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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

No. 323811

(Spokane County Superior Court No. 12-2-00182-5)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

JOSHUA DRIGGS, a single man,

Appellant.

vs.

ANDREW T.G. HOWLETT, M.D. and JANE DOE HOWLETT, and their marital community; PRODIVENCE PHYSICIAN SERVICES CO., aka Providence Orthopedic Specialties, a Washington Corporation

Respondents,

REPLY TO RESPONDENTS BRIEF

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TABLE OF CONTENTS

Page

I. Introduction 1

II. Analysis.....4

A. National v. Washington Standard of Care.....6

1. All evidence was that the national and Washington are the same.....7
2. Dr. Menendez submitted an affidavit that he did follow the form the Respondents complain about.....10

B. Striking of Dr. Menendez for not saying "yes" to more likely than not to a degree of medical certainty was an error..... 12

C. Dr. Menendez struck for informed consent was improper.....14

D. Striking Dr. Menendez was prejudicial error and not a harmless error.....19

E. Ms. DeSaveur should have been on the jury verdict form.....22

III. Conclusion.....24

Table of Cases

Adams v. Richland Clinic,37 Wn.App. 650, 657-658, 659(1984).................17, 18

Adcox v. Children Orthopedic Hosp., 123Wn.2d 15, 36(1993)...........................19

Brown v. Dahl, 41Wn.App. 565(1985)..17, 18

Diaz v. State, 175 Wn.2d 457, 472(2012) 19

Dormaier v. Columbia Basin Anesthesia, 177 Wn.App.828, 851(2013)........21, 22

Elber v. Larson, 142Wn.App. 243, 247,249(2007)...7, 8

Eng v. Klein, 121Wn.App.171, 180(2005).. 7, 9

Hill v. Sacred Heart Medical Ctr., 143Wn.App.438, 444,453(2008)..................7

Hundtofte v. Encarnacion, 181Wn,2d 1, 7(2009)...5, 9

Jones v. Allstate Ins. Co., 146Wn.2d 291, 304(2002).......................................23

Jones v. City of Seattle, 179 Wn.2d , 322, 338-341(2013)..................................5

Kelly v. Carroll, 36Wn.2d 482, 492 (1950)...23

Leaverton v. Cascade Surgical Partners, 160Wn.App. 512, 520(2011).............12-13

Mason v. Bon Marche Corp., 64 Wn.2d 177, 179(1964)..................................21

McLaughlin v. Cooke, 112Wn.2d 829, 837(1989)...13

Reese v. Stroh, 128Wn.2d 300, 309(1995)...16

Ruffer v. St. Frances Cabrini Hospital of Settle, 56Wn.App 625(1990).........17,18

Smith v. Shannon, 100Wn.2d 26, 29(1983)...14, 15

Thomas v. French, 99Wn.2d 95, 105(1983)..19

Tumelson v. Todhunter, 105Wn.2d 596, 605 (1986).. 21

Volk v. Demeerleer, 184Wn.App. 389(2013)..11

White v. Kent Med. Ctr., Inc., 61Wn.App. 163(1991)..12

Winkler v. Giddings, 146 Wn. App. 387(2008) 9,10

Statutes, Administrative Rules and Constitution

CR 50...14

CR 56... 14

ER 104...4, 10

ER 104(b)... 4, 10

ER 702... 6, 10, 12

ER 703... 16

I. Introduction

What we have before the court today is a Respondent attempting to circumvent justice and avoid accountability based upon their view of procedural technicalities that do not align with long-standing Washington law and public policy. First, Washington has consistently rejected hyper-technical protocols as a pre-condition to permitting the trier of fact to consider an expert's standard of care testimony. Second, the Respondents were on notice that the actions done by any agent, here Ms. DeSaveur, on May 27, 2009 in the Respondent's office were part of the claims for negligence, despite what they now claim.

The trial court's exclusion of Dr. Menedez by way of hyper-technicality was an incorrect application of law and was not based upon substantive facts supported in the record. This was clearly a prejudicial error that ether did or could have affected the outcome of trial. Likewise the trial court's exclusion of agent Brandi DeSaveur from the verdict form was based on an erroneous application of law that severely prejudiced the substantial rights of the Appellant and their ability to argue their version of the case to the jury.

With regard to striking Dr. Menedez testimony, prejudicial error is clear in three particular areas:

1. Dr. Menedez was familiar with the standard of care in the

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State of Washington because it is the same as the national standard. All of the evidence, including admissions by the Respondents own medical experts, established that the Washington standard and national standard were synonymous. There was no evidence of any difference between the Washington and national standard of care, not even through the Respondents' witnesses. The court excluded Dr. Menendez because he did not follow the format the Respondents claim is the only allowable way of bringing in an expert familiar with the national standard, contacting Washington physicians and confirming the two standards are the same. If however this is the format for an expert to testify when they are familiar with the national standard of care, then Dr. Menendez's supplemental declaration that he personally confirmed the standards were synonymous cured any purported deficiency prior to the Appellants resting their case.

2. Dr. Menedez based all of his testimony on a more probable than not degree of medical certainty. As pointed out in the Appellant's opening brief, a review of all his testimony shows it based on his expert qualifications as an orthopedic oncologist, and that he testified on a more probable than not basis. The fact that Dr. Menedez verbally did not say "yes" when instructed to give his opinions on a more likely than not degree of medical certainty, is not evidence to strike him, and at best elevates form over substance. In any case this was cured by his

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supplemental declaration that was submitted prior to the Appellant resting the case.

3. Dr. Menendez provided sufficient and reliable testimony to show that Dr. Howlett increased the "probability of occurrence." Dr. Menendez testified that a large bulk allograft left unsupported is more likely to fracture. He testified that when Dr. Howlett performed a "rod-placement surgery" without placing a rod, without consent from the patient to not place a rod, without informing the patient of increased risks but instead instructing him to begin weight bearing, it was a failure to obtain informed consent. Probability need not be presented with a specific numeric percentage to quantify the increased risks.

The Appellant was severely prejudiced by striking of Dr. Menedez's testimony on standard of care, causation, and material risk from being heard before a jury. Instead, the jury was admonished by defense counsel that Dr. Menedez did not testify "Dr. Howlett violated the standard of care any way, shape or form." The jury was admonished by defense counsel that Dr. Menedez did not testify "that fixation hardware in March of '09 would have prevented this fracture." The jury was admonished by defense counsel that Dr. Menedez did not "provide any information ... that there was a violation of the standard of care in postoperative management." The jury was admonished by defense counsel

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that Dr. Menedez did not testify "there was a violation of that standard of care having to do with interpretation of the May 27, 2009 x-ray." Defense counsel used a procedural ruling by the trial court to mislead the jury. Trials should be the pursuit of justice based on facts, and excluding witnesses because they do not testify in the form the Respondents think they should deprived the jury of hearing the Appellant's orthopedic oncologist testimony against and orthopedic oncologist.

II. Analysis

The Respondents have argued that the trial court was within its proper role to keep out the testimony of Dr. Menendez, either as the gatekeeper under ER 104, or possibly as sanctions for him not being properly qualified. Both of these are not correct.

The role of the gatekeeper under ER 104 allows the judge to keep out evidence to ensure that evidence going to the jury does not violate evidence rules. In particular, ER 104(b) removes the rules of evidence when the trial court acts as the gatekeeper. This effectively negates the Respondents' arguments that the trial court was correct to strike Dr. Menendez's curative affidavits under hearsay, since hearsay is not a proper exclusion of foundational evidence for the purpose of gate keeping under ER 104. See Respondent's brief p. 25. Most importantly though a

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judge should have some evidence upon which to base the decisions to strike a witness. See *Hundtofte v. Encarnation*, 181 Wn.2d 1, 7 (2009) for holding it is an abuse of discretion to make a ruling without evidence.

While not overt, the Respondents have implied that another basis for not allowing Dr. Menendez's testimony is as a sanction for Mr. Drigg's counsel not getting Dr. Menendez to follow the proper qualification format. See Respondents' brief p. 1, 23. Our Supreme Court has constantly held that striking a witness is an extreme remedy, even if sanctions are warranted.[1] *Jones v. City of Seattle*, 179 Wn.2d 322, 338 (2013). Prior to striking a witness for improper activity a court must do a Burnett analysis of (1) considering whether a lesser sanction would suffice, (2) whether the violation was willful or deliberate, and (3) whether the violation substantially prejudiced the opponent's ability to prepare for trial. *Id.* This record not only has no such findings against the Appellant, the record does not even discuss this possibility.

Dr. Menendez was struck on his ability to speak (A) to the standard of care because he testified to a national standard and not specifically to the Washington standard, (B) on his causation because he did not affirmatively say yes when he was instructed to make all his

[1] At no time do we believe the court ever stated sanctions are warranted on the Appellant, and Appellant does not agree that this could be a ground, but feels compelled to address the implication here.

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opinions more likely than not based upon a medical degree of certainty, and (C) because he did not use statistics or probability language on speaking to the materiality of the risks for the purpose of informing Mr. Driggs. All of this was without evidence and improper, and (D) deprived the Appellant of his only orthopedic oncologist, and most reliable expert.

A. National v. Washington standard of care

In the original motion to strike Dr. Menendez the only evidence that was presented to the court was that the Respondent's experts, Dr. Rolfe and Dr. Bruckner had testified the national and Washington standard were the same. CP 449. The Respondents presented no evidence of the difference between the national and Washington standard of care, but only argued that Dr. Menendez on his own had no foundation for his opinion that Washington and the national standard were the same. CP 314-315.

The only evidence was that Dr. Menendez was qualified under ER 702 to speak to the standard of care. (1) The only evidence was that the Washington and national standard are the same, and there was no evidence of any difference between. Any exclusion of Dr. Menendez for only speaking to the national standard of care is based upon no evidence. (2) Along with this, Dr. Menendez put in an affidavit that he called Washington physicians and himself verified that Washington and the

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National standard were not different.

1. <u>All evidence was that the national and Washington are the same</u>

Appellants agree that Washington's standard of care is the requirement. This is does not negated by the logical conclusion that when all evidence is that the national and Washington standard are the same, and no evidence is presented in the opposite, then testimony for the national standard of care is the same as testimony of the Washington standard of care. This has been well recognized in several cases: *Eng v. Klein*, 127 Wn. App. 171, 180 (2005) (expert testified to a national versus a local standard and the court found him competent to testify because there was no evidence presented that the standard was different between Washington and the national standard); *Elber v. Larson*, 142 Wn. App. 243, 247, 249 (2007) (expert testifies in a supplemental declaration that Washington and national standard is the same, and court states "And [the expert] is familiar with the standard of care in Washington because it is the same everywhere in this country.) *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 444, 453 (2008) (Two experts submit affidavits, one formerly practicing medicine in Washington who testifies the standard of care in Washington is the same as the national standard, and the other testifying that the standard of care is national and there for applies to

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physicians, both are allowed to testify to the standard of care.)

As stated in our initial brief the only evidence before this court was that the national and Washington standard are the same:

- Dr. Graboff testified that after speaking with other physicians in Washington he determined the standard of care was the same for Washington as national. RP 375.
- Dr. Padrta, in his deposition states that he did not really consider the nationwide standard of care but rather just what he does in his practice as the standard. CP 309.
- Dr. Bruckner testified in his deposition that the standard was the same in Washington, national, and even international. RP 96; 139-142 (1/15/14)
- Dr. Mendendez himself put in a declaration prior to the Appellant resting his case that he had talked with Washington physicians and found no difference in the standard of care. CP 554-55. Almost this exact same declaration was used with approval in *Elber,* 142 Wn. App. at 247.

Respondents try to argue that by their experts testifying to only the Washington standard of care, the pure dispute on the standard of care means there is a difference between national and Washington standards of

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care. Respondent Brief p. 20. This is simply incorrect. A review of the case law shows that there must be testimony of a change in the standard by locality or geography, and not an argument over substance of the standard of care; else bringing in any out of state expert would be a problem. *Eng.*, 127 Wn. App. at 179.

The Respondent's whole argument is that showing the national and Washington standard are the same must be done solely through Dr. Menendez and prior to the first offering of his testimony. To make this argument they rely largely on *Winkler v. Giddings*, 146 Wn. App. 387 (2008) and talk about how a summary judgment ruling on the standard is different than the trial judge's discretion on the standard. It is true those standards are different because in summary judgment the non-moving party gets the facts viewed in their most favorable light, but even a trial judge exercising discretion must have some evidence upon which to make discretionary decisions. See *Hundtofte v. Encarnation*, 181 Wn.2d 1, 6 (2014) forfindingabuse of discretion if a decision is unsupported by facts in the record. *Winkler* even bears this out by distinguishing itself from the *Eng* court and later saying "[u]nlike the doctor in *Eng*, Dr. Giddings showed the standard of care differs depending on the area of the country..." in conjunction with its holding that the finding was supported by the record. *Winkler*, 146 Wn. App. at 393.

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Respondents would have this court rule that a party must go through the format of having their expert contact Washington physicians to verify the national and Washington standard are the same, before the expert can be qualified under ER 104 and 702. The Respondents' position would be that if this were not done then, as a matter of law the expert could not testify. The Appellants believe the rule has always been substance, and that if there is evidence that the Washington and national standard is the same, and no evidence that it changes by geography, then an expert who speaks to the national standard speaks to the Washington standard.

2. Dr. Menendez submitted an affidavit that he did follow the form the Respondents complain about

Appellants submitted an affidavit of Dr. Menendez that he called Washington physicians and verified that the standard of care in Washington was the same as the national standard. The Respondents argue that this was properly struck by the court because it was hearsay, and they did not have a chance to cross examine Dr. Menendez on this declaration. These arguments are not on point for why this should be struck.

ER 104(b) clearly states that the only rule of evidence that applies in the court's gatekeeper role is that of privilege. Despite this the

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Respondents argue hearsay as the rule to keep out Dr. Menendez's affidavits. This is explicitly excluded as a rule at this standpoint and not a viable argument.

Counsel for the Respondents was at the preservation deposition for Dr. Menendez and heard him testify to the national standard. The Respondent could have cross examined Dr. Menendez on the difference between the geography of the standard between California, national and Washington, but did not. The Respondent could have produced experts who testified that the national standard of care was different than the Washington standard of care, but did not do that. To not provide these facts, but rather sit back and wait to make the argument that this affidavit some how deprived the Respondent of evidence , does not do service to justice or this Court.

Like the Appellants said in their initial brief and like in *Volk v. v. Demeerler*, 184 Wn. App. 389 (2013), Dr. Menendez did contact Washington physicians and verify that he personally new the national and Washington standard of care were the same.[2]

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[2] The Respondent's brief on p. 22 implies that Appellants tried to mislead the court by talking about *Volk v. v. Demeerler*, 184 Wn. App. 389 (2013) without mentioning the expert in *Volk's* declaration on contact Washington experts. Even if this was misleading, the Appellants clearly discuss this in their initial brief on p.18-19. Dr. Menedez did this prior to the resting of the Appellant's case.

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B. Striking of Dr. Menendez for not saying "yes" to more likely than not to a degree of medical certainty was an error

If ever there was a format over substance ruling this has to be it. The record is clear, and even the Respondents acknowledge, that counsel for Mr. Drigg's told Dr. Menendez that all opinions should be expressed in terms of likelihood/probability, to a degree of medical certainty. Respondents' brief p. 23, RP 47; CP 1347. The record is also clear that Respondents' counsel tried to cross examine Dr. Menendez to make his opinions not objective, and Dr. Menendez stated his opinions were based on proper items of ER 702. CP 1344-45, Appellant's initial brief p. 20-21. The record is also clear that Dr. Menendez never showed any disagreement with the request to base his opinions on terms of likelihood/probability, to a degree of medical certainty, and rather sent in a declaration stating this is exactly what he did. CP 557-58.

Our case law is clear that there is no special language or magic formula for expert testimony, but rather it is based upon the substantial facts. *White* clearly says "[t]o require experts to testify to a particular format would elevate form over function." *White v. Kent Med. Center*, 61 Wn. App. 163, 172 (1991). Our courts have held that a trial court is to look at the "substance of the allegations and the substance of what the expert brings to the discussion," in order to evaluate the expert. *Leaverton*

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v. Surgical Partners, 160 Wn. App. 512, 520 (2011). The requirement for no magical language or special expert language does not change between standard of care and causation. As one of the cases cited by the Respondents makes clear, it is a question of whether or not from the facts and circumstances and medical testimony given, can a reasonable person infer a causal connection exists. *McLaughlin v. Cooke*, 112 Wn.2d 829, 837 (1989). It is clear that even in causation, as in standard of care, substance of the opinion matters over form.

There was no evidence that Dr. Menendez's opinions were not based on the correct standard. First the statement was made that he should make his opinions based on that, and Dr. Menendez did not object or refuse to do that. CP 1347. Second, when questioned on his basis implying it was something less Dr. Menendez states his opinions are based upon his knowledge, expertise, education, and experience. CP 1344-1345. Dr. Menendez is asked whether or not in regards to the leg fracturing and responds in great detail as to why a fracture is more likely in allograft without fixation. CP 1350; CP 1359-1360.

The only evidence offered of Dr. Menendez not offering opinions on a more probable than not standard, to a degree of medical certainty, is that he failed to say "yes" when he was instructed to do so. Without further evidence this court will be setting a rule for the trial court that you

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must get the magical language or format despite the substance of the testimony. The Appellants believe this would be a bad rule, and conflicts with long precedent that Washington courts prefer substance to format.

C. Dr. Menendez struck for informed consent was improper

Respondents do not offer any basis for striking Dr. Menendez under the rules of evidence, but rather argue that substantively all of Dr. Menendez's testimony, standing alone, could not meet the burden of proof for informed consent. This clearly shows that their motion to exclude Dr. Menendez was a veiled summary judgment under CR 56 or possibly under CR 50 had the Appellant rested. There is simply no evidence rule that allows a witness to be struck because they do not quote probabilities or proportions.

The doctrine of informed consent is based on the doctrine "that every human being of adult years and sound mind has a right to determine what shall be done with his own body." *Smith v. Shannon*, 100 Wn.2d 26, 29 (1983). According to the Respondents brief the discussions up to the surgery and the consent form discuss the placement of the rod, the Respondent found that the rod could be placed because the bone was good enough. Respondent Brief p.7. The Respondent, not the patient, considered the risks of the rod, and concluded those outweighed the

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benefits of placing the rod. *Id.* This flies directly in the face of the informed consent doctrine, that the risks be identified to the patient so the patient can make an informed decision and control their own body. *Smith*, 100 Wn.2d at 29 ("[A] physician, before obtaining the consent of his or her patient to treatment, inform the patient of the treatment's attendant risks.")

"To allow physicians, rather than patients, to determine what information should be disclosed would be in direct conflict with the underlying principle of patient sovereignty." *Id.* at 30. It was within this framework that only material risks need to be disclosed, and expert testimony should be offered to assist the jury in determining what risks are material. *Id.* at 31-33. The role of the physician is to determine what risks exist and their likelihood of occurrence. *Id.* at 33.

The trial court's basis for the striking Dr. Menendez can be seen in the following:

"What I'm saying is that the cases talk about the scientific portion of it, and the likelihood of the occurrence putting a number to it that would, you know, more likely than not, there's no scientific analysis in his opinion." RP 672

This thought process has been clearly rejected by our courts in the area of causation, where our Supreme Court firmly stated "[w]hile an expert may

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express an opinion based on statistics, such a basis is certainly not required." *Reese v. Stroh*, 128 Wn.2d 300, 309 (1995). The court noted that the requirements for an expert is that they testify to a "reasonable degree of medical certainty," and ER 703.

This is further complicated by the fact that statistics and probabilities could not be offered and would have been misleading here since there is no evidence in the record that anyone had ever done an allograft of this size and leave it unsupported by hardware. Dr. Conrad testified that the allograft was six and a half centimeters. CP 1532-33. Dr. Conrad went on to testify that he would only ever do a very small allograft without replacing the hardware, and that is four or five centimeters or smaller. CP 1552. Dr. Padrta testified he had done many allografts, but he did not know the size of the allograft so he could not testify that he had ever done one like this. RP 198 (1/15/14PM). Dr. Bruckner testified that he has never on his own removed the fixation of an allograft and left it unsupported, but has done it once with Dr. Conrad. RP 122-123 (1/15/14AM). Nowhere do we have testimony that anyone has tested removing the support on allograft this large such that Dr. Menendez could even know statistics or probabilities on a level that would be anything more than a guess.

Respondents seem to argue that a failure to say in probability and

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numbers how much a risk increased. *Adams v. Richland Clinic*, 37 Wn. App. 650, 657-658 (1984), makes it clear that interpreting *Shannon v. Smith* only some expert testimony is required because the goal of informed consent is to focus on the patient's sovereignty, and not the practices of the physician like medical malpractice does. *Adams* even goes so far as allowing personal versus objective testimony by a physician "since the evidence need not rise to evidence of a standard of care." *Id.* at 659.

The Respondents state that *Adams* cannot be reconciled to other cases, but that is simply not true. Consider the following cases that the Respondents say override *Adams*:

Ruffer v. St. Francis Cabrini Hospital of Seattle, 56 Wn. App. 625 (1990). In this case the plaintiff provided no expert testimony of their own, but rather relied upon testimony of the defendant. The *Ruffer* court found that because the plaintiff presented no expert testimony, the testimony of the defendant on the amount of risk was the only thing upon which to resolve the matter. *Id.* at 633. The *Ruffer* court does not address the format of the witnesses opinion, nor could it since there is no witness produced.

Brown v. Dahl, 41 Wn. App. 565 (1985). In this Brown the trial court let the experts testify, and the appellate court noted that the testimony was weak, specifically stating "[w]hile the evidence of the risks

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and benefits associated with these various alternatives as compared to the risks and benefits associated with general anesthesia could have been more fully developed... some evidence of risks and benefits associated with the various alternatives was presented." Id. at 571. The *Brown* court went on to find that "some evidence" was sufficient testimony for the informed consent evidence, and even quoted back to *Adams* in its final conclusion on sufficiency of evidence . *Id.* at 576. It should also be noted that the *Brown* court relied on *Adams* and does not criticize the *Adams* ruling or find it difficult to reconcile with its holdings as the Respondents imply. *Id.* at 570.

As the Appellants showed in their initial brief Dr. Menenedez clearly states that it is more likely to get a fracture if you do not put in fixation to support an allograft. CP 1350-51. He supports this statement at another time by saying that it is a risk of fracture if you remove the hardware and do not put back in any support. CP 1343. This is well supported by *Adams*, and not contradicted by *Ruffer* or *Brown*.

In total the court struck Dr. Menendez for not presenting sufficient evidence to make the case for informed consent. This is not proper, and an abuse of discretion. Dr. Menendez offered some medical testimony to instruct the jury, sufficient under *Adams*, and as such the jury should have been allowed to hear it to help them with their decision on whether or not

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Mr. Driggs was fully informed of the risks.

D. **Striking Dr. Menendez was prejudicial error and not a harmless error**

An error is prejudicial if it affects, or presumptively affects, the outcome of the trial. *Diaz v. State*, 175 Wn.2d 457, 472 (2012). Harmless error only occurs if the error is trivial, formal, or academic. *Adcox v. Children's Othopedic Hosp.*, 123 Wn.2d 15, 36 (1993). If there is no way of knowing what value the jury would have placed upon the evidence then a new trial is necessary. *Thomas v. French*, 99 Wn.2d 95, 105 (1983).

As pointed out in great detail in our opening brief, each side had an orthopedic oncologist expert and an orthopedic surgeon expert at the beginning of this case. At the end of this case, the court had struck the Appellant's orthopedic oncologist when it came to testifying on standard of care, causation, and materiality of the risk, while the respondents retained both experts speaking on all those issues. As noted for quite a bit of the Respondents' closing arguments they pointed to this weakness. The Respondents even claimed how wonderful Dr. Menendez was and pointed out how he did not testify to the standard of care, causation or materiality of the risk, implying that his opinion was that they did not exist.[3] Counsel

[3] See Appellant's opening brief p. 30-35. for citations and analysis on this.

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for Mr. Driggs was not able to rebut this because the court had struck all of this testimony.

Despite the Respondents' statements to the jury in closing that Dr. Menendez is the one the jury should rely on, and that his failure to testify on standard of care, causation, and materiality of the risk should be used against the Appellants, now the Respondents argue that Dr. Graboff was sufficient and Dr. Menendez is cumulative. Even without such a reversal of position, the Respondents statement of the facts make it clear that there is a significant difference between a orthopedic surgeon and an orthopedic oncologist for the purpose of testimony.

In the statement of facts the Respondents felt a need to identify the Dr. Howlett's qualifications as not just a orthopedic surgeon, but also an oncologist who gained special experience. Respondents' brief p. 5. The Respondents go on to point out they brought to trial both an orthopedic oncologist, Dr. Bruckner, and an orthopedic surgeon, Dr. Padrta. *Id.* at 12. The Respondents then donate over half a page to Dr. Bruckner's qualifications as an orthopedic oncologist. *Id.* If the Respondents did not believe an orthopedic oncologist like Dr. Menendez was important to the outcome of a jury, it is hard to see why the Respondents spent so much time of their closing, and of their brief to the this Court talking about the importance of an orthopedic oncologist. In contrast, the Respondents

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spend much less brief real estate talking about this being harmless error, and offering any evidence to this court it is harmless. In fact the only cases cited, *Tumelson v. Todhunter*, 105 Wn.2d 596, 605 (1986), and *Mason v Bon Marche Corp.*, 64 Wn.2d 177, 179 (1964) by the Respondents deal with parties who failed to make an offer of proof about what their witness would say, so the reviewing appellate court could not determine prejudice. Here there is ample evidence of the importance of Dr. Menendez as a orthopedic oncologist, so those cases do not apply.

The trial record, and actions of all parties here show that Dr. Menendez was a key witness. Error striking him was clearly prejudicial, especially given the way this was used by the Respondents in closing, to even imply Dr. Menendez did not have the opinions he expressed.

E. Ms. DeSaveur should have been on the jury verdict form

A trial court must instruct the jury on a party's case theory if substantial evidence supports it. *Dormaier v. Columbia Basin Anesthesia*, 177 Wn. App. 828, 851 (2013). As addressed in the Appellant's initial brief there was substantial evidence of Ms. DeSaveur being an employee of the Respondents, and substantial evidence that in that employment she was negligent such that she should be listed as one of the agents of the Respondent. Appellant Brief 35-36 for citations to the record.

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The Respondent's argue that because Ms. DeSaveur was not named in the complaint they simply lacked notice of the claims against their agent such that they could prepare their defense. Complaints are to be notice pleadings, construed liberally, and evaluated to ensure the defendant is given "fair notice of what the claim is and the ground upon which it rests." *Dormaier*, 177 Wn. App. at 853-854.

Here the complaint clearly states where Mr. Driggs followed up with Dr. Howlett's office for pain and "[x]-rays were taken and read as negative for fracture." *Id.* at 2.8. At the time of pleading it was unknown who the agent was who did these actions, but the Respondents were clearly put on notice that these actions were part of the complaint. Dr. Howlett testified that Ms. DeSaveur should have brought any concerns she had that day to him, and that he was aware of the office visit. RP 1252. The Respondents were on fair notice that the actions done at their office in missing the x-rays were part of the complaint, they were aware that Ms. DeSaveur was the person who reviewed the x-rays and was responsible to bring them up to Dr. Howlett and did not do it. When the exact date and incident are raised in the complaint, and the Respondents know who did those acts on that date, it is disingenuous to now claim no knowledge.

Dr. Graboff did testify that the standard of care was breached by not identifying that Mr. Drigg's leg was beginning to fracture on May 27,

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alerting Dr. Howlet, she should have been on the jury verdict for negligence that applies to the Respondents. The Respondents were well aware of the claims for the bad review of the x-rays, and the Respondents placed Ms. DeSaveur in the role of reviewing x-rays for an orthopedic surgeon. They should now not be allowed to now get out of their actions by disclaiming Ms. DeSaveur or trying to hold a lower standard than what the Respondents expected of her when assigning her to interpret x-rays and inform the orthopedic surgeon if there were problems.

III. Conclusion

The trial court erred when it struck the testimony of Dr. Menendez on the standard of care, causation and material risk. It was further error when the trial court refused to let the record be clarified in regards to standard of care and causation, despite the fact the Appellants were still presenting witnesses and their case. It was further error to keep Ms. DeSaveur off the jury verdict form as an agent of the Respondents. These errors were prejudicial because they stopped the Appellant from producing its full case to the jury, and allowed the Respondents to imply that Dr. Menendez actually never had the opinions he clearly stated in his preservation deposition. Appellant asks this court to reverse the decisions of the trial court and order a new trial on the merits.

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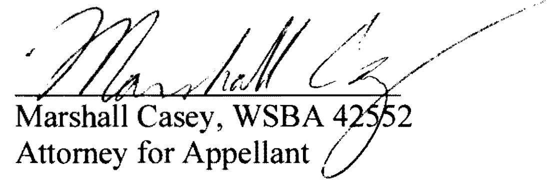
RESPECTFULLY SUBMITTED THIS 27th day of May, 2015.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury, that on the 27th day of May, 2015, I caused to be served a true and correct copy of the foregoing document on the following:

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