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Division III
State of Washington

NO. 32512-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

AMANDA PITTS (nee/aka AMANDA COMPTON, nee/aka AMANDA CRUTCHFIELD) and PAUL PITTS, individually; and AMANDA PITTS as Personal Representative of the ESTATE OF TAYLOR PITTS, and on behalf of all statutory claimants and beneficiaries,

v.

Appellants,

INLAND IMAGING, L.L.C., a Washington business entity and healthcare provider, INLAND IMAGING ASSOCIATES, P.S., a Washington business entity,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

In this medical malpractice/wrongful death action, Amanda and Paul Pitts claimed that Inland Imaging radiologists failed to properly diagnose Mrs. Pitts' twin pregnancy as monochorionic diamniotic and so advise her obstetrician-gynecologist, thereby causing the death of one of their twin fetuses, Taylor Pitts. Inland Imaging contended that its radiologists reasonably interpreted the series of ultrasound scans as a dichorionic diamniotic twin pregnancy, and that no one could have predicted based on the scans that the babies' umbilical cords would become entangled, causing Taylor's death. The jury found Inland Imaging not negligent.

On appeal, the Pitts first challenge a series of trial court orders in which the trial court did not preclude the Pitts from presenting two rebuttal expert witnesses on grounds of late disclosure, but limited the Pitts to presentation of relevant and proper rebuttal testimony, and ultimately excluded one of the experts from testifying on grounds of relevance, and then disallowed the remote rebuttal testimony of the other expert because the Pitts' counsel failed to establish videoconferencing capability in accordance with the reasonable standards and timeframe the trial court set. The Pitts further challenge several other evidentiary rulings, claiming that the trial court abused its discretion in allowing the defense to cross-

examine the Pitts' standard of care expert on subjects he had not referenced on direct examination, in allowing the defense to present what they characterize as cumulative and speculative expert testimony, and in disallowing the Pitts from conducting voir dire of one of the defense experts that had nothing to do with the expert's qualifications to testify. Finally, the Pitts claim that the trial court erred in granting the defense motion for partial summary judgment on their lost chance of survival claim, even though the only expert testimony presented on summary judgment was that the chance of survival lost was 90 percent.

Because the trial court did not abuse its discretion in making any of the complained-of evidentiary rulings, and did not err in its dismissal of the Pitts' lost chance of survival claim (the dismissal of which is moot given the jury's finding of no negligence), the trial court's entry of judgment on the jury verdict should be affirmed.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court properly exercise its discretion in not excluding the Pitts from presenting rebuttal testimony from two experts notwithstanding their late disclosure, but limiting them to presenting relevant and proper rebuttal testimony?

2. Did the trial court properly exercise its discretion in excluding the Pitts' rebuttal expert testimony concerning community

college training of sonographers, when any claim of negligence on the part of Inland Imaging's sonographers was dismissed at the close of the Pitts' case-in-chief and the Pitts have not appealed that dismissal?

3. Did the trial court properly exercise its discretion in disallowing remote testimony of the Pitts' rebuttal radiology expert, when the Pitts' counsel failed to establish the requisite videoconferencing capability in accordance with the reasonable standards and timeframe set by the trial court?

4. Did the trial court properly exercise its discretion in allowing the defense to question the Pitts' standard of care expert on the twin peak sign that Inland Imaging's radiologists saw on the ultrasound images and relied upon in reaching their diagnosis of a dichorionic diamniotic twin pregnancy?

5. Did the trial court properly exercise its discretion in limiting the number of defense expert witnesses but allowing the defense to present two experts on standard of care and two on causation?

6. Did the trial court properly exercise its discretion in disallowing the Pitts from conducting voir dire of one of the defense experts that had nothing to do with the witness' qualifications to testify?

7. Did the trial court properly grant partial summary judgment dismissing the Pitts' lost chance of survival claim where the only expert

testimony concerning the loss of chance presented at summary judgment identified the loss as a 90 percent loss of chance of survival?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background.

During her pregnancy with twins in 2007, Amanda Pitts underwent a series of obstetrical ultrasounds at Inland Imaging, L.L.C., which were interpreted by various radiologists from Inland Imaging Associates, P.S.¹ The first such ultrasound occurred on August 10, 2007, when Mrs. Pitts was approximately 12 weeks pregnant with the twins. Ex. P-1 at pp. 1-2; RP, Filed 10/28/14, Hearing 2/12/14, 202-03, 209-210, 235. After a sonographer conducted the scan, Dr. Scott Hoefer, a radiologist, interpreted the ultrasound images and prepared a report, noting the heart rate and movement of each fetus, observing the position and features of the placental tissue, and concluding that “[t]he ultrasound findings are consistent with a dichorionic diamniotic pregnancy.” *Id.* Dichorionic means that there are “basically two placentas,” one placenta for each twin. RP, Filed 10/28/14, Hearing 2/18/14, 383-84. Diamniotic means there are two amniotic sacs, with each twin encased in its own separate amniotic sac with amniotic fluid and having its own umbilical cord connecting it to the placenta. RP, Filed 10/22/14, Hearing 2/11/14, 431.

¹ Hereafter, Inland Imaging, L.L.C. and Inland Imaging Associates, P.S. are collectively referred to as Inland Imaging in this brief.

At Mrs. Pitts' second visit to Inland Imaging on August 27, 2007, another radiologist, Dr. Tasneem Lalani, reviewed the images captured during the ultrasound scan. Ex. P-1 at pp. 3-4. Dr. Lalani reported that a "[d]ichorionic diamniotic twin pregnancy is seen," noted "subjectively normal" amniotic fluid volume "in each sac," and described certain anatomical details observed in each fetus. *Id.*

Another radiologist, Dr. Elin Angeid-Backman, reviewed and reported on the images from Mrs. Pitts' third ultrasound done on October 4, 2007, noting the heart rate of each fetus, her observation of fetal movement, and various details of each fetus's anatomy. Ex. P-1 at pp. 5-8.

On October 11, Mrs. Pitts first saw obstetrician/gynecologist Dr. Ronald Hardy, to whom she had been referred by her previous doctor. RP, Filed 10/22/14, Hearing 2/11/14, 427, 454-55. Although Dr. Hardy had not yet received the report from the October 4 ultrasound, he noted: "Twin pregnancy with ultrasounds demonstrating a diamniotic dichorionic." *Id.*; Ex. P-2 at p. 7. When Dr. Hardy saw Mrs. Pitts again on October 25, he "heard two separate heartbeats." Ex. P-2 at p. 6.

Mrs. Pitts returned to Inland Imaging for her next ultrasound on November 5, 2007. Ex. P-1 at pp. 9-11. Dr. Ishwar Bhat reviewed the sonogram, listed detailed measurements, and noted a discordance of

21.6% between the twins with regard to estimated weight. *Id.* Dr. Hardy reviewed Dr. Bhat's report with Mrs. Pitts on November 8, 2007, noting the "ultrasound suggests that the babies are growing well." Ex. P-2 at p. 6. Dr. Hardy also noted the discordance of "just barely over a week in gestational age" and "of about 20%" in weight between the twins. *Id.* During his exam, Dr. Hardy "heard excellent heart tones" of "two separate babies." *Id.* After examining Mrs. Pitts again on November 19, 2007, Dr. Hardy noted that the "babies are very active, kicking and moving," and that he heard "excellent double heart tones." *Id.* at p. 5.

Radiologist Dr. Terri Lewis interpreted the next ultrasound scan on December 7, 2007, and reported: "Twin A currently measures 27 weeks 5 days, approximately 2 weeks behind the clinically expected age. Twin B currently measures 29 weeks 3 days, concordant with the expected age." Ex. P-1 at p. 15. Dr. Hardy reviewed Dr. Lewis' ultrasound report on December 13, 2007, noted the "25% discordance" between the twins, Ex. P-2 at p. 4, but was not alarmed by it because the scans showed consistent growth, "good" fluid, and "good flow through the umbilical cords." *Id.*; RP, Filed 10/22/14, Hearing 2/11/14, 466.

Radiologist Dr. Gregory Balmforth reviewed and reported on Mrs. Pitts' next ultrasound scan on December 21, 2007, detailing certain measurements of the twins and noting a growth discordance of 23.4%

between them. Ex. P-1 at pp. 16-18. When Dr. Hardy reviewed that report on December 28, he was reassured that the discordance was not cause for concern because the babies were “maintaining their growth curve.” RP, Filed 10/22/14, Hearing 2/11/14, 474; Ex. P-2 at p. 4. Dr. Hardy heard “excellent heart tones” for each twin and discussed delivery options and risks with Mrs. Pitts. Ex. P-2 at p. 4. Dr. Hardy also noted “good” heart tones at the next office visit on January 2, 2008. *Id.*

On January 17, 2008, Mrs. Pitts returned to Inland Imaging for her next ultrasound scan. Ex. P-1 at pp. 19-21. Dr. Bhat interpreted it, and concluded that “Baby A appears satisfactory,” but that his findings for Baby B, including the absence of heart tones, suggested “intrauterine fetal demise.” *Id.* at p. 21. Dr. Bhat called Dr. Hardy to report the finding. *Id.* After consulting a perinatologist, Dr. Hardy advised Mrs. Pitts that the surviving twin should be delivered immediately and performed a C-section that afternoon. Ex. P-2 at p. 3; RP, Filed 10/22/14, Hearing 2/11/14, 479.

When Dr. Hardy opened the uterus, he found “a sac that seemed to have some bloody fluid in it.” RP, Filed 10/22/14, Hearing 2/11/14, 480-81. He ruptured the sac, delivered the live baby, and found “no more fluid around the deceased baby,” who appeared to have “a membrane kind of covering it.” *Id.* He found the twins’ umbilical cords “traversing that membrane,” “twisted and tangled,” with one going “through the other,”

and then “a tight twist beyond that and some thrombosis in that band.” *Id.* Based on these findings, Dr. Hardy concluded “that this was a cord accident that had caused the death.” *Id.* According to Dr. Hardy, “the only way [he] could think of that those cords could have gotten entangled” was “some disruption of the membrane” between the twins. *Id.* at 481.

Dr. Wayne Riches, the pathologist who analyzed the placenta after delivery, concluded that the twin pregnancy was actually monochorionic diamniotic, meaning “one placenta, two sacs.” Ex. P-4, RP, Filed 10/22/14, Hearing 2/10/14, 261; RP, Filed 10/22/14, Hearing 2/11/14, 481-82.

B. Proceedings Below.

The Pitts sued Inland Imaging, claiming that its sonographers negligently performed Mrs. Pitts’ ultrasound scans and that its radiologists negligently interpreted the ultrasound images. CP 6-8. They alleged that Taylor would not have died had the radiologists properly diagnosed the pregnancy and accurately advised Dr. Hardy. *Id.* Inland Imaging denied the Pitts’ claims. CP 15-20.

The case was assigned to the Honorable Kathleen M. O’Connor. According to the amended case schedule, the deadlines for disclosing lay and expert witnesses were July 8, 2013, for the Pitts and September 9, 2013, for Inland Imaging, the deadlines for disclosing rebuttal witnesses

were October 14, 2013, for the Pitts and November 8, 2013, for Inland Imaging, and trial was set to begin on February 3, 2014. CP 131.

1. Inland Imaging's motion for partial summary judgment.

In December 2013, Inland Imaging moved for partial summary judgment to dismiss any claim for recovery based on loss of chance. CP 133. The trial court considered the expert testimony the Pitts proffered that the "twins would have a 90% chance of survival if Dr. Hardy ... had been properly advised of the twins' circumstances." CP 584-85. In her letter ruling granting partial summary judgment, the trial court stated: "As this percentage exceeds 50%, it does not support giving the lost chance of survival instruction to a jury." *Id.*

2. Inland Imaging's motion to exclude Professor Coffin and Dr. Finberg.

Also in December 2013, the Pitts filed a supplemental expert witness list identifying for the first time Professor Carolyn Coffin and Dr. Harris Finberg. CP 511-13. Inland Imaging moved to exclude both witnesses, claiming the disclosure was too late. CP 497-98. At a hearing on January 17, the trial court clarified and the Pitts' counsel agreed that the Pitts intended to call Professor Coffin and Dr. Finberg as rebuttal witnesses. RP, Filed 10/22/14, Hearing 1/17/14, 102, 105. On January 23, 2014, the trial court entered an order allowing the Pitts to designate Dr. Finberg and Professor Coffin as rebuttal witnesses, but requiring them to

“bear the cost of the video deposition of Dr. Finberg, and any accelerated costs of transcription” of their depositions. CP 949.

3. Inland Imaging’s motion to exclude or limit Dr. Finberg’s opinions regarding stuck twin and IUGR.

After deposing Dr. Finberg, Inland Imaging moved to exclude or limit his testimony to prevent him from offering his opinion that Taylor suffered from conditions known as “stuck twin” or intrauterine growth restriction (IUGR). RP, Filed 10/28/14, Hearing 1/30/14, 76. On January 31, 2014, the trial court entered an order prohibiting Dr. Finberg from offering cumulative testimony or testimony “on any late-disclosed and/or undisclosed liability theories including, but not limited to, “stuck twin” and intrauterine growth restriction (IUGR).” CP 1042.

4. The Pitts’ case-in-chief.

Trial began on February 5, 2014. CP 1509. The Pitts’ theory of the case was that Inland Imaging radiologists misdiagnosed the pregnancy as dichorionic diamniotic. In particular, they claimed that Inland Imaging, through its sonographers and radiologists, breached the standard of care by (1) relying solely on the “twin peak sign” in making that diagnosis, and (2) by failing to investigate indications in the ultrasound scans suggesting that the membrane separating the twins had been compromised in some way. RP, Filed 10/28/14, Hearing 2/6/14, 87-88, 90-91, 94-95, 101-02. They further claimed that had Inland Imaging properly interpreted the scans and

accurately advised Dr. Hardy, he would have taken additional steps and Taylor would not have died. *See* RP, Filed 10/28/14, Hearing 2/6/14 92-94, 105-06; RP, Filed 10/22/14, Hearing 2/10/14, 274; RP Filed 10/22/14, Hearing 2/11/14 476-77. In support of their theory of the case, the Pitts called Dr. Hardy and their radiologist expert, Dr. James Patten.

Dr. Hardy testified that the first step in caring for a patient pregnant with twins is to determine chorionicity. RP, Filed 10/22/14, Hearing 2/11/14, 437. Although he may make a preliminary “guess” based on an ultrasound at his office, Dr. Hardy always sends his patients with twin pregnancies to an ultrasound specialist or radiologist and relies on the expertise of that specialist to determine the chorionicity and amnionicity of the pregnancy. *Id.* According to Dr. Hardy, a dichorionic diamniotic pregnancy is the lowest risk twin pregnancy, with the main risks of “preterm delivery” and hypertension, but no risk of “[b]abies tangling on each other.” RP, Filed 10/22/14, Hearing 2/11/14, 435. With a monochorionic diamniotic twin pregnancy, the “primary risk” is “twin-twin transfusion where babies are sharing blood supply because of a common placenta,” resulting in “edema and shunting and growth differences.” *Id.* at 436. In a monochorionic monoamniotic pregnancy, Dr. Hardy stated that, in addition to “twin-twin transfusion,” the greatest concern is cord entanglement. *Id.*

Dr. Hardy testified that he relies on serial ultrasounds to monitor twin pregnancies. *Id.* at 438-39. When reviewing ultrasound reports, Dr. Hardy considers “the growth and concordance of growth” between the twins, the “fluid status around the babies,” the anatomy, and the blood flow through the umbilical cords. *Id.* at 439. His concerns depend to some extent on the chorionicity and amniocity of a particular pregnancy. *Id.* Growth discordance in a dichorionic twin pregnancy may be acceptable, but growth discordance in a monochorionic twin pregnancy could be a sign of twin-twin transfusion. *Id.* at 439.

Dr. Hardy testified that he would expect a radiologist to report to him if an ultrasound revealed an abnormal distribution of fluid or the apparent absence or compromise of the membrane separating the twins. *Id.* at 446-47. He further testified that, if the Inland Imaging radiologists had reported to him that they could not determine whether there was sufficient fluid around each baby or whether there was a membrane separating the babies, he would have investigated further, ordered more tests, consulted a perinatologist, and perhaps hospitalized Mrs. Pitts for monitoring or early delivery of the twins. *Id.* at 476-77.

To establish the standard of care for radiologists, the Pitts called their radiologist expert, Dr. Patten. According to Dr. Patten, when a radiologist can observe only one placental mass, the best clue to determine

chorionicity early in the pregnancy is the thickness of the membrane between the two fetuses. RP, Filed 10/22/14, Hearing 2/10/14, 203. Dr. Patten opined that Dr. Hoefler breached the applicable standard of care on August 10 by diagnosing the pregnancy as dichorionic diamniotic when the “membrane thickness was much more suggestive of a monochorionic diamniotic pregnancy.” RP, Filed 10/22/14, Hearing 2/10/14, 257. He also found fault with the August 27th report, opining that Dr. Lalani failed to properly assess the “thin” membrane and the “single placental mass.” *Id.* According to Dr. Patten, each of the radiologists who interpreted Mrs. Pitts’ ultrasound images thereafter fell below the standard of care by failing to describe chorionicity and amnionicity or to investigate the inconsistency between the appearance of the single placenta and the diagnosis of a dichorionic diamniotic pregnancy. *Id.* at 257-58. Dr. Patten also opined that the radiologists breached the standard of care by failing to assess the amniotic fluid around each twin in relationship to the membrane separating the two amniotic sacs. *Id.* at 266-67. By failing to properly diagnose the pregnancy as monochorionic diamniotic, and thereafter failing to advise Dr. Hardy that “the membrane seem[ed] to be gone,” Dr. Patten opined that the radiologists breached the standard of care and placed Mrs. Pitts and the twins “at increased risk.” *Id.* at 274.

5. Inland Imaging's motion for directed verdict on the Pitts' claims of sonographer negligence.

After the Pitts concluded their case-in-chief, Inland Imaging moved for judgment as a matter of law as to sonographer negligence. RP, Filed 10/22/14, Hearing 2/18/14, 582. Because the Pitts did not present any expert testimony establishing the standard of care for sonographers, the trial court dismissed the Pitts' claims of negligence on the part of Inland Imaging's sonographers. *Id.* at 586-90; CP 1506-07.

6. Inland Imaging's case-in-chief.

In its case-in-chief, Inland Imaging presented not only the testimony of the Inland Imaging radiologists who interpreted Mrs. Pitts' ultrasound scans, but also the testimony of three expert witnesses: an obstetrician/gynecologist specializing in maternal-fetal medicine, Dr. Mary D'Alton, and two radiologists, Dr. Peter Callen and Dr. Roy Filly.

Dr. D'Alton opined that Dr. Hoefer and Dr. Lalani met the standard of care and appropriately diagnosed Mrs. Pitts' pregnancy based on their observation on the ultrasound images of a "twin peak sign," indicating that the single placental mass was actually two separate placentas next to each other. RP, Filed 10/28/14, Hearing 2/18/14, 292-93, 308, 314-18. Dr. D'Alton showed the jury the twin peak sign on the ultrasound images and explained that it is a more accurate diagnostic tool than the thickness of the membrane. *Id.* at 333. In Dr. D'Alton's opinion,

the images in this case were “classic” for the diagnosis of a dichorionic pregnancy. *Id.* at 342. Dr. D’Alton further opined that the other Inland Imaging radiologists who reviewed the later ultrasound images also met the standard of care in their assessments of amniotic fluid, fetal anatomy and growth, and umbilical cord blood flow. *Id.* at 328. Dr. D’Alton’s “best interpretation of what happened” was that sometime after the December 21, 2007 ultrasound there was “a spontaneous rupture of the dividing membrane between the twins” that allowed the cords to become entangled. *Id.* at 340-41. According to Dr. D’Alton, the ultimate outcome was one that “could not have been predicted or prevented.” *Id.* at 333.

Radiologist expert Dr. Peter Callen also testified that Dr. Hoefler and Dr. Lalani reasonably diagnosed the pregnancy as dichorionic based on ultrasound images showing what appeared to be a classic twin peak sign. RP, Filed 10/28/14, Hearing 2/18/14, 389-90. He further testified that the Inland Imaging radiologists who reviewed the later ultrasound images also met the standard of care. *Id.* at 374-75, 398-99. According to Dr. Callen, an early diagnosis of chorionicity is best “because the accuracy early on in pregnancy is always greater than it is later on in pregnancy.” *Id.* at 390. He testified that there are “a variety of reasons” why a radiologist might not be able to see the membrane between twins as a pregnancy progresses, but those reasons do not suggest error in the

diagnosis of a dichorionic diamniotic pregnancy. *Id.* at 391. On cross-examination, when asked to explain Dr. Riches' pathology report conclusion that Mrs. Pitts' pregnancy was actually monochorionic, Dr. Callen stated that his "best guess" was that a "synechiaie," or ridge of scar tissue in the uterus, "masqueraded as a twin peak sign" in the ultrasound images. RP, Filed 10/22/14, Hearing 2/18/14, 528-29.

Radiologist expert Dr. Roy Filly testified that he believed Mrs. Pitts' pregnancy was actually monochorionic monoamniotic, but that the chorionic membrane and the amniotic membrane wrapped around a synechiaie. RP, Filed 10/28/14, Hearing 2/19/14, 484-85. Dr. Filly described synechiaie as a scar causing the walls of the uterus to partially stick together, creating what looks "like a pillar" running across the uterus from the front wall to the back wall. *Id.* at 483. He opined that the placenta grew into and around the synechiaie, giving the appearance of two separate sacs and a twin peak sign. *Id.* at 487. Dr. Filly pointed out images from the two August ultrasound scans that he believed to be consistent with synechiaie, but admitted that his theory was retrospective and based on his understanding of the pathology after the pregnancy. *Id.* at 486-91. In his review of the ultrasound images, Dr. Filly did not observe any suggestion of cord entanglement, which he described as the only "reliable ultrasound sign for diagnosing a monoamniotic pregnancy." *Id.* at 480-81.

7. The Pitts' rebuttal case.

Near the end of trial, the Pitts sought permission to present Dr. Finberg's rebuttal testimony by simultaneous video transmission because he was out of town for personal reasons. RP, Filed 10/22/14, Hearing 2/18/14, 598. Before ruling on that request, the trial court directed the Pitts' counsel to specifically describe the testimony he intended to present in the Pitts' rebuttal case. *Id.* at 605.

At a hearing on February 19, the Pitts stated that Professor Coffin would testify that the twin peak sign is generally not taught to sonographers in community college classes. RP, Filed 10/22/14, Hearing 2/19/14, 616. Noting that "what [the sonographers] may or may not have been taught" in community college was not relevant to "what they are doing in practice at Inland Imaging," the trial court ruled, "I am not going to allow you to call her for rebuttal, it is not proper rebuttal." *Id.* at 618.

As for Dr. Finberg, the trial court ruled that he would be allowed to identify himself, describe his background, and offer rebuttal testimony tending to show that the Inland Imaging radiologists breached the standard of care by failing to recognize that the membrane was collapsing or had collapsed around Taylor. RP, Filed 10/22/14, Hearing 2/19/14, 637-38, 641-43. The court ruled that Dr. Finberg would not be allowed to testify about twin peak sign, stuck twin, or IUGR. *Id.* at 635, 642-43.

The trial court also ruled that Dr. Finberg could testify remotely, provided that the Pitts' counsel was able to set up and test the necessary equipment in the morning on the next, and final, trial day. *Id.* at 633-34. The Pitts did not object. On Thursday, February 20, 2014, at 12:07 p.m., the trial court's judicial assistant sent an email to the parties stating, "The equipment for Dr. Finberg's testimony was not able to be successfully set-up in time for this afternoon. Therefore, Dr. Finberg will not be testifying at 1:30 p.m." CP 1587. The Pitts did not object.

8. The verdict.

The jury returned a verdict for Inland Imaging, answering "No" to the first question on the special verdict form: "Was Inland Imaging negligent?" CP _____. [Docket #224, Special Verdict Form]²

9. The Pitts's motion for new trial.

After entry of judgment on the verdict, CP _____ [Docket #231, Judgment on Verdict],³ the Pitts moved for a new trial, arguing, among other things, that the "extra judicial decision" of the judicial assistant regarding the remote testimony equipment "was highly irregular; arbitrary and capricious; and an abuse of discretion." CP 1518-20. Citing CR

² Inland Imaging filed a Supplemental Designation of Clerk's Papers on August 31, 2016, designating the Special Verdict Form, Docket #224, and the Judgment on the Verdict, Docket #231, but has not yet received the index to those supplemental clerk's papers and thus is unable to cite to them by CP numbers.

³ See footnote 2, *supra*.

59(a)(1), the Pitts contended that the irregularity of the incident justified a new trial because (1) the remaining necessary adjustments were minor, (2) there was still time to make them before the afternoon session, (3) Dr. Finberg could have testified by telephone, and (4) his testimony was “desperately needed.” CP 1528-29.

In support of the motion, the Pitts submitted a declaration from their counsel, in which he admitted that the trial court “had previously ruled, the prior afternoon, that it would require that a video conference capability to the court’s ‘standards’ be established by noon, February 20, 2014.” CP 1516, 1529. The Pitts’ counsel stated that, “As of noon,” the equipment was working properly except for a single issue with “the relative sizing of the evidence panel, which was then being adjusted manually, but not automatically.” CP 1529. According to the Pitts’ counsel, as he made the necessary adjustments, the judicial assistant stated that “the video link did not comply with the court’s standards. ... There was no discussion allowed. The judicial assistant at noon directed plaintiff’s counsel to vacate the courtroom for lunch break.” *Id.*

In response, Inland Imaging’s counsel submitted her declaration stating that she was in the courtroom on February 20 at 10:00 a.m. and observed the Pitts’ counsel setting up the equipment for remote testimony. CP 1559. She stated, “It was not until after 11:30 a.m. that plaintiff’s

counsel was able to achieve video and sound at the same time, but still could not contemporaneously show ultrasounds or documents.” CP 1559. When she left the courtroom at 11:56 a.m., “knowing that the courtroom needed to close for lunch,” “Plaintiff’s counsel had not accomplished the video-feed with simultaneous document viewing.” CP 1559.

At the hearing on the motion for a new trial, the trial court reiterated the importance of the technical capabilities of the remote equipment. The court stated that “[a]ll of the experts were testifying looking at sonograms, some were fixed, some were moving, ... So if the jury was going to understand anything Dr. Finberg was going to say, they had to have the ability to both see him and see what he was looking at so that that testimony would be helpful for them.” RP, Filed 10/22/14, Hearing 4/25/14, 662. The trial court stated that it had given counsel “that morning, half a day, half a trial day” to set up the equipment, “and by noon it still wasn’t working.” *Id.* at 662-63. The trial court was “satisfied” that counsel had “ample opportunity ... to get this in place and it did not happen.” *Id.* The trial court denied the motion for a new trial. CP 1590.

The Pitts timely appealed.

IV. STANDARD OF REVIEW

Except for the Pitts’ claim of error as to the trial court’s grant of

partial summary judgment dismissing their loss of chance claim, which is subject to de novo review, *e.g.*, *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982), the Pitts' other claims of error all involve the trial court's exercise of discretion. "Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

V. ARGUMENT

A. The Trial Court Properly Presumed that the Testimony of Late-disclosed Rebuttal Witnesses Would be Admissible and Excluded Only Irrelevant or Improper Testimony.

Relying on *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), the Pitts claim, *App. Br. at 26-37*, that they were denied a fair trial by the trial court's three orders concerning their proposed rebuttal witnesses, Dr. Finberg and Professor Coffin. Highlighting references the parties and the trial court made to "late" disclosures, the Pitts characterize the trial court's series of orders limiting Dr. Finberg's testimony and ultimately excluding Professor Coffin's testimony as imposing sanctions for discovery violations without the trial court's consideration on the record of the required *Burnet* factors.

The Pitts, however, fail to accurately describe the record. The trial court imposed only one sanction for the Pitts' late disclosure of rebuttal witnesses: an award of costs for a video deposition and any expedited transcripts. Because the trial court presumed that the rebuttal witnesses would be allowed to testify despite the late disclosure and excluded only irrelevant or improper rebuttal testimony, *Burnet* does not apply.

Under *Burnet*, before imposing a harsh CR 37 sanction – such as dismissal, default, or exclusion of testimony – for violation of a discovery order, the trial court must (1) find that the party's violation was willful, (2) find that the violation substantially prejudiced the opposing party, and (3) consider, on the record, whether lesser sanctions would suffice. *Id.* at 494. *Burnet* requires a presumption that late-disclosed witnesses will be allowed to testify absent a willful violation, substantial prejudice to the other party, and insufficiency of lesser sanctions. *Jones v. City of Seattle*, 179 Wn.2d 322, 343, 314 P.3d 380 (2013). Trial courts must consider the *Burnet* factors before imposing “sanctions that affect a party's ability to present its case,” but not “when imposing *lesser* sanctions, such as monetary sanctions.” *Blair v. TA-Seattle E. No. 176*, 171 Wn.2d 342, 348-49, 254 P.3d 797 (2011) (italics in original).

Appellate courts review a trial court's rulings on discovery sanctions, as well as admissibility of expert testimony, for abuse of discretion.

Id. at 348 (discovery sanctions); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000) (admissibility of expert testimony). Because “the precise limits of rebuttal evidence is a matter resting largely in the discretion of the trial court,” appellate courts will not reverse a trial court’s decision excluding or limiting rebuttal evidence absent “manifest abuse resulting in prejudice to the complaining party.” *Hardman v. Younkers*, 15 Wn.2d 483, 496, 131 P.2d 177 (1942).

1. The trial court properly exercised its discretion in entering its January 23, 2014 order and imposing a monetary sanction for late disclosure of rebuttal witnesses.

The Pitts claim, *App. Br. at 33*, that the trial court abused its discretion by failing to “properly consider and apply” the *Burnet* factors as to its January 23, 2014 order, CP 947-49, in which it allowed them to designate Dr. Finberg and Professor Coffin as rebuttal witnesses, reserved ruling on the admissibility of their testimony, and imposed a monetary sanction for their late disclosure. In particular, they contend, *App. Br. at 33-34, 37*, that the trial court incorrectly considered excusable neglect and mere prejudice, rather than willfulness and substantial prejudice.

First, to the extent the Pitts suggest that the trial court prevented them from calling Dr. Finberg and Professor Coffin in their case-in-chief, the record does not support such a claim. At the January 17 hearing, the trial court asked the Pitts’ counsel to clarify, “First of all, are you, in fact,

planning on calling these witnesses as rebuttal witnesses? Or witnesses in your case in chief? ... It appears to me that you are saying these are rebuttal witnesses.” RP, Filed 10/22/14, Hearing 1/17/14, 102. After some discussion regarding the number and order of potential defense witnesses, the Pitts’ counsel stated that it was his “intent to call Dr. Finberg and Ms. Coffin as rebuttal witnesses.” *Id.* at 105.

Based on that designation, the trial court indicated: “I cannot characterize the lack of disclosure of Dr. Finberg and Ms. Coffin as inexcusable neglect as long as they are being used in rebuttal only. These are not case in chief witnesses which should have been disclosed months before.” *Id.* at 112. The court also found “some merit” in counsel’s claim that he could not prepare for rebuttal until he had deposed the defense experts. *Id.* at 111-12. Recognizing that the late disclosure could increase the expenses incurred by Inland Imaging for depositions, the trial court merely shifted certain limited costs to the Pitts. *Id.* at 114; CP 949.

Thus, the trial court presumed that, despite the late disclosure, Dr. Finberg and Professor Coffin would be allowed as rebuttal witnesses (assuming their testimony was not otherwise excludable) and imposed only a monetary sanction. Because a *Burnet* analysis is not required before such a sanction is imposed, the trial court’s failure to explicitly

refer to the “willful violation” and “substantial prejudice” factors in *Burnet* was not an abuse of discretion. *Blair*, 171 Wn.2d at 348-49.

2. The trial court properly exercised its discretion in limiting Dr. Finberg’s potential testimony to proper rebuttal in its January 31, 2014 order.

The Pitts next contend, *App. Br. at 34, 36*, that the trial court should have performed a separate *Burnet* analysis before entering its January 31, 2014 order, CP 1041-42, precluding Dr. Finberg from offering cumulative testimony or testimony on any late-disclosed or undisclosed liability theories, including stuck twin and IUGR. Again, the record does not support their contention.

On January 30, the trial court heard argument on Inland Imaging’s motion to prevent the Pitts from offering Dr. Finberg’s opinions about stuck twin and IUGR in their rebuttal case. RP, Filed 10/28/14, Hearing 1/30/14, 72-83. Inland Imaging pointed out that the Pitts had not previously disclosed that any expert witness who would testify in their case-in-chief would offer such an opinion. *Id.* 76-78. The only expert who had mentioned stuck twin or IUGR during discovery was Dr. D’Alton, who, in response to questions the Pitts’ counsel asked, stated that Mrs. Pitts’ pregnancy did not involve a stuck twin. *Id.* In addition to contending that it was too late in the discovery process to disclose these opinions, Inland Imaging also argued that it was not proper to allow the

Pitts to introduce Dr. Finberg's opinions on stuck twin and IUGR for the first time in their rebuttal case. If the court were to allow Dr. Finberg to present these opinions, defense counsel argued that "it should be part of their case-in-chief," and that the defense should be allowed call an additional expert to "fairly respond." *Id.* at 78.

The Pitts' counsel argued that it was "premature to rule out his testimony" on "opinions that he may have" that "he might testify to on rebuttal if it's appropriate" because "we certainly don't know what the testimony of the witnesses, defense witnesses will be at trial." *Id.* at 79-81.

The trial court ruled: "I am not going to exclude Dr. Finberg at this point." *Id.* at 81. The court stated, however, that cumulative evidence and new theories "will not be allowed on rebuttal," and noted that "[p]roper rebuttal" does not include "introducing a completely new theory into the case when the plaintiff did not develop that theory through their witnesses in case-in-chief, and the defense did not develop that theory as a response to the plaintiff's case-in-chief." *Id.* at 82. "I am not excluding him but I will not consider testimony on these issues proper rebuttal." *Id.* at 82. "[I]f he has something relevant to say in rebuttal, I will consider it." *Id.* at 83.

The trial court's ruling in that regard was not an abuse of discretion. As the court explained in *State v. White*, 74 Wn.2d 386, 394-95, 444 P.2d 661 (1968) (citations omitted):

Rebuttal evidence is admitted to enable the plaintiff to answer new matter presented by the defense. Genuine rebuttal evidence is not simply a reiteration of evidence in chief but consists of evidence offered in reply to new matters. The plaintiff, therefore, is not allowed to withhold substantial evidence supporting any of the issues which it has the burden of proving in its case in chief merely in order to present this evidence cumulatively at the end of defendant's case. Ascertaining whether the rebuttal evidence is in reply to new matters established by the defense, however, is a difficult matter at times. Frequently true rebuttal evidence will, in some degree, overlap or coalesce with the evidence in chief. Therefore, the question of admissibility of evidence on rebuttal rests largely on the trial court's discretion, and error in denying or allowing it can be predicated only upon a manifest abuse of that discretion.

The Pitts fault the trial court, *App. Br. at 13*, for describing stuck twin and IUGR as "late-disclosed and/or undisclosed liability theories" in the January 31 order, CP 1042, claiming instead that "they were issues of differential diagnosis based on the physical birth evidence of the demised twin, Taylor, being in a shroud of membrane." But again, the trial court's order and oral ruling reflect a presumption that Dr. Finberg would be allowed to testify, albeit only on topics constituting proper rebuttal. Here, there was no claim or expert testimony that Taylor's demise was caused because she was a stuck twin or on the basis of IUGR. It was undisputed

that she died as a result of cord entanglement. And to the extent that the Pitts now suggest that somehow the Inland Imaging radiologists should have done something differently based on some stuck twin or IUGR theory, that was something that they should have presented, but failed to present, in their case-in-chief.

Even had the trial court's January 31, 2014 order constituted a discovery sanction, the Pitts have failed to show how the order affected their ability to present any particular claim for relief in their medical malpractice lawsuit, so as to require consideration of the *Burnet* factors. Nothing in the order prevented the Pitts from rebutting the defense case with Dr. Finberg's opinion that the Inland Imaging radiologists breached the applicable standard of care by failing to recognize ultrasound evidence suggesting the membrane had collapsed or was collapsing around one twin. *Cf. Burnet*, 131 Wn.2d at 490-91 (sanction that removed a properly pleaded claim of corporate negligence from the case was severe, such that imposition without due consideration constituted abuse of discretion). In fact, as discussed below, the trial court's later ruling specifically provided that the Pitts would be allowed to elicit such testimony from Dr. Finberg in their rebuttal case. RP, Filed 10/22/14, Hearing 2/19/14, 641.

3. The trial court properly exercised its discretion in excluding Professor Coffin's testimony as irrelevant and limiting Dr. Finberg's testimony to rebuttal topics.

The Pitts claim, *App. Br. at 35-36*, that the trial court abused its discretion in entering the February 21, 2014 order excluding Professor Coffin's testimony and imposing limits on Dr. Finberg's testimony without considering the *Burnet* factors. CP 1502-04. Contrary to the Pitts' claim, the record again reveals that the trial court presumed that Professor Collins and Dr. Finberg would be allowed to testify (assuming their testimony was otherwise relevant and admissible as proper rebuttal) and did not exclude their testimony as a sanction for the late disclosure. Thus, *Burnet* does not apply. *Cf., Jones*, 179 Wn.2d at 335-36, 343-44 (trial court erred by provisionally excluding late-disclosed witnesses based on presumption against admission contrary to *Burnet*).

- a. Professor Coffin's testimony was irrelevant to any matter at issue before the jury.

The Pitts offered Professor Coffin's testimony to rebut the testimony of Inland Imaging sonographers as to whether their community college training included the twin peak sign. RP, Filed 10/22/14, Hearing 2/19/14, 616-18; *see App. Br. at 29*. But, the trial court had dismissed all claims of negligence on the part of the sonographers after the close of the Pitts' case-in-chief. CP 1506-07. Thus, whether Inland Imaging's sonographers' training had included the twin peak sign had no bearing on

any remaining issue in the case, and the Pitts have not shown that Professor Coffin had any other relevant testimony to offer.

b. The trial court did not abuse its discretion in limiting Dr. Finberg's testimony to proper rebuttal.

The Pitts contend, *App. Br. at 28-32*, that the trial court abused its discretion by failing to consider the *Burnet* factors before restricting the scope and time of Dr. Finberg's rebuttal testimony as a discovery sanction. In particular, they claim, *App. Br. at 35-37*, that a *Burnet* analysis was required because the order prevented them from rebutting Inland Imaging's "primary defense – the twin peak sign" and from "explaining to the jury the undisputed existence of the membrane found" wrapped around Taylor at delivery. Again, the record does not support their claims.

At the hearing on February 19, 2014, the trial court explained the reasons for limiting Dr. Finberg's testimony. RP, Filed 10/22/14, Hearing 2/19/14, 637-38, 641. The trial court indicated that Dr. Finberg "will not be asked ... about the twin peak. That is not rebutting anything, we have had all kinds of discussions about that." *Id.* at 635. The trial court further indicated that "[t]he jury doesn't know anything about stuck twin ... nobody is going to argue stuck twin [or] intrauterine growth problems ... [the jury does] not really know all of that." *Id.* at 642-43. "But [the jury does] know, from Dr. Hardy, that when the baby was born, there was a

membrane over the baby.” *Id.* at 643. The trial court ruled that Dr. Finberg would be allowed to display the relevant ultrasound images and identify the “collapsing” membrane to support his opinion that Inland Imaging radiologists failed to properly diagnose the conditions of the pregnancy. *Id.* at 641-43.

Thus, the trial court presumed that Dr. Finberg would be allowed to testify in rebuttal, but imposed limitations based on the admissibility of the testimony itself as proper rebuttal, regardless of any discovery violation. Rather than limiting the testimony about the twin peak sign as a discovery sanction, the trial court’s oral ruling suggests that it considered additional testimony on that subject to be not only improper rebuttal,⁴ but also a waste of time. *See* ER 403 (relevant evidence may be excluded if its probative value is substantially outweighed by considerations of waste of time). The trial court’s oral ruling also demonstrates that it limited Dr. Finberg’s testimony regarding stuck twin and IUGR because neither party had presented evidence about those conditions and thus they were not proper rebuttal.

The Pitts do not contend that they or Inland Imaging presented any evidence in their respective cases-in-chief that stuck twin or IUGR was

⁴ Indeed, a basic thrust of the Pitts’ claim of negligence in opening statement was that Inland Imaging radiologists were negligent in relying on the twin peak sign to conclude that Mrs. Pitts’ pregnancy was dichorionic diamniotic. *See* RP, Filed 10/28/14, Hearing 2/6/14, 87-88, 90-91, 94-95, 101-02.

present in this case or that those conditions had any connection to the cord entanglement that caused Taylor's death. And, the trial court made clear that Dr. Finberg would be allowed to testify about his opinion that the Inland Imaging radiologists failed to properly interpret the ultrasound images and diagnose what he believed to be was a collapsing membrane. RP, Filed 10/22/14, Hearing 2/19/14, 637-38, 641-43. The Pitts cite, and Inland has found, no authority suggesting that the trial court must consider the *Burnet* factors before limiting rebuttal to its proper scope.

- c. Any alleged error in failing to consider *Burnet* factors was harmless.

After a trial, alleged *Burnet* violations are subject to a harmless error analysis. *Jones*, 179 Wn.2d at 356. The exclusion of evidence is not reversible error unless it results in prejudice. *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978). The record supports the conclusion that the February 21 order excluding Professor Coffin's testimony and limiting Dr. Finberg's testimony did not result in any prejudice to the Pitts and was therefore harmless.

The Pitts offered Professor Coffin's testimony to rebut testimony of the Inland Imaging sonographers about their training. The Pitts have not assigned error to the trial court's dismissal of their claims against the sonographers. And the Pitts do not claim that Professor Coffin's testimony

was relevant to any matter submitted to the jury. Because they cannot demonstrate any resulting prejudice, any error under *Burnet* in excluding her testimony was harmless. *Jones*, 179 Wn.2d at 356-57 (where trial court excluded testimony as irrelevant and unduly prejudicial regardless of source, failure to consider *Burnet* factors was necessarily harmless).

Similarly, the Pitts cannot show prejudice resulting from the trial court's limitations of the scope Dr. Finberg's rebuttal testimony. The trial court ruled that he would be allowed to give certain rebuttal testimony. The Pitts' ultimate failure to present that rebuttal testimony did not result from the trial court's February 21 order. Thus, the Pitts are not entitled to a reversal of the judgment on the jury's verdict or a new trial as a result of any alleged failure of the trial court to follow *Burnet*.

B. The Trial Court Did Not Abuse Its Discretion in Disallowing Dr. Finberg's Rebuttal Testimony by Videoconference when the Pitts Did Not Have the Videoconference Equipment Fully Operational in the Reasonable Time Frame the Court Had Afforded.

The Pitts contend, *App. Br. at 37-40*, that the trial court abused its discretion by foreclosing Dr. Finberg's remote testimony. Generally, a party aggrieved by a trial irregularity "must request appropriate court action to obviate the prejudice before the case is submitted to the jury." *Spratt v. Davidson*, 1 Wn. App. 523, 526, 463 P.2d 179 (1969). A party "is not permitted to speculate upon the verdict by awaiting the result of the

trial and then complain of the irregularity ... in case the verdict is adverse.” *Id.* Because the Pitts did not object at trial or request court action to prevent any prejudice, they have waived any claim of error with regard to the denial of remote testimony and this Court should not address the issue. *Id.* Even if the Court addresses the merits of this claim, however, the Pitts fail to demonstrate grounds for relief.

The Pitts did not raise any issue with the trial court concerning its preclusion of the video presentation of Dr. Finley’s rebuttal testimony because of the Pitts’ counsel’s failure to have the video conferencing properly set up before the noon recess on last day of trial until their motion for new trial. CR 59(a)(1) provides for a new trial if a party is “prevented from having a fair trial” by “[i]rregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion.” Because “the trial judge is in the best position to make firsthand observations,” the trial court is “accorded wide discretion in dealing with trial irregularities.” *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). Appellate courts review an order denying a motion for a new trial for an abuse of discretion. *Alcoa v. Aetna Cas. & Sur.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

CR 43(a)(1) allows the trial court to “permit testimony in open court by contemporaneous transmission from a different location” based

on “good cause in compelling circumstances and with appropriate safeguards.” Because the rule is “by its plain terms discretionary,” appellate courts review the trial court’s rulings regarding the use of remote testimony for abuse of discretion. *In re Marriage of Swaka*, 179 Wn. App. 549, 553, 319 P.3d 69 (2013).

On appeal, the Pitts’ counsel merely reiterates the description of the technical issues remaining to be resolved that he presented with his motion for new trial, *App. Br. at 38-39*, and baldly asserts that the trial court’s differing recollection and description of what occurred is “incorrect,” *App. Br. at 39-40*. The Pitts even go so far as to claim, *App. Br. at 40*, that the trial court had not ordered that “the equipment be perfected by 12:00 noon,” notwithstanding their counsel’s concession below in connection with the motion for new trial that the trial court “had previously ruled, the prior afternoon, that it would require a video conference capability to the court’s ‘standards’ be established by noon, February 20, 2014, CP 1516, 1529. While the Pitts may wish this Court to accept their description, rather than defense counsel’s (CP 1559) or the trial court’s (RP, Filed 10/22/14, Hearing 4/25/14, 662-63) descriptions, of the extent to which the Pitts’ counsel had satisfied the conditions the trial court set for accomplishing video conferencing capability the morning of February 20, it is the trial court’s observations that are entitled to

deference. *See State v. Mak*, 105 Wn.2d at 701 (“the trial judge is in the best position to make firsthand observations,” and is “accorded wide discretion in dealing with trial court irregularities”). “[E]ven where an appellate court disagrees with a trial court, it may not substitute its judgment for that of the trial court unless the basis for the trial court’s ruling is untenable.” *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 463, 232 P.3d 591 (2010).

There was nothing untenable about the trial court’s decision to foreclose Dr. Finberg’s remote testimony when the Pitts’ counsel failed to establish video conferencing capability in the reasonable time frame the trial court had afforded him or in accordance with the standards the trial court had set. The trial court clearly expressed on the record both that the particular type of testimony involved required precise technology and that counsel had been unable to achieve that precision despite being provided ample opportunity. RP, Filed 10/22/14, Hearing 4/25/14, 662-63; *see also* RP, Filed 10/22/14, Hearing 2/19/14, 632-35. The trial court did not abuse its broad discretion in managing the presentation of remote testimony.

C. The Trial Court Did Not Abuse Its Discretion in Admitting Inland Imaging's Proffered Expert Testimony, Limiting the Pitts' Voir Dire of Dr. D'Alton, or Allowing Inland Imaging's Cross-Examination of Dr. Patten.

The Pitts next contend, *App. Br. at 40-48*, that the trial court erred in allowing cumulative testimony by defense experts, admitting speculative testimony by Dr. Filly, limiting voir dire of Dr. D'Alton, and allowing improper cross-examination of Dr. Patten. Because the trial court properly exercised its discretion in making each of the complained-of evidentiary rulings, the Pitts' claims of error with respect thereto are without merit.

1. The trial court properly exercised its discretion in admitting the testimony of Drs. D'Alton, Callen, and Filly.

The Pitts argue, *App. Br. at 40-45*, that the trial court abused its discretion by allowing Inland Imaging to present cumulative and speculative expert testimony. In particular, they contend, *App. Br. at 41-44*, that all three defense experts offered cumulative testimony, claiming that each testified as to "causation," and that both Dr. Filly and Dr. Callen opined about the presence of a synechia complicating the ultrasound visualization of the chorionicity of the pregnancy. They further claim, *App. Br. at 44-45*, that Dr. Filly's synechia testimony should have been excluded as too speculative because it was based on a single paper. The trial court did not abuse its discretion in allowing the defense experts to testify as they did.

“The admissibility and scope of an expert’s testimony is a matter within the court’s discretion.” *Christensen v. Munsen*, 123 Wn.2d 234, 241, 867 P.2d 626 (1994). “Similarly, the admissibility of cumulative evidence lies within the trial court’s discretion.” *Id.* (trial court may have deemed some cumulative testimony helpful to jury’s understanding of “highly technical” and interrelated specialty areas). Moreover, “[t]he admission of evidence which is merely cumulative is not prejudicial error.” *State v. Todd*, 78 Wn.2d 362, 372, 474 P.2d 542 (1970); *see also* Dennis J. Sweeny, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 GONZ. L. REV. 277, 319 (1995-96) (citing cases and noting that Washington has a long history of ruling error harmless if the evidence admitted or excluded was merely cumulative.)

First, the experts agreed that cord entanglement caused Taylor’s death, RP, Filed 10/22/14, Hearing 1/17/14, 146; RP, Filed 10/28/14, Hearing 1/30/14, 46; RP, Filed 10/22/14, Hearing 2/10/14, 260, but disagreed as to what the ultrasound images suggested or revealed about the conditions that allowed the cord entanglement to occur. As did the Pitts’ expert Dr. Patten, each of the defense experts showed the jury what they believed they saw on the ultrasound images, referencing both moving pictures and still images. The trial judge, who was in the best position to evaluate the presentation of testimony and evidence, could have deemed

some cumulative testimony helpful not only to the jury's understanding of the technical aspects and visualization of ultrasound scans, but also to the jury's assessment of the credibility and weight of the expert testimony. *Christensen*, 123 Wn.2d at 241. The Pitts' mere labeling of the defense experts' testimony as "cumulative" as to "causation" does not make it so, nor does it mean that the trial abused its discretion in allowing the defense experts to testify as they did.

Second, the trial court did limit the number of experts the defense would be permitted to call on standard of care and causation, allowing the defense to call maternal-fetal medicine specialist Dr. D'Alton on standard of care and causation, radiologist Dr. Callen on standard of care, and radiologist Dr. Filly on causation. RP, Filed 10/22/14, Hearing 1/17/14, 134, 157-60; CP 948-49. Although the Pitts assert, *App. Br. at 43-44*, that Dr. Callen testified on direct examination as to causation, the portions of the record they cite neither bear out that assertion,⁵ nor show that they objected to the testimony he gave on that basis, *see* RP, Filed 10/28/14, Hearing 2/18/14, pp. 405-07, 409.

Third, although the Pitts' counsel expressed his concern, before Dr. Filly's direct testimony and outside the presence of the jury, that Dr.

⁵ In the portions of Dr. Callen's direct testimony the Pitts cite, Dr. Callen was merely explaining how from the ultrasound images there was no evidence of cord entanglement or of a failure of the inter-twin membrane as of the December 21, 2007 ultrasound. RP, Filed 10/28/14, Hearing 2/18/14, pp. 405-07, 409.

Filly's testimony would be cumulative because Dr. Callen had already testified about synechia, RP, Filed 10/22/14, Hearing 2/18/14, 606, as the trial court repeatedly and correctly observed, Dr. Callen did not mention synechia until the Pitts' counsel asked him about it on cross-examination. *Id.*; *see* RP, Filed 10/22/14, Hearing 2/18/14, 528; *cf.* Callen direct examination, RP, Filed 10/28/14, Hearing 2/18/14, 365-414 (containing no mention of "synechia). "[I]t's not cumulative because you were the one that asked Dr. Callen about it." RP, Filed 10/22/14, Hearing 2/18/14, 606.

Fourth, as to the Pitts claim, *App. Br. at 44-45*, that Dr. Filly's testimony concerning the existence of a synechia masquerading as a twin peak sign was speculative because it was based on only one paper, the Pitts cite no authority suggesting that medical experts must be able to cite more than one paper, in addition to their knowledge, skill, training, experience or deductive reasoning, as support for their causation opinions.⁶ Indeed, a physician with sufficient expertise to demonstrate familiarity with the medical procedure or condition at issue is generally considered qualified to express an opinion on any kind of medical question, even questions involving areas in which the physician is not a specialist. *Wuth v. Lab. Corp. of Am.*, 189 Wn. App. 660, 690-91, 359

⁶ Claims of error not supported by citation to legal authority need not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a)(6).

P.3d 841 (2015). Moreover, the Pitts ignore the facts (1) that Dr. Filly's causation testimony was based on "more than 51% probabilities," not speculation and conjecture, RP, Filed 10/28/14, Hearing 2/19/14, 472; (2) that, on their cross-examination of Dr. Callen, they themselves elicited similar synechiaie testimony, RP, Filed 10/22/14, Hearing 2/18/14, 528-29; and (3) that, on their cross-examination of Dr. D'Alton, they elicited her testimony that she could not rule out Dr. Callen's and Dr. Filly's interpretation of the ultrasounds as showing an intrauterine synechiaie, RP, Filed 10/22/14, Hearing 2/18/14, 515-16. The trial court did not abuse its discretion in admitting Dr. Filly's synechiaie testimony.

2. The trial court did not abuse its discretion in denying the Pitts's request to voir dire Dr. D'Alton.

The Pitts claim, *App. Br. at 45-47*, that the trial court erred by denying her request to voir dire Dr. D'Alton outside the presence of the jury about IUGR and stuck twin. The Pitts do not argue or suggest that the purpose of the requested voir dire was to test Dr. D'Alton's qualifications. *Cf., e.g., Bellevue v. Lightfoot*, 75 Wn. App. 214, 223, 877 P.2d 247 (1994) (after granting defendant's request to reserve voir dire as to expert's qualifications to cross-examination, trial court erred by denying defendant any opportunity to so inquire). Instead, the Pitts argue, *App. Br. at 46*, that Dr. D'Alton's answers would have allowed the Pitts to

challenge the basis of the court's January 31, 2014 ruling prohibiting Dr. Finberg from testifying about stuck twin and IUGR in rebuttal if no witness testified about them in either party's case-in-chief. The Pitts, however, cite no authority supporting the proposition that a trial court is required to permit voir dire for such a purpose or abuses its discretion in disallowing voir dire of an expert witness at trial that has nothing to do with the witnesses' qualifications.⁷

3. The trial court properly allowed Inland Imaging to cross-examine Dr. Patten about the applicable standard of care.

Again without citation to supporting authority, the Pitts contend, *App. Br. at 47-48*, that the trial court erred in allowing Inland Imaging to cross-examine Dr. Patten about the twin peak sign because (1) he did not testify on direct about the twin peak sign; (2) he was not an expert in the use of the twin peak sign; (3) Inland Imaging "essentially drafted" him "as a subordinate defense expert"; and (4) his testimony was cumulative of that of the defense experts.

"The scope of cross examination is within the broad discretion of the trial court and will not be overturned on appeal absent an abuse of discretion." *Miller v. Peterson*, 42 Wn. App. 822, 827, 714 P.2d 695 (1986). ER 611 specifically allows for the trial court's exercise of discretion to "permit inquiry into additional matters" beyond "the subject

⁷ See footnote 6, *supra*.

matter of the direct examination and matters affecting the credibility of the witness.”

In opening statement, the Pitts’ counsel described the twin peak sign and introduced the theory that Inland Imaging radiologists breached the standard of care by relying solely on the twin peak sign to diagnose chorionicity. RP, Filed 10/28/14, Hearing 2/6/14, 87-88, 90-91, 94-95. The Pitts offered Dr. Patten as an expert witness to identify the standard of care for radiologists. Dr. Patten opined that Inland Imaging radiologists breached the standard of care. Essentially, the Pitts are now complaining that the trial court allowed Inland Imaging to cross-examine their expert about the applicable standard of care and about the defense’s claims as to how the Inland Imaging radiologists met that standard of care. The Pitts fail to identify any abuse of discretion by the trial court with regard to defense counsel’s cross-examination of Dr. Patten concerning his knowledge, understanding, and use of the twin peak sign.

D. The Trial Court Properly Granted Summary Judgment Dismissing the Pitts’ Lost Chance of Survival Claim Because the Pitts Failed to Produce Expert Testimony Establishing a Reduction of a Less than Even Chance of Survival.

Finally, the Pitts, *App. Br. at 48-55*, challenge the partial summary judgment order, CP 584-85, dismissing their lost chance of survival theory of recovery because the Pitts’ expert testimony was that the chance of

survival that Taylor allegedly lost was 90 percent, not 50 percent or less. Summary judgment is properly granted when “the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Wilson*, 98 Wn.2d at 437. Appellate courts review summary judgment orders de novo, engaging in the same inquiry as the trial court and viewing the facts and reasonable inferences in the light most favorable to the nonmoving party. *Id.*

A lost chance claim is “not a distinct cause of action, but an analysis within, a theory contained by, or a form of a medical malpractice cause of action.” *Rash v. Providence Health & Servs.*, 183 Wn. App. 612, 629-30, 334 P.3d 1154 (2014). In a lost chance of survival claim, where the plaintiff proves that the defendant’s negligence proximately caused a reduction or loss of “a less than even chance of survival,” that reduction or loss is the injury, and “the defendant is liable, not for all damages arising from the death, but only for damages to the extent of the diminished or lost chance of survival.” *Herskovits v. Group Health Cooperative of Puget Sound*, 99 Wn.2d 609, 632, 664 P.2d 474 (1983); *Mohr v. Grantham*, 172 Wn.2d 844, 857, 262 P.3d 490 (2011) (adopting reasoning of plurality opinion of *Herskovits*). “[B]ut where the defendant’s negligence reduced the decedent’s chance of survival by greater than 50 percent, as a matter of

law, the death remains the injury and the plaintiff receives all-or-nothing recovery under traditional tort principles.” *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 851, 869, 313 P.3d 431 (2013) (“the lost chance doctrine is alternative to and provides different relief than traditional tort principles”).

As the court explained the lost chance of survival claim in *Rash*, 183 Wn. App. at 630-31:

In a lost chance of survival claim, the patient died from a preexisting condition and would likely have died from the condition, even without the negligence of the health care provider. Nevertheless, the negligence reduced the patient’s chances of surviving the condition. *Herskovits*, 99 Wn. 2d 609. ... We distinguish between a lost chance of survival theory and a traditional medical malpractice theory. In the latter, but for the negligence of the health care provider, the patient would likely have survived the preexisting condition. In other words, the patient had a more than 50 percent chance of survival if the condition had been timely detected and properly treated. In a lost chance claim, the patient would likely have died anyway even upon prompt detection and treatment of the disease, but the chance of survival was reduced by a percentage of 50 percent or below.

A plaintiff seeking recovery for a loss of chance of survival must present “testimony from an expert health care provider that includes an opinion as to the percentage or range of percentage reduction in the chance” of survival. *Rash*, 183 Wn. App. at 636 (expert’s testimony that hospital error was substantial factor in accelerating death does not satisfy

plaintiff's burden to articulate percentage); *Christian v. Tomeh*, 191 Wn. App. 709, 731, 366 P.3d 16 (2015). An expert's opinion as to such percentage or range of percentage is required to determine whether the loss or reduction of the chance was "less than even," allowing the plaintiff to assert a loss of chance theory, or greater than 50 percent, such that the plaintiff must prove proximate cause of the ultimate harm by traditional tort principles. *Herskovits*, 99 Wn.2d at 634. "[A] plaintiff may not argue the lost chance doctrine where the defendant's negligence reduced the decedent's chance of survival by greater than 50 percent." *Dormaier*, 177 Wn. App. at 851. If, however, a plaintiff presents expert testimony establishing that a defendant's negligence reduced the chance of survival by a range of percentages that includes 50 percent or less and greater than 50 percent, may present in the alternative both a lost chance of survival and a traditional wrongful death claim to the jury. *Id.* at 853.

Here, the only medical expert who stated an opinion as to a percentage of a lost chance of survival in connection with Inland Imaging's motion for partial summary judgment was Dr. Patten, who opined that there was a 90 percent chance of survival of both twins if Dr. Hardy had been properly advised of the condition of the twin pregnancy. CP 585. Because the alleged loss of a 90 percent chance is greater than 50 percent and does not involve a range including 50 percent, the trial court

properly ruled that the Pitts had to prove that the negligence of Inland Imaging radiologists proximately caused Taylor's death by traditional tort principles and granted partial summary judgment dismissing the Pitts' lost chance of survival claim. *Herskovits*, 99 Wn.2d at 643; *Dormaier*, 177 Wn. App. at 851; *Rash*, 183 Wn. App. at 636.

Without reference to this court's decisions in *Dormaier* and *Rash*, and without a clear description of the reasoning of *Herskovits*, the Pitts nonetheless contend, *App. Br. at 58-54*; RP, Filed 10/22/14, Hearing 2/10/14, 189, that the trial court should have (1) allowed Dr. Patten to testify generally that "[s]tatistically the twins would have survived" if Inland Imaging had properly advised Dr. Hardy of the conditions of the pregnancy, and (2) instructed the jury on a lost chance of survival theory based on that testimony. But the Pitts' reliance on *Lord v. Lovett*, 146 N.H. 232, 239-40, 770 A.2d 1103 (2001), a New Hampshire case generally recognizing the "loss of opportunity doctrine, but limiting its holding "to the legal question of whether New Hampshire recognizes the loss of opportunity doctrine" and declining to address the sufficiency of the plaintiff's evidence "because the trial court has not yet considered the issue", and a Washington case, *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn.2d 136, 341 P.3d 261 (2014), that does not even address the loss of chance claim is misplaced.

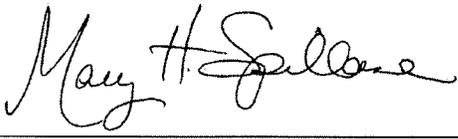
Based on the Pitts' own expert's testimony that Taylor Pitts had a 90 percent chance of survival absent the defendants' alleged negligence, the trial court properly granted summary judgment dismissing the Pitts' lost chance of survival claim. Moreover, even if the trial court somehow erred in dismissing that claim on that basis, any such error is now moot now that the jury has determined that Inland Imaging was not negligent.

VI. CONCLUSION

For the foregoing reasons, the trial court's evidentiary rulings, partial summary judgment ruling, and entry of judgment on the jury's verdict should be affirmed.

RESPECTFULLY SUBMITTED this 6th day of September, 2016.

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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 6th day of September, 2016, I caused a true and correct copy of the foregoing document, "Brief of Respondents," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 6th day of September, 2016, at Seattle, Washington.

A handwritten signature in cursive script, reading "Carrie A. Custer", written in black ink. The signature is positioned above a horizontal line.

Carrie A. Custer, Legal Assistant