

NO. 34491-2-II

Waller
1/29/07

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARTHA E. GRAHAM

APPELLANT

V.

MARK JENKINS, CITY OF TACOMA

RESPONDENTS/CROSS APPELLANTS

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court committed reversible error by allowing Respondents/Cross Appellants to call Dr. Brandt Bede as an expert witness in violation of the Court's Order Setting Case Schedule and Pierce County Local Rules. Therefore, the trial court erred in entering Finding of Fact nos. 25, 27, 29 and 33. Even if Dr. Bede's testimony is allowed, Conclusions of Law nos. 6, 7, 8, 9, 10 and 11 are not supported by substantial evidence.

2. The trial court committed reversible error when it allowed Respondents/Cross Appellants to call Dr. Wendy Marlow as an expert witness during the middle of trial and admitted exhibit no. 94, a report prepared by Dr. Marlow when Dr. Marlow was never named as a witness and the exhibit was never disclosed to Ms. Graham or listed by Respondents/Cross Appellants prior to trial. Even if Dr. Marlow's testimony and Exhibit 94 are allowed, Conclusions of Law nos. 6, 7, 8, 9, 10 and 11 are not supported by substantial evidence.

5. The trial court committed reversible error when it allowed partial, unauthenticated Social Security Administration ("SSA") records of Ms. Graham to be admitted into evidence during the middle of trial when Respondents/Cross Appellants did not provide the records to Ms. Graham prior to trial or list them on their Exhibit List for Trial. Finding of Fact nos. 43, 47, 48, 49, 51, 52, 53, 54 and 55 are in error. Even if the incomplete and unauthenticated SSA records are admissible, Conclusions of Law nos. 6, 7, 8, 9, 10 and 11 are not supported by substantial evidence.

B. Issues Pertaining to Assignments of Error.

1. Should the trial court have excluded Dr. Bede as Respondents'/Cross Appellants' expert witness when Dr. Bede was never identified on any of Defendants' witness list, and, contrary to the assertions of Respondents/Cross Appellants, the undisputed evidence showed that Defendants' original orthopaedic expert was available for trial testimony or a perpetuation deposition?

2. Should the trial court should have excluded Dr. Marlow and Exhibit 94 from trial when Dr. Marlow and Exhibit 94 were never made known to Ms. Graham at any time prior to trial?

3. Should the trial court have admitted unauthenticated and incomplete SSA records of Ms. Graham's in the middle of trial when such records were never listed on Respondents/Cross Appellants' exhibit disclosures and Ms. Graham had no opportunity to conduct any discovery based on such records?

4. Whether Conclusions of Law nos. 6, 7, 8, 9, 10 and 11 are supported by substantial evidence when all of the evidence in this case shows that every doctor who treated Ms. Graham opines that her physical pain and mental and emotional distress is causally related to the motor vehicle accident for which the Respondents/Cross Appellants admit fault and she had no pre-existing complaints of similar pain prior to the accident.

5. Whether the trial court erred in concluding that Ms. Graham's award of damages was limited to \$65,000.00.

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II. STATEMENT OF THE CASE

A. Factual History Related to Ms. Graham's Injuries.

This case arises out of a motor vehicle accident ("accident") on March 23, 2001, in Tacoma, Washington for which the Respondents/Cross Appellants admit liability. Ex. 1. The cause of the motor vehicle accident was found to be Respondent/Cross Appellant Jenkins' "inattention". Ex. 1. Despite months and months of discovery by defendants, including a medical exam by Dr. Battaglia and a woefully incomplete records review by Dr. Bede, it was undisputed at trial that Ms. Graham suffered no painful neck, back, hip or leg condition prior to the accident.

Ms. Graham was a career teacher and was a substitute teaching at the time of the accident. Ex 81, RP 615-619. Ms. Graham started her teaching career in 1983. Ex. 81 RP 578-589. Ms. Graham's personnel files reflect a long and successful teaching career at every school where she taught. Ex. 80, 81, 51, 52, 53, 54, and 55. The day of the accident, Ms. Graham was on her way to meet her daughter Kris Kehler ("Kehler") in Puyallup. RP 634.

The Tacoma Fire Department arrived at the scene of the accident, immobilized Ms. Graham and transported her by ambulance to St. Joseph's hospital in Tacoma with complaints of neck and back pain, and right arm numbness. Ex. 13. It is undisputed that Ms. Graham's medical history is completely negative for any prior complaints, medical findings, or treatment for neck, back, or leg pain. Ex. 15; RP 70-71, 93, 648 & 652-653, RP 948. At St. Joseph's Ms. Graham informed emergency room personnel of her neck and back pain, and right arm numbness. Ex. 14. Ms.

Graham's injuries were assessed and upon discharge she was provided with pain medication and advised to follow up with her primary care physician, Dr. Neil Golan, in Auburn. Ex. 14. Upon release from St. Joseph's on March 23, 2006, Ms. Graham's neck pain started to improve, but soon her lower back worsened. RP 647.

On April 13, 2001, Ms. Graham went to the Good Samaritan Hospital Emergency Room in Puyallup for severe low back pain, with some radiation into her right leg since the accident. Dr. Michael Brook diagnosed Ms. Graham's with "acute severe back pain – acute lumbar strain and muscle spasm." Ex.15 & 17. Dr. Brook prescribed Percocet, ice/heat therapy, and advised Ms. Graham to follow up with Dr. Golan.

On April 16, 2001, Ms. Graham followed up with Dr. Golan. Ex. 15. Ms. Graham reported that her back pain had begun after the accident and had progressively increased over the intervening weeks. Ex. 15. Dr. Golan objectively found Ms. Graham's range of motion to be limited, tenderness to the lumbar region, and diagnosed a sprain to the lumbar region. Ex. 15. Dr. Golan prescribed medications, exercises, ice/heat therapy, and advised Ms. Graham to return in two weeks. Ex. 15.

On April 23, 2001, Ms. Graham contacted Dr. Golan and reported that her symptoms were worsening. Ex. 15. On April 30, 2001, Ms. Graham again sought treatment with Dr. Golan for back pain. Ex. 15. Objective findings of limited range of motion and "moderate tenderness to palpation and spasm of the lumbar paraspinous muscles" were made by Dr. Golan and she was referred to physical therapy. Id. Following the accident, Ms. Graham made unsuccessful attempts to return to work but

could not because her neck and back were too painful to do so. Ex. 16 pg 1. RP 623-624 & 649.

On May 8, 2001, Ms. Graham began a regimen of physical therapy with Apple Physical Therapy in Auburn. Ex. 16. The initial evaluation found a limited range of motion in Ms. Graham's lumbar and cervical area. Ex. 16. The physical therapy records *repeatedly* reflect that Ms. Graham had a "hitch" in her gait which caused her to be unsteady on her feet. Ex. 16. The records contain objective findings confirming Ms. Graham's reports of low back pain and right leg pain and numbness since the accident. Ex. 16, RP 717. The records further reflect that Ms. Graham had difficulty time picking up her right leg, frequently tripped and was generally unsteady. Ex. 16.

Although Ms. Graham's back pain in the Spring of 2001 made teaching difficult she wanted to get a permanent teaching job. RP 623-625. In August, 2001, Ms. Graham interviewed for and was hired as a full time English teacher at Gig Harbor High School. Ex. 80 pg. 004. Ms. Graham's teaching contract for the 2001-2002 school year paid \$33,001. Ex. 80. RP 629.

Also in August 2001, Ms. Graham was continuing therapy with Apple Physical Therapy. She did physical therapy through mid-September, 2001 with little, if any, relief of her symptoms of back pain and right hip/leg pain. Ex. 16, RP 726-727. Ms. Graham was discharged from Apple Physical Therapy to find a physical therapist closer to her home in Gig Harbor. Ex. 16. Her Status/Discharge report from Apple PT,

dated September 17, 2001, reflects that her S1 and lower back hurt with driving and sitting. Ex. 16.

On October 9, 2001, Ms. Graham presented to Harbor Physical Therapy with a chief complaint of pain in the "lower back/Rt. Leg." Ex. 18. Back pain prevented Ms. Graham from standing more than 10 minutes, or sitting more than 30 minutes. Mitchell Blakney, P.T., found tenderness and weakness across the back. Ex. 18. Ms. Graham was told by Mr. Blakney that he thought she might have a herniated disc. RP 728, 1082. Thereafter, Ms. Graham stopped attending physical therapy as she did not receive significant relief from it, it caused her more pain and the increased demands of her new dream job.. RP 721-724, 726-730. Kehler, Ms. Graham's daughter, observed that her mother often would be in more pain coming out of therapy. RP 462-463, 484. To be certain, the undisputed evidence of this case shows that Ms. Graham's back pain did not disappear after her last physical therapy visit on October 9, 2001. Id.

To cope with her back pain during the school day, Ms. Graham continued to self-treat her condition through heating pads at work and over the counter pain relievers. Ms. Graham reduced the amount of her prescription pain relievers as they affected her teaching performance. RP 625-627, RP 724.

Ms. Graham again saw Dr. Golan on October 22, 2001. Dr. Golan's records from the October 22, 2001 visit establish that although Ms. Graham had discontinued physical therapy at that time, she still needed a prescription for Vioxx for her back pain. Ex. 15. Dr. Golan's records further reflect that in January 2002, he provided an additional

prescription of Vioxx for her back pain. Ex. 15, RP 723. While Ms. Graham took over the counter pain medications while at work, after school her back pain was so great that she would increase/change her medications to prescription pain relievers for the evening, use her heating pad, and sleep in her recliner to provide some level of pain relief. RP 626-627, RP 724-725.

On March 4, 2002, with the pain too great to bear any longer, Ms. Graham reported to Urgent Care in Gig Harbor with continued and increased complaints of back pain with radiation down right (butt) cheek, Ex 19. RP 730-731. On March 6, 2002 Ms. Graham followed up with Dr. Golan again for her back pain. Ex. 15. Dr. Golan's records indicate that Ms. Graham is having "LBP" (low back pain). The objective findings in the medical record note back pain of the lumbar region *related to the motor vehicle accident*. Ex. 15.¹ Dr. Golan's plan reflects Ms. Graham is to *continue* flexibility exercises, refill Vioxx, refer to physical therapy, and to schedule an MRI. Ex. 15.

On March 11, 2002, Ms. Graham again reported to Harbor Physical Therapy with "right-sided low back pain following a motor vehicle accident in March, 2001." Ex. 18. Jennifer Tabor, M.P.T. reported that Ms. Graham had pain at 6-7 on a scale of 10, with lumbar pain along the L4-L5 area. Ex. 18. Ms. Graham followed up with another visit at Harbor PT, on March 18, 2002, and reported to the therapist that her MRI

¹ These records were undisputed at trial. However, Conclusion of Law No. 8 states that Ms. Graham failed to establish by a preponderance of evidence that any treatment rendered by any healthcare provider after October 9, 2001 was for injuries sustained as a result of the motor vehicle accident. This alone shows that Conclusion of Law No. 8 is erroneous.

indicated disc bulges in the lumbar spine. Ex. 18. On April 6, 2002, Ms. Graham again reported to the Good Samaritan Hospital Emergency Room with mid and low back pain, and it was noted by Dr. Wayne Duran that she had a "known lumbar disc herniation with recurrent sciatic pain that has gotten worse." Ex. 17.

Because of her continuing and increasingly severe back pain for over a year since the accident, Ms. Graham sought a second medical opinion regarding her back. RP 735. Based upon the recommendation of her registered nurse-daughter, Kehler, Ms. Graham was referred to orthopedic surgeon Dr. Steven Brack. Ex. 20, RP 734-735, 464. On April 11, 2002, after an extensive interview and examination of Ms. Graham, and review of the MRI films, Dr. Brack made the following diagnosis of Ms. Graham's condition:

1. Chronic persistent lower back pain causally related to the motor vehicle accident;
2. Multi level degenerative disk disease unrelated to the motor vehicle accident though aggravated;
3. Right foraminal disc herniation causally related to the motor vehicle accident.

Ex. 20.

Dr. Brack specifically identified, just as all the undisputed evidence in this case show, Ms. Graham did not have any complaints of back pain until after the accident. Ex. 20, RP 70-71, 93. In fact, prior to the accident, Ms. Graham's medical history is negative for *any* prior complaints or treatment for neck pain, back pain, or leg pain. Ex. 15, RP 70-71, 93, 648 & 652-653, & 458-460.

In May 2002, Ms. Graham again reported to Good Samaritan Hospital and Dr. Brack, where the history of her illness was taken, stating:

The patient is a 52 year old right-hand dominant school teacher seen with 75% back and 25% thigh pain. **These symptoms began in March 2001. The symptoms began after a rear-ending collision on Highway 16** She was then taken to the hospital via ambulance because of neck pain. Several days to a couple of weeks later, she had increasing complaints of severe lower back pain. **Since that time, she has undergone management with physical therapy, anti-inflammatories, and time. This has not resolved her lower back complaints. Because of her continued symptoms, she would like to proceed with surgical intervention.**

Ex. 17

On May 6, 2002, Dr. Brack referred Ms. Graham to Dr. Jidya Iyengar of Cascade Interventional Pain Center for a Discogram at L2-3, L3-4, L4-5, and L5-S1 to determine which disc was causing Ms. Graham's pain, and to try to correlate the pain location to assist with surgery. Ex. 20. Dr. Iyengar, through the discogram procedure, made *objective findings* of "concordant discogenic pain" at L3-4, consistent with Ms. Graham's reported complaints of pain. Ex. 23, RP 826. Ex. 23, RP 72.

On May 22, 2002, Dr. Brack performed a right L4-5 micro-discectomy, hoping to alleviate Ms. Graham's right leg pain and some of her back pain. Ex. 20, RP 740-741. Unfortunately there was no improvement of the back pain. RP 82. After consulting with Dr. Brack, Ms. Graham decided to proceed with a posterior fusion of the L-3-4 disc. Ex. 20, RP 80-82, 831. Her records at this time reflect pain at its worst a "10" on a scale of 10, with symptoms severe enough that she has not been able return to work. Ex. 20. Dr. Brack performed the lumbar fusion

surgery on July 25, 2002. Ex. 17, Ex. 20. Neither surgery helped Ms. Graham's back pain. Ex. 20, RP 836-840. Dr. Brack saw Ms. Graham several times after the surgery, Ex. 20, RP 87, and the evidence establishes that nothing else could be done except for pain control management. Ex. 20, RP 38-39.

As a result of her back condition, Ms. Graham could not work. RP 115. On May 14, 2002, immediately prior to the microdiscectomy, Dr. Brack filled out a form to the American Fidelity Assurance Company ("American Fidelity") regarding Ms. Graham's claim for disability benefits. He noted her upcoming microdiscectomy surgery and indicated she would be unable to work for 3-6 months. Ex. 20. Following the microdiscectomy surgery, on June 12, 2002, Dr. Brack filled out another form to American Fidelity noting that Ms. Graham's return to work was "unknown." Ex. 20. On February 3, 2003, following the unsuccessful fusion surgery, Dr. Brack wrote American Fidelity that Ms. Graham suffered from chronic lower back pain and that she could neither sit, stand or walk for any length of time. Ex. 20.

On March 12, 2003, Dr. Brack advised American Fidelity that Ms. Graham suffered from "chronic lower back pain" status post fusion, and her return to work was unknown. Ex. 20. On November 3, 2003, Dr. Brack reported to American Fidelity that Ms. Graham's diagnosis was "failed back surgery syndrome" and that she would not be able to work full time. Ex 20. He further opined that it was unlikely that Ms. Graham would be able to return or that she could be gainfully employed under any type of occupation. Ex. 20, RP 107-109.

In late 2002, following the failed back surgeries, Dr. Brack recommended to Ms. Graham that a warm environment may help alleviate some of her back pain. RP 844, RP 41-42. Ms. Graham's sister resides in Arizona, so in January of 2003, Ms. Graham visited her sister in Arizona to see if the warm climate would help. RP 844. This was not an easy decision for Ms. Graham as most of her children and grandchildren reside in the State of Washington. RP 846.

While in Arizona and away from the closest members of her family, Ms. Graham began experiencing increasing feelings of depression and hopelessness. On May 15, 2003, Ms. Graham voluntarily admitted herself to the Banner Behavioral Health Hospital ("Banner Hospital") and was treated there by Dr. Inayat Alikhan, through May 21, 2003. Ex. 25.

On June 9, 2004, Dr. Alikahn executed a Declaration regarding Ms. Graham wherein he gave the following opinions and conclusions based on his training and experience and treatment of Ms. Graham:

1. Ms. Graham suffers from a history of chronic back pain since an automobile collision, which occurred on March 23, 2001.
2. Chronic pain is a contributory factor that can cause or exacerbate a depressive state.
3. Ms. Graham's admission to Banner Behavioral Health Hospital on May 15, 2003 is causally related to the automobile collision of March 23, 2001 and the resulting chronic back pain.
4. My treatment of Ms. Graham was necessary and reasonable given her condition and symptoms.

Ex. 2 to CP No. 3, Deposition of Dr. Inayat Alikhan filed June 29, 2005²

² The preservation deposition transcripts for Dr. Alikhan, Dr. Marshall Craig, Dr. Lawrence Martin, and Dr. Petra Peter were admitted by the trial court on June 29, 2005. The trial court declined to have them read into the record and the Respondents/Cross Appellants' Findings of Fact and Conclusions of Law adopted by the trial court only state the transcripts were considered.

At his deposition on April 8, 2005, Dr. Alikhan testified that his opinions and conclusions regarding Ms. Graham had not changed. Id. at 18. Ms. Graham eventually permanently relocated to Arizona. RP 845

Though residing in Arizona, Ms. Graham continued to consult with Dr. Brack for her back condition. Ex. 20, RP 114-115, 932. Her then prescribed pain medications were Oxycontin, Neurontin, and Percocet. Dr. Brack noted that her long-term treatment will require medication for pain control. Ex. 20, RP 846-848. In July, 2004, Ms. Graham again saw Dr. Brack "with no significant change in her symptoms." She was able to walk, sit and stand 15-30 minutes at a time. Ex. 20. In November, 2004, Ms. Graham again saw Dr. Brack with 75% complaints of back pain and 25% right leg symptoms. Ex. 20. Dr. Brack's opinion at that time was that she still suffered from "chronic lower back pain." Ex. 20.

In Arizona, Ms. Graham needed a new primary care physician and presented to Dr. Bernadette Reidy of The Mayo Clinic in Scottsdale in March, 2004. Ex. 30. Notably, Dr. Reidy prescribed a bone density test for Ms. Graham in April 2004, which reflected T-scores all in the positive range, including her lumbar spine which was +1.1 (a positive number reflects normal bones with no thinning). Ex. 30. Ms. Graham was also referred by Dr. Reidy to a pain management doctor, and started such treatment with Dr. Steven Glacy of the Arizona Pain Clinic in April 2004. Ex. 27. Dr. Glacy ordered a Lumbar Spine MRI for Ms. Graham, which reflected post operative changes at multiple levels. Ex. 27. Ms. Graham received two epidural injections from Dr. Glacy to alleviate her chronic back pain, and her pain medications were switched from Oxycontin and

Percocet to a Duragesic Patch to obtain more steady pain control. Ex 27. Dr. Glacy also referred Ms. Graham to a psychologist, Dr. Petra Peper, for depression secondary to pain and loss of life style since her accident.

In late May, 2004 Ms. Graham changed her pain management care to Dr. Marshall Craig of the Healthsouth Surgery Center for epidural injections and follow-up pain management. Dr. Craig diagnosed Ms. Graham with Chronic Pain Syndrome and Post-Laminectomy Pain Syndrome, a condition where a person in Ms. Graham's position continues to experience pain despite the Laminectomy (i.e. "lumbar fusion") surgery. Ex. 29, CP No. 4 Deposition of Dr. Marshall Craig filed June 29, 2005 pg. 33-34. Dr. Craig routinely administers to Ms. Graham a Racz-catheter-directed caudal neurolysis, similar to an epidural injection. Id. at 35. Dr. Craig confirms that Ms. Graham will continue to need pain management and the epidural injections in the future. Id. at 52. Additionally, the following colloquy occurred in Dr. Craig's deposition on April 8, 2004:

Q: And based upon your understanding of the motor vehicle accident and the records that you reviewed, how has this chronic pain come about?

A: I believe there is a direct causative event related to her motor vehicle accident.

Q: Why do you believe that?

A: She had no previous history of lumbar back pain, at least as reported to a physician.

Q: Why is that significant?

A: Well, two-fold: One is that, you know she obviously had not had back pain until her accident; second thing is that, once again, on a lumbar MRI on a patient, say, over the age of 40 or 50, you can do an MRI and find

pathology, something that can be reported by a radiologist. Some people would speculate that you know, someone had a pre-existing medical situation; however at least with regard to lumbar degenerative disk disease, basically we all have it. . . . **You can't say that lumbar degenerative disk disease was preexisting before the accident as part of her pain syndrome unless she was reporting pain.**

Id. at 52-53 (Emphasis added).

Dr. Craig opines that Ms. Graham is totally disabled and unable to work as a result of her chronic pain. Id. at 55.

Between October 2003 and March 2005, Ms. Graham began treating with Dr. Lawrence Martin of the Scottsdale Psychiatric Services in Scottsdale for medication management of her bipolar condition, a condition she had since about 1995. RP 598. Dr. Martin diagnosed Ms. Graham with bipolar disorder, post-traumatic stress disorder and recent automobile accident with residual chronic pain problems. Ex. 26 On March 18, 2005, Dr. Martin issued a written opinion wherein he states:

I have reviewed the time frame of her illness and treatment in regards to her motor vehicle accident. It would appear that her mood disorder was coming under control at the time of her accident. I do not believe that her current mood disorder plays a significant or active part in her pain response.

Ex. 3 to CP No. 2, Deposition of Dr. Lawrence Martin filed June 29, 2005

Dr. Martin's deposition was taken on April 5, 2005. Dr. Martin confirmed in his deposition that the statements in his March 18, 2005 opinion letter remained his opinions and conclusions. Id. at 57.

Between April 2004 and November 2004, Ms. Graham also treated with Dr. Petra Peper, of Psychological Services of Scottsdale. In April, 2004, Dr. Peper reported that Ms. Graham was "experiencing

psychological distress secondary to the physical pain she feels and the restrictions it imposes.” Dr. Peper stated the following of Ms. Graham on May 17, 2004:

The patient did well tolerating the degree of emotional distress she was in. She remains motivated to confront these painful issues of loss, knowing that she cannot move forward without working through them (she requested an increase in psychotherapy sessions to two times per week). It was pointed out to her that on the one hand, she will never be able to do certain things again (e.g. riding horses, teaching and rough-housing with her grandchildren), yet on the other hand she needs to develop acceptable new relationships with the things she once loved to do.

Ex. 28

On May 22, 2004, Dr. Peper reported that Ms. Graham “expressed an attitude of feeling defeated by her physical limitations and chronic pain.” On September 29, 2004, Dr. Peper reported that Ms. Graham was “struggling with the realization [of her] physical limitations and pain that she could do nothing about.” Ex. 28. On November 23, 2004, Dr. Peper issued the following report:

The patient continues to experience emotional distress about her continued back pain and the restrictions it has imposed upon her life. She is very aware of the impact of her injury, tearfully stating, “That’s the thing, you don’t have a choice. This whole thing has taken that away from me!”

Ex. 4 to CP No. 5 Deposition of Dr. Petra Peper filed June 29, 2005

On February 4, 2004, Ms. Graham was seen by Dr. Theodore Becker, a physical capacities expert from the Everett Pacific Industrial Rehabilitation clinic. RP 502. The performance based physical capacity evaluation included an interview and a grouping of objective tests

designed to determine the strength and function of different body parts. RP 512, 521. The purpose of the evaluation was to determine the objective tolerance of Ms. Graham for the work place (can she work) and to identify the deficits or restrictions of her particular body sections. RP 513. Dr. Becker opined that the objective results of the tests showed that Ms. Graham's physical deficits were consistent with her reported injuries. RP 530. Dr. Becker testified at trial that Ms. Graham's physical restrictions significantly impacted her ability to function on a daily basis. RP 563-566 Dr Becker testified that Ms. Graham does not qualify for full time work; she is "work intolerant" and cannot qualify for even lowest level of sedentary work. RP 541-544. She cannot even work from a wheelchair. RP 547. Dr. Becker testified that even a physical rehabilitation program is not appropriate due to her level of restrictions for stable movement. RP 545-546, 556-559.

Ms. Graham's vocational situation was also reviewed by Cloie Johnson, a rehabilitation counselor and life care planner with OSC Vocational Services. RP 172. Ms. Johnson is also a vocational expert for the Social Security Administration ("SSA"). RP 174. On November 3, 2004, Ms. Johnson met with Ms. Graham for a vocational assessment, to determine Ms. Graham's ability to work and to develop a life care plan. RP 178. Ms. Johnson contacted all Ms. Graham's health care providers: Dr. Brack, Dr. Craig, Dr. Peper, as well as Dr. Becker. RP 189. She reviewed Ms. Graham's medical records. RP 194. In February, 2005, Ms. Johnson prepared a life care plan for Ms. Graham, and provided a cost analysis of Ms. Graham's future health care needs. RP 195.

Ms. Johnson testified that given Ms. Graham's experience as a teacher she could have earned \$36,272 annually at the time of trial had she been able to work. RP. 184. Ms. Johnson testified that because of Ms. Graham's back impairments, she was unemployable, did not possess the physical capacity to perform, compete for, and sustain gainful employment. RP 210, 218-221.

The economic losses sustained by Ms. Graham as a result of the accident, were reviewed by Professor of Economics, Eugene Silberberg. RP 679. Dr. Silberberg was asked to calculate Ms. Graham's economic loss due to the automobile accident of March 23, 2001. RP 679. Dr. Silberberg reviewed Ms. Graham's work history, tax returns, employment contracts, salary schedules for teachers, and various authoritative sources for work and life expectancy. RP 680, 685, 687. Ms. Graham's work life expectancy was 13.23 more years to about age 65. RP 686. Ms. Graham's last day of work at Gig Harbor High School, was April 30, 2002, so Dr. Silberberg used that date as the starting point for Ms. Graham's economic damages. RP 688. Dr. Silberberg concurs with Ms. Johnson that in the following school year Ms. Graham would have earned \$36,272 as a teacher. RP 689. Dr. Silberberg concluded Ms. Graham's economic damages attributable to the accident, reduced to present value, are:

1. That Ms. Graham has suffered and will suffer a total of \$501,505.00 in post-injury earning capacity. RP 693.
2. Future medical costs of \$525,470. RP 697.

Professor Silberberg's expert opinion was that Ms. Graham has suffered and will suffer a total economic loss of \$1,026,975. RP 698.

Ms. Graham also suffered emotionally from the accident. Ex. 28. Aside from the diagnoses of Ms. Graham's treating mental health providers such as Dr. Peper, Dr. Lawrence Majovski, a highly regarded clinical neuropsychologist in Tacoma, was retained to conduct a clinical assessment of Ms. Graham's psychological state. RP 363-364. Dr. Majovski met with Ms. Graham in November of 2004. RP 376. Dr. Majovski reviewed Ms. Graham's health care records. RP 364. He conducted a face-to-face interview, and a mental status exam with Ms. Graham. RP 367-369. Dr. Majovski utilized a formal testing inventory, the clinical Minnesota Multiphasic Personality Inventory ("MMPI") the mostly widely used tool for making clinical judgments. RP 370. Dr. Majovski's diagnoses of Ms. Graham are: (1) manic-depressive disorder, otherwise known as bipolar disorder type I, since episode, meaning in a depressive state, on-going. Stabilized condition as of the date Dr. Majovski met with her. RP 384; (2) pain disorder from the lower back injury and chronic pain. RP 384; and (3) "adjustment disorder with both anxious mood and depressed features. RP 384.

To summarize, the medical professionals who have actually seen Ms. Graham, interacted directly with her, treated her, examined her, interviewed her, prescribed medications for her, ran tests on her, and operated on her: Dr. Neil Golan, Dr. Steven Brack, Dr. Ianayat Alikhan, Dr. Bernadette Reidy, Dr. Steven Glacy, Dr. Petra Peper, Dr. Marshall Craig, Dr. Lawrence Martin, Dr. Lawrence Majovski, and Dr. Theodore Becker, all unanimously agree that the physical injuries and the mental

and emotional distress Ms. Graham *are attributable to the motor vehicle accident* of March 23, 2001.

B. Factual History Related to Ms. Graham's Bipolar Condition.

At trial the Respondents/Cross Appellants argued they were not responsible for Ms. Graham's wage loss or impaired earnings because Ms. Graham had a preexisting bi-polar disability, for which she was receiving Social Security Disability Insurance ("SSDI") benefits. The overwhelming and substantial evidence establishes that Ms. Graham was, in fact, working at the time of the accident, subsequently obtained a full time job with Gig Harbor High School and reported this to the SSA.

It is true that Ms. Graham had bipolar concerns in 1995 and began treatment with Group Health that same year for possible bipolar affective disorder II. RP 598, 604-605. However, ongoing treatment for her bipolar condition was during a time when Ms. Graham was also successfully teaching for several years in the South Kitsap School District. Ex. 47 & 81. RP 585, 593, 604-605. On April 30, 1999 Ms. Graham remarried, resigned her job at South Kitsap to relocate from Gig Harbor to Auburn where her new husband lived. She looked for teaching jobs in the Auburn area. Ex. 81, RP 593-595.

On July 16, 1999, Ms. Graham did apply for SSDI benefits based upon her bipolar disorder. RP 612. The un rebutted evidence at trial established several stressors exacerbated her bipolar condition: she had been unable to find work in Auburn, she was in a stressful and violent marriage, and her bipolar medications were not working. RP 606-610,

954. On October 25, 1999, she was denied benefits following a SSA examination because her bipolar condition was not considered severe enough to keep her from working. A reconsideration motion on November 20, 1999 was again denied by the SSA. RP 613. A request for a Hearing by an Administrative Law Judge was filed on May 8, 2000. During this period of SSA review, Ms. Graham continued to seek employment. RP 621-622, 957-958.

In addition, Ms. Graham applied for employee disability benefits with American Fidelity on July 27, 1999, indicating bipolar disability, however she was denied benefits on this application. RP 612-613, 962.

Ms. Graham sought employment in the fall of 1999 and in 2000 but was not successful. RP 621-622. Ms. Graham continued to look for work in early 2001, and commencing on February 27, 2001 obtained a job as a substitute teacher in the South Kitsap School District. Ex. 81, RP 615, 619. Following the accident of March 23, 2001, Ms. Graham worked a few days as a substitute teacher but had to decline any further teaching because of the March 23, 2001 accident and the consequent pain she was experiencing. RP 623-624, 649.

On June 4, 2001, Ms. Graham's SSA Administrative Hearing was held. RP 972. After the hearing Ms. Graham still continued to try and find employment. On August 9, 2001 she was hired full time at Gig Harbor High School to teach English at a salary of \$33,001.00. Ms. Graham testified this was her "dream job." She commenced work August 28, 2001. Ex. 80. RP 625-626.

On September 27, 2001, *after* Ms. Graham had begun her full time teaching assignment at Gig Harbor High School, the SSA Administrative Law Judge, in a written notification, concluded that Ms. Graham was disabled and had not engaged in substantial gainful employment since July 15, 1999. The ruling, in part, stated that Ms. Graham had bipolar II affective disorder and was entitled to disability impairment dating back to her original application in 1999. Defendants' Findings of Facts at #53.

The undisputed testimony and documents at trial affirmatively establish, however, that despite her bipolar condition, Ms. Graham *was employed* full time and successfully teaching at the time of the SSA determination of her disability. Ex. 80. RP 625-626. Following the SSA September 27, 2001 determination concluding she was unable to engage in substantial employment, the undisputed evidence establishes that Ms. Graham contacted the local SSA office to advise she had returned to work and did not need the SSA disability benefits. RP 959. The undisputed evidence further showed that Ms. Graham was advised by her SSA case manager of the Trial Work Period/Ticket to Work Program whereby the SSA would continue providing benefits until the employee established a track record of continued employment. RP 175-177, 960. CP 1123-1142. Unfortunately, Ms. Graham was only able to work eight months before she was forced to quit due to her accident-related back pain and impending back surgery in May of 2002. RP 961, 1105-1106. CP 1123-1142. Ms. Graham left her position at Gig Harbor High School on April 30, 2002. She has never worked since her back surgeries in May and July of 2002. Ex. 80. Because Ms. Graham did not engage in continued employment

under the Trial Work Program/Ticket to Work program, the SSA continued to provide her with benefits. RP 214-215.

Based upon the SSA determination of Ms. Graham's bipolar "disability" in September, 2001, Defendants asserted and the Court concluded that Ms. Graham could not have a wage loss or impairment of earning capacity attributable to the accident since her bipolar condition and disability determination preceded the accident. Defendants' Conclusions of Law at #10, 11. This argument was completely contradicted by the undisputed fact that Ms. Graham was employed at the time of the accident, and obtained full time employment prior to the date the SSA determination was actually made. RP 615-619, 623-626, Plaintiffs' Findings of Facts at #68-71. The only reason established at trial why Ms. Graham was forced to leave her teaching position was due to physical pain from her accident-related back injury. Ex. 15, RP 648, 652-653, 970. This is undisputed.

C. Procedural History.

On December 2, 2003, Ms. Graham filed a Complaint for Personal Injuries. CP 4-7. The original trial date was November 30, 2004. CP 2-3. A continuance was entered providing a May 2, 2005 trial date. CP 15. On September 10, 2004, Ms. Graham obtained new counsel. CP 16-17.

On October 25, 2004, Ms. Graham filed Plaintiff's Disclosure of Possible Primary Witnesses. CP 18-21. Notably, Ms. Graham identified her primary treating physicians: Dr. Steven Brack, Dr. Nagavedu Raghunath, Dr. Larry Galbert, Dr. Marshall Craig, Dr. Petra Peper, Dr. Stephen Glacy, Dr. Bernadette Reidy, as well as Dr. Theodore Becker.

Ms. Graham also identified she would be naming a vocational/life care planner, an economist, and a neuro-psychologist, all to “be named shortly.” CP 18-21. On November 13, 2004, Defendants submitted their Primary Witness List. In part, Defendants’ witness list listed Forensic Specialist J. Kristoffersen of the Tacoma Police Department regarding the accident itself; Dr. Michael J. Battaglia, M.D. of Objective Medical Assessments (“OMAC”) to conduct an independent medical evaluation (“IME”) with Ms. Graham; a “vocational rehabilitation expert, economist, and neuro-psychologist,” all to be named later. CP 22-26. Discovery, including Ms. Graham providing numerous records/medical releases, continued. CP 471-474.

On January 10, 2006, Ms. Graham submitted *Plaintiff's Disclosure of Possible Rebuttal Witnesses*. CP 27-29. At that time Ms. Graham identified the three experts by name that she had earlier identified by “specialty”: vocational/life care expert Cloie Johnson; economist Dr. Eugene Silberberg, and neuro-psychologist Dr. Lawrence Majovski. CP 27.

On January 19, 2005, Ms. Graham issued a request to the Social Security Administration for a copy of all Ms. Graham’s SSA records. CP 1018. Also on January 19th Respondents/Cross Appellants filed a “Supplemental Disclosure of Primary Witnesses” naming economist Neal Beaton, CPA, and vocational counselor William Skilling. CP 30-31.

On February 9, 2005, the parties entered a stipulation to extend the discovery cutoff to April 15, 2005. CP 32-33. On February 17, 2005, Ms. Graham, following Defendants’ “supplemental” primary witness list, filed

her own "Supplemental Disclosure of Possible Primary Witnesses" naming three more *treating* doctors of Ms. Graham: Dr. Iyengar, Dr. Alikhan, and Dr. Lawrence Martin. CP 34-35.

On February 22, 2005, Defendants signed a Stipulation Admitting Liability whereby Defendants admitted liability to causing the accident of March 23, 2001. Appendix 1. On March 14, 2005, Defendants issued a Subpeona Duces Tecum to the SSA requesting Ms. Graham's records regarding applications for benefits or benefits received for her bipolar disability. CP 1021.

On March 17, 2005, Ms. Graham responded to the Defendants' request for supplemental discovery, which in part provided resumes for Ms. Graham's retained experts, as well as reports by economist Dr. Silberberg, life care planner Cloie Johnson, and a declaration from Dr. Alikhan. Dr. Majovski never issued a report. On March 28, 2005, Ms. Graham submitted *Plaintiff's Trial Witness and Exhibit List*. CP 36-42.

On April 1, 2005 Respondents/Cross Appellants submitted their *Witness and Exhibit List and Notification of Intent to Offer Documents pursuant to ER 904*. CP 124-129. Notably, Dr. Michael Battaglia, was still listed as their orthopedic expert. CP 124. For the first time ever, though, thirty days before trial, Defendants identified Dr. Allan Tencer, a venerable defense expert in biomechanical dynamics of accidents. CP 125. Respondents continued to list as an expert witness a "psychiatrist to be named" one month before the May 2, 2005 trial date. CP 125.

On April 7, 2005, Ms. Graham brought a motion to exclude Mr. Tencer, and the "psychiatrist to be named" listed by Respondents/Cross

Appellants. CP 251-258. On April 14, 2005 Defendants brought their own motion to exclude Cloie Johnson, Dr. Silberberg, and Dr. Majovski, all of whom had been named at least three months before, on January 10, 2005. CP 28.

On April 15, 2005, an Order was entered continuing the trial date to June 20, 2005, and extending discovery to May 20, 2005. CP 350. A new Order Setting Case Schedule was issued. It did not provide for naming new trial witnesses. CP 351. The very next Monday, April 18, 2005, Respondents/Cross Appellants filed *Defendants' Second Supplemental Disclosure of Primary Witnesses* and, for the first time, named Dr. Bede as an expert witness as to medical causation issues. CP 352-353. Respondents/Cross Appellants alleged Dr. Battaglia, was "unavailable" for trial or deposition. CP 501. Respondents/Cross Appellants further alleged Dr. Bede's testimony would be identical to that of Dr. Battaglia. CP 501. Neither the April 15, 2005 Order or the new Order Setting Case Schedule made any provisions for naming such new witnesses. CP 350-351.

On April 28, 2005, Ms. Graham moved to exclude Dr. Bede, Mr. Tencer, and any other untimely and unnamed witnesses. CP 493-498. On May 6, 2005, the Court, in part, denied Ms. Graham's Motion to Exclude. It ordered that Mr. Tencer could only be a rebuttal witness and that Dr. Bede would be allowed to testify in lieu of Dr. Battaglia. CP No. 1 Verbatim Report Heard May 6, 2005.

On May 16, 2005, Ms. Graham filed her *Trial Witness and Exhibit List*. CP 599-606. On May 19, 2005, Respondents/Cross Appellants filed

their *Amended Witness and Exhibit List*. Appendix 2. Notably, there was no “psychiatrist” named on the *Amended Witness and Exhibit List*. Id. Further, Respondents/Cross Appellants did not identify any of Ms. Graham’s SSA disability records as an exhibit on their ER 904. Appendix 2, CP 657-659

On June 2, 2005, after Ms. Graham discovered that Dr. Battaglia was actually available for trial testimony or preservation deposition, Ms. Graham moved to exclude Dr. Bede and for sanctions. CP 668-670. Ms. Graham submitted un rebuttable evidence to the Court that Dr. Battaglia was available in the Seattle/Tacoma area during the time of trial and, therefore, could be available to testify at trial or to take his perpetuation deposition. CP 666-667. On June 10, 2005, the trial court, without findings, denied Ms. Graham’s Motion to Exclude Dr. Bede. CP 912-913.

Also on June 10, 2005 the parties signed and submitted the Joint Statement of Evidence. Appendix 3. No exhibit from the SSA was identified on the Joint Statement. Id. The Joint Statement makes no mention of a “psychiatrist” or “psychologist” for Defendants. Id.

At trial, the Court allowed Defendants’ Exhibit 94, never before identified by Defendants, to be admitted as impeachment *and substantive* evidence. RP 497, 1034. The Court also allowed an unnamed expert, Dr. Wendy Marlow, to testify in midst of trial. RP 494, 655. In a cross-examination of Ms. Graham’s expert, Dr. Majovski, Respondents/Cross Appellants offered Exhibit 94 over Ms. Graham’s objections. Exhibit 94 is a Personal Injury Interpretative MMPI-2 and Respondents/Cross Appellants offered it as “impeachment by contradiction.” RP 425-426,

440-443, 1030-1034. Exhibit #94 was prepared by Dr. Marlow and neither the exhibit nor Dr. Marlow had ever been identified prior to trial. RP 658, 426-432. Also over Ms. Graham's objections, the Court allowed Dr. Marlow to testify telephonically with regard to Exhibit #94, and then admitted Exhibit #94 as impeachment and substantive evidence. RP 494-495.

During trial, the trial court also admitted Exhibit #112, incomplete and unauthenticated SSA records regarding Ms. Graham. RP 1116-1118, 1182. The SSA records were not listed as a Defendants' exhibit prior to trial. The SSA records showed up five (5) days into trial, on June 24, 2005. Ms. Graham had no opportunity to conduct any discovery from the records, interview any of the persons named in the records or otherwise use the records to prepare for trial.³ The SSA records were unauthenticated, without foundation, and inadmissible hearsay. RP 758. Plaintiff objected to admitting the records. RP 758-760. The Court admitted them. RP 760, 1182.

On June 29, 2005, the trial court requested that each party submit proposed Findings of Fact and Conclusions of Law to the Court. RP 909. The Court stated that it had not decided if he was going to render a decision orally or whether in letter form with "adjusted Findings of Fact and Conclusions of Law." RP 910. As it turned out, the Court did neither. On July 21, 2005, Defendants submitted "Defendants' Proposed Findings

³ Finding of Fact No. 52 goes into great length establishing the testimony of Dr. C. Richard Johnson at a SSA disability hearing. Ms. Graham's attorneys never had the opportunity to interview Dr. Johnson, let alone depose him or present his testimony at trial to get to the truth of the matters argued by the Respondents/Cross Appellants.

of Fact and Conclusions of Law” to the Court. CP 1308-1324. Ms. Graham also submitted her Proposed Findings of Facts and Conclusions of Law to the Court on November 10, 2005. CP 1325-1348. On January 10, 2006, without an oral or written ruling, or even appearance back in Court, the Court just signed the Defendants’ proposed Findings of Facts and Conclusions of Law, with only one minor change, concluding Ms. Graham, injuries resolved on October 9, 2001, only a few months after the accident, concluding Ms. Graham had no loss of earning capacity, and awarded Ms. Graham only \$65,000 to Ms. Graham as her total damages. CP 1323-1324. A Judgment for Plaintiff in the sum of \$65,000 was entered with the Court on February 3, 2006. CP 1349-1350. This Cross Appeal followed.

III. ARGUMENT

A. Standard of Review.

1. Findings of Fact and Conclusions of Law

As noted in the Assignments of Error, Issues Pertaining to Assignments of Error and throughout this brief, Ms. Graham asserts that the substantial evidence in this case does not support numerous Findings of Fact. This Court’s review of the trial court’s findings of fact and conclusions of law is a “two-step process.” Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). First, “the court must determine if the trial court’s findings of fact were supported by substantial evidence in the record. If so, the court must then determine whether those findings of fact support the trial court’s conclusions of law.” Guarino v.

Interactive Objects, Inc., 122 Wn. App. 95, 108, 86 P.3d 1175 (2004).
Conclusions of law are reviewed de novo. Id.

“Substantial evidence” exists to for a factual holding “when there is a sufficient quantum of proof to support the trial court’s findings.” Id. In particular, “[c]onflicting evidence is substantial if that evidence reasonably substantiates the finding even though there are other reasonable interpretations.” Id. “A mere scintilla of evidence will not support the findings; it requires believable evidence of a kind and quantity that will persuade an unprejudiced thinking mind of the existence of the fact to which the evidence is directed.” Hewitt v. Spokane, Portland & Seattle Ry. Co., 66 W.2d 285, 286, 402 P.2d 334 (1965).

2. Evidentiary Rulings and Discovery Orders

The Court of Appeals reviews a trial court’s evidentiary rulings for abuse of discretion. *See, e.g.*, State v. Majors, 82 Wn. App. 843, 848, 919 P.2d 1258 (1996). An abuse of discretion occurs when it is clear that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

The abuse of discretion standard governs review for noncompliance with discovery orders. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). The trial court’s reasons should be clearly stated on the record so that a meaningful review can be

had on appeal. Rivers. v. Conf. of Mason Contractors, 145 Wn.2d 674, 41 P.3rd 1175 (2002).

B. The trial court committed reversible error by permitting Respondents/Cross Appellants to replace their medical expert shortly before trial and should have excluded Dr. Bede. Even if Dr. Bede's testimony was allowable, the substantial evidence in this case does not support the trial court's Findings of Fact or Conclusions of Law.

Respondents/Cross Appellants selected Dr. Battaglia as their orthopedic expert and named him in November 2004. CP 22-26 Dr. Battaglia examined Ms. Graham and issued a report in January 2005. RP 494. Respondents/Cross Appellants confirmed Dr. Battaglia as their expert on April 1, 2005, when they submitted their list of witnesses and exhibits for trial. CP 124-129. On April 18, 2005, without *any* forewarning to Ms. Graham Defendants named Dr. Bede. CP 352-353

There can be no dispute that the eleventh hour substitution of Dr. Bede was untimely, without good cause and done for improper tactical purposes. Ms. Graham had spent months preparing her case in light of Dr. Battaglia's examination and report. Her attorneys and experts relied upon this fact in preparation for trial. CP 468-484. Dr. Bede never saw or met with Ms. Graham. RP 304. Dr. Bede issued his report on May 26, 2005, just before trial started.

Ms. Graham's motion to exclude Dr. Bede should have been granted by the trial court. CP 493-498. The Respondents/Cross Appellants alleged Dr. Battaglia was unavailable for trial because of his "draconian" scheduling policies." CP 499-503. At the May 6, 2005 hearing, the Court specifically asked the Respondents/Cross Appellants

about Dr. Battaglia's availability in general and for a preservation deposition in San Diego, California where he resides. CP 807-809. Respondents/Cross Appellants asserted Dr. Battaglia's schedule precluded such a deposition. Id. Based on that, the Court ruled Dr. Bede could be substituted, abused its discretion and committed reversible error in doing so. CP 809.

1. The trial court abused its discretion by allowing Defendants to substitute Dr. Battaglia with Dr. Bede shortly before trial.

Exclusion of expert witnesses not properly disclosed is left to the trial court's discretion. Dempere v. Nelson, 76 Wn. App. 403, 406, 886 P.2d 219 (1994), review denied, 126 Wn.2d 1015 (1995). However, willful violation of a court order is grounds for excluding experts. Hutchinson Cancer Research v. Holman, 107 Wn.2d 693, 706, 732 P.2d 972 (1987). The violation of a court order without a reasonable excuse will be deemed willful. Kramere v. J.I. Casae Mfg., 62 Wn. App. 544, 552, 815 P.2d 798 (1991). See Also, Lampard v Roth, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984). When a party fails to disclose expert testimony in compliance with a court order, prejudice is not a prerequisite to the court's exclusion of the witnesses as a sanction for the willful failure to comply. Allied Fianancial Services. V. Mangum, 72 Wn. App. 164, at fn 4, 864 P.2d 1 (1993) (as modified by the Court at 871 P.2d 1075). In Allied Fiancial Services v. Mangum, supra, the defendants failed to identify witnesses in accordance with the pretrial discovery

order. The Court of Appeals *rejected* defendants' argument that there must be also a showing of intentional or tactical non-disclosure.

In Dempere v. Nelson, *supra*, the trial court excluded the testimony of an expert witness not identified in accordance with the case schedule.

The test to exclude was met by Ms. Graham and it was an abuse of discretion by the trial court not to exclude Dr. Bede. In Scott v. Grader, 105 Wn. App. 136, 18 P.3d (2001), the Court of Appeals held these defendants "had no reasonable excuse for waiting until the last minute to obtain an expert witness." When Defendants named Dr. Bede as their new expert on April 18, 2005, no excuse or rationalization was provided, let alone good cause for changing horses in mid-stream. CP 352-353. The trilogy of Dempere v. Nelson, *supra*; Kramer v. J.I. Case Mfg. Co., *supra*; and Lampard v. Roth, *supra*, all require the striking and/or exclusion of any undisclosed witnesses, expert or otherwise.

Pierce County Local Rule 5, governing witness disclosures also required exclusion of Dr. Bede. PCLR 5 disallows witnesses to be called at trial to testify if not disclosed pursuant to the case schedule unless the court finds "good cause." PCLR 5(e). At the hearing on Ms. Graham's motion to exclude Dr. Bede, the Court simply denied Ms. Graham's motion without any findings. CP 5.

As it turned out the Court was misled by the assertions of Dr. Battaglia's unavailability. Respondents/Cross Appellants made no legitimate attempt to produce Dr. Battaglia and there was no foundation put forth at the hearing that Dr. Battaglia was truly unavailable.

Respondents/Cross Appellants named Dr. Battaglia in November 2004. CP 817. They had eight months make arrangements for trial or a perpetuation deposition. CP 680. . However, the most egregious part of this situation is that Dr. Battaglia's "unavailability" for trial or a preservation deposition was untrue. In fact, Dr. Battaglia was completely available and making trips to Washington throughout the spring and early summer of 2005! CP 666-667, 681. Following the May 6, 2005 hearing, Ms. Graham was able to ascertain that through the OMAC website that Dr. Battaglia was available in May and June 2005 for numerous appointments *in Seattle, Tacoma, and Everett*. CP 666-667, 681. Private Investigator Christopher Woodruff with just a couple of telephone calls to OMAC was able to obtain several dates whereby Dr. Battaglia would be available to meet with him in the Seattle/Tacoma area for hour-long blocks at a time in May and June 2005. CP 666-667, 681.

These circumstances demonstrate a willful violation of this Court's Scheduling Order and meet the test of "unconscionable conduct." In Lampard v. Roth, 38 Wn. App. 198, 684 P.2d 1353 (Div. I 1984), the defendant failed to comply with discovery scheduling orders. Division I stated:

The choice of specific sanctions for violation of a discovery order is within the trial court's discretion, *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976), but this discretion is not limitless. The court should exclude testimony if there is a showing of intentional or *tactical nondisclosure*. See *Barsi v. Intalco Aluminum Corp.*, 11 Wn. App. 342, 351, 522 P.2d 1159 (1974). The trial court abused its discretion in failing to exclude the testimony of witnesses who were not disclosed prior to trial.
38 Wn. App. at 202.

The trial court's decision constitutes reversible error for several reasons. First, Ms. Graham's attorneys and experts spent a significant amount of time preparing Ms. Graham's case based on Dr. Battaglia's examination and written opinion. Substituting Dr. Bede at the eleventh hour forced Ms. Graham to try and prepare for an entirely new expert at a time when normal trial preparations should have been occurring.

Additionally, Respondents/Cross Appellants claimed Dr. Bede's opinion would be "the same" as Dr. Battaglia's. CP 802. But this was not true at trial. Unlike Dr. Battaglia, Dr. Bede never met or evaluated Ms. Graham. Unlike Dr. Battaglia's January 2005 IME report, Dr. Bede testified regarding biomechanics or "mechanism of injury" to minimize Ms. Graham's injuries before the Court. RP 270-285. Defendants wanted this biomechanical testimony because they were precluded earlier from calling their biomechanical expert Allan Tencer whereas Dr. Battaglia's opinion differed.

Even if Dr. Bede's testimony were allowable, though, it does not provide for enough evidence to support the Findings of Fact and Conclusions of Law challenged here and in light of all the other medical evidence presented. First, throughout Dr. Bede's cross examination at trial he admitted to either not reviewing specific pertinent medical records, or reviewing them but not including them in his report. RP 326-353. Second, Dr. Bede never actually examined Ms. Graham and stated during trial that, in fact, he prefers to conduct physical examinations as opposed to only reviewing records. In fact, Dr. Bede or any other doctor for that matter should not be allowed to testify as to the medical condition of a

person based on a records review only when the subject person is available to be examined. No reasonable patient would allow themselves to be diagnosed and treated by a physician without an examination. Dr. Bede should have been excluded and this Court should hold that the challenged Findings of Fact and Conclusions of Law are not supported by the substantial evidence in this case and remand the matter for a new trial without Dr. Bede's testimony.

C. The trial court committed reversible error when it allowed Dr. Marlow to be called by Respondents/Cross Appellants an expert witness and admitted Exhibit 94 during trial.

During trial, Respondents/Cross Appellants cross-examined Ms. Graham's expert, Dr. Lawrence Majovksi, and, during cross examination, offered Exhibit #94, a "Personal Injury Interpretive MMPI-2" into evidence as "impeachment" against Dr. Majovski's use of the "clinical" version of the MMPI-2, Exhibit #93. RP 425. Respondents/Cross Appellants argued Exhibit 94 should be admitted as impeachment and substantive evidence – "Impeachment by contradiction." RP 425-426, 440-443, 497-498, 1030-1034.

Ms. Graham objected to admission of Exhibit 94, RP 426, as it had had never been identified or listed by Respondents/Cross Appellants prior to that day. RP 426-427. Dr. Majovski had been identified as a witness for Plaintiff since January of 2005. At first, the trial court seemed to agree with Ms. Graham's position. Initially, it reserved its ruling regarding Exhibit #94. RP 428. The Court stated:

Counsel has not had a chance to expect it, talk to his person with regard to its efficacy, it is coming rather late. Maybe in the nature of rebuttal evidence of some sort. Counsel has a right to be prepared. Plus, I think you have to bring in the person who ran it through a computer to see if they ran it through the right computer. I need it for foundation. You can't bring it right this second."

RP 426-427.

"I want him [counsel for Ms. Graham] to look at it [Exhibit #94]. If you are going to get somebody to introduce it, he [Plaintiff's counsel] should have an opportunity to talk to that person. It is coming late in the game for a very important case. That is the best I can do."

RP 428.

Respondents/Cross Appellants never named Dr. Marlow at any time prior to trial. CP 22-26, 30-31, 124-129, 352-353. RP 442. Defendants acknowledged in court on May 6, 2005 that they would not be calling a psychologist or a psychiatrist at trial. CP No. 1 Verbatim Report Heard May 6, 2005, RP 442. And yet on June 23, 2005, Defendants not only offered the undisclosed Exhibit 94, but in addition now offered Dr. Marlow to lay the foundation for Exhibit 94. RP 432. This was a complete surprise to Ms. Graham and her counsel.

With regard to admitting Exhibit 94, through Dr. Marlow, the Court stated:

I think I have ruled. I have indicated to you I'm going to think about it and there has to be more of a foundation, if you wish admission someone has to be brought in to form the foundation, and then this Doctor and counsel have an opportunity to look at it, and to, I guess, rebut that." RP 432-433.

But when Respondents/Cross Appellants could not produce Dr. Marlow to come to court, they offered to have Dr. Marlow's testimony taken by telephone. RP 440. Ms. Graham again objected. RP 440-443.

The Court first ruled:

I have to have that person here. The foundation has to be laid in court, counsel has to have an opportunity to talk to this person before they testify and *I have to eyeball the person so I can get a feeling during cross-examination and in open court as to the efficacy of what they're saying. This is not the kind of thing I can accomplish over the phone.* Also, comes in the middle of the trial. I understand your rebuttal evidence and how everything came in late. If I permit you to do this, this person has to come down. You first have to tell me whether this person is going to come down, at least twice for counsel to talk to for a couple of hours and then to testify. **If the person can't do it, then the argument is ended.**

RP 446-447 (Emphasis added).

Respondents/Cross Appellants asked the Court if the initial interview between Dr. Marlow and Ms. Graham's counsel could be by telephone. RP 447. Again, this is all happening in the middle of trial.

The Court stated:

I think he [counsel for Plaintiff] wants to eye ball this person. I would, if I was the attorney. He's nodding. It is coming in so late in the game. I think he has a right to confront the person and to depose and to at least talk to them to find out what they are talking about. RP 447.

The Court again stated "probably she's going to have to come down for a couple of hours so that counsel can talk to her and then she's going to have to testify for a couple of hours." RP 449. Later that day on June 27, 2005, Respondents/Cross Appellants advised the Court that Ms.

Marlow could only come down on July 7, 2005. RP 493. The trial court stated:

We have to wait a whole week for this person? I don't think that makes sense. I mean, if the person can't make herself available during the pendency of the trial reasonably, I mean, I don't think a Court should be required to wait for a witness for one week, sit around. . . . I think she has to come in or she doesn't make it."

RP 494.

Respondents/Cross Appellants again offered telephonic testimony by Dr. Marlow again. RP 494. This time, though, without explanation and despite the fact that the Court previously held otherwise, the Court completely reversed its earlier position stating, "I don't care that the ultimate testimony in court is by telephone." RP 495. Ms. Graham again objected to allowing Dr. Marlow to testify. RP 495-496. The Court stated that Respondents/Cross Appellants did not have to disclose Dr. Marlow as a consulting expert. RP 496. The Court acknowledged "[t]hey should have disclosed [Dr. Marlow]." RP 496. But the Court allowed Dr. Marlow's telephonic testimony anyway. RP 496. After getting a foot in the door with Dr. Marlow, the Respondents/Cross Appellants then shifted from a position of offering Exhibit 94 as "impeachment" evidence (as they earlier represented to the Court) to offering it as impeachment *and substantive* evidence as "impeachment by contradiction." RP 432, 497.

Knowing that they had not identified a psychological expert or Exhibit 94 before trial, Defendants used the "back-door" what would otherwise be substantive evidence, and an unnamed expert, by calling this "impeachment by contradiction." Defendants cited no evidence rule that

allows them to do this. Exhibit 94 does not qualify as impeachment by contradiction evidence. The evidence rules regarding impeachment begin at ER 607 (who may impeach); ER 608 (“evidence of character and conduct of witness”); ER 609 (“impeachment by evidence of conviction of crime”); ER 610 (“religious beliefs or opinions”); ER 611 (“mode and order of interrogation and presentation”); ER 612 (“writing used to refresh memory”); ER 613 (“prior statements of witnesses”). There is no rule that addresses “impeachment by contradiction.”

Tegland, the leading author of commentary on evidence, does address “impeachment by contradiction” under ER 607, states, “[a]s mentioned, the practice loosely referred to as “impeachment by contradiction” is **actually the process of offering substantive evidence to rebut the opponent’s evidence. Consequently, the contradictory evidence must be admissible under the usual rules of evidence. If the contradictory evidence is hearsay or if it is objectionable under some other rule, it should be excluded.**” (Emphasis added). Tegland, *Courtroom Handbook on Evidence* (2002) at p. 277 (emphasis added) (citing Jacqueline’s Washington, Inc. v. Mercantile Stores Co., Inc., 80 Wn.2d 784, 498 P.2d 870 (1972)).

The trial court erroneously allowed surprise substantive evidence, (Exhibit #94 and Dr. Marlow) while, at the same time sheltering Dr. Marlow from a rigorous cross-examination in open court and the typical discovery that should have occurred had Dr. Marlow and Exhibit #94 been properly identified. Without Dr. Marlow’s testimony and Exhibit 94, there would be no basis for some of the Findings of Fact and Conclusions

of Law now challenged by Ms. Graham (specifically Conclusions of Law Nos. 8, 9, 10 and 11).

In Jacqueline's, supra, our State Supreme Court held that impeachment by contradiction is not supported by any exception to the hearsay rule and, **to be admissible, such extrinsic evidence must be independently competent and must be admissible for a purpose other than that of attacking the credibility of the witness.** Jacqueline's, supra, at 798 (Emphasis added). Exhibit 94 is extrinsic evidence and it is not independently competent to be admissible for any purpose. But the Court went well beyond the allowing Exhibit 94 and Dr. Marlow's testimony as undisclosed substantive evidence through the testimony of an unnamed expert.

D. The trial court abused its discretion and committed reversible error by admitting incomplete and unauthenticated Social Security Administration (SSA) documents into evidence.

During direct examination of their vocational expert, William Skilling, Respondents/Cross Appellants introduced an unauthenticated and incomplete file of Ms. Graham's SSA records. RP 758, 1116-1118, 1182. These records were not produced prior to trial or even listed on Respondents/Cross Appellants' Amended Witness and Exhibit List or ER 904 submission. Appendix 2. Ms. Graham objected to the SSA exhibit as inadmissible hearsay, failure to disclose an exhibit on Defendants' ER 904 and Joint Statement of Evidence, authenticity, and failure of expert Skilling to produce such records at his deposition in April of 2005. Appendix 3, RP 758, 1116-1118, 1182. The Court held that the SSA documents were admissible based upon nothing more than an expert's

“reliance” upon the documents for his testimony. RP 760, 1182. One wonders how Mr. Skilling could have relied upon them if the records just happened to show up during trial. Regardless, the Court admitted the SSA records as Exhibit # 112.

The Court abused its discretion and committed reversible error in admitting Exhibit 112. It is these records which are the only foundational basis for those Findings of Fact and conclusions of law related thereto. Ms. Graham was prevented from conducting any discovery based on these records as well. Exhibit 112 improperly tainted the trial court’s decision and constituted reversible error because Ms. Graham had no opportunity to conduct any discovery from the records.

First, Exhibit 112 was not properly authenticated, ER 1005, and is not self-authenticating as it is not a “document under seal” or “certified” as correct by any official custodian. ER 902. Unfortunately, though, as it did with the substitution of Dr. Battaglia and the surprise evidence of Dr. Marlow and Exhibit 94, the trial Court simply glossed over the authentication and foundation requirements and admitted Exhibit 112. RP 760. Had Exhibit 112 not been admitted, the Court would have no basis for Finding of Fact Nos. 43, 47, 48, 49, 51, 52 (one of the most important Findings of Fact to which Ms. Graham had no opportunity to find Dr. Johnson, depose him or produce him for trial), 53, 54, or 55. As a result, the Court should reverse this matter and remand it for a new trial so that Ms. Graham would have the opportunity to conduct adequate discovery based on the information produced by the Respondents/Cross Appellants at trial.

Regardless, even if this Court holds that the incomplete and unauthenticated SSA records were properly admitted, the substantial evidence establishes that Ms. Graham was not disabled from working due to her bipolar condition. The disability that kept her from working full time in her position with Gig Harbor High School was the accident for which the Defendants admit fault.

E. The trial court committed reversible error by finding that Ms. Graham did not sustain any wage loss or impairment of future earning capacity as a result of the motor vehicle accident.

The Court entered Conclusions of Law Nos. 10 and 11 based on the argument that Ms. Graham's pre-existing bipolar condition rendered her disabled since 1999, pursuant to a SSA determination issued September 27, 2001. Because Ms. Graham was "disabled" and was receiving SSDI benefit, the Court concluded that Ms. Graham failed to sustain any wage loss or impairment of future earning capacity as a result of the accident. CP 1323-1324. Def. Conclusions of Law No. 11. These findings of fact and conclusions of law not only are unsupported by the substantial weight of evidence but the scant evidence on which they are based should never have been admitted. As noted herein, the undisputed evidence in this case is that Ms. Graham has had a bipolar condition since about 1995 but that she also had successfully taught as a teacher since 1995, was teaching at the time of this accident and, even after the accident, obtained a full time position with Gig Harbor High School until she could not work any longer due to excruciating pain. Ex. 81, RP 615-619; Ex. 80, RP 625-626. Ms. Graham cannot logically be disabled from working when she was in fact working at the time of the accident and beyond. Ex.

80 & 81, RP 615-619 & 625-626. Prior to the decision in September, 2001, the SSA denied that Ms. Graham was disabled because the evidence showed she was not prevented from engaging in normal daily activities. A March 9, 2000 SSA letter set forth the "legal requirements for Disability Insurance Claims as follows:

To be considered disabled, a person must not be able to do any substantial gainful work due to a medical condition which has lasted or is expected to last for at least 12 months in a row. The condition must be severe enough to keep a person from working not only in his or her usual job, but in any other substantial gainful work. We look at the person's age, education, training and work experience when we decide whether he or she can work.

Notably, this is not the same test that is employed by the trial Court. By the time the SSA Administrative Law Judge issued his decision, Ms. Graham had been working full time for one month. **The only conclusion the trial court could rationally be left with based on the evidence is that contrary to the ALJ's opinion in September 2001, Ms. Graham was not, in fact, disabled due to her bipolar condition.** It is undisputed that it was Ms. Graham who contacted the SSA and advised the SSA that she had, in fact, obtained a full time position and that she did not need or want the benefits she had applied for. It is undisputed Ms. Graham was advised that under the "Trial Work Program/Ticket to Work" a "disabled" worker could receive benefits and work for a period of time until continual employment was established. RP 175-177, 960. CP 1123-1142, 1212-1225. It is further undisputed that Ms. Graham's benefits from the SSA would have been extinguished had she been able to continue

working. Ms. Graham's vocational expert Cloie Johnson, who is also an SSA vocational expert, testified to that fact as did Ms. Graham. . RP 175-176, 960. This was un rebutted testimony. However, Ms. Graham was forced to leave her employment on April 30, 2002, to undergo back surgery. Ex. 80.

The wages that Ms. Graham claims she has lost stem from a totally disabling back injury resulting from the admitted negligence of the Respondents/Cross Appellants. This is the substantial weight of testimony and completely refutes the position taken by the Respondents/Cross Appellants based on incomplete and unauthenticated records.

Ms. Graham had no authority to force the SSA to issue a decision reconsidering her award of benefits. 42 U.S.C. Section 405(b)(2) provides a mechanism for a State Agency or the Commissioner of Social Security could issue a decision "reconsidering" the award of disability benefits to Ms. Graham. In fact, under the SSA provisions, if a worker is engaged in substantial employment, the worker cannot be considered disabled. In Bowling v. Shalala, 36 F.3d 431 (1994), the Court held that a SSA disability claimant who is working or engaging in substantial gainful activity will not be found to be disabled no matter what the medical findings. Working during the alleged disability period demonstrates a capacity to engage in substantial gainful activity as a matter of law. Marbury v. Matthews, 433 F. Supp. 1081 (W.D.N.Y. 1977). Ms. Graham *was engaged in substantial employment and by the SSA's own terms was no longer disabled*. Therefore, she was entitled to her wage and future earnings claims at trial. The trial court's Findings of Fact and Conclusions

of Law, specifically Conclusions of Law Nos. 10 and 11 are in direct contravention of the actual facts and the law set forth above (which was briefed to the trial court).

F. The Court's total award of \$65,000.00 for Ms. Graham's claim for negligence is not supported by substantial evidence.

The Court found that the cost for Ms. Graham's medical treatment for injuries caused by the motor vehicle accident was only \$4,674.88, and entered judgment for a total award of \$65,000.00. Such a finding and award given the severity of Ms. Graham's special and general damages is not supported by substantial evidence.

Respondents/Cross Appellants admit liability for the accident. Appendix 1. Defendants' liability was the proximate cause of Ms. Graham's economic and non-economic damages prove at trial. Proximate cause is defined in WPI 15.01 as:

A cause which in direct sequence [unbroken by any new independent cause], produces [the injury][event] complained of and without which such [injury] [event] would not have happened.

Respondents'/Cross Appellants' position at trial, adopted by the Court in the Findings, was a "temporal" argument that Ms. Graham's injuries were limited to those damages between the March 23, 2001 accident and October 9, 2001. Conclusion of law No. 8. Finding of Fact No. 19.

There is not substantial evidence to support a finding that Ms. Graham's accident related back pain was resolved by October 9, 2001. Ms. Graham testified she was in constant pain between October 9, 2001 and when she reported to Urgent Care in Gig Harbor in March 2002. RP

626-28, Ex. 19. Even the trial court inquired about Ms. Graham's back pain during this period, asking Ms. Graham's daughter and registered nurse, Kehler, during her testimony if her mother's pain ever subsided during this period; Ms. Kehler testified "No." RP 488-489. There is no substantive evidence to support any finding Ms. Graham's accident-related back pain ever resolved prior to her back surgeries. And in fact, Ms. Graham refilled her prescription pain medication, Vioxx in late October 2001 and again in January 2002.

On April 11, 2002 Dr. Brack, upon an examination of Ms. Graham, and review of her MRI, opined that Ms. Graham suffered from chronic persistent lower back pain causally related to the accident; multi-level degenerative disc disease aggravated by the accident, and a disc herniation related to the accident. Ex. 20, RP 70-73, 163-164, 170-171. There is no serious dispute that Ms. Graham's subsequent surgeries, first the L4-5 micro-discectomy on May 22, 2002, and then the lumbar fusion surgery on July 25, 2002. rendered her incapable of work as a teacher. Dr. Brack described it as "failed back surgery syndrome." Ex. 20. Dr. Brack opined that Ms. Graham was totally disabled and could not be gainfully employed. Ex. 20, RP 107, 115.

Dr. Becker, following a six-hour physical capacities examination of Ms. Graham on February 4, 2004, concurred that Ms. Graham's accident-related back injuries left her unemployable. RP 541-544.

After first noting that he believed Ms. Graham's back injuries were related to the accident, Dr. Craig further opined she was unemployable. CP No. 4 Depo. of Dr. Craig, 103-104.

Vocational expert Cloie Johnson agrees: Ms. Graham is unemployable because of her accident-related back injuries. RP 210-211. Ms. Graham suffered emotionally and psychologically over the loss of her life.

Her treating psychologist, Dr. Petra Peper, testified that Ms. Graham suffer from psychological distress secondary to the physical pain and restrictions that imposes. CP No. 5 Depo. of Dr. Peper, 26.

Plaintiff's neuropsychologist expert, Dr. Lawrence Majovski, who conducted a lengthy psychological assessment of Ms. Graham in November of 2004, diagnosed that she suffered pain and adjustments disorders and depression related to accident. RP 383-385. Dr. Majovski testified that Ms. Graham's psychological condition rendered her unemployable. RP 393.

Respondents/Cross Appellants also argued, an argument adopted by the Court, that Ms. Graham's damages could be explained away by pre-existing degenerative disc disease unrelated to the accident. Finding of Fact No. 27. The undisputed testimony and objective records reflect that prior to the accident **Ms. Graham had no prior history of back pain.**

On April 11, 2002 Dr. Brack opined that Ms. Graham suffered from chronic persistent lower back pain causally related to the accident; multi-level degenerative disc disease aggravated by the accident, and a disc herniation related to the accident. Ex. 20, RP 69-70. But as Dr. Marshall Craig testified, a random sampling of person over the ages of 40-50 (Ms. Graham was 51 at the time of the accident), will show pathology of "pre-existing lumbar degenerative disc disease, but without any prior

history of lumbar back pain, “degenerative disk disease alone would be unlikely to account for Ms. Graham’s symptoms.” CP No. 4 Depo. of Dr. Marshall Craig, 52-53 and Exh.4 to deposition. Dr. Brack testified that Ms. Graham’s MRI indicated multilevel degenerative disk disease that was aggravated from the accident. Ms. Graham’s back complaints first occurred after the accident. Ex. 20. RP 70-71, 93.

In effect the accident “lit up” or aggravated Ms. Graham’s condition. Washington law has long held the rule that a plaintiff’s pre-accident infirm condition which renders them more susceptible than a “healthy” individual to traumatically induced injury will not decrease the defendant’s liability for the resultant injuries. See, Nicholson v. Postal Telegraph Cable Co., 162 Wash. 603, 299 P.2d 397 (1931); See Also, WPI 30.18. This general rule has also been extended to not only cover physical conditions, but also mental conditions. Xieng. v. People’s National Bank, 63 Wn. App. 572, 821 P.2d 520 (1991); WPI 30.18. Pursuant to WPI 30.18, a defendant who activates a previously infirm but dormant or non-symptomatic condition is liable for all injuries caused, despite the fact that the previous infirm condition made the claimant more susceptible to injury than person of normal health. An identical rule applies to non-symptomatic but pre-existing physical or mental conditions “lit up” by the defendant’s negligent acts: the defendant will be responsible for the entirety of the plaintiff’s damages. Bennett v. Messick, 76 Wn.2d 474, 478, 457 P.2d 609 (1969).

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Ms. Graham's own treating doctors, who met her, took records of her treatment, and prescribed treatment for her, concur: she did not have any back pain prior to the accident, and her degenerative disc disease was asymptomatic and aggravated by the accident itself. Ms. Graham can never work again as a teacher as a result of this accident. Her lost wages in the sum of \$127,845.00, and lost future earnings in the sum of \$373,116.00

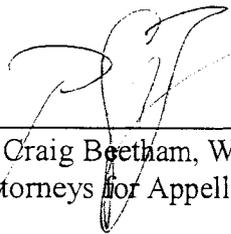
CONCLUSION

Based on the foregoing argument and authority, Plaintiff Marty Graham respectfully requests this court to reverse the trial court's February 3, 2006 Judgment limiting Ms. Graham's damages to \$65,000.00, and remand to the trial court to enter findings that Ms. Graham's special damages were , and enter new findings regarding Ms. Graham's general damages, and enter judgment for same.

RESPECTFULLY SUBMITTED this 27th day of November, 2006.

EISENHOWER & CARLSON, PLLC

By: _____


P. Craig Beetham, WSBA # 20139
Attorneys for Appellant Martha Graham

Certificate of Service

I certify that on the 27th day of November, 2006, I deposited with ABC Legal Services, Inc. a true and correct copy of the foregoing Brief of Appellants to be delivered to counsel for the Respondents/Cross Appellants at the following address:

Margaret Elofson, Assistant City Attorney
Jean Homan, Assistant City Attorney
City of Tacoma, Civil Division
747 Market Street, Room 1120
Tacoma, WA. 98405



Sheri R. McKechnie
Paralegal

APPENDIX 1

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

MARTHA E. GRAHAM, a single individual,

Plaintiff,

v.

MARK JENKINS and "JANE DOE"
JENKINS, husband and wife, and CITY
OF TACOMA, a governmental entity,

Defendants.

No. 03-2-13709-5

STIPULATION ADMITTING
LIABILITY

STIPULATION

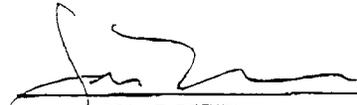
COMES NOW the Defendants, Mark Jenkins, an individual, and the City of Tacoma, a governmental entity, by and through their attorney of record, Jon J. Walker, and hereby stipulate and admit to liability in causing the accident that is the subject matter of this action, but do not admit that the accident was the cause of any injury or

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damage to Plaintiff. Defendants further reserve all defenses and arguments regarding
causation of injuries and amount of damages, if any.

DATED this 22 day of February, 2005.

ELIZABETH A. PAULI, Acting City Attorney

By: 
ION J. WALKER
WSBA# 26270
Assistant City Attorney
Attorney for Defendants

APPENDIX 2

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

MARTHA E. GRAHAM, a single individual,

Plaintiff,

v.

MARK JENKINS and "JANE DOE" JENKINS, husband and wife, and CITY OF TACOMA, a governmental entity,

Defendants.

No. 03-2-13709-5

DEFENDANTS' AMENDED WITNESS AND EXHIBIT LIST AND NOTIFICATION OF INTENT TO OFFER DOCUMENTS PURSUANT TO ER 904

Pursuant to PCLR 3(b)(2), and Evidence Rule 904, defendant submits the following list of witnesses and exhibits.

WITNESSES

1. Dr. W. Brandt Bede, MD: This orthopedic surgeon is expected to testify as to his review of the plaintiff's medical records, his opinion as to the nature and extent of plaintiff's medical conditions and the cause of said conditions.

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2. Allan Tencer, PhD: Dr. Tencer is expected to testify as to dynamics of the accident and their effect on the human body and whether Plaintiff's injuries are consistent with the forces involved.

3. William Skilling: This witness is expected to testify as to his vocational assessment of plaintiff, his opinion of plaintiff's suitability for work

4. Neil J. Beaton, CPA: This witness is expected to testify as to his opinions of plaintiff's claims for economic damages.

5. Timothy A. Moebes, P.E., Plaintiff's expert is expected to testify as to his reconstruction of the subject accident.

6. Martha Graham, Plaintiff.

7. Mark Jenkins, Defendant

8. Any persons necessary to authenticate documents and exhibits to be used at trial.

Reservation of Rights.

This defendant reserves the right to call at trial any and all lay witnesses and expert witnesses disclosed or identified by any party to this action. This defendant reserves the right to call at trial any and all other parties to this action, whether or not disclosed or identified by any other party as a lay or expert witness, including all witnesses discovered through on-going discovery procedures, specifically, plaintiff's treating physicians for treatment rendered as a result of prior accidents and/or illness and for the alleged claimed injuries. This defendant reserves the right to elicit expert testimony from any and all witnesses to the extent permitted by the applicable rules of evidence.

EXHIBITS

1. 12 photographs taken at the scene of the subject accident by J. Kristofferson, City of Tacoma.
747 Market Street, Tacoma, WA 98402 (253) 591-5885
(Bates # 000001-3)
2. Traffic Incident Report prepared by PPO M. Alberts
(Bates #000001-2)
3. Tacoma Fire Department Patient Care Report
No. 469848 dated 3/23/01
4. Rural/Metro Ambulance Emergency Medical Report
dated 3/23/01 consisting of four pages
5. Select medical records from Apple Physical Therapy
(Bates #002; 005-29)
6. Select medical records from Harbor Physical Therapy
(Bates #005; 006-17)
7. Select medical records from Auburn Multicare Clinic
(Bates [upper right hand corner] #0007; 000013-14;
000015-20; 000042-46; 000134-135; 000137-138;
000144-145; 000159-161; 000170-197; 000226-228;
000233-236; 000242-244; and 000261-265
8. Select medical records from St. Joseph Hospital,
(Bates #0007-17; 0018-22; 0032-33; 0034-52)
9. Select medical records from Good Samaritan Hospital
(Bates # 002-09; 0011; 0015; 0023; 0078-112; 00140-44; 00236;
00323; 00238-271; 00276; 00309; 00325-330)
10. Select medical records from Rainier Associates
(Bates #001-36)
11. Select medical records of Neal Shonnard, M.D.
(Bates #002-12)
12. Medical records of Stephen Brack, D.O., (Bates # 002-48; chart
note dated 2-5-04; Follow Up Examination Questionnaire dated
2-5-04; chart notes dated 7-604 and 11-8-04)

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- 13. Select medical records of Richard Schoen, M.D.
(Bates #002-5)
- 14. Select medical records of Lawrence Martin, M.D.
(Bates #001-10)
- 15. Select medical records of Larry Galpert, Ph.D.
(Bates #002-21)
- 16. Select medical records of Healthsouth (Bates #001-4;
0010-14; 0017-20; 0022; 0027-31)
- 17. Select medical records of Cascade Interventional Pain Center
for 5-6-02, consisting of four pages
- 18. Select medical records of Marshall Craig, M.D.
(Bates #007-25; 0073-74)
- 19. Select medical records of Petra Peper, Ph.D.
(Bates #0017-18)
- 20. Select medical records of Banner Behavioral Health
Hospital (Bates #002-9)
- 21. Select medical records of Surgery Center of Scottsdale
(Bates #003-12; 0016-21)
- 22. Select medical records of Mayo Clinic Scottsdale
(Bates #003-11; 0015; 0024-25; 0033-36)
- 23. Select medical records of Arizona Pain Clinic
(Bates #001-2; 005-6; 009-14)
- 24. Plaintiff's personnel file from Peninsula School District
(Bates #001-34)
- 25. Plaintiff's personnel file from South Kitsap School District
(Bates #001-239)
- 26. Documents provided to and relied upon by
William B. Skilling, other than medical records

- 1 27 Report of Neil G. Beaton
- 2 28. Report of William Skilling
- 3 29. Report of Allan Tencer
- 4 30. Report of Timothy A. Moebes, P.E.

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6 **ER 904 Notice**

7 Pursuant to **Evidence Rule 904**, plaintiff is hereby notified that the

8 defendant is offering the following exhibits for admission at the time of trial.

9 Said documents will be deemed authentic and admissible without testimony or

10 further identification, unless objection is served within 14 days of the date of

11 this notice. The name, address and telephone number of the author or maker,

12 if other than a medical provider, is as follows:

- 13 1. 12 photographs taken at the scene of the subject accident by
- 14 J. Kristofferson, City of Tacoma.
- 15 747 Market Street, Tacoma, WA 98402 (253) 591-5885
- 16 (Bates # 000001-3)
- 17 2. Traffic Incident Report prepared by PPO M. Alberts
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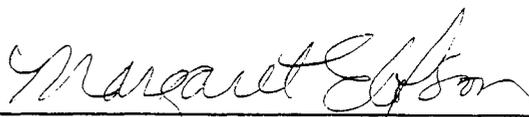
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- 18 13. Select medical records of Richard Schoen, M.D.
19 (Bates #002-5)
- 20 14. Select medical records of Mayo Clinic (Bates #005-7
21 and 0010-12)
- 22 15. Select medical records of Lawrence Martin, M.D.
23 (Bates #001-10)
- 24 16. Select medical records of Larry Galpert, Ph.D.
25 (Bates #002-21)
- 26 17. Select medical records of Healthsouth (Bates #002-5;
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- 20. Select medical records of Petra Peper, Ph.D.
(Bates #0017-18)
- 21. Select medical records of Banner Behavioral Health
Hospital (Bates #002-9)
- 22. Select medical records of Surgery Center of Scottsdale
(Bates #003-12; 0016-21)
- 23. Select medical records of Mayo Clinic Scottsdale
(Bates #003-11; 0015; 0024-25; 0033-36)
- 24. Select medical records of Arizona Pain Clinic
(Bates #001-2; 005-6; 009-14)
- 25. Plaintiff's personnel file from Peninsula School District
(Bates #001-34)
- 26. Plaintiff's personnel file from South Kitsap School District
(Bates #001-239)
- 27. Documents provided to and relied upon by
William B. Skilling, other than medical records

DATED this 19th day of May, 2005.

ELIZABETH A. PAULI, Acting City Atty.


MARGARET ELOFSON, WSB #23038
Assistant City Attorney

APPENDIX 3

RECEIVED

JUN 10 2005

TACOMA CITY ATTORNEY
CIVIL DIVISION

FILED IN COUNTY CLERK'S OFFICE PIERCE COUNTY WASHINGTON
A.M. JUN 10 2005 P.M.
KEVIN STOCK COUNTY CLERK
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

MARTHA E. GRAHAM, a single individual,
Plaintiff,

The Honorable Sergio Armijo

NO. 03-2-13709-5

vs.

JOINT STATEMENT OF EVIDENCE

MARK JENKINS and "JANE DOE"
JENKINS, husband and wife, and CITY OF
TACOMA, a governmental entity,

Defendants.

COME NOW the parties, by and through their respective attorneys, and submit the following
Joint Statement of Evidence in the above-captioned case.

I. WITNESSES

P=Plaintiff D=Defendant

NO.	DESCRIPTION	NAMED WITNESS FOR PARTY	LAY WITNESS	EXPERT WITNESS
1.	Martha Graham	P D	X	
2.	Mark Jenkins	P D	X	
3.	Kris Kehler	P	X	
4.	Dr. Neil Golan, MD	P	X	X
5.	Dr. Steven Brack, DO	P	X	X
6.	Dr. Marshall Craig, MD	P	X	X
7.	Dr. Petra Peper, Ph.D.	P	X	X
8.	Dr. Lawrence Martin, MD	P	X	X
9.	Dr. Inayat Alikhan, MD	P	X	X

COPY

NO.	DESCRIPTION	NAMED WITNESS FOR PARTY	LAY WITNESS	EXPERT WITNESS
10.	Dr. Lawrence Majovski, Ph.D.	P		X
11.	Dr. Theodore Becker, Ph.D.	P		X
12.	Cloie Johnson, M.Ed.	P		X
13.	Eugene Silberberg, Ph.D.	P		X
14.	*W. Brandt Bede, M.D.	D		X
15.	William B. Skilling, M.A.	D		X
16.	Neal J. Beaton, CPA	D		X

*Plaintiff reserves the right to object to the entirety of testimony of Dr. Brandt Bede and to seek exclusion of Dr. Bede as a witness in this matter.

Defendant and Plaintiff reserve the right to call any witnesses identified by either party.

II. EXHIBITS.

P=Plaintiff D=Defendant

NO.	DESCRIPTION	PARTY TO OFFER	NO OBJECTION	AUTHENTICITY ADMITTED BUT OBJECTIONABLE	OTHERWISE OBJECTIONABLE
1.	03/23/01 Police Traffic Collision Report, Supplemental Report, by Tacoma Police Dept. personnel	P	X		
2.	Pictures of Plaintiff's vehicle taken by Plaintiff's insurance company, GEICO (for demonstrative purposes only)	P	X		
3.	Not used				
4.	Not used				
5.	Declaration of Dr. Steven Brack, Orthopedist, dated April 23, 2004; and CV (to be used by plaintiff as reference/impeachment material only - not admitted as evidence)	P		X	
6.	Dr. Marshall Craig, M.D. opinion letter dated March 22, 2005	P		X	

1	7.	Declaration of Dr. Inayat M. Alikhan, Psychiatrist, dated June 9, 2004; and CV	P		X	
2						
3	8.	Dr. Lawrence Martin, Psychiatrist. opinion letter dated March 18, 2005; and CV	P		X	
4						
5	9.	Dr. Petra Peper, Ph.D opinion letter dated March 21, 2005; and CV	P		X	
6						
7						
8	10.	Physical Capacities Evaluation and Biomechanical Assessment by Dr. Theodore Becker, Ph.D.; and CV (Report to be used as reference/impeachment material only - not admitted as evidence)	P	X		
9						
10						
11						
12	11.	Life Care Plan prepared by Ms. Cloie Johnson, M.Ed. with OSC Vocational Systems, Inc.; and CV (Report to be used as reference/impeachment material only - not admitted as evidence)	P	X		
13						
14						
15						
16	12.	Economic Loss report prepared by Dr. Eugene Silberberg, Ph.D. with Bassett, Parks & Silberberg; and CV (Report to be used as reference/impeachment material only - not admitted as evidence)	P	X		
17						
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20						
21	13.	Vocational Assessment Report prepared by William Skilling, MA; and CV (Report to be used as reference/impeachment material only - not admitted as evidence)	P	X		
22						
23						
24						
25	14.	Economic Damages Report prepared by Neil Beaton, CPA/ABV with Grant Thornton, LLP; and CV (Report to be used as reference/impeachment	P	X		
26						

1		material only – not admitted as evidence)				
2						
3	15.	Select medical records from Rural Metro/Shannon Ambulance; and bills	P	X		
4						
5	16.	Select medical records from St. Joseph Medical Center; and bills	P	X		
6						
7	17.	Select medical records from Dr. Neil Golan/Multicare Auburn Clinic; and bills – Excluding records prior to 3/23/01	P		X	
8						
9						
10	18.	Select medical records from Apple Physical Therapy; and bills	P	X		
11						
12	19.	Select medical records from Good Samaritan Hospital; and bills	P	X		
13						
14	20.	Select medical records from Harbor Physical Therapy; and bills	P	X		
15						
16	21.	Select medical records from Gig Harbor Urgent Care; and bills	P	X		
17						
18	22.	Select medical records from Dr. Steven Brack/Rainier Orthopedic Institute; and bills	P		X	
19						
20	23.	Select medical records from Dr. Neil Shonnard; and bills – Including operative report dated 7/25/02	P		X	
21						
22	24.	Select medical records from Dr. Nagavedu Raghunath/Rainier Associates; and bills – Excluding all disability documentation	P		X	
23						
24						
25	25.	Select medical records from Dr. J. Iyengar/Cascade Interventional Pain Center; and bills	P	X		
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26.	Select medical records from Dr. Larry Galpert; and bills	P		X	
27.	Select medical records from Dr. Inayat Alikhan/Banner Behavioral Health Hospital; and bills	P		X	
28.	Select medical records from Dr. Lawrence Martin/Scottsdale Psychiatric Services; and bills	P		X	
29.	Select medical records from Dr. Stephen Glacy/Arizona Pain Clinic/Surgery Center of Scottsdale; and bills	P		X	
30.	Select medical records from Dr. Petra Peper/Psychological Services of Scottsdale; and bills	P		X	
31.	Select medical records from Dr. Marshall Craig/Healthsouth Surgery Center/Scottsdale Healthcare Surgery Center; and bills	P	X		
32.	Select medical records from The Mayo Clinic; and bills	P		X	
33.	Billing records from Marie Steiner, RNFA	P	X		
34.	Billing records from Rainier Anesthesia Associates	P	X		
35.	Billing records from Diagnostic Imaging Northwest	P	X		
36.	Billing records from Medical Imaging Northwest	P	X		
37.	Billing records from Rite Aide Pharmacy	P		X	
38.	Billing records from Good Samaritan Pharmacy	P	X		
39.	Billing records from Fry's Food & Drug Pharmacy	P	X		
40.	Billing records from Express Scripts Medications	P		X	

1					
2	41.	Billing records from Healthcare Supply Network	P	X	
3	42.	Table outlining Plaintiff's medical treatment history, dates of service, and associated costs (for demonstrative purposes only) – Updated as needed	P		X
4					
5					
6	43.	Lumbar MRI films dated 09/17/02 (for demonstrative purposes only)	P	X	
7					
8	44.	Defense Medical Examination Report Dr. Michael Battaglia dated 01/08/05 & CV	P		X
9					
10	45.	Deposition Transcript of Dr. Neil Golan with Exhibit 1 dated 01/11/05 & CV	P		X
11					
12	46.	Deposition Transcript of Dr. Steven Brack with Exhibits 1 – 3 dated 12/22/04 (Transcript for reference/impeachment purposes only) & CV – not admitted as evidence)	P		X
13					
14					
15					
16	47.	Deposition Transcript of Martha Graham with Exhibits 1 – 4 dated 06/21/04 (Transcript for reference/impeachment purposes only) & CV – not admitted as evidence)	P		X
17					
18					
19	48.	Deposition Transcript of Dr. Lawrence Martin with Exhibits 1 - 5 dated April 5, 2005 & CV	P		X
20					
21	49.	Preservation Deposition Transcript of Dr. Petra Peper with Exhibits 1 – 6 dated April 8, 2005 & CV	P	X	
22					
23					
24	50.	Preservation Deposition Transcript of Dr. Marshall Craig with Exhibits 1 – 7 dated April 8, 2005 & CV	P	X	
25					
26	51.	Deposition Transcript of Dr. Inayat Alikhan with Exhibits 1	P		X

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	- 8 dated April 8, 2005 & CV				
52.	Deposition Transcript of Dr. Brandt Bede with Exhibits 1 - dated May 27, 2005 04 (Transcript for reference/impeachment purposes only) & CV - not admitted as evidence)	P		X	
53.	Deposition Transcript of Dr. Lawrence Majovski with Exhibits 1 - dated June 9, 2005 04 (Transcript for reference/impeachment purposes only) & CV - not admitted as evidence)	P		X	
54.	Deposition Transcript of Cloie Johnson with Exhibits 1 - 6 dated April 11, 2005 04 (Transcript for reference/impeachment purposes only) & CV - not admitted as evidence)	P		X	
55.	Deposition Transcript of Dr. Eugene Silberberg with Exhibits 1 - 5 dated April 14, 2005 04 (Transcript for reference/impeachment purposes only) & CV - not admitted as evidence)	P		X	
56.	Deposition Transcript of Neil J. Beaton with Exhibits 1 - 18 dated April 11, 2005 04 (Transcript for reference/impeachment purposes only) & CV - not admitted as evidence)	P		X	
57.	Deposition Transcript of William B. Skilling with Exhibits 1 - 13 dated April 14, 2005 04 (Transcript for reference/impeachment purposes only) & CV - not admitted as evidence)	P		X	
58.	Not used				
59.	Not used				
60.	Not used				

1	61.	Select Personnel and Employment Records from South Kitsap School District – Excluding all disability documentation	P		X	
2	62.	Select Personnel and Employment Records from Peninsula School District	P	X		
3	63.	Not used	P			
4	64.	Not used	P			
5	65.	Not used	P			
6	66.	Tax Return records from 1995 through 2003 (for demonstrative purposes only)	P		X	
7	67.	Table illustrating Plaintiff's wage loss (for demonstrative purposes only)	P		X	
8	68.	Letter of Recommendation for Martha (Gnagey) Graham from Rebecca Lett of Southampton County Schools dated 02/13/95 (for demonstrative purposes only)	P		X	
9	69.	Letter of Recommendation for Martha (Gnagey) Graham from Carolyn Lewis of Hines Middle School dated 03/23/95 (for demonstrative purposes only)	P		X	
10	70.	Letter of Recommendation for Martha (Gnagey) Graham from Margie Holt of Hines Middle School dated 03/24/95 (for demonstrative purposes only)	P		X	
11	71.	Letter of Recommendation for Martha (Gnagey) Graham from Bill Wyant, principal of John Sedgwick Junior High School dated 05/14/99 (for demonstrative purposes only)	P		X	
12	72.	Award of Excellence to Martha (Gnagey) Graham from Hines	P		X	

1		Middle School (for demonstrative purposes only)				
2						
3	73.	Resume of Martha Graham	P		X	
4	74.	Records Review Report by Dr. Brandt Bede dated May 25, 2005 04 (for reference /impeachment purposes only) & CV – not admitted as evidence)	P	X		
5						
6						
7	75.	12 photographs taken at the scene of the subject accident by J. Kristofferson, City of Tacoma. 747 Market Street, Tacoma, WA 98402 (253) 591-5885 (Bates # 000001-3)	D			X
8						
9						
10	76.	Traffic Incident Report prepared by PPO M. Alberts (Bates #000001-2)	D	X		
11						
12	77.	Tacoma Fire Department Patient Care Report No. 469848 dated 3/23/01	D	X		
13						
14	78.	Rural/Metro Ambulance Emergency Medical Report dated 3/23/01 consisting of four pages	D	X		
15						
16						
17	79.	Select medical records from Apple Physical Therapy (Bates #002; 005-29)	D	X		
18						
19	80.	Select medical records from Harbor Physical Therapy (Bates #005; 006-17)	D	X		
20						
21	81.	Select medical records from Auburn Multicare Clinic (Bates [upper right hand corner] #0007; 000013-14; 000015-20; 000042-46; 000134-135; 000137-138; 000144-145; 000159-161; 000170-197; 000226-228; 000233-236; 000242-244; and 000261-265	D		X	
22						
23						
24						
25						
26	82.	Select medical records from St. Joseph Hospital.	D		X	

	(Bates #0007-17; 0018-22; 0032-33; 0034-52)				
83.	Select medical records from Good Samaritan Hospital (Bates # 002-09; 0011; 0015; 0023; 0078-112; 00140-44; 00236; 00323; 00238-271; 00276; 00309; 00325-330)	D	X		
84.	Select medical records from Rainier Associates (Bates #001-36)	D			X
85.	Select medical records of Neal Shonnard, M.D. (Bates #002- 12)	D	X		
86.	Medical records of Stephen Brack, D.O., (Bates # 001-48, chart note dated 2/5/04; Follow up Examination Questionnaire dated 2/5/04; chart notes dated 7/6/04 and 11/8/04)	D	X		
87.	Select medical records of Richard Schoen, M.D. (Bates #002-5)	D	X		
88.	Select medical records of Lawrence Martin, M.D. (Bates #001-10)	D	X		
89.	Select medical records of Larry Galpert, Ph.D. (Bates #002-21)	D			X
90.	Select medical records of Healthsouth (Bates #002-5; 0010-15; 0017-29; 0022; 0027- 31)	D	X		
91.	Select medical records of Cascade Interventional Pain Center for 5-6-02, consisting of four pages	D	X		
92.	Select medical records of Marshall Craig, M.D. (Bates #007-25; 0073-74)	D	X		
93.	Select medical records of Petra Peper, Ph.D.	D	X		

1	(Bates #0017-18)				
2	94. Select medical records of	D	X		
3	Banner Behavioral Health				
4	Hospital (Bates #002-9)				
5	95. Select medical records of	D	X		
6	Surgery Center of Scottsdale				
7	(Bates #003-12; 0016-21)				
8	96. Select medical records of Mayo	D	X		
9	Clinic Scottsdale				
10	(Bates #003-11; 0015; 0024-25;				
11	0033-36)				
12	97. Select medical records of	D	X		
13	Arizona Pain Clinic				
14	(Bates #001-2; 005-6; 009-14)				
15	98. Plaintiff's personnel file from	D	X		
16	Peninsula School District				
17	(Bates #001-34)				
18	99. Plaintiff's personnel file from	D			X
19	South Kitsap School District				
20	(Bates #001-239)				
21	100. Documents provided to and	D			X
22	relied upon by William B.				
23	Skilling, other than medical				
24	records				
25	101. Report of Allan F. Tencer,	D			X
26	Ph.D.				
	102. Report of Timothy Moebes,	D			X
	P.E.				
	103. Economic Damages Report	D			X
	prepared by Neil Beaton,				
	CPA/ABV, dated April 11,				
	2005				
	104. Vocational Assessment Report	D			X
	prepared by William B.				
	Skilling, M.A., dated April 12,				
	2005				

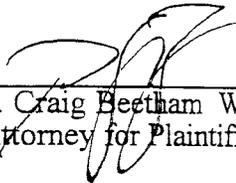
1 *Plaintiff reserve the right to add to this Joint Statement of Evidence any exhibits produced
2 at depositions which are still outstanding, and/or medical records, bills, or updated reports not
3 received prior to filing.

4 *Defendant OBJECTS to any additions to the Joint Statement of Evidence after filing
5 with the court.

6 *Reserved for Court ruling.

7 DATED this 8th day of June, 2005.

8 EISENHOWER & CARLSON, PLLC

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10 
11 P. Craig Beetham WSBA #20139
Attorney for Plaintiffs

12 AGREED TO BY:

13 CITY OF TACOMA

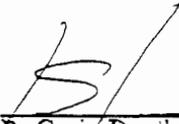
14
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16 By: Margaret Elofson, WSBA # 23038
Attorneys for Defendant
17

1
 2 Plaintiff reserves the right to add to this Joint Statement of Evidence any exhibits produced
 3 at depositions which are still outstanding, and/or medical records, bills, or updated reports not
 4 received prior to filing.

5 Defendant OBJECTS to any additions to the Joint Statement of Evidence after filing with
 6 the court.

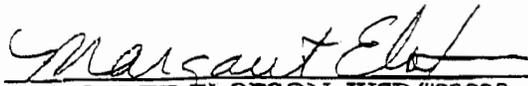
7
 8 DATED this 8th day of June, 2005.

9 EISENHOWER & CARLSON, PLLC

10
 11 
 12 _____
 P. Craig Beetham WSBA #20139
 Attorney for Plaintiffs

13 AGREED TO BY:

14 ELIZABETH A. PAULI, Acting City Atty.

15
 16 
 17 _____
 MARGARET ELOFSON, WSB#23038
 Assistant City Attorney
 Attorney for City of Tacoma

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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

8 MARTHA E. GRAHAM, a single individual,
9
10 Plaintiff,

11 vs.

12 MARK JENKINS and "JANE DOE"
13 JENKINS, husband and wife, and CITY OF
TACOMA, a governmental entity,
14 Defendants.

The Honorable Judge Serjio Armijo
NO. . 05-2-03925-1

AFFIDAVIT REGARDING FACSIMILE
SIGNATURE (GR 17)

15 STATE OF WASHINGTON)
16) ss.
17 County of Pierce)

18 Sheri R. McKechnie, being first duly sworn upon oath, deposes and says:

19 1. I am a paralegal for the Plaintiff's attorney, P. Craig Beetham, in the above-
20 captioned matter. I make this affidavit pursuant to GR 17(a)(2) and based upon my own
21 personal knowledge.

22 2. On June 8, 2005 I faxed the Joint Statement of Evidence to the attorney for the
23 Defendant, Margaret Elofson, for her review, revision and signature where appropriate.

24 3. I have examined the last page of the Joint Statement of Evidence containing the
25 signature of Margaret Elofson, which was transmitted back to me by facsimile on June 8, 2005,
26 and state that according to my files I believe her signature to be true and correct.

AFFIDAVIT REGARDING FACSIMILE
SIGNATURE

00305647.DOC

- 1

EISENHOWER & CARLSON, PLLC

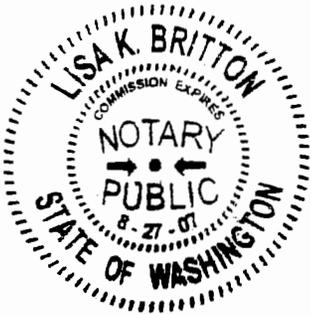
ATTORNEYS-AT-LAW
1200 WELLS FARGO PLAZA
1201 PACIFIC AVENUE
TACOMA, WASHINGTON 98402

PHONE 253-572-4500
FAX 253-272-5732

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Sheri R. McKechnie
Sheri R. McKechnie, Paralegal

SUBSCRIBED AND SWORN to before me on this 10th day of June, 2005.



Signature of Notary [Signature]
Print Name Lisa K Britton
Residing at Orting, Washington.
My Appointment Expires 8/27/07

ABC Legal Messengers, Inc. Messenger Service Request

Seattle
910-5th Ave
Seattle, WA 98104
206-623-8771
1-800-736-7295

TACOMA
943 Tacoma Ave. S
Tacoma, WA 98402
253-383-1791
1-800-736-7250

Everett
2927 Rockefeller
Everett, WA 98201
425-258-4591
1-800-869-7785

Olympia
119 W. Legion Way
Olympia, WA 98501
360-754-6595
1-800-828-0199

Bellevue
126-107th N.E.
Bellevue, WA 98004
425-455-0102

Internet Address: www.abclegal.com

Last Day Date / Time	Firm Name EISENHOWER & CARLSON, PLLC	Phone 253-572-4500	Ext 821	Attorney BEETHAM
6/10/05	Address 1201 PACIFIC AVENUE, SUITE 1200 TAOMA, WA. 98402			Secretary SHERI
	Case Name GRAHAM V. CITY OF TACOMA		ABC Client # 12330	
	Cause Number 03-2-13709-5	Client Matter Number 11556/1		Date Jun 10, 2005 1:13 PM

Documents
JOINT STATEMENT OF EVIDENCE

Signature Required On Documents
 Return Conformed ABC Slip Only
 Return Conformed Copy
 Conform Original Do Not File

Other Instructions

RECEIVED

MARGARET ELOFSON
ASSISTANT CITY ATTORNEY
CITY OF TACOMA, CIVIL DIVISION
747 MARKET STREET, ROOM 200
TACOMA, WA 98402

JUN 10 2005

MARGARET ELOFSON
ASSISTANT CITY ATTORNEY
CIVIL DIVISION

FILED
IN-COUNTY CLERK'S OFFICE
PIERCE COUNTY WASHINGTON
JUN 10 2005 P.M.

Filing	County	Superior Court	District Court (Indicate District)	Auditor	Appellate	Federal Court	Sea	Tac	State Supreme	Sec State
	PIERCE	XX								

THIS FORM NOT FOR PROCESS

PROPER USE OF MESSENGER SLIPS: preparation and final checking of returns!! If for any reason you are confused as to the proper manner in which this messenger slip should be filled out when conveying your specific request instructions...PLEASE consult the Instructions option for pertinent information that should assist you. ABC Messengers will assume no liability for errors which occur as a result of sloppily or improperly filled out messenger slips... including filings not marked in the proper and designated filing boxes, etc. This new messenger slip is designed for your convenience and to help insure accuracy. It is essential that the various boxes be utilized for the purpose for which they were designed. By doing this you will greatly help ensure that your requests are completed timely and accurately. These messenger slips are double-checked for the accuracy with which each request was completed. However, remember, IT IS EXTREMELY IMPORTANT THAT THIS MESSENGER SLIP ALSO BE CHECKED BY OUR CLIENTS UPON IT'S RETURN TO MAKE CERTAIN ALL DELIVERY INSTRUCTIONS WERE FOLLOWED AND COMPLETED AS REQUESTED.

IF THERE IS ANY QUESTION WHATSOEVER THAT A REQUEST WAS NOT COMPLETED PRECISELY AS YOU INDICATED CALL OUR OFFICE IMMEDIATELY.