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NO. 637436-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FESSEHA K. TILAYE and JANE DOE TILAYE, his wife and the marital
community composed thereof, and MAMUYE A. AYELEKA d.b.a.
ORANGE CAB 485 and JANE DOE AYELEKA, his wife and the marital
community composed thereof,

Appellants,

v.

PATRICK A. WILLIAMS and ANDREA HARRIS, his wife, and
ANDREA HARRIS as guardian for ELENA-GENEVIEVE HARRIS,
a minor child, and JOSHUA HARRIS, a minor child,

Respondents.

BRIEF OF APPELLANTS

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I. INTRODUCTION

Washington follows the American Rule, under which attorney's fees are not recoverable by the prevailing party in civil litigation, with few exceptions. One exception to the American Rule is that a party may recover attorney fees when authorized by an applicable statute. No statute authorized the trial court's attorney fee awards in this case.

The Court awarded fees under RCW 4.84.250, which authorizes fees when a plaintiff timely asserts claims not exceeding \$10,000. Under that statute, when a claimant properly pleads that her claim for damages is \$10,000 or less, the statutory scheme allows her to recover attorney fees, and allows the defendant to recover attorney fees if the plaintiff recovers nothing. Additional statutes invoke RCW 4.84.250 when a party makes a settlement offer at least ten-days before trial. RCW 4.84.260-.280.

This case was first decided in a mandatory arbitration hearing, and Plaintiffs appealed the arbitration decision to King County Superior Court. The instant appeal revolves around the central question of when a plaintiff who submits her case for determination in Mandatory Arbitration must plead that her claim for damages is \$10,000 or less, to trigger the statutory provisions of RCW 4.84.250 *et seq.* The statutes, relevant case law, and public policy mandate that the proper time to invoke RCW 4.84.250 is no later than ten days prior to the arbitration hearing.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting respondent Andrea Harris' motion for attorney fees pursuant to RCW 4.84.250 (App. A) and RCW 4.84.280 (App. B), and in entering its findings supporting the award (App. C).

2. If RCW 4.84.250 does apply to this case, the court erred in failing to reduce the Andrea Harris attorney fee award by the time dedicated to the claims of Elena and Joshua Harris, settling Plaintiffs, and by time devoted to her claims against Mamuye Ayeleka, who she dismissed voluntarily on the first day of trial. Findings of Fact Nos. 20, 23; Conclusions of Law Nos. 3, 5, 10 and 12 (App. C).

3. The trial court erred in granting Patrick Williams' motion for attorney fees pursuant to RCW 4.84.250 and RCW 4.84.280, and in entering its findings supporting the award (CP 805-812) (App. D). Conclusion of Law No. 1.

4. If RCW 4.84.250 does apply to this case, the court erred in failing to reduce the Patrick Williams attorney fee award by the time dedicated to the claims against Mamuye Ayeleka, who he dismissed voluntarily on the first day of trial (CP 407-408; 805-812) (Findings of Fact Nos. 9, 11, 14; Conclusions of Law Nos. 1, 3, and 10) (App. D).

5. If RCW 4.84.250 and RCW 4.84.280 apply to this case, the trial court erred in denying Defendant Ayeleka's motion for attorney fees (CP 930).

6. The trial court erred in allowing the testimony of Dr. Marisa De Lisle regarding Andrea Harris' physical condition at the time of trial and her need for future treatment (RP 483-493).

7. The trial court erred in entering Finding of Fact No. 1 regarding Andrea Harris' motion for attorney fees and costs (App. C).

8. The trial court erred in entering Findings of Fact No. 5 regarding Andrea Harris' motion for attorney fees and costs (App. C).

9. The trial court erred in entering Finding of Fact No. 6 regarding Andrea Harris' motion for attorney fees and costs (App. C).

10. The trial court erred in entering Finding of Fact No. 7 regarding Andrea Harris' motion for attorney fees and costs (App. C).

11. The trial court erred in entering Finding of Fact No. 8 regarding Andrea Harris' motion for attorney fees and costs (App. C).

12. The trial court erred in entering Finding of Fact No. 9 regarding Andrea Harris' motion for attorney fees and costs (App. C).

13. The trial court erred in entering Finding of Fact No. 10 regarding Andrea Harris' motion for attorney fees and costs (App. C).

14. The trial court erred in entering Finding of Fact No. 11 regarding Andrea Harris' motion for attorney fees and costs (App. C).

15. The trial court erred in entering Finding of Fact No. 13 regarding Andrea Harris' motion for attorney fees and costs (App. C).

16. The trial court erred in entering Finding of Fact No. 15 regarding Andrea Harris' motion for attorney fees and costs (App. C).

17. The trial court erred in entering Finding of Fact No. 16 regarding Andrea Harris' motion for attorney fees and costs (App. C).

18. The trial court erred in entering Finding of Fact No. 17 regarding Andrea Harris' motion for attorney fees and costs (App. C).

19. The trial court erred in entering Finding of Fact No. 18 regarding Andrea Harris' motion for attorney fees and costs (App. C).

20. The trial court erred in entering Finding of Fact No. 24 regarding Andrea Harris' motion for attorney fees and costs (App. C).

21. The trial court erred in entering Finding of Fact No. 26 regarding Andrea Harris' motion for attorney fees and costs (App. C).

22. The trial court erred in entering Finding of Fact No. 27 regarding Andrea Harris' motion for attorney fees and costs (App. C).

23. The trial court erred in entering Finding of Fact No. 31 regarding Andrea Harris' motion for attorney fees and costs (App. C).

24. The trial court erred in entering Conclusion of Law No. 1 regarding Andrea Harris' motion for attorney fees and costs (App. C).

25. The trial court erred in entering Conclusion of Law No. 9 regarding Andrea Harris' motion for attorney fees and costs (App. C).

26. The trial court erred in entering Conclusion of Law No. 10 regarding Andrea Harris' motion for attorney fees and costs (App. C).

27. The trial court erred in entering Conclusion of Law No. 11 regarding Andrea Harris' motion for attorney fees and costs (App. C).

28. The trial court erred in entering Conclusion of Law No. 12 regarding Andrea Harris' motion for attorney fees and costs (App. C).

29. The trial court erred in entering Finding of Fact No. 1 regarding Patrick Williams' request for attorney fees (CP 805-812) (App. D).

30. The trial court erred in entering Finding of Fact No. 3 regarding Patrick Williams' request for attorney fees (CP 805-812) (App. D).

31. The trial court erred in entering Finding of Fact No. 7 regarding Patrick Williams' request for attorney fees (CP 805-812) (App. D).

32. The trial court erred in entering Finding of Fact No. 17 regarding Patrick Williams' request for attorney fees (CP 805-812) (App. D).

33. The trial court erred in entering Conclusion of Law No. 1 regarding Patrick Williams' request for attorney fees (CP 805-812) (App. D).

34. The trial court erred in entering Conclusion of Law No. 10 regarding Patrick Williams' request for attorney fees (CP 805-812) (App. D).

35. The Court erred in awarding damages to Andrea Harris for estimated future medical care, and for the cost of her general damages. (RP 551).

36. If Plaintiff Harris is entitled to reasonable attorney fees pursuant to RCW 4.84.250, the court erred in failing to reduce her award of attorney fees for time devoted pursuing the claims of Joshua and Elena Harris or for the time spent pursuing her claim against Defendant Ayeleka.

37. If Plaintiff Williams is entitled to reasonable attorney fees pursuant to RCW 4.84.250, the court erred in failing to reduce his award of attorney fees for the time spent pursuing his claim against Defendant Ayeleka.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether RCW 4.84.250 *et seq.* can be invoked after a plaintiff claims damages in excess of \$10,000?

2. Whether a plaintiff can wait until after she appeals the decision in a mandatory arbitration hearing before invoking RCW 4.84.250 *et seq.*, prior to the trial de novo?

3. Whether a defendant who is voluntarily dismissed from a case is entitled to attorney fees if RCW 4.84.250-.290 apply to this case?

4. Whether expert testimony regarding damages for future treatment should be excluded when the testimony is beyond the scope of testimony disclosed in discovery responses and is based upon undisclosed information obtained after the discovery cutoff date?

IV. STATEMENT OF FACTS

A. Respondents Williams And Harris Did Not Plead Damages Of \$10,000 Or Less Prior To The Mandatory Arbitration Hearing.

Before they commenced their lawsuit, Patrick Williams and Andrea Harris, individually and on behalf of her two minor children Joshua and Elena Harris, were represented by the same attorney¹ (CP 605-615). Counsel for respondents requested settlement for Andrea Harris in

¹ The law firm of Dean Standish Perkins represented all four claimants before they filed their lawsuit.

the amount of \$24,600 (CP 605-615) and for Patrick Williams in the amount of \$21,300 (CP 605-615). These settlement offers were not accepted. Andrea Harris and Patrick Williams filed a joint Complaint against Mamuye Ayeleka and Fesseha Tilaye on May 3, 2007, seeking damages from a disputed December 25, 2005 motor vehicle collision (CP 1-7). The Complaint alleged causes of action against Fesseha Tilaye as the driver of the taxicab allegedly involved in the collision, and causes of action against Mamuye Ayeleka as the owner of the cab driven by Mr. Tilaye (CP 1-7). Mr. Williams and Ms. Harris elected to submit their claims to mandatory arbitration, as provided in RCW 7.06.020 and KCLMAR 2.1(a). The Arbitration hearing was held on March 28, 2008 with attorney Robert S. Bryan serving as the arbitrator (CP 31-32). Plaintiffs Andrea Harris and Patrick Williams were represented by separate counsel at the arbitration hearing (CP 27-29).² In her Arbitration Brief, Andrea Harris requested an award of \$25,000 (CP 630-631). On April 2, 2008, the arbitrator filed his award, in favor of defendants on all claims (CP 31-32).

² Mr. Williams was represented by his current counsel, while Ms. Harris and her children were represented by attorney Robert D. Kelly.

B. Respondents Williams And Harris Did Not Send Offers Of Settlement After Filing Their Complaint And Before They Requested A Trial De Novo.

Plaintiffs Andrea, Elena and Joshua Harris retained new counsel after receiving the arbitrators' decision (CP 33-34). The Harris plaintiffs requested a trial de novo on April 15, 2008 (CP 33-34); Patrick Williams requested a trial de novo on April 18, 2008 (CP 41-42). On May 20, 2008, Mr. Williams sent an offer of settlement for \$3,900.00 (CP 633-634). On August 14, 2008, Andrea Harris sent defense counsel offers of settlement: \$9,000 for her individual claims, and \$5,500 and \$600 for her claims on behalf of Joshua and Elena Harris, respectively (CP 635-644). These offers of settlement stated they were made pursuant to RCW 4.84.250 and RCW 4.84.280 (CP 633-644). Ms. Harris's counsel sent second settlement offers, for the claims of Joshua and Elena Harris, on January 6, 2009 (CP 650-655, RP 80). Defendants accepted those offers on January 13, 2009 (CP 656-660). However, Plaintiffs declined to conclude those settlements at that time (RP 77-80; CP 661-665).

C. The Special Damages Andrea Harris Claimed Exceeded \$10,000.

Marisa De Lisle, D.C. and Jamie Jefferson, LMP treated Andrea Harris for injuries she allegedly sustained in the December 25, 2005 accident (CP 128-136). Defendants propounded interrogatories to Andrea

Harris to determine the extent of her treatment (CP 622-629). Interrogatory No. 23 requested an itemized list of all medical expenses claimed in the lawsuit (CP 624). Andrea Harris answered “the chiropractor bill was \$4,674 and the massage therapy was \$1,358.00.” Her itemized medical expenses totaled \$6,032.00 (CP 626). Interrogatory No. 24 requested information regarding future treatment.

Has any **HEALTH CARE PROVIDER** advised you that you may require future or additional treatment for any injuries related to the **INCIDENT**? If so, for each injury state: the name of each such health care provider; the injury complained of; and the nature, duration, and estimated cost of future care or additional treatment.

(CP 624). In response to Interrogatory No. 24 Andrea Harris replied, “Dr. De Lisle recommended further treatments” (CP 626). The interrogatory answer was never supplemented.

The amended discovery cutoff date for this case was February 2, 2009 (CP 272-273). Andrea Harris was reexamined by Dr. Marisa De Lisle on February 24, 2009, without any disclosure to defendants (RP 170). Based on her findings during the examination, Dr. De Lisle testified that Andrea Harris would require future chiropractic treatment three times per week for 8 weeks, then two times per month for 10 months for an estimated cost of \$4,800 (RP 156-158). The Court allowed Dr. De Lisle to testify regarding Andrea Harris’s need future treatment and the

corresponding costs (RP 156-158). Based on Dr. De Lisle's testimony, the Court awarded Andrea Harris \$4,480 in future damages. The costs of Andrea Harris's future care when combined with her previously incurred medical bills total \$10,512.³

D. Procedural History.

Andrea Harris and Patrick Williams commenced this action against Mamuye Ayeleka and Fesseha Tilaye on May 3, 2007 (CP 1-7). The case proceeded to mandatory arbitration on March 28, 2008 (CP 31-32). The arbitrator issued a defense verdict as to all of the plaintiffs' claims (CP 31-32). Andrea Harris requested a trial de novo on April 15, 2008 (CP 33-34) and Patrick Williams requested a trial de novo on April 18, 2008 (CP 41-42). Patrick Williams submitted an offer of settlement of \$3,900 to the defendants on May 20, 2008 (CP 633-634) and Andrea Harris submitted an offer of settlement of \$9,000 on August 14, 2008 (CP 636). The second offers of settlement for Joshua and Elena Harris were submitted on January 6, 2009 and accepted on January 13, 2009 (CP 656-660). The case went to a bench trial on May 4, 2009 before the Honorable Cheryl B. Carey in King County Superior Court (RP 1).

³ Although Plaintiffs did not set forth these special damages as required by CR 9(g), the trial Court allowed these damages to be asserted, effectively Amending Plaintiffs' Complaint under CR 15(d) to assert special damages of \$10,512.

On the first day of trial, the plaintiffs dismissed their claims against Defendant Mamuye Ayeleka, before resting (RP 76); the trial court entered the order of dismissal on May 5, 2009 (CP 407-408). The trial court also enforced the offers of settlement for Joshua and Elena Harris on May 4, 2009, dismissing their claims by settlement (RP 77, CP 435-436). The trial court denied defendant's motion to exclude the testimony of Marisa De Lisle regarding the current condition of Andrea Harris and her need for future treatment (CP 156-158). Marisa De Lisle, D.C. testified that she examined Andrea Harris on February 24, 2009 and concluded that Ms. Harris would need \$4,480 in future chiropractic care (RP 156-158). Dr. De Lisle's testimony was based on her post-discovery cutoff examination of Andrea Harris (RP 170-171). Although the examination took place in February 2009, counsel for Andrea Harris did not disclose the examination or Dr. De Lisle's conclusions from the examination until the commencement of trial (RP 93). The trial court allowed the testimony because she decided there was not sufficient reason to believe the concealment was intentional (RP 493).

After the three day trial Judge Carey awarded Andrea Harris general damages of \$10,000 and special damages of \$10,512 (RP 549-552, CP 437-439; 800-802). The court awarded Patrick Williams general damages of \$3,000 and special damages of \$4,482.00 (RP 549-552, CP

803-804). Plaintiffs Harris and Williams subsequently filed motions for attorney fees, alleging the offers of settlement they made after they appealed the arbitration decision were made pursuant to RCW 4.84.250 and RCW 4.84.280 (CP 457-473; 544-597). Defendant filed opposing memoranda and requested oral argument (CP 734-757). Plaintiffs' motions were granted without oral argument and without the submission of written reasons (CP 800-804). The trial court awarded Patrick Williams \$25,722.00 in attorney fees and awarded Andrea Harris \$49,847.50 in attorney fees (CP 800-804).

Defendant Ayeleka also requested oral argument for his motion for attorney fees based on MAR 7.3 and RCW 7.06.060(1) (App. E), and RCW 4.84.250 and RCW 4.84.270 (App. F) (CP 697-706). The court denied Defendant Ayeleka's motion without oral argument and without a written explanation (CP 930). Defendant Tilaye filed a motion for reconsideration which the court also denied (CP 683-696; 813-814). On June 29, 2009, Defendant Tilaye filed separate motions to amend or strike the findings of facts of Andrea Harris and Patrick Williams (CP 840-850, CP 853-865). The court denied Defendant Tilaye's motion relating to the findings of fact of Andrea Harris on July 8, 2009 (CP 931-932). Defendant Tilaye's motion to amend or strike Patrick Williams' findings of fact was granted in part on July 27, 2009 (CP 933-934).

Defendant Tilaye appeals the judgment awarding Andrea Harris future damages; the judgment awarding Andrea Harris attorney fees; the judgment awarding Patrick Williams attorney fees; and the judgment denying Defendant Ayeleka attorney fees.

IV. ARGUMENT

A. The Court Erred In Allowing Dr. Marisa De Lisle's Testimony Regarding Future Damages.

The Court allowed the testimony of Dr. De Lisle regarding future damages because she decided plaintiff's failure to inform defense counsel of the post-discovery cutoff medical visit did not amount to intentional concealment (RP 492). The Court also suggested the testimony should not be excluded because "this would not be a good case – to compare to a multimillion-dollar case that the bar is concerned about" (RP Vol. IV pg. 492). The Court noted that defense counsel was aware that Dr. De Lisle had been the treating chiropractor and that she would testify at trial (RP 492). This was an abuse of the court's discretion.

Andrea Harris received chiropractic care from Dr. Marisa De Lisle from February 1, 2006 through May 24, 2006, when, according to her records and Discovery Responses, this care ended. The discovery cutoff date for this case was February 2, 2009. At trial, Dr. De Lisle testified that she reevaluated Andrea Harris on February 24, 2009 and opined that

Andrea Harris would require fifty-six (56) additional chiropractic treatments which she estimated would cost \$4,480.00 (RP 157-158). During the discovery phase, defendants sent Interrogatories to Andrea Harris. Interrogatory No. 24 asked:

Has any HEALTH CARE PROVIDER advised you that you may require future care or additional treatment for any injuries related to the INCIDENT? If so, for each injury state: the name of each such health care provider; the injury complained of; and the nature, duration, and *estimated cost of future care or additional treatment*. (italics added).

The response to the interrogatory was “Dr. De Lisle recommended further treatments.”

Interrogatory No. 36 specifically addressed expert witnesses.

INTERROGATORY NO. 36: Identify each person you or your attorneys expect to testify at trial as an expert witness and for each such witness, state:

- (a) The subject matter on which the expert is expected to testify;
- (b) The substance of the facts and opinions to which the expert will testify; and
- (c) A summary of the grounds for each such opinion.

ANSWER:

We expect to call as expert witnesses the health care providers previously identified, who would testify about the complaints, observations, diagnosis, and treatments related to the subject motor vehicle collision and the necessity of the treatments and the reasonableness of the charges therefore [sic].

Interrogatory 36 mirrors the language of CR 26(b)(5)(A)(i) which states:

A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules.

The King County Local Rules also outline the necessary level of disclosure regarding expert witnesses. KCLR 26(b) (App. G) reads in pertinent part:

(3) Scope of disclosure: Disclosure of witnesses under this rule shall include the following information:...(C) Experts. A summary of the expert's opinions and the basis therefore and a brief description of the expert's qualifications.

(4) Exclusion of Testimony. 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.

Defense counsel was not timely notified before the commencement of trial that Dr. De Lisle re-examined Andrea Harris on February 24, 2009 or that Dr. De Lisle would testify regarding her need for future care. Ms. Harris argued in the lower court that the testimony of Dr. De Lisle regarding future damages should not be excluded because: (1) the failure to disclose the subsequent treatment was not intentional or willful; (2) the failure to disclose the information did not prejudice the defendants; and (3) the defendants failed to learn about the evidence by choosing not to

depose Dr. De Lisle (RP 488-490). These arguments are erroneous, and the Court abused its discretion in allowing Dr. De Lisle to testify regarding the Andrea Harris's necessity for future care, and awarding special and general damages based upon that testimony.

When this case was heard in the arbitration proceeding in March 2008, Dr. De Lisle submitted a declaration that outlined her treatment of Andrea Harris, and the corresponding charges for the treatment (CP 600-682). Dr. De Lisle's Declaration stated that she treated Andrea Harris from February through May 2006. Dr. De Lisle also testified in the Arbitration hearing. Defense counsel deposed Andrea Harris on March 6, 2008 and confirmed that she treated with Dr. De Lisle through May 24, 2006.

After appealing the arbitration decision, Andrea Harris moved for a partial summary judgment on the reasonableness of Andrea Harris's medical treatment and bills. Dr. De Lisle again confirmed that she had only treated Andrea Harris from February 2006 until May 2006 (CP 58-127). Prior to the King County Superior Court trial, Marisa De Lisle testified twice by declaration regarding her treatment of Andrea Harris and never mentioned the need for future care.

On or before April 29, 2009, Dr. De Lisle advised Andrea Harris's counsel that she recommended future care of Andrea Harris. In an e-mail

dated April 29, 2009, she responded to an inquiry by counsel for Ms. Harris about the estimated cost of that care (CP 344-350). At least by April 29, 2009, Andrea Harris was obligated to supplement her interrogatory answers to include the information contained in the e-mail from Dr. De Lisle.⁴ CR 26(e)(1) (App. H). CR 26(e)(1) states:

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

Civil Rule 26(e)(2) requires a party “to amend a prior response if he obtains information upon the bases of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.” Failure to seasonably supplement in accordance with this

⁴ And, her decision to seek the additional special damages invoked CR 9(g) and CR 15.

rule will subject the party to such terms and conditions as the trial court may deem appropriate. CR 26(e)(4).

Andrea Harris did not disclose the February 24, 2009 chiropractic examination until the first day of trial. Dr. De Lisle based her opinions of the plaintiff's need for future care on the February 24, 2009 examination. Plaintiff Harris did not disclose that Dr. De Lisle would testify Ms. Harris needed future chiropractic treatment until she filed her trial brief, shortly before trial. The trial court's decision on special damages and general damages, as well as on whether the disputed collision had caused injuries, was influenced, if not determined, by Dr. De Lisle's testimony based upon the February 24, 2009 examination.

Ms. Harris was under a duty to supplement her interrogatory answers to inform defense counsel as to the subsequent examination and her claim for future damages pursuant to CR 26(2) and KCLR 26(b). The court should exclude testimony if there is a showing of willful, intentional or tactical nondisclosure. *Lampard v. Roth*, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984). Defendants do not contend counsel for Ms. Harris made a conscious decision to hide evidence or that he tried to deceive defendants – but that is not the standard. Where no sufficient reason is given for the failure to supplement the interrogatories, or failure to comply with the discovery rules, the actions and omissions are deemed to

constitute a willful failure to comply with the discovery rules. *Hampson v. Ramer*, 47 Wn. App. 806, 812, 737 P.2d 298 (1987). Although the trial court does have considerable discretion in selecting the sanction to be applied in a particular case, sanctions should at least insure that the offending party will not profit from their wrongdoing. *Gammon v. Clark Equipment*, 38 Wn. App. 274, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613 (1985). By not complying with her duty to supplement her discovery responses regarding the scope of Dr. De Lisle's testimony, Andrea Harris deprived the defendants of the ability to investigate and evaluate her claims for future damages. *Port of Seattle v. Equitable Capital Group, Inc.*, 127 Wn.2d 202, 210; 898 P.2d 219 (1994).

Defendants were also substantially prejudiced by the testimony regarding future damages, and by Plaintiff's failure to formally assert her special-damages claim in a pleading, as required by CR 9(g), or in interrogatory answers.⁵ Prior to her trial testimony, Dr. De Lisle had already testified by declaration, twice, regarding Andrea Harris's medical treatment, without testifying about her need for future care. The subsequent examination did not take place until after the discovery cutoff

⁵ The prejudice that follows from Plaintiff's lack of formal pleading follows from the trial court's erroneous application of RCW 4.84.250, *et. seq.*, discussed below.

date. When defense counsel learned of the examination, during the trial, and learned of Dr. De Lisle's opinions regarding plaintiff's need for future care, defense counsel no longer had the opportunity to depose Dr. De Lisle regarding her findings or to require the plaintiff to submit to a CR 35 medical examination. Even if defense counsel had deposed Dr. De Lisle, a deposition taken prior to the discovery cutoff date would not have revealed Dr. De Lisle's opinions, which stemmed from a post-discovery cutoff date examination of the plaintiff.

In addition to prejudicing the defendants by placing them at a strategic disadvantage by failing to supplement her discovery responses regarding the necessity of future care, defendant Tilaye was also prejudiced by the admission of Dr. De Lisle's testimony because the Court awarded Andrea Harris \$4,480.00 for future damages based on the testimony, and based her opinions on causation and general damages on the testimony about the February 24, 2009 examination. Dr. De Lisle's testimony was especially prejudicial given Plaintiff Harris' post-appeal offer to accept a settlement of \$9,000. Plaintiff Harris should not be allowed to make an offer of settlement based on previously disclosed facts and testimony and then neglect to disclose expert testimony regarding plaintiff's need for future care and the cost of future care prior to trial, using the undisclosed testimony to obtain a judgment in excess of the offer

of settlement. The testimony of Dr. De Lisle resulted in prejudice to Defendant Tilaye, and the court should have excluded Dr. De Lisle's testimony regarding future damages and the results of the February 24, 2009 examination.

B. RCW 4.84.250 Does Not Apply To This Case.

Ordinarily attorney fees are not recoverable by a prevailing party in civil litigation. Washington provides limited exceptions to this rule if the recovery of attorney fees is permitted by contract, statute or some recognized ground in equity. *In Re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 60 P.3d 53 (2002). RCW 4.84.250 allows the prevailing party to recover reasonable attorney fees when the plaintiff's claim for damages does not exceed \$10,000.

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is \$7,500.00 or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be \$10,000.00.

The purpose of RCW 4.84.250 is to encourage out of court settlements and to penalize parties who unjustifiably bring or resist small claims. *Valley v.*

Hand, 38 Wn. App. 170, 684 P.2d 1341 (1984).⁶ The purpose of the statutory scheme is served only if a plaintiff is required to invoke RCW 4.84.250 *et seq.* prior to the original trial or arbitration hearing.⁷

1. RCW 4.84.250 *Et Seq.* Only Applies If Invoked Prior To The Mandatory Arbitration Hearing.

The plaintiffs in this case filed motions for attorney fees based on offers of settlement first made after they appealed the arbitration decision and requested a statutory trial de novo. The settlement offers stated they were made pursuant to RCW 4.84.250 and RCW 4.84.280. RCW 4.84.280 states:

Offers of settlement shall be served on the adverse party in the manner prescribed by applicable court rules **at least ten**

⁶ The statutes that provide for Mandatory Arbitration, ch. 7.06 RCW, have the similar purpose of encouraging resolution of small and simple cases in the simplified Arbitration process. *See Mercier v. GEICO Indemnity Co.*, 139 Wn. App. 891, 898, 165 P.3d 375 (2007).

⁷ And, that is what the Mandatory Arbitration statute requires when a plaintiff elects to have her case decided in Arbitration. RCW 7.06.050 and RCW 7.06.060 specify that the arbitration is the trial, and the trial de novo is an appeal. Moreover, under RCW 7.060.050, after a trial de novo is requested, a non-appealing party may serve an offer of compromise, which will affect the determination of whether the appealing party improved her position. The statute does not authorize a party who appealed to make an offer of compromise after requesting a trial de novo, and does not suggest that settlement offers made after an appeal was filed from the Arbitration decision are considered offers to settle made before “trial,” as provided in RCW 4.84.280. As discussed below, RCW 4.84.250-.290 and applicable case-law provide that the Arbitration is the “trial” and a trial de novo is the “appeal” for determining the impact, if any, of an offer to accept \$10,000 or less in settlement.

days prior to trial. Offers of settlement shall not be served until thirty days after the completion of the service and filing of the summons and complaint. Offers of settlement shall not be filed or communicated to the trier of the fact until after judgment, at which time a copy of said offer of settlement shall be filed for the purposes of determining attorneys' fees as set forth in RCW 4.84.250.

(Emphasis added.) To invoke RCW 4.84.250, the plaintiffs' offers of settlement needed to be served ten (10) days prior to the arbitration hearing, because the arbitration hearing is considered the "trial." *Hertz v. Riebe*, 86 Wn. App. 102, 936 P.2d 24 (1997).

In *Hertz*, the Court denied the Riebes' request for attorney fees based on an offer of settlement sent after the district court case but prior to the trial de novo in the Superior Court. The Court held that to recover attorney fees for the trial de novo the Riebes needed to have made an offer of settlement ten days prior to the district court trial.

To recover attorney fees, the Riebes must have made an offer of settlement for greater than the amount of the Hertz's recovery 10 days before the district court trial. They did not. The Riebes are not a prevailing party and therefore not entitled to attorney fees under RCW 4.84.250.

Hertz, 86 Wn. App. at 107.

Andrea Harris and Patrick Williams admit they failed to make offers of settlement prior to the arbitration hearing (CP 783-794). But, they contend that a mandatory arbitration hearing does not constitute a trial for purposes of RCW 4.84.250 *et seq.* This Court has already

determined that a mandatory arbitration hearing constitutes a trial within the meaning of RCW 4.84.250. In *Singer v. Etherington*, 57 Wn. App. 542, 789 P.2d 108 (1990), the plaintiff argued that an offer of judgment made by a party prior to an arbitration hearing lapses for purposes of awarding attorney fees upon the trial de novo. The Court clearly stated that the original trial is the mandatory arbitration hearing, and a trial de novo is the appeal.

A trial de novo in superior court is actually an appeal, making RCW 4.84.290 applicable. ... A mandatory arbitration proceeding is treated as the original trial when applying 4.84.290. The trial de novo is the appeal.

Singer, 57 Wn. App. at 546. This Court reiterated its position in *Thomas Kerr v. Brown*, 114 Wn. App. 554, 59 P.3d 120 (2002):

A trial de novo following arbitration is treated as an appeal. In *Singer v. Etherington*, we addressed the status of a trial de novo following a mandatory arbitration. Although the issue was attorney fees, we first determined that ‘a trial de novo in superior court is actually an appeal...’ In reaching this conclusion, we analogized to small claims court appeals, and cited *Valley v. Hand*. In *Valley*, we held that ‘the proceedings in the Superior Court constituted an appeal within the meaning of RCW 4.84.290, even though the scope of review is trial de novo.’

As stated by this Court in *Thomas Kerr*, for purposes of RCW 4.84.250 *et seq.*, the mandatory arbitration proceeding is the original trial. Plaintiffs needed to make their offers of settlement 10 days prior to the arbitration hearing to invoke RCW 4.84.250. Their failure to do so precludes them

from being able to invoke the statutory provision after they appealed the arbitration decision, and prior to the trial de novo. The trial court erred in awarding plaintiffs attorney fees under RCW 2.84.250 and RCW 4.84.280.

2. Allowing RCW 4.84.250 *Et Seq.* To Apply To This Case Would Contravene The Public Policy Behind The Statute.

RCW 4.84.250 and RCW 4.84.280 required the plaintiffs to make their offers of settlement for \$10,000 or less at least ten days before the arbitration hearing. This provision allows all parties to be put on notice that the small claim fee provision applies. *In re Estate of Tosh*, 83 Wn. App. 158, 920 P.2d 1230 (1996). The notice requirement is intended to work for and against both parties to the litigation. The defendants are placed on notice that the claim can be settled for less than \$10,000 and the failure to accept the offer might result in the awarding of attorney fees. Plaintiffs invoking the statute are also discouraged from pursuing meritless claims because defendants are entitled to attorneys fees in the case of a defense verdict.

Andrea Harris and Patrick Williams should not be allowed to invoke RCW 4.84.250 *et seq.* after the mandatory arbitration and prior to the trial de novo for three compelling reasons. First, the defendants were not given the opportunity to settle any of the claims for \$10,000 or less prior to the arbitration hearing. The plaintiffs did not limit their claims to

\$10,000 prior to the arbitration hearing. Andrea Harris specifically stated in her arbitration brief that she was seeking an award of \$25,000. The plaintiffs' failure to offer to settle for less than \$10,000 negates the intent behind the statutory scheme. RCW 4.84.250 is designed to facilitate out of court settlements for small claims. *In re Estate of Tosh*, 83 Wn. App. at 164. Plaintiffs should not be allowed to invoke RCW 4.84.250 *et seq.* after failing to give the defendants the possibility to avoid further litigation by giving the defendants the opportunity settle their claims for \$10,000 or less prior to the mandatory arbitration.

Similarly, the plaintiffs could have each recovered up to \$50,000 at the arbitration hearing. RCW 4.84.250 *et seq.* is an exception to the rule that attorney fees are not recoverable to the prevailing party in civil litigation, and is only invoked in limited circumstances that are strictly in accord with the statutory variation from the American Rule. The statute only covers claims for damages that are \$10,000 or less, and not merely cases in which a plaintiff agrees to settle for \$10,000 or less well into the litigation process. *Pierson v. Hernandez*, 149 Wn. App. 297, 202 P.3d 1014 (2009). If RCW 4.84.250 were to apply to this case, plaintiffs would be allowed to 'take their shot' at \$50,000 in a mandatory arbitration hearing (or \$75,000 in district court), and if unsuccessful, offer to settle for \$10,000 and seek attorney fees after requesting a trial de novo. This

would have the effect of encouraging prolonged litigation of small or doubtful claims, which is precisely what the statute seeks to avoid.

The third reason RCW 4.84.250 should not apply in this case is because, had the plaintiffs invoked the statute prior to the arbitration hearing, the defendants would have been entitled to attorney fees following the defense verdict. Once invoked, the statute gives both parties an incentive to settle, following the policy the legislature decided was the better course among possible choices. The risk of invoking the statute for a plaintiff is that in the case of a complete defense verdict, the defendant is entitled to attorney fees. In the instant case, the plaintiffs did not make offers of settlement prior to the arbitration hearing. The arbitration hearing resulted in a defense verdict as to all of plaintiffs' claims which would have made the defendants the prevailing party under RCW 4.84.270, if RCW 4.84.250 was applicable. RCW 4.84.270 states:

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280.

The arbitrator entered a defense verdict as to all of the plaintiffs' claims. Once the mandatory arbitration award was entered, RCW

7.06.060 (App. E) and MAR 7.3 (App. I) applied to the trial de novo. These statutes allow the non-appealing party to recover attorney fees if the appealing party fails to improve his or her position at the trial de novo. It was under the threat of attorneys fees pursuant to RCW 7.06.060 and MAR 7.3 that the plaintiffs submitted offers of settlement to the defendants.⁸ RCW 4.84.250 *et seq.* applies only to claims for damages of up to \$10,000. *Klein v. Seattle*, 41 Wn. App. 636, 705 P.2d 806 (1985). Plaintiffs Harris and Williams should not be able to invoke RCW 4.84.250 *et seq.* when they had already avoided the only potential hazard the statute poses for plaintiffs. Allowing Ms. Harris and Mr. Williams to invoke RCW 4.84.250 *et seq.* after the case had already been litigated in an arbitration proceeding at which each plaintiff could have recovered up to \$50,000, and after the plaintiffs had already avoided paying attorneys fees based on the defense verdict at the arbitration proceeding, and after MAR 7.3 already applied to the case, would not serve the purpose for which the statutory scheme was enacted.

⁸ RCW 7.06.050(1)(a) does authorize the non-appealing party to submit an offer of compromise post-arbitration, which has the effect of changing the amount at issue when measuring whether or not the party that appealed improved her position and is liable to pay the other party's attorney fees. The statute contains no provision authorizing a post-arbitration offer of compromise by the party that appealed the arbitration decision, suggesting the legislature did not authorize such a compromise offer.

3. RCW 4.84.250 Does Not Apply To Andrea Harris's Claim Because Her Special Damages Exceeded \$10,000.

Andrea Harris received chiropractic care from Dr. Marisa De Lisle from February 1, 2006 through May 24, 2006, with charges totaling \$4,674.00. Dr. De Lisle also prescribed massage therapy treatments for Ms. Harris which she received from February 24, 2006 through April 17, 2006 totaling \$1,358.00. Together, these special damages originally claimed by Andrea Harris total \$6,032.00.

After Dr. De Lisle reevaluated Andrea Harris on February 24, 2009, she opined that Andrea Harris had a condition she attributed to the 2005 accident, and would require fifty-six (56) additional chiropractic treatments, which she estimated would cost \$4,480.00. The prior special damages of \$6,032.00, when coupled with the future damages of \$4,480.00, brings the total special damages claimed to \$10,512.00, which is the amount of special damages the Court awarded to Andrea Harris. At the very latest, Dr. De Lisle advised the attorney for Andrea Harris of her recommendations regarding the future care of Andrea Harris in an e-mail dated April 29, 2009. As of April 29, 2009, Andrea Harris was obligated to supplement her interrogatory answers to include the information contained in the e-mail from Dr. De Lisle. CR 26(e)(1). CR 26(e)(1) states:

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

If Andrea Harris had properly supplemented her discovery responses pursuant to CR 26(e)(1), her special damages claim alone would have exceeded \$10,000 and RCW 4.84.250 would not apply to her claims. *Klein v. Seattle*, 41 Wn. App. at 640. By asserting her damage claim at trial, she asked the court to amend her pleadings under CR 9(g) and CR 15, and her claim exceeded \$10,000 for purposes of RCW 4.84.250.

C. Defendant Ayeleka Is Entitled To Attorneys' Fees And Costs Under RCW 4.84.270 And RAP 18.1(A) If RCW 4.84.250 Is Applicable In This Case.

Assuming arguendo that Plaintiffs' offers of settlement properly invoked RCW 4.84.280 and RCW 4.84.250, as they have argued, Defendant Ayeleka is entitled to attorney's fees and costs under RCW 4.84.250 and 4.84.270. When RCW 4.84.250 applies, the defendant is entitled to recover attorney fees whenever the Plaintiff recovers nothing in the action. *Lowery v. Nelson*, 43 Wn. App. 747, 752, 719 P.2d 594, *rev. denied*, 106 Wn.2d 1013 (1986).

RCW 4.84.270 defines when the defendant is deemed the prevailing party for purposes of RCW 4.84.250. The section reads:

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the amount allowed under RCW 4.84.250, recovers nothing....

This Court has held that where the plaintiff voluntarily dismisses a defendant after invoking RCW 4.84.250–280, the defendant is the prevailing party for purposes of the statutory scheme. *See Allahyari v. Carter Subaru*, 78 Wn. App. 518, 897 P.2d 413 (1995). If the Court determines that RCW 4.84.250 is applicable in this case, Defendant Ayeleka respectfully submits that he is entitled to attorney’s fees and costs pursuant to RCW 4.84.250 and RCW 4.84.270.⁹

If the Court decides that RCW 4.84.250 applies and Mr. Ayeleka was entitled to recover attorney fees, he also is entitled to recover attorney fees in this appeal, under RAP 18.1(a). Pursuant to RAP 18.1(b), defendant Ayeleka requests an award of attorney fees and expenses, if the Court determines RCW 4.84.250 is applicable.

⁹ This would allow Mr. Ayeleka to recover fees following his dismissal on the first day of trial, even if Ms. Harris’s claim for fees failed because of her (later) amendment of her damage claim at trial under CR 9(g) to seek the additional special damages for future medical expenses.

D. The Court Erred In Entering The Findings Of Fact And Conclusions Of Law Regarding Andrea Harris' Motion For Attorney Fees.

Defendant Tilaye filed his motion to amend or strike the findings of fact and conclusions of law regarding Andrea Harris' motion for attorney fees and costs on the same day as his motion to amend or strike the conclusions of law and findings of fact regarding Patrick Williams' request for attorney fees and to amend judgment. The trial court granted defendant's motion regarding the conclusions of law and findings of fact of Patrick Williams, but denied defendant's motion regarding substantially identical findings regarding Andrea Harris' motion.

The trial court erred in entering Findings of Fact Nos. 1, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 16, 17, 18, 24, 26, 27 and 31 and in entering Conclusions of Law No. 1, 9, 10, 11 and 12 regarding Andrea Harris' motion for attorney fees. After a trial court has weighed the evidence in a bench trial,¹⁰ appellate review is limited to determining whether substantial evidence supports the finding of fact and, if so, whether the findings support the conclusions of law. *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). Substantial evidence is evidence

¹⁰ Here, the Court took no oral testimony; allowed no cross-examination; denied oral argument; and made findings based upon hearsay, speculation, and clearly erroneous statements, including things as simple as the name of the defendants' insurance company – named correctly in other findings.

sufficient to persuade a fair-minded person of the truth of the asserted premise. *Fred Hutchinson Cancer Research Center v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987). The substantial evidence test has not been satisfied with regards to the aforementioned findings of fact and the appellate court should strike them. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003). Findings of fact numbers 4, 5, 6, 7, 8, 11, 13, 26, and 27 are based upon hearsay and not supported by substantial evidence, and the trial court erred in entering the findings.

Defendant objects to the entry of finding of fact number 4 which states:

Plaintiff Harris, therefore, began looking for an attorney to represent her on her de novo appeal by contacting several personal injury attorneys and law firms in the phone book. However, all of the attorneys Plaintiff Harris contacted declined to represent her due to the unlikely chance of success at the trial along with the high level of contingent risk that they would face. Plaintiff Harris was repeatedly told that her case was too risky and difficult due to the fact that liability was disputed by Defendant, and that the amount of time and expense that would be incurred to represent her through trial was just too great with the minimal chance of success, making the case not economically feasible from a business standpoint.

The trial court erred in entering finding of fact number 4 because no admissible evidence was put before the Court to support the finding. Finding of fact number 4 also contains inadmissible hearsay in that it

contains statements that other attorneys allegedly made to Ms. Harris. Finding of fact number 4 is not supported by substantial evidence and was improperly entered by the trial court.

Finding of fact number 5 states:

Plaintiff Harris contacted her current attorney, Patrick Kang, who reluctantly agreed to represent her, even though he knew and understood the high risks and costs that would be involved in handling a minor impact soft tissue injury case where liability damages were in dispute. Mr. Kang also understood that more likely than not, this case would have to be tried to fully recover compensation for Ms. Harris due to the fact that Defendant prevailed at arbitration.

The trial court erred in entering finding of fact number 5. The finding is not based upon admissible evidence submitted to the trial court and it is mostly comprised of the inadmissible hearsay statements of counsel for Andrea Harris – statements that were never subject to cross-examination. The finding is not supported by substantial evidence and was improperly entered by the trial court.

Defendant objects to the entry of finding of fact number 6 which states:

Most of Mr. Kang's cases have to do with employment litigation and civil rights cases involving discrimination, non-payment of wages, and police misconduct, which involve larger recovery of damages than Plaintiff Harris's case.

Defendant objects to the entry of finding of fact number 6 because it is not based on evidence that was offered at trial, and it is not a finding of fact that is relevant to the instant case. The finding is not based on substantial evidence and was improperly entered by the trial court.

Defendant objects to the entry of finding of fact number 7 which states:

Because Plaintiff Harris did not have the financial means to retain her counsel on an hourly basis, Plaintiff Harris and her counsel entered into a contingency fee agreement which calculates the amount of attorney fees at 40% of all sums recovered. The expenses of litigation after the de novo appeal were advanced by Plaintiff's counsel's law firm because Plaintiff Harris could not afford to advance the costs herself.

Defendant objects to the entry of finding of fact number 7 as it is based upon irrelevant hearsay and not based on evidence offered at trial. Furthermore, the finding of fact as stated is prejudicial in that it includes irrelevant information regarding Plaintiff Harris's economic background. Finding of fact number 7 is irrelevant, prejudicial and not based on substantial evidence. Defendant respectfully submits that the trial court erred in entering finding of fact number 7.

Defendant objects to the entry of finding of fact number 8. The finding reads:

On April 16, 2008, shortly after Attorney Kang appeared on the case, he spoke with defense counsel, Philip Meade,

regarding potential settlement of this case. Mr. Meade advised that the defendant's insurance company, Acceptance Indemnity Insurance Co., was not interested in making any type of settlement offer and that if Defendant prevailed at trial, the insurance company would do everything it could to recover its attorney's fees from Ms. Harris. He, therefore, recommended that it would be in Plaintiff Harris's best interest if she dropped the *de novo* appeal.

Defendant objects to the entry of this finding because it is based upon hearsay and was made without allowing cross-examination, even though defendant argued it stated the conversation that actually took place, and also related to a settlement discussion that is not admissible under ER 408. Such a finding is unfair and prejudicial as phrased. Moreover, the suggestion that Mr. Tilaye's insurer had some particular interest in opposing this case because it involved an allegation of a minor impact is unfounded. The trial court erred in entering finding of fact number 8 because it is untrue and not supported by substantial evidence before the trial court.

Defendant also objects to the entry of findings of fact numbers 11 and 13. Findings of fact 11 and 13 refer to defendants' settlement offers to Andrea Harris. No evidence of the settlement offers was offered at trial, and the settlement offers themselves are inadmissible pursuant to ER 408. Findings of fact 11 and 13 were improperly entered because they are

not based on evidence offered to the trial court; and they contain hearsay and inadmissible evidence pursuant to ER 408.

Defendant objects to the entry of findings of fact 26 and 27.

Finding 26 states:

This case involved a minor impact “soft tissue” injury. Plaintiff Harris’s counsel herein has presented evidence through his Declaration, as well as through the Declarations of Scot Blair and Thomas Bierlein, two experienced plaintiff attorneys who have practiced extensively in the area of plaintiff personal injury, and this court is aware from prior cases over which it has presided, that soft tissue injury cases of lesser magnitude where the defense claims no impact to the vehicle and/or no objective evidence of injury is present are inherently costly and very risky to litigate, particularly when compared to the anticipated recovery in many such cases where the medical bills do not exceed \$5-10,000 such as this case.

Finding 27 states:

[t]he Court also finds that Defendant, through his auto insurance carrier and the lawyer retained by it to defend their insured, often vigorously defend such cases, causing many lawyers to decline accepting such cases or to decline to take these cases to trial.

Findings of fact 26 and 27 are not based on the evidence offered at trial. They are based upon speculative hearsay assertions by plaintiffs’ personal injury attorneys and unspecified experiences of the trial Judge, none of whom testified orally or were subject to cross-examination. There has been no proof that Defendant Tilaye was defended in any other action by Acceptance Indemnity Insurance Company, nor by his trial counsel.

The findings are also irrelevant and make disparaging generalizations about the insurance industry and defense counsel that are tantamount to industry profiling. The two findings are based on supposed common practices by unidentified insurers in unspecified cases involving undisclosed facts, and were improperly entered as findings of fact. The findings are not based on substantial evidence that was presented to the trial court, and are based mainly on anecdotal assertions of attorneys involved in plaintiffs' personal injury cases.

Finding of fact 31 incorrectly lists the Defendant's insurance company as Assurance Indemnity Company. As reflected in other Findings, the correct name of the insurance company is Acceptance Indemnity Insurance Company and the trial court erred in refusing to amend the name of the insurance company.

Defendant objects to finding of fact number 1 which states:

[t]his personal injury claim arose as a result of a car crash occurring on December 25, 2005. Defendant Tilaye lost control of his vehicle on Interstate 5 and collided into the Plaintiff Harris's vehicle. Plaintiff Harris sustained neck and shoulder injuries as a result of the collision.

Defendant objects to finding of fact number 1 as the collision and whether Plaintiff Harris sustained injuries as a result of the collision are disputed. For the same reasons Defendant objects to findings of fact number 15 and 16.

Defendant also objects to finding of fact number 9 which reads:

On August 14, 2008, Plaintiff Harris made a formal Offer of Settlement under RCW 4.84.250, .260 and .280 to fully settle the case for \$9,000. ...

Defendant disputes that the settlements sent by Plaintiff Harris triggered RCW 4.84.250 *et seq.* The finding is also misleading because the \$9,000 offer would not have fully settled the case as the claims of Elena and Joshua Harris and the claim of Patrick Williams would have remained.

Defendant objects to finding of fact number 10 which states:

In September 2008, Plaintiff Harris moved for partial summary judgment related to the reasonableness and necessity of her medical expenses. Although Defendant opposed the reasonableness and necessity of the medical expenses, Judge Kimberly Prochnau granted Plaintiff Harris's motion.

Defendant objects to finding of fact number 10 as it misstates Defendant's opposition to Plaintiff Harris's motion for partial summary judgment. Defendant did not dispute the reasonableness of the changes for Plaintiff Harris's medical treatment, Defendant only disputed that the medical treatment was causally related to the December 25, 2005 accident. Judge Prochnau did not rule on causation. (CP 128-136; 254-256).

Defendant also assigns error to the trial court's entry of findings of fact numbers 18 and 24 which state:

18. Plaintiff Harris incurred \$1,372.68 in statutory costs which is recoverable under RCW 4.84.010.

24. Plaintiff Harris has filed and served her cost bill, and said costs being claimed pursuant to RCW 4.84.010 are \$1,372.68.

Defendant contends that if Plaintiff Harris is allowed to recover her reasonable attorney under RCW 4.84.250 *et seq.*, she is not allowed to receive statutory attorney fees under RCW 4.84.010. Defendant assigns error to conclusions of law 1, 10, and 12 because Plaintiff Harris is not entitled to reasonable attorney fees pursuant to RCW 4.84.250 *et seq.*

E. The Court Erred In Entering Findings Of Fact And Conclusions Of Law Regarding Patrick Williams' Request For Attorney Fees.

Defendant Tilaye objects to the trial court's entry of the following findings of fact.

Finding of Fact 17:

This case involved a minor impact "soft tissue" injury. Plaintiff William's counsel herein has presented evidence through his own declaration as well as the Declaration of Harish Bharti, Declaration of Scott Blair and Thomas Bierlein, that soft tissue injury cases of lesser magnitude where the defense claims no impact to the vehicle and/or no objective evidence of injury is present are inherently costly and very risky to litigate, particularly when compared to the anticipated recovery in a case like this when medical bills did not exceed \$5,000.

The trial court erred in entering findings 17 because it is based upon hearsay and not based on evidence presented to the court during trial. Secondly, the finding does not present facts; rather the finding contains the

generalized opinions of plaintiffs' personal injury attorneys that certain types of cases are costly and risky to litigate. This finding fails to meet the substantial evidence standard because no evidence regarding this subject was offered at trial. The trial court improperly entered finding of fact 17.¹¹

Defendant assigns error to findings of fact numbers 1, 3 and 7 because the disputed December 25, 2005 collision, the negligence of Defendant Tilaye, and the causal relationship between the collision and Plaintiff Williams' treatment are not conceded on appeal.

Defendant assigns error to conclusions of law numbers 1 and 10 because Plaintiff Patrick Williams is not entitled to his reasonable attorney fees under RCW 4.84.250 *et seq.*

F. If Plaintiffs Harris And Williams Are Entitled To Their Reasonable Attorney Fees Pursuant To RCW 4.84.250, Their Fees Should Be Discounted For Unsuccessful And Duplicative Claims.

Defendant Ayeleka was not dismissed from this case until May 5, 2009. (CP 407-408). The allegations against Defendant Ayeleka were that, as the owner of the taxicab involved in the accident, he was vicariously liable for the negligence of Defendant Tilaye (CP 1-7). To

¹¹ The trial court deleted findings of fact numbers 19, 20 and 21, and granted Defendant's motion to strike findings of fact numbers 6, 10, 15 and 18.

prove the case of vicarious liability against Defendant Ayeleka, Plaintiffs had to first prove their case against Defendant Tilaye. “The court should discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.” *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). Therefore, if Plaintiffs Harris and Williams are entitled to reasonable attorney fees, the court erred in not reducing their award of attorney fees to account for their unsuccessful claims against Defendant Ayeleka. Similarly, Plaintiffs Andrea Harris, Elena Harris and Joshua Harris were all represented by the same attorney. The claims of Elena and Joshua Harris were not dismissed until May 4, 2009, the first day of trial. Accordingly, if Plaintiff Harris is entitled to reasonable attorney fees, the court erred in not reducing her award to account for time spent on the claims of her minor children.

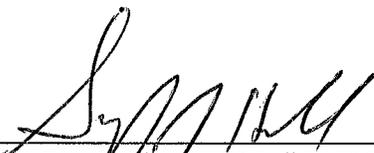
V. **CONCLUSION**

Based upon the foregoing legal arguments, appellants respectfully ask that this Court reverse the decisions of the King County Superior Court granting respondents’ motions for attorney fees, and allowing the testimony of Marisa De Lisle, D.C., regarding future damages. The Court should reverse the judgments entered in this matter and remand the case to the trial court for entry of judgments that do not include attorney fees or any allowance for future medical expenses. If the Court determines

Plaintiffs invoked RCW 4.84.250 successfully, the Court should direct the trial court to reduce the Plaintiffs' attorney fee awards based on time spent on the claims against Defendant Ayeleka, reduce Plaintiff Harris's award to reflect time spent on the claims of her minor children, and award Mr. Ayeleka attorney fees in the trial court, and this Court should award Mr. Ayeleka attorney fees for this appeal.

RESPECTFULLY SUBMITTED this 23 day of November, 2009.

MERRICK, HOFSTEDT & LINDSEY, P.S.

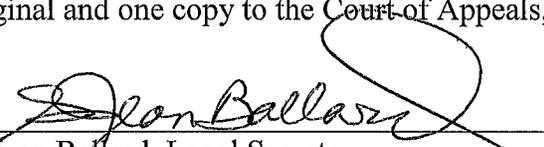
By 
Philip R. Meade, WSBA #14671
Sylvia J. Hall, WSBA #38963
Of Attorneys for Appellants

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3101 Western Ave., Suite 200
Seattle, WA 98121
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Facsimile: (206) 467-2689

L:\315\039\Appeal\Brief of Appellants

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I caused to be delivered via United States Mail a copy of this document to counsel of record listed below and the original and one copy to the Court of Appeals, Division I.


S: Jean Ballard, Legal Secretary
Dated: 11/23/09 at Seattle, Washington.

Mr. Peter Lohnes
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630

Co-counsel for Plaintiff Andrea Harris

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Attorney for Plaintiff Andrea Harris

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Telephone: (206) 706-2882

Attorney for Plaintiff Patrick Williams

APPENDIX A

§ 4.84.250. Attorneys' fees as costs in damage actions of ten thousand dollars or less --
Allowed to prevailing party

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

APPENDIX B

§ 4.84.280. Attorneys' fees as costs in damage actions of ten thousand dollars or less --
Offers of settlement in determining

Offers of settlement shall be served on the adverse party in the manner prescribed by applicable court rules at least ten days prior to trial. Offers of settlement shall not be served until thirty days after the completion of the service and filing of the summons and complaint. Offers of settlement shall not be filed or communicated to the trier of the fact until after judgment, at which time a copy of said offer of settlement shall be filed for the purposes of determining attorneys' fees as set forth in RCW 4.84.250.

APPENDIX C

MAILED

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MEDSICK
HOPSTEED
& LINDSEY

The Honorable Cheryl Carey

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

PATRICK A. WILLIAMS et al.,

Plaintiffs,

vs.

FESSEHA K. TILAYE et al.,

Defendants.

No. 07-2-14407-2KNT

FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
ANDREA HARRIS'S MOTION FOR
ATTORNEY'S FEES AND COSTS

THIS MATTER having come before the Court on Plaintiff Andrea Harris's Motion for Award of Attorney's Fees and Costs and To Amend Judgment pursuant to RCW 4.84.010, .250, .260, and .280, the Declaration of Andrea Harris, the Declaration of Patrick J. Kang and Exhibits attached thereto, the Declaration of Scott Blair, and the Declaration of Thomas C. Bierlein, the Court having reviewed and considered the motion, Defendant's responsive pleadings, and Plaintiff's reply, now, therefore, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

COPY
ORIGINAL

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING
ANDREA HARRIS'S MOTION FOR ATTORNEY'S FEES AND
COSTS

(Case No. 07-2-14407-2KNT)- 1

PREMIER LAW GROUP PLLC
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Seattle, Washington 98121
(206) 285-1743 / Fax (206) 599-6116

1 1. This personal injury claim arose as a result of a car crash occurring on December
2 25, 2005. Defendant Tilaye lost control of his vehicle on Interstate 5 and collided into the Plaintiff
3 Harris's vehicle. Plaintiff Harris sustained neck and shoulder injuries as a result of the collision.

4
5 2. Prior to retaining her current attorney, Plaintiff Harris was represented by another
6 attorney who represented her at the mandatory arbitration. At the arbitration, the arbitrator found
7 in favor of Defendant Tilaye.

8 3. After the defense arbitration award, the attorney who represented Plaintiff Harris at
9 the arbitration declined to further represent Ms. Harris on the *de novo* appeal, ~~due to the great risk~~
10 ~~of not succeeding at trial and the additional out of pocket expense that would need to be incurred~~
11 ~~in this case.~~ He therefore withdrew.

12 4. Plaintiff Harris, therefore, began looking for an attorney to represent her on her *de*
13 *novo* appeal by contacting several personal injury attorneys and law firms in the phone book.
14 However, all of the attorneys Plaintiff Harris contacted declined to represent her, ~~due to the~~
15 ~~unlikely chance of success at the trial along with the high level of contingent risk that they would~~
16 ~~face.~~ Plaintiff Harris was repeatedly told that her case was too risky and difficult ~~due to the fact~~
17 ~~that liability was disputed by Defendant, and that the amount of time and expense that would be~~
18 ~~incurred to represent her through trial was just too great with the minimal chance of success,~~
19 ~~making the case not economically feasible from a business standpoint.~~

20 5. Plaintiff Harris contacted her current attorney, Patrick Kang, who reluctantly agreed
21 to represent her, even though he knew and understood the high risks and costs that would be
22 involved in handling a minor impact soft tissue injury case where liability and damages were in
23 dispute. Mr. Kang also understood that more likely than not, this case would have to be tried to
fully recover compensation for Ms. Harris' ~~due to the fact that Defendant prevailed at arbitration.~~

1
2 6. Most of Mr. Kang's cases have to do with employment litigation and civil rights
3 cases involving discrimination, non-payment of wages, and police misconduct, which involve
4 larger recovery of damages than Plaintiff Harris's case.

5 7. Because Plaintiff Harris did not have the financial means to retain her counsel on
6 an hourly basis, Plaintiff Harris and her counsel entered into a contingency fee agreement which
7 calculates the amount of attorney fees at 40% of all sums recovered. The expenses of litigation
8 after the *de novo* appeal were advanced by Plaintiff's counsel's law firm because Plaintiff Harris
9 could not afford to advance the costs herself.

10 8. On April 16, 2008, shortly after Attorney Kang appeared on the case, he spoke
11 with defense counsel, Philip Meade, regarding potential settlement of this case. Mr. Meade
12 advised that the defendant's insurance company, Acceptance Indemnity Insurance Co., was not
13 interested in making any type of settlement offer and that if Defendant prevailed at trial, the
14 insurance company would do everything it could to recover its attorney's fees from Ms. Harris.
15 He, therefore, recommended that it would be in Plaintiff Harris's best interest if she dropped the
16 *de novo* appeal.

17 9. On August 14, 2008, Plaintiff Harris made a formal Offer of Settlement under
18 RCW 4.84.250, .260 and .280 to fully settle the case for \$9,000. Defendant declined the offer of
19 settlement. As a result, Plaintiff Harris began preparing for trial. The Offer of Settlement was
20 not disclosed to the Court until after Judgment was entered against Defendant Tilaye.

21 10. In September 2008, Plaintiff Harris moved for partial summary judgment related
22 to the reasonableness and necessity of her medical expenses. Although Defendant opposed the
23 reasonableness and necessity of the medical expenses, Judge Kimberley Prochnau granted
Plaintiff Harris's motion.

1 11. Shortly thereafter, Defendant's insurance company offered to fully settle Plaintiff
2 Harris's case for \$6,000, which was less than Plaintiff Harris's medical expenses. Plaintiff
3 Harris rejected the offer due to the fact that the amount offered would not relieve her of her
4 financial obligations to her health care provider.

5 12. The trial date was scheduled for October 20, 2008. However, on October 9, 2008,
6 Judge Prochnau ordered the parties to attend mediation and continued the trial date to December
7 1, 2008. The parties attended mediation on December 1, 2008.

8 13. Defendant made the same \$6,000 offer at mediation that was previously offered.
9 Although the mediator recommended that Plaintiff Harris accept the settlement, she rejected the
10 offer because it would not relieve her of her financial obligations to her health care provider.

11 14. The trial date was again continued due to the late mediation date. Defendant
12 made no other settlement offer.

13 15. This matter was tried before this Court on May 4. After three days of trial, this
14 Court concluded that Defendant Tilaye was negligent and that his negligence was the proximate
15 cause of Plaintiff Harris's injuries and damages. This Court awarded Plaintiff Harris total award
16 of \$20,512.

17 16. The amount of the trial award was in excess of Plaintiff Harris's Offer of
18 Settlement of \$9,000.

19 17. Plaintiff Harris's counsel has submitted a declaration and detailed time records
20 showing the time and work he spent preparing this case for trial and actually trying it.
21 Additionally, he also included detailed time records for his paralegals on certain tasks, billed at
22 a lower rate of \$75 per hour. Plaintiff Harris's counsel put a total of 140.75 hours of time into
23 preparing for this case after the date of Plaintiff Harris's Offer of Settlement through the time
of the verdict, which excludes time he spent for matters other than prosecuting Plaintiff

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING
ANDREA HARRIS'S MOTION FOR ATTORNEY'S FEES AND
COSTS
(Case No. 07-2-14407-2KNT)- 4

PREMIER LAW GROUP PLLC
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1 Harris's claim. Plaintiff Harris's counsel's paralegal put a total of 5 hours of time into
2 preparing for this case after the Offer of Settlement.

3 18. Plaintiff Harris incurred \$1,372.68 in statutory costs which is recoverable under
4 RCW 4.84.010.

5 19. Plaintiff Harris's counsel spent an additional 24.85 hours of time for post-
6 verdict work, including preparing the Findings of Fact and Conclusions of Law regarding
7 liability and damages, the Entry of Judgment, the Motion for Attorneys Fees and Costs,
8 Declaration of Andrea Harris, Declaration of Patrick J. Kang and the exhibits thereto, and the
9 Declarations of Scott Blair and Thomas C. Bierlein in support thereof.

10 20. Additional time of 14.5 hours was also spent by Plaintiff Harris's counsel
11 after the filing of Plaintiff Harris's motion for attorney's fees, which included preparing this
12 Findings of Fact and Conclusions of Law, the Amended Judgment, and reviewing and
13 responding to Defendant's response to Plaintiff Harris's Motion for an Award of Attorney
14 Fees.

15 21. Although Plaintiff Harris's counsel's retainer agreement provides for an hourly
16 fee of \$300 for clients who wish to hire his firm on an hourly basis, Plaintiff Harris's counsel is
17 requesting \$275 per hour for his time and \$75 per hour for his paralegal's time.

18 22. This Court finds Plaintiff Harris's counsel's request for \$275 per hour for his
19 time and \$75 per hour for his paralegal's time to be reasonable based on the Declaration of
20 Thomas C. Bierlein as well as the level of skill required for this difficult case where liability
21 and damages were in dispute and the defendant prevailed at arbitration. Moreover, further
22 favoring the hourly rates were the size of the award received as well as the reputation of
23 Plaintiff's counsel, and the undesirability of this case as no other attorney Plaintiff Harris
contacted wanted to represent Plaintiff Harris for the trial *de novo*.

24 23. The Court further finds that 140.75 hours spent by Mr. Kang in preparing for and
trying this case following Plaintiff Harris's Offer of Settlement, as well as the 24.85 hours spent

1 for work post-verdict, including this motion, are reasonable and productive. The Court further
2 finds that the additional 14.5 hours spent after the filing of Plaintiff Harris's motion for
3 attorney's fees, preparing this Findings of Fact and Conclusions, the Amended Judgment, and
4 reviewing and responding to Defendant's response to Plaintiff Harris's Motion for an Award of
5 Attorney Fees, is also reasonable. Moreover, the 5 hours spent by Mr. Kang's paralegal spent
6 preparing for this trial is also reasonable and productive.

7 24. Plaintiff Harris has filed and served her cost bill, and said costs being claimed
8 pursuant to RCW 4.84.010 are \$1,372.68.

9 25. This court has considered the factors set forth in RPC 1.5(a) when determining a
10 reasonable attorney's fee, including (a) the time and effort required, (b) the terms of the fee
11 agreement and whether the fee is contingent, (c) whether the work will preclude acceptance of
12 other cases by the lawyer, (d) the fee customarily charged for similar work or similar cases, (e)
13 the results obtained, and (f) the lawyer's experience, reputation an ability.

14 26. This case involved a minor impact "soft tissue" injury. Plaintiff Harris's
15 counsel herein has presented evidence through his Declaration, as well as through the
16 Declarations of Scot Blair and Thomas Bierlein, two experienced plaintiff attorneys who have
17 practiced extensively in the area of plaintiff personal injury, and this court is aware from prior
18 cases over which it has presided, that soft tissue injury cases of lesser magnitude where the
19 defense claims no impact to the vehicle and/or no objective evidence of injury is present ~~are~~
20 ~~inherently~~ ^{can be} costly and ~~very~~ risky to litigate, particularly when compared to the anticipated
21 ~~recovery in many such cases where the medical bills do not exceed \$5, 10,000 such as this case.~~ (20)

22 27. The Court also finds that Defendant, through his auto insurance carrier and the
23 lawyer retained by it to defend their insured, often vigorously defend such cases, causing many
24 lawyers to decline accepting such cases or to decline to take these cases to trial.

1 28. ~~The Court further finds that this case was especially risky in light of the fact that~~
2 ~~Plaintiff Harris lost at arbitration and every plaintiff personal injury attorney Plaintiff Harris~~
3 ~~contacted to represent her for the *de novo* declined due to the risks involved.~~

4 29. ~~The court further finds that most prudent plaintiff attorneys would be very~~
5 ~~reluctant from a business standpoint given the costs advanced and possible size of the verdict~~
6 ~~obtained, to even take such a case through a jury trial. This case, meeting all of these factors,~~
7 ~~had considerable risk of Plaintiff Harris not prevailing at trial, or at a minimum, not improving~~
8 ~~her position over her Offer of Settlement. Given this fact, the contingent nature of the~~
9 ~~attorney's fee makes the risk of taking on this case significant for Plaintiff's counsel.~~

10 30. Plaintiff's counsel is an experienced litigation attorney, has a good reputation,
and diligently represented Plaintiff in this case.

11 31. The Defendant was insured through Assurance Indemnity Insurance Co., and
12 Assurance Indemnity Insurance Co. provided Defendant with defense counsel who vigorously
defended Defendant at trial.

13 32. _____
14 _____
15 _____

16 From the foregoing FINDINGS OF FACT, the court makes the following
17 CONCLUSIONS OF LAW:

18 **CONCLUSIONS OF LAW**

19 1. Pursuant to RCW 4.84.250, .260, and .280, Plaintiff Harris is the prevailing
20 party, entitling her to reasonable attorney's fees, because her recovery, exclusive of costs, was
21 substantially more than the \$9,000 offer of settlement she made to Defendant. The offer of
settlement was made more than ten days before trial.

22 2. Plaintiff Harris is also entitled to recover statutory costs and statutory attorney's
23 fees pursuant to RCW 4.84.010 as the prevailing party.

1 3. The Lodestar mount for calculating Plaintiff Harris's reasonable attorney fees
2 for work done after the Offer of Settlement through verdict shall be set at 140.75 hours for
3 work done by Plaintiff's counsel and 5 hours for work done by his paralegal. These hours
4 worked shall be multiplied by Plaintiff counsel's reasonable hourly rate of \$275.00 and his
5 paralegal's hourly rate of \$75 for a lodestar amount of \$39,081.25.

6 4. The Lodestar amount for calculating Plaintiff Harris's reasonable attorney fees
7 for work done post-verdict, including preparing the Findings of Fact and Conclusions of Law
8 regarding liability and damages, the entry of Judgment, the Motion for Attorneys Fees and
9 Costs, Declaration of Andrea Harris, Declaration of Patrick J. Kang and the exhibits thereto,
10 and the Declarations of Scott Blair and Thomas C. Bierlein in support thereof, shall be set at
11 24.85 hours, which will be multiplied by Plaintiff Harris's hourly rate of \$275.00, for a lodestar
12 amount of \$6,833.75.

13 5. The Lodestar amount for calculating Plaintiff Harris's reasonable attorney fees
14 for the work done after the filing of Plaintiff Harris's motion for attorney's fees, which
15 included preparing this Findings of Fact and Conclusions, the Amended Judgment, and
16 reviewing and responding to Defendant's response to Plaintiff Harris's Motion for an Award of
17 Attorney Fees is set at 14.3 hours, which will be multiplied by Plaintiff Harris's hourly
18 rate of \$275.00, for a lodestar amount of \$ 3932.5.

19 6. Plaintiff Harris's contingency fee agreement was reasonable and customary for
20 this type of case.

21 7. ~~An upward adjustment (contingency multiplier) to the Lodestar amount is~~
22 ~~reasonable and appropriate in this case and should be adjusted upward by a multiple of 2.0 due~~
23 ~~to the contingency nature of the case with substantial risks involved based on the fact that the~~
~~case was handled on a contingency basis by Plaintiff Harris's counsel. Plaintiff's counsel faced~~
~~substantial risk that no fee would have resulted if the Court ruled in Defendant's favor based on~~
~~the difficult and risky facts of this case as set forth above in the Findings of Fact. Moreover, an~~

1 upward adjustment by a multiple of 2.0 is further appropriate because of the risk Plaintiff
2 Harris's counsel took in advancing costs in excess of \$1,200 for the case, as well as having to
3 wait in excess of a year to receive any type of compensation. Finally, the fact that Plaintiff
4 Harris's counsel was prevented from working on other cases that involved potential larger
5 recoveries also justifies an upward adjustment by a multiple of 2.0.

6 8. ~~The Court reasonably concludes that the Lodestar amount shall be adjusted~~
7 ~~upwards by a multiplier of 2.0 based upon the Findings of Fact and Conclusions of Law stated~~
8 ~~above. As a result, the Lodestar amount set forth in paragraph 3 in the amount of \$39,081.25~~
9 ~~shall be adjusted upwards by a multiple of 2.0 for an adjusted Lodestar amount of \$78,162.50.~~

10 9. Plaintiff Harris shall also recover her statutory costs pursuant to RCW 4.84.010
11 in the amount of \$1,372.68.

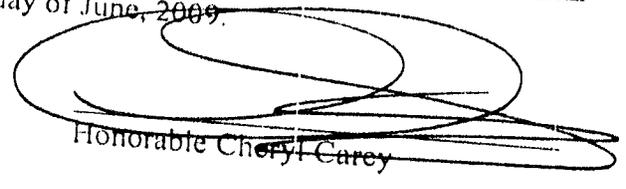
12 10. The total reasonable attorney's fees awarded to Plaintiff Harris shall be
13 \$ 49,847.5, which is the sum of 39,081.25 (paragraph 8), \$6,833.75
14 (paragraph 4), and \$ 3,932.5 (paragraph 5).

15 11. An Amended Judgment against Defendant Tilaye shall be entered accordingly.

16 12. The entire judgment entered herein shall bear interest at the statutory rate set
17 forth in RCW 4.56.110.

18 12. \$ 71,732.18

19 DONE IN OPEN COURT this 19 day of June, 2009.

20 
21 Honorable Cheryl Carey

1 Presented by:

2 PREMIER LAW GROUP, PLLC

3

4 **Patrick J. Kang**, WSBA #30726
5 Counsel for Plaintiff Andrea Harris

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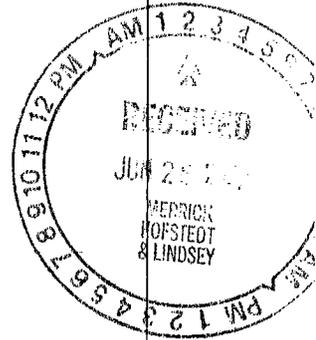
FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING
ANDREA HARRIS'S MOTION FOR ATTORNEY'S FEES AND
COSTS
(Case No. 07-2-14407-2KNT)- 10

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APPENDIX D

Mailed
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SW

The Honorable Cheryl Carey



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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

PATRICK A. WILLIAMS, and ANDREA HARRIS, his wife, and ANDREA HARRIS as guardian for ELENA-GENEVIEVE HARRIS, a minor child, and JOSHUA HARRIS, a minor child,
Plaintiffs,

vs.

FESSEHA K. TILAYE and JANE DOE TILAYE, his wife and the marital community composed thereof,
Defendants.

Case No.: 07-2-14407-2 KNT

CONCLUSIONS OF LAW AND FINDINGS OF FACT REGARDING PATRICK WILLIAM'S REQUEST FOR ATTORNEY FEES

This matter having come before the Court on Plaintiff Patrick Williams's Motion for Award of Attorney's Fees and Costs and To Amend Judgment pursuant to RCW 4.84.010, .250, .260 and .280, the Declaration of Jason Anderson, Declaration of Harish Bharti, Declaration of Patrick Kang, the Declaration of Scott Blair, and the Declaration of Thomas C. Bierlein, the Court having reviewed and considered the motion, Defendant's

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE ATTORNEY FEES FOR PATRICK WILLIAMS - 1

copy

Jason Anderson
Law Offices of Jason Anderson
8015 15th Ave NW Ste 5
Seattle, WA 98117
P: 206-706-2882

1 responsive pleadings if any, and Plaintiff's reply, now, therefore, the court makes the
2 following findings of fact and conclusions of law:

3
4 **FINDINGS OF FACT**

- 5 1. This personal injury claim arose as a result of a car crash occurring on December
6 25, 2005. Defendant Tilaye lost control of his vehicle on Interstate 5 and collided
7 into the Plaintiff Harris's vehicle. Plaintiff Harris sustained neck and shoulder
8 injuries as a result of the collision.
- 9 2. Following the filing of this case it was referred to arbitration. At the arbitration
10 the arbitrator found in favor of Defendant Tilaye. Mr. Williams filed an appeal of
11 this arbitration award and requested a trial.
- 12 3. Mr. William's claims consisted of personal injuries arising from low speed motor
13 vehicle accident and the medical bills incurred to treat his injuries totaled
14 \$4,482.00.
- 15 4. Mr. Williams testified at trial that he earned \$12.00 per hour.
- 16 5. On May 20, 2008, Patrick Williams made an offer of settlement in the amount of
17 \$3,900. This offer was rejected.
- 18 6. At a mediation held on December 1, 2008, the defendant discussed offering
19 \$2,000 to Patrick Williams to settle his claim. This offer was never actually made
20 because it was conditioned on a global settlement with Ms. Harris. The defendant
21 never made another offer prior to the trial.
- 22 7. This matter was tried before this Court on May 4, 2009. After three days of trial
23 this court concluded that Defendant Tilaye was negligent and that his negligence
24 was the proximate cause of Plaintiff Williams' injuries and damages. This Court
25 awarded Mr. Williams special and general damages of \$7,842.00.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE ATTORNEY FEES FOR PATRICK
WILLIAMS - 2

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- 1 8. This amount exceeded Plaintiff Williams' May 20, 2008 offer of settlement of
2 \$3,900.
- 3 9. Plaintiff Williams counsel has submitted a declaration and time records showing
4 the time and work he spent preparing the case for trial and trying the case.
5 Plaintiff's counsel, Jason Anderson, put a total of 70.7 hours of time into
6 preparing this case after the date of Plaintiff Harris' Offer of Settlement through
7 the time of the verdict. Ryan Ko, another lawyer in Mr. Anderson's office spent
8 an additional 3 hours on this case.
- 9 10. Plaintiff Williams incurred \$615.90 in statutory costs which are recoverable under
10 RCW 4.84.010.
- 11 11. Plaintiff Williams' counsel spent an additional 12 hours of time for post-verdict
12 work, including, filing a motion for Entry of Judgment, Motion for Attorney's
13 fees and costs, Declaration of Jason Anderson, Declaration of Harish Bharti,
14 coordination with other counsel in this case and related work.
- 15 12. Additional time of 14.5 hours was also spent by Plaintiff Williams' counsel
16 after the filing of this motion for fee, including responding to the Defendant's
17 opposition to this motion for fees.
- 18 13. Counsel for Patrick Williams hourly rate is \$260 for litigation services. This
19 amount is reasonable considering counsel's experience, the Declaration of Harish
20 Bharti indicating such rate is fair, and the level of skill required for this case
21 where liability and damages were in dispute and the defendant prevailed at
22 arbitration.
- 23 14. The Court further finds that 70.0 hours spent by Mr. Anderson and 3 hours spent
24 by Ryan Ko is preparing for and trying this case following Plaintiff Williams

25 FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE ATTORNEY FEES FOR PATRICK
WILLIAMS - 3

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1 Offer of Settlement, as well as the 12 hours spent for work post-verdict, including
2 this motion, are reasonable and productive. The Court further finds that the
3 additional _____hours spent after the filing of Plaintiff Williams motion for
4 attorney fees is also reasonable.

5 15. Plaintiff Williams has filed and served his cost bill, and said costs being claimed
6 pursuant to RCW 4.84.010 are \$615.90.

7 16. This court has considered the factors set forth in RPC 1.5(a) when determining a
8 reasonable attorney's fee, including (a) the time and effort required, (b) the terms
9 of the fee agreement and whether the fee is contingent, (c) whether the work will
10 preclude acceptance of other cases by the lawyer, (d) the fee customarily charged
11 for similar work or similar cases, (e) the results obtained, and (f) the lawyer's
12 experience, reputation and ability.

13 17. This case involved a minor impact "soft tissue" injury. Plaintiff William's counsel
14 herein has presented evidence through his own declaration as well as the
15 Declaration of Harish Bharti, Declaration of Scott Blair and Thomas Bierlein, that
16 soft tissue injury cases of lesser magnitude where the defense claims no impact to
17 the vehicle and/or no objective evidence of injury is present ^{can be} ~~are inherently~~ costly
18 and ~~very~~ risky to litigate, ~~particularly when compared to the anticipated recovery~~
19 ~~in a case like this when medical bills did not exceed \$5,000.~~

20 18. The Court also finds that Defendant, through his auto insurance carrier and the
21 lawyer retained by it to defend their insured, often vigorously defend such cases,
22 causing many lawyers to decline accepting such cases or to decline to take these
23 cases to trial.

24
25 FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE ATTORNEY FEES FOR PATRICK
WILLIAMS - 4

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19. ~~The Court further finds that this case was especially risky in light of the fact that co-plaintiff Harris, had great difficulty in finding an attorney to represent her for a de novo trial due to the risks involved.~~

20. ~~The court further finds that most prudent plaintiff attorneys would be very reluctant from a business standpoint given the costs advanced and possible size of the verdict obtained, to even take such cases through a jury trial. This case, meeting all of these factors, had considerable risk of Mr. Williams not prevailing at trial, or at a minimum not improving her position over his Offer of Settlement. Given this fact, the contingent nature of the attorney's fee makings the risk of taking this case significant for Plaintiff's counsel.~~

21. ~~It is also significant that counsel provided services in this case for nearly two years and six months before obtaining a judgment in his client's favor.~~

22. Plaintiff's counsel has significant litigation experience, has a good reputation and diligently represented Plaintiff in this case.

23. The Defendant was represented vigorously by counsel at trial.

24. _____

From the foregoing Findings of Fact, the court makes the following Conclusions of Law:

1. Pursuant to RCW 4.84.250, .260, and .280, Plaintiff Williams is the prevailing party, entitling him to reasonable attorney's fees, because his recovery, exclusive of costs, was substantially more than the \$3,900 offer of settlement

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he made to Defendant. The offer of settlement was made more than ten days before trial.

- 2. Plaintiff Williams is also entitled to recover statutory costs and statutory attorney's fees pursuant to RCW 4.84.010 as the prevailing party.
- 3. The Lodestar amount for calculating Plaintiff William's reasonable attorney fees for work done after the Offer of Settlement through verdict shall be set at 70.7 hours for work done by Jason Anderson and 3 hours done by Ryan Ko. These hours worked shall be multiplied by Jason Anderson's reasonable hourly rate of \$260 and Ryan Ko's reasonable hourly rate of \$150 for a total lodestar amount of \$18,832.00.
- 4. The Lodestar amount for calculating Plaintiff William's reasonable attorney fees done for work done post-verdict shall be set at 12 hours, which will be multiplied by Jason Anderson's hourly rate of \$260.00, for a lodestar amount of \$3,120.00.
- 5. The Lodestar amount for calculating Plaintiff Williams' reasonable attorney fees for the work done after the filing of Plaintiff Williams' motion for attorney fees, which includes replying to defendant's response to Patrick William's motion for attorney fees is set at 4.5 hours which will be multiplied by Jason Anderson's hourly rate of \$260, for a lodestar amount of \$ 3770.00
- 6. Patrick Williams contingency fee agreement was reasonable and customary for this type of case.
- 7. ~~An upward adjustment (contingency multiplier) to the Lodestar amount is reasonable and appropriate in this case and should be adjusted upward by a~~

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE ATTORNEY FEES FOR PATRICK
WILLIAMS - 6

Jason Anderson
Law Offices of Jason Anderson
8015 15th Ave NW Ste 5
Seattle, WA 98117
P: 206-706-2882

1 multiple of 2.0 due to the contingency nature of this case with substantial risks
2 involved based on the fact that the case was handled on a contingency basis by
3 Plaintiff William's counsel. Plaintiff's counsel faced significant risk that no
4 fee would have resulted if the Court ruled in Defendant's favor based on the
5 difficulty and risky facts of this case as set forth above in the Findings of
6 Facts. Moreover, an upward adjustment by a multiple of 2.0 is further
7 appropriate because of the risk Plaintiff William's took in advancing costs in
8 excess of \$615.90 for the case as well as having to wait approximately two
9 years and six months to receive any type of compensation. Finally, the fact
10 that Plaintiff William's counsel, Jason Anderson was prevented from working
11 on other cases that did not involve these types of risks also justifies an upward
12 adjustment by a multiple of 2.0.

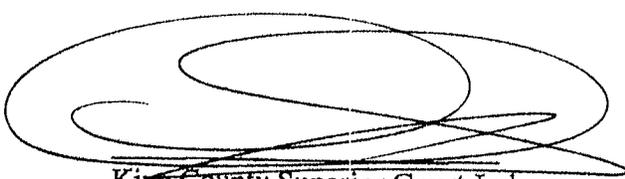
- 13 8. ~~The Court reasonably concludes that the Lodestar amount shall be adjusted~~
14 ~~upwards by a multiplier of 2.0 based upon the Findings of Fact and~~
15 ~~Conclusions of Law stated above. As a result, the Lodestar amount set forth in~~
16 ~~paragraph 3 in the amount of \$18,832.00 shall be adjusted upward by a~~
17 ~~multiple of 2.0 for an adjusted Lodestar amount of \$37,664.00.~~
- 18 9. Plaintiff Williams shall also recover his statutory costs pursuant to RCW
19 4.84.010 in the amount of \$615.90.
- 20 10. The total reasonable attorney's fees awarded to Plaintiff Williams shall be \$
21 25,722.00 which is the sum of: 18,832 (paragraph 8), \$3,120.00
22 (paragraph 4) and \$ 3770.00 (paragraph 5).
- 23 11. An Amended judgment against Defendant Tilaye shall be entered accordingly.
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12. The entire Judgment entered herein shall bear interest at the statutory rate set forth in RCW 4.56.110.

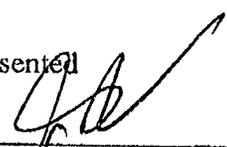
13. _____

Done in Open Court this 19 day of June, 2009



King County Superior Court Judge

Presented



Jason Anderson WSBA #32232
Attorney for Patrick Williams

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE ATTORNEY FEES FOR PATRICK
WILLIAMS - 8

Jason Anderson
Law Offices of Jason Anderson
8015 15th Ave NW Ste 5
Seattle, WA 98117
P: 206-706-2882

APPENDIX E

§ 7.06.060. Costs and attorneys' fees

(1) The superior court shall assess costs and reasonable attorneys' fees against a party who appeals the award and fails to improve his or her position on the trial de novo. The court may assess costs and reasonable attorneys' fees against a party who voluntarily withdraws a request for a trial de novo if the withdrawal is not requested in conjunction with the acceptance of an offer of compromise.

(2) For the purposes of this section, "costs and reasonable attorneys' fees" means those provided for by statute or court rule, or both, as well as all expenses related to expert witness testimony, that the court finds were reasonably necessary after the request for trial de novo has been filed.

(3) If the prevailing party in the arbitration also prevails at the trial de novo, even though at the trial de novo the appealing party may have improved his or her position from the arbitration, this section does not preclude the prevailing party from recovering those costs and disbursements otherwise allowed under chapter 4.84 RCW, for both actions.

APPENDIX F

§ 4.84.270. Attorneys' fees as costs in damage actions of ten thousand dollars or less --
When defendant deemed prevailing party

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280.

APPENDIX G

LCR 26. Disclosure of Possible Lay and Expert Witnesses and Scope of Protective Order.

(a) Scope. This rule shall apply to all cases governed by a Case Schedule pursuant to LCR 4.

(b) Disclosure of Primary Witnesses. Required Disclosures. (1) Disclosure of Primary Witnesses. Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons with relevant factual or expert knowledge whom the party reserves the option to call as witnesses at trial.

(2) Disclosure of Additional Witnesses. Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons whose knowledge did not appear relevant until the primary witnesses were disclosed and whom the party reserves the option to call as witnesses at trial.

(3) Scope of Disclosure. Disclosure of witnesses under this rule shall include the following information:

(A) All Witnesses. Name, address, and phone number.

(B) Lay Witnesses. A brief description of the witness's relevant knowledge.

(C) Experts. A summary of the expert's opinion and the basis therefor and a brief description of the expert's qualifications.

(4) Exclusion of Testimony. 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.

(c) Motions to Seal. A motion to seal must be made separately and cannot be submitted as part of a protective order. When the court has entered an order permitting a document to be filed under seal, the filing party must comply with the requirements of LCR 79(d)(6) a and (7).

(d) Discovery Limits. (1) Interrogatories. (A) Cases with Court-Approved Pattern Interrogatories. In cases where a party has propounded pattern interrogatories pursuant to LCR 33, a party may serve no more than 15 interrogatories, including all discrete subparts, in addition to the pattern interrogatories.

(B) Cases Without Court-Approved Pattern Interrogatories. In cases where a party has not propounded pattern interrogatories pursuant to LCR 33, a party may serve no more than 40 interrogatories, including all discrete subparts.

(2) Depositions. A party may take no more than 10 depositions, with each deposition limited to one day of seven hours; provided, that each party may conduct one deposition that shall be limited to two days and seven hours per day.

(3) Requests for Admission. A party may serve no more than 25 requests for admission upon the other party in addition to requests for admission propounded to authenticate documents.

(4) Modification. (A) Stipulation of the Parties. These limitations may be increased or decreased by written stipulation of the parties based on the scope of the legal and factual

issues presented. Nothing in this rule precludes the parties from engaging in the informal exchange of information in lieu of formal discovery. The parties may establish a written timetable for discovery and develop a discovery plan that will facilitate the economical and efficient resolution of the case. Such plan need not be submitted to the court for approval.

(B) Court Order. If the parties do not agree that discovery in excess of that provided by these rules is necessary, a party may file a motion to submit additional discovery pursuant to LCR 7(b). The proposed order shall include details of what additional discovery is required. A certificate of compliance as required by LCR 37(f) shall be filed with the motion.

(5) Discovery Requests in Violation of Rule. (A) Unless authorized by order of court or written stipulation, a party may not serve requests for admission or interrogatories or note depositions except as authorized by this rule.

(B) Absent a court order or stipulation altering the scope of discovery, the party served with interrogatories or requests for admission in violation of this rule shall be required to respond only to those requests, in numerical order, that comply with LCR 26(d). No motion for protective order is required. The party shall indicate in the answer section of the interrogatories or requests for admission that the party is refusing to respond to the remaining questions because they exceed the discovery limits.

(C) Absent a court order or stipulation altering the scope of discovery, a party served with a notice of deposition in violation of this rule shall inform all parties to the case that he or she will not be attending the deposition. This notification shall occur as soon as possible and, absent extraordinary circumstances, shall not be later than 24 hours before the scheduled deposition. Notice shall be in writing and shall be provided in the manner that is most likely to provide actual notice of the objection. Fax or email notification is permitted, provided (1) the parties have previously agreed to receive pleadings in this manner or (2) the objecting party also provides telephonic notification.

(6) Applicability. These discovery limitations do not apply to family law proceedings as defined by LFLR 1, supplemental proceedings undertaken pursuant to LCR 69(b), or other postjudgment proceedings.

(e) Discovery Not Limited. This rule does not modify a party's responsibility to seasonably supplement responses to discovery requests or otherwise to comply with discovery before the deadlines set by this rule.

APPENDIX H

Rule 26. General provisions governing discovery

(a) *Discovery methods* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) *Discovery scope and limits* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In general* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that: (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

(2) *Insurance agreements* A party may obtain discovery and production of: (i) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and (ii) any documents affecting coverage (such as denying coverage, extending coverage, or reserving rights) from or on behalf of such person to the covered person or the covered person's representative. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Structured settlements and awards* In a case where a settlement or final award provides for all or part of the recovery to be paid in the future, a party entitled to such payments may obtain disclosure of the actual cost to the defendant of making such payments. This disclosure may be obtained during settlement negotiations upon written demand by a party entitled to such payments. If disclosure of cost is demanded, the defendant may withdraw the offer of a structured settlement at any time before the offer is accepted.

(4) *Trial preparation: Materials* Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party

seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this section, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(5) *Trial preparation: Experts* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. (ii) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.

(B) A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(5)(A)(ii) and (b)(5)(B) of this rule; and (ii) with respect to discovery obtained under subsection (b)(5)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subsection (b)(5)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(6) *Discovery from treating health care providers* The party seeking discovery from a treating health care provider shall pay a reasonable fee for the reasonable time spent in responding to the discovery. If no agreement for the amount of the fee is reached in advance, absent an order to the contrary under section (c), the discovery shall occur and the health care provider or any party may later seek an order setting the amount of the fee to be paid by the party who sought the discovery. This subsection shall not apply to the provision of records under RCW 70.02 or any similar statute, nor to discovery authorized under any rules for criminal matters.

(7) *Treaties or conventions* If the methods of discovery provided by applicable treaty or

convention are inadequate or inequitable and additional discovery is not prohibited by the treaty or convention, a party may employ the discovery methods described in these rules to supplement the discovery method provided by such treaty or convention.

(c) *Protective orders* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that the contents of a deposition not be disclosed or be disclosed only in a designated way; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) *Sequence and timing of discovery* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) *Supplementation of responses* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.

(f) *Discovery conference* At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

- (1) A statement of the issues as they then appear;
- (2) A proposed plan and schedule of discovery;
- (3) Any limitations proposed to be placed on discovery;
- (4) Any other proposed orders with respect to discovery; and
- (5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.

Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party.

Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by rule 16.

(g) *Signing of discovery requests, responses, and objections* Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which

may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) *Use of discovery materials* A party filing discovery materials on order of the court or for use in a proceeding or trial shall file only those portions upon which the party relies and may file a copy in lieu of the original.

(i) *Motions; conference of counsel required* The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b). Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.

(j) *Access to discovery materials under RCW 4.24*

(1) *In general* For purposes of this rule, "discovery materials" means depositions, answers to interrogatories, documents or electronic data produced and physically exchanged in response to requests for production, and admissions pursuant to rules 26-37.

(2) *Motion* The motion for access to discovery materials under the provisions of RCW 4.24 shall be filed in the court that heard the action in which the discovery took place. The person seeking access shall serve a copy of the motion on every party to the action, and on nonparties if ordered by the court.

(3) *Decision* The provisions of RCW 4.24 shall determine whether the motion for access to discovery materials should be granted.

APPENDIX I

Rule 7.3. Costs and attorney fees

The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. The court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo. "Costs" means those costs provided for by statute or court rule. Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule.

APPENDIX J

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

PATRICK A. WILLIAMS, and ANDREA HARRIS, his wife, and ANDREA HARRIS as guardian for ELENA-GENEVIEVE HARRIS, a minor child, and JOSHUA HARRIS, a minor child,

Plaintiffs,

v.

FESSEHA K. TILAYE and JANE DOE TILAYE, his wife and the marital community composed thereof, and MAMUYE A. AYELEKA d.b.a. ORANGE CAB 485 and JANE DOE AYELEKA, his wife and the marital community composed thereof,

Defendants.

NO. 07-2-14407-2 KNT

DEFENDANTS' FIRST INTERROGATORIES TO PLAINTIFF ANDREA HARRIS

TO: Andrea Harris, Plaintiff; and

TO: Robert D. Kelly, Counsel of Record.

The following interrogatories are pattern interrogatories, which the undersigned certifies are in compliance with King County Local Rule 33. In accordance with Washington Superior Court Rules 26 and 33, please answer each of the following interrogatories separately, fully, in writing and under oath. Each answer must be as complete and straightforward as the information reasonably available to you permits after reasonable inquiry, including the information possessed by your attorneys or agents. If an interrogatory cannot be answered completely, answer it to the extent possible.

DEFENDANTS' FIRST INTERROGATORIES TO PLAINTIFF ANDREA HARRIS - 1

MERRICK, HOFSTEDT & LINDSEY, P S
ATTORNEYS AT LAW
3101 WESTERN AVENUE, SUITE 200
SEATTLE, WASHINGTON 98121
(206) 882-0610

1 The answers are to be signed by the person to whom they are addressed and must be
2 served on all parties within thirty (30) days after the service of the interrogatories unless these
3 interrogatories were served upon you along with the service of the summons and complaint in
4 which case the answers must be served within forty (40) days.

5 **NOTE:** Answers must be in compliance with the Civil Rules, Local Rules, and
6 Washington State case law, including the duty set forth in CR 26(e).

7 **DEFINITIONS**

8 Words in **BOLDFACE CAPITALS** in these interrogatories are defined as follows:

9 1. **INCIDENT** includes the circumstances and events surrounding the alleged
10 accident, injury, or other occurrence giving rise to this action lawsuit.

11 2. **PERSON** includes a natural person, firm, association, organizations, partnership,
12 business, trust, limited liability company, corporation, or public entity.

13 3. **HEALTH CARE PROVIDER** means a person who is licensed, certified,
14 registered, or otherwise authorized by the law to provide health care in the ordinary course of
15 business or practice of a profession.

16 **SUBMITTING PARTY'S CERTIFICATION**

17 The undersigned attorney for the defendants certifies pursuant to KCLR 33(b) and (c)
18 that these interrogatories are appropriate to the facts of this case and are identical in substance to
19 the Pattern Interrogatories approved by the King County Superior Court.

20 DATED this 21st day of November, 2007.

21 MERRICK, HOFSTEDT & LINDSEY, P.S.

22
23 By 
24 Philip R. Meade, WSBA #14671
25 Of Attorneys for Defendants Tilaye and Ayeleka
26 and Orange Cab 485

DEFENDANTS' FIRST INTERROGATORIES TO
PLAINTIFF ANDREA HARRIS - 2

MERRICK, HOFSTEDT & LINDSEY, P.S.
ATTORNEYS AT LAW
3101 WESTERN AVENUE, SUITE 200
SEATTLE, WASHINGTON 98121
(206) 682-0810

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2 (c) For all continuing complaints, state whether the complaint is subsiding, remaining
3 the same or becoming worse; and state the frequency and duration of the
4 complaint.

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7 **ANSWER:**

8 **INTERROGATORY NO. 22:** List all medications you have taken, including non-
9 prescription and prescription medications, as a result of the **INCIDENT**, and provide the name,
10 address, and telephone number of the pharmacy or other facility that provided the medication
11 and, if a prescription, the prescribing **HEALTH CARE PROVIDER**.

12 **ANSWER:**

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15 **INTERROGATORY NO. 23:** Please provide an itemized list of all medical expenses
16 claimed in this lawsuit to the present.

17 **ANSWER:**

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21 **INTERROGATORY NO. 24:** Has any **HEALTH CARE PROVIDER** advised you
22 that you may require future care or additional treatment for any injuries related to the
23 **INCIDENT**? If so, for each injury state: the name of each such health care provider; the injury
24 complained of; and the nature, duration, and estimated cost of future care or additional treatment.

25 **ANSWER:**

26
DEFENDANTS' FIRST INTERROGATORIES TO
PLAINTIFF ANDREA HARRIS - 10

MERRICK, HOFSTEDT & LINDSEY, P. S.
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3101 WESTERN AVENUE, SUITE 200
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

PATRICK A. WILLIAMS, and ANDREA HARRIS, and ANDREA HARRIS as guardian for ELENA-GENEVIEVE HARRIS, a minor child, and JOSHUA HARRIS, a minor child,
Plaintiffs,

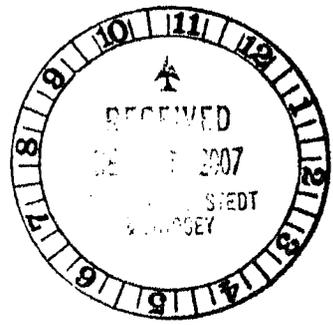
Case No.: 07-2-14407-2 KNT
ANSWERS OF PLAINTIFF ANDREA HARRIS TO DEFENDANT'S INTERROGATORIES

vs.

FESSEHA K. TILAYE and JANE DOE TILAYE, his wife and the marital community composed thereof, and MAMUYE A. AYELEKA d.b.a. ORANGE CAB 485 and JANE DOE AYELEKA, his wife and the marital community composed thereof,

Defendants.

315.039



1. Andrea Harris
maiden name: Arnold
9225 Woodlawn Ave. N.
Seattle, WA 98103
(206) 527-5211
b. 5/14/66

ANSWERS OF PLAINTIFF ANDREA HARRIS
TO DEFENDANT'S INTERROGATORIES - 1

Robert D. Kelly
1800 9th Ave., Suite 1630
Seattle, WA 98101-1322
(206) 621-1337

1 Dr. Marisa E. De Lisle, D.C.
Northwest Family Chiropractic
2 14709 Aurora Ave. N.
Shoreline, WA 98133
3 (206) 363-4478
FAX (206) 363-4640
4 Lisa (866) 870-5879

5 Jamie Jefferson, LMP
14709 Aurora Ave. N.
Shoreline, WA 98133
6 (206) 363-4478
FAX (206) 363-4640

7 Treatment was sought because of pain in neck, back and muscles. The treatments included
8 chiropractic adjustments and massage therapy. See medical records. There were about six months of
9 treatments. At the end of the treatments, the condition was improved, but not completely healed.

- 10 21. Yes.
- 11 a. Neck, shoulder, muscle pain. Headaches.
 - 12 b. The conditions improved very much, but did not completely heal.
 - 13 c. The conditions are staying about the same. They are apparent every day, but are worse
14 on occasion. Exercises help.

15 22. Medications included over-the-counter medications like Ibuprofen.

16 23. The chiropractor bill was \$4,674 and the massage therapy was \$1,358.

17 24. Dr. De Lisle recommended further treatments.

18 25. No.

19 26. I hope not.

20 27. When I drive, I get shoulder pain. If I sit for a long time, I have pain. I was frightened at the time
21 of the collision. I was concerned about my kids. I was worried about the financial obligations for the
22 health care. At the time of the collision, I was in shock. The neck pain, back pain, and headaches started
23 the next day. They were severely intense pains. They improved with chiropractic treatments to being
24 moderate to mild pains. After the collision, sitting and reading was painful. I am a single mother and I
25 have to carry on. Standing too long also was painful.

28. N/A

ANSWERS OF PLAINTIFF ANDREA HARRIS
TO DEFENDANT'S INTERROGATORIES - 4

Robert D. Kelly
1800 9th Ave., Suite 1630
Seattle, WA 98101-1322
(206) 621-1337

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29. Not that I can think of at this time.

30. None.

31. No.

32. I have bi-polar II and have medications for it.

33. No.

34. No.

35. No.

36. We expect to call as expert witnesses the health care providers previously identified, who would testify about the complaints, observations, diagnoses, and treatments related to the subject motor vehicle collision and the necessity of the treatments and the reasonableness of the charges therefore.

Dated this 26th day of December, 2007.

26

Robert D. Kelly
Robert D. Kelly, WSBA 27522

ANSWERS OF PLAINTIFF ANDREA HARRIS
TO DEFENDANT'S INTERROGATORIES - 5

Robert D. Kelly
1800 9th Ave., Suite 1630
Seattle, WA 98101-1322
(206) 621-1337

APPENDIX K

LAW OFFICES OF
DEAN STANDISH PERKINS

A ASSOCIATES
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Paralegal

MICHELLE TIFFANY
Paralegal
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LESLIE TRUAX
Paralegal / Receptionist
Direct Line (425) 868-2193

January 10, 2006

IAT Specialty
Mr. Mike Fanoele
PO Box 3328
Omaha, NE 68103

Sent Via Fax: (402) 342-0097

Re: Our Client: Andrea Harris and Patrick Williams
Your Insured: Orange Cab
Claim No.: 016530324777
Date of Loss: 12/25/05

Dear Mr. Fanoele:

Representation: We have been retained to represent the above-referenced claimant in all matters arising from the accident on the above date.

Coverage: We understand that your company provides liability coverage to the other party. We would appreciate your reply, in writing, verifying that you are extending coverage in this situation. Please provide our office with verification of your policy limits.

Request Medical Records and Statements: Please send us copies of all correspondence, medical bills, medical reports or statements you may have obtained.

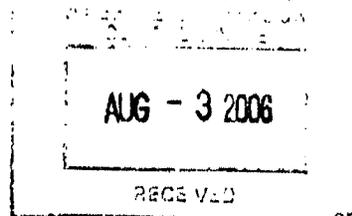
Request Photographs: Please forward to us all photographs you may have of the property damage or injuries sustained by the parties in this accident. Advise us if special arrangements need to be made to obtain copies of photographs.

Revoke Authorizations: All medical and employment authorizations are revoked, and use thereof is expressly prohibited.

Respectfully,


Dean Standish Perkins
Attorney at Law

LAW OFFICES OF
DEAN STANDISH PERKINS
 & ASSOCIATES
 1800 NINTH AVENUE, SUITE 1620
 SEATTLE, WA 98101-1322
 (206) 467-0701 FAX (206) 623-2373



DEAN S. PERKINS
 Attorney at Law

SUSAN B. COHODE July 26, 2006
 Attorney at Law

Also Admitted In Illinois
 Direct Line (425) 430-5699

SCOTT STAFNE
 Attorney at Law
 Of Counsel

Washington Oregon Claims Service
 Ms. Toni Kief
 PO Box 25549
 Seattle, WA 98165

BERT SEWELL
 Paralegal

MICHELE TIFFANY
 Paralegal
 Direct Line (425) 673-7583

LESLIE TRUAX
 Paralegal / Negotiator
 Direct Line (425) 427-0119

ERIC JOHN MAKUS
 WSBA Rule 6 Law Clerk

Re: Our Client: Patrick Williams
 Your Insured: Orange Cab
 Claim No.: 0616530324777
 Your File: 15759-SE
 Date of Loss: 12/25/05

Dear Ms. Kief:

Purpose of Writing: I write at this time to provide you with all medical documentation as it relates to injuries sustained by our client, Patrick Williams in the above mentioned motor vehicle collision.

As you are familiar with the facts of the collision I will provide to you a brief overview of Mr. Williams's injuries and treatment.

Injuries/Treatment

When the collision occurred Patrick Williams and his family were on there way tot he airport to fly to Arizona to spend an extended vacation with family into January 2006.

For Patrick his discomfort did not become noticeable until the following morning, December 26th. Figuring that his discomfort would subside Patrick began self treatment with the use of Ibuprofen and stretching in the morning and at night to loosen the tightness in his neck and back.

By the end of December Patrick's discomfort had not subsided. He was continuing to experience discomfort in his neck, low back as well as bilateral arm pain. As a result Patrick presented himself to chiropractic care with Northwest Family Chiropractic.

Northwest Family Chiropractic: Upon presentation to Dr. Delisle, Patrick was experiencing neck pain, middle back pain as well as bilateral arm pain. He notes that he is now frequently awakened in the night with bilateral hand numbness and that on several occasions he has felt as though his low back would lock up on him. His pain was beginning to interfere with his ability to perform his duties at work k as he is unable to lift as much due to his low back pain.

After a thorough examination, Dr. Delisle diagnosed Patrick with the following:

- 839.0 Cervical Subluxations
- 839.21 Thoracic Subluxations
- 839.41 Sacrococcygeal Subluxations
- 839.20 Lumbar Subluxations

Dr. Delisle began specific chiropractic adjustments to Patrick's spine. He responded favorably to treatment and as a result, was released from corrective care on May 17, 2006.

ECONOMIC LOSSES

PRESENT MEDICAL	DATE	AMOUNT
Northwest Family Chiropractic	2/1/06 – 5/17/06	\$3862.00
Northwest Family Chiropractic (massage)	2/24/06 – 5/1/06	\$990.00
TOTAL ITEMIZED LOSSES		\$4852.00

Settlement Proposal Considering the damages sustained by our client as a result of another's negligence, we are willing to resolve Patrick's injury claim in the amount of \$21,300 and look forward to hearing from you prior to month's end.

Respectfully,

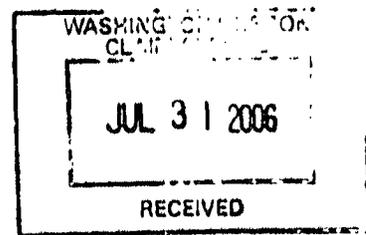

DEAN STANDISH PERKINS
 Attorney at Law

Respectfully,


LESLIE J. TRUAX
 Paralegal Negotiator

LAW OFFICES OF
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July 26, 2006

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ERIC JOHN MAKUS
WSBA Rule 6 Law Clerk

Washington Oregon Claims Service
Ms. Toni Kief
PO Box 25549
Seattle, WA 98165

Re: Our Client: Andrea Harris, Joshua Harris and Elena Harris
Your Insured: Orange Cab
Claim No.: 0616530324777
Your File: 15759-SE
Date of Loss: 12/25/05

Dear Ms. Kief:

Purpose of Writing: I write at this time to provide you with all medical documentation as it relates to injuries sustained by our clients in the above mentioned motor vehicle collision.

As you are familiar with the facts of the collision I will provide to you a brief overview of Andrea Harris and her children's injuries and treatment.

Injuries/Treatment

When the collision occurred Andrea Harris and her family were on there way to the airport to fly to Arizona to spend an extended vacation with family into January 2006.

Andrea Harris: Within an hour of the motor vehicle accident Andrea felt minor neck stiffness and pain. Later that day Andrea developed a headache as well as bilateral shoulder pain. Andrea's pain continued to worsen in the weeks following the collision. Concerned about her lack of insurance, Andrea did not present herself to care until February 1, 2006.

Northwest Family Chiropractic: On February 1, 2006 upon presentation to Dr. Delisle, Andrea's chief complaints were as follows:

- Constant headaches
- Neck pain and stiffness

AUG 04 2006 ITD

- Low back pain
- Has sharp pains in her neck that prevent her from relaxing her head

After a thorough examination, Dr. Delisle diagnosed Andrea with the following:

- 839.0 Cervical Subluxations
- 839.21 Thoracic Subluxations
- 839.20 Lumbar Subluxations

With specific spinal adjustments Andrea made substantial improvement. On May 24, 2006 Andrea was released from corrective care with some residual cervical tightness.

Joshua Harris:

Joshua Harris is 11 years old. A back seat passenger at the time of this collision, Joshua complained of headaches to his mother, Andrea Harris, following the collision. Joshua has been prone to headaches that occur one time ever three to four weeks prior to the collision, however, the frequency and intensity became severe following the collision of December 25, 2005.

Following the collision Joshua began experiencing headaches one time per week – oftentimes these headaches were accompanied by neck pain. His headaches would cause him to be sensitive to light and oftentimes to vomit. On April 11, 2006 Joshua was taken to Dr. Delisle for treatment of his injuries.

Northwest Family Chiropractic: ON April 11, 2006 Joshua was examined by Dr. Delisle for injuries sustained in the December 25, 2005 motor vehicle collision. Upon presentation to Dr. Delisle Joshua's chief complaints were weekly headaches that were oftentimes debilitating and accompanied by neck pain and tightness.

After a thorough examination, Dr. Delisle diagnosed Joshua with the following:

- 839.0 Cervical Subluxation
- 784.0 Headache
- 839.21 Thoracic Subluxation
- 739.1 Segmental dysfunction, cervical

Joshua responded well to specific spinal adjustments and was released from care on June 19, 2006.

Elena Harris: Elena Harris is three years old and was a restrained back seat passenger in her car seat at the time of this collision. Following the collision, on several occasions, Elena would grab at her neck and complain that she was having neck pain.

Andrea took Elena to Northwest Chiropractic where she underwent four chiropractic adjustments. Her complaints of neck pain stopped and she was released from care on May 3, 2006.

ECONOMIC LOSSES: Andrea

PRESENT MEDICAL	DATE	AMOUNT
Northwest Family Chiropractic	2/1/06 – 5/27/06	\$4674.00
Jamie Jefferson, LMP	2/24/06 – 4/17/06	\$1358.00
TOTAL ITEMIZED LOSSES		\$6032.00

ECONOMIC LOSSES: Joshua

PRESENT MEDICAL	DATE	AMOUNT
Northwest Family Chiropractic	4/10/06 – 6/19/06	\$2218.00
TOTAL ITEMIZED LOSSES		\$2218.00

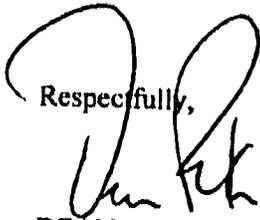
ECONOMIC LOSSES: Elena

PRESENT MEDICAL	DATE	AMOUNT
Northwest Family Chiropractic	4/10/06 – 5/3/06	\$248.00
TOTAL ITEMIZED LOSSES		\$248.00

AUG 04 2006 ITD

Settlement Proposal Considering the damages sustained by our client as a result of another's negligence, we are willing to resolve the injury claims listed above as follows:

- Andrea: \$24,600.00
- Joshua: \$12,300.00
- Elena: \$6500.00

Respectfully,


DEAN STANDISH PERKINS
Attorney at Law

Respectfully,

LESLIE J. TRUAX
Paralegal Negotiator