NO. 45653-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DARLENE FLETCHER,

Appellant,

v.

GRAYS HARBOR COMMUNITY HOSPITAL,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This is a substantial evidence case arising from a workers' compensation appeal. The appellant, Darlene Fletcher (Ms. Fletcher), appeals a decision of the Grays Harbor Superior Court affirming a Board of Industrial Insurance Appeals (Board) Decision and Order dated January 8, 2013, that affirmed a Department of Labor and Industries (Department) order which found that Ms. Fletcher's condition, proximately caused by her industrial injury, did not objectively worsen between August 28, 2003 and December 8, 2011. (CABR 1[1], 19-27).

This Court should decline Ms. Fletcher's invitation to reweigh the evidence as well-established standards of substantial evidence review provide that appellate courts do not reweigh evidence. Here, sufficient medical testimony supports the superior court's finding that Ms. Fletcher's industrially related condition did not worsen between August 28, 2003 and December 8, 2011. Ms. Fletcher's argument that the Board's Finding of Fact No. 4 was barred by res judicata, is untimely and did not have any effect on the ultimate conclusion of law by the Board and the superior court.

[1] Certified Appeal Board Record

Additionally, the superior court's decision not to use Ms. Fletcher's Proposed Jury Instructions No. 13 and No. 14, if in error, was harmless error, and therefore is not a basis to reverse the superior court's decision.

II. COUNTER STATEMENT OF THE CASE

The Washington Industrial Insurance Act provides injured workers the ability reopen their workers' compensation claims if they are able to show their industrially related conditions have objectively worsened between two terminal dates. RCW 51.32.160.

Ms. Fletcher filed an Application to Reopen her claim which was ultimately denied by the Department of Labor and Industries on December 8, 2011. (CABR 45). Ms. Fletcher filed an appeal and the Board held hearings on the issue of whether the reopening application was properly denied. On November 29, 2012, an Industrial Appeals Judge issued a Proposed Decision and Order which outlined the findings of fact which supported its conclusion of law that Ms. Fletcher's industrially related condition had not objectively worsened and the Department order dated December 8, 2011 was correct and affirmed. (CABR 27). Ms. Fletcher filed a Petition for Review which the Board denied on January 8, 2013, thus adopting the Proposed Decision and Order as the Decision and Order of the Board. (CABR 1). Ms. Fletcher appealed this decision to the Superior Court

of Grays Harbor and the matter was tried before a jury on October 1, 2013. (CP 53).

Ms. Fletcher made a motion for a directed verdict at the close of evidence. (Excerpt Verbatim Report of Proceedings before Honorable Judge Gordon Godfrey, 3, hereinafter RP). For the first time in this matter, she raised the argument that Finding of Fact No. 4 in the Board's Decision and Order was the essential finding of fact in this case and was barred by res judicata. (RP 3-5). The Hospital objected to the motion arguing this was a new issue being raised for the first time on appeal and that it was not the essential finding of fact upon which the jury was being asked to focus. (RP 5-6). The Judge denied the motion by stating No. 4 was bad draftsmanship and it had to be read in conjunction with all of the other findings. (RP 8-9).

The Hospital proposed a jury verdict form containing only one question for the jury which would serve as the basis for either affirming or reversing the Board's decision on the critical issue. That question read as follows:

> Was the Board of Industrial Insurance Appeals correct when it found that between August 28, 2003 and December 8, 2011, Darlene H. Fletcher's condition proximately caused by the industrial injury, did not objectively worsen? (CP 82)

The Hospital excepted to the court's decision to include Ms. Fletcher's proposed Question No. 1 on the verdict form (RP 11), which read as follows:

> Question No. 1
>
> Was the Board of Industrial Insurance Appeals correct when it found that on December 8, 2011, Darlene H. Fletcher had no objective findings proximately caused by her industrial injury? (CP 40).

The Judge denied the Hospital's objection and included both questions on the verdict form. (RP 12, CP 40). After the jury returned its verdict, Ms. Fletcher filed her Motion for Judgment as Matter of Law. (CP 41-47). The motion was denied and the Judgment was signed by Judge Godfrey on November 4, 2013. (RP 20, CP 52-53).

III. COUNTER STATEMENT OF THE ISSUES

1. Does substantial evidence support the superior court's finding that Ms. Fletcher's industrially related cervical condition did not objectively worsen between August 28, 2003 and December 8, 2011 within the meaning of RCW 51.32.160?

2. Was it harmless error to exclude Ms. Fletcher's Proposed Jury Instructions No. 13 and No. 14?

IV. STANDARD OF REVIEW

In a workers' compensation case, the superior court reviews a decision of the Board of Industrial Insurance Appeals de novo based on the certified appeal board record. RCW 51.52.115; *Elliot v. Department of*

Labor & Industries, 151 Wn. App. 442, 445, 213 P.3d 44 (2009). On review to the superior court, the Board's decision is prima facie correct and the burden of proof is on the party challenging the decision. *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 828 P.2d 1138 (1992).

The Court of Appeals reviews the superior court's decision in a workers' compensation case under the ordinary standard of civil review. RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."); *see Rogers v. Department of Labor & Industries,* 151 Wn. App. 174, 179-81, 210 P. 3d 355 (2009). Appellate review is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings. *Young v. Department of Labor & Industries*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996).

When undertaking substantial evidence review the appellate court does not reweigh the evidence or re-balance the competing testimony presented to the fact finder. *Fox v. Department of Rt. Sys.,* 154 Wn. App. 517, 527, 225 P.3d 1018 (2009); *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P. 3d 1221 (2002). Rather, the appellate court views the evidence and all reasonable inference from the evidence in the light most

favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006); *Gagnon,* 110 Wn. App. at 485.

V. ARGUMENT

A. Ms. Fletcher improperly raised the res judicata issue as to the Board's Finding of Fact No. 4 for the first time on appeal during the superior court trial.

At the close of Ms. Fletcher's case before the jury in superior court, she raised the issue for the first time, per her Motion for Directed Verdict, as to whether the Board's Finding of Fact No. 4, and similarly Question No. 1 for the jury, was barred by res judicata. (RP 5). This issue was not reviewed by the Board at the administrative level and the Board was not provided the opportunity to review and pass on this issue at any stage of the administrative proceeding before Ms. Fletcher filed her appeal in superior court.

The jury trial held in superior court on October 1, 2013 was the result of an appeal by Ms. Fletcher to an administrative law decision of the Board of Industrial Insurance Appeals. The record, including exhibits and testimony, are developed at the Board level and the superior court's review is de novo. RCW 51.52.115. Therefore, since no new evidence is presented at superior court, the trial court in this matter is the Board.

The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5 (a). The issue of res judicata

pertaining to Question No. 1 to the jury and Finding of Fact No. 4 of the Board's Decision was not raised at the Board level. The Washington Industrial Insurance Act sets out the administrative processes and appeal rights of parties to an industrial insurance claim if they are aggrieved by a decision. Before appealing to the courts, the aggrieved party must file an appeal of an order from the Department of Labor and Industries to the Board. RCW 51.52.060(1)(a). Ms. Fletcher timely filed her notice of appeal of the Department's December 8, 2011 order and her appeal was granted. (CABR 29, 36). The December 8, 2011 order, which Ms. Fletcher appealed, denied her application to reopen her industrial insurance claim because the condition caused by her injury had not objectively worsened since the final claim closure. (CABR 33).

The Industrial Appeals Judge (IAJ), after hearing all the evidence, issued his Proposed Decision and Order (PDO) which contained findings and conclusions as to each contested issue of fact and law. RCW 51.52.104 (CABR 19-27). The PDO contained the following Findings of Fact:

> 3. Darlene H. Fletcher's industrial injury claim was closed August 28, 2003, and she was given a Category 2 permanent partial disability award for cervical and cervico-dorsal impairments.
>
> 4. On December 8, 2011, Darlene H. Fletcher had no objective findings proximately caused by [her] industrial injury.

> 5. During the period between August 28, 2003, and December 8, 2011, Darlene H. Fletcher's industrial injury condition did not objectively worsen. (CABR 27).

The PDO also contained the following Conclusions of Law:

> 2. Between August 28, 2003, and December 8, 2011, Darlene H. Fletcher's condition, proximately caused by the industrial, did not objectively worsen within the meaning of RCW 51.32.160. (CABR 27).

Once the PDO has been issued, any party may file a petition for review to the board within 20 days which shall set forth in detail the grounds for their petition for review. RCW 51.52.104. The petition for review allows the Board to review the proposed decision, evidence, and the parties' objections thereto, and decide whether to grant or deny the requested review. A party is deemed to have "waived" any objections or irregularities pertaining to the decision of the Board that are not specifically set forth in detail by the party in its petition for review before the Board. RCW 51.52.104. WAC Title 263 promulgates the rules concerning the board's practice and procedure pursuant to RCW 51.52.020. WAC 263-12-145(3) specifically sets forth what content is required in a petition for review:

> A petition for review shall set forth *in detail* the grounds for review. A party filing a petition for review waives all objections or irregularities not specifically set forth therein. *A general objection to findings of fact* on the ground that the weight of evidence is to the contrary *shall not be considered sufficient compliance*, unless the objection shall refer to the evidence relied upon in support thereof....If legal issues are involved, the *petition for review shall*

set forth the legal theory relied upon and citation of authority and/or argument in support thereof. (Emphasis added)

Ms. Fletcher filed a Petition for Review dated December 21, 2012 in which she lodged a *general* objection to Finding of Fact No. 4 because it was "not supported by the evidence in the record." (CABR 4). It is implicit upon the party filing the petition for review, as stated in the RCW and the WAC, that they provide the reviewing board enough information, including their legal theory in support of their argument, to make a decision. Here, Ms. Fletcher's general objection to Finding of Fact No. 4 on the ground that the weight of the evidence in the record does not support it, is not sufficient compliance with the rule. The entirety of Ms. Fletcher's "Discussion of Remaining Issues" in her petition for review, is focused on whether the testimony of Dr. Clyde Carpenter, who was a treating physician, should have been given more weight by the Board than that of the testimony from Dr. Karl Goler and Dr. David Bauer. (CABR 4-8). There is absolutely no argument, legal theory, or evidentiary reference to Ms. Fletcher's current argument that Finding of Fact No. 4 and the Board's Order was not supported by the evidence and was barred by res judicata.

For the first time at the jury trial in superior court, Ms. Fletcher challenged the Board's Finding of Fact No. 4 by arguing the evidence in the record did not support it and that it was barred by res judicata. (RP 5). Ms.

Fletcher attempted to raise an issue or argument she failed to make below, by seeking to present it as Question No. 1 on the verdict form. (CP 29). The Hospital excepted to the court's inclusion of Question No. 1 on the verdict from as it had not been raised as an issue at the Board level and it did not have any bearing on the ultimate issue before the jury. (RP 5, 11).

The reason for the rule precluding a party from raising an issue for the first time on appeal, is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials. *Estate of Ryder v. Kelly Springfield Tire Co.*, 91 Wn.2d 111, 114, 587 P.2d 160 (1978). In this case, the Board was not given the opportunity to correct any error as to Finding of Fact No. 4. Therefore, on appeal to superior court and now this Court, Ms. Fletcher cannot now raise the issue.

Ms. Fletcher failed to comply with RCW 51.52.104 and WAC 263-12-145(3). Therefore she waived her argument contending that the Board based its decision on a Finding of Fact barred by res judicata or that the superior court erred in affirming an Order and finding of the Board which was barred by res judicata. Ms. Fletcher had her opportunity when she filed her petition for review with the Board, to argue and refer to the evidence she is now relying on to claim that the finding of fact and order of the Board was not supported by sufficient evidence. She failed to do so and cannot

now be allowed to identify an issue which the Board was not provided the opportunity to review, correct or pass upon.

Since the Hospital was the prevailing party before the Board on the issue of whether Ms. Fletcher's industrially related condition had objectively worsened between the terminal dates, it was content with the decision. The Court of Appeals has recently stated that case law supports the conclusion that a party who seeks no affirmative relief from the decision and order may not appeal for the sole purpose of challenging contested findings. *Cantu v. Department of Labor and Industries*, 168 Wn. App. 14, 23, 277 P.3d 685 (2012). Therefore, as the prevailing party on the ultimate issue in the case, whether or not the Hospital believed that Finding of Fact No. 4 had been poorly written by the Board or was barred by res judicata, it did not need, nor was it permitted, to appeal. *Id.*

Ms. Fletcher's improperly raised arguments should not be considered by this Court. Ms. Fletcher has not asserted an error that is permitted to be raised for the first time on review in the appellate court under RAP 2.5 (a).

B. The substantial evidence in this case supports the jury's verdict that Ms. Fletcher's condition proximately caused by the industrial injury did not objectively worsen between August 28, 2003 and December 8, 2011.

RCW 51.32.160 provides that a claimant may reopen his/her industrial injury claim due to aggravation of that condition. The material issue at the Department level and the Board was whether there was objective *worsening* of the claimant's condition. Jury Instruction No. 11 explained to the jury that Ms. Fletcher had the burden to prove she had objective worsening, or aggravation, resulting in a need for treatment that was proximately caused by the industrial injury and the aggravation occurred between August 28, 2003 and December 8, 2011. (CP 37). In weighing the entirety of the evidence presented to them, the jury ultimately found, by answering "yes" to Question No. 2, that Ms. Fletcher did not have an objective worsening of her industrially related condition. (CP 40).

Question No. 1 on the verdict form, which asked, "Was the Board of Industrial Insurance Appeals correct when it found that on December 8, 2011, Darlene H. Fletcher had no objective findings proximately caused by her industrial injury?" was not relevant to the ultimate issue in Ms. Fletcher's appeal to superior court. The critical issue on appeal, and the one that ultimately affected the Board's Conclusions of Law and the Department's Order which was on appeal, is whether Ms. Fletcher's

industrially related condition objectively worsened within the meaning of RCW 51.32.160 between August 28, 2003 and December 8, 2011.

The Hospital argued against submitting Question No. 1 to the jury precisely because it was a red herring, it was irrelevant to the ultimate issue, and it would lead to confusion. (RP 11). In fact, the jury could have answered "no" to Question No. 1, but it would not have changed the outcome of the verdict, which was an affirmation of the denial of Ms. Fletcher's reopening application, since they also answered "yes" to Question No. 2. Ms. Fletcher's emphasis on whether the answers to the two questions asked of the jury can be "harmonized" is misplaced.

Ms. Fletcher's argument that the jury could not have found aggravation between August 28, 2003 and December 8, 2011 since they answered "yes" to Question 1, is misleading and incorrect. The question asks if they agree that Ms. Fletcher had no objective findings proximately caused by her industrial injury. (CP 40). So, they very well could have disagreed with this question based on the evidence and decided that she did have objective findings on December 8, 2011 proximately caused by her industrial injury. However, merely determining she had objective findings on December 8, 2011 does not require them to find that her *industrially related* condition had *worsened* between the two terminal dates. It is not the mere presence of the objective findings that is required, it is the worsening

of those findings, if there was any worsening, and the objectively worse findings must be proximately caused by her industrial injury. The substantial evidence in this case supported the jury's finding that her condition had not worsened.

The Board's Findings of Fact were provided to the jury in Instruction No. 4. (CP 34). The Board's findings consist of five factual findings. (CP 34). Finding No. 4, which is the focus of Ms. Fletcher's appeal, and which is reflected in Question No. 1 on the verdict form, cannot be considered in a vacuum. It must be weighed in connection with the other findings of the Board. Although Finding No. 4 of the Board's decision may have been poorly written, when it is read in connection with the other findings, along with the substantial evidence presented on the critical issue, a reasonable inference can be made to support the jury's verdict as correct. Even if you remove Finding of Fact No. 4 from the Board's decision or the jury's contemplation, it does not change or disrupt the conclusions of law reached by the Board. The essential finding by the Board and affirmed by the jury verdict, that Ms. Fletcher did not have objective worsening of her industrial injury, is supported by the substantial evidence.

In this appeal, this Court must look at whether the court's conclusions of law flow from the findings. *Ruse v. Department of Labor and Industries*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). The ultimate question

bearing on the Board and the Department's decision to deny Ms. Fletcher's reopening application, was not whether she had objective findings on a specific date, but whether she had objective worsening of her industrially related condition between the original closing date in 2003 and the December 8, 2011 denial order. Therefore, the Conclusion of Law reached by the Board, and upheld by the jury, was that between August 28, 2003 and December 8, 2011 Ms. Fletcher's condition, proximately caused by the industrial injury, did not objectively worsen. (CABR 27). This conclusion clearly flows from the Board's Findings of Fact which address and support this conclusion.

For the sake of argument, assume the jury answered "no" to Question No. 1, which would have resulted in a finding that on December 8, 2011 Ms. Fletcher *did* have objective findings proximately caused by her industrial injury. This would have merely confirmed the Board's Finding of Fact No. 3 which found Ms. Fletcher had a permanent partial cervical disability based on objective findings when her claim closed. Or, presume that finding No. 4 stated, "On December 8, 2011, Ms. Fletcher *did have* objective findings proximately caused by the industrial injury." This would appear to be what Ms. Fletcher is arguing was the appropriate wording of this finding of fact. However, merely finding that Ms. Fletcher had objective findings as of December 8, 2011, does not lead to the conclusion,

as Ms. Fletcher intimates, that she therefore had an objective *worsening* of that condition between August 28, 2003 and December 8, 2011. A claimant can have objective findings proximately caused by the industrial injury, however she is still required to prove that those findings had worsened.

The jury's answer to Question No. 2 does not merely "reiterate" the findings implicit in Question No. 1 as argued by Ms. Fletcher. These two questions can be answered wholly independent of each other. Ms. Fletcher focuses on the evidence directly related to Question No. 1, but is silent on the substantial evidence which is present to support the jury's answer to Question No. 2. Both Dr. Goler and Dr. Bauer testified that Ms. Fletcher's findings on the 2010 cervical MRI did not correlate with her subjective complaints and her industrially related condition did not objectively worsen. (CABR, Goler Deposition p. 28, l. 20 - p. 29, l. 9; CABR, Bauer Deposition at p. 29, l. 3 - 13). The only testimony presented by Ms. Fletcher was that of Dr. Carpenter, who never physically examined her after the claim closed in 2003, did not review the MRI film or report, and did not compare examination findings between the two terminal dates. (CABR, Carpenter Deposition p. 7, l. 3-16; p. 11, l. 7-19; p. 12, l. 12-22). His opinion was unreliable and without medical basis. Through the testimony of Dr. Bauer and Dr. Goler, the Hospital presented substantial evidence which supported

the jury's verdict in favor of the Hospital and denial of Ms. Fletcher's reopening application.

There was legally sufficient evidence for the jury to find that Ms. Fletcher's industrially related condition did not objectively worsen between August 28, 2003 and December 8, 2011, notwithstanding the answer to Question No. 1. In effect, the asking and answering of Question No. 1 was harmless error since it did not have any effect on the ultimate issue, which was asked in Question No. 2. Ms. Fletcher attempts to confuse the question of whether she had objective findings on December 8, 2011 due to her industrially related condition, with the questions of whether her condition objectively worsened and whether her injury was the proximate cause of that worsening. The substantial evidence supports the jury's verdict.

C. Ms. Fletcher was not limited in arguing her theory of the case to the jury and therefore she was not prejudiced by the exclusion of her Proposed Instructions No. 13 and No. 14.

Harmless error is disregarded by the court in every stage of the action if it is an error which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error. RCW 4.36.240. A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it and in no way affected the final outcome of the case. *State v. White*, 31 Wn. App. 655, 667, 644 P.2d 693, 700 (1982). Ms.

Fletcher assigns error to the superior court's exclusion of her Proposed Instruction No. 13 which read:

> It has been established that on August 8, 2011, when her claim was closed, Ms. Fletcher had objective findings of permanent cervico-dorsal impairment. (CP 25).

To begin, the proposed instruction notes the date of "August 8, 2011" as the date Ms. Fletcher's claim closed. However, this date is incorrect by date and year because her claim actually closed on August 28, 2003. (CP 34). Therefore, submission of the instruction to the jury would have merely led to confusion and distraction from the issue the jury was being asked to determine: aggravation of her condition.

In addition, this statement (with the correct date) was favorably set forth in the court's Instruction No. 4 which set forth the Board's Findings of Fact. (CP 34). To restate it in a separate jury instruction would have been repetitive and would not have affected the final outcome of the case.

A trial court's decision to give or reject a particular instruction is reviewed for abuse of discretion and the appellant must establish that any error resulted in prejudice. *Stiley v. Block*, 130 Wn.2d 486, 498-99, 925 P.2d 194 (1996). Ms. Fletcher was not prejudiced by the exclusion of this instruction since it not only was an incorrect statement of the facts but it was favorably stated elsewhere in the court's instructions. In addition, Ms. Fletcher was provided the opportunity to argue her theory of the case and

emphasize this particular fact during opening statements and closing argument before the jury. Therefore, exclusion of this instruction was harmless error because it did not prejudice Ms. Fletcher and should be disregarded by this Court.

Ms. Fletcher also assigns error to the superior court's exclusion of her Proposed Instruction No. 14 which read:

> You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or believe or disbelieve, such testimony. It does require that you give such testimony careful thought in your deliberations. (CP 26).

As the instruction states, it does not require the jury to give greater weight or credibility to, or believe or disbelieve, the testimony of the attending physician. Therefore, if the jury is not required to give this testimony any greater weight or credibility, what prejudice has Ms. Fletcher suffered by not being allowed to give this instruction to the jury?

Ms. Fletcher has not established that she was prejudiced in any way by the exclusion of this instruction. The court's decision to refuse this instruction is not an abuse of discretion. She has not presented any argument to support that the outcome of this case was somehow affected by the exclusion of this instruction.

The Court in *Hamilton* did not hold that it is error to refuse to give such an instruction when an attending physician has testified, it merely held

that this instruction incorporated a rule of law in workers' compensation law and it was not a comment on the evidence. *Hamilton v. Department of Labor Industries*, 111 Wn.2d 569, 761 P.2d 618 (1988). This is an important distinction since here Ms. Fletcher is arguing for its *inclusion* but the courts have not held the inclusion of this instruction is mandatory, even if the evidence supports it. *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998).

The Court in *Harker-Lott* held the trial court's refusal to give the attending physician instruction was not an abuse of discretion because it was not necessary for the jury to understand the theory of the case. *Id.* at 187. Similar to *Harker-Lott*, one of the court's general instructions, Instruction No. 1, in this matter told the jury:

> You are the sole judges of the value of or weight to be given to the testimony of each witness. In considering a witness's testimony you may consider these things: the *opportunity of the witness to observe* or know the things they testify about, the ability of the witness to observe accurately, the quality of a witness's memory while testifying, any personal interest that the witness might have in the outcome of the issues, any bias or prejudice that the witness may have shown, the reasonableness of the witness's statements in the context of all of the other evidence, *and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony*. (Emphasis added) (CP 31).

Jury instructions must be considered as a whole. *Kerr v. Cochran*, 65 Wn.2d 211, 216, 396 P.2d 642 (1964). The court's instructions to the jury fairly stated the law and allowed counsel to argue his theory of the case

to the jury. When reading all of the instructions together as a whole, numbers one through thirteen, it was very clear to the jury what the issue in the case was and what they were being asked to decide. Specifically, whether the claimant's industrially related cervical condition had objectively worsened between the terminal dates. The court's general instruction also gave Ms. Fletcher's counsel the opportunity to argue to the jury regarding the weight and credibility of the testimony of Dr. Carpenter, the attending physician. The exclusion of Proposed Instruction No. 14 did not prejudice the rights of Ms. Fletcher nor did it in any way affect the final outcome of the case.

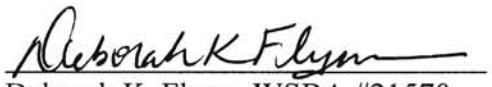
The exclusion of both Proposed Instructions No. 13 and 14 should be regarded as harmless error.

VI. CONCLUSION

For the foregoing reasons, the Hospital requests that this Court affirm the superior court's judgment and verdict.

RESPECTFULLY SUBMITTED this 29th day of April, 2014.

FLYNN LAW GROUP, LLC



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NO. 45653-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DARLENE FLETCHER, Appellant, vs. GRAYS HARBOR COMMUNITY HOSPITAL, Respondent.	CERTIFICATE OF SERVICE OF BRIEF OF RESPONDENT

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on April 30, 2014, I caused to be served the BRIEF OF RESPONDENT as follows:

Via First Class Mail, Postage Prepaid to:

Anastasia Sandstrom
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800 Fifth Avenue, Suite 2000
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Wayne Williams
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I further certify that I filed the original BRIEF OF RESPONDENT as follows:

VIA ABC LEGAL SERVICES

David Ponzoha, Clerk/Administrator
Court of Appeals, Div. II
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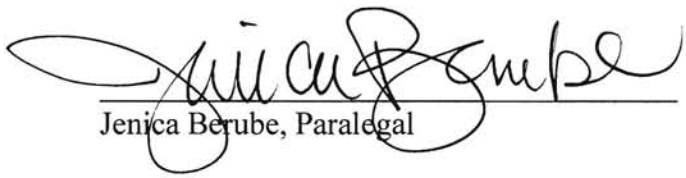
Tacoma, WA 98402

Dated this 30th day of April, 2014.



Jenica Berube, Paralegal