IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

No. 100262-9

From Court of Appeals
No. 36222-1-III

CHERYL AND COLTON BEHR,

Petitioners,

v.

NORTHWEST ORTHOPEDIC SPECIALISTS, et al.

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals' July 8, 2021 decision was substantially in favor of Colton Behr (Behr), the patient/Plaintiff in this medical negligence case. The Court held, in the published portion of its opinion, that the trial court erred in granting summary judgment in favor of Patrick Lynch, M.D. and Michael Powers, M.D. and by dismissing the standard of care claim relative to Physician's Assistant Leann Bach (PA Bach). As a result of these holdings, Behr will receive a new trial.

In the unpublished portion of its opinion, the Court affirmed various discretionary trial court decisions challenged by Behr relating to jury instructions and the trial court's decision not to default the defendants on liability as a discovery sanction. Behr now asks this court to reverse the Court of Appeals with respect to those discretionary trial court decisions. For the reasons set forth below, that aspect of the Court's decision was correct, and, Behr's Petition should thus be denied.

In addition to responding to the issues raised by Behr, per RAP 13.4(d), Respondents ask this court to review that aspect of the Court of Appeals' decision regarding harmless error relative to the dismissal of the standard of care claim against PA Bach.

II. STATEMENT OF THE CASE

A. Medical Treatment Pertinent to Petition for Review

On Wednesday, December 8, 2010, Behr suffered a severe left tibial plateau fracture while playing basketball. CP 80-82. He was examined by Patrick Lynch, Jr., MD in the Deaconess emergency room that day and admitted to the hospital. CP 83-86. The following day, Timothy Powers, MD performed an open reduction/internal fixation repair of the fracture. *Id.* CP 83-84. This major procedure entailed a curved incision from above to below the outside of the knee. RP 592. It required dissection through the fascia of the anterior compartment and peeling the muscle back from the bone to access the fracture. RP 593-94. It also involved drilling holes in bone, the installation of plates, screws and wires and a bone graft. RP 596, RP 625.

Tibial plateau fractures alone involve a significant amount of pain. RP 618. Patients also typically experience significant pain post-surgically. RP 619. Accordingly, post-operative medications often include IV morphine in a system that allows the patient to self-administer, RP 627, and that is what Dr. Powers ordered for Behr. *Id.*

On Friday, Behr was seen by Physical Therapist Ruth Benage shortly after noon. RP 503. Because of decreased light touch/numbness in the left foot and lack of active dorsiflexion she detected on exam, Benage felt she needed to contact the doctor. RP 504-05. She discussed the situation with one of the Deaconess nurses and indicated she would call Dr. Lynch. RP 507.

According to an NWOS phone note, Benage called NWOS for Dr. Lynch on December 10 at 12:55 p.m. RP 517, CP 3711. Dr. Lynch saw the emailed message but considered it misdirected to him so he forwarded to Dr. Powers whom Dr. Lynch assumed

to be the proper person. RP 564-65; RP 518. There was no evidence Dr. Powers received the message.

On Saturday, three days after the open reduction, internal fixation surgery, PA Bach saw Behr at approximately 10:45 a.m. CP 89-90; RP 644. She examined the knee, including the distal compartments, and found them soft and tentable. *Id,* RP 645. Behr had passive range of motion without a marked increase in pain. *Id*; RP 648-49. To reduce swelling around the knee, Bach attempted knee aspiration twice after discussing the situation with the on-call orthopedic surgeon for NWOS, Dr. Christopher Anderson. *Id*; RP 649-49. Although the aspiration attempt was unsuccessful, *Id.,* Bach did not believe Behr had compartment syndrome. RP 657.

That afternoon, Dr. Anderson visited Deaconess to evaluate Behr himself. RP 1385-1402. After reviewing the chart, consulting with the nurses, and performing a detailed examination, Dr. Anderson concluded Behr did not have

compartment syndrome and that the appropriate treatment was continued observation. RP 1390-1402; RP 1403.

Dr. Anderson saw Behr again the following day (Sunday, December 12). RP 1415. Unfortunately, Behr's condition at that point had significantly changed. RP 1415-1417. Faced with this new clinical picture, Dr. Anderson ordered compartment pressure testing. RP 1417. The test results, combined with his examination findings, led Dr. Anderson to diagnose compartment syndrome. RP 1419-1422. Later that day, Dr. Anderson performed a fasciotomy to relieve compartment pressure. *Id.*

B. Trial Court Procedure Pertinent to Petition for Review[1]

Behr filed suit in December 2012, naming as defendants NWOS and NWOS employees Drs. Powers, Lynch, and

[1] The trial court procedure relative to the court's refusal to default the Defendants on liability as a discovery sanction is set forth *infra* at pages 7-9.

Anderson, and PA Bach, as well as Deaconess. CP 1-11. The essence of Behr's claim was that the diagnosis of compartment syndrome was made too late, and that the delayed diagnosis was the result of the Defendants' negligence. *Id.* Specifically, Behr's liability theory was that, by noon on Friday, December 10, and certainly by the time of Dr. Anderson's evaluation the afternoon of Saturday, December 11, Behr had signs and symptoms diagnostic of compartment syndrome and that the various providers involved in his care/treatment were negligent for not diagnosing the condition earlier than Dr. Anderson's diagnosis on December 12. CP 323-332; CP 2159; RP 718-719.

By the time of trial, the parties and issues had narrowed. Dr. Powers and Dr. Lynch had been dismissed on summary judgment years earlier, CP 800, and Behr voluntarily dismissed Dr. Anderson and PA Bach individually on the first day of trial. CP 5635; CP 5640; CP 5642. After ruling there was a lack of qualified expert testimony on PA Bach's standard of care, the court dismissed the standard of care claim relative to PA Bach.

Finally, the court dismissed Deaconess under CR 50 at the close of Behr's case due to lack of qualified expert testimony on causation. CP 5876. Accordingly, when the case was submitted to the jury, NWOS was the sole Defendant with the only remaining liability issue being whether Dr. Anderson violated the standard of care, with NWOS being vicariously liable for any negligence of Dr. Anderson.

Consistent with the above, the court gave a WPI-derived instruction on the standard of care applicable to Dr. Anderson. CP 6586, (Court's Instruction No. 8). It also instructed the jury that Dr. Anderson was an agent of NWOS, and that, accordingly, any act or omission of Dr. Anderson was an act or omission of NWOS. CP 6583 (Court's Instruction No. 5). The court also gave the WPI-derived error in judgment instruction. CP 6590 (Court's Instruction No. 12).

The trial court refused to give a number of standard of care instructions purposed by Behr, most of which were based on *Grove v. PeaceHealth*, 182 Wn.2d 136, 341 P.3d 261 (2014). P-

9 (CP 5778), P-12 (CP 5781), P-13 (CP 5516/CP 5782), and P-14 (CP 5517 / CP 5783). The trial court also refused to give Behr's purposed instruction on *res ipsa loquitur*. P-17 (CP 5520).

On May 25, 2018, the jury returned a verdict in favor of NWOS, concluding, by definition, that Dr. Anderson did not violate the standard of care. CP 6970.

III. ARGUMENT AND AUTHORITIES

A. The Trial Court Properly Refused to Default Defendants on Liability as a Discovery Sanction.

1. Discovery and Procedure Relative to NWOS Phone Note

Context was crucial to the trial court's ruling on this issue. The case was filed on December 7, 2012. CP 1-11. Behr propounded first interrogatories and requests for production to NWOS on January 15, 2014. CP 3025. Additional interrogatories and requests for production were propounded to NWOS October 19, 2014. *Id.* At the time, NWOS was represented by Edward Bruya of Keefe, King and Bruya. CP

3638-39. These interrogatories and requests went unanswered for almost four years, during which time Behr repeatedly sought to have Drs. Lynch and Powers reinstated as defendants, which efforts included two unsuccessful motions for discretionary review to the Court of Appeals, CP 899, CP 1697.

Michael Ramsden and his firm substituted as counsel for NWOS on February 7, 2017. CP 3638-39. The file materials transferred from Bruya's office to the Ramsden firm did not include the interrogatories and production requests Behr propounded to NWOS in 2014. CP 3556. Accordingly, the Ramsden firm was unaware of any outstanding discovery requests served on NWOS. *Id.*

Although his interrogatories and production requests had been outstanding to NWOS since 2014, Behr failed to move to compel or even communicate with NWOS' counsel about the matter. Instead, on December 6, 2017, Behr sought to preclude NWOS and PA Bach from offering any evidence at trial as a sanction for not answering his written discovery. CP 3003.

Now aware of the unanswered written discovery, and in response to Behr's 12/06/2017 motion, NWOS provided initial answers to the interrogatories and production requests on December 11, 2017, CP 3557-3583, and supplemental answers on January 29, 2018. CP 3612. NWOS' supplemental answers included the phone message document reflecting the Benage phone call to NWOS described *supra* at pages 7-8.

The hearing on Behr's motion to strike evidence from NWOS/Bach occurred on February 9, 2018. CP 4868-4925. Because of NWOS' delayed answers, the Court extended the discovery cut-off to allow Behr to conduct deposition discovery of NWOS employees/representatives. CP 4911, CP 3675. Because NWOS CEO John Braun had signed NWOS' answers and supplemental answers, CP 3557-3583, CP 3612, Behr deposed Mr. Braun on March 7, 2018.

On April 13, 2018, Behr filed a "Motion To Continue Trial Or For Remedy For Resistance To Discovery And Related Issues." CP 4641. Therein, he claimed the "alternative to a trial

continuance would be if the court fashioned a suitable remedy, such as default, or a limiting of defenses or other issues at trial." CP 4644. The trial court denied the motion. CP 5557.

2. Pertinent Law Re: Discovery Sanctions

A trial court decision on discovery sanctions is a matter of discretion and will not be disturbed on appeal absent a clear showing that the trial court's discretion was manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

If a trial court imposes one of the more "harsher remedies" under CR 37(b), such as a default judgment, the record must clearly show (1) one party willfully or deliberately violated the discovery rules and orders, (2) the opposing party was substantially prejudiced in its ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would have sufficed. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 584, 220 P.3d 191 (2009).

In considering the issue of prejudice, the trial court is in a much better position than an appellate court to evaluate the significance of late-disclosed evidence. See e.g. *Cavner v. Continental Motors Inc.*, 8 Wn. App. 2d 1001, 2019 WL 631 (Wn. App. Div. 1, unpublished, 2019). And, in considering a party's claim of unfair prejudice as a result of failure to respond to written discovery requests, it is appropriate for the court to consider whether the allegedly aggrieved party ever utilized available remedies to compel responses. See e.g. *Rhodes v. Barnett and Associates, P.S.*, 2020 Wash. App. LEXIS 910 (Wash. App. Div. 3, unpublished, April 2020).[2]

3. The Trial Court Was Well Within Its Discretion in Refusing to Impose the Extreme Sanction of a Default on Liability For the Late Disclosure of the NWOS Phone Record

Given the above, the trial court acted well within its discretion in refusing to default the defendants on liability as a

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[2] Per GR 14.1(a) *Cavner* and *Rhodes* are cited as persuasive, but non-binding authority.

sanction for the manner in which discovery unfolded. There was no willful or deliberate violation of the discovery rules by NWOS. When NWOS became aware it had not answered the written discovery propounded in 2014, it promptly provided initial and then supplemental responses. Moreover, Behr was not substantially prejudiced in his ability to prepare for trial because of the manner in which NWOS responded to Behr's written discovery. Recognizing that NWOS' answers raised new issues, the trial court extended the discovery cut-off and allowed Behr to conduct the depositions of NWOS' CEO and the two NWOS employees involved in the receipt of the 12/10/2010 telephone message from Deaconess, its entry into the electronic medical record, and the manner in which the message was handled. At trial, the phone message was made an exhibit, and Behr questioned Dr. Lynch, and the two NWOS employees about the receipt of the message and its disposition. RP 564-65 (Lynch); RP 491-501 (Tate); RP 514-18 (Loshbaugh).

B. The Court of Appeals Properly Affirmed the Trial Court's Refusal To Give Behr's Proposed Jury Instructions On "Collective" Or "Team Liability.

Jury instructions are sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and, when read as a whole, properly inform the trier of fact of the applicable law. *Fergen v. Sestero*, 182 Wn.2d 794, 802-03, 346 P.3d 708 (2015). In a medical negligence case, an instruction offered as an adjunct to the basic standard of care instruction is a "supplemental" instruction, and whether to give a supplemental instruction is within the trial court's discretion. *Fergen* at 802.

Behr proposed two supplemental standard of care instructions based on *Grove v. PeaceHealth, supra*, that addressed team liability/responsibility: P-13 (CP 5516; CP 5782) and P-14 (CP 5517; CP 5783). These instructions were properly refused for a number of reasons. First, and fundamentally, by the time the case was submitted to the jury, the only remaining defendant was NWOS, and the only remaining issue was whether Dr. Anderson violated the standard of care. Thus, any instruction

on "team" or "collective" liability would have misled the jury into believing that NWOS could be found liable based on the negligence of some individual provider other than Dr. Anderson, including parties that had been dismissed.

Second, there is no legal concept of "team liability" or "team responsibility" in a medical negligence case that eliminates the need for a plaintiff to support his/her claim with expert testimony as to how a particular healthcare provider violated his/her standard of care. The assumption underlying Behr's proposed instructions was that *Grove* established a new legal theory for imposing liability on a healthcare provider. More specifically, Behr's contention was, and remains that *Grove* somehow relieved a plaintiff in a medical negligence case from having to prove the defendant healthcare provider violated his/her individual standard of care. That is a misinterpretation of *Grove*. There, the trial court gave WPI-derived instructions on *respondeat superior* and the standard of care, and the *Grove* court simply held that the evidence presented to the jury was

sufficient to demonstrate that each defendant failed to comply with his/her individual standard of care.

Moreover, Behr's proposed instructions on "team" or "collective" liability would permit one healthcare provider to be found liable for the negligence of another merely because both providers were part of a "team" that provided care to the plaintiff. There are legal relationships that allow one person to be held responsible for the negligent acts/omissions of another. Partnership is one example, where a tortious act or omission of one partner in the scope of the partnership's business is an act or omission of all partners. See WPI 50.14; RCW 25.05.100(1). Multiple individuals acting in concert is another. See WPI 50.20; RCW 4.22.070(1)(a). And an employer is vicariously liable for the tortious acts/omissions of an employee committed within the course and scope of employment. But one healthcare provider cannot be jointly liable for the acts/omissions of another provider simply because both provided care to the plaintiff. That would amount to a resurrection of joint and several liability which was

abolished by tort reform, save in the limited situations listed in RCW 4.22.070.

C. Dr. Anderson Did Not "Change His Position at Trial to Create an Informed Consent Case."

This alleged error is based entirely on the false premise that Dr. Anderson changed his position at trial. He did not. Throughout the case, his unwavering position was that he did not believe Behr had compartment syndrome and that, on December 11, 2010, given everything he reviewed, including PA Bach's note, and his history and examination, and based on his clinical judgment, Behr did not have compartment syndrome. RP 1401-02; RP 1458-59. Dr. Anderson only mentioned the risks associated with a fasciotomy to rebut Dr. Collier's testimony that any time there is "an indication or an inkling" of or "we suspect" compartment syndrome, the standard of care requires a fasciotomy. RP 742; RP 709. To counter this testimony, Dr. Anderson testified there are risks associated with doing a fasciotomy and that, accordingly, "you need an appropriate level of clinical certainty regarding the existence of compartment

syndrome before you go ahead and do a fasciotomy." RP 1435. Dr. Anderson explained that a fasciotomy is a "significant undertaking" and that, accordingly, you do not do a fasciotomy on a "hunch" regarding the possible presence of compartment syndrome. RP 1436-37.

Based on the foregoing, Dr. Anderson did not change his position at trial and suddenly convert this case into one of informed consent, such that Behr should have been allowed a continuance or an informed consent instruction.

D. The Trial Court Did Not Err by Refusing to Give Behr's Proposed Instructions on the Standard of Care and *Res Ipsa* as Purportedly Articulated by Behr's Liability Experts.

1. The Standard of Care in a Medical Negligence Case is Defined by RCW 7.70.040, Not by Expert Witnesses

The trial court properly rejected these instructions for the simple reason that they were incorrect statements of the law. (See discussion of *Grove, supra.*) The standard of care is defined by RCW 7.70.040, and that definition is incorporated into WPI 105.01, which the trial court gave. It makes no difference that

Behr's experts wished to testify about "team" or "collective" responsibility. While an expert witness is certainly free to offer an opinion on what an individual health care provider must do to comply with the standard of care, it is not within the purview of an expert witness to define the legal standard of care for a jury instruction.

2. The Trial Court Properly Refused Behr's Proposed Instruction on *Res Ipsa Loquitur* in this Alleged Failure to Diagnose Case.

As a threshold matter, Behr questions why the Court of Appeals did not address the trial court's refusal to give his proposed *res ipsa* instruction. The reason is found on page 376 of the Court's Opinion. The only Behr-proposed instructions the Court of Appeals considered were P12, P13 and P14, because those were the only instructions Behr identified by name, as required by RAP 10.3(g). The Court excused Behr's failure to provide a separate assignment of error for each instruction, but the Court only addressed Behr's challenges to instructions, given or not given, where Behr identified the instruction or proposed

instruction by number. (P12, P13 and P14). Because Behr never identified his proposed *res ipsa* instruction by number, the Court of Appeals had the discretion not to consider that alleged trial court error. See e.g., *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995).

Even if this court were to find the Court of Appeals abused its discretion in refusing to consider this issue, the trial court's rejection of the instruction (P16, CP 5785) was entirely proper. *Res ipsa* is applicable only when the evidence shows: "(1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary or contribution on the part of the plaintiff." *Pacheco v. Ames*, 149 Wn.2d 431, 436-37, 69 P.3d 324 (2003). Whether *res ipsa* applies in a particular case is a question at law. *Pacheco* at 436.

Here, while the injury-causing occurrence was admittedly not due to any voluntary action or contribution on the part of Behr, (element 3), the development of compartment syndrome and the failure to timely diagnose compartment syndrome are not events which ordinarily do not occur in the absence of negligence. Indeed, the central issue at trial was whether Dr. Anderson violated the standard of care by not diagnosing compartment syndrome earlier than December 12. But this court has recognized that misdiagnosis alone does not establish negligence. See *Reyes v. Yakima Health District*, 191 Wn.2d 79, 88-89, 419 P.3d 819 (2018), quoting *Fergen* at 809.

The court's refusal to instruct on *res ipsa* was also proper because Behr's injury was not caused by an agency or instrumentality within the exclusive control of NWOS. When the case was submitted to the jury, Behr's claims against Deaconess had been dismissed, and the only liability issue, again, was whether Dr. Anderson violated the standard of care. Clearly

Behr, during his stay at Deaconess, was not within the exclusive control of NWOS.

Behr insists that his proposed *res ipsa* instruction was appropriate because of his expert's actual, or potential, testimony that any time compartment syndrome develops in a hospital setting there has been a violation of the standard of care. While that may have been Dr. Collier's opinion, it was not shared by the Respondents' experts. And, as a threshold matter, it is for the court, not an expert witness, to determine whether an incident or event is of the type that ordinarily does not occur in the absence of negligence.

E. Giving the Error In Judgment Instruction Was a Proper Exercise of Trial Court Discretion.

The Court of Appeals did not consider Behr's claimed error relative to the error in judgment instruction because Behr failed to comply with RAP 10.3(g). But, even if this court were to find the Court of Appeals abused its discretion in that regard, the trial court's giving of the instruction was a proper exercise of discretion.

As a supplemental instruction on the standard of care, the error in judgment instruction is discretionary and properly given in a medical negligence case where the doctor "faced a diagnostic or treatment choice that called on his or her judgment." *Fergen, supra,* at 804. While a physician must make a choice for the instruction to be appropriate, in *Fergen* the court made it clear that the phrase encompasses any exercise of professional judgment" in treatment or diagnosis. *Fergen*, *supra*, at 808.[3]

Here, Dr. Anderson used his clinical judgment to choose between the diagnosis of compartment syndrome and ordinary post-operative pain, decreased sensation, limitation of movement, etc. He also exercised his clinical judgment in determining what diagnostic tools to deploy, particularly

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[3] Significantly, one of the two consolidated cases in *Fergen* involved the alleged negligence of the defendants in failing to diagnose compartment syndrome. Like this case, the error in judgment instruction was deemed appropriate because of the choices made with respect to whether the patient's symptoms were caused by compartment syndrome or some other condition, and whether to perform compartment pressure testing.

compartment pressure testing. As the court recognized in *Fergen*, such a clinical situation presents a classic case for the error in judgment instruction.

Behr launches what is essentially a policy attack on the instruction, emphasizing that the court's decision in *Fergen* endorsing the instruction was 5-4. But Behr completely ignores the later case of *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 348 P.3d 389 (2015). There, the court, in a unanimous opinion, affirmed *Fergen* and rejected the appellant's challenge to the error in judgment instruction, noting that the appellant "does not raise an argument distinguishable from those raised in *Fergen*...". 182 Wn.2d at 852-853.

Behr also argues the error in judgment instruction was inappropriate because "informed consent facts" were used to "create the appearance of medical judgment." Behr contends that, because Dr. Anderson testified about the risks associated with a fasciotomy after Dr. Collier testified the standard of care required a prophylactic fasciotomy, not only did the case

suddenly become one of lack of informed consent, but this testimony made the error in judgment instruction inappropriate. What Behr is essentially arguing is that a plaintiff can manufacture an informed consent claim in the middle of a misdiagnosis trial by having his/her expert testify that the defendant should have prophylactically treated a plaintiff for a condition the provider never diagnosed. Then, if the healthcare provider responds by explaining why here he or she would never engage in such a course of treatment prophylactically, for a condition not diagnosed, the case suddenly becomes one of informed consent. This argument, however, ignores that failing to inform a patient of risks associated with a condition not diagnosed does not give rise to an informed consent claim. *Gomez v. Sauerwein*, 180 Wn.2d 610, 331 P.3d 19 (2014).

F. The Court of Appeals Did Not Abuse Its Discretion In Rejecting Behr's 94-Page Opening Brief of November 2019 and then Striking Behr's Appendix.

This was a discretionary decision by the Court of Appeals supported fully by the record. See *State v. Olsen, supra.*

G. Given the Jury's Determination that Dr. Anderson Did Not Violate the Standard Of Care, on Remand, Behr Should Not Be Allowed to Assert a Standard Of Care Claim Against NWOS Based on the Acts/Omissions of PA Bach

The Court of Appeals held the trial court abused its discretion in refusing to allow Plaintiffs' expert Andrew Collier, M.D. to address the standard of care applicable to PA Bach, and in dismissing that claim from the case. NWOS (and non-parties Lynch, Powers and Bach) argued in their brief that if the court erred in dismissing PA Bach, the error was harmless in light of the jury's verdict in favor of Dr. Anderson. The Court of Appeals, however, did not address this issue. NWOS moved the Court of Appeals for reconsideration of that aspect of its opinion, but the Motion for Reconsideration was denied, without explanation.

The Court of Appeals observed that "[i]t is clear from the record that the Behrs could have offered such evidence [that PA Bach breached the standard of care] from Dr. Collier. Court's Opinion, pg. 39. The pre-trial testimony of Dr. Collier relative to PA Bach was essentially the same as his testimony against Dr. Anderson: that both "missed" the diagnosis of compartment syndrome on Saturday, December 11, and that Behr's clinical picture and medical records were such that they should have conducted compartment pressure testing. CP 2159; CP 326-327; CP 329; CP 330; CP 331.

The erroneous pre-trial dismissal of a party is harmless if the jury, by its verdict, necessarily concludes that the conduct of the dismissed party was not negligent. See e.g., *Sehlin v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 38 Wn. App. 125, 686 P.2d 492 (1984) (where plaintiff's decedent killed by allegedly defective equipment, dismissal of employer of equipment operator, even if error, was harmless because jury determined that the equipment operator was not negligent). See

also *Bundrick v. Stewart*, 128 Wn. App. 11, 114 P.3d 1204 (2005) (dismissal of informed consent claim against one party on summary judgment, although error, not prejudicial where jury, by its verdict, found that the patient did not refuse consent).

Both PA Bach and Dr. Anderson saw and evaluated Behr on Saturday, December 11. Behr's theory against PA Bach and Dr. Anderson was the same: that they were negligent on Saturday, December 11 for not reviewing Benage's physical therapy note from the previous day and for not diagnosing compartment syndrome or at least conducting compartment pressure testing.

The jury found that Dr. Anderson did not violate the standard of care. The Court of Appeals determined that the standard of care for PA Bach was the same as the one applicable to Dr. Anderson. Thus, the jury's determination that Dr. Anderson did not violate the standard of care should be given preclusive effect on whether PA Bach complied with the standard of care. Consequently, the dismissal of PA Bach and

all claims against NWOS based on her alleged failure to comply with the standard of care, even if error, was harmless.

IV. CONCLUSION

The trial court's decisions relative to jury instructions, Behr's efforts to inject an informed consent claim into the case, and the court's refusing to default defendants on liability as a discovery sanction were proper exercises of trial court discretion. Accordingly, Behr's Petition should be denied.

Per RAP 13.4(d), NWOS respectfully requests that the Court hold that the trial court's error in dismissing PA Bach's standard of care claim was harmless and order that Behr, on remand, be precluded from advancing any claim against NWOS based on the alleged failure of PA Bach to comply with the standard of care.

V. CERTIFICATION OF WORD COUNT

I certify this Answer to Petition for Review contains 4,793 words, in compliance with RAP 18.17.

RESPECTFULLY SUBMITTED this 10 day of November, 2021.

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CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing ANSWER TO PETITION FOR REVIEW on the 10 day of November, 2021, as follows:

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EVANS CRAVEN & LACKIE, P.S.

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