

NO. 34986-8-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHELLE WATERMAN & DARELL W. WATERMAN,

Appellant,

v.

CALVIN LEE & JANE DOE LEE,

Respondent.

BRIEF OF APPELLANT

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

Assignment of Error

Appellate is entitled to a new trial based on the cumulative errors of improper procedure regarding questioning by jurors, judicial bias, discovery violations, and ineffective assistance of counsel.

Issues Pertaining to Assignments of Error.

No. 1: Whether the court allowed inappropriate procedure and questions regarding inquiries posed by jurors?

No. 2: Whether the judge demonstrated obvious judicial bias through his rulings on objections, failure to rule on reserved objections, and type of juror question allowed?

No. 3: Whether allowing charts and outlines never seen by plaintiff's counsel immediately prior to Mr. Partin's testimony constitutes inappropriate discovery ruling errors?

No. 4; Whether failing to object to any questioning during the entire defense case and failing to show up for the verdict constitutes ineffective assistance of plaintiff's counsel?

B. STATEMENT OF THE CASE:

On March 19, 2004, appellate Michelle Waterman was stopped behind another vehicle that was waiting for traffic to clear in order to turn into a private driveway. Respondent, Calvin Lee, failed to observe that both vehicles were at a complete stop. He drove into the rear-end of Ms. Waterman's car without braking, causing such force she crashed into the front vehicle. Clerk's Papers (CP) at 14. Ms. Waterman suffered substantial injuries causing an inability to work as a self-employed general contractor for six months. Her injuries required extensive treatment from Neurologists, Chiropractic care, and Physical Therapy. Additionally, during her convalescence, Ms. Waterman lost several existing contracts, as well as potential customers.

Ms. Waterman filed a complaint for personal injuries and damages on April 18, 2005, requesting special and general damages caused by the accident. CP at 3-7. On July 11, Mr. Lee admitted liability. CP at 27. A jury trial regarding the issue of liability began on May 8, 2006 in front of Judge Sergio Armijo. Report of Proceedings (RP) May 8, 2006 at 5. Plaintiff's and Defendant's exhibit's were ruled upon. All exhibits were admitted except for four of plaintiff's and the judge reserved ruling on plaintiff's register report of 2003. RP (5/8/2006) at 2. Additionally, defense witness Bill Partin, CPA submitted spreadsheet attachments to testify with. Ms. Waterman objected and Judge

Armijo reserved ruling. RP (5/8/2006) at 21. Mr. Lee objected to Ms. Waterman's massage therapist, neurologist, and chiropractor's testimony, which Judge Armijo also reserved ruling on. RP (5/8/2006) at 25-26. In summary, Judge Armijo reserved ruling on Ms. Waterman's 2003 register report, and the testimony of her massage therapist, neurologist, and chiropractor. Throughout the objections, Mr. Lee continually reminded the court of documents that were provided after the discovery cutoff date. RP (5/8/2006) at 11, 14, 15, and 17.

The jury was chosen and given initial instructions. Judge Armijo advised the jury they were able to submit questions. The colloquy given was: "You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning. You may ask questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you ask any questions, remember that your role is that of a neutral fact finder, not an advocate.

Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question to determine if it is legally proper.

There are some questions that I will not ask, or will not ask in the working submitted by the juror. This might happen either due to the rules of evidence or other legal reason, or because the question is expected to be answered later in the case. If I do not ask a juror's question, or if I rephrase it, do not attempt to

speculate as to the reasons and do not discuss this circumstance with the other jurors.

By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.” CP at 134.

The first witness was the chiropractor, Dr. Joel Vranna. He testified that Ms. Waterman’s injuries were serious, RP (5/8/2006) at 43, she required a minimum of six months time off from her work, RP (5/8/2006) at 43, and the medical bills of \$6,112 incurred were reasonable and necessary. RP (5/8/2006) at 44. Ms. Waterman’s last treatment session was September 20, 2004. RP (5/8/2006) at 48.

After Mr. Lee conducted his cross-examination, a juror submitted a question regarding the reason for Dr. Vranna testifying when he never examined Ms. Waterman. CP at 123. The question was answered by Dr. Vranna. The actual treatment provider’s name is Dr. Frink, who is the ex-husband of Ms. Waterman’s attorney. It was decided that Dr. Vranna would be the more objective witness. RP (5/8/2006) at 54. During the questioning, Mr. Lee objected, and Judge Armijo sustained the objection. RP (5/8/2006) at 54.

The next witness was the Physical Therapist, Carol Zornes. Ms. Zornes testified she was friends with Ms. Waterman for twelve years prior to becoming

her physical therapist. RP (5/8/2006) at 61. Ms. Zornes described Ms. Waterman as healthy and physically active prior to the accident, and afterwards showed guarded movements of a person in pain. RP (5/8/2006) at 63-64. Ms. Zornes recommended Ms. Waterman consult with Apple Physical Therapy, even though she was a licensed physical therapist, to create a professional boundary. RP (5/8/2006) at 63. Ms. Zornes testified Ms. Waterman was referred to physical therapy by her medical doctor, her chiropractor, and her neurologist. RP (5/8/2006) at 64. She stated the treatment was reasonable and necessary, and it ceased on September 20th of 2004. RP (5/8/2006) at 65.

On cross-examination, Mr. Lee inquired as to other business relationships between Ms. Zornes and Ms. Waterman, which was objected to. The objection was denied. RP (5/8/2006) at 71. On redirect, Ms. Waterman inquired as to the gross profits earned through the other business relationships, and then asked how many other female contractors Ms. Zornes was aware of. Mr. Lee objected and Judge Armijo sustained the objection. RP (5/8/2006) at 77-78.

Two juror's asked whether Ms. Zornes benefited from bringing Apple Therapy clients, and what her hourly salary was. CP at 164-65. Ms. Zornes answered in the negative to the first question, and responded that she made \$16 per hour to the second. Ms. Waterman asked about the reason for Ms. Zornes referring her to Apple Therapy, which was objected to and sustained by Mr. Lee.

David Parson's of Lumberman's Building Center testified next. He stated he did a lot of business with Darrell and Michelle's business, Home Builders Northwest, RP (5/9/2006) at 114. When asked how many women contractors Mr. Parson's dealt with, Mr. Lee objected and Judge Armijo sustained. Mr. Parson's acknowledged Ms. Waterman is a good contractor and one of the first ones he recommends to customers. RP (5/9/2008) at 117.

Darrell and Michelle Waterman testified next. Mr. Waterman explained his business in framing and the work lost after the accident. Ms. Waterman's counsel inquired how she was paid as a general contractor. Mr. Waterman stated Ms. Waterman is paid when the project is finished, which can be one year to eighteen months after a contract is signed. RP (5/9/2006) at 136. Mr. Waterman explained the difference between invoicing for framing, which usually happens the month after the job is done. RP (5/9/2006) at 137.

When asked about the effect on their marriage, Mr. Lee objected and Judge Armijo sustained. Mr. Waterman stated many of the recreational activities the family does, Ms. Waterman has still not participated in, such as four wheeling, snowmobiling, and continues to have trouble sleeping. RP (5/9/2006) at 146. Three juror questions were asked. CP at 167. The first inquired if Ms. Waterman ever did any physical work on the job sites. Mr. Waterman could not answer this. The second question asked if Ms. Waterman had been able to do any physical work at job sites since the accident. Mr. Waterman stated maybe sweeping or

picking up garbage. Finally, the third question requested if Ms. Waterman's duties in the company changed since the accident. Mr. Waterman answered she always has done the accounting and paperwork, so she continues with that. Physical labor is mostly done by sub-contractors, so the physical labor done by Ms. Waterman has not changed much either. RP (5/9/2006) at 160-61.

Ms. Waterman was the plaintiff's last witness. She testified how she became a general contractor, and explained that she was the bookkeeper for both Mr. Waterman's framing business and her general contracting business. RP (5/9/2006) at 169-70. When Ms. Waterman's counsel changed the questioning to the injuries suffered by the accident, Mr. Lee objected and Judge Armijo sustained.

After the lunch break that day, Mr. Lee provided Ms. Waterman with exhibits that had never been seen which were intended to be used with Bill Partin's testimony. Similar exhibits had been offered at the beginning of trial, and Judge Armijo had reserved any ruling on them. RP (5/8/2006) at 21. Mr. Lee justified the late introduction of these exhibits by stating they contained no new information and already admitted into evidence by the court. RP (5/9/2006) at 176. This statement was incorrect, and as Mr. Lee had continually reminded the court of documents that were provided after the discovery cutoff date during pretrial rulings, these charts were exactly the type of evidence Mr. Lee objected to

admitting. Ms. Waterman rightfully objected to the use of these untimely, inadmissible charts, but the objection was overruled. RP (5/9/2006) at 177.

Ms. Waterman continued her testimony listing the homes and years they were built her procedure in bidding on products. She explained the income reported for the years 2002 to 2005, showing the extreme drop in income in 2004 based on her accident. Ms. Waterman averaged what she could have made, along with the lost Hedberg contract, and stated \$90,000 was the general and special damages proximately caused by the March 19, 2004 accident.

Mr. Lee's witness, William Partin, CPA, testified regarding his report of Ms. Waterman's claim of lost profits. RP (5/9/2006) at 217. Mr. Partin's conclusion was that Ms. Waterman had no change in the activity of her and Mr. Waterman's business during her convalescence. RP (5/9/2006) at 220. He attributed any loss of wages to the decline of Mr. Waterman's framing activities to focusing on spec homes and real estate developments. (RP (5/9/2006) at 222. Mr. Partin utilized tax returns from the Waterman's corporation, Home Builders Northwest, Inc. and concluded there was no loss of profitability in the business during Ms. Waterman's convalescence. RP (5/9/2006) at 229. Ms. Waterman's counsel did not object during the entire time Mr. Partin testified.

After Mr. Partin's testimony, the jury instructions were determined. It was then discovered that the reserved rulings had not been formally determined. Judge Armijo's explanation was to state if the testimony on the reserved rulings

came in or stayed out, that would be the decision he would have made. RP (5/11/2006) at 284.

Ms. Waterman then took the stand on redirect to address Mr. Partin's testimony. Ms. Waterman stated Mr. Partin's testimony about projected completion due dates were incorrect. She pointed out he left out projects in his construction contracts graph, and listed her general contracting fees for 2003 and 2004 as greater than they actually were. RP (5/11/2006) at 286-87. Ms. Waterman reiterated her version and experience during the accident, RP (5/11/2006) at 292. Additionally, she explained her medical treatment. RP (5/11/2006) at 221-26.

On cross-examination, Mr. Lee also had Ms. Waterman reiterate her previous testimony regarding her fees, the locations of the jobs, and the fundamental nature of her workload. RP (5/11/2006) at 298-315. Ms. Waterman's counsel failed to object to any questions. A juror submitted a question regarding the difference between a spec and custom home, which Ms. Waterman explained. RP 5/11/2006) at 320-21.

After the jury deliberated, Ms. Waterman was awarded \$11,982.31 for past economic damages and \$12,000.00 for future non-economic damages. RP (5/11/2006) at 368-69. Ms. Waterman's counsel was conspicuously absent during the verdict. CP at 182.

C. ARGUMENT.

1. Inappropriate procedure regarding questions posed by jurors.

Standard of Review

In general, a trial court has the responsibility of directing the conduct of a jury trial and, consequently, exercises discretion in a wide range of trial issues. *State v. Johnson*, 12 Wn. App. 548, 550-51, 530 P.2d 662, review denied, 85 Wn.2d 1012 (1975). The Washington Rules of Evidence (ER) do not explicitly address the issue of allowing or disallowing juror questions. ER 611(a) states that a trial court shall exercise reasonable control over the mode of interrogating witnesses. ER 614(b) allows a court to interrogate witnesses provided the questioning is “cautiously guarded so as not to constitute a comment on the evidence.” CR 43(k)¹ allows jurors to submit questions to witnesses in civil cases. A juror's question must be in writing and will be screened by the trial court before it is posed to the witness. Counsel has an opportunity to object. Other procedural details are determined at the local level.

¹ RULE 43(k). TAKING OF TESTIMONY provides:

Juror Questions for Witnesses. The court shall permit jurors to submit to the court written questions directed to witnesses. Counsel shall be given an opportunity to object to such questions in a manner that does not inform the jury that an objection was made. The court shall establish procedures for submitting, objecting to, and answering questions from jurors to witnesses. The court may rephrase or reword questions from jurors to witnesses. The court may refuse on its own motion to allow a particular question from a juror to a witness.

Although the rule gives jurors the right to submit questions, the rule does not guarantee that a juror's question will actually be posed to the witness. The rule expressly allows the court to refuse to pose a question, either on its own motion or upon objection by counsel.

The procedure must include a number of safeguards. Before testimony begins, the court should instruct the jury that:

1. The sole purpose of jurors' questions is to clarify the testimony, not to express any opinion about it or to argue with the witness;
2. Jurors are to remember that they are not advocates and must remain neutral fact finders;
3. Jurors are to submit questions in writing, without discussion with fellow jurors, and are to leave them unsigned; oral questions are not allowed;
4. There are some questions that the court will not ask, or will not ask in the form that a juror has written, because of the rules of evidence or other legal reasons or because the question is expected to be answered later in the case;
5. Jurors are to draw no inference if a question is not asked—it is no reflection on either the juror or the question;
6. Jurors are not to reveal to other jurors a question that was not asked by the judge or speculate as to its answer or why it was not asked; and
7. Jurors are not to interpret this instruction as meaning that the court is encouraging jurors' questions.

The court should take the following steps when allowing jurors to propose questions:

1. At the conclusion of each witness's testimony, the court asks if jurors have written questions, which are brought to the judge;

2. *Outside the presence of the jury*, counsel are given the opportunity to make objections to the question or to suggest modifications to the question, by passing the written question between counsel and the court during a side-bar conference or by excusing jurors to the jury room (emphasis added);

3. The judge asks the question of the witness;

4. Counsel are permitted to ask appropriate follow-up questions; and

5. The written questions are made part of the record. (This recommendation is drawn primarily from American Bar Association standards, the recommendation of the National Center for State Courts, the Federal Judicial Center's Manual for Complex Litigation, and an Arizona rule of civil procedure).

Judge Armijo read appropriate jury instructions regarding questions posed by the juror's, but they never left the room while the lawyer's and judge deliberated over the questions. Discussions were done at the sidebar, which is not prohibited, but allows the jury to observe all body language, facial expressions, and gives them an opportunity to listen to the attorney's discussion, no matter how quiet they construe themselves to be. The American Bar Association standards recommend excusing the jurors to the jury room so the attorney's may

confer clearly outside the presence of the jury. This limits assumptions and conclusions jurors can make by observing the discussions of counsel.

The questions that were allowed caused a typical occurrence from the jurors. Instead of focusing on the liabilities Ms. Waterman was entitled to, the questions brought up several unrelated collateral issues. The first question posed to Dr. Vranna brought out testimony that Ms. Waterman's actual chiropractor is her attorney's ex-husband and his testimony would probably be tainted and not objective. This gave the juror's the impression of impropriety in Ms. Waterman's choice of care providers. The juror questions posed to Ms. Zornes implied she received a kick-back for recommending patients. Ms. Gustason was asked about Ms. Waterman's softball participation. None of these questions clarified the testimony or assisted the jurors determine Mr. Lee's liability for his negligence.

Allowing the submitted questions in evidence and conferring at the sidebar with the juror's in the court room was an abuse of Judge Armijo's discretion and the end result was to cause jurors to comment on the evidence, draw irrelevant inferences, and speculate about the collateral information revealed by the questions. Ms. Waterman experienced a predisposed jury that concentrated more on personal issues than Mr. Lee's liability for his negligence. These errors require a new trial.

2. Obvious Judicial Bias.

Standard of Review

A de novo review, from which we make our own determination of the law and of the facts on the record, as established by case law, is required. *In re Buchanan*, 100 Wn.2d 396, 400, 669 P.2d 1248 (1983).

The Code of Judicial Conduct (CJC) provides:

CANON 3: Judges Shall Perform the Duties of Their Office Impartially and Diligently.

The judicial duties of judges should take precedence over all other activities. Their judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

(A) Adjudicative Responsibilities.

(5) Judges shall perform judicial duties without bias or prejudice:
A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

CJC, CANON 3(A)(5).

For a judge to be biased or prejudiced against a person's cause is to have a preconceived adverse opinion with reference to it, without just grounds or before sufficient knowledge. It is a particular person's state of mind that affects his opinion or judgment. Bias or prejudice on the part of an elected judicial officer is never presumed. *Barbee Mill Co. v. State*, 43 Wn.2d 353, 355, 261 P.2d 418 (1953); RCW 4.12.040.

It is fundamental to our system of justice that judges be fair and unbiased. See, e.g., *Bach v. Sarich*, 74 Wn.2d 575, 582, 445 P.2d 648 (1968); *In re Borchert*, 57 Wn.2d 719, 722-23, 359 P.2d 789 (1961); *State ex rel. McFerran v. Starr*, 32 Wn.2d 544, 549-50, 202 P.2d 927 (1949). An interest that is alleged to create bias or unfairness need not be direct or obvious. 'Any interest, the probable and natural tendency of which is to create a bias in the mind of the judge for or against a party to the suit, is sufficient to disqualify. . . . Pecuniary interest in the result of the suit is not the only disqualifying interest.' *Ex parte Cornwell*, 144 Ala. 497, 498-499, 39 So. 354 (1905). These principles were long ago recognized by this court in *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 17-18, 52 P. 317 (1898), when it stated:

"The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact, the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through and pervading the whole system of judicature, and it is the popular acknowledgment of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to

our private sense of justice as they would be injurious to the public interest.”

See, *State ex rel. Beam v. Fulwiler*, 76 Wn.2d 313, 316-17, 456 P.2d 322 (1969); *Starr*, 32 Wn.2d at 549.

Our system of jurisprudence also demands that in addition to impartiality, disinterestedness, and fairness on the part of the judge, there must be no question or suspicion as to the integrity and fairness of the system, i.e., ‘justice must satisfy the appearance of justice.’ *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954). This court, in *Barnard*, 19 Wash at 17-18, also recognized the importance of appearances in preserving the integrity of our judicial system. The above quoted portion of that decision concluded with the following observations: “The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice. The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” *Chicago, M., St. P. & P. R. Co. v. Washington State Human Rights Commission*, 87 Wn.2d 802, 809, 557 P.2d 307 (1977); *Barnard*, 19 Wash. at 18. It is apparent that even a mere suspicion of irregularity, or an appearance of bias or prejudice, is to be avoided by the judiciary in the discharge of its duties. *State v. Buntain*, 11 Wn. App. 101, 107, 521 P.2d 752 (1974); *State v. Madry*, 8

Wn. App. 61, 68-70, 504 P.2d 1156 (1972), quoting *Diimmel v. Campbell*, 68 Wn.2d 697, 699, 414 P.2d 1022 (1966).

Mr. Lee's attorney objected thirteen times during the course of the trial. Every one of her objections was sustained. Ms. Waterman's attorney objected five times, with three overruled and two sustained. Ms. Waterman's attorney was never given the chance to rebut Mr. Lee's objection with an explanation. Additionally, Judge Armijo reserved ruling on several of Ms. Waterman's objections. These rulings were never made and the evidence objected to was not admitted. When questioned about this practice, Ms. Waterman was told that if the testimony on the reserved rulings either came in or stayed out during questioning, that would be the decision he would have made. Additionally, Mr. Lee introduced several charts and summaries Ms. Waterman had never seen prior to trial. Similar exhibits had been offered during pre-trial and Judge Armijo has reserved ruling on them. Ms. Waterman objected, but it was sustained and all the charts and summaries were admitted even though they had never been formally ruled on.

These actions cause a question or suspicion as to the integrity of the court. Judge Armijo clearly appeared biased and impartial by his actions during trial. Utilizing a de novo standard of review, Ms.

Waterman did not receive the impartial or fair trial she is entitled to. Her remedy is to award a new trial on the issue of Mr. Lee's liabilities caused by his negligence.

3. Discovery ruling errors.

Standard of Review

This court reviews discovery rulings, the admissibility of expert opinion under ER 702,² and the trial court's balancing of probative value against prejudicial effect under ER 403³ for an abuse of discretion. *State v. Brown*, 132 Wn.2d 529, 626, 940 P.2d 546 (1997) (discovery rulings); *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004) (ER 702); *State v. Vreen*, 143 Wn.2d 923, 932, 26 P.3d 236 (2001) (ER 403). An appellate court will find an abuse of discretion only "on a clear showing" that the court's exercise of discretion was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court's discretionary decision "is based 'on untenable grounds' or made

² **EVIDENCE RULE 702. TESTIMONY BY EXPERTS Provides:**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

³ **EVIDENCE RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME Provides:**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A court's exercise of discretion is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" *Rohrich*, 149 Wn.2d at 654. (quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)); *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 424, 138 P.3d 1053 (2006).

Rule 403 does not list surprise as a basis for exclusion, and the federal legislative history makes it clear that the omission was deliberate.⁴ And at least two Washington cases have expressly held that Rule 403 does not authorize the exclusion of evidence on the basis of surprise. *Lockwood v. AC & S, Inc.*, 44 Wn. App. 330, 363, 722 P.2d 826 (1986), *aff'd* 109 Wn.2d 235 (1987); *State v. Gould*, 58 Wn. App. 175, 181, 791 P.2d 569 (1990)

A number of courts, however, have excluded evidence on essentially this basis. In some cases, for example, the courts have found error in permitting an expert to give an opinion that was not disclosed during pretrial discovery. In a prerule case, it was held that the trial court properly refused to allow the testimony of a witness whom the party previously said would not be called.

⁴ Advisory Committee Note, Fed.R.Evid. 403 ("While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence.").

Mueller & Kirkpatrick, 1 Federal Evidence § 98 (2d ed.)

Talley v. Fournier, 3 Wn. App. 808, 813, 479 P.2d 96 (1970) (pre-ER case).

Essentially the same result has been reached under the current rules, particularly in counties having local rules requiring full pretrial disclosure of all witnesses.

In any event, the rule is less than absolute. Although the point is not codified in the Evidence Rules, it is commonly assumed among trial lawyers and judges that when evidence should have been disclosed during discovery, but was not, the court may exclude the evidence if offered by the nondisclosing party.

The point finds support in the Washington cases and can probably be squared with ER 403 on the basis that the introduction of undisclosed evidence would be unfairly prejudicial to party against whom it is offered. *Lockwood v. AC & S, Inc.*, 44 Wn. App. 330, 363, 722 P.2d 826 (1986), *aff'd* 109 Wn.2d 235 (1987)

In addition, CR 37⁵ allows the trial court to exclude evidence as a sanction for discovery violations, including the failure to disclose evidence that should have been disclosed. Taken together, ER 403 and CR 37 give the trial court

⁵CIVIL RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS Provides:

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, and upon a showing of compliance with rule 26(i), may apply to the court in the county where the deposition was taken, or in the county where the action is pending, for an order compelling discovery as follows:

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe the fact was not true or the document was not genuine, or (4) there was other good reason for the failure to admit. CR 37(a & c).

considerable discretion to do what seems fair under the facts and circumstances of the case. See, e.g., *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 417, 58 P.3d 292 (2002) (no abuse of discretion in admitting spreadsheet that had not been disclosed during discovery, where the court saw no prejudice to the opposing party).

Thus, the operation of the rule is fact-specific. The party seeking to introduce the new evidence will want to argue that (a) there was a plausible and benign reason for not disclosing the evidence during discovery, and (b) under the facts and circumstances of the case, the new evidence will not cause any particular prejudice to the opposing party. The opposing party will, of course, argue just the opposite.

At that point the court has considerable discretion to fashion an appropriate course of action. The possibilities include (a) excluding the evidence; (b) admitting the evidence on the basis that the opposing party would not be prejudiced; (c) admitting the evidence but limiting its scope or purpose; (d) admitting the evidence but allowing the opposing party to also introduce new evidence in rebuttal; (e) admitting the evidence but subject to a continuance to allow the opposing party to conduct further discovery, or to otherwise respond to the new evidence.

In addition, many courts also have local pretrial disclosure requirements that must be observed. These local rules may also, in effect, provide a basis for

objecting to evidence that comes as a surprise. For example, many Washington courts have local rules requiring pretrial disclosure of any exhibits a party intends to offer as evidence at trial. A typical rule, King County LR 16, states that undisclosed exhibits may not be offered at trial “unless the court orders otherwise for good cause and subject to such conditions as justice requires.” An exception to the general rule states that counsel need not disclose “exhibits to be used only for impeachment” and exhibits “to be used only for illustrative purposes.”

It is widely assumed that such rules override the work product rule. Thus, if counsel holds material that is protected by the work product rule, but also intends to offer the material as an exhibit at trial, the material must be disclosed in accordance with the applicable rule.

Similarly, many courts have local rules requiring pretrial disclosure of witnesses. Typically, such rules either restrict or bar testimony by undisclosed witnesses, sometimes making an exception for rebuttal witnesses. See Tegland, 14–15 Washington Practice: Civil Procedure § 21.32.

The most common application of Rule 403 has been to control the admissibility of evidence that is likely to be overvalued by the jury. The dangers of confusion and overvaluation have often led the courts to exclude many other kinds of evidence, including evidence that may be unduly impressive because it sounds too official. See *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984); *State v. Sweeney*, 45 Wn. App. 81, 86, 723 P.2d 551 (1986); *State v. Clafin*, 38

Wn. App. 847, 850, 690 P.2d 1186 (1984); *State v. Maule*, 35 Wn. App. 287, 295, 667 P.2d 96 (1983).

Mr. Lee's counsel served Ms. Waterman with additional charts and summaries of Bill Partin's ten minutes prior to his testimony. Her basis for admissibility was that this new evidence was for illustrative purposes only. Unjustly, similar evidence had already been requested admissible, and Judge Armijo had reserved any ruling on it. But when Ms. Lee's counsel moved to utilize the undisclosed evidence during Mr. Partin's testimony, the judge overruled Ms. Waterman's objection, disallowed her any rebuttal argument (such as the original charts and summaries still had not been ruled on), and allowed the prejudicial evidence admitted.

These charts and summaries are exactly the type of evidence that is likely to be overvalued by the jury, based on its unduly impressive and official nature. Allowing admission of this evidence violated CR 37 and should have been excluded as a sanction of the discovery rules. Additionally, ER 403 should have applied to control the admissibility of this confusion and overvalued evidence. Judge Armijo abused his discretion by failing to rule on the reserved evidence, admitting prejudicial evidence undisclosed to the plaintiff's ten minutes prior to the witnesses testimony, and allowing unduly impressive evidence designed to confuse and impress the jury. Ms. Waterman's remedy is a new, non-prejudicial trial.

4. Ineffective Assistance of Counsel.

Standard of Review

A trial court's factual findings relating to an ineffective assistance of counsel claim is reviewed under the substantial evidence standard. See *State v. King*, 78 Wn. App. 391, 404, 897 P.2d 380 (1995), *aff'd*, 130 Wn.2d 517 (1996). We review the trial court's legal conclusions de novo. See *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). A trial court's grant of relief is reviewed under an abuse of discretion standard. See *State v. Dawkins*, 71 Wn. App. 902, 907, 863 P.2d 124 (1993) (applying abuse of discretion standard in reviewing trial court's grant of a motion for new trial on ineffective assistance of counsel grounds).

The test for ineffective assistance of counsel, other than in cases involving an actual conflict of interest, consists of two prongs: (i) whether defense counsel's performance fell below an objective standard of reasonableness; and (ii) whether this deficiency prejudiced the defendant. E.g., *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); *State v. James*, 48 Wn. App. 353, 359, 739 P.2d 1161 (1987). With regard to the first prong, a strong presumption exists that defense counsel provided adequate assistance. *James*, 48 Wn. App. at 359. As to the second prong, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have

been different. *James*, 48 Wn. App. at 359; *State v. Holm*, 91 Wn. App. 429, 434-35, 957 P.2d 1278 (1998) *review denied*, 137 Wn.2d 1011 (1999).

A defendant who has a right to counsel is entitled to the “effective” assistance by the lawyer acting on his or her behalf. *State v. Johnson*, 29 Wn. App. 807, 631 P.2d 413 (1981); *State v. Adams*, 91 Wn.2d 86, 586 P.2d 1168 (1978). This constitutional right to the effective assistance of counsel applies whether counsel is retained by the accused or appointed by the court. Where it appears during the course of the proceedings that the defendant's rights will be substantially impaired or denied, counsel may be discharged or replaced. The appropriate remedy for a trial conducted with the ineffective assistance of counsel is for the case to be remanded for a new trial with new counsel. *State v. Cloud*, 95 Wn. App. 606, 976 P.2d 649 (1999); *State v. Tjeerdsma*, 104 Wn. App. 878, 17 P.3d 678 (2001); *State v. McDonald*, 143 Wn.2d 506, 22 P.3d 791 (2001).

The standard for determining whether a criminal defendant has been denied the effective assistance of counsel is whether “after considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *State v. Martin*, 33 Wn. App. 486, 656 P.2d 526 (1982); *State v. Cummings*, 44 Wn. App. 146, 721 P.2d 545 (1986); *State v. James*, 48 Wn. App. 353, 739 P.2d 1161 (1987); *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980).

Therefore, in order to establish a denial of effective assistance of counsel, a defendant has the burden of proving (1) that he or she was denied effective

representation, and (2) that he or she was prejudiced thereby. *State v. Stephan*, 35 Wn. App. 889, 671 P.2d 780 (1983); *State v. Malik*, 37 Wn. App. 414, 680 P.2d 770 (1984); *State v. Carter*, 56 Wn. App. 217, 783 P.2d 589 (1989); *State v. C.D.W.*, 76 Wn. App. 761, 887 P.2d 911 (1995); *State v. McKinnon*, 110 Wn. App. 1, 38 P.3d 1015 (2001).

The presumption of counsel's competence can be overcome by showing among other things, that counsel failed to conduct appropriate investigation, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial. A defense lawyer should take prompt action to protect the accused and inform him of his rights and take all necessary action to vindicate such rights. Counsel should consider all procedural steps which in good faith may be taken, conduct a prompt investigation of circumstances of the case, and explore all avenues leading to facts relevant to guilt. *State v. Visitacion*, 55 Wn. App. 166, 776 P.2d 986 (1989); *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994); *State v. Rainey*, 107 Wn. App. 129, 28 P.3d 10 (2001); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) *rehearing denied*, 104 S. Ct. 3562 (1984) *on remand*, 737 F.2d 894 (11th Cir.1984). Unprofessional conduct on the part of defense counsel is not necessarily ineffective representation, however. *State v. Warnick*, 121 Wn. App. 737, 90 P.3d 1105 (2004); *State v. Garrett*, 124 Wn.2d 504, 881 P.2d 185 (1994).

In considering claims of ineffective assistance of counsel, the courts have declined to find constitutional violations when the actions of counsel complained of go to the theory of the case or to trial tactics. *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002); *State v. Reichenbach*, 152 Wn.2d 126, 101 P.3d 80 (2004). The failure of a defendant's counsel to obtain a successful result is not indicative of ineffective representation. *In re Richardson*, 100 Wn.2d 669, 675 P.2d 209 (1983); *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407, *cert. denied*, 107 S. Ct. 599 (1986).

Ms. Waterman's counsel began the trial effectively, but as it proceeded, he became less involved until he stopped objecting altogether. This waived several appealable issues and sent a message to the jury that case was insignificant. Additionally, several of the objections were the same, and the results obvious. Ms. Waterman's counsel asked three different witnesses how many female contractors they were acquainted with, causing objections every time that were sustained. The final faux pas was when Ms. Waterman was left alone to hear the verdict. This unprofessional conduct caused Ms. Waterman an unfair trial and she is entitled to another one with competent counsel.

Ms. Waterman is entitled to a new trial based on prejudicial errors, judicial bias, discovery violations, and ineffective assistance of counsel. She respectfully requests this court grant her that relief.

Respectfully submitted,


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Attorney for Appellate

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

MICHELLE WATERMAN AND DARRELL
W. WATERMAN,

Appellants,

vs.

CALVIN LEE AND JANE DOE LEE,

Respondents

Pierce County Case No.: 05-2-07507-0

Court of Appeals No.: 34986-8-II

DECLARATION OF MAILING

1. I am Annette L. Monnett, attorney for the Appellants, Michelle Waterman and Darrell W. Waterman.
2. On November 28, 2006, I served a true copy of the Appellant's Opening Brief on Marilee C. Erickson, by regular mail.

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

Dated this 28th day of November, 2006,
At Tacoma, Washington.

By: Annette L. Monnett
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WSBA # 29428
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DECLARATION OF PERSONAL SERVICE - 1

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