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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 TOLA K. ARERO**

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Jason E. Anderson, WSBA #32232  
For Plaintiff/Respondent Tola K. Arero

LAW OFFICE OF JASON E. ANDERSON  
8015 15<sup>th</sup> Ave. NW  
Seattle, WA 98117  
(206)706-2882

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The respondent, Tola Arero submits this brief in response to the Appellant's Brief.

**A. STATEMENT OF ISSUES AND ASSIGNMENTS OF ERROR.**

Assignment of Error No. 1: Did the trial court abuse its discretion in excluding the testimony of defense witnesses Hoggart and Goodfried.

- a. Did the appellant properly preserve for appeal the exclusion of such witnesses where no offer of proof was made regarding the testimony these witnesses would provide
- b. Did the trial court abuse its discretion when it excluded the testimony of defense witnesses when the late disclosure of such witnesses was unfairly prejudicial to the defendants pursuant to ER 403.
- c. Did the trial court abuse its discretion when it excluded the testimony of defense witnesses due to the failure of the defendant to supplement responses to interrogatories as required under CR 26(e).
- d. Did the trial court abuse its discretion when it excluded the testimony of defense witnesses when the defendant failed to properly disclose them as required under the case schedule.

Assignment of Error No. 2: Did the trial court err in ordering the redaction of certain portions of the defendant's trial exhibits to remove mention of a syncopal episode.

- a. Did the trial court abuse its discretion when it ordered the redaction of medical records to remove statements that were clearly speculative in nature.

Assignment of Error No. 3: Did the trial court abuse its discretion in entering an order for a new trial where the jury awarded \$195.00 representing the towing charge arising from the accident.

- a. Did the trial court abuse its discretion in entering an order for a new trial when there was clear evidence that the plaintiff had paid \$12,000 for the vehicle twenty-three days prior to the accident, that the vehicle was lost as a result of the accident and there was no contrary evidence regarding the value of the vehicle and the jury entered an award of \$195.00.

## **B. STATEMENT OF THE CASE**

The plaintiff, Tola Arero adopts the statement of the case made by Shole Abuna in his response and makes the following additional statements.

### 1. Pretrial Proceedings.

Tola Arero filed a complaint on May 6, 2006, against Kristina Bazley alleging negligence in the operation of a motor vehicle and seeking special damages. CP 5-6. In the complaint he alleged that Kristina Bazley rear ended another vehicle driven by a Mr. Ballinger, drove around that vehicle and subsequently hit Mr. Arero's vehicle which was sitting parked on the side of the road on Stewart Street near the intersection of Ninth Ave in Seattle, Washington. CP 4-5.

The defendant, Kristina Bazley, filed a motion for summary judgment on this claim on November 21, 2006 alleging she was not negligent pursuant to the "sudden illness doctrine." CP 13-18. In that motion the defendant alleged she fell unconscious

while driving and was not in control of her vehicle when the accidents occurred. CP 36-37. In support of this motion the defendant submitted a declaration from Luanne Schocket MD, the OB/GYN treating Ms. Bazley at the time. Dr. Schocket declared: “Kristina Bazley’s June 15, 2005 blackout was unexpected and unforeseen.” CP 39. The court granted this motion for summary judgment. CP 127-128.

The plaintiff filed a motion for reconsideration arguing that there was a genuine issue of fact regarding whether the defendant had actually fallen asleep or alternatively whether she had sufficient warning of this episode for her to have a duty to pull over and park the car before the collision. CP 130-136. The trial court reconsidered this order for summary judgment on February 2, 2007. CP 229.

The parties subsequently arbitrated this case on April 26, 2007. In the pre-hearing brief the defendant listed Dr. Luanne Schocket as the sole medical witness for the arbitration. CP 784. Following the arbitration the plaintiffs requested a trial de novo. The plaintiff deposed Dr. Luanne Schockett. At the deposition she admitted she had not special knowledge regarding sleep or syncope (falling unconscious). CP 616. She said she had no basis for an expert opinion about whether there was any way to distinguish between falling asleep and having a syncopal event (falling unconscious). CP 616. She also stated she could not distinguish between falling asleep and fainting based on the facts before her. CP 616-617. Based on this information the Plaintiff prepared for trial.

## 2. The Surprise Witnesses

Pursuant to the scheduling order, the parties filed witness and exhibits lists identifying the witnesses and exhibits to be presented at trial by the parties. Just twenty-one days before the scheduled trial date, the defendant, for the first time listed two

additional witnesses regarding medical treatment: "EMT Anthony Hoggart" and "attending emergency room physician from Swedish Medical Center First Hill." CP 260. Defendant Bazley failed to include phone numbers or addresses for these new witnesses. CP 260. The plaintiff moved for exclusion of these witnesses.

On August 15, 2007, just less than two weeks before trial, the defendant submitted an amended supplemental witness list indicating that the ER Physician was believed to be Dr. Goodfried. CP 413-414. This document also failed to provide addresses and telephone numbers for these new witnesses. CP 413-414.

The Plaintiff objected to these two witnesses testifying on the basis that those witnesses had not been previously disclosed before the discovery cutoff on July 9, 2007. Early in this case the plaintiff had submitted interrogatories and requests for production. The defendant provided answers to these interrogatories on June 8, 2006. CP 459. In Interrogatory #12 the plaintiff requested: "The Names, addresses, telephone numbers, occupations, job designations and present location of any persons known to you or your attorneys having knowledge of facts pertaining to this lawsuit." CP 447.

In response to this request the defendant provided an incoherent listing of names and addresses listing among others:

Ambulance personnel from American Medical response, PO Box 3429, Modesto, CA 95353, emergency room personnel and physicians at Swedish Medical Center, 747 Broadway, Seattle, WA 98122, Luann Schocket, OB/GYN, Providence Everett Medical Center, 916 Pacific Ave, Everett, WA 98206.

CP 456-457.

The plaintiff also requested in Interrogatory #8: “The names of all doctors, including osteopaths, chiropractors, psychologists, psychiatrists, or healers who have treated you in the previous ten (10) years, and the nature and dates of treatment.”

In response to this request, the defendant listed eight medical providers including:

LuAnn Schocket, OB/GYN, Providence Everett Medical Center,  
916 Pacific Ave, Everett, WA – Pregnancy;

American Medical Response, P.O. Box 3429, Modesto, CA 95353  
– treatment after the subject motor vehicle accident; and

Swedish Medical Center, 747 Broadway, Seattle, WA 98122 –  
treatment after the subject motor vehicle accident.

CP 454.

The only medical witness coherently identified in either of those answers was Luann Schocket, the defendants OB/GYN. There is no evidence that the defendant made any attempt to supplement this answer prior to the expiration of the discovery schedule. The plaintiff deposed Dr. Schocket after she testified in the defendant’s motion for summary judgment and arbitration for the plaintiff. The plaintiff never had a meaningful opportunity to depose these surprise witnesses because they were never disclosed.

### 3. Motions in Limine

The plaintiff filed motions in limine seeking to exclude the testimony of the ambulance personnel (EMT Hoggart) and Swedish emergency room physician (Dr. Goodfried). CP 670-682. In general terms this motion was sought because the plaintiff did not receive proper notice of these witnesses. CP 677. The Plaintiff stated he would “suffer severe prejudice unless the court excludes Defendant’s proposed witnesses.” CP 677.

The defendant argued that its un-supplemented responses provided sufficient notice when taken in conjunction with the medical records obtained by the plaintiffs. RP 14 (August 29, 2007 Pre-trial Motions). The trial court judge entered specific findings that the information ascertainable from the medical records did not cure the lack of notice by the defendant.

In this particular case, the Witness Hoggard is the – I understand an ambulance driver or ambulance personnel with an entity that was given as a Modesto, CA address. Although there is an assertion that his name appears on that report, it is very small, it is in handwriting, it, from my perspective, was undecipherable.

With respect to the emergency room doctor, Richard Goodfried, although his name did appear in the medical records, it was typed and didn't indicate in what capacity that name was, there was three different signatures in that set of medical records, all different people, and it was not realistic for the plaintiff, based upon that limited information, to expect that the witnesses would be called at trial, so I'm not going to allow them to be called at trial.

RP 4-5 (September 30, 2007). The Appellant has not assigned any error to these factual findings.

#### 4. Redacted Medical Records.

Pursuant to a motion by the plaintiff, the trial court ordered that medical records be redacted. The trial court found that the redacted portions appeared to be the “musings of a medical care practitioner.” RP 36-37 (August 30, 2007).

#### 5. Motion for Additur

The jury entered a verdict in favor of the plaintiffs for liability. CP 894. The special damages entered by the jury were \$195.00. CP 894. The plaintiff subsequently filed a motion for additur to the judgment alleging the jury verdict for Tola Arero was

motivated by passion and prejudice and that it did not fall within the range of evidence of damages suffered by Mr. Arero. CP 1065-1075.

During the course of the trial, the plaintiff provided evidence of three categories of damages arising from the accident caused by the defendant: (1) damage to Tola Arero's vehicle, (2) towing and storage charges incurred from the accident, and (3) lost income caused by the accident.

During the course of the trial, Tola Arero testified that he paid \$12,000 for the Crown Victoria that was rear ended by the defendant just twenty-three days before the accident. RP 67-68 (September 5, 2007). He further testified that this was a fair price for the vehicle. RP 68 (September 5, 2007). The defendant did not offer any contrary evidence regarding the value of the vehicle. One witness, Mr Baringer, when asked to identify a picture of the Crown Victoria after the accident stated:

Well, actually, it was hard for me to tell because the other vehicle was all the way up to the back end of it, still attached to the back end of this car, so it looked like one big mass to me. So I couldn't really see any – obviously, it was pretty much destroyed.

RP 87 (September 4, 2007). The plaintiff presented a photograph of the vehicle showing that the total rear of the vehicle was smashed in the accident. CP 275. The defendant stipulated to the admission of this exhibit and it was entered. RP 30 (August 30, 2007 Pretrial). The combination of the testimony presented and the picture evidence establishes that the vehicle was totaled in this accident and was worthless.

In fact, in addition to being worthless, this wreck acted like an albatross around Mr. Arero's neck. After the tow company towed the vehicle to its yard it began charging

Mr. Arero \$50 per day. Money he didn't have. RP 73 (September 5, 2007). Mr. Arero finally settled with the tow company for \$6,527.00 in storage charges. RP 73 (September 5, 2007).

Mr. Arero also testified that he earned approximately \$100 per day from the rental of this vehicle to Mr. Abuna. RP 69 (September 5, 2007).

The court entered findings that the only damages awarded to Mr. Arero consisted of the towing bill of \$195.00. The Trial Court found that this amount was inadequate given the un-controverted evidence that Mr. Arero had paid \$12,000 for the vehicle and that the vehicle was destroyed in the accident. CP 1193-1194.

On October 4, 2007, the trial court judge determined that the jury verdict for Mr. Arero should have included the value of the vehicle and that either additur of \$12,000 or a new trial to determine damages was appropriate. CP 932-38, 1061-62, 1157-58. Accordingly, Mr. Arero filed a motion to revise the order pursuant to this order.

On December 14, 2007 the trial judge ordered a new trial for Mr. Arero on all issues of damages, including lost wages, towing and storage costs.

#### 6. Motion to Vacate Judgment

On October 1, 2008 defendant filed a motion to vacated the judgment as it was not a final judgment and was subject to revision. The court denied this motion and the Arero claim proceeded to trial.

#### 7. Trial for Damages

Pursuant to the trial judge's order a new jury trial date was set. New trial briefs were submitted to the Judge Downing, but new ER 904 documents were not submitted by

either party. On June 4, 2009 the jury rendered a verdict for \$7,500, damages almost 40 times the amount of the damages entered at the original trial. The new judge entered the final judgment on August 15, 2009.

### C. AUTHORITY AND ARGUMENT

The appellee, Tola Arero adopts the authority and arguments made by Shole Abuna and makes the following additional points.

#### 1. The standard of review.

Upon appeal, a trial court's decision to exclude a witness should "not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

Similarly, 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).

Also, when reviewing an award of a new trial under CR 59, the proper standard of review is abuse of discretion. *Usher v. Leach*, 3 Wash. App. 344, 345, 474 P.2d 932 (1970).

#### 2. Assignment of Error No. 1: The Trial Court Properly Excluded Mr. Hoggart and Mr. Goodfried Because Allowing them to Testify Would Cause Unfair Prejudice.

Evidence Rule 403 provides that relevant evidence may be excluded if the evidence would be unfairly prejudicial. In this case, the plaintiff's had no meaningful

notice of the identity of these witnesses and would be unfairly prejudiced if they were permitted to testify. The trial court properly excluded the testimony of these two witnesses on this basis.

3. Assignment of Error No. 1: The Trial Court Properly Excluded Mr. Hoggart and Mr. Goodfried Because the Defendant Failed to Timely Supplement its Answers to Discovery.

Throughout the course of this case the defendant identified Dr. Schockett as the primary medical witness for the defendant. The only information provided to the plaintiff about the ambulance driver was a post office box in Modesto, California and for the doctor at the Emergency Room, and address of Swedish Medical. This information was never supplemented.

Washington Civil Rule of Procedure 26(e) provides:

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.

In this case, the defendant never provided further information regarding the identity and location of Mr. Hoggart and Mr. Goodfried until after the discovery cutoff. The Trial Court clearly has the discretion under CR26(e)(4) to exclude their testimony.

The defendant has raised the argument that the court does not have the power to exclude these witnesses under these circumstances when the plaintiff's counsel has not submitted a certification pursuant to CR 26(i) that he had first discussed the matter with opposing counsel. This argument is unfounded for the following reasons:

First, a motion in limine is brought pursuant to the court scheduling order and the evidence rules. The analysis of whether the surprise witnesses should be excluded is best analyzed under the provisions of ER 403 regarding whether permitting those witnesses to testify would have been unduly prejudicial to the plaintiff. As a result a motion in limine to exclude witnesses that have not been properly identified is not governed by CR 26 but by ER 403 and the CR 26(i) requirements do not apply.

Second, the court entered an order cutting off all discovery by July 9, 2008. The conference requirements identified in CR 26(i) apply only to motions to compel and protective orders occurring over the course of the discovery schedule. After the discovery schedule has expired this requirement no longer applies.

Third, these motions were made in open court with all parties present. As a result, the parties effectively conferred in open court and satisfied the conference requirement of 26(i).

Finally, the court has an independent basis for sanctioning a party for failing to supplement interrogatories that is specifically set out in CR 26(e)(4). This specific grant of authority to the trial court is not subject to the conference requirements of CR 26(i).

4. Assignment of Error No. 1: Even the Witness Lists Submitted on the Eve of Trial Failed to Comply with King County Local Rules.

On July 5, 2008, the court issued a Pre-Trial order providing:

08/06/2007

Witnesses who have been disclosed pursuant to LR 26, and whom counsel and/or intend to call at trial, shall be disclosed as by LR 16(a)(4).

All Witnesses to be called at trial shall be listed in the Joint Statement of Evidence, as required by LR 16(a)(4). Failure 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.

Local Rule 26 provides that parties are required to list the name, address and phone number for each witness disclosed. The defendant's disclosure was defective as to each witness listed. The first witness list read as follows:

1. Kristina Bazley;
2. Luanne Schocket, M.D.;
3. EMT Anthony Hoggart; and
4. Attending emergency room physician from Swedish Medical Center First Hill.

CP 260. The defendant in this case failed to provide an address and phone number for Mr. Hoggart and a name, address or phone number for the emergency room physician from Swedish Medical Center. Contrary to Washington local rules and the scheduling order

entered by the court on July 5, 2007. This scheduling order specifically provided that violation of the order could result in the exclusion of evidence.

Further, this scheduling order indicates that the only witnesses a party is permitted to list are the witnesses disclosed previously pursuant to LR 26. This local rule specifically incorporates the requirements in CR 26(e) to supplement discovery responses. The defendants never supplemented these responses and an order excluding this evidence was proper.

5. Assignment of Error No. 2: The Trial Court Properly Redacted Certain Portions of Defendant's Trial Exhibits that were Clearly Speculative.

Evidence must be relevant in order to be admissible. ER 402. Relevant evidence may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ER 403.

Defendant argues that it was an abuse of discretion to redact the medical records on hearsay grounds because medical records call under a hearsay exception. Defendant cites *Erickson v. Kerr*, 69 Wn. App. 891, in which the Washington Supreme Court held that doctors' records are normally admissible in order to show events, conditions, or acts under the Uniform Business Records as Evidence Act, RCW 5.45.020. However, the court clarified their holding and limited the scope of this exception by stating, “[doctor’s] records are not admissible if they express opinion, conjecture, or speculation” and it is not an abuse of discretion for a trial court to exclude such statements. *Id.* at 903-04.

The trial court correctly identified portions of the defendant's medical record as opinion, speculation and "musings of a medical care practitioner." RP 36-37 (August 30, 2007). Therefore it is not an abuse of discretion to redact such statements as hearsay.

Furthermore, even if un-edited medical records were not hearsay, the probative value of the opinions in the medical record are substantially outweighed by the danger unfair prejudice and misleading the jury. During deposition the defendant's OB/GYN, Dr. LuAnn Schocket, testified that she had no knowledge that the defendant had any history of cardiac problems, neurological problems, psychiatric problems, reflex or orthostatic syncope. CP 613-614. Dr. Schocket also testified that she had never encountered the theory of a fetus causing unconsciousness by pressing on a vein in the mother's body nor had she ever encountered such an occurrence in her practice. Dr. Schocket further testified that she could not tell the difference between a syncopal event and simply falling asleep.

The simple musings of a medical care practitioner do not show the uncertainty of diagnosing a syncopal event, particularly one that did not occur in front of the medical practitioner. To compound the problem, a writing cannot be cross-examined or questioned and the jury would have full access to the writing while deliberating. The trial court acted correctly when redacting any mention of a possible syncopal event from the medical records.

6. Assignment of Error No. 3: The First Jury Award was Inadequate and an Order of Additur Appropriate.

Washington courts have long held that a party is entitled to a new trial on the issue damages where the award was clearly inadequate. *Lanegan v. Crauford*, 49

Wash.3d 563, 304 P.2d 953 (Wash 1956). (Holding that where the Supreme Court determined that a credit for plaintiff was inadequate, a new trial would be ordered for the purpose of fixing the amount of plaintiff's damages).

A court may enter an order for a new trial pursuant to CR 59(a)(5) and (7). CR 59(a)(5) provides that a new trial may be granted where the "damages are so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice." CR 59(a)(7) allows a new trial where "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law." *Kadmiri v. Claasen*, 103 Wash.App 146, 150, 10 P.3d 1076, 1078 (Wash App 2000).

Where a trial court finds that a verdict is inadequate it may enter an order of additur pursuant to RCW 4.76.030 which provides:

If the trial court shall, upon a motion for a new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict.

In this case, Kristina Bazley concedes that the only damages the jury awarded Mr. Arero was \$195.00 for the cost of towing the car from the scene of the collision. See Appellant Brief page 21. The first jury did not award a single cent for the loss of the vehicle Mr. Arero had purchased for \$12,000 just twenty-three days before the accident, not a single cent for storage of the vehicle before Mr. Arero could dispose of the vehicle and not a single cent for lost income from his inability to rent the vehicle out as a town car. The defendant provided no evidence of a different value for the car. As a result, the

court properly held that an additur to the judgment of \$12,000 for the lost value of the car was appropriate.

Washington courts have long held that “the measure of damages for injury to the car, if any, would be the decrease in the fair market value thereof.” *Kane v. Nakamoto*, 113 Wash. 476, 481-482, 194 P 381 (1920). In this case the fair market value was the value Mr. Arero paid for the car. Since the car was lost as a result of the accident, damages were properly set at \$12,000; the difference between the value of the car before the accident and the value of the car after the accident. This decision accords with longstanding Washington precedent and should not be set aside.

In addition, the trial court entered a specific finding as follows: “As indicated in the Court’s oral decision. The jury awarded nothing other than the amount equal to the towing bill. This was despite uncontroverted evidence that Plaintiff Arero’s vehicle was destroyed by Defendant, and that the value of the vehicle was \$12,000.” CP 1193-1194.

RAP 10(g) provides:

A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

In this case, the appellant has not alleged any error to this finding of fact. Where a party has not alleged error to a particular finding, the unchallenged findings are verities on appeal. *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997); *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002). For purposes of appeal, the judges finding that the jury awarded

nothing to Mr. Arero except the towing bill and that he suffered additional damages in the amount of \$12,000 from the total loss of his car must be taken as true. Given this unchallenged finding, the trial court properly entered an order for a new trial on the issue of damages.

**D. CONCLUSION**

The trial court did not abuse its discretion by excluding testimony of witnesses whom the defendant failed to properly disclose during the discovery process. The trial court's decision to redact the speculation of medical providers was also not an abuse of discretion because the statements are hearsay and not covered under the business rule exception. Furthermore the trial court properly granted additur because there was no sound and sufficient basis for the jury to grant Tola Arero absolutely nothing for the loss of the vehicle, the loss of income and the cost to store the destroyed vehicle.

Finally, the defendant has requested a new trial for liability only. However, damages are based on liability and are logically decided only after liability has been determined. Therefore, if this case is remanded for a new trial, the new trial should be a jury trial to determine both liability and damages.

Law Offices of Jason Anderson

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Jason Anderson WSBA #32232

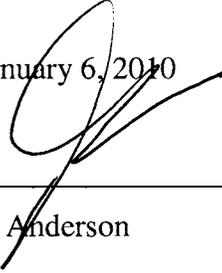
Attorney for Tola Arero

I, Jason Anderson declare under the penalty of the laws of the State of Washington that I hand delivered the following briefs to

James Mendel  
Thomas G Crowell  
720 Olive Way Ste 1600  
Seattle, WA 98101

Robert Kelly  
1800 9<sup>th</sup> Ave Ste 1630  
Seattle, WA 98101

On January 6, 2010



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Jason Anderson

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