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No. 68479-5-1

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

JEFFREY BEDE, as Personal Representative
of the Estate of LINDA SKINNER, Deceased,
Plaintiff/Respondent,

v.

OVERLAKE HOSPITAL MEDICAL CENTER,
a Washington corporation, and
PUGET SOUND PHYSICIANS, PLLC,
a Washington corporation,
Defendants/Appellants.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Beth Andrus)

**APPELLANT'S OPENING BRIEF
(REPLACEMENT)**

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ASSIGNMENTS OF ERROR

Appellants Overlake Hospital Medical Center and Puget Sound

Physicians, PLLC, assign the following errors:

1. The trial court erred by denying PSP's motion to bar rebuttal testimony by Dr. John D. Loeser. RP (12/9/11) 76:24-78:24; CP 853.
2. The trial court erred by denying PSP's renewed motion to bar rebuttal testimony by Dr. Loeser. RP (12/21/11) 675:3-4.
3. The trial court erred by denying PSP's motion to bar rebuttal testimony by Dr. Loeser on standard of care. RP (1/3/12) 1567:16-1570:6.
4. The trial court erred by denying surrebuttal testimony. RP (1/3/12) 1569:6-12.
5. The trial court erred by excluding autopsy photos for being produced after close of discovery. *See* RP (12/19/11) 13:23-25.
6. The trial court erred by denying PSP's motion for reconsideration of the autopsy photo ruling. *See* RP (12/20/11) 282:22-286:12.
7. The trial court erred by excluding autopsy photos for not being listed as exhibits by a local rule deadline. *See* RP (12/20/11) 282:22-286:12.
8. The trial court erred by excluding the autopsy photos under ER 403. *See* RP (12/20/11) 282:22-286:12.
9. The trial court erred by denying PSP's second motion for reconsideration of the autopsy photo ruling. *See* RP (12/27/11) 982:4-10.
10. The trial court erred by excluding the autopsy photos for a violation of the initial exclusion ruling. *See* RP (12/27/11) 982:4-987:22.
11. The trial court erred by denying the Defendants' motion for new trial. *See* CP 1354-69 (App. A).¹

¹ Assuming they have any obligation relating to findings of fact under RAP 10.4(c) pertaining to this order and the order supplementing it, Defendants are attaching copies of these orders and yellow highlighting the language to which error is assigned.

12. The trial court erred by denying Defendants' supplemental motion for new trial. *See* CP 1739-40 (order) (App. B).

STATEMENT OF ISSUES

The following issues pertain to the assignments of error:

1. Exclusion of Autopsy Photo Evidence.

Does a trial court err in excluding autopsy photos, and related expert testimony, in a medical malpractice trial, when: (1) the photos and testimony were material to the jury's resolution of the issues of standard of care and causation; and (2) none of the stated reasons for excluding the evidence can be sustained as a matter of law or fact (sanction for late production in discovery; noncompliance with a local rule deadline; inadmissible under ER 403; sanction for violating the court's initial exclusion ruling)? (Assignments of Error Nos. 5 through 12.)

2. Rebuttal and Surrebuttal Testimony.

- Does a trial court err in allowing a plaintiff to present the testimony of an expert in rebuttal, when that expert's testimony: (1) is either cumulative of testimony presented in the plaintiff's case-in-chief, or offers new opinions that constitute substantial evidence supporting issues for which the plaintiff had the burden of proving in its case-in-chief; and in either case (2) the defendant presented no expert testimony that was inconsistent with, or a deviation from, testimony previously known to the plaintiff? (Assignments of Error Nos. 1 through 3.)

- Does a trial court also err in refusing to allow a defendant to present testimony in surrebuttal, when the plaintiff has been allowed to present new evidence on material issues in rebuttal? (Assignment of Error No. 4.)

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Linda Skinner died of a bacterial infection. Her Estate sued Overlake Hospital and Puget Sound Physicians, the practice group whose doctors staff Overlake's emergency room. The Estate alleged Dr. Laurie

Anderton, a board-certified emergency room physician, breached the standard of care and caused Ms. Skinner's death

According to the Estate, bacteria got into the "meningeal" lining of Ms. Skinner's brain, triggering life-threatening but treatable bacterial meningitis. On January 26, 2010, Ms. Skinner was taken to the Overlake emergency room where her symptomology, elevated white blood cell count, and an MRI all pointed to bacterial meningitis. But instead of ordering a lumbar puncture that would have confirmed meningitis and initiating antibiotics treatment that would have saved her life, Dr. Anderton sent Ms. Skinner home with pain medicine for a neck strain, and she died the next day.

The Defendants focused on surgery Ms. Skinner had in 2006 to remove an acoustic neuroma (a fibrous noncancerous tumor) in her right inner ear. A follow-up procedure to stop fluid leakage sealed off the surgical site, producing an enclosed space immediately adjacent to her brain. According to the Defendants, sometime before January 26, 2010, bacteria got into this space; an infection set in, and pus and bacteria accumulated to form an abscess. Sometime between 9 and 10 a.m. on January 26, after Ms. Skinner had been admitted to the Overlake emergency room, the abscess ruptured into her brain and triggered an infection that no course of treatment could have arrested. The rupture also

eased pressure that had caused pain to radiate into Ms. Skinner's head, causing such an improvement in her condition that Dr. Anderton could reasonably conclude Ms. Skinner did not have bacterial meningitis.

A King County jury returned a divided verdict for the Estate (11-1 on standard of care; 10-2 on causation), and awarded \$3,000,000 in damages. This closely contested case must be retried, for two reasons.

First, the trial court erred when it excluded autopsy photos, and expert testimony based on those photos.

The autopsy pathologist reported finding pus at the acoustic neuroma surgical site, and autopsy photos showed pus at the site. PSP (but not the Estate) requested the photos in discovery. Overlake did not immediately produce them but as discovery unfolded the photos become irrelevant, because the parties' experts agreed that pus as well as bacteria had broken into Ms. Skinner's brain from the surgical site. Then, one week after the King County Superior Court Civil Local Rule 4 deadline for final disclosure of trial exhibits had passed, and 14 days before the start of trial, *the Estate changed its theory of the case*. After disclosing new opinions from expert witness Dr. John Loeser questioning whether pus as well as bacteria had been present at the surgical site, the Estate withdrew expert witness Dr. Richard Cummins who had testified a rupture of pus and bacteria from that site was the source of Ms. Skinner's

infection. PSP contacted Overlake about the photos, Overlake produced them to PSP and the Estate, and PSP notified the Estate that PSP intended to use them (e.g., when cross-examining the Estate's experts). The Estate moved to strike, and the trial court granted the motion. Ultimately the court gave four reasons for excluding the photos and any expert testimony based on them, *none* of which can sustain the court's ruling:

(1) The court initially struck the photos as a sanction for being produced after discovery closed. But the court failed to balance on the record the factors set forth by the Supreme Court in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), and failed to make the findings required by *Burnet* before such a sanction may be imposed. The court never addressed those factors until it denied the Defendants' post-judgment motion for new trial. Such balancing in hindsight may not substitute for the on-the-record balancing that must take place when the court is first called upon to impose the sanction of exclusion. Moreover, the court's belated balancing fails on the merits. Under *Burnet*, the threshold requirement for excluding evidence is a willful discovery violation. The trial court equated willfulness with lack of good cause, impermissibly watering down the willfulness requirement. Moreover, the court's willfulness finding fails on its own terms. The autopsy photos only became relevant after the Estate's eleventh-hour change in its theory

of the case, to which PSP promptly responded by asking Overlake to produce the photos pursuant to PSP's discovery request, and to which Overlake promptly responded by producing the photos to PSP and the Estate. Such conduct cannot be called a "willful" discovery violation by any legally reasonable definition of the term.

(2) The court next struck the photos because they were not listed as trial exhibits in compliance with a deadline established by King County Local Civil Rule 4. King County Local Civil Rule 4 effectively replaces the *Burnet* requirement of an *affirmative showing* by the *objecting party* of a *willful* discovery violation, with a *presumption of exclusion* unless the *proffering party* proves "good cause" for relief from that presumption. Local rules may not trump the Civil Rules, and *Burnet's* requirements are Civil Rule requirements. Moreover, the Defendants satisfied the rule's good cause standard, because there was no reason to designate the photos as exhibits until the Estate changed its theory of the case, and that happened *after* the deadline.

(3) The court also excluded the photos on grounds of "gruesomeness" under ER 403. Photographic evidence, however, may not be excluded just because it is "gruesome." Instead, a trial court must balance the relevance of the evidence against the potential to inflame the jury against the party objecting to the evidence, and may exclude only if

the evidence's probative value is substantially outweighed by its inflammatory impact. Here, the photos were highly probative and any inflammatory effect could have been fully avoided by limiting which photos the jury saw. Moreover, as only the Defendants risked a jury backlash for introducing "shocking" photos, *the Estate had no standing to object* on gruesomeness grounds.

(4) Finally, the court struck the photos as a sanction for a supposed violation of the court's initial exclusion ruling. The court got its facts wrong. The court's notes reflected that PSP's trial counsel had questioned Estate expert Dr. David Talan about "the" autopsy photos; the court stated it would have been a different matter had counsel only asked about autopsy photos in general. But as the transcript shows, *defense counsel only asked about autopsy photos in general*. Moreover, excluding relevant evidence for a violation of a ruling *that should never have been made in the first place* is an indefensibly disproportionate sanction.

The Defendants' expert, Dr. Francis Riedo, would have testified that the autopsy photos confirmed that an abscess located at the acoustic neuroma surgical site erupted a mass of pus and bacteria into Ms. Skinner's brain, unleashing an infection that no course of treatment could have arrested while also causing an improvement in symptomology from which a reasonably prudent physician could have ruled out bacterial

meningitis. While the Estate would have disputed Dr. Riedo's interpretation of the photos, it was for the jury to resolve that conflict. Because the trial court denied the jury that chance, there must be a new trial on standard of care and causation.

Second, the trial court erred by allowing the Estate's expert Dr. Loeser to testify in rebuttal instead of during the Estate's case-in-chief, and in denying the Defendants any surrebuttal to Loeser's testimony.

The trial court allowed the Estate to call Dr. Loeser in rebuttal because the trial court believed a plaintiff is entitled to "the last word"; a trial, however, is not a debate, and a plaintiff in a civil damages action is *not* entitled to the last word. The court allowed Dr. Loeser to testify in rebuttal on standard of care *and* causation, while refusing the Defendants any surrebuttal. On standard of care, Dr. Loeser echoed what Drs. Siegel and Talan said during the Estate's case-in-chief -- a powerful reinforcing echo, of which the Estate made much in closing argument. The trial court later acknowledged that Dr. Loeser's standard of care testimony was substantially cumulative of the Estate's case-in-chief, but failed to recognize it therefore should have granted a new trial on standard of care because it had allowed the Estate an unfair advantage that it fully exploited in closing argument. On causation, Dr. Loeser offered several new opinions to which the Defendants were denied the chance to respond

by surrebuttal. The reasonable probability that this tipped the scales, on an issue on which the jury divided 10-2, is undeniable. The court's rebuttal and surrebuttal errors thus *also* mandate a new trial on standard of care and causation.

II. STATEMENT OF THE CASE

A. The Parties.

Ms. Linda Skinner was 64 when she died while undergoing treatment for a bacterial meningitis infection. Her estate (through her son Jeffrey Bede, its Personal Representative) brought a medical malpractice action against Overlake Hospital and Puget Sound Physicians, whose emergency care specialists staff Overlake's emergency room. The Estate alleged that Dr. Laurie Anderton, a PSP member board certified in emergency medicine, breached the standard of care while treating Ms. Skinner, and that this breach caused her death. The Estate sought damages for Ms. Skinner's death, and for her three adult children (Jeffrey, Samantha, and Christopher).

B. The Contending Cases.

After hearing the contending cases summarized below, the jury deliberated for four days and then returned a divided verdict in the Estate's favor on standard of care (11-1) and causation (10-2). CP 1034 (verdict form at 1); RP (1/11/12) 2028:8-2034:11 (responses by individual jurors),

2041:22-2043-6 (clarification as to vote of Juror “Firage”² on causation).

1. The Estate’s Case.

On January 22, 2010, during a plane flight to Seattle, changing air pressure induced a “barotrauma,” squeezing bacteria-containing fluid into Ms. Skinner’s brain from an immediately adjacent cavity. RP (12/22/11) 761:20-762:6 (Dr. Talan). The cavity was left over from surgeries Ms. Skinner underwent in 2006 for the removal of an acoustic neuroma (a fibrous noncancerous tumor) located in her right inner ear. *Id.* 762:7-16, 756:19-766:3 (Dr. Talan). The penetration of Ms. Skinner’s brain did not involve a catastrophic rupture akin to the bursting of an abscess. RP (1/3/12) 1668:20-1672:16 (Dr. Loeser); *see also* RP 12/22/11) 797:7-800:1 (Dr. Talan). Nor did the bacteria-containing fluid also contain pus. RP (12/22/11) 811:12-812:8, 820:9-821:6 (Dr. Talan) (fluid and bacteria, but not “true pus,” present in the surgical site); RP 1/3/12) 1709:18-25 (Dr. Loeser) (bacteria, not “purulent fluid,” leaked from the site).

The bacterial intrusion set in motion a classic case of bacterial meningitis. Bacterial meningitis is an infection of the “meninges,” a system of membranes that cover the brain and spinal cord. RP (12/21/11) 519:22-520:2 (Dr. Siegel). When bacteria penetrate the meninges, the

² The court reporter spelled Juror Phayaraj’s name phonetically. *See* CP 1234-36 (Dec. of Juror K. Phayaraj). (The Defendants are not assigning error to the trial court’s ruling striking a declaration from Juror Phayaraj, *see* CP 1363-64 (order at 10-11) (striking dec.), given the Supreme Court’s recent decision in *Anfinson v. FedEx Ground Package System, Inc.*, ___ Wn.2d ___, 281 P.3d 289 (2012).

body responds by sending white blood cells to attack the bacteria, inflaming the meninges; unchecked, the ensuing swelling eventually causes death. *Id.* 520:5-6, 546:5-11 (Dr. Siegel). A “classic” “triad” of symptoms is traditionally associated with bacterial meningitis: (1) fever; (2) “nuchal rigidity”³; and (3) altered mental status, to which some add headache. *Id.* 524:3-20 (Dr. Siegel). The triad is seen in 44 percent of bacterial meningitis patients; two of the four symptoms are seen in 95 percent of patients. *Id.* 524:11-20 (Dr. Siegel).⁴

Ms. Skinner was brought to the Overlake emergency room the afternoon of January 25, complaining of fever, headache, and neck pain. *See* Def. Ex. 101 (p. 3, “NOTES”).⁵ She was diagnosed with an “influenza-like illness”⁶ and a “cervical” strain (attributed to her having

³ The parties disputed what qualifies as nuchal rigidity. Estate expert Dr. Martin Siegel defined it as “pain in the neck.” *See* RP (12/21/11) 631:13-14 (Siegel). Estate expert Dr. David Talan testified to a “continuum” that “progresses” from neck “pain” to an inability to put the chin to the chest. *See* RP (12/22/11) 785:19-25 (Talan). Defendants’ expert Dr. Ronald Dobson defined nuchal rigidity as a “specific type of neck stiffness” involving the inability of the patient to move the neck “forward and back because that stretches the meninges” (RP (12/28/11) 1288:12-1289:1) and the irritation of the meninges produces “such an intense reflex spasm in the muscles *that you can’t move the head.*” *Id.* 1299:2-4 (Dobson) (emphasis added).

⁴ Defendants’ expert Dr. Dobson testified that the triad is present in 58 percent of cases of pneumococcal bacterial meningitis (the kind Ms. Skinner had). RP (12/28/11) 1368:13-25 (Dobson) (describing findings in the *New England Journal of Medicine*); *see* RP (12/21/11) 603:15-22 (Dr. Siegel) (Ms. Skinner had pneumococcal meningitis).

⁵ The Defendants introduced into evidence the “charts” (i.e., the medical records) of Ms. Skinner’s three visits to the Overlake emergency room (January 25, January 26 a.m., and January 26 p.m.) as three separate exhibits (Defendants’ Exs. 101, 102, and 103). Each is sequentially paginated (e.g., “DEF 101-00001”), and the Defendants will cite to this pagination (e.g., “p. 2” for DEF. Ex. 101 mean “DEF 101-00002”).

⁶ The diagnosis “influenza-like illness” was made in response to a Center for Disease Control directive regarding diagnosis where a sample swab for Influenza A or B came

lifted some heavy object during her travel to Seattle). *Id.* (pp. 5-6, “DIAGNOSIS”). She was given prescriptions for medicines to treat the flu-like symptoms and the neck strain. *Id.* (pp. 6-7, “PRESCRIPTION”).

Ms. Skinner’s condition deteriorated overnight, and she was brought back to Overlake early the morning of January 26. *See* Def. Ex. 102 (p. 2, noting “triage” arrival time of 7:14 a.m.). Ms. Skinner was vomiting. RP (12/21/11) 652:8-14 (Nurse Larkin). She complained of neck pain and a headache. Def. Ex. 102 (p. 2, “TRIAGE NOTES”). She described her pain as level 10 on the 1-10 pain scale, “the worst pain [she had] ever felt[.]” RP (12/21/11) 652:23-653:15 (Nurse Larkin); *see* Def. Ex. 102 (p. 2, “VITAL SIGNS,” “Pain 10”). She reported she could not touch her chin to her chest. Def. Ex. 102 (p. 15, “NOTES”). The recording nurse testified she asked Ms. Skinner whether she could touch her chin to her chest because of concern about bacterial meningitis, given Ms. Skinner’s complaint about headache and neck pain. RP (12/27/11) 1099:14-22 (Nurse Cella).⁷

back negative, as was the case with Ms. Skinner. *See* Def. Ex. 101 (p. 6, “ED COURSE” entry); RP (12/29/11) 1527:6-18 (Dr. Trione).

⁷ Ms. Skinner also complained of fever and chills. *See* RP (12/20/11) 456:22-457:10 (C. Bede). The Estate implicitly admitted that Ms. Skinner’s recorded temperatures never qualified as a fever. *See* RP (12/21/11) 579:19-22 (Estate expert Dr. Siegel) (admitting that a temperature greater than 100 degrees (Fahrenheit) is required to qualify as a fever), 580:22-581:4 (admitting Ms. Skinner had no documented fever). The Estate suggested this was due on January 26 to Ms. Skinner having her temperature recorded only soon after her arrival, implying her temperature would have qualified as a fever had it been measured later during her stay. *See* RP (12/21/11) 613:13-615:2 (Dr. Siegel, during re-direct).

The standard of care for an emergency medical physician required that Dr. Anderton include bacterial meningitis in her “differential diagnosis.” “Differential diagnosis” is the process by which doctors identify potential conditions based on history and symptomology, then work through those potential diagnoses to arrive at the most probable condition and initiate treatment to address that condition. RP (12/21/11) RP 515:3-516:10 (Dr. Siegel). The differential diagnosis process is used to protect patients from harm, RP (12/21/11) 518:12-521:8 (Dr. Siegel); RP (12/22/11) 791:8-14 (Dr. Talan), and emergency room doctors must take extra care once a potentially fatal disease has been included in their differential diagnosis because of the potential consequences for a patient who is not admitted and later turns out to have had such a condition. RP (12/22/11) RP 751:25-752:13, 754:8-15 (Dr. Talan); *see also* RP (12/21/11) 519:6-14 (Dr. Siegel). That Ms. Skinner was back in the ER and her condition had not improved, that she was reporting neck strain and headache and severe pain (10 out of 10), and that she could not touch her chin to her neck, required Dr. Anderton to include bacterial meningitis in her differential diagnosis. *See* RP (12/22/11) 771:4-774:23 (Dr. Talan).

When Ms. Skinner’s white blood cell count then came back at 19,200 (and with a “left shift” of “neutrophils” of 17,000), the standard of care required that bacterial meningitis be excluded by doing a lumbar

puncture. *Id.* 777:18-780:6 (Dr. Talan); *see also* RP (12/21/11) 532:15-534:3 (Dr. Siegel). Dr. Anderton did not order a lumbar puncture, but did order an MRI. The MRI results came back reporting “meningeal enhancement” and recommending a lumbar puncture; the standard of care now required a lumbar puncture be done, without further delay. *Id.* 780:7-21 (Dr. Talan). Dr. Anderton instead ruled out bacterial meningitis, diagnosed Ms. Skinner as suffering from a muscle spasm, and sent her home with prescriptions for pain and to prevent a recurrence of vomiting. These actions violated the standard of care, under which antibiotic treatment for meningitis should have begun no later than noon. RP (12/22/11) 787:5-14 (Dr. Talan). Had the standard of care been followed, more likely than not Ms. Skinner would have survived the infection and without major complications. RP (12/22/11) 792:11-22, 797:4-797:5 (Dr. Talan); *see also* RP (12/21/11) 548:19-549:16 (Dr. Siegel).⁸

2. The Defendants’ Case.

During the 2006 acoustic neuroma surgery some bone structure was removed, leaving a cavity. RP (12/29/11) 1422:20-1423:1 (Dr. Riedo); RP (Vol. 12) 2100:23-2104:7 (Dr. Wohns). Spinal fluid began leaking from the brain into that cavity, eventually coming out Ms.

⁸ This would have been so even if Ms. Skinner had developed a collateral infection of the ventricular spaces in the brain, as such infections are commonly associated with bacterial meningitis and survivable if treatment for the meningitis itself is timely initiated. RP (12/22/11) RP 802:6-803:17 (Dr. Talan); *see also* RP (12/21/11) 559:4-16 (Dr. Siegel).

Skinner's nose. RP (Vol. 12) 2104:9-2105:15 (Dr. Wohns). A second surgery closed off the site from the sinuses and the outer ear, while reinforcing the barrier between the brain and the site with packing material. *Id.* 2106:16-2108:7 (Dr. Wohns). This turned the surgical site into an enclosed space, immediately adjacent to Ms. Skinner's brain. Sometime before January 26, 2010, bacteria got into this space, and an infection developed. Pus and bacteria accumulated and eventually filled the space, producing an abscess⁹ adjacent to -- but not in -- the brain. RP (12/29/11) 1421:22-1422:14 (Dr. Riedo).¹⁰ Ms. Skinner did not directly feel the abscess, because the acoustic neuroma surgeries had cut the nerve endings to the site. RP (12/29/11) 1503:9-1504:1 (Dr. Riedo); *see* RP (Vol. XII) 2154:3-17 (Dr. Thompson).

Ms. Skinner had a history of muscle spasms in the event of neck strain, and during her flight to Seattle she strained her neck handling luggage. RP (12/29/11) 1539:7-19 (Dr. Trione); *see* Def. Ex. 101 (p. 6, "ED COURSE," reference to "heavy lifting of luggage" possible cause of "neck muscle soreness"). Ms. Skinner was already suffering from a flu-like illness (fever, body aches), and by January 25 her condition was such

⁹ The parties disputed whether an abscess had formed at the acoustic neuroma surgical site; the Defendants referred to it as both an abscess and an "abscess-like formation."

¹⁰ Dr. Riedo noted that the Overlake autopsy report stated that a "*collection of pus*" obscured the view of the site. RP (12/29/11) 1471:13-1472:20 (Dr. Riedo); *see* Def. Ex. 104 (autopsy report, p. 4, "Calvarium and Brain" description, stating that the site is "obscured by a *collection of pus*" (emphasis added), and also stating that a section of "purulent matter" was obtained from the inner ear) (App. C-1).

that her son Christopher took her to Overlake's emergency room, where she was examined by Dr. Marcus Trione -- also a member of the PSP practice group and board certified in emergency medicine. RP (12/27/11) 1059:17-20 (Dr. Trione); RP (12/29/11) 1540:3-6 (Dr. Trione).

Ms. Skinner had none of the "classic triad" of symptoms for bacterial meningitis, and in Dr. Trione's judgment the symptoms she did have indicated something besides meningitis. RP (12/27/11) 1065:11-1066:13 (Dr. Trione). Ms. Skinner complained about a fever, but her temperature showed she did not have one. *See* Def. Ex. 101 (p. 3, "VITAL SIGNS," temperature of 37.5 degrees Celsius); RP (12/29/11) 1495:18-19 (Dr. Riedo) (fever is defined as a temperature of at least 38 degrees Celsius). Dr. Trione took Ms. Skinner's medical history, and learned of her difficulties with neck strain and muscle spasms. RP (12/29/11) 1539:7-19 (Dr. Trione). Dr. Trione diagnosed Ms. Skinner as suffering from an influenza-like illness and a cervical strain (likely caused by lifting some heavy object during her trip to Seattle). Def. Ex. 101 (pp. 5-6, "DIAGNOSIS"). Dr. Trione prescribed medicines to treat the flu-like symptoms and neck strain. *Id.*¹¹

Although Ms. Skinner could not feel the abscess directly, fluid containing bacteria was leaking from the abscess site, RP (12/29/11)

¹¹ The Estate asked Dr. David Talan to evaluate whether Dr. Trione had breached the standard of care, and Dr. Talan concluded that Dr. Trione had not breached the standard of care. RP (12/22/11) 757:15-22 (Dr. Talan).

1489:15-22, 1491:6-13 (Dr. Riedo), and the ensuing inflammatory response caused pain bilaterally across her neck *Id.* 1433:4-9, 1452:8-19, 1490:4-16, 1510:12-1511:3 (Dr. Riedo). Moreover, this inflammatory response immediately adjacent to the brain triggered an inflammation of the meninges themselves, aggravating Ms. Skinner's headache. *Id.* 1490:13-14 (Dr. Riedo). Christopher Bede took his mother back to Overlake, where she was admitted shortly after 7:00 a.m. on January 26. Ms. Skinner was vomiting, but lucid. *See* Def. Ex. 102 (p. 2, "TRIAGE NOTES"). She reported feeling feverish, but her temperature was found to be 36.5 Celsius, lower than the day before. *Id.* (p. 2, "VITAL SIGNS").¹² Ms. Skinner reported pain in her neck, radiating up into her head. *Id.* (p.15, "NOTES"). She described her pain as a "10." *Id.* (p. 2, "VITAL SIGNS," "Pain 10"). The admitting nurse recorded that Ms. Skinner could not touch her chin to her chest. *Id.* (p. 15, "NOTES").

Dr. Anderton would see Ms. Skinner several times that morning, the first shortly before 8:00. RP (1/3/12) 1600:20-23 (Dr. Anderton); Def. Ex. 102 (p. 2, "HPI DOCUMENTATION," "07:44 LMA"). Dr. Anderton had Ms. Skinner hooked up to an IV and treated with fluids for dehydration. *See* RP (1/3/12) 1600:24-1602:10 (Dr. Anderton). Dr. Anderton prescribed Dilaudid for Ms. Skinner's pain, authorizing up to

¹² When her temperature was taken thirty minutes later, it had fallen by another two-tenths of a degree. Def. Ex. 102 (p. 4, VITAL SIGNS," 7.43. a.m.).

three doses of up to 1 milligram each. *Id.* 1621:9-18 (Dr. Anderton); Def. Ex. 102 (pp. 16-17, “Dilaudid” order).¹³ Ms. Skinner took half a milligram at 8:28, and another half a milligram 20 minutes later. Def. Ex. 102 (p. 17, including “Follow-up” entries). Her pain decreased from a 10 to a 9, then to a 6, and she declined a third dose at 9:44. *Id.*¹⁴ When Dr. Anderton next saw Ms. Skinner, her nausea was gone and the pain had stopped radiating up into her head, although her neck was still “stiff” and the pain there felt “more severe than her usual neck strains.” RP (1/3/12) 1602:19-1603:16 (Dr. Anderton); Def. Ex. 102 (p. 15, “NOTES”).

Dr. Anderton included bacterial meningitis in her differential diagnosis, due to Ms. Skinner’s reported inability to touch her chin to her neck. RP (12/27/11) 1001:16-1002:1 (Dr. Anderton). Although Dr. Anderton’s ensuing physical exam had ruled out actual nuchal rigidity, *id.* 1008:20-25, 1039:18-1043:21 (Dr. Anderton), Dr. Anderton remained concerned about *some* kind of infection affecting the neck, in part because Ms. Skinner’s white blood cell count had come back at 19,200.¹⁵ RP

¹³ The parties disputed the import of the Dilaudid that Ms. Skinner took. The Estate characterized Dilaudid as a “potent,” “powerful” pain medicine, suggesting the amount Ms. Skinner took could have masked what was in fact a deteriorating condition due to bacterial meningitis. *See* RP (12/21/11) 540:13-541:7 (Dr. Siegel). The Defendants contended that the amount Ms. Skinner took was a “fairly low” dose that could not explain the degree of Ms. Skinner’s improvement later that morning. *See* RP (12/29/11) 1433:19-1434:5 (Dr. Riedo).

¹⁴ Ms. Skinner received no further pain medication for the balance of her stay. RP (1/3/12) 1624:4-8 (Dr. Anderton).

¹⁵ The parties disputed the significance of the white blood cell count. As stated, the Estate contended that Dr. Anderton should have ordered a lumbar puncture upon

(12/27/11) 1005:6-1006:12; RP (1/3/12) 1626:3-1627:3 (Dr. Anderton). Dr. Anderton ordered an MRI, hoping to rule an epidural abscess, a potentially life-threatening condition that by then was her principal concern. RP (1/3/12) 1626:3-1627:3 (Dr. Anderton); RP (12/22/11) 935:16-936:3 (Dr. Zobel); *see* RP (12/27/11) 1047:2-5 (Dr. Anderton) (“Epidural abscesses are quite likely to be fatal”).

The MRI did rule out an epidural abscess. Estate’s Ex. 3 (report, p. 2). The MRI report stated that meningeal enhancement consistent with bacterial meningitis had been observed and recommended a lumbar puncture, while also stating that the result could be due to a prior lumbar puncture. *Id.* Dr. Anderton discussed the results with Ms. Skinner, and learned she *had* undergone a lumbar puncture. RP (1/3/12) 1604:8-1605:18 (Dr. Anderton); Def. Ex. 102 (p. 6, “ED COURSE”) (“note by the radiologist of an abnormality that could be produced by meningitis or prior LP ... [Patient] reports she had had a prior LP”).

Ms. Skinner demonstrated she could touch her chin to her neck and stated she now believed her continuing pain was nothing more than one of her neck strains. RP (1/3/12) RP 1606:5-15 (Dr. Anderton). The white blood cell count remained unexplained, but was as consistent with muscle spasm as with a bacterial infection, and by now Ms. Skinner was “without

receiving the white blood cell count test results. The Defendants took issue with this assertion, explaining how a count of 19,000 often is of little use as an indicator for course of treatment. *See* RP (12/28/11) 1302:14-1304:8, 1315:1-1316:4 (Dr. Dobson).

any suggestion of meningitis.” Def. Ex. 102 (p. 6, “ED COURSE”). Dr. Anderton therefore determined that a lumbar puncture was not necessary, and that Ms. Skinner need not be placed on antibiotics. RP (12/27/11) 1020:1-21, 1034:8-19 (Dr. Anderton); Def. Ex. 102 (p. 6, “ED COURSE”).¹⁶ Ms. Skinner was discharged with prescriptions for medication to ease her residual pain and avoid a recurrence of vomiting. *Id.* (p. 7, “PRESCRIPTION”).¹⁷

Unbeknownst to anyone, between 9 and 10 a.m. the abscess in the acoustic neuroma surgical site ruptured into Ms. Skinner’s brain. RP (12/29/11) 1427:18-1429:4 (Dr. Riedo).¹⁸ The abscess had reached the critical stage, and the repair between the site and the brain proved the weakest point. RP (12/29/11) 1423:11-1424:19 (Dr. Riedo). The effect was similar to an abscess bursting inside the brain, producing “instant” meningitis and setting in motion an untreatable and fatal infection process. RP (12/29/11) 1435:19-1436:13, 1436:25-1437:18 (Dr. Riedo).¹⁹

¹⁶ Dr. Anderton also took into account the risks associated with a lumbar puncture and associated antibiotic treatment. RP (1/3/12) 1635:6-1638:9 (Dr. Anderton); *see also* RP (12/28/11) 1319:11-1320:15 (Dr. Dobson) (describing the risks associated with lumbar punctures, which are “not benign procedures”).

¹⁷ Dr. Dobson, the Defendants’ standard of care expert, testified that Dr. Anderton’s treatment of Ms. Skinner met the standard of care. RP (12/28/11) 1252:6-11, 1315:1-1320:16, 1327:23-1331:1, 1361:20-1363:4, 1363:21-1364:4 (Dr. Dobson).

¹⁸ When the abscess ruptured it also decompressed, and Ms. Skinner experienced a commensurate reduction in pain contributing to the appearance of an improved condition fundamentally inconsistent with what is to be expected if someone is suffering from bacterial meningitis. RP (12/29/11) 1428:1-6 (Dr. Riedo).

¹⁹ Moreover, the course of the disease included “pyogenic ventriculitis,” an equally untreatable and fatal infection of the brain’s ventricular spaces. RP (12/27/11) 1141:23-

C. The Trial Court's Rulings Giving Rise to This Appeal.

1. Exclusion of Autopsy Photos and Related Expert Testimony.

As stated, photos were taken during the course of the autopsy performed at Overlake.²⁰ Initial discovery requests from PSP and the Estate requested medical records, but did not specifically request autopsy photos. CP 1955 (PSP RFP No. 1 to Overlake); CP 1969 (Estate's RFP No. 9). When Overlake produced records but not photos, PSP -- but *not* the Estate -- served supplemental requests expressly requesting the photos. CP 2010 (PSP's RFP No. 2).²¹

Overlake did not immediately produce the photos.²² Subsequently, expert witness discovery indicated the parties agreed that pus as well as bacteria was located in the acoustic neuroma surgical site. Estate expert

1142:14, 1159:24-1160:9, 1161:14-22 (Dr. Maravilla); RP (Vol. XII) 2091:6-22 (Dr. Wohns).

²⁰ The version of the Autopsy Report initially marked as an exhibit included references to the taking of photos, but the trial court later ordered those references redacted. *See* RP (12/27/11) 987:18-22 (ruling). A copy of the report as redacted (Defendants' substitute Exhibit 104) and a copy of the report without redactions (CP 1217-1221) are attached as App. C-1 and C-2, respectively.

²¹ Initially the Estate claimed *no party* had requested Overlake produce the photos until just before trial. *See* CP 901 (Rosato Dec. 12/19/11 at 2, ¶6). Then the Estate claimed *it* had "formally and informally" sought the photos' production. *See* CP 1911 (Estate's Contempt Request at 1). But the Estate produced no discovery request or any other evidence substantiating this claim; in fact the Estate -- unlike PSP -- *never specifically sought production of the photos*. CP 2028 (Anderson Dec. at 2, ¶5). (The Estate later withdrew its assertion that no party had requested the production of the photos until just before trial, acknowledging that PSP *had* done so. *See* CP 968-74 (Supp. Rosato Dec. 12/27/11).)

²² PSP's counsel's records document that the requests were served on Overlake and the Estate. CP 1382 (McIntyre Dec. 3/1/12 at 3, ¶9); CP 1642-44 (proof of service). Overlake's counsel could not later locate the requests in their files. CP 1736 (Anderson Dec. at 2, ¶5).

Dr. Richard Cummins (deposed October 6, 2011) testified that pus as well as bacteria was present at that site, that this collection constituted an abscess, *and* that this abscess ruptured into Ms. Skinner's brain (while insisting Ms. Skinner could have been saved from the resulting infection). CP 1165-67 (Cummins Dep. at 36:1-37:10, 40:17-41:6), 1172 (Cummins Dep. at 62:3-19). Estate expert Dr. David Talan (deposed October 24) agreed the bacteria came from the surgical site, and agreed there "could" have been pus as well as bacteria present in that site. CP 1194-95 (Talan Dep. at 27:11-23, 29:13:32:4). Estate expert Dr. Martin Siegel (deposed October 28) expressed no opinion as to whether pus as well as bacteria was present in the surgical site, and abjured having any opinions as to how bacteria got into Ms. Skinner's brain. CP 875-76 (Siegel Dep. at 51:11-54:8). Estate expert Dr. John Loeser (when first deposed on November 16) agreed the bacteria came from the surgical site and got into Ms. Skinner's brain when the surgical repair "ruptured or broke open," but expressed no opinion about whether pus as well as bacteria was present at the site. CP 1134-35 (Loeser Dep. 11/16/11 at 72:24-73:12). The Defendants' expert Dr. Francis Riedo (deposed November 18) agreed with Dr. Cummins that the bacteria came from the surgical site, that pus as well as bacteria was present in that site, and that this collection of pus and bacteria ruptured into Ms. Skinner's brain (but disagreed that Ms. Skinner

could have been saved from the resulting infection). CP 1108-11 (Riedo Dep. at 20:3-15, 24:23-29:21).

Agreement that pus as well as bacteria was present in the surgical site evaporated after the King County Local Civil Rule 4 deadline for designating exhibits came and went on November 28. The Estate notified the Defendants that Dr. Loeser had developed additional opinions after reviewing Dr. Riedo's deposition, and at a supplemental deposition (taken on December 5) Dr. Loeser questioned whether pus as well as bacteria was present in the surgical site, and disputed that there had been a "catastrophic" rupture from that site into Ms. Skinner's brain. CP 1147-48 (Loeser Dep. 12/5/11 123:12-126:24). Then on December 12 the Estate withdrew Dr. Cummins. CP 2038 (McIntyre Dec. at 3, ¶9); *see* CP 1824 (Joint Statement of Evidence, filed 12/13/11, at 2) (omitting Cummins from the Estate's expert witness list). PSP contacted Overlake about PSP's outstanding discovery request for the photos, and Overlake produced the photos to PSP and the Estate. CP 2028 (Anderson Dec. at 2, ¶6); CP 2038-39 (McIntyre Dec. at 3-4, ¶¶9-11). PSP then notified the Estate that PSP planned to use the photos (e.g., during cross-examination of the Estate's experts). CP 2046-47 (e-mail exchange between counsel).

On the first day of trial (Monday, December 19), the Estate moved to strike the photos. RP (12/19/11) 11:5-12:13 (motion). The trial court

granted the motion on the ground that the photos had been produced late; the court did not address the *Burnet* factors. *Id.* 13:20-25 (ruling). PSP moved for reconsideration, arguing the photos could not be stricken as a discovery sanction because the requisite *Burnet* findings could not be supported by the record. CP 857-81 (motion). The court denied that motion the following morning, without hearing oral argument. Still not addressing the *Burnet* factors, the court now ruled the photos were excluded because they had not been listed as exhibits on the Defendants' final exhibit list (as required by King County Local Civil Rule 4) and because they were "gruesome" (a conclusion the court stated it had reached after balancing probative value against potential "inflammatory" effect, although the court also stated it had no basis for evaluating probative value). RP (12/20/11) 282:22-286:12 (ruling).

Two days later (Thursday, December 22), PSP renewed its motion for reconsideration. PSP submitted additional material from the discovery record to show it had good cause for being granted relief from the Local Rule 4 deadline. CP 953-59 (renewed motion).²³ PSP submitted a declaration from Dr. Riedo showing the photos were probative and would assist in the presentation of the Defendants' case. CP 963-65 (Riedo Dec.); *see* CP 959-61 (renewed motion at 7-9) (addressing materiality of

²³ PSP also challenged whether the local rule could displace the *Burnet* balancing requirements. *See* RP (12/20/11) 289:6-14 (statement of counsel).

photos). PSP also established that measures short of wholesale exclusion could address concerns about inflammatory effect, and pointed out the Estate had no standing to raise gruesomeness because only the Defendants risked a jury backlash. CP 961 (renewed motion at 9).

That same day, during Dr. David Talan's testimony, a juror asked whether pus in the ventricles would "appear in an autopsy of the brain." RP (12/22/11) 909:25-910:1. PSP's counsel, following up on Dr. Talan's answer, asked two questions about autopsy photos: (1) "Would photos done at *an* autopsy assist you in determining [the answer to] that question?" (*Id.* 910:18-19); and (2) "Did you look at *any* photos here?" (*Id.* 910:21-22). Counsel made no reference to the fact that photos had been obtained by the pathologist who autopsied Ms. Skinner, and no reference to the fact of such photos had yet been made in the presence of the jury. The Estate objected to the questions as violating the court's ruling excluding the photos. *Id.* 927:10-19. The trial court acknowledged its ruling did not forbid reference to the fact that autopsy photos had been taken, stated it had "assumed, as a matter of motion in limine 101" that excluding the photos would foreclose referring to them, and reserved ruling on the issue. *Id.* 928:4-19.

The following day (Friday, December 23), the Estate moved for contempt and sanctions. *See* CP 1911-17 (motion for contempt). The

Estate urged the court to re-ground the exclusion of the photos as a sanction for what the Estate asserted was a violation of the intended scope of the exclusion ruling, and also to strike Dr. Riedo as a witness. The trial court ordered PSP to respond by Tuesday, December 27 (the next court day after the Christmas holiday break); PSP submitted its answer on Monday, December 26. *See* CP 1919-2047 (response with supporting materials including declarations).

The matter was heard the morning of December 27. The trial court stated that asking Dr. Talan about autopsy photos generally would not have been objectionable. RP (12/27/11) 984:22-985:3. But because *the court's notes* showed that counsel had asked about “the” autopsy photos, the court concluded that counsel’s questions were a deliberate effort to evade the court’s exclusion order. *Id.* 985:4-986:1.²⁴ The court ruled the photos would remain excluded, now as a sanction for an attempted evasion of the initial exclusion ruling. *Id.* 986:2-9. The court refused to exclude Dr. Riedo but barred him from testifying about why he believed the photos supported his opinions. *Id.* 986:15-17. The court indicated it no longer considered relevant whether the discovery history showed PSP had good cause for adding the photos as exhibits after the local rule deadline. *See*

²⁴ *The court's notes were wrong.* PSP’s counsel asked Dr. Talan “would photos done at an autopsy assist you in determining [the answer to] that question” -- *exactly* the kind of question about autopsy photos *in general* that the court said was *not* objectionable. RP (12/22/11) 910:18-23 (questions regarding autopsy photos, and responses by Dr. Talan).

id. 975:1-5, 982:5-10, 986:10-14. The court again did not address the *Burnet* factors, and also did not address PSP's request for reconsideration of the court's exclusion of the photos under ER 403.

PSP renewed the Autopsy Photos issues in its motion for new trial following the verdict and entry of judgment. *See* CP 1049, 1054-1060 (motion at 5, 10-16). The motion, joined by Overlake (CP 1039), was supported in part by a supplemental declaration from Dr. Riedo. CP 1061-72 (Supp. Riedo Dec.).²⁵ Dr. Riedo took issue with Dr. Loeser's trial testimony suggestion that the autopsy report's reference to "purulent" matter could have been a description of surgical debris from the acoustic neuroma repair, instead of pus. CP 1064 (Supp. Riedo Dec. at 4, ¶¶10-11). Dr. Riedo described how two photos in particular showed a mass of pus in the immediate vicinity of the acoustic neuroma surgical site, confirming that the author of the report (Dr. Veronica Thoroughgood) was referring to pus when she used the term "purulent." CP 1064-65 (Supp. Riedo Dec. at 4-5, ¶¶12-13); *see* CP 1071-72 (selected photos) (App. D).

The Estate responded with a declaration from Dr. Loeser stating that what was seen on the photos was consistent with surgical debris, and

²⁵ Following the rulings on the Estate's motion for contempt, PSP indicated it might file a supplemental declaration of Dr. Riedo, after he had completed his testimony and further detailing his opinions regarding the relevance of the autopsy photos. RP (12/27/11) 1191:23-1192:22 (counsel for PSP). The court understood that any such declaration would be submitted solely to make a record for any appeal. *Id.* 1192:23-1193:7 (colloquy). In the event, PSP filed that declaration in support of its motion for new trial.

that no definitive determination could be made without conducting a “histopathological analysis.” CP 1313 (Loeser Dec. at 2, ¶5). In reply, PSP submitted a second supplemental declaration from Dr. Riedo and a declaration from Dr. Richard Wohns; they disputed the need for a histopathological analysis and took further issue with Dr. Loeser’s view that Dr. Thoroughgood could have been describing surgical debris rather than pus when she referred to “purulent” matter. CP 1337-40 (Wohns Dec); CP 1342-43 (Second Supp. Riedo Dec.).

In its written order denying a new trial, the court restated the reasons it had given during the trial for excluding the autopsy photos.²⁶ The court then issued a supplemental order, stated it was doing so because of a reference in a footnote in PSP’s motion to the *Burnet* factors, and to document a *Burnet* analysis the court “believe[d] it had put ... on the record. CP 1370-71 (supp. order at 1-2).²⁷ The court analyzed the three *Burnet* factors, and (1) found a willful violation of discovery obligations (which the court equated to a lack of good cause for not having produced the photos earlier); (2) concluded a lesser sanction would not have been sufficient, and; (3) found the Estate would have been prejudiced if the

²⁶ The court also stated that admitting the photos would have made no difference to the outcome because the photos only went to the question of whether pus as well as bacteria was present in Ms. Skinner’s brain, and the parties’ experts (supposedly) were in agreement that pus as well as bacteria got into Ms. Skinner’s brain from the former surgical site. CP 1364-66 (order at 11-12). In fact, as shown, the parties’ experts *disagreed* over whether pus as well as bacteria was present in the site.

²⁷In fact, as shown, *no Burnet* analysis was *ever* put on the record during the trial.

photos had not been stricken. CP 1371-72 (supp. order at 2-3). PSP renewed its motion for a new trial, CP 1376-79, which the court summarily denied. CP 1739-40 (order).

2. Allowance of Rebuttal Testimony, and Denial of Surrebuttal Testimony.

After Dr. Loeser's second deposition on December 5, 2011, the Estate notified the Defendants that it intended to call Dr. Loeser in rebuttal; PSP moved *in limine* for an order restricting Dr. Loeser's testimony to the Estate's case-in-chief, arguing Dr. Loeser could not be withheld just so the Estate could have the "last word." CP 291-94 (motion); CP 770 (reply at 6) (the Estate may not hold Dr. Loeser back "to simply have 'the last word'"). The trial court denied PSP's motion, ruling that the Estate as the plaintiff *was* entitled to "the last word." RP (12/9/11) 72:10-11 ("they're the plaintiff and ... they get the last word"). During the Estate's case-in-chief, Dr. Siegel offered generalized testimony about survivability, saying nothing about whether pus as well as bacteria was present in the acoustic neuroma surgical site, and expressly deferring to Dr. Loeser on the source of the infection. RP (12/21/11) 555:21-556:16 (Dr. Siegel). Dr. Talan similarly offered nothing beyond generalized testimony about survivability, except for the statement questioning whether "true pus" was present in the acoustic neuroma surgical site. RP (12/22/11) 821:3-6 (Dr. Talan). During the Defendants' case-in-chief, the

Estate notified the Defendants that it intended to call Dr. Loeser in rebuttal to address standard of care as well as causation. The Defendants moved to bar Dr. Loeser from testifying in rebuttal on standard of care, CP 978-981 (motion), and also asked permission to present surrebuttal should Dr. Loeser offer new opinions on either standard of care or causation. CP 998-1001 (memorandum). The trial court ruled Dr. Loeser could testify about standard of care as well as causation, and denied surrebuttal. RP (1/3/12) 1568:10-1569:12 (ruling).²⁸

Dr. Loeser's standard of care rebuttal substantially repeated the testimony of Drs. Siegel and Talan: Ms. Skinner presented with several symptoms of meningitis, and these made it mandatory that a lumbar puncture be done and antibiotics be administered no later than noon. RP (1/3/12) 1660:7-1661:9, 1664:3-1665:12, 1666:13-1667:15 (Dr. Loeser). Dr. Loeser's causation rebuttal went substantially beyond Drs. Siegel and Talan. Dr. Loeser testified that Ms. Skinner did not have an abscess in the old surgical site but rather an "empyema," a space created during her acoustic neuroma surgery in which she had developed a "low grade infection." *Id.* 1670:13-19, 1671:19-22, 1707:14-1708:12 (Dr. Loeser). Dr. Loeser also testified that the "purulent" material observed by the pathologist could have been "the remnants of the fat graft, and the

²⁸ The Defendants were granted a standing objection to Dr. Loeser's testimony. RP (1/3/12) 1569:14-1570:8.

collagen and Duragen, and things packed in there” during the 2006 acoustic neuroma surgeries, rather than pus. *Id.* 1671:3-13 (Dr. Loeser)

The Defendants renewed the rebuttal and surrebuttal issues in their motion for new trial.²⁹ Dr. Riedo explained that the term “empyema” is used by physicians to describe the space between the lungs and the chest wall, *not* the kind of space created by Ms. Skinner’s prior surgeries. CP 1065-66 (Riedo Supp. Dec. at 5, ¶¶14-16). Dr. Riedo also explained that abscesses can be surrounded by bone and other tissues, and that the distinction Dr. Loeser was attempting to draw between an empyema and an abscess was substantively meaningless. CP 1066 (Riedo Supp. Dec. at 6, ¶17). Dr. Riedo would also have rebutted the suggestion that the “purulent” matter observed by the pathologist in the vicinity of the acoustic neuroma surgical site could have been surgical debris, rather than pus. CP 1064-65 (Riedo Supp. Dec. at 4-5, ¶¶10-13).

III. STANDARD OF REVIEW

Decisions regarding whether to exclude evidence, either as a sanction or on substantive grounds, are reviewed for abuse of discretion. *Burnet*, 131 Wn.2d at 494 (citation omitted) (sanction); *State v. Lord*, 117 Wn.2d 829, 871, 822 P.2d 177 (1991) (citations omitted) (autopsy photos). Decisions regarding rebuttal and surrebuttal testimony are also reviewed

²⁹ During the trial the Defendants filed a summary offer of proof indicating their general readiness to offer such evidence, and if necessary through the testimony of Dr. Richard Wohns had Dr. Riedo proved unavailable. *See* CP 2048-50 (offer).

for abuse of discretion. *State v. White*, 74 Wn.2d 386, 394–95, 444 P.2d 661 (1968). Discretion is abused if a decision is manifestly unreasonable, or based upon untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (citations omitted).

IV. ARGUMENT

A. **The Trial Court Erred In Excluding Autopsy Photos and in Barring Expert Testimony Based on Those Photos.**

1. **The Trial Court Erred in Excluding Autopsy Photos.**

a. **The Trial Court Failed to Balance the *Burnet* Factors Until Too Late, then Misapplied Them to the Facts of The Case.**

In *Burnet v. Spokane Ambulance*, the Supreme Court held that, before a trial court may exclude evidence as a sanction for violating a deadline, the court must consider, on the record, (1) if the violation was willful, (2) if the violation substantially prejudiced the opponent's ability to prepare for trial, and (3) the possibility of a lesser sanction short of exclusion.³⁰ The Supreme Court's recent decisions in *Blair v. TA-East Seattle No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011), and *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012), leave no doubt that on-the-record

³⁰ 131 Wn.2d at 496-97. In *Burnet*, the trial court summarily excluded an expert witness because the plaintiff failed to disclose the witness in compliance with a court-ordered deadline; the Supreme Court reversed and ordered a trial on a claim for which the expert's testimony was essential. See 131 Wn.2d at 489-491, 499. In *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002), the Supreme Court extended the *Burnet* balancing requirement to case scheduling order deadlines.

balancing of the *Burnet* factors is *always* required before a trial court may exclude evidence as a sanction for a discovery violation (e.g., for producing evidence after the deadline for doing so has passed).³¹

The trial court here excluded the Autopsy Photos because they had been produced after the deadline for discovery had passed, failing to balance the *Burnet* factors before doing so. *See* RP (12/19/11) 11:5-13:25 (motion to exclude and ruling). The court continued to fail to balance the factors during the course of the trial, even though PSP repeatedly pointed out the need for such balancing. CP 858 (motion for reconsideration at 2); RP (12/20/11) 289:6-14 (statement of counsel) (pointing out local rules cannot displace *Burnet*). Not until the trial was over, the verdict returned and judgment entered on that verdict in favor of the party benefited by the exclusion order, did the trial court finally balance the factors.³² This belated effort fails as a matter of law, for two reasons.

- ***First***, the balancing came too late. *Blair* is controlling on this issue. There, a trial court made no *Burnet* findings when it struck witnesses as a sanction for late disclosure (the “August 14 order”), then struck additional witnesses as a sanction for violating the earlier order (the “October 15 order”). 171 Wn.2d at 346-47. The Supreme Court rejected

³¹ *See Blair*, 171 Wn.2d at 349-50; *Teter*, 174 Wn.2d at 216-17.

³² As previously stated, the record is *crystal* clear that the court did *not* balance the factors at any point during the trial.

the respondent's attempt to -- in the court's words -- use the October 15 order to "*backfill*" the August 14 order:

The August 14 order needed to be supportable *at the time it was entered*, **not in hindsight** by reference to the October 15 order. [T]he August 14 order needed to set forth findings under *Burnet* **independent of the later-entered October 15 order**.

Id. at 350 (italicized emphasis by the court; bold emphasis added).

Balancing done when a court is asked to impose the severe sanction of striking evidence assures the court will focus on whether the requirements for imposing a sanction "that affect[s] a party's ability to present its case" have in fact been satisfied. *See Blair* at 348 (internal quotations omitted). Balancing in hindsight invites after-the fact rationalization of a decision. The trial court failed here to address the *Burnet* factors when it struck the Autopsy Photos, and its belated attempt to backfill by balancing after the trial was over and the jury had rendered its verdict is precisely the kind of balancing in hindsight that the Supreme Court condemned in *Blair*.

- **Second**, the trial court's balancing failed on the merits. A willful discovery violation is the predicate *Burnet* requirement for imposing the sanction of exclusion. The court stated it found willfulness "in the sense that the Defendants had not shown *good cause* for their failure to disclose the autopsy photographs during discovery." CP 1371-72 (supp. order at 2-3) (emphasis added). Good cause, however, is not the

standard for imposing the “severe” sanction of excluding evidence -- *willfulness* is the standard. *See Teter*, 174 Wn.2d at 216-17 (citing *Burnet*, 131 Wn.2d at 496-97). The trial court found the photos “were within the control of Defendant Overlake Hospital ... and easily accessible to Defendant PSP during this same period[,]” CP 1372 (supp. order at 3), yet *nothing* in the record supports the notion that PSP’s managing partner need only have walked down the hall and asked Overlake’s risk manager for the photos, and a set would have been handed over without further ado. The trial court was clearly wrong when it asserted that “Defendants and their experts had ample opportunity to review [the] ... photos to determine if they supported the defendants’ theory of the case[.]” *See id.*³³

The trial court also ignored that, as discovery progressed and both sides’ experts were deposed, the parties agreed that pus as well as bacteria had ruptured into Ms. Skinner’s brain. *Compare* CP 1165-67, 1172

³³The court *itself* interjected the notions of “eas[e] [of] accessib[ility]” and “ample opportunity to review[,]” when it issued its supplemental order making the *Burnet* findings it had in fact previously failed to make. In response, PSP submitted a declaration from Overlake’s trial counsel, who correctly pointed out that Overlake was barred by law from handing over the autopsy photos in such an informal fashion. CP 1736 (Anderson Dec. at 2, ¶4, ll. 10-13). Privacy rules promulgated under the federal Health Insurance Portability and Accountability Act (“HIPAA”), 42 U.S.C. 1320d, *et seq.*, which apply to all health care providers including hospitals, protect “individually identifiable health information[,]” 45 CFR § 160.103, which includes health information collected from an individual that “(1) [i]s created or received by a health care provider” and “(2) [r]elates to the *past* ... physical health or condition of an individual [or] ... the provision of health care to an individual” that identifies or could be used to identify the individual. *Id.* (emphasis added). Moreover, individuals include estates. *Id.* The autopsy photos thus were protected health information under HIPAA, and their production and ensuing availability to experts required going through the formal requirements of discovery.

(Cummins dep.) *with* CP 1108-11 (Riedo Dep.). As the trial court itself acknowledged, the photos would only be relevant if the presence of pus in the surgical site was in dispute, and that issue was not in dispute *until the Estate changed its theory of the case just two weeks before trial*. At that point the photos became relevant, and Overlake promptly produced them to both sides when PSP invoked its discovery rights under the request for production of the photos it had previously served.³⁴ The trial court's failure to address these *at least* "arguably valid" reasons for why the photos were not produced until after the close of discovery is *independently* fatal to its finding of willful discovery abuse.³⁵

Had the trial court responded to the Estate's motion to strike by invoking *Burnet* and ordering the parties to bring before it the facts pertaining to the issues of willfulness, substantial prejudice to trial preparation, and lesser sanctions, the court should have recognized that the photos could not properly be stricken. The court could then have ordered the parties to have their experts review the photos and determine the extent

³⁴ The trial court stated the Estate "asked for the production of any documents relating to Ms. Skinner[.]" *see* CP 1372 (supp. order at 3), ignoring that, as shown, only PSP specifically asked for the production of the photos, in a supplemental request served after both PSP's and the Estate's nonspecific requests for production of documents did not lead to the photos' production.

³⁵ *See Blair*, 171 Wn.2d at 350 n.3 (a trial court errs when it fails on the record to consider a party's "arguably valid" reasons for failing to comply with a discovery deadline); *Teter*, 174 Wn.2d at 218-19 (the "bare assertion" of a lack of reasonable excuse "cannot substitute" for the trial court's express "reference to" and "explicit...reject[ion]" of a party's explanation for failing to comply with a discovery deadline).

to which the photos affected their opinions.³⁶ Dr. Riedo and Dr. Loeser presumably would still have clashed over the photos' import, but the jury would have had seen the photos and could have weighed for itself which interpretation of the photographic evidence it found more compelling.

b. King County Local Civil Rule 4 Cannot Save the Exclusion of the Autopsy Photos.

A Case Schedule Order set a deadline of November 28, 2011, for parties to disclose their final proposed trial exhibits and witnesses. CP 2053 (order at 3). Under King County Local Civil Rule ("KCLCR") 4(j), after that deadline has passed, a presumption of exclusion is established for any exhibit proposed to be introduced which did not appear on the offering party's exhibit list, and that presumption can only be overcome by a showing of "good cause." The trial court, in denying the Defendants' first reconsideration request, ruled the Autopsy Photos should be excluded under the authority of this rule. That ground fails for two reasons.

³⁶ If need be, short depositions of Drs. Riedo and Loeser could have been taken (e.g., on Friday, December 23, when trial was not in session). The *obvious* availability of these courses of action fatally undercuts the trial court's analysis of lesser sanctions, which assumed that the only procedural alternative to exclusion was a continuance of the entire trial. CP 1371 (supp. order at 2). Their availability also fatally undercuts the trial court's finding that the Estate was "unduly prejudiced" because it did not have the opportunity to have its experts examine the photographs, depose defense experts regarding their interpretation of them, or have time with its own experts to develop opinions in rebuttal to such evidence. (CP 1372) (supp. order at 3); see *Barci v. Intalco Alum. Corp.*, 11 Wn. App. 342, 345-46, 522 P.2d 1159 (1974) (reversing and ordering new trial where trial court excluded expert disclosed a few days before trial and whose deposition was able to be taken two days after the start of trial). To the extent the Estate would have had to scramble to prepare an expert response to the photos, *it had nothing to fairly blame but its own eleventh hour change in its theory of the case.*

- **First**, a local rule cannot supersede the requirements of the Civil Rules for excluding evidence as a sanction for a discovery violation. *Burnet* and its progeny establish that, under the Civil Rules, mere untimeliness in producing evidence during discovery is an insufficient basis for imposing the sanction of excluding such evidence: The party seeking exclusion must affirmatively establish that the untimeliness was due to a *willful* violation of the proffering party's discovery obligations. KCLCR 4(j), on the other hand, establishes a presumption of exclusion, which must be overcome by an affirmative showing of "good cause." This conflict must be resolved in favor of the Civil Rules requirements established by *Burnet* and its progeny.³⁷

- **Second**, the trial court's application of the local rule fails on the merits. The trial court asserted that the Defendants lacked good cause for not listing the Autopsy Photos on their final exhibit list because of the supposed ease with which they could have accessed the photos earlier in the case. This assertion not only lacked a sound legal and factual basis (*see* discussion at p. 35, n.33, *supra*) -- it also begged the relevant question posed by the rule itself: whether the Defendants ought to have

³⁷ Local rules that conflict with a valuable right granted by the civil rules "cannot be given effect." *Parry v. Windermere Real Estate/East, Inc.*, 102 Wn. App. 920, 928, 10 P.3d 506 (2000) (citing *King County v. Williamson*, 66 Wn. App. 10, 13, 830 P.2d 392 (1992); *see also Harbor Enterprises, Inc. v. Gudjonsson*, 116 Wn.2d 283, 293, 803 P.2d 798 (1991) (a local court rule cannot negate a valuable right granted by statute); *see generally* CR 83(a) (authorizing local rules that are not "inconsistent" with the Civil Rules).

listed the photos on their final exhibit lists. In fact, there was *no* reason to list the photos as exhibits when the final exhibit lists came due, because at that point the parties *agreed* that pus as well as bacteria was present at the surgical site. The need for the photos did not arise until the Estate changed its theory of the case and began to dispute whether pus was present, and that did not happen until *after* the local rule deadline had passed. The Defendants had ample good cause for adding the photos, and striking them for a violation of the local rule deadline cannot be sustained under the standard for exclusion set forth in that rule.

c. “Gruesomeness” Under ER 403 Cannot Save the Exclusion of the Autopsy Photos.

“The fact that the photographic depiction may be gruesome or unpleasant *does not render the evidence inadmissible.*” *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 283, 840 P.2d 860 (1992) (emphasis added) (citing *Mason v. Bon Marché Corp.*, 64 Wn.2d 177, 178, 390 P.2d 997 (1964); 5 K. Tegland, *Washington Practice: Evidence* § 95, at 46 (3rd ed. Supp. 1992)). Instead, trial courts must balance the probative value of such photographs against any unfairly prejudicial effect, and may not exclude them unless their probative value is substantially outweighed by such an effect. *E.g.*, *State v. Lord*, 117 Wn.2d at 871 (citations omitted); *State v. Adams*, 76 Wn.2d 650, 654-56, 458 P.2d 558 (1969), *rev'd not in rel. part sub nom. Adams v. Washington*, 403 U.S. 947 (1971) (citations

omitted) (both affirming admission).³⁸ Here, the trial court stated it was excluding the photographs after balancing their probative value against their prejudicial (“inflammatory”) effect. *See* RP (12/20/11) 285:18-286:12. Yet even as the court said it was balancing probative value against inflammatory effect, the court admitted it did not know how the photos could be used to support the Defendants’ case. *See* RP (12/20/11) 285:25-286:5 (“*I don’t know what [the photos’ probative value]...is, because I don’t know what the defense thinks they show*” (emphasis added)).

The root of the problem is the way the trial court went about changing its rationale for excluding the photos. First, the court struck them as a sanction for late production. When PSP moved for reconsideration of that ruling, the court shifted to the alternate grounds of Local Rule 4 and gruesomeness. In shifting to gruesomeness, the court criticized PSP for not establishing probative value under ER 403, even though PSP’s motion fully addressed the court’s only stated basis for striking the photos: untimely production.³⁹ PSP promptly renewed its

³⁸ The requirements for excluding photographic evidence predate the adoption of the Rules of Evidence in 1976; although the analysis now falls under the rubric of ER 403 since the adoption of the Rules of Evidence, the substance of the inquiry has not changed. *Compare Lord*, 117 Wn.2d at 871 *with Adams*, 76 Wn.2d at 655.

³⁹ PSP filed its motion for reconsideration the afternoon of December 19, following the court’s ruling that morning striking the photos as a discovery sanction. *ER 403 was not raised as a basis for excluding the photographs until the next day, when the Estate filed its response in which it for the first time invoked the rule.* *See* CP 906 (Estate’s response at 3). In its (oral only) motion the previous morning, the Estate referred in passing to the photos being “gruesome,” but did not raise ER 403; its motion was based solely on the issue of late production, and the trial court in turn struck the photos as a sanction solely

motion for reconsideration, and supported the renewal with a declaration from Dr. Riedo showing the photos were *highly* probative. See CP 965 (First Riedo Dec. at 3, ¶¶ 8-9) (several of the photos are “crucial” to an accurate determination of the cause of Ms. Skinner’s death, and would “greatly assist” an expert’s ability “to communicate to a finder of fact exactly what caused Ms. Skinner’s death”). But instead of responding by re-balancing and weighing the Defendants’ proffered basis for probativeness against the court’s stated concern about “inflammatory” effect, the court *never again addressed the issue*.⁴⁰

A trial court should not be credited with a proper balancing of probative value against unfair prejudice under ER 403, when the court complains it “*d[oes] not know*” whether the proffered evidence is probative, and when the proffering party responds with proof of probativeness, the court then ignores that proof. Moreover, the only

because they had been produced late. See RP (12/19/11) 11:5-12:13 (Estate’s motion), 13:20-25 (court’s ruling).

⁴⁰ The court’s only references to the issue after PSP’s renewed motion for reconsideration supported by Dr. Riedo’s declaration are to be found in its order denying the Defendants’ post-judgment motion for a new trial. First, the court summarily stated that it had ruled the photos “inadmissible under ER 403.” CP 1365 (order denying new trial at 12). Second, the court asserted that PSP “did not make an offer of proof...as to how any of the photos were probative of a disputed issue of fact.” *Id.* ***This statement is clearly wrong:*** Dr. Riedo’s declaration submitted in support of PSP’s first motion for reconsideration *fully* satisfied the case law requirements for establishing the probativeness of the photos. Compare CP 965 (First Riedo Dec. at 3, ¶¶ 8-9) (testifying that several of the photos are “crucial” to an accurate determination of the cause of Ms. Skinner’s death, and would “greatly assist” an expert’s ability “to communicate to the finder of fact exactly what caused Ms. Skinner’s death”) with *Washburn*, 120 Wn.2d at 284; *State v. Adams*, 76 Wn.2d at 654 (both holding autopsy photos are admissible where they illustrate or explain expert testimony).

inflammatory effect the court identified involved photos showing the exterior of Ms. Skinner's skull with hair still attached. RP (12/20/11) 286:5-8. But as PSP pointed out in its renewed motion for reconsideration, the Defendants only needed to introduce a few photos, *and none of those would show the skull with hair still attached.* CP 961 (supp. memorandum at 9). Yet as with probative value, the trial court responded by ignoring that any inflammatory effect could be avoided by measures short of wholesale exclusion.

The trial court's *fundamental* error was presuming to balance probative value against unfair prejudice under ER 403 *before the introduction of evidence had begun.* As the Third Circuit has explained, "Rule 403 is a trial-oriented rule":

Precipitous Rule 403 determinations, before the challenging party has had an opportunity to develop the record, are therefore unfair and improper.... [I]n order to exclude evidence under Rule 403 at the pretrial stage, a court must have a record complete enough on the point at issue to be considered a virtual surrogate for a trial record.

In re Paoli R.R. Yard PCB Litigation, 916 F.2d 829, 859 (3rd Cir. 1990) (emphasis added) (reversing pretrial exclusion under Rule 403).⁴¹ Here,

⁴¹ *Accord, In re Diet Drugs Products Liability Litigation*, 369 F.3d 293, 314 (3rd Cir. 2004) (reversing Rule 403 exclusion) (because "at trial th[e] process of evidentiary balancing is nuanced and contextual ... 'excluding evidence under Fed. R. Evid. 403 at the pretrial stage is an extreme measure'" (citing and quoting *Hines v. Consolidated Rail Corp.*, 926 F.2d 262, 274 (3rd Cir. 1991)); *State v. Patterson*, 651 A.2d 362, 367 (Me. 1994) (reversing Rule 403 exclusion) ("caution[ing]" trial courts to "refrain from making Rule 403 determinations prior to trial"; "We question how the court could have engaged in a meaningful analysis of the statements' probative value or prejudicial effect

the trial court presumed to balance before a single witness had been called, *and* before the Defendants had been given a chance to address either probative value or unfair prejudice. Then, after the Defendants showed how the photos were probative, *and* how wholesale exclusion was not required to avoid any inflammatory effect, the trial court ignored both showings and never revisited the issue during trial.⁴² The court's gruesomeness ruling is the *quintessence* of precipitousness, and deference to discretion should not be employed to uphold such decision-making.

Finally, the court's gruesomeness rationale fails because the Estate *had no standing to raise the issue* because *it* could not be prejudiced by any "inflammatory" effect. It was the Defendants who risked offending the jury by introducing the photos, and they were willing to take that chance. CP 961 (supp. memorandum at 9) ("PSP is willing to withstand whatever reaction the jury might have to ... [the photos'] graphic nature. Certainly, *if anyone is concerned about shock, it would be PSP*" (emphasis added)). Nothing in this state's many decisions dealing with admissibility

in the absence of a trial"); *State v. Mechler*, 153 S.W.3d 435, 442-43 (Tex. Crim. Court of Appeals 2005) (Cochran, J, concurring in reversal of exclusion under Rule 403) ("[A]s a general rule, most of Rule 403's work of balancing probative value against the risk of unfair prejudice or confusion of issues is done during trial, not pretrial. As the Third Circuit has stated in discussing pretrial rulings concerning scientific evidence, *it is rare that Rule 403 is an appropriate basis for the pretrial exclusion of evidence* because the trial judge cannot ascertain potential relevance or the impact of countervailing factors without 'a virtual surrogate for a trial record.'" (second internal quotation and citations omitted) (emphasis added)).

⁴² *Compare Jacob v. Kippax*, 10 A.3d 1159, 1162 (Me. 2011) (affirming exclusion of evidence under Rule 403 at the pretrial stage where the trial court also stated it would reconsider the ruling if the evidence became relevant during trial testimony").

of autopsy photos supports allowing a party that can't be prejudiced by a visceral reaction against such evidence, and indeed may *benefit* from such a reaction, to block the admission of such evidence.⁴³

d. The Power to Enforce the Court's Exclusion Ruling Cannot Save the Act of Exclusion Itself.

The power to enforce the court's exclusion ruling cannot save the exclusion ruling itself, for two reasons. First, the trial court got its facts wrong. The court relied on its notes showing that PSP's trial counsel had asked Dr. Talan about whether seeing "the" autopsy photos would help to determine whether a mass reported in the [left] ventricle by the pathologist was pus. *See* RP (12/27/11) 985:4-986:1. But as the transcript establishes, PSP's trial counsel only asked about whether autopsy photos *generally* could help answer that question, RP (12/22/11) 910:18-19, and the trial court itself said that such an open-ended question would not have violated its exclusion ruling. RP (12/27/11) 984:22-985:3.⁴⁴

Second, by the time the trial court was considering whether to sanction the Defendants for the questions asked of Dr. Talan, it should

⁴³ As to how a wrongful death medical malpractice plaintiff can benefit from the admission of autopsy photos, *see Davis v. Wooster Orthopedics & Sports Medicine, Inc.*, 193 Ohio App.3d 581, 952 N.E.2d 1216 (2011) (rejecting a defendant doctor's challenge to admission of an autopsy photo; the photo was probative on the issue of mental anguish damages).

⁴⁴ Trial counsel's other question, about whether Dr. Talan had seen autopsy photos, was similarly open ended and also left unstated whether autopsy photos had been taken during Ms. Skinner's autopsy. *See* RP (12/22/11) 910:21-22. In fact, at the time the questions were asked, although the autopsy report was in evidence and had yet to have its reference to photos redacted, neither counsel nor any witness had informed the jury of the fact that photos had been taken.

have become *crystal* clear to the court that its initial exclusion ruling was *wrong*. The Defendants had submitted the full record of discovery showing they had not willfully violated their discovery obligations, *and* had good cause for adding the photos after the local rule exhibit list deadline. The Defendants also had established that the photos should not have been excluded under ER 403 because they were highly probative, and any inflammatory effect could be fully avoided without taking the draconian step of wholesale exclusion. Whatever sanction the court might reasonably have thought should be meted out, in order to insure that counsel honored the bounds of the court's *in limine* rulings for the remainder of the trial, it was plainly untenable to exclude manifestly relevant evidence as a sanction for violating an exclusion ruling *that never should have been made in the first place*.

2. The Resulting Prejudice Mandates a New Trial on Standard of Care and Causation.

Determining whether pus as well as bacteria was present in the acoustic neuroma surgical site was central to resolving whether Ms. Skinner was the victim of a classic case of bacterial meningitis triggered by a leak of bacteria into her brain (the Estate's case), or of a catastrophic rupture of pus and bacteria from an abscess that had formed within the surgical site, which also relieved Ms. Skinner's symptoms to the extent that Dr. Anderton could reasonably conclude that Ms. Skinner did not

have bacterial meningitis (the Defendants' case).⁴⁵ Had the jury seen the photos, and heard Dr. Riedo's explication of what those photos showed, there is a reasonable probability that the jury would have concluded Dr. Riedo was right, and returned a verdict for the Defendants on both standard of care and causation. Especially given that the change of just two votes on standard of care, and of just *one vote* on causation, would have *hung* the jury and entitled the Defendants to a new trial, the court's erroneous exclusion of the photos, and the expert testimony based on those photos, mandates a new trial. *Magana v. Hyundai Motor America*, 123 Wn. App. 306, 319, 94 P.3d 987 (2004) (ordering a new trial where the court failed to tell the jury that evidence had been stricken and there was a reasonable probability the jury's 10-2 verdict would have ended up hung 9-3, had the jury known the evidence had been excluded).⁴⁶

⁴⁵ The trial court asserted that the autopsy photos were not material because the parties' experts supposedly were in agreement that pus was present at the surgical site. *See* CP 1366 (order at 13). This finding is not supported by the record. Dr. Talan, during the Estate's case-in-chief, disputed the presence of "true pus" at the acoustic neuroma surgical site. RP (12/22/11) 811:12-812:8, 820:9-821:6. And in rebuttal, Dr. Loeser directly challenged Dr. Riedo's reading of the autopsy report's statements about observing "purulent" matter, testifying that what the pathologist observed at the acoustic neuroma surgical site could have been "surgical" debris rather than pus. RP (1/3/12) 1671:3-13.

⁴⁶ In her opinion for the court in *Magana*, Judge Karen Seinfeld took note of Judge Dennis Sweeney's 1996 Gonzaga Law Review article in which Judge Sweeney provided a comprehensive review of the state of our state's harmless error jurisprudence. *See* 123 Wn. App. at 318, citing D. Sweeney, *An Analysis of Harmless Error in Washington: a Principled Process*, 31 Gonz. L. Rev. 277 (1995-96). Judge Sweeney's review shows how Washington harmless error jurisprudence has not been a model of consistency, with courts from time to time yielding to the temptation to weigh evidence in a way that invades the province of the jury. In *Magana*, the court correctly recognized that an error in the admission or exclusion of evidence requires a new trial if there is a substantial

B. The Trial Court Erred in Permitting the Estate to Withhold Dr. Loeser’s Testimony Until Rebuttal, Then Compounded this Error by Denying the Defendants Any Surrebuttal.

The trial court allowed the Estate to call Dr. Loeser in rebuttal because the court believed a plaintiff is entitled to “the last word.” RP (12/9/11) 72:10-11. Yet it is settled Washington law that rebuttal testimony is limited to responding only to new matters raised in the defense case-in-chief, and a plaintiff may not withhold substantial evidence “*merely in order to present this evidence cumulatively at the end of [a] defendant’s case.*” *State v. White*, 74 Wn.2d 386, 395, 444 P.2d 661 (1968) (emphasis added; citations omitted) (stating rule); *see Vasquez v. Markin*, 46 Wn. App. 480, 493, 731 P.2d 510 (1986) (citing *Kremer v. Audette*, 35 Wn. App. 643, 647-48, 668 P.2d 1315 (1983), quoting *State v. White*) (affirming the exclusion of rebuttal testimony in a medical malpractice action that was “simply a reiteration of [the] evidence in chief”).

On standard of care, Dr. Loeser reiterated the testimony of Drs. Siegel and Talan -- a point *conceded* by the trial court in its order denying the Defendants’ post-judgment motion for new trial. *See* CP 1358 (order at 5) (“[T]he Court *agrees with Defendants* that many of [Dr. Loeser’s] ... opinions *were cumulative of those previously expressed by Plaintiff*

possibility or reasonable probability that the error affected the ultimate outcome. There is *no* case law support for the trial court’s contrary suggestion that the Defendants had to show the autopsy photos would have “*definitively*” resolved an outstanding issue, in order to establish prejudice from their exclusion. *See* CP 1366 (order at 13).

experts Drs. Siegel and Talan” (emphasis added)).⁴⁷ Dr. Loeser’s distinguished and distinctive *curriculum vitae* made this reiteration precisely the sort of “dramatic final statement” that careful policing of proposed rebuttal testimony should prevent. *E.g., Skogen v. Dow Chemical Co.*, 375 F.2d 692, 705-06 (8th Cir. 1967) (affirming exclusion of rebuttal expert cumulative of the plaintiff’s case-in-chief) (“[I]t is altogether possible that plaintiffs kept [the expert] in reserve, hoping to achieve some tactical advantage by a dramatic final statement”).

The trial court nevertheless concluded it did not abuse its discretion. CP 1358 (order at 5).⁴⁸ The Defendants are compelled to respond that, if allowing cumulative rebuttal testimony was not an abuse of discretion here, then allowing it will *never* be found to be an abuse of discretion. The trial court also concluded that the Defendants “suffered no prejudice” from Dr. Loeser’s standard of care testimony. CP 1358 (order

⁴⁷ Later in its order the trial court listed six examples of Loeser rebuttal testimony that the court felt constituted “genuine rebuttal.” *See* CP 1360-62 (order at 7-9). Only *one* pertained to standard of care. *See* CP 1361 (order at 8) (bullet point no. 5) (Loeser testimony rebutting contention that meningeal enhancement shown on MRI test result could reasonably have been attributed to a prior lumbar puncture). The record is *crystal* clear that Dr. Loeser’s testimony on standard of care was overwhelmingly just a repetition of Drs. Siegel and Talan.

⁴⁸ The trial court attempted to justify its decision by describing the standard of care issues as “complicated” and stating that standard of care and causation were “intertwined.” *See* CP 1360 (order at 7). These statements miss the point. The danger of a plaintiff gaining an unfair tactical advantage, by presenting what turns out to be merely cumulative testimony to achieve (as the Eighth Circuit put it) a “dramatic final statement” of the case, means a trial court must prospectively probe any request for rebuttal testimony and weed out the merely cumulative. The court made no such effort here.

at 5).⁴⁹ Yet not only did Dr. Loeser's testimony constitute a "dramatic final statement" of the Estate's case -- the Estate's counsel then hammered away in closing argument on the contrast between the *three* experts the Estate presented on standard of care to just *one* for the Defendants.⁵⁰ As the Supreme Court recently held in *Anfinson v. FedEx Ground Package System, Inc.*, ___ Wn.2d ___, 281 P.3d 289 (2012), exploitation of error in closing argument constitutes prejudice entitling a party to a new trial. *See* 281 P.3d at 302, ¶45 (finding a misleading jury instruction was prejudicial because "the incorrect statement was actively urged upon the jury during closing argument. *No greater showing of prejudice from a misleading jury instruction is possible without impermissibly impeaching a jury's*

⁴⁹ The trial court suggested that the Defendants could not establish prejudice unless they proved that allowing Dr. Loeser to repeat the same standard of care opinions as Drs. Siegel and Talan was the *sole reason* for the jury finding in favor of the Estate on standard of care. *See* CP 1362 (order at 9) ("there is no reason to believe that this testimony *alone* was *the* reason that 11 jurors found that Dr. Anderton violated the standard of care" (emphasis added)). There is *no* support in the case law for requiring such a showing in order to establish prejudice.

⁵⁰ *See* RP (1/4/12) 1909:7-16 ("You heard from Dr. Talan, from Dr. Siegel, *from Dr. Loeser yesterday. All of these experts explained* that early in the course of meningitis you're not going to necessarily be able to tell by talking to a patient...The only way to do it is by LP [lumbar puncture]" (emphasis added)), 1914:18-24 (*Dr. Loeser, Dr. Siegel, and Dr. Talan -- all say ... that making the decision to send Ms. Skinner out with pain medication, Percocet, and nausea medication, instead of keeping her in the hospital and doing the lumbar puncture, giving antibiotics, that that violated the standard of care*" (emphasis added)), 1916:7-1917:7 ("So in the entire state of Washington, the only person that the defense brought you to defend Dr. Anderton's care was Dr. Dobson....Then conversely, look at the experts that we brought you. We brought you Dr. Siegel....We brought you Dr. Talan....*Dr. Loeser, who is a seventy-five year old neurosurgeon, he was the assistant dean of curriculum at med school, chief of pediatric neurosurgery. These are the type of experts that we were able to get,* and yet out of all the physicians in this state that practice emergency medicine, the defense only had one person, who is ... retired, [who] now works in software" (emphasis added)).

verdict" (citation omitted) (emphasis added)).

The trial court compounded its error by refusing to allow surrebuttal on causation. Dr. Loeser directly challenged Dr. Riedo's contention that Ms. Skinner was doomed by the bursting of an abscess from the acoustic neuroma surgical site into Ms. Skinner's brain, with opinions not presented during the Estate's case-in-chief. Yet Dr. Riedo's testimony was *consistent* with his deposition testimony.⁵¹ Allowing Dr. Loeser's evidence to stand unrebutted erroneously gave the Estate the benefit of a new expert seeming to offer the final, definitive word on causation.

V. CONCLUSION

This Court should order a new trial on standard of care and causation.

RESPECTFULLY SUBMITTED this 24th day of September, 2012.

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⁵¹ Of the six illustrations of supposed "genuine" rebuttal set forth in the trial court's order, only the first (concerning the import of white blood cell count levels for finding the presence of an abscess) can fairly be characterized as responding to something truly "new." See CP 1360-69 (order at 7-9); compare CP 1104-1115 (Riedo Dep.) with RP (12/29/11) 1398:8-1518:18 (Riedo).

NO. 68479-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

JEFFREY BEDE, as Personal
Representative of the Estate of
LINDA SKINNER, Deceased,

Respondent,

vs.

OVERLAKE HOSPITAL
MEDICAL CENTER, a
Washington corporation, and
PUGET SOUND PHYSICIANS,
PLLC, a Washington corporation,

Appellants.

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of 18 years, not a party hereto and competent to be a witness herein. I certify that on September 24, 2012, I served a copy of the following documents:


- *Letter from Michael B. King to Richard D. Johnson, Court Administrator/Clerk* dated September 24, 2012;
- *Appellant's Opening Brief (Replacement)*; and,
- *This Declaration of Service* on counsel of record as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 24th day of September, 2012.


Sara Leming, Legal Assistant

CLERK OF COURT
STATE OF WASHINGTON
2012 SEP 24 AM 10:15
