4-30-2012

Kafader v. Baumann Appellant's Brief Dckt. 39195

IN THE SUPREME COURT OF THE STATE OF IDAHO

DONETTA I. KAFADER, Plaintiff–Appellant, vs. KIMBERLY A. BAUMANN, Defendant–Respondent.	Supreme Court Docket No. 39195-2011

APPELLANT'S BRIEF

Appeal from the District Court of the Fifth Judicial District County of Twin Falls
The Honorable Randy J. Stoker District Judge Presiding

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Statement of the Case.

The parties at trial are like the teams in a pro football game. The jury is like the on-field officiating crew. At the end of the trial, the jury makes a decision–like the officiating crew makes a ruling on the field. If either team disputes the decision, they throw the red "challenge" flag and ask for a review by a separate reviewing official. Likewise, if a party disagrees with the verdict, they file motions and ask the trial court for a similar review.

When presented with a challenge, the reviewing official must review the play and rule either the play stands or reverse the call on the field, based on his *independent* assessment. The reviewing official cannot defer to the officiating crew on the field and refuse to review the play. The trial judge has a similar role and is required to make an independent evaluation of the credibility of the witnesses and to weigh the evidence. As it would be error for the reviewing official to defer to the officiating crew and refuse to independently review the play, it is error when a trial court defers to the jury and declines to provide an independent evaluation of the credibility of the witnesses or weigh the evidence.

(i) A statement of the case.

The Appellant, Donetta Kafader appeals the trial court's denial of her motion for additur or in the alternative new trial filed following a personal injury jury trial in July 2011.

(ii) The course of the proceedings in the trial and its disposition.

Mrs. Kafader was injured in a rear-end collision in Kimberly, Idaho on October 20, 2008. During discovery, Mrs. Kafader signed a medical release form that provided the Defendant's counsel with complete access to Mrs. Kafader's medical records.

At trial, the Defendant admitted liability but denied responsibility for Mrs. Kafader's injuries. Mrs. Kafader presented her two treating physicians; Dr. Richard Hammond, a neurologist, and Dr. Brad Turner, a chiropractor, who testified they believed, after having treated Mrs. Kafader for over two years, that the cervical injury Mrs. Kafader sustained in this collision was permanent. The Defendant presented video testimony of Dr. Richard Knoebel because Dr. Knoebel refused to attend the trial. Mrs. Kafader then presented Dr. Hammond to rebut Dr. Knoebel's opinions.

The jury awarded $2,787.50 in "Economic damages," and $15,000.00 in "Non-economic damages." Only nine members signed the verdict form. (R., p. 255.)

Mrs. Kafader then timely filed a motion for additur and in the alternative for a new trial. The trial court denied the motion and entered a Memorandum Opinion and Order Denying Plaintiff's Motion for Additur and in the Alternative for a New Trial. (R., p. 332-345.)

(iii) A concise statement of the facts.

A. Judge Stoker did not independently weight the evidence or the credibility of witnesses.

Although this case involved a battle of expert witnesses, Judge Stoker states he did not independently weigh the credibility of any of the experts when considering Mrs. Kafader's motion for new trial. "The credibility of the doctors' opinions is truly a matter for jury determination." (R., p. 339.)

Judge Stoker premised his conclusions on what he assumed the jury believed, not on his own independent evaluation of the evidence and witnesses. "The Court has weighed the evidence in this case and concludes under the above analysis that the verdict was not so disparate

with a reasonable view of the evidence as to suggest an award under the 'influence of passion or prejudice.' An award of $15,000.00 general damages under the facts of this case is consistent with a verdict that this Court sitting without a jury would have awarded, *given the finding that the cervical injury was not permanent.*" (R., p. 340.) (Emphasis added.)

Judge Stoker assumed the jury did not find a permanent injury based on the amount of general damages ($15,000.00) awarded. "If the Court believed *that this jury had concluded* that Plaintiff's cervical injury was permanent then the Court would agree with Plaintiff that the award in this case was woefully inadequate." (R., p. 338.) (Emphasis added.)

B. Mrs. Kafader proved she sustained a permanent cervical injury.

The Defendant testified she was traveling 10–15 miles per hour when she crashed into the back of Mrs. Kafader's pickup truck. (Tr., p. 89, L. 10–13.)

Dr. Richard Hammond is a licensed medical doctor who specializes in neurology. Dr. Hammond had been treating Mrs. Kafader since April 2009 and had seen her 13 times over two years before the trial in July 2011. Dr. Hammond testified he had treated patients who reported being hit from behind in a collision "A couple hundred probably...." during his 20 years in practice. (Tr., p. 147, L. 16, to p. 150, L. 17.) Dr. Hammond's chart notes were admitted as Exhibit 1.

Dr. Brad Turner is a licensed chiropractor and has practiced in Twin Falls for 20 years. (Tr., p. 92, L. 6, to p. 94, L. 18.) Dr. Turner's chart notes were admitted as Exhibit 2.

Mrs. Kafader had a significant medical history, including three lumbar-area back surgeries that predated the collision in October 2008. Mrs. Kafader also broke her ankle in the

Twin Falls Winco parking lot in early 2008, and had several surgeries both before and after October 2008. Notwithstanding this medical history, however, Dr. Turner testified that he did not believe Mrs. Kafader had any "chronic neck injury" prior to October 2008. (Tr., p. 136, L. 17, to p. 137, L. 3.)

Dr. Turner had been treating Mrs. Kafader for pain associated with her back surgeries and ankle surgeries since 2006, but testified although he had treated Mrs. Kafader for neck pain previously on a few occasions over several years, he had never treated Mrs. Kafader for an acute cervical injury before seeing Mrs. Kafader following the October 2008 collision. (Tr., p 103, L. 1, to p. 104, L. 23.)

Mrs. Kafader's cervical injury was consistent with the types of injuries Dr. Turner had observed, diagnosed and treated for 20 years in patients who had been involved in rear-end collisions. (Tr., p. 94, L. 11, to p. 95, L. 20, and p. 105, L. 2, to p. 106, L. 23.)

Dr. Turner testified that when he examined Mrs. Kafader on May 19, 2011, just before the trial, the results of that examination were similar to the results of Dr. Turner's examination in October 2008. Dr. Turner then opined that based upon his clinical observation of Mrs. Kafader from October 2008 until May 2011 and in consideration of his objective findings confirming Mrs. Kafader's subjective complaints, Mrs. Kafader had suffered a permanent cervical injury. (Tr., p. 111, L. 13, to p. 113, L. 4.)

Dr. Hammond confirmed his objective findings of cervical injury in April 2009 were similar to his objective finding of cervical injury just prior to the trial in July 2011 after

observing Mrs. Kafader during 13 appointments covering nearly two and a half years. (Tr., p 158, L. 24 to p. 159, L. 5.)

Dr. Hammond considered and ruled out that fibromyalgia was any factor causing Mrs. Kafader's cervical pain. (Tr., p. 160, L. 7 to p. 161, L. 23, and p. 188, L. 19 to p. 189, L. 10.) (Exhibit 1, p. 23.)_

During cross-examination Defendant's counsel asked Dr. Hammond why "fibromyalgia" is listed in his medical records, (Exhibit 1, p. 30–31.), as a "current problem." Dr. Hammond responded by clarifying the "list" in his medical records is generated by the St. Luke's document system, not Dr. Hammond, so any treating physician can input the information. Dr. Hammond confirmed that simply because something is listed, it does not mean the diagnosis is "active." (Tr., p 187, L. 11–19.)

Dr. Hammond testified both he and Dr. Turner noted and documented spasms in Mrs. Kafader's cervical region well before and long after Dr. Knoebel's examination. Dr. Hammond testified he believed it was "medically impossible" for Mrs. Kafader not to have displayed cervical spasms during Dr. Knoebel's examination–directly attacking Dr. Knoebel's claim he did not observe any objective findings.[1]

Tr., p. 295. [Dr. Hammond's rebuttal testimony]

6 Q. And if I understand your testimony and
7 Dr. Turner's testimony the other day, you both had
8 noted objective findings before and after Dr. Knoebel's

[1] Judge Stoker appears to have misunderstood Dr. Hammond as the Judge states in his opinion, "Significantly, Dr. Hammond testified that it was a "medical impossibility" for the plaintiff to display involuntary spasms in her neck area" (R., p. 334.) Dr. Hammond was not agreeing with Dr. Knoebel's findings but directly refuting them as is evident in Dr. Hammond's actual testimony.

9 evaluation, is that correct?
10 A. That's correct.
11 Q. Now is there, is there an explanation, a medical
12 explanation in your mind that would, that could
13 establish that at a point prior to she had objective
14 findings, at a point prior after a point there were
15 objective findings, but at a certain time in April of
16 '11, for example, that she could not have any objective
17 findings in the cervical and lumbar area?
18 A. Can I make reference to Dr. Knoebel's medical
19 exam?
20 Q. Absolutely.
21 A. Do I have to make that a --
22 Q. Nope.
23 A. Okay. So I have Dr. Knoebel's April 14th, 2011,
24 medical exam of Mrs. Kafader. And I've reviewed this
25 multiple times and at no time does he ever actually

P. 296.
1 make a comment concerning the muscle spasm in her
2 neck. He never once mentions spasm, any type of tone,
3 or any other term you wish to use about the quality of
4 her neck muscles. He says that they are tender, but
5 that's a subjective complaint. He does not make a
6 single reference to the objective findings of her neck
7 muscles in his entire report.
8 Q. Does he report anywhere other than that he
9 actually did a palpation or physical examination of her
10 cervical area?
11 A. Yes. He references that he touches her neck
12 muscles and that she is tender and makes grimacing
13 faces, but he does not once record the tone that he
14 feels when he palpates her.
15 **Q. Okay. Are you saying that you believe it is**
16 **medically impossible for her not to have had objective**
17 **symptomology during that exam?**
18 **A. Correct. There is three of us that have**
19 **documented spasm, marked spasm of her neck muscles:**
20 **myself, Dr. Turner and the physical therapist Julie**
21 **Schwerman.**

Three treating medical care providers observed spasms in Mrs. Kafader's cervical spine region consistently over more than a two-year period and only Dr. Knoebel, during his half-hour exam claimed he did not.

Dr. Hammond also testified he specifically disputed Dr. Knoebel's claim Mrs. Kafader's pain was caused by fibromyalgia. (Tr., p. 300, L. 12, to p. 301, L. 6.)

While Dr. Knoebel claims the drug Sevella is for treating fibromyalgia, Dr. Hammond testified he prescribes this drug for other symptoms, including pain. (Tr., p. 302, L. 24, to p. 303, L. 19.)

Dr. Hammond researched the Quebec "Whiplash" study that Dr. Knoebel identified during his deposition, but which the Doctor had not previously identified in his Defense Medical Examination. During his rebuttal testimony, Dr. Hammond testified he was critical of the "very odd study," and noted the data in the report contradicted the ultimate conclusions that most cervical injuries resulting from a rear-end impact should resolve in eight weeks or less. Dr. Hammond also identified the authors were very selective in their sources and subjects, which further undermined the credibility of the study. Dr. Hammond concluded not only was the "study" flawed in many ways, he believed Dr. Knoebel misapplied the study's findings to his analysis of Mrs. Kafader's case. (Tr., p. 305, L. 7, to p. 309, L. 16.)

Dr. Hammond did agree with Dr. Knoebel's opinion the collision caused a "cervical injury," and exacerbated an existing lumbar injury. (Tr., p. 294, L. 10–16.)

Mrs. Kafader claimed special damages totaling $15,475.72. (Exhibit 4).

C. Dr. Knoebel, the Defendant's medical expert, was not credible.

Dr. Richard Knoebel is a licensed orthopedic surgeon, who has not performed surgery since 1996. (Supp. Tr., p. 5, L. 9–10, and p. 19, L. 2–3.)

Dr. Knoebel's primary business involves performing medical evaluations; 20% of which he claims are related to personally injury litigation, not actively practicing medicine. (Supp. Tr., p. 7, L. 1–7.) Of the medical evaluations Dr. Knoebel performs related to personal injury litigation, Dr. Knoebel conducts "over 99 percent" for defendants. (Supp. Tr., p. 17, L. 16–23.)

Dr. Knoebel evaluated Mrs. Kafader in April 2011, which took "about an hour" and which consisted of "30 minutes of history taking and a then an examination...." (Supp. Tr. p. 20, L. 14–15.)

Dr. Knoebel testified his opinions were based on, "My medical experience, my examination of the claimant, my evaluation of her past medical records and my review of the medical literature." (Supp. Tr., p. 15, L. 23 to p. 16, L. 2.)

Dr. Knoebel conceded that he had not reviewed any medical records from Dr. Hammond as of the date of his deposition on July 13, 2011, a week before the trial. (Supp. Tr., p. 20, L. 24, to p. 21, L. 2, and p. 33, L. 9–12.)

Plaintiff's Exhibit 1 consists of 35 pages of Dr. Hammond's chart notes beginning April 24, 2009 and ending July 13, 2012. During Dr. Knoebel's deposition, he reviewed Dr. Hammond's entire file in less than 2 minutes. (Supp. Tr., p. 39, L. 6–22.)

Dr. Knoebel asserted he had reviewed medical records from Dr. Pica, a rheumatologist, who Dr. Knoebel claimed had diagnosed and treated Mrs. Kafader for fibromyalgia. (Supp. Tr.,

p. 31, L. 18–24.) However, Dr. Knoebel ultimately admitted that he had not reviewed *any* records from Dr. Pica, (who had been retired for at least 5 years), but was referring to a single chart note entered by Mrs. Kafader's family physician Dr. Dobson in which Dr. Knoebel claimed Dr. Dobson stated Dr. Pica had made such diagnosis. (Supp. Tr., p. 32, L. 9–25.)

The Defendant failed to present a single chart note from any physician corroborating Dr. Knoebel's claim of Mrs. Kafader's continuing treatment for fibromyalgia at any time after Dr. Pica's alleged diagnosis five years prior to the collision.

Dr. Knoebel testified he was relying on the "Quebec whiplash study," to support his opinion Mrs. Kafader's cervical injury was not permanent and should have resolved in eight weeks, although he did not refer to that study in his Defense Medical Examination report. (Supp. Tr., p. 26, L. 19.)

Dr. Knoebel charges $500.00 per hour to review medical records, $1,300.00 per each medical evaluation and he does "12–18" per week for "maybe 42" weeks per year. (Supp. Tr., p. 37, L. 9–24.) (Assuming only 1 hour to review medical records per exam, assuming an average of 15 exams per week, and assuming Dr. Knoebel's statement he only works 42 weeks per year is accurate, his gross income is over 1.1 million dollars.)

Plaintiff's Exhibit 1 consists of 35 pages of Dr. Hammond's chart notes beginning April 24, 2009 and ending July 13, 2012. During Dr. Knoebel's deposition, he reviewed Dr. Hammond's entire file in less than 2 minutes. (Supp. Tr., p. 39, L. 6–22.)

Dr. Knoebel repeatedly claimed that no doctor has documented any "physical exam findings" confirming Mrs. Kafader's cervical injuries, yet both Drs. Hammond and Turner

extensively documented their objective findings of Mrs. Kafader's subjective cervical-area pain complaints for over two years before the trial. Dr. Knoebel's statement is refuted on literally every page of Exhibits 1 and 2.

Dr. Knoebel denied he created any documents other than his written Defense Medical Examination. However, when pressed, Dr. Knoebel confirmed he uses some type of "checklist" when conducting his evaluations, but Dr. Knoebel claimed he "destroyed" the checklist he used during Mrs. Kafader's evaluation. When asked for a blank copy of the checklist, Dr. Knoebel claimed he did not know "which checklist" he had used during the April 2011 evaluation he conducted just 3 months prior to his deposition and refused to provide any documents. (Supp. Tr. p., 38, L. 10–23.)

Dr. Knoebel testified Mrs. Kafader's lumbar and cervical injuries should have resolved in eight weeks or less. (Supp. Tr., p. 15, L. 5–19.)

Issues Presented on Appeal.

Whether the District Court abused its discretion when it denied the Appellant's Motion for Additur or in the Alternative New Trial?

Whether the Appellant is entitled to attorney fees on appeal?

Argument.

Mrs. Kafader argues that the District Court abused its discretion when it refused to consider and weigh all of the evidence while considering Mrs. Kafader's motions for additur and new trial. Consequently, she seeks an order remanding the case to the district court with

directions for Judge Stoker to independently evaluate the credibility of the medical expert witnesses when deciding the pending motions.

Mrs. Kafader also argues in the alternative the appellate court should order on remand that the district court enter an order granting her motion for additur and for new trial based on the record presented on appeal.

I. STANDARD FOR NEW TRIAL

Following the trial, Mrs. Kafader timely filed a Motion for Additur and in the Alternative for a New Trial and sought relief according to Rules 59(a)(5) and (6), IRCP. (R., p. 267–8.) When considering a motion brought under Rule 59(a) sections 5 and 6, the Court applies two similar, yet distinct standards.

> "There is a qualitative difference between a trial judge's role in deciding whether a new trial is justified based on the insufficiency of the evidence under Rule 59(a)(6), and whether a new trial is justified based on the amount of the jury's award of damages under Rule 59(a)(5)." *Quick v. Crane*, 111 Idaho 759, 768, 727 P.2d 1187, 1196 (1986). As mentioned above, a new trial can be granted under Rule 59(a)(5) on the ground of "inadequate damages, appearing to have been given under the influence of passion or prejudice." A new trial can be granted under Rule 59(a)(6) based upon the "[i]nsufficiency of the evidence to justify the verdict." The trial court's analysis under the two rules is different. Under Rule 59(a)(5), the trial court "must weigh the evidence and then compare the jury's award to what he would have given had there been no jury. If the disparity is so great that it appears to the trial court that the award was given under the influence of passion or prejudice, the verdict ought not stand." *Dinneen*, 100 Idaho at 625, 603 P.2d at 580 (emphasis in original). Under Rule 59(a)(6) , the trial judge must "weigh the evidence and determine (1) whether the verdict is against his or her view of the clear weight of the evidence; and (2) whether a new trial would produce a different result." *Schwan's Sales Enterprises, Inc. v. Idaho Transportation Dept.*, 142 Idaho 826, 833, 136 P.3d 297, 304 (2006) .

Harger v. Teton Springs Golf and Castings, 145 Idaho 716, 718–19, 184 P.3d 841, 843–44 (2008).

Under either standard, however, the trial court must conduct its own independent evaluation of all the evidence. If the trial court refuses to conduct an independent evaluation of all of the evidence, including the credibility of the expert witnesses, then the trial court has not acted "consistently with the legal standards applicable to the specific choices available to it," the second prong of the abuse of discretions standard. *Sheridan v. Jambura*, 135 Idaho 787, 25 P.3d 100, 102 (2001). Any resulting decision therefore is a patent abuse of discretion.

When reviewing an appeal from the denial of a motion for new trial, the reviewing court is relying on the trial court's independent evaluation of the evidence.

> The trial court is in a far better position to weigh the demeanor, credibility and testimony of witnesses, and the persuasiveness of all the evidence. Appellate review is necessarily more limited. While we must review the evidence, we are not in a position to "weigh" it as the trial court can.

Craig Johnson v. Floyd Town Architects, 142 Idaho 797, 801, 134 P.3d 648, 651 (2006). It is hard to imagine any meaningful review on appeal if the trial court fails to "weigh the demeanor, credibility and testimony of the witnesses" and state its opinions when deciding whether to grant or deny a motion for new trial. The Supreme Court recently in *Carrillo v. Boise Tire Co.*, Supreme Court Doc. No 37026 (2012), agreed as it stated, "[t]hus, to determine whether the trial court abused its discretion, we must assess whether it properly examined the relationship *between its own findings of fact* and the jury verdict through the unique lenses of Rule 59(a)(5) and 59(a)(6). *Carrillo v. Boise Tire Co.*, at p. 7.

II. THE DISTRICT COURT FAILED TO CONDUCT AN INDEPENDENT EVALUATION OF THE WITNESSES AND EVIDENCE WHEN CONSIDERING MRS. KAFADER'S MOTION FOR NEW TRIAL AND THEREFORE ABUSED ITS DISCRETION

This case involved the credibility of three expert witnesses; two treating physicians who had personally observed and treated Mrs. Kafader for two and a half years, and who had concluded based on their respective medical educations and experiences that Mrs. Kafader had sustained a permanent and painful cervical injury, versus a highly-paid defense medical *evaluator*, who admittedly had not reviewed critical medical records, who refused to provide relevant notes from his 30-minute medical examination, whose opinion was based on a highly criticized and doubtful Quebec "whiplash" study, and whose claim he did not observe any "objective" symptoms during his 30-minute exam was a "medical impossibility."

Considering the pivotal issue in this case was whether or not Mrs. Kafader proved she sustained a permanent cervical injury, the trial court was required to state its independent evaluation of the medical expert witnesses, not defer to the jury's assumed conclusions, when considering a motion for new trial. Judge Stoker, however, stated he was not considering or weighing the credibility of the experts. "The credibility of the doctors' opinions is truly a matter for jury determination." (R., p. 338.)

Contrary to Judge Stoker's belief he lacked authority to weigh the credibility of the expert witnesses, in *Sheridan v. Jambura*, 135 Idaho 787, 25 P.3d 100 (2001), a medical malpractice case, the Supreme Court upheld the trial court's grant of a new trial under Rule

59(a)(6), IRCP, and ruled that it was a proper exercise of the trial court's discretion to discount or disregard medical expert testimony, even when that medical evidence was contradicted.

> **The district judge clearly understood his role in weighing the evidence**, however, Dr. Jambura argues the district judge exceeded the bounds of his discretion by discounting the expert testimony offered by the defendants. Specifically, Dr. Jambura argues the district judge abused his discretion by "refusing to weight" or "disregarding" the expert testimony of Drs. Latchaw, Vlcek, Glass and Molteni. This Court has long recognized that the trial judge, sitting at the heart of the trial process, is in a position that those on the appellate level cannot duplicate. Robertson, 115 Idaho at 631, 769 P.2d at 508. **The "trial court is in a far better position to weigh the demeanor, credibility, and testimony of witnesses, and the persuasiveness of all the evidence."** Burggraf, 121 Idaho at 173, 823 P.2d at 777 (citing Quick, 111 Idaho at 770, 727 P.2d at 1198). Because of the trial judge's unique position of having heard all of the testimony and examined all of the evidence, their weighing of the evidence in a motion for new trial is given considerable discretion. Quick, 111 Idaho at 767, 727 P.2d at 1198. See also, Robertson, 115 Idaho at 631, 769 P.2d at 508. **The district judge's determination to discount the testimony of the defendant's expert witnesses; therefore, was a proper exercise of his discretion in weighing the demeanor, credibility and persuasiveness of the evidence.**

Sheridan v. Jambura, 135 Idaho 787,790, 25 P.3d 100, 103 (2001) (Emphasis added).

The *Jambura* Court, after noting the opinion below confirmed the trial judge had questioned the veracity of the proffered defense medical expert's testimony when granting the motion for new trial, and affirmed the judge's disregard of the testimony, even when it appeared the jury had found the medical expert testimony credible. "Again, the district judge's critical assessment of the experts in this case was a proper exercise of his discretion to independently weight the demeanor, credibility and testimony of witnesses." *Sheridan v. Jambura*, 135 Idaho at 790. (Emphasis added.)

The *Jambura* Court understood, rather than deferring to the jury where medical expert testimony is concerned, it is this "expert" testimony that requires the trial court's heightened scrutiny. The reality, as the Supreme Court must have concluded, if a jury is going to be unduly

influenced or misled, it is likely to be through testimony by slick and polished *professional* expert witnesses like Dr. Knoebel, as apparently happened in the *Jambura* case, and obviously occurred here. Dr. Knoebel is not a doctor in the general sense, but a highly-paid expert witness. Consequently, his testimony should be accorded the appropriate weight for testimony that is bought and paid for, not the product of a fair analysis of the facts. The trial judge in *Jambura* determined, and the Supreme Court agreed, while it is important to recognize the function of the jury, justice is hardly served when trial courts ignore obviously biased and suspect expert testimony.

Drs. Hammond and Turner testified Mrs. Kafader's cervical injury was permanent; Dr. Knoebel testified the injury was minimal and should have resolved in 8 weeks–absolutely divergent opinions. Judge Stoker clearly identified he understood this issue; whether Mrs. Kafader's injury was permanent, as throughout the Court's decision, he refers to what the jury *may have concluded* about the permanency of Mrs. Kafader's injury. However, Mrs. Kafader is entitled when moving for an additur or new trial to have the trial court weigh the "demeanor, credibility or persuasiveness" of the experts or their testimony, not to have the trial court *assume* what the jury might have concluded. Did Judge Stoker believe Dr. Knoebel's testimony was credible or was entitled to the same weight as that of Dr. Hammond or Dr. Turner? Undoubtedly, the trial court had a duty to make such a finding, under either a Rule 59(a)(5) or (6) analysis, not simply defer to the jury.

Assuming as Judge Stoker did the $15,000.00 award for general damages indicated the jury did not believe Mrs. Kafader suffered a permanent injury, then to have satisfied the

standards applicable when considering a motion for new trial, Judge Stoker had to conclude such a finding was consistent with what evidence he considered *credible* based on his own *independent* evaluation of Dr. Knoebel's testimony. If Judge Stoker did not consider Dr. Knoebel credible, or give his testimony the weight it accorded Mrs. Kafader's unbiased treating physicians; Dr. Hammond and Dr. Turner, then Judge Stoker should have done just as the trial court did in the *Jambura* case and disregarded Dr. Knoebel's testimony.

Had Judge Stoker considered the credibility of the expert witnesses, undoubtedly, he should have weighed the following factors. First, while Dr. Knoebel claimed that any cervical pain Mrs. Kafader was experiencing after eight weeks was from her alleged preexisting fibromyalgia, and despite his claim that Mrs. Kafader's fibromyalgia treatment was ongoing, remarkably, the Defendant failed to provide a single medical record that established or corroborated either an accurate diagnosis of fibromyalgia or any ongoing treatment for this "syndrome" at any point relative to the 2008 collision as Dr. Knoebel claimed. Conversely, Dr. Hammond considered and ruled out fibromyalgia as a cause of Mrs. Kafader's pain based on his documented observation of objective spasms in Mrs. Kafader's neck over a two year period, the same objective spasms that Dr. Turner confirmed. Based on these facts, it is hard to imagine Dr. Knoebel's opinion that Mrs. Kafader's pain was the result of the amorphous syndrome fibromyalgia which Dr. Knoebel defined "[as] a syndrome, meaning that it is a bunch of subjective complaints *without any hard objective findings*," (Supp. Tr., p. 35, L. 6–8.) (Emphasis added.), was in any manner credible. Mrs. Kafader presented proof of "hard objective

findings" by two treating physicians for more than two years, which obviously ruled out fibromyalgia.

Judge Stoker should also have considered when weighing Dr. Turner's and Dr. Hammond's testimony that Dr. Turner had treated Mrs. Kafader both before and after the collision in 2008, and Dr. Turner's opinions at trial were supported by his personal observations over many years and during each documented appointment in Dr. Turner's medical records, (Exhibit 2.); and that Dr. Hammond's opinion was founded on his personal observations made during thirteen office visits over more than a two year period; versus Dr. Knoebel's one-time 30-minute examination. Who was likely to have misdiagnosed the injury; Drs. Hammond and Turner during their treatment over two and a half years, or Dr. Knoebel after his 30-minute examination?

What about Dr. Hammond's opinion, based on his 20-year experience practicing neurology, it was "medically impossible" for Mrs. Kafader to have presented at Dr. Knoebel's Defense Medical Examination without objective findings of spasms in her cervical spine area; the same objective findings that both Dr. Hammond and Dr. Turner observed and documented both before and after Dr. Knoebel's examination, versus that of Dr. Knoebel, who claimed he did not see any spasms whatsoever? What weight should Judge Stoker have given Dr. Knoebel's testimony considering Dr. Knoebel's observation was based on a 30-minute evaluation and Drs. Hammond and Turner had documented objective findings for over two years, both before and after Dr. Knoebel's exam?

If Dr. Knoebel truly wanted to provide an accurate diagnosis, then perhaps he should have reviewed all relevant medical records, and then conducted more than a "2 minute" cursory review of Dr. Hammond's medical records, considering Dr. Hammond had treated Mrs. Kafader for over two years. What weight should have Judge Stoker given Dr. Knoebel's opinion when it was undisputed Dr. Knoebel had not reviewed all relevant medical records before rendering his opinions?

Was Dr. Knoebel's testimony entitled to any credibility after he testified he reviewed medical records when he had not, or when he purposefully destroyed his evaluation "checklist" and refused to produce even a blank copy of that document?

Judge Stoker should also have considered the fact that Dr. Hammond is a neurologist, that Mrs. Kafader's injury was a neurological injury, and that Dr. Knoebel is not a neurologist. As Dr. Hammond's opinions were based on his diagnosis of an injury related to his particular medical specialty, it would seem his opinion should be entitled to more weight than a doctor who did not have a similar medical specialty?

Additionally, when considering Dr. Knoebel's veracity and credibility, Judge Stoker should have considered whether Dr. Knoebel's opinions were based on his desire to accurately diagnose (assuming then he would want to consider all relevant medical records) or on his desire to maintain a lucrative business testifying for defendants? It appears prudent to acknowledge the obvious–that it would be bad for Dr. Knoebel's business if he were to start agreeing with treating physicians when considering what weight to afford Dr. Knoebel's testimony?

Finally, Judge Stoker should have considered Dr. Knoebel's reliance on the Quebec "whiplash" study in light of Dr. Hammond's rebuttal testimony in which Dr. Hammond identified the fallacies of the study and its rejection by competent medical authority. Dr. Knoebel claimed Mrs. Kafader should have fully recovered in eight weeks or less based on a study the results of which have been rejected by the medical community. What weight should the court have given Dr. Knoebel's opinion under these circumstances?

The Rule 59(a)(5) analysis requires the trial court to make an independent evaluation of all the evidence and determine what the Court would have awarded. Based on these factors, it is hard to imagine had Judge Stoker weighed the testimony and credibility of Drs. Hammond and Turner with that of Dr. Knoebel, Judge Stoker would have had any reasoned basis to find Mrs. Kafader had not proven a permanent cervical injury. If the only credible medical evidence established Mrs. Kafader sustained a permanent cervical injury, which as Judge Stoker conceded would warrant "a much greater award than $15,000 for past and future damages[,] (R., p. 338.), then there should have been a substantial disparity between the court's award and $15,000.00 the jury awarded.

Rule 59(a)(6) also requires the trial court to weigh all of the evidence. If Judge Stoker, after having weighed the credibility of the experts, found that Mrs. Kafader had proved she sustained a permanent cervical injury, then the verdict would be against "the clear weight of the evidence."

While a "trial court is in a far better position to weigh the demeanor, credibility, and testimony of witnesses, and the persuasiveness of all the evidence," on this appeal the reviewing

court is without the luxury of Judge Stoker's opinions or observations regarding the expert testimony.

III. THE VERDICT WAS AGAINST THE CLEAR WEIGHT OF THE EVIDENCE AND A NEW TRIAL WOULD PRODUCE A DIFFERENT RESULT

"A grant of new trial under I.R.C.P. 59(a)(6) is appropriate if the court determines that the evidence is insufficient to justify the jury's verdict. The trial court must "determine (1) whether the verdict is against his or her view of the clear weight of the evidence; and (2) whether a new trial would produce a different result'." *Carrillo v. Boise Tire Co.*, Doc. No 37026, p. 9, (2012), citing *Schwan's Sales Enters., Inc. v. Idaho Transp. Dep't*, 142 Idaho 826, 833, 136 P.3d 297, 304 (2006).

Judge Stoker assumed the jury concluded Mrs. Kafader had not sustained a permanent injury based on the amount of general damages ($15,000.00) it awarded. As both Dr. Hammond and Dr. Turner testified that in their professional opinions Mrs. Kafader's cervical injury was permanent, and Dr. Knoebel stated otherwise, then one logical conclusion nine members of the the jury believed Dr. Knoebel and completely disregarded any other testimony. The other conclusion is the jury believed Drs. Hammond and Turner, but concluded $15,000.00 was adequate compensation for Mrs. Kafader's permanent injury.

As noted above, Mrs. Kafader proved her permanent cervical injury with the testimony of her two disinterested treating physicians based on their personal observations and documented objective findings for over two years. Contrast that compelling evidence with the testimony of

highly-paid Dr. Knoebel who conducted a single 30-minute exam[2] and claimed he was basing his opinions on medical records which he had not reviewed or that did not exist. Dr. Knoebel claimed Mrs. Kafader was suffering from fibromyalgia based on a diagnosis allegedly made five years before the October 2008 collision, but which was not supported by a single subsequent medical record offered as evidence at trial. Assuming for the sake of argument that Dr. Pica had properly diagnosed fibromyalgia five years earlier, there was no record of any diagnosis or treatment subsequent to that time. Nor was there any evidence presented, again even if Mrs. Kafader had the syndrome, it ever affected her neck. The reality, Dr. Knoebel's testimony, assuming the jury somehow believed his baseless opinions, when compared with the compelling evidence to the contrary, is entitled to very little if any weight.

If the trial or reviewing court were to find the verdict is "not in accord with his [their] assessment of the clear weight of the evidence," then the rational conclusion is some force, other than the logical and reasoned interpretation of the evidence caused the particular result. It seems hard to imagine a situation where a district court having just found the verdict was against the clear weight of the evidence; essentially stating the verdict was an anomaly, then not finding a "retrial would produce a different result." Implicit in a ruling "the verdict is not in accord with his assessment of the clear weight of the evidence," is a new trial is warranted and a different result is *likely*.

[2] Dr. Hammond testified that Dr. Knoebel did not reference any objective findings of Mrs. Kafader's neck muscles in his DME report. (Tr., p. 295, L. 18, to p. 296, L. 14.)

While it is not apparent just what motivated nine members of the jury to rule as they did, it is obvious that decision is not supported by the clear weight of the evidence that established Mrs. Kafader suffered a permanent cervical injury. Mrs. Kafader therefore respectfully requests the appellate court order remand with direction for the district court to grant Ms. Kafader's motion for new trial.

VI. THE DAMAGES AWARDED WERE INADEQUATE AND THE TRIAL COURT SHOULD HAVE GRANTED THE MOTION FOR ADDITUR

As the great weight of the evidence established Mrs. Kafader suffered a permanent cervical injury, the resulting verdict of $15,000.00 for pain and suffering for the remainder of Mrs. Kafader's life (26 years) is inadequate.

Even Judge Stoker acknowledged the verdict was inadequate in his opinion if Mrs. Kafader's injury was permanent. "If the Court believed *that this jury had concluded* that Plaintiff's cervical injury was permanent then the Court would agree with Plaintiff that the award in this case was woefully inadequate." (R., p. 338.) (Emphasis added.)

If on appeal the appellate court determines a finding that Mrs. Kafader had not proved a permanent cervical injury is against the great weight of the evidence, then Mrs. Kafader respectfully requests the Court order the District Court on remand to grant her motion for additur.

V. ATTORNEY FEES

Mrs. Kafader seeks attorney fees on appeal according to Idaho Code § 12-121. "Attorney fees under § 12-121 will be awarded to the prevailing party on appeal when this Court is left with

the abiding belief that the appeal was brought, pursued, or defended frivolously, unreasonably or without foundation." *Adler v. Abolafia*, Supreme Court Doc. No. 38189 (2010), p. 10, quoting *Rudd v. Merritt*, 138 Idaho 526, 533, 66 P.3d 230, 237 (2003). Based on the clear standards applicable when considering a motion for new trial that require the trial court to perform an independent evaluation of the evidence, and as the record is clear that the trial court did not follow the requisite legal standards, any defense would appear to be frivolous, unreasonable and without foundation.

Conclusion.

Mrs. Kafader respectfully requests that the appellate court remand this case to the district court with direction the district court conduct its own evaluation of the evidence and weigh the credibility of the medical expert witnesses when deciding Mrs. Kafader's Motion for Additur and in the Alternative New Trial. In the alternative, Mrs. Kafader asks the appellate court to remand the case with direction to the district court to grant Mrs. Kafader's motion for Additur or new trial.

RESPECTFULLY SUBMITTED this 30th day of April, 2012.

CLARK & ASSOCIATES, ATTORNEYS

Eric R. Clark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2012, I served the foregoing, by having a true and complete copy delivered via hand delivery to:

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Eric R. Clark