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No. ~~608495-1~~

COURT OF APPEALS  
DIVISION ONE  
OF THE STATE OF WASHINGTON

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TOLA K. ARERO and SHOLE D. ABUNA,

Plaintiffs/Respondents,

v.

KRISTINA R. BAZLEY,

Defendant/Appellant.

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**BRIEF OF RESPONDENT SHOLE D. ABUNA**

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Robert D. Kelly, WSBA # 27522  
For Plaintiff / Respondent Shole D. Abuna,

LAW OFFICES OF ROBERT D. KELLY & ASSOCIATES  
1800 9<sup>th</sup> Ave., Suite 1630  
Seattle, WA 98101-1322  
(206) 621-1337

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Plaintiffs/Respondents,

v.

KRISTINA R. BAZLEY and JOHN DOE, her husband, and both as a marital  
community,

Defendants/Appellants.

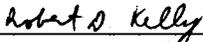
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**BRIEF OF RESPONDENT SHOLE ABUNA**

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DATED this 29<sup>th</sup> day of December, 2009.

LAW OFFICES OF  
ROBERT D. KELLY & ASSOCIATES

  
\_\_\_\_\_  
Robert D. Kelly, WSBA#27522  
1800 9<sup>th</sup> Ave., Suite 1630  
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(206) 621-1337  
For Shole D. Abuna, Respondent

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**1. Introduction.**

This appeal is about the trial court's right to exclude alleged evidence where the unduly prejudicial effect would have outweighed the probative value, and where the alleged evidence was irrelevant because it was speculation and conjecture.

**2. Assignments of Error and Issues.**

It is Plaintiff Abuna's position that the trial court did not commit reversible error in any of the rulings in this case. Issues for the court to consider may include the following:

**2.1** Whether the Defendant waived review of exclusion of witnesses and parts of documents by failing to make an adequate offer of proof?

**2.2** Whether the record and law support the trial court's conclusion that an order excluding surprise witnesses was a justifiable response to there having been insufficient identification of the witnesses before trial when specific identification was required by two pre-trial orders, the King County Local Rules, the Civil Rules for Superior Court, and equitable principles?

**2.3** Whether the record and law support the trial court's conclusion that an order redacting notations from Defendant's medical records was justifiable when the notations were irrelevant (speculation and

conjecture), lacked foundation, and were therefore not admissible even under the business records exception?

**2.4** Whether the record and law support the trial court's conclusion that an order granting additur or in the alternative a new trial to co-Plaintiff Tola Arero was justifiable when the jury's verdict was grossly inadequate for co-Plaintiff Tola Arero?

**2.5** Whether the Court of Appeals should deny Defendant's request for attorney's fees?

**2.6** Whether the Court of Appeals should award attorney's fees and costs to Plaintiffs?

**3. Statement of the Case.**

**3.1 Collision.**

On June 14, 2005, Plaintiff Shole Abuna was sitting in a properly parked car beside Stewart Street in Seattle. (CP 24-27.) Plaintiff Tola Arero was the owner of the parked car. (CP 25.) The Plaintiffs' car was being used for business purposes - it was for hire as a limo / town car. (RP 08/30/2007, p. 147-151; CP 25.)

Defendant Bazley was driving west on Stewart. (CP 24-27.) Defendant Bazley fell asleep at the wheel and her vehicle crashed into Plaintiffs' parked car. (CP 24-27.) Defendant Bazley's velocity at impact was about 30-40 miles per hour. (CP 539; RP 09/04/2007, p. 115.)

An ambulance responded to the scene of the accident to attend to Defendant Bazley and one of the Emergency Medical Technician's (EMT's) wrote in his record "Poss: syncope". (CP 30.) Defendant Bazley was taken to Swedish Medical Center / First Hill where unidentified personnel made a chart note saying "?Venous LE pooling resulted in syncope". (CP 33.)

### **3.2 Litigation.**

Plaintiffs filed suit on May 4, 2006. (CP 3.) During the course of the ensuing litigation, Defendant Bazley attempted to raise the "sudden illness" defense. (RP 08/30/2007, p. 130.) Her defense failed because she did not have any "illness" and she admitted the onset of her unconsciousness or sleep was not "sudden". (RP 09/06/2007, p. 16.)

Plaintiff gave Defendant Interrogatories in May of 2006. (CP 437-472.) Interrogatory 7 asked the Defendant to list all sicknesses or diseases suffered during the last ten years, giving the nature, dates, and length of illness. (CP 443.) Defendant's answer was "Herpes". (CP 454.) Interrogatory 8 asked for the identities of Defendant's health care providers. (CP 443.) Defendant's answer named six health care providers and four health care companies. (CP 454.) Defendant's answers did not give the names of EMT Hoggart or Dr. Goodfried or the specific addresses or telephone numbers to contact them. (CP 454.) The ambulance

company was identified by an address in California. (CP 454.) Interrogatories 12 and 13 asked for Defendant to identify her lay and expert witnesses. (CP 447-448.) Defendant's answers did not name EMT Hoggart or Dr. Goodfried. (CP 456-457.) Defendant promised to provide identifying information upon retaining any expert witnesses. (CP 457.)

Defendant Bazley moved for Summary Judgment. (CP 13-229.) To bolster her motion, Defendant submitted medical records from unidentified makers (CP 29, 30, 32, and 33) and a declaration written by Defendant and signed by Dr. Schocket, OB/GYN. (CP 38-39.) The trial court eventually denied Defendant's motion. (CP 227-229.)

In the course of arbitration, Plaintiffs provided to Defendant a witness list with names, addresses, and telephone numbers of witnesses along with summaries of the witnesses expected testimonies. (CP 791-792.) Defendant continued to rely on a declaration written by Defendant and signed by Dr. Schocket, OB/GYN. (CP 784.)

### **3.3 Court Order of May 8, 2007.**

The Order Setting Schedule for Arbitration Trial de Novo of 05/08/2007 set forth a Case Schedule in Section II. (CP 237.) The Order required a Discovery Cutoff on 07/09/2007, an Exchange of Witness & Exhibit Lists & Documentary Exhibits on 08/06/2007, a Joint Confirmation of Trial Readiness on 08/06/2007, and a Joint Statement of

Evidence by 8/20/2007. (CP 237.) The Order provided references to applicable provisions of King County Local Rule 16. (CP 237.) The 05/08/2007 Order said "IT IS HEREBY ORDERED that all parties shall comply with the foregoing schedule and that sanctions, including but not limited to those set forth in Rule 37 of the Superior Court Civil rules, may be imposed for non-compliance". (CP 237, *emphasis in original*.) The Order set the trial date for 08/27/2007. (CP 237.)

### **3.4 Depositions of experts.**

After months of requesting the deposition of Defendant's Dr. Schocket, Plaintiffs issued a subpoena and noted the Deposition of Dr. Schocket for 07/09/2007, the last day of the discovery period. (CP 240-241.) By agreement of the parties, to cooperate with the doctor's alleged schedule, Plaintiffs re-noted the Deposition of Dr. Schocket for 08/01/2007. (CP 247-248.) The deposition occurred on that date. (CP 608.)

Dr. Schocket testified that she had no special knowledge about sleep disorders or syncope. (CP 613.) Dr. Schocket testified that she had no opinion regarding the mechanism of Defendant Bazley's becoming unconscious before the motor vehicle collision of June 14, 2005. (CP 613-614.) Dr. Schocket testified that she had no knowledge of Defendant Bazley having had any history of any possible causes of syncope (cardiac

problems, reflex or orthostatic syncope, neurological problems or psychiatric problems). (CP 614.) Dr. Schocket testified she could not distinguish between falling asleep and having a syncopal event. (CP 616.) Dr. Schocket testified that she had never encountered a theory of a fetus pressing against a vein in a pregnant woman's body and causing unconsciousness. (CP 617.) Dr. Schocket further testified that she had never encountered such a theory in her practice, either. (CP 617.)

Plaintiffs properly identified an engineering expert well in advance of the discovery cutoff and Defendant noted and took the Deposition of Plaintiffs' engineering witness. (CP 583-590.)

### **3.5 Court Order of July 5, 2007.**

The Pre-Trial Order and Order Requiring Completion of Counsel/Party(ies) Joint Confirmation of Trial Readiness Not Later Than 08/06/2007 issued on or about 07/05/2007. (CP 243.) The Order specifically stated "NONCOMPLIANCE WITH THE TERMS OF THE ABOVE ORDER may result in the exclusion of evidence ...." (CP 243, *emphasis in original*.) The Order re-iterated the requirement for witness lists by 08/06/2007. (CP 244.) The Order again warned "[f]ailure to adhere to the case schedule or to disclose witnesses, as provided for in LR 26 and LR 16, shall result in the exclusion of the witnesses' testimony at

the time of trial, or such other sanctions as the court deems appropriate". (CP 244.)

### **3.6 Pre-trial documents.**

The parties prepared and filed a Joint Confirmation Regarding Trial Readiness on or about 07/25/07. (CP 250-251.) In it, Defendant Bazley represented that she was "aware of all deadlines and requirement in the Pretrial Order" and certified to the Court regarding trial readiness. (CP 250-251.)

Defendant Bazley filed her ER 904 Notice on 07/27/2007. (CP 252-255.) In it, she did not provide an address or telephone number for the alleged maker of the ambulance service report. (CP 253.) The ER 904 Notice also said the author or maker of medical records from Swedish was an "emergency room physician" and gave the address of Swedish Medical Center, but no telephone number. (CP 253.) Plaintiffs made timely objections to Defendant's ER 904 Notice. (CP 410-412.) Plaintiffs objected to the Ambulance Service Report based, *inter alia*, on lack of relevance and lack of foundation. (CP 410.) Plaintiffs also objected to the medical records of Defendant Bazley from Swedish Medical Center based, *inter alia*, on lack of relevance and lack of foundation. (CP 411.)

Defendant Bazley filed a Witness and Exhibit List on or about 08/03/2007, approximately twenty-three days after the discovery cutoff

and twenty-six days before the start of trial. (CP 259, 633-635.) Defendant Bazley's list of Witnesses then named "EMT Anthony Hoggart" and "attending emergency room physician from Swedish Medical Center First Hill." (CP 260.) Defendant Bazley did not include addresses or telephone numbers of either person. (CP 260.)

The parties prepared a Joint Statement of Evidence. (CP 416-423, 643-649.) The parties completed the document on 08/15/2007. (CP 423, 649.) Defendant Bazley did not include addresses or telephone numbers of either EMT Hoggart or the attending ER physician. (CP 418, 645.) Defendant Bazley did not name the ER attending physician. (CP 418, 645.)

On 08/15/2007, fourteen days before the start of trial, Defendant wrote a "Supplemental Witness and Exhibit List". (CP 413-415.) It said the ER physician was "believed to be Dr. Goodfried". (CP 414.) The document did not provide a specific address or telephone number for either EMT Hoggart or Dr. Goodfried. (CP 414.) Defendant mailed the document to Plaintiff and the court on 08/15/07. (CP 415.) The court received the document on 08/16/2007. (CP 413.)

The court received the Joint Statement of Evidence document on 08/17/2007. (CP 416.)

### 3.7 Motions *in limine*.

On or about August 16-17, 2007, all parties moved *in limine* for the court to exclude any reference to or testimony by an expert or witness who had not been previously identified. (CP 427, CP 676-677.) Defendant Bazley based the motion on Lampard v. Roth, 38 Wn. App. 198, 684 P.2d 353 (1984), ER 402, and ER 403. (CP 427.) Defendant Bazley claimed that any such evidence or testimony would be unduly prejudicial. (CP 427.)

Judge Inveen considered the motions *in limine* in open court with counsel for all parties present and found Defendant Bazley had not met the disclosure requirements for EMT Hoggart and Dr. Goodfried. (RP 08/29/2007, pages 12-13.) Judge Inveen ruled EMT Hoggart and Dr. Goodfried would not be allowed to testify. (RP 08/29/2007, p. 13.) Defendant Bazley then made what amounted to a motion to reconsider. (RP 08/29/2007, pp. 13-26.) Judge Inveen reserved ruling until the next day and did not reverse her ruling. (RP 08/30/2007, pp. 4-5.) Defendant Bazley then made yet another (third) attempt to persuade Judge Inveen to reconsider the exclusion of EMT Hoggart and Dr. Goodfried. (RP 08/30/2007, pp. 5-18.) Judge Inveen confirmed her ruling again. (RP 08/30/2007, p. 18.)

Defendant Bazley again (the fourth time) moved to allow EMT Hoggart and Dr. Goodfried to testify. (RP 09/04/2007, pp. 25-26.) The court reserved ruling at that time. (RP 09/04/2007, p. 26.)

Plaintiffs Arero and Abuna also moved, *in limine*, to exclude any speculation and conjecture regarding Defendant Bazley's mechanism of unconsciousness at the wheel of her car. (CP 678; RP 08/30/2007, pp. 32-37.) Judge Inveen ruled to exclude parts of Defendant Bazley's medical records mentioning syncope because they were the "musing of a medical care practitioner wondering if that is, in fact, what happened", not "diagnosis to a reasonable degree of medical certainty". (RP 08/30/2007, p. 37.)

After redaction of the Defendant's proposed medical records to exclude speculation about syncope, Judge Inveen admitted the exhibits. (RP 09/05/2007, pp. 2-11.)

### **3.8 Trial.**

At trial, Plaintiff Abuna testified regarding his lost earnings. (RP 09/05/2007, pp. 16-17.) Plaintiff Arero testified to having paid \$12,000 for his car. (RP 09/05/2007, p. 68.) He also testified regarding lost earnings, towing, and storage charges. (RP 09/05/2007, pp. 69, 73.)

Plaintiffs' engineering expert, Timothy Moebes, testified that the circumstances of the collision were consistent with Defendant Bazley having committed pedal error. (RP 09/04/2007, p. 140.)

Dr. Luanne Schocket appeared and testified on behalf of Defendant Bazley. (RP 09/05/2007, pp. 49-65.) Defendant Bazley testified on her own behalf. (RP 09/06/2007, pp. 5-27.) Defendant Bazley told her version of the story about the time of the collision. (RP 09/06/2007, pp. 16-17.) The Defense rested. (RP 09/05/2007, p. 27.)

Plaintiff Arero's theory in closing was that Defendant Bazley had committed pedal error and could not remember it. (RP 09/06/2007, p. 46.) Plaintiff Abuna's theme in closing was that Defendant Bazley had fallen asleep at the wheel. (RP 09/06/2007, pp. 53-55, 78-79.) Defendant Bazley's final argument relied on the "sudden illness" theory. (RP 09/06/2007, pp. 61-73.)

The jury returned a verdict for the Plaintiffs on 09/07/2007. (CP 894.) The verdict found Plaintiff Arero's damages to have been \$195. (CP 894.) Plaintiff Arero later moved for, and obtained, an order granting additur or a new trial. (CP 932-938, 1061-1062, 1157-1158.) On October 19, 2007, Plaintiff Abuna obtained judgment on his portion of the verdict plus costs in the total amount of \$9,395.10. (CP 1136-1137.)

Defendant took a first appeal (which was essentially identical to the current appeal) and the court dismissed the appeal because the Defendant/Appellant's claims were not yet appealable as a matter of right. The court further concluded that Defendant's claims did not merit discretionary review under RAP 2.3(b).

Plaintiff Arero had a second trial and obtained a substantially improved verdict on the amount of his damages.

#### **4. Summary of Argument.**

Defendant Bazley did not make an adequate offer of proof to provide grounds for appeal.

The trial court properly excluded unduly prejudicial evidence (testimony of surprise witnesses) in accordance with ER 403. The trial court properly excluded irrelevant or unduly prejudicial evidence (speculative and conjectural notations in medical records) in accordance with ER 402 and ER 403.

The trial court ruled correctly in granting co-Plaintiff Arero additur or a new trial because the verdict for co-Plaintiff Arero was obviously inadequate.

Defendant Bazley's appeal is frivolous. The court should deny Defendant Bazley's request for attorney's fees and costs. The court should

order Defendant/Appellant Bazley to pay Plaintiffs'/Respondents' attorneys' fees and costs.

**5. Authority and Argument.**

**5.1 Defendant Bazley did not make an adequate offer of proof.**

**5.1.1 Standard of Review.**

Whether or not an adequate offer of proof was made to preserve issues for appeal is an issue of law for the court of appeals to consider *de novo*. Tomlinson v. Bean, 26 Wn.2d 354, 362, 173 P.2d, 972, (1946).

**5.1.2 The Defendant waived review of exclusion of her witnesses and parts of her documents by failing to make an adequate offer of proof.**

"In order to obtain appellate review of the exclusion of evidence by the trial court, there must be an offer of proof sufficiently definite and comprehensive to advise the appellate court whether or not the party was prejudiced by the exclusion of the evidence". Lyle v. Heidner, 45 Wn.2d 806, 814, 278 P.2d 650 (1954).

Regarding the exclusion of the testimony of EMT Hoggart or Dr. Goodfried, Defendant Bazley failed to preserve the alleged error for appeal by failing to make an adequate offer of proof as to what testimony would have been elicited if the witnesses had been permitted to testify.

Where a court excludes evidence, ER 103 says error "may not be predicated upon a ruling which admits or excludes evidence unless ... the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked".

There are several acceptable forms for an offer of proof. *See* Tegland, Karl B., Evidence Law and Practice, 5 WA Prac. 85 - 95 (2007). An offer of proof may be in the form of an oral or written statement from counsel. Thor v. McDearmid, 63 Wn. App. 193, 204, 817 P.2d 1380 (1991). An offer of proof may be in the form of a signed, written statement from a witness. State v. Guloy, 104 Wn.2d 412, 429, 705 P.2d 1182 (1985). The preferable form for an offer of proof is to have the witness testify in the absence of the jury. Mad River Orchard, Inc. v. Krack, 89 Wn.2d 535, 537, 573 P.2d 796 (1978).

An appellate court cannot reverse on the issue of exclusion of evidence in the absence of at least a showing of a rejected offer of proof. Fugitt v. Myers, 9 Wn. App. 523, 528, 513 P.2d 297 (1973).

An offer of proof, properly presented, serves three purposes. First, it should inform the court of the legal theory under which the offered evidence is admissible. Second, it should inform the trial judge of the specific nature of the offered evidence so the court can judge its admissibility. Third, it thereby creates a record adequate for appellate review.... We have long held that an offer of proof must be specific and the theory of admissibility disclosed....

[I]t is the duty of a party to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. If the party fails to so aid the trial court, then the appellate court will not make assumptions in favor of the rejected offer.

Mad River Orchard, 89 Wn.2d at 537.

Defendant Bazley never produced the testimony of EMT Hoggart or Dr. Goodfried in an offer of proof. Defendant never moved to make any such offer of proof. Defendant therefore waived any subsequent arguments regarding the alleged testimony.

It appears most probable that Dr. Goodfried would have had nothing to say about the case anyway since he may have been an attending physician at the ER and it is usually the residents, physician's assistants, or nurses who actually do the work and write the chart notes. Anyone may have written the speculative Swedish chart note in question. Without an offer of proof, the Defendant missed the boat.

It appears similarly that EMT Hoggart would have had nothing significant to say and that his testimony would have been speculation and conjecture. Without an adequate offer of proof, Defendant does not have any grounds for appeal.

Further, it appears that there would have been no medical, scientific, or factual basis for either surprise witness to have testified to anything supporting the Defendant's theory.

**5.2            The trial court properly excluded surprise witnesses where the prejudicial effect would have outweighed any probative value.**

**5.2.1            Standard of review.**

A court of appeals should not reverse a trial court's decision to exclude a witness unless there was an abuse of discretion - a decision manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Lancaster v. Perry, 127 Wn. App. 826, 830, 113 P.3d 1 (2005).

The abuse of discretion standard again recognizes that deference is owed to the judicial actor who is "better positioned than another to decide the issue in question." *citations omitted*. Further, the sanction rules are "designed to confer wide latitude and discretion upon the trial judge to determine what sanctions are proper in a given case and to 'reduce the reluctance of courts to impose sanctions'. . ."

Physicians Ins. Exch. V. Fisons Corp. 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

**5.2.2            The record and law support the trial court's conclusion that an order excluding surprise witnesses was a justifiable response to there having been**

**insufficient identification of the witnesses before trial when specific identification was required by two pre-trial orders.**

A trial court may exclude expert witness testimony where a party failed to meet the court's deadline, effectively depriving the other party of the opportunity to investigate. Port of Seattle v. Equitable Capital, 127 Wn.2d 202, 209, 898 P.2d 275 (1995).

A trial court does not abuse its discretion when it excludes witnesses for a willful violation of a discovery order. Allied Financial Services., Inc. v. Mangum, 72 Wn. App. 164, 168-69, 864 P.2d 1, 871 P.2d 1075 (Div. I, 1993). A violation of a court order without reasonable excuse will be deemed willful. Dempere v. Nelson, 76 Wn. App. 403, 406, 886 P.2d 219 (Div. I, 1994) *review denied*, 126 Wn.2d 1015 (1995) *citing* Allied Financial, 72 Wn. App. at 168 *citing* Lampard v. Roth, 38 Wn. App. 198, 202, 684 P.2d 1353 (Div. I, 1984) and Anderson v. Mohundro, 24 Wn.App. 569, 574, 604 P.2d 181 (Div. I, 1979), *review denied* 93 Wn.2d 1013 (1980).

Defendant Bazley never offered any reasonable excuse for her violation of the court's orders. Her violation of the court's orders should therefore be deemed willful. Her willful violation of the court's orders was sufficient justification for the trial court's exclusion of witnesses.

In Dempere, the trial court properly excluded a witness that the party identified only 13 days before trial. The basis for the exclusion included the prejudice of conducting additional discovery, finding countering experts and the attendant delay.

In Allied Financial, the trial court properly excluded witnesses for the defendants because they could not provide an explanation for failing, up to the time of trial, to name any of their witnesses. The Allied Financial court also noted that there is no requirement for a showing of actual prejudice from the failure to provide a witness list. Allied Financial, 72 Wn. App. at 168-169.

In the case at bar, the court order requiring a Discovery Cutoff on July 9, 2007 implied that parties had to identify their expert and lay witnesses far enough in advance of the discovery cutoff to allow depositions to be taken within the discovery period. Defendant Bazley failed to do so.

Further, the order of May 8, 2007 and the order of July 5, 2007 specifically required disclosure of witnesses by August 8, 2007 and warned of exclusion of witnesses not disclosed. Defendant Bazley's noncompliance with the terms of the court orders comprised sufficient grounds for the court to subject Defendant Bazley to the exclusion of the witnesses, as promised.

**5.2.3 The record and law support the trial court's conclusion that an order excluding surprise witnesses was a justifiable response to there having been insufficient identification of the witnesses before trial because specific identification was required by the King County Local Rules.**

KCLR 16(a)(4) requires exchange of witness and exhibit lists by saying, in pertinent part, the following:

In cases governed by a Case Schedule pursuant to LR 4, the parties shall exchange, not later than 21 days before the scheduled trial date: (A) lists of the witnesses whom each party expects to call at trial; (B) lists of the exhibits that each party expects to offer at trial, except for exhibits to be used only for impeachment; and (C) copies of all documentary exhibits, except for those to be used only for illustrative purposes. In addition, non-documentary exhibits, except for those to be used only for illustrative purposes, shall be made available for inspection by all other parties no later than 14 days before trial. **Any witness or exhibit not listed may not be used at trial**, unless the Court orders otherwise for good cause and subject to such conditions as justice requires.

*(emphasis added.)* KCLR 26(b) also requires witness lists and says, in pertinent part, the following:

(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 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.

KCLR 26 (*emphasis added*).

A case on point is Lancaster v. Perry, 127 Wn. App. 826, 830, 113 P.3d 1 (Div. I, 2005). There, a Defendant who failed to properly identify an expert witness was not allowed to spring the surprise witness at trial because the King County Local Rules require certain disclosures about witnesses. In affirming the ruling of the trial judge, this court said the following:

the purpose of the case management schedule and disclosure deadlines is to have an orderly process by which a case can proceed. Requiring parties to disclose witnesses allows the opposing party time to prepare for trial and conduct the necessary discovery in a timely fashion.

Lancaster, 127 Wn. App. at 830.

In the case at bar, between the accident of June 14, 2005 and the trial starting August 30, 2007 was a period of over two years. Between the commencement of this lawsuit May 4, 2006 and the start of trial was a period of over one year. KCLR 37(g) requires timely completion of discovery by saying the following:

[u]nless otherwise ordered by the Court for good cause and subject to such terms and conditions as are just, all discovery allowed under CR 26-37, including responses and supplementations thereto, must be completed no later than 49 calendar days before the assigned trial date.

Between the Order of May 8, 2007 setting the discovery cutoff of July 9, 2007 and the discovery cutoff was two months. Between the Order of July 5, 2007 reiterating the deadline for witness lists of August 6, 2007 and the deadline was another month. The Defendant had plenty of time to investigate and gather evidence. The Defendant did not do so in a timely manner, probably because their theory was wrong from the beginning.

Through the litigation, Defendant Bazley identified Dr. Luanne Schockett as the defense medical witness. When it became apparent that Dr. Schockett had little of any relevance to say and did not support the defense theory, Defendant Bazley tried to find some new witnesses, but by then it was too late and Defendant Bazley failed to ever provide required information which would have given Plaintiff the opportunity to depose

the proposed new witnesses. Defendant Bazley has never, to this day, given Plaintiffs any information regarding the qualifications, basis for opinions, or opinions of the proposed surprise witnesses nor adequate address or telephone information.

Because of Defendant's failure to identify proposed witnesses, Plaintiff had no opportunity to depose the alleged witnesses or retain countering witnesses and might therefore have suffered severe prejudice unless the court excluded Defendant's proposed surprise witnesses. The trial court was correct to exclude the proposed surprise witnesses.

**5.2.4 The record and law support the trial court's conclusion that an order excluding surprise witnesses was a justifiable response to there having been insufficient identification of the witnesses before trial because specific identification was required by the Civil Rules for Superior Court.**

In Lampard v. Roth, 38 Wn. App. 198, 202, 684 P.2d 1353 (Div. I, 1984), it was reversible error for a court to allow surprise witnesses to testify.

It has long been a feature of litigation in Washington that one purpose of the law is to enable a litigant to know in advance the witnesses upon whom his adversary is relying and thus to avoid surprise. Sather v.

Lindahl, 43 Wn.2d 463, 465, 261 P.2d 682 (1953). Excluding the testimony of a witness whose identity was not disclosed until shortly before trial can depend upon a careful weighing of the particular circumstances. Miller v. Peterson, 42 Wn. App. 822, 825, 714 P.2d 695 (1986). The particular circumstances in the case at bar weigh heavily towards exclusion of the surprise witnesses. Defendant Bazley did not comply with the rules of discovery. The witnesses were probably available at any time after the collision. There was nothing preventing Defendant Bazley from securing the witnesses earlier. The surprise to Plaintiffs was enormous. There was no opportunity given to the Plaintiffs to depose the witnesses within the discovery period. There was virtually no opportunity given to the Plaintiffs to prepare for cross-examination. There was virtually no opportunity given to the Plaintiffs to secure contradicting witnesses. The impact upon Plaintiffs of the expenses of delay would have been totally unjust.

Another good example of proper exclusion of surprise witnesses is Rupert v. Gunter, 31 Wn. App. 27, 32, 640 P.2d 36 (1982), where a telephone call two days prior to trial identifying a new expert was not sufficient notice. Exclusion of an expert's testimony is an appropriate sanction for failure to timely supply supplementary responses to

interrogatories. Kramer v. J.I. Case Mfg. Co. 62 Wn. App. 544, 551, 815 P.2d 798 (1991).

CR 26(e) (with emphasis added) addresses supplementation of responses to discovery requests thus:

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.

Defendant Bazley never made the required supplementation of her Answers to Plaintiffs' Interrogatories.

In the case *sub judice*, the order of May 8, 2007 specifically threatened imposition of any of the sanctions set forth in CR 37 for

violations of the court order. Cases analyzing CR 37 and related discovery disputes are therefore helpful in determining the application of appropriate sanctions for violation of the court's order and the local rules.

Defendant Bazley had an affirmative duty to supplement her discovery responses with regard to any additional witnesses she wished to call. Such supplementation should have been done soon enough to allow time for Plaintiffs to depose the additional witnesses. KCLR 37(g). Defendant Bazley failed to timely or properly identify the witnesses she wanted. CR 26(e) gave the court great discretion to impose sanctions without reference to CR 37. The trial court was right to exclude any witnesses not properly identified in response to discovery requests.

The conference requirement of CR 26(i) appears specifically applicable to any "motion seeking an order to compel discovery or obtain protection". The conference requirement of KCLR 37 contemplates motions in writing pursuant to KCLR 7. The conference requirement in general appears to be directed towards the purpose of easing the burden on trial court judges of dealing with discovery issues when counsel should be able to resolve such issues without judicial intervention. Clarke v. Office of the Attorney Gen. 133 Wn. App. 767, 779, (2006).

In the instant case, since counsel for all parties met in open court before Judge Inveen on the morning of August 29, 2007 and conferred at

that time in oral argument, there was substantial compliance with the conference requirement. If Defendant Bazley at that time had wished to confer, counsel could have probably spent a few moments in the hallway and conferred. By that time, though, there would have been no acceptable remedy other than exclusion of the witnesses.

The only question in a discovery conference, anyway, is whether there was a reasonable excuse for the violation of the discovery rules. It is apparent that Defendant Bazley had no such excuse.

The fact that Defendant Bazley made a similar motion *in limine*, asking for the court to exclude experts and witnesses not previously identified, (citing to Lampard v. Roth, 38 Wn. App. 198, 684 P.2d 353 (1984), ER 402 and ER 403) without any separate discovery conference shows that Defendant Bazley's reliance on such arguments is specious.

Further, Defendant Bazley's reliance on KCLR 37 is misplaced because KCLR 37(g) says, in pertinent part, that "[n]othing in this rule shall modify a party's responsibility to seasonably supplement responses to discovery requests or otherwise to comply with discovery prior to the cutoff".

CR 26(g), CR 11, CR 37 and the inherent power of the court all allow courts to sanction parties for discovery violations. Fisons, 122 Wn.2d at 339-340. The letter, spirit, and purpose of the discovery rules

are each important and support the trial court's rulings here. The trial court was correct to exclude the Defendant's proposed surprise witnesses.

**5.2.5 The record and law support the trial court's conclusion that an order excluding surprise witnesses was a justifiable response to there having been insufficient identification of the witnesses before trial because specific identification was required by equitable principles.**

A court has inherent powers to exclude surprise witnesses.

Inherent power is just that, inherent: The inherent power of the court is the power to protect itself; the power to administer justice whether any previous form of remedy had been granted or not; the power to promulgate rules for its practice; and the power to provide process where none exists. It is true that the judicial power of this court was created by the constitution, but upon coming into being under the constitution, this court came into being with inherent powers.

Saldin Sec. v. Snohomish County, 134 Wn.2d 288, 299, 949 P.2d 370 (1998) (Justice Talmadge, concurring.)

Defendant Bazley relies on Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997). Defendant Bazley's argument has no merit. The sanction that was imposed in Burnet was significantly more severe than the sanction imposed on Defendant Bazley. The Burnet court not only limited the Burnets' discovery, but it also removed an issue from

the case. In contrast, the trial court allowed Defendant Bazley to argue a "sudden illness" defense to the jury, notwithstanding there having been virtually no legitimate evidence in support of Defendant's theory whatsoever.

Further, the disputed conduct in Burnet occurred long before trial, as opposed to Defendant Bazley's misconduct, which occurred on the eve of trial. Plaintiffs would have suffered severe prejudice had Defendant Bazley been allowed to proceed as she wanted.

Justice Talmadge's vigorous dissent in Burnet (131 Wn.2d starting at page 499) also sets forth an apt thesis regarding the need for trial courts to have strong case management powers and to exercise their case management powers firmly.

Courts have inherent powers to sanction parties for discovery violations and disobedience to court orders. Fisons, 122 Wn.2d at 355-356. On appeal, an order may be sustained on any basis supported by the record. Hadley v. Cowan, 60 Wn. App. 433, 444, 804 P.2d 1271 (1991), LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989).

Perhaps most importantly, the trial court was correct because ER 403 allowed exclusion of the surprise witnesses.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403. Allowing Defendant Bazley to spring surprise witnesses would have been unduly prejudicial. The surprise witnesses might have confused the issues or misled the jury. Delaying the trial would have been grossly unfair to the non-wrongdoing parties. The trial court was correct to exclude the proposed surprise witnesses.

It is also of paramount importance to remember that Defendant Bazley herself (in addition to Plaintiffs) moved *in limine* to exclude "any expert or witness ... not previously identified". The Defendant was hoisted by her own petard.

**5.3            The trial court was correct in redacting some notations from Defendant's medical records as irrelevant.**

**5.3.1            Standard of review.**

Trial court rulings excluding documentary evidence are reviewed under an abuse of discretion standard. Erickson v. Kerr, 69 Wn. App. 891, 904, 851 P.2d 703 (1993).

**5.3.2            The trial court was within its discretion in ordering the redaction of certain parts of the Defendant's trial exhibits to remove mention of an**

**alleged syncopal episode because the redacted portions were irrelevant (speculation and conjecture) and unduly prejudicial without significant probative value.**

ER 402 says, in pertinent part, "[e]vidence which is not relevant is not admissible." ER 403, quoted above, also is applicable to the current circumstances.

Rule 403 has been termed the cornerstone of the Evidence Rules. Gold, Victor J., "Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence", 58 Wash. L. Rev. 497-533 (1983). Although the term "unfair prejudice" may not have been defined with crystal clarity as yet, case law is plain that surprise expert witnesses and speculative comments are unfair prejudice because they would cause a jury to make erroneous inferences.

The notations about syncopal episode were speculation and conjecture. They were therefore irrelevant. To the extent the notations had any probative value, the risk of unfair prejudice, confusion of the issues, or misleading the jury required exclusion. The balancing test required by ER 403 weighed heavily towards exclusion of the notations.

The standard of proof as to the degree of certainty to be expressed by a medical expert is that the evidence must be in terms of "probability," or "more likely than not," rather than in terms of "possibility" or variations

thereof (*i.e.* "might have" or "could have") because any lesser standard would violate the sound policy rule against jury speculation and conjecture. Carlos v. Cain, 4 Wn. App. 475, 477, 481 P.2d 945 (1971); Torno v. Hayek, 133 Wn. App. 244, 250-251, 135 P.3d 536 (2006); Merriman v. Toothaker, 9 Wn. App. 810, 814, 515 P.2d 509 (1973); O'Donoghue v. Riggs, 73 Wn.2d 814, 821-824, 440 P.2d 823 (1968); Coffman v. McFaddin, 68 Wn.2d 954, 961, 416 P.2d 99 (1966).

*Stare decisis* requires a clear showing that an established rule is incorrect and harmful before it can be abandoned. Electrical Workers v. Trig Electric, 142 Wn.2d 431, 442, 13 P.3d 622 (2000), *cert. denied*, 532 U.S. 1002 (2001). For medical testimony and evidence, the "more probable than not" standard of admissibility is correct and beneficial. We should not abandon it.

In the present case, the redacted parts of Defendant Bazley's medical records were not sufficiently sure. They were not made on a more probable than not basis or to a reasonable degree of medical certainty. The trial court properly excluded them.

**5.3.3 The record and law support the trial court's conclusion that an order redacting some notations from Defendant's medical records was**

**5.3.4 The business records exception does not allow the admission into evidence of records without relevance or foundation.**

RCW 5.45.020 (1947) allows business records as evidence only under certain conditions.

**A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.**

RCW 5.45.020 (1947), *emphasis added*. The statute therefore requires relevance and foundation as prerequisites to admission. However, records are not admissible if they express opinion, conjecture, or speculation. Young v. Liddington, 50 Wn.2d 78, 83-84, 309 P.2d 761 (1957), Erickson, 69 Wn. App. at 903-904.

The statute does not change the rules of competency or relevancy with respect to recorded facts. It does not make that proof which is not proof. It merely provides a method of proof of an admissible 'act, condition or event.' It does not make the record admissible when oral testimony of the same facts would be inadmissible.

Young, 50 Wn.2d at 84. Further, the Young court, at page 85, held that "a medical opinion as to causation, which is not the result of an observed act, condition or event, cannot be established by a business record".

A medical opinion based solely upon subjective symptoms or a patient's statement is inadmissible, and if admitted into evidence, has no force or effect. Smith v. Ernst Hardware Co., 61 Wn.2d 75, 79, 377 P.2d 258 (1962). The notations in question were not based upon any objective medical measurements or legitimate diagnostic tests. No medical personnel were measuring Defendant Bazley's blood pressure, respiration, pulse, or other vital signs in her vehicle while she drove towards demolishing the Plaintiffs' parked car. Defendant Bazley's having become unconscious, a subjective symptom, was therefore, by itself, not a sufficient basis for any medical opinion regarding the mechanism of the unconsciousness.

The trial court in the instant case correctly characterized the redacted parts of Defendant Bazley's medical records as having been the musings of medical care practitioners wondering what happened. The notations (*a fortiori* the ambulance notation saying "poss" and the emergency room notation with a question mark) were not sufficiently certain to meet the standard of admissibility. The court was correct to exclude the documentary annotations in question.

The notations in question were merely recitations from medical texts referring to orthostatic syncope. "Orthostatic" is the type of syncope occurring when a person stands up. As much as 40% of a person's blood

can move from the thoracic region to pool in the veins in the lower extremities upon standing. Hospitals often see people who had been lying down, stood up suddenly and fainted. Obviously, Defendant Bazley did not experience orthostatic syncope. She was seated in her car. The other types of syncope were ruled out by Dr. Schocket's deposition testimony, too.

At first, the defense wanted to assert the "Act of God" defense. Then they changed their minds and decided to try the "sudden illness" defense. The facts do not support their theory. Drowsy driving is a common problem, but it's difficult to prove because there is not physical evidence the way there is with drunk driving. Also, people who have fallen asleep at the wheel are embarrassed about it. The frequency of the use of the phrase "asleep at the wheel" shows how common it is. Occam's Razor eliminates Defendant Bazley's attempted "sudden illness" defense. She had no illness. She merely gradually fell asleep at the wheel.

**5.4 The record and law support the trial court's conclusion that an order granting additur or in the alternative a new trial to Plaintiff Tola Arero was justifiable because the jury's verdict was grossly inadequate for co-Plaintiff Tola Arero.**

CR 59 allows the trial court to grant a new trial for a verdict of damages so inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice or contrary to evidence. Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997).

Co-Plaintiff Tola Arero's verdict of \$195 was unmistakably contrary to the evidence. The only evidence before the court regarding the value of the demolished vehicle was co-Plaintiff Arero's testimony of his having paid \$12,000 for it. There was testimony from both Plaintiffs and other evidence regarding the business value of the vehicle. There was also evidence regarding the towing and the storage of the wreck. The trial court was therefore justified in granting additur or a new trial for co-Plaintiff Arero.

**5.5 The Court of Appeals should deny Defendant's request for attorney's fees.**

Defendant Bazley argues for attorney's fees and costs based on the fact that Plaintiffs requested a trial de novo after mandatory arbitration. MAR 7.3 requires assessment of costs and reasonable attorney fees against a party who appeals an arbitration award and fails to improve the party's position on the trial de novo. The Plaintiffs herein improved their positions at the jury trial. Therefore, Defendant Bazley's request is frivolous.

**5.6 Plaintiff Abuna should be deemed a prevailing party on appeal and awarded attorney's fees and costs.**

Washington courts hold an appeal is "frivolous" if, considering the record as a whole, there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal. RAP 18.9(a). Streater v. White, 26 Wn. App. 430, 434-435, 613 P.2d 187 (1980).

RAP 18.9(a) says, in pertinent part, the following:

The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

*See* Talmadge, Philip A. and Jordan, Mark V., Attorney Fees in Washington, (Lodestar Publishing, Seattle, 2007).

Defendant Bazley's appeal is frivolous or merely for the purpose of delay. Defendant Bazley has raised no debatable issues upon which reasonable minds might differ. Defendant Bazley's appeal is totally devoid of merit. It would be appropriate for the court to award attorney's fees and costs on appeal to Plaintiffs. Because Defendant Bazley's appeal was frivolous, Plaintiff Abuna requests an award attorney's fees to

Plaintiffs in an amount to be determined by the court commissioner in accordance with RAP 18.1.

RAP 14.2 describes entitlement to costs by saying the following:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

Plaintiff Abuna therefore asks the court to award costs accordingly.

**6. Conclusion.**

There was not an adequate offer of proof at trial for the excluded testimony and evidence. The absence of an offer of proof is sufficient grounds to deny Defendant Bazley's appeal and affirm the trial court.

We should support firm case management by Washington's trial judges. Judge Inveen ruled correctly to exclude surprise witnesses in accordance with ER 403. If Defendant Bazley had been allowed to introduce surprise witnesses in violation of the court's orders, the King County Local Rules, and the Civil Rules for Superior Court, it would have obviously been undue prejudice. The trial court ruled correctly in order to avoid imposing on Plaintiffs Abuna and Arero the prejudice of conducting additional discovery, finding countering experts, and the attendant delay. The trial court correctly refused to allow the Defendant Bazley to profit from her wrongdoing.

Defendant Bazley wants another bite of the apple. This court should deny her request. Defendant Bazley herself also moved, *in limine*, to exclude surprise witnesses. The basis for the requested exclusion was unfair prejudice (ER 403), irrelevance (ER 402) and the common law of the State of Washington pursuant to the principle of *stare decisis*. It was therefore reasonable for the court to exclude surprise witnesses.

Without surprise witnesses, the speculative documentary notations had no foundation. Even with the surprise witnesses, the speculative documentary notations would have been inadmissible because they were conjecture and therefore unduly prejudicial. Even had the surprise witnesses testified, the redacted documentary notations would have had inadequate foundation because they were not based on objective observations. The business records statute does not operate to admit into evidence records lacking in relevance or foundation.

The trial court was justified in excluding proffered testimony and evidence because Defendant Bazley did not obey the court's orders regarding pre-trial disclosures. The trial court was justified in excluding proffered testimony and evidence because Defendant Bazley did not comply with her duties under the King County Local Rules. The trial court was justified in excluding proffered testimony and evidence because Defendant Bazley did not comply with her duties regarding discovery

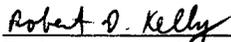
under the Civil Rules for Superior Courts. The trial court was justified in excluding proffered testimony and evidence because the trial court has inherent powers to exclude surprise witnesses, exclude irrelevant documentary notations, and make trial a revelation of truth and fairness. The judge in the trial court in this case ruled properly, with the cool logic of the law, tempered with appropriate human sensibilities.

Defendant Bazley's request for attorney's fees is wholly frivolous. Defendant Bazley's entire appeal is utterly frivolous. There should be an award of attorney's fees and costs on appeal to Plaintiffs.

For all of the above reasons, Plaintiff Abuna asks the court to affirm the trial court and to award attorney's fees and costs to Plaintiffs.

Respectfully submitted this 29<sup>th</sup> day of December, 2009.

LAW OFFICES OF  
ROBERT D. KELLY & ASSOCIATES

  
Robert D. Kelly, WSBA # 27522  
For Plaintiff / Respondent Shole D. Abuna,  
1800 9<sup>th</sup> Ave., Suite 1630  
Seattle, WA 98101-1322  
(206) 621-1337

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No. ~~608495-T~~

COURT OF APPEALS  
DIVISION ONE  
OF THE STATE OF WASHINGTON

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TOLA K. ARERO and SHOLE D. ABUNA,  
  
Plaintiffs/Respondents,  
  
v.  
  
KRISTINA R. BAZLEY,  
  
Defendant/Appellant.

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**CERTIFICATE OF SERVICE**

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The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and  
competent to be a witness herein.

I certify under penalty of perjury of the laws of Washington that  
I caused to be delivered the following document to all parties or their  
attorneys of record on the 29th day of December, 2009 as follows:

**DOCUMENT:** BRIEF OF RESPONDENT SHOLE ABUNA

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 DEC 30 AM 10:45

**PARTY/COUNSEL**

**DELIVERY INSTRUCTIONS**

The Court of Appeals of the  
State of Washington  
Division I  
One Union Square  
600 University Street  
Seattle, WA 98101-4170

- Via U.S. Mail
- Via Hand Delivery
- Via fax 206 389 2613

**Counsel for Co-Plaintiff Arero**  
Jason E. Anderson, WSBA #32232  
Law Offices of Jason Anderson  
8015 15th Ave. NW, Ste 5  
Seattle, WA 98117  
(206) 706-2882

- Via U.S. Mail
- Via Hand Delivery
- Via Overnight Mail

**Counsel for Defendant Bazley**  
James N. Mendel, WSBA # 29223  
Thomas G. Crowell, WSBA # 23622  
George W. McClean, Jr. & Associates  
720 Olive Way, Suite 1600  
Seattle, WA 98101  
(206) 839-4200

- Via U.S. Mail
- Via Hand Delivery
- Via Overnight Mail

Dated this 29th day of December, 2009.

Robert D. Kelly  
Robert D. Kelly