

64123-9

64123-9

No. 64123-9-I

COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

---

TOLA K. ARERO, and SHOLE D. ABUNA,

Plaintiffs/Respondents,

v.

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

Defendants/Appellants.

---

**REPLY BRIEF OF APPELLANT**

---

James N. Mendel, WSBA#29223  
Thomas G. Crowell, WSBA#23622  
Attorney for Defendant/Appellant

GEORGE W. MCLEAN, JR. & ASSOCIATES  
720 Olive Way, Suite 1600  
Seattle, WA 98101  
(206) 521-5000

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2018 FEB 25 AM 8:59

COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

---

TOLA K. ARERO, and SHOLE D. ABUNA,

Plaintiffs/Respondents,

v.

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

Defendants/Appellants.

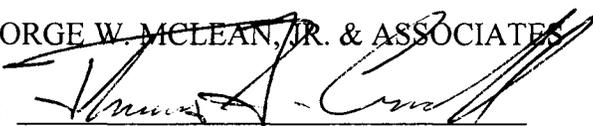
---

**REPLY BRIEF OF APPELLANT**

---

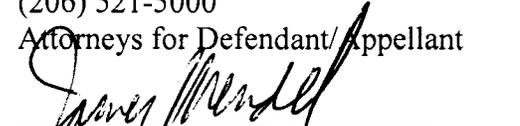
DATED this 4<sup>th</sup> day of February, 2010.

GEORGE W. MCLEAN, JR. & ASSOCIATES

By: 

Thomas G. Crowell, WSBA#23622  
720 Olive Way, Suite 1600  
Seattle, WA 98101  
(206) 521-5000

Attorneys for Defendant/Appellant

By: 

James N. Mendel, WSBA#29223  
720 Olive Way, Suite 1600  
Seattle, WA 98101  
(206) 521-5000

TABLE OF CONTENTS

1. Introduction..... 01

2. The Sudden Illness Defense is a Viable Theory that does not  
Require Exert Testimony..... 02

3. The Trial Court was not Authorized to Exclude the  
Witnesses as a Discovery Violation..... 03

4. There was no Violation of the Case Schedule..... 05

5. There was no Violation of KCLR 16(a)(4)..... 08

6. Defendant’s Witnesses were not New or Surprise Witnesses..... 09

7. The Trial Court had Sufficient Notice of the Evidence the  
Defense Wanted Admitted..... 11

8. The Evidence Supported the Jury Award to Plaintiff Arero..... 14

9. Defendant’s Appeal is Not Frivolous and Plaintiffs are not Entitled  
to Fees and Costs..... 17

10. Conclusion..... 17

## TABLE OF AUTHORITIES

### Table of Cases

Burke v. Pepsi-Cola Bottling Co., 64 Wn.2d 244, 246, 391 P.2d 194 (1964) .....	16
Case v. Dundom, 115 Wn. App. 199, 203, 58 P.3d 919 (2002) .....	03
Courtright v. Youngberg, 4 Wn. App. 234, 480 P.2d 522 (1971).....	2, 11
Dempere v Nelson, 76 Wn. App. 403, 886 P.2d 219 (1994).....	10
Gestson v. Scott, 116 Wn. App. 616, 622, 67 P.3d 496 (2003) .....	15
Herriman v. May, 142 Wn. App. 226, 232, 174 P.3d 156 (2007) .....	16
Ide v. Stoltenow, 47 Wn.2d 847, 848, 289 P.2d 1007 (1955) .....	15
Lancaster v. Perry, 127 Wn. App. 826, 113 P.3d 1 (2005).....	10
Mad River Orchard v. Krack Corp., 89 Wn.2d 535, 537, 573 P.2d 796 (1978).....	12
McUne v. Fuqua, 45 Wn.2d 650, 652, 277 P.2d 324 (1954) .....	15
Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003) .....	16
Rudolph v. Empirical Research Sys., Inc., 107 Wn. App. 861, 866, 28 P.3d 813 (2001) .....	03
Rupert v. Gunter, 31 Wash.App. 27, 640 P.2d 36 (1982).....	10
State v. Greenwood, 120 Wn.2d 585, 592, 845 P.2d 971 (1993).....	07
State v. Roy, 116 Wn.2d 531, 539, 806 P.2d 1220 (1990).....	12
Thurston County v. City of Olympia, 151 Wn.2d 171, 175, 86 P.3d 151 (2004).....	07

### Regulations and Rules

Civil Rule 26.....	02
Civil Rule 26(e)(4).....	04
Civil Rule 26(i) .....	3, 4
Civil Rule 37 .....	03
Civil Rule 54(b).....	14
ER 103 (a)(2).....	12
King County Local Mandatory Arbitration Rule 7.1(c) .....	06
King County Local Rule 4 .....	5, 6, 8
King County Local Rule 4(a).....	03
King County Local Rule 16(a)(4) .....	5, 8, 9
King County Local Rule 26 .....	03
King County Local Rule 26(a) .....	05
King County Local Rule 26(b) .....	6, 8

King County Local Rule 26(c) ..... 06  
RAP 18.9.....17

Other Authorities

Philip A. Trautman, Motions Testing the Sufficiency of Evidence,  
42 Wash. L. Rev. 787, 811 (1967) ..... 15

## **1. Introduction**

The parties agree that defendant/appellant Kristina Bazley lost control of her car on June 14, 2005 and collided with a vehicle occupied by plaintiff/respondent Shole Abuna. The parties agree on very little else. The defense alleges Ms. Bazley lost control because she blacked out due to an unforeseen syncopal episode brought on by her pregnancy. The plaintiffs argue Ms. Bazley simply fell asleep. This was a central dispute between the parties and should have been fully presented to the jury. The trial court; however, effectively ruled in favor of the plaintiffs on this dispute and stripped the defense of any evidence to support their position. The trial court did so by erroneously interpreting the relevant civil rules.

Plaintiff Abuna's response brief spends time dwelling on aspects of the defendants medical history that was never at issue in this case. It must be presumed the only purpose for introduction of these details into the appellate record was to embarrass the defendant in retaliation for her seeking appellate review. This only further illustrates the logical disconnect between the facts of this case and the rulings of the trial court – irrelevant and erroneous allegations have been used to circumvent a fair and just hearing.

**2. The Sudden Illness Defense is a Viable Theory that does not Require Expert Testimony.**

The plaintiffs' response briefs contain profuse speculation regarding defendant Bazley's motivations and medical treatment. Plaintiff Abuna's counsel also seeks to testify about what actually occurred at the emergency room and to render his opinion of who the true authors of records were or the actual diagnosis of defendant's condition (Abuna brief at pages 34-35). The plaintiffs do so in an attempt to argue that defendant Bazley was legally required to present expert testimony in order to prevail upon a sudden illness defense. Notwithstanding these musings, the law provides that an expert witness is not a pre-requisite to support the sudden illness defense. *Courtright v. Youngberg*, 4 Wn. App. 234, 480 P.2d 522 (1971).

Dr. Schhockett's testimony at trial (RP 9/5/07 at pages 49-64) and her declaration used at the summary judgment motion and Mandatory Arbitration hearing set forth the lack of prior problems that would have put the defendant on notice of a dangerous condition that would have nullified her ability to raise the sudden illness defense. Defendant's own testimony at trial (RP 9/6/07, pages 9-27) clarified this issue and set forth a version, consistent with the medical records, and also consistent with her prior testimony that was given to plaintiffs at her deposition and at their

Mandatory Arbitration hearing, that supported defendant's theory at trial and denied that she was fatigued or simply fell asleep at the wheel.

The emergency medical technician (EMT Hoggart) and emergency room physician (Dr. Goodfried) were witnesses to defendant's condition in the minutes and hours immediately following the accident. Their observations, based upon their professions, were disclosed throughout the pendency of the litigation and the trial court's exclusion of their testimony and redaction of their records denied defendant a full and fair opportunity to present her theory of the case.

**3. The Trial Court was not Authorized to Exclude the Witnesses as a Discovery Violation.**

Both plaintiffs argue that exclusion of the evidence (Dr. Goodfried and EMT Hoggart's testimony, as well as the redacted documents) was proper as a sanction for a discovery violation. This argument ignores the foundational requirement of a CR 26(i) discovery conference prior to a motion brought pursuant to CR 37.

Neither plaintiff disputes the point that there was never a discovery conference pursuant to CR 26(i). In the absence of such a conference, the trial court lacked jurisdictional authority to entertain a CR 37 motion. *Rudolph v. Empirical Research Sys., Inc.*, 107 Wn. App. 861, 866, 28 P.3d 813 (2001); *Case v. Dundom*, 115 Wn. App. 199, 203, 58 P.3d 919 (2002).

Plaintiffs argue that such a conference requirement was superfluous since counsel for all parties met in open court. This argument ignores the clear jurisdictional requirement of an advance conference. CR 26(i) plainly provides that “[a]ny motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.” The certification is that the conference requirements had been met and the rule speaks in the past tense. The conference, therefore, is a predicate for the motion. CR 26(i) clearly requires that conferences be held prior to the filing of a discovery motion.

Plaintiff Arero argues that the trial court had authority under CR 26(e)(4) that “is not subject to the conference requirements of CR 26(i).” (Brief of Respondent Tola Arero, p.13). Plaintiff Arero provides no legal citation for this assertion. Moreover, this contention is in plain conflict with the language of CR 26(i), which states that “[t]he court will not entertain any motion or objection **with respect to rules 26 through 37** unless counsel have conferred with respect to the motion or objection” (emphasis added). Any motion brought pursuant to CR 26(e)(4) is necessarily one “with respect to rules 26 through 37” and requires a CR 26(i) conference.

There was no compliance with the jurisdictional requirements of CR 26(i) and therefore the court was not authorized to take any action under that rule.

**4. There was no Violation of the Case Schedule.**

The plaintiffs argue in the alternative that the court was authorized to exclude the testimony and redact the documents in question as a remedy for violation of the initial case scheduling order. As explained in appellant's initial brief, however, an Amended Case Schedule was issued when the plaintiffs appealed the arbitration award and requested a trial de novo. Defendant Bazley fully complied with the Amended Case Schedule.

The amended case schedule issued by the court after the request for trial de novo contained no requirements for designation of witnesses until the Exchange of Witness and Exhibit Lists and Documentary Exhibits in accordance with KCLR 16(a)(4) – three weeks before trial. It is not disputed that the defendant listed Dr. Goodfried and EMT Hoggart by this time.

The plaintiffs, and the trial court, erroneously assumed that the initial case scheduling order governed the case at the time it was called to trial. In a civil case filed in King County, the initial case scheduling order is a creation of King County Local Rules 4 and 26. KCLR 26(a) specifies that it applies to “all cases governed by a Case Schedule pursuant to

KCLR 4.” It is KCLR 26(b) that requires that the parties designate witnesses in accordance with the scheduling order “Case Schedule” created by KCLR 4. KCLR 4 sets out the following pertinent deadlines: “Disclosure of Possible Primary Witnesses (LR 26(b)): T – 22” and “Disclosure of Possible Additional Witnesses (LR 26(c)): T – 16.” The “T” in this matter refers to the trial date and the number indicates the amount of weeks prior to the trial date. This case schedule is issued when the matter is first filed. KCLR 4(a).

This matter was directed into mandatory arbitration, however, and the plaintiffs requested trial de novo subsequent to the issuance of the arbitrator’s award. Under these circumstances, King County Local Mandatory Arbitration Rule 7.1(c), states specifically: “[p]romptly after the request for trial de novo is filed, the Court will issue to all parties a Notice of Trial Date together with an Amended Case Schedule, which will govern the case until the trial de novo.” The plain meaning of this rule is that the Amended Case Schedule, and not the initial case schedule, governs the case subsequent to the request for trial de novo.

Defendant should not have been compelled to adhere to the initial case schedule order after the trial de novo has been filed as it would lead to absurd and unworkable results. The initial case scheduling order under KCLR 4 provides for a deadline to disclose possible primary witnesses 22

weeks before trial, and a deadline to list possible rebuttal witnesses 16 weeks prior to trial. In this matter the request for trial de novo was filed on May 8, 2007 (CP 233-235) – less than 16 weeks prior to the trial date of August 29, 2007. According to the plaintiff’s argument, the defendant was required to file primary and rebuttal witness lists while the matter was still in arbitration. Court rules are interpreted as though they were statutes, applying the principles of statutory construction. *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993). One of the principles of statutory construction is that interpretation should be done in a manner that avoids “unlikely, absurd or strained consequences.” *Thurston County v. City of Olympia*, 151 Wn.2d 171, 175, 86 P.3d 151 (2004). Expecting parties to adhere to initial case schedule disclosure deadlines while the case is in arbitration is not a reasonable interpretation of the court rules and should be rejected by this court.

The Amended Case Schedule governed this matter after the plaintiffs requested trial de novo. The defendant fully complied with the deadlines set out on the Amended Case Schedule and there was no basis to exclude the defendant’s evidence as a result.

Respondents also argue, without any legal support, that the discovery cutoff date should be construed as a requirement that further information be provided by that time. To support this, counsel for Arero

argues that appellant's initial interrogatory responses provided an "incoherent listing of names and addresses" for the witnesses (Arero respondent brief at p. 4). Despite this alleged incoherent listing, at no time, prior to the motions in limine, did respondents ever object to this response or schedule a discovery conference or seek a motion to compel supplemental or amended responses. In fact, these supposedly incoherent responses were adequate enough to be utilized to prepare authorizations which allowed the respondents to obtain all the records and information regarding appellant's health and treatment before and after the subject accident. The fact that the ambulance records are maintained in Modesto, California, at the corporate offices of American Medical Response, should have no weight on the contact information that was accurately provided.

**5. There was no Violation of KCLR 16(a)(4)**

The plaintiffs argue (often interchangeably with their argument regarding KCLR 4 and 26(b)) that the defendant was somehow non-compliant with King County Local Rule 16(a)(4). KCLR 16(a)(4) states, in full:

In cases governed by a Case Schedule pursuant to LR 4, the parties shall exchange, not later than 21 days before the scheduled trial date: (A) lists of the witnesses whom each party expects to call at trial; (B) lists of the exhibits that each party expects to offer at trial, except for exhibits to be used only for impeachment; and (C) copies of all documentary exhibits, except for those to be used only for

illustrative purposes. In addition, non-documentary exhibits, except for those to be used only for illustrative purposes, shall be made available for inspection by all other parties no later than 14 days before trial. Any witness or exhibit not listed may not be used at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires.

Contrary to the implications of the plaintiffs, nowhere in the text of KCLR 16(a)(4) is a narrative disclosure of the substance of the witness' expected testimony required. KCLR 16(a)(4) requires nothing more than the parties to exchange a list of witnesses and exhibits expected to be called or introduced at trial and also requires the parties to exchange copies of their exhibits.

In this case, the defendant fully listed witnesses in a timely manner pursuant to LR 16(a)(4). There was no basis to exclude evidence and witnesses pursuant to LR 16(a)(4).

Further, respondent's description of witnesses (i.e. emergency room physician or EMT worker) serves more to advise the adverse parties of who a witness is rather than if respondent just used a name.

#### **6. Defendant's Witnesses Were Not New or Surprise Witnesses**

Throughout plaintiffs' briefs they improperly describe defendant's witnesses as "new" or "experts" or "surprise." Their use of this language is done to conform with the holdings of the cases that they cite that uphold

the exclusion of last minute disclosures of expert witnesses. For instance, in *Dempere v Nelson*, 76 Wn. App. 403, 886 P.2d 219 (1994) the court excluded an additional expert witness that was identified 13 days before trial. In *Lancaster v. Perry*, 127 Wn. App. 826, 113 P.3d 1 (2005) the court excluded a CR 35 medical expert where a case schedule required a primary witness list and a rebuttal witness list and where plaintiff moved prior to the day of trial for such exclusion. In *Rupert v. Gunter*, 31 Wash.App. 27, 640 P.2d 36 (1982) the court excluded an expert appraiser that plaintiff advised the defendant's of in a telephone conversation two days before trial

In the case at bar, the individuals defendant listed in her witness disclosure were lay witnesses that were not new and should not have been considered as a surprise. These witnesses examined and treated the defendant at the scene of the accident on the day of the accident. The information about these witnesses was apparent as it was disclosed in interrogatory answers, was disclosed again in the summary judgment motion and at oral argument of that motion, within the pre-hearing statement of proof for both sides at Mandatory Arbitration and was described to the court and counsel again at the motions in limine. These witnesses were not last minute hired experts.

An expert witness is not a pre-requisite to support the sudden illness defense. See *Courtright v. Youngberg*, 4 Wn. App. 234, 480 P.2d 522 (1971). Judge Inveen reviewed the *Courtright* case and concurred with its proposition when she allowed the sudden illness jury instruction. (RP 9/6/07, p. 36 - 38).

These witnesses should not be considered as a surprise to plaintiffs or an attempt to bring in experts at the last minute to assert a tactical advantage. They were the known witnesses of the treatment of defendant's sudden and unforeseen loss of consciousness. None of the cases plaintiffs cite are analagous to the witnesses that this defendant sought to call at trial.

**7. The Trial Court had Sufficient Notice of the Evidence the Defense Wanted Admitted.**

Plaintiffs argue that this court should decline review on the basis that the defendant made an inadequate offer of proof. The record is abundantly clear, however, that Dr. Goodfried and EMT Hoggart would testify based upon the documents that were ordered redacted. (CP 710-714, CP 13 – 43, CP 252-258, and CP 766-797). The documents were available to the trial court and are part of the record on appeal. The trial

court was well aware of the purpose of the testimony and the documents. Plaintiff Abuna's argument thus fails.

ER 103 (a)(2) requires that, in order to assign error to the exclusion of evidence, "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." An offer of proof, properly presented, serves three purposes. First, it should inform the court of the legal theory under which the offered evidence is admissible. Second, it should inform the trial judge of the specific nature of the offered evidence so the court can judge its admissibility. Third, it thereby creates a record adequate for appellate review. *Mad River Orchard v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978). An offer of proof must be sufficient to apprise the court of the specific nature of the evidence. *State v. Roy*, 116 Wn.2d 531, 539, 806 P.2d 1220 (1990). An offer of proof is not required, however, if the substance of the excluded evidence is apparent from the record. *Id.* In this case the substance of the excluded evidence is apparent in the record.

In this matter, the plaintiff sought to exclude the introduction of specific documents offered as Defendant's Exhibits Number 12 and 13, and also the testimony of the authors of the documents -- EMT Hoggart and Dr. Goodfried. The documents in question were not only before the trial court as defendants proposed exhibits, they had also been submitted

as exhibits in the defendant's motion for summary judgment. (CP 28 – 33). Furthermore, Defendant's Trial Brief informed the trial court:

Defendant was taken to Swedish Medical Center where she was treated and released. It was noted that she was 32 weeks pregnant and had no other contributing factors. A possible diagnosis was rendered of "? Venous [lower extremity] pooling resulted in syncope." (CP 710 - 714)

The record is clear that defendant sought to introduce her ambulance and emergency room records, which showed the differential diagnosis of a syncopal episode leading to her passing out and that Dr. Goodfried and EMT Hoggart would testify consistent with these records (*See also* RP 8/29/07 pp. 14-15).

The court was aware that the defense was claiming the sudden illness doctrine. (RP 8/29/07, p 3). Plaintiff's counsel himself identified the witnesses to be excluded as the "ambulance response personnel" and the "attending physician at the emergency room." (RP 8/29/07, p.6., p.12.) The plaintiff's attorney plainly advised the court that the elimination of these witnesses was a tactic to eliminate the defense of the sudden illness doctrine. (RP 8/29/07, pp.6-7 "So we've made a motion to exclude the alleged offense of the sudden illness since there doesn't appear to be sufficient evidence to support it.").

The trial court knew that the records were the defendant's ambulance and emergency room records. The plaintiffs conceded that

these records were authentic (RP 8/30/07, p. 32). The trial court knew that Dr. Goodfried and EMT Hoggart were the emergency room physician and the ambulance response person, respectively, who tended to the defendant after the accident. The trial court knew that the defendant was diagnosed as suffering from a syncopal episode. The trial court knew that defendant was asserting the sudden illness doctrine. The trial court knew that the evidence was related to the sudden illness doctrine because plaintiff wanted to exclude the testimony specifically to eliminate the defense of sudden illness doctrine. The substance of the evidence ultimately excluded by the trial court was apparent to the trial court. This court has an adequate record with which to review the trial court's decision.

Defendant most recently provided the court with another offer of proof when she filed her motion to vacate the judgment or seek the entry of a final judgment pursuant to CR 54(b) on September 26, 2008 (CP 1200-1232).

**8. The Evidence Supported the Jury Award to Plaintiff Arero.**

The jury returned a verdict finding that Mr. Arero's economic damages were \$195.00. Subsequently, the trial court granted Plaintiff Arero's motion to set the verdict aside and ordered additur or new trial. (RP 10/4/07, p. 36). In so doing, the trial court disregarded evidence favorable to the defense and improperly usurped the role of the jury.

“[W]here the proponent of a new trial argues the verdict was not based upon the evidence, appellate courts will look to the record to determine whether there was sufficient evidence to support the verdict.” *McUne v. Fuqua*, 45 Wn.2d 650, 652, 277 P.2d 324 (1954); *Ide v. Stoltenow*, 47 Wn.2d 847, 848, 289 P.2d 1007 (1955); Philip A. Trautman, *Motions Testing the Sufficiency of Evidence*, 42 Wash. L. Rev. 787, 811 (1967). To determine if the trial record supports the jury’s verdict for the purpose of deciding a motion for a new trial, the court must view the evidence in the light most favorable to the nonmoving party. *Gestson v. Scott*, 116 Wn. App. 616, 622, 67 P.3d 496 (2003). Where sufficient evidence exists to support the verdict, it is an abuse of discretion to grant a new trial. *McUne*, 45 Wn.2d at 653; *Ide*, 47 Wn.2d at 848; Trautman, *supra* at 811.” *Id.* at 197-198.

As set out in the defendant’s initial brief, the evidence clearly supports the jury verdict. The \$195 was not an arbitrary figure picked from thin air. This amount came from an actual line item on the receipt, which was entered into evidence for the jury to consider in conjunction with the testimony of the witnesses. The evidence regarding the ownership and value of the vehicle was inconclusive at best. There were no documents regarding the purchase or sale of the vehicle and no evidence at all regarding the market value of the vehicle. Mr. Arero was

cross-examined during trial and his testimony was repeatedly contradicted by his interrogatory answers, prior deposition testimony and even his own testimony during direct examination.

It is not sufficient for the trial court to simply believe that Mr. Arero was a credible witness or that he had difficulty understanding the English language (RP 10/04/07, p.32). In jury trials the credibility of witnesses and the weight to be given to the evidence are “matters which rest within the province of the jury.” *Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 246, 391 P.2d 194 (1964). Because credibility determinations are solely for the jury, they are free to believe or disbelieve a witness. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). Inconsistencies in testimony, such as in Mr. Arero’s testimony, are a topic that affects weight and credibility and is within the exclusive province of the jury. *Herriman v. May*, 142 Wn. App. 226, 232, 174 P.3d 156 (2007).

There was ample evidence to support the jury’s verdict regarding Mr. Arero’s damages. The jury was fully entitled to disregard his inconsistent testimony and conclude that Mr. Arero had failed to meet his burden of proof on damages in excess of \$195.

Plaintiff Arero’s evidence and credibility was once again deemed by the jury to be less than convincing. While he did improve his position from the first jury’s verdict, the second jury’s verdict was less than the

alleged purchase price of the vehicle, was less than the lost wages or business income claimed and on its own barely covered the storage fees and towing expense and more importantly, was less than the amount Judge Inveen had deemed as an appropriate amount as additur if defendant did not opt for a new trial. With the benefit of hindsight of the second trial it is clear that the jury from the first trial was equally able to weigh the evidence and come to an informed decision. The trial court abused its discretion in setting aside the initial jury verdict on plaintiff Arero's damages and it should be re-instated.

**9. Defendants Appeal is not Frivolous and Plaintiffs are not Entitled to Fees and Costs.**

It is defendant's contention that her appeal has merit and is not frivolous as described in RAP 18.9. Furthermore, defendants should be the party awarded fees and costs as more fully outlined in her appellate brief.

**10. Conclusion**

The trial court mistakenly concluded that superseded court deadlines, or in the alternative a discovery motion without a requisite advance conference, was sufficient to authorize the exclusion of key evidence in support of the defense's case. The facts and the law make it clear that there was no acceptable basis for the exclusionary order and the

trial court abused its discretion when it excluded witnesses and evidence that were sufficiently disclosed by defendant throughout the pendency of the case.

The trial court further erred in setting aside the jury award of damages to plaintiff Arero and ordering additur or new trial. In light of the evidence and testimony at trial, the jury award was fully justified.

COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

---

TOLA K. ARERO, and SHOLE D. ABUNA,

Plaintiffs/Respondents,

v.

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

Defendants/Appellants.

---

CERTIFICATE OF SERVICE

---

The undersigned declares as follows:

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

I certify under penalty of perjury of the laws of Washington that I  
caused to be delivered the following document to all parties or their  
attorneys of record on the 4 day of February 2010 as follows:

**DOCUMENT:** REPLY BRIEF OF APPELLANT

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 FEB -5 AM 8:59

**PARTY/COUNSEL**

**DELIVERY INSTRUCTIONS**

**Counsel for Plaintiff Abuna**

Jason E. Anderson, WSBA #32232  
Counselor at Law  
8015 15<sup>th</sup> Avenue NW, Suite 5  
Seattle, WA 98117  
Tel.: (206) 706-2882

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

**Counsel for Plaintiff Arero**

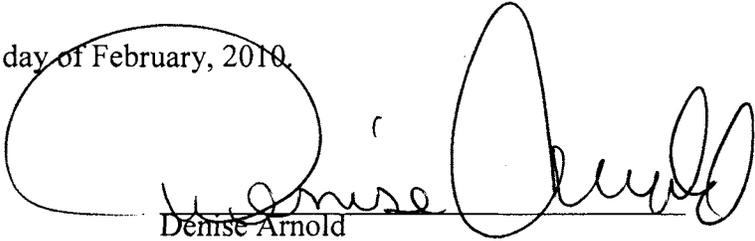
Robert D. Kelly, WSBA #27522  
Law Office of Robert D. Kelly  
8015 15<sup>th</sup> Avenue NW, Suite 5  
Seattle, WA 98117  
Tel.: (206) 261-3817

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

The Court of Appeals of the  
State of Washington  
Division 1  
One Union Square  
600 University Street  
Seattle, WA 98101-4170

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

Dated this 4 day of February, 2010.



Denise Arnold