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FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 FEB -4 PM 12:15

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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MAUREEN BLAIR, and  
KENNETH E. BLAIR, Appellants

v.

TA-SEATTLE EAST #176  
dba TRAVELCENTERS OF AMERICA, Respondents

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REPLY BRIEF OF APPELLANT

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**ORIGINAL**

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## I. SUMMARY OF ARGUMENTS IN REPLY

- 1) *Burnet* applies to the imposition of sanctions by a trial court. The striking of seven (7) witnesses by the August order was a sanction to which *Burnet* applies. The trial court failed to follow the requirements of *Burnet*; therefore, the trial court should be reversed and the case remanded for further proceedings.
- 2) *Burnet* applies to the imposition of sanctions by a trial court. *Burnet* requires a trial court to make certain findings and follow general guidelines in imposing sanctions. In October the court imposed the severe sanction of striking 2 witnesses that had been disclosed in discovery, records from whom had been obtained, TravelCenters had listed as them as possible primary witnesses, The Blairs had attempted to take their depositions, The Blairs had disclosed them in supplemental discovery disclosures, and The Blairs had listed them on the LR 16 Witness List. The trial court made no findings in issuing its order and did not follow the guidelines. Therefore, the trial court abused its discretion in imposing the October sanctions.
- 3) The rules require the disclosure of witnesses and the substance of any expert opinions to be expressed. Dr. Higgs, Dr. Colburn, Dr.

McManus and Keith Drury were disclosed in early discovery, their records were obtained, TravelCenters listed them as possible primary witnesses, in May and again in July counsel for The Blairs and TravelCenters discussed the calling of these witnesses, The Blairs sought to take their depositions and TravelCenters refused to cooperate, The Blairs supplemented discovery and disclosed them, The Blairs listed them on the LR 16 Witness List. Therefore, the witnesses were disclosed, the opinions were known, and striking the witnesses was error by the trial court.

- 4) Medical testimony must be to a reasonable medical probability. Dr. Colburn states that his opinion is “based on reasonable medical probability” that Mrs. Blair’s diagnosis was degenerative joint disease of the left hip “related to the 05/12/03 injury as an aggravation of a previously asymptomatic degenerative joint disease.” (CP 340, last paragraph.) Therefore, the trial court had a medical opinion based on the proper level of certainty before it, and should not have granted Summary Judgment in favor of TravelCenters.
- 5) ER 803(a) (4) provides for the admission of certain medical records, particularly those containing statements for purposes of diagnosis or

treatment. Dr. McManus was consulted for a second opinion; i.e. to diagnose Mrs. Blair's injury and recommend treatment. Although Dr. Colburn states his evaluation was for an independent medical exam, the capstone section of his records is the "diagnoses"; clearly the intent of the evaluation was to diagnose. Both records being for diagnosis and treatment purposes therefore fall under the rule and should be admissible.

- 6) ER 701 allows for lay witnesses to offer certain opinions based on personal knowledge. Appellant Maureen Blair is a witness who can testify, from personal knowledge, as to the facts of the fall, the pain and limitations she experiences pursuant to the fall, and the effects of those limitations on her and her life. Therefore, there is sufficient evidence to present a case to the jury.
- 7) Damages may include both economic and non-economic elements. Each element of the total damage claim must be based on competent evidence. The loss of one element of damages is not fatal to a case, it only reduces its value. Therefore, even if the records from Doctors Colburn and McManus are not admissible, and even if Dr. Higgs and Keith Drury could not testify, there is still a case to go to the jury;

admittedly, without the proof of those damages, the total damages able to be supported by competent evidence is diminished, but the case survives nonetheless.

## II. MATERIAL FACTS IN REPLY

- 1) Respondent received signed answers to their First Set of Interrogatories and Requests for Production on January 19, 2007. (CP at 2, lines 4 -6.)
- 2) Respondent sought and obtained Mrs. Blair's medical records before May, 2007. (CP at 2, line 6.)
- 3) On May 21, 2007, TravelCenters filed their list of Possible Primary Witnesses, which included: Dr. R.C. Colburn, Dr. Owen Higgs, Dr. J. Gerald McManus, and Keith Drury. (CP 227)
- 4) On June 14, 2007, the Blairs moved to continue the trial date (CP 109), a motion the trial court denied on July 13, 2007. (CP 15.)
- 5) On July 11, 2007, The Blairs filed their list of Possible Primary Witnesses, which included a reservation of "the right to call as witnesses at trial any primary or rebuttal witnesses, including expert

witnesses, disclosed by Defendant, or otherwise identified during the course of discovery” (CP 387-388.)

- 6) On August 3, 2007, TravelCenters filed a motion to strike Plaintiff's Disclosure of Possible Primary Witnesses. (CP 17.)
- 7) In early August, 2007, the Blairs begin asking to schedule depositions of medical providers. Respondent “declined to schedule them at [that] time.” (CP 321 at third paragraph.)
- 8) On August 14, 2007, the trial court signed TravelCenters' proposed order, adding the following: “Witness #11 on Plaintiff's Disclosure of Possible Primary Witnesses is stricken. **Of the remaining 14 witnesses** Plaintiff shall select 7 to be called as witnesses and notify defendant by August 17, 2007 which 7 are to be called. **The motion to strike 7 of the 14 witnesses is granted.** Plaintiff shall pay Defendant \$750.00 in terms.” (CP 217, emphasis added.)
- 9) On August 29, 2007, counsel for the Blairs write to TravelCenters, and again complain of TravelCenters' refusal to schedule depositions of Dr. Higgs and Dr. Colburn. (CP 317 at fourth paragraph.)
- 10) On September 13, 2007, The Blairs filed a Motion for Clarification of the August 14, 2007, Order. The Blairs specifically urged the

Court to adopt a proposed understanding, but sought the guidance of the trial court as it related to KCLR 16. In that Motion, The Blairs noted that the “witnesses sought to be called have been further identified in supplemental discovery disclosures.”<sup>1</sup> The Blairs then notified the trial court that, unless ordered otherwise, they would include those witnesses on the LR16 Joint Statement of Evidence. Concluding, “[s]uch identification, along with the identification and discussion of calling these witnesses which goes back to July, 2007, clearly removes any possible claim of surprise.” (CP 233.)

- 11) On September 21, 2007, the trial court signed the Respondent’s proposed order without modification. It stated, “Plaintiff’s Motion for Clarification is DENIED.” (CP 257.)
- 12) On October 2, 2007, The Blairs filed their witness and exhibit list pursuant to KCLR 16, and included those witnesses addressed in their September Motion for Clarification. (CP 267.)
- 13) On October 4, 2007, TravelCenters filed a Motion to Strike Additional Witnesses Named in Plaintiffs’ Witness and Exhibit List.

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<sup>1</sup> The exact contents of the “supplemental discovery disclosures” are not part of the record as they were not produced to the trial court. Therefore, it can only be noted that the supplemental discovery disclosures were made.

(CP 258.)

- 14) On October 15, 2007, the trial court signed the Order proposed by TravelCenters, and added: "Plaintiff has violated the Court's order by adding 2 additional witnesses that they were prohibited from adding due to untimely disclosure." (CP 277-78.)
- 15) On October 12, 2007, TravelCenters filed an untimely "Motion to Dismiss Case Because Plaintiff's Cannot Present Expert Medical Testimony to Prove Causation Or Damages." The motion was noted for hearing 10 days later on October 22, 2007, the same day trial was scheduled. (CP 280.)
- 16) The Blairs replied to the Motion for Summary Judgment pointing to the testimony of Plaintiff Maureen Blair and the medical records of Dr. Colburn and Dr. McManus as being sufficient to present a justiciable issue to the jury. (CP 291.)
- 17) On June 30, 2008, the trial court granted summary judgment in favor of TravelCenters. (CP 307-08.) This appeal followed.

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### III. ARGUMENT

1. **The striking of seven witnesses is a sanction imposed by the trial court and which violates the *Burnet v. Spokane Ambulance* rule.**

The Washington Supreme Court, in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), dealt with sanctions imposed for “compliance problems with a scheduling order.” (*Id.* at 491.) Among the teachings the Supreme Court gave in that case are: a reaffirmation that:

“it is an abuse of discretion to exclude testimony as a sanction [for noncompliance with a discovery order] absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.”

*Id.* at 494, quoting *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 706, 732 P.2d 974 (1987).

This teaching came on the heels of the Court instructing us what record the trial courts should make “so that meaningful review can be had on appeal.” We learn that before a trial court imposes harsh sanctions the trial court should make a record that it “explicitly considered” whether a lesser sanction would suffice, whether the trial court found the disobedience to be willful or deliberate, and whether the disobedience “substantially prejudiced” the opposing party in preparing for trial. (*Id.*)

The Supreme Court also re-enunciated some of the “guiding

principles” the trial court should follow in considering sanctions:

the court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not so minimal that it undermines the purpose of discovery; the purpose of sanctions generally are to deter, to punish, to compensate, to educate, and to ensure that the wrongdoer does not profit from the wrong.

*Id.*, at 495-6, quoting *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 8588 P.2d 1054 (1993).

It is through this lens that we must view the instant case. On August 14, 2007, the trial court signed the Order presented by TravelCenters, without comment and without findings. The trial court modified the proposed Order, adding, *inter alia*: “[t]he motion to strike 7 of the 14 witnesses is granted.”

Respondent attempts to characterize this order striking witnesses as a “second chance witness list.” (*Resp. Br.* at 7, 8, 19, 25, and 28.) While that phrase has a certain rhetorical flourish, it is, however, incorrect and misleading, and diametrically opposed to Respondent’s arguments below. (*See i.e.*: CP 448, “...the Court Order...specifically only permits you to select seven of ‘the remaining 13 [sic] witnesses’ identified ....” *See also*: CP 237, “plaintiffs were required to select seven witnesses from its untimely disclosure....”)

The striking of witnesses is, unquestionably, a severe sanction. The

trial court imposed this sanction without any of the findings required by *Burnet*, neither written or otherwise. We are left to guess and speculate as to the thoughts entertained by the trial court in reaching his decision. We are left without a record to allow a “meaningful review on appeal.”

However, we are also left with one inescapable conclusion: “it is an abuse of discretion to exclude testimony as a sanction [for noncompliance with a discovery order] absent” the necessary showings. *Burnet*, at 494.

Therefore, the trial court should be reversed.

**2. The trial court abused its discretion by striking 2 witnesses in the October 15, 2007, Order.**

Consistently the Blairs have maintained and given notice to TravelCenters of The Blairs’ intent to call witnesses listed by TravelCenters. (CP 97, 311, 315, 323, ) After including the reservation language in the August 17, 2007, witness list, counsel for the parties continued to argue about its applicability. The result of the dispute between counsel was The Blairs filing a Motion for Clarification, in which it was stated:

unless the Court orders that Plaintiffs are not allowed to call the witnesses, Plaintiffs intend to disclose them in the Joint Statement of Evidence and the Witness List which is due 21 days prior to trial. Such identification, along with the

identification and discussion of calling these witnesses which goes back to July, 2007, clearly removes any possible claim of surprise.”

(CP 233.)

The Blairs argued below, and reassert here, that King County Local Rule (KCLR) 16, the Official Comment to KCLR 16(b) and *Allied Financial Services, Inc. v. Mangum*, 72 Wn. App. 164, 864 P.2d 1, 871 P.2d 1075 (1994), when read in harmony stand for the proposition that a party may subpoena witnesses named by the other side and call them at trial.

The Official Comment to KCLR 16(b) states:

**A party wishing to present the testimony of a witness who has been listed by another party may not rely on the listing party to obtain the witness’s attendance at trial. Instead, a subpoena should be served on the witness, unless the party is willing to risk the witness’s failure to appear.**

KCLR 16(b) Official Comment.

This rule was addressed in *Mangum*, in which a trial court prohibited the Mangums from calling any witnesses at trial. The Mangums failed to file a witness list at any time prior to trial (including the KCLR 16 list), and then relied on KCLR 16 to be able to call witnesses identified by the opposing party. The Court affirmed the trial court.

In this case, The Blairs filed the KCLR 16 witness list (CP 267).

These witnesses had been the subject of a Motion for Clarification, discovery, supplemental discovery, and numerous letters. This case is essentially the inverse of *Mangum*.

In ruling on the Motion for Clarification, the trial court, again without comment or finding, signed the order proposed by Respondent, which stated: "Plaintiff's Motion for Clarification is DENIED." (CP 257.)

It is true, error has not been assigned to the denial of a motion for clarification. The error complained of is that, in light of the trial court's refusal to clarify a point of contention between the parties which is based, in part on the trial court's order and part upon the rules, it is an abuse of discretion to impose the sanctions imposed by the October 15, 2007 order.

After the Motion for Clarification was denied, The Blairs did exactly what they had notified the trial court and opposing counsel they would do if there was no order: they identified witnesses under KCLR 16 they intended to call at trial; witnesses who had been on TravelCenters KCLR 26 witness list (CP 84), who's reports TravelCenters had in their possession for months (CP 2, lines 5 -6), who The Blairs had attempted to depose but did not due to

the stonewalling of TravelCenters<sup>2</sup> (CP 315, 317 - 319, 321), and who had been disclosed in supplemental discovery disclosures (CP 233, lines 2 - 3).

The October 15, 2007, order must also be viewed through the lens provided in *Burnet*, with additional light from the Motion for Clarification.

In the October 15, 2007, order, the trial court set forth a reason for imposing \$500 in terms, as follows: "Plaintiff has violated the Court's order by adding 2 additional witnesses that they were prohibited from adding due to untimely disclosure."

First, the reasoning set forth applies, by its own language, to the imposition of terms, not to the sanction of striking witnesses. Even if it were to be read to apply to the striking of witnesses, it is insufficient under the *Burnet* rubric. There is no consideration of a lesser sanction, which will be discussed further below. Any suggestion of willfulness must be tempered with the Blairs seeking (and being denied) guidance from the trial court as to the applicability of KCLR 16 and *Mangum*. Though TravelCenters claim prejudice, such a claim must be viewed critically in light of TravelCenters'

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<sup>2</sup> TravelCenters incorrectly claim that the attempts to depose these witnesses came after August 17, 2007. (*Resp. Br.* at 27) But as made clear in letters between counsel, the attempts began in early August with calls from the Blairs' counsel which were met with the statement that TravelCenters counsel "declined to schedule them at this time." (CP 321.) It is true that the Blairs' counsel accepted partial responsibility due to failure to put the deposition requests in writing during the early weeks of August.

own refusal to cooperate in the setting of the relevant depositions during the time allowed for discovery; one should not be able to refuse the setting of a deposition and then be heard to claim prejudice for the lack of a deposition.

TravelCenters argue that the October 15, 2007, order does not fall under *Burnet* because “the trial court has already given plaintiff one chance to cure noncompliance with witness disclosure rules and orders ....” (*Resp. Br.*, at 19) which, once again, attempts to assert the false and misleading claim that the August order somehow created a “second chance witness list” rather than imposing the sanction it did.<sup>3</sup> The October order struck witnesses that were otherwise available under KCLR 16. This was an abuse of discretion, and would be manifestly unreasonable, especially in light of the

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<sup>3</sup> TravelCenters’ reliance on *Scott v. Grader*, 105 Wn. App. 136, 18 P.3d 1150 (2001), is also misplaced. In *Grader*, the trial court **allowed** the disclosure of an expert witness a **month after discovery cutoff**. The trial court further authorized the perpetuation of testimony with the sanction that the opposing party would pay for the costs of a discovery deposition, and if the expert did not comply with the discovery, then he would be stricken. The expert did not comply and he was stricken. The *Scott* court relies on several cases in which disclosure occurred **after** discovery cut-off and shortly before trial. In the instant case, the witnesses were disclosed in discovery, medical records obtained (CP 2), included on TravelCenters’ witness list (CP 84), identified by Blairs (CP 321), attempted to be deposed by Blairs (CP 321), disclosed in supplemental discovery prior to discovery cut-off (CP233), and **then** included on the Blairs’ LR16 witness list. The cases are distinguishable and turn on different points of law. It is worth noting, however, that *Scott* does have language which **supports** the concept of effective reservation of rights: “Grader reserved the right to request a CR 35 medical examination of Scott....” *Scott*, at 138. Neither the trial court nor the appellate court seemed to have any objection to reserving rights to call future witnesses in that case. Interestingly, TravelCenters’ own witness disclosure reserved the right to call “as witnesses at trial any primary or rebuttal witnesses, including expert witnesses, disclosed by Plaintiff, or otherwise identified during the course of discovery.” (CP 91 at paragraph No. 10.)

trial court's refusal to clarify.

3. **Dr. Colburn states that his opinions are “based on reasonable medical probability.” Dr. McManus delivers opinions that “represent [his] best professional judgment.”**

It is beyond dispute that medical testimony must be in terms of “reasonable medical probability.” (*See: Merriman v. Toothaker*, 9 Wn. App. 810, 515 P.2d 509 (1973), “The testimony must be sufficient to establish that the injury-producing situation “probably” or “more likely than not” caused the subsequent condition....”)

In opposing TravelCenters’ Motion for Summary Judgment, the Blairs provided the trial court with portions of the transcript from Plaintiff Maureen Blair, and records from Dr. Colburn and Dr. McManus. (CP 336 - 358.)

TravelCenters erroneously claim that Dr. Colburn does not establish the standard by which his opinions are rendered. (*Resp. Br.* 37.) However, a reading of Dr. Colburn’s reports dispels such a claim. In his March 1, 2006, report, Dr. Colburn states: “[t]he opinions expressed above are based on reasonable medical probability and upon my interview and examination of the examinee as well as review of the medical information made available to

me.” (CP 340.) It was to this standard that Dr. Colburn found “[t]he diagnoses is as before: Degenerative joint disease, left hip, related to the 5/12/03 injury as an aggravation of a previously asymptomatic degenerative joint disease.” (CP 339.) It was also to that reasonable medical probability that he determined the stress of protecting the left hip which was injured in the fall “may have had some effect on the development of the symptomatic degenerative joint disease in the right hip, I think this was a minor effect in causation.” (CP 340.)

The result is that Dr. Colburn’s opinions, as expressed in his records, is to the proper standard. Whether the trial court considered Dr. Colburn’s opinions in making a determination on summary judgment may never be known as the court made no findings of fact or conclusions of law, there is no record of what the court considered, just a signature on the order proposed by Respondent.

4. **The records of Dr. Colburn and Dr. McManus are records relating to the diagnosis or treatment of Maureen Blair, and as such, fall under ER 803(a)(4).**

ER 803(a)(4) states:

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

ER803(a)(4).

Contrary to TravelCenters' inaccurate suggestion, these records are from doctors charged with diagnosing, if not treating, Mrs. Blair's condition. Dr. McManus performed his evaluation as "an orthopedic second opinion examination of Maureen Blair performed at the Syringa Hospital in Grangeville, Idaho on December 14, 2004." (CP 346.) By its very nature, a second opinion evaluation is for diagnostic purposes.

Dr. Colburn's reports come from a slightly different footing. He states that he saw Maureen Blair "on 2/23/06 for an independent medical evaluation." (CP 338.) However, the mere fact that it is an independent medical evaluation does not remove it from being a medical record. In fact, Dr. Colburn not only diagnoses Mrs. Blair's injury (CP 339, 342) but also makes treatment recommendations which are followed (CP 339, 341) and

imposes restrictions on what activities she can or should engage in (CP 342).

The records are for diagnosis or treatment.

Respondent also proposes an incorrect standard for whether the opinions stated are admissible, suggesting the incorrect standard of whether that opinion was “necessary in order to diagnose or treat the hip condition.”  
(*Resp. Br.* 35.)

The rule states the standard “reasonably pertinent to diagnosis or treatment.” These opinions, and the statements from Mrs. Blair which are recorded in these reports, are statements of the general character of the cause which are “reasonably pertinent to diagnosis or treatment.”

TravelCenters argue that *Silves v. King*, 93 Wn. App. 873, 884, 970 P.2d 790 (1999), precludes the admission of the reports by Doctors Colburn and McManus. (*Resp. Br.* 34.) But *Silves* does not stand for the proposition that the records from a doctor hired by a third party are inadmissible. Rather, in *Silves* the issue before the court was the non-diagnostic, non-treatment use of medical records compiled by his employer, it was properly excluded. Unlike the instant case, in *Silves* the plant physician testified that he did not diagnose nor treat Mr. Silves; it was only an evaluation for return to work. The *Silves* court held:

Thus, statements to the plant physician recorded in Exhibit 10 were not made for purposes of medical diagnosis or treatment, and the exhibit was therefore not admissible under the medical records exception. There was no abuse of discretion in refusing it.

*Silves*, at 884.

The evaluation by a plant physician to determine whether an employee can come back to work is vastly different than an orthopedic second evaluation and an independent medical exam for diagnosis and treatment recommendations. The reliance of Respondent on this case is misplaced.

The records from Dr. Colburn and Dr. McManus should have been considered by the trial court and create a question of fact sufficient that summary judgment should not have been granted.

5. **Lay witnesses may offer opinion or fact testimony. Maureen Blair's deposition testimony was sufficient to raise an issue of fact as to causation and damages.**

In response to Respondent's Motion for Summary Judgment, the Blairs provided the trial court with portions of Mrs. Blair's deposition as well as the medical records discussed above. Mrs. Blair's testimony which was

before the trial court included this exchange:

Q. And do you think that any of the situation that you have that required you to get a hip replacement was due to the fact that you're in your late 50's and you've got some Degenerative arthritis?

A. No.

Q. Why not?

A. Because it didn't bother me before I had this accident. I got along just fine. Got in and out of my rig just fine. Didn't have any problems. I didn't have any problems with my hips or nothing else until I took this spill.

(CP 336-37.)

Though this section of proffered testimony is not extensive, it addresses the issues confronted by the Motion for Summary Judgment: causation and damages. Causation is shown by her hip not bothering her prior to the accident, and being problematic after (having a hip replacement and the implied comparison to getting along just fine before (not after), getting in and out of her rig just fine before (not after), no problems before (problems after)).

Mrs. Blair is competent to offer the opinions in the above quote. According to ER 701, lay witnesses may offer opinion testimony when based

on personal knowledge.<sup>4</sup> While this does not allow Mrs. Blair to opine that the hip replacement was necessitated by the fall, she could testify to the condition of her health before the fall (a snapshot of which is presented above) as compared to the condition after, she could testify that she had a hip replacement, and the problems the fall has caused her.

Mrs. Blair's testimony, either standing alone or with the support of the medical records which are discussed above, establishes an issue of fact as to causation and damages which was sufficient to overcome summary judgment, and the trial court erred in granting summary judgment. If the medical records are incompetent, then the measure of damages is limited, but there are still damages. Washington Pattern Instructions set out various elements of economic and non-economic damages including: the reasonable value of

- necessary medical care, treatment and services received to the present time (WPI 30.07.01)
- earnings, earning capacity, employment, salaries, business

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<sup>4</sup> ER 701 states: If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

opportunities, or earning opportunities lost to the present time

(WPI 30.08.01)

- substitute domestic services or nonmedical expenses (WPI 30.09.01)
- several others listed in WPI 30.10 - .16
- the nature and extent of the injuries (WPI 30.04)
- disability, disfigurement and loss of enjoyment of life experienced and with reasonable probability to be experienced in the future (WPI 30.05)
- pain and suffering, both mental and physical experienced with reasonable probability to be experienced in the future (WPI 30.06).<sup>5</sup>

There is no authority to suggest that the loss of one of these causes the loss of all of these, it would be an absurd argument. Yet, that is what TravelCenters argue by suggesting that without the testimony of the doctors and/or medical records The Blairs cannot prove damages. The argument is a canard and is unsupported by authority.

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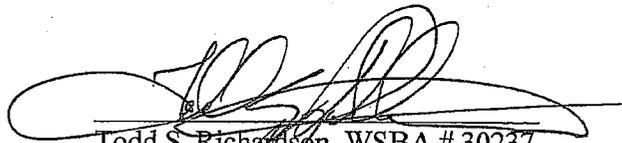
<sup>5</sup> The listing of the various elements of economic and non-economic damages is not intended to suggest that The Blairs have or would assert damages in each of those categories; rather they are listed to demonstrate that the loss of one element is not fatal to the other elements.

The trial court erred in granting the summary judgment, and should be reversed.

#### IV. CONCLUSION

For each of the foregoing reasons, the trial court's rulings should be reversed.

Respectfully submitted this 4<sup>th</sup> day of February, 2009.

A handwritten signature in black ink, appearing to read 'Todd S. Richardson', is written over a horizontal line.

Todd S. Richardson, WSBA # 30237  
Attorney for Plaintiffs

CERTIFICATE OF DELIVERY

I hereby certify under penalty of perjury under the laws of the State of Washington, that on the 4<sup>th</sup> day of February, 2009, I caused a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT to be delivered via U.S. Mail, postage prepaid, to the following counsel of record:

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Dated this 4<sup>th</sup> day of February, 2009.

  
\_\_\_\_\_  
Debra S. Harris

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STATE OF WASHINGTON  
2009 FEB -4 PM 12:25

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

Court of Appeals No. 62033-9-1

MAUREEN BLAIR, et vir.,

Plaintiffs

vs

AFFIDAVIT PURSUANT TO  
GR 17(a) (2)

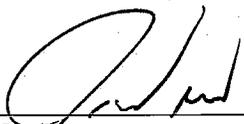
TA-SEATTLE EAST #176 dba  
TRAVELCENTERS OF AMERICA, et al.,  
Defendants

J. Wuollet declares and states:

1. I am employed with Seattle Legal and submit this declaration pursuant to GR 17 (a) (2) as recipient of **Reply Brief of Appellant** received for filing with the Court in this matter.

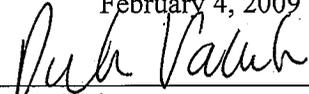
2. I have examined the document. The **Reply Brief of Appellant** consists of Twentynine (29) page(s), including the signature page, and this Declaration page. It is completed and legible.

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

  
\_\_\_\_\_  
J. Wuollet

SIGNED OR ATTESTED BEFORE ME

February 4, 2009

  
\_\_\_\_\_  
Peter A. Valente

Notary Public in and for the State of  
Washington, County of King  
My appointment expires June 7, 2012

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STATE OF WASHINGTON  
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