

NO. 37158-8-II

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

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JOLEE MERCER, APPELLANT

v.

RICKY BIRCH, ET. AL., RESPONDENTS

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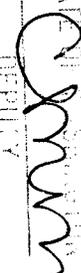
BRIEF OF RESPONDENTS

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LAW OFFICES OF KENNETH R.  
SCEARCE

GORDON C. KLUG  
WSBA #21449  
1501 Fourth Avenue  
Suite 420  
Seattle, WA 98101  
(206) 326-4219

STATE OF WASHINGTON  
BY  DEPUTY

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## I. STATEMENT OF THE CASE

This is an appeal from a July 26, 2007 Clark County Superior Court jury verdict. Clerk's Papers 97 (hereinafter "CP"). In that verdict the jury found that, as a proximate result of an April 5, 2002 motor vehicle collision, Appellant was entitled to recover \$14,500 in damages. CP 147 – 148.

Before trial the Appellant submitted to an independent medical examination (hereinafter "IME") by Paul Tesar, MD at the request of the Respondents. Doctor Tesar issued a 24 page report of his findings on June 22, 2006 which was given to Appellant's attorney well in advance of the then scheduled May 7, 2007 trial date. CP 16, RP 103, line 3. Appellant's attorney chose not to serve the Respondents with interrogatories during discovery, CP 45 and decided not to take Dr. Tesar's discovery deposition until one month before trial. CP 25 – 33. By the time she took that deposition Appellant's attorney had possession of his IME report for nine months. CP 44. At his deposition, Appellant's attorney decided to spend less than one hour deposing the Respondent's only expert witness. CP 45. According to Dr. Tesar's deposition transcript of April 12, 2007, his testimony started at 11:08 a.m., CP 26, and concluded at 12:00 p.m. CP 33. At that deposition Respondent's attorney asked Appellant's lawyer whether she needed more time to which she responded, "No, I don't." CP 33. Attached as an Exhibit to Dr. Tesar's April 12<sup>th</sup> deposition was a copy of a previous letter Respondent's attorney mailed to this expert for the purposes of the IME. CP 34 – 36. Listed in the records being delivered to Dr. Tesar were documents from Kaiser Permanente. CP 35.

On April 19, 2007 (seven days after Dr. Tesar's first discovery deposition) Respondent's attorney then deposed this medical practitioner for the purposes of perpetuating his testimony. CP 15. After that deposition Appellant's attorney filed a motion with the lower court to exclude or limit the testimony of Dr. Tesar at trial. CP 12 – 13. In her memorandum in support of the motion, Appellant's attorney argued that in the seven days between his discovery and perpetuation depositions, Dr. Tesar was provided with medical records from Kaiser Permanente, CP 14 – 21, and this constituted a, "new expert" who had been identified, "some 18 days before trial." CP 18. Although Dr. Tesar was provided with the medical records from Kaiser Permanent *before* his IME the trial court fashioned a "remedy" and ruled that the May 7, 2007 trial date would be continued to July 23, 2007. The court also ruled that Dr. Tesar could be deposed for a third time. CP 49 – 50, Report of Proceedings (hereinafter, "RP") 66, 67. Respondents did not object to this ruling.

Dr. Tesar was then deposed by the Appellant's attorney, again, on June 21, 2007. That deposition lasted over three hours. CP 128. In total the Appellant's attorney participated in three depositions of Dr. Tesar over a period of 5 to 6 hours.

At trial the lower court ruled that the Respondents were entitled to show photos of the accident scene to the jury for illustrative purposes. CP RP 12, line 17 – 13, line 3. Although Judge Nichols does state that the Respondents, "can refer to them in cross-examination" RP 32 that statement was colloquy and was not a specific limitation on his prior ruling. RP 22.

After the jury rendered its verdict Appellant's attorney filed a motion for a new trial which the lower court denied. CP 142 – 143. On December 14, 2007 the Appellant's attorney filed her current appeal to this Court. Specifically the Appellant appeals from the trial court's decision to allow photographs of the collision scene to be shown to the jury, from the jury verdict of July 26, 2007, entry of Judgment on October 12, 2007 and the lower court's denial of the Appellant's motion for a new trial on November 16, 2007. CP 145-146.

## II. ISSUES

1. Did the trial court abuse its discretion in ruling that the photos of the accident scene could be shown to the jury for illustrative purposes? ANSWER --- NO.
2. Did the court abuse its discretion when it found that Dr. Tesar would be permitted to testify to opinions which he expressed in his independent medical examination report and in three prior depositions? ANSWER – NO.
3. Was the Appellant *prejudiced* by the lower court's decision to allow the photos to be shown to the jury and limiting Dr. Tesar's testimony to the opinions he expressed in his IME report and prior depositions? ANSWER – NO.

## III. STANDARD OF REVIEW

A trial court has broad discretion in balancing the probative value of evidence against the potentially harmful consequences that might result from its admission. Lockwood vs. A.C. & S., Inc., 109 Wn.2d 235, 256, 744 P.2d 605 (1987). On appeal a trial court's decisions on the admissibility of evidence and its rulings on motions *in limine* are reviewed for abuse of discretion. State vs. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A trial court abuses its discretion when its decision is manifestly unreasonable

or exercised on untenable grounds or for untenable reasons. Oliver vs. Fowler, 161 Wn.2d 655, 663, 168 P.3<sup>rd</sup> 348 (2007). In determining whether the trial court's decision constitutes an abuse of discretion, an appellate court considers whether there was prejudice preventing a fair trial. ALCO vs. Aetna Cas. & Surety Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000). It is also well established, and codified in RAP 2.5(a), that a trial court's rulings can be affirmed on any grounds and not necessarily those laid out by the parties to a proceeding. LaMon vs. Butler, 112 Wn.2d 193, 770 P.2d 1027 (1989); East Wind Express, Inc., vs. Airborne Freight Corp., 95 Wn.App 98, 974 P.2d 369 (1999); Schumacher Painting Co. vs. First Union Management, Inc., 69 Wn.App 693, 850 P.2d 1361 (1993).

#### IV. ARGUMENT

1. Did the trial court abuse its discretion in ruling that the photos of the accident scene could be shown to the jury for illustrative purposes? ANSWER --- NO.

Counsel for the Appellant argues that the trial court erred in allowing the Respondents' attorney to show the jury photographs taken shortly after the April 5, 2002 motor vehicle collision. She claims that the photos were not relevant to this suit as liability was uncontested at trial and there was no "expert testimony" tying the photos to any injury claimed by the Appellant. This is the very same argument Appellant's counsel raised at trial and one which the lower court rejected. Judge Nichols ruled that the photos were relevant to this suit, CP 27, and that they would be

admitted for illustrative purposes (i.e. not sent back to the jury room for use during deliberations). RP 12 – 13, 16, 21 – 22.

For a photograph to be admissible, a witness must testify that the photograph is an accurate representation of what is depicted, it must be relevant under ER 402, and its probative value must not be outweighed by undue prejudicial effect under ER 403. Hansel vs. Ford Motor Co., 3 Wn.App. 151, 473 P.2d 219 (1970); Kelly vs. Great Northern R.R. Co., 59 Wn.2d 894, 899, 371 P.2d 528 (1962); State vs. Tatum, 58 Wn.2d 73, 360 P.2d 754 (1961). At trial the Appellant, RP 37 – 40, 49 – 57, 61 – 62, and three independent eye witnesses (William Wallace, Ron Miltenberger and Randy Goecke) RP 153 – 154, 159 – 160, 162 – 164, testified that the photos which are the subject of the Appellant’s current appeal were true and accurate depictions of the accident scene taken shortly after the collision ensued.

The Rules of Evidence are designed so that “the truth may be ascertained and proceedings justly determined.” ER 102. Relevant evidence is admissible. ER 402 The evidence rules define relevancy broadly as:

**[E]vidence 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.**

ER 401 [emphasis added]. Facts that either tend to establish a party's theory or disprove an opponent's evidence are relevant and should be admitted. Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 89, 549 P.2d 483 (1976).

The photos which were shown to the jury depict the vehicles involved in the subject accident and clearly support the Respondent's theory that the impact between the Respondents' semi-truck and the Appellant's sports utility vehicle was a light collision. Over the Respondents' objections the court ruled that the photographs would not be admitted into evidence (and thus go back to the jury room) but would be allowed only for illustrative purposes. RP 12 – 13, 16, 21 – 22.

*Judge Nichols did not Abuse his Discretion*

As the Appellant correctly stated in her brief, the use of illustrative evidence is favored by the Supreme Court, State vs. Lord, 117 Wn.2d 829, 855 (1991), citing, State vs. Chapman, 84 Wn.2d 373, 378 (1974) which will only be reviewed on appeal for abuse of discretion. State vs. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999).

At trial Judge Nichols did an exceptional job of reasoning his way through whether to admit, or reject, the photos at issue. RP 6 – 36. Opposing counsel did not object to the authenticity of the photographs, RP

10, lines 14 – 17. After ascertaining that the photos were authentic and that foundation was properly established, Judge Nichols then evaluated the Appellant’s trial testimony which occurred earlier in the day. He noted the Appellant testified that, “she was smashed; that the front end was rode up on; that it drug the car backwards, everything flew around and they ended up side-by side.” RP 12. The court also noted that the Appellant, “brought up the issue of the severity, I guess, or the traumatic effect of it.” Id. He continued to reason that the photos, “illustrate where the cars ended up, the vehicles ended up” as well as, “illustrate the conditions of the road at the time,” and, “the position of the vehicles.” He further stated that, “it confirms that the reflective tape was right on her side of the window. It brings into question of how smashed up it was, whether it rode up.” RP 12 – 13.

Judge Nichols also heard Appellant attorney’s argument where she outlined her concerns that the photographs were not relevant in an admitted liability case. RP 14. During his evaluation of the photographs Judge Nichols observed that they depicted minimal damage in light of a plaintiff claiming a substantial injury. In doing so he also pondered, ‘what if the damages were substantial’ (such as in a “total head-on” collision),

RP 15, and concluded that he would probably still only allow the photos to be used for illustrative purposes. RP 16 – 17.

The record is very clear that Judge Nichols did an exceptional job of evaluating: 1) the evidence, 2) the argument of counsel, 3) whether the photos would be unduly prejudicial. In the end he concluded that the photos would come into evidence but for only illustrative purposes. He commented:

**The only concern I have and that I would be ready to concede to the defense is the fact that there was pretty emotional testimony about the accident itself, the degree of it, the smash, as I pointed out, the other adjectives that were used, and how this affected her life, how she feared for her life because of that . . . . [w]ell, being smashed, being drug back, it paints a picture in the jury's mind. There is no question about that. And that's why I am willing to concede for illustrative purposes, they should be able to see the accident – actual pictures of the accident and to verify – to counteract, I guess, some point of that.**

RP 15 – 16.

The trial judge then heard pleas from Respondent's attorney asking that the photos be admitted as substantive evidence which could be sent back to the jury room. Again the Judge carefully heard argument from both counsel and concluded that there was not enough evidence to allow the photos to be admitted as substantive evidence. He reasoned that it would be proper to admit the photos for illustrative purposes as the

Appellant testified that, “it was smashed, that type of thing, and she kind of opened the door with regard to that.” RP 17 – 23.

The record is clear that Judge Nichols meticulously weighed the evidence and concluded that the photos would only be admitted for illustrative purposes and not as substantive evidence. This is the product of an exceptional jurist reasoning his way through the “pros and cons” of either admitting or rejecting the photos. There is no evidence that his ruling on the photographs constitute an abuse of discretion. As stated earlier, a court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Oliver vs. Fowler, 161 Wn.2d 655, 663, 168 P.3<sup>rd</sup> 348 (2007). In the case at bar Judge Nichols’ ruling, although probably not the one either side really wanted, is clearly the product of exceptional thinking and careful reasoning.

*Admitting Photos into Evidence is Encouraged --  
Even if Liability is Not at Issue*

The practice of admitting photographs is *encouraged* as an aid to the comprehension of physical facts. Kramer v. Portland-Seattle Auto Freight, Inc., 43 Wn.2d 386, 389, 261 P.2d 692 (1953) [emphasis added]. Kramer was a wrongful death case where there was a dispute between the parties as to the speed of the vehicles and extent of damage. The Supreme Court stated, “[t]hese pictures were pertinent to the issues. They depict the

force of the impact. They show the damage to the car.” Such evidence clarifies issues and gives the jury and the court a clearer comprehension of the physical facts than can be obtained from the testimony of witnesses. Id. citing, Cady vs. Department of Labor & Industries, 23 Wn.2d 851, 863, 162 P.2d 813, 819 (1945), See also, Kadmiri v. Claassen, 103 Wn.App. 146, 147, 10 P.3d 1076 (2000), rev. denied, 142 Wn.2d 1029 (2001) (photographs of vehicles showing slight damage admitted in damages only case).

In the case at bar the parties vigorously disputed causation and the extent of the Appellant’s injuries. The severity of the impact between the vehicles was highly relevant to that issue. Excluding this obviously relevant evidence would have deprived the Respondents not only of their theory of the case but also of their ability to present the true and complete facts of the accident to the jury. See, ALCO vs. Aetna Cas. & Surety Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

Appellant’s position is contrary to long-established Washington law. As long ago as 1913 the Washington Supreme Court recognized the relevance and admissibility of vehicle damage photographs to the issue of causation of injury in auto accident cases. In Taylor v. Spokane, P. & S. Ry. Co., 72 Wash. 378, 130 P. 506 (1913), (a personal injury case where

one question on appeal was whether the trial court erred in admitting vehicle damage photographs offered on the issue of causation), the court held:

**We are of the opinion now that that this photograph was properly admitted to show the probable force of the impact of the train, because it is a well-known fact that that a collision which will crush a car is reasonably certain to cause injury to the passengers within the car. The force of impact, therefore, is a material matter to be considered in determining whether or not the passenger was actually injured upon the car. A photograph taken of a car at the time is competent to show the result of the impact, the same as oral evidence of that fact.**

Taylor, 72 Wash. at 379 (emphasis added).

Washington cases subsequent to Taylor have only reinforced the admissibility of post-accident auto photographs; none have gone the other way.

For example, in Murray v. Mossman, 52 Wn.2d 885, 329 P.2d 1089 (1958), the Plaintiff filed an action for damages arising from a motor vehicle accident. The Defendant admitted liability; limiting the issues for trial to the nature and extent of injuries to the Plaintiff and the damages to which the Plaintiff was entitled. Murray, 52 Wn.2d at 886-87. Five photographs of the accident scene were admitted for the limited purpose of showing the force of impact that allegedly resulted in damage to the Plaintiff. Id. Witnesses were allowed to testify concerning the point of impact and the course the Defendant's car took after impact. Id. The

Plaintiff prevailed and the Defendant appealed arguing in part that the trial erred by admitting the photographs. Id.

On appeal, the Court upheld the trial court and concluded:

**When the Defendant in a negligence case admits liability and contests only the question of damages, he is entitled to have excluded from the testimony all references to the manner in which the accident occurred except such as are relevant to the questions of damages... With minor exceptions in the testimony (the admission of which is not sufficient to constitute an abuse of discretion), the photographs and the testimony concerning them tended to show the force and direction of the impact that resulted in [Plaintiff's] injury.**

Id., 52 Wn.2d at 888 [emphasis in original]; citing Snyder v. General Electric Co., 47 Wn.2d 60, 68, 287 P.2d 108 (1955).

Counsel for the Appellant may argue that expert testimony was necessary to avoid speculation under ER 403 about the relationship between the minor vehicle damage and her client's injuries. The Supreme Court would disagree. In Murray vs. Mossman, 52 Wn.2d 885, 329 P.2d 1089 (1958), the high court said, "[i]t is well established in Washington that photographs of vehicle damage in personal injury actions are relevant and admissible to show the force of impact without expert testimony." 52 Wn.2d at 887.

The lower court correctly ruled that the photographs of the accident scene were both relevant and that proper foundation had been laid so that they could be shown to the jury. Appellant's argument that it was error to

allow these photos to be shown to the jury is without precedent. Her contention to this court that Judge Nichols abused his discretion in allowing the photographs to be shown to the jury is also unsupported by the clear evidence revealed in the court's record.

2. Did the court abuse its discretion when it found that Dr. Tesar would be permitted to testify to opinions which he expressed in his independent medical examination report and in three prior depositions? ANSWER – NO.

Appellant's lawyer states that her client is entitled to a new trial because Dr. Tesar was permitted to testify "outside the scope of his 2006 report" and, alternatively, her client is entitled to a new trial because Dr. Tesar's trial opinions were, "not contained in his report or subsequent depositions."

More specifically opposing counsel states that Dr. Tesar 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. She also states that prior to trial Dr. Tesar 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." (sic) CP 145 and 147. Appellant's Brief (hereinafter "AB") 20 – 27.

In addition Appellant's counsel states that she was under the impression that the court limited Dr. Tesar's opinions to that which was expressed in his report after Judge Nichols ruled that Dr. Tesar would not be permitted to testify about the Appellant's psychological make up or attempt to relate the photos to the Appellant's injury. AB 7. This belief presumably arose after the trial court issued a written order *in limine* (which the Appellant's attorney drafted) specifically saying that Dr. Tesar's opinions would be limited to his report and his *subsequent depositions*. CP 84 [emphasis added].

Appellant's attorney deposed Dr. Tesar twice before trial. One of those depositions lasted almost three hours. In addition Dr. Tesar was deposed a third time by Respondent's counsel as it was anticipated that his deposition would need to be perpetuated before trial. Several months before the rescheduled trial date, and before the second discovery deposition by Appellant's counsel, it was discovered that Dr. Tesar would be available to testify at trial so his perpetuation deposition was not needed. During that perpetuation deposition, however, Appellant's counsel had a third opportunity to question Dr. Tesar about any aspect of his investigation into her client's medical condition. It is disingenuous for her to now claim "surprise" when she had personally participated in three, separate, depositions of Dr. Tesar and also previously received a 24 page IME report from him a year before trial.

On appeal a trial court's decision to limit a witness' trial testimony is reviewed for abuse of discretion. Stevens vs. Gordon, 118 Wn.App 43, 51, 74 P.3<sup>rd</sup> 653 (2003). Similarly a court's decision to deny a request for a new trial is also reviewed for abuse of discretion. Palmer vs. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). That discretion will not be disturbed unless no reasonable person would take the position adopted by the trial court, Mayer vs. City of Seattle, 102 Wn.App. 66, 79, 10 P.3<sup>rd</sup> 408 (2000), or is based on untenable grounds or reasons. Wagner Development, Inc., vs. Fid. & Deposit Co., 95 Wn.App 896, 906, 977 P.2d 639 (1999). In determining whether the trial court's decision was an abuse of discretion, an appellate court considers whether there was prejudice preventing a fair trial. ALCO vs. Aetna Cas. & Surety Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

Appellant's attorney first raised the issue of Dr. Tesar "testifying beyond the scope of his IME report" in a motion to strike which was argued before the original May 7, 2007 trial date. CP 14 – 24. Specifically the Appellant's attorney claimed that in Dr. Tesar's second deposition of April 19, 2007 she learned that he was provided with additional records since his earlier discovery deposition taken just seven days earlier. CP 23 – 24. More specifically she claims he was provided with records from Kaiser Permanente. CP 18. Although a cover letter Respondent's attorney sent to Dr. Tesar before his IME report did include a reference that the Kaiser records were sent to him before his first discovery deposition, CP 34 – 35, the trial court fashioned a remedy and

ruled that the May 7<sup>th</sup> trial would be continued to July 23, 2007 and that Appellant's attorney would be allowed to take another discovery deposition of Dr. Kaiser. CP 49-50. Respondent's attorney did not object to continuing the May 7<sup>th</sup> trial date so Appellant's attorney could re-depose Dr. Tesar and was actually the party who suggested this type of ruling to the court. CP 167.

Opposing counsel then re-deposed Dr. Tesar on June 21, 2007. At trial Appellant's attorney again asserted that Dr. Tesar's testimony should be limited to the opinions he expressed in his IME report in a motion *in limine*. CP 14 – 21. In this motion the Appellant's lawyer argued that, in spite of deposing Dr. Tesar three times, she was "surprised" by the Respondent's attorney giving Dr. Tesar the Kaiser Permanente records after his first discovery deposition but before his perpetuation and second discovery depositions. CP 18. It should be noted by the court that Appellant's attorney never objected to the trial being continued from May 7 to July 23, 2007 so as to permit her to re-depose Dr. Tesar and that she was the one who drafted the court's order. CP 49 – 50.

The lower court denied Appellant's request to limit Dr. Tesar's trial testimony to the opinions expressed in his IME report but did rule that he would restrict his testimony to the opinions he expressed in his IME report and three subsequent depositions. CP 84.

Opposing counsel's argument that, at trial, Dr. Tesar offered opinions beyond his IME report and subsequent depositions is without merit. In her brief she does not specifically point out where in Dr. Tesar's

trial testimony he went “beyond” the court’s prior rulings. In her brief, however, she argues that Dr. Tesar offered “new opinions” when he characterized an October 2002 incident a “new injury”; a December 2002 MVA a “new injury”, and an August 30, 2005 MVA a “new injury.” AB 20 – 21. Prior to trial, opposing counsel argues, Dr. Tesar 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.” (sic). Id.

Assuming that counsel’s description of these “inconsistencies” is accurate she is only arguing semantics. Her argument is also not supported by the record. Judge Nichols observed that this was the case. In a discussion about the scope of Dr. Tesar’s prior depositions which he read the trial judge said, “[a]nd then when she had the incident with the blow dryer, she re – the injury – she has a new injury with the blow dryer not related to automobile accident that resulted in some pain. The she – from the dog collar, that was a new injury unrelated to the automobile accident.” RP 104 – 105 [emphasis added]. At trial Dr. Tesar was also asked, on cross examination, by Appellant’s attorney about these “inconsistencies” between his trial testimony and that expressed in his prior report and discovery depositions. RP 126 – 127, 135 – 137 (October 2002 incident), 41 – 41, 45, 128 – 129, 139 – 140 (December 25, 2002 MVA), 49, 59, 130, 140 – 141 (August 30, 2005 MVA).

Counsel’s argument to this court that Dr. Tesar’s trial testimony is inconsistent with his IME report or prior depositions is completely without

basis. At trial Appellant's attorney compared Dr. Tesar's trial testimony with that given in an April 19, 2007 deposition. She does not bring to the jury's (nor this court's) attention what Dr. Tesar stated in the third deposition the court ordered after Appellant's counsel was given a trial continuance. She also does not bring to this court's attention Dr. Tesar's statements in his earlier perpetuation deposition. In short she has not established to this court that Dr. Tesar's trial testimony is inconsistent with his earlier deposition testimony or IME report.

In her brief Appellant's attorney argues that allowing Dr. Tesar to offer testimony which was "beyond" his IME report and depositions amounted to trial by ambush. AB 24. The record does not establish that Dr. Tesar did offer testimony beyond that which was limited by the trial court. Calling an injury a "flare up" vs. a "new injury" was also highlighted by opposing counsel during cross examination. His trial testimony was focused on the Appellant's medical condition and addressed the complaints she had about low back pain. These matters were put at issue in the Appellant's original complaint. CP 3 - 5.

The Appellant had possession of Dr. Tesar's IME report for one year before the July 23, 2007 trial. In the case of Davis vs. Sill, 55 Wn.2d 447, 348 P.2d 215 (1960) the plaintiff submitted to a second independent medical examination *four days* before trial. The defense doctor who performed the exam was too busy to write a report detailing his findings and opinions from the second exam. Over plaintiff counsel's objections the case went to trial on this admitted liability personal injury case. After

judgment was entered the plaintiff's counsel appealed arguing that he was surprised over some of the defense doctor's testimony regarding the second exam. The Washington Supreme Court upheld the trial court's decision to allow the doctor to testify about the results of the second exam. The plaintiff argued that over his objections, the doctor was permitted to testify to certain matters discovered by the second examination concerning torn and strained muscles at the back of the neck and torn nerve ends which affected the plaintiff's vision. The Court held that there was no surprise as to any new issue in the case as the physical condition of the plaintiff was within the issues raised in his complaint. 55 Wn.2d at 479.

Such was the case with the Appellant's trial. Her attorney had a report from Dr. Tesar over 1 year before trial. She also participated in three separate depositions of Dr. Tesar and, during cross examination at trial, plaintiff counsel questioned him about the "inconsistencies" between his trial testimony and previous reports/deposition testimony. Furthermore Appellant's attorney has not shown this court that the lower court committed an "error of law" affected the right of her client to a fair trial.

In her brief Appellant's attorney also suggests that, pursuant to CR 26(e)(1)(b) a party is required to "seasonably supplement" the subject matter and substance of an expert's trial testimony. Aside from the obvious contention whether, in light of the questions actually posed to Dr. Tesar in his prior depositions, his statements about various injuries constitute a "flare up" vs. a "new injury" vs. an "aggravation", CR 26(e)(1)(b) talks about responses a party has made to discovery; such as

responding to interrogatories or request for production of documents. That rule does not cover deposition testimony. There is no legal requirement that a witness “seasonably supplement” deposition testimony. Under CR 33, however, a party does have an obligation to seasonably supplement answers to interrogatories. Counsel for the Appellant did not serve damage or liability interrogatories on the Respondents in this case. Had she done so AND asked for all of Dr. Tesar’s testimony at trial she *may* stand a better chance on appeal. Counsel for the Appellant, however, decided not to serve written discovery on the Respondents and, as such, there was no obligation on the part of the Respondents to “supplement” Dr. Tesar’s trial testimony regarding characterizing various accidents as a “new injury,”

In the end, however, the Appellant has to prove to this court that Judge Nichols abused his discretion in permitting Dr. Tesar to offer testimony which was “beyond” the scope of his IME report and contained in subsequent depositions. It is difficult to envision how the Appellant’s attorney could be “surprised” by Dr. Tesar’s trial testimony when the only concern she has involved whether to call various accidents a “new injury” as opposed to a “flare up.” This is especially so when considering that she was given an opportunity to depose Dr. Tesar a third time to discuss these various accidents with him. As there is no evidence to demonstrate that Judge Nichols abused his discretion in allowing Dr. Tesar to testify “beyond the scope” of his IME to include subsequent deposition testimony the Appellant’s current appeal on this issue is misplaced.

3. Was the Appellant prejudiced by the lower court's decision to allow the photos to be shown to the jury and limiting Dr. Tesar's testimony to the opinions he expressed in his IME report and prior depositions? ANSWER – NO.

Revised Code of Washington 4.36.240 provides as follows: “[t]he court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.” In reviewing the evidence, the court does not reweigh the evidence, draw its own inferences, or substitute its judgment for the jury. “The court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it. The inferences to be drawn from the evidence are for the jury and not for this court. The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.” Burnside vs. Simpson Paper Co., 123 Wn.2d 93, 108, 864 P.2d 937 (1984) (quoting State vs. O’Connell, 83 Wn.2d 797, 839, 523 P.2d 872 (1974)). In addition, on appeal, a party must show that he or she was *prejudiced* as a result of a potential error committed by the trial court. ALCO vs. Aetna Cas. & Surety Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000) [emphasis added].

During the Appellant's trial the jury heard testimony that she was involved in three subsequent motor vehicle accidents and well as one subsequent slip and fall. Appellant admitted to injuring her back six months after the accident with the Respondent while blow drying her hair. At that time her low back pain, "really started to experience some real intense pain" which was described as a "hot poker" being put inside her back. RP 41. Then two months later she was involved in another motor vehicle accident when her car rolled down an embankment two or more times on Christmas Day of 2002. RP 41. In that accident her Ford Bronco was totaled. RP 48. Then in August of 2005 she was involved in another motor vehicle collision when someone moved into her lane of travel while going 25 miles per hour. RP 49.

After the April 2002 motor vehicle collision with the Respondent the Appellant admitted at trial that she was involved in a third motor vehicle collision which occurred sometime after the April 2002 accident and December 2002 collisions. RP 58 – 59. In addition the Appellant admitted on the stand that she was involved in a slip and fall after the collision with the Respondent where she landed on her buttocks and broke her tail bone. RP 60 – 61

At trial the Appellant also said that she sustained \$22,000 in medical bills after the collision with the Respondent and that most of her medical bills were for chiropractic treatment. RP 62 – 63

Orthopedic surgeon Paul Tesar, MD testified at trial that, on exam, the Appellant's subjective complaints were out of proportion to the

objective medical evidence as well as inconsistent with her previous sworn statements. CP 131. Dr. Tesar also attested that he believes the Appellant sustained a minor left shoulder sprain as well as a minor sprain at the L4-5 levels in her low back as a proximate result of the accident with the Respondents. CP 131. He further opined that he believes the Appellant's treatment should have lasted 6-12 weeks after the April 5, 2002 motor vehicle collision. CP 131 – 132. Dr. Tesar said that he reviewed a pre-2002 lumbar MRI film which revealed a disc bulge at L4-5 that was in the process of degenerating even without the subject accident. CP 131. He believes that this bulge is unrelated to the 2002 motor vehicle accident and a potential explanation for why the Appellant continued treating. CP 131.

In addition Dr. Tesar and the Appellant's family physician, Dr. Nicoski, testified that the Appellant initially stopped treating for 3 months between June and August of 2002. Dr. Tesar stated that this was further evidence that the Appellant's treatment should have only lasted 6-12 weeks. CP 131 – 132.

At trial the Appellant's only expert was that of Dr. Nicoski. He testified that his patient was in need of additional treatment and that the post April, 2002 motor vehicle collisions and various accidents only temporarily aggravated his patient's low back complaints. He admitted, however, that he had not seen the Appellant for her injuries until several months after the April, 2002 accident. At trial he also stated that he last saw the Appellant one month before trial and that he had not treated her for one year before that last visit.

In addition the Appellant had five different gaps in her treatment records which ranged from three months to upwards of a year and a month. The first gap in her treatment occurred three months after the motor vehicle collision with the Respondent and coincides with the period of time when Dr. Tesar said the Appellant's treatment should have ended.

The verdict in this case is clearly the product of a jury who carefully listened to all of the evidence as well as meticulously followed the instructions of law as given to them by this court. The Appellant's medical bills were also sent back to the jury room. It is conceivable that the jury was convinced that Appellant had a pre-existing back condition that was progressing over time and was in need of treatment. It is also conceivable that the jury reviewed the Appellant's medical bills and, after careful examination of each bill, decided for themselves which charges were for injuries caused by the April 2002 motor vehicle accident and which of the bills were for unrelated conditions. Their decision to award the Appellant \$14,500 in damages is clearly consistent with the instructions the lower court gave to the jury as well as the evidence presented before them. The Appellant has not shown to this Court how, absent the lower court's rulings on appeal, the jury's verdict would have been any different than the one they issued after listening to all of the evidence. She also has not proven that as a result of Judge Nichols' rulings her client was prejudiced in presenting her case to the jury.

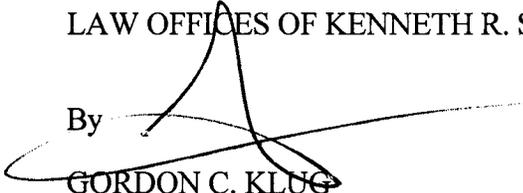
## V. CONCLUSION

The jury in this case rendered its decision. The Appellant has not shown this court how she was prejudiced by the lower court allowing photos of the accident scene to be shown to the jury. Appellant's lawyer also has not demonstrated how her client was adversely affected by permitting Dr. Tesar to characterize various subsequent accidents as a "new injury" as opposed to a "flare up" or an "aggravation". She claims, however, that the jury's verdict was the product of unjust rulings by the lower court. Arguments based on vague generalized statements of "injustice" do not form a basis for a successful appeal. As such the Respondents respectfully request this court to allow the jury's verdict to stand and deny the Appellant's request for a new trial.

DATED this 27<sup>th</sup> day of May, 2008.

Respectfully submitted,

LAW OFFICES OF KENNETH R. SCEARCE

By 

GORDON C. KLUG  
Counsel for Respondents

WSBA # 21449

No. 37158-8-II

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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JOLEE MERCER

v.

RICKY BIRCH, et al.

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AFFIDAVIT OF SERVICE / BRIEF OF RESPONDENTS

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GORDON C. KLUG  
Of Attorney for Defendants  
Ricky Birch and Pacific Rock  
1501 Fourth Avenue, Ste. 420  
Seattle, WA 98101  
(206) 326-4217

COURT OF APPEALS  
DIVISION II  
OCT 28 PM 1:42  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

The undersigned declares as follows:

1. I am over the age of eighteen, competent to testify and have personal knowledge regarding the facts set forth herein.

2. That on the date below, I served the Brief of Respondents and this document, on:

Jennifer K. Snider  
Reed Johnson & Snider, P.C.  
201 NE Park Plaza Drive, Suite 248  
Vancouver, WA 98684  
(360) 696-1526  
(360) 695-3135 fax

by mailing a full, true and correct copy thereof via DHL overnight mail, postage pre-paid, addressed to the attorney as shown above, to the last-known office address of the attorney, by placing in the DHL drop-box at 1501 Fourth Avenue, Seattle, Washington on the date set forth below.

The documents were also faxed to Jennifer K. Snider on this day.

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATE: 5/27/08  
PLACE: Seattle, WA

Ana C. Susan  
Ana C. Susan