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King County Superior Court

No. 08-2-43576-8KNT

COA No. 68272-5-I

In the Court of Appeals for
the State of Washington
Division I

BERNARDO FIGUEROA and ROSA FIGUEROA,
husband and wife

Respondents,

vs.

THOMAS RYAN, M.D.

Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This case raises a trio of novel evidentiary issues. The first questions the extent a trial court can protect a plaintiff, who happens to also be a member of a racial minority, against the consequences of his own dishonest acts. Incorrectly applying **ER 403**, the learned trial judge excluded medical records which demonstrated the plaintiff's physical condition at the time of the alleged malpractice, an essential element of his claim of negligence. The court's exclusion of this evidence unfairly deprived the defendant of highly relevant evidence and left the jury to speculate about the missing medical records.

The second issue raises the issue of tactical, selective waiver of evidence relating to habit and routine. As argued in Part VI, C the plaintiff cannot criticize the doctor's routines in order to establish a violation of the standard of care and then deny the doctor the right to rebut that testimony by explaining, fully, those routines which establish he met the standard of care.

Finally, the case also raises important questions concerning the required factual foundations for medical testimony establishing the existence of an injury and causation. Here, the plaintiff submitted a

stipulation which established that the treating physician had found no permanent injury other than that associated with a surgery which would have been required regardless of any negligence. Nonetheless, the trial court permitted an expert to testify the plaintiff's injuries were causally related to the defendant's negligence even though he admitted the following: a) he had not examined the plaintiff; b) he reviewed only the initial medical records of the treating physician; c) he had no expertise in the surgery performed by the treating physician; and d) he based his opinion that a permanent injury existed upon the deposition testimony of the plaintiff and his wife. VRP 417.

Because the trial court erred in resolving these and other issues, Appellant, Dr. Thomas Ryan, respectfully requests the jury's verdict be reversed and the matter remanded for a new trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the plaintiffs' motion to exclude evidence Bernardo Figueroa used a false identity on the day he sought treatment.
2. The trial court erred in allowing the plaintiff to submit a redacted medical record which removed the plaintiff's signatures from the admission and discharge papers.

3. The trial court erred in concluding the evidence of the plaintiff's use of a false identity was more prejudicial than probative.

4. The trial court erred in not granting the motion to reconsider this ruling after the plaintiffs made the condition of the patient's hand the central issue in the case.

5. The trial court erred in granting plaintiff's motion in limine regarding habit and routine.

6. The trial court erred by failing to reconsider its ruling regarding habit and routine evidence after the plaintiff admitted he had introduced testimony on this topic as a "tactical matter."

7. The trial court erred in denying defendant's motion to exclude Dr. Zafren's proximate cause testimony when plaintiffs' pretrial disclosures did not reveal that he was going to provide this testimony.

8. The trial court erred in denying the motion to exclude Dr. Zafren's testimony regarding causation when he a) admitted he had no expertise in the treatment of plaintiff's injury; b) had not examined the plaintiff; c) had not reviewed the complete medical records of the treating physician; and d)

primarily based his opinion that a permanent injury existed upon plaintiffs' deposition testimony.

9. The trial court erred in entering judgment on the jury's verdict where the expert testimony lacked the required factual foundation.

10. The trial court erred in refusing give the error of judgment instruction, WPI 105.08.

11. The trial court erred in denying the motion for a new trial given multiple errors and the lack of qualified expert testimony linking causally the alleged negligence with the plaintiff's injury.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. May a trial court allow a party to alter medical records necessary to prove defendant's theory of the case in order to shield the plaintiff from the consequences of a voluntary act of dishonesty committed by the plaintiff at the time of treatment by the defendant?

2. Did the admission of the altered medical records unfairly prejudice the defendant by: a) denying the defense the use

of objective evidence of the plaintiff's condition at the time of treatment; b) undercutting defense cross-examination; and c) causing jury confusion about the whereabouts of the medical records used in questioning the plaintiff?

3. Did the trial court improperly limit the scope of Dr. Ryan's direct testimony under **ER 406** in light of the plaintiff's tactical use of Dr. Ryan's deposition testimony relating to Dr. Ryan's habit and routine?

4. Did the trial court improperly allow plaintiffs' expert to testify on proximate cause when the testimony had not been disclosed in accordance with the local disclosure rule and the expert lacked sufficient factual foundation to render an opinion?

5. Does sufficient evidence of causation exist to sustain the jury's verdict?

6. Did the trial court err by failing to give WPI 105.08 in a case where the physician's judgment regarding how long to observe the patient in the emergency room was the basis of the alleged negligence?

7. Did the trial court err by denying defendant's motion to exclude evidence that the doctor's written documentation

violated the standard of care when there was no expert testimony causally linking the breach with the injury?

8. Did the trial court err in denying the motion for a new trial based on juror misconduct, attorney misconduct in closing argument and the combined impact of the above errors?

IV. FACTUAL STATEMENT

A. Background

This is a medical malpractice action brought by plaintiffs Bernardo Figueroa and his wife Rosa. Bernardo Figueroa came to the United States in 1987. VRP II, p. 257. He became a U.S. citizen in 2000. ***Id.*** To obtain his citizenship, the law required that Bernardo demonstrate "an understanding of the English language, including the ability to read, write, and speak, simple words and phrases in ordinary usage in the English language" and to demonstrate "a knowledge and understanding of the fundamentals of the history, principles and form of government of the United States." [1]

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[1] See USCIC publication, "A Guide to Naturalization" published at: http://www.uscis.gov/files/article/chapter4.pdf .

Plaintiff has not worked since 2003 when he was injured at a construction site. VRP II, pp. 261-62. In 2009, following a hotly disputed labor and industry claim that stretched over six years, he obtained permanent disability based on post-traumatic stress syndrome and a claim of permanent paralysis and damage to his left arm. VRP 498.

The plaintiff was deposed in 2009. Plaintiff denied that he had ever been convicted of a crime. CP 137. In fact, plaintiff had convictions for patronizing a prostitute, assault in the 4th degree, driving while license suspended, and criminal trespass. CP 23.

During his deposition, the plaintiff refused to discuss the industrial injury, stating "I---I cannot talk about that because I get ill when I do that." CP 128; VRP 543.

At trial, the plaintiff had the ability to describe in vivid detail how he had been injured. He claimed he was thrown 20 feet apparently as a result of an electrical shock and his left arm was hurt and "shook for many years." VRP 70-71. He then explained his left arm stopped "shaking" two years before the trial, or about 2009. VRP 73-74. Coincidentally, the plaintiff was awarded permanent disability for the damage to his left arm and for damages to his psyche in 2009. VRP 498; 544.

B. Medical Incident

On October 3, 2005, at 1350 hours (1:50 p.m.) a Hispanic gentleman identifying himself as Seku Montana-Linares arrived at the Highline Medical Specialty[2] Center emergency room complaining of abdominal pain. CP 443. He gave his date of birth as 07-10-68, and provided a driver's license with his picture and the name Seku Montana-Linares. CP 443; Ex. 11. The patient was Benardo Figueroa. He signed the ER admission papers with the Seku name, using the falsified driver's license to support this fraudulent act. CP 442; Ex. 11. Although plaintiff's wife, Rosa, drove him to the hospital, he gave a different name as next of kin and listed his marital status as single. CP 442.

Dr. Thomas Ryan was the emergency room physician on duty. He is a Board Certified Emergency physician who has practiced at the Highline Hospital Special Campus ER since 1984. See VRP 756; CP 393. As is common with emergency room physicians, especially when a case is litigated years after the event, Dr. Ryan had no independent recall of the plaintiff or the events associated with the plaintiff's medical event. VRP 753; 798.

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[2] Highline maintains emergency rooms at both its Specialty Center located in Tukwila Washington and at its main campus located in Burien.

The medical records show that Dr. Ryan was concerned the patient had a possible ruptured appendix and that he ordered a CT of the patient's abdomen. VRP 810. To assist in obtaining the best view of the appendix, the radiology department injected a radio contrast dye into an IV site on the plaintiff's right hand. VRP 298-99.[3] The radiology department later reported that approximately 60 ml's (a little over 2 fluid ounces) escaped from the vein. VRP 326; CP 445. The term for this event is "extravasation". VRP 326. An extravasation is a leak from the vein of the contrast fluid. ***Id.*** Leakage of contrast fluid from a vein to the surrounding tissue can damage the tissue if the fluid is an irritant. VRP 300-01. Most often, however, the body reacts with swelling and some pain, but eventually absorbs the dye. VRP 318. The treatment for extravasation consists of ice, elevation and observation all of which Dr. Ryan and the nurses provided for Mr. Figueroa. CP 445; VRP 311.

A patient with an extravasation injury may develop a very rare complication, a compartment syndrome.[4] Only one in 170,000

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[3] See also, VRP 396-97. [Plaintiff's expert admitting that attending physician has nothing to do with infusing contrast material.]

[4] Compartment syndromes are not in and of themselves rare only the mechanism by which it occurred here. The testimony established that compartment syndromes are much more frequently seen as a result of trauma. VRP 818-19.

extravasations will cause this complication. VRP 588. The plaintiff's expert agreed it "would be an uncommon complication." VRP 392.

A compartment syndrome occurs when the muscle swells to a degree its expansion becomes limited by the relatively inelastic fibrous capsule in which it is enclosed, the fascia. See VRP 304-05. The expansion within the compartment causes the pressure within it to rise. ***Id.*** Initially that process may cause the veins, which are low pressure, to collapse. If the pressure continues to rise, it can also impede the flow of blood being brought into the muscle by the arteries. ***Id.***

If untreated, a compartment syndrome can cause death of the muscle tissue. VRP 306. The treatment for compartment syndrome, once it occurs, is a fasciotomy, a surgery where the surgeon slices through the fascia so the swelling can expand to the level it needs to reduce the pressure on the tissue and vessels inside. VRP 307-08. Once a compartment syndrome begins, the only treatment is to perform the fasciotomy. VRP 308.

Ultimately, Mr. Figueroa's CT was reported as negative, ruling out an acute appendix. Dr. Ryan treated the abdominal symptoms and the extravasation injury. Plaintiff's arm was

elevated, ice applied to reduce swelling and Dr. Ryan ordered a single dose of pain medication. CP 445-48. According to the nurse caring for the patient, plaintiff's swelling and discomfort decreased.[5] CP 445. This is important because all the testifying experts agreed that compartment syndrome does not get better and then worse. Rather "it is a steady downhill course." VRP 430 [Plaintiffs' expert Zafren.] It is a progressive problem that does not start, get better, start again and get worse. VRP 642. [Dr. Ronald Dobson, defense expert.]

The nursing notes document that the patient reported he could "move my fingers" at 16:45. CP 445. Consistent with that comment, the patient provided a urine sample at 17:10, an act that required the use of at least one functional hand.[6] ***Id.***

He was discharged at 1718 (5:18 p.m.). At the time of his discharge, the patient signed his discharge instructions with his right hand, the hand with the extravasation injury. CP 453; VRP 541. Had plaintiff's hand been swollen to the degree consistent with

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[5] Plaintiffs' expert disputed this conclusion, dismissing the nurse's note with the contention that one could not observe swelling decrease and that the movement of the fingers was the result of the pain medication. VRP 430.

[6] At the time, the patient was wearing a splint on his left arm because of his 2003 industrial injury. CP 444.

compartment syndrome, he would not be able to pick up a pen and sign a document. VRP 785-86.

Plaintiff, however, signed both the admission papers and the discharge papers using the name on his falsified Washington State Driver's license, Seku Montana. CP 442-43; 453. His signature on admission prior to the extravasation and his signature on the discharge papers are virtually identical. This objective evidence illustrated clearly that plaintiff's hand was functional at the time of discharge. Cf. CP 59 and 61; Appendix A.

At 2140 (9:40 p.m.), over 4 hours after his discharge, Mr. Figueroa returned to the emergency room, with complaints of right forearm pain, numbness and swelling. CP 456. He was admitted and transferred to the main campus with a diagnosis of "compartment syndrome". CP 459. A surgeon, Dr. Vincent Muoneke, performed the required fasciotomy to relieve internal arm pressure on the muscles and nerves. CP 471. This operation was successful and plaintiff was discharged on October 4, 2005. ***Id.*** He received follow-up treatment, including subsequent skin grafts. Ex. 1. His medical records establish he had good healing and that he had aggressive physical therapy. Ex. 1.

During his treatment by Dr. Muoneke, plaintiff continued to complain of pain. Ex. 1. Dr. Muoneke referred him to a Dr. Clark for a second opinion. Ex. 1;VRP 871. Dr. Clark concluded that the plaintiff "might have some mild ischemia and subsequent scarring. Ex. 1, Clark Letter p. 2. He recommended an EMG to assist in the diagnosis. Ex. 1, Clark letter p. 3. Dr. Muoneke's office made the appointment. The plaintiff, however, did not show up for his EMG appointment at the neurology clinic, did not reschedule it or ultimately get this diagnostic test which would have determined the existence of a permanent injury. Ex. 1, Record dated 4/5/2006 from South Sound Neurology Associates.

Dr. Muoneke did not see the plaintiff after April 2006 and did not testify at trial. Ex. 1, page 1. According to a stipulation read to the jury, Dr. Muoneke observed no dead tissue in the arm and hand. VRP 746. The stipulation provided further that Dr. Muoneke would have testified there was nothing in his written records that would support that the plaintiff suffered a permanent physical injury beyond the scars. VRP 746 [Emphasis added].

C. Procedural Statement

1. Pretrial Matters

The original suit named both the hospital, Highline Medical Center, the emergency room doctor, Dr. Thomas Ryan, and his practice, Highline Emergency Physicians, PLLC. CP 1-9. It alleged that Dr. Ryan improperly discharged the plaintiff with a compartment syndrome, which if it had been treated at the time would have resulted in no permanent injury. CP 5. The complaint further alleged that the plaintiff had suffered permanent paralysis in his arm. CP 5. The plaintiff averred this "created a substantial problem for Mr. Figueroa since his other arm had been permanently paralyzed when he was electrocuted on the job. CP 5.

In December 2010, the hospital moved for summary judgment. [Supp. Clerk's Papers at _____; Motion for Summary Judgment] Plaintiffs offered no opposition to this motion and the trial court granted it on January 11, 2011. [Supp. Clerk's Papers, Order Granting Motion for Summary Judgment].

On May 31, 2011, Plaintiffs filed "Plaintiffs' Disclosure of Possible Primary Witnesses." [Supp. Clerk's Papers at ____]. This document listed Dr. Ken Zafren as an expert witness to testify regarding the standard of care. [Supp. Clerk's Papers, Disclosure at page 3.] No witness were designated to testify regarding

proximate cause, however, several treating physicians were disclosed . [See Disclosure at pp. 4-5.]

2. Evidentiary Motions

Prior to trial, the plaintiff moved to exclude testimony and documents showing the use of the false driver's license and the forged signature. CP 21.[7] These records were part of the Defendants' Exhibit 11,[8] the original medical records of the plaintiff.

The defense objected to exclusion of the evidence, arguing the information was highly relevant to the plaintiffs' credibility, a critical issue in the case. Based in part on the reasoning in ***Silas v. Hi-Tech Erectors,*** 168 Wn.2d 664, 670, 230 P. 3d 583 (2010), the trial court ruled that the information had overwhelming potential for prejudice that would distract the jury from dealing with the issues they had to deal with, "the claims of medical malpractice." VRP 6.

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[7] Plaintiffs' counsel referred to the use of the fake identification and identity as use of an "alias." CP 21-22. In fact, as argued to the trial court, the plaintiff was engaged in identity theft and forgery. CP 68. During his deposition, plaintiff admitted that 1) the name belonged to a real person who lived in Mexico; 2) that he did not have permission to use the name; 3) that he obtained the fake identification because it was "easy" and because he needed a driver's license since he lost his after driving under the influence of alcohol. CP 131-32;134.

[8] Exhibit 11 was the un-redacted version of the plaintiff's medical records. VRP It is not clear whether the Clerk retained this exhibit. The disputed pages, however, appear in the Clerk's Papers several times at CP 59-63; CP 442-453.

The court allowed the Plaintiffs to redact the signature lines of both the admission and discharge records and submit the medical records with the signatures line blank. Exhibit 1.

Plaintiff also moved to exclude testimony regarding the plaintiffs' industrial injury and to preclude Dr. Ryan from testifying about his habit and routine. CP 109-112. The industrial injury motion was granted and the issue of habit and routine was reserved. CP 212; VRP 15.

The defense moved to exclude testimony regarding any criticism of Dr. Ryan that was not causally linked to the plaintiffs' injury. CP 38-42. The defense requested that plaintiff's expert be prevented from testifying about any violation of standard of care based on the record keeping of Dr. Ryan because there was no causal link between the lack of documentation and the plaintiff's injuries. CP 95-96. Plaintiffs' counsel responded to this concern by stating: "I don't plan to argue that it is below the standard of care." VRP 14-15. He reserved the right to address the issue in cross-examination. VRP 15. Based on these representations, the court granted the defense motion in limine. CP 212.

3. Trial Testimony

a. Lay Witnesses

Plaintiffs produced the testimony of a man who had interpreted for Mr. Figueroa during the industrial appeal, that of the couple's teenage friend and another family friend. In addition, Bernardo and Rosa Figueroa testified through interpreters.[9]

Mr. Figueroa relayed the details of his treatment by Dr. Ryan. He testified that his hand was very swollen, and that he asked the doctor if he could remain there under observation. VRP 537. He stated that he asked the doctor this twice. ***Id.*** He claimed that the doctor twice told him "no, you will be fine" that everything would be fine in two or three hours and that his swelling would go down. VRP 537. He also showed the jury his hand and testified that "My hand was so swollen that my fingers were stuck together like this. They were touching like this." VRP 456.

Mr. Figueroa testified to a list of physical impairments he claimed he still had.[10] He testified he could not repair his car, could not lift or move heavy furnishings, could not mow his lawn, could not pitch a baseball, could not lift heavy garbage bags, could not

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[9] Mr. Figueroa testified that he understand some English, he just understood the regular words. VRP 75. Counsel had the plaintiff answer and respond to several questions in English so that the jury could "understand or get an idea of how well you speak, sort of how its sounds when you communicate in English." VRP 75.

[10] It appears that this list was developed for the purposes of trial. VRP 481. On day three of trial, the plaintiff could not remember what was on the list. VRP 481. The next morning he came prepared to discuss the laundry list of deficiencies described above. See VRP for November 3, 2011, starting at page 486.

take the garbage cans to the curb, could not lift a chair to seat himself, could not lift grocery bags, could not use scissors, could not use a wrench, or pliers "just to loosen a screw." VRP 487-88. He stated he could not do these things because he did not have enough strength in his hands. VRP 488. He stated he had pain and numbness in his hand, arm, wrist and fingers. VRP 488.

The plaintiff claimed he felt extreme pain three or four times a week "in such a way that I just can't do absolutely anything with my arm, my hand." VRP 489. The plaintiff discussed the many mental and emotional issues this injury combined with the prior industrial accident had caused him. VRP 489-92. He testified he could not work with his right and left arm as they were. VRP 492-93. He testified further he would like to work but that "I have such intense psychological problems, that I can't. And I am limited due to my two arms." VRP 493.

On cross-examination, the plaintiff confirmed he was on total disability from the Department of Labor & Industries because of his left arm injury and his psyche. VRP 495. He testified he could not tie shoe laces, "to this day" and because of that he used a slip on shoe. VRP 497. He indicated he could use a cell phone but with the left hand. VRP 497. He agreed with counsel that it was

difficult, given his history of manual labor, not to be able to use tools. VRP 497.

Defense counsel gave Mr. Figueroa a last chance to tell the jury the truth. Counsel asked Mr. Figueroa if it was important to teach his children to tell the truth and whether he had exaggerated his current limitations or made untrue statements. Mr. Figueroa affirmed that everything he had said to the jury "is true." VRP 501.

At that point defense counsel produced a video tape of the plaintiff doing most, if not all, of the things he had just testified he was unable to do. VRP 501; Ex. 22.

Plaintiffs' counsel objected and the jury was excused. VRP 502. The trial court allowed plaintiffs' counsel to review the tape in the courtroom in the plaintiffs' presence. VRP 503. The video showed the plaintiff driving his red SUV with both hands, reaching up to close the rear hatch, using his left arm without difficulty, using a cell phone with the right and left hand, moving the heavy gate which walled off the plaintiff's residence from the street, opening doors, using power tools to secure signs, rolling up the awning on his wife's taco truck, lifting multiple grocery bags, moving chairs, serving food to customers and many other actions which directly undercut his testimony on direct. See Ex. 22; VRP 504-05.

Plaintiffs moved for a mistrial arguing they had been ambushed. VRP 507. The defense represented, accurately, that the plaintiffs had not issued interrogatories or requests for production and thus no there was no discovery violation. VRP 506. The court gave counsel three hours to locate interrogatories and/or requests for production that might have requested the information. VRP 519. Counsel could not produce such a document. ***Id.***

The court denied the motion for mistrial. VRP 519. The judge noted that the jury had only seen a few seconds of the video, there was no discovery violation and that he addressed the issue as soon as there was an objection. ***Id.*** The court also observed it was appropriate to lay the foundation with the plaintiff. VRP 520. The court admitted the evidence for impeachment only and gave an appropriate limiting instruction. VRP 522.

The jury was then shown the video while defense counsel asked the plaintiff questions. VRP 525. The plaintiff went to great lengths to qualify his previous direct testimony. Demonstrating a remarkable improvement in communication skills, the plaintiff made fine distinctions. He distinguished between tying a knot and "wrapping" cords. VRP 527. When shown the portion of the tape which contained images of him rolling up a canvas awning, he

distinguished between rolling his wrist and hands and using his fingers. VRP 527. The large sign which the video showed him moving was "a very light material" not heavy plywood. VRP 528.

He claimed his testimony concerning moving furniture and chairs only meant he had to use two hands "to lift heavy things." VRP 528. He then testified "I never said I had permanent—I said that my hand slowly, but surely, I started to have more strength." VRP 529.

b. Expert Testimony Re: Standard of Care and Proximate Cause.

Plaintiffs' expert, Dr. Kenneth Zafren, testified that Dr. Ryan breached the standard of care by not diagnosing the compartment syndrome, by not giving proper discharge instructions and by not requesting a surgical consult. VRP 342-54. He testified, over defense counsel's objection, to the lack of documentation. VRP 352; 357.

Dr. Zafren admitted that the extravasation injury required that the plaintiff undergo the fasciotomy surgery. VRP 616-17. [11] He agreed that that procedure would have required him to be

[11] In closing argument, Plaintiff's counsel also recognized that the surgery would have had to have been done regardless of any negligence. . "The surgery that he had, that was going to happen anyway." VRP 880.

hospitalized and would have caused scarring. ***Id.*** He concurred that the plaintiff most likely would have had to have the skin grafts he received. ***Id***.

Over defense objection, Dr. Zafren was allowed to testify concerning causation. VRP 401; 409. The defense pointed out that the plaintiff had failed to disclose that Dr. Zafren would be testifying regarding causation, that he was not an expert in the required area, that he had not examined the patient and that he had not reviewed the treating physician's full medical records. VRP 417. Dr. Zafren based his conclusions regarding causation on the deposition testimony of the plaintiffs. VRP 417. He conceded that the information from Rosa and Bernardo Figueroa, however believable, would not be the medical information that a surgeon would use to offer an opinion on permanent harm. VRP 417-18.

Recognizing it was a close question, the trial court nonetheless ruled that the objections to Dr. Zafren's testimony went primarily to its weight rather than admissibility. VRP 409.

Dr. Zafren opined that Mr. Figueroa would not have had residual issues if the surgery had been performed earlier. VRP 434-35. Before the jury, Dr. Zafren repeated his conclusion that the delay in diagnosis of the compartment syndrome caused

permanent impairments and noted this conclusion was based on the deposition testimony of the plaintiffs. VRP 434. His testimony was the only testimony concerning proximate cause between the plaintiff's injury and the claimed permanent injury.[12]

c. Defense Expert Testimony

Dr. Ryan's care was supported by Dr. Ryan and Dr. Ronald Dobson. Dr. Dobson is the former Medical Director of the Swedish Emergency Department, a position in which he was in charge of Swedish' s four emergency rooms. VRP 584. He is board certified in emergency medicine, internal medicine and critical care medicine. VRP 577.

Dr. Dobson testified Dr. Ryan met the standard of care in the evaluation, management and discharge of Mr. Figueroa. VRP 579. Using the expertise developed over his long career and the knowledge evident by his triple board certifications, Dr. Dobson explained why he believed that at the time of discharge Bernardo Figueroa did not have a compartment syndrome. VRP 598. He outlined the events which led to the later need for surgery. Initially, the fluid which leaked into the plaintiff's hand created inflammation

[12] Dr. Zafren testified before the introduction of the video tape. It is unknown what his position would have been had he seen the video demonstrating the plaintiff's unimpaired ability to use both his hands. As he had returned to Alaska after his testimony, recalling him to the stand was not practical.

in the area of tissue in which it has leaked. ***Id.*** That inflammation set up a chain of events that ultimately caused the development of the swelling and tissue of the muscle. VRP 598. The process took time to develop. ***Id.*** Dr. Dobson noted compartment syndrome occurs only when the swelling impedes blood flow. VRP 601. Once the process gets to that point, the situation becomes serious very quickly, perhaps within a half hour or an hour.[13] ***Id.*** Dr. Dobson believed that that may have occurred as late as 7:30 or 8:00 that evening. ***Id.***

Dr. Dobson testified that "almost all extravasations resolve as a result of elevation and ice." VRP 599. As long as the patient is following the expected course or clinical trajectory, one continued with the usual treatment. VRP 600. Here, Mr. Figueroa condition was following the expected course, the swelling was going down, the pain improved and the fingers were able to move. ***Id.***

Dr. Dobson testified that the plaintiff was observed for an appropriate period. VRP 602. The decision of how long to observe a patient should be based on what is occurring at the time "and the best judgment of the physician." VRP 603. He concluded that "this physician looked at this man for roughly two hours, saw an

[13] Again, this complication occurs perhaps in one in 170,000 patients. VRP 588.

improving trajectory and all of that is consistent with a reasonable and prudent action on his part." VRP 603. He reiterated the decision to discharge was based on clinical judgment, experience, knowledge, and what has happened to that patient under the doctor's direct supervision and care. VRP 604.

Dr. Dobson also testified to the important role of habit and routine in emergency room practices. He noted that a typical emergency room physician sees three to four thousand patients a year and explained that all are taught to develop routines, including stock warnings, which are engrained. He indicated that even if he can't remember something he knows he has said or done it. VRP 610-11.

Finally, Dr. Dobson testified that even with three board certifications, as an ER doc, he was not qualified to comment on the causation issue. He noted it did not fall within any of his training to offer an opinion on whether the timing of the diagnosis of the compartment syndrome changed the ultimate outcome in the case. VRP 613.

Dr. Ryan' testimony was severely restricted by the trial court's ruling relating to habit and routine. See, e.g. VRP 787. Dr. Ryan could not testify about what he would have done to evaluate

the plaintiff's condition when he returned from radiology. VRP 765. He could not testify concerning the number of times he would have checked on the patient. VRP 768. He could not testify about how he would go about making a patient understand he had to come back if there was a problem. VRP 772. He could not testify about the adequacy of oral instructions he would have given. VRP 813. He could not refute the plaintiffs' testimony he told him "don't worry this will go away in two or three hours." VRP 787.

These rulings were made despite the plaintiff introducing the issue of the doctor's habit and routine into the case. The plaintiff referred to it in his opening statement and also asked his expert to evaluate Dr. Ryan's deposition testimony about his routine. VRP 173, 364. Plaintiff's counsel freely admitted he had, for "tactical" reasons, used Dr. Ryan's deposition testimony on habit and routine. VRP 833. Nonetheless, the trial judge refused defense counsel's request that he rule the objection had been waived. VRP 833-34.

4. Jury Instructions, Closing Argument and Verdict

The jury instructions were agreed except as to the defendant's request that the error in judgment instruction, WPI 105.08 be given. VRP 843.

The issue of the adequacy of Dr. Ryan's routine instructions was a main theme in the plaintiffs' closing argument. VRP 858; 874. Counsel criticized the defense expert for reaching conclusions too early. VRP 858-59. He argued that the routine oral instructions described in the deposition were not adequate and faulted Dr. Ryan's routines. VRP 869-70.

Counsel also talked extensively about special privileges for doctors and referred the jury to the case of Dr. Moumma (sic) who had been sexually abusing patients.[14] VRP 859

Jury deliberations took place over the course of several days. The jury sent out three questions. One of them specifically requested "all medical records." CP 219. This question was answered "No. You have all the exhibits admitted into evidence." CP 220.

On November 9, 2011, Mr. Fitzer's legal assistant[15], Dawne Shotsman, logged onto her personal Facebook account and researched the jurors. CP 256. She discovered that one juror had been posting comments about her jury duty on Facebook. CP 258-261. Among the comments were statements about how difficult it

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[14] . Defendant's timely objection to this reference was sustained. VRP 860.

[15] Ms. Shotsman did not inform her employer of her discovery until after the jury had returned its verdict. CP 257.

was to listen to the interpreter. CP 260. She commented that she hoped to "finish by noon on Thursday." CP 259. The comments concluded with a discussion of the fact that they had found the doctor negligent and given money to the plaintiff. CP 258.

On November 10, 2011, the jury returned a verdict in favor of the plaintiffs in the amount of $122,000. CP 275. The defendant made a timely motion for new trial which was denied. CP 244; 266-67. Judgment was entered in favor of the plaintiff on January 12, 2012. The defendant filed his Notice of Appeal on February 3, 2012.

V. ARGUMENT SUMMARY

As argued throughout the plaintiffs' closing, the greatness of our system of justice is that everyone is equal under the law. VRP 848. The law treats nobody as particularly special. VRP 847. If we make a mistake we are held accountable. ***Id.***

Unfortunately the trial court's concern about stereo types denied the defendant his right to rebut the exaggerated claims and assertions made by the plaintiffs. This evidence was central to the case. Plaintiffs' medical malpractice claim rested on the condition of plaintiff's hand at the time of discharge from the emergency room. If the plaintiffs' evidence was believed, the doctor neglected the

plaintiff and discharged him with a grossly swollen, non-functional hand.

To resolve the issue of the condition of the hand at discharge, the jury needed to see documents that demonstrated the plaintiff was using his hand without impairment at the time of discharge. That the plaintiff forged someone else's signature in signing those medical records is unfortunate but it is a direct result of his own purposeful, voluntary, dishonest act. A desire to avoid stereo types and prejudices does not justify denying the innocent party evidence essential to his defense.

The court's error was not mitigated by allowing the defense to ask the plaintiff and his wife about the documents. First, the communication deficits asserted by the plaintiffs[16] provided a ready excuse that they did not understand the questions. Second, the missing documentation actually exacerbated the doctor's disadvantage. As established by the jury's question requesting all of the medical records, the lack of the specific records referred to by defense counsel was confusing to the jury, opened the door to speculation and eventually resulted in the jury discounting the

[16] There was no way of determining what the plaintiff's communication skills actually were. It is worth noting, however, that the plaintiff testified in his deposition that he did not have trouble talking with Dr. Ryan that night. CP 145.

cross-examination. Lack of an admitted exhibit supporting the cross-examination thus substantially undercut the credibility of defense counsel and significantly prejudiced the defendant's case.

The doctor was also treated differently than the plaintiffs when the court resolved issues relating to the admissibility of evidence of habit and routine under **ER 406.** The court permitted the plaintiffs to use of Dr. Ryan's deposition testimony tactically to establish a breach of the standard of care. VRP 833. It then denied Dr. Ryan the opportunity to explain his routines. This ruling excluded critical facts involving the extent of discharge instructions and the assessments Dr. Ryan would have performed to rule out compartment syndrome. VRP 830.

This interpretation of **ER 406** was incorrect. Dr. Ryan's routines are the type which **ER 406** permits. As established by Dr. Dobson, these actions are part of an engrained professional response that emergency room physicians do on all occasions. VRP 610; 830. Moreover, once the plaintiffs introduced evidence of Dr. Ryan's habit and routine, it was fundamentally unfair to deny Dr. Ryan his opportunity to explain those routines. The trial court thus erred in excluding Dr. Ryan's evidence of habit and routine. These errors, combined with testimony on causation which lacked factual

foundation, and incomplete jury instructions, denied Dr. Ryan the right to present his defense under the same rules as the plaintiffs were allowed to present their case. For these reasons, and those set out below, the jury's verdict should be reversed and the matter remanded for a new trial.

VI. ARGUMENT

A. Standards of Review

The trial court's evidentiary rulings are reviewed for abuse of discretion. ***Clark v. Gunter***, 112 Wn. App. 805, 808, 51 P.3d 135 (2002). Similarly, the trial court's decision regarding a motion for new trial is committed to the sound discretion of the trial court. ***State v. Higgins,*** 75 Wn.2d 110, 115, 449 P.2d 393 (1969).

B. The Use of Redacted Medical Records Denied the Defense the Highly Probative, Objective, Evidence of the Plaintiff's Physical Condition at the Time of Discharge and Prejudiced the Defendant's Presentation of His Case.

ER 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to determination of the action more probable or less probable than it would be without the evidence." Relevant evidence is admissible

pursuant to **ER 402.** This rule requires only a minimal showing of logical relevance—any tendency to make the existence of a fact more or less probable. **Tegland Courtroom Evidence (2011) p. 208.**

ER 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of **unfair** prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ***Carson v. Fine***, 123 Wn. 2d 206, 223, 867 P. 2d 610 (1994). ***ER 403*** is an extraordinary remedy and the burden is on the party seeking to exclude the relevant evidence to demonstrate that the probative value of the evidence is substantially outweighed by the undesirable characteristics of the evidence. ***Carson, supra,*** **Tegland Courtroom Evidence at §403 (1)**. When the balance is even, the evidence should be admitted. ***Id., Lockwood v. AC & S, Inc.***, 44 Wn. App. 330, 722 P. 2d 826 (1986) aff'd 109 Wn. 2d 235, 744 P. 2d 605 (1987).

No cases could be located with facts directly on point. In its initial decision, the court relied upon ***Silas v. Hi-Tech Erectors,*** 168 Wn. 2d 664, 670, 230 P. 3d 583 (2010) to find that the

relevance of the evidence of the false signature evidence was outweighed by unfair prejudice under **ER 403.** VRP 4. The court's reliance upon this case was misplaced.

In ***Silas***, ***supra***, the defendant sought admissibility of the plaintiff's illegal immigrant status arguing that if the plaintiff was deported, his future earnings would be different than if he remained in the U.S. ***Silas***, 168 Wn.2d at 671. The court agreed that the plaintiff's immigration status might impact his future earnings but rejected the evidence reasoning that the politically sensitive nature of immigration status "can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasonable deliberation." ***Silas,*** 168 Wn.2d at 672.

Silas neither controls nor aids in resolving this issue. Here, the plaintiff was a U.S. citizen, not an illegal immigrant. VRP 4. Here, there was a significant qualitative difference between the plaintiff's conduct and illegal immigration status. An illegal immigrant who seeks a better life for himself and his family may enter or remain in this country illegally but otherwise live his life in compliance with the laws of his new home. The plaintiff, however, entered legally. He became a U.S. citizen and agreed to be bound by the laws of State of Washington. Having violated those laws, he

took the "easy" way out and simply obtained another driver's license using the name of a real individual living in Mexico. CP 131; 134. He then used that false identification in violation of the law.

The fact that the plaintiff misrepresented who he was at the time of his admission goes to his credibility. ***Goehle v. Fred Hutchinson Ctr.***, 100 Wn. App. 609, 622, 1 P. 3d 579 (2000). [False statement on employment application is misrepresentation and is admissible for purposes of credibility.]

Moreover, the disputed evidence was highly probative, objective evidence of the main issue in the case, the condition of the plaintiff's hand at discharge. This was the focus of a direct and passionate attack on the doctor's care. He accused the doctor of ignoring his pleas to remain in the emergency room. VRP 454; 460; 538;539. He claimed that he had told a nurse "I can't move my fingers. I can't" VRP 456. He reiterated that he could not move his fingers at discharge and asserted "my hand was so swollen my fingers were stuck together like this. They were touching like this." VRP 457. He claimed that the entire palm, hand and forearm were swollen. ***Id.*** He denied that the doctor ever physically touched his

hand and claimed that Dr. Ryan did none of the routine assessments that would have been done. VRP 458.

This testimony put the condition of the plaintiff's hand at the time of discharge and his credibility regarding that condition, at the center of the dispute. The medical records signed by the plaintiff at the time of discharge were objective evidence which directly negated his testimony concerning the condition of his hand. **Rule 403** does not extend to the exclusion of crucial evidence relevant to the central contention of a valid defense. ***State v. Young***, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987).

The exclusion of this evidence not only denied the defendant the use of highly probative evidence, it also undercut the defendant's cross-examination. As is obvious from the jury's note requesting all the medical records, they noticed that medical records were missing. CP 219. The court's response, that they had been given everything that was admissible, then further undercut the defense cross-examination and its credibility by implying the documents the defense based the questions upon were not evidence they could consider. CP 220.

Legally, the plaintiff bore the burden of proving that the evidence was unfairly prejudicial. ***Carson v. Fine***, 123 Wn. 2d 206,

223, 867 P. 2d 610 (1994). The court disregarded the fact that **ER 403** is an extraordinary remedy. ***Carson, supra,* Tegland Courtroom Evidence at §403 (1)**. See also, ***Lockwood v. AC & S, Inc.***, 44 Wn. App. 330, 722 P.2d 826 (1986) aff'd, 109 Wn. 2d 235, 744 P.2d 605 (1987).

Moreover, when the plaintiff opened the door to this evidence, it became proper rebuttal. ***See State v. Gefeller***, 76 Wn.2d 449, 455, 458 P. 2d 17 (1969). While the court did allow the defense to question the plaintiffs about the signatures, without the documents, the jury was left to speculate on whether the defense counsel had simply taken advantage of a witness whose language skills were limited.

Finally, the court's ruling violated the rule of completeness contained in **ER 106.** The jury was provided with only a portion of the relevant medical records in order to protect the plaintiff from the consequences of his own misconduct. The law does not allow this. Just because the hospital records contain information detrimental to the plaintiff does not justify their exclusion. **See *Falconer v. Penn Mar., Inc.***, 421 F. Supp. 2d 190 (U.S. Dist. Ct. Maine, 2006). .

C. The Court Erred by Excluding Dr. Ryan's Testimony Based on Habit and Routine While Allowing the

Plaintiff to Offensively Use Habit and Routine Evidence to Establish Violation of the Standard of Care.

It is fundamental that the rules of evidence are "to be administered in an evenhanded manner." ***Carson, supra*** at 206***;*** **Tegland, 5 Wash. Prac. §403.2**. The above error under **ER 403** was compounded by the court's uneven application of the provisions of **ER 406** and its refusal to allow Dr. Ryan to explain fully his habit and routine regarding instructions upon discharge.

When a witness states that they "always" act in a certain manner, habit testimony is admissible to establish the existence of a specific fact. ***Meyers v. Meyers***, 81 Wn.2d 533, 539, 503 P. 2d 59(1972); [Underlying court of appeals decision cited with approval in ***Wash. St. Physicians' Ins. Exch. & Ass'n v. Fisons***, 122 Wn.2d 299, 326, n. 39, 858 P.2d 1054 (1993). In ***Heigis v. Cepeda***, 71 Wn. App. 626, 633, 862 P.2d 129 (1993) a claims representative was allowed to testify that she "always" advised claimants that she represented the adverse party. Similarly, in ***Meyer v. U.S.***, 638 F.2d 155 (10th Cir. 1980), a dentist and his technicians were allowed to testify that they "always" advised the patient of the risks associated with the surgery in question.

The testimony in this case established that emergency room doctors have routines that are so engrained that they become automatic. VRP 610.

Relying on ***Fisons***, ***supra,*** the trial court excluded the evidence. VRP 829. Dr. Ryan was substantially prejudiced by this error and by the uneven application of the evidentiary rules.[17] Plaintiffs' counsel was able to use Dr. Ryan's deposition testimony concerning his routine warnings to establish his claim that Dr. Ryan violated the standard of care. VRP 363-64. The court precluded Dr. Ryan, on the other hand, from fully explaining his specific routines for warnings he would have given and other essential routines. VRP 772. Because Dr. Ryan was entitled to rebut plaintiffs' attack on his routines with a complete description of these routines for caring for patients in the emergency room, a new trial is required.

D. The Court Erred by Denying the Defendant's Request that the Jury Be Instructed Pursuant to WPI 3d 105.08.

[17] The trial court did note that it was its intention to allow Dr. Ryan to testify concerning the oral instructions and as to the notes he took. VRP 834. Unfortunately, his actual application of the rule did not conform with his intent. See VRP 772 [Objection to how he makes patient understand oral instructions sustained.] VRP 787 [Objection to what caveats he discusses with patients sustained.]

A defendant's conduct must be judged at the time of the alleged malpractice. **RCW 7.70.040(1).** Neither speculation nor hindsight is admissible to prove a violation of the standard of care. ***Gjerde v. Fritzsche,*** 55 Wn. App. 387, 777 P.2d 1072 3 (1989); ***see also Griswold v. Kilpatrick***, 107 Wn. App. 757, 27 P.3d 246 (2001).

Physicians are not liable for errors of judgment if they occur within the confines of reasonable care. That is, the medical judgments of the physicians are not measured by the character of the outcome, but rather by the reasonableness of their conduct at the time in question. ***Watson v. Hockett***, 107 Wn.2d 158, 166-67, 727 P.2d 669 (1986); ***Christensen v. Munsen,*** 123 Wn.2d 234, 248, 867 P.2d 626 (1994).

WPI 105.08[18] correctly states this law. A party is entitled to a jury instruction if it is a correct statement of the law, is supported by the evidence and is necessary in order for the party to argue their theory of the case. ***Adcox v. Children's Orthopedic***

[18] Although it appears that a hard copy of the proposed jury instruction was not filed, the proposed instruction was provided to counsel and the court and read into the record. VRP 837. The instruction states: "A physician is not liable for selecting one of two or more alternative course of treatment/and or diagnoses, if, in arriving at the judgment to follow a particular course of treatment and/or make a particular diagnosis the physician exercised reasonable care and skill within the standard of care the physician was obliged to follow." VRP 837; WPI 6th, 105.08 .

Hospital & Med. Ctr., 123 Wn. 2d 15, 36, 864 P. 2d 921 (1993). The proposed instruction met all three of these tests. The court's failure to give this instruction was thus error.

E. The Defendant Was Prejudiced by the Improper Admission of Dr. Zafren's Testimony Regarding Causation.

1. Plaintiff Failed to Properly Disclose Dr. Zafren as a Causation Expert.

King County Local Rule [KCLR] 26(k)(1) requires the parties to disclose their witnesses prior to trial. KCLR 26 (k)(3)(C) requires that the disclosing party provide a summary of their expert's opinions and the basis therefore. Any person not disclosed in compliance with the rule may not be called to testify at trial unless the trial judge orders otherwise based on good cause. KCLR 26 (k)(4).

Plaintiffs' Disclosure of Primary Witnesses violated this rule. The disclosure listed Dr. Zafren as an expert who would testify as to the standard of care. [Supp. Clerk's Papers, Plaintiff's Disclosure at 3]. The document contains no summary of the expert's opinions or the basis upon which he made those conclusions. The document contains no statement that the doctor

would testify regarding causation. Plaintiffs' non-compliance with KCLR 26 (k) should have resulted in exclusion of Dr. Zafren's causation testimony.[19]

2. Dr. Zafren lacked the necessary factual foundation to testify concerning the causal relationship between the plaintiff's alleged injury and the alleged violation of the standard of care.

The standard of care required of professional practitioners "must be established by the testimony of experts who practice in the same field." ***McKee v. Am. Home Products, Corp.***, 113 Wn. 2d 701, 706, 782 P.2d 1045 (1989). In order to testify on the applicable standard of care, a doctor must demonstrate that he or she has sufficient expertise in the relevant specialty. ***Young v. Key Pharms., Inc.*** 112 Wn.2d 216, 227-28, 770 P.2d 182 (1989). Foundation for a plaintiff's expert opinion in a medical malpractice case must be to a "reasonable degree of medical probability" and expert testimony must be based on the facts of the case, not speculation or conjecture. ***Rounds v. Nellcor Puritan Bennett, Inc.***, 147 Wn. App. 155, 163, 194 P.3d 274 (2008).

Dr. Zafren's testimony did not meet this test. He stated that

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[19] Prejudice is not a perquisite to a court's exclusion of a witness for non-compliance with a court rule. ***Allied Fin. Services Inc. v. Mangum***, 72 Wn. App. 164, 168-69, 864 P. 2d 1 (1993).

he was not testifying about the plaintiffs' current condition and that he was not qualified to give such an opinion. VRP 434.[20] He acknowledged that a surgeon would not rely on the Figueroas' testimony in offering an opinion about permanent harm. VRP 417-18. He acknowledged that he had not reviewed the treating physician's complete records regarding Mr. Figueroa and the deficits and problems that he claimed he had post-surgery. VRP 436.

The trial court recognized that this was a close question, but then resolved it in favor of the plaintiff. VRP 409. That ruling may have made sense in the context of a case where the necessary factual foundation was anticipated through the testimony of the treating physician. But once the plaintiffs' credibility was damaged because of the surveillance video, the case shifted to one where the plaintiffs' attorney was seeking ways to expedite and complete the trial without additional expenditures. He then offered a stipulation which removed the factual basis for Zafren's testimony. The stipulation stated that "nothing in his [treating surgeon's] written medical records would support a permanent injury beyond the

[20] He testified that the only opinion he was offering "is that he had some degree of impairment. That is known. That is why we are having this trial. Had he had the operation promptly, he would have a full functional recovery." VRP 407-08.

scars. VRP 746. The same stipulation established that the treating physician did not notice any dead tissue in the arm or hand. ***Id.*** Dr. Zafren's conclusions were thus contradicted by the one expert who had the factual foundation and expertise to render an opinion. Because this witness's testimony lacked the required factual foundation, the trial court abused its discretion in allowing this testimony and reversal is required. [21]

F. The Court's Admission of Evidence Relating to Poor Documentation Allowed the Jury to Improperly Speculate Regarding a Violation of the Standard of Care Which Was Not Supported by the Required Expert Testimony Establishing a Causal Link to a Reasonable Degree of Medical Certainty.

In contrast to the restrictions placed on evidence allegedly prejudicial to the plaintiffs, the court allowed extensive cross-examination and testimony concerning the doctor's failure to document his encounter with the patient.

The defense moved to exclude this evidence under **ER 403** and under **ER 402.** The evidence was not relevant because no testimony could link the alleged documentation errors with the

[21] Without sufficient evidence of causation, this court could reverse on the grounds of insufficient evidence to sustain the verdict and remand the case for dismissal. ***See, e.g., Sdorra v. Dickinson***, 80 Wn. App. 696, 701, 910 P. 2d 1328 (1996).

injury. CP 38-45. The court's decision to allow the plaintiffs to extensively explore this alleged misconduct, allowed the jury to improperly speculate regarding causation in a manner prohibited by established Washington law. ***See Lewis v. Simpson Timber,*** 145 Wn. App. 302, 319, 189 P.3d 178 (2008); ***Grimes v. Lakeside Indus.***, 78 Wn. App. 554, 561, 897 P.2d 431 (1995). ***Zipp v. Seattle School District***, 36 Wn. App. 598, 676 P. 2d 538(1984). Because the evidence did not meet the applicable standards, the court erred in allowing its admission.

G. The Combination of Legal Errors and Juror and Attorney Misconduct, Resulted in a Jury Verdict that Was Substantially Unjust.

Where more than one error occurs during a trial, the cumulative effect of the multiple errors may justify granting a motion for new trial even when the errors taken individually would not. ***Storey v. Storey***, 21 Wn.2d 370, 375, 585 P.2d 183 (1978), rev. denied, 91 Wn. 2d 1017 (1979). In addition to the legal errors discussed above, this trial was tainted by a juror and attorney misconduct.

Here, a juror posted comments regarding the case on Facebook. CP 256-261. Her comments represent a breach of her oath as a juror. CP 260.

An additional issue arises from improper argument by counsel. During closing, Mr. Firkins attempted to draw similarities between the Figueroa's case and that of a doctor convicted of sexually abusing his patients. VRP 859-60. The defense promptly objected, and the jury was instructed to disregard the argument. VRP 860.

Plaintiffs' counsel then essentially accused defense counsel of being a racist and represented that his client was innocent of any wrong doing that night. VRP 887. He argued:

> It is all part of the defense play book. He is different from us. He is not like us. He is one of them. I will ignore him, ignore the law. Ignore your obligation, ignore your oath, rule against him. He is one of them.

VRP 910-11.

Counsel went on to argue:

> Who is taking responsibility for those errors now? The guy who didn't do anything wrong, showed up at the hospital, with abdominal pain and walks out with two arm surgeries?
>
> What did he do wrong. Nothing?

VRP 911.

While individually these final errors might not justify reversal, in a case where the defendant was denied his right to present relevant evidence and argue his theory of the case, these errors compound the damage and further justify reversal.

VII. CONCLUSION

A plaintiff who seeks a better life should not be punished because his desire to find a better life violated the immigration laws of the United States. But the reasoning underpinning decisions which recognize that principle does not extend to protecting a plaintiff from the consequences of dishonest acts at the time of the events in dispute. Because the trial court's evidentiary decisions unfairly favored the plaintiffs and denied the defendant his right to present his case to the jury, Appellant respectfully requests that the court reverse the verdict in favor of the plaintiffs and remand the case for a new trial.

Dated this 10th day of October 2012.

By: _____

Bertha B. Fitzer, WSB #12184
Attorney for Appellant
bertha@fitzerlaw.com

DECLARATION OF SERVICE

I, Bertha B. Fitzer, state and declare under penalty of perjury under the laws of the state of Washington that I caused to be served in the manner noted below a copy of this document, entitled "APPELLANT'S OPENING BRIEF" on the attorney of record as follows:

Attorney for Respondent:

Tyler Firkins
Van Siclen Stocks & Firkins
721 45th St. NE
Auburn, WA 98002-1303

tfirkins@vansiclen.com

[x] Electronically and via USPS

DATED at Tacoma, Washington this 10th day of October, 2012.

Bertha B. Fitzer

Appendix A

HIGHLINE MEDICAL CENTER — ORIGINAL COPY

Main Campus (206) 244-9970 | X | Specialty Campus (206) 244-0180 | Highline Home Health and Hospice (206) 439-9095

ADMIT DATE 10/03/05 TIME 1350 RM/BD -

MONTANA-LINARES, SEKU - Figueroa Bernardo E

2208 SW 333ST

FEDERAL WAY, WA 98023

MR# V306999 CATEGORY REG ER

ACCT # V03006962 SERV/LOC VER

Phone # - INS. GROUP SP SS#

Date of Birth 07/10/68 Age 37 Sex M Religion Marital Status S User: HICKSR

Employer NONE Phone # Occ:

Next of Kin MAYRGA, RICARDO Phone # - Relationship FRIEND

Person to Notify MAYRGA, RICARDO Phone # - Relationship FRIEND

GUARANTOR — COMMENTS: NOC

MONTANA-LINARES, SEKU - Phone # - VIP

2208 SW 333ST SS #

FEDERAL WAY, WA 98023 Occ. OCCURRENCE DATE: 09/22/05 TIME:

Employer NONE Phone # OCCURRENCE TIME: ONS

INSURANCE — POLICY # — COVERAGE # — SUBSCRIBER:

SELF PAY — MONTANA-LINARES

REASON FOR VISIT ABD DISCOMFORT

ADMIT PHYSICIAN — FAMILY PHYSICIAN NOT ON STAFF — ER PHYSICIAN Ryan, Thomas M → D. Anderson — Arrival mode: WLK

CONSENT TO MEDICAL CARE: The undersigned consents to any laboratory, imaging, anesthetic, medical, surgical or emergency treatment and/or hospital services rendered the patient under the instruction of the physician. All Physicians, consultants, and allied health care professionals providing services, including radiologist, pathologist, anesthetist and the like are independent contractors and are not employees or agents of the facility. The patient also consents to observation of the patient during administration of medical treatment, surgical or diagnostic procedures for the purpose of education of students whose presence is deemed appropriate by the attending physician. The undersigned understands that a personal physician is to be selected by or on behalf of the patient at the time of this visit if hospitalization or further treatment is required or immediately if complications arise. The undersigned understands that the facility is not liable for any act or omission by the patient for following instructions of said physician. The patient understands that no guarantee or assurance has been made as to the results that may be obtained during treatment.

RELEASE OF PATIENT INFORMATION: The undersigned hereby consents that the hospital may release to the guarantor's insurance company, or any third party payor, pertinent information related to the medical treatment including; HIV testing and treatment, sexually transmitted diseases, psychiatric, alcohol and drug treatment records in order to secure contractual payments for services rendered during this episode of care. The facility may, unless requested by the t or personal representative, provide directory information including room and general condition. Information may also be released for continuity of patient esearch, health authorities and as otherwise described in RCW 70.02.050 and federal law. We keep a record of the health care services we provide you. You may ask us to see and copy that record. You may also ask us to correct that record. We will not disclose your record to others unless you direct us to do so or as defined in the "Notice of Privacy Practices". You may see your record or get more information about it by contacting our Medical Record Department.

ASSIGNMENT OF INSURANCE BENEFITS: In the event the patient is entitled to hospital or medical benefits of any type whatsoever arising out of any policy of insurance insuring patient or any other party liable to patient, such benefits are hereby assigned to the hospital for application to patient's bill. The patient may be responsible for 100% of charges not covered by this assignment. Patients eligible for Medicare hereby authorize the facility to bill and collect from Medicare directly. Any charges not covered by Medicare or any supplementary insurance may be the responsibility of the patient.

FINANCIAL AGREEMENT: In consideration of the extension of credit by Highline Medical Center, the undersigned will pay for facility services, including any balance not covered by insurance, rendered to the above named patient. I obligate myself to pay the account in accordance with Highline Medical Center's payment policy. I acknowledge that the failure to meet my obligations could result in the referral of this account to a collection agency. Accounts placed with an agency will bear interest at the legal rate and the guarantor will be responsible for all additional collection costs. I further agree that any credit balance from personal payments may be applied to any other open accounts owed to Highline Medical Center by the guarantor.

CHARITY CARE PROGRAM: Highline Medical Center offers a Charity Care Program for patients in need of financial assistance. Please contact the Admission Department or Patient Accounting Department to obtain an application.

DSHS PATIENTS: If you are covered under DSHS "Family Planning" or "Take Charge" program, you will be responsible for payment of all services not covered by these programs.

PERSONAL VALUABLES: The hospital is not liable for the loss or damage to any personal property unless placed in the hospital safe.

PATIENT REPRESENTATIVE: Should you have any concerns about your care, please contact our patient representative at (206) 988-5791.

SM My initials acknowledge the receipt of the "Patient Rights and Responsibilities" pamphlet.

SM My initials acknowledge the receipt of the "Notice of Privacy Practices".

_____ My initials acknowledge the receipt of the "Important Message from Medicare" (inpatients only) This does not waive any of the patient's rights to request a review.

THE UNDERSIGNED CERTIFIES that he/she has read the foregoing, and is the patient, or is duly authorized by the patient as his legal representative to execute the above and accept its terms. If competent, patient should sign in space indicated. If a minor, or incapable of signing, responsible representative should sign in space indicated.

X Seku Montana 10-3-05 — X RH II 10-3-05

PT SIGNATURE — DATE — WITNESS SIGNATURE — DATE

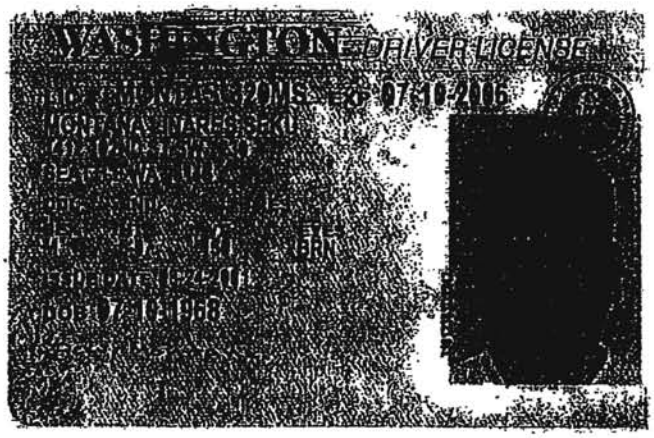
X _____

PATIENT'S AGENT OR REPRESENTATIVE'S SIGNATURE — DATE

RELATIONSHIP TO PATIENT	PATIENT IS A MINOR ☐ YES ☐ NO	STATE WHY INCAPABLE OF SIGNING

EXHIBIT 1

HH000010



MONTAÑA-LINARES,SEKU -
V03006962 MR# V306999 SP
37 M 07/10/1968 VER
Ryan,Thomas M 10/03/05

EXHIBIT 2 HH000011

Highline Community Hospital
Emergency Department Discharge Instructions

Specialty Center Emergency Department 206-248-4730

Primary Physician: AA YOUR PRIVATE DOCTOR.

It is YOUR RESPONSIBILITY to make an appointment for follow up care. IF YOU HAVE ANY QUESTIONS or PROBLEMS, call your PERSONAL PHYSICIAN or your FOLLOW UP PHYSICIAN. If you cannot see them, call or return to the EMERGENCY DEPARTMENT. DO NOT LET ANYONE ELSE USE YOUR MEDICATIONS!

Witness: _____ Signature Seku Montana