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Division III
State of Washington
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IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON

DIVISION III

CHERYL AND COLTON BEHR,

Appellants,

v.

NORTHWEST ORTHOPEDIC SPECIALISTS,

Respondent.

BRIEF OF RESPONDENT NORTHWEST ORTHOPEDIC SPECIALISTS (NWOS) and NON-PARTIES PATRICK LYNCH, JR., MD, CHRISTOPHER ANDERSON, MD and LEE ANN BACH, PA-C

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I. INTRODUCTION

In December 2010, Appellant (and Plaintiff below) Colton Behr (Behr), suffered a severe left tibial plateau fracture while playing basketball. He was admitted to Deaconess Hospital where he underwent an open reduction/internal fixation surgery to repair the fracture. Four days after the surgery, while recovering in the hospital, Behr was diagnosed with a compartment syndrome, which necessitated additional surgery – a fasciotomy – to relieve compartment pressure. As a consequence of compartment syndrome, Behr suffered muscle loss and permanent nerve damage.

Three orthopedic surgeons were involved in Behr's care/treatment at Deaconess. Patrick Lynch, Jr., MD, saw Behr in the emergency room and admitted him to the hospital. Timothy Powers, MD performed the open reduction/internal fixation surgery. And Christopher Anderson, MD diagnosed compartment syndrome and performed the fasciotomy. Two physician assistants also saw Behr while he was at Deaconess: Mark Bauescher, PA-C and Lee Ann Bach PA-C. The orthopedic surgeons and PA-Cs were all employees of Northwest Orthopedic Specialists (NWOS).

Dr. Anderson was the on-call orthopedic surgeon for NWOS on Saturday, December 11, 2010, which was two days after the open

reduction/internal fixation. That afternoon, he evaluated Behr at Deaconess. After reviewing the chart, consulting with the nurses, and performing a detailed examination, Dr. Anderson concluded that Behr did not have compartment syndrome and that the appropriate treatment was continued observation.

Dr. Anderson saw Behr again the following day (Sunday, December 12). Unfortunately, Behr's condition had significantly changed. Faced with this new clinical picture, Dr. Anderson ordered compartment pressure testing. The test results, combined with his examination findings, led Dr. Anderson to diagnose compartment syndrome. Later that day, Dr. Anderson surgically addressed the compartment syndrome with a fasciotomy to relieve compartment pressure.

Behr filed suit in December 2012, naming as defendants Drs. Powers, Lynch, and Anderson, physician's assistant Bach and Deaconess. The essence of Behr's claim was that the diagnosis of compartment syndrome was made too late, and that the delayed diagnosis was the result of the Defendants' negligence. Specifically, Behr's liability theory was that, by noon on Friday, December 10, and certainly by the time of Dr. Anderson's evaluation the afternoon of Saturday, December 11, Behr had signs and symptoms diagnostic of compartment syndrome and that the various providers involved in his care/treatment were negligent for not

diagnosing the condition earlier than Dr. Anderson's diagnosis on December 12.

The case had a lengthy and tortuous procedural history. By the time it was tried to a jury in May 2018, five and a half years after commencement, it had been handled by four different superior court judges. There had been in excess of 50 trial court motions, three separate, unsuccessful motions for discretionary review by Behr, and four trial continuances.

By the time of trial, the parties and issues had narrowed. As a consequence of pre-trial summary judgment orders (dismissing Dr. Powers and Dr. Lynch), Behr's voluntary dismissal of individual defendants (Dr. Anderson and PA-C Bach), trial court rulings regarding the lack of qualified expert testimony on PA-C Bach's standard of care, and the CR 50 dismissal of Deaconess at the close of Behr's case, when the case was submitted to the jury, NWOS was the sole Defendant. And the only remaining liability issue was whether Dr. Anderson violated the standard of care by not diagnosing compartment syndrome on December 11, with NWOS being vicariously liable for any negligence of Dr. Anderson. The alleged factual basis for Behr's standard of care claim against NWOS (Anderson) was that Behr's clinical signs and symptoms at the time of Dr. Anderson's evaluation were diagnostic of compartment syndrome, or at least sufficiently indicative of compartment syndrome to where Dr. Anderson, to comply with the

standard of care, should have ordered compartment pressure testing which, according to Behr, would have revealed compartment syndrome.

On May 25, 2018, the jury returned a verdict in favor of NWOS, concluding, by definition, that Dr. Anderson did not violate the standard of care, and that Behr's signs and symptoms, at the time of Dr. Anderson's examination/evaluation, were not diagnostic of compartment syndrome or sufficient indicative of compartment syndrome for the standard of care to require Dr. Anderson to order compartment pressure testing.

In this appeal, Behr identifies 11 assignments of error, most of which relate in some way to the summary judgment dismissal of Drs. Lynch and Powers, (and Behr's unsuccessful efforts to have Drs. Lynch and Powers reinstated as Defendants), and the trial court's rulings and instructions on the applicable standard of care, particularly as affected by *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn.2d 136, 341 P.3d 261 (2014).

As demonstrated, *infra*, none of Behr's assignments of error have merit. And, even if the trial court did err, in each instance the error was harmless – it did not affect the outcome of the case. That is particularly true with respect to the dismissal of Drs. Lynch (and Powers) and dismissal of the standard of care claim against PA-C Bach. The jury ultimately determined, by finding that Dr. Anderson did not violate the standard of

care, that Behr's signs and symptoms were not diagnostic of compartment syndrome on the afternoon of December 11, 2010, or sufficiently indicative of compartment syndrome for the standard of care to require Dr. Anderson to perform compartment testing. Drs. Lynch and Powers and PA-C Bach all interacted with Behr before then. Accordingly, the presence of Drs. Lynch and Powers in the case as defendants and a standard of care claim against PA-C Bach would not have affected the outcome.

II. STATEMENT OF THE CASE

A. Medical Care / Treatment

At approximately 10 p.m. on Wednesday, December 8, 2010, Behr presented to the Deaconess emergency room. CP 80-82. He had suffered an injury playing basketball and reported left knee pain. *Id.* Emergency room personnel diagnosed a closed left lateral tibial plateau fracture, and Behr was admitted to the hospital. CP 80-82. (*Id.*)

The emergency department contacted Dr. Lynch, the on-call orthopedic surgeon. *Id.* He examined Behr, confirmed the diagnosis of lateral tibial plateau fracture, and recommended surgical correction. CP 85-86.

As part of his discussion with Behr regarding surgical treatment, Dr. Lynch explained that his partner, Dr. Timothy Powers, also a Board Certified orthopedic surgeon, would be available to do the necessary

surgery earlier on Thursday, December 9th, and Dr. Lynch gave Behr the option of having the surgery then or waiting until the evening when Dr. Lynch would be available. CP 85-94. Behr chose earlier surgery with Dr. Powers. *Id.*

On Thursday, December 9th, Dr. Powers performed the planned open reduction and internal fixation. CP 83-84. The surgery was major. It entailed a curved incision from above to below the outside of the knee, RP 592, dissection through the fascia of the anterior compartment and peeling the muscle back from the bone to access the fracture. RP 593-94. The procedure also involved drilling holes in the bone, installation of plates, screws and wires and a bone graft. RP 596, RP 625.

Tibial plateau fractures themselves involve a significant amount of pain, RP 618, and patients also typically experience significant pain during the post-operative period. RP 619. Because of anticipated post-operative severe pain, post-operative prescribed medications often include IV morphine in a system that allows the patient to self-administer, RP 627, and that is what Dr. Powers ordered for Behr. *Id.*

On Friday (December 10, 2010), physician's assistant Mark Buescher examined Behr and found that he was neurovascularly intact, was able to wiggle his toes, that his pain was under control, that he was a-febrile

with stable vital signs, and that he had a normal hemoglobin and hematocrit. CP 86-88.

Later that day, shortly after noon, Behr was seen by physical therapist Ruth Benage. RP 503. She examined Behr's left leg and found passive range of motion in the knee, dorsi-flexion to neutral. *Id.* Behr also had decreased light touch/numbness in the left foot. *Id.* There was no active dorsiflexion or toe flexion. *Id.* Because of the decreased light touch/numbness in the left foot and lack of active dorsiflexion, Benage felt she needed to contact a doctor. RP 504-05. She discussed the situation with one of the Deaconess nurses and indicated she would call Dr. Lynch. RP 507[1].

NWOS' records included a phone note evincing a call from Ms. Benage to NWOS for Dr. Lynch on December 10 at 12:55 p.m. RP 517, CP 3711. The note was a printout from an electronic medical record that reflected a message taken telephonically, and then typed into the NWOS

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[1] At trial, Benage did not know whether the foot numbness she charted was on the dorsal or the plantar surface. RP 509. Likewise, she did not know if it was on the medial or lateral side of the foot. RP 509-510. She did not know whether the numbness extended to the heel or the back of the foot, or whether it went up to the ankle. RP 510. She did not note any increased pain when she performed passive range of motion testing of the foot. RP 511. She conceded that, between her and an orthopedic surgeon, the latter would be in a better position to diagnose compartment syndrome. RP 512.

system. RP 564. Dr. Lynch saw the message, but considered it misdirected to him so he forwarded it Dr. Powers whom Dr. Lynch assumed to be the proper person. RP 564-65; RP 518. There was no evidence Dr. Powers received the message.[2]

The next morning (December 11, 2010) Behr was seen by PA-C Lee Ann Bach at approximately 10:45 a.m. CP 89-90; RP 644. She examined the knee, including the compartments distal to the knee, and found them soft and tentable. *Id,* RP 645. Behr was able to engage in passive range of motion without marked increase in pain. *Id*; RP 648-49. Behr had swelling around the knee and, to reduce swelling, Bach attempted knee aspiration twice after discussing the situation with her supervising orthopedic surgeon,

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[2] At trial, "Dr. Powers testified his responsibility for Behr ended after the surgery on December 9. He saw Behr in the post-anesthesia care area, wrote notes and orders and "that was the beginning of his weekend." He left town the morning of Friday, December 10. RP 462.

On the clinical significance of Ms. Benage's physical therapy note, Dr. Powers testified that, with respect to the reference to lack of active dorsi-flexion, there are people who simply do not have active dorsi-flexion of the great toe or their toes. RP 475. Also, Behr had just undergone a major surgery on that part of the leg that causes the foot to go up, that the inability to dorsiflex could have been because of pain, and that "a number of other things could play into that." RP 475. Regarding the PT note's reference to decreased sensation, Dr. Powers testified Behr had undergone a "massive surgery to the anterior compartment" which is one of the nerves that runs out the top of the foot lives, and that the nerve "may not be particularly happy." RP 475.

Dr. Christopher Anderson. *Id*; RP 649-49. Although the aspiration attempt was unsuccessful, *Id.,* Bach did not believe Behr had compartment syndrome. RP 657.

Dr. Anderson saw Behr the afternoon of December 11, 2010 at approximately 3 p.m. RP 1385-86. Dr. Anderson reviewed the x-rays and chart[3], had an extensive discussion with the floor nurse and charge nurse, RP 1386, then performed a thorough examination of Behr. Dr. Anderson determined Behr was neurovascularly intact and, critically, that he did not have compartment syndrome. RP 1390-1402. In keeping with his clinical impression, Dr. Anderson ordered continued monitoring of the patient. RP 1403.

Dr. Anderson returned to see Behr at 11:00 a.m. the following morning (December 12). RP 1415. On exam, Dr. Anderson found Behr had tense anterior swelling that was not present the day before and also pain with plantar flexion and extension of the toes which was likewise not present the day before. *Id.* Behr's pulses were intact. RP 1415. However,

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[3] Dr. Anderson did not recall reviewing Ms. Benage's P.T. note in conjunction with his evaluation of Behr on December 11. RP 1389. However, he testified that if he had reviewed it, it would not have changed his diagnosis or treatment approach, RP 1389-90, because his examination and diagnosis are the most important things to him in caring for and treating a patient. RP 1390.

Behr had decreased sensation to pin prick in the peroneal nerve, so he was no longer neurologically intact. *Id.* Also, compared to the day before, Behr had diminished motor function exhibited by reduced ability to actively extend his toes. RP 1416. In addition, the anterior compartment was now firm when palpated. RP 1417.

Given this changed clinical presentation, Dr. Anderson ordered needle pressure testing of the compartments to determine if Behr had a compartment syndrome. *Id.* The testing showed elevated pressures in the anterior compartment and also slightly elevated pressures in the lateral compartment. RP 1419. Noting that Behr had clinical and objective evidence of compartment syndrome, Dr. Anderson immediately took Behr to surgery and performed a fasciotomy of the anterior and lateral compartments to relieve the pressure. RP 1419, 1422.

Behr was discharged from Deaconess on December 13, 2010 for follow-up care at his home in Montana. CP 8. Despite the fasciotomy, as a result of acute compartment syndrome, Behr was left with motor weakness in the left lower extremity resulting in decreased ability to dorsiflex the toes and foot and require an ankle foot arthrosis to keep his foot in a neutral position and to keep the foot from dropping with walking or other activities. *Id.*

B. Pertinent Procedural History

For the sake of brevity and clarity, relevant procedural history is addressed in connection with each assignment of error.

III. ARGUMENT AND AUTHORITIES

A. The trial court did not err in granting summary judgment in favor of Dr. Lynch because Behr's only liability expert, Andrew Collier, MD, testified unequivocally at his deposition that he had no standard of care criticism of Dr. Lynch, and, in connection with Behr's opposition to summary judgment, the trial court properly applied the *Marshall* rule to preclude Dr. Collier from changing his unequivocal deposition testimony. (Assignment of Error No. 1)

1. Standard of Review

The standard of review for summary judgment and evidentiary rulings made in the context of summary judgment is *de* novo. *Folsom v. Burger* King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

2. Qualified Expert Testimony Was Necessary to Defeat Dr. Lynch's Motion for Summary Judgment

In a medical malpractice case the applicable standard of care and its violation must generally be established through qualified expert testimony. *Reyes v. Yakima Health District*, 191 Wn.2d 79, 86, 419 P.3d 819 (2018); *Boyer v. Morimoto*, 10 Wn. App. 2d 506, 449 P.3d 285 (2019) pet. rev. den. 194 Wn.2d 1022 (2020). Because this case involved complex medical issues beyond the comprehension and understanding of a lay person,

qualified medical testimony on the Washington standard of care and its breach was required.

3. At His Deposition Plaintiff's Expert Dr. Collier Testified He Had No Standard of Care Criticism of Dr. Lynch.

In early December 2013, Behr disclosed his lay and expert witnesses. CP 51. The only medical expert identified was Andrew Collier, MD. *Id.* In late January 2014, all counsel travelled to Philadelphia, Pennsylvania for Dr. Collier's deposition. CP 51. There, Dr. Collier testified unequivocally he did not have any standard of care criticisms of Dr. Lynch:

> ...
>
> Q: Who do you understand Dr. Lynch to be?
> A: I don't know who Dr. Lynch is. I believe he's maybe one of Dr. Powers' partners.
> Q: Do you have any criticism of Dr. Lynch in this case?
> A: No sir. I think he just saw the patient one time.
> ...
> Q: I think I've asked you this, but I want to make sure, do you have any opinions regarding Dr. Lynch, that he did anything or didn't do anything that violated the standard of care in this case?
> A: No sir.

CP 398-99.

The only standard of care criticisms levied by Dr. Collier at his deposition were of PA-C Bach and Dr. Anderson. According to Dr. Collier,

PA-C Bach "missed the compartment syndrome." CP 399. With respect to Dr. Anderson, Dr. Collier testified:

> Q: So then, do you have any criticism of Dr. Anderson that would amount to a statement that he violated the standard of care?
>
> A: Well, he came in and evaluated the patient. I believe that Mr. Behr had a compartment syndrome at that time, and he should have got compartment pressures, being a board certified orthopedic surgeon after a tibial plateau fracture with increasing pain, swelling, increasing narcotics, anxiousness, and things that basically lead to the diagnosis of a compartment syndrome. Even though there may not be hard and fast findings on clinical examination.

CP 399.

Because of Dr. Collier's unequivocal deposition testimony, Dr. Lynch moved for summary judgment. CP 61. (Dr. Powers, PA-C Bach, and NWOS followed suit.) CP 48 (Powers); CP 97 (PA-C Bach/NWOS).

4. Dr. Collier Contradicts Deposition Testimony in Effort to Defeat Summary Judgment

In response to the summary judgment motions, Behr submitted a declaration from Dr. Collier wherein he reversed himself and took the position that NWOS and "all of the physicians, and their physician's assistants" were negligent in their surgical follow-up care of Behr. CP 323-337. Consistent with Behr's interpretation of *Grove v. PeaceHealth*, Dr. Collier asserted that "the practice group, Northwest Orthopedic Specialists,

had a collective responsibility to follow-up, post-surgically, with the care of Colton Behr." CP 323-332.

5. Application of *Marshall* rule

Dr. Lynch moved to strike Dr. Collier's declaration for violation of the *Marshall* rule. CP 380-389. The court granted the motion and then, because of the lack of requisite expert testimony on the standard of care and its violation, granted summary judgment in favor of Dr. Lynch (and Dr. Powers). CP 800-810.

The trial court's refusal to allow Dr. Collier to change his unequivocal deposition testimony pursuant to the *Marshall* rule, and the court's subsequent grant of summary judgment in favor of Dr. Lynch (and Dr. Powers) were entirely appropriate. "When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989). The "*Marshall rule*" provides that (1) When a party has given clear and unambiguous deposition testimony that indicates there is no genuine issue of material fact, (2) that party may not create an issue of material fact with a later self-serving affidavit or

declaration that contradicts, without explanation, the previous testimony. *Marshall*, 56 Wn. App. at 185.

The declaration testimony must directly the deposition testimony in order for the *Marshall* rule to exclude the declaration. *Duckworth v. Langland*, 95 Wn. App. 1, 7-8, 988 P.2d 967 (1998), review denied, 138 Wn.2d 1002 (1999). The *Marshall* rule applies whether the declarant is a party or a witness. See *Barry v. Crown Cork and Seal Company, Inc.*, 103 Wn. App. 312, 14 P.3d 789 (2000).

Courts from Washington and other states have applied the *Marshall* rule to preclude an expert witness from defeating summary judgment by submitting a declaration or affidavit that directly contradicts earlier unambiguous testimony. Particularly germane is *Marthaller v. King County Hospital District No.* 2, 94 Wn. App. 911, 973 P.2d 1098 (1999). There, Division I of the Court of Appeals affirmed summary judgment in favor of the defendant healthcare provider where the plaintiff's sole expert witness testified at his deposition he had no standard of care criticisms of the defendants, but then submitted a declaration, in opposition to summary judgment, opining there was a violation of the standard of care. In so holding, the court stated:

> When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact,

> that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony. (citations omitted).
>
> ...

94 Wn. App. at 918.

See also *Susie v. Family Healthcare of Siouxland, P.L.C*, 942 NW.2d 333 (Iowa 2020)(expert witness in medical negligence case not allowed to contradict earlier sworn testimony on issue of causation); *Lesnik v. Duval Ford LLC*, 185 So.3d 577 (Florida 2016) (expert who testified at deposition he had no opinion regarding auto dealership's conduct that might have caused accident cannot defeat summary judgment by submitting an affidavit that the dealership failed to take action that would have prevented an accident); *Yahnke v. Carson*, 613 NW 2d 102 (Wisc. 2000) (in medical malpractice case where, at deposition, expert was unable to say that any of the defendants breached the standard of care, plaintiff cannot avoid summary judgment by submitting declaration/affidavit that treatment failed to comply with the standard of care); *Cousart v. Charlotte-Mecklenburg Hosp. Authority*, 704 SE 2d 540 (NC 2011) (where expert had no opinion at deposition on issue of causation, expert cannot defeat summary judgment by submitting a declaration/affidavit giving an opinion on causation).

Dr. Collier's contradiction of his unambiguous deposition testimony in an effort to defeat summary judgment is why the *Marshall* rule exists.

The trial court did not err by striking the declarations of Dr. Collier and granting summary judgment in favor of Dr. Lynch.

6. Even if Error, the Summary Judgment Dismissal of Dr. Lynch was Harmless.

Even if the trial court erred in granting Dr. Lynch's motion to strike Dr. Collier's declarations and in granting summary judgment in favor of Dr. Lynch, the error was harmless. An error that is harmless (non-prejudicial) is not grounds for reversal. *Brown v. Spokane Co. Fire Protection Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). An error is considered harmless if it does not affect the outcome of the case. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

The erroneous pre-trial dismissal of a party, is harmless if the jury, by its verdict, necessarily concludes that the conduct of the dismissed party was not negligent. See e.g., *Sehlin v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 38 Wn. App. 125, 686 P.2d 492 (1984) (where plaintiff's decedent killed by allegedly defective equipment, dismissal of employer of equipment operator, even if error, was harmless because jury determined that the equipment operator was not negligent). See also *Bundrick v. Stewart*, 128 Wn. App. 11, 114 P.3d 1204 (2005) (dismissal of informed consent claim against one party on summary judgment, although error, not

prejudicial where jury, by its verdict, found that the patient did not refuse consent).

In the instant case, the jury found that Dr. Anderson did not violate the standard of care. By so finding, the jury necessarily concluded that the medical information available to Dr. Anderson the afternoon of December 11, specifically the information contained in the chart and that derived by Dr. Anderson as a result of his detailed examination, was not diagnostic of compartment syndrome, or sufficiently indicative of compartment syndrome to require Dr. Anderson to order compartment testing in order to comply with the standard of care. Because the jury reached this determination, the presence of Dr. Lynch (and Dr. Powers) in the case as defendants would not have affected the outcome. Even if Dr. Lynch (and/or Dr. Powers) had evaluated Behr the afternoon/evening of December 10, or on December 11 before or at the same time Dr. Anderson performed his evaluation, the jury, by its verdict, concluded there were no signs/symptoms diagnostic of compartment syndrome at that time, nor were there any signs/symptoms indicative of compartment syndrome such that the standard of care required compartment pressure testing.

B. The trial court did not err in rejecting Behr's multiple efforts to reinstate Drs. Lynch as a Defendant (Assignment of Error No. 2)

After his summary judgment dismissal, Behr twice moved to reinstate Dr. Lynch as a defendant. The trial court properly rejected both attempts.

1. Standard of Review

A trial court order that dismisses fewer than all of the claims or parties, unless certified under CR 54(b), "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all of the parties." CR 54(b). The trial court possesses "wide discretion and authority" to issue, change or modify interlocutory orders. *Snyder v. State*, 19 Wn. App. 631, 636, 577 P.2d 160 (1978).

2. Procedure Re: First Motion to Reinstate

On February 27, 2015, Behr moved to reinstate both Dr. Lynch (and Dr. Powers). CP 1773 -1784. The claimed basis for reinstatement was Behr's interpretation of *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn.2d 136, 341 P.3d 261 (2014), combined with Dr. Collier's post-deposition declaration testimony regarding "team" or "collective" liability. *Id.* On April 2, 2015, the court denied the motion. CP 1927. CP 1930-1936.

3. The Trial Court's Denial of Behr's First Motion to Reinstate Dr. Lynch was a Proper Exercise of Discretion.

Here, it was not an abuse of discretion for the trial court to deny Behr's first motion to reinstate. Reinstating Dr. Lynch would have effectively nullified the *Marshall* rule. In addition, Behr's effort to reinstate Dr. Lynch was based on the incorrect assertion that *Grove* somehow eliminated the requirement that a plaintiff in a medical malpractice case support his/her claim against an individual provider with expert testimony that the provider violated his/her individual standard of care. At the time of Behr's first (and second) motion to reinstate Drs. Lynch and Powers, there was no direct standard of care criticism of either. Rather, Behr's theory, supported by Dr. Collier's declarations, was that Dr. Lynch and Dr. Powers were liable simply because they were part of the "team" that provided care to Behr at Deaconess.

4. Procedure Re: Second Motion to Reinstate

On 3/16/18, Behr again moved to reinstate Dr. Lynch. CP 3685-3696. By this time, NWOS, in response to Behr's written discovery requests, had produced the NWOS telephone message record discussed *supra* at pages 7-8. CP 3685. Behr's theory was that this phone note showed "that compartment syndrome was fully underway for Colton by noon on 12/10/10, and that Dr. Lynch ignored the communication from

NWOS about these symptoms." CP 3690. On 4/27/2018, the court denied the motion. CP 5442-5446.

5. The Trial Court's Denial of Behr's Second Motion to Reinstate Dr. Lynch was a Proper Exercise of Discretion.

It was not an abuse of discretion for the trial court to refuse to reinsert Dr. Lynch into the case as a defendant in April 2018, four years after his summary judgment dismissal and less than one month before a trial that had already been continued three times. Again, reinstating Dr. Lynch would have nullified the Marshall rule and, to the extent Dr. Collier now based his criticisms of Dr. Lynch on the NWOS phone note and Dr. Lynch's response thereto, reinstatement would have endorsed Behr's years-long failure to pursue discovery that would have revealed the existence of the NWOS phone note earlier than March 2018. (See discussion of discovery relative to phone note, infra at pgs. 23-25.)

Moreover, Dr. Lynch's response to the phone message was immaterial. At most, the NWOS phone note supported the proposition that Dr. Lynch should have evaluated Behr in the hospital sometime on December 10, after the Benage phone call to NWOS was made. But Dr. Collier testified at his deposition that he could not say what examination findings would have been present if Behr had been examined the afternoon/evening of December 10. CP 4099; CP 4019-20. Based on this

testimony, Dr. Anderson moved *in limine* for an order precluding Dr. Collier from testifying about what an examiner's findings and conclusions would have been the afternoon/evening of December 10. RP 4053, 4068, and the trial court granted the motion. CP 6839. In addition, at the time of the second motion to reinstate, Behr's standard of care claims against PA-C Bach and Dr. Anderson, both of whom saw and evaluated Behr on Saturday, December 11, remained. Accordingly, the presence of Dr. Lynch in the case as a defendant was not necessary for Behr to advance his theory of delayed diagnosis of compartment syndrome.

6. Even if Error, the Trial Court's Refusal to Reinstate Dr. Lynch was Harmless.

Even if the trial court's denial of Behr's first motion to reinstate Dr. Lynch was error, it was harmless because, again, the presence of Drs. Lynch and Powers in the case as Defendants would not have affected the case's outcome, given the jury's determination that Dr. Anderson did not violate the standard of care. (See discussion of harmlessness of error, *supra*, at pgs. 15-17.) Denial of the second motion to reinstate, even if erroneous, was also harmless. In addition to the above, Behr insisted that the contents of PT Benage's call, and the NWOS record reflecting that call, demonstrated clear signs and symptoms of compartment syndrome, and that if Dr. Lynch had somehow received and responded to that message by evaluating Behr, Dr.

Lynch would have diagnosed compartment syndrome. But, again, the jury's verdict was a determination that Behr did not have signs and symptoms diagnostic of compartment syndrome as late as the afternoon of December 11, 2010, when he was seen by Dr. Anderson.

C. The trial court did not abuse its discretion by refusing to enter a default judgment on liability as a discovery sanction. (Assignment of Error No. 3)

1. Standard of Review

A trial court decision on discovery sanctions is a matter of discretion and will not be disturbed on appeal absent a clear showing that the trial court's discretion was manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

2. Grounds for Harsh Sanction of Default on Liability

If a trial court imposes one of the more "harsher remedies" under CR 37(b), such as a default judgment, the record must clearly show (1) one party willfully or deliberately violated the discovery rules and orders, (2) the opposing party was substantially prejudiced in its ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would have sufficed. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 584, 220 P.3d 191 (2009), *citing Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.3d 1036 (1997).

A trial court is in a much better position than an appellate court to evaluate the significance of late-disclosed evidence in considering the issue of prejudice. See e.g. *Cavner v. Continental Motors Inc.*, 8 Wn. App. 2d 1001, 2019 WL 1254015 (Wn. App. Div. 1, unpublished, 2017). And, in considering a party's claim of unfair prejudice as a result of failure to respond to written discovery requests, it is appropriate for the court to consider whether the allegedly aggrieved party ever utilized available remedies to compel responses. See e.g. *Rhodes v. Barnett and Associates, P.S.*, 2020 WL 1814945 (Wn App. Div. 3, unpublished, April 2020).

3. Discovery and Procedure Relative to NWOS Phone Note

Consideration of this trial court ruling requires context. The case was filed on December 7, 2012. CP 1-11. Behr propounded first interrogatories and requests for production to NWOS on January 15, 2014. CP 3025. Additional interrogatories and requests for production were propounded to NWOS October 19, 2014. *Id.* At the time, NWOS was represented by Edward Bruya of Keefe, Bowman and Bruya. CP 3638-39. These interrogatories and requests went unanswered for almost four years, during which time Behr repeatedly sought to have Drs. Lynch and Powers reinstated as defendants, which efforts included two unsuccessful motions for discretionary review to the Court of Appeals, CP 899, CP 1697.

Michael Ramsden and his firm substituted as counsel for NWOS on February 7, 2017. CP 3638-39. The file materials transferred from Bruya's office to the Ramsden firm did not include the interrogatories and production requests Behr propounded to NWOS in 2014. CP 3556. Accordingly, no attorney at the Ramsden firm was aware of any outstanding discovery requests served on NWOS. *Id.*

Although his interrogatories and production requests had been outstanding to NWOS since 2014, Behr never moved to compel NWOS to submit answers nor did he communicate with NWOS' counsel about the matter. Instead, on December 6, 2017, Behr moved to preclude NWOS and physician's assistant LeAnn Bach from offering any evidence at trial as a sanction for not answering his written discovery. CP 3003.

Now aware of the unanswered interrogatories and production requests, and in response to Behr's 12/06/2017 motion, NWOS provided initial answers to the interrogatories and production requests on December 11, 2017, CP 3557-3583, and supplemental answers on January 29, 2018. CP 3612. NWOS' supplemental answers included the phone message document reflecting the Benage phone call to NWOS described *supra* at pages 7-8.

The hearing on Behr's motion to strike evidence from NWOS/Bach occurred on February 9, 2018. CP 4868-4925. At the time, Behr was

apparently unaware of the NWOS telephone record because no mention was made of it at the hearing. CP 4868-4925. Regardless, because of the delayed answers, the Court extended the discovery cut-off to allow Behr to conduct deposition discovery of NWOS employees/representatives. CP 4911, CP 3675. Because NWOS CEO John Braun had signed NWOS' answers and supplemental answers, CP 3557-3583, CP 3612, Behr deposed Mr. Braun on March 7, 2018.

On April 13, 2018, Behr filed a "Motion To Continue Trial Or For Remedy For Resistance To Discovery And Related Issues." CP 4641. Therein, he claimed that the "alternative to a trial continuance would be if the court fashioned a suitable remedy, such as default, or a limiting of defenses or other issues at trial." CP 4644. Behr accused the defendants of "willful misbehavior," RP 4641, Dr. Lynch of filing "an untruthful, sworn, declaration on 3/3/14", RP 4642, of "obstructing further discovery" RP 4643, "discovery intransigence" *Id.*, "material dishonesty" RP 4644, "bad faith" *Id.*, "discovery abuses" *Id.*

4. **The Trial Court's Refusal to Enter a Default Judgment on Liability as a Discovery Sanction was a Proper Exercise of Discretion**

Given the above, the trial court acted well within its discretion in refusing to default the defendants on liability as a sanction for the manner

in which discovery unfolded[4]. There was no willful or deliberate violation of the discovery rules by NWOS. When NWOS became aware it had not answered Plaintiff's interrogatories and production requests propounded in 2014, NWOS promptly provided initial and then supplemental responses. Moreover, Behr was not substantially prejudiced in his ability to prepare for trial because of the manner in which NWOS responded to Behr's written discovery. Recognizing that NWOS' answers raised new issues, the trial court extended the discovery cut-off and allowed Behr to conduct the depositions of NWOS' CEO and the two NWOS employees involved in the receipt of the 12/10/2010 telephone message from Deaconess, its entry into the electronic medical record, and the manner in which the message was handled. At trial, the phone message was made an exhibit, and Behr

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[4] In denying the motion, the court observed that no Behr did not depose Dr. Powers, Dr. Lynch, Dr. Anderson, physical therapist Benage, or physician's assistant Bach. RP 94. The court also considered that Behr never moved to compel answer to interrogatories or production requests, RP 94-95, and noted that the only thing done by Behr with respect to outstanding interrogatories and production requests was the filing of the motion to strike testimony. RP 95. The court remarked that "the facts were there to discover if any discovery had been done. At least that's how this court views those things. So based upon all of these things, I do not find that there is good cause to grant the continuance." RP 95. At the hearing, Behr did not argue that in lieu of a continuance, a default or some other sanction should be levied against defendants, so the court, in its ruling, did not address that aspect of Behr's motion. RP 92-95.

questioned Dr. Lynch, and NWOS employees Deneen Tate and Marcie Loshbaugh about the receipt of the message and its disposition. RP 564-65 (Lynch); RP 491-501 (Tate); RP 514-18 (Loshbaugh). The essence of the testimony was that the "comment" portion of the message was sent to Dr. Lynch as an email, and that Dr. Lynch forwarded the message to Dr. Powers.

The jury's verdict is further evidence Behr was not prejudiced by the timing of NWOS' disclosure of the phone message record. The subject of the message was the findings of physical therapist Benage. Those findings were part of the Deaconess medical record made an exhibit at trial, and Behr persistently argued that Dr. Anderson, in order to comply with the standard of care, had an obligation, when he saw the patient on 12/11/2010, to review physical therapist Benage's notes and be aware of her findings. RP 739-41. Dr. Anderson testified he did not review the record in conjunction with his examination of Behr on 12/11/2010. RP 1389-09. Nevertheless, the jury determined that Dr. Anderson did not violate the standard of care.

D. The trial court did not err by refusing to instruct the jury on "Collective Responsibility" Under *Grove v. PeaceHealth* (Assignment of Error No. 4)

1. Jury Standard of Review for Supplemental Instruction in Medical Negligence Case

Jury instructions are generally sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and, when read as a whole, properly inform the trier of fact of the applicable law. *Fergen v. Sestero*, 182 Wn.2d 794, 802-03, 346 P.3d 708 (2015). An instruction offered as an adjunct to the basic standard of care instruction is a "supplemental" instruction, and whether to give a supplemental instruction is within a trial court's discretion. *Fergen v. Sestero*, 182 Wn.2d 794, 802, 346 P.3d 708 (2015).

2. Standard of Care and Agency Instructions Given by Court, and Context for Those Instructions

By the time the court instructed the jury, the negligence of Dr. Anderson was the only remaining issue, with NWOS, Dr. Anderson's employer, the only remaining Defendant. The court instructed the jury that Dr. Anderson was an agent of NWOS, and that, accordingly, any act or omission of Dr. Anderson was an act or omission of NWOS. CP 6583, (Inst. No. 5). The court also instructed on an orthopedic surgeon's standard of care, with the standard of care instruction substantially mirroring WPI 15.01. CP 6586 (Inst. No. 8). Those instructions were correct statements

of the law, consistent with the evidence, and allowed the parties to argue the issue of alleged negligence in diagnosing compartment syndrome to the jury.

3. Behr's Proposed Instructions Were a Distortion of *Grove v. PeaceHealth*

Behr proposed two supplemental standard of care instructions based on *Grove v. PeaceHealth* that addressed team liability/responsibility: P-13 (CP 5516/CP 5782) and P-14 (CP 5517/CP 5783). Because, these instructions, Behr's liability theories, and so many of his assignments of error, were/are related to *Grove*, a thorough discussion of the case is appropriate.

In *Grove*, the plaintiff, Grove, developed a compartment syndrome after a complex, lengthy cardiac surgery at St. Joseph Medical Center, owned and operated by PeaceHealth. Grove sued PeaceHealth for medical malpractice, claiming the hospital was vicariously liable for the negligence of the employees who treated him. The jury returned a special verdict for Grove, finding that PeaceHealth was negligent and that its negligence was a proximate cause of Grove's damages. The trial court, however, granted PeaceHealth's post-verdict motion for judgment as a matter of law on the ground that Grove failed to offer expert standard of care testimony particular to any particular PeaceHealth employee. The trial court reasoned

that, while a hospital is liable under respondeat superior where an employee is negligent within the scope of their employment, a plaintiff is still required to prove negligence on the part of the particular employee and, according to the trial court, there was insufficient expert testimony to support the verdict. The Court of Appeals agreed.

The Washington State Supreme Court reversed, finding that Grove's experts had offered sufficient testimony that individual employees of PeaceHealth had violated or failed to comply with the standard of care applicable to them. More specifically, the Supreme Court noted that Grove's experts had identified Dr. Leon as being negligent as the healthcare provider ultimately responsible for monitoring Grove or insuring that he was monitored post-surgery. Essentially, Grove's expert testified that each surgeon violated his/her standard of care by failing to properly monitor Grove, a duty which began with Dr. Leon and continued to each cardiovascular surgeon who headed the care team on a particular day.

In specific reference to the proposed concept of "team liability", the court observed that "Dr. Adams and Ghidella (Grove's standard of care experts) established the monitoring standard of care applicable to the surgeons who headed the care team and how they breached that standard. The court concluded that further evidence regarding the negligence of other

team members was not required [to support a verdict against PeaceHealth, the employer of the surgeons.] 182 Wn.2d 136, 148, fn. 14.

In light of the above, Behr's *Grove*-derived proposed instructions were properly refused for a number of reasons. First, and fundamentally, by the time the case was submitted to the jury, the only remaining defendant was NWOS, and the only remaining issue was whether Dr. Anderson violated the standard of care. Thus, any instruction on "team" or "collective" liability would have misled the jury into believing that NWOS could be found liable based on the negligence of some individual provider other than Dr. Anderson, including parties who had been dismissed.

Second, contrary to Behr's assertions, there is no legal concept of "team liability" or "team responsibility" in a medical negligence case that eliminates the need for a plaintiff to support his/her claim with expert testimony as to how a particular healthcare provider violated his/her standard of care. As *Grove* illustrates, a plaintiff can establish liability with expert testimony that a particular provider violated the standard of care because of the way in which he/she participated, with other providers, in the plaintiff's care. And the purported standard of care violation can be that the provider failed to carry out his/her responsibility as the member of a team. But to establish liability on an individual provider, there still must be expert testimony that the individual failed to comply with the standard of care

specific to him/her. And to establish liability on an entity health care provider, there must be expert testimony that an entity employee violated the individual standard of care applicable to him/her.

A fundamental problem with Behr's proposed instructions on "team" or "collective" liability is that they would permit one healthcare provider to be found liable for the negligence of another merely because both providers were part of a "team" that provided care to the plaintiff. There are certainly legal relationships that allow one person to be held responsible for the negligent acts/omissions of another. Partnership is one example, where a tortious act or omission of one partner in the scope of the partnership's business is an act or omission of all partners. See WPI 50.14; RCW 25.05.100(1). Multiple individuals acting in concert is another. See WPI 50.20; RCW 4.22.070(1)(a). And an employer is vicariously liable for the tortious acts/omissions of an employee committed within the course and scope of employment. But one healthcare provider cannot be jointly liable for the acts/omissions of another provider simply because both provided care to the plaintiff. That would amount to a resurrection of joint and several liability which was abolished by tort reform, save in the limited circumstances set forth in RCW 4.22.070. See *Kottler v. State*, 136 Wn.2d 437, 444, 963 P.2d 834 (1998) ("We have repeatedly acknowledged that RCW 4.22.070 abolishes joint and several liability in Washington in favor

or proportionate liability, with joint and several retained in several explicitly listed exceptions.")

Behr was free to have his expert witnesses testify as to what the standard of care required of Dr. Anderson given the nature of his participation in the care of Behr, and his expert offered that testimony. The court then issued an appropriate standard of care instruction relative to orthopedic surgeons.

In sum, Behr's proposed instructions on "team" or "collective" liability were not reflective of the parties and issues that remained in the case when it was submitted to the jury, were misleading, were incorrect statements of the law, and, at best, were supplemental standard of care instructions that the court, in its discretion, was free to reject.

E. The trial court did not err by refusing to submit Behr's proposed instructions to the jury on the standard of care as purportedly articulated by Behr's liability experts. (Assignment of Error No. 5.)

1. Behr's Position on "Team" Liability

Again, Behr made it clear in his pre-trial submissions and proposed jury instructions that he wished to have his expert witnesses, particularly Dr. Collier, testify that the entity defendants (NWOS and Deaconess) had a "collective" or "team" responsibility or duty. This purported duty was articulated in Behr's proposed instructions, particularly P-9 (CP 5778), P-12 (CP 5781), P-13 (CP 5782) and P-14 (CP 5783).

2. The Legal Standard of Care in a Medical Negligence Case is Defined by RCW 7.70.040, Not by Expert Witnesses

In addition to the reasons set forth *supra* re Assignment of Error No. 4, the trial court properly rejected these instructions for the simple reason that they were incorrect statements of the law. (See discussion of *Grove v. PeaceHealth, supra,* at pgs. 29-32). The standard of care is defined by RCW 7.70.040, and that definition is incorporated into WPI 105.01, which the trial court gave. It makes no difference that Behr's experts wished to testify about "team" or "collective" responsibility. While an expert witness is certainly free to offer an opinion on what an individual health care provider must do to comply with the standard of care, it is not within the purview of an expert witness to define the legal standard for a jury instruction.

3. The Trial Court Properly Refused Behr's Proposed Instruction on *res ipsa loquitur* in this Failure to Diagnose Case.

Res ipsa allows a permissive inference of negligence. *Curtis v. Lein*, 169 Wn.2d 884, 239 P.3d 1078 (2010). The doctrine is "sparingly applied" in only "peculiar and exceptional cases" and only where the "facts and demands of justice make its application essential." *Id.* *Res ipsa* is applicable only when the evidence shows: "(1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency

or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary or contribution on the part of the plaintiff." *Pacheco v. Ames*, 149 Wn.2d 431, 436-37, 69 P.3d 324 (2003). Whether *res* ipsa applies in a particular case is a question at law. *Pacheco* at 436.

Here, the trial court properly rejected Behr's *res ipsa* instruction. CP 5520 (P-17). While the injury-causing occurrence was admittedly not due to any voluntary action or contribution on the part of Behr, (element 3), the failure to timely diagnose compartment syndrome, and Behr's development of compartment syndrome, are not the kind of injury/event which do not ordinarily occur in the absence of negligence. The central issue at trial was whether Behr's signs and symptoms were diagnostic of compartment syndrome, and whether the Defendants violated the standard of care by not diagnosing compartment syndrome and performing a fasciotomy earlier than December 12. In short, the crux of Behr's claim was misdiagnosis. However, misdiagnosis alone does not establish a violation of the standard of care. See *Reyes v. Yakima Health District*, 191 Wn.2d 79, 88-89, 419

P.3d 819 (2018), quoting *Fergen v. Sestero*, 182 Wn.2d 794, 809, 346 P.3d 708 (2015)[5].

Behr asserts a *res ipsa* instruction was appropriate because of his expert's actual, or potential, testimony that any time compartment syndrome develops in a hospital setting, there has been a violation of the standard of care. But it is for the court, not an expert witness, to determine whether an incident or event is of the type that ordinarily does not occur in the absence of negligence.

F. The trial court did not err by refusing to permit Dr. Collier to establish the standard of care for a Physician's Assistant in Washington. (Assignment of Error No. 6)

1. Necessity of Qualified Expert Testimony on Standard of Care and Standard of Review for Trial Court Determination on Qualification

The applicable standard of care in a medical malpractice action must be generally be established through expert testimony. *Reyes v. Yakima Health District*, 191 Wn.2d 79, 86, 419 P.3d 819 (2018), *citing Miller v. Jacoby*, 145 Wn.2d 65, 71-72, 33 P.3d 68 (2001). The trial court must make a preliminary finding of fact as to whether a proposed expert is qualified to express an opinion on the standard of care. *Winkler v. Giddings*, 146 Wn.

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[5] In addition, the court properly refused to give a *res ipsa* instruction because Behr was not in the exclusive control of Dr. Anderson.

App. 387, 392, 190 P.3d 117 (2008). This determination is a matter of trial court discretion. *Id.* In addition, because the standard of care for a health care provider in Washington is a Washington standard, in order to qualify as an expert on the standard a proposed expert must also demonstrate his/her familiarity with the standard of care in the state of Washington. *Boyer v. Morimoto*, 10 Wn. App. 2d 506, 520, 524, 449 P.3d 285 (2019).

2. Requirement of Sufficient Expertise in Relevant Medical Specialty

To qualify, the expert must have "sufficient expertise in the relevant specialty such that the expert is familiar with the procedure or medical problem at issue." *Frausto v. Yakima HMA, LLC,* 188 Wn.2d 227, 232, 393 P.3d 776 (2017). While it is possible for a physician to testify regarding a different medical practitioner's standard of care, see e.g. *Hall v. Sacred Heart Medical Center*, 100 Wn. App. 53, 60, 995 P.2d 621 (2000) (physician qualified to testify regarding a nurse's standard of care), in order to do so, the physician must show that he has had sufficient training and supervisory expertise to testify to that standard. *Id.* See also *Davies v. Holy Family Hospital*, 144 Wn. App. 483, 183 P.3d 283 (2008), abrogated on other grounds in *Frausto, supra,* (radiologist not qualified to testify on standard of care for hospital nurses).

3. Dr. Collier Failed to Demonstrate He Was Qualified to Testify Regarding the Standard of Care for a Physician's Assistant in Washington.

Here, Behr attempted to establish the standard of care for physician's assistant in the state of Washington through the testimony of Dr. Collier, an orthopedic surgeon from Philadelphia, Pennsylvania. RP 685-86. Dr. Collier graduated Rutgers Medical School and received his orthopedic surgery training from Temple University. RP 685-86. There was no evidence that Dr. Collier had ever practiced orthopedic surgery outside the state of Pennsylvania. At trial, when asked if he was familiar with the standard of care for a physician's assistant Dr. Collier replied "to a certain extent." RP 725-26. He then testified he does not use physician's assistants in his practice, but, instead, uses resident physicians. RP 726. He admitted he has not had any experience working directly with physician's assistants since his residency. RP 726. Dr. Collier testified only that he has "worked with other physicians" who utilize physician's assistants, RP 726, and that he has "seen them at work." RP 729.

Because Dr. Collier had no experience working with physician's assistants or supervising physician's assistants, he was not qualified to testify on a physician's assistant's standard of care. Merely observing a physician's assistant at work is not enough. See *Davies, supra.*

Notwithstanding the above, even if Dr. Collier had sufficient experience with physician's assistants to qualify him to testify on an orthopedic surgeon's physician's assistant's standard of care in general, he did not demonstrate familiarity with the standard of care for a physician's assistant in the state of Washington. Such familiarity is required. *Boyer v. Morimoto*, *supra.*

4. Even if the Trial Court Erred in Refusing to Allow Dr. Collier to Testify on a Physician Assistant's Standard of Care (and in Subsequently Dismissing the Standard of Care Claim Against PA-C Bach) the Error Was Harmless.

The jury's determination that Dr. Anderson did not violate the standard of care demonstrates that the presence of a standard of care claim against PA-C Bach, who saw Behr three hours earlier, would not have changed the outcome. Accordingly, the trial court ruling, even if error, was harmless.

G. The trial court did not err in first precluding, on a motion *in limine*, testimony regarding the liability of NWOS prior to 3 p.m. on 12/10/2010 and then precluding testimony based on acts/omissions of an NWOS agent prior to the afternoon/evening on 12/11/2010 (Assignment of Error No. 7)

1. Standard of Review

The admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *State v. Ellis*, 136 Wn.2d 498, 504, 963 P.2d 843 (1998).

2. Given the Issues and Parties in the Case the Trial Court's Orders Were a Proper Exercise of Discretion

The trial court, on a defense motion *in limine*, precluded evidence regarding the liability of NWOS the afternoon/evening of 12/10/2010. Because Drs. Lynch and Powers, the only NWOS physicians who saw Behr prior to 3 p.m. on 12/10/2010, were determined, via summary judgment dismissal, not to have violated the standard of care, any testimony regarding the liability of NWOS prior to 3 p.m. on 12/10/2010 would have been irrelevant and misleading. Behr wished to criticize Dr. Lynch, and perhaps Dr. Powers, for not responding to the phone message from Benage to NWOS. But, again, because Drs. Lynch and Powers were determined, via the court's summary judgment orders, not to have violated the standard of care, the court properly precluded Behr from criticizing Lynch or Powers relative to their response to the phone message.

An additional basis for the trial court's order was that Dr. Collier had testified at his deposition that he did not know what the findings would have been of any examination performed by an NWOS provider any time on 12/10/2010. CP 4099, CP 4019-20. And, accordingly, the trial court issued an order *in limine* precluding Dr. Collier from testifying about what an examiner's findings would have been the afternoon/evening of December 10. CP 6839. Any liability claim against an NWOS provider

based on acts/omissions allegedly occurring on 12/10/2010 would, by definition, have to have been based on the provider's examination of Behr on that date.

As for the court's order precluding any testimony regarding the liability of NWOS based on acts/omissions occurring prior to 3 p.m. on 12/11/2010, by the time this order was issued, the court had determined that Dr. Collier was not qualified to render an opinion on the standard of care for a physician's assistant in the state of Washington. Accordingly, Behr could not base a liability claim against NWOS on any acts/omissions of physician's assistant Bach, including her evaluation of Behr on 12/11/2010 at approximately noon. By the time the court granted this motion *in limine*, as the court aptly observed, the only claim that survived against NWOS was the claim based on Dr. Anderson's alleged violation of the standard of care when he evaluated Behr at 3 p.m. on 12/11/2010.

H. Dismissal of Deaconess as a matter of law (Assignment of Error No. 8) (Not addressed by these Respondents)

(This assignment of error does not pertain to these Respondents).

I. Dr. Anderson did not "change his position at trial to create an informed consent case". (Assignment of Error No. 9)

1. Dr. Anderson Trial Testimony re: Not Diagnosing Compartment Syndrome and Risks Associated with Fasciotomy

This assignment of error is based entirely on a false premise: that Dr. Anderson changed his position at trial. He did not. Throughout the case, Dr. Anderson's unwavering position was that he did not believe Behr had compartment syndrome, and that, on December 11, 2010, given everything he reviewed, including PA-C Bach's note, and his history and examination, and based on his clinical judgement, Behr did not have a compartment syndrome. RP 1401-02; RP 1458-59. Dr. Anderson only mentioned the risks associated with a fasciotomy because Dr. Collier testified that any time there is "an indication or an inkling" of or "we suspect" compartment syndrome, the standard of care requires a fasciotomy. RP 742, RP 709. To rebut this testimony Dr. Anderson testified that there are risks associated with doing a fasciotomy, and that, because of those risks, "you need an appropriate level of clinical certainty regarding the existence of compartment syndrome before you go ahead and do a fasciotomy." RP 1435. Dr. Anderson explained that a fasciotomy is a "significant undertaking" and that, accordingly, you do not do a fasciotomy on a "hunch" regarding the possible presence of compartment syndrome. RP 1436-37. Similarly, in response to Dr. Collier's testimony that a

fasciotomy should be done anytime "we suspect" compartment syndrome, Dr. Anderson testified that "suspicion" is vague word, that anyone who has had a surgery conceivably could have a "suspicion" of a compartment syndrome, and that, consequently "suspicion" in and of itself is not enough to subject somebody to a compartment release. RP 1513.

2. This was a Failure to Diagnose Case and Dr. Anderson had No Duty to Disclose to Behr Risks Associated with a Condition He Never Diagnosed – Compartment Syndrome.

Behr argues that, because Dr. Anderson gave this testimony about the risks associated with a fasciotomy, Dr. Anderson should have informed him of those risks, even though Dr. Anderson never diagnosed compartment syndrome. And, Behr posits, Dr. Anderson's testimony thus gave rise to an informed consent claim. But a healthcare provider does not have a duty to inform a patient of risks associated with a condition not diagnosed, including treatment options for that undiagnosed condition. *Gomez v. Sauerwein*, 180 Wn.2d 610, 618, 331 P.3d 19 (2014). See also *Gustav v. Seattle Urological Associates*, 90 Wn. App. 785, 954 P.2d 319 (1998); *Bays v. St. Lukes Hospital*, 63 Wn. App. 876, 825 P.2d. 319 (1992); *Harbottle v. Braun*, 10 Wn. App. 2d. 374, 447 P.3d 654 (219); *Thomas v. Wilfac Inc.*, 65 Wn. App. 255, 828 P.2d. 597 (1992).

J. The trial court appropriately gave an error of judgment instruction. (Assignment of Error No. 10)

1. Standard of Review.

Whether to give a supplemental jury instruction in a medical negligence case is a matter of trial court discretion, and, accordingly, is reviewed for abuse of discretion. *Fergen v. Sestero*, 182 Wn.2d 794, 802, 346 P.3d 708 (2015).

2. This was an Appropriate Case for the Error in Judgment Instruction

The error in judgment instruction is appropriate in medical malpractice cases based on negligence where the doctor "faced a diagnostic or treatment choice that called on his or her judgment." *Fergen* at 804. While a physician must make a choice for the instruction to be appropriate, in *Fergen* the court made it clear that the phrase encompasses any exercise of professional judgment" in treatment or diagnosis. *Fergen, supra*, at 808.[6]

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[6] Significantly, one of the two consolidated cases in *Fergen* involved the alleged negligence of the defendants in failing to diagnose compartment syndrome. With respect to the appropriateness of the instruction in that case, the court stated:

> Similarly, the physicians in *Appukuttan* made diagnostic choices based on their medical judgment. They testified regarding the details of their physical examinations. They looked for the warning signs and symptoms of compartment syndrome and testified that, in their judgment, they did not find them. They made a choice in whether to perform the

Here, Dr. Anderson used his clinical judgment to choose between the diagnosis of compartment syndrome and ordinary post-operative pain, decreased sensation, limitation of movement, etc. He also exercised his clinical judgment in determining what diagnostic tools to deploy, particularly compartment pressure testing. As the court recognized in *Fergen*, such a clinical situation presents a classic case for the error in judgment instruction.

Behr contends it was inappropriate to give the error in judgment instruction because of the presence of "informed consent facts." But, as explained *supra*, this was not an informed consent case, and Dr. Anderson's testimony about the risks associated with a fasciotomy was given only to rebut Dr. Collier's testimony that a fasciotomy should be done anytime there is an "inkling" or "suspicion" of compartment syndrome.

> additional pressure test but determined it was unnecessary because their physical examination did not indicate that compartment syndrome was the diagnosis, and instead, another problem was likely the cause of his symptoms. 182 Wn.2d at 809.

K. The trial court did not err by refusing to continue the trial, or ordering a new trial on an amended complaint. (Assignment of Error No. 11)

In this portion of his brief, Behr does not reference any specific trial court error or issues pertaining to those assignments of error, nor does he make any legal arguments. Instead, Behr simply incorporates his other arguments by reference. NWOS, Dr. Lynch, PA-C Bach and Dr. Anderson likewise incorporate their response to Behr's other assignments of error by reference.

IV. CONCLUSION

After five and a half years of contentious litigation, Behr had his day in court on his negligent diagnosis of compartment syndrome claim, and the jury rejected that claim.

Based on the foregoing argument and authorities, Respondent Northwest Orthopedic Specialists and non-parties Patrick Lynch, Jr., MD, Christopher Anderson, MD and Lee Ann Bach PA-C respectfully request that all of the trial court's challenged orders be affirmed, and that the jury's verdict be left undisturbed.

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RESPECTFULLY SUBMITTED this 1st day of June, 2020.

EVANS CRAVEN & LACKIE, P.S.

By _____

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CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **Brief of Respondent Northwest Orthopedic Specialists (NWOS) and Non-Parties Patrick Lynch, Jr., MD, Christopher Anderson, MD., and Lee Ann Bach, PA-C** on the 1st day of June, 2020, as follows:

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V. APPENDIX

RCW 7.70.040 -	Necessary elements of proof that injury resulted from failure to follow accepted standard of care.
Jury Instructions	P-13 (CP 5516); P-14 (CP 5517); P-17 (CP 5520); P-12 (CP 5781); P-13 (CP 5782); P-14 (CP 5783); P-16 (CP 5785).

RCW 7.70.040

Necessary elements of proof that injury resulted from failure to follow accepted standard of care.

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;

(2) Such failure was a proximate cause of the injury complained of.

[**2011 c 336 § 251**; **1983 c 149 § 2**; 1975-'76 2nd ex.s. c 56 § 9.]

NOTES:

Severability—1975-'76 2nd ex.s. c 56: See note following RCW **4.16.350**.

INSTRUCTION NO. P-13

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

Any act or omission of a Deaconess employee was an act or omission of the hospital.

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

A continuing duty to monitor passes through successive care-givers (emphasis added):

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

Grove v. PeaceHealth St. Joseph Hosp., 182 Wash. 2d 136, 146–47, 341 P.3d 261, 266 (2014).

NEGLIGENCE— *Grove* case law

Plaintiffs' Proposed Jury Instruction No.: **13**

Adopted____ Rejected_____ Reserved _____

INSTRUCTION NO. P-14

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

> Further, the Court of Appeals published decision declined to apply this court's decision in *Hansch v. Hackett,* 190 Wash. 97, 66 P.2d 1129 (1937). There, the estate of a deceased patient sued a hospital and one of its physicians for negligence after the patient died following childbirth. The jury returned a verdict in favor of the plaintiff as to the hospital but also returned a verdict in favor of the physician. On the hospital's appeal this court affirmed, holding that while there was evidence that would have supported the jury's determination that the defendant physician was not negligent, there was also evidence indicating that another doctor and one or more nurses may have been negligent in treating the patient in the absence of the defendant physician, and thus the jury could validly find the hospital liable under the rule of respondeat superior. *Id.* at 101–02, 66 P.2d 1129.

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

NEGLIGENCE— *Hansch* case law

Plaintiffs' Proposed Jury Instruction No.: **14**

Adopted____ Rejected_____ Reserved _____

INSTRUCTION NO. P-17

If you find that:

(1) the failure to diagnose compartment syndrome while a patient is under clinical care, producing permanent tissue damage, is of a kind that ordinarily does not happen in the absence of someone's negligence;

(2) the injury was caused by an agency or instrumentality within the exclusive control of the defendants; and

(3) the injury-causing failure to diagnose compartment syndrome was not due solely to a voluntary act or omission of the plaintiff;

then, in the absence of satisfactory explanation, you may infer, but you are not required to infer, that the defendants were negligent, and that such negligence produced the damages complained of by the plaintiff.

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

WPI22.01Res Ipsa Loquitur—Inference of Negligence, 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 22.01 (6th ed.)
Dr. Cossman and Dr. Collier have testified that the failure to diagnose compartment syndrome, in someone under clinical care, before permanent tissue damage occurs, is always a result of medical negligence. If the fact-finder agrees with Dr. Collier and Dr. Cossman, then this instruction is appropriate, as there is substantial evidence to support the instruction.

WPI 22.01

Res Ipsa Loquitur

Plaintiffs' Proposed Jury Instruction No.: 17

Adopted____ Rejected_____ Reserved _____

INSTRUCTION NO. P-12

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

RCW 7.70.020(3).

Plaintiffs' Proposed Jury Instruction No.: **12**

NEGLIGENCE— MEDICAL EMPLOYER AS HEALTHCARE PROVIDER

Adopted____ Rejected_____ Reserved _____

INSTRUCTION NO. P-13

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

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

A continuing duty to monitor passes through successive care-givers (emphasis added):

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

Grove v. PeaceHealth St. Joseph Hosp., 182 Wash. 2d 136, 146–47, 341 P.3d 261, 266 (2014).

NEGLIGENCE— *Grove* case law

Plaintiffs' Proposed Jury Instruction No.: **13**

Adopted____ Rejected_____ Reserved _____

INSTRUCTION NO. P-14

The failure to meet the appropriate duty of care makes the employing entity, Northwest Orthopedic Specialists in this instance, responsible for any medical negligence, even if the responsible individual cannot be identified, or if an individual has been mis-identified as a responsible individual during trial.

It is appropriate, if it conforms to the evidence, to find a named individual defendant not liable for negligence while still finding Northwest Orthopedic Specialists liable for the negligence attributable to the employees of Northwest Orthopedic Specialists.

CITATION FOR INSTRUCTION

> Further, the Court of Appeals published decision declined to apply this court's decision in *Hansch v. Hackett,* 190 Wash. 97, 66 P.2d 1129 (1937). There, the estate of a deceased patient sued a hospital and one of its physicians for negligence after the patient died following childbirth. The jury returned a verdict in favor of the plaintiff as to the hospital but also returned a verdict in favor of the physician. On the hospital's appeal this court affirmed, holding that while there was evidence that would have supported the jury's determination that the defendant physician was not negligent, there was also evidence indicating that another doctor and one or more nurses may have been negligent in treating the patient in the absence of the defendant physician, and thus the jury could validly find the hospital liable under the rule of respondeat superior. *Id.* at 101–02, 66 P.2d 1129.

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

NEGLIGENCE— *Hansch* case law

Plaintiffs' Proposed Jury Instruction No.: **14**

Adopted____ Rejected_____ Reserved _____

INSTRUCTION NO. P-16

If you find that:

(1) the failure to diagnose compartment syndrome while a patient is under clinical care, producing permanent tissue damage, is of a kind that ordinarily does not happen in the absence of someone's negligence;

(2) the injury was caused by an agency or instrumentality within the exclusive control of the defendants [in this instance, that Colton Behr was under direct medical care by the defendant Northwest Orthopedic Specialists after his tibial plateau fracture repair]; and

(3) the injury-causing failure to diagnose compartment syndrome was not due solely to a voluntary act or omission of the plaintiff;

then, in the absence of satisfactory explanation, you may infer, but you are not required to infer, that the defendant was negligent, and that such negligence produced the damages complained of by the plaintiff.

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

WPI22.01Res Ipsa Loquitur—Inference of Negligence, 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 22.01 (6th ed.)
Dr. Cossman and Dr. Collier have testified that the failure to diagnose compartment syndrome, in someone under clinical care, before permanent tissue damage occurs, is always a result of medical negligence. If the fact-finder agrees with Dr. Collier and Dr. Cossman as to the standard of care, then this instruction is appropriate, as there is substantial evidence to support the instruction.

WPI 22.01

Res Ipsa Loquitur

Plaintiffs' Proposed Jury Instruction No.: **16**

Adopted____ Rejected_____ Reserved _____

EVANS CRAVEN & LACKIE, P.S.

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