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,

APPELLANTS' INITIAL BRIEF

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I. Introduction

This is an appeal from a medical negligence case where one of the Appellant's two experts was not allowed to speak to the standard of care of the Respondents, the risks of the procedure for the purpose of informed consent. This expert had testified in a perpetuation deposition, was the more qualified of the two experts offered by the Appellant, and was supposed to be the teaching expert of the Appellant. Despite being struck on those issues, the trial court relied upon the testimony of the expert (the trial court had read it in their decision to strike) to help justify the denial of the CR 50 motion and let the case go to the jury. Unfortunately the jury never heard what the trial court heard. Along with this the Respondents argued in their closing that the expert never gave those opinions so the jury could take that as the expert not having those opinions.

The trial itself was on a surgery done by the Respondents on the Appellant's leg. The Appellant was a teenager at the time of the surgery. Several years prior to the surgery the Appellant had cancer that caused a portion of his leg bone to be removed and replaced with a cadaver bone, or allograft. This allograft was braced by plating that began to hurt the Appellant's foot and ankle. The Appellant went into the Respondents and asked them to fix it and it was agreed to remove the plating and place a rod through the bone to be the brace instead. The Respondent never

placed the rod but instead just removed the plating. Two months later the leg fractured and the Appellant had to into the emergency room and then back to the Respondent. At that time the Respondent placed the rod, but the harm was already done. The Appellant was required to have a second surgery that destroyed his ankle and has had issues with his leg ever since.

The focus of the appeal is upon the trial court striking of the expert orthopedic oncologist Dr. Menendez's opinions on standard of care, causation and informed consent, along with the trial court refusing to put one of the agents of the Respondents in the jury instructions. The Appellant argues that these decisions on Dr. Menendez were an abuse of discretion because there was substantial evidence that Dr. Menendez was familiar with the standard of care, testified objectively versus upon speculation or personal opinions, and offered substantial evidence on the material risks for the purpose of informed consent. Appellant argues the agent should have been identified in the instructions since there was substantial evidence of the person being an agent and breaching the standard of care such that it would make the principal liable.

II. Assignment of Error

Appellants assign error to the following items:

1. The court abused its discretion by striking Plaintiff's expert witness Dr. Lawrence R Menendez's perpetuation testimony that Dr. Howlett violated the national standard of care for orthopedic oncology.

a. If all testimony, including by defense experts in pre-trial discovery and depositions, is that orthopedic oncology is governed by a national standard care, and there is no deviation in Washington, is the court preventing plaintiff's expert from testifying to the national standard of care was an abuse of discretion?

b. If prior to resting their case in chief, the Appellants present evidence that the disqualified expert is now familiar with the Washington standard and that it is the same as the national standard, is preventing plaintiff's expert from testifying an abuse of discretion?

2. Striking of Plaintiff's expert witness Dr. Lawrence R Menendez perpetuation testimony on the basis that the testimony did not clearly express that his opinions on causation were on a more probable than not basis based upon reasonable medical certainty was an abuse of discretion.

a. Does an expert need to consent to specific verbiage if in context his testimony shows his opinions are objective and on a more probable than not basis based upon his experience and training?

b. If prior to resting Appellant's resting their case in chief, the disqualified expert submits a declaration clarifying that his opinions in

the perpetuation deposition were on a more probable than not basis, based upon reasonable medical certainty, was striking the testimony was an abuse of discretion?

3. Striking Plaintiff's expert witness Dr. Lawrence R. Menendez on the basis that he could did not numerically quantify the degree of the increased risk for the purpose of providing a scientific basis on informed consent was an abuse of discretion.

a. Did Dr. Menendez's perpetuation testimony establish there was a materially increased risk of fracture such that it helped the jury in determining whether or not this should be disclosed to the patient?

b. For Dr. Menendez's perpetuation testimony to be admissible, is it required to refer to specific statistics and numbers on the materiality of a risk before it is relevant to materiality under either ER 401, 403 or 702?

4. The court's refusal to have verdict designations for Dr. Howlett and his physician's assistant, Brandi Desaveur when negligence interpretation of x-rays and other negligence was introduced as evidence during the trial to show Brandi Desaveur was negligent was an error of law.

III. Statement of Case

This case arises from a surgery performed by the Respondent on March 6, 2009. The Appellant, Mr. Joshua Driggs, when he was 15 had previously had a tumor in his leg, which was removed along with a section of the bone. This section of the leg was replaced with an allograft (cadaver bone). The cadaver bone was at least six and a half centimeters according to Dr. Conrad. CP 1532-33. The allograft surgery was done by Dr. Conrad, who braced it with plates and screws. CP 1532-34.

Mr. Driggs was under the treatment of Dr. Howlett (one of the Respondents, with the other party being Dr. Howlett's entity). RP 637 Mr. Driggs complained of pain in his ankle and Dr. Howlett diagnosed the pain as coming from the hardware bracing the allograft. Dr. Howlett and Mr. Driggs agreed to have the hardware removed and replaced with a tibial rod running down the inside of the bone. RP 1230. This surgery was scheduled for March 6, 2009 and is the basis of this case.

In a tibial rod surgery the rod is placed down the center of the bone versus a plate that goes on the outside of the bone. CP 1346.

On March 6, 2009 Dr. Howlett performed a surgery that removed the hardware and plating which had previously supported the allograft. However, inconsistent with the agreement, Dr. Howlett removed the existing support but did not install the tibial rod.

Mr. Driggs then began having physical therapy on the foot along with taking pain medication for the surgery. Mr. Driggs went in for a follow up and on April 10, 2009 an x-ray showed the beginning of a fracture. RP 366. On May 27, 2009 Mr. Driggs went back into the Respondents with his ankle swelling, and pain associated with any pressure on his leg. RP 1248. An x-ray was taken showing a fracture between two screw holes in the allograft. RP 369; RP 200 (1/15/14PM).[1] The x-ray was taken and reviewed by Ms. Desaveur, a physician's assistant working for the Respondents, who diagnosed the problem as a sprained ankle. RP 269; 302-303. Mr. Driggs eventually went to the emergency room for increased pain, and the emergency room notified the Respondents. RP 1250. After the emergency room notified Dr. Howlett, Dr. Howlett called Mr. Driggs to have him come in and be reviewed on June 8, 2009. RP 1250-1251. Dr. Howlett did not look at the May 27th x-ray until Mr. Driggs came back for the June 8, 2009 appointment, at which point Dr. Howlett took new x-rays showing increased fractures, and compared them to the May 27th x-ray finding the facture was apparent on the May 27th x-ray. RP 1250.

On June 11, 2009 Dr. Howlett did another surgery on Mr. Driggs; at that time placing the tibial rod through. RP 1317. Between that surgery

[1] January 15, 2014 was provide by Ms. Rodriguez and seems to have a different numbering sequence than the rest of the verbatim report, thus the date next to it.

and December of 2009 the allograft still did not fuse with the bone after the fracture so on December 11, 2009 a second surgery was done. RP 1333. This surgery placed a rod from the bottom with screws through the leg. RP 1335.

Mr. Driggs continued to have severe pain in his foot until his final visit with Dr. Howlett in April of 2010. RP 1336-1342. Mr. Driggs continued to have pain in walking after that.

Procedural Aspects of the Case

This case was filed on January 17, 2012. CP 1. The complaint alleged medical malpractice under RCW 7.70.040, and lack of informed consent under RCW 7.70.050. CP 12. The complaint named Dr. Howlett and his entity Providence Orthopedic Specialties defendants. CP 7.

This case went to trial between January 2, 2014 and January 24, 2014. In this matter the Appellant had two expert witnesses, Dr. Menendez, an orthopedic oncologist, and Dr. Graboff, an orthopedic surgeon. CP 67-68. The Respondent named five experts, of whom they called two, Dr. Bruckner, an orthopedic oncologist, Dr. Padtra, an orthopedic surgeon. RP 8 (1/15/14PM), RP 185 (1/15/14AM) CP 108-100; CP 1622-1623. Along with the Defendant Dr. Howlett. Since most of this appeal focuses around Dr. Menendez the Appellant will take a special focus upon him as an expert.

Dr. Menendez is on staff with the University of Southern California in the department of orthopedic surgery. CP 1325. In that capacity Dr. Menendez looks after patients with musculoskeletal tumor problems. He also teaches medical students about orthopedic oncology, or the evaluation and treatment of tumors of the musculoskeletal system. CP 1325. In that practice Dr. Menendez works with allografts. CP 1326. Dr. Menendez has done procedures like the ones done in this matter, but without leaving the allograft unsupported. CP 1343.

Dr. Menendez resides in California and was not able to make it to trial so his perpetuation deposition was taken by video on December 12, 2013. CP 1318-1517. On December 31, 2013 the Respondents moved for motions in limine to much of Dr. Menendez's testimony. CP 314-323. This motion was partially heard on the first day of trial, January 6, 2014. RP 147-160. While there were preliminary rulings, the trial court heard this matter again on January 13, 2014. RP 660-681. The trial court ruled Dr. Menendez was not allowed to testify to the following:

1. The standard of care and any of the Respondents violations of the standard of care due to the fact he testified to a national versus Washington standard of care, RP 674-675;

2. His opinions on causation, because although he was instructed to give his opinions to a degree of medical certainty on a more likely than not

basis, he did not say "yes" to this, RP 673-674, 679-680; and

3. His opinions on informed consent because he did not give numbers as to the likelihood of occurrence. RP 681.

On the morning of January 22, 2014 the Appellant, prior to resting their case, and prior to the playing of Dr. Menendez's video testimony brought to the court a motion for reconsideration on the striking of Dr. Menendez's testimony. CP 541-582. During this motion for reconsideration the Appellants submitted to the court two declarations of Dr. Menendez clarifying 1), that after his deposition he had personally researched the national versus Washington standard of care and found them the same and 2) that he made his opinions based upon the objective standard except for where he was specifically asked for his personal opinions. *Id.* By this time Dr. Graboff, the other Appellant Expert, had already testified that the national and Washington standard were the same, and Dr. Bruckner, the Respondent's expert, had also testified in his deposition that the national standard of care was the same as the Washington Standard of care. RP 375, RP 140-141.[2] The trial court denied the motion for reconsideration. RP 1305-1306.

Prior to the motion for reconsideration on Dr. Menendez the Respondents moved to strike the testimony of Dr. Graboff on informed

[2] Dr. Bruckner tried to back off this testimony at trial by saying he is not familiar with the national standard of care so he cannot speak to that. RP 95-96

consent because he did not testify to percentages and statistics in regards to the probability of the risk. CP 587-593. Dr. Graboff had testified with very similar language as Dr. Menendez on the risks. The motion was denied by the court RP 1292-1305.

Following the resting of the Appellant's case the Respondents moved for a CR 50(a)(1) on among other things the informed consent portions of the claims. RP 1552. In this argument the Respondents argued that Dr. Conrad had simply not offered enough evidence on the increased risks of not putting in the tibial rod to meet the requirements of informed consent. RP 1548. The trial court found that the testimony of Dr. Graboff and Dr. Menendez was sufficient to take the matter to the jury. RP 1552.

During closing arguments the Respondent compared the testimony of Dr. Menendez with the testimony of Dr. Graboff noting how much more qualified Dr. Menendez was to Dr. Graboff. RP 1690-1691. The Respondent went on to make the point that the Appellant brought forward two expert witnesses, and the more qualified one, Dr. Menendez, never testified to a breach of the standard of care or to causation, where the less qualified one was the only doctor to offer testimony on the breach of the standard of care. *Id.*

In the discussion of jury instructions the Appellants presented an

instruction that requested Ms. Brandi DeSaveur to be identified as an agent of the Respondents along with Dr. Howlett. CP 86; 539-40. This was objected to in hearing and struck so that only Dr. Howlett was identified as the agent of the Respondents. RP 1594-1604; CP 1640.

On January 24, 2014 the jury issued a verdict finding the Respondents not to have violated the standard of care of a medical professional, and finding the Respondents to have violated Mr. Drigg's rights to informed consent. CP 1648.

IV. Argument

This appeal focuses around the striking of large portions of one of the Appellant's expert witnesses, Dr. Menendez, and a jury instruction in this matter. This brief will be organized by first addressing the issues surrounding the striking of Dr. Menendez (A-C), followed by why not having Dr. Menendez testify was prejudicial to the Plaintiffs case (D), and ending with the issue around the jury instruction (E).

The standard of review for exclusion of evidence is based upon an abuse of discretion. *Kappelman v. Lutz*, 167 Wn.2d 1, 6 (2009). A trial court abuses its discretion when the trial court's decision is based on untenable grounds or untenable reasons. *Id.* A decision is based on

untenable grounds or untenable reasons if it rests on facts unsupported in the record, or if it is reached applying the wrong legal standard. *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 6 (2014). A verdict will only be reversed on an evidentiary error if the error was prejudicial. *Diaz v. State*, 175 Wn.2d 457, 472 (2012). An error is prejudicial if it affects, or presumptively affects, the outcome of the trial. *Id.*

A. It was an abuse of discretion for the trial court to strike Dr. Menendez as an expert on the standard of care in Washington.

RCW 7.70.040(1) requires that the health care provider be shown to have violated the standard of care of a reasonably prudent health care provider in Washington. ER 702 requires an expert to be qualified by their knowledge in order to support their opinions. To admit expert testimony under ER 702 the trial court must determine the witness qualifies as an expert and that the testimony will help the trier of fact. *Lakey v. Puget Sound Energy*, 176 Wn.2d 909, 918 (2013).

The question before the trial court here was whether or not Dr. Menendez was qualified to speak to the standard of care of a reasonably prudent health care provider in the state of Washington. In the first ruling

the Appellants argued that all testimony showed that the national standard of care and the Washington standard of care were the same. Since Dr. Menendez testified he was familiar with the national standard then he was qualified to speak to the Washington standard of care. This argument is expressed in the old algebraic formula, if a=b then b=a. Accordingly, if the Washington standard of care equals the national standard of care, then knowledge of the national standard is knowledge of the equal Washington standard.

The case law in Washington has also held that if the testimony shows the Washington and national standard can equally testify to the Washington standard; after all the evidence is they are the same. *Elber v. Larson*, 142 Wn. App. 243, 247-249 (2007); *Eng v. Klein*, 121 Wn. App. 171, 180 (2005). That Appellate Court recognized last year that an out of state expert can give testimony to the national standard when the national standard is the same as the Washington standard of care. *Volk v. Demerrleer*, ___ Wn. App. ____, p. 45, 337 P.3d 372 (2014). The limitation to this rule is when evidence has been produced that the national standard of care differs from the standard of care in Washington. *Winkler v. Giddings*, 146 Wn. App. 387, 393 (2008) (Holding that it was appropriate for the plaintiff's expert to show a basis for the national standard of care to be the same as Washington when the defendant's

expert stated there was a difference).

Here there was ample testimony by the Appellants other expert, Dr. Graboff, that after speaking with other physicians in Washington he had determined the national and Washington standard of care are the same. RP 375. Along with this, the Respondents' expert Dr. Bruckner testified in his deposition that testified in his deposition that there was no difference between the Washington and national standard of care. RP 139. Despite Dr. Bruckner later saying he was not familiar enough with the national standard to speak to the differences, there is simply no evidence that the national standard of care is different than the standard of care in Washington. This means when the trial court ruled Dr. Menendez was not qualified to testify based on only knowing the national standard and not knowing the Washington standard, it was relying on facts unsupported by the record, which is an abuse of discretion.

Also of import, before the Appellant rested his case, Dr. Menendez entered a declaration speaking to the fact that he personally consulted Washington physicians and determined the national and Washington standard of care were the same. CP 554-55. We see this well supported by the *Volk* opinion where the expert there contacted other experts to determine that the national standard of care was the same as Washington. *Volk*, 337 P.3d 372, p. 45-46. The *Volk* court even found such contact was

appropriate when the expert did not disclose who in Washington he consulted. *Id.*

The fact that Dr. Menendez was struck on the standard of care because he testified to the national standard of care is an abuse of discretion. There were no facts in the record to determine there was a difference between the Washington and national standard of care to support a determination that Dr. Menendez lacked the knowledge on the applicable standard of care (Washington/national). Along with that Dr. Menendez himself testified he had investigated and the national and Washington standard were the same. This means the trial court's ruling was based upon facts outside the record; by definition untenable grounds, and an abuse of discretion.

B. It was an abuse of discretion for the trial court to strike Dr. Menendez as an expert based on finding his opinions were not objective opinions

The trial court found that Dr. Menendez's opinions were not objective despite being told in his perpetuation deposition "[a]nd, Doctor, again, I want you to base your opinions on a reasonable degree of medical certainty based upon what's more likely than not likely as I ask you about

your opinions in this regard." CP 1347. The basis of the trial court's decision was that Dr. Menendez did not give an answer to this question. RP 673.

The requirement is that the opinions of the expert are objective and not personal or speculative in nature, but a specific language or a magical phrase has been rejected as the standard. *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 172 (1991). "To require experts to testify to a particular format would elevate form over substance." *Id.* Instead a the trial court should look at the "substance of the allegations and the substance of what the expert brings to the discussion. *Leaverton v. Surgical Partners*, 160 Wn. App. 512, 520 (2011).

There is clear evidence in the record that Dr. Menendez's opinions were objective in nature. In answer to questions on the standard of care he states that his opinion is based upon his experience, and presentations. CP 1344-45. When the Respondents try to challenge his opinions as personal we see the following interaction:

> Mr. King: My question is: The opinions you've expressed today in response to my questions and Mr. Casey's questions are simply your personal opinions?
>
> Dr. Menendez: Well, I mean, technically, I'm offering my opinion—

Mr. King: Okay

Dr. Menendez: --based on my knowledge and expertise and education and experience, but I haven't given you a specific article or pieces of literature, anything of that nature. So technically, it's my opinion, yes.

This shows his opinions are properly based objectively and not just based on what he would do or a shifting standard. Probably though more compelling is that Dr. Menendez was told by the Appellant to "base [his] opinions on a reasonable degree of medical certainty based upon what's more likely than not likely as I ask you about your opinions in this regard," and he did not state that he misunderstood this and he did not refuse. CP 1347.

We see further statements that Dr. Menendez is to base his opinion on what's more probable than not, rather than just his opinion. He is asked if he had an opinion on what was more probable than not in regards to the fracture occurring when it did. CP 1350. Dr. Menendez state that it is less likely that you will get a fracture if you put in fixation to support the allograft, and if you don't put in fixation it is more likely you will have a fracture. *Id.* Dr. Menendez further goes on to explain in detail the mechanism and characteristics of the allograft being unsupported that caused failure, stating these are the basis of his opinion. CP1359-60. This

clearly shows these are not personal opinions, or speculation, but rather based upon his well-qualified experience and knowledge while looking through the records.

To the extent though that Dr. Menendez's failure to say "yes" or agree to the instruction that his opinions be "based upon a reasonable degree of medical certainty based upon what is more likely than not" could be a valid basis for striking his testimony, that basis was removed prior to his testimony being offered and the Appellant resting. Dr. Menendez submitted a declaration stating that he had given his opinions in his perpetuation deposition based upon the instruction by Mr. Casey in his deposition. Further his declaration stated that only when his personal opinion was asked for was his personal opinion given. CP 557-58. This is clear evidence that the trial court did not have a valid basis for striking the testimony of Dr. Menendez on the basis that his opinions were subjective, speculative or personal because he did not say the yes to the magic phrase.

C. It was an error of law for the court to strike Dr. Menendez's testimony toward the materiality of a risk for informed consent purposes.

There are no tenable grounds or reasons to strike Dr. Menendez's

testimony on materiality because (a) the court did not and could not exclude him as an expert under ER 702, and (b) the court did not and could not exclude his testimony as irrelevant under ER 402 and ER 403, and (c) it was an error to require statistics or probabilities on this.

"The doctrine of informed consent refers to the requirement that a physician, before obtaining the consent of his or her patient to treatment, inform the patient of the treatment's attendant risks. The doctrine is premised on the fundamental principle that '[e]very 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). A physician is not required to disclose all the risks involved in a procedure, but only those risks that are material. *Id.* at 31. To determine whether or not a risk is material requires a two step process: (1) the initial scientific nature of the harm which may result and the probability of its occurrence, and (2) the trier of fact then decides whether that type and probability of harm of risk would be considered by a patient in deciding on treatment. *Id.* at 33. This is codified in RCW 7.70.050.

The trial court ruled that Dr. Menendez was not allowed to testify to informed consent because he did not put a number on the likelihood of occurrence. RP 672, RP 681. The trial court determined that the likelihood of occurrence requires putting a number on the probability in

order to meet the legal issues of the first step and therefore he cannot meet the required standard of proof for the first step of informed consent. RP 672. The trial court is not clear under what legal theory Dr. Menendez was struck here. Striking a witness because a party cannot as a matter of law reach a burden of proof under the first element of consent seems to sound under CR 50(a) is striking a claim. The only evidence rules that could have been a basis for striking this testimony by Dr. Menendez are either under ER 702 or for relevancy under ER 402, or ER 403. None of these applied.

1. It would be an abuse of discretion to strike Dr. Mendez under ER 702

ER 702 states that a witness "qualified by knowledge, skill experience, training or education" may testify to opinions if such specialized knowledge would help the trier of fact. The trial court was clear that it did not have problems with Dr. Menendez's experience or training. RP 679. So the only basis the trial court could have used to strike Dr. Menendez was if his specialized knowledge did not help the jury.

As stated in *Smith*, an expert is required to educate the jury on the

first element of informed consent of materiality of risks or by testifying to the initial scientific nature of the harm which may result and the probability of its occurrence. *Smith*, 100 Wn.2d at 33. The amount of this expert testimony needed though is "some" and can even be based upon opinions that do not rise to the objective or Washington requirements necessary in the standard of care. *Adams v. Richland Clinic*, 37 Wn. App. 650, 657-658; 659 (1984).

The *Adams* case is directly on point for this issue. In *Adams* the plaintiff's experts were struck on their standard of care testimony because they did not meet the objective or the statewide requirements for their opinions on the standard of care. *Id.* at 655-656. Like the trial court here, the trial court in *Adams* also struck the informed consent opinions for not providing enough testimony on informed consent or the probability of the risk. *Id.* at 660. The *Adams* court overturned the trial court, noting that the expert testifying that both the plaintiff's ulcer and hernia were a result of the surgery, but opining that the risk of an ulcer was not "significant" was sufficient evidence of probability to be expert testimony to the first prong of informed consent on risks. *Id.*

Much like the trial court in *Adams*, here the trial court did not rule on the qualifications of Dr. Menendez to give this opinion, but rather upon the sufficiency of his evidence. RP 672, 681. As noted by the *Adams*

court, such a determination is not within the discretion of the judge in allowing in expert testimony and does not fall under ER 702. *Adams*, 37 Wn. App. at 659. Under the *Adams* standard, excluding Dr. Menendez for not speaking to a number or statistic applies the wrong legal standard and is an abuse of discretion.

2. Dismissal of Dr. Menendez for not giving sufficient evidence in the form of statistics was not allowed under relevancy rules

As shown above the trial court's ruling went to the sufficiency of evidence rather than to the qualifications of Dr. Menendez. The only other evidentiary rules that could be used to strike Dr. Menendez's testimony is under ER 402 for no relevance or ER 403 on the opinion's probative value being substantially outweighed by other concerns. Since there is no evidence of the court weighing unfair prejudice, confusion of issues or misleading the jury then there is no basis for the court to exclude the evidence under ER 403. This means that proper analysis is under ER 402.

Evidence is relevant if it has a tendency to make the existence of any fact that is in consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. "Under our modern rules of evidence, the threshold to admit relevant

evidence is low and even minimally relevant evidence is admissible." *Kappelman*, 167 Wn.2d at 9. All relevant evidence is generally admissible. ER 402. Here the issue of the materiality of the risk of a fracture was a fact in consequence to the determination of the informed consent portions of the Appellant's claims. The only proper way to strike those claims would have been under CR 50(a)(1) before they could no longer be relevant, which was not done at the point of this ruling and the court later denied. RP 1552.

Dr. Menendez says "So it's less likely that you'll get a fracture if you put in fixation to the support the allograft. If you don't put fixation in its more likely that you'll have a fracture..." CP 1350-51. Dr. Menendez further testifies, "when you take the hardware out, for whatever reason it might be, you generally want to minimize the risk of fracture...you want to put something back in... you want to protect it so that you minimize the risk of fracture." CP 1343. This is much more evidence than the testimony in *Adams* that the noted was sufficient testimony of the materiality portions of the risk. It goes directly toward the claims and mandated as admissible under ER 402.

There was simply no basis, either under ER 401, 403, or 702 to strike Dr. Menendez on the materiality of the risk. It is by definition abuse of discretion.

3. Requiring statistics or probability was impossible in this matter

The cadaver bone was six and a half centimeters according to Dr. Conrad. CP 1532-33. A review of the experts here will show there is no testimony that they are aware of any instance in which such a large allograft is left without fixation or internal support.

Dr. Padrta states he has done multiple allografts; he goes on to testify that he does not know the size of the allograft so he cannot testify he has ever done one like this. RP 198 (1/15/14PM). Dr. Bruckner states that he has only ever once done the removal of fixation with allografts and that was with Dr. Conrad. Dr. Bruckner goes on to testify that he has never done this type of procedure, removing the fixation of an allograft and leaving it unsupported. RP 122-123 (1/15/14AM). Dr. Conrad in his testimony states that he would only consider removing fixation around an allograft and not replacing it if the graft is "very small and it has vigorous bone formation around it." CP 1552. His definition of very small is four or five centimeters or smaller. *Id.*

Based on the testimony in the record, this surgery here appears to be the only surgery that the doctors are aware of where an allograft of this size was left without fixation and support. This makes it utterly

impossible for Dr. Menendez to give a percentage or numbers as to the probability of a fracture from the lack of fixation. After all, the only one that is actually known of by all the experts is this surgery done by Dr. Howlett and it has fractured due lack of support, according to Dr. Menendez. To require any different testimony is to rely on facts not in the record and is an abuse of discretion by the trial court.

Despite not having any numbers from previous surgeries Dr. Menendez does speak to the risks involved leaving an allograft unsupported in great detail, and backs up those risks with why it happens. When asked about the risks recognized in his profession he explains that the reason you put in fixation is to protect the allograft and that allografts do not rebuild themselves well; add to that the stress holes from the screws and you have a lot of weakness. CP 1339-41. Without anyone ever being aware of such a surgery the best item to describe the probability of a risk occurring is to describe the process and concerns in the process. This is good testimony toward probability.

D. The striking of Dr. Menendez was not harmless error

Harmless error is error which is trivial, formal, or academic. *Adcox v. Children's Orthopedic Hops.*, 123 Wn.2d 15, 36 (1993). An error

is prejudicial if it affects, or presumptively affects, the outcome of the trial. *Diaz,* 175 Wn.2d at 472. If there is no way of knowing what value the jury would have placed upon evidence a new trial is necessary. *Thomas v. French*, 99 Wn.2d 95, 105 (1983).

There are three pieces of the trial which show striking Dr. Menendez is prejudicial. The first is the qualifications of Dr. Menendez as an orthopedic oncologist was critical to the Appellant's case. CP 284- 305 (Dr. Menendez's CV). The second portion of the trial is the Respondents closing arguments. RP 1688-91; RP 1703-4. The third is the trial court's response to the CR 50(a)(1) motion of the Respondents. RP 1551, 1552.

1. Dr. Menendez qualifications and testimony were critical to the case

Beginning this case the Appellants had an orthopedic oncologist in Dr. Menendez, and an orthopedic surgeon in Dr. Graboff. The Respondents had an orthopedic oncologist and surgeon in Dr. Bruckner, and an orthopedic surgeon in Dr. Padrta. After most of Dr. Menendez's testimony was struck, especially in the three areas of the standard of care, his opinions on causation, and his opinions on the informed consent, the Appellant was left with only an orthopedic surgeon expert, while the

Respondents had both their orthopedic oncologist expert and their orthopedic surgeon expert.

Add to this that between the two experts of the Appellant Dr. Menendez was, as the Respondents point it, well qualified to speak. RP 1690. "Dr. Menendez is a well-qualified individual, Fellowship trained orthopedic oncologist, teaches at an academic center." RP 1690.

If we are to take the statements of the Respondents as true, which the jury did agree with the Respondents in the verdict, then Dr. Graboff by comparison was "kicked out of the prestigious organization for orthopedic surgeons" for violation ethics codes. RP 1689. Dr. Graboff was a hired gun. *Id.* Dr. Graboff is not Fellowship trained, never authored a single peer reviewed article. RP. 1690.

By any standards when both sides are equally matched with two experts in respective fields, and most of one expert's testimony gets struck based upon an abuse of discretion it is prejudicial. Even more prejudicial is when that expert is the better expert that even the Respondents acknowledge as well qualified.

2. Striking Dr. Menedez on the standard of care and his objective verses personal opinions was prejudicial.

The prejudice on these decisions can easily be seen in the following portions of the Respondent's closing argument:

"This entire case on the standard of care theory rests on the very slender and very fragile and very unstable threat of one physician, Dr. Graboff." RP 1688.

"The other expert they brought in who is mentioned twice by Mr. Casey's closing argument and only after 40 minutes of talking about what he says is circumstantial evidence, is Dr. Menendez. Let's just imagine that the only case you had to adjudicate here was the standard of care case and the only witnesses you heard from were Dr. Graboff and Dr. Menendez because those are the two experts that the plaintiff called to prove that my client violated the standard of care. Put yourself in that position." RP 1688-89.

The Respondent went on to ask the jury to "stack up the two experts against each other" and analyze Dr. Menendez versus Dr. Graboff emphasizing how much more qualified Dr. Menendez was versus Dr. Graboff. RP 1689- 90. The Respondents closing argument goes on to say of Dr. Menendez's testimony:

"Did he say that Dr. Howlett violated the standard of care any way, shape or form in this case? No. Did he say that fixation hardware if put in place in March of '09 would have prevented this fracture? No. Did he

provide any information to you that there was a violation of the standard of care in postoperative management of this patient after the March, 6, 2009 surgery by Dr. Howlett? No

Did he say that there was a violation of the standard of care having to do with the interpretation of the May 27, 2009 x-ray? No.

Did he say that but for the failure to put in fixation hardware in this case Mr. Driggs with his ankle fusion and his previously failed allograft would have no difficulty or problem with his lower extremity? No." RP 1690-91.

Basically the Respondent had the trial court strike Dr. Menendez inappropriately, and then used the fact the trial court would not let that testimony in to imply to the jury the testimony never occurred. This is a clear sign of prejudice in this matter.

3. Striking Dr. Menendez's testimony on the materiality of a risk for informed consent was prejudicial

The other evidence of prejudice on this matter is the trial court's response to the CR 50 motion brought by the Respondent. The Respondents moved to dismiss the informed consent claims because no information was offered on the increased risk of fracture. RP 1543. The

Respondents go on to state that only Dr. Graboff's testimony goes toward increased risk in the record. RP 1548. Despite this the trial court stated "[s]o after hearing from Dr. Graboff, after hearing from Dr. Menendez, I do believe that it has met enough for the jury to make the decision based not only on 7.70.050, but on the materiality two-step process." RP 1552. The trial court determined that Dr. Menendez's testimony toward determining material risk was one of the bases for this evidence to go to the jury. The problem arises, because the trial court struck this testimony and did not allow the motion for reconsideration, this evidence never went to the jury for them to consider in verdict.

The other evidence that striking the informed consent testimony was prejudicial is in the closing statement of the Respondents. When discussing the risks of not putting in the tibial rod, the Respondents state that would not have changed the risk of fracture. RP 1703. The Respondents go on to state, "Who says differently? Only one man, Dr. Graboff, who has nowhere near the qualifications and has suspect credibility for the reasons I have explained." RP1704. Striking Dr. Menendez here facilitated the Respondents argument that only one expert out the multiple called here testified that the failure to put in the tibial rod increased the risk of fracture. The reality is that Dr. Menendez testified to it to, it was excluded based upon an abuse of discretion, but the jury was

left thinking he did not testify that way, and the Respondents fully argued it that way.

E. It was an error of law to not add Brandi DeSaveur to the jury verdict form

Jury instructions challenged on appeal are reviewed to determine whether they permit the parties to argue their theories of the case, whether they are misleading, and whether read as a whole they accurately inform the jury of the applicable law. *Adcox*, 123 Wn.2d at 36.

The issue here is that the Appellant proposed a jury instruction that stated "Brandi DeSaveur, PA-C was the agent of Providence Orthopeadic Services, and therefore, any act or omission of the agent was the act or omission of Providence Orthopeadic Services." CP 86. The Appellant also provided a jury verdict form containing this instruction. CP 539-40. The trial court though issued jury instruction 14 that only included Dr. Howlett as the agent of Providence Orthopeadic Services. CP 1640.

A party is entitled to have the jury instruction on its theory of the case if substantial evidence in support of the theory has been admitted. *Hizey v. Carpenter*, 119 Wn.2d 251, 266 (1992). Here there was enough

evidence to submit to the jury that Ms. DeSaveur was both an agent of Providence Orthopeadic Services and that she breached the standard of care. First Ms. DeSaveur testified that she worked for Providence Orthopeadic Services. RP 269. Dr. Graboff testified that when Ms. DeSaveur reviewed the May 27, 2009 records and missed the fracture that this was breach of the standard of care. RP 399-402. Dr. Howlett also testified that Ms. DeSaveur was to bring up problematic x-rays to him and this was not done. RP 1252.

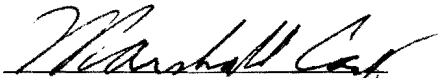
Based upon that there was sufficient evidence to put Ms. Desaveur, as an agent for Providence Orthopeadic Services in the jury instructions and forms. Her negligence would have gone to Providence Orthopeadic Services's negligence. However, the instruction left the jury thinking the only agent of Providence Orthopeadic Services was Dr. Howlett and his negligence was the only item being reviewed. This stopped the Appellant from being able to argue their theory of the case in this matter. This is an error in the jury instructions that should give a new trial.

V. Conclusion

This matter is clear that the Appellant was unable to present a major portion of the case because the Appellant's best witness was struck

on issues of standard of care, causation, and informed consent. The striking of Dr. Menendez on all the issues, especially informed consent, was a clear abuse of discretion since none of it was done on a proper foundation of law or fact in the record. Along with this the Appellant was hampered in putting on its theory of the case in regards to a negligent agent of one of the Respondents. These are clear errors and the Appellant asks this court to correct these by ordering a new trial in this matter.

RESPECTFULLY SUBMITTED THIS 12th day of February 2015.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury, that on the 12th day of February, 2015, I caused to be served a true and correct copy of the foregoing document on the following:

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