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IN THE  
**COURT OF APPEALS, DIVISION ONE**  
FOR THE STATE OF WASHINGTON

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**MOGHADAM M. MOVAHEDI,**

*Appellant,*

- v. -

**RAYMOND THOMAS, ET UX,**

*Respondents.*

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ON APPEAL FROM THE SUPERIOR COURT FOR  
KING COUNTY, WASHINGTON

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**BRIEF OF APPELLANT**

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*Of Counsel:*

Jaime M. Olander

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*CO. 11.19.19 11:05*

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court improperly permitted Respondents' sole expert witness, Mary Reif, M.D., to testify to her previously undisclosed medical opinion that Appellant did not sustain a traumatic brain injury in the subject motor vehicle collision, in violation of King County Local Civil Rule 26(k).

2. The trial court erred in entering the order denying Appellant's motion for a new trial entered on October 1, 2013.

## **II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Did the trial court abuse its discretion in permitting Dr. Reif to testify to her previously undisclosed medical opinion concerning Appellant's traumatic brain injury, where Appellant was unfairly prejudiced by Respondents' serial discovery violations and tactical non-disclosure? (Assignments of Error 1 and 2)

2. Did the trial court abuse its discretion in permitting Dr. Reif to testify to her previously undisclosed medical opinion concerning Appellant's traumatic brain injury, where Appellant was unfairly prejudiced by the untimely disclosure of Dr. Reif's new medical opinion at trial, after Appellant rested his case, and in violation of the clear and mandatory disclosure requirements contained in the local rules, and where

Respondent failed to make any showing of good cause? (Assignments of Error 1 and 2)

3. Did the trial court err in refusing to grant a new trial, where the jury's verdict was contrary to the evidence? (Assignments of Error 1 and 2)

### **III. STATEMENT OF THE CASE**

King County Local Civil Rule 26(k) provides in relevant part:

(k) Disclosure of Primary Witnesses. Required Disclosures.

(1) Disclosure of Primary Witnesses. Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons with relevant factual or expert knowledge whom the party reserves the option to call as witnesses at trial.

(2) Disclosure of Additional Witnesses. Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons whose knowledge did not appear relevant until the primary witnesses were disclosed and whom the party reserves the option to call as witnesses at trial.

(3) Scope of Disclosure. Disclosure of witnesses under this rule shall include the following information:

(A) All Witnesses. Name, address, and phone number.

(B) Lay Witnesses. A brief description of the

witness' relevant knowledge.

**(C) Experts. A summary of the expert's opinions and the basis therefore and a brief description of the expert's qualifications.**

**(4) Exclusion of Testimony. Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires.**

KCLCR 26(k)(emphasis added). Respondents' Disclosure of Primary Witnesses provided the following with respect to their expert, Mary Reif:

The above named witness performed an examination of the plaintiff, Milad Moghadam-Movahedi, and will testify regarding her review of plaintiff's medical records, her finding on examination, and her opinions regarding plaintiff's condition. Dr. Reif is a doctor of Neurology and is licensed to practice in the state.

CP 21. Respondents' disclosure of Dr. Reif did not contain a summary of Dr. Reif's opinions as required by KCLCR 26(k). At no time prior to the middle of trial did Respondents disclose that Dr. Reif had formulated and would testify as to her undisclosed opinion that Appellant **had not** suffered a traumatic brain injury as a result of the subject motor vehicle collision. Respondent disclosed this new opinion **after** appellant rested. CP 74.

Appellant's First Interrogatories and Requests For Production

included detailed discovery requests regarding Respondents' experts. CP

81. With respect to expert witnesses, Respondents provided the following information:

**INTERROGATORY NO. 18:**

With regard to each expert witness whom Defendant has retained, please state:

- (A) Name, address and telephone number;
- (B) Profession/occupation;
- (C) The opinion of each expert witness, and basis therefore.

**ANSWER:**

OBJECTION. This interrogatory seeks information which is protected by the attorney-client privilege and attorney work product doctrine. *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 706 P.2d 212 (1985).

/s/ Vivienne A. Alpaugh

VIVIENNE A. ALPAUGH,

WSBA #19807

**INTERROGATORY NO. 19:**

With regard to each expert witness whom Defendant expects to call at trial, please state the witnesses' professional backgrounds, educational backgrounds, and qualifications. In lieu of answers, you may attach current curriculum vitae with the information requested.

**ANSWER:**

No determination has been made as to whom, if anyone,

will be called as an expert witness at trial. Once such determination is made, this interrogatory answer will be supplemented.

CP 81-82. Contrary to defense counsel's representations, Respondents never supplemented their answers to Appellant's Interrogatories 18 and 19. CP 74. Respondents never provided a summary of Dr. Reif's opinions and the basis therefore in response to Interrogatory No. 18. CP 74. The only supplementation of Appellant's expert discovery provided by Respondents was the production of Dr. Reif's February 6, 2013, report of her medical examination of Appellant. CP 74. **Dr. Reif's report contains no reference to any opinion with respect to concussion or traumatic brain injury.** CP 74; CP 84-100.

Prior to the commencement of trial in this matter, in response to Respondents' Motion In Limine, Appellant set forth his position on expert testimony at trial as follows:

Expert witnesses. Neither party should be allowed to introduce evidence through expert witnesses not disclosed and produced during the pendency of discovery. Plaintiffs will not call any expert witness during trial, other than Plaintiff's providers. Defendants have identified two expert witnesses, Dr. Reif and Dr. Kutsy (although Dr. Kutsy is Plaintiff's provider). The opinions of Defendants'

experts must be limited to those opinions properly disclosed during the pendency of discovery. Dr. Reif's opinions were disclosed in a report authored by her. *Her opinions should be strictly limited to those opinions set forth in her report.*

CP 104 (emphasis added). Respondents never properly supplemented their expert discovery responses, and failed to properly disclose Dr. Reif's opinions in their LCR 26(k) witness disclosure.

Trial commenced on September 10, 2013. Appellant called his treating provider, board-certified physician Chi Gan, M.D., who testified that Appellant sustained a traumatic brain injury in the subject collision. CP 74; RP 20. Appellant's cousin Azita and her husband Behzad also testified to their observations of his symptoms of traumatic brain injury. CP 74.

Outside the presence of the jury, Appellant's counsel Jaime M. Olander moved the trial court for an Order in Limine excluding any opinion testimony of Dr. Reif outside the substantive opinions set forth in her report:

THE COURT: (To Ms. Alpaugh): Are you going to be asking her about any new opinions that you do not believe are addressed in her report?

Ms. Alpaugh: I'll be asking her if she agrees or disagrees,

whether or not she can make an opinion about whether the plaintiff sustained a traumatic brain injury in the accident.

Mr. Olander: That's exactly my objection.

THE COURT: You didn't depose Dr. Gan. You didn't send...ok. Alright, so I'm not hearing a discovery violation. Um, well you can ask her whether she has any other diagnoses than the ones she's given here....but I don't believe you can ask her anything more than that. You can certainly ask her, and you can ask her, to make it clear you're not diagnosing him as having a traumatic brain injury. But since she doesn't provide any information on why she ruled that out in her report - did not give an opinion on that - you're not going to be able to go into the background on that. That's as far as you can go.

RP 29-35. When Dr. Reif was on the stand, defense counsel proceeded to question her on matters outside the scope of her report and of

Respondents' pre-trial disclosures:

Ms. Alpaugh: Now, based on your expertise as a neurologist and your examination and review of the records, you're not diagnosing him as having had a traumatic brain injury, correct?

Mr. Olander: Objection – order in limine.

THE COURT: Uh...the objection is overruled.

Dr. Reif: No, I'm not diagnosing him with a TBI.

RP 37-38. Over Plaintiff's objections, the Court permitted defense counsel to seek testimony from Respondent's sole expert Dr. Reif as to previously undisclosed opinions, without any showing of good cause, in violation of LCR 26(k) and Civil Rules 26 through 37.

At trial, liability and related medical expenses of \$6,970 were stipulated by the defense. CP 41-42. After deliberating for approximately one hour, the jury returned a verdict of \$6,970 in special damages, along with \$650 in non-economic damages. CP 56. But for Respondents' discovery violations, and but for the trial court's error in allowing Dr. Reif to testify as to her undisclosed opinion that she found no traumatic brain injury, Appellant's evidence of traumatic brain injury would have been uncontested at trial. In the absence of passion or prejudice, the jury would have awarded a substantially greater sum for non-economic damages.

Appellant timely filed a motion for new trial under Civil Rule 59(a). CP 58-112. Appellant's motion was denied by order dated October 1, 2013. CP 151-152. This appeal followed.

## IV. ARGUMENT

### A. Standards of Review.

The admission of expert testimony is reviewed for abuse of discretion. *Kirk v. WSU*, 109 Wn.2d 448, 459, 746 P.2d 285 (1987).

Generally, decisions on CR 59 motions for new trial are reviewed for abuse of discretion. *Ma'ele v. Arrington*, 111 Wn.App. 557, 561, 45 P.3d 557 (2002). However, if the trial court's decision was predicated on an issue of law, "then the appellate court reviews the record for error in application of the law rather than for abuse of discretion." *Cox v. Gen. Motors Corp.*, 64 Wn.App. 823, 826, 827 P.2d 1052 (1992).

"Where 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." *Palmer v. Jensen*, 132 Wn.2d 193, 197-98, 937 P.2d 597 (1997). A trial court abuses its discretion by denying a motion for a new trial where the verdict is contrary to the evidence. *Krivanek v. Fibreboard Corp.*, 72 Wn.App. 632, 865 P.2d 527 (1993). "Where special damages are undisputed, and the injury and its cause is clear, the court has little hesitancy in granting a new trial when the jury does not award these amounts." *Id.* at 636.

**B. Appellant was unfairly prejudiced by Respondents' discovery violations, requiring a new trial.**

In *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P. 3d 191, 197-201 (2009), the Supreme Court affirmed the trial court's entry of default judgment against the defendant for violating discovery orders:

Broad discovery is permitted under CR 26. "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence." CR 26(b)(1). If a party objects to an interrogatory or a request for production, then the party must seek a protective order under CR 26(c). CR 37(d). If the party does not seek a protective order, then the party must respond to the discovery request. The party cannot simply ignore or fail to respond to the request. "[A]n evasive or misleading answer is to be treated as a failure to answer." CR 37(d). Hyundai never sought a protective order under CR 26(c) but simply objected to Magaña's discovery requests, asserting the requests were overbroad and not reasonably calculated to lead to the discovery of admissible evidence.

A court should issue sanctions appropriate to advancing the purposes of discovery. The discovery sanction should be proportional to the discovery violation and the circumstances of the case. "[T]he least severe sanction that

will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong." *Fisons*, 122 Wash.2d at 355-56, 858 P.2d 1054.

*Id.* (citations omitted). In the present case, Respondents did ***exactly*** what Hyundai did in the *Magana* case: they failed to provide ***any answer whatsoever*** to Appellant's expert witness discovery requests, without moving for a protective order. Under *Magana*, it is not necessary for a party to first move to compel discovery prior to seeking the exclusion of evidence or default; the failure to provide discovery is prejudicial not just to the party's right to a fair trial, but also to that party's trial preparation as well. *Id.*, 167 Wn.2d at 588.

Respondents then compounded their discovery violations by seeking to introduce new, previously-undisclosed expert opinion testimony at trial. Respondents' acts and omissions, in violation of the Civil Rules, constitute irregularity in the proceedings of an adverse party, misconduct of the opposing party, and surprise which ordinary prudence could not have guarded against, materially affecting the substantial rights of Appellant, entitling him to a new trial.

C. **Appellant was unfairly prejudiced by the trial court's failure to exclude new expert opinion testimony disclosed for the first time after Appellant rested.**

After the close of Appellant's case, the trial court erred when it permitted Respondents to introduce previously undisclosed expert opinion testimony from their sole expert witness called at trial, Dr. Reif.

Apparently, the trial court improperly concluded that, since Dr. Reif did not address the issue of traumatic brain injury ("TBI") in her report, *she must have ruled it out.*<sup>1</sup> The trial court's rationale is a logical fallacy that has no basis in fact or law and therefore constitutes reversible error.

Defense medical experts are called on in every case to rule out the existence of medical conditions alleged to have been the result of the defendant's negligence. In the present case, Appellant was diagnosed with a traumatic brain injury at the emergency room, within hours of the accident. For whatever reason, Dr. Reif never addressed Appellant's traumatic brain injury in her report.

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<sup>1</sup> THE COURT: But Mr. Olander, I assume you're not arguing that she can't...**Because by, isn't it clear that by that information that she did not diagnose him with that.** (emphasis added). RP 33. *See also:* THE COURT: You didn't depose ... But since she doesn't provide any information on **why she ruled that out in her report....** (emphasis added). RP 32-33.

As a result, it was improper for the trial court to assume that Dr. Reif ruled out Appellant's medical condition by omitting it from her report. Stated differently, the trial court in effect amended Dr. Reif's report during trial, after the close of Appellant's case. The explanation offered by Mr. Olander (i.e. that Dr. Reif only undertook to investigate the questions propounded by defense counsel - who failed to ask Dr. Reif whether Plaintiff had suffered TBI) was never denied by defense counsel.

In permitting Dr. Reif to testify outside the scope of her report, the trial court acted in contravention of its own local rule, KCLCR 26(k), which provides that "[a]ny person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires." KCLCR 26(k)(4).

In its oral ruling, the trial court specifically found that Appellant had not engaged in any discovery violation, and that Respondents had made no effort to discover the opinions of Appellant's treating physician Dr. Gan prior to trial. Notwithstanding the clear, undeniable absence of good cause, the trial court permitted Dr. Reif to testify to the previously undisclosed opinion that Mr. Movahedi had not, in Dr. Reif's opinion, suffered a traumatic brain injury.

In Washington, it is reversible error to admit previously undisclosed expert testimony at trial. *Port of Seattle v. Equitable Capital Group, Inc.*, 127 Wn.2d 202, 898 P.2d 275 (1995)(en banc). In *Port of Seattle*, the trial court excluded new expert opinion evidence disclosed seven days before trial. *Id.* at 209. The Supreme Court affirmed:

By not complying with the pre-trial order of January 8, 1993 and the complete change of his database with expansion of his comparables from 88 to 237 after January 11, 1993, Dr. Whitelaw effectively deprived the Port of the opportunity to investigate his comparables. The trial court properly rejected his testimony which would have resulted in prejudice to the Port.

*Id.* at 209-10. Likewise, in the present case, Respondents never complied with the KCLCR 26(k)(3) disclosure requirements, which require parties to disclose “a summary of the expert’s opinions and the basis thereof.” Similarly, Respondents never provided any expert witness discovery responses of any kind, apart from the disclosure of Dr. Reif’s report, which is wholly silent as to her opinion of whether or not Appellant suffered a traumatic brain injury.

Respondents never disclosed Dr. Reif’s new opinion until *after* the close of Appellant’s case. As a result, Appellant was substantially prejudiced. As the Supreme Court ruled in the *Port of Seattle* and

*Magana* decisions, it is reversible error to permit an expert witness to offer previously-undisclosed opinion testimony for the first time at trial, thereby enabling a trial by ambush. Appellant is entitled to a new trial.

**D. Appellant is entitled to a new trial because the jury's verdict is contrary to the evidence.**

In the present case, Respondents stipulated to liability and stipulated to medical expenses in the amount of \$6,970. Dr. Reif testified during direct examination that Appellant sustained injuries to his neck, mid-back, low back, and wrists as a proximate result of the subject accident. Despite this uncontroverted evidence, the jury awarded only \$650 in special damages. This verdict is contrary to the evidence.

In *Palmer v. Jensen*, 132 Wn.2d 193, 197-98, 937 P.2d 597 (1997), a new trial was granted because the jury awarded only the plaintiff's special damages. 132 Wn.2d at 201. The court held that, in the absence of a "legitimate controversy regarding special damages, it was clear that the verdict included no compensation for pain and suffering." *Id.* Similarly, in the instant case, the special damages were undisputed, and supported by the defense medical expert. Under *Palmer* and *Krivanek v. Fibreboard Corp.*, 72 Wn.App. 632, 865 P.2d 527 (1993), the jury's award of \$650 in pain, suffering, and loss of enjoyment of life damages was contrary to the

evidence. Accordingly, Appellant is entitled to a new trial on that basis as well.

#### V. CONCLUSION

For the reasons stated above, this matter must be remanded for a new trial.

RESPECTFULLY SUBMITTED, August 18, 2014.

WASHINGTON LAW GROUP

  
\_\_\_\_\_  
Jaime M. Olander, WSBA 25129  
Of attorneys for Appellants

**CERTIFICATE OF SERVICE**

The undersigned certifies that on August 18, 2014, he caused a copy of this document to be served on the following persons via hand delivery and/or electronic mail and/or First Class U.S. Mail, postage paid:

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DATED, August 18, 2014, at Seattle, Washington.

  
\_\_\_\_\_  
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