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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.

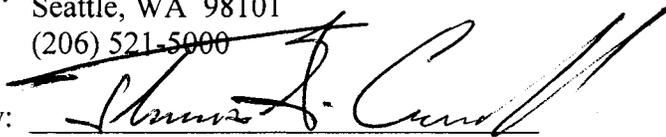
BRIEF OF APPELLANT

DATED this 4th day of December, 2009.

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TABLE OF CONTENTS

A. Assignments of Error..... 01

B. Issues Pertaining to the Assignments of Error..... 01

C. Statement of the Case..... 02

1. June 14, 2005 – Motor Vehicle Accident..... 02

2. Defendant Puts Plaintiff on Notice of Sudden Illness
Doctrines Defense..... 03

3. Defendant Moves for Summary Judgment Based
on the Sudden Illness Doctrine..... 04

4. The Defendant Asserts the Sudden Illness
Doctrines at Arbitration..... 05

5. The Arbitration Award is Appealed and the Case
is Set for Trial..... 06

6. The Parties Serve and File ER 904 Submissions..... 07

7. Defendant’s Witness and Exhibit List..... 07

8. Plaintiffs’ Motions in Limine..... 08

9. Defendant’s Trial Brief..... 08

10. Trial..... 09

11. Testimony of Plaintiff Tola Arero..... 10

12. Jury Verdict..... 11

13. Motion for New Trial and/or Additur..... 11

14. Motion to Vacate Judgment..... 12

15. New Trial for Plaintiff Arero..... 13

D.	Argument.....	13
1.	Introduction.....	13
2.	Standard of Review	14
a.	Excluding Evidence at Trial.....	14
b.	Granting New Trial.....	15
3.	The Trial Court Wrongly Excluded Defense Witnesses	15
a.	There Was No Discovery Motion Before the Court.....	15
b.	The Plaintiffs Had Never Conducted a Discovery Conference.....	15
c.	There Was No Violation of the Case Schedule.....	17
d.	There Was No Equitable Basis for Excluding the Witnesses.....	18
4.	The Trial Court Wrongly Required Redaction of the Defendant’s Exhibits	19
5.	The Trial Court Wrongly Set Aside the Jury’s Verdict on Damages.....	21
a.	Setting Aside a Jury Verdict Requires Extraordinary Circumstances.....	21
b.	There Was Sufficient Evidence to Support the Jury’s Verdict.....	22
6.	The Defendant should be deemed the prevailing party on appeal and awarded costs and a provisional award of attorneys’ fees.....	24

E. Conclusion..... 25

TABLE OF AUTHORITIES

Table of Cases

Burke v. Pepsi-Cola Bottling Co., 64 Wn.2d 244, 246, 391 P.2d 194 (1964)	23
Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)	16
Case v. Dundom, 115 Wn. App. 199, 203, 58 P.3d 919 (2002)	16
Cox v. Charles Wright Academy, Inc., 70 Wn.2d 173, 176, 422 P.2d 515 (1967)	21
Cox v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000)	14
Erickson v. Kerr, 69 Wn. App. 891, 903-904, 851 P.2d 703 (1993)	20
Gestson v. Scott, 116 Wn. App. 616, 620, 67 P.3d 496 (2003)	15, 22
Green v. McAllister, 103 Wash. App. 452, 462, 14 P.3d 795 (2000)	21
Herriman v. May, 142 Wn. App. 226, 232, 174 P.3d 156 (2007)	23
Hill v. Cox, 110 Wn. App. 394, 411, 41 P.3d 495 (2002)	21
Hill v. GTE Directories Sales Corporation, 71 Wn. App. 132, 138, 856 P.2d 746 (1993)	21
Ide v. Stoltenow, 47 Wn.2d 847, 848, 289 P.2d 1007 (1955)	20, 22, 23
Kohfeld v. United Pac. Ins. Co., 85 Wn. App. 34, 40, 931 P.2d 911 (1997)	15, 22
Lampard v. Roth, 38 Wn.App. 198, 202, 684, P.2d 1353 (1984)	16
Ma'ele v. Arrington, 111 Wn. App. 557, 561, 45 P.3d 557 (2002)	22
McUne v. Fuqua, 45 Wn.2d 650, 652, 277 P.2d 324 (1954)	21, 22
Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003)	23
Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997)	22
Rudolph v. Empirical Research Sys., Inc., 107 Wn. App. 861, 866, 28 P.3d 813 (2001)	16
State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) ...	14
Tolli v. School Dist. No. 267 of Whitman County, 66 Wn.2d 494, 403 P.2d 356 (1965)	21
Wooldridge v. Woollett, 96 Wn.2d 659, 668, 638 P.2d 566 (1981)	15

Constitutional Provisions

Const. art. I, § 21	21
---------------------------	----

Statutes

RCW 5.45.020 - Uniform Business Records as Evidence Act 20
RCW 4.76.030 21

Regulations and Rules

Civil Rule 26(f) 16
Civil Rule 26(i) 16
Civil Rule 37 16
Civil Rule 37(a) 16
Civil Rule 37(b)(2) 15
Civil Rule 59(a)(5) 22
Civil Rule 59(a)(7) 22
Evidence Rule 803(a)(4) 20
King County Local Mandatory Arbitration Rule 7.1(c) 17
King County Local Rule 4 17
King County Local Rule 16(a)(4) 7, 17
King County Local Rule 26 17
King County Local Rule 26(a) 17
King County Local Rule 26(b) 16
King County Local Rule 26(i) 15
King County Local Rule 37 16
Mandatory Arbitration Rule 7.1 24
Mandatory Arbitration Rule 7.3 25
Rules of Appellate Procedure 18.1(i) 25

Other Authorities

Philip A. Trautman, Motions Testing the Sufficiency of Evidence,
42 Wash. L. Rev. 787, 811 (1967) 22, 23

A. Assignments of Error

1. The trial court erred in excluding the testimony of defense witnesses Hoggart and Goodfried.

2. The trial court erred in ordering the redaction of certain portions of the defendant's trial exhibits to remove mention of a syncopal episode.

3. The trial court erred in granting additur or in the alternative new trial to plaintiff Tola Arero.

B. Issues Pertaining to the Assignments of Error

1. Did the trial court abuse its discretion when it excluded the testimony of defense witnesses despite the lack of any violation of a discovery order? (Assignment of Error No. 1)

2. Did the trial court abuse its discretion when it excluded the testimony of defense witnesses despite the lack of any violation of a local rule or case scheduling order? (Assignment of Error No. 1)

3. Did the trial court abuse its discretion when it excluded the testimony of defense witnesses when the testimony of the witnesses was readily apparent to the plaintiffs? (Assignment of Error No. 1)

4. Did the trial court abuse its discretion when it ordered the redaction of medical records that were admissible under the rules of

evidence and statutory exceptions to the hearsay rule? (Assignment of Error No. 2)

5. Did the trial court abuse its discretion in setting aside the jury's verdict and granting additur or new trial to plaintiff Tola Arero when the evidence of his damages was inconclusive, his testimony inconsistent, and there was no evidence supporting elements of his damages claim? (Assignment of Error No. 3)

C. Statement of the Case

1. June 14, 2005 – Motor Vehicle Accident.

This is a personal injury lawsuit arising out of a motor vehicle accident that occurred on June 14, 2005 in Seattle. (CP 3-6). On that date, a vehicle driven by defendant/appellant Kristina Bazley collided with a vehicle owned by plaintiff Tola Arero and occupied by plaintiff Shole Abuna (CP 3-6). Mrs. Bazley was approximately eight months pregnant at the time of the accident (RP 9/6/07, p. 11 and CP 868). She claimed that just before the accident she suddenly felt hot and dizzy and then lost consciousness (RP 9/6/07 p. 16, and CP 866-868).

On May 4, 2006 plaintiffs file a lawsuit in King County Superior Court alleging that defendant Kristina Bazley was negligent in the use and operation of her vehicle. (CP 3 - 6)

**2. Defendant Puts Plaintiff on Notice of Sudden Illness
Doctrine Defense.**

On June 19, 2006 defendant served responses to plaintiffs interrogatories. (CP 670 - 682). One of plaintiff's interrogatories (number 8) asked about all places where the defendant had sought medical treatment for 10 years prior to the accident. Another interrogatory (number 12) asked about witnesses to the facts of the lawsuit. In response to these interrogatories, the defendant listed several treatment providers, including: (1) Drs. Luann Schocket and Kevin Pieper – her OB/GYNs; (2) American Medical Response – the ambulance company that transported her from the accident scene; and (3) Swedish Medical Center – the hospital where she received emergency room care after the accident.

On June 22, 2006, three days after defendant provided interrogatory answers, plaintiffs' counsel sent defense counsel a letter requesting that the defendant sign authorizations for release of her medical records as “[i]t seems obvious that her medical condition is a central issue to the case.” (CP 766-797). Two weeks later defense counsel provided the requested authorizations allowing plaintiffs to obtain copies of all of defendant's medical records, including the ambulance personnel records and the emergency room physician's records. (CP 766 – 797).

On October 23, 2006 the defendant filed an Answer and Affirmative Defenses (CP 7 - 12). One of the affirmative defenses raised was the sudden illness doctrine. (CP 9).

On November 2, 2006 the plaintiffs' attorney deposed defendant Bazley. In her deposition Mrs. Bazley testified that she was pregnant at the time of the accident (CP 868) and she suddenly and unexpectedly suffered a loss of consciousness just prior to the accident. (CP 867). She further testified that she recalled speaking to a paramedic at the scene of the accident (CP 869-870). In fact, during the deposition, plaintiffs' attorney read from the notes of the ambulance personnel (CP 886) and the Swedish emergency room doctor (CP 886 – 887) during the questioning of the defendant. She further testified with regard to treatment from the Swedish emergency room personnel including the doctor who advised her of the cause of her sudden loss of consciousness. (CP 887).

3. Defense Moves for Summary Judgment based on the Sudden Illness Doctrine.

On November 21, 2006 the defense filed a motion for summary judgment based upon the sudden illness doctrine (CP 13-43). Part of the evidence relied upon for this motion consisted of copies of the reports created by the ambulance personnel, EMT Hoggart, (American Medical Response) and an emergency room physician, Dr. Goodfried from

Swedish Hospital. (CP 28 – 30 and 32 - 33). In addition to these documents, the motion quoted directly from the statements of these individuals as well as defendant (CP 14 - 15).

This motion was granted. (CP 127 - 129). On December 27, 2006 plaintiffs filed a motion for reconsideration. As part of this motion the evidence relied upon by them consisted of the reports and records from the ambulance personnel (Anthony Hoggart) and Swedish emergency room physicians (Dr. Goodfried). (CP 130 - 137). On February 2, 2007 the trial court granted the motion for reconsideration and vacated the summary judgment order. (CP 227-229).

4. The Defendant Asserts the Sudden Illness Doctrine at Arbitration.

The plaintiffs directed this matter into mandatory arbitration. On or about April 11, 2007, the plaintiff filed a Pre-Hearing Statement of Proof (CP 766-797), which included portions of the defendant's medical records obtained through discovery. Included in these records were: 1) ambulance records created by EMT Hoggart from American Medical Response 2) Swedish emergency room records created and supervised by Dr. Goodfried and 3) records from Dr. Schocket and Dr. Pieper as well as others at Providence Hospital that treated her during her entire pregnancy including after the accident. (see Exhibit 4 to Declaration of James N.

Mendel, which is part of defendant's Response to Motions in Limine at CP 766 - 797).

On April 12, 2006 defendant submitted her own pre-hearing statement of proof, which cited to the sudden illness doctrine and provided copies of (1) the ambulance personnel records for defendant's treatment at the scene (2) Swedish emergency room physician's reports for treatment she received at the emergency room and (3) records from Dr. Schocket and others at Providence Hospital that treated her after the accident and through the remainder of her pregnancy. (CP 766 - 797).

On April 26, 2007 the arbitration hearing was conducted and an award issued (CP 230-232).

5. The Arbitration Award is Appealed and the Case is Set for Trial.

On May 8, 2007 the plaintiffs filed a request for trial de novo. (CP 233-235). On that same date, the Court issued a Notice of Trial date, which included an Order Setting Schedule for Arbitration Trial De Novo. (CP 236-239). The Order Setting Schedule for Arbitration Trial De Novo contained no requirements or deadlines for primary or rebuttal witness lists. (CP 237).

6. The Parties Serve and File ER 904 Submissions.

On July 27, 2007, thirty-one days before the trial was scheduled to commence, both plaintiffs and defendant filed and served ER 904 submissions. (CP 252 – 255 and 256 - 258). Defendant's ER 904 contained and identified the ambulance records (American Medical Response and EMT Hoggart), the Swedish emergency room records and physician (Dr. Goodfried) and the medical and OBGYN records from Dr. Schocket, Dr. Pieper and the Providence Medical Center. *Id.* On August 9, 2007, plaintiffs filed objections to defendant's ER 904 documents. (CP 410 - 412).

7. Defendant's Witness and Exhibit List.

The only witness and exhibit list requirement contained in the Order Setting Schedule for Arbitration Trial De Novo was pursuant to KCLR 16(a)(4) which required a witness and exhibit list to be filed by each party 21 days before the trial date – August 6, 2007. (CP 237). In accordance with this requirement, the defendant mailed a copy of her Witness and Exhibit list to the court and plaintiffs' counsel on August 2, 2007. This list named witnesses to be called at trial including EMT Anthony Hoggart, the attending emergency room physician from Swedish Medical Center and Dr. Schocket. The defense also identified the exhibits they intended to be utilized at trial, which included the ambulance records,

Swedish emergency room records and the records from Dr. Schocket and Dr. Pieper from Providence Medical Center. (CP 259-261). On August 16, 2007 defendant supplemented the witness and exhibit list to include records custodians as well as listing Dr. Goodfried as the emergency room physician from Swedish Hospital. (CP 413-415).

8. Plaintiffs' Motions in Limine.

On August 17, 2007 the plaintiffs filed their motions in limine, which amongst other things sought to exclude the testimony of the ambulance personnel (EMT Hoggart) and Swedish emergency room physician (Dr. Goodfried). (CP 670-682). Plaintiffs argued that these witnesses had "not been sufficiently or timely identified in discovery or witness lists." (CP 678). Defendant opposed this motion and filed a response on or about August 23, 2007 (CP. 766-797).

9. Defendant's Trial Brief.

On August 21, 2007 defendant filed a Trial Brief identifying the issues pertaining to the sudden illness doctrine and referring to direct quotes to the ambulance personnel and emergency room physician who treated the plaintiff. The brief also referred to the exhibits in defendant's ER 904. (CP 710-714).

10. Trial.

Trial in this matter commenced on August 29, 2007. The court heard motions in limine on August 29th and 30th, 2007 and then granted plaintiffs' motion to exclude the witness from American Medical Response (EMT Hoggart) and the Swedish emergency room physician (Dr. Goodfried). (RP 8/29/07 pp. 11–18; RP 8/30/07, pp 3–18).

EMT Hoggart was expected to testify that defendant reported becoming hot and dizzy just before the accident and told him she was going to pull off of roadway but then her next memory was post accident. He was expected to testify this report was consistent his diagnosis of a syncopal episode.¹

Dr. Richard Goodfried was expected to testify that he saw the defendant at the emergency room and, on a more probable than not basis with medical certainty, defendant's sudden and unforeseen loss of consciousness was the result of a syncopal episode brought on by the pooling of blood in her extremities due to her pregnancy.²

¹ These facts are from documents that utilized in defendant's motion for summary judgment (CP 13-43), in defendant's pre-hearing statement of proof for mandatory arbitration as referenced in their response to plaintiffs' motions in limine (CP 766-797) and in defendant's ER 904 (CP 256-258)

² Dr. Goodfried's anticipated testimony is based upon his report and diagnosis contained within the Swedish Emergency Room records that were disclosed by defendant in her motion for summary judgment (CP 13-43), the documents in her pre-hearing statement of proof for mandatory arbitration as referenced in her response to plaintiffs' motions in limine (CP 766-797) and in her ER 904 (CP 256-258)

On August 30, 2007 plaintiffs partially withdraw their objections to defendant's ER 904 exhibits (authenticity) pertaining to the ambulance reports, emergency room records and defendant's OBGYN and other medical records from Dr. Schocket, Dr. Pieper and Providence Hospital. (RP 8/30/07, pp. 32 - 33). The Court ruled that while the exhibits were admissible, portions should be redacted. (RP 8/30/07, pp. 36-37). Those portions that were eventually redacted dealt directly with defendant's claim of sudden illness as they reference the syncopal episode that occurred unexpectedly and without warning on the day of the accident. (RP 8/30/07, pp. 32-42).

11. Testimony of Plaintiff Tola Arero.

On September 5, 2007 Mr. Arero testified regarding his damages (RP 9/5/07, pp 65-75). Although he testified he paid \$12,000 for the car involved in the accident. (RP 9/5/07, p 68), Mr. Arero presented no tangible evidence that he purchased the car for that amount (RP 9/5/07, p. 94) or that he was the legal owner of the car in question. Furthermore, there was no testimony or exhibits regarding the cost of repairs to the vehicle or its market value. There was an exhibit, however, that suggested Mr. Arero had paid \$195.00 in towing charges for the vehicle after the accident. (RP 9/5/07, pp. 73-74).

Mr. Arero was cross-examined and inconsistencies were revealed between his testimony on direct examination as well as his discovery answers in regards to all elements of his damages (the purchase price/value of the car that was damaged in the accident, the proof of lost income he sustained from Mr. Abuna being unable to drive his car and the towing/storage charges). (RP 9/5/07, pp 75 - 85).

12. Jury Verdict.

On September 7, 2007 the jury returned a verdict finding that the defendant was negligent and that such negligence resulted in damages to plaintiffs. (CP 894).

The jury determined that Mr. Arero's economic damages were \$195.00 (the amount of the towing bill). (CP 894).

The jury also determined that plaintiff Shole Abuna's economic damages were \$5,718.00 and his non-economic damages were \$2,500.00. (CP 894).

13. Motion for New Trial and/or Additur.

Both plaintiffs respectively filed and joined in each other's motions to set aside the verdict or for a new trial or additur (CP 932-938 and CP 1061-1062). Defendant objected and responded to each motion based upon procedural defects as well as the contention that there was

more than sufficient evidence to support the findings made by the jury and that such decision was void of passion or prejudice. (CP 1025-1048 and CP 1102-1124).

On October 4, 2007 the trial court judge ordered that the jury verdict for plaintiff Shole Abuna would not be reversed (RP 10/4/07, p. 34). The judge, however, determined that the jury verdict for Tola Arero should have included \$12,000 for the value of the vehicle. (RP 10/4/07, p. 36). To this extent the court determined either additur of \$12,000 or a new trial was appropriate. (RP 10/4/07, p. 36).

On November 26, 2007 plaintiff Arero filed a motion to revise the order for new trial or for additur to the judgment. (CP 1153-1155). Defendant responded to this motion (CP 1159-1184) and plaintiff replied thereto (CP 1185-1192). On December 14, 2007 the trial judge ordered a new trial for plaintiff Arero on all issues of damages (not just the value of the car) or additur of \$12,000. (CP 1193-1194).

14. Motion to Vacate Judgment

On October 1, 2008 defendant filed a motion to have the judgment vacated as it was not a final judgment and was subject to revision. To this extent defendant presented argument that defendant should have been allowed to call EMT Hoggart and Dr. Goodfried at trial as the sum and

substance of their anticipated testimony was patently obvious from the documents that were before the court and provided to plaintiffs' attorney. (CP 1200-1232). In the alternative defendant requested that a final judgment be entered. (CP 1200-1232). Plaintiffs opposed this motion (CP 1233-1248 and (CP 1249-1254) and defendant replied (CP 1255-1259). The court ultimately denied this motion (CP 1260-1262) and the Arero claim proceeded to trial.

15. New trial for Plaintiff Arero

In accordance with the trial judge's order allowing for a new trial on all issues of damages for plaintiff Arero a new jury trial date was set. (CP 1272-1273). No new ER 904s were submitted by any parties; however, new trial briefs were submitted to the new trial judge. (CP 1306-1331 and 1332 to 1393). The Arero trial took place before Judge Downing (CP 1394-1399) and verdict in the amount of \$7,500.00 was rendered on June 4, 2009. On August 15, 2009 the trial judge signed the judgment and ruled that it was a final judgment as to all claims. (CP 1417-1418).

D. Argument

1. Introduction.

The trial court wrongfully limited the defendant's ability to present evidence at trial regarding an affirmative defense central to the defense

case. Then, after the jury rendered a verdict in favor of the plaintiffs, the trial court inexplicably concluded that the jury's verdict regarding Plaintiff Arero was the result of prejudice or passion, but the verdict for Plaintiff Abuna was not. The court set aside a jury verdict regarding Plaintiff Arero's claim despite his failure to present documentary evidence establishing any ownership of the vehicle and his impeached testimony.

The trial court's several errors created a trial framework in which only plaintiffs were allowed to prevail; evidence opposing their case would be suppressed, and any verdict for them below a certain minimum would be set aside. In so doing, the trial court essentially ignored the defendant's right to present evidence in her own defense and her right to trial by jury. The trial court's actions were without proper justification and should be reversed.

2. Standard of Review.

a. Excluding Evidence at Trial.

Washington State trial courts exercise broad discretion when deciding evidentiary matters, but those decisions are subject to an abuse of discretion standard. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). A trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

b. Granting New Trial.

In reviewing a trial court's order on a motion for new trial, an appellate court also applies an abuse of discretion standard. *Wooldridge v. Woolett*, 96 Wn.2d 659, 668, 638 P.2d 566 (1981) (upholding trial court's denial of new trial following verdict that failed to award plaintiff any general damages in survival action), *See also, Gestson v. Scott*, 116 Wn. App. 616, 620, 67 P.3d 496 (2003). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 40, 931 P.2d 911 (1997).

3. The Trial Court Wrongly Excluded Defense Witnesses.

The basis for the court's exclusion of the witness testimony was an allegedly inadequate disclosure of the witnesses' identity prior to trial. The basis for the court's order was ambiguous, however. The exclusion seemed to be either a sanction for discovery violations or as an enforcement of the local rule requiring designation of witnesses.

a. There Was No Discovery Motion Before the Court.

As a matter of law, however, the court was not authorized to sanction the defendant for discovery violations. Civil Rule 37(b)(2)

authorizes a court to sanction a party for failure to comply with a previous court order made pursuant to CR 37(a) or CR 26(f). In this matter there had been no previous CR 37(a) or CR 26(f) order. Furthermore, the motion was brought in the context of a motion in limine and not a CR37(b)(2) motion.

b. The Plaintiffs Had Never Conducted a Discovery Conference.

In addition, it is undisputed that the plaintiffs' counsel never sought to confer with defense counsel pursuant to Civil Rule 26(i) or King County Local Rule 37. A trial court lacks authority to entertain a CR 37 motion when the moving party fails to first hold a conference pursuant to CR 26(i). *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). Under the procedural facts of this case the trial court lacked authority to exclude the witnesses for an alleged discovery violation.³

³ Exclusion of testimony, moreover, is considered one of the more severe sanctions for violations of a discovery order. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). When the trial court excludes evidence as a sanction, the record must show that the court considered whether a lesser sanction would have sufficed and whether the disobedient party's refusal to obey the discovery order was willful or deliberate and substantially prejudiced the moving party's ability to prepare for trial. *Id.* "The Court should exclude testimony if there is a showing of intentional or tactical nondisclosure." *Lampard v. Roth*, 38 Wn.App. 198, 202, 684, P.2d 1353 (1984).

c. There Was No Violation of the Case Schedule.

The alternative justification for the exclusion of the witnesses seemed to be that the trial court felt it was enforcing King County Local Rule 26. KCLR 26 (a) specifies that the rule shall apply to all cases governed by a Case Schedule pursuant to KCLR 4. KCLR 26(b) requires that the parties designate witnesses in accordance with the scheduling order “Case Schedule” created by LR 4.

This case, however, came to trial upon an appeal from mandatory arbitration and a request for trial de novo. 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**” (emphasis added). 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 was never disputed that the defendant complied with this requirement. Quite simply, the court failed to understand that the defendant complied with the case scheduling order that was issued specifically for the instant lawsuit.

d. There Was No Equitable Basis for Excluding the Witnesses.

Because the trial court had no justifiable basis to exclude the defendant's witnesses either as a discovery sanction or as an enforcement of the case scheduling order, the only possible remaining basis would have been under the inherent equitable power of the court to ensure that justice is done and a fair trial held. The specific facts of this case, however, indicate that exclusion of the witnesses was an injustice and the defendant's right to a fair trial was violated.

It is abundantly clear that the plaintiffs were fully aware that the defendant would be using the testimony of the emergency room physician and the emergency medical technician. In his letter of June 22, 2006 (more than 14 months prior to trial) plaintiffs' attorney acknowledged that "[i]t seems obvious that [defendant's] medical condition is a central issue to the case." The plaintiffs then requested and obtained copies of the defendants' treatment records. The parties argued both a motion for summary judgment and a motion for reconsideration in which the defendant's treatment records were a central item of evidence. The parties held an arbitration hearing in which the defendant's treatment was again a significant issue and where both parties submitted the defendant's medical

records, which contained the notes of the specific witnesses defendant intended to call at trial.

It is indisputable that the plaintiffs were aware that Mrs. Bazley would seek to present the same evidence of her medical condition at the time of the trial.

Despite this knowledge, the plaintiffs never asked the defendant to supplement her discovery answers or to otherwise give more specific information regarding anticipated trial witnesses. The plaintiffs seemed to have made no effort to contact the witnesses and certainly did not ask for the assistance of the defense to do so.

There was no proper discovery motion before the court. There was no violation of the case scheduling order. The plaintiffs were aware of the expected testimony and had ample opportunity to prepare for it. The exclusion of the defendant's witnesses by the trial court was an abuse of authority and requires a new trial on liability.

4. The Trial Court Wrongly Required Redaction of the Defendant's Exhibits.

In addition to the exclusion of the witnesses, the trial court ordered that the defendant's treatment records be redacted in order to eradicate any evidence of a syncopal episode.

The plaintiffs' attorney withdrew any objection to the authenticity of the documents at the beginning of the trial. The sole remaining objection to the exhibits was hearsay.

ER 803(a)(4), however, specifically excludes from the hearsay prohibition "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Furthermore, doctors' records are normally admissible under the Uniform Business Records as Evidence Act – RCW 5.45.020 – in order to show events, conditions, or acts. *Erickson v. Kerr*, 69 Wn. App. 891, 903-904, 851 P.2d 703 (1993). The combination of ER 803(a)(4) and RCW 5.45.020 make virtually all regularly kept medical records exempt from the bar on hearsay evidence.

The trial court should not have ordered the documents redacted. It was an abuse of discretion by the trial court that prejudiced the defendant's ability to present the sudden illness defense.

5. The Trial Court Wrongly Set Aside the Jury's Verdict on Plaintiff Arero's Damages.

a. Setting Aside a Jury Verdict Requires Extraordinary Circumstances.

In Washington State, with limited exceptions, the right of trial by jury shall be inviolate. Washington State Constitution, Article I, §21. This includes the jury's right to determine damages. The Washington State Supreme Court has clearly stated that "[r]egardless of the court's assessment of the damages, it may not, after a fair trial, substitute its conclusions for that of the jury on the amount of damages." *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967) citing *Tolli v. School Dist. No. 267 of Whitman County*, 66 Wn.2d 494, 403 P.2d 356 (1965). Our courts have repeatedly reaffirmed this standard of deference to a jury's damage determination. See, *Hill v. Cox*, 110 Wn. App. 394, 411, 41 P.3d 495 (2002) and *Green v. McAllister*, 103 Wash. App. 452, 462, 14 P.3d 795 (2000). A jury damage award should be overturned only in the most extraordinary circumstances. *Hill v. GTE Directories Sales Corporation*, 71 Wn. App. 132, 138, 856 P.2d 746 (1993).

RCW 4.76.030, states that the court may grant additur or remittitur if it finds the damages awarded by a jury to be "so excessive or inadequate

as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice.” This same language is codified in CR 59(a)(5). CR 59(a)(7) allows the court to order a new trial and/or additur if it is shown by the non-moving party, that “[t]here is no evidence or reasonable inference from the evidence to justify the verdict or the decision or that it is contrary to law.” *Ma'ele v. Arrington*, 111 Wn. App. 557, 561, 45 P.3d 557 (2002). However, a trial court should not order new trial if sufficient evidence supports the jury's verdict. *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997).

b. There Was Sufficient Evidence to Support the Jury's Verdict.

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. at 622, citing *Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. at 41. “[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). 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.

In this matter, the evidence clearly supports the first jury's damages verdict. The first jury's award to Tola Arero of \$195 represents an actual line item on the towing receipt. 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. There was no testimony or evidence regarding the market value of the vehicle. Mr. Arero was cross-examined during trial, and his testimony was contradicted by his interrogatory answers, prior deposition testimony, and even his own testimony during direct examination.

It is well settled law that 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). Furthermore, a jury is free to believe or disbelieve a witness, since credibility determinations are solely for the trier of fact. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). Inconsistencies in evidence are matters which affect weight and credibility and are within the exclusive province of the jury. *Herriman v. May*, 142 Wn. App. 226, 232, 174 P.3d 156 (2007). The first jury was entitled to disregard Mr. Arero's

testimony due to his inconsistencies. The first jury was fully justified to conclude that Mr. Arero had failed to establish damages in excess of \$195.

When the trial judge revised her initial ruling for a new trial the Defendant was forced to choose between an additur of \$12,000.00 or another trial for all of Mr. Arero's economic damages. Defendant rejected the trial judge's additur and the case proceeded to trial. It is significant to note that the second jury awarded an amount significantly less than what plaintiff Arero requested and also less than what the trial judge would have compelled the defendant to pay if she had agreed to the judge's additur. With the benefit of another jury verdict it is clear that the initial jury's deliberate and well reasoned verdict should have been undisturbed.

The trial court abused its discretion in setting aside the first jury's verdict on Mr. Arero's damages.

6. The Defendant should be deemed the prevailing party on appeal and awarded costs and a provisional award of attorneys' fees.

This case was originally directed to mandatory arbitration. The plaintiffs appealed the arbitrator's award and requested trial de novo pursuant to MAR 7.1. In the event that, upon remand, the plaintiffs do not

improve their position from the arbitration award, the defendant would be entitled to an award of attorneys' fees. MAR 7.3.

The defendant requests that this court award costs of appeal and also make a provisional award of attorneys' fees to be determined by the court commissioner. In the alternative the defendant asks that this court direct that the trial court determine the amount of fees and expenses after remand pursuant to RAP 18.1(i).

E. CONCLUSION

Based upon a series of unfounded conclusions and erroneous assumptions the trial court judge excluded defendant's witnesses. The trial court further erred when it ordered the redaction of admissible treatment records. Both acts were an abuse of discretion and prejudiced the defendant's right to a fair trial on the issue of liability.

The trial court properly determined that the damages verdict for plaintiff Shole Abuna was correct and did not merit additur or new trial. The trial judge then improperly granted additur or in the alternative new trial for all of co-plaintiff Tola Arero's damages despite the sound and sufficient basis for the jury verdict. This also was an abuse of discretion and warrants reversal.

Both plaintiffs had a full and fair trial on damages. The original jury verdict for the damages to plaintiff Arero should be reinstated.

The defendant was denied a fair trial on the issue of liability. This case should be remanded for new trial on the issue of liability only. Should liability be established against the defendant following a trial in which all of her witnesses are allowed to testify and present evidence of the sudden illness doctrine then the level of damages should be those awarded by the first jury.

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 December, 2009 as follows:

DOCUMENT: BRIEF OF APPELLANT

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Dated this 4 day of December, 2009.



Denise Arnold

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2009 DEC - 7 AM 11:51

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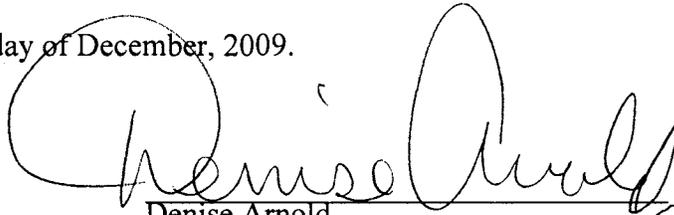
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