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NO. 63361-9-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

JOANNE HURLEY,

Appellant,

v.

SAFEWAY, INC.,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This is a simple “slip” (no fall) case wherein the jury—after hearing the evidence and weighing credibility for six days—unanimously awarded appellant Joanne Hurley \$1,200 in special damages and -\$0- in general damages. After the jury trial, Hurley moved for a new trial or alternatively, for additur. Respondent Safeway consented to additur of \$3,500 in general damages, which is reflected in the Judgment.

Respondent Safeway, Inc. respectfully submits that the jury verdict and the trial court’s pre- and post-trial rulings should be affirmed because: (1) the jury’s verdict is supported by abundant evidence in the record; and (2) the trial court properly exercised its discretion: (a) in denying a new trial, but permitting Hurley post-trial additur for general damages; and (b) in allowing Safeway’s medical expert to testify at trial. Significantly, Hurley does not assign error to the post-trial award of the general damages additur of \$3,500.

In sum, the jury’s verdict and the trial court’s pre- and post-trial rulings were reasonable and tenable, and should be affirmed.

II. STATEMENT OF THE CASE

A. **The Jury Awarded Hurley \$1,200 in Medical Specials and Wage Loss After Hearing Testimony and Weighing All of the Evidence.**

Hurley filed suit against Safeway on August 2, 2007, alleging that on August 31, 2004, she slipped, but did not fall while working as merchandiser for independent contractor DPI at Safeway's Upper Queen Anne store. (CP 3-4) She testified she "rolled" her left ankle. (Trial Ex. 134 at 1) At trial, Hurley sought recovery of \$89,397.94 in medical bills, roughly \$250,000.00 in wage loss and the cost of a college education, plus an unspecified amount of general damages. (2/5/09 RP 702, 712)

After a six-day trial, the jury awarded Hurley \$1,200 in medical bills and wage loss. (CP 394) The jury wrote "\$0" in the blank entitled "Physical pain and suffering." *Id.* The verdict was unanimous. (2/5/09 RP 772-74) Post-trial, the court granted Hurley's motion for general damages additur in the amount of \$3,500.00, to which Safeway consented. (CP 463) Hurley does not dispute the amount of the additur, nor does she assign error to the trial court's general damage additur. (App. Br. at 1-2)

Hurley's appeal is limited, in essence, to the jury's award of medical bills and wage loss. (App. Br. at 20) She contends that "[t]he [j]ury's award of \$1,200 is so far removed from the undisputed evidence ... that the situation warranted a new trial as to special damages." (App.

Br. at 23) To the contrary, the material evidence was disputed, and there was an ample factual basis for the jury's verdict.

B. The Jury Heard Testimony that Hurley Ignored the Doctors' Orders to Modify Her Work and Stay Off of Her Injured Ankle.

The day after Hurley "slipped," she visited HealthWorks physician Dr. Catherine Smith complaining that she rolled her left ankle. (Trial Ex. 134 at 1) Hurley's merchandising work was physically demanding: it involved prolonged periods of walking, bending, lifting and pushing heavy merchandising carts. (Trial Ex. 134; 2/3/09 RP 300-303) X-rays showed an ankle sprain. (2/3/09 RP 379) Dr. Smith order modified work duty and prescribed ibuprofen. (2/3/09 RP 379)

On September 3, 2004, Hurley followed-up with HealthWorks physician Dr. Monica Haines. (2/2/09 RP 110) Dr. Haines noted Hurley had "returned to work today – unable to walk, lots of pain." (2/3/09 RP 443) Consistent with Dr. Smith's orders, Dr. Haines ordered Hurley to only perform light duty work. (2/3/09 RP 443) For example, Dr. Haines ordered no standing or walking more than 10 minutes per hour; no kneeling or squatting; and no lifting in excess of 10 pounds. (2/3/09 RP 444-45)

Dr. Haines referred Hurley to Dr. Mark Lewis for an evaluation. Hurley continued to work full duty and did not visit a doctor again until October 26, 2004, nearly two months later. (Trial Ex. 27; 2/2/09 RP 117)

Inexplicably, Hurley continued to work on unmodified work duty after her slip (between September 3, 2004 and October 26, 2004) contrary to several doctors' orders. (2/2/09 RP 116; Trial Ex. 27) Her supervisor, Barbara Diehl, testified that Hurley did not disclose until October 29, 2004, that Hurley's doctors had ordered modified work duty. (2/4/09 RP 578) Ms. Diehl testified that Hurley—after rolling her ankle—continued to work on unmodified duty for nearly two months, sometimes working shifts as long as 13 hours. (2/4/09 RP 580; Trial Es. 27)

Ms. Diehl testified that she “immediately put a stop to her doing regular duties” when she learned that Hurley had been ordered to perform light duty work. (2/4/09 RP 586) She testified with documentary support that Hurley's employer created a special light-duty position for her with no reduction in pay. (2/4/09 RP 586, 609; Trial Ex. 113) Ms. Diehl offered the position to Ms. Hurley, but Ms. Hurley turned it down. (2/4/09 RP 586)

C. The Jury Heard Evidence that Hurley Concealed Significant Facts About Her Employment and Submitted Contradictory Testimony.

At Hurley's February 2009 deposition, she denied that she had performed any work since leaving DPI in 2004, except for caring for her mother between January and June 2007. (CP 515: "Q. So you haven't been employed since June of '07. A. Correct"). Her vocational expert stated Hurley was "unemployable" until December 2006. (CP 253) He stated, after that time, Hurley was capable only of "sit-down," sedentary employment. (CP 253) Hurley's medical expert, Dr. Gary Schuster, concurred in the opinion that Hurley was effectively limited to sedentary employment. (2/2/09 RP 83)

With trial set in this case for January 26, 2009, Safeway learned on January 12, 2009, Hurley, in the course of preparing her economist expert for trial, inadvertently disclosed 2007 W-2s from multiple employers including (1) CNC LLC; (2) Teatro Zinzanni; (3) Morcos Brothers; (4) Host International, Inc.; and (5) Columbia Hospitality (the "W-2 employers"). (CP 140-45) Safeway received these documents in the economist's report.

Hurley had concealed these employers in her October 2007 written discovery answers. (CP 126; 130) She had also concealed the identity of these employers at her June 2008 deposition. (CP 515) One such W-2

was issued by “CNC LLC and “Dori Custer.” (CP 143) Cross-checking against a 2007 bankruptcy petition filed by Hurley revealed that CNC, LLC was doing business as “Swank.” (CP 150)

In the bankruptcy petition, Hurley verified she had been employed by Swank for at least six months in 2007 as a “bartender” making an average monthly income of \$1723.22 including \$350 per month in “tips.” (CP 150) This revenue was in excess of those reported on her 2007 W-2 from CNC LLC. (Compare CP 143 with CP 150) Moreover, the W-2s showed Hurley’s use of at least three different social security numbers. (CP 140-45)

Moreover, Hurley was shown in on-line advertisement as a bartender claiming to make between \$75,000 and \$100,000 per year. (CP 240-42) Hurley testified she did not authorize the advertisement, even though a business card she admitted to creating used the same graphics, photo, and fonts as the online advertisement. (2/4/09 RP 524) Additionally, Hurley certified in an August 5, 2008 Uniform Residential Loan Application that she was a 15-year self-employed bartender, with a gross monthly income of \$5,980. (CP 244-46) Hurley testified that she never read the application, but admitted she signed it. (2/3/09 RP 467) Respondent Safeway obtained Hurley’s business card, wherein she held herself out as an “independent bartender” for “private parties” with a

“large following.” (Trial Ex. 136) Safeway also obtained a picture that revealed Hurley working in a crouching position dismantling furniture with a screw driver and exerting significant downward force on her left ankle. (Trial Ex. 128) Most if not all of this evidence was admitted at trial. (Trial Ex. 128, 130, 132, 136, 137)

At trial, Hurley admitted she had concealed her employment history during her deposition. (2/3/09 RP 463) She testified she was “banquet bartending” for some of her W-2 employers, and continued to do so in 2008 and 2009. (2/3/09 RP 469-70)

At the conclusion of her testimony, the jury asked Hurley the following questions:

Why are you actively promoting yourself as a bartender if your injury hurts you to perform the work?

Why did you not read the Uniform Residential Loan Application document before putting your signature on it?

(2/3/09 RP 546-547)

D. The Jury Heard Testimony from Hurley’s Own Medical Expert, Who Agreed that Hurley Exacerbated her Injury by Continuing to Work Contrary to the Doctors’ Orders.

At trial, Hurley’s medical expert, Dr. Schuster, agreed that Hurley continued to work contrary to her doctors’ recommendations. Dr. Schuster stated “first of all, with that kind of injury, you ... wouldn’t want someone to continuously walk on that all day, loading the joint. It’s

certainly not helpful for it to fully heal; and secondly, it wouldn't be consistent with her to be able to do it." (2/2/09 RP 61, 116) When Dr. Schuster was asked: "[W]ould it surprise you ... that after being restricted to only ten minutes per hour of standing of walking, that [Hurley] was working eight -, eleven -, twelve hour days in September 2004?" He answered "[P]ossible, I mean, I don't have those records." (2/2/09 RP at 114)

Dr. Schuster testified that the November 15, 2004 MRI requested by Dr. Lewis showed Hurley's injury as "chronic or acute-on-chronic." (2/2/09 RP 124; Trial Ex. 135) Moreover, Dr. Schuster testified that he agreed that when a patient sustains a sprain to the ankle, "that ankle is more likely to be re-sprained over and over." (2/2/09 RP 127) He testified that it was "certainly possible" that "patients will sometimes exacerbate their condition by ... walking ... and ... roll[ing] it accidentally again." (2/2/09 RP 127) He did not know whether Hurley continued to roll or re-sprain her ankle between the dates of her visit to Dr. Smith of August 31, 2004, and the November 15, 2004, MRI. (2/2/09 RP 128)

Dr. Schuster also opined Hurley had a "31 per cent left lower extremity impairment rating." (2/2/09 RP 131) He initially testified that an individual amputated from the left knee down would have a "50 per

cent rating.” (2/2/09 RP 132) He then retracted the statement. (2/2/09 RP 132-33)

At trial, Dr. Schuster acknowledged the inconsistency between Hurley’s purported injury and her continued work at DPI. (2/2/09 RP 61) However, he saw no inconsistency between Hurley’s medical condition and her continued bartending; he testified she could bartend, *so long as she was sitting down*. (2/2/09 RP 61; 144-45)

E. The Jury Heard Testimony Which Established That Hurley’s Initial Injury at Safeway Was Minor.

After Hurley injured her ankle at Safeway in August 2004, and then continued working at her physically demanding job, she had ankle fixation surgery in February 2005. (2/3/09 RP 391) The record was clear that Hurley failed to follow doctor’s orders after the incident. In response to that evidence, Hurley’s own lawyer, while cross-examining Safeway’s expert, established without question that the initial injury was minor, perhaps in a vain attempt to explain why Hurley had failed to follow medical instructions:

Q. [By Hurley’s attorney]: And would you agree with me, Dr. Ghidella, there is no indication in the early records at U.S. Healthworks by Dr. Smith that this was a very serious ankle sprain?

A. ... I don't know that [s]he graded it.

Q. There is no indication in there that she was not to weight bear, was there?

A. ... I don't believe her weight bearing was restricted outside of the work restrictions that I do recall.

Q. And in fact, she was only given ibuprofen the first time, correct?

A. ... that is probably accurate. ...

Q. You didn't recall seeing in there as to whether or not her ankle was taped?

A. No, ma'am.

Q. You didn't see any indication in there that her ankle was put in a splint?

A. ... I don't recall that.

Q. Do you recall seeing whether or not she put in a walking boot?

A. No, ma'am.

Q. Do you recall she was prescribed crutches?

A. No, ma'am.

Q. Do you recall she was put into any physical therapy?

A. No, ma'am.

Q. In fact, that would be the same as well for the 3rd of September when she went back in to U.S. Healthworks, correct?

A. ... [T]that's what I recall.

Q. And those would be modalities you would expect to see with probably a far more severe sprain, correct?

A. Certainly as the severity increases, yes, you're going to expect more aggressive treatments even within the conservative realm.

(2/3/09 RP 418-20, 441-42)

The jury heard testimony from Dr. Ghidella that if Hurley had abided by Dr. Smith's and Dr Haines's recommendations to modify her

work duties and discontinued full-duty work, then her ankle would have healed, and she could have avoided surgical intervention. He stated that most all ankle sprains respond “to simple rest, rehab ... [and] ... physical therap[y].” (2/3/09 RP 389, 402) Dr. Ghidella “would have recommended modified work for one week, and then brought the person back in ... you can always give them another week”. (2/3/09 RP 448)

Hurley’s medical bills for her visits to Dr. Smith and Dr. Haines totaled \$442.38. (Trial Ex. 1 at 2-5) Associated prescription medications amounted to \$11.41. (Trial Ex. 3 at 2) Hurley’s wage was \$11.00 per hour. (CP 574) The jury awarded her \$1,200 in wage loss and medical expenses. (CP 394) In a post-trial motion, the trial court awarded Hurley \$3,500 in general damages additur.

III. ARGUMENT

A. **Hurley’s Opening Brief Should Be Stricken Because Most of it Fails to Cite to the Record.**

RAP 10.3(a)(4) requires a “statement of the facts and procedure relevant to the issues presented for review, without argument” and that “[r]eference to the record must be included for each factual statement.” RAP 10.7 authorizes this Court, on its own motion or the motion of a party, to strike portions of a brief and sanction a party for failure to comply with the Rules of Appellate Procedure.

Respondent Safeway respectfully requests that the Court strike Hurley's opening brief. Hurley was twice directed by the Court of Appeals to submit a brief with proper citations to the record. Her third and most recent brief is substantially the same as her second. Hurley continues to fail to cite to the record for many of her contentions. See, e.g., App. Br. at 2. Typically, Hurley constructs multiple sentences in a large paragraph, then includes a citation only to the last sentence. See, e.g., App. Br. at 4 (first full paragraph); App. Br. at 10 (first paragraph).

Notably, most of her uncited contentions are both central to her appeal and directly contradicted by the actual record. Compare, e.g., App. Br. at 21 ("Dr. Ghidella gave an opinion that a simple sprain would have healed within a week, if not trod upon overly much") with 2/3/09 RP 448 (Dr. Ghidella testified he would have required Hurley to return in one week for an evaluation). Compare, e.g., App. Br. at 20-21 ("[t]here was no evidence in the record which disputed general damages or the amount of special damages") with 2/3/09 RP 402 (Dr. Ghidella testified "Hurley's return to work, and working through October 26, 2004, exacerbate[d] her injuries"). Respondent Safeway moves herein to strike Hurley's opening brief, or alternatively, defers to the court's own motion to strike Hurley's brief because she fails to cite to the record and makes numerous erroneous statements, represented as "facts."

B. The Standard of Review is “Abuse of Discretion”

When reviewing the trial court’s order denying a motion for new trial, the applicable standard of review is abuse of discretion. App. Br. at 19; Cowan v. Jensen, 79 Wn.2d 844, 847, 490 P.2d 436 (1971) (the denial of a motion for new trial will not be disturbed absent a manifest abuse of discretion). A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based on untenable grounds. Allard v. First Interstate Bank, N.A., 112 Wn.2d 145, 148, 768 P.2d 998, modified, 773 P.2d 420 (1989).

C. The Trial Court Did Not Abuse Its Discretion in Denying Hurley a New Trial Because the Jury’s Verdict Was Supported by Sufficient Evidence.

It is not an abuse of discretion to deny a new trial when the verdict has evidentiary support. CR 59(a)(7). “Where sufficient evidence exists to support the verdict, a new trial should not be granted.” Lopez v. Salgado-Guadarama, 130 Wn. App. 87, 91, 122 P.3d 733 (2005). “The finding of the jury, upon substantial, conflicting evidence ... is final.” Bunnell v. Barr, 68 Wn.2d 771, 777, 415 P.2d 640 (1966) (citations omitted). “Determining ... damages is within the province of the jury.” Lopez, 130 Wn. App. at 91 (citing Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997); Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 329, 858 P.2d 1054 (1993)). “An appellate court will not

disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice.” Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 268, 840 P.2d 860 (1992). Nor will the court disturb the jury’s finding “where the amount of special damages is disputed and the injury and its cause uncertain.” Lopez, 130 Wn. App. at 92 (citing Singleton v. Jimmerson, 12 Wn. App. 203, 205, 529 P.2d 17 (1974)).

In Gestson, the plaintiff Gestson claimed medical expenses of \$ 65,000.00 plus general damages, and the jury's total award was \$458.34, the cost of her emergency room visit. Gestson v. Scott, 116 Wn. App. 616, 618, 67 P.3d 496 (2003). Gestson received initial treatment in the emergency room and was released. Id. at 618-19. Six months after the incident, she was diagnosed with a disk herniation and neck injury. Id. at 619. The defense disputed proximate cause based on a preexisting neck problem. Id. at 624. The court ruled the evidence “raised doubts as to the casual connection between the accident and Gestson’s neck injury.” Id. at 623. “Gestson experienced neck pain and stiffness, numbness in her arms, and headaches before the accident, the jury could properly disregard the opinions of the Gestsons’ experts.” The court reversed the trial court’s grant of a new trial. Id. at 625.

Here, as in Gestson, there was ample evidence contradicting Hurley's theory that Safeway caused all of her injuries. The distinction that Gestson involved preexisting injuries, and this case involves evidence post-incident injuries, is immaterial. The jury was instructed that proximate cause is "a cause which in a direct sequence unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened." (CP 385)

Safeway specifically framed the issue at closing as to whether the jury could "really say the resultant ligament injuries were caused by [the initial ankle roll]." (CP 747) The evidence was sufficient for the jury to find Hurley's surgeries and related ongoing issues were not caused by her initial ankle roll, but by her continued work contrary to doctor's recommendations. Initial x-rays showed a simple ankle sprain. (2/3/09 RP 379) Both of her initial doctors, on September 1 and 3, 2004, recommended light duty in a physically exacting job. (Trial Ex. 134; 2/2/09 RP 110, 112-13, 443) Nevertheless, Hurley continued to work after her slip for nearly two months on full work duty with significant overtime in a physically exacting job, contrary to doctor's orders. (2/2/09 RP 114-116, 326, 580; Trial Ex. 27)

Hurley did not visit a doctor again until October 26, 2004, nearly two months after her initial visit with Dr. Smith. (2/2/09 RP 117) A

November 15, 2004 MRI showed both chronic and acute injuries more severe than were observed on September 1, 2004. Compare Trial Ex. 134 with Trial Ex. 135. She then started bartending. Trial Ex. 136.

Hurley's own expert agreed Hurley's continued work might have exacerbated the injury. (2/2/09 RP 127) He testified he could not say whether Hurley had continued to re-injure herself while working during the roughly 60-day gap in treatment. (2/2/09 RP 127-28)

Moreover, Hurley contended her initial injury was minor. She established "there [was] no indication in the early records ... this was a very serious ankle sprain." (2/3/09 RP 418) There are no "modalities you would expect to see with probably a far more severe sprain." (2/3/09 RP 420) Dr. Ghidella merely reiterated what the evidence showed, i.e., that if Hurley stopped bearing weight on her ankle, as her doctors recommended, then her ankle would have healed, and she could have avoided subsequent additional treatment, surgeries, and associated medical bills. (2/3/09 RP 402)

In sum, the jury's award of \$1,200 in wage loss and medical bills was supported by the evidence; it covered Hurley's initial treatment, prescription medication, and roughly eight days of wage loss. There was ample evidence that Safeway was not the proximate cause of all of

Hurley's alleged medical treatment, wage loss, and purported need for a college education.

D. The Jury's Verdict Should Not Be Disturbed on Appeal Because It Is Supported by Sufficient Evidence and the Credibility of Witnesses.

Hurley's credibility is a significant factor when reviewing the jury's findings on special and general damages. Lopez, 130 Wn. App. at 93 (affirming award of special damages and no general damages because, inter alia, "[the plaintiff's] credibility was at issue. He originally testified he was carried to the ambulance, but when questioned regarding who carried him, he admitted he walked").

There were numerous inconsistencies in Hurley's case and testimony. For example, her initial position at trial was that her injury was severe. Hurley testified that her "first sensation" on rolling her ankle was as follows: "Everything that I could possibly imagine was horrific ... it was throbbing, it was piercing." (2/3/09 RP 313) She testified that her ankle could not bear weight. (2/3/309 RP 314) Her medical expert, Dr. Schuster, opined that the severity of Hurley's injury remained constant from the date of injury. (2/2/09 RP 48) He stated Hurley had torn ... "all the structure and support of [her] ankle."

Significantly, Hurley's roughly two months of full-duty work, combined with her description of the heavily physical nature of her job,

directly contradicted her medical expert's testimony that she had no structure or support in her ankle. (Compare 2/3/09 RP 300-03 and 2/3/09 RP 313-14 with Trial Ex. 27) Also, Hurley testified that her ankle could not bear weight, however, she walked in the Safeway store extensively after the incident. (2/3/09 RP 316-21) She walked back and forth across the store, in search of store staff and cleaning supplies. (2/3/09 RP 316-21) Hurley even cleaned the floor. (2/3/09 RP 316-21)

To address these inconsistencies, Dr. Schuster tried to excuse Hurley's willingness to ignore her doctors' orders and engage in ongoing full-duty work with his explanation that "she was on narcotics at the time." (2/2/09 RP 61) However, Dr. Schuster was merely speculating. "If she's working with those pain pills, she [would] not necessarily have to seek more medical attention." (2/2/09 RP 117) When queried about whether additional prescriptions were issued after September 3, 2004, Dr. Schuster acknowledged that there were none, and then hypothesized that Hurley had been given automatic refills of narcotic painkillers. (2/2/09 RP 118) The jury heard him testify as follows: "I don't know, I didn't see the prescription." (2/2/09 RP 118) Hurley's medical billings showed no such refills. (Trial Ex. 3 at 2-3; Trial Ex. 5 at 3-13) Dr. Ghidella testified that automatic refills of narcotic prescriptions were illegal. (2/3/09 RP 381)

Caught in a deepening morass, Hurley ultimately shifted tactics and took the position that her initial injuries were minor. (2/3/09 RP 418-20, 441-42) Hurley also admitted she had extensively concealed her employment and earnings history. (2/3/09 RP 462) The evidence revealed that Hurley had worked extensively as a bartender after leaving DPI. (Trial Ex. 130, 132, 136, 137) She held herself out as bartender. (Trial Ex. 130, 132, 136, 137) She falsely stated in bank documents, under penalty of criminal sanction, that she had worked a bartender for the past 15 years. (Trial Ex. 132)

When the evidence revealed that Hurley had worked extensively as a bartender after leaving DPI, she finally conceded that she was bartending, explaining that she was a “sit-down” bartender. (2/2/09 RP 268; 2/3/09 RP 347-348, 547) (“I can bring a chair, or I can bring what I need to accommodate myself.”)

Hurley’s opening brief fails to reflect what actually occurred at trial. Hurley had significant credibility problems relating centrally to her personal injury claim. The jurors’ questions reflected that concern. (2/4/09 RP 546-47) In sum, the evidentiary facts supported an award of her September 2004 medical bills and sufficient wage loss to cover a one-to-two week recovery period for a sprained ankle. The impeachment

evidence alone was sufficient for the jury to disbelieve the extent of her claimed damages.

E. Hurley Is Barred from Appealing the Additur of General Damages of \$3,500 Because She Failed to Assign Error to the Order, and Accepted the Additur Relief as an Alternative to a New Trial.

Hurley raises the jury's denial of general damages obliquely, asserting the court's instruction that Hurley was not claiming emotional distress damages caused the jury to reject in toto her general damage claim. App. Br. at 15. There is no basis for her assertion because she instructed the jury at length on the distinction between damages for physical pain and suffering, and damages for emotional distress. (CP 388; 2/5/09 RP 703-713) Hurley has no basis to appeal her award of general damages.

First, Hurley assigns no error in her opening brief to the court order granting her motion for additur as an alternative to a new trial on general damages. (App. Br. at 1-2) She makes no direct reference to the additur in her opening brief. Second, she moved for additur as an alternative to a new trial on general damages. (CP 412-16) Accordingly, the trial court gave her the additur. (CP 463) She is now barred from appealing the relief that she specifically requested.

F. The Trial Court Did Not Abuse Its Discretion in Ruling that Dr. Ghidella Should Be Allowed to Testify.

Hurley concedes the standard of review on denial of a motion to exclude a witness is abuse of discretion. App. Br. at 24 (citing Smith v. Behr Process Corp., 113 Wn. App. 306, 324, 544 P.3d 665 (2005). “[I]t is an abuse of discretion to exclude testimony as a sanction [for noncompliance with a discovery order] absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.” Fred Hutchinson Cancer Research Ctr. v. Holman, 107 Wn.2d 693, 706, 732 P.2d 974 (1987).

Hurley complains that the trial court should have excluded timely-disclosed defense medical expert Dr. Sean Ghidella, whom she never deposed. App. Br. at 24-28. The trial court refused to exclude Dr. Ghidella because his opinions—to the effect that Hurley caused her ongoing ankle problems by continuing to work and bartend—were premised in part on information she withheld then provided to her economist and was discovered shortly before trial. (CP 256-59)

The trial court’s ruling expressly states: “Plaintiff has created the delay in Dr. Ghidella’s ‘late’ conclusions and opinions.” (CP 210) On appeal, Hurley omits the central fact that she concealed her employment

history and earnings, and the prejudicial affect this had on Safeway's ability to test Hurley's claim that she was limited to sedentary work.

First, Hurley tries to minimize her belated disclosure of her employment history and earnings, conjecturing that Dr. Ghidella's opinions solely "arose from some W-2 forms." App. Br. at 26. Even if true, that non-disclosure was a significant Fisons violation relating centrally to her claim of physical limitation and wage loss, and created a significant and additional factual basis for expert opinion.

The effect of her concealment and belated disclosure was significant. Dr. Ghidella's opinions arose from the landslide of information that Safeway received shortly before trial, after it learned that Hurley concealed her employment history. (CP 256-60; Trial Ex. 128, 130, 132, 136, 137) True, Dr. Ghidella could not specifically testify that Hurley's work for her W-2 employers contradicted her purported limitations. However, Hurley's concealment in the first instance deprived Safeway of the opportunity to do so: Hurley managed to keep the information secret until shortly before trial. It was Safeway—not Hurley—that was prejudiced by the nondisclosure.

Second, Hurley is incorrect that Dr. Ghidella's opinions were limited to the DPI timesheets. (App. Br. at 27) He testified, for example, that the photograph of Hurley dismantling furniture contradicted Dr.

Schuster's impairment ratings, and that her continued work prevented her ankle from healing and necessitated subsequent surgery. (2/3/09 RP 399, 420)

Third, Hurley fails to demonstrate that she was prejudiced. In spite of her concealment, Safeway issued supplemental written discovery disclosures detailing Dr. Ghidella's opinions on January 23, 2009, six days before trial commenced on January 29, 2009. (CP 256-59; 1/27/09 RP 15) Moreover, his opinions at trial were uncontroversial in any event; they merely reiterated Hurley's contention that her initial injury was minor. (2/3/09 RP 418-20, 441-42)

In sum, Safeway did not engage in any intentional nondisclosure, and there was no prejudice to Ms. Hurley. It was Hurley—not Safeway—that engaged in discovery abuses. Her concealment of her employment and earning history permeated both her medical and wage loss claim. The loan documents alone were a sufficient basis to find that Hurley's medical and wage loss damage was nominal. As such, even if the trial court erred, the error was harmless. See Mitchell v. Mitchell, 24 Wn.2d 701, 704, 166 P.2d 938 (1946) (non-prejudicial harmless error to admit evidence available in other admissible sources). Regardless, the trial court did not abuse its discretion in denying the plaintiff's motion to exclude Dr. Ghidella. Its decision was not "manifestly unreasonable or based on

untenable grounds.” Allard, 112 Wn.2d at 148. Accordingly, the trial court’s ruling should be affirmed.

G. The Trial Court Correctly Instructed the Jury that Hurley Was Not Claiming Emotional Distress Damages.

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.” Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995) (citing Adcox v. Children's Orthopedic Hosp. & Med. Ctr., 123 Wn.2d 15, 36, 864 P.2d 921 (1993)). The court reviews, *de novo*, jury instructions for errors of law, and error is reversible where it prejudices a party. Id.

In this case, Hurley signed a stipulation that she was not asserting emotional distress damages. (CP 11-13) Accordingly, the judge instructed the jury that “[t]he plaintiff is not claiming emotional distress damages. If you find for the plaintiff your award cannot include damages for emotional distress.” (CP 390) Hurley asserts that the instruction was “confusing” because the jury might have thought that general damages consisted only of emotional distress damages. (App. Br. at 16-17) There is no factual or legal basis for this assertion.

The damage instruction specifically allowed for physical pain and suffering. (CP 388) At closing arguments, Hurley’s counsel explained the

concept of “general damages” at length. (2/5/09 RP 703-13) He referred to them repeatedly as comprised of “physical pain and suffering, permanent injury, and loss of enjoyment of life.” (2/5/09 RP 703, 708-12) He gave multiple examples, and related them to Hurley’s claim. (2/5/09 RP 703-13) He expressly distinguished emotional distress damages from the type of damages Hurley was claiming:

The award of how much [general damages] are worth for a permanent impairment considering what [Hurley] can no longer do ... ties into loss of enjoyment of life ... Is that anxiety, is that depression? Is it me being sad and crying myself to sleep every night? No, that is not it. Those are emotional distress damages that are not part of this case.

(2/5/09 RP 711) There is no factual basis to believe that the jury was confused. Rather, Hurley expressly instructed the jury on this point to avoid the confusion she now alleges. The trial court did not err when it instructed the jury that Hurley was not claiming emotional distress damages.

IV. CONCLUSION

The jury’s award to Hurley of \$1,200 in medical bills and wage loss was amply supported by the evidence. Moreover, Hurley was beset with credibility problems. Ultimately, she conceded that her initial injury was minor. Further, the trial court did not abuse its discretion in allowing Dr. Ghidella to testify. Hurley fails to demonstrate intentional non-

disclosure or prejudice. Also, the trial court properly instructed the jury that Hurley was not claiming emotional distress damages. Hurley expressly instructed the jury on the distinction between physical and emotional damages to avoid the confusion she now alleges. Her assertion that the jury was confused should be rejected. This court should affirm the jury verdict, and the trial court's pre- and post-trial rulings.

RESPECTFULLY SUBMITTED this 23rd day of October, 2009

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CERTIFICATE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on October 23, 2009, I caused service of the foregoing BRIEF OF RESPONDENT on each and every attorney of record herein:

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