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Court of Appeals No. 68272-5-I

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION I

BERNARDO FIGUEROA and ROSA FIGUEROA, husband and wife,

Plaintiff/Respondent,

vs.

THOMAS RYAN, M.D.,

Defendant/Appellant.

Appeal from the Superior Court of King County
King County Superior Court No.: 08-2-43576-8 KNT

RESPONDENTS' OPENING BRIEF

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I. INTRODUCTION

On October 3, 2005 at around 1:50 PM Bernardo Figueroa went to the Highline Hospital emergency room because he was suffering stomach pains. By around 10:00 PM that night, Mr. Figueroa had nearly lost the use of his left arm, and had come dangerously close to death. Dr. Thomas Ryan, the emergency room physician who treated Mr. Figueroa when he arrived that afternoon, had failed to properly observe Mr. Figueroa to determine if he had a case of compartment syndrome. Instead, Mr. Figueroa was discharged from the hospital with vague and insufficient care instructions. By the time Mr. Figueroa returned to the hospital on his own initiative, the damage was done. Because a prior unrelated injury had deprived Mr. Figueroa of the full use of his right arm, Mr. Figueroa left Highline Hospital that day nearly incapacitated.

At trial, Mr. Figueroa's experts presented testimony and evidence that the delay in treatment and diagnosis was a breach of the standard of care and proximately caused Mr. Figueroa's injury. Defendant's expert waffled on the issue, and in some instances admitted that Dr. Ryan's acts fell below the standard of care. Dr. Ryan himself testified that he has no independent recollection of treating Mr. Figueroa. The evidence of what was said or done that day is the testimony of Plaintiff and the sparse written record made by Dr. Ryan.

Despite admitting that he had no memory of the day in question, Dr. Ryan was still permitted to testify that he gave adequate warnings to Mr. Figueroa. The court also permitted Defendant to impeach Mr. Figueroa with a previously-undisclosed and unauthenticated video clip of Mr. Figueroa performing various physical actions. Plaintiff's motion for a mistrial was denied, and the case proceeded to a jury verdict in favor of the Plaintiff. In short, Defendant was permitted to put on a full and questionably admissible defense, and still lost.

Defendant now asserts a large number of unsubstantiated and inadequate errors relating to issues that were solely within the discretion of the trial court. In so doing, Defendant severely mischaracterizes the testimony and evidence on record and the law of this state in an attempt to create the existence of error. Defendant essentially asks this Court to review de novo the trial court's discretionary decisions and the jury's findings of fact. Because the standard of review does not permit such radical action, the rulings of the trial court must be affirmed.

II. ISSUES ON APPEAL

1. Did the trial court properly exclude the cumulative and unduly prejudicial evidence of Plaintiff signing different names when the purported purpose for that evidence was admitted by Plaintiff during cross examination?

2. Did the trial court properly deny Defendant's motion to reconsider this ruling?
3. Did the trial court properly grant Plaintiff's motion *in limine* to exclude Dr. Ryan's's testimony regarding habit and routine when such testimony did not have sufficient probative value and would only have confused the jury?
4. Did the trial court properly exclude evidence of habit and routine when such evidence was not probative as to whether malpractice was committed on the particular occasion in question?
5. Did the trial court properly permit Plaintiff's expert to testify as to causation when that expert was fully disclosed and Defendant previously had the opportunity to depose him on that issue?
6. Did Plaintiff present sufficient evidence of causation when his experts testified that Dr. Ryan's negligence was the cause of Mr. Figueroa's injury?
7. Did the trial court properly enter judgment on the jury's verdict when substantial evidence was presented to support that verdict?

8. Did the trial court properly deny Defendant's request for WPI 105.08 when the issue was not a choice of treatments but instead whether Dr. Ryan properly attempted to diagnose or treat Mr. Figueroa's compartment syndrome at all?
9. Did the trial court properly deny Defendant's motion for a new trial when no attorney misconduct occurred and Defendant had a full and fair opportunity to present their case?

III. STATEMENT OF THE CASE

A. Mr. Figueroa's background

Mr. Figueroa is a United States citizen who emigrated to the United States from Mexico in 1987. VRP 256. While Mr. Figueroa understands basic English, he does not understand more complicated phrases and concepts. VRP 269, 270-72. His wife of seventeen years, Rosa Figueroa, is also of Hispanic ancestry. VRP 258. She also has limited skills in English. VRP 692. Both required the use of an interpreter during trial. VRP 255, 557. Mr. Figueroa and Rosa have three children, Bernardo, Jr., Emelia, and Andres. VRP 257.

Mr. Figueroa was employed as a fisherman until he decided to seek other work so that he could spend more time with his family. VRP 259. He was a very hard working man who supported his wife and children.

VRP 560. When Mr. Figueroa was not fishing in Alaska, he worked as a union laborer in the Seattle area. VRP 260.

In January of 2003, Mr. Figueroa was electrocuted on a construction job. VRP 263. He was working at the airport laying foundation at the time of the accident. *Id.* He was carrying a powerful drilling machine over his left shoulder when some flaw in the power cords caused him to be electrocuted. VRP 265. The current was so strong that Mr. Figueroa was thrown twenty feet. *Id.* He woke up in the ambulance on the way to Harborview. *Id.* Mr. Figueroa sustained significant permanent injuries to his left arm, including partial paralysis. VRP 266. It was several years before he was able to use his arm at all, and several years beyond that before the tremors finally subsided. VRP 267.

Prior to his injury, Mr. Figueroa would spend a lot of time engaging in family activities such as going to the park, church, or playing sports with his kids. VRP 262. The electrocution injury caused Mr. Figueroa significant depression and anxiety because he couldn't engage in the same family activities or work. VRP 273-74. He was prevented from working and supporting his family, and was eventually determined to have a permanent disability. VRP 268. The family began to experience significant financial problems as a consequence of Mr. Figueroa's inability

to work. Mr. Figueroa received only a tiny portion of his prior income by way of a Labor and Industries pension. VRP 498.

On October 3, 2005, on the way home from a visit with Dr. Proano, Mr. Figueroa's psychiatrist, Mr. Figueroa began to experience unexplained abdominal pain. VRP 275. Mr. Figueroa was dropped off at Highline Hospital by his wife so that she could run home and make sure the children had somebody to watch them. VRP 688. While Rosa went home to arrange for care for the kids, Mr. Figueroa checked himself in. VRP 276.

B. The initial Emergency Room visit

Mr. Figueroa was first seen in the ER at 3:00 p.m. VRP 276; CP 442. The Defendant, Dr. Thomas Ryan, examined Mr. Figueroa. VRP 278. Mr. Figueroa was complaining of nausea and burning in his abdomen, so Dr. Ryan sent Mr. Figueroa for a CT scan with contrast to rule out certain conditions, such as an inflamed or burst appendix. VRP 445. An IV was placed in his right hand for an initial saline injection. VRP 277. Mr. Figueroa complained several times to the nurse that his hand hurt, but nothing was done. *Id.*

Mr. Figueroa was delivered to the radiologist at around 3:40 p.m. An IV was prepared and connected to his hand. VRP 447. During the injection of dye contrast, Mr. Figueroa felt that something "blew up" in his

hand. *Id.* He began screaming as his hand and arm increasingly swelled until the staff finally took notice. VRP 448. After considerable effort, the nurse and radiologist were able to disconnect the IV. *Id.* Mr. Figueroa was returned to the ER at 3:45 p.m. *Id.* He was experiencing swelling and significant pain in his forearm and hand that he described as a 10 out of 10 on the pain scale. VRP 449.

Mr. Figueroa had suffered an extravasation, which occurs when contrast fluid from an IV leaks from the vein. VRP 326. The leaked fluid can damage surrounding tissue. VRP 300. In some rare instances, the body will develop what is known as compartment syndrome. VRP 304. When this occurs, the swelling builds up pressure in body "compartments" composed of thick connective tissue known as fascia where there is no room for expansion. *Id.* This eventually results in the collapse of the surrounding veins and the cessation of blood flow into and out of the compartment. VRP 305. The treatment for compartment syndrome is a fasciotomy, a surgery in which the fascia is cut until the pressure decreases and the vessels can reexpand. VRP 307. Unless surgery occurs, the problems compound until that part of the body dies. VRP 306-07. Time is therefore of the essence when dealing with a potential compartment syndrome. VRP 359. It is generally accepted that surgery should occur within six hours to prevent serious injury. VRP 350.

Compartment syndrome was not properly tested for or diagnosed at the time, despite the "red flag" of pain. VRP 319. Mr. Figueroa's fingers became impossible to move without significant pain. VRP 451. There was also significant swelling and pain associated with the swelling. *Id.* Ice was applied. *Id.* Dr. Ryan then had Mr. Figueroa injected with large dose of the painkiller Demorol, after which Mr. Figueroa unsurprisingly reported feeling less pain. VRP 453, 333. The nurse reported that the swelling appeared to decrease upon application of ice, but this was not something she could accurately observe. VRP 430. Mr. Figueroa also reported being better able to move his fingers, which is consistent with the effects of pain medication because pain was the primary inhibitor of movement. VRP 346-47.

Mr. Figueroa was discharged at 5:18 p.m. CP 461. Dr. Ryan never physically examined Mr. Figueroa's hand or forearm. VRP 458-59. He never requested that a nurse perform any tests. *Id.* All he did was look at Mr. Figueroa's hand, and then order ice and an injection of Demorol. *Id.* There were no written discharge instructions regarding the potential for compartment syndrome, nor any mention of the extravasation injury. The only reference to Mr. Figueroa's arm in the discharge instructions was for him to keep the arm elevated and not work the next day. VRP 339. He was

instructed to return within 24 hours if his symptoms did not improve. VRP 359.

Dr. Ryan admits that he has no independent memory of Mr. Figueroa. VRP 808. The only evidence of what occurred that day is the testimony of Mr. Figueroa, his wife Rosa, and the medical records.

C. Mr. and Mrs. Figueroa return to Highline

After leaving the hospital, the Figueroas stopped to pick up their children. VRP 462. When Mr. Figueroa got home, he elevated his arm as instructed and waited for the pain to subside. VRP 463. It never did. *Id.* Mr. Figueroa's pain became so significant that he and Rosa returned to the emergency room. VRP 464.

According to Highline records, Mr. Figueroa was seen in triage at 9:40 p.m.. CP 456. He was seen by a physician at 9:46 p.m. *Id.* Doctors immediately saw that there was a serious problem and Mr. Figueroa was transferred to the Burien hospital campus for surgery. CP 459. The Diagnosis of the problem was "compartment syndrome." *Id.*

Dr. Mouenke, a surgeon, performed an emergency fasciotomy surgery to resolve the compartment syndrome at approximately 11:40 p.m., approximately eight hours after the extravasation. CP 471. The surgery came too late and Mr. Figueroa has suffered significant permanent

injuries to his right arm. VRP 471. Now both of Mr. Figueroa's arms have been severely compromised.

During post-surgery treatment by Dr. Mouenke, Mr. Figueroa related that he was still having serious problems with his arm. VRP 872. Dr. Mouenke sent Mr. Figueroa to Dr. Clark for a second opinion. VRP 872. Dr. Clark noted that Dr. Mouenke made a valiant effort to resolve the compartment syndrome, but he was too late. *Id.* He stated regarding Dr. Mouenke's actions,

> Despite your best efforts to treat this emergency, it appears that it was probably six hours before you were able to get him to the operating room simply because he went home and there was a delay before he actually came back.

VRP 907. Mr. Figueuroa had persistent problems after the surgery, including "decreased motion, significant stiffness, and continued pain as well as paresthesia in the median nerve distribution..." and "Unfortunately [Mr. Figueroa] has residuals of stiffness and weakness" because of the delay. VRP 872, 906.

D. Procedural history

Plaintiff initially brought suit against Highline Medical center, Dr. Ryan individually, and Dr. Ryan's practice for medical malpractice in failing to exercise the standard of care as it related to treatment of Mr. Figueroa's compartment syndrome. CP 1-9. Highline moved for summary

judgment, and Plaintiffs did not oppose. Highline was subsequently dismissed from the suit.

On May 31, 2011, Plaintiffs filed their disclosure of primary witnesses. Included in this list were Dr. Zafren, Dr. Mouenke, and Dr. Proano. (Supplemental Designation of Clerk's Papers filed collaterally herewith). Dr. Zafren was not listed as a witness for proximate cause, but Defendant was well aware what his testimony would be, based on Dr. Zafren's deposition testimony that had been taken several days prior. VRP 409.

E. Evidentiary motions

1. The Court properly excluded evidence of Mr. Figueroa's Alias.

The Defendant sought to offer documents which indicated that that Mr. Figueroa used an alias, Seku Montana-Linares. The Plaintiff moved to exclude these documents on the basis that such evidence was unfairly prejudicial and of minimal probative value. CP 21. Defendant objected, arguing that such evidence was crucial and went to the character of Mr. Figueroa. CP 68. The trial court granted Plaintiffs' motion and had the signatures redacted from the documents. VRP 6.

The court ruled that under an ER 403 balancing, the potential for unfair prejudice was likely to distract the jury from dealing with the issues

at hand of medical negligence. *Id*. The court also reasoned that it did not want the jury to speculate regarding the alias, but agreed to reconsider its ruling if the Plaintiff opened the door. *Id.* When the issue was again raised during the testimony of Mrs. Figueroa, the court noted that the Defendant had already been able to elicit the testimony that the signatures supposedly proved: that Mr. Figueroa's signature looked the same on his intake and discharge forms. VRP 681. Any "incremental delta of additional probative value" that the signatures provided was far outweighed by their potential for unfair prejudice. VRP 681-82.

2. Dr. Ryan's testimony regarding his habit and routine was properly excluded.

Plaintiff also moved to exclude testimony regarding Mr. Figueroa's industrial injury, which was granted, as well as testimony by Dr. Ryan regarding his habit and routine, which was reserved. CP 109-12, 212; VRP 15. The trial court later resolved the issue of habit when it arose during the testimony of Dr. Ryan by properly excluding it. VRP 829. The court reasoned that, under *Physicians Ins. Exchange v. Fisons Corp.*, 122 Wn.2d 299, 326, n. 39, 858 P.2d 1054 (1993), any testimony by Dr. Ryan regarding a habit or routine instructions regarding a potential compartment syndrome, or even an extravasation injury, were quite different from the permitted testimony described in that case. VRP 829. The court further

noted that such testimony was not admissible in light of the fact that Dr. Ryan admittedly had no memory of what he may or may not have said to Mr. Figueroa. *Id.* The trial court granted Defendant's motion to exclude testimony regarding criticism of Dr. Ryan not causally related to the injuries suffered by Mr. Figueroa. CP 212.

3. The Trial Court's ruling regarding discharge instructions favored the Defendant.

The court also granted Defendant's motion to exclude testimony regarding Dr. Ryan's failure to document written discharge instructions, with the caveat that Plaintiff was permitted to discuss that lack of documentation on cross examination and in closing. VRP 15. The trial court noted that this issue would be readdressed when Dr. Ryan took the stand. *Id.* The issue was actually readdressed during the testimony of Dr. Zafren, expert witness for the Plaintiff, at which time the Court ruled that since the only evidence of what was done beyond Mr. Figueroa's testimony was solely based on written records, Dr. Zafren could properly address the issue of documentation with respect to the standard of care. VRP 344.

4. *Defendant was permitted to improperly introduce a previously undisclosed and unauthenticated video tape for impeachment purposes.*

During the cross examination of Mr. Figueroa, Defendant introduced as impeachment evidence an unauthenticated, unpublished, and previously undisclosed video clip that showed Mr. Figueroa performing physical activities. VRP 501. Plaintiff's counsel objected and the court excused the jury. VRP 502. The trial court then reviewed the video outside the eyes of the jury. VRP 504-05.

Plaintiffs moved for a mistrial because of the unfair ambush by defense counsel. VRP 511. Defendant's counsel vehemently argued against granting a mistrial. VRP 515. The court denied Plaintiffs' motion, reasoning that the jury had only seen a few seconds of video before it was halted. VRP 519. The court then admitted the video for impeachment purposes only. VRP 521. The court gave the jury a limiting instruction, directing them to not consider the video as substantive evidence. VRP 523-24. Defense counsel later attempted to undermine this ruling by asking to play the video during closing, which the trial court properly forebade because of the great chance the jury would consider the video to be substantive evidence. VRP 827.

During the subsequent impeachment, Mr. Figueroa explained that the limited sections of time shown in the video demonstrated improvement

to his condition since the time of the accident, and that none of the activities shown required significant physical strength, stamina, or dexterity. VRP 527-29. Ms. Figueroa confirmed this testimony, stating that the video fails to show is how frequently Mr. Figueroa needs to take breaks while doing something, the times when he can't do these things because the pain is too great, and all the emotional effects of the trauma. VRP 703.

F. Expert Testimony

1. Dr. Zafren testified regarding Dr. Ryan's breach of the standard of care and Mr. Figueroa's injury that proximately resulted.

Dr. Kenneth Zafren, Plaintiffs' expert witness, is an emergency physician with nearly twenty years of emergency room experience and a clinical associate professor at Stanford University School of Medicine. VRP 287-88. He is board certified in emergency medicine by the American Board of Emergency Medicine, a national organization. VRP 289-90.

Dr. Zafren testified to the standard of care Dr. Ryan should have met. When treating a patient that has suffered an extravasation injury, the doctor should initially observe the patient in addition to icing and elevating the injury. VRP 311. Patients should be checked on every half-hour or so, for at least a two hour period before they are discharged from

the hospital. VRP 312-13. If the doctor suspects that a compartment syndrome may be developing, he should call a consulting orthopedic or plastic surgeon. VRP 313. This is because a shorter period of time is not always sufficient for a compartment syndrome to evolve. *Id.* In short, Dr. Ryan should have had Mr. Figueroa wait in the emergency room for a few hours and made one phone call. VRP 342-43.

Physical examinations are also used to test for compartment syndrome. VRP 315. These include checking for a pulse, testing artery refill by squeezing a finger nail, testing nerves by touching the affected area, or checking for pain on passive motion, i.e., when the patient relaxes the area and the doctor moves the muscles. VRP 315-316. There is no evidence that Dr. Ryan did any of these things. VRP 340.

Dr. Zafren testified that Dr. Ryan breached the standard of care, on a more probable than not basis, because he did not do these things. Additionally, Dr. Zafren testified that someone with an extravasation injury alone will generally not be in severe pain. VRP 319. The fact that Mr. Figueroa experienced such pain should have been a red flag for Dr. Ryan that something other than a pure extravasation injury had occurred. *Id.* Dr. Ryan gave Mr. Figueroa a large enough dose of pain medication that it would decrease pain for almost any cause. VRP 322. That Mr.

Figueroa still experienced significant paint afterwards indicates that further testing or monitoring was required. *Id.*, 439.

Mr. Figueroa should not have been discharged from the hospital at that time. VRP 353. Nonetheless, even the discharge instructions given by Dr. Ryan fell below the standard of care. VRP 354. Patients generally do not remember most oral discharge instructions, so written instructions are important and are standard practice in every emergency department in the United States. VRP 355. Dr. Ryan discharged Mr. Figueroa with no written instructions on what to do if the condition of his arm got worse, stayed the same, or got better. VRP 357. All discharge instructions appear from the records to be directed at Mr. Figueroa's abdominal pain. VRP 358. The instructions told Mr. Figueroa that his symptoms should improve within 24 hours. *Id.* If Mr. Figueroa had actually waited 24 hours, his arm tissue would have been dead. VRP 361. Finally, a Spanish interpreter should have been present to explain all of this to Mr. Figueroa, given his limited English skills. VRP 369.

Dr. Zafren testified that the longer the time between the development of compartment syndrome and the surgery, the worse the outcome. VRP 405. Compartment syndromes steadily worsen, though treating the symptoms with pain medication can falsely make it appear as though it is temporarily getting better. VRP 431. Defendant objected to

Dr. Zafren's testimony regarding proximate cause and the court had a hearing outside of the present of the jury. VRP 401. After allowing both parties to question the witness, the court ruled that Defendant's arguments went primarily to the weight of Dr. Zafren's testimony. VRP 409. Dr. Zafren did not testify to specifics and percentages of impairment, only that Mr. Figueroa had some ongoing problems as a result of the belatedly treated compartment syndrome. VRP 438.

2. Dr. Dobson's testimony for the Defendant was inconsistent.

Conversely, Defense expert Dr. Ronald Dobson testified that Dr. Ryan met the standard of care. VRP 579. Dr. Dobson hotly contested that Mr. Figueroa had compartment syndrome while he was initially in the emergency room. VRP 598. During direct examination, however, Dr. Dobson admitted that once swelling from a compartment syndrome begins to impede bloodflow, serious problems start to arise in as little time as half an hour. VRP 601. He testified that Dr. Ryan observed Mr. Figueroa for an appropriate period of time, despite the fact that the records show that Mr. Figueroa was discharged from the hospital within an hour and a half of the extravasation injury, and records show that Dr. Ryan observed Mr. Figueroa for only a portion of that time. VRP 603. He testified as to the role of habit and routine in emergency room practice, but did not testify as to its application when an extremely rare event happens. VRP 611.

During cross examination, Dr. Dobson admitted that he formed his opinion as to what Dr. Ryan may have said to Mr. Figueroa without actually reading anything beyond the medical records, and without knowing what Dr. Ryan stated in his deposition. VRP 619. He also admitted that Dr. Ryan breached the standard of care by failing to provide written discharge instructions for dealing with a rare condition. VRP 620. Doctors tend to chart things that they think are important. VRP 671. Dr. Dobsen agreed with Dr. Zafren that physical examination and observation were important when dealing with a known extravasation injury. VRP 631-32. Dr. Dobson also admitted that there was no evidence from the written records that any physical examination was performed on Mr. Figueroa. VRP 628. Dr. Dobson agreed that keeping a patient under observation and calling a surgical consult were within the standard of care. VRP 660. Finally, Dr. Dobsen admitted that his training background and experience did not tell him what happened at Highline hospital on October 3, 2005. VRP 652.

3. Dr. Ryan testified despite having no memory of the incident.

Dr. Ryan was permitted to testify that he gave oral discharge instructions, even though he had no independent memory of the events. VRP 808, 834. The trial court ruled that Dr. Ryan could not testify as to his habit and routine, when the case at bar involved hotly contested and

factually specific elements as to what Dr. Ryan may or may not have orally instructed Mr. Figueroa. VRP 829. A compartment syndrome arising from an extravasation injury is a rare occurrence, and it is extremely unlikely that Dr. Ryan has a routine relating to a potential compartment syndrome. VRP 832.

G. Post trial and verdict

1. The Trial Court properly declined to give WPI 105.08.

All jury instructions were agreed except for the Defendant's request to give WPI 105.08. VRP 837. The court declined to give that instruction. The court ruled that the instructions as given properly instructed the jury on the law of the case. CP 258-260. To give Defendant's proposed instruction would only serve to confuse the jury on the law, especially in light of the fact that there is no evidence of any alternative treatment or diagnosis proposed. VRP 843.

Plaintiffs' counsel argued that the jury should not blindly buy Dr. Dobson's testimony that Dr. Ryan did the right thing, just like "all other doctors" and referenced the recent case involving Dr. Moumma. VRP 859. Defense counsel objected, and the court sustained. VRP 860.

2. The Jury requested documents that had been mistakenly excluded from their binders.

During deliberations, the jury sent a note to the court requesting "all medical records." CP 219. The court responded that the jury already had all records admitted into evidence. CP 220. Without any supporting statements or evidence, Defendant argues that this means the jury was specifically requesting unredacted documents showing Mr. Figueroa's signatures. Defendant's Opening Brief at 35. This is wholly inaccurate. Through inadvertent mistake, multiple documents admitted into evidence were accidently left out of the jury's notebook. Counsel for both parties realized the error and corrected it by giving the jury the other documents.

3. A juror posted innocuous comments on Facebook

Also during deliberations, a juror posted extremely limited comments on her jury duty to her Facebook account:

> - Happy Halloween my friends! Thanks for the wishes … now on to Medicare and great health. Spent the day in Superior Court doing my civic duty. On jury duty for next 2 weeks. :(Enjoyed a birthday dinner with Miss Harper, Kiki, Jeff, and Kip…but only ice cream, no cake. Ha!
>
> - Day 3 of jury duty. Very difficult to listen to the translator during the questioning. I can pick out some words. Halloween is over and done, so taking down the décor and bringing out the turkeys! Rain has returned with snow coming in the mountains tonight and tomorrow. It's fall alright!

> - Day 4 of jury duty, off on Friday, and back to the jury on Monday. Hope to finish by noon on Thursday. It's been interesting. Love the 1 ½ hour lunches. Went to Pike Market on Thursday for a bowl of chowder. Walked back with bunches of flowers. Sun shining brightly which added to the day!

CP 258-260. After the jury had reached a verdict, she posted:

> - My civic duty, jury duty, ended today with a negligent claim on the doctor. This was tough to decided $s to the plaintiffs. Mentally exhausting! Onto Overlake Hospital for "caregivers class" for Kip's surgery. Now to get him a date with the knife. Ending day with birthday cake for Jeff…40 candles, not one more or less. And a birthday cheer for Jacob Brandon Pugh who has 4 candles on his cake!

Id. Mr. Fitzer's office was aware of these comments well before the jury rendered its verdict, and when an alternate juror was available, yet Mr. Fitzer claims that he personally did not know until afterward. CP 257. Regardless, the comments did not demonstrate any kind of insight into the jury's deliberation, let alone cast doubts on that juror's ability to be fair.

The jury returned a verdict in favor of Mr. Figueroa in the amount of $122,000. CP 275. Defendant moved for a new trial, but was properly denied. CP 267. The trial court entered judgment in favor of Mr. Figueroa on January 12, 2012. Dr. Ryan then appealed on February 3, 2012.

IV. ARGUMENT

Defendant is asking this court to find error in rulings that were solidly within the discretion of the trial court. A trial court's decision to

admit or exclude evidence will be overturned only for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A court abuses its discretion if its ruling is "manifestly unreasonable or based upon untenable grounds or reasons." *Id.* Similarly, a trial court decision on a motion for a new trial is reviewed for abuse of discretion. *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). When reasonable people could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). Defendant fails to meet this burden.

In this case, Defendant appeals the trial court's decisions to redact unduly prejudicial information from Mr. Figueroa's medical records, exclude testimony by Dr. Ryan regarding his habit or routine when his testimony was that he had no independent recollection of what he did or did not do to treat Mr. Figueroa, deny a request for an inapplicable and potentially confusing jury instruction, permit Plaintiff's expert to testify as to causation after a thorough inquiry outside the presence of the jury, and allow testimony regarding Dr. Ryan's written documentation when such documentation was the only confirmed evidence of what was actually done. In the process, the Defendant asks this Court to usurp the position of

the jury and reevaluate the evidence presented at trial. This court should affirm the rulings of the trial court.

A. Defendant was able to argue that Mr. Figueroa's signature was not affected by his injury without the use of unfairly prejudicial evidence.

1. Use of Mr. Figueroa's alias was unfairly prejudicial and was properly excluded.

Prior to trial, the court redacted Mr. Figueora's driver's license and a signature from two medical records because Mr. Figueroa had used the alias of Seku Montana-Linares. The trial court ruled to exclude this evidence given the minimal evidentiary value of the signatures and the strong potential for unfair prejudice. Relevant evidence is generally admissible. ER 402. Under ER 403, however, otherwise "relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..." The purpose of evidence is to convince the trier of fact to reach one decision rather than another, so "the linchpin word is unfair" when determining whether ER 403 excludes evidence. *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987) (internal quotation marks omitted). Generally, "unfair prejudice is caused by evidence that is likely to arouse an emotional response rather than a rational decision among the jurors." *Id.* (internal quotation marks omitted). Additionally, the trial court, "not an appellate court, is in the best position

to evaluate the dynamics of a jury trial and therefore the prejudicial effect of a piece of evidence." *State v. Harris*, 97 Wn. App. 865, 869, 989 P.2d 553 (1999) (citing *State v. Taylor*, 60 Wn.2d 32, 40, 371 P.2d 617 (1962)), review denied, 140 Wn.2d 1017 (2000). "Because of the trial court's considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion." *Carson v. Fine*, 123 Wn.2d 206, 226, 867 P.2d 610 (1994), citing to *State v. Gould,* 58 Wn. App. 175, 180, 791 P.2d 569 (1990); *State v. Gatalski*, 40 Wn. App. 601, 610, 699 P.2d 804, review denied, 104 Wn.2d 1019 (1985). The Court of Appeals will overturn a trial court's balancing of the danger of prejudice against the probative value of the evidence "only if no reasonable person could take the view adopted by the trial court." *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

The court's exclusion of the driver's license and signatures was proper for two reasons: evidence of unrelated alleged wrongdoing on behalf of Mr. Figueroa was of minimal relevance for determining whether Dr. Ryan had committed medical malpractice in light of the associated potential for prejudice, and Mr. Figueroa admitted at trial to the facts which Defendant was purportedly trying to prove. ER 403 exclusions generally do not extend to evidence crucial to a defense. *State v. Young*, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987). This is because, at that point,

the evidence's probative value exceeds its potential for prejudice. *Id.* The evidence Defendant sought to admit in this case does not rise to this level.

On cross examination, Defendant asked Mr. Figueroa to identify his signature on the official cover sheet he signed when he first arrived at Highline Hospital. VRP 541. Mr. Figueroa did so. *Id.* Defendant's counsel next asked Mr. Figueroa to identify his signature on the acknowledgement of discharge instructions form. *Id.* Mr. Figueroa also stated that it was his signature. *Id.* Mr. Figueroa then admitted that both signatures looked identical. VRP 542. During cross examination, Defendant was permitted to question Mrs. Figueroa regarding the same. VRP 682. There was no ambiguity in this testimony. Erroneously excluding evidence that would be cumulative with admitted evidence is harmless. See *State v. Flores*, 164 Wn.2d 1, 19, 186 P.3d 1038 (2008). Defendant was able to present evidence to the jury that Mr. Figueroa's signature had not changed from the time he first entered the hospital until the time he was discharged. Even if the trial court was in error when it excluded the signatures, presenting the documents with Mr. Figueroa's aliases would have been cumulative to the evidence already in front of the jury.

Defendant argues that the trial court relied on *Salas v. High Tech Erectors*, 168 Wn.2d 664, 670, 230 P.3d 583 (2010) to support the

exclusion of the identity evidence. This is a mischaracterization of the trial court's ruling. The trial court balanced the issue here by noting that while the cases involving immigration status are not directly on point, it is the invitation to arouse prejudice, suspicion and anger that caused the Court to disallow the minimally probative evidence. *Id.* at 668 (citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). The trial court ruled that under an ER 403 balancing test, whatever probative value the signatures may have was overwhelmed by the potential for prejudice, and was likely to district the jury from dealing with the claim at hand: medical malpractice. VRP 6; 682. The trial court specifically noted that *Salas* was not directly applicable to the case at bar, and did not base its ruling on that case. VRP 4; 680.

2. *It would have been improper to use Mr. Figueroa's alias for impeachment.*

The next argument raised by the Defendant,, that the plaintiff's use of an alias was proper impeachment evidence against Mr. Figueroa's credibility, is similarly unfounded. Defendant deceptively relies on the case of *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 621-622, 1 P.3d 579, 586 (2000), claiming the case stands for the proposition that putting down false information on a job application is *per se* admissible. The case does not, however, stand for this proposition.

Instead, the case deals with the legal doctrine of "after acquired evidence" and refers to the *McKennon* and *Janson* holdings permitting the admission of after acquired evidence. I need another sentence or two to understand your point here. *Id.* at 621-622. As such, it is not relevant to the case at bar when the issue is the unfairly prejudicial effect of minimally useful evidence.

Further, Defendant's argument is premised on a number of unproven assumptions, including the assumption that Mr. Figueroa used a false name for some illegal or fraudulent reason. There is no evidence on the record that this is true here. Indeed, Mr. Figueroa accurately included his address and contact information and also accurately stated that he was uninsured. Mr. Figueroa also informed the hospital of the use of the alias and the records were corrected. Mr. Figueroa testified that he used the alias to prevent the hospital from improperly denying him services. None of these facts are sufficient to permit the admittance of otherwise inadmissible documents.

The Defendant also attempts to deceive the Court by claiming that the jury's request to see "all medical records" somehow means that the jury was specifically requesting the unredacted documents described by the Defendant. Defendant's Brief at 35; CP 219. The request from the jury was because they had not been provided with all of the admitted

exhibits. This omission came to light when the jury sent out the note, and the error was corrected. The defendant is well aware of these facts.

Further, there is no evidence whatsoever to support this particular interpretation of the jury's request. The documents to which Defendant refers were admitted into the record, merely in redacted form. The Defendant goes on to speculate that this created a cascade of doubt that eventually resulted in the jury discounting the Defendant's case. Again, there is nothing on the record providing evidence for this self-serving and unsupported interpretation of events.

It is also unclear from Defendant's briefing where he believes Plaintiff opened the door regarding evidence of an alias by Mr. Figueroa. In *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.3d 17 (1969), cited by Defendant, defense counsel opened the door to questions about a lie detector test after he expressly questioned a witness regarding whether a such a test had been given, and whether the defendant had been cooperative. In this case, Mr. Figueroa testified that he could not move his fingers. During cross examination, he admitted that there was no difference between his signatures on arrival at the hospital and discharge. Defense counsel was able to directly address any door opened by Mr. Figueroa's attorney.

Finally, Defendant argues that redacting the records violates the rule of completeness contained in ER 106, because the jury was provided with "only a portion of the relevant medical records." Defendant's Opening Brief at 36. The Defendant misunderstands this rule. ER 106 is "not a vehicle for the wholesale introduction of otherwise inadmissible evidence." Karl B. Tegland, *5D Courtroom Handbook on Washington Evidence* 2011-12 § ch. 5 p. 204. Mr. Figueora's use of an alias did not "tend to modify, explain, or rebut the part that was introduced." *Id.*, quoting *State v. La Pierre*, 71 Wn.2d 385, 428 P.2d 579 (1967). Documents are frequently redacted by a court to remove sensitive information without violating this rule, such as bank accounts or addresses. If the Court were to adopt Defendant's argument, this would not be permitted. Such is clearly not the case in practice. The trial court did not abuse its discretion in excluding evidence of Mr. Figueroa's alias as unduly prejudicial under ER 403.

B. Dr. Ryan's testimony of his habit and routine was properly excluded where there was no supporting evidence and he had no memory of the event.

The trial court also properly excluded Dr. Ryan's testimony regarding his habit or routine of giving instructions because there is no evidence that he actually gave any instructions beyond what was written, and Dr. Ryan himself has no memory of the incident. VRP 829. As

recognized by the *Fisons* court, "determination of admissibility of habit evidence is within the trial court's discretion," and "[s]ince habit is 'semi-automatic, almost involuntary and invariably specific response to fairly specific stimuli,'" it would be absurd for Dr. Ryan to testify that he treats or discharges every patient condition in the same semi-automatic manner. *Physicians Ins. Exchange v. Fisons Corp.*, 122 Wn.2d 299, 326, n. 39, 858 P.2d 1054 (1993). Doctors routinely assert every patient is different and every circumstance is different. During trial, Dr. Ryan and Dr. Dobson both emphasized how rare it was for an emergency physician to even encounter a compartment syndrome arising from an extravasation injury. Dr. Ryan in fact testified that he has not seen a compartment syndrome from an extravasation before or since. VRP 808. It is therefore inconceivable that when confronted with an extremely rare occurrence that he had never seen, Dr. Ryan would develop a routine.

The *Fisons* court recognized that there is difference between admissible habit and what a professional does in some circumstances. *Id.* at 326 n.39. In *Meyers v. Meyers*, 5 Wn. App. 829, 491 P.2d 253, *aff'd*, 81 Wn.2d 533, 503 P.2d 59, 59 A.L.R.3d 1318 (1972), a notary's testimony that she never varied her business practice was admissible habit evidence. Conversely, in *Meder v. Everest & Jennings, Inc.,* 637 F.2d 1182 (8th Cir. 1981), the fact that an officer normally spoke to victims first in his

investigation did not rise to the level of habit under Fed.R.Evid. 406. In that casethe officer's testimony regarding whether his notes were based on victim statements was properly excluded.. *Fisons* at 326 n.39 (discussing *Meder v. Everest et al*). The instant case is much more analogous to *Meder* than to *Meyer*, as no competent physician would give the exact same injury-specific instructions to every person discharged from the hospital.

Dr. Ryan expressly testified that he does not have any independent recollection of treating Mr. Figueroa. VRP 753. Dr. Ryan was nonetheless permitted by the trial court to testify that he gave oral discharge instructions to Mr. Figueroa regarding his arm, despite no memory, and despite the fact that the only written notes state, "no work and elevate arm." VRP 803. Any testimony regarding what else may or would have been said is pure speculation, and therefore inadmissible. Having nonetheless been granted the opportunity to speculate by the trial court, Defendant now asserts that the trial court should have permitted him to speculate further. It was eminently reasonable for the trial court to limit Defendant's speculation.

Finally, it would be poor policy to permit doctors to testify what they would have said under an ER 406 exception, regardless of any written record or corroborating evidence. This would discourage creating

such a record, because a doctor could later immunize himself from liability by merely claiming that it was always his habit to give appropriate discharge instructions. This is not the intent of the rule, and the trial court did not abuse its discretion when it properly excluded such testimony.

C. The Trial Court properly declined to give Washington Pattern Jury Instruction 105.08.

A trial court's decision to give or not give a particular jury instruction is a matter within the discretion of that court and will not be reversed absent abuse of that discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). An instruction may be refused if the other instructions are sufficient to permit each party to argue its theory of the case, are not misleading and properly inform the trier of fact of the applicable law. *Hyatt v. Sellen Constr. Co.,* 40 Wn. App. 893, 895, 700 P.2d 1164 (1985). "'Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.'" *Robertson v. State Liquor Control Bd.,* 102 Wn. App. 848, 860, 10 P.3d 1079 (2000) (quoting *Hue v. Farmboy Spray Co.,* 127 Wn.2d 67, 92, 896 P.2d 682 (1995)). Specifically, WPI 105.08 is to be given with caution. *Watson v. Hockett,* 107 Wn.2d 158, 166, 727 P.2d 669 (1986). It applies only where there is evidence that in arriving at a judgment, "the physician

or surgeon exercised reasonable care and skill, within the standard of care he [or she] was obliged to follow." *Id.* The instruction's application will ordinarily be limited only to situations where the doctor is confronted with a choice among competing therapeutic techniques or medical diagnoses. *Id.*

Here, where the Court is significantly cautioned in the use of WPI 105.08, it was not abuse of discretion for the trial court to refuse to give the instruction, particularly when the Defendant was able to argue his theory of the case with the instructions actually given. Additionally, this is not a case where two competing treatments or diagnoses were considered by the defendant. At issue was when Mr. Figueroa acquired compartment syndrome, and whether Dr. Ryan exercised the reasonable standard of care in diagnosing it or giving discharge instructions. There is no evidence that Dr. Ryan exercised any judgment in choosing a discharge instruction, because there is no actual evidence that an instruction was given. WPI 105.02, given by the trial court, adequately informed the jury of the standard of care. Giving WPI 105.08 would only serve to confuse the jury that Dr. Ryan somehow made a different diagnosis or exercised his judgment as to what instruction he gave. As the court noted about WPI 105.08 in *Ezell v. Hutson*, 105 Wn. App. 485, 20 P.3d 975 (2001), "It appears to us that the standard instructions are adequate to allow argument

on the topic without undue emphasis or risk of confusion." WPI 105.08 was unnecessary, and the trial court did not abuse its discretion in refusing to give it.

D. The Court was well within its discretion to permit Dr. Zafren to testify regarding causation.

1. The Defendant was fully aware of Dr. Zafren's credentials and expected testimony.

A trial court's ruling on the admissibility and scope of expert testimony is reviewed for abuse of discretion. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). King County Local Rule [KLCR] 26(k)(3) requires that a party disclosing an expert witness provide a summary of their expert's opinions or risk precluding testimony. However, even if a witness disclosure is found to be lacking, KCLR 26(k)(4) provides that a trial judge may overcome this restriction based on good cause.

In this case, the trial court permitted Dr. Zafren to testify as to causation after through argument by counsel, noting that the Defendant was well aware of what Dr. Zafren would testify since he had testified to the same during his deposition more than five months prior and that Defendant's objections primarily went to the weight of the testimony. VRP 409. Such a decision to permit an expert to testify is within the discretion of the trial court. *Weber v. Budget Truck Rental, LLC*, 162 Wn.

App. 5, 15 n.26, 254 P.3d 196 (2011). Dr. Zafren was properly permitted to testify as to causation.

Further, Dr. Zafren was qualified to give his testimony. Dr. Ryan held himself out and provided care within the province of the practice of emergency physician. As such, he is held to the standard of care of the specialty of ER physician. WPI 105.02 (3rd.ed. 1994 Pocket Part). *See also Dinner v. Thorp*, 54 Wn.2d 90(1959); *Richards v. Overlake Hosp. Med. Center*, 59 Wn. App. 266 (1990). A medical expert's opinion may be based on the expert's first-hand knowledge or on information generally relied on in the field of expertise. *Reese v. Stroh*, 128 Wn.2d 300, 309, 907 P.2d 282 (1985). It is not necessary to prove every element of causation by medical testimony if, from the facts, circumstances and medical testimony given, a reasonable person could infer that the causal connection exists. *Douglas v. Freeman*, 117 Wn.2d 242, 252, 814 P.2d 1160 (1991). Additionally, inconsistency in expert testimony does not by itself prevent such testimony from meeting the burden of proof. *Browning v. Ward*, 70 Wn.2d 45, 51, 422 P.2d 12 (1966).

2. *Dr. Zafren provided sufficient evidence for a reasonable jury to determine that Dr. Ryan's breach of the standard of care proximately caused Mr. Figueroa's injury.*

Dr. Zafren, like Dr. Ryan, is an emergency room doctor. As such, he has the requisite knowledge, experience, and education to describe the

standard of care for an emergency room doctor, as well as the necessary knowledge, experience, and education to know what happens when a compartment syndrome arises in an emergency room setting and is not timely diagnosed and treated. He made no comment on the later adequacy or type of treatment, only on the fact that doctors in the emergency room are aware that there is a limited time window in which to catch compartment syndrome before injury occurs and that the standard of care requires certain minimal precautions by the treating physician. VRP 401, 434.

Dr. Zafren testified that all Dr. Ryan would have needed to do to meet the standard of care as an emergency room physician was to call for a specialist consult and observe Mr. Figueroa for a few hours. Neither act would have required a great expenditure of effort on the part of Dr. Ryan. Nevertheless, he simply sent Mr. Figueroa home with vague and inadequate instructions. The resulting delay in treatment caused the injury which Mr. Figueroa suffered. VRP 434. These actions are entirely within the scope of Dr. Zafren's expertise.

As acknowledged by the Defendant, the trial court considered this a close question and exercised its discretion in allowing Dr. Zafren's testimony. VRP 409. Defendant speculates that the court permitted the testimony because it anticipated other corroborating testimony, but the

court did not comment on this. Defendant further assumes he knows Plaintiff's attorney's internal reasons for his trial strategy. This is, yet again, insufficient to demonstrate that the trial court abused its discretion.

3. *Plaintiff's proximate cause evidence was not limited to the testimony of Dr. Zafren.*

Defendant also neglects to discuss the fact that additional evidence of causation was entered into the record at trial, with no objection from the Defendant. The parties stipulated that Dr. Mouneke, Mr. Figueroa's treating doctor, would testify that the records contained in Exhibit 1 are true and correct copies of his records of treating Mr. Figueroa. VRP 745. Contained in that exhibit are Dr. Clark's observations in agreement with Dr. Mouenke that the lapse in time between when the compartment syndrome began and when Mr. Figueroa went into surgery caused Mr. Figueroa to suffer injury, despite Dr. Mouneke's best efforts. Dr. Clark said,

> Despite [Dr. Mouenke's] best efforts to treat this emergency, it appears that it was probably six hours before [Dr. Mouenke was] able to get him to the operating room simply because he went home and there was a delay before he actually came back.

VRP 907. As a result of the delay, "[Mr. Figueroa] has residuals of stiffness and weakness." VRP 906. He also noted that Mr. Figueuroa had persistent problems after the surgery, including "decreased motion,

significant stiffness, and continued pain as well as paresthesia in the median nerve distribution…". VRP 872.

The stipulated testimony Defendant claims removes the factual basis for Dr. Zafren's opinion, in fact, does the opposite. Combined with the testimony of Dr. Zafren, this was more than sufficient evidence for a reasonable jury to conclude that Dr. Ryan's breach of the standard of care caused the injury to Mr. Figueroa.

The parties stipulated that Dr. Moeneke would testify on cross examination that nothing in his record would suggest a permanent injury beyond scarring, and that he did not notice dead tissue in Mr. Figueroa's hand or arm. Neither of these statements addresses causation. Instead, they go to the extent of Mr. Figueroa's injury after the compartment syndrome had occurred.

E. It was within the discretion of the Trial Court to admit evidence relating to a lack of documentation.

Defendant implies that the trial court somehow exhibited prejudice against him by permitting testimony regarding Dr. Ryan's lack of documentation from his treatment of Mr. Figueroa. What Plaintiff actually argued, however, was that the defendant's written discharge instructions, together with the insufficient oral instructions, caused the plaintiff's injuries. The jury agreed. So did Dr. Dobson, who noted on cross

examination that the defendant breached the standard of care regarding written instructions. As discussed above, it is within the discretion of the trial court whether to admit or exclude evidence. *Powell*, 126 Wn.2d at 258. The three cases cited by Defendant, *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); and *Zipp v. Seattle Sch. Dist. No. 1,* 36 Wn. App. 598, 601, 676 P.2d 538 (1984); stand simply for the proposition that the testimony of medical experts must establish that it is more probable than not that the incident in question caused the subsequent disability. *Grimes,* 78 Wn.App. at 561. In each case, the expert was permitted to testify. What these cases do not discuss, however, is anything to do with jury speculation.

Dr. Zafren testified that, based on the information available to him from Dr. Ryan's statements and his documentation, that Dr. Ryan breached the standard of care because there is no evidence that a surgical consult was ever made. VRP 343. Defendant's counsel objected, but was overruled. VRP 344. The court properly reasoned that, given Dr. Ryan's lack of memory of the incident, the only evidence of what was done was contained in the written charts and records. Dr. Zafren could therefore only base his opinion on what was in, or absent from, those records. Defendant again objected, and again was properly overruled, when Dr.

Zafren testified that a doctor should document what he thinks is important. VRP 353. Such testimony was not prejudicial, such that it was "likely to arouse an emotional response rather than a rational decision among the jurors." *Rice*, 48 Wn.App. at 13. The trial court was in the best position to make this assessment, and was within its discretion to permit this testimony.

F. There was no "combination of legal errors and juror and attorney misconduct"; Defendant was properly denied a new trial.

1. Multiple errors do not provide Defendant with a new trial.

Defendant argues that cumulative errors may create the basis for a new trial citing *Storey v. Storey*, 21 Wn. App. 370, 585 P.2d 183 (1978). *Storey* does not, however, stand for the broad proposition asserted by the defendant here. In *Storey*, the plaintiffs asserted that the defendant had "volunteered 35 unresponsive and prejudicial statements in the course of giving testimony which covers 47 pages in the record." *Id.* at 374. The court noted that its "own reading of the defendant's testimony disclosed 27 times (by conservative count) wherein the trial court ordered defendant's answers stricken or admonished her to be responsive to the questions asked." *Id.* The *Storey* trial court gave curative instructions. When the jury returned a verdict for the defendants, plaintiff's made a motion for a new trial. The court found that the prejudice created by the defendant's answers

was incurable and granted a new trial. *Id.* at 375. The Court of Appeals affirmed. The presumption that a jury followed curative instructions is inapplicable when the court finds as a fact that the prejudice is incurable. *Id.* Thus, *Storey* does not stand for the proposition that multiple alleged errors involving the exercise of the trial court's discretion equate to the requirement of a new trial.

2. *There was no juror misconduct sufficient to impeach the verdict.*

Additionally, the Defendant's counsel's office was aware of the alleged juror misconduct before the verdict was read, and while an alternative juror was still available to replace the juror who purportedly committed misconduct. Instead, the defendant waited until an adverse verdict and then advised the Court of the concern. Defendant argues that he was not informed by his assistant until after the verdict, but her knowledge is imputed to him. By waiting until after the verdict, Defendant waived any objection. *Spratt v. Davidson,* 1 Wn. App. 523, 526, 463 P.2d 179, 181 (1969). A party is not permitted to speculate upon the verdict by awaiting the result of the trial and then complain of an irregularity or misconduct in case the verdict is adverse. *Casey v. Williams*, 47 Wn.2d 255, 287 P.2d 343 (1955) (juror fell asleep); *In re Orcas Street, etc., Seattle*, 87 Wn. 218, 151 P. 506 (1915) (the absence of retained counsel

familiar with the case); *Kasey v. Suburban Gas Heat*, 60 Wn.2d 468, 374 P.2d 549 (1962) (improper argument to the jury).

Whether such juror misconduct even exists and whether it warrants a new trail is within the discretion of the trial court. *State v. Rempel*, 53 Wn. App. 799, 801, 770 P.2d 1058 (1989), *rev'd on other grounds*, 114 Wn.2d 77, 785 P.2d 1134 (1990). If misconduct is found, great deference is due the trial court's determination that no prejudice occurred. *State v. Briggs*, 55 Wn. App. 44, 60, 776 P.2d 1347 (1989); *State v. Cummings*, 31 Wn. App. 427, 430, 642 P.2d 415 (1982). A strong, affirmative showing of juror misconduct is required to impeach a verdict. "Verdicts should be upheld and the free, frank and secret deliberation upon which they are based held sacrosanct unless (1) the affidavits of the jurors allege facts showing misconduct and (2) those facts support a determination that the misconduct affected the verdict." *Ryan v. Westgard*, 12 Wn. App. 500, 503, 530 P.2d 687 (1975).

Here, the only posting that occurred during the trial was an innocuous statement regarding a translator. This fact statement does not bear at all on the jurors' deliberation or her ability to be fair. Under *State v. Theobald*, 78 Wn.2d 184, 470 P.2d 188 (1970) (juror talking to party about innocuous matters), this is not grounds for a new trial. The juror's comments here were a literal description of her day, and discussed no

significant issues at trial. It did not engender extraneous comments and there has been no showing by Defendant that the juror inappropriately considered extrinsic evidence from her postings. Defendant cannot demonstrate juror misconduct that casts any reasonable doubt on the verdict.

3. Plaintiff's attorney did not engage in misconduct.

Defendant's unsupported legal argument that in closing argument plaintiff's counsel committed acts of misconduct is also without merit. Even assuming the argument in question was improper, the trial court sustained Defendant's objection. The jury was instructed that argument of counsel is not evidence and that it should only consider admitted evidence. There was no error.

In summary, the trial court did not err in any of its rulings during the course of the trial. At most the defendant argues that the trial court should have exercised its discretion differently. However, the defendant must establish a manifest abuse of discretion. He has failed to do so in every instance.

V. CONCLUSION

Dr. Ryan had a duty to meet the standard of care when treating Mr. Figueroa. Plaintiff presented sufficient evidence for the jury to find that Dr. Ryan committed medical malpractice by failing to adequately test for

compartment syndrome or to issue adequate instructions upon Mr. Figueroa's release from the hospital, causing a delay in treatment that injured Mr. Figueroa. The trial court was well within its discretion when it decided to exclude or permit certain evidence of these issues at trial. Dr. Ryan was able to adequately argue his case to the jury, and was even permitted to testify to facts of which he has no memory and to show an improperly admitted video tape. He cannot now claim actual error or prejudice, and the jury's verdict should be affirmed.

DATED this 29th day of December, 2012.

VAN SICLEN, STOCKS & FIRKINS

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CERTIFICATE OF TRANSMITTAL

I hereby certify that the foregoing Brief of Respondent was sent out for delivery via ABC Legal Messengers to the following:

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DATED this 27th day of December, 2012 at Auburn, Washington.

Diana Butler
Diana M. Butler