

original

No. 36405-1-II

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WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

TERESA CLUTE and ALLEN CLUTE,

Appellants,

vs.

FURM DUNCAN, JR., M.D.,

Respondent.

BRIEF OF RESPONDENT

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dm 11/21/07

TABLE OF CONTENTS

	<u>Page</u>
I. ISSUES IN RESPONSE TO APPELLANT’S BRIEF	1
Responses to Assignments of Error	1
Issues Pertaining to Assignments of Error	1
II SUPPLEMENTAL STATEMENT OF THE CASE	2
III. ARGUMENT	5
Plaintiffs’ Arguments Fail Because They Do Not Fully Consider The Purpose and Intent Behind The Use Of Expert Depositions Under CR 32(a)(5)(A)	5
The Court Should Affirm the Discretionary Award of Costs Under CR 40(d)	18
IV. CONCLUSION	21

TABLE OF AUTHORITIES

	Page
Cases	
<u>Allyn v. Boe</u> , 87 Wn.App. 722, 943 P.2d 364 (1997), <i>review denied</i> , 134 Wn.2d 1020, P.2d 315 (1998)	14
<u>Am. Cont'l Ins. Co. v. Steen</u> , 151 Wash.2d 512, 91 P.3d 864 (2004)	5
<u>Associated Mtg. Invest. v. G.P. Kent Const. Co., Inc.</u> , 15 Wn.App. 223, 548 P.2d 558 (1976)	18
<u>Battle v. Meml. Hosp. at Gulfport</u> , 228 F.3d 544, (5th Cir., 2000)	16
<u>Baxter v. Jones</u> , 34 Wn.App. 1, 658 P.2d 1274 (1983)	15
<u>Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.</u> , 113 Wn.2d 123, 776 P.2d 666 (1989)	7
<u>City of Bellvue v. Hellenthal</u> , 144 Wash.2d 425, 28 P.3d 744 (2001)	5, 11
<u>Creanna v. Ford Motor Co.</u> , 12 Wn.App. 824, 532 P.2d 290 (1975)	9
<u>Dep't of Ecology v. Campbell & Gwinn, LLC</u> , 146 Wash.2d 1, 43 P.3d 4 (2002)	5
<u>Ex Parte Coots</u> , 527 So.2d 1292 (Ala. 1988)	12
<u>Haldane v. Hall</u> , 234 So.2d 739 (Fl.App. 1970)	12, 13

<u>Hannah v. Larche,</u> 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960)	15
<u>Hanson v. Shim,</u> 87 Wn.App. 538, 943 P.2d 322 (1997)	19
<u>Hendrickson v. King County,</u> 101 Wn.App. 258, 2 P.3d 1006 (2000)	9, 13
<u>Higgins v. Intex Recreation Corp.,</u> 123 Wn.App. 821, P.3d 421 (2004), Division III	17
<u>Kimball v. Otis Elevator Co.,</u> 89 Wn.App. 169, 947 P.2d 1275 (1997)	7, 9, 16
<u>Kinsman v. Englander,</u> ___ Wn.App. ___, 167 P.3d 622, 626 (2007)	10
<u>Lent's Inc. v. Santa Fe Engineers, Inc.,</u> 29 Wn.App. 257, 628 P.2d 488 (1981)	19
<u>Lutz Tile, Inc. v. Krech,</u> 136 Wn.App. 899, 151 P.3d 219 (2007)	11
<u>Miller v. Arctic Alaska Fisheries Corp.,</u> 133 Wn.2d 250, 944 P.2d 1005 (1997)	10
<u>Olympic Forest Prods., Inc. v. Chaussee Corp.,</u> 82 Wash.2d 418, 511 P.2d 1002 (1973)	15
<u>Paiya v. Durham Constr. Co., Inc.,</u> 69 Wn.App. 578, 849 P.2d 660 (1993)	6
<u>State v. Greenwood,</u> 120 Wn.2d 585, 845 P.2d 971 (1993)	11
<u>State v. McIntyre,</u> 92 Wash.2d 620, 600 P.2d 1009 (1979)	5

<u>State v. Ralph Williams’ N.W. Chrysler Plymouth,</u> 87 Wn.2d 298, 553 P.2d 423 (1976), <u>app. dismissed</u> 430 US 952 (1977)	18
<u>Wash. Pub. Ports Ass’n v. Dep’t of Revenue,</u> 148 Wash.2d 637, 62 P.3d 462 (2003)	6

Statutes and Rules

Washington State

CR 32 (a)(5)(A)	6
CR 26(b)(5)	7
CR 32(a)(5)	4, 11
CR 26(b)(5)	7
CR 32	3, 6, 8 10, 13, 16
CR 32(a)	6
CR 32(a)(3)	7
CR 32(a)(3)(B)	3, 6, 8, 9, 10
CR 32(a)(5)	1, 6, 7
CR 32(a)(5)(A)	1, 5, 7, 8, 9, 10, 12, 13, 16, 17, 18, 20
CR 40(d)	18, 20
CR 43(a)(1)	10

Federal

FRCP 32	16
---------------	----

Other States

Fla. R. Civ. P. 1.390 13

Ala.R.Civ.P, Rule 32(a)(3)(D) 12

Other Authorities

Karl B. Tegland, Wash. Prac. Series: Rules Practice CR 32,
Vol. 3A (5th ed., West 2007) 9, 11

I. ISSUES IN RESPONSE TO APPELLANTS' BRIEF

Responses to Assignments of Error

1. The trial court's refusal to allow plaintiffs to submit the discovery deposition of their own expert in lieu of having their expert testify in person at trial was appropriate when plaintiffs filed a motion declaring their intent to do so only two weeks before trial and without prior notice to defendant.
2. The trial court was within its discretion when it conditioned the continuance of the trial on plaintiffs paying costs to the court and defendant for plaintiffs' failure to follow the requirements of CR 32(a)(5)(A).

Issues Pertaining to Assignments of Error

1. Does CR 32(a)(5) require a party seeking use of the discovery deposition of their own expert witness at trial, in lieu of live testimony, to provide adequate notice and an opportunity to cross-examine the expert to any party against whom the deposition is being used?
2. Does a trial court have discretion to award costs against a party who forces trial to be reset because they failed to adhere to the requirements of CR 32(a)(5)(A)?

Plaintiffs do not raise any issues challenging the verdict or judgment, or that would entitle plaintiffs to a remand. Plaintiffs' appeal is limited to

pretrial rulings that prohibited plaintiffs from reading their own experts discovery deposition at trial and conditioned the continuance requested by plaintiffs upon their payment of terms.

II. SUPPLEMENTAL STATEMENT OF THE CASE

Plaintiffs' statement of the case is incomplete. Therefore, defendant summarizes the case to the extent relevant to this appeal.

Plaintiffs brought suit against Furr M. Duncan, M.D. for medical malpractice. Dr. Duncan denied negligence and the action proceeded to discovery and trial. Plaintiffs named A. Albert Yuzpe, M.D. of Vancouver, British Columbia, as an expert who would testify on plaintiffs' behalf. RP 2. Defense counsel took Dr. Yuzpe's deposition at his office in Vancouver on June 22, 2005. RP 3, 7. Defense counsel agreed to plaintiffs' request to videotape the deposition for the limited purpose of showing it to focus groups. RP 7, CP 35 at 2. At the deposition, defense counsel specifically objected to its use for the perpetuation of Dr. Yuzpe's testimony. Id.

The parties were originally slated for trial on August 1, 2005, but because the parties were “third set” that day, a continuance was entered and the trial was reset to December 5, 2005. RP 2. Before the original August trial date, plaintiffs submitted a motion to use Dr. Yuzpe’s testimony in the event he would be unavailable to testify during the August trial. RP 2, 9. However, the trial date was reset before defendant was required to file a response, and plaintiffs’ motion was never heard. RP 2-3, 9. The parties agreed to the December trial date only after consulting their clients and experts to ensure everyone would be available. RP 9-10; CP 35 at 2.

Plaintiffs waited until November 22, 2005, just two weeks before trial and a period encompassing the Thanksgiving holiday, to again file a motion to use Dr. Yuzpe’s deposition in the event Dr. Yuzpe could not make it to trial. RP 10. Before filing the November 22nd motion, counsel for plaintiffs provided no notice to defendant of plaintiffs’ intent to use Dr. Yuzpe’s deposition in lieu of live testimony at trial. RP 20.

When counsel arrived for trial, the trial judge heard arguments on plaintiffs’ motion to allow the reading of Dr. Yuzpe’s deposition. The issue was potentially dispositive because plaintiffs had no other expert witnesses. Plaintiffs argued that CR 32(a)(3)(B) allows the deposition of any witness more than 20 miles from the court to be used by any party for any purpose. RP 3. Defendant argued that the 1993 amendment to CR 32 – which added

subsection (a)(5) – distinguished the treatment of expert witness depositions from those of lay witnesses and directed the court to the drafters' comments on the amendment. RP 7, 24-25.

The court agreed with the defendant and ruled that plaintiffs could not use their own expert's discovery deposition for proof at trial. Plaintiff requested the court grant a continuance and the court agreed, conditioning the continuance upon payment of terms by plaintiffs. RP 23, 30. The court inquired into the costs defendant had expended to prepare for trial. RP 30. Defendant ball-parked the costs of cancelling experts and the travel expenses of Dr. Duncan (now living in Ontario, Oregon) to be between \$3,500 - \$5,000. RP 30-32. Defendant did not request compensation for attorney time spent in preparation. *Id.* The court awarded terms of \$3,000 to defendant and \$500 to the county for court costs. RP 32-33.

The case was tried in April 2007 and the jury returned a defense verdict for Dr. Duncan. Plaintiffs filed their appeal.

III. ARGUMENT

A. Plaintiffs' Arguments Fail Because They Do Not Fully Consider The Purpose And Intent Behind The Use Of Expert Depositions Under CR 32(a)(5)(A)

Plaintiffs attempt to create a loophole in CR 32 whereby they would have the court treat their expert witness as just another lay witness. See CR 32 at Appendix A. Plaintiffs' argument requires ignoring the rule's clear intent to subject expert witnesses to more rigorous discovery. A more careful and reasoned approach to the rule demonstrates no ambiguity and affirms the trial court's refusal to allow the discovery deposition of plaintiffs' expert to be used at trial.

1. Courts Construe Court Rules Applying Statutory Rules Of Construction

Courts construe procedural rules in the same manner they construe statutes. City of Bellvue v. Hellenthal, 144 Wash.2d 425, 431, 28 P.3d 744 (2001), State v. McIntyre, 92 Wash.2d 620, 622, 600 P.2d 1009 (1979). When interpreting a rule, the court's primary goal is to "give effect to the [drafters'] intent and purpose in creating the [rule]." Am. Cont'l Ins. Co. v. Steen, 151 Wash.2d 512, 518, 91 P.3d 864 (2004). The court first considers the rule's plain meaning on its face. If its meaning is clear on its face, "the court must give effect to that plain meaning as an expression of the [drafters] intent." Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wash.2d 1, 9-

10, 43 P.3d 4 (2002). The “plain meaning” of a rule is discerned by looking at the ordinary meaning of the language at issue, and “the context of the [rule] in which that provision is found, related provisions, and the [rule] scheme as a whole.” *Id.* at 10-12, Wash. Pub. Ports Ass’n v. Dep’t of Revenue, 148 Wash.2d 637, 645, 62 P.3d 462 (2003).

2. When Dealing With An Out-Of-State Expert, CR 32(a)(5) Controls The Use Of Depositions At Trial In Lieu Of Live Testimony

CR 32 addresses the use of depositions in court proceedings. The rule begins by stating that a deposition, in part or in its entirety, is admissible at trial against any party who was present or represented at the time the deposition was taken so long as certain provisions are met. CR 32(a). Under plaintiffs’ analysis, the court would look no further than CR 32(a)(3)(B), which allows the use of the deposition of any witness who resides outside of the county and more than 20 miles from the place of trial. However, a caveat to this provision restricts its applicability if the party offering the deposition caused the witness to be unavailable or “the witness is an out-of-state expert subject to subsection (a)(5)(A) of this rule;” *Id.*

There is no dispute that Dr. Yuzpe, plaintiffs’ expert, lives outside the state. It is also indisputable that Dr. Yuzpe is an “expert” within the meaning of the court rules, as he was retained by plaintiffs solely to “develop facts and opinions in anticipation of litigation.” Paiya v. Durham

Constr. Co., Inc., 69 Wn.App. 578, 580, 849 P.2d 660 (1993) (citing Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc., 113 Wn.2d 123, 129-130, 776 P.2d 666 (1989)); see also CR 26(b)(5).

Because Dr. Yuzpe is an out-of-state expert, the trial court correctly considered the relationship between CR 32(a)(3) and CR 32(a)(5). RP 28. The court found CR 32(a)(3) provides generally for the unencumbered use of a deposition at trial by any party. Id. However, in derogation to that rule, the court found CR 32(a)(5) permits a party's use of an expert's deposition only upon the fulfillment of certain enumerated requirements. Id. at 28-29. CR 32(a)(5) acts as an exception to the broader provisions of CR 32(a)(3). As such, the court correctly evaluated the applicability of CR 32(a)(5) to plaintiffs' request to use the discovery deposition of Dr. Yuzpe at trial.

3. CR 32(a)(5)(A) Provides The Only Basis For Using The Deposition Of An Out-Of-State Expert

CR 32(a)(5) sets forth the two "special circumstances" under which the deposition of an expert witness may be used at trial. Kimball v. Otis Elevator Co., 89 Wn.App. 169, 175, 947 P.2d 1275 (1997). The first and only applicable condition for this case states:

(A) The discovery deposition of an opposing party's rule 26(b)(5) expert witness, who resides outside 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.

CR 32(a)(5)(A). Plaintiffs' sole argument on the matter is that CR 32(a)(5)(A) cannot apply to this case because it only refers to the "deposition of an opposing party's" expert. In this case, plaintiffs seek to use the deposition taken by defendant of plaintiffs' *own* expert. Plaintiffs conclude that because this case does not appear to fit the wording of the rule, the court ought to default to the general provision of CR 32(a)(3)(B), which would allow the deposition to be used for any purpose by any party, including being read at trial. For the reasons discussed below, plaintiffs' conclusion is erroneous.

i. Experts Are Intended To Be Subject To More Rigorous Discovery Rules

The trial court correctly considered the distinction between a lay witness and an expert witness when it considered whether it would allow plaintiffs simply to read the deposition testimony of their expert. RP 16-17. Because, as the trial judge suggests, there is a need to know what position the opposing expert is taking and to discuss that position with one's own experts in order to have a meaningful cross-examination, more stringent rules must be applied to expert discovery.

The drafters of the 1993 amendment to CR 32 noted as much when they discussed how fact witnesses are available to both sides of a matter, but experts have special protections and the party who retains the expert has

considerable control over whether that expert will testify or even be identified. Karl B. Tegland, Wash. Prac. Series: Rules Practice CR 32, Vol. 3A (5th ed., West 2007) (citing Creanna v. Ford Motor Co., 12 Wn.App. 824, 532 P.2d 290 (1975) (defendant could not call an expert identified in plaintiff's interrogatories and whose testimony at trial was uncertain). Commentators on the rules also recognize this distinction. [CR 32(a)(3)(B) does] not, however, apply to depositions given by true expert witnesses; i.e., experts who have developed opinions solely in anticipation of, and for purposes of, the litigation at hand. If the deponent is a true expert witness, the more rigorous requirements in [CR 32(a)(5)] are applicable." Id.

Although this dichotomy has not been clearly addressed by the courts, the distinction regarding discovery of experts versus fact witnesses is apparent from cases dealing generally with this rule. The court *in* Hendrickson v. King County relied on CR 32(a)(5)(A) when it excluded the deposition testimony of an expert because the party intending to use the deposition did not provide sufficient notice to the other parties under the rule. 101 Wn.App. 258, 265-66, 2 P.3d 1006 (2000). By contrast, there is no notice requirement for fact witnesses under CR 32(a)(3)(B). In another case, the court addressed the related provision in CR 32(a)(5)(B) and held that the deposition of a physician who was a *fact* witness and not an expert was admissible under the less rigorous provisions of CR 32(a)(3)(B). Kimball,

89 Wn.App. at 175-76. Both of these cases demonstrate there is a difference between expert and fact witnesses which requires distinct and more stringent rules for experts.

ii. The Drafters Commentary To CR 32(a)(5)(A) Makes It Clear The Rule Is Intended To Govern Precisely This Situation

Plaintiffs attempt to pigeonhole the court into defaulting to the more relaxed provisions of CR 32(a)(3)(B) in this case because they believe CR 32(a)(5)(A) should be read to exclude any issues pertaining to the use of the deposition of one's own expert. Plaintiffs cite only one Washington case from before the 1993 adoption of (a)(5)(A), in support of the position that it is their "tactical prerogative" to read a deposition instead of calling the expert at trial. Pl.Br. at 13. That assertion runs counter to this court's recently stated view that "[t]he rules of court strongly favor the testimony of live witnesses whenever possible so that the fact finder may observe the witnesses' demeanor to determine their veracity." Kinsman v. Englander, ___ Wn.App. ___, 167 P.3d 622, 626 (2007); see also CR 43(a)(1).

Plaintiffs' narrow and erroneous reading of the rule attempts to create an ambiguity that they argue justifies their interpretation. The rule, however, is not ambiguous. Even if it were, the ambiguity would not change the result. Courts construe an ambiguous rule in the same manner they interpret ambiguous statutes. Miller v. Arctic Alaska Fisheries Corp., 133

Wn.2d 250, 258, 944 P.2d 1005 (1997) (citing State v. Greenwood, 120 Wn.2d 585, 592, 845 P.2d 971 (1993)). This court recently stated that when it construes court rules, “the cardinal principle is that we ascertain and carry out the intent of the drafting body.” Lutz Tile, Inc. v. Krech, 136 Wn.App. 899, 903, 151 P.3d 219 (2007) (citing Hellenthal, 144 Wn.2d at 431). The drafters comments to the 1993 amendment that adopted 32(a)(5) not only elucidate the purpose of the rule, but specifically describe plaintiffs’ alleged tactical prerogative as the “trap” the amendment was intended to resolve.

The drafters present the following scenario in explaining the addition of (a)(5)(A): Defendant undertakes a discovery deposition of Plaintiff’s expert. After taking the deposition and speaking with their own experts, Defendant concludes that the Plaintiff expert’s opinion was faulty or his credibility was vulnerable. The comment continues:

Nevertheless, if [Plaintiff’s] expert does not appear at trial, *under the existing rule*, [Plaintiff] may use this discovery deposition. [Defendant] has been effectively prevented from cross-examining the expert after learning of the factual errors or false assumptions. Moreover, the reading of the deposition suggests to the jury that [Defendant] is vouching for testimony adverse to its position.

Tegland, Wash. Prac. Series 3A (emphasis added).

The drafters sought to avoid these prejudicial problems by adopting (a)(5)(A) to restrict the use at trial of a “discovery deposition of an out-of-state expert” *only if* all the parties have been given notice and “any party

against whom the deposition is intended to be used is given a reasonable opportunity to depose the expert again, in order to have an opportunity for meaningful cross examination.” Id. In stark contrast to plaintiffs’ position, the drafters comments draw no distinction between a party calling its own expert or opposing counsel’s expert; rather, the explanation and the scenario are unmistakably inclusive and use the precise situation at bar to demonstrate the behavior (a)(5)(A) is intended to prevent.

iii. Plaintiffs Fail To Cite Persuasive Case Law In Support Of Their Position

Plaintiffs reliance on cases from other jurisdictions is not helpful because those cases do not interpret Washington procedural rules or other comparable state rules. Pl.Br. at 14. Ex Parte Coots, 527 So.2d 1292 (Ala. 1988), and Haldane v. Hall, 234 So.2d 739 (Fl.App. 1970), do not support plaintiffs’ argument in this case because the courts relied on statutes very distinct from CR 32(a). The Coots court summarized the applicable rule in that case: “Rule 32(a)(3)(D), Ala.R.Civ.P., provides that the deposition of a witness, whether or not a party, may be used for any purpose if the court finds that the witness is a licensed physician or dentist.” Coots, 527 So.2d at 1294. Clearly the Alabama rule provides considerably more latitude for use of expert depositions than Washington. The Florida rule at issue in Haldane states: “The testimony of an expert or skilled witness may be taken at any

time before the trial in accordance with the rules for taking depositions and may be used at trial, regardless of the place of residence of the witness No special form of notice need be given that the deposition will be used for trial.” Fla. R. Civ. P. 1.390. Again, the rule is drastically different and considerably more permissive than CR 32. As a result, neither of these cases provides any persuasive support to plaintiffs’ proposition that they should be allowed to use their own expert’s deposition without first providing sufficient notice and opportunity for meaningful cross-examination to defendant.

4. Allowing The Deposition Of Dr. Yuzpe To Be Read Would Have Been Highly Prejudicial Because Plaintiffs Gave No Notice And Did Not Provide Defendant With A Reasonable Opportunity For Meaningful Cross-Examination As Required By CR 32(a)(5)(A)

Notice by plaintiffs of their intent to use Dr. Yuzpe’s deposition in this case was not timely given. The rules are silent on what amount of time is required to be considered sufficient notice, but this court has concluded that three weeks notice before trial is insufficient for purposes of CR 32(a)(5)(A). Hendrickson, 101 Wn.App. at 266. A trial court’s decision to include or exclude expert testimony under CR 32(a)(5)(A) is reviewed for an abuse of discretion. Id. at 265 (citing Allyn v. Boe, 87 Wn.App. 722,

738, 943 P.2d 364 (1997), review denied, 134 Wn.2d 1020, 958 P.2d 315 (1998)).

At every critical juncture before trial defendant made it clear that Dr. Yuzpe's deposition was for discovery purposes only and never consented to its use at trial. RP 7, 9; CP 35 at 2. Plaintiffs did file a motion to use Dr. Yuzpe's deposition testimony at trial before the original August trial date, but the motion was withdrawn before it was heard because the trial was reset. However, before setting the new trial date, the parties consulted their experts and agreed to the date of December 5, 2005. RP 9-10; CP 35 at 2. Therefore it was reasonable for defendant to conclude there would be no issue with Dr. Yuzpe's availability to testify and no reason to anticipate his deposition would be used at trial.

When plaintiffs filed a motion on November 22, 2005, indicating that they *might* use Dr. Yuzpe's deposition in lieu of oral testimony, they completely surprised defendant. The notice came less than two weeks before trial and encompassed the Thanksgiving holiday. Defendant could not reasonably have been expected, in the midst of final preparations for trial, to drop everything and travel to Vancouver, British Columbia and conduct a meaningful cross-examination of Dr. Yuzpe on such short notice. What little notice was given was clearly insufficient and, on that basis alone,

allowing plaintiffs to use Dr. Yuzpe's deposition to be read at trial would have been prejudicial to defendant.

Furthermore, if the trial court allowed plaintiffs to read Dr. Yuzpe's deposition at trial without first allowing for a meaningful cross-examination, the court would have denied defendant certain due process protections. Due process guarantees the right to a full and fair hearing. Olympic Forest Prods., Inc. v. Chaussee Corp., 82 Wash.2d 418, 422, 511 P.2d 1002 (1973).

While the process which is due may vary according to the type of proceeding, cross-examination is clearly an integral part to any civil judicial proceeding. Hannah v. Larche, 363 U.S. 420, 439, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960). Denying a party the right to cross-examine a witness can be a prejudicial error. Baxter v. Jones, 34 Wn.App. 1, 5, 658 P.2d 1274 (1983).

Here, defendant conducted the deposition entirely for the purpose of gaining an understanding of Dr. Yuzpe's theory on the case. RP 9; CP 35 at 2. Allowing Dr. Yuzpe's deposition to be read to the jury would have denied defendant the opportunity to scrutinize his position and cross-examine him in a meaningful manner. Furthermore, if the exchange of questions and answers from the deposition were read to the jury, it would unfairly mislead them into believing that defendant was in agreement or unable to refute Dr. Yuzpe's testimony. Clearly this would be prejudicial to defendant.

Despite the harmful effect reading the discovery deposition would clearly have on defendant, plaintiffs assert that nothing prohibits their use of a discovery deposition at trial. Plaintiffs cite several federal cases for the proposition that it is not uncommon for expert discovery depositions to be used at trial. Pl.Br. at 21-26. These courts are interpreting Federal Rule of Civil Procedure 32. Although similar to CR 32, it is significant that FRCP 32 draws no distinctions regarding the use of expert depositions, and there is no federal counterpart to subsection (a)(5)(A). Therefore, those cases are not persuasive on the interpretation of Washington's rule.

Furthermore, at least one federal case cited by plaintiffs, Battle v. Meml. Hosp. at Gulfport, 228 F.3d 544, 552 (5th Cir., 2000), has no bearing on the issues in this case. Pl.Br. at 23. Battle deals with the use of an expert *fact* witness's deposition at trial. That court acknowledged that expert fact witnesses are treated like ordinary fact witnesses, and the same is true in Washington. Battle, 228 F.3d at 552; see Kimball, 89 Wn.App. at 175-76. Consequently, the expert in that case would not even fall within the purview of CR 32(a)(5)(A) because he is not an expert within the meaning of the rules.

Plaintiffs cite only three Washington cases that post-date the 1993 amendments to CR 32. Plaintiffs distinguish all three on the proposition they do not address whether a party may use the discovery deposition of

their own expert witness at trial. Pl.Br. at 16-20. Of course, the paucity of authority supporting plaintiffs' position is not surprising; it is difficult to imagine that this issue often arises. Nevertheless, at least one case is instructive on the discretion trial courts have been given in interpreting and applying CR 32(a)(5)(A).

In Higgins v. Intex Recreation Corp., 123 Wn.App. 821, 99 P.3d 421 (2004), Division III ruled the plaintiff could read the discovery deposition of one of defendant's experts in lieu of the expert testifying at trial. The Higgins case is distinguishable from this case because the defendant had told opposing counsel and the court before trial and even during the case-in-chief that defendant intended to call the expert to testify. Plaintiff relied on the defendant's representations and, when defendant rested without calling the expert, the court allowed plaintiff to read from the expert's deposition important information that the plaintiff otherwise would have been denied the opportunity to present. Id. at 836. The trial court's ruling was rooted in issues of fairness. The court of appeals affirmed the trial court's decision mostly on the basis of trial court discretion and there were tenable grounds for the trial judge's ruling, making Higgins a case about trial court discretion in these situations rather than a substantive interpretation of the rule itself. Id. at 837.

In the present case, CR 32(a)(5)(A) clearly applies, both facially and by means of statutory construction. Plaintiffs indubitably failed to provide adequate notice of their intent to use Dr. Yuzpe's deposition and, had the trial court allowed them to do so despite the deficient notice, defendant would be denied his right to cross-examine an opposing expert as provided for under CR 32(a)(5)(A). Therefore, the trial court properly denied plaintiffs' use of Dr. Yuzpe's discovery deposition at trial.

B. The Court Should Affirm The Discretionary Award Of Costs Under CR 40(d)

The trial court's award of terms was appropriate and entirely reasonable given the circumstances arising the morning of trial. CR 40(d) provides: "[w]hen a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a continuance. The court may, in a proper case, and upon terms, reset the same."

A trial court's decision to impose costs as a condition for continuance under CR 40(d) is reviewed for manifest abuse of discretion. State v. Ralph Williams' N.W. Chrysler Plymouth, 87 Wn.2d 298, 303-04, 553 P.2d 423 (1976), app. dismissed 430 US 952 (1977). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. Associated Mtg. Invest. v. G.P. Kent Const. Co., Inc., 15 Wn.App. 223, 229, 548 P.2d 558 (1976).

Plaintiffs recognized the dispositive nature of their omission and requested the court to grant a continuance rather than dismiss the case. RP 23. The court agreed to the continuance, but recognized that defendant unnecessarily accrued expenses in preparation for trial that day as a result of plaintiffs' misinterpreting the rules. The award of terms is particularly appropriate given defendant's objections to perpetuating Dr. Yuzpe at his deposition, plaintiffs' affirming their experts availability when the trial was reset in August, and because plaintiffs waited until the last minute, just two weeks prior to trial, to notify defendant that Dr. Yuzpe *might* not be available.

There was no showing that plaintiffs' expert was unavailable. Rather, plaintiff sought to use defendant's discovery deposition as a substitute for testimony, taking the chance that the trial court would allow it, over defendant's certain objection. Courts do not generally condone "wait and see" approaches to litigation. *Cf.*, Hanson v. Shim, 87 Wn.App. 538, 547-48, 943 P.2d 322 (1997), Lent's Inc. v. Santa Fe Engineers, Inc., 29 Wn.App. 257, 264, 628 P.2d 488 (1981). It is only appropriate that in this case plaintiffs should bear the expense.

Furthermore, the terms awarded were not onerous. In fact, plaintiffs do not challenge the amount, only the award. Given that the court's alternative was to dismiss the case entirely, plaintiffs were fortunate the

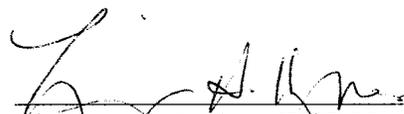
court exercised its discretion and granted a continuance upon payment of terms, as permitted by CR 40(d).

The terms set by the court were reasonable. Defendant requested between \$3,500 and \$5,000 to cover the costs cancelling defendant's expert witnesses at the last minute and Dr. Duncan's travel expenses and the court awarded terms of \$3,000 to defendant and \$500 to the court. Consequently, the trial court's ruling was well within its discretion and should be affirmed.

IV. CONCLUSION

The trial court's rulings should be affirmed because plaintiffs did not comport with the requirements of CR 32(a)(5)(A) governing the use of expert depositions at trial and because the court was within its discretion to award terms for continuing the trial at plaintiffs' request.

DATED this 21st day of November 2007.



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Of Attorneys for Respondent
Furm M. Duncan, Jr., M.D.

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, 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:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any purpose permitted by the Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (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; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(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 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.

Substitution of parties pursuant to rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any state and another action involving the same issues and subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Rules of Evidence.

(b) Objections to Admissibility. Subject to the provisions of rule 28(b) and subsection (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the

witness were then present and testifying.

(c) Effect of Taking or Using Depositions. A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subsection (a) (2) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) Effect of Errors and Irregularities in Depositions.

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **RESPONDENT'S**

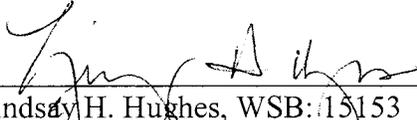
BRIEF on the following:

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Of Attorneys for Appellants

by mailing to said parties a true copy thereof, contained in a sealed envelope, addressed to said parties at their last known addresses, and deposited in the post office at Portland, Oregon, on said day.

DATED this 21st day of November, 2007.

KEATING JONES HUGHES, PC



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