

FILED

JAN 21 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA No. 318338-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

PAMELA CLONINGER, et al., Appellants

v.

KIM CHEN, D.O., et al., Respondents

BRIEF OF RESPONDENT DEACONESS MEDICAL CENTER

MATTHEW W. DALEY, WSBA # 36711
BRIAN T. REKOFKE, WSBA # 13260
STEVEN J. DIXSON, WSBA # 38101
WITHERSPOON · KELLEY, P.S.
422 West Riverside Avenue, Suite 1100
Spokane, Washington 99201-0300
Phone: (509) 624-5265

Counsel for Respondent Deaconess Medical Center

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION & RELIEF REQUESTED	1
A. The Estate's Proposed Spoliation Instruction Was Properly Rejected Because it Misstated Washington State Law.....	2
B. The Estate Never Established that the Anesthesia Monitor Recorded any Information Regarding Mr. Cloninger's Case.....	3
C. Regardless of Whether the Information Ever Existed, the Estate Did Not Present Substantial Evidence of Spoliation.....	4
D. The Estate Failed to Demonstrate That any Duty to Preserve Evidence Existed, Under the Facts of This Case.....	5
II. RESTATEMENT OF THE ISSUE PRESENTED	7
III. STATEMENT OF FACTS	8
A. Mr. Cloninger Passed Away Due to Post-Surgical Complications.....	8
B. Following Mr. Cloninger's Surgery, the Operating Room and the Anesthesia Monitor Were "Cleared" in Preparation for the Next Patient.....	8
C. There Was No Evidence That the Anesthesia Monitor Ever Stored any Data.....	10
D. Regardless of Whether Data Existed, the Estate Offered No Evidence That Anyone Was Aware That Such Data Existed or Could Be Preserved.....	11
IV. STATEMENT OF CASE	12

V.	ARGUMENT.....	13
	A. Standard of Review.....	13
	B. The Trial Court Correctly Rejected the Estate's Proffered Instruction Because It Was Not an Accurate Statement of Washington State Law.	14
	1. Breach of a Duty to Preserve Evidence is Only Spoliation in Those Cases Where the Breach Was Willful or in Conscious Disregard of Duty.	15
	2. The Estate's Proffered Instruction Misstated Washington Law by Removing Culpability From the Inquiry.	17
	C. The Estate Failed to Offer any Evidence to Show That the Anesthesia Monitor Ever Contained any Data.	18
	D. The Estate Failed to Establish that any Duty to Preserve the Hypothetical Content of the Anesthesia Monitor Existed.	20
	E. The Trial Court Correctly Rejected the Estate's Spoliation Instruction Because There was No Showing that Evidence Was Willfully Destroyed or Consciously Not Preserved.	23
	F. Purported Credibility Issues Cannot Justify a Spoliation Instruction.....	24
VI.	CONCLUSION.....	26

TABLE OF AUTHORITIES

Cases

<i>Barrett v. Lucky Seven Saloon, Inc.</i> , 152 Wn.2d 259 (2004)	14
<i>Carroll v. Junker</i> , 79 Wn.2d 12 (1971)	13
<i>Epstein v. Toys-R-Us Delaware, Inc.</i> , 277 F. Supp.2d 1266 (S.D. Fla. 2003)	19
<i>Folsom v. Burger King</i> , 135 Wn.2d 658 (1998)	22
<i>Henderson v. Tyrrell</i> , 80 Wn. App. 592 (1996)	passim
<i>Homeworks Const., Inc. v. Wells</i> , 133 Wn. App. 892 (2006)	passim
<i>Marshall v. Bally's Pacwest, Inc.</i> , 94 Wn. App. 372 (1999)	18
<i>Ripley v. Lanzer</i> , 152 Wn. App. 296 (2009)	18
<i>Shepherd v. American Broadcasting Cos.</i> , 62 F.3d 1469 (D.C.Cir. 1995)	14
<i>Stiley v. Block</i> , 130 Wn.2d 486 (1996)	13, 14
<i>Tavai v. Walmart Stores, Inc.</i> , 176 Wn. App. 122, 307 P.3d 811 (2013)	18, 19
<i>Tri-County Motors, Inc. v. American Suzuki Motor Corp.</i> , 494 F. Supp. 2d 161 (E.D.N.Y. 2007)	19
<i>Veit v. Burlington Northern Santa Fe Corp.</i> , 150 Wn. App. 369 (2009)	17, 25, 26

I. INTRODUCTION & RELIEF REQUESTED

This appeal arises from a Spokane County medical negligence action. The Plaintiffs/Appellants (hereinafter "the Estate") alleged that Glen Cloninger died as a result of medical negligence during a surgical procedure performed at Deaconess Medical Center (hereinafter "Deaconess").

The matter was tried to a jury. And on June 24, 2013, the jury returned a unanimous verdict in the Defendants' favor.

The Estate assigns error to the Superior Court's refusal to instruct the jury on spoliation. The Estate's spoliation claim relates to the Defendants' alleged failure to preserve data generated by the anesthesia monitor used during Mr. Cloninger's surgery. The Estate contends that the monitor's information was spoliated when the operating room was cleaned, and the monitor reset, between Mr. Cloninger's procedure and the following patient's procedure. The Estate argues that the jury should have been instructed on spoliation, despite the Estate's concession that no information was intentionally destroyed.

The Estate's appeal fails for at least four reasons, each of which independently requires the trial court to be affirmed. First, the Estate's proposed instruction misstated Washington State law. Second, the Estate never established that the information at issue ever existed. Third, even assuming that the information existed, the Estate failed to offer substantial evidence that anyone

either willfully destroyed or consciously disregarded an obligation to preserve information. Finally, and again assuming that the information existed, the Estate never established that the Defendants had any duty to preserve information, under the facts of this case.¹

A. THE ESTATE'S PROPOSED SPOILIATION INSTRUCTION WAS PROPERLY REJECTED BECAUSE IT MISSTATED WASHINGTON STATE LAW.

At its core, spoliation provides for an inference that a party is conscious that it has a weak case and that the party destroyed evidence to bolster its case. Due to the extreme prejudice that the spoliation inference carries, it is applicable only in those cases where a party **willfully destroys** information or where a party **consciously disregards** an obligation to preserve information. Without such culpability, there is no connection between the loss of potential evidence and a party's consciousness of the weaknesses in its case. Without that connection there is no justification for the spoliation inference.

¹ At trial, the Estate asserted a separate claim for "corporate negligence" based upon the same alleged "negligent breach of duty" that it purports in this appeal. *See* CP 17-18; Brief of Appellants, p. 2. That corporate negligence claim was not only asserted, but it was also tried – the Estate proposed a jury instruction on corporation negligence, CP 311; the Court, in fact, instructed the jury on corporate negligence, CP 543; and Deaconess even proposed a special verdict form acknowledging the claim for corporate negligence, CP 334-37. The Estate, however, withdrew that claim from the jury. *See* CP 559-60. It is more than a little ironic for the Estate to now assign error to the trial court's refusal to instruct the jury on the same alleged breach of duty under the auspices of spoliation.

The Estate acknowledges that no evidence was intentionally destroyed. The Estate offered no evidence to show that any information was willfully destroyed. Likewise, the Estate offered no evidence to show that anyone consciously disregarded an obligation to preserve information.

Accordingly, the Estate proposed an instruction that entirely omitted any culpability requirement. By seeking to eliminate Washington's traditional culpability requirement, the Estate is seeking a significant change in State law. The trial court did not abuse its discretion in rejecting the Estate's proposed instruction because it was not an accurate statement of law. The Court of Appeals should also decline the Estate's invitation to expand Washington's law on spoliation.

B. THE ESTATE NEVER ESTABLISHED THAT THE ANESTHESIA MONITOR RECORDED ANY INFORMATION REGARDING MR. CLONINGER'S CASE.

While the Estate's brief completely fails to address the issue, there is a fundamental flaw in the Estate's appeal. The Estate did not, and could not, establish that the information at issue ever existed. The Estate, instead, bases its entire appeal on the speculation that information may have existed and may have been lost.

It is undisputed that the anesthesia monitor at issue would not, by its default settings, store any information. While it is undisputed that the anesthesia

monitor had the technical capability to be reconfigured to store information, the Estate did not offer any evidence to demonstrate that the machine had **ever** been reconfigured to store information, much less that the machine was configured to store data during Mr. Cloninger's surgery.

The Estate bore the burden of demonstrating – with facts – that the information at issue existed. However, the Estate offered nothing but speculation. That speculation was fatal to the Estate's spoliation claim. That speculation was fatal to the Estate's request for a spoliation instruction. And that speculation is fatal to the Estate's appeal.

C. REGARDLESS OF WHETHER THE INFORMATION EVER EXISTED, THE ESTATE DID NOT PRESENT SUBSTANTIAL EVIDENCE OF SPOLIATION.

Setting aside the fact that the Estate never established that the information at issue ever existed, the Estate also failed to demonstrate that anyone **willfully destroyed** or **consciously disregarded** an obligation to preserve information. At trial, there was no evidence offered to show that anyone involved in Mr. Cloninger's care knew (or even suspected) that the anesthesia monitor retained (or was even capable of retaining) data. Simply put, there was no evidence that anyone involved knew or believed that the anesthesia monitor contained potential evidence. Being unaware that the data existed (assuming that it did), no one can be said to have willfully destroyed or consciously failed to preserve it.

The Estate failed to offer any evidence – much less, substantial evidence – of a willful destruction of relevant evidence. The Estate also failed to offer any evidence to show a conscious disregard of a duty to preserve relevant evidence. Like the Estate's speculation regarding the information's existence, the failure to offer evidence of willfulness or of conscious disregard was fatal to the Estate's requested jury instruction. And that failure to offer proof is fatal to this appeal. The trial court did not abuse its discretion in omitting a spoliation instruction in light of the Estate's failure to offer substantial evidence to support it.

D. THE ESTATE FAILED TO DEMONSTRATE THAT ANY DUTY TO PRESERVE EVIDENCE EXISTED, UNDER THE FACTS OF THIS CASE.

Lastly, the Estate's entire argument is based upon the premise that the Defendants had a duty to immediately preserve the hypothetical anesthesia monitor data regarding Mr. Cloninger's case. The Estate, however, never actually established the existence of such a duty. In fact, the Estate withdrew a corporate negligence claim, purporting the same duty, from the jury. *See supra* note 1.

The Estate purports to base its argument on Deaconess' Sentinel Event Policy; that policy, however, does not support the Estate's arguments. The policy does require the investigation of Sentinel Events. However, only those occurrences that result in "unanticipated death or permanent loss of function" qualify as Sentinel Events. Moreover, the evidence offered at trial demonstrated:

(i) that the decision regarding whether an occurrence qualifies as a Sentinel Event is made by the hospital's administration; and (ii) that it takes time for an occurrence to be declared a Sentinel Event – that time period can range from a few hours to a couple of days.

It was undisputed that the anesthesia monitor was reset to its factory default settings (thereby eliminating any information that could have been present) within 42 minutes of Mr. Cloninger's procedure. The Estate did not offer any evidence to establish that Mr. Cloninger's case qualified as a Sentinel Event at any point during that 42 minute period. In fact, the only evidence that was offered acknowledged that no one knew (within those 42 minutes) what Mr. Cloninger's prognosis was – that is, no one knew whether Mr. Cloninger would suffer death or permanent loss of function.

It is also undisputed that Mr. Cloninger's case had not been declared a Sentinel Event within the 42 minute period at issue. It is, therefore, undisputed that the monitor was reset to its factory defaults before a Sentinel Event was declared. By definition, Deaconess' Sentinel Event Policy could not have imposed a preservation duty until Mr. Cloninger's case was declared to be a Sentinel Event.

Thus, the Estate's argument actually has nothing to do with Deaconess' Sentinel Event Policy. Instead, the Estate asserts that the Defendants had a duty

to preserve data in the face of a **potential Sentinel Event**. The Estate, however, never demonstrated that such a duty existed. In fact, the Estate never acknowledged the true nature of its claim.

The trial court did not abuse its discretion in denying the Estate's requested spoliation instruction. The Estate's instruction was not an accurate statement of Washington State law. The Estate offered nothing but speculation to show that the information at issue ever existed. The Estate did not present any evidence to show that anyone **willfully destroyed** data or **consciously disregarded** a duty to preserve data. Finally, the Estate failed to establish that any duty to preserve data existed, under the facts of this case. Each of those reasons, alone, requires the Estate's appeal to be rejected. And taken together, they demonstrate the complete propriety of the trial court's decision. The Court should, therefore, affirm the trial court in every respect.

II. RESTATEMENT OF THE ISSUE PRESENTED

Did the trial court abuse its discretion in refusing to instruct the jury on spoliation where the proffered instruction misstated the law and where the Estate failed to present substantial evidence in support of the instruction?

III. STATEMENT OF FACTS

A. MR. CLONINGER PASSED AWAY DUE TO POST-SURGICAL COMPLICATIONS.

On or about December 1, 2010, Mr. Cloninger reported to Deaconess Medical Center to undergo a previously scheduled surgical procedure. *See* CP 159. The procedure was successfully completed. *See* CP 162. However, Mr. Cloninger suffered from complications during the post-surgical anesthesia process. CP 163-66. Those complications resulted in brain damage, and Mr. Cloninger passed away shortly thereafter. *See* CP 5.²

B. FOLLOWING MR. CLONINGER'S SURGERY, THE OPERATING ROOM AND THE ANESTHESIA MONITOR WERE "CLEARED" IN PREPARATION FOR THE NEXT PATIENT.

Defendant, Kim Chen, D.O. served as the anesthesiologist for Mr. Cloninger's surgery. CP 159-66. During the surgery, Dr. Chen utilized an anesthesia monitor, known as a Datascope monitor. CP 345-46. The anesthesia monitor tracked Mr. Cloninger's vital signs throughout the procedure and during the time when complications arose. *See* RP 550-551. Once Mr. Cloninger's condition stabilized, he was transferred to Deaconess' Intensive Care Unit

² The Estate devoted much of its brief to asserting and arguing the underlying merits of its medical negligence claim. *See generally*, Brief of Appellants. Neither that claim, nor its merits, has any bearing on this appeal. Moreover, that claim was presented to a jury, and following two weeks of trial testimony, the jury returned a unanimous defense verdict. CP 559-62.

(hereinafter "ICU"). RP 254-55, 550-551, CP 166. When Mr. Cloninger was transferred to the ICU he was connected to a different monitor, and the anesthesia monitor remained in the operating room for use with the next patient. RP 254-55, 550-551.

Per Deaconess' standard practices, following Mr. Cloninger's vacation of the operating room, an anesthesia technician reset the anesthesia monitor to its factory default settings, as part of the process to prepare the room for its next patient. RP 235-236, 278-79, 550. In this case, it is undisputed that the operating room was prepared for its next patient within 42 minutes of Mr. Cloninger's procedure being completed. RP 319-20, 337.³ Moreover, one of the Plaintiff's experts acknowledged that it is a typical and standard process in hospitals all over the country to have operating rooms turned over and prepared for the next patient in this manner, including resetting the monitors. RP 278-79.

³ The Estate acknowledges that the technician who reset the monitor did not "engage [] in any conscious act of bad faith." Brief of Appellants, p. 9,n.26. The Estate goes on to argue that "Dr. Chen or one of the several nursing staff and supervisors involved" in Mr. Cloninger's care should have instructed the technician to preserve the monitor's data. *Id.* Setting aside whether any monitor data existed, the Estate failed to present any evidence demonstrating that anyone involved in Mr. Cloninger's care knew that such data existed. *See supra* Part III.D.

C. THERE WAS NO EVIDENCE THAT THE ANESTHESIA MONITOR EVER STORED ANY DATA.

At trial, it was undisputed that the anesthesia monitor had factory default settings such that no data would be stored on the monitor. RP 235, CP 351, 374. It was undisputed that Deaconess' standard process was to have the anesthesia monitors reset to their factory settings at the completion of each case, in preparation for the next case. RP 235-236, 550, *see also* CP 378 (the monitor's manual also provides that all data is erased when discharged).

As a result, at the outset of each case, the anesthesia monitors in Deaconess' operating rooms are set not to record any data. *See* RP 235-236, 550, *see also* CP 386-87. It would then be incumbent upon each anesthesia provider to determine whether he or she wanted the monitor configured to record data and to configure the monitor accordingly. RP 237-238.

There was no evidence offered regarding how the anesthesia monitor was configured for Mr. Cloninger's surgery. Despite the issue's seeming significance, the Estate did not ask Dr. Chen whether he had the monitor configured to record data during Mr. Cloninger's procedure – in fact, the Estate did not cross examine Dr. Chen at all. RP 536.

Thus, the only evidence offered demonstrated that at the outset of Mr. Cloninger's procedure Deaconess' standard practice had the monitor set not to

record any data. The Estate did not challenge that evidence, and the Estate did not offer any contrary evidence. In fact, Alan Lipschultz, one of the Estate's experts, acknowledged that there was "no evidence that any data was retained" in this case. CP 360. There was, therefore, no evidence offered to support the Estate's contention that any data was lost when the anesthesia monitor was reset following Mr. Cloninger's surgery.⁴

D. REGARDLESS OF WHETHER DATA EXISTED, THE ESTATE OFFERED NO EVIDENCE THAT ANYONE WAS AWARE THAT SUCH DATA EXISTED OR COULD BE PRESERVED.

Setting aside the fact that no evidence was offered to show that any data existed in the first place, the Estate also failed to offer any evidence to show that anyone involved in Mr. Cloninger's care was (i) aware that the anesthesia monitor was capable of storing any data; or (ii) aware that any data could be retrieved from the anesthesia monitor. In fact, the testimony was exactly the opposite:

- Dr. King, one of the anesthesiologists involved in Mr. Cloninger's care, testified that he did not know how to configure the anesthesia monitors. RP 108-09, 121.

⁴ The Estate purports that "the evidence would make it likely" that the anesthesia monitor had, at some point in the past, been reconfigured to record data and that it would be "strange" to "overwrite" that configuration once set. Brief of Appellants, p. 19. The Estate's speculation is entirely improper and does nothing to respond to the undisputed evidence that Deaconess' monitors are reset to their factory default settings between each use. See RP 235-36, 550.

- Dennis Coleman, one of the Estate's expert witnesses, acknowledged that neither Nurse Hayes, nor Nurse Chudanski, nor Dr. Chen was aware that the anesthesia monitor had any ability to record data. RP 298-99, *see also* RP 319, 337 (Nurse Hayes' own testimony confirmed that she was unaware that the monitor had any ability to retain data).

The Estate did not offer any evidence to the contrary. Simply put, the Estate did not offer any evidence to demonstrate that anyone involved in Mr. Cloninger's care knew (or even suspected) that the anesthesia monitor could contain data regarding Mr. Cloninger's case.

IV. STATEMENT OF CASE

Before the trial began, the Defendants brought a motion in limine to preclude the Estate from offering evidence in support of its spoliation allegations. RP 44-47. The Defendants observed that the Estate acknowledged, as it does on appeal, that there was "no intentional destruction of evidence." RP 45, *see also* Brief of Appellants, p. 38.

After considering the parties' submissions, the trial court reserved ruling on the motion in limine. RP 52. The trial court, thus, allowed the Estate to present whatever evidence the Estate saw fit to support the Estate's spoliation claim, as well as the Estate's corporate negligence claim, which alleged the same duty to preserve evidence. *See* CP 17-18, *see also* CP 334-37 (Deaconess'

proposed special verdict form, which acknowledged the Estate's corporate negligence claim).

The trial began on or about June 10, 2013, and over the next two weeks the jury was presented with evidence. CP 552. The jury was instructed and given the case on June 24, 2013. CP 561. The trial court declined to give the jury the Estate's proffered spoliation instruction. See RP 540, CP 527-51.

The jury returned a unanimous defense verdict. CP 559-60. On July 16, 2013, the trial court entered a judgment on the jury's verdict. CP 561-62. And on July 22, 2013, the Estate filed a timely notice of appeal. CP 563-66.

V. ARGUMENT

A. STANDARD OF REVIEW.

Trial court decisions regarding whether to give a particular jury instruction are reviewed for abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498 (1996); *Henderson v. Tyrrell*, 80 Wn. App. 592, 612 (1996). In this case, the trial court's decision to omit the Estate's proffered spoliation instruction cannot be overturned because it was not manifestly unreasonable, based on unreasonable grounds, or based on untenable reasons. *Stiley*, 130 Wn.2d at 498; *Carroll v. Junker*, 79 Wn.2d 12, 26 (1971).

A party is entitled to a proffered jury instruction only if it is supported by "substantial evidence" and is an accurate statement of the law. *Barrett v. Lucky*

Seven Saloon, Inc., 152 Wn.2d 259, 267 (2004); *Stiley*, 130 Wn.2d at 499. As demonstrated below, the Estate's proffered spoliation instruction did not satisfy either inquiry. The trial court was, therefore, well within its discretion to refuse to instruct the jury on spoliation, and the Court of Appeals should affirm the trial court's decision.

B. THE TRIAL COURT CORRECTLY REJECTED THE ESTATE'S PROFFERED INSTRUCTION BECAUSE IT WAS NOT AN ACCURATE STATEMENT OF WASHINGTON STATE LAW.

Spoliation is "a term of art, referring to the legal conclusion that a party's destruction of evidence was **both willful and improper**." *Homeworks Const., Inc. v. Wells*, 133 Wn. App. 892, 900 (2006) (quotations and citations omitted) (emphasis added). Spoliation "has historically been treated as an evidentiary matter", and the common remedy for spoliation has, therefore, been an adverse evidentiary inference. *Henderson*, 80 Wn. App. at 605. That adverse inference, or any other "sanction for failure to preserve evidence is appropriate **only** when a party has **consciously disregarded** its obligation to do so." *Id.* at 609 (quoting *Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1481 (D.C.Cir. 1995)) (emphasis added). A spoliation instruction is, therefore, properly rejected where it would "unfairly . . . create[] the suspicion that [a party] had willfully attempted to deny jurors access to adverse evidence." *Henderson*, 80 Wn. App. at 613, *see also Homeworks*, 133 Wn. App. at 902 (holding that the trial court abused its

discretion by instructing the jury on spoliation where the party was unaware that any evidence has been lost).

1. Breach of a Duty to Preserve Evidence is Only Spoliation in Those Cases Where the Breach Was Willful or in Conscious Disregard of Duty.

The Estate argues that nothing more than a duty to preserve information is necessary to support a spoliation claim. *See generally*, Brief of Appellants.⁵ However, Washington imposes spoliation liability only where a party's failure to preserve evidence is **willful** or in **conscious disregard** of a preservation duty. *Homeworks*, 133 Wn. App. at 900.

The Estate relies heavily on the Court of Appeals' decision in *Homeworks Const., Inc. v. Wells*. *See generally*, Brief of Appellant. However, the Estate's description omits the importance that the *Homeworks* Court placed on culpability.

In *Homeworks* the Washington State Court of Appeals considered a general contractor's appeal of a summary judgment order dismissing claims against its subcontractors. 133 Wn. App. at 894. A homeowner hired a general contractor, Homeworks Construction, Inc. (hereinafter "Homeworks") to build a house. *Id.* at 895. Homeworks subcontracted with Wells Exterior Systems (hereinafter "Wells") to perform work on the house. *Id.* at 895. The homeowners

⁵ As noted at the outset, note 1, the Estate withdrew a corporate negligence claim alleging the same duty from the jury, despite putting on evidence, proposing an instruction, and obtaining an instruction on the claim.

noticed water damage in the house, and with the assistance of a consultant, they identified Wells as being potentially responsible. *Id.* at 895.

Approximately two years later, Homeworks settled with the homeowners and initiated suit against Wells to recover damages. *Id.* at 895-96. Shortly after the suit was filed, and without notice to Homeworks or Wells, the homeowners had the water damage repaired. *Id.* at 896. Due to the water damage having been repaired, Wells argued that Homeworks spoiled critical evidence. *Id.* at 897.

The Court of Appeals undertook an extensive discussion of spoliation law in Washington, specifically analyzing the Court of Appeals' prior decision in *Henderson v. Tyrrell*, 80 Wn. App. 592 (1996). *Id.* at 898. The Court of Appeals observed:

The [*Henderson v. Tyrrell*] court . . . adopted Alaska's approach to determine when spoliation requires a sanction . . . Under this test, the trial court weighs (1) the potential importance or relevance of the missing evidence; and (2) the **culpability or fault** of the adverse party . . . After weighing those two general factors, the trial court uses its discretion to craft an appropriate sanction.

Id. at 899 (internal citations omitted & emphasis added). The Court went on to observe:

The *Henderson* court acknowledged that many courts examine whether a party acted in bad faith or with "conscious disregard" for the importance of evidence . . . By noting that **disregard can be sufficient** to deserve a sanction, the *Henderson* opinion suggests that spoliation encompasses a broad range of acts beyond those that are purely intentional or done in bad faith.

Id. at 900 (emphasis added). Thus, if the destroying party had a duty to preserve evidence, culpability turns on whether he or she acted **willfully** or in **conscious disregard** for his or her obligations. *Id.* at 900; *Henderson*, 80 Wn. App. at 609.

Applying Washington's spoliation principles, the Court of Appeals held that Homeworks bore no culpability for the purported loss of evidence. *Id.* at 901. Specifically, the Court observed that Homeworks had no knowledge that evidence was being lost, because Homeworks did not know that the homeowners were undertaking repairs. *Id.* at 901. The Court of Appeals, therefore, held that the trial court abused its discretion in concluding that Homeworks spoliated evidence. *Id.* at 902. In reversing the trial court, the *Homeworks* Court reiterated the importance of culpability in spoliation cases. *See Id.* at 901-02.

2. ***The Estate's Proffered Instruction Misstated Washington Law by Removing Culpability From the Inquiry.***

"A 'spoliation instruction' is appropriate under the **narrow circumstances** in which a party cannot offer a 'satisfactory explanation' for the loss of information under its control." *Veit v. Burlington Northern Santa Fe Corp.*, 150 Wn. App. 369, 378 (2009). In deciding whether to give a spoliation instruction, the court must take into consideration: (i) "the potential importance or relevance of the missing evidence"; and (ii) "the **culpability or fault** of the adverse party." *Id.* (emphasis added), *see also Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122,

307 P.3d 811, 818 (2013); *Ripley v. Lanzer*, 152 Wn. App. 296, 326 (2009).

Culpability turns on whether the party acted in bad faith or in conscious disregard of the importance of the evidence. *Tavai*, 176 Wn. App. 122, 307 P.3d at 818; *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 382 (1999). Spoliation can be based upon a party's failure to preserve evidence only where such failure was **willful** or in **conscious disregard** of an obligation to preserve evidence. *See Henderson*, 80 Wn. App. at 609; *Homeworks*, 133 Wn. App. at 900.

The Estate's argument and its proposed instruction completely remove culpability from the analysis. The Estate's argument and proposed instruction are directly at odds with Washington State law. The trial court was correct to reject the Estate's proffered instruction. And the Court of Appeals should decline the Estate's invitation to remove culpability from Washington's spoliation analysis.

C. THE ESTATE FAILED TO OFFER ANY EVIDENCE TO SHOW THAT THE ANESTHESIA MONITOR EVER CONTAINED ANY DATA.

"Spoliation is defined simply as the intentional destruction of evidence." *Henderson*, 80 Wn. App. at 605. The first requirement, therefore, is that there exists some evidence to be lost or destroyed. A party alleging spoliation must offer substantial evidence to show that evidence 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) ("[S]peculative assertions as to the existence of documents

do not suffice to sustain a motion for spoliation . . ."); *Epstein v. Toys-R-Us Delaware, Inc.*, 277 F. Supp.2d 1266, 1277 (S.D. Fla. 2003) ("In order to prevail on a claim for the destruction of a videotape, Plaintiff must at a minimum point to some *facts* indicating that such a video exists.").

In *Tavai v. Walmart Stores, Inc.*, the Court of Appeals considered a spoliation claim arising from a slip and fall in a retail outlet. 176 Wn. App. 122, 307 P.3d at 817-18. The plaintiff sought a spoliation inference based upon the store's failure to preserve the recordings from its video surveillance system. *Id.* In affirming the trial court's rejection of the Plaintiff's spoliation claim, the Court of Appeals noted that the plaintiff "failed to establish that surveillance video captured the area where she fell . . . Thus, the importance of any video footage was small because the area where [the plaintiff] fell was likely not captured." *Id.*

The Estate, likewise, failed to show that the anesthesia monitor recorded any data regarding Mr. Cloninger's case. In fact, the evidence that was offered tended to show that no information regarding Mr. Cloninger's case was ever recorded. It was undisputed that the anesthesia monitor had factory default settings such that no data would be recorded. RP 235, CP 351, 374. It was also undisputed that the monitor was reset to its factory settings in preparation for each procedure. RP 235-236, 550. The Estate did not challenge or rebut that

evidence.⁶ In fact, Alan Lipschultz, one of the Plaintiff's experts, acknowledged that there was "no evidence that any data was retained" in this case. CP 360. Instead, the Estate relies exclusively on speculation.⁷ Speculation cannot support a spoliation instruction. The trial court did not abuse its discretion in declining the Estate's proffered instruction where there was no evidence in support of it.

D. THE ESTATE FAILED TO ESTABLISH THAT ANY DUTY TO PRESERVE THE HYPOTHETICAL CONTENT OF THE ANESTHESIA MONITOR EXISTED.

Much of the Estate's brief is devoted to an attempt to demonstrate that Deaconess' Sentinel Event Policy imposed a duty to preserve the anesthesia monitor's data. *See generally*, Brief of Appellant. However, the Estate never established that any duty existed, under the facts of this case.

There is no dispute regarding the fact that Deaconess had, and has, a Sentinel Event Policy. RP 227-29, 250-51. The policy defines a sentinel event as: "an event that has resulted in an unanticipated death or permanent loss of function not related to the natural course of the patient's illness or underlying condition." RP 228, 250.

⁶ It was also undisputed that the decision regarding whether to reconfigure the anesthesia monitors was left to each individual anesthesia provider. RP 237-38. Only Dr. Chen could have answered the Estate's speculation regarding whether the monitor had been reconfigured to store data. Yet, the Estate chose to make no inquiry of Dr. Chen. RP 536.

⁷ The Estate's brief is rife with speculative statements that should be disregarded. *See e.g.* Brief of Appellant, pp. 15, 19, 21.

It is undisputed that the policy calls for the immediate investigation of a sentinel event. RP 250-52. It was equally undisputed that Sentinel Events cannot be immediately declared, and that no Sentinel Event had been declared before the anesthesia monitor was cleared. *See* RP 228, 239-40, 251, 318-20, 337. The Estate acknowledged that not all unusual occurrences are Sentinel Events. RP 273. The Estate also acknowledged that decisions regarding whether a particular event is a Sentinel Event generally occurs at the hospital's administrative level. CP 380. And the Estate recognized that it can take time (a few hours to a couple of days) for an unusual medical occurrence to be declared a Sentinel Event; in fact, one of the Estate's experts acknowledged that it is not possible to say that a declaration of a Sentinel Event must occur within a set period of time. RP 276-77, *see also* 231-32, 234-35 (there are a number of steps that must be followed, per Deaconess' policy, before an occurrence can be declared to be a Sentinel Event).

Further, the Estate never established that Mr. Cloninger's case qualified as a Sentinel Event at any point prior to the anesthesia monitor being cleared. By the policy's definition, a Sentinel Event is one that involves **death** or the **permanent loss of function**. RP 228. It was undisputed that the anesthesia monitor was reset within 42 minutes of Mr. Cloninger's procedure. RP 319-20, 337. And the only evidence offered at trial acknowledged that it was impossible for anyone to know,

during that time period, whether Mr. Cloninger's case was going to result in death, permanent loss of function, or a complete recovery. RP 228, 239-40, 318-20. In short, within those first 42 minutes no one could have known what Mr. Cloninger's prognosis was. *Id.* Therefore, in addition to it being undisputed that no formal Sentinel Event existed during the relevant time period, the Estate failed to demonstrate that Mr. Cloninger's case could have qualified as a Sentinel Event, even if formal recognition was possible within the relevant 42 minute timeframe.

Thus, despite casting its claim as relating to a preservation duty arising from Deaconess Sentinel Event policy, the Estate's claim is actually that the Defendants had a duty to preserve evidence, in the face of a **potential Sentinel Event**. Setting aside the deleterious impacts that such a rule would have on patient safety, the Estate never presented such a duty to the trial court, and the Estate never developed the evidence necessary to support such a duty.⁸

⁸ The Estate incorrectly argues that whether Deaconess' Sentinel Event Policy (or some other duty) required the Defendants to preserve the hypothetical monitor data should have been a jury question. Brief of Appellant, p. 12-13. The Estate is incorrect. Whether a duty exists is a question of law that must be determined by the Court. *See Folsom v. Burger King*, 135 Wn.2d 658, 671 (1998). Moreover, the Estate knowingly prevented the jury from answering that exact question by withdrawing the claim for corporate negligence. *See supra*, note 1.

E. THE TRIAL COURT CORRECTLY REJECTED THE ESTATE'S SPOILIATION INSTRUCTION BECAUSE THERE WAS NO SHOWING THAT EVIDENCE WAS WILLFULLY DESTROYED OR CONSCIOUSLY NOT PRESERVED.

Ignoring for the moment questions regarding whether the information at issue ever existed or whether the Defendants breached a duty to preserve information, the Estate completely failed to demonstrate that any information was **willfully destroyed** or that a duty to preserve evidence was **consciously disregarded**. However, substantial evidence of willful destruction or conscious disregard was required to support the Estate's spoliation instruction. *Henderson*, 80 Wn. App. at 609, 612.

The Estate did not offer any evidence to show that anyone was aware that the anesthesia monitor was capable of storing information – much less that the monitor had been reconfigured to store information regarding Mr. Cloninger's case. In fact, the only evidence offered uniformly indicated that no one knew (or even suspected) that the anesthesia monitor could contain retrievable data. RP 108-09, 121, 298-99, 319, 337. Moreover, the Estate's expert, Dennis Coleman, acknowledged that there was "no evidence that someone deliberately erased data so [the litigants] would never find it." RP 280.

Without such evidence the Estate could not demonstrate the **willful destruction** or the **conscious disregard** of an obligation to preserve evidence that is necessary to support a spoliation inference. *See Homeworks*, 133 Wn. App. at

900; *Henderson*, 80 Wn. App. at 609. And without substantial evidence to support the Estate's proffered instruction the Court did not abuse its discretion in refusing to give it. *Henderson*, 80 Wn. App. at 612.

F. PURPORTED CREDIBILITY ISSUES CANNOT JUSTIFY A SPOILIATION INSTRUCTION.

The Estate spends much of its brief arguing that alleged spoliation enabled Dr. Chen to modify his chart note regarding Mr. Cloninger's case. *See generally*, Brief of Appellants.⁹ The Estate argues that this, somehow, creates a credibility issue that should have been presented to the jury. *See id.* Specifically, the Estate argues that spoliation "requires a jury's determination regardless of the offending party's explanation for lost evidence." Brief of Appellants, p. 38. The Estate is simply incorrect.

First, Dr. Chen's chart note (and the revisions thereto) are completely irrelevant to this appeal. The Estate's spoliation claim was based upon the alleged loss of information from the anesthesia monitor. Dr. Chen's chart note has nothing to do with that claim. Moreover, it was undisputed that the Estate had access to the complete "audit trail," identifying each revision that Dr. Chen made. RP 196-97. The Estate acknowledged that it had the ability to identify and track

⁹ Notably, the Estate argues that Dr. Chen spent "in excess of 200 hours" editing a chart note addendum between December 3, 2010 and December 10, 2010. Brief of Appellants, p. 16. However, that eight day period (counting both the third and the tenth) consisted of a total of 192 hours.

each revision that was made to the note. *Id.* The Estate simply chose not to perform that analysis. *See id.*

Second, the court – not the jury – determines whether the evidence of culpability is sufficient to support a spoliation instruction. *See Veit*, 150 Wn. App. at 387. The trial court did not abuse its discretion in declining the Estate spoliation instruction in light of the Estate's failure to present substantial evidence of the Defendants' culpability.

In *Veit v. Burlington Northern Santa Fe Corp.* the Court of Appeals considered spoliation in the context of a collision between a train and an automobile. 150 Wn. App. at 372. The Plaintiff sought a spoliation instruction, based upon the railroad's destruction of a tape from an on-board data recording device. *Id.* at 387.

The Court analyzed the evidence that was offered with respect to spoliation. *Id.* The Court noted that a railroad employee analyzed the tape and, in doing so, found that the tape "did not properly record the data and the data was unusable." *Id.* The Court also noted that the railroad employee had downloaded the contents of the tape to a laptop computer, prior to destroying the original tape. *Id.* Finally, the Court noted that the laptop computer (which contained the copied data) had been stolen. *Id.* No contrary evidence appeared in the appellate record. *See generally, id.*

Based upon that evidence, the Court of Appeals held that the railroad had "presented a satisfactory explanation for the loss of the event data recorder." *Id.* at 387. Accordingly, the Court of Appeals held that the trial court did not abuse its discretion in refusing to instruct the jury on spoliation. *Id.* The Court did not, as the Estate advocates, hold that questions regarding whether the railroad's explanation was credible required the jury to be instructed on spoliation. *See Id.*

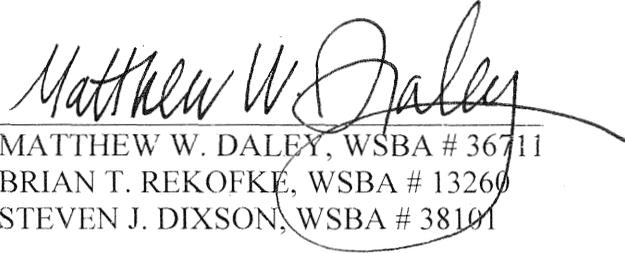
The Court of Appeals should, therefore, reject the Estate's arguments. The Estate had every opportunity to present evidence to a jury. The jury heard and considered two-weeks' worth of evidence and trial testimony, and after considering that evidence, the jury rejected the Estate's arguments.

VI. CONCLUSION

Based upon the foregoing, the Court file, and the records and pleadings therein, Deaconess Medical Center respectfully asks the Court of Appeals to affirm the trial court in every respect. The Estate failed its burden to present substantial evidence in support of its spoliation instruction, and the trial court, therefore, did not abuse its discretion in refusing to instruct the jury on spoliation.

RESPECTFULLY SUBMITTED, this 21st day of January, 2014.

WITHERSPOON· KELLEY, P.S.

A handwritten signature in cursive script that reads "Matthew W. Daley". The signature is written in black ink and is positioned above a horizontal line. The line is slightly wavy and extends across the width of the signature.

MATTHEW W. DALEY, WSBA # 36711
BRIAN T. REKOFKE, WSBA # 13260
STEVEN J. DIXSON, WSBA # 38101

Counsel for Respondent

CERTIFICATE OF SERVICE

On the 21st day of January, 2014, I caused to be served a true and correct copy of the foregoing document described as BRIEF OF RESPONDENT DEACONESS MEDICAL CENTER on all interested parties to this action as follows:

<p>Stephen Haskell Stephen Haskell Law Offices 222 North Wall Street, Suite 402 Spokane, Washington 99201-0813</p> <p>Email: haskellaw@aol.com</p> <p>Counsel for the Plaintiffs</p>	<p>Via United States Mail <input type="checkbox"/></p> <p>Via Federal Express <input type="checkbox"/></p> <p>Via Hand Delivery <input checked="" type="checkbox"/></p> <p>Via Facsimile <input type="checkbox"/></p> <p>Via Electronic Mail <input checked="" type="checkbox"/></p>
<p>Mary H. Spillane Williams Kastner & Gibbs 601 Union Street, Suite 4100 Seattle, Washington 98101-2380</p> <p>Email: mspillane@williamskastner.com</p> <p>Counsel for Defendants Chen and Anesthesia Associates of Spokane</p>	<p>Via United States Mail <input type="checkbox"/></p> <p>Via Federal Express <input type="checkbox"/></p> <p>Via Hand Delivery <input type="checkbox"/></p> <p>Via Facsimile <input type="checkbox"/></p> <p>Via Electronic Mail <input checked="" type="checkbox"/></p>



EVELYN M. HANSON, Legal Assistant