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Division III No. 362221

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

CHERYL AND COLTON BEHR, APPELLANTS

v.

**CHRISTOPHER ANDERSON, NORTHWEST ORTHOPEDIC
SPECIALISTS, et al., RESPONDENTS**

**REPLY BRIEF OF APPELLANT
To NWOS, et al. (2 of 3)**

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I. Introduction to Reply Issues

This reply brief addresses the response brief of NWOS, Dr. Patrick Lynch, Dr. Christopher Anderson, and PA Leann Bach (hereinafter NWOS). Issues sufficiently presented in the Behrs' opening brief will not be re-hashed; instead, the Reply brief will focus on the issues most likely to be confused or muddled by the response briefing of NWOS.

Grove v. Peacehealth and issues of "team liability" will be addressed first, along with the law of jury instructions (Part II, below). Then, the dismissals of Dr. Lynch (and Dr. Powers) and the failures to reinstate them, and the prejudice at trial will be addressed. (Part III, below.) Finally, the subtle "escape hatch" for medical defendants of the "error of judgment" instruction, on informed-consent facts, will conclude the substantive presentation. (Part IV, followed by Conclusion in Part V.)

II. *Grove v. Peacehealth*: The "Duty to Properly Monitor" as a Post-Surgical Standard of Care: Prejudicial Failure to Instruct the Jury

On pages 30 to 34 of its response brief, NWOS seeks to explore *Grove v. Peacehealth* -- and the "team liability" or "collective liability" theories -- on which the trial court denied the Behrs' jury instruction.

As was shown in the opening brief (and in the response briefs) the judges prior to Judge McKay (the trial judge) had relied upon the overruled 2013 appellate case, *Grove v. PeaceHealth St. Joseph Hosp.*, 177

Wash. App. 370, 373, 312 P.3d 66, 68 (2013), which was reversed by the State Supreme Court in 2014, by *Grove v. Peacehealth* 182 Wash. 2d 136, 341 P.3d 261 (2014). On p. 31 of the response brief of NWOS, NWOS concedes that the State Supreme Court version of *Grove* backed the idea of “team liability” for “failing to properly monitor” the *Grove* plaintiff for compartment syndrome. The Behr experts also discussed “entity liability.”

A. Prejudice from the Erroneous Dismissals (and Failure to Reinstate) Dr. Powers and Dr. Lynch

As was addressed in, for example, pages 37-38 in the Opening Brief, Judge McKay continued to express her confusion about the law and facts of the Behr case, rooted in the 4/23/14 dismissals of Dr. Lynch and Dr. Powers, for example her discussion of *Grove* at RP 1736-38:

[Speaking of the Behr case compared to *Grove*.] There is vague references to telephone calls. And I understand why they are vague, because of the pre-rulings that were in this case with regards to the fact that Lynch and Powers are not negligent here. So you cannot throw them under the bus, so to speak, in a trial when they've already been found to not be negligent. So I understand the vagueness of it, but the circumstances in this case are not anywhere close to that in *Grove v PeaceHealth*. So at this point in time, I don't know that I can even find evidence in this case to find there is somebody that is vicariously liable to hold Northwest Orthopedics vicariously liable for anything that occurred on Friday, December 10th.

As was stated in the Opening Brief, Judge McKay erroneously believed (a) that she could not alter Judge Moreno's 2014 decision, and

(b) Judge McKay did not properly-weigh the late-disclosed electronic NWOS message of 12/10/10 that showed Dr. Lynch had actual notice of Colton Behr's compartment syndrome symptoms, and did nothing but forward the message to an absent Dr. Powers. (CP 3951)

The trial court's view was prejudicially narrow, and the ruling was not consistent with the expert opinion provided by the Behrs.

B. Plaintiffs' Proposed *Grove*-based Instructions

The following instructions (denied by the court) were proposed by the Behrs based upon *Grove v. Peacehealth* and upon RCW 7.70:

INSTRUCTION NO. P-12

As Northwest Orthopedic Specialists employs healthcare providers, it is itself a healthcare provider, and must manage its employees such that its employees meet the standard of care owed to orthopedic patients.

(Citing reference for the instruction was RCW 7.70.020(3)).

INSTRUCTION NO. P-13

A team of individuals responsible to care for a patient has a team responsibility to that patient such that every person in that team has an independent duty of care to its patients, as part of a team, as well as individually, and that responsibility passes through successive care-givers as the team cares for the patient. The failure of successive care-givers to meet the appropriate duty of care makes the employing entity responsible for any medical negligence, even if the responsible individual cannot be identified.

Any act or omission of a Northwest Orthopedic Specialists' employee was an act or omission of Northwest Orthopedic Specialists.

Cited authority was *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wash. 2d 136, 341 P.3d 261 (2014), which read (emphasis added):

Grove had three cardiovascular surgeons: Drs. Leone, Zech, and Douglas. Dr. Adams opined that the failure to properly monitor began with Leone and continued to each cardiovascular surgeon who headed the team on a particular day thereafter and this resulted in the failure to timely diagnose the compartment syndrome. The jury could have relied on that testimony to determine that one or all of the cardiovascular surgeons who acted as Grove's primary care physician during his postoperative recovery period breached the standard of care, resulting in the hospital's vicarious liability.

Grove v. PeaceHealth St. Joseph Hosp., 182 Wash. 2d at 146–47.

And the third instruction (No. P-14) read:

INSTRUCTION NO. P-14

The failure to meet the appropriate duty of care makes the employing entity, Northwest Orthopedic Specialists in this instance, responsible for any medical negligence, even if the responsible individual cannot be identified, or if an individual has been mis-identified as a responsible individual during trial. It is appropriate, if it conforms to the evidence, to find a named individual defendant not liable for negligence while still finding Northwest Orthopedic Specialists liable for the negligence attributable to the employees of Northwest Orthopedic Specialists.

Cited reference was *Hansch v. Hackett*, 190 Wash. 97, 66 P.2d 1129 (1937), whose vigor was renewed in *Grove* (emphasis added) when it reversed the appellate court and imposed team or entity liability on the hospital (*Grove* quoting *Hansch* approvingly):

Further, the Court of Appeals published decision declined to apply this court's decision in *Hansch v. Hackett*, 190 Wash. 97,

66 P.2d 1129 (1937). There, the estate of a deceased patient sued a hospital and one of its physicians for negligence after the patient died following childbirth. The jury returned a verdict in favor of the plaintiff as to the hospital but also returned a verdict in favor of the physician. On the hospital's appeal this court affirmed, holding that while there was evidence that would have supported the jury's determination that the defendant physician was not negligent, there was also evidence indicating that another doctor and one or more nurses may have been negligent in treating the patient in the absence of the defendant physician, and thus the jury could validly find the hospital liable under the rule of respondeat superior. *Id.* at 101–02, 66 P.2d 1129.

Grove v. PeaceHealth St. Joseph Hosp., 182 Wash. 2d 136, 149, 341 P.3d 261, 267 (2014).

See also *Instruction P-9*:

INSTRUCTION NO. P-9

The defendant Northwest Orthopedic Specialists is an entity having an independent duty of care to its patients as a healthcare provider. A corporation can act only through its officers, employees, and agents. Any act or omission of an officer, employee, or agent of Northwest Orthopedic Specialists is the act or omission of Northwest Orthopedic Specialists. Northwest Orthopedic Specialists' employees, and agents must exercise the degree of skill, care, and learning expected of reasonably prudent employees of an orthopedic surgical company in the State of Washington acting in the same or similar circumstances at the time of the care or treatment in question. Failure of the employees to exercise such skill, care, and learning is negligence on the part of the entity. The specific degree of skill, care, and learning at issue in this case is the post-surgical monitoring for compartment syndrome, a known potential post-surgical complication from a tibial plateau fracture repair, and at issue is the plaintiffs' allegation of a delay of diagnosis of compartment syndrome that fell below the standard of care, proximately causing him (and his wife) damage.

CP: 5778.

These instructions should have been given, and the failure to give them was profoundly prejudicial to the Behrs, as they could not present theories supported by their expert testimony to the jury.

NWOS seeks to mis-state the issue on p.33 of its response brief, stating:

But one healthcare provider cannot be jointly liable for the acts/omissions of another provider simply because both provided care to the plaintiff.

Of course, the issue is not “both provided care” as if one doctor shoed the horse and other fed it. NWOS undertook a tibial plateau fracture repair with the known complication of compartment syndrome, and *NWOS failed to provide post-surgical monitoring that met the standard of care*. It was the weekend, and Colton Behr fell through the cracks in the sparsely-provided care, and the jury should have been able to determine malpractice under these standards.

C. Juries Are the Fact-Finders Among Competing Experts

In the Behr case, the trial judge did not allow the Behrs to present their theory, in violation of established law:

Assessing the credibility of that testimony and what weight to give it were for the jury to decide. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989) (deference must be given to trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and persuasiveness of material evidence).

Grove v. PeaceHealth St. Joseph Hosp., 182 Wash. 2d 136, 146, 341 P.3d 261, 265 (2014). The Behrs offered Instruction No. P-3 (CP 5506) to try to protect the province of the jury, but their instruction was prejudicially rejected as the trial court essentially made the experts the fact-finders.

INSTRUCTION NO. P-3 A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts. You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness. [The expert does not find the facts in this case, as that is the province of you, the jury.]

Instruction No. P-3 should have been provided to the Jury. See CP 5506.

D. NWOS Provided No Competing Expert on Entity Liability

As the opening brief recounted, the Behrs' experts, Dr. Collier and Dr. Cossman, testified to entity liability and the collective liability of a professional group undertaking medical care and Dr. Collier specifically said that an orthopedic surgical group was collectively liable for their patients' post-surgical care. NWOS' own expert, Dr. Hans Moller, had not proffered any opposing opinion.

As was noted in the Opening Brief, in the deposition of NWOS' expert, Dr. Hans Moller (CP 4291-4337), it was clear that NWOS had no

expert testimony rebutting Dr. Collier's (and Dr. Cossman's) theories of entity liability:

THE WITNESS: Could you ask the question again?

Q. {By Mr. Mason) Sure. My understanding is that we were clarifying that when you said there's no collective responsibility, you meant that the other individual physicians are not responsible for any errors of the one physician assigned to that patient on that day?

THE WITNESS: Correct.

Q. (By Mr. Mason) And that you were not offering an opinion about the -- one way or the other about the liability of the employing entity?

THE WITNESS: Correct.

Dr. Moller's deposition at CP: 4309-10 (objection discussions omitted, and emphasis added). Dr. Moller did not testify at trial. NWOS should be found collectively liable on unchallenged facts as a matter of law.

E. The Behrs' Right to Take their Theories to the Jury

If a party has presented substantial evidence, they have a right to bring their theory to the jury. *Cooper v. Dep't of Labor & Indus.*, 188 Wn. App. 641, 647-48, 352 P.3d 189 (2015). Evidence is substantial if it could "persuade a fair-minded person of the truth of a declared premise." *Nationscapital Mortg. Corp. v. Dep't of Fin. Inst.*, 133 Wn. App. 723, 738, 137 P.3d 78 (2006). The Behrs provided substantial expert testimony.

In determining whether substantial evidence supports the instruction, the court must view the evidence in the light most favorable to the instruction's proponent. *Mina v. Boise Cascade Corp.*, 37 Wn. App.

445, 448, 681 P.2d 880 (1984), *aff'd*, 104 Wn.2d 696, 710 P.2d 184 (1985). Appellate courts review *de novo* a trial court's decision on a jury instruction if based on a matter of law, or for abuse of discretion if based on a matter of fact. *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). Whether *res ipsa loquitur* applies is a question of law. *Pacheco v. Ames*, 149 Wash. 2d 431, 440–41, 69 P.3d 324, 329 (2003). And prejudicial error is grounds to reverse for a new trial. *Stiley v. Block*, 130 Wn.2d 486, 498–99, 925 P.2d 194 (1996).

As the *Pacheco* court said:

In particular, a *res ipsa loquitur* instruction should not be denied to a plaintiff when all of the elements for application of the doctrine are present although there is evidence offered to explain the incident. *Brown v. Dahl*, 41 Wash.App. 565, 582, 705 P.2d 781 (1985) (citing *ZeBarth v. Swedish Hosp. Med. Ctr.*, 81 Wash.2d 12, 499 P.2d 1 (1972)). Even where the defendant offers weighty, competent and exculpatory evidence in defense, the doctrine may apply. *ZeBarth*, 81 Wash.2d at 22, 499 P.2d 1; *see also Siegler v. Kuhlman*, 81 Wash.2d 448, 451–53, 502 P.2d 1181 (1972). In sum, the plaintiff is not required to “ ‘eliminate with certainty all other possible causes or inferences’ ” in order for *res ipsa loquitur* to apply.³ *Douglas*, 73 Wash.2d at 486 (quoting William L. Prosser, HANDBOOK OF THE Law of Torts 222 (3d ed.1964)).

Pacheco v. Ames, 149 Wash. 2d 431, 440–41, 69 P.3d 324, 329 (2003).

Dr. Collier and Dr. Cossman testified that compartment syndrome that remains undiagnosed to the point of loss of function (let alone the death and debridement of the compartment) is malpractice. The Behrs’

substantial evidence should have led the court to allow the Behrs' theories of the case to proceed to the jury. See also, as unpublished authority for such weight as the court gives it under GR 14.1, *Soucy v. Gilbertson*, No. 79927-4-I, 2020 WL 4753839, at *2 (Wash. Ct. App. Aug. 17, 2020).

In addition to his trial testimony cited in the Opening Brief, in Dr. Cossman's initial 6/5/17 disclosure, CP 2104-11, he had declared:

In summary, the standard of care requires that fasciotomies be performed for compartment syndrome before permanent nerve or tissue damage occurs. This is especially true in the context of clinical entities that are known to be associated with the development of compartment syndrome, such as tibial plateau fractures. If the monitoring physician ascribes signs and symptoms compatible with compartment syndrome to other causes, compartment pressures should be obtained to support the decision not to do fasciotomies.

CP 2010 (emphasis added). See also the 12/8/17 declaration of Dr.

Cossman, CP 3125-30, esp. at CP 3128 (emphasis added):

Failure to diagnose and treat compartment syndrome in a clinical setting known to be associated with compartment syndrome is negligence, especially when there was an unacceptably long interval between examinations on the 11th and 12th and Dr. Anderson failed to avail himself of additional consultation or compartment pressure measurements which would have helped him to make a timely diagnosis.

The trial court erred to preclude this theory of the case.

The Behr's proposed *Instruction P-16* was a specific incorporation of the expert testimony of Dr. Cossman that was admitted at trial, formulating *res ipsa loquitur* to apply to Colton Behr's situation.

INSTRUCTION NO. P-16

If you find that:

- (1) the failure to diagnose compartment syndrome while a patient is under clinical care, producing permanent tissue damage, is of a kind that ordinarily does not happen in the absence of someone's negligence;
- (2) the injury was caused by an agency or instrumentality within the exclusive control of the defendants [in this instance, that Colton Behr was under direct medical care by the defendant Northwest Orthopedic Specialists after his tibial plateau fracture repair]; and
- (3) the injury-causing failure to diagnose compartment syndrome was not due solely to a voluntary act or omission of the plaintiff; then, in the absence of satisfactory explanation, you may infer, but you are not required to infer, that the defendant was negligent, and that such negligence produced the damages complained of by the plaintiff.

The Behrs presented the following legal authority in defense of their instruction, also at CP 5785, as well as in other briefing.

Application. Res ipsa loquitur ("the thing speaks for itself") provides a permissive inference of negligence to be drawn by the factfinder in certain cases. *Curtis v. Lein*, Wn.2d, 239 P.3d 1078, 1081 (2010). Whether the doctrine can be used in a given case is a question of law. *Curtis v. Lein*, supra; *Pacheco v. Ames*, 149 Wn.2d at 436. The doctrine is "ordinarily sparingly applied, 'in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.'" *Curtis v. Lein*, 239 P.3d at 1081; *Tinderv. Nordstrom, Inc.*, 84 Wn.App. 787,792,929 P.2d 1209 (1997). After the judge decides the initial question of law, the jurors decide whether the inference should be drawn. *Pacheco v. Ames*, supra; *Robison v. Cascade Hardwoods, Inc.*, 117 Wn.App. 552, 563, 573-74, 72 P.3d 244 (2003). When each of the elements of res ipsa loquitur is supported by substantial evidence, the plaintiff is entitled to an instruction on this doctrine. See *Pacheco v. Ames*, 149 Wn.2d at 444. WPI22.01 Res Ipsa Loquitur-Inference of Negligence, 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 22.01 (6th ed.)

Dr. Cossman and Dr. Collier have testified that the failure to diagnose compartment syndrome, in someone under clinical care, before permanent tissue damage occurs, is always a result of medical negligence. If the fact-finder agrees with Dr. Collier and Dr. Cossman as to the standard of care, then this instruction is appropriate, as there is substantial evidence to support the instruction.

CP 5785.

Vascular Surgical Expert Dr. David Cossman presented the standard of care testimony that *no patient under direct care should suffer permanent injury from compartment syndrome when it is a known complication*, as it was in Colton Behr's tibial plateau repair.

Dr. Cossman's Trial Testimony at RP 1257-58 read as follows

(objection discussions are omitted from the following quote):

Q. What is the standard of care regarding performing fasciotomies in a clinical condition in which compartment syndrome is known to be a complication? ...

THE WITNESS: Standard of care requires that fasciotomies be done when they are needed to be done to avoid any permanent damage, and that they be done correctly and completely. Because you can do a fasciotomy that's incomplete, where you don't open up all the fascial compartments. So you have to do it in a timely manner and you have to do it correctly.

BY MR. MASON: Q. And what is the standard of care for diagnosing when a fasciotomy is to be done? ...

THE WITNESS: It's really the same answer in that the standard of care requires that the diagnosis be made before you have any permanent damage so that when you do the fasciotomy, you don't wind up with any permanent loss of function or tissue.

Dr. Cossman Trial Testimony at RP 1257-58 (emphasis added).

Dr. Cossman articulated this standard with reasonable medical certainty (emphasis added):

Q. Regarding the standard of care statement that you are obliged under the standard of care in clinical settings where compartment syndrome is a known complication to perform fasciotomies before there's permanent tissue damage or death, have you made that statement on a more probable than not basis with reasonable medical certainty?

A. Yes.

Q. Regarding your statement that the standard of care requires compartment pressure checks if you can't rule out compartment syndrome, have you made that statement on a more probable than not basis with reasonable medical certainty?

A. Yes.

Dr. Cossman Trial Testimony at RP 1259. The Behrs should have been allowed to present their instructions, including the res ipsa locquitur instruction, based upon their substantial evidence admitted at trial.

III. Dismissal of, and Prejudicial Failure to Reinstate, Dr. Lynch

The respondents have chosen to split the Response Brief duties of Dr. Powers and Dr. Lynch, but they both reference the other, as inevitably will be done here, as well. However, the emphasis in this Reply is on the prejudicial implications of the dismissal.

NWOS states that it had not answered interrogatories until early 2018; however, as was shown in the Opening Brief, Dr. Powers and Dr. Lynch and Deaconess had all disavowed in sworn answers any undisclosed email, electronic, or other messages between the doctors

and/or doctors and any other relevant participant. Sworn answers are expected to mean something more than “catch me if you can” under *Fisons* and its progeny. 122 Wn.2nd 299, 358 P.2d 1054 (1993).

It was only on the eve of trial, when deposing NWOS CEO Mr. Braun, that the Behrs discovered the 12/10/10 (Friday) electronic message of NWOS that showed that NWOS had received from the hospital notice of Colton’s compartment syndrome symptoms. The message was then “disclosed” in supplemental answers to discovery on 1/30/18, the eve of trial, after it was uncovered six years after it had been requested in discovery.

NWOS believes that allowing a couple of last-moment depositions with no change to the trial date was “sanction” enough for the failure of disclosure. The Behrs entire case was prejudiced by believing sworn statements that no NWOS agent was “made aware” (Dr. Lynch’s words) of the Deaconess 12/10/10 noon phone call about Colton’s symptoms. The entire formulation of the case was altered due to the NWOS electronic message being withheld for six years.

The hospital’s call about Colton’s compartment syndrome was received by NWOS around noon on 12/10/10, and was then sent by NWOS electronically to Dr. Lynch, and Dr. Lynch then sent the message with the notice of symptoms to Dr. Powers, who was out of town.

This 12/10/10 NWOS electronic message was enough to reinstate Dr. Lynch (and Dr. Powers) even without the other arguments regarding 2014. The discovery violation was egregious and default on liability, given the facts in the file, is a reasonable and proportionate response; certainly a new trial is the least remedy the Behrs should expect.

A. Respondents' (Trial Defendants') Ongoing Misrepresentation of Dr. Collier's CR 30(e) Corrections as Not Part of His "Deposition" – The Record Shows They are "Intra-deposition"

As already presented in the Opening Brief, even if someone contradicts his prior sworn statement, all that is necessary to admit that change in testimony is a reason, or "something else" to explain the change. The standard is "change-plus" under the Marshall Rule case law. However, it is *Seattle-First Nat. Bank v. Rankin* that applies here.

Dr. Collier's declarations at issue prior to Judge Moreno dismissing Dr. Lynch (and Dr. Powers) in 2014 are ***declarations made under CR 30(e) corrections*** to his deposition. They are his "deposition" taken as a whole. The only legal ramification of a deposition correction is that both versions go to the jury. That is it. *Seattle-First Nat. Bank v. Rankin*, 59 Wash. 2d 288, 293–94, 367 P.2d 835, 839 (1962). Recall that in *Rankin* the deponent wanted to keep out of evidence his transcript and sought to have the court **only admit his corrections**. The law of this state

is that both versions come in. There was no basis in law to strike Dr. Collier's "intra-deposition" declaration, of corrections made under CR 30(e).

Turning to the "Marshall Rule," the case law is clear that the "Marshall Rule" is a sufficiency of the evidence rule, and the "Marshall Rule is never a basis to "strike" evidence. *Schonauer v. DCR Entm't, Inc.*, 79 Wash. App. 808, 817–18, 905 P.2d 392, 398 (1995).

It was error to strike Dr. Collier's deposition corrections and to dismiss Dr. Lynch (and Dr. Powers) in 2014.

It should be clear to any rational observer to infer from the circumstantial evidence that if NWOS had not gotten new counsel (Mr. Ramsden) who was left out of the original planning to commit a *Fison's* violation, and not produce the electronic message of 12/10/10, the hospital-to-NWOS-to-Lynch-to-Powers electronic message would have never surfaced for the Behrs. This discovery (and the violation it documented) should have led to the reinstatement of Dr. Lynch (and Dr. Powers) as defendants when the motion was made in March of 2018.

B. Question-Begging: Trial Judge Precluded Any Testimony Regarding Friday 12/10/10.

NWOS then uses question-begging to claim the Behrs suffered no prejudice, since the jury found no malpractice on Saturday 12/11/10.

NWOS presents the jury verdict as “proving” the following
(emphasis added) from page 18 of NWOS’ Response Brief:

In the instant case, the jury found that Dr. Anderson did not violate the standard of care. By so finding, the jury necessarily concluded that the medical information available to Dr. Anderson the afternoon of December 11, specifically the information contained in the chart and that derived by Dr. Anderson as a result of his detailed examination was not diagnostic of compartment syndrome, or, sufficiently indicative of compartment syndrome to require Dr. Anderson to order compartment testing in order to comply with the standard of care.

However, Dr. Anderson, in ambush trial testimony, converted his defense into an “error of judgment” by suddenly providing informed consent facts. (See Part IV, below.) The jury made no specific finding about compartment syndrome. In other words, it is no surprise that there was no jury finding of negligence on 12/10/10, because the trial court did not allow any testimony on any topic prior to Dr. Anderson’s first visit to the hospital on Saturday, 12/11/10, and the trial court allowed informed consent facts into evidence to essentially guarantee an “error of judgement” defense verdict, and certainly the jury made no specific “finding” about compartment syndrome.

In fact, Dr. Cossman was clear at trial of his certainty that Colton Behr would have suffered no permanent loss of function with a 12/10/10 fasciotomy:

Q. Yes. What would have been the long-run condition or outcome for Mr. Behr if anterior compartment -- the fasciotomy had been done on December 10th, 2010?

A. He'd have two fasciotomy incisions and a normally-functioning leg.

Q. And can you say that on a more probable than not basis with reasonable medical certainty?

A. Sure.

Q. And what would have been the condition of his anterior compartment if there had been a fasciotomy done on December 11th, 2010? ...[objection and ruling omitted]..

A. THE WITNESS: Yeah. I mean, the 11th is 24 hours long. And the way the compartment syndrome works is what happens to the muscle's a function of the amount of pressure over the amount of time. So the 11th is kind of a critical day. If it was done early on the 11th, the result would probably be very similar to the 10th. He'd be whole. If it was done one minute before the stroke of midnight before the 12th, he'd probably be better off than when it was done 12 hours later, but he might have lost some muscle.

RP 1253, lines 4-14, and RP 1254, lines 1-10. Dr. Collier's causation testimony was essentially identical.

The Behrs were prejudiced by the exclusion of Friday, 12/10/10, testimony, and by the failure to reinstate Dr. Lynch and Dr. Powers, especially as Dr. Powers' own standard of care testimony matched the testimony of Dr. Cossman and Dr. Collier, and it is rational to infer that Dr. Powers would have ordered a fasciotomy had he received the (long-withheld) 12/10/10 NWOS electronic message:

Dr. Powers of NWOS said of his own standard of care:

Q. When there's compartment syndrome in the anterior compartment, does blood flow still get to the foot?

A. Oftentimes it does.

Q. So would capillary refill be sufficient to show if the anterior compartment had blood flow or not?

A. I'm sorry, you'll have to rephrase the question.

Q. Would a capillary refill test of the toes be sufficient information as to whether the anterior compartment had blood flow?

A. I don't think we're comparing apples to apples. Either thing could happen exclusive of the other.

Q. They could be independent of each other?

A. Potentially.

Q. Do you do fasciotomies?

A. I do.

Q. How many have you done in your career?

A. I would only be wagering a guess. I have no idea.

Q. How many have you done to anterior compartments of lower legs?

A. I don't know the exact number.

Q. Would it be hundreds? Or tens? Or...

A. Probably tens, not hundreds. I don't know that there are many people that do hundreds.

Q. In your experience, how common is it after a tibial plateau fracture to have to do a fasciotomy?

A. I would say it is not common, but it does happen.

Q. Is it something to keep an eye out for?

MR. RAMSDEN: I'm going to object, your Honor; this is standard of care questions and this witness has not been designated as such.

BY MR. MASON: Q. Do you keep an eye out for it?

A. Always.

Dr. Timothy Powers (of NWOS) Trial Testimony at RP 467-68.

From this Dr. Powers' testimony, it would have indeed been the salvation of Colton Behr if Dr. Powers had received the message from NWOS about Colton Behr's symptoms of compartment syndrome.

And Dr. Collier's testimony was sufficient for him to comment on the failures of PA Bach on 12/10/10 and 12/11/10.

NWOS defense expert, Dr. Hans Moller stated that Physician Assistants are "care extenders" for the Orthopedic Surgeons. Dr. Moller was an Orthopedic Surgeon, in a larger Orthopedic LLC:

Q. (By Mr. Mason) Let's discuss your group for a moment. Do they employ -- do you have employees?

A. Sure.

Q. Do any of the employees provide healthcare

A. Yes, they do, *our physician extenders, our PAs*. And I guess you could say the partners also are employees of the LLC. I understand that's the way we're set up.

CP 4306 (Deposition of Moller, emphasis added). Again, NWOS did not call Moller at trial, as their own witness was problematic for their trial positions.

At trial, despite tumultuous objections, the Behrs' Orthopedic Surgical Expert Dr. Collier testified at trial that he was familiar with the Orthopedic PA standard of care. RP 726-31. This was admitted at trial:

THE WITNESS: Yes. They are extenders of the physician, so they're in the guise and the auspices of the physician –

MR. KING: Your Honor –

THE COURT: I will limit it to that answer. Next question.

RP 726-31 (Dr. Collier trial testimony, emphasis added).

The trial court invaded the province of the jury not to allow jury consideration of qualified experts' statements. Even with the portion of

Dr. Collier's testimony admitted, PA Bach should not have been dismissed in her own right, as Dr. Collier knew the Orthopedic PA standard of care. Additionally, PA Bach was part of the "team" liable for Colton Behr's care, under the *Grove* and *Hansch* authorities already discussed.

IV. The Use of Informed Consent Testimony to Evade Malpractice Liability Under the Error of Judgment Instruction.

A. Dr. Anderson's New Testimony To Support the "Error of Judgment" Instruction Created an Informed Consent Case

Dr. Anderson stepped over the "error of judgment" line into "choice of treatment responses" (and therefore implicated informed consent), when his surprise testimony at trial went from how difficult compartment syndrome is to diagnose (in all of his pre-trial filings) to the trial testimony that he considered compartment syndrome and just decided to "monitor" for it, because fasciotomies are a possible burden to the patient. This new testimony made the case into an informed consent case.

Dr. Anderson's testimony that he made a choice between treatment and non-treatment in contemplation of compartment syndrome follows.

RP 1432-36, including:

Q. And in connection with that conclusion, Doctor, did you do what this jury has heard about called compartment pressures, sticking a needle in the various compartments and getting a pressure reading?

A. I did not, no.

Q. Please explain to the jury your thinking or your thought process related to compartment pressure testing on Saturday, December 11th?

A. Well, compartment pressure monitoring in and of itself is not exact science. And if the history and the physical do not reach the level where you would say "I think this patient has a compartment syndrome," the pressure isn't -- it can be off by several millimeters of mercury, just the machine. The usage of the machine can be inaccurate. And so you don't make a decision to do fascial releases or compartment surgery based on that number if your clinical exam didn't support it.

RP 1432. The development of informed consent testimony continued under direct examination:

Q. Have you, in your training or your experience, ever taught or learned that it's okay to do a fasciotomy on mere suspicion even if the patient doesn't go on to develop a compartment syndrome?

A. You would need appropriate level of clinical certainty to go ahead.

Q. And is that notion of clinical certainty to prevent an unnecessary surgery and the complications you've just described?

A. Not sure I'm following.

Q. Is the necessity for appropriate clinical certainty to prevent an unindicated or unnecessary surgery and the complications that can arise from it?

A. So you're saying don't do surgery the patient doesn't need because a lot of bad things could happen? Is that what you're asking me?

Q. That's better than what I asked.

A. Okay. Yes, you should not do that.

RP 1435-36.

Flyte v. Summit View Clinic is very clear that a patient must have all material facts about possible diagnoses, even if no diagnosis is yet made. *Flyte* states that as long as the doctor considered the diagnosis, then

the case is not solely a medical negligence claim. *Flyte v. Summit View Clinic*, 183 Wash. App. 559, 565, 333 P.3d 566, 569–70 (2014).

Dr. Christopher Anderson dramatically changed his prior testimony at trial, the Behrs were profoundly prejudiced not to be allowed amendment or new trial on informed consent. The trial court essentially guaranteed a defense jury verdict under the “error of judgment” instruction, when that theory was predicated upon informed consent facts.

B. *Needham v. Dreyer*: Reversing Error of Judgment Instruction

The facts in Behr track *Needham v. Dreyer* (2020) in the sense that (a) either there was no error of judgment, or (b) the Behr case just became an informed consent case at trial.

In reversing the trial court’s decision to give the Error of Judgment instruction the appellate court (review denied) said (emphasis added):

Needham contends that “[f]ailing to follow up, failing to appreciate abnormal vital signs and failing to pay attention to a patient’s complaints are not choices.” For the reasons that follow, we agree and conclude that the use of the instruction was improper.

Needham v. Dreyer, 11 Wash. App. 2d 479, 489–90, 454 P.3d 136, 142–43, *review denied*, 195 Wash. 2d 1017, 461 P.3d 1201 (2020).

Under *Flyte*, if Dr. Anderson made a “choice,” then Colton Behr needed to be involved under the law of informed consent. Dr. Anderson’s pre-trial disclosures were all about how difficult compartment syndrome is

to detect – nothing else. Then at trial, Dr. Anderson presented his own choices to risk Colton’s leg to avoid Colton having fasciotomy scars. That was a choice that should have been made by Colton Behr.

As the *Needham* court has indicated, the error of judgment instruction is a free ticket out of liability for medical defendants:

The trial court should use caution in providing the exercise of judgment instruction. ...

Finally, we cannot ignore that giving the exercise of judgment instruction nearly always results in a defense verdict, and courts should use the instruction with caution. See *Fergen*, 182 Wash.2d at 818, 346 P.3d 708 (Stephens, J., dissenting). Indeed, the four Justice dissent in *Fergen* noted that “[i]n every case to have considered an error of judgment instruction, this court has recognized this type of instruction serves to emphasize the defendant’s theory of the case.” *Fergen*, 182 Wash.2d at 818, 346 P.3d 708... Thus, where, as here, the instruction was improper, the error can hardly be said to be harmless.

Needham v. Dreyer, 454 P.3d 136, 142–47 (Wash. Ct. App. 2019), *review denied*, 195 Wash. 2d 1017, 461 P.3d 1201 (2020) (emphasis added).

Dr. Collier and Dr. Cossman testified also to fasciotomy as a known prophylactic against, as well as treatment, given the diagnosis of risk of compartment syndrome. Dr. Anderson surprise trial testimony that he diagnosed the risk but kept the choice of response (to “monitor”) to himself created an informed consent case and a sure defense verdict under the error of judgment instruction. Exactly this point was made by the State Supreme Court in the 2014 case, *Gomez v. Sauerwein*:

We affirm the Court of Appeals' decision but clarify that *Gates* is not overruled. *Gates* stands for the proposition that patients have a right to be informed about a known or likely condition that can be readily diagnosed and treated.

Gomez v. Sauerwein, 180 Wash. 2d 610, 626, 331 P.3d 19, 27 (2014), and see Footnote 14: “Nontreatment is a form of treatment. *See* RCW 7.70.060; *Backlund v. Univ. of Wash.*, 137 Wash.2d 651, 661 n. 2, 975 P.2d 950 (1999) (citing *Brown v. Dahl*, 41 Wash.App. 565, 570, 705 P.2d 781 (1985)). *Id.* at 627-28 (Justice Gonzalez concurring making clear that cases can have both informed consent and negligence aspects).

V. Conclusion and Relief Requested

Jury instructions are generally sufficient if they: (1) “are supported by the evidence[, (2)] allow each party to argue its theory of the case,” and (3) properly inform the trier of fact of the applicable law when all instructions are read together. *Fergen*, 182 Wash.2d at 803, 346 P.3d 708.

Needham v. Dreyer, 11 Wash. App. 2d 479, 487, 454 P.3d 136, 41, *review denied*, 195 Wash. 2d 1017, 461 P.3d 1201 (2020).

For a variety of reasons, as outlined above and in the Opening Brief, the Behrs were denied the ability to fairly present their case and their theory of the case. The NWOS discovery violation of the 12/10/10 NWOS message being withheld compounded trial court errors.

A new trial under both informed consent theories, as well as on medical negligence, is requested, on terms deemed just on these facts.

Respectfully submitted on 9/8/20,

A handwritten signature in black ink, appearing to read "Craig A. Mason", written over a horizontal line.

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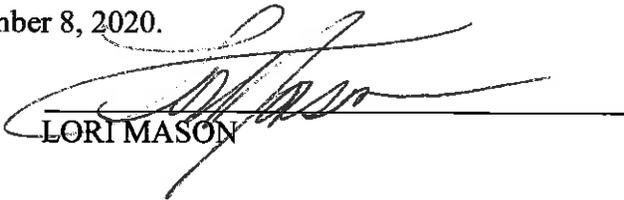
COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

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| Colton and Cheryl Behr |) | |
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| Appellants, |) | |
| |) | |
| v. |) | CERTIFICATE OF SERVICE |
| |) | re: Reply Brief of Appellant |
| Christopher G. Anderson, et al, |) | to NWOS, et al |
| |) | |
| Respondents. |) | |

I certify, under penalty of perjury under the laws of the State of Washington, that on the 8th day of September, 2020, I caused a true and correct copy of Appellants' Reply Brief to NWOS to be served upon the following, via the eFiling Portal for the Washington State Appellate Courts:

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