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No. 36405-1-II

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

TERESA CLUTE and ALLEN CLUTE,

Appellants,

vs.

FURM M. DUNCAN, JR., M.D.,

Respondent.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This is a medical negligence action. Plaintiffs Teresa and Allen Clute (hereafter “plaintiff wife” and “plaintiff husband” or “plaintiffs Clute”) contended that defendant Furm M. Duncan, Jr. (hereafter “defendant physician”) failed to discover a “lost IUD” in plaintiff wife, which resulted in Mrs. and Mr. Clute not being able to conceive a baby. Plaintiff wife and plaintiff husband contended that defendant physician should have discovered the IUD during 1990-92, when plaintiff wife received infertility care from defendant physician. The IUD was discovered by another physician in August 2001 when plaintiff wife was 45-years-old and had only a remote chance of conceiving.

The parties appeared for trial on December 5, 2005. Plaintiffs Clute attempted to introduce the testimony of their expert witness, A. Albert Yuzpe, M.D., Vancouver, B.C., via the reading of his deposition. The

court ruled that plaintiffs Clute could not read the deposition of their expert physician to the jury. Instead of dismissing the case, the court ordered a continuance on the condition that plaintiffs Clute pay \$3,000 terms to defendant Furm M. Duncan, Jr. (hereafter “defendant physician”) and \$500 to Cowlitz County for jury expenses.

Trial took place from April 18-20, 2007. The jury found for defendant physician. This appeal challenges two rulings made by the court on December 5, 2005: (a) the trial court’s refusal to allow plaintiffs Clute to the read of the deposition of Dr. Yuzpe, their expert witness, and (b) the trial court’s award of \$3,500 in terms against plaintiffs Clute as a condition to having their case continued. Plaintiffs Clute do not challenge the verdict of the jury.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in its ruling of December 5, 2005, denying the right of plaintiffs Clute to present the evidence of their expert witness, Dr. A. Albert Yuzpe, via the reading of his deposition.

2. The trial court erred in its ruling of December 5, 2005, conditioning the continuance of the lawsuit upon the payment of \$3,000 terms to defendant physician and \$500 terms to Cowlitz County.

Issues Pertaining to Assignments of Error

1. Should a plaintiff be permitted to read the deposition transcript of plaintiff's expert witness if the witness resides out of the county and more than 20 miles from the place of trial?

2. Should sanctions be awarded as a condition of continuing a trial if the continuance was caused by an erroneous ruling of the trial court?

III. STATEMENT OF THE CASE

Plaintiff wife's expert witness was A. Albert Yuzpe, M.D., an obstetrician and gynecologist from Vancouver, B.C. (Plaintiffs' motion for continuance of trial date and motion for order allowing video taped testimony at p. 2, CP 2.) On June 22, 2005, Dr. Yuzpe's deposition was taken at Vancouver, B.C. by counsel for defendant physician. (Id. at p. 3; CP 3.) The date of the deposition was set by agreement by the undersigned and Sheri C. Browning (hereafter "defense counsel"), counsel for defendant physician. (Id.; CP 3.) Before the deposition, counsel for plaintiffs Clute advised defense counsel that he would like her agreement for the undersigned to video tape the deposition. (Id.; CP 3.) Counsel for plaintiffs Clute undersigned advised defense counsel that he wanted to video tape the deposition so that he could use it with a focus group or he could use it at trial if Dr. Yuzpe did not appear in person. (Id.; CP 3.) Defense counsel advised counsel for plaintiffs Clute that she would discuss

the proposal with others and then would let him know.
(Id.; CP 3.)

By the date of the deposition, defense counsel had not advised counsel for plaintiffs Clute whether she would allow him to video tape the deposition for potential use at trial. (Id.; CP 3.) Counsel for plaintiffs Clute made a video tape of the deposition. (Id.; CP 3.) During the deposition, counsel for plaintiffs Clute advised defense counsel that he may want to show the video deposition at the time of trial. (Id.; CP 3.) Defense counsel objected. (Id.; CP 3.)

By pleading dated July 15, 2005, plaintiffs Clute made a motion for an order allowing Dr. Yuzpe's video tape deposition to be shown at the time of trial. (Id. at pp. 1-4; CP 1-4.) The motion for continuance was to continue the trial from being "third set" on August 1, 2005 to some other date certain. (Id. at p. 2; CP 2.) The motion was not heard because the trial date was continued to

December 5, 2005 without need of the parties to personally appear in court.

By pleading dated November 22, 2005, plaintiffs Clute made a motion for an order to allow Dr. Yuzpe's video tape deposition to be shown at the time of trial. (Plaintiff's motion for order allowing video taped testimony at pp. 1-3; CP 7-9.) The motion was noted to be heard on December 5, 2005, the first day of trial. (Note for motion docket at pp. 1-2; CP 10-11.)

By pleadings dated December 1, 2005, defendant physician filed a legal memo and a declaration objecting to the use of Dr. Yuzpe's deposition at the time of trial pursuant to CR 32(a)(5)(A). (Defendant's opposition to plaintiffs' motion for order allowing video taped testimony at pp. 1-6; CP 12-17, and declaration in support of defendants' opposition to plaintiffs' motion to allow use of video taped testimony at pp. 1-3; CP 18-24.)

By pleading dated December 5, 2005, plaintiffs Clute replied to defendant physician's legal argument about the use of Dr. Yuzpe's deposition. (Plaintiffs' reply to defendant's opposition to plaintiffs' motion for order to allow videotaped testimony at pp. 1-3; CP 25-27.)

The hearing on the issue took place on December 5, 2005 – the first day of trial. A transcript of the complete hearing is on file. (Verbatim report of proceedings at pp. 1-36.) During the hearing, counsel for plaintiffs Clute argued to the court that it was “a total matter of discretion for Your Honor as to whether Your Honor will allow us to let [the jury] watch the videotape” (RP 6.) Counsel for plaintiffs further argued that “there's no question at all that [plaintiffs Clute are] allowed to read the deposition our expert witness, Dr. Yuzpe of Vancouver, B.C.” (RP 2.)

The court ruled that plaintiffs Clute could not even read Dr. Yuzpe's deposition to the jury. (RP at 28-29.) The court stated that it was “very reluctant to dismiss any

lawsuit on procedural issues, and I'm not going to dismiss this lawsuit on procedural issues" but that the court would "continue [the trial] on the awarding of terms." (RP at 30.) The court ruled: "The matter can be reset for trial if the following terms are paid within 30 days: \$500 to the county for jury costs, \$3,000 to the Defense." (RP at pp. 32-33.) The undersigned paid the terms on the day of the ruling. (RP 35.)

The trial went forward on April 18, 2007. The jury found for defendant physician.

IV. ARGUMENT

1. Plaintiffs Clute should have been allowed to present the testimony of their expert witness, Dr. A. Albert Yuzpe of Vancouver, B.C., via the reading of his deposition to the jury.

CR 32 (Use of Depositions in Court Proceedings)

provides:

(a) Use of Depositions. At the trial . . . any part or all of a deposition, so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

. . .

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds . . . (B) that the witness resides out of the county and more than 20 miles from the place of trial, unless it appears that the absence of the witness was procured by the party offering the deposition or **unless the witness is an out-of-state expert subject to subsection (a)(5)(A) of this rule**

. . .

(5) The deposition of an expert witness may be used as follows:

(A) The **discovery deposition of an opposing party's rule 26(b)(5) expert witness,** who resides outside of the state of Washington, may be used if

reasonable notice before the trial date is provided to all parties and any party against whom the deposition is intended to be used is given a reasonable opportunity to depose the expert again,

(B) The **deposition of a health care professional, even though available to testify at trial**, taken with the expressly stated purpose of preserving the deponent's testimony for trial, may be used if, before the taking of the deposition, there has been compliance with discovery requests made pursuant to rules 26(b)(5)(A)(i), 33, 34, and 35 (as applicable) and if the opposing party is afforded an adequate opportunity to prepare, by discovery deposition of the deponent or other means, for cross examination of the deponent.

(Emphasis added.)

Plaintiffs Clute maintain that Dr. Yuzpe is not an out-of-state expert subject to CR 32(a)(5)(A). Dr. Yuzpe is a CR 32(a)(3)(B) witness who resides outside of

Cowlitz County and more than 20 miles from Kelso, where the trial was held.

Subsection CR 32(a)(5)(A) shall be referred to as the “opposing party’s expert witness from out of state” rule and CR 32(a)(5)(B) shall be referred to as the “health care professional available to testify at trial” rule.

Case law before the 1993 amendments to CR 32 should apply unless the wording of the amendments, in an unambiguous manner, state that a party A may not read the deposition that was taken by opposing party B of party A’s expert witness. **The amendments state that party A may not read the deposition taken by party A of opposing party B’s expert witness** unless certain notice provisions are given.

It is understood that **CR 32(a)(5)(A)** “is ambiguous because its meaning depends upon the perspective of the reader.” 14 K. TEGLAND, WASH. PRAC., CIVIL PROCEDURE Sec. 16.30 (2003 & Supp. 2007).

(Emphasis added.) It is reasonable for counsel to conclude that “since **subsection (a)(5)(A) applies only to the admissibility of an opposing party’s expert**, not my own expert, the exception does not apply” and “**I can use my expert’s deposition because CR 32(a)(3)(B) says I can.**” *Id.* (Emphasis added.)

Before the 1993 amendments, CR 32(a)(3)(B) was clear that the deposition of an expert witness who lived out of county and more than 20 miles from the place of trial could be used for substantive purposes. CR 32(a)(3)(B) was explained by the Washington Supreme Court in Bertsch v. Brewer, 97 Wn.2d 83, 640 P.2d 711 (1982). In Bertsch, plaintiff alleged that defendant doctor negligently removed her thyroid. The deposition was taken of “a doctor with information vital to the malpractice case” who also “lived out of the county and more than 20 miles away.” 97 Wn.2d at p. 89. The Washington Supreme Court stated that the trial court should have

allowed the doctor's deposition to be read at trial. The court stated at pp. 89-90:

The requirements of CR 32(a)(3)(B) were met, because the deponent-witness lived out of the county and more than 20 miles away. Additionally, [plaintiff] did not cause the absence of the witness. Counsel for [plaintiff] offered economy as the reason for using the deposition rather than calling the witness to testify in person. Where an attorney is within the rules, he is free to try his case in his own manner. Here, the deponent was a doctor with information vital to the malpractice case. The briefs suggest that the doctor gave a more favorable impression of [plaintiff's] case in the deposition than could be expected as a live witness at the trial. Therefore, **it was [plaintiff's] tactical prerogative to introduce the doctor's deposition under CR 32(a)(3), rather than produce the doctor for live testimony.**

(Emphasis added.) [NOTE – The court added: “Unfortunately, [plaintiff] did not object to the judge’s refusal to allow the admission of the deposition; therefore, she waived her right to appeal this error in the subject appeal.” 97 Wn.2d at p. 90.]

Appellate opinions from other states allowing plaintiff to read the deposition of plaintiff's expert witness even though the expert's deposition was taken by defendant as a discovery deposition include Ex parte Coots, 527 So.2d 1292 (Ala. 1988)("[T]he fact that the plaintiffs did not give defendants notice of their intention to question [plaintiff's expert witness] Dr. Blake at his deposition to obtain information for use as evidence at trial is not a proper ground for prohibiting the plaintiff's from reading the deposition to the jury.") and Haldane v. Hall, 234 So.2d 739, 740 (Fla.App. 1970)("[D]efendants were clearly aware at the time they served the notice of Dr. Arron's deposition that the doctor was an expert witness . . . and defendants contemplated the possible use of the deposition at trial. . . . [T]here was no error in permitting Dr. Arron's deposition to be used [by plaintiff] . . .").

Opposing Party's Expert Witness from Out of State

By the terms of this sub-section, it does not apply to this case. **The sub-section involves the right of a party taking the deposition of “an opposing party’s rule 26(b)(5) expert witness” to use the deposition at trial.** The sub-section does not discuss the right of a party whose own rule 26(b)(5) expert witness is deposed by the opposing party to use the deposition at trial. **Plaintiffs Clute did not attempt to read the deposition of “an opposing party’s rule 26(b)(5) expert witness . . .”**

Defendant physician’s argument in opposition to the reading of Dr. Yuzpe’s deposition, set forth in his brief in opposition dated December 1, 2005, was based entirely on CR 32(a)(5)(A), the opposing party’s expert witness from out of state rule. (Defendant’s opposition to plaintiffs’ motion for order allowing videotaped testimony

at pp. 3-5; CP 14-16.) Defendant physician stated: “CR 52(a)(5) [sic – CR 32(a)(5) was obviously intended] applies and prohibits a party from using the discovery deposition testimony of his or her own expert at trial.” (Id. at p. 3; CP 14.)

Defendant physician’s brief cited one case, Hendrickson v. King County, 101 Wn.App. 258, 2 P.3d 1006 (2000)(case discussing CR 32(a)(5)(A)) at p. 3 of the brief. (CP 14.) The Hendrickson case does not apply to this issue. A high school swimmer suffered a spinal cord injury during swimming practice at a county owned pool. She brought a lawsuit against her high school and the county. Plaintiff named Dr. Piper of Missouri as an expert witness. Defendant school district named Dr. Kazarian of Ohio and Mr. Leonard of Florida as expert witnesses. Defendant county took the depositions of Dr. Kazarian and Mr. Leonard. Defendant school district then settled with plaintiff. Plaintiff then retained Dr. Kazarian

as her own expert witness. Before trial, plaintiff did not list Dr. Piper or Dr. Kazarian as a witness expected to be called at trial. In a joint statement of evidence, neither plaintiff or defendant county listed Dr. Piper or Dr. Kazarian as witnesses anticipated to be called at trial. About 30 days before trial, defendant county served notice pursuant to CR 32(a)(5)(A) that it intended to introduce the depositions of Mr. Leonard, Dr. Piper and Dr. Kazarian at trial. The court ruled that defendant could present live testimony from Mr. Leonard but could not read his deposition. The court ruled that defendant county could not call Dr. Piper and Dr. Kazarian at trial and could not read their depositions at trial. **The issue before the court did not involve whether plaintiff could read the deposition of plaintiff's own rule 26(b)(5) expert witness who was deposed by a defendant.**

The Hendrickson case was cited in Higgins v. Intex Recreation Corp., 123 Wn.App. 821, 99 P.3d 421 (2004)(case discussing CR 32(a)(5)(A)). The Higgins court noted at p. 428 that the expert witness deposition issue “turns on the permissible use **of an opponent’s expert witness.**” (Emphasis added.) A man sustained severe spinal injuries when he was struck by a snow tube manufactured by Intex Recreation Corp. and being ridden by Dan Falkner. Plaintiff was trying to prevent a minor named Kyle Potter from being struck. Kyle Potter’s father, Curt Potter, was present at the time. Plaintiff sued Intex, Mr. Falkner, Kyle Potter and Mr. Potter. Intex listed Gerald Bretting as an expert witness. Intex rested its case without calling Mr. Bretting. Plaintiff was then granted permission to read from part of Mr. Bretting’s deposition. **The issue before the court did not involve whether plaintiff could read a deposition of his own**

rule 26(b)(5) expert witness that was taken by a defendant in the lawsuit.

Another case discussing CR 32(a)(3)(B) is Kimball v. Otis Elevator Co., 89 Wn.App. 169, 947 P.2d 1275 (1997). The Kimball case does not address the issue in this case. In Kimball, a hospital worker injured her knee when an elevator failed to properly level. Dr. Kimball, who lived out of county and more than 20 miles from trial (but not out of state), examined plaintiff in connection with her Labor & Industries claim. “Dr. McCollum was not hired by either party” 89 Wn.App. at p. 175. The defense took the deposition of Dr. McCollum. Plaintiff objected to Dr. McCollum’s deposition being read at trial because notice was not given as required by CR 32(a)(5)(B). [NOTE – This was a “health care professional available to testify at trial” case – not an “opposing party’s expert witness from out of state” case.] The court allowed Dr. McCollum’s deposition to be read.

After a defense verdict, plaintiff appealed. The Kimball court specifically stated: “We need not decide whether CR 32(a)(5)(B) was violated because the deposition testimony related solely to the issue of damages, which the jury never reached, and not to the issue of liability; therefore, any error was harmless.” 89 Wn.App. at pp. 174-75. The court added: “Nevertheless, at the request of both parties, we address the merits of Ms. Kimball’s argument.” 89 Wn.App. at p. 175. Thus, the court’s comment on the issue was dicta. The court found that Dr. McCollum was not a retained rule 26(b)(5) expert witness so the court did not abuse its discretion in admitting his deposition under CR 32(a)(5)(B). The issue before the court did not involve whether plaintiff could read a deposition of her own expert witness that was taken by defendant in the lawsuit.

Decisions Decided Under the Similar Federal Rule on Use of Depositions in Court Proceedings

CR 32 was patterned after Fed.R.Civ.P. 32, which provides:

(a) Use of Depositions. At the trial . . . any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition . . . in accordance with any of the following provisions:

. . .

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

. . .

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition[.]

“[F]ederal cases interpreting analogous federal provisions are highly persuasive.” Pickett v. Holland America Line-Westours, Inc., 145 Wn.2d 178, 188, 35 P.3d 351 (2001), cert. denied 536 U.S. 941, 122 S.Ct. 2624, 153 L.Ed.2d 806 (2002). Thus, opinions by federal

courts interpreting Fed.R.Civ.P. 32(a)(3)(B) are instructive.

In Ueland v. United States, 291 F.3d 993 (7th Cir. 2002), an inmate brought a tort lawsuit against the United States for a personal injury. Plaintiff attempted to read the deposition of another inmate who lived more than 100 miles from the place of trial. The trial court refused to allow the deposition to be read to the jury. In reversing the trial court, the Court of Appeals stated at 996-97:

Use of depositions as substantive evidence is normal in federal practice.

What is even more disappointing than the district's judge's spontaneous refusal to admit the deposition is the United States Attorney's defense of that decision. . . . Subsection (3)(B) says that a deposition is admissible if "the witness is at a greater distance than 100 miles from the place of trial or hearing . . . unless it appears that the absence of the witness was procured by the party offering the deposition". The party offering the deposition is forbidden to procure the deponent's absence (or distance); this is a far cry from requiring the litigant to procure the deponent's presence. . .

. . .

[The case of Polys v. Trans-Colorado Airlines, Inc., 941 F.2d 1404 (10th Cir. 1991)] does not stand for the proposition for which the United States Attorney used it: that the proponent must try and fail to procure live testimony before offering a deposition under Rule 32(a)(3)(B). Nor does any other appellate decision support that view, and at least one rejects it. See Daigle v. Maine Medical Center, Inc., 14 F.3d 684, 691 (1st Cir. 1994). We are the second. As is true for many legal points, the paucity of support in appellate opinions does more to show that the proposition is too clear to be questioned than to show that it is debatable.

(Emphasis added.)

In Battle v. Memorial Hospital at Gulfport, 228 F.3d 544 (5th Cir. 2000), rehearing en banc denied 237 F.3d 633 (5th Cir. 2000), plaintiffs brought a medical negligence claim for violations of the Emergency Medical Treatment and Active Labor Act (EMTALA). Defendant took the deposition of Dr. Lakeman, an expert in microbiology and virology who resided more than 100 miles from the place of trial. At trial, the trial court denied plaintiffs' attempt to read the deposition of Dr. Lakeman. In reversing the trial

court, the Court of Appeals stated at 551: “**This court has held that nothing prohibits the use of a discovery deposition at trial, particularly against the party who conducted it.**” (Emphasis added.) The court added at 552-53:

The core of [defendants’] argument is that they did not aggressively test Lakeman’s answers with cross-examination type questions. They claim their deposition questions were motivated only by the desire to understand Plaintiffs’ case, not to test it with cross examination. Defendants posit no argument that Lakeman’s testimony lacked reliability. They do not suggest a single question or line of question that would have added reliability to the deposition. In fact, they characterize Lakeman’s testimony as cumulative of Whitley’s testimony which was admitted at trial. Based on the foregoing, we conclude that Defendants’ motive in questioning Lakeman at his deposition was similar to their motive at trial and consequently, Lakeman’s deposition was admissible pursuant to Rule 804. . . . [T]he exclusion of Lakeman’s deposition testimony was not harmless error.

In Tatman v. Collins, 938 F.2d 509 (4th Cir. 1991), plaintiff brought a personal injury action. Defendant took

the deposition of Dr. Amico, who lived more than 100 miles from the place of trial. The trial court refused plaintiff's attempt to read the deposition because the deposition was taken for discovery purposes and because Dr. Amico lived within 100 miles of the border of the geographical boundary of the Southern District of West Virginia. In reversing the trial court, the Court of Appeals stated at 510-11:

The Federal Rules of Civil Procedure make no distinction for use of a deposition at trial between one taken for discovery purposes and one taken for use at trial (de bene esse). See Rule 32 (use of depositions in court proceedings). Moreover, we are unaware of any authority which makes that distinction.

[Citations omitted.]

The court added at 511:

The district court . . . is afforded broad discretion to admit or exclude any deposition testimony by applying the rules of evidence. But **it cannot exclude deposition testimony on the basis that the defendant intended the deposition to be taken for discovery**

purposes and did not expect that it would be used at trial.

(Emphasis added.)

In Williams v. Hughes Helicopters, Inc., 806 F.2d 1387 (9th Cir. 1986), former test pilots brought an age discrimination suit against a helicopter manufacturer. Plaintiffs moved to prevent the reading of a deposition that was taken of Dr. Earl Carter, one of defendant's expert witnesses. Dr. Carter was in Australia at the time of trial. The Court of Appeals affirmed the trial court's decision allowing the use of the deposition at trial. The use of the deposition at trial was based on Rule 32(a)(3) – "the witness is at a greater distance than 100 miles from the place of trial . . . or is out of the United States"

In the case at bar, Dr. Yuzpe met the requirements of CR 32(a)(3)(B) because he resided out of county and more than 20 miles from the place of trial.

Health Care Professional Available to Testify at

Trial

By the terms of this sub-section, it also does not apply to this case. The sub-section pertains to “a health care professional” (i.e., a treating physician, nurse, physical therapist, psychologist, etc.) and not a rule 26(b)(5) retained expert witness.

This sub-section was also added by amended of September 1, 1993. Mr. Tegland quoted the drafters of the amendment that sub-section (a)(5)(B) addresses “the high cost of litigation in general, and the expense associated with presenting the testimony of a health care professional at trial specifically.” 3A K. TEGLAND WASH. PRAC., RULES PRACTICE CR 32, heading 14 (5th ed. 2006 & Supp. 2007). Mr. Tegland further quoted the drafters:

Practitioners have noted that while the cost of deposing such an expert (perhaps after office hours) may be measured in the hundreds of

dollars, the fee charged for testifying at trial (during the work day) can be several thousand dollars. The amendment would allow a party to depose a health care professional for the purpose of preserving such persons' testimony for trial, even though the person is available to testify at trial, if several conditions are satisfied.

Sub-section (a)(5)(B) does not apply to this case.

Sub-section (a)(5)(B) was enacted for depositions of treating physicians and other "health professionals" who reside in the county where the trial is to take place and less than 20 miles from the place of trial.

No Excuse Is Required to Explain Why Expert Witness Did Not Appear in Person

Where an expert witness for a party meets the mileage requirement of Rule 32, a party may read the expert's deposition to the jury and is not required to give an excuse why the expert witness did not appear in person. See Brown v. Pryor, 954 P.2d 1349, 1352 (Wyo. 1998):

We hold that absence of the deponent at the time the deposition is offered is sufficient to allow the deposition into evidence, and **the party offering the deposition need not proffer an excuse for the failure of the deponent to appear.**

(Emphasis added; citing with approval 7 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE Sec. 32.24[4][a] (3d ed. 1997) and Houser v. Snap-On Tools, Corp., 202 F.Supp. 181, 189 (D. Md. 1962).) See also United States v. International Business Machines Corp., 90 F.R.D. 377, 380 n. 5 (S.D.N.Y. 1981)(quoting with approval Snap-On Tools, supra at 189).

2. Since the court erred in ruling that Dr. Yuzpe's deposition could not be read to the jury, it was err to impose sanctions of \$3,500 on plaintiffs Clute.

The court's sanctions as a condition to continuing the trial was apparently based on some type of fault on the part of counsel for plaintiffs Clute. The court's

sanctions were due to the trial needing to be continued due to the blunder of counsel. Sanctions should be reversed when it is determined that the court's ruling was an error of law or an abuse of discretion. Cf. Mayer v. Sto Industries, 156 Wn.2d 677, 683, 132 P.3d 115 (2006)(case involving monetary sanctions which were imposed for a discovery violation; such sanctions "will not be disturbed absent a clear abuse of discretion" which occurs when a decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.").

V. CONCLUSION

The court should find that the court erred in not allowing the deposition of Dr. Yuzpe to be read to the jury. At minimum, the court's order was a clear abuse of discretion. Accordingly, the court should vacate the court's order awarding sanctions of \$3,500.

RESPECTFULLY SUBMITTED this 18th day of
October, 2007.

BAKER LAW OFFICE

s/ JEB

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