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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

AMANDA CALDERA, as Personal Representative
of the Estate of DAWN CALDERA,

Appellant,

v.

SUSAN PARSONS, a married person, *et. al*.,

Respondents.

BRIEF OF RESPONDENT SUSAN PARSONS

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A. INTRODUCTION

This appeal arises out of a motor vehicle accident brought by Plaintiff/Appellant Amanda Caldera as personal representative of the Estate of Dawn Caldera ("Plaintiff") against Respondent/Defendant Susan Parsons ("Defendant").

This trial was decided by a jury on the merits of this case. The jury verdict awarded Plaintiff $29,000 with a finding that she was 10% at fault in the jury verdict. CP 630-631. The Judgment was entered on September 20, 2019 for $26,624.50. CP 633. This decision was based on the facts that were properly presented and was not the product of the trial court's exclusion of one expert witness.

Plaintiff's primary witness disclosure was due on February 16, 2018 under the Clark County Washington Case Schedule. CP 15. The disclosure of rebuttal witnesses was due on March 30, 2018 with the discovery cut-off being set on September 17, 2018. *Id*. The Plaintiff's disclosure of

Dr. Chong was made over two months after the September 17, 2018 discovery cut-off on November 16, 2018. CP 292, 293.

The trial Judge Suzan Clark granted Defendant's motion to exclude Dr. Dennis Chong as a witness on November 20, 2018. CP 375-378. Plaintiff moved for reconsideration. The Order Denying Reconsideration was signed on December 20, 2018. CP 519. The proceedings for the first trial setting began in December of 2018 but were aborted due to a medical emergency involving Plaintiff's attorney.

Plaintiff subsequently filed a motion to admit the testimony of Dr. Chong. This motion was denied by the Court on April 26, 2019. CP 559. Plaintiff filed a discretionary appeal of this Order to the Court of Appeals. The Court of Appeals denied hearing this interlocutory appeal. CP 561. The trial was subsequently reset for September of 2019.

Plaintiff claims that the trial court erred by excluding Dr. Chong who was not properly disclosed without considering the three-part test contained in *Burnet v. Spokane Ambulance*,

131 Wn.2d 484, 933 P.2d 1036 (1997) (if a lesser sanction would suffice, if the violation was willful or deliberate, and if the opponent's ability to prepare for trial was substantially prejudiced).

Whether to admit or exclude expert testimony is discretionary with the trial court. *Stevens v. Gordon*, 118 Wn. App. 43, 51, 74 P.3d 653 (2003). The trial court has discretion to exclude an expert who is identified shortly before trial. *Id*. at 51-52. A reviewing court will not disturb that decision unless it was exercised on untenable grounds or for untenable reasons. *State v. Burke*, 163 Wn.2d 204, 210, 181 P.3d 1 (2008).

The Order excluding Dr. Chong was based on at least five arguments, including late disclosure and failure to supplement the interrogatories with the opinions of the expert, set forth in Defendant's Motion to Exclude, which include:

1. The disclosure of Dr. Chong occurred two months late and after the September 17, 2018 discovery cut-off;

2. There was no expert report or CR 26(b)(5) disclosure of expert testimony for Dr. Chong;

3. The interrogatories requiring this disclosure were never supplemented pursuant to rule;

4. The required notice time for a video perpetuation deposition was not provided pursuant to CR 30(8)(a); and

5. The Notice of the Perpetuation Deposition of Dr. Chong did not comply with the mandatory service requirement of CR 5.

CP 214-221, CP 547-548.

The trial court's decision was about much more than late disclosure of the witness pursuant to the Clark County case schedule as Plaintiff argues. The fact that the Orders to exclude were based on more than a case schedule violation was specifically referenced by the Court in the hearing on April 26, 2019. CP 657. The trial court had the opportunity to consider these same issues three times (and a fourth time involving a motion in limine that was not appealed). Each time the trial court properly exercised its discretion and denied the motion to allow Dr. Chong to testify.

Plaintiff did not have a report from Dr. Chong to show what opinions he would provide. There are no opinions from Dr. Chong and therefore no prejudice is established in the record. The party seeking review has the burden of providing this court with an adequate record to review the issues raised on appeal. See *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 345, 760 P.2d 368 (1988). An insufficient record precludes appellate review of the alleged error. *Bulzomi v. Dept of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994).

Plaintiff never supplemented her interrogatory answers that requested the identity of any expert witnesses or provided the sum and substance of Dr. Chong's testimony. In *Stevens v. Gordon*, 118 Wn. App. at 50-52 the court upheld a trial court's exclusion of an expert witness not included in answers to interrogatories and only declared as a likely witness six weeks before trial. That is the same situation that is present here.

Plaintiff did have one expert designated, Dr. Reed Wilson, and this expert could have been called as a witness at

trial. CP 204-296. Instead, Plaintiff sought to substitute Dr. Chong as the medical expert two months after the Clark County discovery deadline. CP 292-293. Plaintiff was able to prove her liability and damages case and receive a favorable jury verdict. CP 630-631. Plaintiff had a fair trial and fails to establish any prejudice that occurred.

Plaintiff's appeal is her attempt to avoid any consequences for her failure to operate in accordance to the well-established rules regarding discovery. The discovery rules are implemented to prevent parties from being blindsided at trial. The failure of the trial court to make a finding on the three *Burnet* factors is not per se reversible error. *Jones v. City of Seattle*, 179 Wn.2d 322, 338, 360, 314 P.3d 380 (2013) (holding *Burnet* error can be harmless). Reversal is strong medicine and will not be administered when it is plain from the record that the error was harmless. *Id*.

Plaintiff's request for a change of judge should be denied as a review of the record will show that the trial judge acted

fairly, impartially, and patiently in this matter despite Plaintiff's numerous procedural missteps.

In summary, the three rulings of the trial court should be affirmed.

B. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Defendant acknowledges Plaintiff's assignments of error, but believes that the assignments of error could be more appropriately formulated as follows:

(1) Assignments of Error

1. Did the trial court correctly exclude Dr. Chong in Defendant's motion to exclude an expert witness in the trial court's November 10, 2018 order? CP 375-378.

2. Did the trial court properly deny Plaintiff's motion for reconsideration excluding Dr. Chong as an expert witness in the order dated December 20, 2018? CP 519.

3. Did the trial court in ruling on Plaintiff's restyled motion to admit the testimony of Dr. Chong properly exclude

the witness for the third time in the order dated April 26, 2019? CP 559.

(2) Issues Pertaining to Assignments of Error

Defendant acknowledges Plaintiff's issues pertaining to assignments of error, but designates the following issues for consideration:

1. Did the trial court properly exercise its discretion to exclude Dr. Chong based on the totality of the circumstances, including, but not limited to, late disclosure under the case schedule; failure to supplement the interrogatories to provide an expert report and CR 26(b)(5) disclosure of expert testimony; and procedural irregularities in noting the perpetuation deposition of Dr. Chong?

2. Did Plaintiff by obtaining a favorable jury verdict establish any prejudice by the Court ruling excluding the expert witness which requires the reversal of this case?

3. Has Plaintiff established sufficient grounds for a different judge on remand?

C. RESTATEMENT OF THE CASE

(1) Introduction.

This appeal arises out of a motor vehicle accident brought by Plaintiff Amanda Caldera as personal representative of the Estate of Dawn Caldera against Defendant Susan Parsons. The jury verdict awarded Plaintiff $29,000 with a finding that she was 10% at fault in the jury verdict. CP 630-631. The Judgment was entered on September 20, 2019 for $26,624.50. CP 633. The Satisfaction of the Judgment was filed on September 20, 2019. CP 635-636. This case was appealed on October 16, 2016. CP 637.

This appeal involves the propriety of the three Orders of the Court that excluded the expert testimony of Dr. Dennis Chong. The orders for the exclusion were based on more than a late disclosure of a witness under the Clark County case schedule. Respondent acknowledges that the court did not conduct a *Burnet* analysis in its three orders. However, the

court acted within its discretion in excluding the witness as shown below.

(2) <u>Order To Exclude Dr. Chong.</u>

The first hearing on the motion to exclude Dr. Chong was held on November 30, 2019. CP 375-378. There were numerous reasons to support the motion to exclude which include the late and improperly designed expert testimony in violation of the case scheduling order, failure to properly supplement the interrogatories for the expert witness testimony pursuant to CR 36(b)(5), and failure of counsel for Plaintiff to meet and confer prior to the filing of the motion. CP 214-221.

Plaintiff's primary witness disclosure was due on February 16, 2018. The disclosure of rebuttal witnesses was due on March 30, 2018. Dr. Chong was improperly designated *two months* beyond the September 17, 2019 Discovery cut-off deadline established by the Case Scheduling Order. CP 26.

Plaintiff failed to meet the requirements of CR 26(b)(5) in providing a sum and substance of his forensic expert.

CP 214, 216-219. CR 26(b)(5) requires Plaintiff to state "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules." CR 26(b)(5)(A) requires:

> (5) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (A) (i) A party may through interrogatories require any other party to identify each person whom the other part expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, **to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules**. * * *." (emphasis supplied).

The only "disclosure" provided in the notice of the perpetuation deposition merely stated that "the purpose of his

testimony on all issues disclosed in discovery relative to Plaintiff's medical treatment and medical charges." CP 216. This is not a proper disclosure and is by no measure a sum and substance as required by CR 26(b)(5). There was no report provided and certainly not adequate information provided to prepare for an expert's deposition.

There were other important grounds as well. CP 214. The email notice of the perpetuation deposition of Dr. Chong was untimely as the perpetuation deposition was scheduled with less than the 20-day notice period required pursuant to CR 30(8)(a). CP 215. The deposition was scheduled to be in Seattle, Washington on short notice for a Clark County, Washington case. Plaintiff's counsel failed to confer prior to sending the late deposition notice to perpetuate the testimony of Dr. Chong. CP 219.

Defendant propounded discovery to plaintiff requesting the names and opinions of the expert witnesses that she expected to testify at trial. Plaintiff failed to provide the

opinions of Dr. Chong at any time – even after the motion to exclude was filed. The interrogatory requests to Plaintiff stated, as follows:

> **<u>INTERROGATORY NO. 1:</u>** State the name and address and field of expertise of any expert you have consulted in connection with any issue in this case.
>
> **ANSWER: Objection, by the very nature of this question it asks for an identification of consulting witnesses. Consulting witnesses are patently work product.**
>
> **<u>INTERROGATORY NO. 2:</u>** Do you intend to call any experts as witnesses at the trial? If so, identify each and every person you expect to call at trial or arbitration as an expert witness and state for each witness:
>
> Their name, address, and telephone number;
> The subject matter on which they are expected to testify;
> The substance of the facts and opinions to which they are expected to testify;
> A detailed summary of the grounds for each opinion;
> A summary of their qualifications to testify as an expert witness;
> Identify the date of each report issued by this expert concerning this litigation including the name, address, and telephone number of the report's present custodian;

> Please describe any and all instances within the last five years in which either the plaintiff or the plaintiff's attorney involved in this case has retained or consulted said expert, including the name of the case, the name of the claimant and the defendant, and whether a lawsuit was filed. If a lawsuit was filed, state the name of the case, case number, and the court in which it was filed. Also, state the amount of fees paid to the expert in this case and all above-described instances within the last five years;
>
> Please set out the total amount of gross income received by the expert over the last five years from insurance companies and attorneys, and for providing opinions relating to litigation and potential litigation.
>
> **ANSWER: Presently that is not known. It is believed the facts of the accident are so clear plaintiff does not require an accident reconstructionist. The plaintiffs treating providers are not expert witnesses. However, at such time plaintiff retains expert witnesses this response will be supplemented.**

CP 217-218. As shown above, Plaintiff only objected to providing expert witness information regarding Dr. Chong or any expert – and even claimed that none was needed - until two months after the discovery cutoff.

It should be noted that Plaintiff did designate another expert witness. Plaintiff designated Dr. Reed Wilson as an expert witness. CP 204-206. For unexplained reasons in the record this witness was not called. In a footnote by Plaintiff in her brief she acknowledges that an expert witness was designated but states she had to "swap out the disclosed expert due to an issue." Appellant's Brief, Pg. 5.

The Court issued the order on the motion to exclude on November 30, 2018. CP 375-378. The Order stated: "Motion To Exclude Expert Is Granted. The Court reserves on costs at this time."

(3) <u>Order Denying Motion For Reconsideration</u>

Plaintiff filed a motion for reconsideration of this Order. This motion was denied by the Court by the Order signed on December 20, 2018. CP 519.

(4) <u>Motion To Admit Testimony of Dr. Chong</u>

Plaintiff filed a restyled motion in April of 2019 seeking to admit the trial testimony of Dr. Chong. This motion was denied by the Court on April 26, 2019. CP 559.

This motion sought to have the Trial Court overturn the prior orders of the court denying the expert testimony of Dr. Chong. The Trial Judge had already made her ruling on this issue on November 30, 2018. CP 375-376.

The Trial Court expressly stated that the exclusion of Dr. Chong involved more than a mere case schedule violation. In addition, the court remarked that this motion was just "another bite of the apple" for the Order granting the exclusion of Dr. Chong on November 20, 2018 and Order denying reconsideration on December 20, 2018, as set forth below:

> THE COURT: What I am saying is it's not a mere case schedule violation. I found a number of other things, and Mr. Foley goes through the list of those, and my order because my order excluding was November 30th.
>
> MR. BRIDGES: Right.

> THE COURT: And then reconsideration I denied on December 20th, and there was no appeal taken from that order. Now you've come back four months later asking me, in essence, for another bite at the apple, without moving to amend the case schedule, and so we're still under that operative case schedule.

CP 649, 657.

It should be emphasized that the November 30, 2018 Order had a detailed list of all materials considered by the trial court. The Court's statement that "[I] found a number of other things, and Mr. Foley goes through the list of those, and my order because my order excluding was November 30…" is a shorthand way of establishing the basis for the Court Order. The November 30, 2018 Order did include all pleadings considered by the court. CP 375-378.

Plaintiff appealed this Order to the Court of Appeals. CP 561. This court denied the Motion for Discretionary Review.

D. ARGUMENT

(1) Standard of Review

The standard of review of a trial court's decision to exclude an expert witness is for an abuse of discretion. *Lancaster v. Perry*, 127 Wn. App. 826, 830, 113 P.3d 1 (2005).

(2) The Trial Court Properly Exercised Its Discretion in Excluding Dr. Chong.

This section will address all three of Appellants' Assignments of error. Contrary to Plaintiff's claim, this case is about more than a mere case schedule violation. As previously explained, Plaintiff's disclosure of the expert was untimely under the case schedule, there was no report provided by the expert – no sum and substance of the expert's opinions under CR 26(b)(5), no supplementation of the interrogatories, and procedural irregularities in the timing and noting of the expert perpetuation deposition.

Plaintiff claims that the trial court erred by excluding Dr. Chong who was not properly disclosed without considering

the three-part test contained in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484,933 P.2d 1036 (1997) (if a lesser sanction would suffice, if the violation was willful or deliberate, and if the opponent's ability to prepare for trial was substantially prejudiced).

Whether to admit or exclude expert testimony is discretionary with the trial court. *Stevens v. Gordon*, 118 Wn. at 51. The trial court has discretion to exclude an expert who is identified shortly before trial. *Id*. at 51-52.

A reviewing court will not disturb that decision unless it was exercised on untenable grounds or for untenable reasons. *State v. Burke*, 163 Wn.2d at 210. In other words, a reviewing court will not find abuse of discretion unless no reasonable person would take the position adopted by the trial court. *Stevens*, 118 Wn. App. at 51.

In *Lancaster v. Perry*, 127 Wn. App. at 833, the court held that the trial court did not abuse its discretion by excluding a defense witness not disclosed under KCLR 26 and in the

absence of good cause. The plaintiff in *Lancaster* was injured in a rear-end automobile accident. The defendant conceded liability, but disputed damages.

The defendant stated in both his primary and rebuttal witness disclosures that "[d]efendants will call those healthcare professionals who will conduct a CR 35 Examination of the Plaintiff. This CR 35 Examination has not been scheduled at this time and, accordingly, Defendants cannot identify those professionals who may conduct the examination." *Id.* at 828-29. The defendant did not provide the name, address, phone number, qualifications, and summary of the expert's opinion as required by the local rules and the case scheduling order.

Prior to discovery cut-off, the plaintiff moved to exclude the expert witness. The trial court granted the motion to exclude. On appeal, the Court of Appeals affirmed on the grounds that the defendant did not meet the minimum requirements of KCLR 26. *Lancaster*, 127 Wn. App. at 831. "Allowing disclosures to be made in the manner suggested by

[the defendant], in the absence of good cause that is not present here, would frustrate the purpose of the scheduling rules." *Id.* at 833. Here, it is undisputed that Plaintiff never made a disclosure of the opinions to be provided by Dr. Chong. No expert report was ever provided.

Stevens v. Gordon is factually similar and provides additional authority for affirming the trial court. In *Stevens* the Court upheld a trial court's exclusion of an expert witness not included in answers to interrogatories and only declared as a likely witness six weeks before trial. *Stevens v. Gordon*, 118 Wn. at 51-52. The facts in *Stevens* regarding late disclosure of the expert after the discovery cut-off were nearly identical to this case – the Plaintiff decided to change the expert witness at the last minute to obtain more favorable testimony, as shown below:

> The trial court's oral ruling on the motion added that it was fundamentally unfair to subject Ms. Stevens to last minute discovery by converting the consulting expert into a testifying expert. Mr. Gordon argues that he notified Ms. Stevens of

> his intent to call Dr. Sears in ample time to depose the doctor before trial. The trial court did not agree, and Mr. Gordon fails to show that no reasonable person would take the trial court's position. *Mayer*, 102 Wn. App. at 79. Supporting the trial court's position is the fact that the discovery cutoff date (December 24, 2001) had passed when Mr. Gordon revealed his intent to call Dr. Sears as a witness, and discovery had not been reopened for the trial de novo.

Id. at 51-52.

The court in *Stevens* stated that they would not find an abuse of discretion in this situation unless no reasonable person would take the position adopted by the trial court. The court stated that "[A]ny question of what issues, witnesses, and evidence may be added is governed by the civil rules and remains in the discretion of the trial court," and that "[U]nfair surprise and timeliness are factors properly considered by the trial court in exercising this discretion." *Id*.

There is a procedural problem for Plaintiff that provides a basis for affirming the trial court regardless of the *Burnet* factors. Plaintiff never provided the opinions of Dr. Chong –

no interrogatories were supplemented and no report was ever provided. Plaintiff has failed to properly present a record for how she was prejudiced. She never provided the court with the expert's testimony or opinions. The party seeking review has the burden of providing this court with an adequate record to review the issues raised on appeal. See *Story v. Shelter Bay Co.*, 52 Wn. App. at 345. An insufficient record precludes appellate review of the alleged error. *Bulzomi v. Dept of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994). Plaintiff never advanced to first base here.

Based on these facts, there was no error by the trial judge by failing to state the *Burnet* factors in the three Court Orders. And even if the Court were to apply the *Burnet* factors, the briefing by both parties in the record provides ample support for the trial court's decision.

(3) **Plaintiff Received A Favorable Verdict Despite Not Having An Expert – Error Without Prejudice Is Not Grounds For Reversal**

Even if a trial court abuses its discretion by excluding admissible evidence, the judgment should be affirmed unless the errors affected the outcome of the trial. *Qwest Corp. v. Washington Utilities and Transp. Comm 'n*, 140 Wn. App 255, 260, 166 P.3d 732 (2007) ("Error without prejudice is not grounds for reversal, and error is not prejudicial unless it affects the case outcome."); ER 103(a).

Washington law is equally clear that the erroneous exclusion of cumulative evidence is considered, at most, harmless error. See *Saldivar v. Momah*, 145 Wn. App. 365, 396, 186 P.3d 1117 (2008) (citing 5 Karl B. Tegland, *Washington Practice: Evidence Law & Practice* § 404.14, at 513 (5th ed. 2007)); *Silves v. King*, 93 Wn. App. 873, 885, 970 P.2d 790 (1999) (erroneous exclusion of cumulative evidence is harmless).

The trial court has "considerable discretion" in allowing a party to develop and present evidence at trial. *In re Marriage of Zigler*, 154 Wn. App. 803, 814, 226 P.3d 202 (2010). The court similarly has great discretion in the way it manages its courtroom, ranging from controlling the conduct of the parties to the setting of the calendar. *Id*. at 814-816 (managing courtroom); *State ex rel. Sperry v. Super. Ct. for Walla Walla County*, 41 Wn.2d 670, 671, 251 P.2d 164 (1952) (managing calendar).

In this situation where a party is attempting to "swap out" an expert witness (Dr. Wilson for Dr. Chong) for undisclosed reasons at the 11th hour before trial, the trial court should have inherent authority to manage its calendar, control the conduct of the parties, and be able to exclude the witness. The *Burnet* factors are frequently cited and have evolved to be applied in many different situations, but the original case involved a CR 37 violation and should not act as a basis for per-se reversal when the trial court has another basis for exercising discretion.

See concurring opinion by Judge Steven C. González in *Keck v. Collins*, 184 Wn.2d 358, 374-75, 357 P.3d 1080, 1088 (2015).

Here, Plaintiff received a favorable verdict. The Judgment was entered and a Satisfaction of Judgment was filed with the Clark County Superior Court. Plaintiff has not established any prejudice by the ruling of the trial court – she simply cannot explain on the record before the trial would have differed had her expert Dr. Chong testified.

(4) <u>Plaintiff's Request For Remand To A Different Judge Should Be Denied.</u>

Plaintiff's request that the court remand the case to a different trial judge should be denied. Plaintiff's counsel fails to establish facts for a change of judge. Plaintiff was well aware that making the same argument for the third time through a restyled motion, after denial of the motion for reconsideration, to a trial court judge is pushing the envelope of reasonableness. This is not a basis to remove the judge on remand as the transcript of the April 2019 hearing shows that trial court handled the hearing in a fair and reasonable manner. Plaintiff

fails to provide specific cites to the record showing how she was treated unfairly.

(5) <u>Response To Specific Arguments.</u>

Plaintiff counsel's attempt to suggest that the Defense "concealed" expert witnesses until the end of the discovery cut-off is a red-herring. The defense experts Dr. Tesar and Dr. Bell were identified on Defendant's disclosure of witnesses. Their reports dated August 25, 2018 were not received by counsel until September 11, 2018 and then promptly provided to opposing counsel. CP 536. Both experts dated their reports on the day of the examination – not the day the finalized report was delivered to counsel for Defendant. CP 414, 660.

E. <u>CONCLUSION</u>

The decision of the trial court should be affirmed.

DATED this 26th day of May, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Douglas F. Foley, certify that I mailed, or caused to be mailed, a copy of the foregoing Respondent's Brief, postage prepaid, via U.S. Mail and by email, to the following counsel of record at the following address:

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DATED this 26th day of May, 2020.

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