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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ON APPEAL FROM
KING COUNTY SUPERIOR COURT NO. 08-2-35088-6

STACEY COOPER,

Appellant,

v.

PATRICIA STEDMAN,

Respondent.

BRIEF OF RESPONDENT

Angela Wong, WSBA #28111
WONG BAUMAN LAW FIRM, PLLC
1900 W. Nickerson St., Suite 209
Telephone: 206-285-4130
Facsimile: 877-310-3020
Attorney for Respondent

ORIGINAL

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I. INTRODUCTION

Respondent Patricia Stedman (“Stedman”) respectfully requests that the Court of Appeals affirm the Superior Court’s orders excluding Dr. Allan Tencer, Ph.D., the Court’s entry of judgment on the jury verdict and awarding statutory costs pursuant to RCW 4.84.010, and entry of the amended judgment awarding attorney fees and costs under MAR 7.3 and RCW 7.60.060 against Appellant Stacey Cooper (“Cooper”).

II. RESPONSE TO ASSIGNMENTS OF ERROR

Cooper has not identified errors that would justify reversing the trial court:

1. Cooper’s Notice of Appeal of the Jan. 25, 2011 judgment was filed on Mar. 17, 2011 and is therefore untimely. (CP 701-709)
2. The Superior Court Judge acted within her discretion to exclude the testimony of Dr. Allan Tencer. (CP 290-292)
3. Even if the Superior Court erred in excluding Dr. Tencer, the error was harmless. (CP 483-484)
4. While Cooper now argues that Stedman opened the door to Dr. Tencer’s testimony, she failed to raise this issue at trial and therefore has waived this issue on appeal. (CP 290-292)
5. The Superior Court correctly entered judgment on the jury verdict and correctly awarded statutory costs to Stedman for

prevailing at arbitration and at trial. (CP 559-561)

6. The Superior Court correctly held that Cooper failed to improve her position on the trial de novo and entered an amended judgment awarding attorney fees and costs. (CP 693-696)
7. Cooper failed argue that *Niccum v. Enquist*, 152 Wn.App. 496 (2009), *review granted*, 168 Wn.2d 1022 (2010), was wrongly decided and failed to object to the segregation of damages in Stedman's offer of compromise before the trial court, and therefore is precluded from raising this issue on appeal.
8. Cooper may not complain on appeal that the trial court erred in following the rule in *Niccum v. Enquist, supra*, since Cooper invited the Court to commit that error.

III. STATEMENT OF THE CASE

A. Facts of the accident

This case arises out of an automobile collision that occurred on January 12, 2006 in Seattle, Washington. CP 4-6. Stedman was driving a 1990 Ford Aerostar westbound on N. 90th St. toward Cooper, who was parked alongside the curb on Stedman's right facing eastbound. CP 5.

As Cooper pulled out of her parking space, she struck Stedman's vehicle as Stedman drove by. 4 RP 388. The impact between the Cooper

vehicle and the Stedman vehicle “was initially bumper to bumper.” 4 RP 399. Cooper’s passenger-side, front corner bumper impacted the passenger-side, front corner bumper of Stedman’s vehicle, cracking and dislodging Stedman’s bumper. Id.; Ex. 16-18. Stedman’s vehicle continued to move forward after the initial impact (4 RP 395-396), and Cooper’s right front corner struck Stedman’s front passenger-side wheel, dislodging the hubcap (Ex. 16; 1 RP 26-27), and continued down left front quarter panel and passenger door. Id. Cooper estimated that Stedman was traveling “definitely over 20 miles an hour” at impact. 4 RP 399.

On October 13, 2008, Stedman filed suit against Cooper for the injuries she sustained in the accident and for property damage. CP 4-7. Cooper denied liability for the collision and Stedman’s damages. CP 8-10.

B. The CR 35 Examiners’ report

On June 25, 2010 and pursuant to CR 35, Cooper had Stedman evaluated by two medical examiners, Dr. Daniel Brzusek, D.O. (medical), and Dr. Thomas Renninger, D.C. (chiropractic). The joint CR 35 exam report, signed by both doctors under penalty of perjury, stated that Stedman sustained a list of injuries as a result of the motor vehicle accident “based on a reasonable degree of medical certainty” (CP 390):

- 1) Minor cervical strain as a result of motor vehicle accident on January 12, 2006;

- 2) Right shoulder sprain and strain as a result of motor vehicle accident on January 12, 2006;
- 3) Mild lumbosacral and sacral coccygeal sprain and strain as a result of motor vehicle accident on January 12, 2006;
- 4) Right knee contusion as a result of MVA injury of January 12, 2006;
- 5) Right hip abrasion as a result of injuries sustained in motor vehicle accident on January 12, 2006.
- 6) Massive obesity complicating recovery from her injuries;
- 7) Significant de-conditioning complicating recovery from injuries. CP 384-385.

While acknowledging that this was “a rather minor accident,” (CP 385)

Dr. Brzusek opined that certain portions of Stedman’s medical treatment were reasonable, necessary, and related to the motor vehicle accident:

The MRI scan done at CDI of her lumbar spine is related to evaluation of the injuries she sustained in the Jan. 12, 2006 accident. It showed no fractures or evidence of herniations, etc. The evaluation done at Ballard Orthopedic & Fracture Clinic on 4/12/06 does appear to be related to the injuries she sustained in the Jan. 12, 2006 accident. The treatment provided at the Kruger Clinic Orthopedics on 1/26/06 through 4/30/06 by Thomas Degan, M.D., appears to be for the injuries she sustained in the accident. The physical therapy treatment in 2006 at Northwest Hospital, however, is related to the injuries she sustained in the Jan. 12, 2006 accident. She went to therapy for an extended period of time, March-Nov 2006; but it would appear the treatment she received was reasonable, necessary and related to the injuries sustained in the Jan. 12, 2006 accident. The treatment given by Marco Wen, M.D., ... was related to evaluation and treatment of the injuries she sustained in the Jan. 12, 2006 accident. CT scan done at Seattle Radiology on 8/25/06 is related to evaluation of the injuries the patient sustained in the Jan. 12, 2006 accident. CP 387-388.

Dr. Brzusek deferred to Dr. Renninger regarding the reasonableness and necessity of Stedman’s chiropractic care (CP 388), who stated:

From a chiropractic perspective, Ms. Stedman's condition became fixed and stable by mid March 2006. I am not certain Ms. Stedman sustained any injury that required chiropractic care. Assuming that Ms. Stedman sustained a spinal straining injury, then, in my opinion, her condition became fixed and stable by mid March 2006. CP 387.

C. Mandatory Arbitration

On Aug. 24, 2010, the parties underwent Mandatory Arbitration. The arbitrator found in favor of Stedman and awarded her \$16,300.00 in special damages and \$7,000 in general damages against Cooper. CP 585. Cooper requested a trial de novo from the arbitration award. CP 624.

On December 3, 2010, Stedman served an offer of compromise pursuant to RCW 7.06.050 on Cooper. The offer of compromise stated:

“Pursuant to RCW 7.06.050 and MAR 7.3, plaintiff Patricia Stedman does hereby offer to compromise her claim in the amount of \$23,299.99. Such compromise is intended to replace the arbitrator's award against defendant Stacey Cooper with an award of \$23,299.99, inclusive of costs, statutory attorney fees, and attorney fees and sanctions. This offer is open for ten calendar days after receipt of service.” CP 587.

D. Motion to Exclude Dr. Tencer

On September 24, 2010, Stedman filed a motion to exclude the testimony of Cooper's biomechanical expert, Alan Tencer, Ph.D. CP 11-22. Dr. Tencer had rendered a report on August 12, 2010, opining about the low level of “G forces” involved in the accident after reviewing Stedman and her passenger's depositions, property damage photos, and

property damage estimates. CP 25-30; 12/28/10 RP 2-3. Dr. Tencer did not review Stedman's medical records or Cooper's deposition, wherein she testified that Stedman was traveling at an excessive speed at the time of the accident, "at least 20, 25 miles an hour, if not more." Id.; CP 302.

In her motion to exclude, Stedman argued that Dr. Tencer's opinion, that the amount of "G force" involved in the accident was low and found to be generally tolerable among his human volunteers in tests "related to the development of improved head restraints for whiplash protection," (CP 27) was irrelevant under the facts of this case, because Cooper's own medical examiners opined that Stedman sustained some injury in this "rather minor accident." CP 11-22.

In opposition to the motion, Cooper offered the Declaration of Dr. Tencer, who attested that the opinions in his report regarding Stedman were based upon "fundamental engineering principles," and that he considered "the position of **Ms. Hargrave**, and restraint system use, along with her age, weight, and height, to compute the forces acting on Plaintiff's body during the impact." CP 165 (emphasis added).

In her reply, Stedman questioned the reliability of Dr. Tencer's opinions, since "Ms. Hargrave" was not the plaintiff in this action and because Dr. Tencer did not review any documents that would have

indicated Stedman's height, weight and deconditioning, factors that were medically significant to the defense doctors. CP 239-246; CP 264-289.

On October 5, 2010, the Superior Court found that while Dr. Tencer's opinions were "valid science under the Frye test," his testimony was irrelevant to the issue the jury must decide (i.e. the degree to which the Stedman was injured in this particular accident) and cumulative of other witnesses' descriptions and opinions about the accident. CP 290-291. The Court entered an order excluding Dr. Tencer from testifying at trial "except on rebuttal, if [the] 'door is opened.'" Id.

On October 10, 2010, Cooper moved for reconsideration on the Court's order. CP 293-299. The Court requested and the plaintiff filed a response. CP 421-429. Cooper replied (CP 433-438) and on December 7, 2010, the Court denied Cooper's motion for reconsideration. CP 469-471.

E. Stedman's Motion for Partial Summary Judgment

On November 5, 2010, while Cooper's motion for reconsideration on the exclusion of Dr. Tencer was pending, Stedman moved for partial summary judgment on liability, causation, and certain medical expenses based upon the CR 35 examiners' report. CP 300-317. Despite the defense examiners' unequivocal attestations in the CR 35 report that Stedman sustained some injuries as a result of this accident (CP 384-385),

Cooper submitted Dr. Renninger's declaration in opposition to Stedman's motion, wherein he stated that Stedman's examination findings after the accident could have been caused by her pre-existing obesity:

"the examination findings noted in the medical records can be explained by pre-existing conditions unrelated to the collision. Specifically, [Stedman is] significantly obese. . . Ms. Stedman is 5 feet 3 inches tall and weighs 318 pounds. Obesity of this magnitude can cause a number of health complications. The excess weight that [Stedman carries] puts a tremendous strain on [her body]. I would expect that a person as obese as Ms. Stedman would suffer from musculoskeletal pain, regardless of whether they had been involved in a motor vehicle collision. Thus, the objective findings reported in the records do not necessarily indicate that either woman was injured." CP 332.

Dr. Renninger further stated that, "In order to believe that Ms. Stedman . . [was] injured in the accident, I would have to believe the credibility of [her] reports of increased pain following the accident." Id. Stedman replied that Dr. Renninger's opinions regarding a possible alternative cause of Stedman's symptoms and examination findings were based on pure speculation and therefore inadmissible. CP 444-450.

On December 3, 2010, in light of Dr. Renninger's declaration that Stedman's objective findings could be related to her obesity, the Court granted Stedman's motion in part on liability, but denied Stedman's motion on causation and damages, finding that "a genuine issue of

material fact existed as to whether any injuries were caused or medical treatment was necessary as a result of the accident.” CP 466-467.

F. Offer of Proof – Dr. Tencer

On December 28, 2010, Cooper presented an offer of proof of Dr. Tencer’s testimony. 12/28/10 RP 1-14. Dr. Tencer testified that he reviewed photographs of the vehicles, property damage estimates, and plaintiffs’ depositions and determined that the G forces in this accident were low. Id. Dr. Tencer testified that this was a side impact accident wherein Stedman’s body should have moved in the direction from which the impact came, and in this case, toward the passenger’s front. 12/28/10 RP 12. He testified that the force on Stedman’s body in this accident was “generally within the normal range of motion,” (12/28/10 RP 13) and compared it to the G force generated by soccer players:

“Well, in daily activities, uhm, you know, G Forces of 3 to 5 G are fairly common. We’ve actually measured that in a separate study; we’re doing a study on injuries in soccer players. And when they undergo various activities, even walking and running, they generate 3 G. So, you know, it’s certainly within the realm of daily forces that you would experience.” 12/28/10 RP 8.

Dr. Tencer made no mention of reviewing Stedman’s medical records, the CR 35 report, or Cooper’s deposition, and did not consider Stedman’s height and weight in his calculations.

On cross examination, Dr. Tencer admitted that he was not opining about whether Stedman was or was not injured in the accident:

- Q Doctor, you're not here rendering a medical opinion today?
A. No. All the opinions have been related to the biomechanics.
Q. And you're not rendering an opinion that the - - these particular Plaintiffs¹ were or were not injured as a result of this accident?
A. No, I'm talking about the severity of the accident, the forces involved and the kinematics. 12/28/10 RP 13.

At no time did Cooper presented any evidence from any of the medical experts, including her own CR 35 examiners, that Dr. Tencer's opinions would be relevant to their evaluation of Stedman, assist them in rendering their medical opinions, or affect their medical opinions in any way.

G. Trial

1. Patricia Stedman

On January 3, 2011, this case proceeded to trial. Stedman testified that the initial impact with her bumper caused her to be jolted forward to her right and the subsequent impact with her front tire caused the steering wheel to jerk to the left:

“When she hit I was going to the side – forward to the side into it. And the seatbelt pulled me back, it jerked and pulled me back into the seat hard. And then I was still holding onto the steering wheel. And the steering wheel – as she was going over my wheel with the force of her car, the steering wheel jerked me over into the driver's side window door.” 1 RP 55.

¹ This case involved two plaintiffs, Stedman and her passenger, Debra Braxton. Braxton's claims were resolved after the offer of proof but prior to trial.

2. David Spanier, MD

Plaintiff's medical expert, Dr. David Spanier, MD, testified that the mechanism of Stedman's injury was a jarring impact from the side. 2 RP 91. Dr. Spanier testified that Stedman sustained hyperextension and hyperflexion injuries to the joints in her neck, mid and low back, and injury to her sacroiliac joint. 2 RP 88. In general, Dr. Spanier agreed with Dr. Brzusek's diagnoses of Stedman, although he did not agree that Stedman's injuries were "minor," as noted in the CR 35 report. 2 RP 122. Dr. Spanier did not do any force calculations (2 RP 160), but testified that the speed of a vehicle is not indicative of degree of injury:

"No. No. I think both Ms. Stedman and the other driver gave different reports as to the velocities their vehicles were traveling. Clearly Ms. Stedman's car was moving and the other car was – had to have come out of its parking space. I can't imagine that car was going 25 miles an hour. It just – it would be pretty impossible.

The other thing I would say to that is, you know, people always look at, well, how fast were the cars going. In truth I don't really care so much what a patient tells me as far as how fast the vehicle was going. I've seen people with terrible pain and injury after what would appear to be a very minor fender bender in a grocery store parking lot. I can recall several patients who were backing up and were looking behind them and they bumped into one of these fixed cement poles that sort of protects a light pole or something like that, and just this little jarring action gave them severe neck pain and whiplash symptoms." 2 RP 212-213.

3. Daniel Brzusek, DO

Cooper's medical expert, Dr. Brzusek, testified that he reviewed

the medical records, damage estimates, property damage photos and determined that Stedman had sustained a fairly minor injury. 3 RP 287. Dr. Brzusek testified that Stedman sustained a lumbosacral sprain and strain, a minor cervical strain, minor right shoulder sprain, right knee contusion and right hip abrasion as a result of the motor vehicle accident. 3 RP 299-302, 315. He further testified that Stedman's deconditioning made her more susceptible to injury:

"You know, patient's not expecting a blow, comes in from the right side, maybe a little bit of – you know, not in good shape. She's not a Seahawk player, she's not a woman's volleyball champion, I mean. So she's going to get probably a minor injury." 3 RP 302.

Dr. Brzusek testified that some of Stedman's medical treatment was related to the accident:

"However, I did feel the MRI scan done in relation to the one that we reviewed was related to the accident. The doctor ordered it. It was related. The evaluation done at Valley Orthopedic & Fracture Clinic, the shoulder evaluation, neck evaluation, whatever you want to say, the doctor sent her there for a second opinion. Great, it was related. . .Thomas Degan, orthopedic surgeon, saw her; related to the accident. . .Physical therapy, however, was related. That would have been at Northwest Hospital. It was a bit prolonged. I probably wouldn't have ordered it for that long a period of time. Patient has no control over that. The doctors are ordering it. Related. . .Treatment provided by Dr. Marco Wen, the physiatrist, was a good attempt at trying to diagnose the patient and treat her. Related." 3 RP 303-304.

....
"CT scan done at (Inaudible) Radiology done in August. That was done. I think it's related." 3 RP 305.

Dr. Brzusek also testified that Stedman's injuries became stable on or about October 27, 2006, 10 months post-accident, and that her excessive weight problem played a role in her recovery. 3 RP 316-317. Dr. Brzusek deferred to Dr. Renninger on Stedman's chiropractic care. 3 RP 300.

4. Thomas Renninger, DC

Cooper's chiropractic expert, Dr. Renninger, testified that he diagnosed Stedman with minor cervical strain, right shoulder strain, mild lumbosacral and sacrococcygeal sprain and strain, right knee contusion, and right hip abrasion as a result of the car accident. 4 RP 377-380. Dr. Renninger testified that this was not a serious accident and that Stedman sustained a soft-tissue injury. 4 RP 367. He also outlined how much chiropractic care he thought was reasonable:

"I think a reasonable amount of chiropractic care would be two months of care at 20 visits. . . I mean I – so I feel very comfortable that 20 visits over an eight week time frame is a reasonable amount of care given her – my understanding of her strain/sprain type injuries." 4 RP 367.

Further, he testified that Stedman's weight complicated her condition. Id.

5. Stacey Cooper

Stacey Cooper testified that the impact was "minor," "low impact," and "seemed like a very small grazing of the cars." 4 RP 392. She said that Stedman appeared to be going "20, 25 miles an hour, if not more" and

that the initial impact was “bumper to bumper.” 4 RP 399. Cooper’s vehicle scraped along the side of Stedman’s van, as Stedman’s van continued to move forward after the initial impact. 4 RP 402.

6. Jury Instructions

The Court instructed the jury on WPI 30.18 (Previous Infirm Condition) and WPI 30.18.01 (Particular Susceptibility). CP 499-500.

7. Closing Argument and Verdict

Stedman asked the jury to award \$57,494.94: general damages of \$20,000.00; medical expenses of \$35,494.94; and property damage of \$2,000.00. 4 RP 503, 506-508. Cooper asked the jury to award a small amount for general damages and, if the jury believed Stedman was accurately reporting her symptoms, one month of chiropractic treatment as addressed by Dr. Renninger totaling \$1,318 (4 RP 524) and the medical expenses that Dr. Brzusek found to be appropriate totaling \$17,889 (4 RP 525). On Jan. 6, 2011, the jury rendered a verdict in favor of Ms. Stedman for \$22,000 in total damages. CP 483-484.

H. Judgment, Statutory Costs, and Amended Judgment for Attorney Fees under MAR 7.3

On January 14, 2011, Stedman moved for entry of judgment on the verdict and sought statutory costs of \$1,469.83, which included costs for medical records admitted into evidence at arbitration. CP 510-517.

Cooper objected, arguing that Stedman was prohibited from recovering her costs associated with the arbitration, and asked the Court to award only \$902.94 in costs. CP 527-533. Stedman replied (CP 540-544) and on January 25, 2011, the Court entered a Judgment in favor of Stedman for the principal amount of \$22,000 plus statutory costs of \$1,469.83, for a total judgment amount of \$23,469.83. CP 559-560.

On February 3, 2011, Stedman moved for an Amended Judgment and for attorney fees and costs pursuant to MAR 7.3, arguing that Cooper failed to beat Stedman's offer of compromise in the amount of \$23,299.99, "inclusive of costs, statutory attorney fees, and attorney fees and sanctions." CP 562-574. On the same day Stedman moved for the Amended Judgment, Ms. Cooper moved the Court to "vacate its Judgment and Order Regarding Patricia Stedman, which was entered January 25, 2011, arguing that the court erroneously award [sic] costs that are not permissible under RCW 4.84.010.² CP 601-608. Cooper argued that, since this was a trial de novo, RCW 4.84.010(5) did not permit the award of costs for medical records admitted into evidence at mandatory arbitration. Id. Plaintiff opposed. CP 609-610. On February 14, 2011, the

²Although Cooper titled her motion as "Defendant's Motion for Reconsideration," the relief requested was actually a request to vacate the judgment, and the Court entered an order denying Cooper's motion to vacate the judgment.

Court signed an Order stating that Cooper's "Motion to Vacate is DENIED." CP 689-692. The Order was filed on Feb. 17, 2011. Id.

On February 9, 2011, Cooper opposed Stedman's motion for an Amended Judgment, arguing that the Court erroneously awarded Stedman costs prohibited under RCW 4.84.010 and asked the Court to construe RCW 4.84.010 as allowing only costs for evidence admitted at trial. CP 623-626; CP 601-607 (by incorporation). Out of the \$1,469.83 in costs claimed by Stedman, Cooper asked the Court to award only costs for medical records admitted into evidence at trial and stated:

Because the Plaintiff's Offer of Compromise was inclusive of costs and statutory fees, Plaintiff would be entitled to an attorney fee award only of her costs exceeded \$1,299.99. Plaintiff has claimed \$1,469.83 in costs. If the court awards these costs to her, the judgment amount will exceed the Offer of Compromise by a mere \$169.84. CP 625 (emphasis added)

On February 17, 2011, the Court found that Cooper failed to improve her position on the trial de novo and entered an Amended Judgment awarding attorney fees and costs of under MAR 7.3. CP 693-695.

I. Cooper's Notice of Appeal of the Original Judgment and the Amended Judgment

On March 17, 2011, Cooper filed a Notice of Appeal of the Jan. 25, 2011 Judgment and of the Feb. 17, 2011 Amended Judgment, and "each and every adverse ruling and determination made." CP 701-709.

IV. ARGUMENT

A. Cooper's Appeal of the Jan. 25, 2011 Judgment is untimely.

Under RAP 2.2(a)(1) and 5.2(a), a party has 30 days after entry of a final judgment to file a notice of appeal of the judgment, regardless of whether the judgment reserves for future determination an award of attorney fees or costs. *Carrara, LLC, v. Ron & E. Enterprises, Inc.*, 137 Wn. App. 822, 155 P.3d 161 (2007). RAP 2.4(b) provides for an appeal of a later decision on attorney fees but does not provide a means for reviewing any prior decision; i.e., a notice of appeal of a decision on attorney fees does not bring up for review a prior judgment on the merits:

RAP 2.2(a)(1) allows a party to appeal a final judgment of any proceedings, regardless of whether the judgment reserves for future determination an award of attorney fees or costs. This notice must be filed within 30 days after the entry of the decision of the trial court. RAP 5.2(a). RAP 2.4(b) allows a timely appeal of a trial court's attorneys' fees decision but makes clear that such an appeal does not allow a decision entered before the award of attorney fees to be reviewed (i.e., it does not bring up for review the judgment on the merits) unless timely notice of appeal was filed on *that* decision. RAP 2.4(b); 2A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE RAP 2.4 at 183 (6th ed. 2004). This clause, when adopted in 2002, was a change in the law and effectively overruled *Franz v. Lance*, 119 Wn.2d 780, 836 P.2d 832 (1992) (which allowed an appeal of sanctions to bring up an appeal from the underlying judgment). *See* 2A TEGLAND, *supra*, at 183 (citing Drafters' Cmt., 2002 Amend.). "The practical lesson is clear--counsel should appeal from the judgment on the merits, even if the issue of attorney fees is still pending."

Carrara, 137 Wn.App. at 826 (citing 2A TEGLAND, *supra*, at 181).

RAP 5.2(e) permits the notice of appeal of a judgment to be filed within 30 days of an order deciding certain timely motions. These motions are expressly limited to motions for arrest of judgment under CrR 7.4, for new trial under CrR 7.6, for judgment as a matter of law under CR 50(b), to amend findings under CR 52(b), for reconsideration or new trial under CR 59, and for amendment of judgment under CR 59. RAP 5.2(e).

The facts in this case are similar to *Carrara, supra*. The trial court entered the original judgment on the merits on January 25, 2011 and then entered an Amended Judgment awarding MAR 7.3 attorney fees and costs on February 17, 2011. On February 3, 2011, Cooper filed a Motion entitled “Motion for Reconsideration Re Judgment.” While the form of the pleading was entitled “Motion for Reconsideration,” the substance of the motion and the specific relief requested was for the trial court to vacate its January 25, 2011 Judgment. On February 14, 2011, and the trial court construed Cooper’s motion, not as a motion for reconsideration, but as a motion to vacate the judgment, and entered an order stating that the “Motion to Vacate is DENIED.” The Court used Cooper’s own proposed order form entitled “Order Vacating Judgment.” The Order denying motion to vacate was filed on February 17, 2011.

If the Order denying the motion to vacate is deemed entered on

February 14, 2011, the day the court signed the order (as opposed to filing on February 17, 2011), Cooper's March 17, 2011 appeal of the January 25, 2011 is untimely, even if Cooper's motion falls under one of the enumerated motions in RAP 5.2(e). However, since a motion to vacate judgment and an order denying a motion to vacate judgment are not one of the motions and orders enumerated under RAP 5.2(e) to extend the 30 day deadline for appeal, Cooper's March 17, 2011 appeal of the Jan. 25, 2011 original judgment is untimely. Therefore, Cooper's appeal of the trial court's exclusion of Dr. Allan Tencer, Ph.D., the granting of statutory costs, and the entry of the original judgment is also untimely.

B. The Superior Court Judge acted within her discretion in excluding the testimony of Dr. Allan Tencer, Ph.D.

Assuming the Court's order denying Cooper's motion to vacate is an order denying reconsideration, the court did not err in excluding Dr. Tencer. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701 (1997). The court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *Id.* Thus, even where an appellate court disagrees with a trial court, it may not substitute its judgment for that of the trial court unless the basis for the trial court's ruling is untenable. *State v. Tobin*, 161 Wn.2d 517, 523 (2007); *See*

Moore v. Hagge, 158 Wn. App. 137, 155 (2010) (“The trial court has wide discretion in ruling on the admissibility of expert testimony. This court will not disturb the trial court’s ruling ‘[i]f the reasons for admitting or excluding the opinion evidence are both fairly debatable.’”).

The Supreme Court recently discussed the admission of expert testimony in *Anderson v. Akzo Nobel Coatings, Inc.*, 82264-6 (WA Sup. Ct. Sept. 8, 2011):

[T]he trial court, in its gate keeping role, must decide if evidence is admissible...Evidence must be probative, relevant, and meet the appropriate standard of probability...Expert testimony, in addition, must be helpful. Evidentiary rules provide significant protection against unreliable, untested, or junk science...The *Frye*³ test is an additional tool used by judges when proffered evidence is based upon novel theories and novel techniques or methods...In our courts, scientific evidence must satisfy the *Frye* requirement that the theory and technique or methodology relied upon are generally accepted in the relevant scientific community...Having satisfied *Frye*, the evidence must still meet the other significant standards of admissibility. For example, persons performing experiments and interpreting results must be qualified. ER 702 and ER 703 mandate the evidence must be relevant and helpful. *Azko*, at 12-13.

Once scientific evidence has been deemed admissible under *Frye*, the trial court must analyze whether that testimony is proper expert testimony under ER 702 and ER 703. *Reese v. Stroh*, 128 Wn.2d 300, 306 (1995). A trial court's decision to admit scientific testimony under the

³ See *Frye v. United States*, 54 U.S.App.D.C. 46, 47, 293 F. 1013, 1014 (1923).

Frye standard is reviewed de novo, while a trial court's decision to admit expert testimony under ER 702 and ER 703 is reviewed for abuse of discretion. *Kaeck v. Lewis County Pub. Util. Dist. No. 1*, 106 Wn.App. 260, 272-273, 23 P.3d 529 (2001), *review denied*, 41 P.3d 485 (2002).

In this case, although the trial court held that Dr. Tencer's testimony was valid science under *Frye*, the court excluded Dr. Tencer's testimony under ER 702 and ER 703. Thus, the standard of review is for abuse of discretion. As argued below, the trial court acted within its discretion to exclude the testimony of Ms. Cooper's biomechanical expert on the basis that his testimony was irrelevant and cumulative under the facts of this case, even though the court found that his opinions were "valid science under the *Frye* test."

In *Reese v. Stroh*, 128 Wn.2d 300 (1995), the Court set forth the following steps for admitting expert testimony under ER 702 and ER 703:

- 1) ER 702 requires a two-step inquiry:
 - a) whether the witness qualifies as an expert; and
 - b) whether the expert testimony would be helpful to the trier-of-fact.
- 2) ER 703 requires that the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. *Reese*, 128 Wn.2d at 306.

Inherent in the ER 702 and ER 703 inquiry is to determine whether the expert's testimony would be relevant, reliable, and helpful to the jury *under*

the facts of the particular case. Expert opinions based on speculation and inaccurate data are not helpful to the trier of fact. *See Davidson v. Municipality of Metropolitan Seattle*, 43 Wn.App. 569 (1986). “Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.” *Queen City Farms, Inc., v. Central Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 103 (1994); *See also Griswold v. Kilpatrick*, 107 Wn.App. 757, 761-763 (2001).

In this case, even though Dr. Tencer’s testimony was found to be admissible under *Frye*, the trial court acted within its discretion to exclude his testimony under ER 702 and ER 703, on the basis that his testimony was irrelevant and cumulative of the testimony of other witnesses.

1. Dr. Tencer’s testimony is irrelevant to the facts of this case and would not be helpful to the trier-of-fact – ER 702

Washington law is clear that the relationship between an accident and an injury is a subject requiring medical evidence. In *Miller v. Staton*, 58 Wn.2d 879 (1961), The Washington Supreme Court held:

The causal relationship of an accident or injury to a resulting physical condition must be established by medical testimony beyond speculation and conjecture. *Miller*, 58 Wn.2d at 886.

In *Carlos v. Cain*, 4 Wn. App. 475, 477, 481 P.2d 945 (1971), the Court confirmed that the causal relationship between an auto accident and an injury presents a question of “reasonable medical probability” and held

that a lay witness was not competent to testify regarding the reasonable medical probability between a collision and an injury.

Dr. Tencer admits he is not a medical expert, and that he does not render medical opinions. Instead, the gist of Dr. Tencer's proffered testimony is that the forces imparted on Stedman were found to be tolerable among his volunteer test subjects, so Stedman must not have been injured by this accident. The purpose of Dr. Tencer's proffered testimony is to tell the jury that the average person in Stedman's situation would not be injured by this accident. The logical fallacy of Dr. Tencer's use of an "average" to predict what actually will occur, or what did occur, is similar to claiming that, because the odds against a plane crash are 1:1,000,000, that the plane probably didn't crash, despite the wreckage. When followed to their logical conclusion, Tencer's opinions are preposterous.

Washington Courts have specifically rejected the application of "average" or "generally-applicable" theories to determine whether a *specific individual* has suffered an injury from a specific event. In *Boeing Co. v. Heidi*, 147 Wn.2d 78, 81 (2002), Boeing attempted to use a "median-based" allocation, using data from hearing loss studies to find a "norm" for average hearing loss at a given age. This "norm" was then applied to Mr. Heidi to reduce the percentage of his hearing loss award as attributable to age:

The key issue in this case, reduced to its essence, is whether an employer can reduce a worker's permanent partial disability award for work-related loss because people of that worker's age generally suffer from age-related hearing loss. The Department of Labor and Industries, the Board of Industrial Insurance Appeals, and two superior courts said no. We affirm.

Heidy, 147 Wn.2d at 81 (2002) (emphasis added). The methodology used by Boeing is strikingly similar to Dr. Tencer's theories in our case:

Dr. Dobie's testimony summarizes the flaw with the median-based allocation method; it does not assist a doctor in determining the actual extent to which *an individual* suffers from ARHL. At best, it allows a doctor to compare an individual's age and hearing loss percentage with a smoothed-data chart based on information not intended to be used to assess individuals. The doctor can then "norm" the individual's actual hearing loss percentage so that it reflects the median amount of ARHL expected by a person of that age.

Heidy, at 85. The Supreme Court rejected the use of this method:

Statistical studies showing tendencies within given age groups do not help triers-of-fact determine the actual extent of workers' individual work-related diseases.

Id. Thus, even if there is scientific basis for Dr. Tencer's theories and opinions, *Boeing v. Heidy* holds that the trier-of-fact should not be allowed to use evidence about averages or general population tendencies to speculate about what occurred to a specific individual in a specific situation.

Courts in other jurisdictions have upheld the trial court's exclusion of biomechanical testimony virtually identical to Dr. Tencer's theories. In *Schultz v. Wells*, 13 P.3d 846 (Col. App. 2000), the court upheld the trial

court's exclusion of an expert's biomechanical testimony concerning "injury thresholds." The court ruled that evidence indicating there is a threshold force level below which a person probably could not be injured is inadmissible under both the test articulated in *Frye, supra*, and the Colorado Rules of Evidence:

Applying these principles here, we address, and reject, defendant's contention that the trial court abused its discretion by refusing to admit testimony on the injury potential of low-speed accidents.

Analyzing the proffered evidence under CRE 702, the trial court first found that the expert was qualified to testify as an expert engineer. However, with regard to the content of the test results, the court found that such evidence would not be helpful to the jury in that the test results "are inadequate for the purpose for which they are being offered." In other words, the court ruled that the force threshold for probability of injury demonstrated in the test results could not be used to "prove that a particular person was not injured or was likely not injured in this accident."

In coming to this conclusion, the court reasoned that tests used to ascertain safety for the purposes of doing a cost-benefit analysis with regard to the expense of designing the seat of a car were not applicable to prove that a particular person was unlikely to be injured in a specific accident. The court assessed the usefulness of presenting a probability theory to the jury, and concluded that such testimony would be confusing and misleading to the jury.

....

We conclude that the trial court properly analyzed the expert scientific evidence at issue here for its potential to aid the jury and used appropriate factors to review the validity of the scientific principles and the likelihood that the evidence may mislead the jury. The record supports the trial court's conclusions.

As a result, we conclude that the trial court did not abuse its discretion in excluding the expert evidence regarding the force threshold injury test results of rear-end crash testing on humans.

Schultz, 13 P.3d at 851-852. In this case, Dr. Tencer's proffered testimony is similar to the testimony excluded in *Schultz*. Dr. Tencer admits that he is not rendering a medical opinion and is not offering an opinion Stedman was or was not injured. Instead, his opinion is that the forces imparted in this accident are generally within the normal range of motion, and then compares the normal range of motion to soccer players. Dr. Tencer compares Stedman (who wasn't expecting a crash) to his volunteer test subjects, while making no mention whatsoever about Stedman's significant obesity (5'2" and 318 lbs.) and deconditioning, both of which were *medically* significant to Cooper's own medical examiners.

The issue of whether or not a patient is injured rests with the clinician, and the diagnoses are done on a case by case basis, not on a statistical model as Dr. Tencer would want the jury to believe. Dr. Tencer's research, while maybe relevant to the design of headrests or vehicle restraint systems for the average general population, has no relevance in determining whether this particular plaintiff in this particular case sustained injury from this particular accident. Expert testimony which is misleading or is not helpful to the jury is not admissible. ER 702. If Tencer's research were

relevant to determine whether an individual person has sustained an injury, he would be called into emergency rooms all the time.

In a tort case, the defendant takes the plaintiff as she is, and if the plaintiff is unusually fragile for any reason, the defendant may not be heard to argue that she is not liable for any increased damage resulting from plaintiff's fragility. *Xieng v. Peoples National Bank of Washington*, 63 Wn. App. 572 (1991), *aff'd*, 120 Wn.2d 512 (1993); *See also* Washington Pattern Jury Instruction (WPI) 30.18.01, regarding Particular Susceptibility, states:

If you find that:

- (1) before this occurrence the plaintiff had a bodily condition that was not causing pain or disability; and
- (2) the condition made the plaintiff more susceptible to injury than a person in normal health,

then you should consider all the injuries and damages that were proximately caused by the occurrence, even though those injuries, due to the pre-existing condition, may have been greater than those that would have been incurred under the same circumstances by a person without that condition.

In this case, even Cooper's own medical experts testified that Stedman sustained some injury (albeit minor) and that her obesity complicated her condition. Stedman's particular susceptibility injury due to her obesity and deconditioning was an issue at trial, and the trial court properly instructed the jury on WPI 30.18.01. It would be a misstatement of the law to assert that a defendant is not liable for what would not have injured an "average" person. Thus, Dr. Tencer's contention that a particular degree

of force is generally tolerable, is irrelevant to issue of the degree of Stedman's injuries from this particular accident.

2. Tencer's opinions are unreliable and unsupported by the facts.

An expert's opinion must have a proper foundation and be based on facts. *Walker v. State*, 121 Wn.2d 214, 218 (1993). Expert testimony that lacks adequate factual basis may not be admitted at trial. *Miller v. Likins*, 109 Wn App 140 (2001) ("when ruling on somewhat speculative testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert").

Nowhere in Dr. Tencer's report, research, or proffered testimony did he address the following key facts: 1) Stedman's pre-existing obesity and significant deconditioning; 2) The description by both drivers that this accident was initially a "bumper to bumper" accident as opposed to a side swipe; 3) Cooper's estimate that Stedman was traveling at least 20 to 25 miles per hour, "if not more," when the collision occurred; and 4) that both of Cooper's medical experts opined that Stedman sustained *some* injury. Dr. Tencer admittedly did not review the medical records, the CR 35 examiners' report, or Cooper's deposition, which would have alerted him to the unique facts in this case. Therefore, even assuming Dr. Tencer's methodology is accepted in the scientific community and

assuming his force calculations are correct with regard to the average person, his testimony is *inapplicable and unreliable under the facts of this case*, because he cannot provide an answer as to how force would have impacted specifically Stedman's significantly obese and deconditioned body. Not even the defense examiners testified that Dr. Tencer's opinions would be in anyway helpful to the formulation of their medical opinions.

Common sense should not be ignored here. Dr. Tencer very carefully attempts to craft his testimony to avoid *directly* giving an opinion about whether or to what extent Stedman was injured in this collision, because such testimony can only come from a medical expert. Instead, Dr. Tencer's opinion that the forces Stedman experienced in this collision were below the level of force which Dr. Tencer has determined to be "generally tolerable," is nothing more than an invitation for the trier-of-fact to improperly speculate, despite competent medical evidence from the medical experts, including the defense's own examiners.

While not cited to in Appellant's Brief, it is anticipated that Appellant will argue in Reply that *Ma'ele v. Arrington*, 111 Wn.App. 557, 563, 45 P.3d 557 (2002), offers some assistance regarding the admissibility of Dr. Tencer's opinions. However, that opinion does not give carte blanche admissibility to Dr. Tencer. *Ma'ele* stands only for the

unremarkable proposition that it was not an abuse of discretion for the trial court to allow Dr. Tencer's testimony under the facts of that case. Not surprisingly, the court originally elected not to publish the opinion. The *Ma'ele* case cannot be authority to eliminate a trial court's inherent discretion to exclude or admit expert testimony.

3. Appellant's stated purpose of calling Tencer to prove that Stedman is an exaggerator is not permitted.

Dr. Tencer essentially proffered two opinions, each one of which must be examined for relevance. The first is of the forces allegedly produced by the crash. This is based on his alleged reconstruction. That reconstruction is based upon numerous assumptions regarding what did occur. These include assumptions about such things as Stedman's pre-accident health and physical characteristics, which Dr. Tencer did not know, the forces needed to produce the vehicle damage, which Dr. Tencer did not actually examine, and what occurred in the crash, which is based upon disputed testimony. 12/28/10 RP 3-7. The second is that, assuming his assumptions and the calculations based upon them are correct in every respect, Dr. Tencer opines that people are exposed to allegedly similar forces under other circumstances without injury. 12/28/10 RP 8.

Appellant's stated purpose in offering these opinions is to allow "Cooper the ability to provide persuasive, scientific evidence about the

forces and impacts of the accident,” to prove that Stedman’s “account of the accident and her injuries were exaggerated.” Appellant’s Brief, p. 20. However, nothing in the record suggests that Dr. Tencer attempted to testify to either Stedman’s perception of the crash or her injuries. Cooper appears to misunderstand what her expert was actually testifying to. These opinions are discussed above. No offer of proof was given that Dr. Tencer would claim Stedman is exaggerating anything, and Dr. Tencer specifically testified that he was not rendering an opinion about whether Stedman was or was not injured in the accident.

A witness is not allowed to give an opinion on another witness's credibility. *State v. Carlson*, 80 Wn.App. 116, 123, 906 P.2d 999 (1995). *State v. Thach*, 126 Wn.App. 297, 312, 106 P.3d 782 (2005). There was no evidence that Tencer claimed the he had the qualifications required to know Stedman’s state of mind. Nowhere does he set forth facts that would lay a foundation for such testimony. Exclusion of Dr. Tencer’s testimony was entirely proper, because with no expert credentials to support the testimony, it would be at best his lay opinion on what Stedman was thinking. See *State v. Farr-Lenzini*, 93 Wn.App. 453, 462, 970 P.2d 313 (1999). Cooper admits that her purpose in offering Dr. Tencer was to impeach Stedman’s credibility, not on the issue of whether or not she was

injured or the extent of her injuries, so Tencer's testimony was irrelevant.

Cooper also claims that Dr. Tencer's testimony was "logical." Appellant's Brief, p. 20. If true, then the testimony of 4 doctors must have been illogical. How does this conflict get resolved? The answer of course is that Dr. Tencer's testimony is flawed. In the case of biomechanical testimony the flaw is logically obvious: No form of science can disprove the occurrence of something that has already happened. The fact is plaintiff was injured according to all four medical experts.

The trial court in this case carefully weighed the evidence under ER 702 and ER 703 before exercising its discretion to exclude Dr. Tencer. Dr. Tencer's opinions were irrelevant and cumulative in light of Cooper's own testimony that the impact was "minor," "low impact," and "seemed like a very small grazing of the cars" (4 RP 392), and the defense doctors' opinion that the accident was indeed "minor." CP 385. Cooper's medical experts, whose opinions were not solely derived from Stedman's account of the accident, but also from reviewing the property damages photos, damage estimates, medical records, and depositions, testified that this was "not a serious accident" resulting in "a fairly minor injury." 4 RP 367; 3 RP 287. Cooper's medical experts neither reviewed Dr. Tencer's report

nor claimed that Dr. Tencer's biomechanical opinions would be helpful in formulating their medical opinions about Stedman.

The issue regarding the **likelihood** of injury Stedman was moot, as all 4 of the medical experts agreed that Stedman sustained some injury. Thus, the trial court did not abuse its discretion in excluding Dr. Tencer.

C. Any error in excluding Dr. Tencer was not prejudicial.

"Evidentiary error is grounds for reversal only if it results in prejudice. . . An error is prejudicial if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (quoting *State v. Smith*, 106 Wn.2d 772, 780 (1986)).

In this case, the jury's award was consistent with the defense doctors' testimony regarding the amount of reasonable and necessary treatment and Cooper's own arguments in closing. The Dr. Bruzsek and Dr. Renninger testified that certain portions of Stedman's medical treatment and expenses were reasonable, necessary and related to the accident. While their testimony did not include a tally of the bills, Cooper's attorney added up the bills conceded to by the defense doctors and advised the jury of the total amounts during closing argument. Specifically, Cooper asked the jury to award a small amount for general

damages and, if the jury believed Stedman was accurately reporting her symptoms, to award one month of chiropractic treatment as testified to by Dr. Renninger totaling \$1,318.00 and the medical expenses that Dr. Brzusek found to be appropriate totaling \$17,889.00. 4 RP 524-525. Therefore, the jury's verdict of \$22,000.00 reflects Cooper's own recommendations to the jury that they should award \$19,207.00 in total medical expenses plus a small amount for general damages.

Appellant also argues that the trial court's order excluding Dr. Tencer was inconsistent with the court's order on Stedman's motion for partial summary judgment which states, "A genuine issue of material fact exist [sic] as to whether any injuries were caused or medical treatment was necessary as a result of the accident." However, as indicated above, Dr. Tencer's opinions are irrelevant with regard to the issues of medical causation and the reasonableness and necessity of medical treatment.

In denying Stedman's summary judgment motion on the medical treatment, the Court held that there were issues of material fact regarding medical causation and damages because, in opposition to Stedman's motion for partial summary judgment, Cooper submitted a new declaration from Dr. Renninger that directly contradicted the sworn statements he made in his CR 35 report. Instead of finding that Stedman sustained some

injury in the accident like he did in his report, Dr. Renninger's new declaration stated that Stedman injuries were subjective, that he didn't know if she sustained any injury, and that her examination findings after the accident could have been caused by her pre-existing obesity:

“the examination findings noted in the medical records can be explained by pre-existing conditions unrelated to the collision. Specifically, [Stedman is] significantly obese. . . Ms. Stedman is 5 feet 3 inches tall and weighs 318 pounds. Obesity of this magnitude can cause a number of health complications. The excess weight that [Stedman carries] puts a tremendous strain on [her body]. I would expect that a person as obese as Ms. Stedman would suffer from musculoskeletal pain, regardless of whether they had been involved in a motor vehicle collision. Thus, the objective findings reported in the records do not necessarily indicate that either woman was injured.”

CP 332. Dr. Renninger further stated that, “In order to believe that Ms. Stedman . . . [was] injured in the accident, I would have to believe the credibility of [her] reports of increased pain following the accident.” Id.

In light of Dr. Renninger's new declarations, and viewing all of the evidence in favor of Cooper, the Court denied Stedman's motion on causation and damages, finding that “a genuine issue of material fact existed as to whether any injuries were caused or medical treatment was necessary as a result of the accident.” Again, Dr. Renninger did not review Dr. Tencer's report or ever state that Dr. Tencer's opinions would be relevant to the issues of medical causation and damages in this case.

Credibility determinations are for the fact-finder and are not reviewed on appeal. *Isla Verde Int'l v. City of Camas*, 99 Wn. App. 127, 133-134, 990 P.2d 429 (1999), *aff'd on other grounds*, 146 Wn.2d 740, 49 P.2d 867 (2002). Factual findings are reviewed under the substantial evidence standard. Substantial evidence exists when the evidence in the record is of sufficient quantity to persuade a fair-minded, reasonable person of the truth of the finding. *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 34, 891 P.2d 29 (1995). Under the substantial evidence standard, the appellate court should not substitute its judgment for that of the fact finder. *Hilltop Terrace*, 126 Wn.2d at 34. Instead, the Court should accept the fact finder's views regarding the credibility of witnesses and the weight accorded to reasonable but competing inferences. *Id.*

In this case, there was substantial evidence supporting the verdict. First, Dr. Renninger eventually admitted at trial that Stedman sustained some injury and conceded to some of her treatment, conforming his opinions to the CR 35 exam report again. Apparently, the statements in his declaration contradicting the report (that he could not say whether Stedman was injured in the accident) were submitted for the sole purpose of avoiding summary judgment.

Second, Dr. Brzusek also testified that Stedman sustained some injury in the accident and that some of her treatment was reasonable, necessary and related to the accident. Third, Cooper's own arguments to the jury in closing supported an award of \$19,207.00 in medical bills conceded to by Dr. Renninger and Dr. Brzusek plus a small amount for general damages if they believed Stedman's report of injury. The jury's verdict reflects just that: \$19,207.00 in medical bills plus \$2,793.00 in general damages. Thus, even if the court erred in excluding Dr. Tencer, the error was harmless and would not have materially affected the verdict.

D. The Superior Court's order excluding Dr. Tencer stated that he could testify "on rebuttal if the door is opened."

The Superior Court's exclusion of Dr. Tencer reserved Cooper's right to call Dr. Tencer to testify if Stedman "opened the door" to his testimony. While Cooper now argues that Stedman opened the door at trial, Cooper failed to raise this issue at trial and made no attempt to call Dr. Tencer on rebuttal. Thus, Cooper has waived this issue on appeal.

Under RAP 2.5(a) an evidentiary error that is not of constitutional magnitude cannot be raised for the first time on appeal. "The purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error." *State v. Moen*, 129 Wn.2d 535, 547, 919 P.2d 69 (1996).

Cooper argues on appeal that Stedman opened the door to Dr. Tencer's testimony because she elicited testimony about the force and impact of the accident and disputed the accident as being "minor." Even if this is so, Cooper did not object, did not raise this issue before the trial court, and did not seek to call Dr. Tencer on rebuttal. Any alleged error regarding the door being opened by Stedman cannot be raised for the first time on appeal. Therefore, any err in excluding Dr. Tencer is waived.

E. The Superior Court correctly awarded statutory costs.

Cooper asserts that the court erred in awarding Stedman \$657.39 in costs for medical records admitted into evidence at mandatory arbitration, but not admitted into evidence at trial. However, RCW 7.06.060(3) specifically allows the trial court to award statutory costs incurred for "both" arbitration and trial de novo if the party prevails in both actions:

(3) If the prevailing party in the arbitration also prevails at the trial de novo, even though at the trial de novo the appealing party may have improved his or her position from the arbitration, this section does not preclude the prevailing party from recovering those costs and disbursements otherwise allowed under chapter 4.84 RCW, **for both actions.**

RCW 7.06.060(3) (emphasis added). In this case, Stedman was the prevailing party at the arbitration and also prevailed at the trial de novo. Thus, the Court correctly awarded RCW 4.84 costs to Ms. Stedman for the mandatory arbitration and for the trial de novo under RCW 7.06.060(3).

Further, the plain language of RCW 4.84.010 supports an award of costs for records, “which are admitted into evidence at trial or in mandatory arbitration” (emphasis added). Cooper is mistaken in thinking that Stedman wants to change the word “or” to “and.” Changing “or” to “and” would mean that a prevailing party would only be entitled to costs associated with a piece of evidence that is admitted both at trial and at arbitration (which is what Cooper is proposing).

Cooper would have this Court view this case in a vacuum. However, this case did not begin with a trial de novo. Mandatory arbitration was one of the many processes and proceedings Stedman underwent in order for Cooper to have a trial de novo. Stedman had to file a complaint and pay a filing fee. She had to serve Cooper and incur service of process charges. She elected to undergo mandatory arbitration and paid an arbitration filing fee. She incurred copy charges for her medical records that were admitted into evidence at mandatory arbitration. All of these costs are not negated because there is a trial de novo. The fact that Cooper admits that Stedman is entitled to the arbitration filing fee of \$230 (CP 533), an arbitration cost, but disputes the cost of medical records admitted into evidence at arbitration, another arbitration cost, shows just how arbitrary her position is.

RCW 4.84.010 costs can be based on evidence admitted in proceedings before trial. See e.g. *Spurrell v. Bloch*, 40 Wash.App. 854, 871, 701 P.2d 529 (1985) (Under RCW 4.84.010(5), costs available to a prevailing party include costs of depositions used in support of a summary judgment motion and specifically considered by the trial court). Cooper argues that *Spurrell, supra*, is distinguishable because the entire case was decided on summary judgment and no trial occurred. But she offers no rationale to distinguish between statutory costs incurred in obtaining partial summary judgment on liability and statutory costs incurred later in obtaining a judgment on damages. Stedman is entitled to costs for prevailing at both arbitration and trial. The plain language of RCW 7.06.060(3) and RCW 4.84.010 supports the trial court's award of costs.

F. The Superior Court correctly held that Ms. Cooper failed to improve her position on the trial de novo and correctly awarded attorney fees and costs under MAR 7.3.

1. Cooper did not improve her position on the trial de novo.

Pursuant to RCW 7.06.060, plaintiff Stedman timely served defendant with an offer of compromise in the amount of “\$23,299.99, inclusive of inclusive of costs, statutory attorney fees, and attorney fees and sanctions.” Cooper did not accept the offer.

In addition to the \$22,000.00 jury verdict, the Court awarded Ms. Stedman \$1,469.83 in statutory costs and fees and entered judgment in favor of Ms. Stedman in the amount of \$23,469.83. After subtracting statutory fees and costs of \$1,469.83 from Stedman's offer of compromise of \$23,299.99 ($23,299.99 - 1,469.83 = \$21,830.16$), the amount to beat in compensatory damages was \$21,830.16. Thus, Cooper failed to improve her position with a \$22,000.00 jury verdict.

Niccum v. Enquist, 152 Wn.App. 496, 215 P.3d 987 (2009), *rev. granted*, 168 Wn.2d 1022 (2010), is exactly on point. In *Niccum*, the plaintiff Niccum made an offer of compromise of "\$17,350.00 including costs and statutory attorney fees." *Niccum* at 498. The jury returned a verdict in favor of Niccum for \$16,650.00 and the trial court awarded Niccum \$1,016.28 in costs. Mr. Niccum argued that the court is required to "compare comparables" under MAR 7.3, so the court should reduce the amount of the offer of compromise by the amount of the statutory costs. The trial court agreed, and in determining whether the Enquist had improved his position on the trial de novo, the trial court subtracted \$1,061.28 in costs allowable under chapter 4.84 RCW from the offer of compromise of \$17,350 for a total of \$16,288.72. This amount was then

compared to the \$16,650 jury award to determine that Mr. Enquist had not improved his position at trial. *Niccum* at 498-499. The Court also agreed:

“We conclude that RCW 7.06.050(1)(b) should be read so that any segregated amount of an offer must replace an amount in the same category granted under the arbitrator's award. We apply the *Tran* analysis for determining attorney fees under MAR 7.3 to the interpretation of RCW 7.06.050(1)(b). *Tran v. Yu*, 118 Wash.App. 607, 612, 75 P.3d 970 (2003).

Tran determined that the statutory costs and CR 37 sanctions should not be considered when making a MAR 7.3 determination because these costs were not before the arbitrator and were not “comparable” to the compensatory damages awarded by the arbitrator. *Tran*, 118 Wash.App. at 616, 75 P.3d 970. *Tran*'s analysis is applicable here. **Thus, we conclude that the trial court correctly considered comparables in the offer of compromise and the jury verdict, and properly subtracted costs and fees.**”

Niccum, at 500-501 (emphasis added). Because Stedman’s offer of compromise of \$23,299.99 should be reduced by the amount of statutory costs of \$1,469.83 before “comparing comparables,” defendant Cooper failed to improve her position on the trial de novo.

The doctrine of comparing comparables in mandatory arbitration is a well-established rule on Washington. Despite Cooper’s argument to the contrary, *Tran, supra*, is actually supportive of Stedman. Just as the Court did in *Tran*, the trial court here “properly subtracted costs and fees,” before comparing the compensatory damages in the offer of compromise with the compensatory damages in the jury’s verdict.

2. Stedman properly segregated compensatory damages from attorney fees and costs in her offer of compromise.

Cooper argues that Stedman's segregation of damages in the offer of compromise is irrelevant, because if Cooper had accepted Stedman's offer, the case would have ended and Stedman would not be entitled to taxable costs as a "prevailing party." She wrongly presumes that Stedman would not have been able to enter judgment on the offer of compromise.

RCW 7.06.060 and MAR 7.3 are intended to encourage parties to accept the arbitrator's award (or an offer of compromise) by penalizing unsuccessful appeals from them. Nothing in RCW 7.06.050 conditions an acceptance of an offer of compromise on payment or precludes a party from entering judgment on an offer of compromise. The statute speaks only of accepting an offer of compromise, and does not require payment:

In any case in which an offer of compromise is not accepted by the appealing party .. for purposes of MAR 7.3, the amount of the offer of compromise shall replace the amount of the arbitrator's award for determining whether the party appealing the arbitrator's award has failed to improve that party's position on the trial de novo.

RCW 7.06.050(1)(b). Cooper's interpretation of RCW 7.06.050 provides no remedy if party accepting the offer of compromise is unwilling or unable to pay. It would also discourage a party, who is unable to pay or is only able to make partial payment, from *accepting* an offer of compromise in order to avoid further penalties. As a practical matter, the nonappealing

party must be able to enter judgment on an offer of compromise in order to enforce payment. As a public policy matter, even insolvent parties should be encouraged to accept offers of compromise in order to avoid further penalty and to reduce court congestion. Otherwise, they would be precluded from accepting offers of compromise and forced to go to trial.

Because Stedman's offer of compromise was inclusive of compensatory damages, costs, and fees (as opposed to being exclusive of fees and costs), it was indeed a global offer for settlement and, had Cooper accepted the offer of compromise, she would have been obligated to pay *upon judgment* only the amount stated in the offer. HOWEVER, Cooper did not accept the offer, so Stedman's offer of compromise, with the segregation for compensatory damages and statutory costs, replaced the arbitration award. RCW 7.06.050(1)(b). Contrary to Cooper's argument that the segregation is just as ineffectual for purposes of settlement as it is in establishing a new threshold for the arbitration award, there is a big difference. By failing to accept Stedman's offer of compromise, "\$23,299.99, inclusive of costs, statutory attorney fees, and attorney fees and sanctions," replaced the amount of the arbitrator's award for the purpose of determining whether Cooper failed to improve her position.

Cooper cites to no authority stating that an arbitrator cannot segregate damages or that an arbitration award segregating compensatory damages from statutory costs is “irrelevant” or “ineffectual” for purposes of establishing the threshold by which compensatory damages are compared. On the contrary, Washington case law clearly allows the segregation of compensatory damages from RCW 4.84 costs in an arbitration award, and that the segregated amount of compensatory damages creates the threshold by which the jury verdict is compared.

In *Wilkerson v. United Inv., Inc.*, 62 Wn.App. 712, 715, 815 P.2d 293 (1991), an arbitrator awarded the Wilkersons \$10,965.12 in compensatory damages and \$10,000.00 in attorney fees and costs for a CPA violation against defendant Sloan. Sloan requested a trial de novo and a jury awarded Wilkerson \$16,000.00 in compensatory damages, and the CPA claim was dismissed by the Court. *Id* at 715-716. In comparing comparables, the Court held that Sloan failed to improve his position at trial, even though the jury verdict (\$16,000.00) was less than the arbitrator’s combined award:

The arbitrator was permitted to award attorney fees pursuant to the CPA and costs pursuant to RCW 4.84.010. The court awarded the attorney fees pursuant to RCW 7.06.060 and MAR 7.3. It would be inequitable to compare the jury verdict for compensatory damages with an arbitrator's combined award of compensatory damages, attorney fees, and costs. The better approach to

determine whether one's position has been improved, is to compare comparables. Here, the jury's compensatory damage award exceeded the arbitrator's compensatory damage award. We find Mr. Sloan did not improve his position; the judgment is affirmed. The Wilkersons are entitled to attorney fees on appeal.

Id. at 716-717; *see also* *Haley v. Highland*, 142 Wn.2d 135, 154 (2000)

(Although the Supreme Court did not decide whether to adopt *Wilkerson* given the facts of that case, the Court noted, "[w]e generally agree with the Court of Appeals' view that only comparables are to be compared.").

In *Do v. Farmer*, 127 Wn.App. 180, 110 P.3d 840 (2005), this Court also upheld the segregation of compensatory damages from costs in an offer of compromise, and compared only the compensatory damages in the offer of compromise (which was unaccepted and replaced the arbitration award) with the compensatory damages in the judgment:

“Although an arbitration award was entered for \$18,692.72, under RCW 7.06.050(1)(b), the amount of the offer of compromise replaced the amount of the arbitrator's award for the purpose of determining whether Getty failed to improve his position. Tran's offer of compromise was for \$15,000 plus \$2,004 in costs. The judgment entered was for \$17,004 as the principal amount and \$2,426.36 in costs.” *Do v. Farmer*, 127 Wn.App. at 185.

The primary objective of the court when interpreting a statute "is to carry out the intent of the Legislature." *Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wn.App. 298, 302, 693 P.2d 161 (1984). The purpose of RCW 7.06.060 and MAR 7.3 is to discourage meritless appeals of arbitration awards and to relieve court congestion. *Id.* at 303.

Specifically, RCW 7.06.060 and MAR 7.3 are intended to encourage parties to accept the arbitrator's award (or an offer of compromise) by penalizing unsuccessful appeals from them.

Cooper's interpretation of RCW 7.06.060 would have parties submitting offers of compromise for more than the arbitration award in some instances and actually *discouraging* parties from submitting offers of compromise. For example, if an arbitration award for \$20,000.00 exclusive of costs is appealed and the costs total \$3,000, even if the non-appealing party is willing to accept \$1,000 less in compensatory damages, does that party file an offer of compromise for \$22,000.00, because any segregation of damages in the offer of compromise is irrelevant according to Cooper? Certainly, this contradicts the purpose of an offer of compromise and accomplishes the opposite of what the legislature intended: to lessen court congestion.

G. Cooper failed to raise the issue that *Niccum v. Enquist* was wrongly decided and object to the segregation of damages in Stedman's offer of compromise before the trial court.

Pursuant to RAP 2.5(a), the appellate court may refuse to review any claim of error which was not raised in the trial court. *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005). The decision to review is discretionary under these circumstances. *Id.*; RAP 2.5(a).

In this case, Cooper failed to raise the issue that *Niccum v. Enquist, supra*, was wrongly decided and failed to object to the segregation of damages in Stedman's offer of compromise before the trial court. Therefore, Cooper failed to preserve for appeal what she now claims is reversible error by the trial court.

H. Cooper may not complain on appeal that the trial court erred in following the rule in *Niccum v. Enquist, supra*, since Cooper invited the Court to commit that error.

An invited error should not be reviewed on appeal even if it meets the standard for review under RAP 2.5. See *State v. Henderson*, 114 Wn.2d 867, 869-70, 792 P.2d 514 (1990). Under the invited error doctrine, a party may not set up an error at trial and then complain about the error on appeal. *State v. Korum*, 157 Wn.2d 614, 646, 141 P.3d 13 (2006). "The invited error doctrine prevents parties from benefiting from an error they caused at trial regardless of whether it was done intentionally or unintentionally." *State v. Recuenco*, 154 Wn.2d 156, 163, 110 P.3d 188 (2005), *rev'd on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

Cooper never objected to Stedman's segregation of damages in the offer of compromise and never argued before the trial court that *Niccum v. Enquist, supra*, was wrongly decided. Instead, Cooper actually directed

the trial court to the rule in *Niccum*, but asked the Court to award only \$906.94 in costs, and not \$1,469.83 claimed by Stedman:

Because the Plaintiff's Offer of Compromise was inclusive of costs and statutory fees, **Plaintiff would be entitled to an attorney fee award only of her costs exceeded \$1,299.99.** Plaintiff has claimed \$1,469.83 in costs. **If the court awards these costs to her, the judgment amount will exceed the Offer of Compromise by a mere \$169.84.** CP 625 (emphasis added)

Presumably, Cooper was willing to live with the rule in *Niccum*, so long as the trial court awarded the costs she recommended. However, the court awarded Stedman \$1,469.83 in costs, and having lost this issue below, Cooper now contends on appeal that it was error for the trial court to apply *Niccum*. Had the court accepted Cooper's arguments regarding the award of costs, Cooper would have beaten the offer of compromise under the *Niccum* rule. Thus, Cooper invited any error by requesting the trial court to apply only \$906.94 in costs to the *Niccum* rule.

Under the doctrine of invited error, even unintentional errors caused by the complaining party cannot be raised on appeal. *Sundberg v. Evans*, 78 Wn.App. 616, 621, 897 P.2d 1285 (1995), *rev. denied*, 128 Wn.2d 1008, 910 P.2d 482 (1996) (where parties did not receive notice of motion for summary judgment, they could not claim error on appeal when they did not object to trial court's action, did not insist upon proceeding to trial, and tacitly agreed to trial court's summary resolution). *In Re Estate*

of *Stevens*, 94 Wn.App. 20, 29 (1999) (Any error in determining that there was no meritorious defense when denying motion to set aside default was invited by moving party, who moved to vacate order of default under CR 60, the rule governing vacation of default judgments, and not CR 55, the rule for setting aside defaults).

I. Stedman is Entitled to Attorneys Fees And Costs on Appeal.

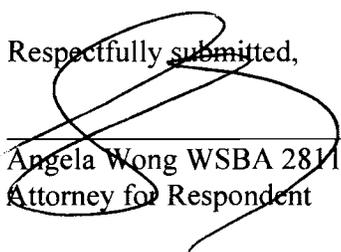
Cooper, by virtue of her failure to improve her position on the trial de novo, has triggered the attorney's fees provision of MAR 7.3, including attorney fees on appeal. Stedman is entitled to an award of attorney's fees and costs under MAR 7.3. *Kim v. Pham*, 95 Wn. App. 439 (1999).

V. CONCLUSION

The trial court rulings ought to be affirmed in all respects. The trial court did not abuse its discretion in excluding the testimony of Dr. Tencer. Statutory costs were correctly awarded to Stedman for prevailing both at arbitration and at trial. The court correctly applied *Niccum v. Enquist, supra*, in awarding Stedman attorney fees under MAR 7.3.

Dated this 21st day of September, 2011.

Respectfully submitted,



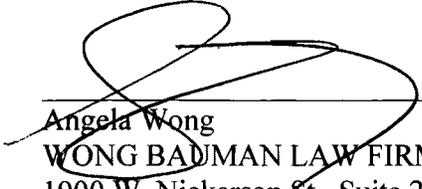
Angela Wong WSBA 28111
Attorney for Respondent

CERTIFICATE OF SERVICE BY MESSENGER

I hereby certify under penalty of perjury under the laws of the State of Washington that on September 21, 2011, the foregoing was delivered to ABC Legal Messenger Services with instructions to serve the foregoing document on the following parties by September 22, 2011:

Marilee Erickson
Reed McClure
601 Union Street, Suite 1500
Seattle, WA 98101

Dated September 21, 2011.



Angela Wong
WONG BADJMAN LAW FIRM, PLLC
1900 W. Nickerson St., Suite 209
Seattle, WA 98119
206-285-4130