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DIVISION II

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

BEATRIZ HERNANDEZ and ROSARIO CONTRERAS

Plaintiffs/Respondents,

v.

HELEN STENDER and JOHN DOE STENDER, wife and husband and their
marital community,

Defendants/Appellants.

APPELLANT'S BRIEF

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ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY OF APPELLANTS.....	1
II. ASSIGNMENTS OF ERROR.....	1
III. STATEMENT OF THE CASE.....	3
IV. ARGUMENT.....	5
A. The trial court erred when it granted attorney fees to Ms. Hernandez despite her violation of RCW 7.06.050.....	5
B. The trial court erred when it failed to exclude evidence not previously disclosed.....	14
C. The trial court erred by refusing to admit documents submitted pursuant to ER 904 when the Plaintiffs never made objections to the documents.....	27
D. The trial court erred when it failed to exclude Dr. Bhanji's bills from the evidence.....	32
V. CONCLUSION.....	35

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>United States Supreme Court Cases</u>	
<i>Hickman v. Taylor</i> , 329 U.S. 495 (1947).....	15
 <u>Washington State Cases</u>	
<i>Allied Fin. Servs. Inc. v. Mangum</i> , 72 Wn. App. 168, 168-69, 84 P.2d 1 (1993).....	16
<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wn.2d 581, 597-99, 675 P.2d 193 (1983).....	13
<i>Bus. Servs. of Am. II, Inc. v. Wafertech, LLC</i> , 174 Wn.2d 304, 307, 274 P.3d 1025 (2012).....	32
<i>Clausen v. Icycle Seafoods, Inc.</i> , 174 Wn.2d 70, 81, 272 P.3d 827 (2012).....	12, 13
<i>Connell v. Francisco</i> , 127 Wn.2d 339, 346, 898 P.2d 831 (1995).....	19
<i>City of College Place v. Staudenmaier</i> , 110 Wn. App. 841, 845, 43 P.3d 43 (2002).....	33
<i>City of Spokane v. Spokane County</i> , 158 Wn.2d 661, 672-73, 146 P.3d 893 (2006).....	6
<i>Dempere v. Nelson</i> , 76 Wn. App. 403, 406, 886 P.2d 219 (1994).....	16
<i>Do v. Farmer</i> , 127 Wn. App. 180, 110 P.3d 840 (2005).....	7, 8, 9
<i>Dombrosky v. Farmers Ins. Co.</i> , 84 Wn. App. 245, 259, 928 P.2d 1127 (Div. 2 1996).....	33
<i>Ethridge v. Hwang</i> , 105 Wn. App. 447, 461, 20 P.3d 958 (2001).....	12

<i>Hanson v. Estell</i> , 100 Wn. App. 281, 997 P.2d 426 (2000).....	7, 8, 9
<i>High Tide Seafoods v. State</i> , 106 Wn.2d 695, 701-02, 725 P.2d 411 (1986).....	21
<i>Humphrey Indus., Ltd. v. Clay St. Assocs.</i> , 170 Wn.2d 495, 501-502 (2010).....	10
<i>In re Marriage of Lindsey</i> , 101 Wn.2d 299, 678 P.2d 328 (1984).....	19, 20
<i>In re Marriage of Muhammad</i> , 153 Wn.2d 795, 803, 108 P.3d 779 (2005).....	28
<i>In re Parentage of J.H.</i> , 112 Wn. App. 486, 495, 49 P.3d 154 (2002), <i>review denied</i> , 148 Wn.2d 1024, 66 P.3d 637 (2003).....	27
<i>Kramer v. J.I. Case Mfg. Co.</i> , 62 Wn. App. 544, 551, 815 P.2d 798 (1991).....	16
<i>Mackay v. Acorn Custom Cabinetry, Inc.</i> , 127 Wn.2d 302, 311, 898 P.2d 284, 288 (1995).....	14
<i>Malted Mousse, Inc. v. Steinmetz</i> , 150 Wn.2d 518, 528, 70 P.3d 1154 (2003).....	25
<i>Miller v. Arctic Alaska Fisheries Corp.</i> , 133 Wn.2d 250, 944 P.2d 1005 (1997).....	27, 28, 29
<i>Paris Am. Corp. v. McCausland</i> , 52 Wn. App. 434, 438, 759 P.2d 1210 (1988).....	21
<i>Physicians Ins. Exch. v. Fisons Corp.</i> , 122 Wn.2d 299, 341-42, 858 P.2d 1054 (1993).....	15
<i>Primark, Inc. v. Burien Gardens Assocs.</i> , 63 Wn. App. 900, 907, 823 P.2d 1116 (1992).....	21
<i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010).....	14
<i>Sanders v. State</i> , 169 Wn.2d 827, 869, 240 P.3d 120 (2010).....	13

<i>State v. Budik</i> , 173 Wn.2d 727, 733, 272 P.3d 816 (2012).....	6
<i>State v. Dearbone</i> , 125 Wn.2d 173, 178, 883 P.2d 303 (1994).....	10
<i>State v. Schwab</i> , 163 Wn.2d 664, 671, 185 P.3d 1151 (2008).....	32
<i>State v. Stenson</i> , 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).....	14
<i>State v. Wanrow</i> , 88 Wn.2d 221, 237, 559 P.2d 548 (1977).....	15
<i>Univ. of Wash. Med. Ctr. v. Dep't of Health</i> , 164 Wn.2d 95, 104, 187 P.3d 243 (2008).....	14

Washington Statutes

RCW 4.84.280.....	7, 8
RCW 7.06.050.....	1, 5, 7, 8, 9, 10

Washington Court Rules

CR 6.....	28
CR 26.....	23
CR 58.....	33
ER 904.....	2, 5, 27, 28, 29, 30, 31
MAR 7.2.....	25, 26

I. IDENTITY OF THE APPELLANTS

Appellants, Helen and Richard Stender (Stenders), were the Defendants in the Pierce County Superior Court Cause Number: 09-2-15257-3. Respondents, Beatriz Hernandez and Rosario Contreras, were the Plaintiffs below.

II. ASSIGNMENTS OF ERROR

1. Did the trial court err when it granted attorney fees to Ms. Hernandez despite her direct violation of RCW 7.06.060? Answer: *Yes. Ms. Hernandez violated RCW 7.06.060 by informing the trial court of an Offer of Compromise prior to the trial court issuing a ruling on the Stenders' Motion for Remittitur and before entering the Judgment.*

2. Did the trial court err when it granted nearly all requested fees when only Ms. Hernandez improved her position from arbitration? Answer: *Yes. The trial court granted nearly six times the amount of reasonable attorney fees to Ms. Hernandez when the amount of work was split virtually 50/50 between the Plaintiffs.*

3. Did the trial court err when it admitted evidence that should have been excluded as follows:

a. a property damage claim that was not previously disclosed and for property that did not belong to Ms. Hernandez? Answer: *Yes. Ms. Hernandez never disclosed*

a property damage claim and even expressly disclaimed that she would bring this claim at her deposition. Further, Ms. Hernandez does not own the vehicle that she claimed was damaged.

b. an essential services claim that was not disclosed until trial? Answer: *Yes. Ms. Hernandez never disclosed an essential services claim, but was allowed to raise the issue in closing arguments.*

c. a wage loss claim that was previously affirmatively disclaimed under oath? Answer: *Yes. Ms. Hernandez never disclosed a wage loss claim and even expressly disclaimed that she would bring this claim at her deposition.*

4. Did the trial court err when it excluded documents under ER 904 that were not objected to by the Plaintiffs? Answer: *Yes. Evidence Rule 904 allows for the admission of documents not objected to within 14 days of submission, and while Plaintiffs never objected prior to trial, the court excluded the documents.*

5. Did the trial court err when it excluded evidence that Dr. Al Noor Bhanji waived his medical bills? Answer: *Yes. The trial court*

allowed refused to allow evidence that Dr. Bhanji had waived the Plaintiffs' bills.

6. Did the trial court err when it admitted medical bills that had been waived by the provider? Answer: *Yes. The medical bills were not due and owing pursuant to Dr. Bhanji's own sworn testimony, yet they were allowed as "damages" at trial.*

7. Did the trial court err when it entered a judgment that included waived medical bills from Dr. Bhanji? Answer: *Yes. The trial court refused to remove the portion of the jury's verdict that allowed windfall damages to the Plaintiffs.*

III. STATEMENT OF THE CASE

A. Background

The lawsuit arises of out of a minor motor vehicle collision that occurred on January 8, 2007. CP 2. The vehicle Ms. Hernandez was driving was stopped at a stoplight when it was rear-ended by the Stenders' vehicle. Exhibit #18. The impact was so minimal, the damage to the Stenders' vehicle was only \$83.77. Exhibit #2. Dr. Allan Tencer estimated the "maximum speed change" of the Plaintiffs' vehicle was about 6.1 mph. Exhibit #18. According to Dr. Tencer, the speed change would be the equivalent of backing a vehicle into a wall traveling 4 mph. *Id.* The photographs that were presented support Dr. Tencer's theory. *See*

Exhibits #19 and 20. Dr. Tencer further found these forces were “within the range of forces experienced in daily living.” *Id.*

The Stenders admitted fault for the accident, but disputed the nature and extent of Ms. Contreras’s and Ms. Hernandez’s claimed damages as a result of the accident. CP 338-39.

B. Plaintiffs’ claimed injuries

Ms. Hernandez testified that she did not sustain any cuts, bruises, scrapes or broken bones. RP 61. Despite the evidence to the contrary, Ms. Hernandez alleged she needed chiropractic treatment for approximately seven months. RP 54.

Dr. Al Noor Bhanji treated both Ms. Hernandez and Ms. Contreras for their alleged injuries. CP 46 and 49. Dr. Bhanji was charged with four counts of perjury in the first degree on or about November 8, 2010, for providing intentionally deceitful responses to deposition questions on multiple occasions. CP 111-12. Dr. Bhanji eventually pled guilty to three counts of false swearing. Exhibit #18.

C. Dr. Bhanji

Allstate Insurance Company filed a lawsuit against Dr. Bhanji for alleged fraudulent conduct that had occurred for several years, including submitting false and inaccurate records. Exhibit #25. A Confession of Judgment in favor of Allstate was filed in the Allstate lawsuit on or about

March 30, 2009. Exhibit #26. Despite no objections to these documents offered under ER 904, the trial court excluded them. CP 163-165. The jury was also denied the opportunity to view documentation that the medical bills in this case were waived and the context for that waiver. Exhibits #27 and 28.

The trial court made numerous prejudicial errors in this case that require this Court to remand for a new trial.

IV. ARGUMENT

A. THE COURT ERRED WHEN IT GRANTED ATTORNEY FEES TO MS. HERNANDEZ DESPITE HER VIOLATION OF RCW 7.06.050.

1. Post-arbitration offer communicated to court

Ms. Hernandez sought to recover attorney fees as the “prevailing party” in the case below. However, before the Court had entered a judgment, Ms. Hernandez advised the Court in a pleading the exact number she “had to beat” to receive those fees. CP 765. The trial court, armed with information explicitly prohibited by the statute, then granted Plaintiff’s requested relief.

After the jury returned a verdict, the Stenders filed a Motion for Remittitur in this matter on June 25, 2012. CP 694-712. The Stenders asked for a reduction in the amount of the jury verdict pursuant to the

Declarations of Al Noor Bhanji waiving the medical bills for Ms. Hernandez and Ms. Contreras.

Ms. Hernandez filed a Response to the Stenders' Motion in Opposition to Entry of Verdict re: Remittitur on June 27, 2012. CP 713-20. The final sentence of Section IV of that response, states “[Stender] brings this same motion again post trial to lower the award such that [Respondents] award does not exceed its *offer of compromise* in the amount of \$9,500.00.” CP 715. Judge Serko signed the Judgment in this case on June 29, 2012 – two days *after* learning of the offer of compromise amount. CP 722.

Thus, the trial court learned of the offer of compromise before entering the judgment *and* before issuing a ruling on the Motion for Remittitur. This violates the plain language of the statute and undermines the purpose of that statute.

Interpretation of a statute is a question of law and is subject to de novo review. *State v. Budik*, 173 Wn.2d 727, 733, 272 P.3d 816 (2012); *City of Spokane v. Spokane County*, 158 Wn.2d 661, 672-73, 146 P.3d 893 (2006).

“A postarbitration offer of compromise *shall not be filed or communicated to the court* or the trier of fact until after judgment on the trial de novo, at which time a copy of the offer of compromise shall be

filed....” RCW 7.06.050(1)(c) (emphasis added). Illustrating the importance of complying with this law, the Washington State Court of Appeals, Division 1, extended an earlier Division 3 ruling that denied a party attorney fees because “the party violated RCW 4.84.280 by communicating too early the existence of a settlement offer.” See *Hanson v. Estell*, 100 Wn. App. 281, 290, 997 P.2d 426 (Div. 3 2000). Recognizing the substantially identical language between RCW 7.06.050 and 4.84.280, the Division 1 Court reasoned that a party claiming attorney fees is required by RCW 7.06.050(1)(c) to wait until *after the judgment* to communicate the offer of compromise to the Court and failing to do so prevented recovery of attorney fees under the statute. See *Do v. Farmer*, 127 Wn. App. 180, 188, 110 P.3d 840 (Div. 1 2005) (emphasis added).

The Division 3 Court’s reasoning behind the denial of fees in *Hanson* is illustrative here. In that case, the Hansons filed a copy of the offer of settlement five days before the entry of judgment. *Hanson*, 100 Wn. App. at 290. The Court of Appeals found the Hansons did not comply with the plain language of the statute and denied reasonable attorney fees for the violation. *Id.*

At the motion for entry of judgment in *Hanson*, the trial court asked the appellant’s counsel “how the party seeking attorney fees would accomplish this task so the fees would be part of the judgment summary.”

Id. Appellant’s counsel replied that “he thought the judgment would always have to be amended with a supplemental judgment in order to comply with the statute.” *Id.* The Court of Appeals agreed and found “the clear language of RCW 4.84.280 prohibits the trial court from learning of any settlement offers until *after the judgment has been signed.*” *Id.* (emphasis added). The Court then held “[f]or this violation of RCW 4.84.280, the Hansons are not entitled to attorney fees under RCW 4.84.250.” *Id.* at 291.

The Court in *Do*, extended the *Hanson* rationale to RCW 7.06.050, reasoning that the language used in the statutes was very similar:

RCW 4.84.280 provides in pertinent part “offers of settlement shall not be filed or communicated to the trier of fact until after judgment,” while RCW 7.06.050(1)(c) provides in pertinent part that “a postarbitration offer of compromise shall not be filed or communicated to the court or the trier of fact until after judgment on the trial de novo.”

Do, 127 Wn. App. at 188.

The justification behind the rule supports the Stenders’ position. The trial court should not be swayed by learning of an offer of compromise before the final judgment is entered. The only possible outcome of this type of revelation is impermissible bias. The statute was written precisely

to protect against this and the afore-mentioned appellate courts have agreed.

Just as in *Hanson*, Ms. Hernandez brought the offer to the Court's attention days before the entry of judgment. The Court in *Hanson* found that the violation of the statute was sufficient to deny fees altogether. The Court in *Do*, then extended the *Hanson* rationale to the statute at issue here because the language was very similar.

The repercussions for a violation of the statute are severe, but the *Do* Court held such a remedy was appropriate because of the "importance of complying with this law." *Do*, 127 Wn. App. at 188. The Stenders respectfully requests this Court follow this well-reasoned jurisprudence and reverse the award of attorney fees. Otherwise, the statute is rendered meaningless and offers of compromise may be communicated at will to a court or jury without consequence.

2. In the alternative, the fees should be reduced.

Even if the case law and statutes are ignored, the fees in this case were excessive. Ms. Hernandez was awarded six times the amount of attorney fees as those of Ms. Contreras, and, conveniently for Ms. Hernandez and her attorneys, she was the only party that "prevailed" under RCW 7.06.050.

Ms. Hernandez filed a Motion for an Award of Fees and Costs on July 5, 2012. CP 724-751. As an exhibit to that motion, Ms. Hernandez filed a fee breakdown spreadsheet. CP 738-743. Not coincidentally, Ms. Contreras failed to improve upon her position pursuant to RCW 7.06.050, but only had fees of \$8,725.00; whereas, Ms. Hernandez successfully improved upon her arbitration position and had fees of \$51,415.00. *Id.*

Despite the Stenders' responsive brief calling the trial court's attention to this glaring discrepancy, the court awarded not only the requested disproportionate fees to Ms. Hernandez, but then also applied a lodestar multiplier of 1.5 to those disproportionate fees as well.

The Stenders' filed a Motion for Reconsideration pursuant to CR 59, to deny fees altogether, but at most to award only a 50/50 split for the fees proposed. CP 827-28. A motion for reconsideration may be granted for many reasons, which are spelled out in the rule. *See CR 59*. The interpretation of this rule and its components entitle the Stenders to de novo review, as this is a question of law. Even if this was a mixed question of law and fact, review would still be de novo. *See State v. Dearbone*, 125 Wn.2d 173, 178, 883 P.2d 303 (1994); *see also Humphrey Indus., Ltd. v. Clay St. Assocs., LLC*, 170 Wn.2d 495, 501-502 (2010).

Plaintiffs presented testimony from eight witnesses (not including Plaintiffs themselves). Several testified on behalf of each Plaintiff, but six

presented testimony on behalf of Ms. Hernandez, and five presented testimony on behalf of Ms. Contreras. The amount of trial testimony, presentation, and argument, was split virtually 50/50, yet the trial court obliged Ms. Hernandez's request for six times the amount of fees as would have been awarded to Ms. Contreras if the situation would have been reversed.

Plaintiffs asserted it would be impossible to segregate the fees because "nearly every fact and issue in our case necessarily relates to both claims." CP 817.

Factually, this is impossible. If this were true, Ms. Hernandez's and Ms. Contreras' injuries would be identical and the testimony of any treating providers would be identical. It is hard to conceive of a situation where two individuals would react *identically* to a collision especially considering that in this case, the seatbelts restraining each would not be identical, but rather mirrored.

Ms. Hernandez further asserted that he would have prepared no differently for the Stenders' experts had there only been one plaintiff. *Id.* Again, this is not possible. Appellants' expert, Dr. David Nicholes, performed a medical records review for *both* Ms. Hernandez and Ms. Contreras for which he gave testimony.

The only case cited by Ms. Hernandez in her Response to support her contention that the fees need not be broken down further is *Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d 958 (2001). In that case a plaintiff succeeded on one of three claims against the defendant sufficient to earn reasonable attorney fees (CPA claim, MHLTA, and tortious interference). *Id.* The court in that case ruled that reasonable fees were appropriate because *factually* the three claims were so intertwined with each other, but alleged *different bases of recovery*. *Id.* Conversely here, the facts are *not* the same (e.g. Respondents' treatment necessarily different), but the bases of recovery are *exactly* the same (tort). Ms. Hernandez misses the true import of *Ethridge*.

The only fact in this case that “necessarily related to both claims” is Ms. Hernandez and Ms. Contreras were involved in a low-impact rear-end collision. Ms. Hernandez seeks to benefit for the work performed for both by submitting a disproportionate fee breakdown for that work.

Further the trial court allowed a “1.5 lodestar” multiplier in this case. CP 784. A trial court initially determines attorney fees and costs using the “lodestar” calculation, multiplying the total number of hours reasonably expended in the litigation by the reasonable hourly rate. *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 81, 272 P.3d 827 (2012). Once the lodestar has been calculated, the court may adjust the fee to

reflect factors not yet considered. *Id.* The two categories for adjustment are based on whether the fee was contingent in the outcome and the quality of work performed. *Id.* The party requesting an adjustment has the burden to show the deviation is justified. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597-99, 675 P.2d 193 (1983). Adjustments of the lodestar product are “discretionary and rare.” *Sanders v. State*, 169 Wn.2d 827, 869, 240 P.3d 120 (2010) (affirming trial court ruling refusing to adjust upward lodestar product where that product already greatly exceeded the contingency fee for the case).

In regards to the contingency factor, the *Bowers* Court stated “[i]n adjusting the lodestar to account for this risk factor, the trial court must assess the likelihood of success at the outset of the litigation.” *Bowers*, 100 Wn.2d at 598. They continued, “the contingency adjustment is designed *solely* to compensate for the possibility...that the litigation would be unsuccessful and that no fee would be obtained.” *Id.* at 598-99 (emphasis added). Further, “the risk factor should be applied only to time expended before recovery is assured.” *Id.* at 599.

Here, the Stenders admitted liability in the Answer, which was filed on or about November 25, 2009. CP 3-5. Thus at the time of the last offer of compromise, June 20, 2011, liability had already been admitted. This reduces the “risk of no recovery” to virtually zero. As a result, this

factor should reduce the lodestar amount if anything, not increase it by the 1.5 multiplier.

The Stenders respectfully request this Court deny fees altogether. However, if the Court determines that reasonable attorney fees are appropriate, the Stenders respectfully request the Court reverse the award of six times the fees to Ms. Hernandez, and remand for a dispensation that accurately depicts the amount of work spent for each Plaintiff, i.e. 50/50 split.

B. THE TRIAL COURT ERRED WHEN IT FAILED TO EXCLUDE EVIDENCE NOT PREVIOUSLY DISCLOSED.

The court reviews a trial court's evidentiary rulings under an abuse of discretion standard. *Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 104, 187 P.3d 243 (2008). A trial court abuses its discretion when the ruling is “manifestly unreasonable or based upon untenable grounds or reasons.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010) (quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). An error is harmless if it is “trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311, 898 P.2d

284, 288 (1995) (emphasis omitted) (quoting *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)).

The purpose of written discovery is to provide litigants the opportunity to adequately prepare for trial. The United States Supreme Court has stated in this regard:

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.

Hickman v. Taylor, 329 U.S. 495 (1947), cited with approval in *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 341-42, 858 P.2d 1054 (1993) (internal quotations omitted).

Ms. Hernandez and Ms. Contreras filed the Complaint in this matter on October 29, 2009. CP 1-2. In that complaint, they prayed for “general damages, for special damages, for costs and attorney fees, [and] for such other relief the Court deems proper.” *Id.* Nowhere in this document do they allege that they sustained property damage.

1. **The trial court erred by allowing evidence of property damage to Sergio Hinojosa's vehicle, because a) Ms. Hernandez never disclosed a property damage claim and b) Mr. Hinojosa was not a party to this litigation.**

The trial court erred by allowing Ms. Hernandez to make a property damage claim at trial for two reasons: 1) a property damage claim was never disclosed, and 2) the vehicle did not belong to Ms. Hernandez.

a. Failure to disclose

The decision to exclude evidence that has not been properly disclosed within the discovery period is within the trial court's discretion. *Kramer v. J. I. Case Mfg. Co.*, 62 Wn. App. 544, 551, 815 P.2d 798 (Div. 1 1991) (exclusion of expert's testimony was an appropriate sanction for failing to timely provide supplementary answers to interrogatories). A court abuses its discretion only when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Dempere v. Nelson*, 76 Wn. App. 403, 406, 886 P.2d 219 (Div. 1 1994). It is not necessary that the objecting party demonstrate actual prejudice under these circumstances. *See Allied Fin. Servs. Inc. v. Mangum*, 72 Wn. App. 168, 168-69, 84 P.2d 1 (1993).

Ms. Hernandez and Ms. Contreras filed the Complaint in this matter on or about October 29, 2009. CP 1-2. Nowhere in the Complaint do Ms. Hernandez and Ms. Contreras allege property damage. *Id.*

Ms. Hernandez was served with written discovery on November 25, 2009. CP 470-485. She did not disclose a property damage claim. CP 494.

Finally, Ms. Hernandez provided sworn deposition testimony on February 10, 2010. She testified at her deposition that “Sergio [Hinojosa]” owned the car she was driving at the time of the motor vehicle accident. CP 80. Mr. Hinojosa also testified at trial that the vehicle belonged to him:

Mr. Park: Are you familiar with the car that was involved in [the] accident, the car that Beatriz was driving?

Mr. Hinojosa: Yes, sir.

Mr. Park: Whose car was that?

Mr. Hinojosa: It was mine.

Report of Proceedings (RP) 16.

When asked who performed the service on the vehicle, Ms. Hernandez replied Mr. Hinojosa would. CP 81. When asked how the vehicle was purchased, Ms. Hernandez replied “Sergio brought the car home.” *Id.* Later during her deposition, the following exchange took place between Ms. Hernandez, Rory W. Leid, III, counsel for Appellants, and Joyce Brannon, prior counsel for Respondents:

Mr. Leid: Next I'm showing you, Ms. Hernandez, what I've marked as Exhibit 4, which is a four-page document for an estimate to repair your car.

Ms. Brannon: I'm going to object. This is not her car.

Mr. Leid: Wasn't her testimony it was?

Ms. Brannon: No. It's not her car. It belongs to Sergio, and they are not married, and he took care of that. She didn't. So I'm just going to object.

Ms. Hernandez: Yeah. That's correct.

Mr. Leid: This estimate states that the cost to repair was \$861.91. Did you ever receive any type of an estimate in writing that the cost to repair was more than the \$861.91?

Ms. Hernandez: Well, I don't know. No. I never took anything, any part of the repair as my responsibility.

See Appendix A.

Ms. Hernandez did not disclose a property damage claim in her Complaint. CP 1-2. She further did not disclose a property damage claim in answers to discovery. CP 494. Finally, she *unequivocally disclaimed* a property damage claim at her deposition. **Appendix A.** Yet, at trial, Ms. Hernandez's counsel was allowed to elicit testimony, over the Stenders' objection, regarding a property damage claim.

This is not only unacceptable under the rules of our judicial system, but also is a manifest abuse of discretion by the trial court judge to allow the testimony. The Stenders were prejudiced by the failure to

disclose this claim and respectfully request this Court reverse and remand this for trial.

b. Vehicle owned by Mr. Hinojosa

Not only was the property damage claim never disclosed, but Ms. Hernandez did not have an ownership interest in the car from which she claimed that property damage. It was undisputed that Mr. Hinojosa and Ms. Hernandez were not married. It was further undisputed that the vehicle belonged to Mr. Hinojosa. Finally, Ms. Hernandez confirmed both of those facts are deposition where she *explicitly disclaimed* an interest in the vehicle. *See Appendix A.*

However, at trial, Ms. Hernandez claimed the property damage under what can only be assumed to be the theory of a meretricious relationship. There was no evidence presented to that effect, but it is the only conceivable theory where she could be awarded property damage for property to which she did not have an ownership interest.

A meretricious relationship is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.” *Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995) (citing *In re Marriage of Lindsey*, 101 Wn.2d 299, 304, 678 P.2d 328 (1984)). Generally, five factors are considered to determine whether a meretricious relationship exists: continuous habitation, duration

of the relationship, pooling of resources, services for joint projects, and the intent of the parties. *Lindsey*, 101 Wn.2d at 304-05.

Further, the term meretricious relationship has only been used in determining how parties divide assets among themselves (first party) when that relationship is terminated. There is no case law that has extended this judicially created exception to marriage to cases involving third parties. Plaintiffs' counsel essentially asked the trial court to create new law by applying the meretricious relationship principles to third parties. There is no case law to support this type of application.

Ms. Hernandez admittedly did not have any ownership interest in the vehicle, did not participate in its purchase, and did nothing to maintain the vehicle. Further, the relationship between Mr. Hinojosa and Ms. Hernandez was never terminated. The termination of the relationship insofar as Washington courts have interpreted is a prerequisite to the application of meretricious relationship principles. There is no reasonable justification to extend the application of meretricious relationships as Plaintiffs suggest. It was error for the trial court to allow Ms. Hernandez to make a property damage claim, especially when she adamantly denied she would be bringing such a claim.

Ms. Hernandez presented no evidence in regards to the five factors required to form a meretricious relationship. Ms. Hernandez expressly

disclaimed any ownership interest in the vehicle at her deposition. *See Appendix A.* Yet, the trial court allowed evidence, over objection, that Ms. Hernandez somehow had an ownership interest in the vehicle.

A court lacks jurisdiction to consider a lawsuit if a party lacks standing to bring it. *High Tide Seafoods v. State*, 106 Wn.2d 695, 701-02, 725 P.2d 411 (1986). A party has standing to raise an issue if that party has a distinct and personal interest in the issue. *Paris Am. Corp. v. McCausland*, 52 Wn. App. 434, 438, 759 P.2d 1210 (1988). The interest must be present and substantial rather than expectant or contingent. *Primark, Inc. v. Burien Gardens Assocs.*, 63 Wn. App. 900, 907, 823 P.2d 1116 (1992).

Here, Ms. Hernandez swore under oath at her deposition that she did not have a legal interest in this vehicle, and thus she should have had no standing at trial to assert a property damage claim.

The Stenders respectfully request this Court reverse the trial's court's ruling that Ms. Hernandez be allowed to present a property damage claim when 1) she not only failed to disclose the claim, but also expressly disclaimed that she would bring such a claim, and 2) she did not have standing to bring the claim because she had no legal interest in the vehicle that was damaged.

2. **The trial court erred by allowing evidence of an “essential services” claim when Plaintiffs never disclosed the claim.**

As with the property damage claim, Ms. Hernandez did not allege an essential services claim (or anything resembling that claim) in the Complaint. CP 1-2.

The Stenders submitted interrogatories to both Plaintiffs on November 25, 2009. Interrogatory No.14 reads:

If you have engaged any person or persons to do any work, at home or otherwise, that you are alleging would not have been necessary if it were not for the occurrence and injuries alleged, state the name and address of each such person or persons, the period of each said employment, the general nature of the duties of each said person in each said employment, and the compensation paid to each said person [sic] for such service.

CP 476-77.

Both Ms. Hernandez and Ms. Contreras submitted responses to these interrogatories on February 1, 2010, and in their responses to this interrogatory, indicated they would *not* be pursuing this claim. CP 492, 502.

Washington Civil Rule 26(e)(2) imposes a duty on a party to supplement his/her response to an interrogatory if “he obtains information of which he knows that the response though correct when made is no

longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.” *CR 26(e)(2)*. Ms. Hernandez and Ms. Contreras did not supplement their interrogatory responses.

Likewise, Ms. Hernandez did not mention any individual that provided these services during her trial testimony. RP 41-69. She thus could not have presented any evidence as to what payments she made for these services. The Stenders respectfully request the Court reverse and remand for a new trial with a prohibition against reference to essential services.

3. The trial court erred by allowing evidence of wage loss claim despite Ms. Hernandez, Ms. Contreras, and their attorney expressly denying they would be bringing that claim and failed to disclose prior to trial.

As with the property damage and essential services claims, Ms. Hernandez and Ms. Contreras did not allege wage loss in their Complaint. CP 1-2.

In the discovery process, Ms. Contreras and Ms. Hernandez were asked “[W]hat is your total loss of wages, or income, if any, to date as a result of this accident?” CP 465, 481. Each replied “none.” CP 503, 493. The very next interrogatory asked “Will you lose income in the future as a result of the incident.” CP 465, 481. Each replied “no.” CP 503, 493.

Neither response was ever supplemented. The following exchange took place between Ms. Hernandez, her attorney, and the Stenders' attorney at her deposition:

Ms. Brannon: I will state that we are not making a wage loss claim or future earnings claim.

Mr. Leid: Am I understanding there is no wage loss claim for Ms. Hernandez or no future?

Ms. Brannon: No wage loss, past or future.

Ms. Hernandez: Yes.

CP 278.

A similar exchange took place between Ms. Contreras, her attorney, and the Stenders' attorney:

Ms. Brannon: For the record, we are not making a wage loss claim.

Mr. Leid: Is that your understanding as well, Ms. Contreras?

Ms. Contreras: Yes.

CP 282.

Ms. Hernandez and Ms. Contreras did not disclose a wage loss claim in their discovery responses, and expressly disclaimed wage loss at their depositions. The Stenders respectfully request the Court reverse the award of wage loss to Ms. Contreras and remand for a new trial prohibiting reference to the undisclosed wage loss claim.

4. **It is anticipated Plaintiffs will claim that they disclosed several of these claims at arbitration, yet MAR 7.2 expressly prohibits use of MAR evidence for trial purposes.**

Mandatory Arbitration Rule 7.2(b) requires the trial de novo be conducted as though *no arbitration proceeding had occurred*. MAR 7.2(b)(1) (emphasis added). No pleading, brief, or statement (written or oral) during the trial de novo may refer to the arbitration proceeding. *Id.* The Washington Supreme Court has ruled on the effect of a de novo request:

The trial de novo process is exactly what the rule says it is: a trial that is conducted *as if the parties had never proceeded to arbitration*. The entire case *begins anew*. The arbitral proceeding becomes a *nullity*, and it is relevant *solely* for the purposes of determining whether a party has failed to improve his or her position.... Thus...a court should not defer, consider, or analyze an arbitration award *at all* when conducting a trial de novo under chapter 7.06 RCW.

Malted Mousse, Inc. v. Steinmetz, 150 Wn.2d 518, 528, 79 P.3d 1154 (2003) (emphases added).

Ms. Hernandez is likely to argue that because the issues were raised in arbitration (despite the fact that interrogatories were never supplemented and deposition testimony was never recanted), that this put the Stenders on notice that these claims were imminent. However, MAR 7.2(b) and *Malted Mousse* state that the trial de novo should be conducted as though the arbitration had never occurred. This mandate requires that

the parties make evident their claims independent from the arbitration. Ms. Hernandez and Ms. Contreras did not disclose these claims in discovery and in fact expressly *disclaimed* them.

The Plaintiffs could easily have supplemented their responses to discovery, filed an amended complaint, or drafted correspondence to Stenders' counsel that they intended to revoke their answers previously given. These options are not unduly burdensome, yet they failed to do anything other than raise the issue at arbitration. This conduct is in direct contravention to MAR 7.2. The claims should have been excluded at trial based on the Stenders' motions in limine, and the trial court abused its discretion by failing to exclude them.

The trial court abused its discretion by allowing a property damage claim, essential services claim, and wage loss claim. Ms. Hernandez and Ms. Contreras failed to disclose any of these claims and, with regard to the property damage and wage loss claims, *expressly denied* they were seeking these claims in their responses to interrogatories, and again under oath at their depositions. To allow this testimony into the record over the Stenders' objection is manifestly unreasonable because the Stenders were not able to adequately prepare these issues for trial. The Stenders respectfully request the Court reverse the trial court's denial of the

admission of evidence regarding 1) property damage, 2) essential services, and 3) wage loss.

C. THE TRIAL COURT ERRED BY REFUSING TO ADMIT DOCUMENTS SUBMITTED PURSUANT TO ER 904 WHEN THE PLAINTIFFS NEVER MADE OBJECTIONS TO THE DOCUMENTS.

Despite ER 904's very plain and unambiguous language regarding the admission of documents, the trial court, against all Washington law that has interpreted the law, ruled the documents were inadmissible. This abuse of discretion prejudiced the Stenders from presenting their entire case, despite Plaintiffs' failure to comply with ER 904(c).

The purpose of the rule is to expedite the admission of particular documents frequently used at trial. *See ER 904(a)(1)-(5); Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 256, 258, 944 P.2d 1005 (1997). Consequently, ER 904 "creates an 'expectation of admission' in the absence of a timely objection." *Miller*, 133 Wn.2d at 260 (citation omitted).

Upon receipt of the notice, the opposing party must specifically object to the document's admissibility or authentication within 14 days by "identifying each document to which objection is made by number and brief description." *ER 904(c)*. A trial court's evidentiary ruling is reviewed for an abuse of discretion. *In re Parentage of J.H.*, 112 Wn. App. 486,

495, 49 P.3d 154 (2002), *review denied*, 148 Wn.2d 1024, 66 P.3d 637 (2003). A manifest abuse of discretion occurs when the discretion was exercised on untenable grounds. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005).

The *Miller* case is nearly identical to the case at bar. In that case, the plaintiff submitted, under ER 904, two letters from medical providers that contained hearsay statements. *Miller*, 133 Wn.2d at 255. Approximately one month later, the defendant objected to the letters. *Id.* The Court in that case noted that “[o]pposing counsel may request proof of authentication and identification of the documents, or pose any appropriate evidentiary objection to the documents, within 14 days of receiving notice.” *Id.* at 258. A footnote attached to that statement reads “[t]he 14-day window for objections under ER 904(c) need not create a hardship for counsel. Under compelling circumstances, an expansion of time could be requested. *Id.* See also e.g., *CR 6(b)*.”

The Court continued: “the trial court may exercise its traditional discretion to address a party’s evidentiary objection and admit or exclude the documentary evidence, *provided* that the objection to the admission of the evidence is made in accordance *with the terms and time limits* of ER 904.” *Id.* at 259 (emphases added). The *Miller* Court held that even though hearsay was contained in the documents, “[u]nder ER 904, we hold

the documentary evidence will be admitted absent an objection.” *Id.* at 260.

In the present case, the Stenders filed their Notice of Intent to Offer Documents Under ER 904 on August 19, 2011. CP 175-79.

Plaintiffs did not object to the following documents:

- #1: Records review of Beatriz Hernandez;
- #2: Records review of Rosario Contreras;
- #4: Photographs of Mr. Hinojosa’s vehicle;
- #5: Photographs of the Stenders’ vehicle;
- #6: Repair estimate of Mr. Hinojosa’s vehicle;
- #7: Repair estimate of the Stenders’ vehicle;
- #9: Certified copies of Dr. Bhanji’s guilty plea to three counts of false swearing;
- #10: Complaint in the civil case filed by Allstate against Dr. Bhanji;
- #11: Confession of Judgment regarding Dr. Bhanji.

CP 175-77.

In *Miller*, the documents were objected to, albeit approximately two weeks late. *See Miller*, 133 Wn.2d at 255. The Court in that case held that due to the late objection, and even though the documents contained hearsay, they would admit the documents due to the expectation of admission associated with ER 904. *Id.* at 260. Here, the vast majority of the documents that the Stenders sought to admit at trial were never objected to prior to the day of trial.

Ms. Hernandez and Ms. Contreras did not object until the case was at trial. Evidence Rule 904 and ensuing case law support admission of the

documents. There is no evidence that the Stenders' ER 904 notice created a hardship upon Ms. Hernandez's and Ms. Contreras' counsel.

Despite ER 904's mandate and the appellate case law interpreting it, Judge Serko did not allow the Stenders to present documents not objected to within 14 days, at trial. This is the definition of a manifest abuse of discretion. Evidence Rule 904 and case law require one outcome, yet the trial court judge, without the weight of authority, made the exact opposite ruling. The ruling is therefore on "untenable grounds" as it is in direct conflict with the state of the law.

The Stenders were significantly prejudiced by this flawed ruling. For example, documents 1 and 2 of their ER 904 submission were records reviews performed by Dr. David Nicholes of Ms. Hernandez's and Ms. Contreras' chiropractic records, respectively. CP 175-76. These reviews raise significant questions as to their subjective complaints, the objective findings related to their treatment, and the actual treatment that was provided in this case. This information implicates both the special and general damages alleged by Ms. Hernandez and Ms. Contreras. Especially considering the admissions of Dr. Bhanji's illegal billing practices in the unrelated civil case against him, these reviews may have completely altered the jury's verdict on the amount of reasonable damages to award for these medical bills.

Document 9 was a certified copy of guilty pleas to three counts of false swearing. “For the purpose of attacking the credibility of a witness...evidence that the witness has been convicted of a crime shall be admitted...only if the crime...involved dishonesty or false statement, regardless of punishment.” *ER 609(a)*. Despite the plain language of the rule and the prior ruling that the documents were admissible for all purposes, the trial court refused to admit the guilty pleas.

Documents 10 and 11 were the Complaint for Violation of the Consumer Protection Act, Civil Fraud, and Violation of the Criminal Profiteering Act, and Confession of Judgment in King County Superior Court case *Allstate v. Bhanji, et al.*, cause number 07-2-39916-0 KNT. Exhibits #25 and 26. These documents were also never objected to under the procedures of ER 904. The lawsuit alleged that Dr. Bhanji had engaged in fraudulent billing practices. The facts and circumstances surrounding the Complaint against Dr. Bhanji go to his credibility as a witness, especially in a case such as this where he was submitting medical bills in the same manner as that which gave rise the Allstate lawsuit. The trial court failed to allow this evidence.

The Stenders respectfully request this Court reverse the ruling of the trial court denying admission of ER 904 documents that were not

objected to prior to trial and grant a new trial due to the resulting prejudice to them.

D. THE TRIAL COURT ERRED WHEN IT FAILED TO EXCLUDE DR. BHANJI'S BILLS FROM THE EVIDENCE.

Dr. Bhanji filed signed declarations that the bills he had charged to Ms. Hernandez and Ms. Contreras were waived, not collectible, and that he would not be pursuing any type of collection action to recover these bills. CP 46-51. Plaintiffs sought a windfall by attempting to recover bills that were not owing pursuant to the provider's own sworn testimony. Neither Plaintiffs, nor their agent(s), paid the bills, and thus to allow recovery was an abuse of discretion.

The trial court allowed the windfall by failing to exclude these bills and allowed the jury award of medical "damages" that were not damages at all. The court then compounded the error, by not allowing evidence of the waiver of those bills. Finally the court's erred in not granting the Motion re: Remittitur to correct the prior errors.

1. Entry of Judgment

Interpretation of a court rule is a question of law that is subject to de novo review. *Bus. Servs. of Am. II, Inc. v. WaferTech, LLC*, 174 Wn.2d 304, 307, 274 P.3d 1025 (2012) ((citing *State v. Schwab*, 163 Wn.2d 664,

671, 185 P.3d 1151 (2008), (citing *City of College Place v. Staudenmaier*, 110 Wn. App. 841, 845, 43 P.3d 43 (2002))).

Here, the trial court entered judgment pursuant to CR 58, on June 29, 2012, despite the legal issues presented below that affected that entry. CP 721-723.

2. Waived bills are not collectible and thus were not recoverable.

Ms. Contreras and Ms. Hernandez sought a windfall at trial by attempting to collect the medical bills initially offered by Dr. Bhanji. However, Dr. Bhanji signed a declaration under the penalty of perjury that “the medical bills for the treatment rendered...for Beatriz Hernandez [and Rosario Contreras]...are being waived for reasons unrelated to this subject litigation. *There will be no collection action...in any way to recover the amount of these medical bills.*” CP 46-51 (emphasis added).

Dr. Bhanji has thus waived his right to collect on these medical bills. Accordingly, allowing Ms. Contreras and Ms. Hernandez to recover these expenses in their Judgment would be providing money to them for a “damage” that does not exist. “[A]n insured receives only that amount that will indemnify actual loss, not an additional windfall above this amount.” *Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245, 259, 928 P.2d 1127 (Div. 2 1996).

3. Denial of Motion for Remittitur

The Stenders filed a Motion in Opposition of Entry of Verdict re: Remittitur on June 25, 2012. CP 694-712. Dr. Al Noor Bhanji signed sworn declarations for both Ms. Hernandez and Ms. Contreras in this case, saying that he was not attempting to collect the bills and would institute no further action attempting to collect them. CP 699-700, 703-04. Essentially, Dr. Bhanji waived the bills owed to him in this case (for reasons unrelated to this case), relieving Ms. Hernandez and Ms. Contreras of any financial responsibility to him or his office. *Id.*

The Stenders' position in the action for remittitur was to reduce the overall amount of the verdict by the amount of the medical bills awarded to Ms. Hernandez and Ms. Contreras solely from Dr. Bhanji. These bills were not collectible as a matter of law because the waiver satisfied any amount due and owing.

The Stenders respectfully request this Court reverse the entry of the Judgment in this case based on the trial court erring to reduce the amount of the verdict by the amount of medical bills waived by Dr. Bhanji for fraudulent billing practices. The Stenders further respectfully request this Court remand the matter for entry of judgment consistent with this decision.

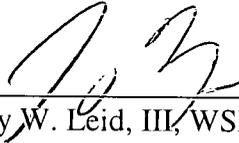
V. CONCLUSION

The Stenders respectfully request this Court reverse the trial court's ruling regarding the award of attorney fees, and reverse the trial court's abuses of discretion regarding the evidentiary rulings.

RESPECTFULLY SUBMITTED this 28 day of January, 2013.

COLE | WATHEN | LEID | HALL, P.C.

By: _____


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APPENDIX A

Relevant Portions of Deposition Testimony of Beatriz Hernandez

2/10/2010 Deposition of Beatriz Hernandez

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

BEATRIZ HERNANDEZ and ROSARIO)
CONTRERAS,)
)
Plaintiffs,)
)
vs.) No. 09-2-15257-3
)
HELEN STENDER and "JOHN DOE")
STENDER, wife and husband and their)
marital community,)
)
Defendants.)
)

DEPOSITION UPON ORAL EXAMINATION OF
BEATRIZ HERNANDEZ
Wednesday, February 10, 2010

2/10/2010 Deposition of Beatriz Hernandez

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Also Present:

Rosario Contreras

Spanish Interpreter:

Jose Luis Molnar

2/10/2010 Deposition of Beatriz Hernandez

1 damage on page 2 because you don't have your glasses to
2 help you see or it's not there to be seen?

3 A. Well, I have a very blurry image, and that's all I can
4 see.

5 Q. Turn to the last picture on Exhibit 3.

6 Are you able to see any of the damage in this
7 photograph?

8 A. Truth be told, I cannot see clearly. I have blurry
9 vision. I cannot see clearly, the image.

10 Q. Is that, again, because you don't have your glasses
11 with you today?

12 A. Yes. I went just a week ago to get glasses. I didn't
13 used to have need for glasses.

14 (Exhibit No. 4 marked for
15 identification.)

16 BY MR. LEID:

17 Q. Next I'm showing you, Ms. Hernandez, what I've marked
18 as Exhibit 4, which is a four-page document for an
19 estimate to repair your car.

20 MS. BRANNON: I'm going to object. This is not
21 her car.

22 MR. LEID: Wasn't her testimony it was?

23 MS. BRANNON: No. It's not her car. It belongs
24 to Sergio, and they are not married, and he took care
25 of that. She didn't. So I'm just going to object.

2/10/2010 Deposition of Beatriz Hernandez

1 THE WITNESS: Yeah. That's correct.

2 BY MR. LEID:

3 Q. This estimate states that the cost to repair was
4 \$861.91.

5 Did you ever receive any type of an estimate in
6 writing that the cost to repair was more than the
7 \$861.91?

8 A. Well, I don't know. No. I never took anything, any
9 part of the repair as my responsibility.

10 Q. Was there any period of time that you were unable to go
11 to church following the 2007 accident?

12 A. Yes.

13 Q. How long were you unable to go to church after the
14 accident?

15 A. Maybe about a month, 20 days. About that.

16 Q. Before the accident, who did the shopping, grocery
17 shopping, clothes shopping for your family?

18 A. I used to do that.

19 Q. Was there a period of time after the accident that you
20 were unable to do the shopping?

21 A. Yes.

22 Q. How long were you unable to shop?

23 A. Well, in fact, up to this moment, I have not been able
24 to do it.

25 Q. So from the time of the accident until now, you have

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

DEPUTY

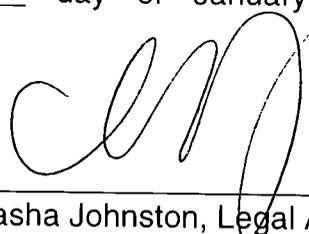
I hereby certify that on January __, 2013, ~~3~~ copies of Appellants' Opening Brief were served on counsel at the following address via U.S. Mail and email:

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

DATED this 28 day of January, 2013, at Seattle, Washington.



Natasha Johnston, Legal Assistant