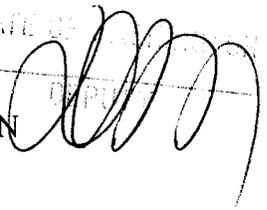


COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY 

No. 38742-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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KIMBERLY A. COGGER, a single woman in her individual capacity

Respondent,

vs.

SANDERS S. BLAKENEY, M.D. and "JANE DOE" BLAKENEY

Appellants.

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BRIEF OF APPELLANT

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Timothy R. Gosselin WSBA #13730

*Attorney for Appellants*  
**Gosselin Law Office, PLLC**  
1901 Jefferson Avenue, Suite 304  
Tacoma, WA 98402  
Phone: 253.627.0684  
Fax: 253.627.2028

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## **NATURE OF THE CASE**

This is an action for medical malpractice. Plaintiff, Kimberly Cogger, claimed that defendant, Dr. Sanders Blakeney, provided deficient care following a surgery. After his attorney withdrew in January, 2008, Dr. Blakeney proceed pro se through trial. On December 16, 2008, a jury returned a verdict against him for \$1 million. Dr. Blakeney appeals from the judgment entered on that verdict.

## **STATEMENT OF THE CASE**

Dr. Blakeney is an OB-GYN who has practiced in the Pierce-King County community since 1983. (Exhibit 15) On August 5, 2003, he performed a total abdominal hysterectomy on Ms. Cogger. There is no dispute the surgery was performed properly. During the surgery, an incidental cystotomy occurred. An incidental cystotomy is a laceration of the bladder. It is a known risk of abdominal hysterectomies.

Dr. Blakeney's notes and the testimony indicate the cystotomy was located in the front of the bladder. (CP 259; Exhibit 4 at P 0245.) It was repaired and the repair was tested by injecting methylene blue into the bladder then examining for leaks. No leaks were seen. The surgery was completed and Ms. Cogger was released from the hospital on August 8<sup>th</sup>.

Following her discharge, Ms. Cogger claimed to have experienced pain, bleeding, fever and other symptoms and sought treatment from Dr. Blakeney. (See generally RP 83-97; 119-31; 195-99.) She claimed Dr. Blakeney failed to respond to her complaints, and they worsened. *Id.*

On August 16, 2003, Ms. Cogger presented to the emergency department of St. Francis Hospital complaining of pelvic pain and blood in her urine. Diagnostic tests and examination revealed a bladder rupture with pelvic abscess and peritonitis. (Exhibit 8 at P 0796 - P 0799.) The rupture was located in the back of the bladder. (CP 259.) Dr. Kevin Ward performed surgery to close the bladder rupture, place a ureteral stent and evacuate the pelvic abscess. (Exhibit 8 at P 0796 - P 0799.)

Ms. Cogger continued to experience problems associated with the rupture, and eventually underwent multiple additional surgeries.

On November 2, 2006, Ms. Cogger filed suit in Pierce County Superior Court naming both Dr. Blakeney and Dr. Ward as defendants. As to Dr. Blakeney she alleged that his “post-surgical care and treatment of Ms. Cogger fell below the standard of care expected of a reasonably prudent OB-GYN practicing in the State of Washington. (CP 5.) She alleged that “Defendant Kevin Ward’s care and treatment of Ms. Cogger fell below the

standard of care expected of a reasonably prudent urologist practicing in the State of Washington.” (CP 6.)

On March 30, 2007, Dr. Ward was dismissed on summary judgment. (CP 58.) Under RCW 7.70.150, whenever a plaintiff alleges personal injury as a result of a violation of a medical standard of care, the plaintiff must file a separate certificate of merit against each named defendant at the time the complaint is filed. Summary judgment was sought because, among other reasons, Ms. Cogger had failed to file a proper certificate of merit against Dr. Ward. (CP 20-21).

In April, 2007, Dr. Blakeney also sought summary judgment. Under RCW 7.70.100, a person may not commence a medical malpractice action unless at least 90 days before they have given notice of their intention to commence the action to the defendant. The undisputed evidence was that Ms. Cogger gave her notice to Dr. Blakeney by delivering it to a receptionist at the office where he worked on August 3, 2006. (CP 75-76, 84-89, 100-01, 108-10). Dr. Blakeney did not actually receive the notice (CP 68-69) and the person to whom it was delivered had no recollection ever delivering it to him. (CP 108-10.) Dr. Blakeney asked for summary judgment because the plaintiff failed to comply with the notice requirement. Deciding that

delivering the notice to the receptionist was sufficient under the statute, the trial court denied the motion. (RP 11-14; CP 128.)

On January 4, 2008, Dr. Blakeney's counsel withdrew. (CP 152.) On September 17, 2008 Dr. Blakeney underwent abdominal surgery for a "near-fatal blood loss secondary to bleeding from stomach ulcers." (CP 180.) Trial began on December 2, 2008. Because the attorneys he tried to hire required retainers he could not afford, Dr. Blakeney was forced to represent himself through trial. (RP 22-23.) Because he had not timely disclosed expert witnesses (see CP 126), Dr. Blakeney was not allowed to present expert testimony the expert testimony he proposed. (CP 215; RP234-55.) Dr. Blakeney was his only witness. The jury returned a verdict against him for \$1 million. (CP 386-87.)

#### **ASSIGNMENTS OF ERROR**

1. The trial court erred in denying Dr. Blakeney's motion for summary judgment under RCW 7.70.010.
2. The trial court erred in entering judgment on the verdict because the evidence did not establish that Dr. Blakeney caused or contributed to the bladder rupture with pelvic abscess and peritonitis which formed the basis of her claim.
3. The trial court erred in admitting testimony of Dr. Ward that he had treated other of Dr. Blakeney's patients for similar conditions.

## ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is the requirement of RCW 7.70.010 that medical malpractice plaintiffs give notice to the defendant of their intention to commence the action met by leaving notice with a receptionist at the defendant's workplace? (Assignment of Error 1).
2. Did Ms. Cogger present substantial evidence that Dr. Blakeney caused or contributed to the bladder rupture with pelvic abscess and peritonitis which formed the basis of her claim? (Assignment of Error 2)
3. Did the trial court abuse its discretion by allowing Ms. Cogger to read to the jury deposition testimony of Dr. Ward that he had treated other of Dr. Blakeney's patients? (Assignment of Error 3)

## ARGUMENT

**A. Ms. Cogger did not give the pre-suit notice to Dr. Blakeney that RCW 7.70.100 requires. RCW 7.70.100 requires actual notice to the defendant or service of the notice on the defendant. Mere actions which may result in notice are not sufficient.**

As it existed in 2006,<sup>1</sup> RCW 7.70.100 provided in relevant part:

(1) No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to

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1. RCW 7.70.100 was amended in 2007. Laws of 2007, ch. 119 §1(1).

commence the action. If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the service of the notice.

The trial court decided that delivering notice to the receptionist at the office where Dr. Blakeney worked met the requirements of this statute. The court reasoned that because the statute uses the word “served” only in reference to notices given within 90 days of the expiration of the statute of limitations, the requirements for service of process only applied to those notices. (RP 12-13) As to other notice, the court reasoned, it is sufficient if the acts are “reasonably calculated to provide actual notice.” (RP 13, lns. 18-23)

The manner of giving the notice required by RCW 7.70.100 requires interpretation of that statute. The interpretation and meaning of a statute is a question of law subject to de novo review. *Castro v. Stanwood Sch. Dist. No. 401*, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004). The primary objective of statutory interpretation is to discern and implement legislative intent. *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). To determine legislative intent, the court first looks to the language of the statute. *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 767, 103 P.3d 1034 (2000). Absent ambiguity, a statute's meaning is derived from the language

of the statute and the court must give effect to that plain meaning as an expression of legislative intent. *Campbell & Gwinn*, 146 Wn.2d at 9-10. “[T]he court should assume that the legislature means exactly what it says. Plain words do not require construction.” *City of Kent v. Jenkins*, 99 Wn. App. 287, 290, 992 P.2d 1045 (2000).

Appellate courts have reviewed the notice requirements of RCW 7.70.100 three times since enactment. *Bennett v. Seattle Mental Health*, \_\_\_ Wn. App. \_\_\_, 208 P.3d 578 (2009); *Breuer v. Presta*, \_\_\_ Wn. App. \_\_\_, 200 P.3d 724 (2009); *Waples v. Yi*, 146 Wn. App. 54, 189 P.3d 813 (2008), *rev. granted*, 165 Wn.2d 1031, 203 P.3d 382 (2009). In *Bennett* and *Waples*, the courts affirmed dismissal of a plaintiff’s suit because the plaintiff failed to wait ninety days after giving notice before filing suit. In *Breuer*, the court held that plaintiff’s suit was untimely even after the 90 day extension provided by the statute. Of these, the *Bennett* court conducted the most thorough review of the statute.

In *Bennett*, the plaintiff filed suit on the 90<sup>th</sup> day after giving the required notice. RCW 7.70.100 requires that the plaintiff give “at least ninety days notice” before filing suit. The defendant moved to dismiss because plaintiff’s suit was filed too early. Plaintiff argued the statute allowed him

to commence suit on the 90th day after the notice was served. 208 P.3d at 582. The Court of Appeals disagreed and affirmed the trial court's dismissal. In doing so, the court noted that the language of the statute was clear, the statute required strict compliance with the claim filing period, and analogy to the claim filing standards for tort lawsuits against government agencies was apt. 208 P.3d at 582-83.

The trial court's analysis here is erroneous for several reasons. First, it violates the clear language of the statute. The statute clearly states "No action . . . may be commenced unless the defendant has been given . . . notice . . ." (Emphasis added) The statute does not say "No action . . . may be commenced unless the plaintiff has taken steps reasonably calculated to give the defendant notice . . ." Nor does it say "No action . . . may be commenced unless the defendant or someone who works with him has been given . . . notice . . ." This statute requires notice be given to the defendant.

This interpretation accords with the interpretation of other claim notice statutes. For example, in the context of claim notice standards for tort lawsuits against government agencies, a claimant must strictly comply with all procedural requirements.

Although we liberally construe claims content requirements to allow substantial compliance, we require strict compliance with procedural filing requirements. Strict compliance with procedural filing requirements is mandatory, even if the requirements seem “harsh and technical.” *Shannon v. Dep't of Corr.*, 110 Wn. App. 366, 369, 40 P.3d 1200 (2002) quoting *Levy v. State*, 91 Wn. App. 934, 957 P.2d 1272 (1998). Failure to comply with a notice of claim statute results in dismissal of the suit.

*Burnett v. Tacoma City Light*, 124 Wn. App. 550, 558, 104 P.3d 677 (2004).

In *Burnett*, the claimants served their notice on the City Attorney instead of the City Clerk. The court affirmed dismissal of their subsequent lawsuit even though the City had actual knowledge of the claim.<sup>2</sup> *Id.* at 559; accord *Kleyer v. Harborview Med. Ctr. of Univ. of Wash.*, 76 Wn. App. 542, 887 P.2d 468 (1995) (plaintiff filed claim with a claims manager at the University instead of the Office of Risk Management, as required by statute).

Second, the less rigorous standard applied by the trial court violates the purpose and intent of the statute. As the *Bennett* court noted, this statute is part of comprehensive amendments to the medical malpractice act the Legislature adopted in 2006. Their purpose was to improve patient safety,

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2. Analogy to governmental tort claim notice standards is appropriate. In enacting RCW 7.70.100 in 2006, the legislature itself made reference to those standards. See Final Bill Report, 2<sup>nd</sup> Sub. HB 2292 at 4 (<http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bill%20Reports/House%20Final/2292-S2.FBR.pdf>)

address the high cost of medical malpractice insurance, provide incentives to settle cases before resorting to court, and to improve the mediation process. 208 P.3d at 581. Strict compliance limits the malpractice cases that go forward, assures that parties to a malpractice dispute have the opportunity to consider other alternatives before suit is filed thereby reducing the cost of such cases, and provides the best opportunity for mediation to occur.

Third, even if the trial court's analysis distinguishing between notice and service is correct, it still should have dismissed Ms. Cogger's suit. The statute provides that if the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the service of the notice. The trial court reasoned that this provision allowed only those plaintiffs who "served" the 90 day notice to have the advantage of the extended statute of limitation. (RP 13, lns. 7-17.) In other words, according to the trial court, the statute distinguishes between notice and service, and plaintiffs wanting to extend the statute of limitations must "serve" their 90 day notice. What the court did not consider was that Ms. Cogger extended the statute of limitation. Therefore, under the court's analysis, she had to "serve" her notice. Medical malpractice lawsuits have a three-year statute

of limitations. RCW 4.16.350(3). The three years begin to run from the date of the act alleged to have caused the injury. *Morris v. Swedish Health Services*, \_\_\_ Wn. App. \_\_\_, 200 P.3d 261, 263 (2009). Ms. Cogger's action arose either on August 5, 2003 the date of her hysterectomy, or August 15, 2006, the date of Ms. Cogger's last contact with Dr. Blakeney. Thus, the statute of limitations would have run at the latest on August 13, 2006. Ms. Cogger delivered her notice to the receptionist on August 3, 2006. This puts her notice within 90 days of the expiration of the applicable statute of limitations. According to the trial court's analysis, therefore, Ms. Cogger was required to "serve" her notice on Dr. Blakeney. Thus, even under its analysis, the trial court should have required Ms. Cogger to prove service.

If service is the standard, Ms. Cogger clearly did not meet it. Where a statute calls for service on a particular individual, only personal service on that individual is sufficient. See *Hastings v. Grooters*, 144 Wn. App. 121, 182 P.3d 447 (2008)(where, under RCW 61.30.120, service is to be made upon "the seller or the seller's agent or attorney," service on attorney's receptionist is insufficient); *French v. Gabriel*, 57 Wn. App. 217, 225-26, 788 P.2d 569 (1990), aff'd, 116 Wn.2d 584, 806 P.2d 1234 (1991)(personal service was found insufficient where process was left with the attorney's

secretary); *Nitardy v. Snohomish County*, 105 Wn.2d 133, 712 P.2d 296 (1986)(under RCW 4.28.080 service on secretary to the county executive was not service on auditor). Ms. Cogger delivered her notice to a receptionist at Dr. Blakeney's office, a person Ms. Cogger did not even establish was employed by Dr. Blakeney. Ms. Cogger did not serve her 90 day notice on Dr. Blakeney.

Notice to a person is just that: notice to the person. "Service" is a term of art which, while sufficient to meet due process concerns, may or may not result in notice to the person. In its 2007 amendments to RCW 7.70.100, the Legislature identified alternate means of giving the 90 day notice called for by that statute. Laws of 2007, ch. 119 §1(1). The statute in affect at the time of this suit did not. As it existed in 2006, RCW 7.70.100 required a plaintiff to give notice to the defendant or, at best, under certain circumstances "serve" the defendant. In this case, Dr. Blakeney is the defendant. Thus, he was the one to whom Ms. Cogger was required to give or serve notice. She gave notice to a receptionist at the office where Dr. Blakeney worked. Because she did not give or serve notice to Dr. Blakeney, she was not entitled to file suit against him. The trial court erred when it denied Dr. Blakeney's motion to dismiss.

**B. Sufficient evidence did not support the jury verdict. Ms. Cogger did not establish that Dr. Blakeney caused or contributed to the bladder rupture with pelvic abscess and peritonitis which formed the basis of her claim.**

There must be substantial evidence, as opposed to a mere scintilla, to support a jury verdict. A verdict cannot be founded on mere theory or speculation. *Morse v. Antonellis*, 112 Wn. App. 941, 946, 51 P.3d 199 (2002). Substantial evidence is evidence that would convince an unprejudiced, thinking mind of the truth of the assertion. *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980). The absence of substantial evidence may be raised for the first time on appeal. RAP 2.5(a); *Roberson v. Perez*, 156 Wn.2d 33, 39-40, 123 P.3d 844 (2005).

RCW 7.70.030 provides in part that no award shall be made in any action or arbitration for damages for injury occurring as the result of health care unless the plaintiff establishes that injury resulted from the failure of a health care provider to follow the accepted standard of care. The plaintiff has the burden of proving each fact essential to an award by a preponderance of the evidence. *Id.* To support a medical malpractice action, a plaintiff must present expert medical testimony to show that the plaintiff's injuries were

proximately caused by the defendant's alleged negligence. RCW 7.70.040 (2); *Reece v. Stroh*, 128 Wn. 2d 300, 308, 907 P. 2d 282 (1995); *Harris v. Groth*, 99 Wn. 2d 438, 449, 663 P.2d 113 (1983). When faced with a technical causation issue, it is unreasonable to rely on lay opinion. *Id.* Rather, the plaintiff must prove the element of proximate cause by the testimony of a medical expert. *Pelton v. Tri-State Mem. Hosp.*, 66 Wn. App. 350, 355, 83 P.2d 1147 (1992).

In a case such as this, medical testimony must be relied upon to establish the causal relationship between the liability-producing situation and the claimed physical disability resulting therefrom. The evidence will be deemed insufficient to support the jury's verdict, if it can be said that considering the whole of the medical testimony the jury must resort to speculation or conjecture in determining such causal relationship. In many recent decisions of this Court we have held that such determination is deemed based on speculation and conjecture if the medical testimony does not go beyond the expression of an opinion that the physical disability "might have" or "possibly did" result from the hypothesized cause. To remove the issue from the realm of speculation, the medical testimony must at least be sufficiently definite to establish that the act complained of "probably" or "more likely than not" caused the subsequent disability.

*O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968).

Ms. Cogger's claim was not that Dr. Blakeney fell below the standard of care in performing her hysterectomy. Her claim was that he failed to repair

a bladder tear that occurred during surgery. As her counsel stated:

[W]e are not making an allegation that tearing the bladder when you are doing a hysterectomy falls below the standard of care. That is a known risk. Once you tear the bladder, however, you have to repair it properly.

(RP 23, Ins. 19-23.) Though it appears simple, her claim took a curious route.

The parties did not dispute a bladder tear occurred during the surgery. Dr. Blakeney documented the tear in his post-operative report. (Exhibit 4 at P 0245.) The dispute centered on whether it was this tear or a subsequent bladder rupture that caused Ms. Cogger's post surgical problems. Central to Ms. Cogger's case was her contention that the tear occurred during the surgery and Dr. Blakeney failed to repair it. Dr. Blakeney identified the tear that occurred during surgery as located at the top front of the bladder. He repaired that. (RP 316-17, 319-20, 356-57, 560.) The tear underlying Ms. Cogger's claim was located transversely along the bottom back wall of the bladder. (RP 337, 349, 356-57; CP 248.)

Ms. Cogger's case was premised on the tear that Dr. Blakeney repaired being the tear underlying her claim. Dr. Blakeney denied that contention. (RP 337-39.) In her support, Ms. Cogger presented two medical

witnesses: Dr. Jimmy W. Ross and Dr. Kevin Ward. She presented Dr. Ross by deposition.<sup>3</sup> He testified that the tear Dr. Blakeney identified and his repair of it met the standard of care, but Dr. Blakeney fell below the standard of care when he removed a catheter from Ms. Cogger four days after the surgery. (CP 353.) If Dr. Blakeney had left the catheter in longer, Dr. Ross opined, urine in the bladder would not have broken down the repair. (CP 354.) His opinion is premised on the tear that caused Ms. Cogger's post-hysterectomy treatment being the tear that Dr. Blakeney repaired, and the repair failing due to breakdown. However, nowhere in his testimony does Dr. Ross provide evidence to support either the proposition that the tear along the back of Ms. Cogger's bladder was the tear Dr. Blakeney repaired, or that the tear along the back of her bladder was a tear that had been repaired and then failed. (See generally CP 346-55.)

Ms. Cogger also presented the testimony of Dr. Ward by deposition.<sup>4</sup>

Dr. Ward acknowledged that the injury he repaired did not match the injury

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3. Dr. Ross' 9-page deposition was taken on April 23, 2008, after Dr. Blakeney's attorney withdrew. (Compare CP 346 and CP 152.) Dr. Blakeney was not represented at, and not present for, the deposition. (CP 347.)

4. Dr. Ward's deposition occurred on either February 12 or March 12, 2007 – the date on the front page is different than the dates at the bottom of the pages of transcript. (CP 236-37.) Dr. Blakeney's attorney had not yet withdrawn and he was represented. (CP 237.)

Dr. Blakeney described in his post-operative report. (CP 258-59; 308.) The injury Dr. Blakeney described was at the front of the bladder in a vertical line, while the injury Dr. Ward saw was at the back in a horizontal line. (CP 259, lns. 5-13). In his words: "I'm a little hard-pressed to know exactly where the original injury was on the basis of what I saw at the time of the cystoscopy." (CP 260.) And, he testified, while it was possible he might have seen evidence of Dr. Blakeney's August 5<sup>th</sup> bladder repair when he (Dr. Ward) repaired her bladder on August 17<sup>th</sup>, it was not likely because the sutures would not have been present then. (CP 260; 304-05.) Dr. Ward did testify that because of the size and condition of the tear, "he was hard-pressed to anticipate how the defect [he repaired on August 16<sup>th</sup>] would have occurred later than August 5<sup>th</sup>." (CP 263.) However, later in his testimony he acknowledged that a tear of the size he corrected would have been plainly visible during the August 5<sup>th</sup> surgery (CP 309), that it might have resulted not from a faulty repair, but from a breakdown of tissue around the repair (CP 307-08), and that he could not tell if the tear occurred on August 5<sup>th</sup> or later.

- Q. Can you tell us that this occurred on the 5<sup>th</sup> versus the 10<sup>th</sup>, based upon what you saw?
- A. Based upon what I saw, I mean, I can't tell you anything about how it got there based purely on what I saw.
- Q. Or how long it had been there, other than that it obviously

wasn't a brand new injury?

A. I know for a fact it's not a brand-new injury. That's correct.

Q. Okay. But you can't tell us whether it was on the 5<sup>th</sup> or the 10<sup>th</sup> or the 12<sup>th</sup>?

A. Based purely on what I saw, I can't say anything other than there was an injury which was not fresh.

(CP 315-317.)

Simply put, noone testified to Ms. Cogger's ultimate theory: That more probably than not the reason for the tear that was treated on August 17, 2003 was the failure of Dr. Blakeney's repair on August 5<sup>th</sup> due to premature removal of the catheter. The theory depends on the tear that Dr. Blakeney repaired on August 5<sup>th</sup> being the same tear Dr. Ward repaired on August 17<sup>th</sup>; and that Dr. Blakeney simply wrongly described the location of the tear he repaired, placing it in front of the bladder instead of in the back.

In place of evidence, Ms. Cogger asked the jury to reach that conclusion as a presumption. That fact is illustrated by Plaintiff's closing argument:

Before we even get there, you have to ask your cell for the question, and Elise I did, what is this a same tear that Dr. Blakeney began that Dr. Ward saw on August 16? I think it is very clear. Again, the standard is more likely than not. You heard the judge's instructions. More likely than not is it probable. In fact, the tear that Dr. Ward saw was the same tear that Dr. Blakeney should have repaired. There is only to other conceivable possibilities. Let's look at those.

One is that Dr. Blakeney lacerated the bladder twice. I think it is pretty unlikely because I think that even Dr. Blakeney would have made that notation. Obviously, if he did lacerate it twice and didn't make the note and didn't find that fell below the standard of care, I don't think that's what was likely what happened here.

Second, the bladder is somehow spontaneously tore. Again, there is no evidence that this could even happen. The bladder or something that is flexible can move around by its very nature.

(RP 517-18). In fact, the second theory is precisely what Dr. Blakeney's evidence to support. He reviewed in detail factors in her history that made her susceptible to complications. (RP 298-99, 300-302, 303-04.) These included a history of pelvic scar tissue from a previous Caesarean section, pelvic inflammatory disease, and smoking which put her at risk of bladder rupture and bladder fistulas. (Id.; Exhibit 16 at 1.)

To be sure, Ms. Cogger undoubtedly will focus on her claim of Dr. Blakeney's lack of treatment during the eight days between her release from the hospital on August 8, 2003 and her appearance at the emergency room on August 16<sup>th</sup>. While emotional, that testimony serves only to deflect attention. Dr. Blakeney's care is actionable only if it caused or contributed to Ms. Cogger's condition. However, even Dr. Ward acknowledged that if the tear existed and had been discovered as early as August 12<sup>th</sup>, he could not say with

any level of certainty that her condition or course of recovery would have changed.

- Q. Let's say you had done your surgery on the 12<sup>th</sup>, five days earlier. Can you tell us, with reasonable medical probability or certainty, that her outcome would be significantly better than what she had?
- A. No, I can't speak to that.
- Q. Would it make sense to you that if you had done the surgery on the 12<sup>th</sup> versus the 17<sup>th</sup>, that the course of events would likely be similar to what she's had?
- A. Again, there are arguments pro and con, and I think it's fairly speculative.
- Q. So you can't tell us that she would do better if she had been operated on on the 12<sup>th</sup>?
- A. I can't tell you that her ultimate outcome would be different.
- Q. Or the course of events leading to the ultimate outcome would be substantially different?
- A. I can't say for sure that it would be substantially different.
- Q. Or with reasonable probability that it would be substantially different?
- A. You know, again, with the reasonable probability, not necessarily.

(CP 324.) Substantial evidence does not support Ms. Cogger's theory of recovery or the jury verdict.

**C. The trial court improperly allowed Dr. Ward to testify regarding his treatment of other of Dr. Blakeney's patients.**

A trial court's decision to admit evidence is reviewed for abuse of

discretion. Discretion is not abused unless the decision is manifestly unreasonable, is based on untenable grounds, or was made for untenable reasons. *State v. C.N.H.*, 90 Wn. App. 947, 949, 954 P.2d 1345 (1998).

Ms. Cogger presented Dr. Ward's testimony by deposition. In his deposition, Dr. Ward testified that on three or four occasions he had to treat other bladder injuries on Dr. Blakeney's patients. (CP 281-285)(See Appendix A). The trial court originally denied Ms. Cogger's request to read that testimony. (RP 186.) Ms. Cogger renewed the request at the end of Dr. Blakeney's testimony because Dr. Blakeney had "opened the door" by testifying that he had just three abdominal hysterectomy bladder injuries during his career (see Exhibit 15 at 2), and counsel wanted to impeach that testimony. (RP 482-84.) The reference was one sentence in Dr. Blakeney's review of his medical background. (RP 276, Ins. 15-18.) An extensive discussion occurred (RP 483-89) during which the trial court vacillated between disallowing the testimony because it lacked specificity (RP 484: "he hasn't checked any records"; "we may be talking about apples and oranges here") and interjected a collateral issue (RP 485), to allowing it without explanation. (RP 489.) Ultimately, the court allowed the testimony. (RP 489, Ins. 13-16.) Ms. Cogger's counsel cited it extensively in closing

argument. (RP 547-50)(Appendix B).

Evidence rule 404(b) generally prohibits evidence of other wrongs or acts. Evidence of prior wrongs or acts must be closely scrutinized and admitted only if it meets two distinct criteria: (1) it must be logically relevant to a material issue before the jury; (2) if the evidence is relevant, its probative value must outweigh its potential for prejudice. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

If the evidence is admitted, an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose or purposes.

*Id.* ER 404(b) is only the starting point. It must be read in conjunction with ER 402 and 403. *Id.* at 361. Prior to admitting the testimony, the trial court should balance on the record whether the probative value of the testimony substantially outweighs any undue prejudice. *State v. Halstein*, 122 Wn.2d 109, 126-27, 857 P.2d 270 (1993).

In this case, the trial court did not engage in any on-the-record balancing. After noting the reasons why it should not admit the testimony, the court simply decided to allow it. The total of the court's ruling is: "I have looked at the whole thing now in some better detail, and I'm going to permit

it almost entirely.” (RP 489, lns.13-15.)

Moreover, Dr. Ward’s testimony had little if any probative value. Plaintiff herself presented testimony that incidental cystotomy is a recognized risk of abdominal hysterectomies. She did not, therefore, make a claim based on Dr. Blakeney’s lack of surgical skill. The evidence that Dr. Blakeney had three as opposed to some other number of such complications thus had no material impact on her case. Because of the lack of cross examination on the issue when Dr. Ward’s deposition was taken, however, his testimony was both incomplete and misleading. As the trial court noted, Dr. Ward was questioned without having consulted records for any patient to confirm either the nature of the condition he treated or that the patient indeed was Dr. Blakeney’s. Indeed, Dr. Ward did not even identify the patients so Dr. Blakeney could review their records. He was not questioned whether the condition of any of the patients he treated was an expected or natural risk of the treatment or instead the result of misconduct or negligence. Nevertheless, his testimony, and the purpose to which Plaintiff’s counsel put it, left the unmistakable impression that the other cases resulted from failure on Dr. Blakeney’s part. Dr. Blakeney’s inability to cross-examine Dr. Ward on the testimony prevented him from testing its veracity, compounding the

prejudice. Dr. Ward was not at trial – Ms. Cogger had established his unavailability for trial. (CP 188-91.) And, the court gave no limiting instruction.

Simply put, Ms. Cogger seized on Dr. Blakeney’s introduction of minor, irrelevant information to justify presenting previously excluded, highly inflammatory, un rebuttable testimony suggesting that Dr. Blakeney was unskilled and unqualified. She did not use the testimony simply to impeach Dr. Blakeney’s credibility or rehabilitate Dr. Ward’s, but to suggest that Dr. Blakeney had caused the very same problems she experienced in other patients. Without a limiting instruction, the court allowed this to occur.

Before evidentiary error justifies a new trial, the error must be shown to be harmful. “Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial.” *Thomas v. French*, 99 Wn.2d 95, 104, 859 P.2d 1097 (1983). If there is no way to know what value the jury placed upon improperly admitted evidence, a new trial is necessary. *Id.* at 105.

In this case, the nature of the evidence shows its prejudice. Ms. Cogger did not claim that the occurrence of the cystotomy breached the standard of care. Yet by introducing evidence suggesting Dr. Blakeney had

caused an inordinate number of the those injuries, she invited the jury to reach that conclusion. The implication of Dr. Ward's testimony and her use of it was not that her condition resulted from the failure to properly treat a known risk, but that Dr. Blakeney's lack of skill enhanced the known risk, and other patients had been, and possibly were being, subjected to that lack of skill. The evidence could clearly have inflamed the jury to punish Dr. Blakeney well beyond the merits of this particular case. The evidence clearly could have affected the outcome of the trial. For that reason, the error in admitting it requires a new trial.

### **CONCLUSION**

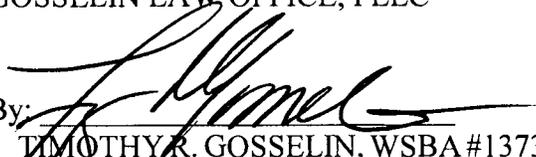
Circumstances forced Dr. Blakeney was forced to represent himself against two highly skilled lawyers. The disparity in skill cannot, however, overcome error. Ms. Cogger failed to perfect her claim by properly giving notice under RCW 7.70.100. Her claim never should have gone to trial. Having gone to trial, Plaintiff still bore the burden of showing that Dr. Blakeney violated the standard of care. Because she failed to provide evidence either that Dr. Blakeney caused the cystotomy on which she based her claim, that he violated the standard of care by not discovering it, or that if he had discovered it her outcome would have been different, she failed to

meet her burden and her claims should be dismissed. But even if she presented substantial evidence that Dr. Blakeney violated a standard of care, because the court wrongly allowed Ms. Cogger to present testimony and argument regarding other alleged patients of Dr. Blakeney's, Dr. Blakeney is entitled to a new trial.

For these reasons, Dr. Blakeney asks that the judgment entered against him be reversed, and Ms. Cogger's claims be dismissed. In the alternative, he asks that the case be remanded for retrial.

Dated this 24<sup>th</sup> day of August, 2009.

GOSSELIN LAW OFFICE, PLLC

By: 

TIMOTHY R. GOSSELIN, WSBA #13730  
Attorney for Appellant

# **Appendix A**

1 but doing so to in fact treat the pain?

2 A Yes.

3 Q So he said other things about her. What else did he  
4 say besides difficult patient?

5 A That was literally it. It was a very short  
6 conversation.

7 Q Did you ask him any questions?

8 A Not at that time, no.

9 Q After that, have you had other conversations with him?

10 A No, sir. Not about Ms. Cogger.

11 Q Have you ever had to treat other of Dr. Blakeney's  
12 patients for complications they experienced during his  
13 surgeries?

14 A Yes.

15 Q How many times?

16 A Three or four that I can think of off the top of my  
17 head.

18 Q What did those involve?

19 A Bladder injuries.

20 Q All three or four of them?

21 A Yes, sir.

22 Q And of this same nature?

23 A Similar.

24 Q Did they occur when he was performing a hysterectomy?

25 A I believe all of them were hysterectomies. I can't

1 promise you that, but I believe they were.

2 Q And what time period are we talking about? Is this  
3 within a year, two years, or a five-year time period?

4 MS. LEEDOM: Relative to what,  
5 Counsel?

6 MR. MUNGIA: To this surgery, to the  
7 August 17th.

8 MS. LEEDOM: '03?

9 MR. MUNGIA: Correct.

10 A Over about four years.

11 Q (By Mr. Mungia) Were they all prior to this surgery?

12 A No. I can think of one prior to this surgery. I can  
13 think of three subsequent.

14 Q Did all of them involve a patient who had a bladder  
15 injury post-hysterectomy, where he didn't discover it?

16 A No.

17 Q Did any of them?

18 A I believe one did for sure.

19 Q So in one patient, he did a hysterectomy, injured the  
20 bladder, didn't discover it, and then you found it  
21 subsequently?

22 A I was called to see that patient subsequently, yes.

23 Q Was it the same kind of defect, where it was in the  
24 posterior part of the bladder?

25 A It was roughly in the same location, yes.

1 Q Same size?

2 A Yes.

3 Q Was this the one before or after Ms. Cogger?

4 A This was after Ms. Cogger.

5 Q Tell me about the other three.

6 A One was -- actually, one was a vesicovaginal fistula.

7 That is, the bladder had -- was communicating directly

8 to the vaginal cuff after hysterectomy; that is, where

9 the cervix is amputated and the vagina is sealed, sewn

10 shut.

11 One was actually where I was consulted to see the

12 patient after an injury had been recognized and

13 closed, and he had sought recommendations for

14 management of the patient and the catheter

15 postoperatively.

16 And another was an open injury/laceration of the

17 bladder, which required closure.

18 Q So the vesicovaginal fistula, isn't that what

19 Ms. Cogger had subsequently?

20 A That's correct, sir.

21 Q So this happened on another of Dr. Blakeney's

22 patients?

23 A Yes, sir.

24 Q How did that result from the bladder -- from the

25 hysterectomy?

1 A I believe -- and again, I haven't reviewed her records  
2 for this, and it was some time ago, but I believe  
3 there was an injury to the bladder that was healed or  
4 closed; recognized, closed. And I got a call from  
5 Dr. Blakeney that a lady post abdominal hysterectomy  
6 was draining copious quantities of clear fluid from  
7 her vagina, and he asked me to see her.

8 Q Did you repair the fistula on that patient?

9 A Yes, I did.

10 Q The second one you mentioned, there was an injury that  
11 he actually closed. Why did he consult you?

12 A The injury was closed, the patient was on the nursing  
13 unit postoperatively, and he asked me to recommend  
14 postoperative care and catheter management.

15 Q And the third one, it sounded like you closed the  
16 injury?

17 A Yes, sir, I did.

18 Q So how did that come about?

19 A I was actually called in to that operating room when  
20 Dr. Blakeney and her primary care physician were  
21 exploring her abdomen for problems postoperatively.  
22 And they had explored her abdomen and found that there  
23 was a large hole in the bladder, and called me and  
24 asked me to come fix it.

25 Q Do you know any other times Dr. Blakeney has had

# **Appendix B**

1 show that. Dr. Ward, when he is giving his deposition  
2 testimony, if you'll remember, he was looking at the  
3 four photos that he took showing the laceration. Why  
4 do you care when he dictated it? That's not the  
5 important thing. We want accuracy. As we have seen  
6 with some of Dr. Blakeney's notes, you could dictate  
7 right away, but not be accurate or be thorough or be  
8 complete. That's what we are worried about is the  
9 goal. Not the process, the product is what we are  
10 concerned about.

11 Dr. Ward then didn't operate as quickly as Dr.  
12 Blakeney would have liked to have see. Wait a second.  
13 Again, a little curious. He is saying, this is a major  
14 problem. You have a lacerated bladder. You have to  
15 get in right away. He is critical of Dr. Ward. Oh, my  
16 goodness. Oh, my goodness. She started complaining  
17 she was having blood in her urine, which means that the  
18 repair failed, and he sat on his hands. Now he is  
19 critical of another doctor who went through the steps?

20 Let me go through this -- going through this --  
21 and remember in Dr. Blakeney's opening statement where  
22 he made his outline of his past experience, and he put  
23 down he has only had three bladder lacerations in his  
24 career. Somebody hopefully remembers that. It is in  
25 the very bottom of the second page of his background.

1 I asked him, on cross, okay, was one of those Kim  
2 Cogger? Yes. The other two, were they treated by  
3 Dr. Ward? He said, no. He says, you know, Dr. Ward --  
4 remember, his testimony? Dr. Ward never saw -- never  
5 had seen any of my patients. I have never talked to  
6 Dr. Ward. He saw one of my patients -- that I know  
7 of -- six weeks after I treated her, but that was it.

8 Well, that's what we got on in the rebuttal  
9 testimony. Remember, Dr. Ward's testimony, have you  
10 ever had to treat any other of Dr. Blakeney's patients  
11 for complications they experienced during the  
12 surgeries?

13 Answer, yes.

14 Question, how many times?

15 Answer, three or four that I can think of off the  
16 top of my head, and these did not include Kim Cogger.

17 Let me just go through this once. Patient number  
18 one -- question, so in one patient, he did a  
19 hysterectomy, injured the bladder, didn't discover it,  
20 and then you found it subsequently?

21 Answer, I was called to see that patient  
22 subsequently, yes.

23 Question, was it the same kind of defect where it  
24 was in the posterior part of the bladder?

25 Answer, it was roughly in the same location, yes.

1           Question, same size?

2           Answer, yes.

3           That's number one.

4           Number two, and I got a call from Dr. Blakeney  
5           that a lady's post-abdominal hysterectomy was draining  
6           copious quantities of clear fluid from her vagina, and  
7           he asked me to see her. "He" being Dr. Blakeney.

8           Number three, and he asked me to recommend  
9           post-operative care and catheter management that was  
10          the third one.

11          Fourth -- I'm, obviously, skipping around.  
12          Fourth, though, question, so how did that come about?  
13          We are on number four.

14          Answer, I was actually called into the operating  
15          room when Dr. Blakeney and her primary care physician  
16          were exploring her abdomen for problems  
17          post-operatively, and they had explored her abdomen and  
18          found that there was a large hole in the bladder and  
19          called me and asked me to fix it.

20          So, significant for a couple of reasons -- and he  
21          testified that the first one happened before  
22          Kim Cogger. The last three were after Kim Cogger. So,  
23          why is this significant? Dr. Blakeney got up on the  
24          stand and told you that he had only had three total:  
25          One involving Kim Cogger; two that Dr. Ward did not

1 treat.

2 Now, obviously, going around your background, you  
3 can say anything you want. How can you check how many  
4 bladder lacerations that doctors have had? Unless you  
5 are, in fact, lucky enough to get a subsequent treating  
6 doctor who happened to see that first doctor's  
7 patients. Other than that, the doctor can get up there  
8 and say anything. That's what happened here. Dr. Ward  
9 directly contradicts that.

10 The second point that is significant here is that  
11 Dr. Blakeney now is very critical of Dr. Ward. He is  
12 saying, well, look at him. He dictates late. He  
13 waited too long for this surgery. This was the same  
14 Dr. Blakeney that, after Kim Cogger, asked Dr. Ward  
15 three times, three different patients, to treat his  
16 patients, to help him out. Do you really think that  
17 Dr. Blakeney doesn't trust the judgment of Dr. Ward?  
18 He is the one calling Dr. Ward saying, help me repair  
19 these bladder lacerations.

20 I went through the inconsistencies. That was one  
21 of them. Again, it is small, but it's very concrete.  
22 How can anybody in the healthcare profession say, of  
23 course, if you are going to quote someone, you are  
24 going to -- in a medical, you put that in quotes. Of  
25 course, that was not the patient's language because if

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

KIMBERLY A. COGGER, a  
single woman in her individual  
capacity

Respondent,

vs.

SANDERS S. BLAKENEY,  
M.D. and "JANE DOE"  
BLAKENEY

Appellants.

NO. 38742-5-II

DECLARATION OF  
SERVICE OF BRIEF  
OF APPELLANT

STATE OF WASHINGTON  
BY:   
DATE: \_\_\_\_\_  
COURT REPORTER  
CLERK OF COURT

On said day below, I personally delivered a true and correct copy of  
the Brief of Appellant to the following:

Salvador A. Mungia  
GORDON THOMAS HONEYWELL MALANCA  
PETERSON & DAHEIM LLP  
P.O. Box 1157  
Tacoma, WA 98401-1157

Thomas B. Vertitis  
PFAU COCHRAN VERTITIS KOSNOFF PLLC  
911 Pacific Avenue, Suite 200  
Tacoma, WA 98402-4413

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

Signed this 21<sup>st</sup> day of August, 2009, at Tacoma, Washington

  
Timothy R. Gosselin  
Gosselin Law Office, PLLC