

NO. 42141-1-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

(CLARK County Cause No. 08-2-08862-0)

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SUMMER V. RICHARDS, as duly appointed personal representative of the estate of BRIAN W. RICHARDS; SUMMER V. RICHARDS, individually; SUMMER V. RICHARDS as duly appointed guardian of the estate and person of BRAEDEN F. RICHARDS, DOB 2-9-2002; SUMMER V. RICHARDS as duly appointed guardian of the estate and person of LAELA L. RICHARDS, DOB 9-16-2004; and SUMMER V. RICHARDS as duly appointed guardian of the estate and person of CHENAYA R. RICHARDS, DOB 5-11-2006,

*Appellant,*

vs.

AMERICAN MEDICAL RESPONSE NORTHWEST, INC., a foreign corporation doing business in Washington; SCOTT SQUIRES; and LEWIS FOX,

*Respondents.*

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OPENING BRIEF OF APPELLANT

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## I. INTRODUCTION & SUMMARY OF ARGUMENT

Brian Richards, a 32-year-old husband and father of three young children, died of an irregular heartbeat on June 9, 2006. Tragically, had Brian been treated at a hospital after he called 911 on the morning of his death, he would be alive today. But Brian did not receive that care because the emergency responders who came to his home that morning failed to follow protocols, and did not take Brian<sup>1</sup> to the hospital. Summer Richards, Brian's wife, brought this wrongful death suit against American Medical Response Northwest ("AMR") and its employees, Scott Squires, a paramedic, and Lewis Fox, an emergency medical technician ("EMT"), in 2008.<sup>2</sup> Central to this case was whether Squires and Fox violated emergency response protocols that mandated specific care for cardiac patients like Brian Richards.

During the litigation, Ms. Richards sought discovery from AMR about its emergency response protocols and its internal investigation of its employees' response to Brian's 911 call. But instead of meeting its discovery obligations, AMR embarked on a two-year pattern of withholding discoverable information critical to Ms. Richards' case.

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<sup>1</sup> For the sake of clarity, this brief will frequently refer to Summer and Brian Richards by their first names.

<sup>2</sup> Summer Richards also brought suit against two co-defendants, Dr. Arthur Simons and Mountain View Medical PLLC. Ms. Richards does not appeal the jury's verdict in their favor.

Among the most egregious of these abuses was AMR's denial of the existence of its protocols and the records of its investigation, requiring Ms. Richards to file three motions to compel. And yet, on the eve of trial, the trial court merely authorized Ms. Richards to reopen depositions at AMR's expense and awarded her attorneys' fees for her motions. The trial court's failure to enter default – the only appropriate sanction against AMR – rewarded the conduct that sanctions are intended to deter.

Not only did the trial court commit prejudicial error when it failed to appropriately sanction AMR, it committed other prejudicial errors once the trial began. First, although substantial evidence supported Ms. Richards' claim that AMR negligently retained and supervised Squires and Fox, and based on an incorrect legal analysis, the trial court dismissed this claim. Next, without conducting the required balancing test, the trial court precluded Ms. Richards from impeaching a key defense witness with his felony conviction. Finally, the trial court *sua sponte* included a jury instruction that left out provisions of the applicable law, which prejudiced Ms. Richards' ability to argue her theory of case, overemphasized Respondents' theories, and rendered the instruction misleading at best and a misstatement of the law at worst. Despite the significance of these errors, the trial court denied Ms. Richards' motion for a new trial after the jury returned a verdict in favor of Respondents.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred by failing to order a meaningful sanction for AMR's ongoing discovery abuses. RP 26:2-25.
2. The trial court erred in dismissing Ms. Richards' claims against AMR for negligent retention and supervision when AMR had supervisory authority over its employees and substantial evidence supported the claims. RP 1832:23-1834:3, 1834:16-1835:1.
3. The trial court erred in excluding evidence of the prior felony conviction of Travis Hardin, a key defense witness. RP 1363:10-1364:9, 1365:12-1366:1, 1366:3-5; CP 919-22, 1265-9.
4. The trial court erred in giving jury instruction 16, which quoted only part of RCW 18.71.210, the first responder immunity statute. CP 1325; RP 2518:15-2519:14.
5. The trial court erred in denying Ms. Richards' motion for a new trial under CR 59(a). CP 1346-62.

## **III. ISSUES PRESENTED**

1. Whether this Court should reverse the trial court's decision to deny default as a sanction against Respondent AMR, when AMR's discovery abuses were willful and prejudiced Ms. Richards' ability to prepare for trial. (Assignment of Error No. 1)

2. Whether this Court should reverse and remand for a new trial because the trial court dismissed Ms. Richards' claims for negligent retention and supervision based on the trial court's stated opinion that these claims were "weak," even though Ms. Richards presented substantial evidence supporting those claims. (Assignment of Error No. 2)

3. Whether an employer may avoid liability for negligent retention or supervision because its employees are certified by the state of Washington and are members of a union. (Assignment of Error No. 2)

4. Whether this Court should reverse and remand for a new trial because the trial court failed to balance, on the record, the factors supporting admission of Travis Hardin's felony conviction under Evidence Rule 609(a)(1), resulting in the exclusion of evidence that was more probative than prejudicial and would have, within reasonable probability, led to a different outcome. (Assignment of Error No. 3)

5. Whether this Court should reverse and remand because the trial court's inclusion of a jury instruction consisting of part of the verbatim text of the first responder immunity statute overemphasized the defense theory of the case, misstated the law, and prevented Ms. Richards from arguing a theory of her case. (Assignment of Error No. 4)

6. Whether this Court should reverse and remand because the trial court denied Ms. Richards' motion for a new trial, despite the

individual and cumulative prejudicial effect of the trial court's errors.

(Assignments of Error Nos. 2-5)

#### IV. STATEMENT OF THE CASE

##### A. Statement of facts

##### 1. Squires and Fox had a troubled employment history with AMR.

AMR is a private ambulance and emergency response company under contract with Clark County, Washington. RP 467:9-18. Under that contract, AMR provides ambulances staffed by paramedics and EMTs who are in its employ and under its supervision. RP 1133:13-16, 1314:11-1315:2. In Washington State, paramedics and EMTs must be certified by the Department of Health, and are permitted to perform certain medical functions, provided they work under the supervision of a licensed physician. RP 471:25-473:11; *see also* RCW 18.71.205.

AMR hired Squires and Fox, also Respondents in this case, as a paramedic and EMT, respectively, in 2000. CP 175; RP 1323:13-15. Both Squires and Fox had a troubled employment history with AMR. RP 1314:5-1333:2; Exs. 21A, 22. Within just two months of beginning work, Fox was reprimanded for weaving in and out of traffic while on duty. RP 1323:16-19. In 2001, AMR noted his "poor assessment skills, mediocre mapping ability, anger management problems, insufficient medical

knowledge, no apparent desire to learn, poor chart writing” and problems responding “defensively to constructive criticism.” RP 1328:17-23. Later that year, AMR reprimanded Fox after his ambulance was found parked in front of a gun store, and noted that he had “jeopardized [AMR’s] county contract and patient care.” Ex. 22, p.3. That same month, Fox put his head through a wall at work after a game of ping pong, earning another reprimand. RP 1337:4-18. Between 2002 and 2008, Fox was reprimanded for numerous infractions, including tardiness, failing to be at his post, improper charting, and falling asleep on duty. RP 1331:3-1333:2.

In 2001, AMR reprimanded Squires for repeated tardiness, and fired him a month later for that same infraction. RP 1316:1-17. Squires was rehired on a probationary status in 2002. RP 1317:21-24. Within two months of his rehire, Squires failed to get patient signatures on five charts, as required; a few months later AMR issued Squires another warning for tardiness. RP 1318:11-1319:8, 1320:23-1321:1. Yet, Squires continued to be late for work, and was suspended from multiple shifts in 2003. RP 1320:15-24. In 2005, Squires’ certification expired because he failed to complete his paperwork on time. RP 1322:11-24. Despite their employment records, AMR permitted Squires and Fox to work as a team, as they did the morning of Brian Richards’ death. RP 1334:2-17.

**2. Brian Richards sought medical attention for chest pain.**

Brian Richards was 32 years old on June 8, 2006. Ex. 1, p.1. That day, he came home from work and told his wife, Summer, that he was experiencing chest pains and pain radiating down his left arm. RP 905:1-12. Because his pain did not resolve after a short rest, the couple went to an urgent care clinic near their home. RP 905:18-25, 907:9-20; Ex. 1. There, Dr. Arthur Simons performed a 12-lead electrocardiogram (“EKG”); the results were normal. RP 909:19-23. Dr. Simons scheduled Brian for a cholesterol check the next day, and sent him home with instructions to take aspirin and heartburn medication, and to call 911 or go to the hospital if his pain worsened. RP 909:21-9:10:4; Ex. 1, p.2.

Brian went home and did as Dr. Simons recommended. RP 910:21-911:2. Early the next morning, he awakened his wife. RP 911:11-21. Brian told her that the pain in his chest and arm had worsened, and said “I don’t want to die. What do I do? What do I do?” *Id.* Summer called her parents and began to wake their three young children so the family could take Brian to the hospital. *Id.* Realizing, however, that waking all three children and driving 20 minutes to the hospital would take a long time, they decided to call 911. RP 912:4-9.

Clark County District 11 firefighters were first on the scene. RP 1443:11-16. Summer stood near Brian and observed him explaining his

symptoms of chest and arm pain. RP 917:23-918:3. Concerned that Brian was experiencing cardiac problems, the firefighters obtained a 4-lead EKG. RP 1443:9-16. A few minutes later, an AMR ambulance staffed by Squires and Fox arrived. RP 1335:20-22. Squires and Fox were near the end of their shifts when they arrived at the Richards' home. RP 1397:16-24. They remained at the Richards' home for at most 11 minutes. Ex. 3.

What happened during those minutes is contested. It is not disputed, however, that Clark County and AMR have protocols for how its paramedics and EMTs must treat patients experiencing possible cardiac problems. RP 470:16-471:24, 481:9-492:20; Exs. 16, 17. In those circumstances, the emergency responders must obtain a 12-lead EKG, and must transport the patient to a hospital. RP 484:16-23, 842:1-14, 844:24-847:18, 1040:1-5. If the patient refuses transport, the emergency responders must call a medical control physician, whose role is to talk to the patient by phone to try to convince him to go to the hospital. RP 492:8-20, 848:19-23. If, after that, the patient still refuses, the lead paramedic on the scene must explain the risks of refusal, ensure that the patient is fully informed and competent to refuse transport, and then sign a refusal form. RP 488:22-489:23, 490:5-17, 1036:14-1037:4.

And, for any patient, emergency responders must document what happened during their response to a call before the end of their shift. Ex.

16A, p. 13. Squires and Fox did not obtain a 12-lead EKG, did not call medical control, did not sign the refusal form indicating that they reviewed it with Brian, and did not document what happened on this call until after they learned that Brian Richards had died. RP 405:23-406:16, 484:16-23, 512:2-15, 773:21-774:11, 842:1-14, 848:19-23, 1100:18-1101:10, 1110:15-18, 1474:24-1475:2, 1481:15-20; Exs. 14B, 23, 31.

This is where the parties' agreement ends. Squires and Fox maintain that they were not required to follow these protocols because they thought Brian Richards had heartburn. RP 1093:12-18, 1474:24-1475:11, 1480:3-7, 1481:18-1482:8, 1608:20-24. They also claim (rather contradictorily) that they encouraged Brian to come with them to the hospital, to the point of referring to pictures of his children hanging on the living room wall, and urging him, for the children's sake, to go to the emergency room. RP 1557:5-6, 1609:22-1611:2. Although the emergency responders admit that a firefighter signed the form Brian filled out to decline transport to the hospital, they testified that Squires actually reviewed the content of that form with Brian. RP 1415:4-9, 1472:20-1473:11, 1612:11-21. Squires also claimed that his failure to document the call was caused in part by a computer error. RP 1439:3-1440:6.

But this version of events does not match what Summer Richards observed the morning of her husband's death. She testified that Squires

and Fox never physically examined Brian. RP 923:20-924:6. When Fox told Brian about his own experiences with acid reflux, Brian responded that he had had heartburn before and that this burning sensation was different. RP 920:14-22, 1404:1-12, 1606:15-21, 1606:24-1608:3. In response, one of the responders told Brian it could be a tear in his esophagus. *Id.* Brian then asked, “what about the pain in my arm?;” to this, one of the paramedics suggested Brian had pulled a muscle. RP 920:23-921:4. After remarking that Brian’s blood pressure was high and that it was something he should get checked out, Squires asked Brian what he wanted to do. RP 922:11-21. Brian said “if you’re telling me this is heartburn, I don’t want to be transported.” *Id.* Summer observed Squires ask a firefighter to give Brian a clipboard with a refusal form attached; Brian signed the form and the emergency responders packed up and left. RP 923:12-19. As Summer and her mother, who had arrived while the paramedics were there, testified, no one discussed the content of the refusal form with Brian, nor did they urge him to go to the hospital. RP 941:2-943:16, 924:10-925:1, 1174:3-11. After the emergency responders left, the Richards family felt relieved because they understood that Brian was merely experiencing heartburn. RP 925:14-926:2.

Travis Hardin, one of the District 11 firefighters who responded to the Richards home that morning, corroborated Squires’ story that he urged

Brian to go to the hospital. 1755:23-1756:25, 1757:10-14. Characterized at trial as a “neutral” witness, Hardin also said, in contradiction to Summer’s testimony, that he observed Squires review the refusal form with Brian. RP 1757:17-19, 1757:25-1758:7.

**3. Brian Richards died of cardiac arrhythmia later that day.**

Later that morning, Brian went to a clinic to have his blood drawn. RP 926:6-25. During the visit, he saw only a medical assistant, and there is no record of whether he mentioned his chest pains. *Id.*; RP 816:13-817:7; CP 28. That afternoon, Brian was resting at home when his heart went into an irregular rhythm. RP 927:1-930:22. Summer rushed to his side and phoned an ambulance, but tragically, it was too late. *Id.* Paramedics tried to revive him, but Brian died shortly after arriving at the hospital. *Id.* The parties agree that Brian would be alive today if he had been transported to the hospital that morning by Squires and Fox. RP 605:2-6, 746:7-13, 1898:19-1899:1.

**4. Events after Brian Richards’ death.**

**a. Hardin is convicted of an unrelated felony.**

As noted above, Travis Hardin was one of the firefighters who responded to Brian’s 911 call on the morning of his death. RP 1443:9-16. In March of 2007, Hardin pled guilty to four counts of encouraging child

sexual abuse in the second degree in the state of Oregon. CP 920. This crime is committed when a person knowingly possesses child pornography. ORS §163.686. Following the conviction Hardin resigned from his position as a firefighter. CP 1047. During the trial in this case, Hardin was incarcerated in Oregon serving a 16-month sentence for violating the terms of his probation. CP 920.

**b. AMR investigates its employees' response to Brian Richards' 911 call**

After Brian Richards' death, AMR's clinical education director, Heather Tucker, opened an internal investigation into the response to Brian's 911 call. RP 493:8-494:4. On June 21, 2006, she wrote a summary of her findings and recommendations, eventually sharing that document with the Washington State Department of Health ("DOH"). RP 389:2-12; Ex. 23. In her summary, she stated that Squires, as lead paramedic on the call, violated numerous Clark County and AMR protocols. Ex. 23. She recommended permanent removal of his status as lead paramedic, and suggested that DOH determine whether he should lose his paramedic certification entirely. *Id.* Her recommendation was made after meeting with Dr. Lynn Wittwer, the Medical Program Director for Clark County, who sent a letter to DOH requesting an investigation into Squires' conduct. RP 494:5-495:14, 1032:17-1033:2; Ex. 14B. This was the first time in his career that Dr. Wittwer had sent such a

letter. RP 1032:17-24. However, once this lawsuit commenced, AMR—assuming that the results Ms. Tucker’s internal investigation would never come to light—took the position that Squires and Fox had merely violated documentation protocols. *See, e.g.*, RP 841:18-849:22.

**c. The Washington State Department of Health disciplines Squires.**

In response to AMR’s recommendations, DOH did an investigation into Squires’ conduct during his response to Brian’s 911 call. RP 385:14-17. DOH found that the allegations against Squires – for violating protocols by failing to obtain an EKG, failing to contact medical control, failing to obtain a proper refusal, and failing to document the call – were substantiated. RP 405:23-406:16. As a result, DOH informally disciplined Squires through a “Stipulation to Informal Disposition.” RP 423:5-424:10; CP 44-48. By signing the document, Squires agreed to various conditions, including a two-year probation. CP 46-7.

**B. Procedural history**

Summer Richards filed this suit on behalf of herself, Brian Richards’ estate, and their children in December of 2008. CP 1-14. Four months later, in answer to Ms. Richards’ first set of interrogatories, AMR indicated that Squires had been disciplined by DOH after Brian’s death, and that Ms. Richards should obtain records of that action through a public

disclosure request. CP 172. Ms. Richards did so, and received from DOH a file containing Heather Tucker's summary and the letter from Dr. Wittwer recommending that DOH investigate Squires. CP 542.

**1. AMR's attempts to avoid discovery.**

**a. AMR denies existence of its patient care protocols.**

Ms. Richards sought discovery to obtain all documents held by AMR related to Brian Richards' 911 call. CP 16. Also, because the depositions of Squires and Fox had revealed that AMR had its own protocols for emergency responders, Ms. Richards sought those as well. CP 16, 308. In response to these requests, AMR repeatedly insisted that it had no internal protocols. CP 30-1, 39, 262. Yet, without explanation, and only after Ms. Richards filed her first motion to compel, AMR produced hundreds of pages of internal protocols more than a year after the first request. *See* CP 316-17.

**b. AMR withholds requested – and highly relevant – documents without excuse.**

Within a month of the trial court's order granting her first motion to compel, Ms. Richards had to file a second motion. CP 70. Although the trial court had ordered AMR to produce hospital run reports for Squires and Fox, AMR still refused to provide that information. *Id.* The trial court granted the second motion on April 13, 2010. CP 153.

Further, in her first interrogatories, Ms. Richards requested all communications, reports, testimony, or statements related to Brian Richards' death and Squires and Fox's response to his 911 call. CP 157. Yet, AMR provided no documents from its internal investigation, and only admitted the existence of the investigation in a 30(b)(6) deposition held more than 12 months after the first request. CP 158, 250, 478. At that point, AMR claimed that the file had been lost. CP 158, 208-9, 251, 478. After Ms. Richards' third motion to compel (detailed below), AMR produced a few documents from its internal investigation, including notes from a meeting between Squires and AMR management. CP 61. Tellingly, several of the documents that AMR eventually produced shortly before trial contradicted the deposition testimony of AMR's 30(b)(6) deponent, Dave Fuller, as well as the testimony of AMR managers Heather Tucker and Pontine Rosteck, who each maintained that Scott Squires and Lewis Fox had merely failed in their documentation of the Brian Richards' phone call. CP 479-483. Moreover, AMR has never explained the delay nor produced the complete records of its internal investigation.

**c. AMR falsely claims to have searched for emails related to the Brian Richards call.**

Ms. Richards also sought all *emails* related to the Brian Richards'

911 call. CP 161. At the hearing on Ms. Richards' second motion to compel, held on December 3, 2010, AMR claimed that it had searched for relevant emails but found none. CP 161, 251; Allred Transcript ("AT") 62-63.<sup>3</sup> Yet, three weeks after this hearing, AMR's systems administrator testified in a deposition that he was the only AMR employee who could search company-wide for emails; that, until December 8, 2010, he had never heard of the Brian Richards incident or the lawsuit; and that prior to that date he had never conducted a search related to this case. CP 289, 292-93, 295-6, 299. After that deposition, AMR produced a few emails, including one between company managers that flatly contradicted their previous deposition testimony that AMR had no patient care concerns with Squires' conduct on the day of Brian Richards' death. CP 407, 409, 411, 413. AMR objected to producing some emails on the basis of attorney-client privilege. AT 107-110. This objection came over a year after Ms. Richards' initial request. *Id.* Ultimately, AMR never completed an exhaustive search for emails. CP 251, 492.

## **2. The trial court's ruling on discovery sanctions.**

After AMR continued to claim that it could not find its complete investigation file, Ms. Richards filed a motion for sanctions pursuant to

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<sup>3</sup> As explained in the Statement of Arrangements, filed herein, two transcription companies (Smith & Lehmann and Allred Transcriptions) separately transcribed portions of the record for this appeal. The Allred Transcript is a record of pretrial motions hearings, and will be referred to throughout this brief as "AT."

Civil Rule 37, seeking default against AMR because its ongoing willful failures to comply with discovery had prejudiced her ability to prepare for trial. CP 471, 503. During oral argument, the trial court expressed frustration with Ms. Richards' counsel over the fact that she had, early on in the litigation, obtained a copy of Heather Tucker's 3-page investigation summary from DOH.<sup>4</sup> AT 88-91. Then, after intensely questioning counsel for AMR about discovery lapses, and calling the corporation's conduct "despicable," the trial court asked the parties for additional briefing and reserved ruling. AT 97:9-98:6, 102:20-23, 103:4-5, 118.

One month later, the trial judge indicated that he would not grant default for reasons "I will articulate later," and stated that he was considering other sanctions and was not ready to rule. AT 194:20-195:17. During argument on pre-trial motions, Ms. Richards asked the trial court again to rule on the sanctions motion. RP 26:2. Without explanation, the trial court ruled that Ms. Richards was entitled to attorneys' fees and costs for her motions to compel, and, noting that no depositions were reopened,

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<sup>4</sup> The trial court's concern apparently arose, in part, from a misapprehension of Ms. Richards' discovery obligations. AT 117-18. AMR has never alleged – nor could it – that Ms. Richards did not meet her discovery obligations. Ms. Richards did not have to disclose that she had obtained Heather Tucker's report from DOH, because she obtained those records through her attorneys' work product and AMR did not request it nor demonstrate a "substantial need and inability to obtain the document from another source." See CR 26(b)4; *Limstrom v. Ladenburg*, 136 Wn.2d 595, 611, 963 P.2d 869 (1998). Of course, AMR already had the report and was well aware of its existence. Conversely, had Ms. Richards' attorneys not obtained that report from DOH, Ms. Richards would not have known that AMR was withholding evidence.

ordered AMR to pay the costs of any such depositions. RP 26:2-25. The trial court did not grant any other sanction. Thus, by the time trial began, AMR still had not searched for or produced all documents related to the Brian Richards call.

**3. The trial court dismisses Ms. Richards' negligent retention and supervision claims.**

At the close of Ms. Richards' case, the trial court heard AMR's motion to dismiss her negligent retention and supervision claims. RP 1514:19-21. During oral argument, the trial court reasoned that the claims were "weak," and that AMR could not be held liable for negligent retention or supervision because emergency responders were state-certified, were members of a union, and worked under a physician's license. RP 1521:1-18. After taking the issue under advisement, the trial court granted the motion two days later. RP 1832:23-1834:3. When Ms. Richards pointed out that AMR management had testified that it could terminate the employment of Squires or Fox and was responsible for their supervision (*see* RP 1834:4-15), the trial judge noted that he was aware of that testimony but nevertheless believed that the evidence did not support the claim. RP 1834:16-1835:18.

**4. The trial court excludes evidence of Hardin's prior conviction.**

The trial court also granted AMR's motion *in limine* to preclude any evidence concerning the felony conviction of defense witness Travis Hardin, the former firefighter who responded to Brian's 911 call on the morning of his death. RP 1363:10-1366:1, 1366:3-5; CP 1265-69. The trial judge stated that evidence of Hardin's conviction was "too prejudicial," and that sanitizing the felony for the jury would undermine the purpose of the rule allowing consideration of prior convictions. RP 1363:17-19, 1366:3-5. Although the trial judge said "I have weighed the factors," he did not conduct that weighing on the record. *Id.*

Thus, the trial court permitted portions of Hardin's discovery deposition to be read to the jury, without informing the jury that Hardin had a felony conviction or that he was absent because he was incarcerated. RP 1726:13-1759:24. One of AMR's attorneys read the questions, while another took the stand and read Hardin's responses. RP 1730:3-8. The jury heard, in this fashion, that Hardin was a firefighter who arrived first on the scene, observed Brian hunched over and evidently in pain, and then saw Squires tell Brian he should go to the hospital. RP 1732:17-22, 1738:114-17, 1739:21-1740:15, 1755:23-1756:9, 1756:14-25, 1757:10-1759:24. In closing argument, counsel for AMR referred to Hardin as a

“fireman,” a “learned intermediary” and an “emergency responder with the Clark County Fire Department.” RP 2474:7-22. He concluded by arguing that Hardin’s testimony “absolutely destroys plaintiff’s case.” *Id.*

**5. The trial court includes Jury Instruction 16.**

Before the jury began deliberations, the trial court spontaneously added a jury instruction that quoted portions of RCW 18.71.210. CP 1392-94. That statute grants qualified immunity to emergency responders, shielding them from suit if their actions are within the scope of their duties, are in good faith, and are not grossly negligent, willful, or wanton.

*See* RCW 18.71.210. The text of that instruction was as follows:

No act or omission of any emergency medical service intermediate life support technician and paramedic done or omitted in good faith while rendering emergency medical service under the responsible supervision and control of a licensed physician or an approved medical program director or delegate(s) to a person who has suffered illness or bodily injury shall impose any liability upon:

The physician’s trained emergency medical service intermediate life support technician and paramedic, emergency medical technician, or first responder;

This section shall not apply to any act or omission which constitutes either gross negligence or willful or wanton misconduct.

CP 1325. This instruction – number 16 – purports to be a recitation of the statute, but omits a key provision.

Along with Instruction 16, the trial court included Instructions 18, 19, and 20, which together explained both parties' burdens of proof on good faith and gross negligence. CP 1327-29. Instruction 8 defined the terms "gross negligence" and "willful and wanton misconduct." CP 1317. No instruction explained that immunity exists only for emergency responders acting within their field of medical expertise.

The parties and the trial court spent the evening before closing arguments preparing the jury instructions. RP 2330:9-12. This discussion was conducted off the record. RP 2344:17-2345:2; CP 1393. During that discussion, Ms. Richards' counsel strenuously objected to Instruction 16, noting that it repeated other instructions and was potentially misleading. *Id.* Her counsel also argued that the missing portion of the statute – the provision that further defines the parameters of qualified immunity – should be included. CP 1393-94. Nonetheless, the trial court included Instruction 16 without the missing paragraph. RP 2386:11-25.

After closing arguments, Ms. Richards' counsel again took exception to this instruction, without repeating the arguments made the night before. RP 2518:15-2519:14. Shortly after the jury began deliberating, the foreperson submitted a question to the trial court indicating the jury's confusion about how to answer the special verdict form if it found that Squires, Fox, and Dr. Simons acted in good faith. RP

2530:18-2542:15. The trial court gave another instruction explaining that Instruction 16 did not apply to Dr. Simons, but did not clarify the qualified nature of the emergency responders' immunity. *Id.*

**6. The trial court denies Ms. Richards' motion for a new trial.**

The jury found no liability on the part of the Respondents for Brian Richards' death. CP 1341-5. Ms. Richards moved for a new trial pursuant to CR 59(a)(1), (8), and (9). CP 1346-60. The trial court denied the motion. CP 1367-8.

**V. ARGUMENT**

**A. Standards of review.**

Appellate courts review decisions regarding discovery sanctions for abuse of discretion. *Mayer v. Sto Industries*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* (quoting *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976)).

Evidentiary rulings, such as the exclusion of Hardin's felony conviction, are also reviewed for abuse of discretion. *State v. Rivers*, 129 Wn.2d 697, 704-5, 921 P.2d 495 (1996). If the trial court abused its discretion, the appellate court will reverse where, within reasonable

probability, the error materially affected the outcome of the trial. *State v. Calegar*, 133 Wn.2d 718, 727, 947 P.2d 235 (1997) (citing *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991)).

Similarly, a trial court's denial of a motion for a new trial is generally reviewed for abuse of discretion. *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 103, 841 P.2d 1300 (1992), *aff'd*, 125 Wn.2d 1, 882 P.2d 157 (1994) (citations omitted). The test for determining whether a trial court has abused its discretion in this context is whether "such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial." *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978). However, appellate courts review *de novo* those aspects of the ruling based on claimed errors of law. *Schneider v. City of Seattle*, 24 Wn. App. 251, 255, 600 P.2d 666 (1979).

Decisions on a motion to dismiss – such as the trial court's decision to dismiss Ms. Richards' claims of negligent retention and supervision – are not discretionary. *Brown v. Dahl*, 41 Wn. App. 565, 573, 705 P.2d 781 (1985). This Court will only affirm such a dismissal if, after viewing all evidence in the light most favorable to the non-moving party, drawing all inferences in her favor, there remains no evidence or inference therefrom to support the claim. *Id.* However, the trial court's conclusion that the union status and state certification of AMR's

employees precluded a negligent retention claim was a question of law which this Court reviews *de novo*. See, e.g., *McCallum v. Allstate Property and Cas. Ins. Co.*, 149 Wn. App. 412, 420, 204 P.3d 944 (2009) (citing *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004)).

Finally, while this Court reviews decisions regarding the number and wording of jury instructions for abuse of discretion, claimed errors of law in jury instructions are reviewed *de novo*. *Joyce v. State, Dept. of Corrections*, 116 Wn. App. 569, 595-96, 75 P.3d 548 (2003), *aff'd in part, rev'd in part*, 155 Wn.2d 306, 119 P.3d 825 (2005).

**B. The trial court abused its discretion by imposing too minimal a sanction for AMR for its egregious conduct in discovery.**

While the trial court committed prejudicial errors during the trial that individually and cumulatively warrant reversal, a trial on liability should never have occurred, as default was the appropriate sanction for AMR's discovery conduct. Although trial courts have broad discretion to determine sanctions for discovery violations, that discretion has limits. *Taylor v. Cessna Aircraft*, 39 Wn. App. 828, 836, 696 P.2d 28 (1985). A trial court must not impose too severe a sanction, or too minimal a sanction, without justification. *Blair v. TA-Seattle East No. 176*, 171 Wn.2d 342, 348, 254 P.3d 797 (2011) (citing *Mayer*, 156 Wn.2d at 688, and *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 495-96, 933 P.2d

1036 (1997)); *see also Taylor*, 39 Wn. App. at 836 (“[i]mposition of unduly light sanctions will only encourage litigants to employ tactics of evasion and delay, in contravention of the spirit and letter of the discovery rules.”) (*citing Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 282, 686 P.2d 1102 (1984) *aff’d*, 104 Wn.2d 613, 708 P.2d 685 (1985) and *Lampard v. Roth*, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984)).

In her motion for sanctions, Ms. Richards provided ample evidence to justify default against AMR: namely, willful conduct that prejudiced her ability to prepare for trial. *See Blair*, 171 Wn. 2d at 348 (before a trial court may impose the more severe sanctions available under CR 37, it must find 1) willful conduct that 2) substantially prejudiced the complaining party and 3) must consider whether lesser sanctions are sufficient to cure the discovery violations). Here, the trial court did not analyze these three factors (“the *Burnet* factors”), but simply ordered AMR to pay fees incurred in bringing three motions to compel, and to pay for any reopened depositions. RP 26:2-25. Given AMR’s egregious conduct, this sanction was far too minimal either to cure the prejudice to Ms. Richards or to serve the purposes of discovery sanctions.

**1. Failure to appropriately sanction abusive discovery conduct is reversible error.**

The appellate courts of this state have reached the same conclusion

where litigants have engaged in similar discovery abuses. *See, e.g., Physicians Ins. Exchange v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993) (reversing the trial court's decision not to sanction Fisons and its attorneys for withholding documents relevant to liability); *Lampard v. Roth*, 38 Wn. App. at 202 (reversing decision to allow testimony of witnesses not disclosed prior to trial); *Doe v. Gonzaga University*, 143 Wn.2d 687, 24 P.3d 390 (2001), *rev'd on other grounds by Gonzaga University v. Doe*, 536 U.S. 273 (2002) (failing to sanction Gonzaga for withholding chronology reflecting internal meetings relevant to the student's disciplinary proceedings was reversible error). In *Fisons*, as here, documents crucial to a party's case were not provided until one month prior to the scheduled trial date. *Fisons*, 122 Wn.2d at 337. The documents at issue in *Fisons* showed that the drug company knew about the potential toxicity of the drug the plaintiff pediatrician had prescribed to his patient. *Id.* The Washington Supreme Court reversed the trial court's refusal to impose sanctions, and instructed that a sanction should "not be so minimal . . . that it undermines the purpose of discovery." *Id.* at 356.

In a case involving conduct very like that of AMR, Division One of the Washington Court of Appeals reversed a trial court's decision to impose a fine, rather than a more serious sanction, for discovery abuses. *Gammon v. Clark Equipment*, 38 Wn. App. 274, 282, 686 P.2d 1102

(1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985). In *Gammon*, the plaintiff's husband was killed while using a rented loader manufactured by Clark. *Id.* at 276. For two years, Clark withheld accident reports involving the same or similar equipment, until deposition testimony one month before trial revealed the existence of such reports. *Id.* at 278-79. After Clark failed to follow the terms of an order compelling production of these materials, the trial court imposed a \$2,500 fine as a sanction, but denied the wife's request for a new trial. *Id.* at 280. In reversing this decision, the appellate court stated, "[a]pproval of such a *de minimis* sanction in a case such as this would plainly undermine the purpose of discovery. Far from insuring that a wrongdoer not profit from his wrong, minimal terms would simply encourage litigants to embrace tactics of evasion and delay." *Id.* at 282.

In another case where the trial court did not appropriately sanction abusive conduct, a customer of a department store brought various claims, including race discrimination, against the store after it wrongly accused him of shoplifting. *Demelash v. Ross Stores*, 105 Wn. App. 508, 513-14, 20 P.3d 447 (2001). During discovery, the plaintiff sought information about complaints received from previous customers, but Ross Stores would not provide the requested information. *Id.* at 515-16. After the trial court ordered production, the company provided documents missing

critical information, and then, fourteen months after the initial request, claimed that many documents had been destroyed in a “disastrous flood.” *Id.* at 518. The appellate court reversed the trial court’s refusal to compel additional production, and further held that the trial court should have sanctioned Ross Stores for its discovery conduct. *Id.* at 520, 530-532.

AMR’s conduct in this case was far worse than the conduct at issue in *Gammon* and *Demelash*, as Ms. Richards sought AMR’s own protocols that govern the duties of its employees, as well as investigative documents from an incident in which a patient died. Yet, AMR denied the existence of internal protocols, and did not produce them until more than a year after they were requested. AT 2:18-20, 7:9-12, 9:8-13. Likewise, AMR did not disclose the existence of its internal investigation, gave deposition testimony that directly contradicted that investigation, and when it came to light, claimed to have “lost” the files. CP 155, 208-9, 479-83. When portions of those files appeared in the weeks prior to trial, AMR could not explain why they surfaced so long after the request was made. CP 61. And, like Ross Stores, AMR represented to the trial judge that AMR had searched company-wide for emails related to Brian Richards’ death, when in fact it had not. CP 251, 292, 295, 299. Despite the seriousness of these breaches, AMR’s egregious conduct went unaddressed, allowing the company to “profit from the wrong.” *See, e.g., Fisons*, 122 Wn.2d at 356.

**2. Here, default is the only meaningful remedy because AMR's willful conduct prejudiced Ms. Richards.**

AMR's behavior warranted more than a slap on the wrist. The trial court should have imposed the severe sanction of default because AMR's conduct was willful and prejudiced Ms. Richards. *See, e.g., Gammon*, 38 Wn. App. at 282. In numerous similar cases, the appellate courts of this state have agreed that default has been the appropriate – and often, the *only* appropriate – sanction. Most recently, the Washington Supreme Court upheld the entry of default against a car manufacturer as a sanction for withholding accident reports involving seatback failures similar to the one that caused the plaintiff's injuries. *Magaña v. Hyundai Motor America*, 167 Wn.2d 570, 576, 220 P.3d 191 (2009). As the Court explained, Hyundai's deliberate conduct warranted the harsh sanction of default, because other sanctions would not suffice to “address the prejudice to Magaña or the judicial system.” *Id.* at 592.

Case law is replete with additional examples in which willful and ongoing discovery violations resulted in this most severe of sanctions. *See Smith v. Behr Process Corp.*, 113 Wn. App. 306, 324, 329-30, 54 P.3d 665 (2002) (default appropriate where company withheld documents relevant to causation until the week before trial); *Anderson v. Mohundro*, 24 Wn. App. 569, 573-75, 604 P.2d 181 (1979) (default was appropriate sanction

after plaintiffs failed to respond to interrogatories, and after two motions to compel, did not fully comply with trial court's order); *Associated Mtg. Invest. v. G.P. Kent Const. Co., Inc.*, 15 Wn. App. 223, 548 P.2d 558 (1976) (default was appropriate where defendants never responded to interrogatories and failed to provide them after court ordered them to do so); *Delany v. Canning*, 84 Wn. App. 498, 929 P.2d 475 (1997) (trial court properly granted default after the defendant repeatedly failed to answer interrogatories and comply with discovery orders).

As in these cases, AMR's conduct, which had no reasonable excuse, must be deemed willful. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002). Further, AMR's conduct prejudiced Ms. Richards, because it irreparably harmed her ability to prepare and present her case. *See, e.g., Magaña*, 167 Wn.2d at 589 (holding that the proper analysis is whether trial preparation was prejudiced, and finding that willful failure to comply with discovery requests delayed or eliminated the plaintiff's ability to investigate possibly relevant evidence).

Like the plaintiff in *Magaña*, Ms. Richards was forced to spend time and resources pushing AMR to produce relevant information. The lack of prompt and complete discovery undermined her ability to conduct effective depositions, especially of Squires, whose admissions in meetings

with AMR management were unknown to Ms. Richards until well after his deposition. CP 484-86. To adequately deal with it would have required a trial delay, which would further prejudice Ms. Richards. *See, e.g., Gammon*, 38 Wn. App. at 282 (“Requiring Gammon to disrupt her trial presentation to accommodate Clark would reward noncompliance.”) And in the end, Ms. Richards never received the complete file of AMR’s investigation, including an incident report prepared by Fox – information certainly relevant to her claim that Squires and Fox were grossly negligent. CP 826-27.

**3. Default is the only remedy for AMR’s conduct that will serve the purpose of sanctions**

Sanctions for discovery abuses should deter, compensate, punish, and educate. *Magaña*, 167 Wn.2d at 584 (*quoting Fisons*, 122 Wn.2d at 356). The attorneys’ fees award here serves none of these purposes. Rather, this non-sanction hearkens back to a day when some litigants treated discovery as a war of attrition, and dishonest conduct went undeterred. *See, e.g., Gammon*, 38 Wn. App. at 280. Fees and costs, while not insignificant to Ms. Richards, are miniscule to a large national corporation like AMR. *See id.* at 282. And as neither party reopened depositions, the award of costs was illusory. RP 26:2-25. The message to AMR is that there is no consequence to its conduct. As *Fisons, Magaña*,

and other cases teach, this message is unacceptable in modern litigation. This Court should reverse and remand with instructions to find AMR in default as a meaningful sanction for its discovery violations.

**C. In the absence of default, the trial court's legal and evidentiary errors require reversal and remand for a new trial.**

Because the trial court failed to appropriately sanction AMR, trial went forward in March of 2011. During the trial, the court made three critical legal and evidentiary errors. These errors, alone and cumulatively, warrant reversal. *See, e.g., Storey v. Storey*, 21 Wn. App. 370, 374, 585 P.2d 183 (1978). Accordingly, the trial court should have granted Ms. Richards' motion for a new trial; its failure to do so, given the errors discussed below, requires reversal and remand for a new trial.

**1. The trial court improperly dismissed Ms. Richards' claims of negligent retention and supervision.**

When it dismissed Ms. Richards' claims of negligent retention and supervision, the trial court erred in two ways: first, by incorrectly analyzing a legal issue, and second, by substituting its own view of the strength of the claim for that of the jury.

**a. The fact that AMR's employees are state-certified and members of a union is irrelevant to AMR's liability for negligent retention and supervision.**

The trial court's stated concern that AMR's employees are union members and are certified by the state of Washington, operating under the

supervision of a licensed physician, is inapposite. *See* RP 1521:1-18, 1834:16-1835:18. There is no authority for the proposition that an employee's union or certification status has any bearing on the employer's liability for negligent retention or supervision. *See, e.g., Scott v. Blanchet High School*, 50 Wn. App. 37, 44, 747 P.2d 1124 (1987) (school can be liable for negligently supervising teachers; while Blanchet High School is a private school where the teachers may not be in a union, the court did not so limit its holding); *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993) (upholding summary judgment for medical clinic sued by patient sexually assaulted by employee physician, because the clinic had no knowledge of the physician's assaults; the physician's license was irrelevant); *see also Douglas v. Freeman*, 117 Wn.2d 242, 248, 814 P.2d 1160 (1991) (doctrine of corporate negligence applies to dental clinic's supervision of licensed physicians and dentists).

A case on the related doctrine of corporate negligence for hospitals is helpful on this point. In the first case recognizing the doctrine, the Washington Supreme Court noted that the hospital has the better opportunity to observe, supervise, and control physician performance than state licensing boards and professional organizations, and thus can be held liable for negligently supervising the physician's actions. *Pedroza v. Bryant*, 101 Wn.2d 226, 232, 677 P.2d 166 (1984) (quoting Koehn,

*Hospital Corporate Liability: An Effective Solution to Controlling Private Physician Incompetence?*, 32 RUTGERS L. REV. 342, 376–77 (1979)).

Like the hospital in *Pedroza*, AMR is an employer with supervisory responsibility for its employees. RP 1314:23-1315:6. To hold that its employee's status as a union member or as a state-certified professional shields an employer like AMR from negligent retention/supervision claims would work a wholesale change in the law.

**b. The claim against AMR for negligent supervision or retention was supported by substantial evidence.**

Further, Ms. Richards provided substantial evidence that AMR retained Squires and Fox with knowledge that they were unfit, failed to appropriately supervise them despite this knowledge, and that AMR's negligent retention/supervision was a proximate cause of Brian Richards' death. *See Peck v. Siau*, 65 Wn. App. 285, 294, 827 P.2d 1108 (1992) (*quoting* RESTATEMENT (SECOND) OF TORTS § 317 (1965)) (describing prima facie case of negligent supervision); *Scott v. Blanchet High School*, 50 Wn. App. 37 at 43 (discussing elements of negligent retention); *Rucshner v. ADT Sec. Systems, Inc.*, 149 Wn. App. 665, 204 P.3d 271 (2009). That the jury found that neither Squires nor Fox was liable for Brian Richards' death is irrelevant. *Douglas v. Freeman*, 117 Wn.2d at 253 (rejecting contention that negligent supervision claim failed because

dentist whose care was at issue was not negligent, and noting that hospital owed the patient an independent duty of care). Negligent supervision and retention is “a wrong to the [plaintiff], entirely independent of the liability of the employer under the doctrine of *respondeat superior*.” *Scott*, 50 Wn. App. at 43 (quoting 53 Am.Jur.2d *Master and Servant* § 422 (1970) (footnotes omitted)).

AMR’s own testimony showed that it negligently retained and supervised these employees. Emergency responders are entrusted with responding to situations where human lives are at stake, and are expected to use their skills and training to ensure the best possible outcome for patients. These employees’ repeated breaches of that trust were known to AMR. RP 1323-1334. Indeed, AMR had once terminated Squires, and had issued Fox numerous warnings. Exs. 21, 22. Despite their records, AMR retained them and allowed them to respond to 911 calls; worse, AMR allowed them to respond to calls *together*. RP 1334:2-17. Had employees who routinely followed protocols arrived in response to his 911 call, Brian Richards would have had the benefit of a 12-lead EKG, a consultation with a physician, and would not have been reassured that he was experiencing heartburn. In short, substantial evidence supported this claim. The trial court should have allowed the jury to weigh it.

**c. The assessment of the strength or weakness of this claim was for the jury.**

The trial court's view that Ms. Richards' claim was "weak" (RP 1519:18) is not the standard for granting a motion to dismiss. Rather, the trial court may grant such a motion only where "there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party." *Indus. Indem. Co. v. Kallevig*, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990). The court must "defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). "If there is *any justifiable evidence* upon which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury." *Douglas v. Freeman*, 117 Wn.2d 242, 247, 814 P.2d 1160 (1991) (quoting *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 243, 744 P.2d 605 (1987)) (emphasis added).

Given the litany of protocol violations AMR testified to at trial, and its admitted failure to take any remedial action to ensure that its employees did not jeopardize patient care, there was not merely "justifiable" but *significant* evidence that could lead a jury to conclude that AMR negligently retained and supervised these employees. Further, the trial court was required to view that evidence in the light most

favorable to Ms. Richards, drawing all inferences in her favor. *Brown v. Dahl*, 41 Wn. App. at 573. Because Ms. Richards provided substantial evidence supporting this claim, it should have gone to the jury. *Douglas*, 117 Wn.2d at 247. Moreover, the trial court's incorrect legal analysis cannot justify dismissal of this claim. This Court should reverse the trial court's decision to dismiss Ms. Richards' negligent retention and supervision claims and remand for a new trial.

**2. The trial court committed reversible error when it excluded Travis Hardin's felony conviction.**

The prejudice to Ms. Richards from the loss of one of her causes of action was compounded when the trial court excluded evidence of Travis Hardin's prior felony conviction. Hardin, the former firefighter who responded to Brian's 911 call, did not appear at trial because he was incarcerated. Instead of observing his live testimony, the jury heard Hardin's deposition read into the record by a lawyer from the defense team. RP 1730:3-8. Given the critical nature of his testimony, the jury's inability to observe his demeanor, and other factors explained below, the trial court should have admitted the evidence of Hardin's felony conviction. Indeed, if a prior conviction is not admissible under these circumstances, then ER 609(a)(1) is an essentially meaningless exception to the general prohibition against admission of prior convictions.

**a. The trial court failed to perform the required balancing test under ER 609(a)(1).**

Evidence of a prior felony conviction not involving dishonesty or false statement is admissible if the conviction is less than 10 years old and the evidence of the conviction is “slightly” more probative than prejudicial. ER 609(a)(1) and (2); *State v. Calegar*, 133 Wn.2d 718, 722, 947 P.2d 235 (1997); *State v. Russell*, 104 Wn. App. 422, 436, 16 P.3d 664 (2001). There is less risk of potential prejudice when a witness – as opposed to a criminal defendant – is impeached with his or her prior convictions. Karl B. Tegland, 5A WASHINGTON PRACTICE, *Evidence Law and Practice* § 609.7 (5<sup>th</sup> ed.) (citing *U.S. v. Blankenship*, 870 F.2d 326 (6th Cir. 1988)). Regardless, when ruling on any request to admit or exclude a prior conviction, a trial court’s bare assertion that the conviction is more probative than prejudicial, or vice versa, is insufficient. *State v. Jones*, 101 Wn.2d 113, 122, 677 P.2d 131 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988) and *State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989).

Instead, the trial court must engage in a “meaningful” analysis of six factors, and must do so for the record. *Id.* The court must consider 1) the length of the witness’ criminal record, 2) the remoteness of the prior conviction, 3) the nature of the prior crime, 4) the age and circumstances

of the witness, 5), the centrality of the credibility issue, and 6) the impeachment value of the conviction. *State v. Calegar*, 133 Wn.2d at 722 (citing *State v. Alexis*, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980)); see also *State v. Jones*, 101 Wn.2d at 121-2. In assessing these factors, the trial court's overriding consideration is whether evidence of the conviction would help the jury determine if the witness is likely to tell the truth on the stand. *State v. Hardy*, 133 Wn.2d 701, 707-8, 946 P.2d 1175 (1997).

**b. The failure to weigh the required factors was an abuse of discretion.**

While it is apparent that the nature of Hardin's conviction informed his decision, it is impossible to fully assess the trial judge's reasoning because the trial judge did not conduct the required balancing test on the record. This failure is an abuse of discretion. See *State v. Jones*, 101 Wn.2d at 122. ("Without a statement of reasons demonstrating that the trial court did engage in a balancing analysis it is impossible for an appellate court to evaluate the trial court's decision. . . a trial court *must* state, for the record, the factors which favor admission or exclusion of prior conviction evidence.") (emphasis added); see also *State v. Rivers*, 129 Wn.2d 697, 705-6, 921 P.2d 495 (1996).

As in *Jones* and *Rivers*, there is nothing in this record to show that the trial court conducted the required balancing test. See *Jones*, 101

Wn.2d at 116 (trial court abused discretion when it summarily, albeit firmly, stated “the probative value...substantially outweighs any remote prejudicial effect that might result”); *Rivers*, 129 Wn.2d at 706. The trial judge here stated a summary conclusion that he had “weighed the factors” and that the evidence was more prejudicial than probative. RP 1363:17-19, 1366:3-5. Failing to do more was an unequivocal abuse of discretion.

**c. Hardin’s felony conviction is more probative of veracity than prejudicial.**

Had the trial court engaged in the required balancing test, the necessity of admitting Hardin’s conviction for impeachment purposes would have been plain. Some of the factors are disposed of quickly. First, Hardin does not have a lengthy criminal record, so the danger of prejudice by admission of multiple convictions was not at issue here. *See, e.g., State v. Gomez*, 75 Wn. App. 648, 652, 880 P.2d 65 (1994) (a witness’s lengthy criminal record may sway the jury against him because of an amorphous belief that a person who commits many crimes will also lie); *see also Jones*, 101 Wn.2d at 126. Second, the conviction is not remote in time, so there is no risk that a crime committed many years ago was improperly interpreted to bear on the more mature person’s credibility. *See, e.g., Jones*, 101 Wn.2d at 121 (more recent convictions are more probative of

veracity) (*citing U.S. v. Hayes*, 553 F.2d 824 (2nd Cir. 1977), *cert. denied*, 434 U.S. 867 (1977)).

Likewise, Hardin's age at the time of the crime and the circumstances surrounding his conviction do not shield him from admissibility of his prior conviction. He was 25 years old when convicted of this felony, and there is no evidence of mitigating circumstances. *See, e.g., Gomez*, 75 Wn. App. at 653 (crimes committed at a younger age are less probative of the veracity of an adult); *see also Jones*, 101 Wn.2d at 121 (conviction at a "very young age" or under extenuating circumstances may have less bearing on credibility).

It is the fourth factor – the nature of the crime – that is the most difficult. The trial court could have appropriately concluded that the crime of viewing child pornography is likely to inflame prejudice against the person convicted of it. *See, e.g., State v. Newton*, 109 Wn.2d 69, 79, 743 P.2d 254 (1987) ("prior sex offenses...can be particularly damning"). And yet, the nature of Hardin's conviction relates directly to openness and veracity. Viewing and possessing child pornography is a clandestine crime, unlike assault or driving under the influence of alcohol, crimes generally viewed as irrelevant to veracity. *See, e.g., State v. Renfro*, 28 Wn. App. 248, 255, 622 P.2d 1295 (1981); *State v. Kilgore*, 107 Wn. App. 160, 186, 26 P.3d 308 (2001). Hardin's crime involves furtive and

secretive behavior, and the possessor of such material is likely to hide its existence from others. This is not to suggest that there should be a *per se* rule admitting such convictions. *See State v. Calegar*, 133 Wn.2d at 726-7 (overruling prior cases that held that certain felonies, such as drug trafficking convictions, were *per se* admissible under ER 609(a)(1)); *see also State v. Hardy*, 133 Wn.2d at 708. But in this case, the nature of the crime was relevant to veracity.

If the nature of the crime at issue were the only factor favoring admission, this would be a harder case. But the remaining factors – the centrality of Hardin’s credibility and the impeachment value of the evidence – weigh strongly in favor of admission of his prior conviction. Hardin’s testimony was the crucial tie-breaker between competing versions of events. Respondents’ counsel banked on this and devoted multiple points in closing argument to its significance. RP 2474:7-22. Even prior to trial, Respondents conceded the importance of Hardin’s testimony to their case. CP 919. The jury was confronted with the irreconcilable testimony of Brian Richards’ family and the emergency responders, and understandably looked to a third party – Hardin – for help interpreting these competing descriptions of events.

Finally, the impeachment value of this prior conviction weighs most heavily in favor of its admission. Because of his incarceration,

Hardin was not present at trial. RP 164:10-25, 1726:13-1727:9. His discovery deposition testimony, cleansed of any references to his criminal record, was read to the jury by an attorney for the defense. RP 1730:3-8. The members of the jury could not see Hardin's facial expressions, hear the tone of his voice, or take note of any hesitancy through their own observations. This is troubling; as Chief Justice Madsen explained in concurrence in *In re Detention of Stout*, 159 Wn.2d 357, 383, 150 P.3d 86 (2007), "witness demeanor is a crucial part of determining credibility." *See also* WPI 1.02 ("You are the sole judges of the credibility of the witness.").

Moreover, the jury was asked to consider the testimony of a person they believed to be a firefighter, a profession that garners great respect in the United States.<sup>5</sup> Under these circumstances, Hardin's testimony had a heightened aura of credibility, because of who the jury believed he was and the fact that they could not assess his credibility in person.

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<sup>5</sup> While it is well understood that Americans hold firefighters in particularly high esteem, this fact was confirmed by a Harris Interactive poll cited by the National Science Board. National Science Board, *Science and Engineering Indicators 2010*, p. 7-36 (2010), available at <http://www.nsf.gov/statistics/seind10/c7/c7h.htm> (citing Harris Interactive, *Prestige Paradox: High Pay Doesn't Necessarily Equal High Prestige: Teachers' Prestige Increases the Most Over 30 Years* (2008)). The poll indicates that, year after year, Americans rank firefighters as *the most* prestigious profession, ahead of doctors, nurses, teachers, clergy members, and lawyers. *Id.* As the poll authors note, "Americans are more likely to trust people in prestigious occupations to tell the truth." *Id.*

**d. The trial court's error in excluding the felony conviction was prejudicial and requires reversal.**

Hardin's testimony was so central to the case that it very likely determined the verdict. *See, e.g., State v. Calegar*, 133 Wn.2d at 727 (citing *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991)). The jury was surely inclined to believe the testimony of a man they believed to be a firefighter, whose demeanor they could not observe. Had the jury known of his conviction, they would not likely have relied on him to break the tie between the other witnesses. This Court should reverse and remand for a new trial, as it is "reasonably probable" that the failure to admit evidence of this conviction "tipped the balance against [Ms. Richards] and therefore determined the outcome of the trial." *Id.* 133 at 729.<sup>6</sup>

**3. The trial court erred when it gave Jury Instruction 16.**

Finally, because Ms. Richards was also prejudiced by the trial court's spontaneous decision to include Jury Instruction 16, she is entitled to a new trial. *See, e.g., Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67,

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<sup>6</sup> Reversal and remand are the appropriate remedies here, as in *Calegar*, for the reasons stated above. *See State v. Roche*, 75 Wn. App. 500, 501-2, 878 P.2d 497 (1994) (noting that when the outcome of the balancing test is obvious, the appellate court may substitute its analysis for that of the trial court, but declining to do so in that case because the record could support either admission or exclusion); *but see State v. Gomez*, 75 Wn. App. at 656, n. 11 ("The cases allowing appellate courts to resolve this issue where the trial court has not done so were not intended to create an exception to swallow the rule, nor did those cases contemplate that we substitute our analysis of the *Alexis* factors as a matter of course.") Here, the record contains ample evidence from which this Court may determine that the required factors weigh in favor of admission. It would be wasteful of judicial resources to remand to the trial court to conduct the balancing test, as that test applied here mandates admission and thus, a new trial.

92, 896 P.2d 682 (1995) (citing *State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548 (1977) (erroneous inclusion of jury instructions is reversible error where it prejudices a party). The cardinal rule of jury instructions is that they “allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002) (quoting *Bodin v. City of Stanwood*, 130 Wn.2d 726, 730, 927 P.2d 240 (1996)). With the addition of Instruction 16, the instructions in this case were misleading, unfairly emphasized AMR’s theory of the case, and deprived Ms. Richards of the ability to argue one of her theories. The resulting prejudice requires reversal.

**a. The instructions overemphasized Respondents’ case.**

Instruction 16 is set out in its entirety in the Statement of the Case, p. 20 above. As noted, it consisted of a portion of RCW 18.71.210, which provides that emergency responders who act in good faith are not liable for their acts or omissions while rendering emergency care, unless they are grossly negligent or engage in willful or wanton misconduct. CP 1325. This instruction was superfluous, as Instructions 8, 18, 19, and 20 together explained that if the jury found that Squires and Fox acted in good faith,

then Ms. Richards had the burden of proving gross negligence or willful or wanton misconduct. CP 17, 27-39.

By merely repeating the law already set out in other instructions, Instruction 16 effectively doubled the emphasis on Ms. Richards' burdens of proof, favoring Respondents to her detriment. *Compare Brown v. Dahl*, 41 Wn. App. at 579-80 (remanding for new trial where instructions were so repetitious they prejudiced a party, and noting "[e]ven though each instruction considered separately might be essentially correct . . . if the instructions on a given point or proposition are so repetitious and overlapping as to make them emphatically favorable to one party, the other party has been deprived of a fair trial") (*quoting Samuelson v. Freeman*, 75 Wn.2d 894, 897, 454 P.2d 406 (1969)) *with Adcox v. Children's Hospital*, 123 Wn.2d 15, 864 P.2d 921 (1993) (instructions were not prejudicial where recitation of applicable law may have naturally emphasized one party's case, but was "balanced and non-repetitious"). As in *Brown*, this error prejudiced Ms. Richards and requires reversal.

**b. Instruction 16 was misleading, deprived Ms. Richards of her ability to argue her theory of the case, and was confusing to the jury.**

"[I]f an instruction sets forth the language of a statute it is appropriate only if the statute is applicable, reasonably clear, *and not misleading.*" *Bell v. State*, 147 Wn.2d 166, 177, 52 P.3d 503 (2002)

(emphasis added).<sup>7</sup> As Ms. Richards argued, once the trial court decided to include an instruction based on RCW 18.71.210, it should have included the following paragraph from that statute:

This section shall apply to an act or omission committed or omitted in the performance of the actual emergency medical procedures *and not in the commission or omission of an act which is not within the field of medical expertise of the physician's trained emergency medical service intermediate life support technician and paramedic, emergency medical technician, or first responder, as the case may be.*

RCW 18.71.210 (emphasis added). This section makes it clear that first responders are *not immune* from liability for negligent acts if they acted *outside* the scope of their expertise, one of Ms. Richards' theories in this case. The absence of this section from this or any other instruction left the incorrect impression that gross negligence or wanton or willful misconduct were the sole exceptions to immunity. Without this paragraph, the jury was left with an incomplete – and thereby misleading – statement of the law, which prejudiced Ms. Richards. *See, e.g., Hawkins v. Marshall*, 92 Wn. App. 38, 45, 962 P.2d 834 (1998) (misinterpretation of evidence rule in jury instructions was misleading and prejudicial.)

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<sup>7</sup> The trial court indicated that it drew Instruction 16 from *Malone v. City of Seattle*, 24 Wn. App. 217, 600 P.2d 647 (1979). But the issue in *Malone* was whether qualified immunity applied at all; there was no suggestion that the paramedics took any action outside the scope of their expertise, in contrast to the situation here. *Id.* at 223-24. The second paragraph of the statute was therefore not at issue in *Malone*. In short, *Malone* does not apply to the circumstances of this case and does not support the trial court's decision to include Instruction 16.

The omission of this paragraph was also prejudicial because, in addition to being misleading, it deprived Ms. Richards of a statement of governing law that addressed one of her theories of her case. *See, e.g., Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 267, 96 P.3d 386 (2004) (*quoting Hue*, 127 Wn.2d at 77) (“As with a trial court’s instruction misstating the applicable law, a court’s omission of a proposed statement of the governing law will be ‘reversible error where it prejudices a party.’”). *Cf. Douglas v. Freeman*, 117 Wn.2d at 257 (affirming the trial court’s rejecting the invitation to quote only portions of an applicable statute and instead quoting the entire statute as a jury instruction). Here, Ms. Richards offered expert testimony and other evidence that Squires and Fox not only breached their standard of care by violating paramedic protocols, but in fact acted outside their expertise when they improperly reassured Brian that he was having heartburn and gave him medical advice to “try apple cider vinegar.” RP 763:8-19, 1260:7-1262:14. Omitting this portion of RCW 18.71.210 deprived Ms. Richards of one theory of her case, and rendered her unable to address Respondents’ arguments about the statute. *See* RP 2445:3-2446:8.

Had the missing part of the statute been included as she requested, Ms. Richards could have explained to the jury that by its own terms the statute does not apply in situations like this one, where the emergency

responders acted outside their expertise. There was no other instruction Ms. Richards could rely upon to make this argument, and thus, she could not “lessen any potential prejudice by explaining [her] own position.” *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 91, 18 P.3d 558 (2001) (jury instructions are essential for a party to argue its theory of the case). For this reason alone, the trial court’s decision to include this instruction was error and warrants reversal. *See, e.g., Hawkins*, 92 Wn. App. at 45-46 (instruction that prevented plaintiff from arguing a theory of her case was prejudicial error).

Not only was Instruction 16 an erroneous statement of the law with the potential to confuse the jury, it actually confused the jury.<sup>8</sup> Shortly after deliberations began, the foreperson submitted a question to the trial judge about immunity, good faith, and applicability to various defendants. RP 2530:18-2542.15. While the trial court gave another instruction in an attempt to address this confusion, it did not address the jury’s questions regarding liability of Respondents, nor did it clarify that immunity for paramedics and EMTs requires that they perform only those actions within the scope of their duties. *Id.* The obvious confusion engendered by Instruction 16 is an additional reason that a new trial is warranted.

In short, Ms. Richards was prejudiced when the trial court gave an

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<sup>8</sup> Even the trial judge admitted that the statute was “confusing.” RP 2519. (The Court: “Frankly, it’s a confusing statute.”)

instruction that 1) set forth a difficult legal concept in language difficult for a layperson to understand 2) left out a portion of the law critical to Ms. Richards' case 3) obviously confused the jury and 4) emphasized Respondents' case to her detriment. *See, e.g., Blaney v. Int'l Ass'n of Machinists and Aerospace Workers*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004) (“[a]n erroneous instruction is presumed prejudicial unless it affirmatively appears that it was harmless.”) Moreover, the incorrect instruction was not cured by reference to the instructions as whole. The trial court's inclusion of this prejudicial instruction warrants reversal of the jury's verdict and remand for a new trial.

## VI. CONCLUSION

What should have been a relatively straightforward wrongful death case was hopelessly complicated by AMR's abusive discovery tactics and the trial court's legal and evidentiary errors. The trial court's denial of any serious sanction for AMR's “despicable” failure to comply with its discovery obligations essentially condones such conduct. This Court should reverse and remand for imposition of default against AMR. In the event that a lesser sanction is imposed, Ms. Richards is entitled to a new trial with the inclusion of her negligent retention and supervision claims, the admission of Travis Hardin's felony conviction, and the elimination of Jury Instruction 16.

DATED this 4<sup>th</sup> day of November, 2011.

**PETERSON YOUNG PUTRA**



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Of Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

I hereby certify that on this day I personally served the Brief of Appellant on counsel for Appellant/Defendants by eservice from the Court of Appeals website, as follows:

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

SIGNED at Seattle, Washington, this 7<sup>th</sup> day of November, 2011.

  
\_\_\_\_\_  
Mary Monschein

# PETERSON YOUNG PUTRA LAW OFFICE

**November 07, 2011 - 10:16 AM**

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