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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**

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

On December 8, 2010, Colton Behr, then age 39, was a fit, athletic, active young man who was playing basketball in Sandpoint, Idaho. After he fractured his left tibial plateau, Colton drove himself from Sandpoint to Deaconess Hospital in Spokane, WA. After diagnosis, he had tibial plateau surgery late on Thursday, December 9, 2010, from Dr. Timothy Powers of Northwest Orthopedic Specialists (NWOS). By noon on Friday, 12/10/10, Deaconess physical therapist, Ruth Benage, had noticed the signs and symptoms of compartment syndrome in Colton's left "anterior compartment." **NOTE:** Compartment syndrome is swelling inside the muscle casing (the fascia) of a muscle compartment, and it is a known complication of a tibial plateau fracture, for which orthopedic surgeons, PAs, and nurses must monitor. The compartment pressure from the swelling stops the flow of blood in the capillaries, and tissues die. Even though the higher pressure in the larger arteries can still push blood through the compartment into the foot, the lower pressure in smaller arteries and capillaries means that they constrict and collapse, and tissues die without circulation. The only appropriate treatment upon diagnosis of compartment syndrome is the timely-cutting the fascia to relieve the pressure in the compartment (a fasciotomy) to restore circulation.

PT Benage and Deaconess nurses sent the message of the symptoms to NWOS shortly after noon on Friday 12/10/10. NWOS sent the message to Dr. Lynch, who sent it to Dr. Powers (with no response). Dr. Powers later testified of his tendency to follow the standard of care described by the Plaintiffs' experts -- which is to promptly take compartment pressures and perform a fasciotomy upon suspicion of compartment syndrome.

Instead of Colton receiving a timely fasciotomy, nurses failed to escalate the concerns until there was a competent orthopedic response, and NWOS agents failed to properly respond. Later, the less experienced Dr. Anderson took over responsibility for Colton and missed the symptoms until it was too late. As a result, Dr. Anderson did not diagnose Colton's compartment syndrome until two days later, around noon on Sunday 12/12/10, by which time all of Colton's muscles, tendons, and nerves necessary to lift his left foot had died, became necrotic and later were amputated, leaving Colton with drop-foot. Colton Behr had fallen through the cracks of the weekend coverage of his post-surgical care by NWOS and its agents, and this substandard medical care altered his life forever. Colton Behr, and his wife, Cheryl, filed a suit for medical negligence on 12/7/12 against NWOS and its agents, and against Deaconess Hospital.

Among the breaches of the standard of care were presented the following: (1) Orthopedic Expert Dr. Andrew Collier testified that the compartment syndrome was diagnosable by noon on Friday 12/10/10, and Dr. Collier declared, and then testified, that the NWOS subsequent failures to timely-diagnose were also below the standard of care. (2) Dr. Collier also testified that NWOS – the surgical entity as a healthcare provider in its own right -- had an *institutional post-surgical duty of care to Colton* which NWOS failed to meet, causing him lifetime damages. (3) Vascular Expert Dr. David Cossman also testified that the compartment syndrome should have been diagnosed on Friday 12/10/10, and that the leg function would have certainly been saved, and would have more probably than not been saved by fasciotomy on Saturday 12/11/10. (4) Further, *Dr. Cossman testified that any patient under direct care (such as at a hospital) should never suffer the delayed diagnosis of compartment syndrome to the point of tissue death and loss of function.* (5) Nursing Expert Linda Newman testified that among the various failures of Deaconess nurses to meet the standard of care was *the failure to escalate Colton Behr's concerns until there was a sufficient orthopedic response.* All three experts described the absolutely textbook quality of Colton's symptoms.

The various legal errors, detailed below, prejudicially gutted the Behrs' case before it was submitted to the jury. Further, Dr. Anderson

changed his testimony at trial, leading to the Behrs' request to amend their complaint and/or for a new trial. A defense verdict was returned on the third day of deliberations (by a 10 to 2 vote) on 5/25/18. A request for a new trial was renewed and denied. This appeal timely followed.

II. ASSIGNMENTS OF ERROR

Given the vastness of this case, and given that this brief has been cut to 20% of its original length, this section only lists the macroscopic errors, and component errors will be assigned and discussed in the Assignment of Error and Argument portion of the brief (Sec. IV) that follows the Statement of the Case (Sec. III).

The errors to be discussed with particularity in Section IV are:

- A. Error No. 1 – the 4/23/14 Dismissals of Dr. Lynch and Dr. Powers. (Error of Law)
- B. Error No. 2 – the Failure to Reinstate Dr. Lynch and Dr. Powers. (Error of Law, esp. that Denials of Discretionary Review were Substantive Decisions that “handcuffed” the judge.)
- C. Error No. 3: Failure to Default on Liability as a Discovery Sanction. (Abuse of Discretion.)
- D. Error No. 4: Refusal to Instruct the Jury on Collective Responsibility (Team Liability/*Grove* Liability), including the Failure to Instruct on Entity Liability, and the denial of the Plaintiffs' proposed instructions, esp. P-12, P-13 and P-14. (Error of Law)
- E. Error No. 5: Refusal to Properly Instruct the Jury on the Standard of Care as Articulated by the Behrs' Experts (Cossman and Collier) – Including a Variant on *Res Ipsa Loquitur*. (Error of Law)

F. Error No. 6: Disallowing Orthopedic Expert Dr. Collier from Establishing the Standard of Care for Orthopedic Physician's Assistants. (Error of Law)

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J. Error No. 10: Instruction on Error of Judgment on Lack of Informed Consent Facts. (Abuse of Discretion)

K. Error No. 11: The Trial Court Erred Not to Continue the Trial, or Order a New Trial upon an Amended Complaint. (Abuse of Discretion rooted in Errors of Law)

The details of these errors are presented in Section IV, after Section III -- *Statement of the Case* -- which has two parts: *Part A. the Medical Timeline* and *Part B, the Procedural Timeline*.

III. STATEMENT OF THE CASE

A. Medical Timeline Overview

The following medical timeline is presented from the final version of the Deaconess records (298 pages) which can be found at ExD101 in the Defense Exhibits, which was admitted at trial. RP 464. This 298-page version of the Deaconess medical records that are ExD101 can also be

found at CP 2631-2929, which is Exhibit G to the 12/4/17 Declaration of Dr. Chris Anderson. The medical timeline follows, below:

On 12/8/10, Colton Behr, a resident of Whitefish, Montana, was playing basketball in Sandpoint, Idaho. He landed after a quick change of direction, and had substantial pain in his left knee. RP 427-28. Colton was helped up and into his vehicle, and he drove himself to Deaconess Hospital in Spokane. RP 428-29. Colton was admitted to Deaconess ER at 10:01 p.m. on 12/8/10. ExD101-1. (Under RAP 10.4(f) Exhibit D101 will hereinafter be referred to as “MR” for Medical Record, pages MR 1-298.)

The preliminary diagnosis was “possible tibial dislocation.” MR 2. X-rays showed a tibial plateau fracture, and there was intact sensation and movement of the ankle and toes without pain. MR 3. Colton’s pain was “moderate,” and he described prior orthopedic surgeries. MR 3. Colton was placed on the 10th floor, pending surgery, due to lack of space elsewhere. Id. After pain medicine was administered, Colton reported his pain at a “2.” MR 14. Colton signed his consent for surgery on 12/8/10. MR 19. Dr. Timothy Powers of Northwest Orthopedic Specialists (NWOS), on 12/14/10, presented a summary of the 12/9/10 surgery and aftermath in MR 20-21, which reads that Colton (emphasis added):

... was taken to the operating room on 12/9/10, where an open reduction internal fixation of his lateral tibial plateau fracture was performed without complication...He had a slowly evolving

apparent compartment syndrome over the course of several days with increasing pain and ultimately dense numbness over the dorsum of his foot with an inability to dorsiflex his foot by Sunday, the 12th... Ultimately, following a measurement of his compartment pressures on Sunday, 12/12/2010, he was taken to the operating room, Dr. Chris Anderson, for open fasciotomy with release of the anterior and lateral compartments...

NOTE: The tissues were necrotic and Colton's anterior compartment had to be amputated leading to this lawsuit for medical negligence. The trial testimony of Dr. Blasingame – the doctor who removed Colton's dead tissue from his left leg -- can be found at RP 1180-87. The Behrs' account is at CP 255-64 and RP 427-449 (Colton) and RP 374-406 (Cheryl).

The medical records then return to a chronological timeline, at MR 22, with Dr. Patrick Lynch of NWOS indicating on 12/8/10 that Colton had no numbness or tingling of his toes, and a pain of "2/10 in terms of numerically describing his pain." Dr. Lynch told Colton of a risk of infection and warned Colton of several months of recovery from the surgery, and Dr. Lynch indicated that he would do the surgery if Dr. Powers were not available. MR 23.

The tibial repair surgery was done very late on Thursday, 12/9/10, by Dr. Powers. MR 63-65. As part of the 12/9/10 tibial repair, the fascia was opened that contained the compartments of the tissue that later died from compartment pressure. MR 64. (Since the fascia were open, there could not have been compartment syndrome during surgery.) See RP 592-

94, 615-17 & 625 in which Dr. Powers was asked and answered as follows:

A. [Dr. Powers] The compartment would be between the plate and the skin. The plate would be deep to the muscle.

Q. [Mr. Mason] And because that was open, I assume there was no compartment syndrome during the surgery?

A. That's correct.

See also RP 694.

Sometime between midnight on 12/9/10 and 9:30 a.m. on Friday 12/10/10, a physician's assistant checked Colton Behr for compartment syndrome, and noted he was able to wiggle his toes. MR 25. As to the timing being before 9:30 a.m., that was noted by Dr. Collier, Colton's orthopedic expert at RP 696-97, and this fact was not challenged by any defendant, as the early PA note appeared prior to the trauma services note of 9:30 a.m. on 12/10/10 at MR 26.

By noon on 12/10/10, Colton Behr began displaying symptoms of compartment syndrome. MR 101 is the hand-written physical therapy note which indicates that the physical therapist, Ruth Benage, was noticing a lack of sensation, tingling, and loss of range of movement in Colton's toes. Ms. Benage describes this note in more detail in RP 502-508, and the note was entered into the Deaconess system at MR 153 with the additional note that PT Ruth Benage had spoken with the RN (Jennifer),

and indicated that Dr. Lynch was going to be called regarding the symptoms. (Abbreviation reminder: MR 153 is ExD101 at 153.)

ExD103 will be a subject of subsequent discussion, as this document was not timely-disclosed by the Defendants (not provided until 1/30/18), but it shows that NWOS received the message of PT Benage around noon on 12/10/10, and the message was then sent to Dr. Lynch, who did not respond, except to forward it to the absent Dr. Powers.

ExD103. Dr. Powers did not respond because he had left Spokane to go skiing well before 6a.m. on Friday 12/10/10. RP 462-63. At 11:17 p.m. on 12/10/10, Colton Behr's pain had continued to increase, despite heavy medication. MR 150. Colton's increasing pain was such that he was "maxed out" on Norco by 8:32 a.m. on 12/11/10. MR 150. Colton's pain and anxiety continued to increase through Saturday, 12/11/10. MR 150. The NWOS physician's assistant (PA Leann Bach) arrived at Colton's room at 10:45 a.m. on Saturday, 12/11/10. MR 27. Colton had been given 16 Norco in the past 24 hours, but his pain was increasing, and so PA Bach tried to "aspirate" his left knee. MR 27-28. Dr. Anderson was called, and appeared mid-day on 12/11/10 and his note says "No sx [signs] of compartment syndrome." (He missed it per Experts Dr. Collier and Dr. Cossman.) Cheryl Behr had a recollection of that visit that differed from Dr. Anderson's, as compartment syndrome was not mentioned. RP 388

and 393. Over these days, Colton Behr was receiving very large doses of pain medications, as his pain was increasing, not decreasing, after the tibial repair surgery. MR 123-43, and, e.g., RP 876-77. Colton was put on ventilation due to suppressed respiration. MR 123. RP 389, 406-07. Colton continued to express increasing pain, and Dr. Anderson was contacted at 6:20 p.m. on 12/11/10 as the “on call” physician for NWOS. MR 210. Dr. Anderson was called again at 11:02 p.m. on 12/11/10. And Dr. Anderson was called at 6:29 a.m. on 12/12/10. MR 155. The Behrs had been feeling ignored during this time. E.g., RP 392. The records show no more visits by Dr. Anderson to Colton, until Dr. Anderson arrived to see Colton at 11:00 a.m. on Sunday, 12/12/10. MR 29. Dr. Anderson then measured compartment pressures at 11:30 a.m. MR 29. RP 392-93. Colton was then taken for a fasciotomy by Dr. Anderson. MR 80-81 and MR 30. After Colton’s fasciotomy, at 3:26p.m. on 12/12/10, he felt immediate relief. MR 152. RP 394. Colton and Cheryl proceeded home to Whitefish, MT, without knowing his tissues were dead and would need to be removed. RP 447. Colton’s left anterior compartment (that raises his foot) was necrotic, and was removed by Dr. Blasingame, cited above. RP 1180-87, and RP 447-48. Colton thereafter had a drop-foot, precipitating this suit for medical negligence. E.g., 448-49 for the drop-foot condition.

Additional details of the medical facts will be presented in the context of various rulings on appeal, addressed *infra*, after the legal history of the case.

B. Procedural Timeline: Legal History of the Case

As the number of orders and relevant rulings in this case is vast, the history of the case shall largely be provided by the orders in the case, with a few exceptions. Only the most prejudicial errors have been explicitly assigned in this case. Further details will be provided in the argument section (Section IV). The procedural timeline follows:

12/7/12: The Summons and Complaint was filed. CP 1-11.

2/7/13: The Behrs filed a Motion for Default and Answers soon followed. CP 12-35.

1/31/14 through early 2014: Defendants brought a motion for Summary Judgment, after deposing the Behr's Orthopedic expert, Dr. Andrew Collier. CP 48-49, 61-61, & 97-98. This CR 56 motion was made on the raw deposition transcript, before Dr. Collier had reviewed or corrected his deposition under CR 30(e). The Behrs moved to strike deposition excerpts that were filed before the deposition was finalized under CR 30(e). CP 149-164. Additionally, the Behrs brought a motion to compel discovery answers. CP 190-251. Next, the Behrs also brought a counter-motion for summary judgment. CP 265-72. *Dr. Andrew Collier completed his*

deposition corrections and filed his declarations on 2/24/14. CP 323-37. Additional Dr. Collier's declarations were filed on 3/21/14. CP 521-542. Dr. Collier's corrections were timely provided to the court reporter (CP 724-35), and the corrections were part of his deposition under CR 30(e). Dr. Collier's main deposition correction/explanation was that he had testified that Dr. Lynch and Dr. Powers had not "committed" acts that harmed Colton Behr, however, they had negligently "omitted" to do their duties, and that omission was malpractice. CP 521-542 and 724-35.

Defendants then brought a motion to strike Dr. Collier's CR 30(e) deposition corrections under "the Marshall rule." CP 354-63.

The Behrs defended under *Seattle-First Nat. Bank v. Rankin*, 59 Wash. 2d 288, 293-94, 367 P.2d 835, 839 (1962) which holds that both a raw transcript and its corrections are to be admitted, and Plaintiffs rejected that "the Marshall rule" would provide a basis to strike Dr. Collier's corrections even if they occurred after the deposition had been finalized under CR 30(e), as Dr. Collier provided a reason for his correction, and substantial additional evidence supported his statements. CP 637-47.

4/23/14: Order Granting Motion Summary Judgment (in part, and denying in part). CP 800-10. Judge Moreno struck the testimony of Dr. Collier as to Dr. Lynch and Dr. Powers, under "the Marshall rule," and dismissed them from the case. The case proceeded against the remaining

Defendants (Deaconess, NWOS, PA Bach, and Dr. Anderson). Expert Dr. Collier's opinions were not otherwise stricken or limited. CP 800-10.

Note: Discretionary review of this partial dismissal was sought and denied by Division III, on the basis that full relief at trial remained possible.

May through December of 2014: Cheryl and Colton Behr brought a motion for summary judgment on liability against Deaconess Hospital. CP 1101-07. The Behrs supported their motion with the declarations of Nursing Expert Linda Newman (CP 1138-46; CP 1574-1604; CP 1466-1501), and Orthopedic Expert Dr. Andrew Collier (CP 1446-65). Also, the Behrs brought another motion to compel Defendants' incomplete and absent answers to the Plaintiffs' discovery questions. CP 1120-1135.

Deaconess responded with legal arguments (CP 1376-1412) and with requests to strike testimony (CP 1502-04). However, Deaconess presented no factual rebuttal to the Behrs' CR 56 motion on liability, relying upon the Division One case, *Grove v. Peacehealth*, which had denied "team liability." Division One was reversed by the State Supreme Court in *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wash. 2d 136, 341 P.3d 261 (2014). The 12/11/14 *Grove* decision came down, after oral argument, but before the Behr trial court made its 12/12/14 decision. The Behrs promptly submitted *Grove* to the trial court. CP 1636-1653.

12/12/14: Court's Decision re: Summary Judgment. The Behr's motion for partial summary judgment was denied. CP 1686-1696.

Early 2015: The Behrs had also brought a motion to limit the number of defense experts. CP 1135-37. The various rulings and motions from late 2014 through early 2015 can be summarized in the orders, below:

2/19/15: Order Appointing Discovery Master. CP 1734–1740.

3/27/15: Order Staying Proceedings. CP 1905-1907.

4/02/15: Order Denying Motion Reinstate. CP 1927-1936.

5/5/15: Court's Letter Decision (denying reinstatement of Powers and Lynch). CP 2009-10.

5/19/15: Order Denying Plaintiffs' Motion for Reconsideration of Reinstatement of Powers and Lynch. CP 2035 – 2039.

The stay issued as the Behrs again sought discretionary review, especially of the trial court's denial of their motion to reinstate Dr. Lynch and Dr. Powers. *Note:* Division III still declined discretionary review, reserving appeal for after trial, if then necessary. Unfortunately, the trial court later treated the Division III denials of interlocutory review to be substantive decisions, as will be shown, *infra*.

To save pages, the remainder of the procedural timeline will be presented through the Orders, with more specific citations to the record being made in Section IV, *infra*. The most relevant orders were:

12/01/17: Order re Motion to Strike. CP 2486-2487. This was the Behrs' motion to strike the Defendants' motions to strike the Behrs' experts for Defendants' failure to use the discovery master appointed on their motion

in 2015. This motion was denied. Other numerous motions to strike, and mutual summary judgment motions, were re-set to 12/20/17. CP 3131-3133. Trial was continued to 5/7/18, and all motions were moved to 2/9/18. CP 3585- 585. The hearing was moved again, and all competing motions were finally heard on 3/7/18.

3/07/18: Order Granting and Denying Motions. CP 3675-3682. The order summarizes the motions at CP 3675:

THIS MATTER came before the Court on Deaconess Hospital's Motion for Partial Summary Judgment, Deaconess Hospital's Renewed Motion to Strike Plaintiffs' New Summary Judgment Opinions, Defendants Bach and Power's Motion to Exclude Witnesses Christina Tapia, Ph.D. and John Fountaine, M.A., Defendants Bach and Powers Motion to Strike Expert Witness David Cossman, M.D., Defendant Northwest Orthopedic Specialists, PLLC's Motion to Strike Dr. Collier Affidavit, Plaintiffs' Motion for Partial Summary Judgment, Plaintiffs' Motion to Strike Dr. Anderson, Plaintiffs' Motion to Strike Shaun Sigler, and Plaintiffs' Motion to Strike all Evidence Re: NWOS and Bach. Oral argument was held on February 9, 2018, at 9 a.m.

In the 3/7/18 Order: (a) the Defense's motion to strike Plaintiffs' experts -- Dr. Cossman, John Fountaine, and Christine Tapia -- was denied; (b) Deaconess was granted partial summary judgment on one definition of corporate liability; (c) the Behrs' partial summary judgment motions were denied, as was (d) their motion to strike Dr. Anderson as an expert, for not having been disclosed as such; (e) along with their motion to strike Shaun Sigler (a late-disclosed PA expert); and (f) Plaintiffs'

motion to strike trial testimony from NWOS and PA Bach for complete failure to answer discovery was also denied; but (g) leave was granted for follow-up discovery to the NWOS discovery answers provided finally to the Behrs on 1/30/18. CP 3680-81. Finally, (h) Colton Behr was held to have no responsibility for the failure of medical providers to timely diagnose his compartment syndrome. CP 3681.

3/29/18: Order Denying Motion Reconsideration. CP: 4158–59 This order was the trial court’s summary refusal of the Behrs’ request that the court revisit the 3/7/18 rulings.

4/25/18: Order Quashing Defense SDT to Sodemann Document

Services. CP: 5153-53. The Behrs’ continuing medical records request produced the 12/10/10 (12:55 p.m.) email in which PT Benage’s message about Colton’s symptoms of compartment syndrome, which was shown to have been received by NWOS and sent to Dr. Lynch, who forwarded the message to the absent Dr. Powers (all on 12/10/10), without NWOS responding. (ExD103, CP 3951). In response, the Defendants sought to depose the medical records provider, Sodemann, implying that a request for medical records was an ex parte contact with a defendant. Plaintiffs brought a motion to quash the deposition as beyond the discovery cut-off, and the Behrs filed the Declaration of Robert Aronson (CP 4557-63) which stated that a patient, or his agent, may always request the patient’s

medical records, even if the medical provider is an opposing party in a lawsuit, as patients always have a right to their records. CP: 5153-53 (quashing deposition of medical record provider, Sodemann).

4/27/18: Order Denying Plaintiff Motion to Reinstate Dr. Lynch. CP 5442–46. After the discovery of the 12/10/10 NWOS electronic messages (CP 3951), which was discovered subsequent to the 3/7/18 denial of the motions to reinstate Dr. Powers and Dr. Lynch, the Behrs renewed their motion to reinstate Dr. Powers and Dr. Lynch, based upon this new information. CP 4418-34. In support of their motion, the Behrs filed the deposition of NWOS employee, Marcie Loshbaugh, who was Dr. Lynch’s practice coordinator. CP 3925-52.

Ms. Loshbaugh confirmed the NWOS system of symbols and abbreviations that indicated that Dr. Lynch had received the PT Benage message at 12:55 p.m. on Friday 12/10/10, and which Dr. Lynch had forwarded to Dr. Powers on 12/10/10, with no NWOS response to the PT Benage message. CP 3951 has that 12/10/10 message, as does ExD103. The Behrs also filed the similar deposition testimony of NWOS administrator, Deneen Tate. CP 4025-49. The internal NWOS email is also at CP 4048.

The motion to reinstate Dr. Powers and/or Dr. Lynch was denied, as were later requests to revisit the matter before and after trial (see below)

and see, e.g., CP 5562-65 for the 5/02/18 Order Denying Plaintiffs' Motion to Reconsider the 4/27/18 Order. (The written order denying reinstatement of Dr. Powers was entered on 5/17/18. CP 5761-63, and motion to revisit was denied on 5/23/18 by written order. CP 5835-36.)

5/02/2018 Order Denying Plaintiff Motion to Depose Deaconess

Employees Based upon Late Disclosures. The Behrs sought leave to follow-up on these late disclosures from NWOS agents: CEO John Braun, Marcie Loshbaugh and Deneen Tate. This motion was denied (CP 5559–61), as was the motion for trial continuance (next section).

5/02/2018 Order Denying Plaintiff Motion to Continue Trial. The Behrs also sought trial continuance to follow-up on these late disclosures, which was denied. CP 5557–58.

5/04/2018 Order Granting Defendants Motion for Relief. Defendants brought a motion against the Behrs' motion to strike Dr. Lynch's declared testimony that had been contradicted by the late disclosures of NWOS employees Deneen Tate and Marcie Losbaugh. The trial court granted the relief by declaring that Dr. Lynch had not been misleading. CP 5618-20.

5/04/2018 Order Grant Defendants Motion to Strike Late-Disclosed Opinions of Linda Newman (Plaintiffs' Nursing Expert). On the same day that the court denied the Behrs' motion for trial continuance, noted above, the court struck the supplemental declaration of the Plaintiffs'

Nursing expert, Linda Newman (CP 1466-1501), as late-disclosed opinions, without *Burnet* analysis or findings. CP 5621-23.

05/07/2018 Orders Dismissing Litigants. Given the trial court's rulings, the Behrs non-suited PA Bach and Dr. Anderson under CR 41(a)(1), proceeding to trial against Deaconess and NWOS for the acts of their agents. CP 5640-43. (Jury Selection and Motions in Limine began 5/7/18.)

Deaconess Orders During Trial and After: After the Plaintiffs rested, Deaconess Hospital was dismissed as a matter of law, and reconsideration denied. The relevant orders are:

05/17/2018 Order re Deaconess Motions in Limine. CP 5756-60.

05/25/2018 Order Dismissing Litigant (Deaconess) and Granting Judgment as a Matter of Law. CP 5876-79.

06/21/2018 Order Deny Motion Reconsideration of the Dismissal of Deaconess. CP 6813-15.

The rulings underlying the dismissal as a matter of law will be discussed in Section IV, below. Also, oral rulings were made on motions in limine (RP 164-287), but the written orders were not entered until after trial:

06/27/2018 Order re Defendants NWOS Motion in Limine. CP 6835-44

06/27/2018 Order re Motions in Limine. CP 6828-32.

Northwest Orthopedic Specialists (NWOS) also moved for judgment as a matter of law, which was granted in part (next section).

5/22/2018 Order re Defendants (NWOS) Motion for Judgment as a Matter of Law. CP 5833–34. The court ruled that the orthopedic surgical expert, Dr. Andrew Collier, could not establish the standard of care for an orthopedic PA, and thus NWOS was found not liable for the omissions of PA Bach; the issue of the “collective responsibility” (or entity/team liability) of NWOS was reserved for jury instruction proceedings; and NWOS motion to have no liability for Dr. Anderson was denied. CP 5834. (The jury instruction discussion is reserved for Section IV, below.)

By oral ruling (memorialized in written order on 6/27/18), the trial court limited the period of possible malpractice for the jury to consider from 3p.m. on 12/11/10 until the fasciotomy on 12/12/10. CP 6833-34. All NWOS actions by any NWOS agents prior to 3p.m. on 12/11/10 were dismissed, based upon the prior dismissals of Dr. Powers and Dr. Lynch, and based upon prior rulings forbidding discussion of 12/10/10. The jury was only allowed to consider behavior of Dr. Anderson starting at 3p.m. on 12/11/10. CP 6834 at line 1. On the third day of deliberations, the jury returned a 10-2 defense verdict. CP 6601-02.

D. Procedural Timeline Continued: Post-trial motions

The Behrs made another attempt to have the trial court remedy its errors on appeal, and these motions were denied by the following orders:

06/21/18 Order Denying Motion New Trial. CP 6810-12.

07/11/18 Order Denying Motion/Petition. CP 6845-46.

This appeal timely followed.

IV. ASSIGNMENTS OF ERROR AND ARGUMENT

Because of the size of the record, and because of the number of errors appealed (despite severe editing and compression), the errors and argument will each be presented together in their respective sections.

A. Error No. 1 – the 4/23/14 Dismissals of Dr. Lynch and Dr. Powers

Issue No.1.1: Should the trial court have applied the “Marshall Rule” to strike Orthopedic Expert Dr. Andrew Collier’s CR 30(e) deposition corrections from consideration regarding Defendants Dr. Lynch and Dr. Powers, and then to dismiss Dr. Powers and Dr. Lynch under CR 56(c)?

Answer: No. The governing authority is clear that raw deposition transcripts and their corrections *both* come into evidence. *Seattle-First Nat. Bank v. Rankin*, 59 Wash. 2d 288, 293–94, 367 P.2d 835, 839 (1962). This creates a question of fact, not an issue of striking testimony.

Issue No. 1.2: Did the entire surgical team/entity of Northwest Orthopedic Specialists, and their agents, have responsibility for Colton Behr?

Answer: Yes. By the sworn admission of Dr. Powers, by the testimony of Orthopedic Expert Dr. Andrew Collier, and by *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wash. 2d 136, 341 P.3d 261 (2014) (and authorities cited therein), Dr. Powers, Dr. Lynch, and the entire NWOS medical staff

had a collective responsibility – a team and entity duty – to Colton Behr for competent post-surgical care. That duty was breached, causing Colton permanent losses of function and tissues of his lower left leg.

1. Argument Against the 4/23/14 Dismissal

In his answer to the Behrs' Interrogatory No. 39, regarding who at NWOS was responsible for Colton Behr during the periods of his post-surgical care, Dr. Timothy Powers of NWOS stated that there was no particular person assigned to Colton's care, and Dr. Powers then provided the sworn answer (emphasis added): "...there is a shared responsibility with patient care..." CP 320-22, esp. 321.

Orthopedic Surgical Expert, Dr. Andrew Collier, was deposed on 1/29/14, and in that testimony he said that Dr. Powers and Dr. Lynch had not "committed" medical negligence, and Dr. Collier clarified, under CR 30(e), that they had committed negligence by "omitting" to provide proper post-surgical care for Colton Behr. CP 521-43, 323-337, with the CR 30(e) deposition corrections at CP 531-41.

The Defendants filed the raw deposition pages -- not finalized under CR 30(e) -- of Dr. Collier, e.g., CP 348-53, and then the Defendants moved to strike Dr. Collier's CR 30(e) corrected deposition testimony under "the Marshall Rule" (e.g., CP 348-63) arguing that Dr. Collier was absolutely prohibited from contradicting his raw deposition transcript. The

Defendants cited *Marshall v. AC & S Inc.*, 56 Wash. App. 181, 183, 782 P.2d 1107, 1108 (1989), a case in which Marshall (plaintiff in that case) changed his story at the last moment to avoid summary judgment on statute of limitations grounds, and the court found Marshall's evidence insufficient, and dismissed his case as time-barred. *Id.*

The Behrs opposed the motion to strike Dr. Collier's opinions by emphasizing: First, (a) that Dr. Collier deposition corrections were "**intra-deposition**," and thus Defendants' alleged contradictions were "within" the same deposition, citing CR 30(e) and citing *Seattle-First Nat. Bank v. Rankin*, 59 Wash. 2d 288, 293-94, 367 P.2d 835, 839 (1962) (both the raw transcript and the corrections are admissible). Second, (b) that "the Marshall Rule" does not allow for excluding testimony when one gives a reason for the change in testimony, even if Dr. Collier had not been merely correcting his deposition under CR 30(e). See, e.g., CP 637-47, esp. 644-45 for the *Seattle-First v. Rankin* discussion. See also CP 149-64.

The *Behrs' point (a)* is self-evident under *Seattle-First Nat. Bank v. Rankin*, *supra*, under CR 30(e). A contrast with Dr. Collier's circumstances can be found in *Viereck v. Fibreboard Corp.*, 81 Wash. App. 579, 588, 915 P.2d 581, 586 (1996), where the deponent refused to correct or sign his deposition, and it was finalized under CR 30(e) and then admitted. *Viereck v. Fibreboard Corp.*, 81 Wash. App. at 588.

As to the **Behrs’ point (b)**, rejecting the application of the “Marshall rule,” the Behrs cited myriad cases (e.g., CP 637-47) distinguishing the Marshall rule, as the case law is clear that the Marshall rule is a *sufficiency of the evidence rule*, **not an admissibility rule**. See *Schonauer v. DCR Entm’t, Inc.*, 79 Wash. App. 808, 817–18, 905 P.2d 392, 398 (1995), and *Appendix No. 1*. In Behr, the medical records, other testimony, and Dr. Collier’s CR 30(e) explanations, all provide sufficient evidence, such that the trial court should not have dismissed NWOS employees, Dr. Lynch and Dr. Powers (who had retained responsibility for Colton Behr’s post-surgical care). The court, in *Beers v. Ross*, 137 Wash.App. 566, 571-72, 154 P.3d 277 (2007) (and cases cited therein), extensively reviewed the clarification of the Marshall Rule as a sufficiency of the evidence rule, when it reversed the trial court’s summary judgment ruling and reversed the trial court’s use of the “Marshall rule” to exclude a material declaration. Id. The *Beers* appellate court noted its frustration that the trial court relied upon “on a widespread misunderstanding of *Marshall*,” *Beers v. Ross*, 137 Wash. App. at 571. Additionally, the 2014 case, *Taylor v. Bell*, noted that the 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. *Taylor v. Bell*, 185 Wash. App. 270, 294, 340 P.3d 951, 964 (2014), and see *Appendix No. 2*.

Application of Taylor, Beers, DCR and other cases to Dr. Andrew

Collier's Expert Opinions: Dr. Collier's testimony was a deposition correction under *Seattle-First v. Rankin*, and should have been admitted simply as part of his deposition under CR 30(e). However, even under the Marshall Rule, Dr. Collier simply clarified the difference between "commission" of malpractice versus "malpractice by omission." CP 521-43, 323-337. Dr. Andrew Collier's opinions should not have been stricken.

Additionally, as will be shown below, once Orthopedic 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 should have been admitted by the court (see discussion below); however, they were struck. ***NOTE on Dr. Lynch versus the Evidence:*** In the 3/3/14 Declaration of Dr. Lynch, CP 413-15, Dr. Lynch stated that the PT Ruth Benage message "did not come to my [his] attention." However, the 12/10/10 *NWOS e-message* discovered in early 2018, as explained by *NWOS agents*, Marcie Loshbaugh (CP 3925-52) and Deneen Tate (CP 4025-49) show that Dr. Lynch forwarded the 12/10/10 *NWOS e-message* to Dr. Powers on that same day. Related facts at CP 3973-4025, 3904-12, 3685-3808. ***NOTE on Discretionary Review:*** The trial prejudice of the dismissal of Dr. Powers and Dr. Lynch was obvious to the Behrs at the

time of the Order of 4/23/14, which is why discretionary review was sought (review was denied in Division III case no. 325130, and again in cases no. 350591, and 333345, on the theory that complete relief for the Behrs was still possible at trial, and any appeal could follow trial).

2. Trial Prejudice of Rulings Excluding Dr. Powers and Dr. Lynch

Even though Division III was clear that no substantive ruling was made in denying discretionary review, the following sections will show, *the trial court treated the denials of interlocutory review as substantive affirmations of the prior errors of law*. In addition to the 2014 errors of law, the 2018 trial court treated the overbroad 2014 Marshall Rule exclusions as binding on subsequent trial judges (as “handcuffs” at e.g., RP 1736), as is also shown below. The ultimate exclusion of essentially all testimony regarding Friday 12/10/10 was highly prejudicial to the Behrs’ case, and the 4/23/14 exclusion of parts of Expert Dr. Collier’s testimony sowed confusion, from trial rulings depriving the jury of material facts, through the rulings on jury instructions, as will be shown, *infra*.

B. Error No. 2 – the Failure to Reinstate Dr. Lynch and Dr. Powers

Issue No. 2.1: After *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wash. 2d 136 (2014) was issued, should Dr. Powers and Dr. Lynch have been reinstated on this new basis? Answer: Yes. The case authority was clear.

Issue No. 2.2: Should Dr. Powers and Dr. Lynch have been reinstated as Defendants after the Behrs learned (only in 2018) of that *12/10/10 NWOS electronic message* that showed that NWOS received PT Benage's phone message at 12:55 p.m. on Friday, 12/10/10, and that showed that the PT's message went to NWOS to Dr. Lynch who forwarded it to the absent Dr. Powers, and that neither Dr. Powers nor Dr. Lynch responded to the PT's account of Colton's compartment syndrome symptoms? Answer: Yes. Dr. Powers and Dr. Lynch were clearly directly responsible for Colton Behr's negligent lack of care, and they were responsible for the negligent lack of response to Colton's symptoms of compartment syndrome. Orthopedic Expert Dr. Collier's additional declaration, and the testimony it portended, CP 3953-3962 (filed on 3/28/18), should have been considered and allowed by the trial court. *Dr. Collier was opining on new facts unknown prior to the 2018 late-disclosures from NWOS.*

1. Argument in Support of Reinstating Dr. Powers and Dr. Lynch

The Behrs' Motion and Memorandum to Reinstate Dr. Lynch as a defendant is at CP 3685-96, and the Exhibits are at CP 3697-3716 & 3717-3808. The Motion and Memorandum to Reinstate Dr. Powers is at CP 4418-34. Correcting the 4/23/14 evidentiary ruling of Judge Moreno (CP 800-10) would have been a sufficient basis to reinstate Dr. Powers and Dr. Lynch, even without the 2018 late-discovery of the 12/10/10 *NWOS e-*

message. **NOTE:** This 12/10/10 NWOS message will hereinafter be referred to as the “NWOS e-message.” The *NWOS e-message* has four vital aspects: (a) It shows that PT Benage’s report of Colton’s symptoms was received, (b) was sent by NWOS to Dr. Lynch, and (c) Dr. Lynch sent the PT message to Dr. Powers, and (d) neither doctor responded further.

One more basis (of many) to reinstate Dr. Powers and Dr. Lynch is presented here: First, refresh upon Dr. Powers’ statement at CP 321 when his sworn answer to Plaintiffs’ ROG 39 about patient assignments was that they all had “shared responsibility” for Colton’s post-surgical care. Then, after the NWOS e-message was uncovered, Dr. Lynch filed a declaration on 3/23/18 (CP 3867-68), which read, in relevant part:

I [Lynch] was not the on call surgeon for Northwest Orthopedic Specialists for hospitalized patients at Deaconess Medical Center on December 10, 2010. I was likewise not Colton Behr’s attending physician at that time... While I admitted Mr. Behr, once Mr. Behr decided to undergo surgery by Dr. Powers on December 9, 2010, Dr. Powers became his attending physician.

CP 3867. ***This change of story is material and is prejudicial.*** Instead of allowing the Behrs to follow-up on these changing stories, as will be cited below, Trial Judge Julie McKay felt “handcuffed” by prior interlocutory decisions, and Judge McKay made the explicit error of law to presume that the prior denials of discretionary review were substantive decisions on the merits of the interlocutory decisions. ***NOTE: Timeline of Trial***

Judges: Judge Moreno had dismissed Dr. Powers and Dr. Lynch on 4/23/14, but she had accepted Dr. Collier’s Physician’s Assistant (PA) standard of care testimony. CP 800-10. Judge Cooney had refused to reinstate Dr. Powers and Dr. Lynch in May of 2015. (See CP 2009-10, 5/5/15 Letter Decision denying reinstatement and CP 2035 – 2039, 5/19/15 Order Denying Reconsideration.) Judge Julie McKay made the subsequent substantive rulings in 2017 through trial, and post-trial motions in May and June of 2018, declaring herself “handcuffed” by prior rulings, e.g, RP 1736 – except Judge McKay “unhandcuffed” herself when she denied that Dr. Collier could present the standard of care of an orthopedic PA, contrary to Judge Moreno’s 4/23/14 ruling.

At the close of trial evidence on 5/22/18, NWOS brought a motion to dismiss, and Judge McKay stated at RP 1736, lines 16 to 21:

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.

As discretionary review of the decision had never been accepted, it was error of law for Judge McKay to believe that a substantive determination had been made. On the face of RAP 2.3(c), there is no prejudice to a denial of discretionary review. (See *Appendix No. 3*.) However, Judge McKay did not treat the prior rulings as “tentative and subject to change,”

but as “handcuffs.” This was an error of law. Compare Judge McKay’s quote, above, with *Minehart v. Morning Star Boys Ranch, Inc.*, which emphasizes that discretionary review is typically denied because court rulings on excluding evidence are “tentative and subject to change...” *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wash. App. 457, 466-68, 232 P.3d 591, 596 (2010) (and see *Appendix No. 4*).

To reiterate, Judge McKay regularly treated the denials of RAP 2.3 review as substantive decisions, which is an error of law. E.g., RP: 33-34, 55-57. Instead of believing the trial court was “handcuffed,” the trial court could have reinstated Dr. Powers and Dr. Lynch at any time, even without the new evidence that emerged just before Orthopedic Expert Andrew Collier’s declaration of supplemental opinions on 3/28/18. CP 3953-3962. For case law on how the court is not “handcuffed, see, e.g., *Teter v. Deck*, 174 Wash. 2d 207, 274 P.3d 336 (2012), and see the *Washburn* and *Chaffee* (next paragraph). Additionally, *Shephard v. Gove*, 26 Wash. 452, 454, 67 P. 256, 257 (1901) was also cited to the court in the Behrs’ Motion for a New Trial, regarding subsequent judges being able to, and encouraged to, correct prior judges’ legal errors, to avoid the need for appeal. See *Appendix No. 5*, and see CP 6612-49, esp. 6613-14.

It is a clear error of law that the trial court believed that its “hands were tied,” preventing the trial court from reinstating Dr. Lynch and Dr.

Powers as Defendants, contrary to *Washburn v. Beatt Equip. Co.*, 120 Wash. 2d 246, 300–01, 840 P.2d 860, 890 (1992), and contrary to *Chaffee v. Keller Rohrback LLP*, 200 Wash. App. 66, 73–77, 401 P.3d 418, 422–24 (2017). *Washburn* and *Chaffee* both stand for the proposition that trial courts should freely “revisit” prior decisions without thinking they are constrained by CR 59 or CR 60. Judge McKay was not “handcuffed” by prior interlocutory rulings, and the trial judge could have reinstated Dr. Powers and Dr. Lynch at any time short of final judgment, per *Washburn*, *Chaffee*, *Teter v. Deck*, and cases cited therein. Judge McKay reiterates her misunderstanding of the law at RP 1855-56, in her 6/21/18 rulings on a motion for a new trial (emphasis added):

So let me start with the issue of reinstating Drs. Lynch and Powers. Again, this issue was litigated, although plaintiff argues that this Court has the authority to correct Judge Moreno's error and reinstate. That very issue went to the Court of Appeals on a couple of occasions and was litigated. It was addressed by Judge Cooney and then went to the Court of Appeals, as well as the Supreme Court, being litigated.

This trial court misunderstanding of the meaning of a denial of discretionary review (mistaking it to be a substantive decision) is an error of law that was highly prejudicial to the Behrs, given how the trial court felt “handcuffed,” e.g., on 5/22/18 at RP 1736, lines 16 to 21.

The 1/30/18 production of the *NWOS e-message* by the CEO John Braun and new counsel (Mr. Ramsden) -- as subsequently explicated by

NWOS employees Marcie Loshbaugh and Deneen Tate -- *opened new facts of liability for Dr. Powers and Dr. Lynch (and NWOS)* that should have led to their reinstatement. Also, the trial court erred to strike Dr. Collier's and Dr. Cossman's expert opinions based upon these new and expanded facts. CP 3685-96, 3697-3716, 3717-3808 & 4418-34.

2. Trial Prejudice of Failing to Reinstate Drs. Powers and Dr. Lynch

After the new *Grove* authority, *supra*, issued from the State Supreme Court on 12/11/14, and after the 12/10/10 *NWOS e-message* and related facts were discovered in March of 2018, there was ample reason to allow testimony at trial regarding the failures of (a) Dr. Lynch, (b) Dr. Powers, and (c) other NWOS staff and agents, to act on the 12/10/10 *NWOS e-message*, especially as Dr. Powers' testimony showed that he would have done a fasciotomy (would not "wait and see"), which goes to the harm of the failure to get a response from Dr. Powers on 12/10/10.

The trial court, instead, in reliance upon the 4/23/14 Order dismissing Dr. Lynch and Dr. Powers, precluded any allegation of liability regarding the substantive events implicating NWOS liability by any of its agents on 12/10/10. See CP 6833-34 for the Order regarding the Ruling of 5/23/18 (RP 1776), and see the sections, below, for specifics on the motions in limine and jury instruction issues. For example, the "collective responsibility" and "*Grove*" liability discussion in **Section D**, below, show

how prejudicial it was to the Behrs for the trial court to fail to reinstate Dr. Lynch and Dr. Powers. One of many examples from the course of trial can be found at RP 725, lines 10 to 23, where Orthopedic Expert Dr. Collier's testimony was material, and yet Collier's testimony was excluded on the basis of the trial court's error of law ("prior orders" rooted in error).

It is also significant that the standard of care and causation expert, Vascular Surgeon, Dr. David Cossman, testified 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 at RP 1253, lines 4-14, and RP 1254, lines 1-10, and see *Appendix No. 6*. The Behrs were directly prejudiced by being unable to present their theory of the case, and by the further limitations made upon their case by rulings on motions in limine. See, e.g, the use of "prior orders" on RP 725, lines 11-20, to prevent trial testimony.

C. Error No. 3: Failure to Default on Liability as a Discovery Sanction

Issue 3.1: Did the failure of NWOS, Dr. Lynch, and Dr. Powers to produce the 12/10/10 *NWOS e-message* in response to the Behrs' discovery requests amount to a sufficiently grievous withholding of relevant evidence as to merit a finding of liability as a sanction for their discovery violation? Answer: Yes. The court abused its discretion not to default NWOS and its doctors on liability for the egregious discovery

violations of NWOS, especially regarding the NWOS e-message, and the responsibility schedules (meaning which medical providers were assigned when and where in general, and when to Colton in particular).

1. Argument in Favor of Default as a Sanction

NWOS was spectacularly defiant in not answering discovery, after stalling the Behrs' 2014 and 2015 motions to compel discovery. Finally, on 12/6/17, the Behrs brought a motion to exclude NWOS evidence from trial for refusal to answer interrogatories and requests for production. CP 2936-42. NWOS responded to the motion with insufficient answers to ROGS and RFPS, and then NWOS provided a supplement on 1/30/18. The review of the answers and subsequent depositions are summarized, with exhibits, in CP 4694-4705, which reveals the most egregious of discovery violations. For example, *REPLY Dec. of Plaintiffs' Counsel on NWOS Refusing to Answer Discovery* filed on 4/17/18, detailed the failures of NWOS and its agents to produce messages or schedules. CP 4694-4705. See also CP 3904-3912 and exhibits at CP 3973-99, and see CP 4000-05, and exhibits at CP 4006-24. And see *Appendix No. 7*.

NWOS's failure to produce the *12/10/10 NWOS e-message* was compounded by the trial court refusing to accept the updated 3/28/18 opinions of Expert Dr. Collier provided in response to NWOS' late-disclosed information. CP 3953-3962. The court's refusal to accept these

opinions was repeated in the denials of requests to reinstate Dr. Powers and Dr. Lynch, and those orders were prejudicial in the motions in limine, at trial, and in jury instructions (detailed further in following sections).

The Behrs ask the court to default NWOS (and Lynch and Powers), citing *Magana v. Hyundai Motor Am.* 167 Wash. 2d 570, 589, 220 P.3d 191, 200 (2009) (and *Appendix No. 8*) regarding prejudice in trial preparation as a basis for default as a sanction. NWOS should be defaulted for the bad faith behavior of the NWOS defendants in this case. CP 4000-24; CP 3904-3912; CP 3973-99. **NOTE:** And it was error of the court to issue the Order of 5/4/18, CP 5618-20, that Dr. Lynch had not been misleading, as the substantial evidence contradicts that finding. *Id.*

The behavior of NWOS and Dr. Lynch (and to a lesser extent of Dr. Powers) is egregious, and is in pure violation of *Fisons* and its heirs. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 342, 858 P.2d 1054, 1077 (1993) (“a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials”), and see *Appendix No. 9*. A new trial is certainly in order, and default on liability is requested. *Magana*, supra.

2. Trial Prejudice of NWOS Discovery Violations

The trial prejudice of NWOS discovery withholding was direct and enormous, as it led the trial court to preclude testimony regarding NWOS

failures to properly monitor and respond to Colton's symptoms on Friday 12/10/10, and the withholding led to the dismissal -- and refusal to reinstate -- Dr. Powers and Dr. Lynch as Defendants. Subsequently, the dismissals were used to further limit the Behrs' case at trial in the rulings on Motions in Limine. E.g., RP 188-205, and RP 232-247. The egregious and willful discovery violations merit default on liability. *Magana v. Hyundai Motor Am.*, 167 Wash. 2d 570, 589, 220 P.3d 191, 200 (2009). Also, the facts of the case, properly admitted, point to the liability of NWOS and its agents as a matter of law. This relief is requested upon review, with the remand for trial only in regards of damages.

D. Error No. 4: Refusal to Instruct the Jury on Collective

Responsibility (Team Liability/*Grove* Liability/*Hansch* Liability)

Issue No. 4.1: Did the court prejudicially err to not instruct the jury on the collective liability (aka "team liability" or "*Grove* liability")? Answer:

Yes. There was expert testimony to support the instruction.

Issue No. 4.2: Did the trial court commit an error of law to insist that for an entity to be liable the Behrs would have to point to a particular employee that breached the standard of care? Answer: Yes, NWOS as an entity is a "healthcare provider" under RCW 7.70.020, and as a member of a healthcare entity, Orthopedic Expert Dr. Andrew Collier (as co-owner of a surgical entity) was competent to indicate that the entity itself was liable,

even if no particular agent of the entity could be identified as having committed the medical negligence at issue.

1.a. Argument: Law of Prejudicial (“Non-Harmless”) Instructions

The law of prejudicial (“non-harmless”) instructions is as follows:

(i) An instruction that misstates the law and infringes upon the party's ability to argue his or her theory of the case is erroneous. *Price v. Department of Labor & Indus.*, 101 Wash.2d 520, 529, 682 P.2d 307 (1984); *Goodman v. Boeing Co.*, 75 Wash.App. 60, 68, 877 P.2d 703 (1994) (citing *Thomas v. French*, 99 Wash.2d 95, 104, 659 P.2d 1097 (1983)). (ii) Appellate courts presume prejudice when the trial court gives an erroneous instruction on behalf of the party in whose favor the verdict was returned, unless it affirmatively appears that the instruction was harmless. *State v. Wanrow*, 88 Wash.2d 221, 237, 559 P.2d 548 (1977), and see *Price v. Dep't of Labor & Indus. of State of Wash.*, 101 Wash. 2d 520, 528–29, 682 P.2d 307, 311–12 (1984) (reversal if the party could not argue their theory of the case in the instructions), and *Appendix No. 10*.

Standard of Review: This cited law applies the standard of review appropriate to all arguments in this brief.

1.b. Argument: Failure to Instruct on Entity Liability

Judge McKay continued to express her confusion in her ruling of 5/22/18, at RP 1736-38, which refused to apply *Grove v. Peacehealth* to

NWOS because Dr. Lynch and Dr. Powers were already determined (in error) to be not negligent. See *Appendix No. 11* for ruling quotations. The trial court's view was prejudicially narrow, and the ruling was not consistent with the expert opinion provided by the Behrs' experts.

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 Behrs presented proposed instructions on NWOS as a healthcare provider, as a "team," and as an "entity" under theories of "collective responsibility." The trial court's denial of the use of these instructions meant the Behrs could not sufficiently, let alone fully, argue their case. (Plaintiffs' Proposed Instructions are at CP 5501-28, and in *Appendix No. 12*.) *Instruction P-12* presented NWOS as a "healthcare provider" under RCW 7.70.020(3); *Instruction P-13* presented "team liability" from *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wash. 2d 136, 341 P.3d 261 (2014), and *Instruction P-14* clarified that no particular individual need be identified as negligent if the care by the entity was

negligent citing *Hansch v. Hackett*, 190 Wash. 97, 66 P.2d 1129 (1937), cited by *Grove*, 182 Wash. 2d 136 at 149 (2014).

2. Trial Prejudice of Refusing *Grove* and *Hansch* Instructions

Not only were the Behrs deprived of presenting their *Grove* and *Hansch* theories of the case (argued above), but, also, 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 1257-59, and see *Appendix No. 13*. Dr. Cossman's testimony supports that of Orthopedic Expert Dr. Andrew Collier, and Dr. Collier should have been able to present his "collective" liability standard of care, and Dr. Cossman's testimony, and such of Dr. Collier's trial testimony that survived limine orders, was sufficient to instruct the jury on the *Grove* "team" liability and the "entity" liability theories (discussed further, below). The testimony and the instructions should have been allowed.

In the deposition of NWOS expert, Dr. Hans Moller was clear he had no expert testimony rebutting Dr. Collier's (and Dr. Cossman's) theories of entity liability. CP 4291-4337, and see *Appendix No. 14*.

Orthopedic Expert Dr. Andrew Collier's, and Vascular Surgical Expert Dr. David Cossman's, standard of care testimony about the liability

of entities for the care of those for whom they have taken responsibility was unrebutted. Summary judgment should have been granted for the Behrs, and it was error of law for the trial court not to find liability for NWOS and its agents on 3/7/18. CP 3675-82. In any event, Colton and Cheryl Behr should have been able to present their full theory at trial, which was supported by expert testimony.

The court's exclusion of Dr. Andrew Collier's testimony rested upon legal error, and those legal errors, as well as abuses of discretion, further prejudiced the Behrs at trial by preventing them from instructing the jury on the theories of their case, for which enough evidence to present the instruction had been provided at trial. If all of Dr. Andrew Collier's expert testimony had been allowed, in concert with that of Dr. David Cossman, the factual support -- in favor of liability under the appropriate instructions -- would have been overwhelming.

E. Error No. 5: Refusal to Properly Instruct the Jury on the Standard of Care as Articulated by the Behrs' Experts (Cossman and Collier) – Including a Variant of Res Ipsa Loquitur

Issue No. 5: Should the instructions have allowed for the jury to consider the Plaintiffs' vascular expert (Dr. David Cossman's) expert opinion that anytime a patient is (a) under "direct care" (such as in a hospital) and (b) there is a failure to diagnose compartment syndrome before there is

permanent loss of tissue medical negligence has occurred? Answer: Yes.
The jury should have been allowed to consider this standard of care evidence, as it had expert testimony supporting it.

1. Argument for Res Ipsa Loquitur and Dr. Cossman's Variant

Dr. David Cossman clearly presented at trial his expert opinion that when anyone is under direct medical care, even if intubated and unconscious, it is medical negligence if their compartment syndrome goes undiagnosed to the point of nerve and muscle damage to the point of loss of function. RP 1257-59, and in his initial 6/5/17 disclosure, CP 2104-11, esp. CP 2010, and in the 12/8/17 declaration of Dr. Cossman, CP 3125-30. See also *Appendix No. 15*. In conclusion, there was ample disclosure, and ample expert testimony, for Dr. Cossman's standard of care evidence to be presented to the jury by instruction. It was legal error, and a prejudicial abuse of discretion, not to allow the Behrs' instruction to the jury. The Behrs should have been allowed to present to the jury Instructions No. P-9 (CP 5778) – as well as Instructions P 2.1, P-3, P-9 and P-16, in addition to P-12, P-13, and P-14. That said, Instruction No. P-16 is the excluded instruction most specific to this issue, as it precisely reflected the admitted expert testimony of Dr. Cossman, as supported by Dr. Collier. (Instruction No. P-16, which can be found at CP 5785, and at *Appendix No. 16*.) This instruction formulated res ipsa loquitur under Colton Behr's situation, as

supported by Expert Dr. Cossman, Expert Dr. Collier, and by citation to *Curtis v. Lein*, 169 Wn.2d 884, 239 P.3d 1078 (2010), and other cases cited in *Appendix No. 17*. See also a recent res ipsa loquitur medical negligence case, *Grp. Health Coop. v. Coon*, 193 Wash. 2d 841, 447 P.3d 139 (2019) (res ipsa loquitur discussion regarding an inability to determine which medical worker tracked the infection into the operating room is at 846–47). The State Supreme Court also applied res ipsa loquitur to hospitals and doctors in concert in *Miller v. Jacoby*, 145 Wash. 2d 65, 74, 33 P.3d 68, 72 (2001). The trial court erred not to give *Instruction P-16* on the testimony presented at trial, and the trial court erred not to allow Dr. Cossman and Dr. Collier to further present such evidence, instead of having excluded this testimony on the rulings in limine. CP 6828-44 and RP 164-287. Competent expert testimony was provided at trial that if a patient is under direct care, ***the failure to timely-diagnose compartment syndrome before permanent loss of function is always medical negligence***. The means to timely-diagnose compartment syndrome lay entirely in the post-surgical care of NWOS, and in the duties of Deaconess nurses to escalate awareness of the signs and symptoms of compartment syndrome until NWOS responded. This did not occur, and it was conceded by the Defendants that Colton Behr did not contribute to his late-diagnosis. CP 6830. The instruction should have been given, as the

jury should be allowed to make that determination, given the expert opinion in support of the Behrs' instruction. ***NOTE on Standard of Review:*** Appellate review of a trial court's decision not to instruct on res ipsa loquitur is a de novo review of a question of law. *Pacheco v. Ames*, 149 Wash. 2d 431, 436, 69 P.3d 324, 327 (2003) (holding the plaintiff is entitled to the instruction, despite defendant's contrary evidence).

2. Trial Prejudice of Not Allowing Plaintiffs' Jury Instructions

The trial prejudice of the error is obvious. Colton and Cheryl Behr were deprived of the jury considering their theory of the case, even though the Behrs had the testimony of an Orthopedic Surgical Expert (Collier) and a Vascular Surgical Expert (Cossman) in support of their theory. Sufficient evidence had come in by testimony, despite the limitations from the orders striking supplemental opinions and despite rulings in limine.

F. Error No. 6: Disallowing Orthopedic Expert Dr. Collier from Establishing the Standard of Care for Orthopedic PAs

Issue No. 6: Should the court have allowed Dr. Collier to establish the standard of care for Orthopedic Physician's Assistant Leann Bach, and thus maintained her actions as a basis of the liability of NWOS? Answer: Yes. As Orthopedic Surgical Expert Dr. Collier testified, orthopedic PAs are extensions of the Orthopedic surgeons, and from his years of directing

PAs, Dr. Collier could articulate their standard of care, and thus present NWOS' liability for PA Bach's failures to meet the standard of care.

1. Argument for Dr. Collier's PA Standard of Care

Dr. Hans Moller, NWOS defense expert, stated in his deposition that Physician Assistants are "care extenders" for the Orthopedic Surgeons. Dr. Moller was an Orthopedic Surgeon, in a larger Orthopedic LLC. CP 4306, and see *Appendix No. 18*. It was on this same basis that Behr Orthopedic Surgical Expert Collier stated he was familiar with the Orthopedic PA standard of care. RP 726-31, *Appendix No. 19*.

Dr. Collier was able to present the same view as NWOS expert, Dr. Moller, stated in his deposition: *The Physician's Assistant is an extension of the surgeon, and the surgeon and the surgical group (including its staff and PAs) must meet the standard of post-surgical care when compartment syndrome is a known complication of a tibial plateau fracture repair, such as Colton Behr's.* RP 726-31, *Appendix No. 19*.

PA Bach's failures to meet the standard of care should not have been precluded from implicating the liability of NWOS; the trial court erred to preclude Dr. Andrew Collier's standard of care testimony regarding physician's assistants. **NOTE:** Dr. Christopher Anderson's declaration regarding PA standards of care, filed 12/4/17, CP2597-98, point 7, was accepted by the court, and Judge Moreno had accepted Dr.

Collier's standard of care testimony in her ruling on 4/23/14, CP 800-10. It was error and an abuse of discretion for Judge McKay to feel that Judge Moreno's Order of 4/23/14 "handcuffed" her at hearings and trial regarding the dismissals of Dr. Powers and Dr. Lynch, but then Judge McKay ignored the "handcuffs" of the 4/23/14 Order in an inconsistent manner, prejudicial to the Behrs, when she would revisit Judge Moreno's 4/23/14 Order to strike Dr. Collier's PA opinions accepted on 4/23/14.

2. Trial Prejudice of Excluding Dr. Collier's PA Standard of Care

As the trial court rejected the NWOS surgical-entity liability testimony, based upon the dismissals of Dr. Lynch and Dr. Powers, the trial court then further precluded Cheryl and Colton Behr from presenting their theory of the case when it excluded Expert Dr. Collier's testimony regarding NWOS PA Leann Bach's failures to meet the standard of care. After the close of the Behrs' case-in-chief trial testimony, on 5/17/18, NWOS orally moved for judgment as a matter of law. RP 1333. NWOS asked that NWOS not be held liable for any failures of PA Bach, nor of any other NWOS agent due to the prior dismissal of Dr. Lynch and Dr. Powers. RP 1333-34. Although NWOS also asked for dismissal of any theories of entity or team liability, in the flow of trial testimony, substantial entity liability evidence did come in through the Dr. Collier and Dr. Cossman testimony, listed above. The trial court's confusion

regarding its prior orders, and confusion about what was prohibited to the Behrs at trial by pre-trial orders can be found at RP 1335-37. The trial court then ruled that no defendants would remain in the case except as to a unity between Dr. Anderson and NWOS. RP 1356-58. This ruling led to the written order of 5/22/19 (CP 5833-34) which read:

- a. Defendant NWOS has no vicarious liability for any act or omission of Leann Bach, P.A.
- b. The issue of Defendant NWOS's "collective responsibility" is reserved for the jury instruction conference.
- c. The issue of Defendant NWOS's liability for any act or omission for Dr. Anderson as respects any alleged act or omission of his on December 10, 2010 and the vicarious liability of NWOS therefor is DENIED.

The trial prejudice is clear. NWOS and its agents were entirely exonerated of liability for all of the standard of care violations that occurred on Friday, 12/10/10, whereas all of this evidence should have been presented to the jury, along with the complete testimony of Dr. Cossman and Dr. Collier, along with Dr. Powers' implications that his involvement would have led to a fasciotomy on 12/10/10. *NOTE:* The same 5/17/18 ruling, RP 1350-58 (memorialized on 5/22/18 at CP 5833-34), granted Deaconess Hospital's motion for judgment as a matter of law, based upon there being *no nursing causation* testimony that connected the causal dots between *nursing failures to meet the standard of care* and *the*

delayed diagnosis of Colton Behr's compartment syndrome. The written order of 5/24/18, dismissing Deaconess, is at CP 5876-79.

In summation, the cascading effects of the erroneous dismissals of Dr. Powers and Dr. Lynch, and the failure to reinstate them, continued to prejudice the Behrs at trial, clearly affecting the outcome regarding NWOS, and then further prejudicing the Behrs in its effects on the dismissal of Deaconess as a matter of law. The trial court's errors were inter-related and over-lapping in preventing the Behrs from presenting their case to the jury.

G. Error No. 7: Disallowing Testimony Regarding the Liability of NWOS Prior to 3p.m. on 12/10/10 (or 3p.m. on 12/11/10, as the Order Internally Conflicts).

Issue No. 7: Should trial testimony have been allowed regarding the failure of NWOS to respond to PT Ruth Benage's message of 12:55p.m. on 12/10/10 – the *NWOS e-message* -- regarding Colton Behr's compartment syndrome symptoms? Answer: Yes. (a) Orthopedic Expert, Dr. Collier, and Vascular Expert, Dr. Cossman, both testified that it was absolutely certain that a physician meeting the standard of care would have performed a fasciotomy on 12/10/10, and that it was absolutely certain that Colton Behr would not have suffered any permanent loss of tissue had that been done. (b) Nursing Expert Linda Newman testified that

the nursing staff had a duty to escalate the concern until there was an appropriate orthopedic response. The orthopedic response known to nurses and all medical providers would have been fasciotomy (see trial testimony in the next section).

1. Argument on Error of Excluding Friday 12/10/10 Testimony

As has been already shown, the trial court (a) erred to dismiss, and erred to fail to reinstate, Dr. Lynch and Dr. Powers. Further, (b) the court then erred to over-stretch the dismissal of Dr. Lynch and Dr. Powers to essentially hold that NWOS had no post-surgical responsibility to Colton Behr until the afternoon of Saturday 12/11/10. (Order at CP 5833-34.) Nursing Expert Linda Newman's testimony was that nurses had a duty to escalate concerns *until there was an appropriate orthopedic response* to the 12:55 p.m. 12/10/10 NWOS e-message of PT Benage-to-Lynch-to-Powers (and until there was an orthopedic response to Colton's other textbook signs and symptoms of compartment syndrome). Nurses owed that duty to Colton, which they breached, and NWOS owed a timely-response, which was not forthcoming. That appropriate medical response would always have been a timely-fasciotomy per Dr. Cossman at RP 1234-35 and *Appendix No. 20*. Additionally, Orthopedic Expert Dr. Andrew Collier stated that it was never a violation of the standard of care to do a fasciotomy upon any indication of compartment syndrome, even

prophylactically. RP 709-710, and *Appendix No. 21*. Even Dr. Timothy Powers (of NWOS) testified as much at RP 467-68, *Appendix No. 22*.

In short, NWOS failed its duty to have sufficient post-surgical care for Colton Behr in place after Dr. Powers left town before 6a.m. on Friday 12/10/10. Colton Behr was not given the proper level of care after Dr. Powers left Spokane well before 6a.m. on Friday 12/10/10. (See Dr. Powers' Trial Testimony at RP 463 for his 12/10/10 departure time.)

2. Trial Prejudice of the Exclusion of 12/10/10 Testimony

The trial prejudice is clear. Compartment syndrome is common, but the failure to timely-diagnose it is rare, and it is medical negligence, especially when compartment syndrome is (a) a known complication of tibial plateau repair, and (b) Colton Behr was exhibiting textbook symptoms.

The Behrs should have been able to bring their entire factual narrative to the jury, and have the jury entirely instructed on their theories of liability. There is no legal excuse for the delayed diagnosis of compartment syndrome when it is a known complication, and there is no legal excuse to have deprived Colton of the only remedy that could have saved his leg tissues – a timely-fasciotomy. RP 745-46, and *Appendix No. 23*. Colton and Cheryl Behr were deprived of a fair trial.

H. Error No. 8: The Court Erred to Dismiss Deaconess as a Matter of Law on the Causation Issue

Issue 8.1: Should the court have allowed Nursing Expert Linda Newman to present causation testimony based upon her qualifications? Answer: Yes. Linda Newman had sufficient *expertise through experience* to make causation statements. Issue 8.2: Was the causation testimony of Orthopedic Expert Dr. Collier and of Vascular Expert Dr. Cossman sufficient to provide the causal links *between* the failures of the nursing standard of care described by Linda Newman *and* how the nursing negligence caused Colton Behr's tissue death and amputation from that medical negligence? Answer: Yes. Linda Newman had *sufficient expertise through experience* to make causation statements as supplemented by Dr. Cossman and Dr. Collier. Issue 8.3: Was the causation testimony of Expert Dr. Collier and Expert Dr. Cossman (that once compartment syndrome was detected only a fasciotomy can prevent tissue death) sufficient for a lay person to understand the causal links between failures of the nursing standard of care and the consequences of the nurses' negligent failure to procure Colton medical intervention before the death of Colton's muscles, nerves and tendons? Answer: Yes. There was sufficient expert testimony on causation that a reasonable layman could make the remainder of the causal links without Nursing Expert

Linda Newman having to provide causation testimony about every causal link obvious to laymen. Issue 8.4: Did the trial court therefore err to dismiss Deaconess Hospital as a matter of law on the causation issue?

Answer: Yes. There was sufficient causation expert testimony that the liability of Deaconess should have been sent to the jury.

1. Argument and Prejudice of the Trial Court Rulings

Issue 8.1 Argument: On 4/4/18, the Behrs filed supplemental expert opinion disclosures of Dr. Collier (orthopedic), Dr. Cossman (vascular) and Linda Newman (nursing). CP 4397-99. These were promptly filed after the late-disclosed *NWOS e-message* led to the 3/26/18 depositions of NWOS employees Deneen Tate and Marcie Loshbaugh whose testimony provided new material information, and whose testimony provided new evidence of withheld electronic messages and withheld responsibility schedules. **NOTE**: The 3/26/18 Deposition Transcript of Marcie Loshbaugh was filed on 3/28/18. CP 3925-52, see esp. 3931-43. The 3/26/18 Deposition Transcript of Deneen Tate was also filed on 3/28/18. CP 4025-4049, see esp. 4031-41.

The supplemental opinions were made by the Behrs' experts within a week of the 3/26/18 depositions of NWOS agents (weeks before trial); and those late-depositions were due to the failures of NWOS and its agents to answer discovery (summarized above) and the 1/30/18

uncovering of the 12/10/10 *NWOS e-message* led to these NWOS staff depositions. The Behrs acted promptly on learning information contrary to the sworn deposition answers of NWOS and its agents, and the Behrs' subsequent supplemental expert opinions should have been allowed.

Alternatively, trial should have been continued to cure any prejudice to the Defendants of the late-disclosures. (NWOS and its agents had prejudiced themselves due to their own failures to candidly answer discovery.)

As to Linda Newman in particular, she simply stated that her trial testimony would include her qualifications to present causation testimony if she qualified under *Frausto v. Yakima HMA, LLC*, 188 Wash. 2d 227, 393 P.3d 776 (2017), based upon her extensive relevant experience. CP 4398. A continuance should have been granted under *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) if the defendants could show prejudice from late-disclosure, but continuance was denied, as well, when requested on that ground, as well as on other grounds. CP 5557–58. *Issue 8.1 Prejudice:* The court erred to order that Linda Newman could not testify as to causation regarding the impact on Colton of the violations of the Nursing Standard of Care. CP 5621-23. The prejudice to the Behrs was that Deaconess was dismissed as a matter of law, and the clear nursing violations of the standard of care that would have gotten Colton a suitable response from NWOS and its agents were removed from the case.

RP 1350-58 is where the court ruled that there was no expert testimony on causation regarding the nursing violations of the standard of care.

NOTE on Standard of Review: As the evidentiary ruling was made as part of what became a dismissal as a matter of law, review of evidentiary rulings are de novo. *Frausto v. Yakima HMA, LLC*, 188 Wash. 2d 227, 231, 393 P.3d 776, 778 (2017), citing *Aba Sheikh v. Choe*, 156 Wash.2d 441, 447, 128 P.3d 574 (2006). This would also apply to the evidentiary rulings that dismissed Dr. Lynch, Dr. Powers, PA Bach, and NWOS regarding Friday 12/10/10, as they were also dismissed as matters of law.

Issue 8.2 Argument and Prejudice: Given the Expert testimony of Orthopedic Expert Dr. Collier and Vascular Expert Dr. Collier that the only medical response for Colton's compartment syndrome was fasciotomy, there was *sufficient expert testimony to provide the causal links between* Linda Newman's testimony that a nurse must get an appropriate orthopedic response **and** the surgical expert testimony that the response would be the fasciotomy without which Colton's tissues would die, and Colton would suffer permanent disability. The links were complete, and dismissing Deaconess as a matter of law was error.

Issue 8.3 Argument and Prejudice: That same *nursing expert testimony* (that a nurse must escalate patient concerns until the patient receives a suitable orthopedic response to the signs and symptoms of compartment

syndrome), **and surgical expert opinion** (that only fasciotomy would have prevented Colton Behrs' tissue death and loss of function) *was sufficient* such that any "causal gaps" could have been filled by lay understanding. *McLaughlin v. Cooke*, 112 Wash. 2d 829, 837–38, 774 P.2d 1171, 1175–76 (1989), **Appendix No. 24**; furthermore: "One expert may rely on the opinions of another expert when formulating opinions." *Driggs v. Howlett*, 193 Wash. App. 875, 900, 371 P.3d 61, 73 (2016), **Appendix No. 25**.

The prejudice of dismissal as a matter of law is obvious, and a review of the decision, and of the evidentiary rulings, is de novo.

Issue 8.4 Argument and Prejudice: Based upon the foregoing, the court is asked to reverse the dismissal of Deaconess as a matter of law.

Note on Plaintiffs' 2014 Motion for Summary Judgment: As was noted, above, in the procedural history, the Behrs moved for summary judgment on liability against Deaconess on 10/17/14. CP 1101-07. This was the same time that the Behrs first also tried to bring a motion to compel answers to their discovery. CP 1120-35. Deaconess provided no factual response, only legal argument. CP 1376-87. As the facts were un rebutted, it was error not to grant the Behr's motion on liability. The 12/12/14 ruling is at 1686-96. Given the facts presented at trial, with evidentiary rulings corrected by the appellate court, Deaconess should be found liable for Colton's injuries as a matter of law.

I. Error No. 9: Allowing Dr. Anderson’s Sudden Informed Consent Testimony without Allowing the Behrs an Amended Complaint (and Informed Consent Instructions) or a New Trial

Issue 9: Did the court err to *not allow* the Plaintiffs a *substantive Response to Dr. Anderson’s transformation of the negligence case into an informed consent case* by surprise trial testimony that contradicted his prior declarations? Answer: Yes. The court should have allowed an amended complaint and additional testimony under informed consent, or granted a new trial, after Dr. Anderson suddenly changed his story at trial to strengthen his request for an “error of judgment” instruction (see next section), but which presented competing treatment responses for which Colton Behr should have been able to give informed consent.

1. Argument on Need for New Trial after Dr. Anderson’s New Story

In his 2/28/14 declaration, Dr. Christopher Anderson of NWOS did not present sufficient particular facts to have avoided the Behrs’ summary judgment motion on liability (CP 338-39), and it was error at that time for the court not to find Dr. Anderson (and therefore also NWOS) liable as a matter of law (CP 800-810). *Anica v. Wal-Mart Stores, Inc.*, 120 Wash. App. 481, 488, 84 P.3d 1231, 1236 (2004) (“But the nonmoving party must set forth specific facts to defeat a motion for summary judgment, rather than rely on bare allegations”). Three years later, the 12/4/17

declaration of Dr. Anderson (CP 2596-2929) presented the first substantive sworn statement of his position, which he thereafter presented throughout the case (and thereafter up to trial). On 12/5/17 Dr. Anderson denied Dr. Cossman's standard of care that it is medical negligence if someone under direct care suffers loss of function from nerve and tissue damage due to excess delay in diagnosing and treating compartment syndrome. CP 2599-60 at points 13-15. Dr. Anderson declared that:

compartment syndrome can be difficult to diagnose because it can have an insidious and unpredictable onset and course.

CP 2599 at point 13. And see CP 2600, point 15 for the same position.

Comment: This shows that *the case remained a medical negligence case regarding failure to make timely diagnosis*, and it shows that the instruction on Dr. Cossman's standard of care should have gone to the jury for the jury to decide between the admitted experts' testimonies and facts.

Dr. Anderson then states his standard of care, and he presents his position regarding *the non-diagnosis* of compartment syndrome on Saturday, 12/11/10, esp. from CP 2601:

My reasons for concluding compartment syndrome was *not present* included the following...

Dr. Anderson *defended his failure to make a timely diagnosis* (contra the testimony of Dr. Collier and Dr. Cossman) and his failure to take compartment pressures (contra the testimony of Dr. Collier and Dr.

Cossman) as within the standard of care. Dr. Anderson also took some pains to explain his late 2017 discovery (“finding” it at his home) of a 12/11/10 chart note more than seven (7) years after the fact that had not been in the medical records. CP 2602 & Exhibit C, CP 2620, and Dr. Anderson explained it again at CP 3862 to 3866. Even the “found” 12/11/10 chart note was offered by Dr. Anderson *only to explain the late-diagnosis*, and it was not formulated in the informed consent terms that Dr. Anderson presented in his surprise trial testimony.

Conclusion as to Pre-Trial Disclosure of Opinions and Sworn

Statements: At no point was Dr. Anderson’s testimony other than “compartment syndrome was not present.” CP 2601. Dr. Anderson repeated this non-diagnosis testimony under direct examination of his defense counsel. RP 1401-02 and see *Appendix No. 26*.

Appearance of Informed Consent Facts: However, Dr. Anderson’s subsequent testimony created an informed consent case as he presented *surprising and inconsistent new testimony* to try to justify the “Error of Judgment” Jury Instruction, as he testified that he made a choice between treatment and non-treatment in contemplation of compartment syndrome. RP 1435-37, RP 1402, and *Appendix No. 27*. At this point, *Dr. Anderson has now said that he had possession of material facts that should have been disclosed to Colton Behr so that Colton could have made an*

informed decision about whether or not to have a fasciotomy. See also the Behrs' 6/4/18 Motion to Amend their Complaint (CP 6650-76) and their 6/4/18 Motion for a New Trial (CP 6612-49) for more detail.

Normally, medical negligence cases and informed consent cases are alternative bases for liability, and a failure to timely-diagnose is a medical negligence case. Dr. Anderson's changed testimony at trial suddenly opened up an informed consent claim. The boundary between the two kinds of cases – a boundary breached by Dr. Anderson at trial -- can be seen in *Backlund v. Univ. of Washington*, in which the University of Washington lost its claim that the facts behind a negligence claim could not also support an informed consent claim (emphasis added):

We have no facts in this case, however, suggesting Dr. Jackson was unaware of the transfusion alternative.³ Rather, in his professional judgment, he did not believe Ashley required a transfusion because her bilirubin levels were not serious enough to warrant such treatment. The jury upheld his professional judgment on that issue, but a trier of fact might still have found he did not sufficiently inform the patient of risks and alternatives in accordance with RCW 7.70.050. The University's contention, that an informed consent action is not present here as a matter of law because the patient's injury was not caused by the practitioner's actual treatment, fails.

Backlund v. Univ. of Washington, 137 Wash. 2d 651, 659–63, 975 P.2d 950, 954–56 (1999, en banc), and *Appendix No. 28*. Given Dr. Anderson's change of testimony at trial on the facts most material to the Behrs' claim of medical negligence, it was legal error and an abuse of discretion not to

allow the Behrs the remedy of (a) additional testimony and instruction on informed consent under an Amended Complaint, or (b) a new trial. See CP 6612-76.

J. Error No. 10: Instruction on Error of Judgment on Lack of Informed Consent Facts.

Issue on Error No. 10: Did the court err to give the Error of Judgment instruction on the facts of this case? Answer: Yes. The Error of Judgment instruction was materially misleading in that informed consent facts were divulged at trial for the first time (RP 1435-37 and *Appendix No. 29*), which then made a defense verdict a virtual certainty under the Error of Judgment instruction.

Application of *Backlund v. Univ. of Washington*, 137 Wash. 2d 651 (1999) to Dr. Anderson’s New Testimony: Dr. Anderson’s change of testimony has created an informed consent case. *Until trial*, Dr. Anderson maintained that compartment syndrome was “insidious, unpredictable, and uncommon” (CP 2600) – he was explaining why it was *reasonable for him to have missed the diagnosis* until it became more obvious. *At trial*, Dr. Anderson testified that he suspected compartment syndrome but decided to simply “monitor” Colton’s condition. Colton Behr should have been informed of these material facts and allowed to choose fasciotomy over “wait and see.” See, e.g., *Flyte v. Summit View Clinic*, 183 Wash. App.

559, 565, 333 P.3d 566, 569–70 (2014) (patient must have all material facts about possible diagnoses, even if no diagnosis is yet made – as long as the doctor considered the diagnosis, then the case is not solely a medical negligence claim). Judge McKay allowed the error of judgment instruction based upon Dr. Anderson’s suddenly-appearing *informed consent testimony, that Dr. Anderson presented at trial for the first time in the history of the case* (emphasis added):

THE COURT: Based upon my review of the instruction, and again on my review of the testimony by all parties, both the plaintiff and the defense, there were possibly two diagnoses that were put on the record by Mr. King, so I will be giving this instruction.

RP 1751, lines 4-8.

The State Supreme Court recently barely upheld (5-4) *any* use of the Error of Judgment instruction, noting that the instruction required proper facts to support it, and stating that it was never error not to give the instruction. *Fergen v. Sestero*, 182 Wash. 2d 794, 346 P.3d 708 (2015) and *Appendix No. 30*. (The dissenters found the instruction too prejudicial to ever be proper to give, as “any choice,” even a negligent one, will get a free pass. *Fergen v. Sestero*, 182 Wash. 2d 794, 818–19, 346 P.3d 708, 720 (2015) (dissent) and *Appendix No. 31*.) In the Behr case, the instruction was overwhelmingly prejudicial, and, as it was based upon surprise testimony, that was itself additionally unfairly prejudicial.

Application of *Fergen v. Sestero*: It was an abuse of discretion to give the Error of Judgment instruction in the Behr case, and it was legal error and an abuse of discretion not to allow the Behrs to amend their complaint to include informed consent cause of action, and it was legal error and an abuse of discretion not to allow the Behrs a trial continuance to follow up on the NWOS late-disclosures and changes of testimony.

The trial court's prejudicial errors were compounded because the Behrs had substantial evidence in support of their theories of the case, and they were not allowed to instruct the jury in their theories of the case. An example is Dr. Cossman's testimony that a person under direct care should never suffer permanent loss of function from undiagnosed compartment syndrome. (See discussion of the court's refusal to give the Behrs' instructions, *supra*.)

The practical problem for the Behrs is that Dr. Anderson moved from the sworn statements that compartment syndrome was "insidious" and hard to diagnose to inventing a "choice of treatment" to create the testimonial basis for the Error of Judgment instruction. Dr. Anderson suddenly created an informed consent case. In other words, the chronic problem of the Error of Judgment instruction came into view.

As the review of authorities in the *Backlund* case, *supra*, shows, usually, a case is *either* an informed consent case *or* a medical negligence

case. When a patient suffers delayed or missed diagnosis, the case is clearly one of medical negligence.

At trial, seeking the Error of Judgment instruction leads negligent physicians to suddenly discuss their “choices” (“the instruction may lead juries to conclude a defensible choice is synonymous with a nonnegligent choice”), and *in the minds of the jury informed consent facts become a defense to medical negligence*. The jury becomes baffled by the conflation and the plaintiffs cannot carry their burdens.

Division III is not asked to resolve this issue in general, but the appellate court is asked to find that the Error of Judgment Instruction should not have been given to the Behrs’ jury in particular, and that it was prejudicial error (not harmless) for the trial court to have done so.

And Division III is asked to apply the general law of jury instructions, and thereby to rule that that Dr. Cossman -- especially as supported by Dr. Collier -- presented substantial evidence such that the jury should have received the instruction regarding the standard of care that no person under direct medical care should suffer permanent loss of function due to delayed diagnosis of compartment syndrome. **NOTE:** Although the Behrs believe the Error of Judgment Instruction should not have been applied in their case, if Division III believes that the State

Supreme Court should directly review the Error of Judgment Instruction debate again, with this case as the vehicle, that would be understandable.

It is clear from review of the case law that the Error of Judgment Instruction misleads many jurors because its facts “pun upon” (are too related to) informed consent facts, and as medical negligence is an entirely distinct set of facts from informed consent, the two causes of action are conflated in the mind of the jury, and the confusion prejudicially benefits the defendant physicians in all cases.

K. Error No. 11: The Trial Court Erred Not to Continue the Trial, or Order a New Trial upon an Amended Complaint

Based upon the foregoing the court is asked incorporate those arguments, above, and hold that the trial court prejudicially erred not to continue the trial, and not to order, alternatively, a new trial upon an amended complaint. Motions at CP 6612-76 & Orders at 6610-15.

V. CONCLUSION AND RELIEF REQUESTED

Prejudice at trial means that there is a *reasonable probability* that the outcome of the *trial was materially affected*. *In re Welfare of X.T.*, 174 Wash. App. 733, 739, 300 P.3d 824, 828 (2013). See also, *James S. Black & Co. v. P&R Co.*, 12 Wash. App. 533, 537, 530 P.2d 722 (1975) (error will be considered prejudicial if it presumptively affects the outcome of the trial). The Behrs have sought to reduce the recitation of errors to those

errors which most reach the standard of a reasonable probability that the trial was materially affected. They have documented significant prejudicial errors, each, individually, meriting a new trial.

Colton and Cheryl Behr ask the court to review the excluded evidence, and to review the bad faith discovery behavior of NWOS, and to consider finding NWOS liable as a matter of law as sanction for discovery violations, or liable as a matter of law on the properly-admitted facts, and remand for trial on damages only. Likewise, this court is asked to find Deaconess liable as a matter of law on the basis of the properly-admitted facts, and remand for trial on damages only. Alternatively, the Behrs ask the appellate court to remand for trial, after issuing rulings which correct the errors presented in the brief, above, and the remand order is asked to include the reversal of the trial court's dismissal of Deaconess as a matter of law on causation (as well as correcting the trial court's errors regarding NWOS and its agents, and jury instructions).

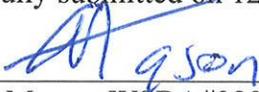
The Behrs ask that Dr. Lynch and Dr. Powers be reinstated as Defendants, and that NWOS be clarified as a defendant in its own right as a healthcare entity responsible for the post-surgical care of its patients, and this court is asked to clarify that NWOS is responsible for all of its agents, to clarify that all those agents implicate NWOS in the care of Colton Behr, and to clarify that lay understandings of cause and effect, when

supplemented by medical expert opinion on matters not known to the lay person, are sufficient to allow for a jury to find causation in medical negligence cases.

The Behrs request an opinion from this court that clarifies that the Behrs may bring their jury instructions before the jury on entity liability, and on the liability of NWOS “team,” and on the liability of the overall medical care “team” of Deaconess and NWOS, regarding their collective medical duties owed to Colton Behr on the facts of this case. The Behrs ask for an opinion clarifying that Expert Dr. Cossman’s standard of care may be presented to the jury by instruction, and that a *res ipsa loquitur* instruction may be presented to the jury, given the substantial expert testimony that supports both of these instructions. The Behrs ask that Dr. Collier’s qualifications be deemed sufficient to present the standard of care for “extenders” of Orthopedic Surgical Care (specifically the physicians’ assistants). The Behrs ask that the Error of Judgment instruction be held inapplicable on these facts, and that Colton Behr be allowed to amend his complaint to bring an informed consent cause of action based upon the trial testimony of Dr. Anderson and the cited case law.

A remand for a new trial, based upon the cited errors and with the remedies sought in the briefing, above, is requested.

Respectfully submitted on 12/8/19,

A handwritten signature in blue ink that reads "A. Mason". The signature is written in a cursive style with a large initial "A" and a long horizontal stroke extending to the right.

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