

FILED

JAN 24 2014

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 31833-8-III

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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PAMELA CLONINGER, individually, and as Personal Representative of  
the ESTATE OF GLEN CLONINGER; BROOKE CLONINGER,  
individually; BLAKE CLONINGER, individually; BRITTNEY  
CLONINGER, individually,

Appellants,

vs.

KIM CHEN, D.O., and JANE DOE CHEN, husband and wife;  
ANESTHESIA ASSOCIATES OF SPOKANE, P.S.; and DEACONESS  
MEDICAL CENTER,

Respondents.

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BRIEF OF RESPONDENTS  
KIM CHEN, D.O.,  
AND ANESTHESIA ASSOCIATES OF SPOKANE, PS.

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## I. SUMMARY

Pamela Cloninger, as personal representative of the estate of her husband Glen Cloninger, complains that an anesthesia monitor owned by Deaconess Medical Center was not sequestered after Mr. Cloninger suffered a cardiopulmonary arrest during emergence from general anesthesia. Mrs. Cloninger contends that the monitor's hard drive stored vital-signs data that would have proved that anesthesiologist Dr. Kim Chen did not respond as promptly to the arrest as he claimed in his chart notes and trial testimony, and that he waited too long to call a "code." She characterizes the loss of "the data" as "a form of spoliation," and assigns error and seeks a new trial on the ground that the trial court erred in refusing to give her proposed "unfavorable inference" instruction, CP 570.

Mrs. Cloninger's arguments fail for several separate reasons. First, a duty to preserve cannot apply to evidence that is not shown to have existed. Deaconess' monitor had to be programmed to store vital-signs data on its hard drive, but Mrs. Cloninger failed to prove that the monitor was so programmed.

Second, the "spoliation" or "unfavorable inference" instruction Mrs. Cloninger proposed was not an accurate statement of Washington law as it did not make clear that it applied only where the alleged failure to preserve evidence was willful or in conscious disregard of a preservation

duty. Mrs. Cloninger acknowledges that there was no intentional destruction of any evidence and she presented no evidence that any evidence was willfully destroyed or that anyone consciously disregarded any duty to preserve evidence.

Third, Mrs. Cloninger does not articulate why *Dr. Chen* could be blamed for “failing” to sequester the hard drive. She cites no common-law or statutory duty owed by a physician, to his or her patient, to preserve data stored on equipment owned by someone else. Nor did she present competent expert testimony establishing that the standard of care applicable to anesthesiologists imposed such a duty on Dr. Chen. Even if Deaconess’ internal policy relating to the investigation of “sentinel events” somehow obliged *the hospital* to preserve the hard drive on December 1, 2010, so that the hospital could engage in privileged quality assurance analysis, Mrs. Cloninger fails to explain how such a duty applied to Dr. Chen, whom the hospital did not employ. Nor does she explain what gives her standing to complain about noncompliance with that “sentinel event” policy even if it required preservation of data on the anesthesia monitor’s hard drive and applied to Dr. Chen.

Fourth, Mrs. Cloninger cites no legal authority holding that it is reversible error to refuse to give a *permissible* unfavorable inference (“you *may* infer ...”) instruction, which her proposed instruction was.

Fifth, the instruction Mrs. Cloninger proposed permitted the jury to draw an inference adverse only to Deaconess Medical Center, not to Dr. Chen. Thus, even if it could be said that it was error for the trial court to refuse to give the instruction, any such error was harmless for purposes of Mrs. Cloninger's malpractice claim against Dr. Chen.

In sum, because there was no showing either that any evidence was actually stored on the hard drive that was lost, or that the failure to preserve data on the hard drive was willful or in conscious disregard of an obligation to preserve evidence, or that Dr. Chen owed a duty to Mr. Cloninger to preserve the hard drive, no spoliation instruction was called for, and any error in failing to give the proposed *permissible* unfavorable inference instruction was harmless with respect to the anesthesiology malpractice claim against Dr. Chen.

## II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Did the trial court properly decline to give plaintiff's proposed "unfavorable inference" instruction, CP 570, which would have told the jury that:

If Deaconess Medical Center failed to produce evidence which was under their [sic] control and reasonably available to them [sic] and not reasonably available to plaintiff, then you may infer that the evidence was unfavorable to the defendant [singular] who could have produced it but did not.

(2) Was any claimed error in failing to give that proposed instruction harmless as to plaintiff's anesthesiology malpractice claim against Dr. Chen, where the proposed instruction would not have permitted the jury to draw an unfavorable inference against Dr. Chen, but only against Deaconess Medical Center?

### III. COUNTERSTATEMENT OF THE CASE

A. Glen Cloninger Had a Cardiovascular Arrest During Emergence from General Anesthesia.

On December 1, 2010, Glen Cloninger, age 66, underwent lithotripsy, a noninvasive outpatient procedure to break up a kidney stone, at Deaconess Medical Center.<sup>1</sup> His anesthesiologist for the procedure, Kim Chen, D.O., recommended, and it is undisputed that Mr. Cloninger gave informed consent to, general anesthesia,<sup>2</sup> which Dr. Chen administered through an endotracheal tube.<sup>3</sup> The lithotripsy was completed uneventfully and Mr. Cloninger was moved to a recovery room.<sup>4</sup> After Dr. Chen extubated him, Mr. Cloninger laryngospasmed and had a cardiopulmonary arrest.<sup>5</sup> Dr. Chen attempted to re-intubate him and a

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<sup>1</sup> Ex. P-1, pp. 5, 12, 16; CP 27 (¶7).

<sup>2</sup> Ex. P-1, pp. 4-5, 12, 46-47.

<sup>3</sup> Ex. P-1, pp. 16, 48.

<sup>4</sup> *Id.*

<sup>5</sup> Ex. P-1, pp. 12, 32, 50.

“code” was called.<sup>6</sup> Appellant, Mrs. Cloninger, disclaims any criticism of care provided once the “code” was called. *App. Br. at 8*; RP 162.

Dr. Chen’s colleague, Dr. James King, responded to the code and reintubated Mr. Cloninger.<sup>7</sup> With cardiopulmonary resuscitation (CPR), Mr. Cloninger eventually developed a sustainable heart rate and blood pressure.<sup>8</sup> An hour and 43 minutes after the “code” was called, Mr. Cloninger was transferred to intensive care.<sup>9</sup> A Deaconess-owned anesthesia monitor, RP 119, *App. Br. p. 2*, that had displayed Mr. Cloninger’s vital signs – heart rate, blood pressure, and oxygen saturation, RP 36 – remained in the operating room, *App. Br. pp. 8-9 and fn. 26*; RP 254.

In the intensive care unit, Mr. Cloninger showed no neurological reflexes and was given a grim prognosis.<sup>10</sup> On December 5, 2010, the ventilator was discontinued and he died.<sup>11</sup>

B. Malpractice Allegation Against Dr. Chen.

Pamela Cloninger, as personal representative of her husband Glen Cloninger’s estate, filed this medical malpractice/wrongful death lawsuit on December 1, 2011, against Deaconess Medical Center, Dr. Chen, and

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<sup>6</sup> Ex. P-1, pp. 28-29, 50.

<sup>7</sup> Ex. P-1, p. 40, 50-51; RP 110-11, 114-17, 123.

<sup>8</sup> Ex. P-1, p. 53; RP 108-11, 116-17, 134-38.

<sup>9</sup> Ex. P-1, pp. 28 (code called at 0937) and 151 (transfer to ICU at 1120).

<sup>10</sup> Ex. P-1, pp. 12-13, 29, 32.

<sup>11</sup> Ex. P-1, pp. 12-13; CP 27 (¶8).

Dr. Chen's employer, Anesthesia Associates of Spokane, PS. CP 3.<sup>12</sup> She filed an Amended Complaint in April 2012, CP 13-24, and a Second Amended Complaint on February 27, 2013, CP 25-36. She alleged that Dr. Chen negligently mismanaged Mr. Cloninger's airway during extubation and related post-operative management, causing Mr. Cloninger to develop untreated hypoxia and hypoxic brain damage.

C. "Spoliation" Allegation.

Mrs. Cloninger has contended that a nine-page amendment Dr. Chen made to the medical record, Ex. P-1, pp. 46-54, over the period from December 3 to December 10, 2010, *see* RP 177-79, described a more prompt response to Mr. Cloninger's cardiopulmonary arrest than actually occurred.<sup>13</sup> She has complained that she could not prove that because she lacked vital-signs data that the anesthesia monitor could have been programmed to retain on its hard drive that she contends would have shown more minutes elapsing between the time Mr. Cloninger's vital

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<sup>12</sup> Although the complaint purports to assert claims on behalf of Mr. Cloninger's children "individually," CP 25 (caption), and the opening brief is styled as the "Brief of Appellants [plural]," and refers in its text to "plaintiffs" and "appellants," wrongful death actions may be prosecuted only by the personal representative of the decedent's estate, RCW 4.20.010; *Beal v. City of Seattle*, 134 Wn.2d 769, 776, 954 P.2d 237 (1998). Thus, children of the decedent, although statutory beneficiaries on whose behalf the personal representative may recover certain kinds of damages, *see* RCW 4.20.020, are not proper plaintiffs in their own right, or "individually."

<sup>13</sup> CP 31-33 (¶¶28-33); CP 106-08; RP 181-85, 189-94.

signs collapsed and the time the “code” was called than Dr. Chen claimed had elapsed.<sup>14</sup>

Mrs. Cloninger concedes that there is no evidence that Deaconess or Dr. Chen actually *did* program the monitor used during Mr. Cloninger’s procedure (or the hospital’s anesthesia monitors generally) to record (as well as display) vital-signs data. *App. Br. pp. 18-22.*<sup>15</sup> She asserts, however, that such programming is “not unusual” and that Dr. King has sometimes done it. *Id. p. 21.*<sup>16</sup> Mrs. Cloninger surmises that a hospital technician probably erased “the data” on the monitor while routinely preparing the recovery room for the next patient after Mr. Cloninger. *App. Br. p. 9, fn. 26.* The undisputed testimony was that such preparation takes 15 to 90 minutes. RP 235-36.

D. Trial; Defense Verdict; Appeal.

Mrs. Cloninger initially proposed jury instructions, CP 293-327, that included no spoliation or “unfavorable inference” instruction. But, on

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<sup>14</sup> CP 106-07; CP 32-33 (¶¶33-34); RP 235.

<sup>15</sup> Mrs. Cloninger does not acknowledge or attempt to explain away uncontradicted testimony that the biomedical department did not change the hospital’s monitors’ default settings, under which the monitors did not record data, although individual users may so program them for a given procedure. RP 238. She also does not acknowledge or attempt to explain away Deaconess’ interrogatory answer, CP 146 (last line of answer to Interrogatory 4), in which Deaconess advised plaintiff that its anesthesia monitors were not configured to retain data.

<sup>16</sup> At the pages of the transcript to which Mrs. Cloninger cites, RP 120, Dr. King testified that he sometimes has the monitor print out the data it is displaying, not that he programs it to record data for retrieval later if something goes wrong.

May 24, 2013, she filed a brief, CP 120-33, requesting the following instruction that would have told the jury that:

If defendants failed to produce evidence which was under their control and reasonably available to them and not reasonably available to plaintiff, then you may infer that the evidence was unfavorable to the defendants who could have produced it and did not. CP 120.

That instruction was not given, and that is not the instruction that Mrs. Cloninger claims on appeal that the trial court erred in failing to give. Instead, Mrs. Cloninger argues that the trial court erred in refusing to give her later proposed, *see* RP 540, and different “permissive unfavorable inference” instruction, CP 570, which focused only on “Deaconess Medical Center” rather than on “defendants” and which would have told the jury that:

If Deaconess Medical Center failed to produce evidence which was under their [sic] control and reasonably available to them [sic] and not reasonably available to plaintiff, then you may infer that the evidence was unfavorable to the defendant who could have produced it but did not.

Trial to a jury began June 10, 2012. CP 552. At the conclusion of the evidence, the Honorable Kathleen M. O’Connor instructed the jury only on a medical negligence claim, CP 536, 538, 540-41, 549, and gave no spoliation or adverse-inference instruction. The trial court instructed the jury that Dr. Chen was an agent for Anesthesia Associates and

Deaconess CP 535,<sup>17</sup> and that Deaconess owed its patients an “independent” duty of care, CP 542-43 (Instruction Nos. 13 and 14). The court’s verdict form asked, for liability purposes, only whether Dr. Chen was negligent and, if he was, whether his negligence proximately caused Mr. Cloninger’s death. CP 559-60. The verdict form, to which Mrs. Cloninger did not except, *see* RP 540, and as to which Mrs. Cloninger raises no issue or argument on appeal, did not ask whether Deaconess breached any independent duty of care.<sup>18</sup>

On June 24, 2012, the jury found Dr. Chen not negligent, and did not reach the issue of causation. CP 559-61. Judge O’Connor entered judgment on the verdict, dismissing all claims. CP 561-62. Plaintiff timely appealed. CP 563-66. The parties later stipulated to the record being supplemented with the proposed “unfavorable inference” jury instruction that Mrs. Cloninger argues the trial court erred in failing to give, CP 567-70, and the court ordered the record so supplemented, CP 571-73. Mrs. Cloninger asserts that the court refused to give her proposed “unfavorable inference” instruction, CP 570, because there was no evidence of bad faith or wrongful intent. *App. Br. at 3, fn. 4.* The

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<sup>17</sup> Court’s Instruction 7 states: “Any act or omission of an agent within the scope of authority is the act or omission of the principal. Kim Chen, D.O. is an agent of Anesthesia Associates of Spokane, P.S. and Deaconess Medical Center.”

<sup>18</sup> *See* Brief of Respondent Deaconess Medical Center at 2, fn. 1.

transcript page she cites, RP 540, does not disclose the court's reasoning, although that is certainly one of the arguments defendants made against the proposed instruction.

#### IV. STANDARD OF REVIEW

Respondents Dr. Chen and Anesthesia Associates of Spokane, P.S., agree with Respondent Deaconess Medical Center that (1) trial court decisions whether to give a particular jury instruction are reviewed by abuse of discretion, (2) such discretion is not abused unless the trial court's decision is manifestly unreasonable, or is based on unreasonable grounds or untenable reasons, and a party is entitled to a proposed jury instruction only if it is supported by substantial evidence and is a correct statement of the law. *See* Brief of Respondent Deaconess Medical Center at 13-14 and cases cited therein. Because Mrs. Cloninger's proffered spoliation/adverse inference instruction was not supported by substantial evidence and was not an accurate statement of the law, the trial court did not abuse its discretion in declining to give it.

#### V. ARGUMENT

A. Mrs. Cloninger's Proposed Spoliation Instruction Was Not an Accurate Statement of the Law and Was Not Supported by Substantial Evidence.

Respondents Dr. Chen and Anesthesia Associates adopt and incorporate by reference the arguments and authorities set forth at pages

14-18 and pages 23-24 of the Brief of Respondent Deaconess Medical Center establishing (1) that Mrs. Cloninger's proposed spoliation instruction was not a correct statement of the law because it did not make clear that the instruction applied only where an alleged failure to preserve evidence was willful or in conscious disregard of a legal duty to preserve the evidence; and (2) that Mrs. Cloninger failed to show that any evidence was destroyed willfully or in conscious disregard of a duty to preserve it.

B. There Was No Basis for Giving Any "Unfavorable Inference" Instruction Because There Was No Evidence that the Anesthesia Monitor Had Been Programmed to Store Data on Its Hard Drive.

The jury was presented with uncontroverted and undisputed testimony that Deaconess Medical Center's anesthesia monitors do not store vital-signs data on their hard drives under their "default" settings and must be affirmatively programmed to do so. RP 238. Mrs. Cloninger argues that someone likely programmed the monitor Dr. Chen used to store vital signs data, but she cites no testimony that would support, much less compel, a finding to that effect. No evidence showed or implied that Dr. Chen or anyone else involved in Mr. Cloninger's care changed the anesthesia monitor's default setting or were even aware that the anesthesia monitor could be configured to store vital signs data. Absent evidence that there was vital signs data stored on the monitor to preserve, there was no basis for the court to give an instruction allowing the jury to draw an

inference unfavorable to *any* defendant based on a “failure” to preserve such data. A party alleging spoliation must offer evidence, not just “speculative assertions,” to show there was evidence that was actually lost or destroyed. *Tri-County Motors, Inc. v. American Suzuki Motor Corp.*, 494 F. Supp. 2d 161, 177 (E.D.N.Y. 2007).

C. Mrs. Cloninger Fails to Show or Explain How Deaconess’ Internal “Sentinel Events” Policy Would Have Imposed on Dr. Chen Any Legal Duty, to Mr. Cloninger, to Preserve Any Data Stored on the Anesthesia Monitor Hard Drive, Even if the Monitor Had Been Programmed to Store Such Data.

Mrs. Cloninger seeks a new trial solely because the trial court did not give the proposed spoliation/adverse instruction set out at page 3 of her brief, CP 570. *App. Br. p. 41*. Mrs. Cloninger’s “issues pertaining to assignments of error,”<sup>19</sup> refer to “Deaconess” and to “the Defendant hospital,” but not to Dr. Chen or Anesthesia Associates of Spokane. There is no reason to suppose that is an oversight, because Mrs. Cloninger specifies that “[t]his appeal is premised on Plaintiffs’ contention [that] *the hospital’s* failure to preserve critical medical documentation was a negligent breach of duty, a form of spoliation,” *App. Br. p. 2* (italics supplied), and that she is claiming that “*Deaconess Hospital* breached a separate duty to preserve monitor data,” which duty “is based on *the hospital’s* Sentinel Event Policy,” *App. Br. p. 10* (italics supplied), of

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<sup>19</sup> Mrs. Cloninger’s brief includes no formal assignments of error.

which, according to Mrs. Cloninger, “nursing staff was aware,” *id. p. 11*. Later, she again argues that “*Deaconess Hospital* breached a separate duty to ‘immediately investigate’ a Sentinel Event defined under hospital policy [italics supplied],” requiring the trial court to give her “proposed spoliation instruction.” *App. Br. at 32*. That instruction applied, according to its terms, solely to Deaconess Medical Center, not Dr. Chen:

*If Deaconess Medical Center failed* to produce evidence which was under their [sic] control and reasonably available to them [sic] and not reasonably available to plaintiff, then you may infer that the evidence was unfavorable to the defendant [singular] who could have produced it but did not.

CP 570 (emphasis supplied). Thus, Mrs. Cloninger does not articulate why an “unfavorable inference” instruction was warranted due to any “failure” *by Dr. Chen* to preserve any monitor-stored data.

Mrs. Cloninger might attempt to argue in reply that Dr. Chen had a duty to preserve data from the anesthesia monitor’s hard drive under the Deaconess “sentinel events” policy because he was Deaconess’ agent according to Court’s Instruction No. 7, CP 536. This Court should decline to consider such an argument raised for the first time in reply<sup>20</sup> but even if the Court were to consider such an argument, Mrs. Cloninger would be

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<sup>20</sup> See RAP 10.3(c), and *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration”).

incorrect. The function of the agency instruction was to make Deaconess liable if – and only if – the jury found Dr. Chen causally negligent in managing Mr. Cloninger’s airway before the “code” was called at 9:37 a.m. on December 10, 2010.<sup>21</sup> Negligence on Dr. Chen’s part was defined by Court’s Instruction No. 9 (CP 538),<sup>22</sup> No. 11 (CP 540),<sup>23</sup> and No. 12 (CP 541)<sup>24</sup> as failure to exercise the degree of skill, care, and learning expected of a reasonably prudent anesthesiologist, not as failing to implement internal hospital administrative policies.

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<sup>21</sup> The agency instruction was given because the trial court accepted plaintiff’s argument that Dr. Chen was Deaconess’ ostensible/apparent agent under *Adamski v. Tacoma General Hosp.*, 20 Wn. App. 98, 579 P.2d 970 (1978), and *Hogan v. Sacred Heart Med. Ctr.*, 122 Wn. App. 533, 94 P.3d 390 (2004), *rev. denied*, 153 Wn.2d 1026 (2005), CP 112-15, not because Dr. Chen was a hospital employee, it being undisputed that Dr. Chen was not Deaconess’ employee.

<sup>22</sup> “In connection with the plaintiffs claims of injury resulting from medical negligence, the plaintiffs have the burden of proving each of the following propositions: First, that Kim Chen, D.O. failed to follow the applicable standard of care and was therefore negligent; Second, that the plaintiffs were injured; Third, that the negligence of Kim Chen, D.O. was a proximate cause of the injury to the plaintiffs...”

<sup>23</sup> “The plaintiffs have the burden of proving that the injury resulted from the negligence of Kim Chen, D.O. in failing to exercise the degree of skill, care, and learning expected of a reasonably prudent anesthesiologist.”

<sup>24</sup> “Kim Chen, D.O. owes to the patient a duty to comply with the standard of care for one of the profession or class to which he or she belongs. An osteopathic physician who holds himself out as a specialist in anesthesia has a duty to exercise the degree of skill, care and learning expected of a reasonably prudent anesthesiologist in the State of Washington acting in the same or similar circumstances at the time of the care or treatment in question. Failure to exercise such skill, care, and learning constitutes a breach of the standard of care and is negligence. The degree of care actually practiced by members of the medical profession is evidence of what is reasonably prudent. However, this evidence alone is not conclusive on the issue and should be considered by you along with any other evidence bearing on the question.”

The court's agency instruction did not make Dr. Chen an *alter ego* of Deaconess, and Mrs. Cloninger has not argued that it did. In any event, a principal – in this case Deaconess – may be liable for what an agent (Dr. Chen) failed to do while acting within the scope of his agency, but the agent is not vicariously liable for the principal's nonperformance of a duty the principal owed unless discharging that duty was the agent's responsibility as agent. Unless Dr. Chen had somehow been made responsible for Deaconess's omissions (rather than the other way around, which is what Instruction No. 7, CP 536, did), no adverse inference instruction could have been given as to Dr. Chen, even if one could have been given as to Deaconess under the "independent duty of care" theory that the trial court applied to Deaconess in its Instruction Nos. 13 and 14 (CP 542-43), but omitted from the verdict form it gave the jury without any objection from Mrs. Cloninger.

For the foregoing reasons, it cannot have been error to refuse plaintiff's proposed instruction, at least to the extent plaintiff appeals the dismissal of her malpractice claim against Dr. Chen, personally (and her claim against Anesthesia Associates predicated on its employment-based vicarious liability for Dr. Chen's alleged malpractice).

D. The Record Provides No Support for a Conclusion that *Dr. Chen* Owed a Data-Preservation Duty to Mr. Cloninger on December 1, 2010.

As explained above, there is no evidence that vital-signs data actually was recorded on the monitor's hard drive to *be* preserved. As also explained above, Mrs. Cloninger develops no argument that *Dr. Chen* owed a legal duty to Mr. Cloninger to prevent erasure of "the data" after Mr. Cloninger was transferred to the ICU on December 1, 2010.<sup>25</sup> Even if that evidentiary gap did not exist and the Court were inclined to search the record and case law on its own to ascertain whether there was a legal duty on Dr. Chen's part to preserve data for Mr. Cloninger, such searches would yield no basis for giving an unfavorable inference instruction as to Dr. Chen.

The elements of a negligence cause of action, including a cause of action for medical negligence, are duty, breach, causation, and damage.

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<sup>25</sup> The only place in her brief where Mrs. Cloninger so much as suggests that Dr. Chen had a duty to preserve data stored on the anesthesia monitor's hard drive is at page 14, in her statement of the case: "Plaintiffs believe both Dr. Chen and the hospital not only disposed of critical evidence having a direct bearing on the outcome of the case, but significantly leveraged this absence of evidence, creating a differing medical record beyond verification through any objective data [that] the monitor's documentation would have provided." That seems mostly to be an argument about prejudicial effect (leveraging the absence of evidence), but if that assertion is intended as some kind of legal argument that a legal duty existed and was owed to Mr. Cloninger, it should not be considered. See *Christensen v. Munsen*, 123 Wn.2d 234, 247, 867 P.2d 626 (1994) (an appellate court need not consider arguments "made without assignment of error, without citations of relevant authority, and without references to the record").

*E.g., Caughell v. Group Health Coop.*, 124 Wn.2d 217, 237, 876 P.2d 898 (1994). One cannot breach a duty one does not have. *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998) (“a negligence action will not lie if a defendant owed a plaintiff no duty of care”).

Theoretically, a legal duty could exist at common law. But Mrs. Cloninger offers no argument or authority that would impose on Dr. Chen a common law duty to preserve hard-drive data on anesthesia monitors or any other type of hospital equipment. Nor does Washington case law recognize any such duty.

Theoretically, a duty could be imposed by statute. Mrs. Cloninger, however, does not, and cannot, cite any Washington or federal statute that obligated Dr. Chen to preserve vital-signs data on the monitor hard drive. Indeed, she cites no statute in her brief for any purpose.

Theoretically, a professional standard of care could impose a duty. Although Mrs. Cloninger does not cite and cannot cite any case authority for a standard of care requiring the preservation of data on anesthesia or similar hospital monitors, she asserts that anesthesiologists called to testify at trial “on behalf of both parties acknowledged [that] *they* retained data for later access and review when an unusual or adverse event occurred involving a patient [italics supplied],” citing to testimony by Drs. Richard Cooper and Robert Caplan. *App. Br. pp. 20-21*. Conspicuously, however,

Mrs. Cloninger fails to argue that any expert's testimony was offered to prove, much less did prove, that the *standard of care* applicable to anesthesiologists in 2010 required Dr. Chen to retain data stored on a monitor's hard drive when a patient arrested or "coded."<sup>26</sup> Her own experts' standard-of-care opinions concerned Dr. Chen's "airway management," not what he did or did not do after Mr. Cloninger was transferred to the ICU. Moreover, Mrs. Cloninger affirmatively has disclaimed any criticism of the health care Mr. Cloninger received once the "code" was called,<sup>27</sup> 103 minutes before he was transferred to the ICU.<sup>28</sup> Neither of the experts whose testimony Mrs. Cloninger cites in her brief said that he, or anyone he knows, *routinely* programs anesthesia monitors to retain data in cases like Mr. Cloninger's, or that in 2010 it was a standard, recommended, customary, or even common practice for anesthesiologists to do so.<sup>29</sup> Thus, *even if* Mrs. Cloninger were trying to

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<sup>26</sup> With respect to other subject matter, plaintiff's counsel took care to elicit medical testimony framed explicitly in terms of a standard of care. RP 51-52, 57-59, 61.

<sup>27</sup> *See App. Br. at 8* ("There is no criticism of any health care provider's actions once the code was initiated.")

<sup>28</sup> Compare Ex. P-1 p. 28 (code called at 0937) and Ex. P-1, p. 151 (transfer to ICU at 11:20).

<sup>29</sup> Although a medical expert's opinion testimony does not have to be stated in standard-of-care language to be admissible, "an expert's personal opinion is insufficient to establish the recognized standard of care," and when questions propounded to the experts are not in standard of care terminology expert testimony is likely to be mere personal opinion. *White v. Kent Med. Ctr.*, 61 Wn. App. 163, 172, 810 P.2d 4 (1991). To be admissible to prove the standard of

argue that *Dr. Chen* owed an evidence-preserving duty to Mr. Cloninger based on a standard of care applicable to anesthesiologists in 2010, the evidence and case law do not support such an argument.

Implicitly conceding all of that, Mrs. Cloninger predicates the “duty” on which her “unfavorable inference” instruction is based on Deaconess Medical Center’s “sentinel event investigation” policy. *App. Br. p. 2*. She fails, however, even to attempt to explain how a policy that required *hospital staff* to preserve evidence specifically for internal quality assurance purposes after a “sentinel event” necessarily would confer rights on a patient who later sued the hospital in connection with the “sentinel event.” That is she fails to explain why Mr. Cloninger is a beneficiary of a hospital policy adopted to further the hospital’s internal critical self-assessment function.<sup>30</sup>

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care, medical expert testimony must “be more than a personal opinion,” and “[t]his requirement is met so long as it can be concluded from the testimony that the expert was discussing general, rather than personal, professional standards and expectations.” *Id.* Mrs. Cloninger does not argue that it can be concluded from either Dr. Cooper’s or Dr. Caplan’s cited trial testimony – nor *can* it fairly be concluded – that either witness was “discussing general, rather than personal, standards and expectations.” That a practice is “not unusual,” *App. Br. p. 21*, does not make, or imply that, the practice standard or even generally followed.

<sup>30</sup> Without citing legal authority, Mrs. Cloninger also argues, *App. Br. at 12-13*, that what the Deaconess internal policy means – when an event becomes a “sentinel event” and at what point that triggers the data-preservation obligation she infers from the policy – was a *question of fact*, but fails to explain why the trial court erred by failing, in effect, to anticipate a jury finding that the policy imposed the obligation she claims it imposed by giving an instruction that presumed a legal duty on Deaconess’ part to preserve data based on the policy.

That is an omission that, standing alone, dooms Mrs. Cloninger's appeal. Whether one person owed a legal duty of care to another presents an issue of law. *E.g., Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn.2d 601, 618, 220 P.3d 1214 (2009). A defendant organization's internal policies "may provide evidence of the *standard* of care and therefore be evidence of negligence [italics added]" on the organization's part, but internal policies "generally do not create law." *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 323-24, 119 P.3d 825 (2005). Thus, if the hospital owed a duty to Mr. Cloninger to preserve data not otherwise part of the medical record it routinely kept for patients, the hospital's internal policy might illuminate a *standard* of care that applied to the scope or discharge of that duty, but the existence of the internal hospital policy did not of itself create a *legal duty* on the hospital's part – much less on Dr. Chen's part – that either owed to *Mr. Cloninger*.

To summarize, Mrs. Cloninger fails to demonstrate, and the record does not establish, that Dr. Chen, personally, had a legal duty to Mr. Cloninger to preserve the hard drive on Deaconess' anesthesia monitor before any data recorded on the hard drive was lost on December 1, 2010. Dr. Chen had no common law or statutory duty; plaintiff did not prove a standard of care imposing such a duty; and Mrs. Cloninger does not offer reasoned legal argument for imposing such a duty on Dr. Chen based on

Deaconess' internal "sentinel event" investigation policy. Thus, no demonstrated basis existed for giving an adverse inference instruction because of a negligent "failure" on Dr. Chen's part to preserve the hard drive before the Deaconess-owned anesthesia monitor was prepared for the next patient.

E. Any Error in Declining to Give the Proposed Deaconess-Specific Spoliation Instruction Was Harmless for Purposes of Plaintiff's Claims Against Dr. Chen and Anesthesia Associates of Spokane.

1. Mrs. Cloninger does not show that it can be error as a matter of law to refuse to give a *permissible* unfavorable inference instruction, and offers no argument that the trial court abused its discretion, with resulting prejudice to her, in refusing to give the instruction she proposed.

Plaintiff's proposed unfavorable inference instruction was a *permissible* inference instruction:

If *Deaconess Medical Center* failed to produce evidence which was under their [sic] control and reasonably available to them [sic] and not reasonably available to plaintiff, then ***you may infer that the evidence was unfavorable to the defendant*** [singular] who could have produced it but did not.

CP 570 (emphases added). An instruction that the jury is permitted, but not required, to draw a particular inference does not create a mandatory presumption that is binding on the jury unless rebutted. *State v. Hoffman*, 116 Wn.2d 51, 107, 804 P.2d 577 (1991). The jury may, or may not, infer from the loss of evidence that the lost evidence would have been unfavorable to the party responsible for its loss. So recognizing, plaintiff's coun-

sel and expert witnesses reminded the jury repeatedly that vital-signs data that the anesthesia monitor could have been programmed to store on its hard drive was not available.<sup>31</sup> Plaintiff's counsel also elicited a hospital administrator's acknowledgment that Dr. Chen, as well as Deaconess nurses, would have had the *authority* (not the obligation) to sequester the monitor once Mr. Cloninger was transferred to the ICU. Because juries do not need judges to tell them they *may* hold the absence of evidence against a party who is shown to have had at least the opportunity to keep it from being lost, a trial court's refusal to give a *permissible* unfavorable inference instruction is different from refusing to give a *mandatory* rebuttable negative inference instruction where there is evidence of actual spoliation. As the court explained in *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994), *cert. denied*, 515 U.S. 1159 (1995):

[A] judge need not deliver instructions describing all valid legal principles. Especially not when the principle in question describes a permissible, but not an obligatory, inference. Many an inference is permissible. Rather than describing each, the judge may and usually should leave the subject to the argument of counsel.

*Accord, Browning v. United States*, 567 F.3d 1038, 1040-41 (9<sup>th</sup> Cir. 2009), *cert. denied*, 559 U.S. 1067 (2010).

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<sup>31</sup> RP 34-36, 45, 48, 53, 68, 119-21, 235-36, 254-57, 318,20, 382.

In light of such authority, it is by no means self-evident that it is *or ever can be* reversible error for a trial court to refuse to give a *permissible* inference instruction. It was incumbent on Mrs. Cloninger to make at least a colorable argument that the law in Washington is otherwise. She has not even attempted to do so. At best, then, refusal to instruct on a *permissible* unfavorable inference must be subject to review for abuse of discretion and Mrs. Cloninger must demonstrate not only an abuse of discretion, but also prejudice resulting from the error. *See, e.g., Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983) (“error without prejudice is not grounds for reversal”). Mrs. Cloninger does not attempt to show and cannot show either.

2. Plaintiff’s proposed instruction applied, as worded, to Deaconess but not to Dr. Chen.

Mrs. Cloninger does not argue that the trial court should have given the “failure to produce evidence” instruction that she proposed before trial, CP 120, which began: “If *defendants* [plural] failed to produce evidence ....” The instruction that she contends the trial court erred in refusing to give applied, as worded, solely to Deaconess Medical Center:

If ***Deaconess Medical Center*** failed to produce evidence which was under their [sic] control and reasonably available to them [sic] and not reasonably available to plaintiff, then you may infer that the evidence was unfavorable to the defendant [singular] who could have produced it but did not.

CP 570 (*italics supplied*). The proposed instruction thus would not have affected how the jury deliberated on the malpractice claim against Dr. Chen.<sup>32</sup> The court's "failure" to give it was harmless error if it was error at all.

F. The Spoliation Decisions Mrs. Cloninger Relies Upon Are Beside the Point As Well as Not on Point.

None of the spoliation decisions Mrs. Cloninger cites are on point and none provide an authoritative stepping-off point for adoption, in Washington, of the new "negligent spoliation" rule Mrs. Cloninger proposes at page 40 of her brief. For one thing, under all of the decisions Mrs. Cloninger cites, spoliation occurs only when someone has destroyed relevant evidence that can be shown to have existed and that the defendant knew existed. Dr. Chen destroyed no evidence that plaintiff proved actually existed, and he was not legally responsible for a hospital technician's erasure of the hard drive, even if that caused recorded vital-signs data to be lost.

Moreover, in four of the five Washington decisions that Mrs. Cloninger cites, the court held there had been no spoliation and in three of

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<sup>32</sup> Refusal to give the proposed instruction might have affected how the jury deliberated as to as to Deaconess *if* the verdict form had included a question of whether Deaconess had breached the "independent" duty of care that the court's instructions told the jury Deaconess owed its patients (CP 542-43), but the verdict form included no such question. That point is, however, irrelevant to Mrs. Cloninger's appeal from the dismissal of the malpractice claim against Dr. Chen and Anesthesia Associates.

those four decisions the courts so held even though there had been at least intentional (if not bad-faith) destruction of evidence the existence of which had not been in dispute: a wrecked car (*Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996)); improperly applied stucco siding (*Homeworks Constr., Inc. v. Wells*, 133 Wn. App. 892, 138 P.2d 654 (2006)); and an exercise treadmill machine (*Marshall v. Bally's PacWest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999)). In the fourth case, *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 307 P.3d 811 (2013), the court held there was no spoliation of evidence of a slippery condition on the defendant's premises because the plaintiff failed to establish that a video surveillance tape that defendant had destroyed would have captured the area where she slipped and fell. And *Tavai* hardly supports adoption of a doctrine of *negligent* spoliation. It emphasized that any destruction of evidence occurred before the plaintiff had asked to see the evidence and rejected the notion that a duty to preserve arises automatically whenever there is an accidental injury, which is essentially what Mrs. Cloninger would impose here:

The record does not establish when Tavai requested Walmart to retain its footage. It is also unclear when the video was deleted. There is no evidence that it was deleted after Tavai asked for the footage. Thus, it may have been deleted before any request, which, because it did not contain video of the area of the fall, would tend to show a lack of bad faith.... We decline to require store premises to

retain all video anytime someone slips and falls and files an accident report.

*Tavai*, 176 Wn. App. at 136. Washington decisions thus do not authorize “unfavorable inference” instructions for unintentional destruction of evidence in cases where the party who destroyed it was not on notice that his adversary wanted the evidence preserved. In light of *Tavai*, Washington decisions provide no support for imposition of a duty to act automatically *within 90 minutes* after an accident to preserve data on the hard drive of a piece of equipment owned by someone else.

Among the decisions Mrs. Cloninger cites, it is only in *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 573 P.2d 2 (1977), that a Washington court held there had been spoliation, and in that case the evidence – records documenting how assessments had been calculated in certain years – had been destroyed during the course of (not before there arose) the legal controversy between the parties over property tax valuations. In *Henderson*, *Marshall*, and *Tavai*, as well, the destruction of evidence occurred after the parties had lawyered up, and in those three cases the courts still held that there was no spoliation calling for an adverse inference or rebuttable presumption instruction, at least in part because the plaintiff had not requested that the evidence be preserved before it was destroyed, which also is true here.

The out-of-state spoliation decisions that Mrs. Cloninger cites likewise would not be pertinent, even if there existed a data-preservation duty on Dr. Chen's part to Mr. Cloninger on December 1, 2010 before the hard drive was erased (assuming it was erased).

The Florida and Mississippi decisions involved the loss of types of medical records that statutes required hospitals to create and keep and that the defendant hospitals did not deny having kept and meant to keep. *Public Health Trust v. Valcin*, 507 So. 2d 596 (Fla. 1987) (an operative note), see *Valcin v. Public Health Trust*, 473 So. 2d 1297, 1305-06 (Fla. Ct. App. 1984) (citing *Fla. Stat. §395.001*); *Delaughter v. Lawrence County Hosp.*, 601 So. 2d 818, 821 (Miss. 1992) (intake medical history and physical assessment; nurses' progress notes (citing *Miss. Code. Ann. §41-6-69 (Supp. 1990)*). Here, Mrs. Cloninger did not offer evidence or argue in the trial court, and does not argue in her opening brief, that any Washington statute or administrative regulation requires hospitals, much less individual physicians to store and keep vital-signs data that anesthesia monitors display in real time.

Mrs. Cloninger does not acknowledge that her own expert on hospital administration, Dennis Coleman, RP 243, testified that the Joint Commission [on Accreditation of Healthcare Organizations, or "JCAHO"] has no policy requiring hospitals to automatically and immediately retain

data from anesthesia monitors, RP 279-80. Mrs. Cloninger also has never suggested why, or under what authority, an individual physician would be required to retain data recorded on equipment owned by and located at a hospital even if the hospital itself is not required to retain the data.<sup>33</sup>

The federal district court decision that Mrs. Cloninger cites, *Carr v. St. Paul Fire & Marine Ins. Co.*, 384 F. Supp. 821, 827-28 (W.D. Ark. 1974), involved emergency room vital-signs records that a hospital's employees admitted having created and then destroyed on the evening following the visit by a patient who was turned away and later died. That decision is inapposite because no such admissions were made in this case. The Alaska decision that Mrs. Cloninger cites, *Sweet v. Sisters of Providence*, 895 P.2d 484, 490 (Alaska 1995), involved lost informed-consent forms, nursing notes, and treatment records – the sorts of medical records that any hospital routinely makes a point of keeping.

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<sup>33</sup> RCW 70.41.190, which Mrs. Cloninger does not cite, provides:

Unless specified otherwise by the department [of health, see RCW 70.41.020(1)], a hospital shall retain and preserve all medical records which relate directly to the care and treatment of a patient for a period of no less than ten years following the most recent discharge of the patient; except the records of minors, which shall be retained and preserved for a period of no less than three years following attainment of the age of eighteen years, or ten years following such discharge, whichever is longer.... The department shall by regulation define the type of records and the information required to be included in the medical records to be retained and preserved under this section...

As best as counsel for these respondents can tell, no Department of Health regulation includes anesthesia monitor vital-signs data among records hospitals are required to retain or preserve.

The out-of-state decisions that Mrs. Cloninger cites thus involved the admitted loss of data that hospitals – not individual doctors – routinely record and routinely keep, which Mrs. Cloninger failed to show is true for vital-signs data displayed on anesthesia monitors in hospital rooms used for a series of patients on a given day.

VI. CONCLUSION

For the reasons explained above, the judgment on the jury verdict dismissing plaintiff's claims against Dr. Chen and Anesthesia Associates of Spokane, PS, should be affirmed.

RESPECTFULLY SUBMITTED this 22nd day of January, 2014.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that, on the 22nd day of January, 2014, I caused a true and correct copy of the foregoing document, "Brief of Respondents Kim Chen, D.O., and Anesthesia Associates of Spokane, PS," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 22nd day of January, 2014, at Seattle, Washington.



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