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No. 63361-9

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

JOANNE HURLEY,

Appellant,

vs.

SAFEWAY, INC.,

Respondent.

BRIEF OF APPELLANT HURLEY

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I. ASSIGNMENTS OF ERROR

1. The Court gave an instruction as to emotional damages which read: “The Plaintiff is not claiming emotional distress damages. If you find for the plaintiff your award cannot include damages for emotional distress.”
2. The Court denied Plaintiff’s motion for a new trial as to special damages.
3. The Court denied Appellant’s motion to exclude Respondent’s medical expert witness, Dr. Ghidella, and denied Appellant’s motion for a new trial as to damages based on the decision to allow Dr. Ghidella to testify.

II. APPELLANT’S STATEMENT OF THE ISSUES

1. Whether the Court committed reversible error in giving the following instruction to the jury on emotional damages “The Plaintiff is not claiming emotional distress damages. If you find for the plaintiff your award cannot include damages for emotional distress” where, pursuant to an Order in limine, the jury had not been presented with any evidence concerning emotional distress.
2. Whether the Trial Court erred in failing to grant the Plaintiff’s motion for a new trial as to special damages where the evidence of special damages did not support the verdict.
3. Whether the Trial Court erred in denying the Plaintiff’s motions to exclude the testimony of Dr. Ghidella from the trial of this case and whether the Trial Court erred in

finding that a new trial as to damages was not warranted after hearing the testimony that Dr. Ghidella offered.

III. APPELLANT'S STATEMENT OF THE CASE

A. General facts of the case as to negligence

In 2004, the Plaintiff in this case, Ms. Hurley, was working for a company called DPI, as a merchandiser. DPI markets food items which are sold at various supermarkets. Hurley would drive from grocery store to grocery store on a route and place DPI products on the shelves. Safeway, Inc., the Defendant in this lawsuit, is a grocery store which offered DPI's wares among the goods that it sold. When Ms. Hurley arrived at the store, the DPI goods would be loaded onto large push carts with low, flat beds, with six wheels. She would push the cart to the appropriate location in the store and arrange the goods on the shelf.

On August 31, 2004, Ms. Hurley arrived at the Safeway store at about 7:00p.m. She had six carts to distribute, and, around 8:00p.m. she proceeded to retrieve the last cart from the rear of the store, to stock the DPI merchandise. As she pushed the cart down an aisle to her destination, she slipped on a substance which was on the floor, and over which she had pushed the cart. She suffered injuries to her ankle, twisting it when she

slipped. A jury found that Safeway was negligent and one hundred percent at fault for Ms. Hurley's injuries.

B. Facts relevant to the issue of the jury instruction on Emotional Distress

In July of 2008, the Court issued an order, by stipulation of the parties, dismissing Hurley's claims for emotional distress in this case. The Order applied only to claims for emotional distress, not to claims for pain and suffering or for loss of enjoyment of life. (CP 11-13) Prior to the trial of this case, on January 27, 2009, Hurley successfully argued a motion in limine seeking to exclude all testimony, evidence, and argument concerning emotional distress. (RP: Pre-Trial Hearing 1-27-09: 31-33) The parties adhered to this order throughout the trial.

Hurley did argue for and claim damages for pain and suffering and for loss of enjoyment of life. Evidence was presented showing that Hurley suffered severe pain after her ankle injury in 2004, and that the pain had continued constantly, but at varying levels up until the day of trial. Hurley's medical expert detailed the medical history of her complaints of pain through the approximately five years since her injury. (RP: Jury Trial (hereinafter "JT") 38,54,61,64,65, 68, 69, 81, 83) Hurley testified that she had severe pain in her ankle and knee immediately after the injury. Eventually the knee pain resolved, but the ankle pain subsided only to a

constant pain which would worsen when she walked or put weight on the ankle. (RP: JT 327, 328, 335-339, 343-344) Even Dr. Ghidella, Safeway's medical expert, who had never actually seen Hurley, but who based his opinions on a records review, admitted that Ms. Hurley's records showed she had constant and continuing complaints of pain, which he did not dispute. (RP: JT 391-392) Dr. Ghidella reviewed Ms. Hurley's two ankle surgeries and noted that, though they were "successful" in the sense that the repairs to the tendons, and the removal of malfunctioning hardware were accomplished, the surgeries failed to give Ms. Hurley relief from the pain. (RP: JT 430)

As to the loss of enjoyment of life, Hurley presented testimony describing her life before the injury as very athletic and active, including dance, from ball room to break dancing, as well as participation in team sports such as rugby and basketball. She testified that, with the restrictions of her injury, she could only engage in less strenuous bicycle riding and some limited yard work, such as mowing the lawn with a self propelled mower that she did not have to push. (RP: JT 364-367, 369)

At the close of the evidence in the trial, the Court received proposed jury instructions from the parties. Prior to that, the parties had exchanged proposed jury instructions and crafted a set of agreed upon instructions. On the day that the Judge was to instruct the jury, Safeway's

counsel presented a new instruction to the Judge, which read “The Plaintiff is not claiming emotional distress damages. If you find for the plaintiff your award cannot include emotional damages.” (RP: JT 658-661) Hurley’s counsel argued against the instruction, but was overruled. The Court offered to allow Hurley to take exception to his ruling at that time, in order to preserve the issue. Hurley’s counsel did take exception to the ruling. (RP: JT 661) The Court then charged the jury, including the charge to which Hurley had objected and taken exception. (RP: JT 679)

At closing arguments, in keeping with the Court’s ruling on the motion in limine, restricting discussion of emotional distress, neither party mentioned emotional distress. Hurley’s counsel argued for special damages and general damages, explaining that general damages consisted of pain and suffering, permanent impairment, and loss of enjoyment of life. (RP: JT 703, 711-713)

The jury then returned a verdict which included \$1,200.00 in wage loss and medical expenses and no award for general damages. (CP 393-394) Hurley filed a post trial motion, requesting a new trial as to damages, based on the delivery of the jury instruction concerning emotional distress. (CP 403-407, 416-417) The Court heard argument on March 6, 2009, and denied the motion on the basis that the instructions did state that the Jury

could consider an award of pain and suffering. (CP: 472-478; CP: 471 RP: Post Trial Motion for Additur 13-14) Plaintiff timely appealed this order.

C. Facts relevant to Hurley's motion for new trial on special damages

At the trial of this case, Ms. Hurley, presented a series of medical bills for her treatment, totaling \$89,397.94 as evidence. Her medical expert, Dr. Schuster, had begun to go over the bills, one at a time, in order to testify as to the necessity and reasonableness of the treatment and bills for treatment when Safeway's Counsel interrupted the testimony to stipulate to Dr. Schuster's continuing testimony, and as to the admissibility of all of the medical bills. (RP: JT 86-92) Safeway produced a medical expert, Dr. Ghidella, who testified that the medical treatment for Hurley's ankle was reasonable, including the second surgery, which was to remove malfunctioning hardware. (RP: JT 391, 423, 428) He also noted that, based on his review of the records, there was no evidence of any other "processes" at work in the ankle to have caused Ms. Hurley's injuries. (RP: JT 401) Although Dr. Ghidella testified that he thought Hurley may have suffered a simple sprain from the initial injury on August 31, 2004, and opined that a week being off of the ankle would have healed it, the undisputed record showed that Ms. Hurley was, in fact, off the ankle for a week after the injury, and that it did not heal. (RP: JT 420-422)

Despite the undisputed record as to Ms. Hurley's medical treatment and the cost thereof (\$89,397.94), the jury returned a verdict for special damages in the amount of \$1,200.00. (CP 393-394)

D. Facts relevant to the Motion to Exclude Dr. Ghidella's testimony

Dr. Ghidella was named as an expert witness by Safeway (the Defendant), on August 25, 2008. Safeway submitted a disclosure of possible primary witnesses (CP 186), naming Sean Ghidella, M.D. as a possible witness, stating:

Dr. Sean Ghidella is an orthopedic surgeon who may be called to testify on Ms. Hurley's alleged injuries and whether Ms. Hurley's alleged slip and fall is the cause of her alleged physical limitations. His testimony will be based on expertise in his field, an independent medical examination performed by Dr. Ghidella or a referral for the purposes of testing and evaluation, and a review and analysis of records deemed pertinent to the evaluation. A copy of his CV will be provided upon request.

On the same date, August 25, 2008, Safeway submitted responses to Hurley's second set of interrogatories and Requests for production (CP 190-193). In response to Interrogatory #1 (Plaintiff's request for identification of witnesses and explanation of opinions and statements expected), Safeway stated:

ANSWER TO INTERROGATORY NO. 1:

Defendant objects to this interrogatory as overly burdensome to the extent case investigation is continuing and other witnesses may exist.

Without waiver of that objection, see Safeway, Inc.'s August 25, 2008 disclosure of possible primary witnesses.

In response to Interrogatory # 3 (Plaintiff's request for witness identification concerning affirmative defenses), Safeway stated:

ANSWER TO INTERROGATORY NO. 3:

Defendant objects to this interrogatory as to the extent case investigation is continuing and other witnesses may exist. Without waiver of that objection, defendant identifies the following witnesses: Plaintiff relative to contributory fault, pre-existing condition, allocation of fault, and offset; plaintiff's attending physicians relative to contributory fault and pre-existing condition.

On September 23, 2008, Plaintiff served a third set of requests for production on the Defendant. (CP 204-205). The first request asked:

Please produce copies of and all documents or materials of any nature (including electronically generated or stored materials), which the Defendant or its representatives have procured from any person or entity not a party to this lawsuit and which is relevant to any claim, affirmative defense, or defense in this case, or would tend to prove or disprove any fact at issue.

On October 29, 2008, Safeway supplemented its responses to Hurley's second discovery requests. (CP 199-200) The responses to Interrogatories numbers 3 and 4 remained identical to the original responses noted above.

On the same date, October 29, 2008, Safeway responded to the third requests for production. (CP 207-208) In response to the first request, Safeway dated:

RESPONSE TO REQUEST FOR PRODUCTION No. 1:

Defendant objects to this request to the extent case investigation is continuing and other responsive documents may exist. Without waiver of these objections, defendant identifies the following responsive documents:

- Safeway's August 30, 2007 document production;
- Plaintiff's medical and employment records and all other records authorized by stipulation;
- Safeway's September 2, 2008 document production
- Safeway's October 9, 2008 document production
- Safeway's October 29, 2008 document production.

None of the document productions referenced contained any information from, about, or referring to, in any way, Dr. Sean Ghidella, or his opinions, if he had any. (CP 169-209) At no time, during discovery, in this case, or at any other time, did Safeway ever make a request for Dr. Ghidella to perform an independent medical examination of Ms. Hurley. Neither Did Safeway ever request a referral for the purposes of testing and evaluation. Because no evaluation or testing ever took place, there could be no records pertinent to an evaluation. Dr. Ghidella's CV was never produced prior to the filing of Hurley's original motion to exclude Dr. Ghidella. (CP 169-209)

Hurley moved to exclude Dr. Ghidella as a witness at the trial of the case, as he had not offered any opinion, according to the discovery responses received from Safeway. The motion was denied, as Safeway claimed that it had recently discovered some W-2 tax forms upon which Dr. Ghidella was, according to Safeway, going to base new medical opinions. The Order denying the motion stated, as the reason for denial “Plaintiff has created the delay in Dr. Ghidella’s ‘late’ conclusions and opinions.” (CP 210-211)

In fact, Dr. Ghidella’s testimony relied wholly on documents that had been in the record from the beginning of the case (namely, time records from Hurley’s job of injury showing the hours she worked after her injury). (RP: JT 298; Exh. #27) Dr. Ghidella admitted, on cross examination that, although the parties had these timesheets throughout the duration of discovery, he was not given a copy of them until the Saturday before the commencement of the trial, by defense counsel. (RP: JT 414-416) Safeway’s Counsel never did ask Dr. Ghidella to perform an exam of Ms. Hurley. (RP: JT 376-377) Based on his alleged review of the timesheets, Dr. Ghidella testified that he believed that Hurley had returned to work immediately after her injury. (RP: JT 387) Dr. Ghidella opined that, had Hurley simply stayed off her ankle for a week or so after her injury, it would have healed. Based upon his belief that she had actually

continued to work immediately after the injury, he opined that she had exacerbated what started out as a simple sprain. (RP: JT 402) Upon cross examination, Dr. Ghidella was presented with the time cards, showing Hurley's hours after the injury, upon which he claimed to have based his opinion. The time cards, when presented to Dr. Ghidella during cross examination, showed that Hurley had worked for three hours and then had been off of work for a week. (RP: JT 420-422) thus proving not only that Dr. Ghidella's premise for his opinion was false, but showing that Ghidella's opinion had nothing to do with a W-2 tax form, negating the Court's basis for its original order denying Hurley's motion to exclude Dr. Ghidella. As to medical testimony, Dr. Ghidella found the treatment including the second surgery that Hurley had on her ankle to remove faulty hardware to be reasonable. (RP: JT 391, 423, 428) He also testified that, based on his records review, he could not find any evidence of any other "processes" at work in Hurley's ankle which could have caused the injuries. (RP: JT 401)

Despite the fact that the time cards showed Hurley had not worked for the week after the accident, Safeway argued, at closing, that the jury should award, at most medical treatment for a simple sprain, based on Dr. Ghidella's testimony (which was based on a false premise, that Hurley had worked a full work week immediately after the injury). The jury awarded

\$1,200.00 in special damages, which were uncontested at \$89,397.94 in the record.

At the close of the trial, Hurley made a post trial motion, asking for a new trial in that Dr. Ghidella should not have been allowed to testify. (CP 403-407, 417-422) The Court adopted the Rulings of Judge Specter on the original motions to exclude Dr. Ghidella, and denied the motion. (RP: Presentation of Judgment and Order 7-9; CP 472-478) Hurley timely appealed. (CP: 479-493)

IV. STANDARD OF REVIEW

A. Standard of Review as to the inclusion of the jury instruction as to emotional distress

“Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.” Ezell v. Hutson, 105 Wn.App. 485, 488, 20 P.3d 975 (2001) (quoting Robertson v. State Liquor Control Bd., 102 Wn.App. 848, 860, 10 P.3d 1079 (2000), review denied, 143 Wn.2d 1009 (2001)), review denied, 144 Wn.2d 1011 (2001).

Appellate Courts review de novo whether an instruction is an error of law. Id. But the giving of a particular instruction is reviewed for an abuse of discretion. Thomas v. Wilfac, Inc., 65 Wn.App. 255, 264, 828 P.2d 597, review denied, 119 Wn.2d 1020 (1992). Error is not prejudicial

unless it affects or presumptively affects the outcome of the trial. Thomas v. French, 99 Wash.2d 95, 104, 659 P.2d 1097 (1983).

Appellate Courts review de novo the instructions in their entirety in order to determine whether the instructions are misleading or incorrectly state the law, which results in prejudice to the objecting party. Furfaro v. City of Seattle, 144 Wn.2d 363, 382, 27 P.3d 1160, 36 P.3d 1005 (2001). If an improper jury instruction results in prejudice to the objecting party, a new trial should be ordered. Id.

B. Standard of review as to denial of motions to exclude Dr. Ghidella.

The Court heard argument concerning Hurley's attempts to exclude Dr. Ghidella from the trial of this case on three occasions. The first and second arguments, before Judge Specter, were a motion in limine (which was denied) and a request for reconsideration of the same motion (also denied). (CP 157-168, 169-209, 210-211, 267-304, 305-307, 329) At the close of the trial, Hurley brought a motion for a new trial, basing it on the decision of the Court to allow the testimony of Dr. Ghidella. The Trial Court adopted the orders of Judge Specter, and denied the motion. (RP: Presentation of Judgment and Order 7-8; 472-478) As the original motion and motion for reconsideration requested exclusion as a discovery sanction. An Appellate Court reviews a trial court's decision as to

sanctions for discovery violations under an abuse of discretion standard.

Smith v. Behr Process Corp., 113 Wash.App. 306, 324, 54 P.3d 665

(2002). Failure to exercise discretion can be considered an abuse of

discretion. State v. Pettitt, 93 Wash.2d at 295-96, 609 P.2d 1364 (1980).

The denial of a motion for a new trial is also reviewed under an abuse of discretion standard. Bunch v. King County Dep't of Youth Servs., 155 Wash.2d 165, 175-76, 116 P.3d 381 (2005). Therefore, the Appellate Court should review the Trial Court's decisions as to the matter of Dr. Ghidella's testimony under an abuse of discretion standard.

C. Standard of review for new trial as to special damages

The Appellate Court reviews the denial of a new trial as to damages for abuse of discretion. Bunch v. King County Dep't of Youth Servs., 155 Wash.2d 165, 175-76, 116 P.3d 381 (2005) (discussing standard of review for remittitur); Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wash.2d 517, 537-38, 998 P.2d 856 (2000) (discussing standard of review for CR 59 motion). A court abuses its discretion when the jury award upheld over the motion for a new trial is contrary to the evidence. To determine whether evidence supports the jury's damages award, the Appellate Court must examine the record. Palmer v. Jensen, 132 Wash.2d 193, 197, 937 P.2d 597 (1997).

V. ARGUMENT FOR REVERSAL

- (1). The Trial Court erred in presenting the Jury with an instruction prohibiting the award of emotional damages where emotional damages were not mentioned at trial as a result of the Court's Order on a motion in limine.

Where an improper jury instruction results in prejudice to the objecting party, a new trial should be ordered. Furfaro v. City of Seattle, 144 Wn.2d 363, 382, 27 P.3d 1160, 36 P.3d 1005 (2001). The Court should review the instructions as a whole in order to determine whether the instruction was improper, but must also consider the case as a whole to determine whether it is likely that the instruction caused prejudice to the appellant. Often an appeal based on a jury instruction focuses on whether the instruction itself misstates the law. In this case, the instruction herein challenged does not state the law at all, but instead, is instructing the jury as to what claims are NOT being made. Appellant's argument is that, in light of the context of the case, telling the jury that it is not to award any damages for emotional distress, when there was no evidence, argument, or mention at all of an emotional distress claim during the trial, would be confusing to any reasonable juror. The outcome of the trial, the verdict with special damages but no award of general damages, shows that the instruction did confuse the jury and prejudice Hurley.

The parties opted to remove any claim for emotional distress, as a part of general damages in this case in July of 2008, long before the trial in January of 2009. This was accomplished by stipulation and an Order from the Court. (CP: 11-13) The Appellant, Ms. Hurley, brought a motion in limine asking the Court to prohibit any mention of emotional distress, as that claim had been removed from the case. The Judge granted the motion in limine (RP: Pretrial Hearing 1-27-09: 31-33) and the parties adhered to the Order throughout the trial, as it should be. Had that not been the case, and had the jury been presented with any evidence of emotional distress damages, a curative or explanatory instruction, explaining that Hurley was not pursuing emotional distress as a separate element of damages would have been appropriate. However, as there had been no mention at all of emotional damages, an instruction stating “The Plaintiff is not claiming emotional distress damages. If you find for the Plaintiff your award cannot include damages for emotional distress” is unnecessary and is redundant to the two previous orders in the case, one removing the claim, and the other excluding any mention of it before the jury.

Giving an unnecessary charge, in and of itself, is not necessarily prejudicial. In this case, however, based on the posture of the case and the evidence which had been presented (and more importantly not presented) to the jury, the instruction was confusing. The jury had been presented

with evidence of general damages, including pain and suffering and loss of enjoyment of life. Those two elements of general damages do have an “emotional” component to them, although they are not the same thing as “emotional distress.” Pain is certainly mental, As is “suffering.” The loss of enjoyment of life also implies an emotional component, the capacity to “enjoy” life being within the province of the mind. In this case, the jury was never told that there was a component to general damages called “emotional distress,” which had not been presented to them, and that this component was separate and apart from pain and suffering or loss of enjoyment of life. It stands to reason that it would be confusing, then, for a jury to be told to consider an award for pain and suffering or loss of enjoyment of life, but to exclude an award for any emotional damages absent any previous mention of emotional distress as a separate element of damages.

The proof of prejudice to Hurley can be seen by comparing the evidence supporting the claims for pain and suffering and loss of enjoyment of life to the verdict. Every witness who addressed Ms. Hurley’s continuing pain testified that she had been in pain since the accident in 2004, through the date of the trial. Even Safeway’s medical expert, who was there to dispute Hurley’s claims, admitted that he had no reason to dispute that Ms. Hurley was in pain. (RP: JT 391-392, 430) Ms.

Hurley described activities that she used to do and could no longer do because of her injured ankle, such as dance, rugby, walking, basketball, and other physical activities. Nobody disputed this. In response, the Jury, finding Safeway negligent and one hundred percent responsible, gave an award of special damages, but an award of “0” for general damages. (CP: 393-394) Based on the evidence, which was completely one sided, as to Ms. Hurley’s pain and suffering and loss of enjoyment of life, one must conclude that the jury was confused as to whether they were to award general damages where there was an obvious emotional component, to the extent that the Jurors simply did not award any damages which were not physical in nature in order to comply with the directive delivered through the jury instruction.

The inclusion of jury instruction No. 19, “The Plaintiff is not claiming emotional distress damages. If you find for the Plaintiff your award cannot include damages for emotional distress” was improper in this case as it was not only unnecessary, but was, in light of the evidence which had been presented to the jury, confusing to the jury and prejudicial to Ms. Hurley. The verdict bears this out. The Appellant therefore respectfully requests that the Appellate Court remand this case to the superior Court for a new trial as to general damages in this case.

2) The Trial Court erred in denying Appellant's motion for a new trial as to special damages where the award for special damages was not supported by the evidence presented in the case.

In this case, Hurley filed a post-trial motion requesting an additur or new trial as to special damages. The Trial Court denied the motion. The Appellate Court reviews the denial of a motion for a new trial for abuse of discretion. A Court abuses its discretion when the jury award is contrary to the evidence. To determine whether evidence supports the jury's damages award, the Court must examine the record. Palmer v. Jensen, 132 Wash.2d 193, 197, 937 P.2d 597 (1997). Where sufficient evidence exists to support the verdict, it is an abuse of discretion to grant a new trial. McUne v. Fuqua, 45 Wash.2d at 653, 277 P.2d 324 (1954) ; Ide v. Stoltenow, 47 Wash.2d at 848, 289 P.2d 1007 (1955). Conversely, it is an abuse of discretion to deny a motion for a new trial where the verdict is contrary to the evidence. Krivanek v. Fibreboard Corp., 72 Wash.App. 632, 637, 865 P.2d 527 (1993) (trial court abused its discretion when it denied a new trial on the basis of inadequate damages in wrongful death case because damages were not within the range of substantial evidence). The adequacy of a verdict, therefore, turns on the evidence. Palmer v. Jensen 132 Wash.2d 193 at 201, 937 P.2d597 (1997), See Hills v. King, 66 Wash.2d 738, 404 P.2d 997 (1965) (no abuse of discretion to grant new trial where

jury awarded nothing for pain and suffering but plaintiff experienced pain for at least 17 months after the accident).

One of the grounds for a motion for a new trial as to damages is “inadequate damages,” where the amount of damages awarded by the jury are far less than the amount of damages presented in the undisputed evidence from the record. Krivanek v. Fibreboard Corporation, 72 Wn.App. 632, 865 P.2d 527 (1993) (undisputed items far exceeded award; new trial should have been granted on ground of inadequate damages). In this case, Hurley presented evidence of special damages in the form of medical bills (\$89,397.94) Lost wages (\$138,150.89) and future lost wages (\$74,846.08) and Retraining costs (\$7,500.00) (RP: JT 686-696, 698-702) Safeway, during the trial, stipulated to the admissibility of all of Ms. Hurley’s medical bills (which were admitted into evidence by stipulation) and as to the testimony of Dr. Schuster, Ms. Hurley’s medical expert, who testified that the bills were all for reasonable and necessary medical treatment for her injuries. (RP: JT 86-92) The jury clearly found that Safeway was liable, one hundred percent, for Hurley’s injuries. (CP: 393-394) Although Safeway did produce one witness who testified that she had offered Ms. Hurley a job at a comparable salary, within her restrictions, there was no evidence in the record which disputed general

damages or the amount of special damages represented by Hurley's bills for medical treatment.

Safeway did not dispute the amount of medical bills which were submitted. It was stipulated to by Safeway's counsel that Hurley's expert, Dr. Schuster would testify that all the treatment was reasonable and necessary for injury. There was no cross examination of Dr. Schuster on this issue, and no contrary evidence or testimony offered. All of the bills offered, totaling \$89,397.94, were admitted as evidence, without objection from Safeway. (RP: JT 86-92) Safeway's own medical expert, Dr. Ghidella testified that the treatment, including the second surgery to remove hardware from Ms. Hurley's ankle which had begun to malfunction, was reasonable. (RP: JT 391) Dr. Ghidella gave an opinion that a simple sprain would have healed within a week, if not trod upon overly much. Dr. Ghidella's opinion was contrary to the majority of the medical evidence including the medical records he reviewed and relied upon. The evidence did not support his diagnosis, since the Hurley did, in fact, stay off her ankle for about a week, and the ankle did not heal. (RP: JT 420-422) Not only did the evidence not support his opinion, but (as is argued below) the time sheets showing Plaintiff did not work for five days after the injury specifically controverted the very premise of Dr. Ghidella's theory (that Hurley worked a large number of hours on her feet

immediately after the injury). The medical bills in the amount of \$89,397.94, their reasonableness, and the necessity of the treatment they represent, is all undisputed in the record.

Dr. Ghidella did not give any testimony, evidence, or opinion as to a superceding cause of the injury. In fact, Dr. Ghidella specifically testified that There was no evidence of “other processes” at work in Hurley’s ankle which would have caused her injuries. (RP: JT 401) The only dispute to the amount of and reasonableness of the treatment and medical bills claimed by Hurley, which was raised by Safeway was not evidentiary, but was part of the Safeway’s closing argument, in which Safeway’s counsel argued that the only treatment that was reasonable and necessary would have been treatment for a sprained ankle. (RP: JT 749-750)

Often the responding party to a motion for a new trial will argue that, although the record lacks evidence to support the verdict, the verdict could still be found to be reasonable if the Court is willing to assume that the jury simply did not believe any of the evidence presented to it by the Appellant. The Washington Appellate Courts have already rejected this approach:

Ide v. Stoltenow, 47 Wash.2d 847, 289 P.2d 1007 (1955) is directly on point. In Ide, we held the trial court was justified in granting a new trial where the jury's verdict was \$120 more than

the lowest computation of special damages. Ide, 47 Wash.2d at 849, 289 P.2d 1007. The defendant in Ide, like the defendant here, argued the jury could have concluded some of the treatment was unnecessary, particularly the treatment received over one year after the accident. Ide, 47 Wash.2d at 849, 289 P.2d 1007. In response to this argument, we stated:

The difficulty with that argument is that, carried to its logical conclusion, there never could be an inadequate verdict, because the conclusive answer would always be that the jury did not have to believe the witnesses who testified as to damages, even though there was no contradiction or dispute.

Ide, 47 Wash.2d at 851, 289 P.2d 1007.

Likewise, in Hills v. King, 66 Wash.2d 738, 404 P.2d 997 (1965), the defendant presented no medical testimony challenging the necessity or reasonableness of the plaintiff's treatment for injuries to her back and neck caused by a minor car accident. The defendant instead argued the plaintiff was not seriously injured and, "except for her imagination," there was little need for most of the special damages. Hills, 66 Wash.2d at 739, 404 P.2d 997.

The Record in this case includes an undisputed amount of special damages in the form of medical bills. The amount entered into evidence, without objection by Safeway is \$89,397.94. The Jury's award of \$1,200.00 is so far removed from the undisputed evidence in this case that the situation warranted a new trial as to special damages. The Trial Court abused its discretion in denying the Appellant's motion for a new trial where the jury's damage award was wholly unsupported by the evidence. Appellant respectfully requests that the Appellate Court remand this case for a new trial as to special damages.

3. The Trial court erred in failing to exclude the testimony of Dr. Ghidella.

The Appellate Court reviews a Trial Court's sanctions for discovery violations under an abuse of discretion standard. Smith v. Behr Process Corp. , 113 Wash.App. 306, 324, 54 P.3d 665 (2002). In this case, the Trial court opted not to impose the requested sanction (exclusion of Dr. Ghidella from the trial of the case). Failure to exercise discretion is an abuse of discretion. State v. Pettitt, 93 Wash.2d at 295-96, 609 P.2d 1364. (1980). “A discretionary decision rests on ‘untenable grounds’ or is based on ‘untenable reasons’ if the trial court relies on unsupported facts or applies the wrong legal standard.” Mayer v. Sto Indus., Inc., 156 Wash.2d at 684, 132 P.3d 115 (2006) (internal quotation marks omitted) (quoting State v. Rohrich, 149 Wash.2d 647, 654, 71 P.3d 638 (2003)).

The legal standard that was to be applied for consideration of the exclusion of Ghidella as a discovery sanction arose from the discovery rules promulgated by the King County Local Rules and the case scheduling order for the trial of the case. The Case scheduling order required Safeway to make its discovery disclosures by discovery cutoff. KCLR 4(g). Also, the discovery rules require a Defendant to make requested disclosures. KCLR 26(b)(3)(C) (for expert witnesses, the disclosure must include a “summary of the expert’s opinions and the

basis therefore and a brief description of the expert’s qualifications”); KCLR37(d) (“Failure to Make Discovery; Sanctions”); Where the issue is non-disclosure of witness testimony, the Court should look to see whether the non-disclosure was “willful or deliberate and that it substantially prejudiced the opponent’s ability to prepare for trial.” Peluso v. Barton Auto Dealerships, Inc., 138 Wn.App. 65, 70, 155 P.3d 978 (2007) (citing Fred Hutchinson Cancer Research Ctr. V. Holman, 107 Wn.2d 693, 706, 732 P.2d 974 (1987)). “Any person not disclosed in compliance with [KCLR 26] may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions [a]s justice requires.” KCLR 26(b)(4). In this case, Safeway’s nondisclosure of Ghidella’s expected testimony was intentional and did prejudice Hurley’s case.

According to the only information Safeway supplied about Dr. Ghidella, he was expected to perform an evaluation (pursuant to CR 35) of Hurley, and his testimony would be based on this evaluation. Safeway never requested or attempted such an evaluation. Safeway objected to Hurley’s discovery requests for information about Dr. Ghidella’s testimony stating that its investigation was ongoing, and referred Hurley to the primary witness disclosure, which states only that “Dr. Sean Ghidella is an orthopedic surgeon who may be called to testify on Ms. Hurley’s

alleged injuries and whether Ms. Hurley's alleged slip and fall is the cause of her alleged physical limitations." The non-disclosure was clearly intentional.

Safeway's only disclosure concerning Dr. Ghidella, during this entire case, indicated that his testimony would be based on an independent evaluation of the Plaintiff or a referral for the purposes of testing and evaluation, and a review of documents pertinent to the evaluation. Safeway chose not to ever pursue such an evaluation. It certainly could have, as Rule 35 allows it to make such a request. Because Dr. Ghidella's testimony was clearly limited to the outcome of an evaluation which was never done, Hurley did not pursue a motion to compel as to his testimony (it would have been premature prior to any evaluation).

The trial of this case began on January 26, 2009. As of January 22, 2009, the nature, and basis of any testimony or opinions to be presented by Dr. Ghidella remained undisclosed by Safeway. Safeway's intentional conduct left insufficient time to review any report, to subpoena Dr. Ghidella's file and take his deposition, or to prepare a rebuttal analysis and present it at trial.

Safeway argued that Dr. Ghidella's "new" testimony arose from some W-2 forms which it claims it had only recently discovered

(although Hurley had long before that authorized Safeway to request tax information), insisting that Hurley and her attorneys had engaged in “dilatatory practices.” (RP: JT 11) In fact, as Ghidella’s testimony was ultimately presented, his testimony and medical opinion did not, in any way, rely on W-2 forms. Instead, it relied solely, and ultimately erroneously, on time records that had been in the parties’ possession since the opening of the discovery period, but which had been supplied to Dr. Ghidella only after he apparently gave the opinion which he claimed was supported by the time cards. (RP: JT 387) As it was presented at trial, Dr. Ghidella opined that Hurley had suffered a simple sprain. He testified that had she only stayed off the ankle immediately after the injury for about a week, the sprain would have healed. He based this testimony on his belief that she had worked a full workweek after the injury. On cross examination, he was presented with Hurley’s time cards, which showed she had actually worked only three hours the day following her injury, and then been off of work for over a week. (RP: JT 420-422)

The Court’s decision not to exclude Dr. Ghidella was an abuse of discretion. It was erroneous according to the applicable law in that the local rules called for exclusion of a witness whose testimony was not properly disclosed by a party. The non-disclosure was clearly intentional. The argument that Safeway presented in order to stave off exclusion (that

Ghidella's testimony was based on W-2 forms that it had recently acquired) was clearly untrue, as is evidenced by the fact that his testimony did not rely on W-2 forms at all, but on time records which had been in the parties' possession for the duration of discovery. The Appellant respectfully requests that the Appellate Court remand this case for a new trial as to damages and that Dr. Ghidella be excluded from offering testimony at the trial of the case.

VI. CONCLUSION

The verdict in this case was clearly affected prejudicially by the introduction of Dr. Ghidedlla's erroneous and undisclosed testimony, as well as by an erroneous and confusing jury instruction. The Jury's verdict as to Special and general damages was clearly unsupported by the evidence presented at trial. Under a de novo review, the Appellate Court should find that a new trial is warranted as to general damages based on the erroneous instruction to the jury. Under an abuse of discretion standard, the Appellate panel should find that the Trial Court erred in failing to grant a new trial as to special damages, and in declining to grant a new trial based on the failure to exclude Dr. Ghidella as a witness.

Ms. Hurley respectfully requests that this Court for the above listed arguments reverse the superior court's judgment and remand this matter back to the Superior Court for a new trial as to damages.

DATED this 7th day of September, 2009.

VAIL, CROSS & ASSOCIATES



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Attorneys for Appellant

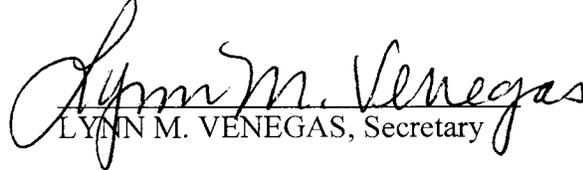
CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 22nd day of September, 2009, the document to which this certificate is attached, Brief of Appellant Hurley w/Corrected Citations, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Tammy L. Williams
Nicholas L. Jenkins
Floyd, Pflueger & Ringer, PS
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DATED this 22nd day of September, 2009.


LYNN M. VENEGAS, Secretary

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