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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 Dr. POWERS (1 of 3)

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TABLE OF CONTENTS	Page
Table of Authorities	ii
I. Introduction to Reply to Dr. Powers’ Response Brief	1
II. Dr. Powers’ Own Theory of Collective Liability	2
III. Dr. Powers’ Standard of Care Coincides With the Standards of Care of the Behr Experts Dr. Collier and Dr. Cossman	4
IV. Dr. Collier Corrected His Deposition Under CR 30(e) and Therefore <i>Seattle-First Nat. Bank v. Rankin</i> Applies to any “Intra-deposition” Critique Dr. Powers Wishes to Make of Dr. Collier	7
V. The “Marshall Rule” Did Not Apply to Dr. Collier Under <i>Rankin</i>	8
VI. The “Marshall Rule” Is A Sufficiency of The Evidence Rule, and The “Marshall Rule” Is <u>Not</u> A Rule To Exclude Evidence	9
VII. The “Marshall Rule” Mis-Applied Exclusions From 2014 Do Not Impact the 2018 Opinions of Dr. Cossman and Dr. Collier Made After the 12/10/10 Electronic Message Was Discovered in Early 2018	10
VIII. Reply to Other Specific Arguments of Dr. Powers’ Response Brief (in order presented)	13
IX. Conclusion and Relief Requested	25

TABLE OF AUTHORITIES**Page****Court Rules:**

CR 30(e)	1, 7-13, 22-24, <i>en passim</i>
RAP 2.3(c)	12, 19-21

Cases:

<i>Berry v. Crown Cork & Seal Co.</i> , 103 Wash.App. 312, 14 P.3d 789 (2000)	9
<i>Bowcutt v. Delta N. Star Corp.</i> , 95 Wash. App. 311, 976 P.2d 643 (1999)	11-12
<i>Kaplan v. Nw. Mut. Life Ins. Co.</i> , 100 Wash.App. 571, 990 P.2d 991, 6 P.3d 1177 (2000)	9
<i>Meridian Minerals Co. v. King Cty.</i> , 61 Wash. App. 195, 810 P.2d 31 (1991)	24-25
<i>Roberson v. Perez</i> , 156 Wash. 2d 33, 123 P.3d 844 (2005)	20
<i>Safeco Ins. Co. v. McGrath</i> , 63 Wash.App. 170, 817 P.2d 861 (1991)	9
<i>Schonauer v. DCR Entm't, Inc.</i> , 79 Wash. App. 808, 905 P.2d 392 (1995)	9-10
<i>Seattle-First Nat. Bank v. Rankin</i> , 59 Wash. 2d 288, 367 P.2d 835 (1962)	1-2, 7-10, 13, 22-24, <i>en passim</i>
<i>State v. Pettitt</i> , 93 Wash.2d 288, 609 P.2d 1364 (1980)	11-12
<i>Taylor v. Bell</i> , 185 Wash. App. 270, 340 P.3d 951 (2014)	9
<i>Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wash. 2d 299, 858 P.2d 1054 (1993)	7, 11-12

TABLE OF AUTHORITIES, cont. **Page**

Treatise:

15 Lewis H. Orland & Karl B. Tegland, Washington Practice: Judgments § 380, at 55–56 (4th ed.1986)	20
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I. Introduction to Reply to Dr. Powers' Response Brief

The first sections of this Reply Brief address categories of issues, and then the later section moves seriatim through Dr. Powers' arguments. Most significantly: (1) *Dr. Powers' theory of collective liability* can be seen in his sworn statement to the Behrs' interrogatory (Rog#39) about the patient assignments during the relevant time of Colton's care was that the NWOS doctors all had "shared responsibility" for Colton's post-surgical care. CP 321 (and see CP 320 for more context). (2) From his trial testimony, *Dr. Powers affirms the positions of the Behrs' medical experts*, quoted infra (and quoted in the Behrs' Opening Brief) as very similar to his own. (3) *Dr. Powers over-reaches regarding Dr. Colliers "Intra-deposition" alleged conflicts*. Washington State case law is clear that if there is a conflict between the deposition transcript and the finalized deposition under CR 30(e), then both the finalized corrections and the transcripts come into evidence. *Seattle-First Nat. Bank v. Rankin*, 59 Wash. 2d 288, 293-94, 367 P.2d 835, 839 (1962). Dr. Collier's CR 30(e) corrections can be found at CP 521-41, among other locations in the record. (4) Dr. Collier's transcript versus his corrections were at issue, which falls under the *Rankin* case and CR 30(e), not under the "Marshall Rule." Dr. Powers aerobically refuses to address *Rankin* case or CR 30(e). (5) *The "Marshall Rule" is a sufficiency of the evidence rule* and is never

a reason to exclude evidence, and nonetheless it does not apply under *Rankin*. (6) The 2018 new evidence (the 12/10/10 NWOS electronic message (CP 3711, 3951, and 3998) was a sufficient basis for Dr. Collier to supplement his expert opinions after the previously un-disclosed electronic message (CP 3951) was uncovered during the deposition of NWOS CEO Braun on the eve of trial in 2018. (7) The Behrs were severely prejudiced at trial by the absence of Dr. Powers (and Dr. Lynch) as defendants, especially as the case was reduced by orders in limine. Ultimately, the trial court precluded any medical negligence testimony prior to Dr. Anderson's involvement on Saturday, 12/11/10, severely prejudicing the Behrs at trial, and prejudice was compounded as Dr. Anderson muddied misdiagnosis with informed consent issues as part of his trial tactic of receiving the "error of judgment" instruction (also challenged on appeal – see the Opening Brief and the Reply to NWOS).

Substantive argument now follows on each of these points.

II. Dr. Powers' Own Theory of Collective Liability

Dr. Powers' sworn statement to the Behrs' interrogatory (Rog#39) about the patient assignments during the relevant time of Colton's care was that the NWOS doctors all had "shared responsibility" for Colton's post-surgical care. CP 320-21.

This was presented to the trial court on 2/24/14, as part of the Behrs' response to summary judgment and in support of their motion for summary judgment on liability. See, e.g, CP 265-366 for a small portion of the 2014 Behrs' filings, as this is the document that contained Dr. Powers' sworn interrogatory answer as an exhibit.

The clear opinion of Orthopedic Surgical Expert Dr. Collier was that there was a "collective responsibility" of the surgical company (NWOS, as a healthcare provider) to competently attend to the post-surgical care of Colton Behr, *as an entity*. See e.g., CP 323-337, esp. 325-27, and CP 521-543, esp. 535-36, and CP 3953-62, esp. 3956-57. The NWOS standard of care expert, Dr. Hans Moller, never contradicted Dr. Collier's account of entity liability. CP 4309-10.

The collective responsibility at issue is: (a) For the surgical group to properly monitor for compartment syndrome, (b) for the medical team (including nurses, PA's and PT's) to properly monitor for compartment syndrome. Then, (c) there is the standard of care requirement for the assigned physician to properly monitor the post-surgical care and timely-diagnose compartment syndrome before there is permanent loss of function.

On the eve of trial in early 2018, the Behrs learned of the NWOS 12/10/10 electronic message that informed NWOS of Colton Behr's

compartment syndrome symptoms on Friday 12/10/10, that NWOS sent to Dr. Lynch, who forwarded it to Dr. Powers, who did not respond. CP 3951, also at 3998 and 3711. No other NWOS agent responded to the call from Deaconess nor to the (long-withheld) NWOS internal electronic message. Implications of this message are addressed, below.

III. Dr. Powers' Standard of Care Coincides With the Standards of Care of the Behr Experts Dr. Collier and Dr. Cossman

From his trial testimony, Dr. Powers affirms the positions of the Behrs' experts (Dr. Collier and Dr. Cossman), as to monitoring for compartment syndrome and as to rapid fasciotomy as the response.

Dr. Powers of NWOS testified as to 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.

As Dr. Collier indicated, there is no cure for compartment syndrome except for timely fasciotomy:

Q. What is the -- essentially -- is there any response to compartment syndrome other than fasciotomy?

A. No. If you have a compartment syndrome, you have to do a fasciotomy to relieve the pressure.

Q. If you do not do a fasciotomy, what occurs?

A. The compartment dies. So your muscle will die; your nerves will die. Basically, you lose the compartment.

Dr. Collier's Trial Testimony at RP 745-46.

Had NWOS gotten the 12/10/10 electronic message of Colton's compartment syndrome symptoms to Dr. Powers, Colton would have had a timely fasciotomy under Dr. Powers' standard of care.

Standard of care and causation expert, Vascular Surgeon Dr. David Cossman, testified at trial that there was reasonable medical certainty that Colton Behr would have had no loss of function or tissue if the

compartment syndrome had been detected and treated by fasciotomy on 12/10/10. See RP 1253, lines 4-14, and RP 1254, lines 1-10.

In short, had Dr. Powers been paying attention to his assigned patient, Colton Behr -- or attended to the forwarded message of 12/10/10 - - by Dr. Powers' own testimony, Colton would have gotten the fasciotomy the less-experienced Dr. Anderson did not timely-provide.

NOTE: See the Reply Brief to NWOS in which the Behrs explain that an "error of judgment" verdict does not address the existence of diagnosable compartment syndrome, especially where informed consent facts were presented to support the instruction. Dr. Powers' own testimony is that he would not "monitor" or "wait and see," but do the fasciotomy upon reasonable suspicion of compartment syndrome.

When the trial court dismissed Dr. Powers as a party, and refused to reinstate him, the Behrs lost substantial evidence regarding their case, and the trial court deprived the Behrs of the ability to testify about all the below-standard care that Colton received on 12/10/10, and on the question of fact about Dr. Powers being more ready to intervene with a fasciotomy than was Dr. Anderson (who took upon himself to "monitor" the situation, despite a suspicion of compartment syndrome). As Dr. Collier testified:

BY MR. MASON: Q. When do you believe Colton Behr had the onset of compartment syndrome?

A. Again, I think he started on 12/10 in the morning, it got worse through day and it continued. It doesn't usually go away unless you address it.

Q. And when do you believe it was diagnosable?

MR. KING: Same objection as to form and foundation.

MR. HAZEL: Join.

THE COURT: I will overrule based upon his testimony.

THE WITNESS: Any time during the treatment afterwards, so as of 12/10, definitely around noontime on that day. So any time after that.

Dr. Collier Trial Testimony at CP: 718-19 (on compartment syndrome beginning before the noon message to NWOS reporting symptoms).

IV. Dr. Collier Corrected His Deposition Under CR 30(e) and Therefore *Seattle-First Nat. Bank v. Rankin* Applies to any “Intra-deposition” Critique Dr. Powers Wishes to Make of Dr. Collier

Dr. Powers should be reinstated as a defendant for the *Fisons*-like discovery violation shown by the non-disclosed electronic message of 12/10/10 (CP 3951) – the kind of message requested of all parties in 2012 in discovery -- and which message was not disclosed until the eve of trial in 2018, and only after NWOS CEO Braun revealed it with new counsel.

First to address the 2014 dismissal, the Behrs pointed out that Dr. Collier’s deposition clarifications under CR 30(e) were clearly admissible and clearly created genuine issues of material fact as to the failures of NWOS, including Dr. Powers, to care for Colton Behr, both (a) for the omissions that violated the standard of care, and (b) for the failures of

post-surgical monitoring that violated the standard of care, individually and as a surgical group. See, e.g., Dr. Collier's CR 30(e) corrections at CP 536-38.

Washington State case law is clear that if there is a conflict between the deposition transcript and the finalized deposition under CR 30(e), then both the finalized corrections and the transcripts come into evidence. *Seattle-First Nat. Bank v. Rankin*, 59 Wash. 2d 288, 293–94, 367 P.2d 835, 839 (1962). Dr. Collier's CR 30(e) corrections can be found at CP 521-41, among other locations in the record.

The 2014 trial court's decision to "strike" Dr. Collier's CR 30(e) deposition corrections as contrary to "his deposition" is logically incoherent. The CR 30(e) corrections are part of the deposition as a whole. See *Seattle-First Nat. Bank v. Rankin*, supra.

Dr. Collier's CR 30(e) correction declaration is "intra-deposition." None of Collier's declared corrections should have been stricken. Dr. Powers should not have been dismissed.

V. The "Marshall Rule" Did Not Apply to Dr. Collier Under *Rankin*

Dr. Collier's transcript versus his corrections were at issue. First, Dr. Collier's deposition corrections were admissible under *Seattle-First Nat. Bank v. Rankin*, supra, and the Marshall Rule did not apply.

However, even under the Marshall Rule, as noted in the Opening Brief, Dr. Collier gave a reason for his corrections, even if the Marshall Rule did apply (and it does not, per *Rankin*). The court in the 2014 case, *Taylor v. Bell*, noted that the Marshall rule was a very narrow one, and if an explanation is given for the change of testimony, then the issue becomes a question of fact (emphasis added):

This rule is a narrow one. The “self-serving affidavit” must “directly contradict” the affiant’s “unambiguous sworn testimony” previously given. *Kaplan v. Nw. Mut. Life Ins. Co.*, 100 Wash.App. 571, 576, 990 P.2d 991, 6 P.3d 1177 (2000); *accord Berry v. Crown Cork & Seal Co.*, 103 Wash.App. 312, 322, 14 P.3d 789 (2000) (“While [the] statements contain potential inconsistencies, they are not necessarily contradictory, and certainly do not rise to the level of clear contradiction necessary to invoke the *Marshall* rule.”). Moreover, if the subsequent affidavit offers an explanation for previously given testimony, whether the explanation is plausible is an issue to be determined by the trier of fact. *Safeco Ins. Co. v. McGrath*, 63 Wash.App. 170, 175, 817 P.2d 861 (1991).

Taylor v. Bell, 185 Wash. App. 270, 294, 340 P.3d 951, 964 (2014).

VI. The “Marshall Rule” Is A Sufficiency of The Evidence Rule, and The “Marshall Rule” Is Not A Rule To Exclude Evidence

The case law is clear that the Marshall rule is a *sufficiency of the evidence rule*, **not an admissibility rule**:

To say evidence is admissible is to say it may be considered. To say evidence is sufficient is to say, after considering it, that it is capable of raising an issue of fact for the jury. The *Marshall* court considered the plaintiff’s affidavit in light of the other evidence in the case, *Marshall*, 56 Wash.App. at 184–85, 782 P.2d 1107, before concluding (1) that the affidavit was

inconsistent with plaintiff's earlier deposition testimony, (2) was offered without explaining the inconsistency, and thus (3) was insufficient to raise a reasonable inference supporting plaintiff's position. The *Marshall* court was dealing with sufficiency, not admissibility, and its holding fails to support DCR's present argument.

Schonauer v. DCR Entm't, Inc., 79 Wash. App. 808, 817–18, 905 P.2d 392, 398 (1995). In *Behr*, the medical records, other testimony, and Dr. Collier's CR 30(e) explanations, all provide sufficient evidence not to have dismissed NWOS employees Dr. Powers (and Dr. Lynch), who had responsibility for Colton Behr's post-surgical care.

Certainly, Dr. Collier's deposition corrections provided as CR 30(e) corrections under *Rankin* (which also provided explanations), and his subsequent declarations consistent with this deposition (whole deposition under CR 30), should not have been excluded. The dismissal of Dr. Powers (and Dr. Lynch) was in error and was prejudicial at trial.

VII. The "Marshall Rule" Mis-Applied Exclusions From 2014 Do Not Impact the 2018 Opinions of Dr. Cossman and Dr. Collier Made After the 12/10/10 Electronic Message Was Discovered in Early 2018

The 12/10/10 NWOS electronic message (CP 3951), that had been requested of all parties since 2012 -- and that was not produced until 2018, on the eve of trial -- was a new and independent basis for reinstating Dr. Powers (and Dr. Lynch) as defendants.

The 12/10/10 electronic NWOS message suddenly revealed that Deaconess employees had contacted NWOS just before noon on Friday, 12/10/10, informing NWOS that Colton Behr was suffering compartment syndrome symptoms. NWOS sent the message to Dr. Lynch, who sent it to Dr. Powers, who did not respond. RP 564-65 (Trial Testimony of Dr. Lynch). See also CP: 3930-42, the Deposition of NWOS employee, Marcie Loshbaugh.

The Opening Brief, especially at pages 29-30, showed how Judge McKay erroneously viewed herself as “handcuffed” by the prior rulings of Judge Moreno (RP 1736). Judge McKay “handcuffed” herself to the point that Judge McKay would not even consider reinstating Dr. Powers (and Dr. Lynch) under the new 2018 evidence, despite *Fisons*-like discovery violations by NWOS and its doctors to withhold the electronic message.

For example, Judge McKay said she was “handcuffed” by prior rulings, at RP 1736, which Judge McKay stated:

I'm not sure that the plaintiffs understand quite how handcuffed and hand-tied this Court is and has been since Powers and Lynch have been dismissed, and that went through appeal after appeal after appeal. None of those appeals were successful.

RP 1736, lines 16 to 21.

Judge McKay’s failure to exercise discretion is itself an abuse of discretion:

Failure to exercise discretion is an abuse of discretion. *State v. Pettitt*, 93 Wash.2d 288, 296, 609 P.2d 1364 (1980).

Bowcutt v. Delta N. Star Corp., 95 Wash. App. 311, 320, 976 P.2d 643, 648 (1999).

And it bears repeating that Judge McKay took the denial of discretionary review to be a substantive decision, contrary to RAP 2.3(c). It is clear on the face of RAP 2.3(c) that there is no prejudice to a denial of discretionary review:

(c) Effect of Denial of Discretionary Review. Except with regard to a decision of a superior court entered in a proceeding to review a decision of a court of limited jurisdiction, the denial of discretionary review of a superior court decision does not affect the right of a party to obtain later review of the trial court decision or the issues pertaining to that decision.

It is well-established that an error of law is an abuse of discretion:

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law

Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wash. 2d 299, 339, 858 P.2d 1054, 1075–76 (1993).

Judge McKay's own quote, above, shows the cascading prejudice of the absence of Dr. Powers (and Dr. Lynch) from the case. In short, the trial judge found prejudice (in her "handcuff" lament), and the prejudice is obvious as the Behrs' case was truncated by withheld evidence, and then

further limited by the court's refusal to respond to the evidence once it was produced (inadvertently by new NWOS counsel) on the eve of trial.

After Orthopedic Surgical Expert Dr. Andrew Collier reviewed the previously withheld *NWOS e-message* in early 2018, then ***Dr. Collier had a new basis for additional expert opinions***, which he filed on 3/28/18, CP 3953-3962, and which Judge McKay refused to consider, again abusing her discretion based upon an error of law as to her discretion.

A new trial with Dr. Powers (and Dr. Lynch) reinstated is requested, and Division III has been asked to consider default on liability as a sanction for Dr. Powers (and Dr. Lynch) withholding such an important message in their own, individual, answers to discovery.

VIII. Reply to the Argument of Dr. Powers' Response Brief

The particular arguments of Dr. Powers will be addressed in this section in the order presented.

Page 2 (bottom of page) of Dr. Powers' Response (underlining in the original): Dr. Powers writes: "In April of 2014, with the finding of the trial court that Dr. Lynch and Dr. Powers were not negligent...)

REPLY: There was **not** a finding that Dr. Powers was "not negligent." Judge Moreno struck Dr. Collier's CR 30(e) deposition corrections, in violation of *Rankin*, supra, and found insufficient expert testimony in the

now-stricken record for the Behrs to proceed against Dr. Powers (and Dr. Lynch). There was no “finding” of non-negligence.

Page 3 (bottom of page) of Dr. Powers Response: Dr. Powers writes: “A maxim in healthcare is that a doctor cannot diagnose what is not clinically present at the time of his care of the patient.”

REPLY: The Deaconess staff detected compartment syndrome symptoms before noon on Friday, 12/10/10, and the electronic message, withheld for six years by NWOS, shows that Dr. Lynch, Dr. Powers, and NWOS committed malpractice by omission, in failing to undertake proper post-surgical monitoring of Colton Behr.

Page 4 of Dr. Power's Response: Dr. Powers presents a timeline that jumps from early morning on 12/10/10 to Saturday mid-day on 12/11/10.

REPLY: It is simply not addressing the facts to avoid the emergence of Colton Behr's compartment syndrome symptoms before noon on 12/10/10 and to completely avoid discussing the 12/10/10 electronic message that shows that Deaconess did inform NWOS of Colton Behr's compartment syndrome symptoms on noon on Friday 12/10/10, and that shows that NWOS sent the message to Dr. Lynch, *who forwarded it to Dr. Powers*, who did not respond. (CP 3951)

Dr. Collier was clear that this was violation of the surgical, and surgical group, standard of post-surgical care, and Dr. Cossman was clear as to the causation of harm.

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.

Dr. Powers fails to address, in his Response Brief, the appearance of Colton's compartment syndrome symptoms between early morning on

Friday 12/10/10 when PA Buescher saw Colton (the therapy ordered by PA Buescher arrived at 9:30a.m.) and Colton was doing fine until 11 a.m. on 12/10/10, by which time the Deaconess messages showed that Colton's compartment syndrome was underway before noon on Friday 12/10/10.

Page 5 of Dr. Powers' Response Brief (emphasis added):

Chronologically, neither Dr. Lynch nor Dr. Powers were in positions that would subject them to the Behr's theory of liability... Neither Dr. Lynch nor Dr. Powers were present at times in which an alleged failure to diagnose compartment syndrome could have been made.

REPLY: The point is conceded they were not "present." That is the problem. They had a *duty to monitor and a duty to respond* to the 12/10/10 electronic message. The malpractice point of Dr. Collier in 2014 was that they should have monitored (and NWOS as an entity should have monitored) the post-surgical care of Colton Behr. After the 2018 discovery of the 12/10/10 electronic message, and NWOS' admission of receipt of the message by NWOS and then by Lynch, and then later by Dr. Powers), the evidence of malpractice by omission is overwhelming.

Page 6 of Dr. Powers' Response (emphasis added): "The Behrs reference in their assertion of collective responsibility that a phone message to Northwest Orthopedics was made by physical therapist Ruth Benage on Friday, 12/10/10 that was not received by Dr. Lynch."

REPLY: Dr. Lynch had declared in 2014 that he did not receive the message (CP:4380); however, at the 2018 trial Dr. Lynch testified that he did receive the 12/10/10 message: “A. I passed it forward [to Dr. Powers], correct.” RP 564-65. That message expressed the noontime observations of Deaconess staff that Colton Behr was showing symptoms of compartment syndrome – a clearly known complication of tibial plateau fracture repairs. This is spectacular and prejudicial dishonesty in both the 2014 perjury and in the withholding of the message requested of Dr. Powers and Dr. Lynch in 2012 discovery requests.

Page 7 of Dr. Powers’ Response Brief: At the bottom of the page Dr. Powers argues that there is no expert opinion that he “violated the standard of care in his performance of the surgical repair of Mr. Behr’s injury.”

*REPLY: That is correct. The entire case is the failure to post-surgically monitor Colton Behr and to diagnose compartment syndrome before permanent loss of function occurs. Compartment syndrome occurs in up to 20 percent of these repairs. The *occurrence* of compartment syndrome is not the issue, for it is a predictable complication. The *issue is the failure to make a timely diagnosis*, which requires monitoring and timely responses to such things as the 12/10/10 NWOS electronic message capturing for NWOS, Dr. Powers, and other agents, that the hospital staff are seeing symptoms of compartment syndrome in Colton Behr.*

Dr. Cossman's trial testimony. at RP 1257-58, reads 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. Powers and NWOS failed to meet the standard of care. The extensive expert testimony of Dr. Cossman and Dr. Collier confirm this, and Dr. Powers suddenly shifts to a defense of Dr. Lynch against a failure to diagnose (near the bottom of page 7), but not of himself. All recipients of the Deaconess call, and all recipients of the NWOS electronic message, had a duty to follow-up and make a timely diagnosis. Dr. Powers did not meet his standard of care.

Page 8 of Dr. Powers' Response Brief: Next, Dr. Powers relies upon the 2014 denial of discretionary review -- in which a hypothetical possibility of success at trial without appellate review is the reason for the appellate

court not to take piecemeal review – and that denial of discretionary review in 2014 is presented by Dr. Powers as a legal determination that the errors of dismissing Dr. Powers (and Dr. Lynch) were harmless. Again, RAP 2.3(c) is implicated. More importantly, Judge McKay believing herself to be “handcuffed” (see above) by prior rulings -- and limiting the Behrs’ case further in rulings in limine at the beginning of trial -- were a cumulative and cascading prejudice to the Behrs’ case.

Page 9 of Dr. Powers’ Response Brief: Dr. Powers says: “There was no prejudice to any party at the time of trial as the result of the 2014 dismissals of Dr. Lynch and Dr. Powers....”

REPLY: Incorporating the Opening Brief and the Reply Brief to NWOS, the prejudice to the Behrs was tremendous, as neither Dr. Cossman, nor Dr. Collier, were allowed to testify as to the errors of Friday, 12/10/10, due to rulings in limine at the very start of trial.

Here is one of many examples of prejudice at trial from the orders in limine (“prior orders” referenced below):

BY MR. MASON: Q. Do you have any criticisms of the care Mr. Behr received on Friday, December 10th?

MR. KING: Your Honor, form and foundation and overbroad, lack of foundation as to certain providers.

MR. HAZEL: Join. THE COURT: If you can be specific, Mr. Mason.

BY MR. MASON: Q. This is D-103 in the notebook in front of you. When an orthopedic surgeon receives a note from a physical therapist to this effect, does it create an obligation?

MR. KING: Your Honor, objection. Prior rulings, move to strike.

MR. HAZEL: I'll join.

THE COURT: So this is part of the prior ruling this Court has made, so I'm going to have you not ask this question. Go to your next question.

CP: 725 (Dr. Collier trial testimony, emphasis added).

The prejudice at trial was overwhelming. Between the 2014 *Rankin* error, to Judge McKay's erroneous "self-handcuffs," to the discovery misbehavior of Dr. Powers (and Dr. Lynch and NWOS) in not producing the 12/10/10 electronic message, the Behrs were unjustly and erroneously prevented from presenting their case fairly and completely at trial.

Page 10 of Dr. Powers' Response Brief: Dr. Powers proposes that this court ignore RAP 2.3(c) and declare the denial of discretionary review of the dismissals of Dr. Powers and Dr. Lynch as "the law of the case."

REPLY: The "law of the case" does not apply, by definition, under RAP 2.3(c).

Here is the law of the case defined – a governing appellate decision:

In its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. *Id.* (citing 15 Lewis H. Orland & Karl B. Tegland, *Washington Practice: Judgments* § 380, at 55–56 (4th ed.1986)).

Roberson v. Perez, 156 Wash. 2d 33, 41, 123 P.3d 844, 848 (2005).

Both under RAP 2.3(c) in general, and in the denials of discretionary review in the Behr case in particular, no “law of the case” was established. In short, Dr. Powers hopes to mislead this court the way NWOS misled Judge McKay about the meaning of a denial of discretionary review. The Behrs ask the court not to take this bait.

Page 11 of Response Brief of Dr. Powers: Another timeline is presented.

REPLY: Dr. Powers again leaves out the crucial times that the late-disclosed electronic message covers, and Dr. Powers omits the times NWOS and Dr. Powers failed to monitor Colton Behr and failed to respond to the Deaconess message.

Pages 12-13 of Dr. Powers' Response: Dr. Powers reiterates that his surgery met the standard of care (true), and then he concludes the page with a quote that he was unaware of Colton's condition until he returned after the weekend.

REPLY: Dr. Powers (or Dr. Lynch or NWOS) had a duty to be aware as part of the duty of post-surgical monitoring. Dr. Lynch declared that Dr. Powers was responsible for Colton's post-surgical monitoring at CP 3989-90. Dr. Lynch also had declared on 3/3/14 (CP:4380) (emphasis added):

I was not advised on December 10, 2010 that Mr. Behr was experiencing declining sensation, left foot edema, an absence of 13 dorsiflexion, or an absence of toe movement. I was not made aware of that information on 14 December 10, 2010.

From the late-disclosed NWOS electronic message of 12/10/10, we know this sworn statement is materially inaccurate. Again, compare Dr. Lynch's admissions of receipt at RP 564-65. CP: 3998 & 3711 for the message.

Pages 13 to 17 of Dr. Powers' Response: Dr. Powers quotes Dr. Collier's uncorrected transcript without acknowledging the CR 30(e) corrections.

REPLY: See the opening sections of this Reply on the *Rankin* case and on CR 30(e) as Dr. Powers refuses to address either argument, and Dr.

Powers refuses to discuss the withheld 12/10/10 electronic message that did not surface until early 2018 from NWOS CEO Braun.

Dr. Powers does admit that Dr. Collier (in 2014) "attempted to correct his deposition" (Response at the bottom of page 15). However, CR 30(e) and the *Rankin* case remains the law of Washington State, and so it was not that Dr. Collier "attempted" to correct his deposition. Instead, *Dr. Collier had a right to correct his deposition* upon review, which was effectively denied to him, to the prejudice of Cheryl and Colton Behr.

Judge Moreno committed clear and prejudicial error in 2014, and the 2018 discovery of the 12/10/10 electronic message led Dr. Collier to update his expert opinion. Dr. Collier's declaration -- that updates his opinions after the NWOS message was disclosed -- can be found at CP: 3953-57. Once again, Judge McKay refused to consider Dr. Collier's

opinion, even though it was based upon new facts, under her “handcuff” legal error, addressed, above (and in the Opening Brief).

Page 19 of the Response Brief of Dr. Powers: Dr. Powers ignores CR 30(e) and the *Rankin* case *en passim* throughout the remainder of the brief, and Dr. Lynch includes a quote from Judge McKay saying that Dr. Lynch won’t be reinstated but can still be a witness with the judge saying:

I’m not sure it changes anything because Dr. Lynch is still saying, “I didn’t take the calls.” That is an issue for trial.

However such questions were not allowed at trial, per the “prior rulings” quoted above from the orders in limine.

Page 21-22 of Dr. Powers’ Response Brief: As with NWOS, Dr. Powers tries to turn the jury verdict into an exoneration that it is not. First, as is shown in the Reply to NWOS, Dr. Anderson changed the nature of the case from a failure to diagnose to an informed consent case. With that surprise testimony, the jury most likely looked at the “error of judgment” instruction and applied the informed consent testimony of Dr. Anderson to find no liability. The jury applying the error of judgment instruction would not be saying there was “no compartment syndrome,” but the jury would be saying, “given your stated choice of seeing the risk and choosing to monitor it (an informed consent issue), you just made an error of judgment.”

Even if the court does not see the subtle shift to an informed consent case, an error of judgment defense verdict does not have the jury saying, “You did not miss it,” but instead *the jury is saying, “It was okay to miss it due to your error of judgment.”* (Those issues are addressed in the Opening Brief and in the Reply to NWOS.) If NWOS, including Dr. Powers, had been monitoring the hospital records and answering the messages from Deaconess, then it is rational to infer that Colton Behr would have never lost his anterior compartment to delayed diagnosis.

As the Dr. Powers’ quotes that begin this Reply Brief show, Dr. Powers’ own standard of care matched that of Dr. Collier and Dr. Cossman, and had Dr. Powers been monitoring Colton Behr, it is likely that a timely fasciotomy would have been undertaken by Dr. Powers or by someone at this direction.

Response of Dr. Powers from page 20 to the end: Dr. Powers continues to misapply the “Marshall Rule” and continues to ignore (1) CR 30(e), (2) *Rankin*, (3) the late-disclosed electronic message, and (4) the extensive causation testimony and declarations of Dr. Cossman and Dr. Collier.

As for the late-disclosed NWOS electronic message (CP:3998 & 3711), Dr. Powers’ own quote, on the bottom of his page 29 to page 30, addresses the legal basis for experts submitting new opinions, quoting *Meridian Minerals v. King County*. Although *Meridian Minerals* is

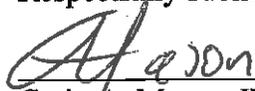
ostensibly quoted against Dr. Collier's deposition corrections, Dr. Powers' quote reads: "Unless discovered after the opportunity passes, the parties should generally not be given another chance to submit additional evidence," 61 Wn.App, 195, 203-204 (1991). The message was late-discovered because it was late-disclosed (six years late).

Dr. Collier had new evidence, from NWOS, and the Behrs promptly sought continuance and more time to develop a trial response, and, in the end, Dr. Collier presented new opinions, which were struck. *REPLY*: The arguments, facts and law of Colton and Cheryl Behr are not substantively addressed by Dr. Powers, and the quote from *Meridian Minerals v. King County* shows why the late-disclosed NWOS electronic message should be taken very seriously by the court. As was noted above, Dr. Lynch was caught in profound dishonesty, comparing his declaration to the fact of his receipt of the message (admitted in trial), and Dr. Powers had duties for Colton Behr that he did not meet.

IX. Conclusion and Relief Requested

If the court does not find NWOS liable as a matter of law, either on the facts under proper legal theory or as a discovery sanction, then a new trial is requested with Dr. Powers (and Dr. Lynch) reinstated as defendants, and under such clarifications of the law and other rulings as the court deems just. A new trial is requested on those terms.

Respectfully submitted on 9/8/20,

A handwritten signature in cursive script that reads "Craig A. Mason". The signature is written in black ink and is positioned above a horizontal line.

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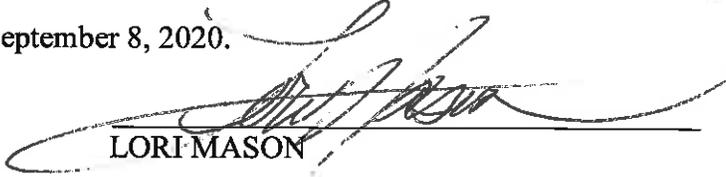
Division III No. 362221

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

Colton and Cheryl Behr)	
)	
Appellants,)	
)	
v.)	CERTIFICATE OF SERVICE
)	re: Reply Brief of Appellant
)	to Dr. Powers
Christopher G. Anderson, 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 Dr. Powers to be served upon the following, via the eFiling Portal for the Washington State Appellate Courts:

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