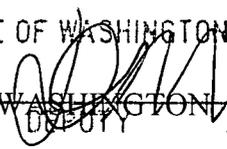


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

BY 
~~DEPUTY~~

No. 48189-8-II

LINDA YEAGER,

Appellant,

vs.

JOHN O'KEEFE,

Respondent.

BRIEF OF RESPONDENT JOHN O'KEEFE

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NATURE OF THE CASE

This is personal injury action arising from a car accident. The Plaintiff Yeager appeals a judgment in her favor following a jury trial. She claims the trial court abused its discretion when it refused to allow her to present the testimony of a doctor by deposition instead of in person. Because the trial court did not abuse its discretion and Yeager has not shown harm, this court should affirm the judgment.

STATEMENT OF THE CASE

Yeager and defendant O'Keefe were involved in a car accident on January 28, 2011. O'Keefe rear-ended Yeager. Yeager filed suit on January 14, 2014. (CP 1) O'Keefe admitted liability, but disputed the nature and extent of Plaintiff's damages. (CP 3) Yeager had many significant pre-existing conditions, and O'Keefe claimed these were the cause of her symptoms, not the car accident. In February, 2015, the case was set for trial on September 14, 2015. (RP 1:165)

This appeal concerns the testimony of Dr. Eyal Kedar, a doctor at Virginia Mason Clinic. About ninety days before trial, Yeager identified Dr. Kedar as her "current rheumatologist."¹ (CP 20) Yeager had three rheumatologists. (RP 1:190)

1. In April, 2015, Yeager identified the medical doctors with whom she had treated as potential witnesses in her case. (CP 9-11) She did not identify Dr. Kedar in that disclosure. She first identified Dr. Kedar in a supplemental witness disclosure in June, 2015. (CP 19-20)

O’Keefe’s counsel deposed Dr. Kedar on August 24, 2015. Though the notice of deposition is not in the record, all parties agree defense counsel noted the deposition for discovery purposes, not perpetuation. (RP 1:158)

Unbeknownst to defense counsel, Yeager’s attorney intended to present Dr. Kedar’s testimony at trial. She claims she sent a subpoena to Dr. Kedar’s employer in early August.² (RP 2:345) She did not send a copy to defense counsel. (RP 2:352) While she had not been successful serving Dr. Kedar by the time of his deposition, Yeager’s counsel did not serve a subpoena at his deposition on August 24th. Nor did she attempt to perpetuate his testimony at or after the deposition.

Whatever her original intentions were, three days after Dr. Kedar’s deposition Yeager’s attorney sent notice to defense counsel indicating she would present Dr. Kedar’s testimony at trial by deposition. (CP 26-27) On September 3, 2015, she also told the court that Dr. Kedar would testify by deposition. (CP 93)

Neither notice identified the parts of the deposition she would present. (CP 26) The first simply said the portions would be “designated when available.” (CP 26) The second said he would testify “by portions of

2. Yeager incorrectly states that “Dr. Kedar was subpoenaed to appear at trial more than a month before the trial began.” Brief of Appellant at 3, 7. At best, Yeager attempted to serve Dr. Kedar then, but never succeeded. (RP 2:345) Even this, however, is questionable. As of his deposition, Dr. Kedar had not been asked to testify at trial.

deposition transcript.” (CP 93)

Only the first notice stated the rule on which Yeager was relying to present Dr. Kedar’s deposition testimony: “CR 32(5).” (CP 26) Both Yeager’s counsel and defense counsel understood the citation was incorrect and she was relying on CR 32(a)(5). (RP 155)

Prior to trial, O’Keefe’s counsel objected to the use of Dr. Kedar’s deposition. The court heard argument on the issue on the second day of trial, after jury selection. (RP 1:155-168) During argument, Yeager changed the basis for allowing her to use the deposition from CR 32(a)(5) to CR 32(a)(3). (RP 1:157) In the alternative, she asked the court to allow her to present Dr. Kedar’s testimony telephonically. (RP 1:156-57) Yeager’s counsel contended Dr. Kedar could not appear in person because he had a busy patient schedule. (RP 164).

The trial court denied the request to use the deposition. The court reasoned that rule 32(a)(5) was the applicable rule, but none of the conditions stated in the rule applied. (RP 1:163) The court also denied the request to present Dr. Kedar by telephone. The court acknowledged the preference for in person testimony reflected in CR 43. The court noted that allowing Dr. Kedar to testify by telephone would prejudice the jury by depriving them of the ability to observe him, and would prejudice the defense by limiting its ability to cross-examine him. (RP 1:167) Yeager could call Dr. Kedar to

testify, but he had to appear in person.

Trial progressed. Yeager did not call any of her other treating doctors. Instead, she called a single expert, Dr. Samuel Coor. (See generally RP1:182-92) He practices neurology and osteopathics. (RP 1;183) Dr. Coor had reviewed all of Yeager's records, as well as a summary of her care provided by Yeager's attorney. (RP 1:183, 186) He was asked about and discussed the treatment given by many of Yeager's providers. These included Yeager's primary care physician at the time of the accident, Dr. Boyd (RP 1:185), her primary care physician who took over for Dr. Boyd, Dr. Vivian Stone, and other specialists. (RP 1:189) He gave opinions as to what injuries Yeager suffered in the accident (RP 1:185, 192), the relationship between those injuries and the treatment she received (RP 1:188, 192), the affect of pre-existing injuries (RP 188-89), the permanency of her injuries (RP 1:191-92), and the need for future treatment (RP 1:188-89). Yeager's attorney did not ask by name about Dr. Kedar's care and treatment, but Dr. Coor did testify to the care provided by Yeager's three rheumatologists and their conclusions. (RP 1:190)

Before she rested, on the third day of trial, Yeager asked the court to reconsider its decision not to allow her to present Dr. Kedar's testimony by deposition or telephonically. (CP 105-07; RP 3:337) For the first time, she presented actual testimony, a declaration from Dr. Kedar, saying he lived

more than 20 miles from Thurston County and could not appear to testify “due to my patient schedule.” (CP 103) Yeager argued that Dr. Kedar was not an expert witness but rather a fact witness, making CR 32(a)(3) the applicable rule, not CR 32(a)(5). She contended that the *Burnet* factors³ prevented the court from excluding Dr. Kedar from testifying, and in any event CR 43 allowed Dr. Kedar to testify by telephone.

The record shows the trial court carefully considered the motion. (See generally RP 2:337-90) The court declined to reconsider disallowing use of the deposition. It reasoned that regardless of whether Dr. Kedar would be considered a fact or expert witness for purposes of the discovery rules, Yeager had designated and was using him as an expert. Thus, the court concluded, CR 32(a)(5) was the applicable rule, but Dr. Kedar’s deposition did not qualify under that rule. (RP 2:387-88) The court also declined to allow Dr. Kedar to testify by telephone, noting that Yeager had not shown good cause or compelling circumstances to justify that result. The court observed that Yeager first raised the need for a telephonic appearance during trial. Moreover, she had not shown she made reasonable efforts to secure his testimony in person. (RP 2:389-90) The court reiterated it was not excluding Dr. Kedar from testifying, it was only requiring that he testify in person. Thus, the *Burnet* factors did not apply.

3. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

Trial continued to verdict. The jury found for Yeager, but in an amount less than she wanted. She has appealed. The only issue she has raised pertains to the trial court's ruling not allowing her to present Dr. Kedar's testimony by deposition.

ARGUMENT

1. Introduction

Civil Rule 43 states the general rule regarding presentation of testimony at trial: "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise directed by the court or provided by rule or statute." In this case, the trial court correctly required Yeager to present Dr. Kedar in person because she could not establish the conditions for using his deposition.

Moreover, even if the trial court erred, Yeager has not shown harm. The record does not show what Dr. Kedar would have testified. Whatever opinions he would have expressed would have been cumulative to the testimony of Dr. Coor and evidence admitted through medical records. Despite the court's ruling, Yeager was fully able to present the substance of Dr. Kedar's testimony and argue her theory of the case.

2. The trial court correctly applied CR 32(a)(5) rather than CR 32(a)(3) in determining whether to allow Dr. Kedar's deposition testimony.

The centerpiece of Yeager's argument is that the admission of a

deposition of a healthcare professional offering expert opinions is not governed exclusively under CR 32(a)(5), but is admissible if it meets the criteria of CR 32(a)(3) as well. Brief of Appellant at 8. Yeager raises this for the first time on appeal⁴ and cites no authority for the proposition.

Neither the wording nor the history support Yeager's contention. The rule states unequivocally: "The deposition of an expert may be used as follows . . .:" It does not say: "Except as provided in CR 32(a)(3), the deposition of an expert may be used as follows . . .," or "In addition to the circumstances described in CR 32(a)(3), the deposition of an expert may be used as follows" By its express terms, CR 32(a)(5) applies whenever a party is offering the deposition of an expert.

The history of CR 32(a)(5) supports that conclusion. The provisions of CR 32(a)(5) were added to CR 32 in 1993. The drafters noted that the amendment was intended to address two problems. The first was to eliminate a trap that arises when a party conducts a discovery deposition of a CR 26(b)(5) expert only to learn later that the expert could be impeached, such as by having relied upon faulty information. If the deposition is allowed to be presented, the deposing party is effectively prevented from cross

4. This is significant. Yeager argued that CR 32(a)(3) applied, not CR 32(a)(5). She did not argue the trial court had to analyze her request under CR 32(b)(3) regardless of whether it also applied CR 32(b)(5). As a result, the trial court never had to address whether Dr. Kedar's absence had been procured by Yeager within the meaning of CR 32(a)(3)(B).

examining the expert after learning of the grounds to impeach the witness. Drafters' Comments, Karl B. Tegland, 3A Wash. Prac. at 757-58 (6th Ed., 2013). Subsection (a)(5)(A) prevents that by requiring the opposing party be given a reasonable opportunity to depose the expert again if another party is going to use the discovery deposition.

The second was intended to address the high cost of presenting the testimony of health care professionals. Subsection (a)(5)(B) allows a party to preserve the health care professional's testimony, and present it in lieu of live testimony under specified conditions which protect the other party's ability to cross-examine the witness: The preserving party notes the deposition as a preservation deposition; the witness is adequately disclosed in discovery; and, the other party is given the opportunity to depose the health care professional prior to the preservation deposition. Drafters' Comments, Karl B. Tegland, 3A Wash. Prac. at 757-58 (6th Ed., 2013).

Yeager has not shown how either of these purposes is furthered by applying the provisions of CR 32(a)(3) as a supplement to CR 32(a)(5). Each of the subsections of CR 32(a)(5) carefully balances the need and efficiency of presenting expensive expert testimony in a more efficient and cost effective way with the need to protect the other party's ability to cross examine and impeach the witnesses' opinions and testimony. In doing so, the amendments address the problems created by, and curb abuses allowed under,

CR 32(a)(3). If, despite the 1993 amendments, subsection (a)(3) remains fully applicable to experts as Yeager argues, subsection (a)(5) is superfluous. The same abuses and the same problems will continue despite the amendment. The trial court did not err in deciding that CR 32(a)(5) controlled Yeager's request.

3. The trial court properly treated Dr. Kedar as an expert for purposes of CR 32(a)(5).

Yeager's alternative contention – that if CR 32(a)(5) is the sole mechanism for introducing expert testimony the court nonetheless erred because Dr. Kedar was not a CR 26(b)(5) expert – is incorrect for two reasons. First, the language and the history of CR 32(a)(5) show the rule is not limited to CR 26(b)(5) experts. Second, the trial court did not abuse its discretion in determining that Dr. Kedar should be treated as a CR 26(b)(5) expert in any event.

The language of subsection (b) shows it is not constrained by CR 26(b)(5), nor is it limited to experts hired in anticipation of litigation. The rule states unequivocally: “The deposition of an expert may be used as follows” It does not say: “The deposition of a CR 26(b)(5) expert may be used as follows” Not all experts are CR 26(b)(5) experts. A witness need not be a CR 26(b)(5) expert to give expert testimony under ER 702. See ER 702; *In re Commitment of A.S.*, 138 Wn.2d 898, 982 P.2d 1156 (1999)(Social workers who initially evaluated plaintiffs could testify under

ER 702).

Moreover, differences in subparts (A) and (B) of CR 32(a)(5) show the rule is not limited to CR 26(b)(5) experts. Unlike CR 32(a)(5)(A) which explicitly states that it applies to 26(b)(5) experts, CR 32(a)(5)(B) does not. It says it applies to any “health care professional.” It does not say it applies to just a “rule 26(b)(5) health care professional.” And, in addition to referencing disclosure under CR 26(b)(5), CR 32(a)(5)(B) also references disclosure under CR 33, 34 and 35. Disclosures under those rules are not limited to CR 26(b)(5) experts. Thus, even if the opening use of the word “experts” in CR 32(a)(5) was ambiguous or unclear, the subparts make clear that CR 32(a)(5) is not limited to CR 26(b)(5) experts.

This conclusion is born out by the drafter’s comments as well. The problems identified by the drafters as being the targets of CR 32(a)(5) are not limited to CR 26(b)(5) experts.

Kimball v. Otis Elevator Co., 89 Wn. App. 169, 947 P.2d 1275 (1997), does not require a different conclusion. In *Kimball*, the trial court allowed the use of a treating physician’s testimony under CR 32(a)(5)(B), and the plaintiff appealed. However, the appellate court stated explicitly that it did not have to address the application of CR 32(a)(5)(B) because the testimony that was allowed went to the issue of damages but the jury never reached the damages phase of the case. 89 Wn. App. at 174-75 (“We need

not decide whether CR 32(a)(5)(B) was violated because the deposition testimony related solely to the issue of damages, which the jury never reached, and not to the issue of liability; therefore, any error was harmless.”) Analysis after this is dicta.

As important, the analysis in that dicta is flawed. The court’s analysis turned on its conclusion that both subparts (A) and (B) of CR 32(a)(5), were limited to CR 26(b)(5) experts. 89 Wn. App. at 175 (“Subsection (a)(5) allows the use of the deposition of an expert witness under two special circumstances, both of which refer to CR 26(b)(5) provisions regarding discovery of facts known and opinions held by experts, acquired or developed in anticipation of litigation or for trial.”) But, as shown above, neither the language of the rule itself, nor the comments from its drafters support that conclusion. To the extent the *Kimball* court concluded that the word “expert” means CR 26(b)(5) expert for all purposes in the civil rules in general or CR 32(a)(5) in particular, it was in error and should not be followed.

Yeager’s analysis is flawed for an additional reason as well. Even if CR 32(b)(5) is limited to CR 26(b)(5) experts, the trial court did not abuse its discretion in deciding that Dr. Kedar should be treated as a CR 26(b)(5) expert. Yeager did not list Dr. Kedar among those she identified in April, 2015, as “Treating Physicians and Providers” in her Disclosure of Primary Witnesses. (CP 10-11) When she did disclose him in June, 2015, she listed

him cryptically as a “Medical Professional” (CP 20), which was the same broad category she used in her earlier disclosure to identify all of her experts, including Dr. Coor. (CP 9) She gave no designation for him in her final witness list. (CP 93) She originally indicated she was using his deposition testimony pursuant to CR 32(a)(5), which she now contends only applies to CR 26(b)(5) experts. (CP 26-27) She acknowledged she was presenting him to provide opinion testimony as an expert. (RP 4:638) And she only changed to contending he was a fact witness after the defense challenged her reliance on CR 32(a)(5) as the basis for admitting his deposition. (RP 1:155, 157) Under these circumstances the trial court acted well within its discretion in deciding that Yeager had adopted Dr. Kedar as a CR 26(b)(5) expert regardless of his actual status.⁵ Even under Yeager’s interpretation of CR 32(a)(5), if the trial court properly decided Dr. Kedar should be treated as a CR 26(b)(5) expert, it did not err in assessing the admissibility of the deposition under CR 32(a)(5).

4. Yeager has not shown that any error was harmful.

Even if the trial court erred in applying CR 32(a), this court still should affirm the judgment. The error was either harmless or invited.

5. Though the trial court was not aware of it, there was a question whether Dr. Kedar was actually retained for purposes of the trial. Dr. Kedar first saw Yeager in November, 2013, more than two years after the accident. Yeager filed suit just two months later. A better opportunity to inquire may have shown that Dr. Kedar actually met the requirements of a CR 26(b)(5) expert regardless of Yeager’s contentions.

This court may not reverse due to an evidentiary error that does not result in harm to the appellant. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error is harmless unless it was reasonably probable that it changed the outcome of the trial. *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 452, 191 P.3d 879 (2008). As appellant, Yeager has the burden of providing an adequate record to review whether error by the trial court was harmful. *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 345, 760 P.2d 368 (1988).

Yeager cannot show harm for two reasons. First, she has not provided a record that allows the court to determine whether Dr. Kedar's testimony would have affected the outcome of trial. Yeager has not provided the testimony in the record on review. She did not make an oral offer of proof in the report of proceedings. The most the court has are the comments of Yeager's counsel during argument that Dr. Kedar "is a vital witness to Plaintiff's case." (RP 2:346) Then, after Plaintiff rested (RP 4:631), her counsel also told the court that Dr. Kedar was planning to testify that "she now has fibromyalgia that they believe is related to the motor vehicle collision."⁶ (RP 4:638) This is not a sufficient record for this court to

6. In her brief Yeager states: "During [his] deposition, Dr. Kedar 'offer[ed] . . . opinions on causation related to the car accident.' RP 388 Specifically, Dr. Kedar testified Ms. Yeager 'developed diffuse pain syndrome following the motor vehicle accident [that] is consistent with fibromyalgia.' RP 628" Brief of Appellant at 3. This statement is misleading. The citation, RP 628, does not describe what Dr. Kedar testified to in his deposition, specifically or otherwise. It describes what his medical records that were admitted into evidence showed.

determine within reasonable probabilities whether, had the error not occurred, the outcome of the trial would have been materially affected.

Second, Yeager had other options for presenting the information that might have been contained in Dr. Kedar's deposition testimony. These included her expert Dr. Coor and medical records. Dr. Coor had reviewed all of Yeager's records, as well as a summary of her care that had been provided by Yeager's attorney. (RP 1:183, 186; 4:695-96) He was asked about and discussed the treatment given by all of Yeager's providers. These included Yeager's primary care physician at the time of the accident, Dr. Boyd (RP 1:185), her primary care physician who took over for Dr. Boyd, Dr. Vivian Stone, and other specialists. (RP 1:189) He gave opinions as to what injuries Yeager suffered in the accident (RP 1:185, 192), the relationship between those injuries and the treatment she received (RP 1:188, 192), the affect of pre-existing injuries (RP 1:188-89), the permanency of her injuries (RP 1:191-92), and the need for future treatment (RP 1:188-89). Yeager's attorney did not ask by name about Dr. Kedar's care and treatment, but Dr. Coor did testify to the care provided by Yeager's rheumatologists – of which Dr. Kedar was one of three – and whether she had an autoimmune disorder. (RP 1:190)

Counsel did not quote from his deposition, but simply indicated that his testimony "is consistent with what is in her medical records." (RP4:628)

Q. Okay. And you didn't have any follow-up on those visits or of any nature?

A. The only followups were -- I think that the three rheumatologists came to agreement.

Q. And what was that agreement?

A. That there was no evidence of an autoimmune disorder.

(RP 1:190) There is no reason to believe Yeager did not get whatever information would have been given by Dr. Kedar in to evidence through Dr. Coor.

Yeager also had medical records. The trial court admitted some if not all of Yeager's medical records. (RP 627-28) During discussion about their admissibility, Yeager's counsel specifically noted that the records included the records of Dr. Kedar and from them she could argue the information that Dr. Kedar's testimony would have provided.

Okay. Your Honor, Dr. Kedar is not available to be present today. I will direct the Court's attention to Exhibit 6 at page 232 and other places in Exhibit 6 that have now been admitted. Dr. Kedar's testimony through his deposition, as we've argued previously, is as a treating physician. The rest -- his testimony that we have submitted for use is consistent with what is in her medical records. It is not anything going outside the scope of what was documented in the medical records, which specifically is, it does appear that she developed diffuse pain syndrome following the motor vehicle accident is consistent with fibromyalgia. And then later on, the same comment that was read by Dr. Grassbaugh yesterday, in that they found that she was having fibromyalgia related to the motor vehicle collision. And that is documented in these medical records.

(RP 4:628-29) The trial court allowed her to argue from these records. (RP 4:638-39)

If Yeager failed to use these other vehicles for presenting the testimony Dr. Kedar's deposition would have provided, she invited the harm. That alone would preclude her appeal. *State v. Burton*, 165 Wn. App. 866, ¶¶62, 269 P.3d 337 (2012)(A party may not set up an error at trial and then complain of it on appeal.) Ultimately, however, Yeager's counsel did use these vehicles. During closing, she specifically referred to Dr. Coor and the admitted medical records as proof that Yeager suffered from fibromyalgia related to the car accident.

From there the records will show that she was referred to physical therapy. She had a round of physical therapy at Woodland Creek Physical Therapy. And then she did some exercise and stuff on her own, but she's still not getting better. And then so she goes back, contacts the doctor again. He refers her for orthopaedic evaluation. She goes to Olympia Orthopaedics. She's evaluated. They don't find anything. So they send her back and recommend either injections or additional physical therapy, which she does do the additional physical therapy. She doesn't want to do the needles; she does additional physical therapy.

After the additional round of physical therapy, she's still having problems. And she is -- then she's seen by Vivian Stone at Virginia Mason who documents -- both Vivian Stone and Dr. Boyd, throughout the time, document that she's having this ongoing pain that she associates with the motor vehicle collision.

Vivian Stone sees her, evaluates her, and said -- makes a finding of fibromyalgia. So you have Dr. Coor that came in, and he testified for you that she had the initial care with Dr. Boyd; she had the two rounds of physical therapy; she had the referral to orthopaedic; and she had the referral to Virginia Mason. And all of those are related to the motor vehicle collision.

(RP 4:666-67) She reaffirmed the point during rebuttal.

So Dr. Coor, as I said, reviewed the records, documented all of her prior problems, said I don't think that any of this preexisting stuff is what caused these injuries in the accident. (RP 4:695)

Dr. Coor he goes through the course of care that she had specifically from the car accident: Her medical care. She goes to physical therapy; she's still having problems. She goes to orthopaedic; she's still having problems. They send her for a second round of physical therapy; still having problems. She's referred to Virginia Mason; okay?

That Virginia Mason visit, which you should take a look at as well, is Exhibit 6 at pages 230 to 233; okay? All of that. Dr. Coor says that's all treatment specifically related to the motor vehicle collision, \$6,063.63. (RP 4: 695-96)

Yeager obviously was able to argue her theory of the case. She has not shown what Dr. Kedar's testimony would have added to her case that was not provided by Dr. Coor and the medical records admitted into evidence. Under the circumstances, Yeager cannot establish that error in refusing to admit Dr. Kedar's deposition testimony harmed her case.

CONCLUSION

Yeager hired an expert to summarize all of her care, relate injuries to the accident and differentiate those of her conditions that were unrelated, presumably so she would not have to call the many providers that treated her over the years. Yet, she wants a new trial simply because the trial court refused to allow her to use the deposition testimony of one of those many providers. Because the trial court correctly refused to allow her to use the

deposition of Dr. Kedar, and because she has not shown that she was harmed because she could not use Dr. Kedar's deposition testimony, this court should reject her appeal and affirm the judgment in this case.

Dated this 3rd day of June, 2016.

By:


TIMOTHY R. GOSSELIN, WSBA # 13730
Attorney for Respondent

Appendix 1

CR 32
USE OF DEPOSITIONS IN COURT PROCEEDINGS

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

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

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

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

(A) that the witness is dead; or

(B) that the witness resides out of the county and more than 20 miles from the place of trial, unless it appears that the absence of the witness was procured by the party offering the deposition or unless the witness is an out-of-state expert subject to subsection (a)(5)(A) of this rule; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

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

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

(A) The discovery deposition of an opposing party's rule 26(b)(5) expert witness, who resides outside the state of Washington, may be used if reasonable notice before the trial date is provided to all parties and any party against whom the deposition is intended to be used is given a reasonable opportunity to depose the expert again.

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

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

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

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

(d) Effect of Errors and Irregularities in Depositions.

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

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

(3) As to Taking of Deposition.

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

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors

of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

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

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

[Originally effective July 1, 1967; amended effective July 1, 1972; September 1, 1983; September 1, 1993; amended April 28, 2015.]

Appendix 2

RULE ER 702
TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[Adopted effective April 2, 1979.]

Comment 702

[Deleted effective September 1, 2006.]

FILED
COURT OF APPEALS
DIVISION II

2016 JUN -3 PM 3:03

COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON
BY 
DEPUTY

LINDA YEAGER, an unmarried
woman,

Appellant,
vs.

JOHN O'KEEFE and "JANE DOE"
O'KEEFE, and the marital community
composed thereof,

Respondents.

NO. 48189-8-II

DECLARATION
OF SERVICE

I, TIMOTHY R. GOSSELIN, declare and state:

I am a citizen of the United States of America and the State of
Washington, over the age of twenty-one (21), not a party to the above-entitled
proceeding, and competent to be a witness therein.

On the 3rd day of June, 2016, I did place in the United States Mail,
first class postage affixed, and did email, the following documents:

1. BRIEF OF RESPONDENT

and this declaration directed to and to be delivered to:

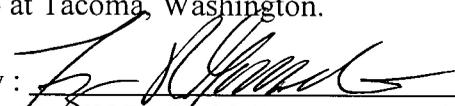
Christopher Taylor
FT Law, P.S.
402 Legion Way SE Ste 101
Olympia, WA 98501

DECLARATION
OF SERVICE
Page 1

GOSSELIN LAW OFFICE, PLLC
1901 JEFFERSON AVENUE, SUITE 304
TACOMA, WASHINGTON 98402
OFFICE: 253.627.0684 FACSIMILE: 253.627.2028

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

Signed this 3rd day of June, 2016 at Tacoma, Washington.

By : 
TIMOTHY R. GOSSELIN, WSBA #13730
Attorney for Respondent O'Keefe