

Original

No. 37158-8-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
08 APR 28 AM 9:29
STATE OF WASHINGTON
BY DEPUTY

JOLEE MERCER

v.

RICKY BIRTH, et al.

APPELLANT'S TRIAL BRIEF

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A. Introduction

Appellant Jolee Mercer (hereinafter Jolee) filed an action for personal injury she sustained as a result of an collision which occurred in Clark County, WA in April 2002 between her Ford Bronco and a 18 wheeled truck owned/operated by Pacific Rock Products. (hereinafter PRP) A jury trial was held July 23-26, 2007 in the courtroom of the Honorable John Nichols.

Jolee alleges that the trial court erred in two ways. First, by allowing photographs of the vehicles at the collision scene to be shown to the jury for illustrative purposes in a case of admitted liability. Second, by allowing PRP expert, Dr. Paul Tesar, to offer opinions at trial that were not contained in his June 22, 2006 report nor disclosed in subsequent depositions, in violation of an order *in limine*.

At trial, Jolee requested that PRP be prohibited from showing photographs from the collision scene to the jury because they were irrelevant in a case of admitted liability. Following argument over two days, the court allowed the photographs to be used for illustrative purposes only. RP 6-36.

Prior to the initial trial date of May 7, 2007, Jolee requested that Dr. Tesar's opinions be limited to those set forth in his June 22, 2006

report. CP 45, 46 and 47. The court denied this request, allowed another deposition of Dr. Tesar and continued the trial date. CP 69.

Jolee filed Motions in Limine prior to the amended trial date of July 23, 2007. CP 95, 96. One of the requests was to disallow any testimony by Dr. Tesar which was not set forth in his June 22, 2006 report. CP 95, 96 (Section 11). At trial, lengthy discussion was held regarding Dr. Tesar and what he would, or would not, be allowed to testify to. RP 65-125. The court denied the request to limit his testimony strictly to his report, but indicated his testimony would be limited to the opinions set forth in his report and his subsequent discovery depositions. CP 132, RP 65-125. Dr. Tesar's testimony of July 25, 2007 exceeded the court ordered limitations. RP 125-130.

The claimed errors on appeal were raised at trial and in a motion for a new trial, which the trial court denied. CP 145, 147, and 157.

B. Assignments of Error

1. The trial court erred by allowing photographs of the collision scene to be shown to the jury for illustrative purposes when liability was admitted, the photographs were irrelevant, the photographs did not meet the standard for use of illustrative exhibits, the photographs should have been excluded under ER 403 as they invited speculation by

the jury, and PRP counsel improperly used the photographs. The court further erred by refusing to grant a new trial related to use of the photographs.

2. The trial court erred by allowing PRP expert Dr. Paul Tesar to testify to opinions that were not contained in his CR 35 report, not disclosed during the course of three separate depositions, and which violated the court's order *in limine*. The court further erred by refusing to grant a new trial based on standing objections to the testimony, violation of the order *in limine* and on grounds of surprise under CR 59(a)(3).

C. Statement of the Case

Jolee objected to the use of the photographs prior to opening statements in the case. RP 6-8. After the jury was released on the first day of trial, the photographs were again addressed. Jolee objected to the photos on grounds of relevancy, that they would invite the jury to speculate, and that the photos could mislead the jury. RP 8-24. The court reserved a decision at the time. *Id.* The following morning, prior to the jury being brought in, the photos were again discussed. RP 24-36. Jolee objected on the same grounds stated the previous evening, as well as the fact that there would be no testimony tying the photographs to injury or

lack thereof, so therefore the photos did not meet illustrative requirements. RP 27. The court ruled that Exhibits 19 and 20 could be used for illustrative purposes only. RP 36. Specifically they were to be used during cross examination of plaintiff. RP 32. They were not sent back to the jury room during deliberations.

In 2006, PRP requested a CR 35 medical examination be performed on Jolee. Jolee cooperated and presented for a defense medical examination by Dr. Paul Tesar on June 22, 2006. Dr. Tesar prepared a report which was also dated June 22, 2006 and which was produced on July 19, 2006. This report was never supplemented. CP 45, 46 and 47 and attached deposition transcript.

Dr. Tesar was deposed by Jolee on April 12, 2007. Dr. Tesar was asked during the discovery deposition whether or not he had been asked to supplement his report of June 22, 2006. *Id.* During that same deposition, he indicated his opinions were in his report.

Q “Okay. Why don't you just go ahead and tell me what opinions you plan on offering in this matter, and you can just list them all if you would like and then we can go back and touch on them with more specific questions.”

A “Well, I think the opinions are expressed in my report, and the answers to the questions -- if I may have -- I may have another opinion if one of those questions wasn't answered. It would be hard to tell you just all my opinions. I think the crux of my opinions is in the report. I can't tell you if that -- I would be asked a question where I didn't express an opinion on that question that I would later on.”

Q “Okay. And when you're telling me that they're in your report, you're talking about the impressions section, say for example on page 21, and the discussion and recommendations that start on page 21 and continue on for a few pages?”

A “Yes.” CP 47 and attached deposition transcript, Page 7 lines 10-25.

On April 19, 2007, a perpetuation deposition of Dr. Tesar was scheduled by PRP counsel. Dr. Tesar's direct testimony was started, but did not conclude in the time frame he had set aside that day. From the outset of the perpetuation deposition, it was apparent that Dr. Tesar: 1) had been provided additional documentation since the discovery deposition a week earlier, and 2) was prepared to testify to a slew of opinions not contained in his June 22, 2006 report. A review of documentation he brought with him to the perpetuation deposition indicated that Dr. Tesar

received approximately six inches of Kaiser records on April 16, 2007 from PRP counsel. Letters which accompanied the records indicate that the records had been in the possession of PRP counsel since October 2005 and April 2006 respectively, months prior to the CR 35 exam. Dr. Tesar had also been provided 5 photos of the accident scene by PRP counsel on April 17, 2007. CP 45, 46 and 47.

Jolee immediately requested that the court limit or exclude Dr. Tesar's testimony from trial. CP 45, 46 and 47. The Honorable John Nichols ordered that the trial set for May 7, 2007 would be continued to July 23, 2007 and that Jolee would have another opportunity to depose Dr. Tesar. CP 69.

The second discovery deposition took place on June 21, 2007. When asked at this deposition about the provision of the new material, Dr. Tesar stated that the material was provided to him because he requested it in his report. CP 96 (Section 11) A review of Dr. Tesar's report indicates that he stated he would be interested in seeing records from Kaiser "following the accident" of April 5, 2002 to "determine the onset of the patient's symptomatology". *Id.* Dr. Tesar certainly did not request years of pre-collision records, yet that is what he was provided immediately after

the initial discovery deposition. *Id.* Dr. Tesar had also been provided 5 photos of the accident scene on April 17, 2007. *Id.* Dr. Tesar indicated on June 21, 2007 that he had been provided additional photographs in May 2007 after Jolee had already raised the issue of late record provision with the court. *Id.*

In addition, Jolee moved for an order *in limine* before trial to limit Dr. Tesar's opinions to those contained in his report. CP 95, 96 (Section 11). The court initially reserved and required an offer of proof prior to Dr. Tesar's testimony because it had become apparent that Dr. Tesar planned to testify regarding psychological conditions and claim that Jolee's psychological make up caused increased physical symptoms and/or use the photographs taken at the collision scene in an attempt to relate the images to injury sustained. *Id.*

The trial court correctly held that Dr. Tesar would not be allowed to testify about Jolee's psychological make up or attempt to relate photos to injury. CP 132. These rulings indicated to Jolee that Dr. Tesar would be testifying to the opinions set forth in his report because it was his opinions regarding psychological issues and the photographs which had not been stated in his report or disclosed in the first deposition.

Specifically, the court denied Jolee's request to limit Dr. Tesar's opinion testimony to his report alone, but held that his opinions would be limited to those contained in his report and his deposition testimony. CP 132.

D. Argument

FIRST ISSUE ON APPEAL: Did the trial court err when it allowed photographs of the collision scene to be shown to the jury for illustrative purposes in a case where liability was admitted?

STANDARD ON REVIEW: The trial court's discretion with respect to evidentiary matters is broad. *Cox v. Spangler*, 141 Wn.2d 431,439 (2000). A trial court decision on evidentiary matters will only be reversed if an abuse of discretion occurs. *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662-63 (1997). Discretion is abused if it is based on untenable grounds or for untenable reasons. *In re Parentage of J.H.*, 112 Wn. App. 486,495 (2002), *review denied*, 148 Wn.2d 1024 (2003). It is Jolee's position that the trial court abused its discretion in allowing the use of collision photographs for illustrative purposes in a case of admitted liability.

OBJECTIONS TO USE OF PHOTOGRAPHS:

Jolee properly objected to the use of the photographs as set forth in the Statement of the Case section above.

THE PHOTOGRAPHS ARE NOT RELEVANT: The photographs in this case should have been excluded completely because they were not relevant. Photographs of a collision, after it has occurred, are not relevant in a case where liability is admitted. ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

In this case, the defense admitted liability prior to trial. The PRP medical expert, Dr. Paul Tesar, acknowledged after a CR 35 examination and in 3 separate depositions that Jolee did sustain injury in the collision. The only question the jury was asked to consider was to *what extent* Jolee was injured. PRP argued at the time of trial, and may try to argue here, that causation was also disputed. PRP misses the point. This collision caused injury to Jolee. All medical experts agreed on that fact. The experts simply disagreed as to *what* injury was caused.

Because the jury inquiry - the fact that was of consequence to the

determination of the action - was limited to the extent of injury/damages to Jolee's person, the photographs were not relevant. The photographs do not have a tendency to make it more probable that Jolee sustained only a lumbar strain/sprain as PRP's expert testified. Similarly, the photographs do not have a tendency to make it more probable that Jolee sustained a disk herniation as her treating physician testified. It is impossible to look at the photographs of the vehicles and determine what injury did, or did not, occur. The only thing one can do when comparing the photographs of the vehicles to Jolee's alleged injury is speculate.

This same logic has been followed by Washington courts when refusing to allow evidence to be introduced regarding injury to others in a collision, or over the use of seat belts. Please see *Allen v. Mattoon*, 8 Wn.App. 220, 504 P.2d 316 (1972), and *Amend v. Bell*, 89 Wash.2d 124, 134 (1977), referring to *Baumgartner v. American Mtrs. Corp.*, 83 Wn.2d 751, 522 P.2d 829 (1974).

In the above cases, Washington courts have determined that it is improper to allow evidence of the defendant's injuries in a collision - to suggest to the jury that the plaintiff could not have been injured as claimed; and that it is improper to allow evidence of seat belt use - where a

person using a seat belt was killed and a person not using a seat belt sustained only slight injury. Similarly, it is improper to show photographs of vehicles in a case of admitted liability, and a case where some injury is admitted, to suggest that the plaintiff could not have been injured as claimed.

This is especially clear where the court properly excluded any reference to whether or not the driver of the truck or his passenger were injured, and properly refused to allow the PRP medical expert to attempt to relate the photographs to injury sustained by Jolee. CP 95, 96 and 132 (requests No. 14 and 18)

When discussing the relevancy of the photographs, the Court commented as follows:

The Court: So getting back to it, is it relevant to the jury? Does it help ‘em decide some issue of fact? No, it really doesn’t as far as that goes.” RP 19, Lines 22-24.

These irrelevant photographs should not have been seen by the jury. The court abused its discretion in holding that the photographs were irrelevant and then allowing them to be used for illustrative purposes. Under ER 402, irrelevant evidence should be excluded.

THE PHOTOGRAPHS DO NOT MEET STANDARD FOR
ILLUSTRATIVE OR DEMONSTRATIVE EVIDENCE:

Because the photographs are not relevant to the sole issue in this case (the extent of Jolee's injuries sustained) they do not meet the criteria for the use of illustrative or demonstrative exhibits. Although Washington courts have held that "the use of demonstrative or illustrative evidence is to be favored." *State v. Lord*, 117 Wn.2d 829 at 855 (1991), the court must make certain that the demonstrative or illustrative evidence is "based upon, and fairly represents, competent evidence already before the jury". *Id.* Because the trial court properly disallowed any attempts to relate the photographs of the vehicles to injury sustained by Jolee, there is no way the photographs could be based upon competent evidence already before the jury. The photos cannot prove, or disprove, any injury claimed.

Additionally, to guard against the possibility that the jury will treat the illustrative exhibit as "additional evidence," the trial court must instruct the jury that the illustrative evidence is not itself evidence, but "is only an aid in evaluating the evidence." *State v. Lord*, 117 Wn.2d 829 at 855 (1991) The judge in the case at bar gave no such instruction to the jury when the photographs were shown, although he did indicate the need for one when the use of the photographs was being argued. RP 23, lines

22-23.

The photographs are not proper illustrative or demonstrative evidence. Even PRP counsel agreed that they were not proper as illustrations.

Mr. Klug: "...So it's not something that should be only used for illustrative purposes; it's substantive evidence." RP 13, lines 22-23.

THE PHOTOGRAPHS SHOULD HAVE BEEN EXCLUDED UNDER ER 403:

Even if the photographs could somehow be deemed relevant, they should have been excluded under ER 403. These photographs were designed to mislead the jury, allow them to speculate about what did or did not happen in this collision and therefore speculate about what injuries could or could not have occurred. PRP counsel admitted as much in the following selections when arguing over the use of the photographs:

Mr. Klug: "...the plaintiff, as you know, has characterized this as a very traumatic type of an accident to her, and I think that the jury needs to hear both sides of the story. One part of that story, obviously, Your Honor, are the photos of the accident scene itself....And that the jurors can arrive at their own opinions as to whether - what type of an accident this was...." RP Page 9, lines 14-21.

Mr. Klug: “It’s one of the central issues that the jury’s going to be deciding is, well, how big is this accident. And then they’re also going to be talking about, well, you know, big is this accident compared to other accidents that have happened.” RP 13, lines 17-21.

Mr. Klug: “Now we’re talking about damages and it’s highly relevant to damages because we’re talking about how severe was that accident? What better way –“

The Court: “So you admit that’s what you wanted to get it in for is for the fact of –....”

Mr. Klug: “Well, they can draw their own conclusions...but the thing is –“

The Court: “You don’t have any evidence to tie in the impact equals damages? You don’t have g forces –“

Mr. Klug: “Well, no, not from a biomechanical standpoint no, but I shouldn’t because the photos speak for themselves. As the old saying goes, you know, a picture says a thousand words” RP 20, lines 4-17.

Mr. Klug: “I want the jury to know what happened and what the accident did to the vehicles.” RP 23, lines 1-2.

The Court: "...but you want to get 'em in to show that it wasn't a very severe impact."

Mr. Klug: "Yes." RP 27, lines 7-9.

The Court: "The conclusion that you want to get is it's not a very extreme impact, as a result, these injuries should have resolved in four to six weeks."

Mr. Klug: "And the photographs are consistent with that." RP 28, lines 2-6.

Based on these admissions by PRP counsel, the court should have disallowed the use of the photographs entirely. The clear intent was to put these photos in front of the jury so they could speculate.

THE PHOTOGRAPHS WERE USED IMPROPERLY:

As further prejudice to plaintiff, PRP counsel used the photographs improperly and against court instruction. The court ordered that the photographs could be used to cross examine Jolee about what she said happened in this collision and to show the scene of the accident, not with regard to impact and connecting that to the injuries. RP 36, Lines 9-12.

Although PRP counsel did ask Jolee some questions about what

she said had happened when this collision occurred, he also inquired specifically into her injuries while the photographs were being shown, as well as lengthy cross examination about other collisions and damage to her vehicles in those collisions, as well as damage to the vehicle in this collision, even though there was no request related to property damage in this case. RP 36-64. The purpose was to suggest that this impact wasn't severe and because of that Jolee could not have sustained the injury claimed. The error lies in that there was no testimony from any witness to that affect. In fact, it was properly prohibited by the Court via a pre-trial motion *in limine*. CP 95, 96 and 132.

Even in closing, PRP counsel continued to invite the jury to speculate and attempted to mislead them. The first thing he did was put a photograph up. RP 170. He told the jury:

“one of the issues is the accident itself.” RP 171, lines 3-4.

He also stated:

“This photograph, its undisputed.” RP 172, Lines 7-8.

He continued:

“As the old saying goes, pictures say a thousand words”. RP 180 Line 19-

20.

The Court cautioned his use of the photos after he stated:

“...a mild back strain is also consistent with the photos...of Ms. Mercer at the scene.” RP 198, Lines 4-25.

Even after the Court’s instruction, he repeated:

“So its consistent with that.” RP 199, Line 1.

The photographs were irrelevant, were not illustrated by testimony of witnesses, and served no purpose but to invite speculation. They should not have been shown to the jury for illustrative purposes, or for any other purpose.

SECOND ISSUE ON APPEAL: Did the trial court err when it allowed Dr. Tesar to testify to opinions not contained in his report? Secondly, is a new trial necessary where Dr. Tesar’s opinions at trial were not contained in his report or subsequent depositions?

STANDARD ON REVIEW: The trial court's discretion with respect to evidentiary matters is broad. *Cox v. Spangler*, 141 Wn.2d 431,439 (2000). A trial court decision on evidentiary matters will only be reversed if an abuse of discretion occurs. *Sintra, Inc. v. City of Seattle*,

131 Wn.2d 640, 662-63 (1997). Discretion is abused if it is based on untenable grounds or for untenable reasons. *In re Parentage of J.H.*, 112 Wn. App. 486,495 (2002), *review denied*, 148 Wn.2d 1024 (2003).

PROCEDURAL HISTORY AND OBJECTIONS TO DR.
TESAR'S TESTIMONY:

Jolee properly objected to Dr. Tesar's testimony before, during and after trial, as set forth in the Statement of the Case section above.

TESTIMONY SHOULD HAVE BEEN LIMITED TO REPORT:

The trial court should have limited Dr. Tesar's opinions to his report under the discovery rules. CR 26(a) allows for discovery to be conducted through depositions, interrogatories, requests for production of documents or things, and physical and mental examinations, among others. If a party elects to conduct discovery through a mental or physical examination, CR 35(b) requires that:

"The party causing the examination to be made shall deliver to the party or person examined a copy of a detailed written report of the examining physician or psychologist setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition, regardless of whether the examining physician will be called to testify at trial. The report shall be delivered within 45 days of the examination and in no event less than 30

days prior to trial. These deadlines may be altered by agreement of the parties or by order of the court. If a physician or psychologist fails or refuses to make a report in compliance herewith the court shall exclude the examiner's testimony if offered at trial, unless good cause for noncompliance is shown."

By requiring that a report be received no less than 30 days prior to trial, protection is afforded the examined party, in that there will be no late surprises on the eve of trial. The examined party has the right to expect that the opinions contained in the report are those which the expert will testify to at trial. The examined party also has the right to expect that supplementation, if necessary, will occur in advance of the 30 day rule as well. CR 26(e)(1)(b) requires seasonable supplementation of the subject matter and substance of expert testimony. As a defined discovery method under CR 26, CR 35 examinations would fall under this requirement. Failure to seasonably supplement can subject the offending party to sanctions. CR 26(e)(4).

If Dr. Tesar had failed to prepare a report, the court would have been mandated to preclude his testimony unless PRP could show good cause. It should also follow that failure to supplement a report should result in preclusion of that testimony without good cause. Here, over

Jolee's objection, Dr. Tesar was allowed to supplement his report orally in deposition testimony. When Jolee attempted to exclude Dr. Tesar or portions of his testimony because they differed from his report, (CP 95 and 96), PRP argued that Jolee had ample opportunity to discover Dr. Tesar's opinions, admittedly not contained in his report, during two separate discovery depositions. CP 57. PRP fails to acknowledge that the second discovery deposition was totally necessitated by the fact that Dr. Tesar was provided significant materials by PRP counsel after the first discovery deposition had been conducted, even though those materials had been in the possession of PRP counsel months prior to the CR 35 examination.

TRIAL TESTIMONY VIOLATED THE *ORDER IN LIMINE*:

Although the court denied Jolee's requests to limit Dr. Tesar's opinion testimony to his report alone, it did order that Dr. Tesar's opinion testimony would be limited to his report and his deposition testimony. CR 132 (Section 11). Instead, Dr. Tesar's opinion testimony at trial far exceeded his report, his first discovery deposition, the partially completed perpetuation deposition by PRP counsel, and his second discovery deposition. Specifically, Dr. Tesar's testimony at trial violated the *in limine* order when he called an October 2002 incident a "new injury"; a

December 2002 MVA a “new injury”, and an August 30, 2005 MVA a “new injury”. RP 125-142. Prior to trial, he referred to the October 2002 incident as a “flare up”; the December 25, 2002 MVA as an “aggravation” or “increase” in symptoms; and the August 30, 2005 MVA as “increased” her symptoms. CP 145 and 147.

Once this occurred, Jolee was forced to simply point out the differences in the testimony during cross examination. RP 125-142. Although Dr. Tesar admitted that the day of trial was the first time he had testified to “new injuries”, (RP 125-142) it is Jolee’s position that the prejudice had already occurred.

JOLEE HAD A STANDING OBJECTION VIA THE DENIED
MOTION IN LIMINE / VIOLATION OF SAME WARRANTS A
NEW TRIAL

As the party whose motion *in limine* had been denied, Jolee had a standing objection to any opinions not set forth in the June 22, 2006 report. See *State v. Kelly*, 102 Wn.2d 188, 193 (1984). Because the opinions offered at trial exceeded the CR 35 report and the two discovery depositions which followed, Jolee clearly had a standing objection to them via the request to limit Dr. Tesar (CP 45, 46 and 47) and the motions and order *in limine*. CP 95, 96 and 132.

The violation of an *in limine* order may warrant a new trial. *State v. Clemons*, 56 Wn. App. 57, 62, (1989). "Great weight is placed on the sound discretion of the trial court, which is not reversed absent a showing of an abuse of discretion." *Id.*

"Where litigants have advanced the issue below, giving the trial court an opportunity to rule on relevant authority, and the court does so rule, it may not be necessary to object at the time of admission of the claimed erroneous evidence in order to preserve the issue for appeal. A means of giving the trial court an opportunity to rule on admissibility of evidence is the motion in limine." *State v. Koch*, 126 Wn. App 589, 597 (2005).

"The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation." *State v. Sullivan*, 69 Wn. App. 167, 171 (1993) *citing State v. Kelly*, 102 Wn.2d 188, 193 (1984). The party losing the motion in limine has a standing objection. *Id.*

A review of the authorities discloses that a standing objection to the introduction of evidence, thus preserving the issue for appeal, has been allowed only to the party losing the motion to exclude the evidence. *See*

State v. Kelly, supra; State v. Koloske, 100 Wn.2d 889, 895, (1984),
overruled on other grounds in State v. Brown, 111 Wn.2d 124, (1988),
adhered to on rehearing, 113 Wn.2d 520, (1989); *State v. Evans*, 96
Wn.2d 119, 123, (1981); *Garcia v. Providence Med. Ctr.*, 60 Wn. App.
635, 641, *review denied*, 117 Wn.2d 1015 (1991); *State v. Ramirez*, 46
Wn. App. 223, 229, (1986). There are sound policy reasons for these
holdings. When the trial court has clearly and unequivocally ruled against
the exclusion of evidence, the party, in order to preserve the issue on
appeal, should not be required to again raise the issue in front of the jury at
the risk of making comments prejudicial to its cause, as well as incurring
the annoyance of the trial judge. *State v. Sullivan*, 69 Wn. App. 167, 171
(1993). Here, Jolee was the party who sought to exclude the evidence and
had the request denied.

In addition to the standing objection due to the denial of the motion
in limine, Jolee properly raised the issue of *in limine* violation in her post
trial motion for a new trial. CP 145 and 147. The violations of the courts'
order limiting Dr. Tesar's testimony warrants a new trial in this case.

DR. TESAR'S TESTIMONY AT TRIAL AMOUNTED TO
SURPRISE.

A new trial is also warranted under the "unfair surprise" portion of

CR 59(a)(3) as requested by Jolee in her motion for a new trial. CP 145 and 147. Jolee properly objected to Dr. Tesar's testimony pre-trial (CP 45, 46, 47, 95 and 96 and during trial following the offer of proof and PRP counsel's statement of what his testimony would consist of (RP 87-125) as required when making a request on grounds of surprise. See *Ward v. Ticknor*, 49 Wn.2d 493 (1956).

Expert opinions need to be divulged in advance of trial so as to eliminate surprise and/or a "trial by ambush", which is heavily disfavored in Washington law. See *Lybbert v. Grant County*, 141 Wn.2d 29 (2000).

In this case, the actual opinions of Dr. Tesar were not revealed until he was testifying in front of the jury. When an expert offers his opinions for the very first time at trial, this is unfair surprise which should result in a new trial. Just as the defendants in *Lybbert* could not lie in wait with a defense of insufficient service of process, PRP should not have been allowed to surprise Jolee with Dr. Tesar's new opinions at trial.

Under PRP's rules of conducting litigation, an expert could prepare a report that doesn't contain any of the opinions he or she intends to testify to at trial and the requirements of CR 35(b) would be met. Additionally, that expert could testify under oath in deposition to opinions and then

testify to something completely different when on the stand. Either way, the other side is ambushed and severely disadvantaged.

In practice, there is no difference between a litigant disclosing an expert on the eve of trial, so that the opposing party has no opportunity to prepare for their testimony, and having an expert who has been previously disclosed testify to opinions that have not been disclosed. The “surprise” is the same. Late disclosed experts are routinely prohibited after considering prejudice. Please see *Marriage of Gillespie*, 89 Wn. App. 390 (1997) citing *Barci v. Intalco Aluminum Corp.*, 11 Wn. App. 342, 349-50, (1974).

Similarly, admission of surprise testimony is grounds for a new trial upon a showing of prejudice. *Kramer v. J. I. Case Mfg. Co.*, 62 Wn. App. 544, 562 (1991). The prejudice to Jolee in this case is obvious. Dr. Tesar’s testimony was material. It went to the heart of the dispute in the case, which was the extent of the injury sustained in the April 5, 2002 collision. His prior testimony indicated the existence of back pain when the other incidents took place. His testimony at trial was that all other incidents were “new” injuries. Because his opinion was first disclosed during testimony, there was no ability to prepare for cross examination.

Although Jolee did point out the inconsistencies between Dr. Tesar's trial testimony, his report, and his depositions during cross examination, the prejudice had already occurred. The jury verdict indicates that the jury believed Dr. Tesar's testimony regarding "new" injuries. Had Dr. Tesar's testimony been limited to his report as requested, Dr. Tesar would have testified only that the injury sustained by Jolee was a standard soft tissue injury which should have healed within 6-8 weeks following the collision. He would not have been permitted to comment on anything after June/July 2002, because his report did not offer opinions about any occurrence after June/July 2002. CP 45, 46 and 47.

Had PRP followed the *in limine* order, Dr. Tesar's testimony would have been limited to his report and subsequent depositions, and he would have testified that the subsequent MVA's and other incidents were "flare-ups" or "aggravations". This would have indicated to the jury that underlying back pain was present when these other incidents took place.

Dr. Tesar's testimony should have been limited to his report as initially requested. The court disagreed and limited it to his report and deposition testimony. PRP violated this order at trial and Jolee was substantially prejudiced.

CONCLUSION

Jolee should receive a new trial in this case based on the improper admission of the photographs. Jolee should receive a new trial in this case because Dr. Tesar was permitted to testify to opinions not contained in his report and in violation of an *in limine* order. Either or both were errors that amount to an abuse of discretion.

Submitted this 25th day of April, 2008.



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DIVISION II

08 APR 28 AM 9:27

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No. 37158-8-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

JOLEE MERCER

v.

RICKY BIRTH, et al.

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