and damages allegations. They had treated Mrs. Blair, but that does not mean they needed to or did form opinions as to whether her 2003 fall caused her to need the hip replacement. It was incumbent on Mrs. Blair to make an offer of proof as to what Dr. Higgs' and Mr. Duruy's testimony would have been. Her failure to do so is fatal to her claim that it was prejudicial error to strike them as witnesses. Estate of Bordon ex rel. Anderson v. State, Dept. of Corrections, 122 Wn. App. 227, 245-247, 95 P.3d 764 (2004), rev. denied, 154 Wn.2d 1003 (2005); compare Aubin v. Barton, 123 Wn. App. 592, 98 P.3d 126 (2004) (reversing exclusion of expert testimony because proponent had made detailed offer of proof). Because Mrs. Blair cannot show that the October 15, 2007 ruling striking Dr. Higgs and/or Mr. Duruy deprived her of evidence to prove causation and/or damages, any error in striking them would be harmless.

B. The Two Witness-Disclosure Orders Were Not Abuses of the Trial Court's Discretion to Enforce Its Orders.

1. Mrs. Blair's reliance on *Burnet v. Spokane Ambulance* is misplaced but, even if the finding requirements of that decision apply, they were satisfied.
 - a. *Burnet* did not apply to the October 15 order, and did not apply to the August 14 order, either.

Mrs. Blair argues, *App. Br. at 8-15*, that Judge McCarthy abused his discretion because he did not consider a less severe sanction and did not make two findings required by *Burnet v. Spokane Ambulance*, 131

Wn.2d at 494.¹² Two separate rulings, made two month apart, are at issue: the August 14 and October 15 orders. Mrs. Blair lumps them together for purposes of applying finding requirements stated in Burnet. Analyzing the issue that way is incorrect. When an order excludes a witness as a sanction for violating an *earlier* order that imposed a *less* severe sanction for noncompliance with witness-disclosure deadlines, Burnet does not apply. Scott v. Grader, 105 Wn. App. 136, 141, 18 P.3d 1150 (2001). The October 15 order excluded Dr. Higgs and Mr. Duruy as a sanction for Mrs. Blair's violation of the August 14 order. The August 14 order imposed a sanction less severe than striking all witnesses and less severe than striking any specific witnesses except the truck driver named "Jim." Thus, in light of Scott, Burnet's finding requirements did not apply to the October 15 order.

Burnet did not apply to the *August 14* order because it did not exclude or strike all witnesses or any specific witnesses, and thus did not

¹² In Burnet, a medical malpractice case, the trial court ruled that the plaintiffs had not sufficiently pled a claim of "negligent credentialing," and barred further discovery relating to such a claim. 131 Wn.2d at 491. The Court of Appeals held that negligent credentialing had been adequately pled, but that the trial court had not erred in excluding, under CR 37, testimony plaintiffs offered at trial to support the claim, because they had not complied with a discovery order. The Supreme Court held that the trial court abused its discretion in removing the claim of negligent credentialing from the case because no finding had been made that the discovery violation was willful and because the sanction of excluding the entire claim was too harsh. No claim was stricken in this case. Mrs. Blair could have listed, on her August 17 disclosure, not only fact witnesses but experts necessary to cover the essential elements of her case (assuming any qualified experts would have testified favorably to her). The failure to list any experts was her decision and her fault, not Judge McCarthy's.

impose the kind of drastic sanction that brings Burnet's finding requirements into play. The August 14 did limit Mrs. Blair to seven of her July 11 witnesses, but she had chosen the witnesses on that list and she did not ask, either before or after the August 14 order was entered, to be allowed to include, among a list of witnesses limited to seven, any people who had not been on her July 11 list.

b. Even if *Burnet* applied, its requirements were satisfied.

(1) Judge McCarthy not only considered but imposed a moderate sanction in August 2007 for Mrs. Blair's noncompliance with rule-mandated and court-ordered witness disclosure requirements.

Even if Judge McCarthy would be guilty of abusing his discretion under Burnet unless he "explicitly considered whether a lesser sanction would probably have sufficed," it is quite apparent from the record here that he *considered* a sanction short of striking witnesses, because his August 14 order *imposed* a lesser sanction.

Ms. Blair was required by LR 26(b)(1) and the case scheduling order to disclose the names and addresses of possible lay and expert witnesses and their areas of knowledge by May 21 or July 2, 2007. CP 369. She did not do it. Nor did she meet the LR 26(b)(2) deadline for disclosing additional possible witnesses. Ms. Blair nonetheless was given a chance to mitigate the effect of her noncompliance by filing a late

witness disclosure limited to seven people. She did not ask or try to put Dr. Higgs or some other health care provider on that second-chance list, nor did she later ask for leave to amend her list of seven witnesses to substitute health care providers for some on the August 17 list, although she did move for leave to add an eighth (and non-health care provider) fact witness, Rusty Wellbourne. CP 218-225. When a trial court has already given a plaintiff one chance to cure noncompliance with witness disclosure rules and orders, Burnet does not require it also to approve the plaintiff's later and eleventh-hour attempt to sneak new witnesses into her case. See Scott v. Grader, 105 Wn. App. at 141.

(2) Mrs. Blair had committed a willful violation of a court order.

As Ms. Blair argues, *App. Br. at 8-9*, a trial court does not abuse its discretion by excluding testimony for willful violation of a court order. Burnet, 131 Wn.2d at 510. Ms. Blair neglects to acknowledge that Burnet itself holds that the violation of a court order without reasonable excuse is willful. Id. When Ms. Blair attempted, three weeks before trial, to add health care providers to the list that the court had allowed her to serve late, and after the court had already denied a motion to let her add an eighth witness ("Rusty" Willbourne) to her list, Judge McCarthy made an express finding that she had "violated the Court's [date] order by adding two

additional witnesses that [she was] prohibited from adding due to untimely disclosure.” CP 278. Mrs. Blair neither assigns error to that finding nor argues that she did not violate the August 14 order by taking it upon herself to add Dr. Higgs and Mr. Duruy on October 2 after being told she could not add Rusty Wellbourne.

Apparently by way of suggesting that her noncompliance with – and thus violations of – the court’s witness-disclosure orders was not “willful,” Ms. Blair asserts, also at page 11 of her opening brief, that her counsel had faced, and informed the superior court of, “complications and problems that contributed to the delay in full disclosure of witnesses.” Her brief does not say what those “complications and problems” were. If there was a good excuse for not even trying to disclose a single health care provider witness until October 2, it ought to be stated, not left for the Court of Appeals to look for in the clerk’s papers. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992) (“It is not the function of the appellate court to search through an entire deposition to locate relevant testimony”) (citing RAP 10.3(a)).

Even if Mrs. Blair’s argument is adequately developed and supported, however, the pages of the clerk’s papers to which her brief cites, CP 128-130, are part of a declaration that her counsel filed on August 9, 2007 in opposition to TravelCenters’ motion to strike her July

11 witness list, CP 429-434, on which she had included no health care providers at all. The excuses offered in the declaration thus do not purport to explain Ms. Blair's subsequent failure to list health care providers, or even to ask for permission to list health care providers, as possible trial witnesses on August 17, 2007. Nor does she offer an explanation for putting Dr. Higgs and Mr. Duruy on her expected witness list, which the local rules assume will consist of a subset of those witnesses previously disclosed as possible witnesses. See LR 26(b)(4).

- (3) Allowing Mrs. Blair to call undeposed expert witnesses would have prejudiced TravelCenters' ability to prepare for trial.

Ms. Blair asserts that TravelCenters was not prejudiced by her having waited until October 2 to list Dr. Higgs and Mr. Duruy as trial witnesses, because the company had contended, in opposing her earlier motion to continue the trial, that there was "plenty of time" to complete discovery. *See App. Br. at 5 and 11.* Nonsense; as of early *July* 2007, when defense counsel made that statement, CP 3, there *was* plenty of time to complete discovery by the September 4 cutoff date, and there would have been time (if not *plenty* of time) to complete discovery by September 4 had Mrs. Blair listed Dr. Higgs and Mr. Duruy as possible witnesses by May 21 or even by July 2. But as of July 2007 there was plenty of time because Mrs. Blair had not disclosed any expert or treating-provider

witnesses; (b) the witnesses she had disclosed could not address medical issues or were TravelCenters personnel, and (c) the court-ordered deadlines for disclosing any more possible witnesses had both passed. Ms. Blair's attempt to add witnesses on October 2, had it been successful, manifestly would have prejudiced TravelCenters' ability to prepare for trial, because she had previously disclosed no health care provider witnesses and therefore no such witness had been deposed. See Lancaster v. Perry, 127 Wn. App. 826, 833, 113 P.3d 1 (2005) ("The purpose of the [King County] case management schedule and disclosure deadlines is to have an orderly process by which a case can proceed[, and r]equiring parties to disclose witnesses allows the opposing party time to prepare for trial and conduct the necessary discovery in a timely fashion"). TravelCenters' counsel had been prohibited from having *ex parte* contact with Dr. Higgs and Mr. Duruy. Loudon v. Mhyre, 110 Wn.2d 675, 678, 756 P.2d 138 (1988). For that reason, and because Mrs. Blair never disclosed what opinions (*if any*) she had reason to expect they would express, TravelCenters had no indication what Dr. Higgs' or Mr. Duruy's opinion testimony might be and be based on, and was not in a position to cross-examine them effectively at trial if they did express opinions as to causation.¹³

¹³ At no time between October 4, 2007, when TravelCenters moved to strike Dr. Higgs

2. Allied Financial Servs. v. Langam and Lancaster v. Perry do not support for Mrs. Blair's argument.

Mrs. Blair argues that Allied Fin'l Servs., Inc. v. Mangum, 72 Wn. App. 164, 864 P.2d 1, 871 P.2d 1075 (1994), supports her argument that the King County local rules were meant "to allow parties to call witnesses who were initially listed by another party." *App. Br. at 13*. No it doesn't, for several reasons. First, that decision affirmed an order prohibiting the appellants from calling any witnesses at trial, so it hardly illustrates an exclusionary ruling that constitutes an abuse of a trial court's discretion.

Second, the sanction imposed here was not to prevent Mrs. Blair from calling any witnesses, which is what happened in Allied; it was to strike two specific witnesses whom Mrs. Blair listed late and with no excuse for not having listed them as possible witnesses either as required by LR 26(b)(1) and (2) and the Scheduling Order, or as allowed by the August 14 order.

Third, the quotation from Allied on which Mrs. Blair relies ("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") does not mean a party can simply

and Mr. Duruy as witnesses, and October 14, when the court ruled on the motion to strike, did Ms. Blair's counsel file anything in which she represented that Dr. Higgs and Mr. Duruy were available to be deposed prior to trial and would appear to testify at trial.

“reserve the right” to call any unspecified witness whom her adversary has listed in compliance with LR 26(b). What the court meant was that a party can list someone whom an adversary also lists, provided the party actually does *list* that person, which is what Mrs. Blair failed to do.

What this case and Allied have certain in common is that the appellants in both cases were subject to witness disclosure rules and orders but did not comply with them and when they nonetheless sought to call witnesses for trial who had not been disclosed as required by King County local rules, the trial court refused because they lacked a plausible excuse for their noncompliance. The parallels with Allied should be extended by a decision in this case affirming the trial court.

Mrs. Blair also makes an unpersuasive argument that Lancaster v. Perry, 127 Wn. App. 826, which also affirmed a trial court’s order excluding a late-disclosed expert witness, is distinguishable “in that the expert . . . was never fully identified and the substance of the testimony was never provided.” *App. Br. at 14*. Mrs. Blair never named any possible experts. Even after TravelCenters moved to dismiss, she never advised Judge McCarthy of what the substance of Dr. Higgs’ and/or Mr. Duruy’s testimony would be, and both would have been useless as witnesses for her unless their testimony included expert causation and “reasonableness of care” opinions. This case is like Lancaster, not

different from it. Dempere v. Nelson, 76 Wn. App. 403, 886 P.2d 219 (1994), and Rivers v. Conf. of Mason Contractors, 145 Wn.2d 674, 41 P.3d 1175 (2001), *see App. Br. at 14*, are not distinguishable, either, in ways that support an argument that Judge McCarthy abused his discretion in making his August 14 and October 15 rulings. The Rivers decision sending the case back for more findings was based (among other reasons) on the fact that the witness-exclusion sanction that the Supreme Court vacated had been imposed even though trial was still three months away, *see Rivers*, 145 Wn.2d at 694, which means the discovery cutoff date had not passed, because under King County LR 37(g) the cutoff date is set seven weeks before trial. Here, by the time Mrs. Blair tried to put Dr. Higgs and Mr. Duruy on her expected witness list, discovery had been closed for four weeks and trial was less than a month away, and she had already been given a reprieve from the witness-disclosure requirements imposed by court order and local rules and a second chance to disclose who she might call to testify at trial.

3. Mrs. Blair's "reservation of rights" to call witnesses disclosed by TravelCenters did not operate as a disclosure, by her, that Dr. Higgs and Mr. Duruy might testify for her as experts.

Mrs. Blair contends that she had been claiming, and thus *had*, the right to prove her case by calling as a trial witness anyone whom

TravelCenters had disclosed as a possible trial witness in its LR 26(b)(1) disclosure. *App. Br. at 11-13*. That argument fails for several reasons. First, LR 26(b)(3)(A) and (B) expressly require that the name, address, and phone number and knowledge-area description be provided for any possible lay witness, and LR 26(b)(3)(C) requires that a summary of opinions be provided for any possible expert witness. LR 26 does not excuse a party from complying with those requirements through a blanket “reservation of rights” to call persons on another party’s disclosure.

Second, TravelCenters had listed Dr. Higgs and Mr. Duruy as possible *nonexpert* witnesses. CP 422-423. A basic (though faulty) premise of Mrs. Blair’s appeal is the August 14 and October 15 orders erroneously deprived her of those two witnesses’ opinions as to causation and the reasonableness of her medical care. Mrs. Blair fails to explain why a “reservation of rights” could and should be allowed to convert an adversary’s nonexpert witness into the reserving party’s expert without the reserving party having to disclose the witness’ expected opinions, which the adversary has not disclosed because it did not disclose the witness as a possible expert. Mrs. Blair at no time disclosed any opinions she expected to elicit from Dr. Higgs or Mr. Duruy.¹⁴

¹⁴ If TravelCenters *had* disclosed Dr. Higgs and Mr. Duruy as possible defense experts, its omission of them on its LR 16(a)(4) list of expected trial witnesses would have precluded Mrs. Blair from calling them as her experts, under the well-established rule

Third, even if a “reservation of rights” could be effective, it would not relieve Mrs. Blair of the obligation on appeal to point to some basis in the record upon which this Court could conclude that, had she been allowed, based on her “reservation of rights,” to pick Dr. Higgs, Mr. Duruy, and/or some other person(s) whom TravelCenters had disclosed as a possible trial witness in May 2007, and call them to testify at trial, such person(s) would have given testimony that would have saved her case from dismissal. Mrs. Blair fails to do that.

4. The account of Mrs. Blair’s counsel’s attempt to schedule depositions neglects to mention that he did not do so until after August 17, 2007.

Mrs. Blair argues that her counsel had “tried to get defense counsel to cooperate in setting . . . depositions of the two witnesses that defendants named and who plaintiffs wanted to call at trial.” *App. Br. at 13*. She does not specify whose depositions her counsel tried to set and when he tried to do it. At page 6 of her brief, Mrs. Blair cites to “CP 310” in connection with the attempted setting of depositions, but it would appear she means CP 311, where her counsel referred to proposed depositions of Dr. Higgs (Mrs. Blair’s hip surgeon) and Dr. Colburn (one of the Idaho IME examiners), but not of Mr. Duruy. Items of correspondence attached

that a party may not call her adversary’s nontestifying expert as a trial witness. Peters v. Ballard, 58 Wn. App. 921, 926, 795 P.2d 1158, *rev. denied*, 115 Wn.2d 1032 (1990); Crenna v. Ford Motor Co., 12 Wn. App. 824, 828, 532 P.2d 290 (1975).

as supporting exhibits to counsel's declaration, CP 315, 317-319 and 321, are all dated *after August 17, 2007*, which is the date when Mrs. Blair's second-chance LR 26(b) disclosure of possible witnesses was served. That disclosure had not listed Dr. Higgs, Dr. Colburn, or any other health care provider, let alone as an expert, so they were not persons whose testimony Mrs. Blair was going to be able to present at trial. See LR 26(b)(4) ("Any person not disclosed in compliance with [LR 26(b)(1)-(3)] may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires"). As for lack of cooperation, counsel for Mrs. Blair acknowledged in his letter of August 30, 2007 -- two business days (because of the three-day weekend for Labor Day) before the September 4 discovery cutoff date (see CP 369) -- that there had been a "communication gap" for which he shared responsibility. CP 321. Even if Mrs. Blair had had a right to depose Dr. Higgs and Dr. Colburn (in Idaho) as experts for her side even though she had not disclosed them as witnesses at all and even though TravelCenters had listed them only as possible nonexpert witnesses, it was not TravelCenters' responsibility to "cooperate" to get them deposed within two business days.

C. The Colburn and McManus Hearsay Statements Were Not Admissible to Save Mrs. Blair's Case from Summary Dismissal.

Mrs. Blair's main argument is that Judge McCarthy abused his discretion by striking Dr. Higgs and Mr. Duruy as witnesses, but she argues at the end of her opening brief that she had enough evidence to avoid summary judgment even without their testimony. *App. Br. at 15-16.* This Court should reject that argument, too.

1. Mrs. Blair does not adequately support her assertion that Dr. Colburn's and Dr. McManus' out-of-court statements concerning causation are admissible for their truth.

Mrs. Blair argues that certain statements that Drs. Colburn and McManus made in what she calls "medical records" were "admissible under ER 803" and establish both causation and reasonableness of treatment (but not the reasonableness of the charges for treatment). *App. Br. at 7, 16.* Mrs. Blair would offer the statements for their truth, so they are hearsay. ER 801(c). She does not specify which subprovision(s) of "ER 803" she thinks would make the statements admissible despite ER 802.¹⁵ Her argument that the McManus/Colburn statements are admissible therefore is inadequately supported by citation to authority, and this Court

¹⁵ Nor does Mrs. Blair argue or cite authority for the proposition that a document authored by a physician may be admitted in evidence at trial to establish causation over a hearsay or other objection even though the doctor does not take the witness stand. See *Johnson v. Cassens Transp. Co.*, 814 N.E.2d 545, 550 (Ohio Ct. App. 2004) (the hearsay rule exception for statements made for purposes of medical diagnosis or treatment does not permit a court to admit a report containing the diagnosis or opinion of a physician other than the one testifying).

may and should reject it for that reason. RAP 10.3(a)(6); see King County v. Seawest Inv. Associates, LLC, 141 Wn. App. 304, 317, 170 P.3d 53 (2007), rev. denied, 163 Wn.2d 1054 (2008) (party who cites no authority for an argument presumably has found none; court will not consider an issue absent argument and citation to legal authority).

2. The August 14 and October 15 orders did not implicitly authorize Mrs. Blair to offer, or oblige the trial court to admit, the Colburn and McManus statements in evidence.

Mrs. Blair argues that causation opinions stated in Dr. Colburn's and Dr. McManus' reports are admissible because neither the August 14 order nor the October 15 order says otherwise. *See App. Br. at 16*. That argument is absurd. The orders granted motions that had nothing to do with trial exhibits. The fact that they did not address exhibits did not mean the court was licensing Mrs. Blair to put hearsay documents before a jury as substitutes for testimony by undisclosed and non-testifying witnesses. The admissibility of exhibits and of witness testimony are treated separately, both as a matter of common sense and under the court rules. *See, e.g.*, ER 904 and King County LR 16(a)(5) (since recodified as LR 4(k)) (providing a procedure for advising the court, five days before trial, whether the parties agree that each exhibit they have listed is authentic and admissible). Mrs. Blair's argument also would subvert LR 26(b)'s witness-disclosure requirements. LR 26(b)(4) provides that "[a]ny

person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires.” By no stretch of the imagination was that rule meant to make *ipso facto* admissible the hearsay statement of someone who was not disclosed under LR 16(a)(4) as an expected trial witness and who was not disclosed under LR 26(b)(1) or (2) as a possible trial witness.

3. Mrs. Blair did not adequately develop below, and in any event has abandoned, any argument that the statements are admissible as “business records”.

In the trial court, Mrs. Blair referred to Dr. Colburn’s and Dr. McManus’ reports to ESIS, Inc., as “business records,” CP 295, but she cited neither ER 803(a)(6) nor RCW 5.45.020, and offered no evidentiary foundation based on which the trial court could have admitted or recognized the reports as “business records.” On appeal, she makes no “business records” allusion or argument at all. Thus, even if Mrs. Blair’s passing reference to “business records” in the trial court could have preserved such an issue for appeal, she has abandoned and/or waived it by not raising it in her opening brief. See Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 169 n.3, 876 P.2d 435 (1994) (issue raised in Court of Appeals but not briefed in Supreme Court deemed abandoned in Supreme Court), and Gossett v. Farmers Ins. Co. of Washington, 133 Wn.2d 954,

981 n.7, 948 P.2d 1264 (1997) (same); and Westmark Dev. Corp. v. City of Burien, 140 Wn. App. 540, 553-554, 166 P.3d 813 (2007) (“Points not argued and discussed in the opening brief are deemed abandoned and are not open to consideration on their merits”) (quoting In re Kennedy, 80 Wn.2d 222, 236, 492 P.2d 1364 (1972)).

4. The statements do not qualify as ER 803(a)(4) statements.

If Mrs. Blair’s references to “ER 803” and “medical records,” *App. Br. at 7, 16*, are made with ER 803(a)(4) in mind, Dr. McManus’ and Dr. Colburn’s IME report statements about causation do not qualify for that exception to the hearsay rule. ER 803(a)(4) excepts from the hearsay rule a statement that was made for medical diagnosis or treatment.¹⁶ Mrs. Blair does not argue (and never has argued) that either statement was made for such purposes, nor were they.

The theory of the ER 803(a)(4) hearsay exception is that such statements are trustworthy because people speak truthfully when they provide information in order to obtain proper medical care. State v. Butler, 53 Wn. App. 214, 220, 766 P.2d 505, rev. denied, 112 Wn.2d 1014 (1989) (It is “assumed that a patient has a strong motive to speak truthfully

¹⁶ ER 803(a) provides in pertinent part that “[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (4) . . . Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.”

and accurately because the treatment or diagnosis will depend in part upon the information conveyed[, so t]he declarant's motive thus provides a sufficient guarantee of trustworthiness to permit an exception to the hearsay rule"¹⁷). The same rationale does not apply when the context in which a statement was made is an examination conducted to evaluate whether a person qualifies for insurance or worker's compensation benefits. The statements by Drs. McManus and Colburn that Mrs. Blair's brief quotes were made for purposes of evaluating her condition for purposes of worker's compensation or insurance.

Furthermore, ER 803(a)(4) creates an exception to the hearsay rule for statements that *patients* make in order to obtain a medical diagnosis or treatment. That the rule also renders admissible statements that *physicians* make *to* their patients is doubtful and Mrs. Blair offers no authority that it does. See Bulthius v. Rexall Corp., 789 F.2d 1315, 1316 (9th Cir. 1985) (the exception in the federal rule of evidence on which ER 803(a)(4) is modeled "applies only to statements made by the patient to the doctor, not the reverse"); accord, Field v. Trigg County Hosp., Inc., 386 F.2d 729, 735-736 (6th Cir. 2004).¹⁸ Although in 5B Washington Practice: Evidence

¹⁷ Quoting in United States v. Renville, 779 F.2d 430, 436 (8th Cir. 1985).

¹⁸ See also Liftee v. Boyer, 117 P.3d 821, 831 (Haw. Ct. App. 2004) (holding that, where plaintiff had offered statements in IME doctor's report not for plaintiff's statements in the report that had been made for medical diagnosis and treatment, but as expert opinions by the IME doctor that plaintiff's injuries were attributable to the first of two car accidents,

Law and Practice, § 803.20, the authors note that” [a]t least one Washington case . . . hold[s] that a letter written by a patient’s physician fell within the hearsay exception,” citing Du Pont v. Dept. of Labor and Indus., 46 Wn. App. 471, 730 P.2d 1345 (1986), the letter in that case had been written by the plaintiff’s *treating* physician and conveyed information that the physician had “gained from” the patient/claimant’s visits to him. DuPont, 46 Wn. App. at 479. The statements did not express the physician’s causation opinion, as the statements that Mrs. Blair quotes would. Whether it was because the parties did not raise the issue or for some other reason, the DuPont court did not address the issue of whether ER 803(a)(4) does or should apply to statements a physician makes.

Whether or not DuPont is persuasive on its facts, however, even *a plaintiff’s* statement is not admissible under ER 803(a)(4) if it was made to a physician who was evaluating the plaintiff’s capability of resuming work after injury at the request of a third party, such as an employer. Silves v. King, 93 Wn. App. 873, 884, 970 P.2d 790 (1999). Drs. McManus and Colburn were not physicians Mrs. Blair chose or was referred to for treatment. Dr. Colburn examined Mrs. Blair three times at ESIS’ request

the statements were not admissible under Hawaii’s version of ER 803(a)(4), although error in admitting the evidence was held not to be reversible error).

to assess her ability to return to work, and reported to ESIS. CP 342. Dr. McManus examined her at ESIS's request to assess whether she needed hip replacement surgery because of a work-related injury. CP 355. The doctors' causation opinions no doubt mattered for purposes of Mrs. Blair's eligibility for workers' compensation benefits, but neither doctor's opinion that the 2003 fall was a cause of Mrs. Blair's hip condition was necessary in order to diagnose or treat the hip condition. The statements by Drs. McManus and Colburn that Mrs. Blair quotes in her brief thus were not admissible to support and prove Mrs. Blair's allegations of causation.

In reviewing summary judgment orders, appellate courts consider supporting affidavits and other *admissible* evidence. Allen v. Asbestos Corp., Ltd., 138 Wn. App. 564, 569, 157 P.3d 406 (2007), *rev. denied*, 162 Wn.2d 1022 (2008). "A 'court may not consider inadmissible evidence when ruling on a motion for summary judgment.'" Id., (quoting Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 744, 87 P.3d 774, *rev. denied*, 153 Wn.2d 1016 (2004) (quoting King County Fire Prot. Dists. No. 16, No. 36, and No. 40 v. Housing of King County, 123 Wn.2d 819, 826, 872 P.2d 516 (1994))). Because the causation opinions in the McManus and Colburn reports to ESIS are inadmissible hearsay, Judge McCarthy was correct in rejecting Mrs. Blair's effort to avoid summary judgment by relying on them to establish causation.

5. It would have been untenable to admit the Colburn and McManus causation opinions in written form without TravelCenters having had the opportunity to voir dire or cross-examine the authors to test foundation.

Even if one ignores hearsay issues, the standards of certainty that Drs. McManus and Colburn had used in rendering their opinions are dubious enough that it would have been untenable to consider their opinions without TravelCenters having had the opportunity to cross-examine in order to test and challenge the foundation for the opinions and establish whether they met or did not meet the standard required in civil lawsuits for personal injury in Washington. See Conrad ex rel. Conrad v. Alderwood Manor, 119 Wn. App. 275, 282, 78 P.3d 177 (2003) (“To 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”). But neither Idaho doctor had been deposed because Mrs. Blair had not disclosed them as possible witnesses, and even in response to TravelCenters’ motion to dismiss she did not represent that she planned or wanted to have them testify in person at trial.

The record does not establish what the practice is in Idaho for non-treating doctors who examine plaintiffs in the context of workers compensation cases, but Dr. McManus’ report told pains to tell ESIS that

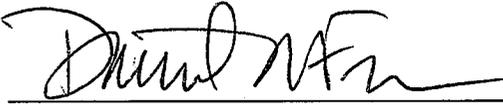
“nearly all scientific and imaging data suggests that [Mrs. Blair’s] problems are unrelated to the 5/12/03 injury” and that his conclusion that she had needed the hip surgery because of the fall reflected “a principle in Workmen’s Compensation cases that benefit of the doubt be given to the patient in cases of uncertainty.” CP 355. Such a disclaimer is a red flag, and at least calls into question the standard of certainty under which Drs. McManus and Colburn rendered their opinions a connection between Mrs. Blair’s 2003 fall at the TravelCenters truck stop and her 2005 hip replacement surgery. If Dr. McManus thought Idaho law required him to give Mrs. Blair the “benefit of the doubt” in opining on causation, Dr. Colburn may have thought the same thing (and perhaps correctly so). In any event, the record Mrs. Blair made below provides no basis to think Dr. Colburn applied different principles than Dr. McManus’ report says he applied. Thus, even if there had been no hearsay problem, it was not an abuse of discretion to grant summary judgment despite Mrs. Blair’s reliance on the unsworn causation opinion that the two nontestifying Idaho physicians had rendered for worker’s compensation claim purposes.

VI. CONCLUSION

For the multiple reasons discussed above, the order dismissing the Blairs’ claims against TravelCenters of America should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of December, 2008.

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Attorneys for Respondent

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 29th day of December, 2008, I caused a true and correct copy of the foregoing document, "BRIEF OF RESPONDENT," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

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DATED this 29th day of December, 2008, at Seattle, Washington.



Carrie A. Custer