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Supreme Court No. _____

Court of Appeals No. 63336-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

RONALD and DEBORAH TETER, husband and wife,

Plaintiffs/Petitioners,

v.

ANDREW DECK, M.D.,

Defendant/Respondent.

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COURT OF APPEALS
DIVISION I

RONALD AND DEBORAH TETERS' PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Ronald and Deborah Teter, respondents below and plaintiffs in the trial court, are the petitioning parties.

II. COURT OF APPEALS' DECISION

The Teters seek review of *Deck v. Teter*, Court of Appeals No. 63336-8-I (Oct. 25, 2010), an unpublished decision reversing an order granting the Teters' motion for a new trial. Copies of the decision, the order granting a new trial (CP 708-14), and a pre-trial order striking the Teters' replacement urology expert (CP 351-54) are attached.

III. ISSUES PRESENTED FOR REVIEW

1. Under *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) and its progeny, does a trial court abuse its discretion by imposing a severe discovery violation sanction (excluding a critical substitute expert) without finding willfulness, without considering lesser sanctions, and with only a conclusory finding of prejudice?
2. Do *Burnet* and its progeny permit the Court of Appeals to rely on discovery violations unrelated to the excluded witness as grounds for upholding a witness exclusion order?
3. Is it an abuse of discretion to bar a substitute expert witness identified more than a month before trial absent any evidence the substitution was made for tactical reasons?
4. Is it misconduct warranting a new trial for counsel to "feign ignorance" of evidentiary rules and thereby cause opposing counsel to

object so often that the jury openly expressed its frustration? If so, does a party waive the right to seek a new trial on such grounds by failing to ask for a curative instruction and move for a mistrial?

5. May an appellate court substitute its judgment for the trial court about the prejudicial effect of counsel's cumulative misconduct?

IV. STATEMENT OF THE CASE

Ronald Teter's doctors lacerated his abdominal aorta during a laporoscopic kidney removal. Mr. Teter survived, but the resulting blood loss caused debilitating nerve and muscle damage. CP 296-302. The Teters filed suit against Dr. Lauter and respondent Dr. Andrew Deck. CP 1-12. The Teters and Dr. Lauter resolved their dispute. CP 28-29. The Teters tried their claims against Dr. Deck in January 2009. 1/12-1/30 RP.

Neither party fully complied with discovery deadlines and requirements and their relationship became acrimonious.¹ Both parties filed multiple discovery-related motions, but the assigned judge, Judge Washington, ruled on only a handful.² Faced with dueling witness exclusion motions and a September 2008 trial date, Judge Washington continued trial to January 12, 2009, and on September 17, 2008, ordered the Teters to file an updated witness list by October 1 and Dr. Deck to do the same by October 15, and directed both parties to provide "a concise

¹ *E.g.*, CP 726-27, 908, 924, 948, 997-100, 1085, 1129-30, 1132-33, 1166-71.

² *E.g.*, CP 756-60, 873-81, 937-39, 972-77, 1172-76, 1192-93, 1339-57, 1576-88, 1647-51, 1695-1700, 1712-17; *see also* CP 1737-39, 1743-48.

summary of the [expert] opinions expected to be offered regarding the standard of care, causation, and damages.” CP 1379-80.

The Teters timely-filed a 17-page disclosure to which Dr. Deck did not object. CP 1360-78; *see* CP 1413-15. The disclosure demonstrated the Teters’ intent to secure a replacement expert for the January 2009 trial:

Replacement Urologist/William Y. Duncan, III, M.D. Plaintiffs cannot say with certainty at this time what a replacement forensic expert witness will specifically testify to, except that it is anticipated that she or he will provide opinions that Dr. Deck’s care and treatment fell below the standard of care, and that such negligence was the proximate cause of the injuries at issue here, including the compartment syndrome and related nerve damage and chronic pain, and all of the problems that occurred post-operatively. This witness is also expected to testify that there was a failure to provide informed consent with regard to the choice between the laparoscopic and open nephrectomy procedures, as well as the relative inexperience of Dr. Deck, and the role that he was going to take in the procedure.

CP 1376, 1414.

The Teters had recently learned (in August 2008) that Dr. Duncan had fallen, ruptured his spleen, developed an MRSA infection, and could not testify at the September 2008 trial. CP 275-76. Judge Washington’s trial continuance gave the Teters an opportunity to find a replacement urology expert. Doing so would not prejudice Dr. Deck, since the replacement expert would offer basically the same opinions as Dr. Duncan had espoused in a declaration filed in January 2007 and at his January 2008 deposition.³ CP 296-302, 875, 885; *see* CP 965-66, 1376.

³ Dr. Duncan’s deposition ended early because he was recovering from the flu. His illness and a previously scheduled back surgery made it unlikely he could testify at the trial then scheduled for March 2008. However, after the

Dr. Deck's assertions notwithstanding, Judge Washington's September 17 order did not direct the Teters to name a replacement expert by October 1. *See* CP 1379-80. Judge Washington issued no additional written orders and it is uncontested the Teters had until November 12 to replace Dr. Duncan. CP 1386. On that date the Teters named Dr. Robert Golden as their replacement urology expert and provided a "concise summary" of his expected testimony. CP 1419-20. Dr. Deck did not object to the timeliness or adequacy of the Teters' disclosures, he simply scheduled Dr. Golden's deposition for November 24. CP 1422-28, 1513.

As Dr. Golden later explained, he agreed to testify for the Teters based on his "professional belief that Dr. Deck committed malpractice in the course of operating on Mr. Teter in September 2004." CP 349. However, on November 18, 2008, Dr. Golden somehow learned that he had "a longstanding professional and personal relationship with one of Dr. Deck's partners." CP 349. Dr. Golden decided the relationship required he withdraw as the Teters' urology expert. *Id.* Oddly, Dr. Golden gave Dr. Deck's attorneys direct notice of his decision. CP 1430-31.

The Teters immediately began taking "all available steps to secure" another replacement expert. CP 347. That "was not a quick or easy process ... given the relatively small number of urologists that are

March trial date was continued to September 2008, Dr. Duncan's availability was no longer a concern. Although Dr. Deck has claimed otherwise, the Teters never said or even implied that Dr. Duncan would not appear at the September 2008 proceeding. CP 276; *see* CP 745 (letter advising Dr. Deck that the Teters "may" need to locate a substitute for Dr. Duncan "to testify at trial in March."):

familiar with the laporoscopic procedure at issue[.]” *Id.* The Teters found a Spokane urologist, Dr. Thomas Fairchild, to testify against Dr. Deck. On December 10, 2008, the Teters told Dr. Deck that Dr. Fairchild would testify “to the same liability and causation issues” as his predecessor experts. CP 1442-46. On December 12, the Teters filed a formal written disclosure of Dr. Fairchild’s expected testimony. CP 1448-49. That was more than 30 days before trial and less than three months after the trial continuance gave the Teters an opportunity to replace Dr. Duncan.

Dr. Deck initially indicated he would depose Dr. Fairchild for three hours and tentatively agreed to do so on December 19, 2008. CP 1439-40, 1476-77. However, Dr. Deck then decided to use Dr. Golden’s personal-conflict-based withdrawal as reason to keep the Teters’ expert urology testimony from the jury and thereafter rejected all proposed deposition dates. CP 345, 735-36, 1462-64, 1476-77, 1533. Dr. Deck’s hardball stance was unjustified, particularly since he knew Dr. Fairchild would largely reiterate Dr. Duncan’s previously disclosed opinions, *compare* CP 296-302 *with* CP 1448-49; Dr. Deck’s own discovery foibles required the Teters to depose Dr. Deck’s witnesses up to and during trial, CP 207, 329-30, 335-36, 345, 804; 1/12 RP 81-82; and Dr. Deck’s deposition of Dr. Fairchild would take only three hours, CP 1439-40.

Dr. Deck moved to strike “Plaintiff’s Improperly-Disclosed Expert Witness, Dr. Thomas Fairchild.” CP 356-68. He misleadingly portrayed the Teters’ delay in disclosing Dr. Fairchild as “willful, tactical, and

utterly inexplicable,” and informed Judge Washington it would be an abuse of discretion to do anything but strike Dr. Fairchild. CP 366-67. The Teters corrected Dr. Deck’s mischaracterization of events, urged that Dr. Deck’s discovery violations were equally if not more egregious, pointed out Dr. Deck’s failure to establish grounds for the severe sanction of witness exclusion, and explained the extreme prejudice that Dr. Fairchild’s exclusion would impose on the Teters. CP 260-349.

On January 12, 2009, trial began before Judge Gonzalez, who took over the case because Judge Washington was unavailable for trial. 1/12 RP; CP 1754-71. On that same day, after prompting by Judge Gonzalez and without allowing oral argument, *see* 1/12 RP 7-13; Judge Washington rejected Dr. Deck’s “improper disclosure” assertions but still granted Dr. Deck’s motion.⁴ CP 351-54 (copy attached). Judge Washington did not find the Teters had engaged in intentional, willful or other unconscionable conduct, did not indicate he had considered a lesser sanction, and made only a conclusory finding of prejudice to Dr. Deck. CP 353-54.

The 11-day trial was marred by Dr. Deck’s very experienced attorney’s persistent refusals to adhere to basic evidentiary requirements and repeated efforts to get inadmissible evidence before the jury. That forced the Teters to object repeatedly, which so frustrated the jury that one

⁴ At the same time, Judge Washington denied the Teters’ motion to exclude or limit Dr. Deck’s belatedly and/or improperly disclosed expert witnesses. CP 535-36, 1749-53.

juror informed the court he felt “like strangling a couple of lawyers[.]”⁵ 1/29 RP 1917. Ultimately Judge Gonzalez concluded that Dr. Deck’s counsel was “feign[ing] ignorance” of basic rules governing the admission and presentation of evidence for tactical reasons. 1/28 RP 1904 [CP 562]; *see also* 1/28 RP 1787-88 [CP 512]. Judge Gonzalez’s opinion of defense counsel’s prejudicial conduct fell even lower when he learned counsel had misled the court and the Teters about what witnesses she intended to call. CP 561-62, 571-76, 579-80, 586-87, 590, 600-02; 1/28 RP 1638-41, 1902-08; 1/29 RP 1913-17.

The jury returned a verdict for Dr. Deck. CP 110-11. The Teters moved for a new trial on two grounds relevant here: (1) Dr. Fairchild’s exclusion; and (2) misconduct by Dr. Deck’s counsel. CP 220-616. Judge Gonzalez granted the motion, finding Judge Washington abused his discretion in excluding Dr. Fairchild, and the witness exclusion order contravened this Court’s analytical and evidentiary requirements. Judge Gonzalez further found that defense counsels’ repeated evidentiary violations and “misleading representations” about witnesses “warrants a new trial, as it casts doubt on whether a fair trial occurred.” CP 708-10, 712-13 (copy attached).⁶

⁵ *See* CP 231-42 (summarizing and explaining the bases for the Teters’ objections at trial and citing and quoting transcript excerpts included in the appellate record at CP 370-400, 495-529, 538-51, 554-66).

⁶ Judge Gonzalez’s findings detail the prejudice the Teters suffered as a result of Dr. Fairchild’s exclusion. CP 708-10. Dr. Deck has not challenged Judge Gonzalez’s findings regarding prejudice and the Teters do not address

Dr. Deck appealed. Division I of the Court of Appeals reversed and directed reinstatement of the verdict for Dr. Deck. In so doing the appeals court held that compliance with *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) and its progeny is unnecessary; that the unforeseeable need to retain a replacement expert more than a month before trial is not a reasonable excuse for a late witness designation; and that a party waives the right to a new trial based on opposing counsel's cumulative misconduct unless he or she objects *and* asks for a curative instruction *and* moves for a mistrial. None of these holdings comport with established law and all contravene sound public policy requiring cooperation among attorneys and candor to the court. The Teters respectfully ask this Court to grant review, reverse the Court of Appeals, and remand this matter for a new trial before Judge Gonzalez.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. Dr. Fairchild's Exclusion

1. The Court of Appeals' Decision Affirming Judge Washington's Ruling Conflicts With *Burnet* and Its Progeny. RAP 13.4(b)(1).

Burnet requires that "before a trial court may impose a CR 37(b)(2)(B) sanction excluding testimony, a showing of willfulness [is] required[.]" *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006). Willfulness can be assumed only if the sanctioned party offers no

them here. The Teters had preserved the right to contest Dr. Fairchild's exclusion by making an offer of proof during trial, 1/27 RP 1625-28, which satisfied *Burnet* requirements. 131 Wn.2d at 498-99.

reasonable excuse or justification for the discovery violation. *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002). Further, “the record must clearly state the reasons for the sanction,” and establish “the trial court's consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it.” *Mayer*, 156 Wn.2d at 688. “[The trial court's] reasons should, typically, be clearly stated on the record so that meaningful review can be had on appeal.” *Burnet*, 131 Wn.2d at 494; *accord Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 583, 220 P.3d 191 (2009); *Rivers*, 145 Wn.2d at 685.

The Court of Appeals’ opinion conflicts with these decisions by relieving Dr. Deck and Judge Washington of the duty to comply with the evidentiary, analytical, and record-making requirements they impose. Specifically, the Court of Appeals court upheld Judge Washington’s exclusion order even though:

(1) Dr. Deck offered no evidence of willful or intentional conduct pertaining to the Teters’ December 2008 substitution of Dr. Fairchild for Dr. Golden; Judge Washington thus could not and did not find the evidence established a willful or intentional delay; and Judge Washington did not indicate he had presumed willfulness because the Teters failed to give a reasonable justification for the substitution, CP 351-54, 356-68;

(2) Dr. Deck did not establish and Judge Washington did not find that the substitution 33 days before trial “*substantially* prejudiced [Dr. Deck’s] ability to prepare for trial.” *Rivers*, 145 Wn.2d at 686 (emphasis

added); *see* CP 351-54, 356-68;

(3) Judge Washington made a conclusory finding that “Dr. Deck and his attorneys have been prejudiced in their trial preparation by the plaintiffs’ *failure to properly disclose* Dr. Fairchild,” CP 354 (emphasis added); but that conflicted with his rejection of Dr. Deck’s “improper disclosure” claim, CP 351-54. Further, taking a three-hour deposition a month before trial is not substantially prejudicial when, as here, the movant’s own witnesses are still being deposed, CP 207, 329-30, 335-36, 345, 804, 1439-40; 1/12 RP 81-82; and

(4) Dr. Deck’s motion did not propose any sanction but exclusion and Judge Washington’s order does not show any “consideration of a lesser sanction.” *Mayer*, 156 Wn.2d at 688; *see* CP 351-54, 356-68.

Instead of assessing whether the *Burnet* factors were met, Judge Washington excluded Dr. Fairchild “*based on the plaintiffs’ multiple violations of the Court Rules and the Orders of this Court.*” CP 354 (emphasis added). The Court of Appeals affirmed. In so doing the court committed legal error, as it held *Burnet* findings are unnecessary if “*the record as a whole* reflects that the court found that the violation was willful, and that the court considered lesser sanctions.” *Op.* at 10. The court then compounded its error by misapprehending the record.

Specifically, the Court of Appeals upheld Dr. Fairchild’s exclusion based on “a five-month period” of the Teters “fail[ing] to comply with at least five separate court orders requiring them to identify witnesses,

provide a summary of expert opinions, and make experts available for depositions.” Op. at 8. But no order pertaining to the Teters’ urology expert could have been entered before September 17, 2008 (when Judge Washington continued trial and thereby gave the Teters an opportunity to replace Dr. Duncan); no pre-September 2008 discovery dispute involved Dr. Duncan (whose opinions were disclosed in 2007 and who was deposed in 2008); Judge Washington did not enter a single written order pertaining to the Teters’ urology expert; and even Judge Washington did not find noncompliance spanning five-months and five orders.⁷

The Court of Appeals’ approach conflicts with this Court’s precedent. To the extent the Court of Appeals relied on the Teters’ and Dr. Deck’s pre-September 17, 2008 discovery squabbles, it impermissibly authorized exclusion of a replacement expert for discovery violations unrelated to the excluded expert or his predecessor. *See supra* n.7. That violates the mandate of *Burnet* and its progeny that a sanction must relate to and be proportional to the particular discovery violation and the surrounding circumstances. *Rivers*, 145 Wn.2d at 695; *Burnet*, 131 Wn.2d at 494-98.

In addition, this Court does not allow trial courts to avoid

⁷ CP 351-54. The record in fact establishes that the Teters’ original urology expert, Dr. Duncan, was not the subject of Dr. Deck’s motions to compel or exclude. CP 873-81, 1339-57. There was no reason for Dr. Deck to so move because Dr. Deck had deposed Dr. Duncan in January 2008 and received his declaration a year before. CP 296-302, 875, 885. And there is not one order in the record directing the Teters to perform a single act pertaining to Dr. Duncan or his successors or warning of potential urology expert-related sanctions.

demonstrating, on the record, compliance with *Burnet*. *Rivers* is illustrative. In *Rivers*, as here, the trial court imposed a harsh sanction (in that case, dismissal) without making *Burnet* findings. There (as Dr. Deck claims occurred here), the trial court had issued a series of discovery orders that petitioner disobeyed. 145 Wn.2d at 687-93. The Court of Appeals affirmed the dismissal, but this Court reversed.

In so doing, the *Rivers* Court rejected the Court of Appeals' holding that a missing *Burnet* finding does not warrant reversal if it is apparent from the record that grounds for the omitted finding were present. It admonished that the trial court's "conclusion was not affirmatively stated on the record by the trial court, as required by our decision in *Burnet*." 145 Wn.2d at 694. The *Rivers* Court also made clear that trial courts cannot rely on conclusory findings such as the prejudice finding made here. Thus it found inadequate a trial court finding that the "court has considered lesser sanctions of terms and exclusion of testimony, but has determined that dismissal ... is the only appropriate remedy." 145 Wn.2d at 696. The Court explained:

The record in this case indicates that Petitioner manifested a somewhat casual disregard for the rules of discovery and her obligation to comply with the orders of the court under those rules. Whether she should be subject to the drastic sanction of dismissal cannot be determined under the limited language used by the trial court in its order of dismissal. Before resorting to the sanction of dismissal, *the trial court must clearly indicate on the record that it has considered less harsh sanctions under CR 37. Its failure to do so constitutes an abuse of discretion.*

Rivers, 145 Wn.2d at 696 (emphasis added; footnote omitted).

The Court of Appeals' decision here conflicts with this Court's requirement of compliance with *Burnet* and its progeny. It conflicts with the requirement that discovery sanctions be based on related discovery violations. The Court should accept review to resolve these conflicts.

2. Division I's Analysis Conflicts With Decisions of Other Divisions of the Court of Appeals. RAP 13.4(b)(2).

Review of Division I's decision also is warranted because it conflicts with decisions of other Divisions of the Court of Appeals.

Division I has repeatedly allowed litigants and trial courts to ignore the requirements of *Burnet* and its progeny. Op. at 8-11; *Blair v. TA-Seattle E. No. 176*, 150 Wn. App. 904, 909-10, 210 P.3d 326 (2009), review granted, 168 Wn.2d 1006 (2010); *Scott v. Grader*, 105 Wn App. 136, 142, 18 P.3d 1150 (2001);⁸ see *Rivers, supra* (reversing Division I's unpublished opinion). These decisions conflict with those from other Divisions of the Court of Appeals as well as with decisions by this Court.

In *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 155 P.3d 978 (2007), Division III reversed and remanded a case because the trial court had excluded witnesses without making *Burnet* findings.

Division III explained:

We generally review a trial judge's management of a trial for abuse of discretion. But decisions that preclude a party from calling an expert as a sanction for discovery violations are different. The standard is more rigorous....

⁸ Dr. Deck relied heavily on *Scott* in his appeal and the *Teter* court cited the case repeatedly. *Scott* has never been cited in a published decision and Division I is the only court to cite the case in unpublished decisions.

Before the trial court can exclude a witness as a sanction for the failure to comply with a discovery time table, the court must consider, on the record, lesser sanctions. And the court must find that the disobedient party's refusal to obey a discovery order was willful or deliberate and that it substantially prejudiced the opponent's ability to prepare for trial. Indeed, the court must find that the failure to comply amounted to "intentional nondisclosure, willful violation of a court order, or other unconscionable conduct." The failure to support a decision to exclude a witness with these essential findings is an abuse of discretion.

138 Wn. App. at 69-70 (citations omitted; emphasis added).

Decisions from Division II also make clear the need for an on-the-record showing of consideration of the *Burnet* factors in an order, or in transcribed oral remarks. *E.g.*, *Casper v. Esteb Enters.*, 119 Wn. App. 759, 768-70, 82 P.3d 1223 (2004); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 324-31, 54 P.3d 665 (2002). Under RAP 13.4(b)(2), the conflict between these properly-decided cases and *Teter* is grounds for accepting review.

Review is also warranted because *Teter* conflicts with a Division III opinion holding that the non-tactical substitution of an expert witness shortly before trial is not grounds for exclusion. In *In re Estate of Fahlander*, 81 Wn. App. 206, 210, 209-11, 913 P.2d 426 (1996), review denied, 130 Wn.2d 1002 (1996); an "eleventh hour" substitution was made because scheduling conflicts made it impossible to schedule the original expert's deposition. The trial court refused to let the substitute expert testify. Division III held that was an abuse of discretion because:

There is no evidence that the late attempt to call ... a

substitute for Dr. Bigelow was a trial tactic by ... counsel or that counsel intended to violate any discovery rule or scheduling order. Defense counsel's scheduling problems contributed to the difficulty associated with deposing Dr. Bigelow creating the 11th-hour adjustments. That fact should have been considered by the court in fashioning a sanction.

81 Wn. App. at 211 (emphasis added).

Here, as in *Fahnlander*, there was no evidence of a tactical substitution. The Teters did not replace Dr. Golden because he changed his mind about Dr. Deck's malpractice; indeed, Dr. Golden reiterated his malpractice opinion in support of the Teters' opposition to Dr. Deck's motion to strike Dr. Fairchild. CP 348-49. And the Teters did not keep their urology expert's opinions from Dr. Deck; they disclosed those opinions in 2007 and 2008. CP 296-302, 875, 885.

The fact is, the Teters had to find two replacement experts for wholly unforeseeable reasons – one witness's fall and related critical medical problems, and the other's after-the-fact discovery of a personal conflict. Division I's affirmance of the severe sanction of exclusion in such circumstances conflicts with Division III's *Fahnlander* decision.

B. The Court of Appeals' Rejection of Judge Gonzalez's Misconduct Findings Conflicts With Supreme Court Precedent. RAP 13.4(b)(1).

Judge Gonzalez granted the Teters' motion for a new trial for two reasons: (1) Judge Washington's improper exclusion of Dr. Fairchild; and (2) defense counsel's cumulative trial misconduct. CP 708-14. Decisions by this Court required the Court of Appeals to employ a very lenient standard in reviewing Judge Gonzalez's ruling. In civil cases, reviewing

courts are to apply “a standard that more generally upholds trial court decisions” on new trial motions. *Aluminum Co. of Am. (Alcoa) v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000). Further, a stronger showing of abuse of discretion is required to set aside an order granting a new trial than to set aside an order denying one. *E.g., Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997).

Ignoring these standards, the Court of Appeals rejected Judge Gonzalez’s finding that defense counsel’s cumulative misconduct “casts doubt on whether a fair trial occurred,” CP 713, and substituted its own secondhand opinion on the effect of counsel’s misconduct, Op. at 12 (the conduct did not “appear[] ... to deprive the Teters of a fair trial”); Op. at 14 (“any prejudice that may have occurred ... was insufficient to warrant setting aside the jury verdict.”). By so doing not only did the Court of Appeals apply the wrong standard of review, it disregarded this Court’s repeated admonition that “[t]he trial court is in the best position to most effectively determine if ... misconduct prejudiced a [party’s] right to a fair trial.” *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177, *cert. denied*, 506 U.S. 856 (1992); *accord State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998); *see* 14A Karl B. Tegland, WASH. PRACTICE, CIVIL PROCEDURE § 30.41 at 281 (2d ed. 2009) (“where the infringements though less serious in nature are repeated after warning it quickly becomes a case where prejudice is conclusively implied.”). These conflicts with this Court’s holdings warrant review.

Review is also warranted because the Court of Appeals' decision conflicts with this Court's decisions holding that it is misconduct warranting a new trial for counsel to repeatedly ask objectionable questions in order to put the opposing party in the unfavorable position of having to make constant objections. *State v. Simmons*, 59 Wn.2d 381, 386, 393, 368 P.2d 378 (1962); *see also Shaw v. Prudential Ins. Co. of Am.*, 166 Wash. 652, 657-59, 8 P.2d 431 (1932). Put differently, "it is improper for counsel to continue to question a witness on matters that have been held by a court to be inadmissible," and "the persistent asking of questions which counsel knows are objectionable is misconduct." 14A WASH. PRACTICE, *supra* § 30.33 at 262. That is precisely the form of misconduct Judge Gonzalez found occurred here and which he in turn found "forced plaintiffs to repeatedly object to improper questions and unfairly and improperly exposed the jury to inadmissible evidence, [and] prejudiced plaintiffs[.]" CP 712-13.

The Court of Appeals rejected Judge Gonzalez's misconduct analysis, stating that a new trial on misconduct grounds is warranted only when "out of the ordinary" or "irregular" or "flagrant" conduct is involved. Op. at 12. But by so holding, the Court of Appeals deviated from *Simmons* and *Shaw* and again impermissibly substituted its assessment for the trial court's. Its decision thus conflicts with this Court's precedent and warrants review under RAP 13.4(b)(1).

The Court of Appeals' misconduct analysis also conflicts with this

Court's precedent on preserving the right to seek a new trial based on opposing counsel's misconduct. The dispositive authority is *Alcoa*, which holds that:

“The movant must ordinarily have properly objected to the misconduct at trial, ... and the misconduct must not have been cured by court instructions.”

140 Wn.2d at 539 (quoting 12 James Wm. Moore, MOORE'S FEDERAL PRACTICE § 59.13[2][c][1][A], at 59-48 to 58-49 (3d ed.1999)). If “no objection was made, the issue becomes whether any curative instructions would have effectively erased the prejudice.” *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Here objections were made over and over. That is all *Alcoa* requires. But the Court of Appeals opined that *Nelson v. Martinson*, 52 Wn.2d 684, 328 P.2d 703 (1958) – a case neither party cited – required the Teters to also request curative instructions *and* a mistrial. Op. at 12-13. *Nelson*, however, involved a party who “did not make any objection to any of the alleged acts of misconduct,” and thus gave the trial court no chance for corrective action. 52 Wn.2d at 689. It is inapposite.

Moreover, *Nelson* did not involve cumulative misconduct consisting of “feigned ignorance” designed to require repeated objections. Only rarely (and certainly not in this case) would such tactics warrant a contemporaneous curative instruction or a mistrial. In any event, Judge Gonzalez did instruct the jury that it was not to consider evidentiary rulings or be influenced by objections, CP 161-62; and the Teters twice

asked (unsuccessfully) for limiting instructions, CP 420-24; 1/29 RP 2135.

C. The Court of Appeals' Decision Conflicts With Strict Prohibitions Against Making Misrepresentations to the Court. RAP 13.4(b)(1), (4).

Attorneys must exercise candor toward the tribunal. RPC 3.3.

Misconduct is not tolerated because it “will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense.” *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 355, 858 P.2d 1054 (1993) (citation omitted). Lawyers thus must conduct themselves “in a manner consistent with the proper functioning of [rules governing the] system.” *Id.* (citation omitted).

Judge Gonzalez found that defense counsel “made misleading representations to the Court and to plaintiffs’ counsel about witnesses defendant was intending to call to testify.” CP 713. The Court of Appeals found that conduct unremarkable and *sua sponte* held that the Teters waived their right to cite the misrepresentations as grounds for a new trial by failing to seek curative instructions and a mistrial. Op. at 13-14. Curative instructions were not warranted since the misrepresentations were not made before the jury, 1/28 RP 1638-41, 1896, 1903-04, 1/29 RP 1913, 1915; and as explained above, a mistrial motion is not required. This aspect of *Teter* conflicts with *Alcoa*, 140 Wn.2d at 539; conflicts with *Fisons* and the policies of RPC 3.3; and condones conduct that misleads the Court; thereby warranting review under RAP 13.4(b)(1) and (4).

VI. CONCLUSION

For all of the reasons stated above, the Teters respectfully ask the Court to accept review under RAP 13.4(b)(1), (2) and (4), reverse the Court of Appeals, and reinstate Judge Gonzalez's order granting a new trial. By so doing the Court will curtail Division I's erosion of *Burnet*, confirm the proper standard and scope of review of new trial orders, and clarify when cumulative attorney misconduct warrants a new trial and how to preserve the right to a new trial in the face of such misconduct.

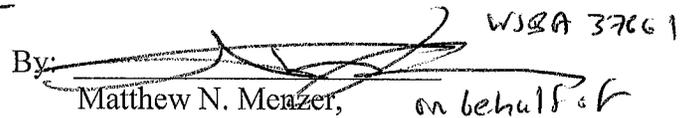
DATED this 24th day of November, 2010.

McNAUL EBEL NAWROT &
HELGREN PLLC

MENZER LAW FIRM, P.L.L.C.,

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on November 24, 2010, I caused to be served a true and correct copy of the foregoing Brief of Respondents upon counsel of record as stated below:

Mary H. Spillane and Mark S. Davidson	<input checked="" type="checkbox"/>	Via Messenger
Williams Kastner & Gibbs PLLC	<input type="checkbox"/>	Via U.S. Mail
601 Union Street, Suite 4100	<input type="checkbox"/>	Via Overnight Delivery
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Nancy C. Elliott	<input checked="" type="checkbox"/>	Via Messenger
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DATED this 24th day of November, 2010, at Seattle, Washington.

By: 
Cathy Hendrickson, LEGAL ASSISTANT

APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

ANDREW DECK, M.D.,)	
)	No. 63336-8-I
Appellant,)	
)	DIVISION ONE
v.)	
)	
RONALD and DEBORAH TETER,)	UNPUBLISHED OPINION
Husband and Wife,)	
)	
Respondents.)	FILED: <u>October 25, 2010</u>

SPEARMAN, J — After the jury returned a defense verdict in this medical malpractice action against Dr. Andrew Deck, the trial court granted Ronald and Deborah Teter's motion for a new trial. Because the judge who presided over discovery matters did not abuse his discretion in excluding one of the Teters' expert witnesses, and because the alleged misconduct by defense counsel did not deprive the Teters of a fair trial, we hold the trial court erred in granting a new trial, and we reverse.

FACTS

Background

Ronald Teter was diagnosed with a tumor in his right kidney. Drs. Andrew Deck and David Lauter performed a laparoscopic procedure to remove the kidney. During the procedure, Mr. Teter's abdominal aorta was lacerated, and the laparoscopic procedure was converted to an open surgery. Dr. Michael Towbin, a vascular surgeon, repaired

No. 63336-8-1/2

the aortic laceration. Immediately after the surgery, Mr. Teter developed compartment syndrome in his left leg. Compartment syndrome is a condition where the circulation or function of the tissue within a specific compartment of the body is being compromised because of increased pressure in that compartment. To address the compartment syndrome, orthopedic surgeon Robin Fuchs performed a fasciotomy on Mr. Teter. A fasciotomy involves making an incision on each side of the leg through the skin to release the fascia, the connective tissue, surrounding the muscles, so that pressure in the leg compartment is released.

Discovery and Witness Disclosures

On April 21, 2006, the Teters sued Dr. Deck and Dr. Lauter, claiming they negligently failed to convert the laparoscopic procedure to an open surgery in a timely fashion, thereby causing the post-operative compartment syndrome. The Teters later stipulated to dismiss Dr. Lauter. In May 2007, the trial date was continued to March 17, 2008, and in February 2008, upon the parties' joint motion, the trial date was again continued to September 22, 2008.

On June 2, 2008, Dr. Deck moved to compel the Teters to provide their primary witnesses for deposition, or alternatively, to exclude the witnesses from testifying at trial. The trial judge at the time was the Honorable Christopher Washington. Judge Washington declined to exclude the witnesses, but on June 11, he granted Dr. Deck's motion to compel. The judge directed that:

Plaintiffs shall provide names and available times, and dates for the depositions of plaintiffs' primary witnesses by June 20, 2008 . . . If the depositions cannot be completed reasonably before trial, the court will consider a continuance of the trial date or other remedies.

The Teters failed to provide the deposition dates by June 20. Instead, on July 11, 2008, they moved to continue the trial date or, in the alternative, extend the discovery cutoff period through August. Dr. Deck opposed the motion and moved for sanctions. Judge Washington declined to continue the trial date or impose sanctions, but he did extend the discovery cutoff to August 29, 2008 to facilitate depositions. On August 21, Dr. Deck moved for an order setting a pretrial conference. He suggested that the conference was necessary because, among other things, only a week remained before discovery cutoff and the Teters had not yet provided witnesses' names, nor had they provided dates and times for possible depositions. Judge Washington granted the motion and scheduled the pretrial conference for September 17.

By the August 29, 2008 extended discovery cutoff date, the Teters had not yet complied with Judge Washington's June 11 order. Instead, on September 2, 2008, they served a trial witness list in which they listed as a urology expert: "Replacement Urologist/William Y. Duncan, III, M.D." The Teters had first stated they were seeking a replacement for this urology expert in January 2008, but never disclosed anyone specific, and never made anyone available for deposition.¹

¹ After Dr. Duncan became ill during a deposition in January 2008, counsel for Mr. Teter sent a letter advising defense counsel that:

[D]ue to Dr. Duncan's various health issues, we may be substituting another urologist for him. We are currently looking for someone who can quickly step in, and timely complete his or her deposition, and be available to testify at trial in March.

The Teters point out that after the trial date was continued to September 22, 2008 they expected that Dr. Duncan would be available to testify at trial and discontinued their search for another urology expert. The record does not reflect whether this was ever communicated to Dr. Deck. The Teters contend that it was not until August 11 that they became aware that as a result of another illness, Dr. Duncan would be unavailable in September.

On September 12, Dr. Deck moved to exclude seven of the Teters' physician witnesses and his physical therapist. Around the same time, the Teters also moved to exclude and/or limit the testimony of several defense expert witnesses.

On September 17, 2008 Judge Washington held the pre-trial conference. He refused to exclude or limit the testimony of any witnesses. Instead, he continued the trial date again, with a new trial date of January 12, 2009 and a new discovery cutoff of November 24, 2008. Judge Washington also ordered both parties to identify their experts and provide "a concise summary of the opinions expected to be offered regarding the standard of care, causation, and damages" by October 1, 2008.

The Teters did not comply with this order. On October 1, 2008, they served a witness disclosure which again listed as their urology expert "Replacement Urologist/William Y. Duncan, III, M.D." They admitted they could not "say with certainty at this time" what specifically would be the nature of the testimony of any potential replacement expert.

On October 22, 2008, Judge Washington held another pre-trial conference. He again gave the Teters latitude, giving them until October 29, 2008 to disclose their urology expert and provide a summary of his or her opinions.

The Teters violated this order too, disclosing no one October 29, and instead asking defense counsel for additional time. Judge Washington convened a third pre-trial conference on November 12, 2008. Again, he did not sanction the Teters. Instead, he ordered that if the Teters failed to identify an expert urologist and disclose his or her

opinions that day, they would not be permitted to call an expert urologist at trial. The Teters disclosed Dr. Robert Golden that day.

On November 24, 2008, the date of the new discovery cutoff, the Teters struck Dr. Golden as an expert witness because Dr. Golden had a professional and personal relationship with one of Dr. Deck's partners. The Teters stated, "[w]e will determine shortly if there will be a replacement for Dr. Golden." On December 10, the Teters advised defense counsel they intended to replace Dr. Golden with Dr. Thomas Fairchild. On December 12, the Teters provided a disclosure for Dr. Fairchild.

On December 29, 2008, Dr. Deck moved to exclude Dr. Fairchild as a trial witness. Judge Washington granted the motion on January 12, 2009. His order found that (1) the Teters had failed to comply with the Case Schedule Order; (2) the Teters had failed to comply with three separate court-ordered deadlines for disclosing a urology expert; (3) the Teters had failed to comply with the September 17, 2008 order requiring a concise summary of the expert testimony; (4) the Teters did not provide Dr. Deck with a reasonable opportunity to depose Dr. Fairchild; and (5) Dr. Deck and counsel had been prejudiced in trial preparation by these repeated failures.

The same day Judge Washington entered his order, the case was assigned to Judge Steven Gonzalez for trial. On January 13, 2009, the Teters informed Judge Gonzalez they would file a motion to reconsider Judge Washington's order, but they never did.

Trial

The trial of this case was very contentious. Counsel for both sides objected repeatedly and frequently. Judge Gonzalez expressed his displeasure with defense counsel on multiple occasions, reminding her not to make "speaking" objections. Judge Gonzalez was also frustrated with defense counsel's inability to have exhibits properly marked and to properly lay a foundation for marked exhibits. He stated:

Let me just say that I have found the performance this morning exasperating. Counsel knows how to mark exhibits in advance, show them to the witness, and knows what refreshing recollection is. I expect no more speeches in front of the jury this morning.

At the end of the day, the judge continued:

I'm also concerned about attempts to circumvent the court's ruling on admissibility of documents. It certainly appears that way by putting issues before the jury regarding documents in a purported attempt to lay foundation.

For disregard for protocol and rules of evidence which are repeated – and this is not the first court in which they have occurred – for continued speaking objections after clear direction from me not to do so, and what can only be described as feigned ignorance when I say that a document must be marked before it's shown to a witness, it certainly doesn't mean it has to be admitted before a witness can refer to it to refresh recollection. It is fairly fundamental and basic how you can refresh and when you can refresh a witness's recollection.

At no point during the trial did counsel for the Teters move for a mistrial based on any "speaking" objections or on defense counsel's questions while attempting to lay foundation. Regarding the Teters' expert witnesses, they relied on a general surgeon who was permitted to opine that Dr. Deck had violated the standard of care.

On January 20, 2009, after deliberating for about two hours, the jury returned a defense verdict.

Motion for New Trial

The Teters moved for a new trial, claiming Judge Washington erred in excluding Dr. Fairchild; the jury was erroneously instructed on the standard of care; and defense counsel's questions violated various orders in limine, and were so prejudicial as to deprive them of a fair trial.² Judge Gonzalez granted the motion under CR 59(a)(8), finding Judge Washington's exclusion of Dr. Fairchild was an "abuse of discretion, and a reversible error of law." Judge Gonzalez also granted the motion under CR 59(a)(1) and (2), finding that defense counsel attempted to expose the jury to contents of exhibits that had not been admitted into evidence; that counsel made numerous and improper speaking objections; and that counsel's representations about which witnesses would testify, and when, were misleading. Judge Gonzalez did not find any

² The Teters specifically relied on CR 59(a)(1)(2) and (8) which provide:

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

...

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or . . .

error with the jury instructions, nor did he find that defense counsel violated any orders in limine.³ Judge Gonzalez also vacated a judgment entered on the verdict. The court denied Dr. Deck's motion for reconsideration, and he appeals.

DISCUSSION

Exclusion of Dr. Fairchild

In granting the Teter's motion for a new trial, pursuant to CR 59(a)(8), the trial court found that the exclusion of Dr. Fairchild was "an abuse of discretion, and a reversible error of law" that violated the Teters' right to a fair trial. We disagree. Exclusion of a witness as a sanction for intentional or willful violations of a discovery order is within the sound discretion of the trial court. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). A court abuses this discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Id. However, a party's untimely designation of a witness, without reasonable excuse, will justify an order excluding the witness. Scott v. Grader, 105 Wn. App. 136, 140, 18 P.3d 1150 (2001).

Here, as described in detail above, over a five-month period, the Teters failed to comply with at least five separate court orders requiring them to identify witnesses, provide a summary of expert opinions, and make experts available for depositions. Despite Dr. Deck's several motions seeking sanctions, Judge Washington repeatedly resorted to non-punitive means to address the Teters' non-compliance. He continued

³ The Teters spend much of their briefing discussing how counsel's questions violated various orders in limine, but Judge Gonzalez specifically crossed out these portions of the proposed order granting a new trial.

the trial date, extended the discovery cutoff, and on at least three occasions gave the Teters more time to name an expert urologist. Only upon threat of exclusion of any urology expert did the Teters finally comply by naming Dr. Golden. Even then, less than two weeks later, the belatedly named expert withdrew due to a perceived conflict of interest. It was not until over two weeks later, and one month before trial, that the Teters finally provided Dr. Deck with their expert, Dr. Fairchild, and a summary of his opinion. Under these circumstances, Judge Washington did not abuse his discretion by excluding Dr. Fairchild after the Teters' designated him in an untimely fashion.

The Teters in their appellate briefing make the same explanations for missing deadlines they provided in their briefing to Judge Washington. But this was a dispute about discovery that was heard and resolved by the judge who had presided over and ruled upon months of discovery disputes. The issue is not whether another court would have exercised its discretion differently, but whether the ruling excluding the witness was manifestly unreasonable, based on untenable grounds or made for untenable reasons. Burnet, 131 Wn.2d at 494. In the circumstances presented here, we conclude, that it was not.

The Teters also contend, and Judge Gonzalez agreed, that Judge Washington erred by failing to consider a lesser sanction before excluding Dr. Fairchild, and by failing to find that the Teters intentionally and willfully violated discovery orders. We disagree. The proper question is not whether the trial court included the words "willful" and "lesser sanction" on the last order to be issued, rather, the proper question is

whether *the record as a whole* reflects that the court found that the violation was willful, and that the court considered lesser sanctions. See Scott, 105 Wn. App. at 142 (expert can properly be excluded so long as it is "*apparent from the record* that the trial court explicitly considered whether a lesser sanction would have sufficed, and whether the disobedient party's refusal . . . was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial.")⁴ (citing Burnet, 131 Wn.2d at 494).

Here, the record plainly reflects that Judge Washington carefully considered and repeatedly utilized lesser sanctions, and also that he found the violations were willful. "A party's disregard of a court order without reasonable excuse or justification is deemed willful." Magana v. Hyundai Motor America, 167 Wn.2d 570, 584, 220 P.3d 191 (2009) (quoting, Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002)). Judge Washington's order indicates he considered how the Teters failed to comply with not only the Case Schedule Order, but also at least three separate disclosure deadlines ordered by the court. Judge Washington also found that the Teters disregarded his order that they provide defendants with a summary of the opinions of their experts. Further, he found these repeated violations prejudiced Dr. Deck. As such, the record clearly reflects that Judge Washington considered and found that the Teters violations were willful and prejudiced Dr. Deck. Likewise, the record reflects that Judge Washington only excluded Dr. Fairchild after months of giving the Teters opportunities to comply with multiple orders,

⁴ Emphasis added.

including the order that the Teters disclose a urology expert and opinion on November 12, 2008 or face exclusion of the witness.

In sum, the record reflects that Judge Washington considered lesser sanctions and found the violations were willful. As such, he did not abuse his discretion in excluding Dr. Fairchild, and it was error to grant the Teters a new trial on that basis.

Alleged Misconduct of Defense Counsel

The Teter's motion for a new trial was also granted on grounds that defense counsel attempted to expose the jury to contents of exhibits that had not been admitted into evidence; that counsel made numerous and improper speaking objections; and that counsel's representations about which witnesses would testify and when, were misleading. The trial court concluded that these alleged acts represented irregular proceedings or misconduct warranting a new trial under CR 59(a)(1) and (2). We disagree for the reasons described below.

Defense counsel's foundation questions and speaking objections

No specific line of questioning or particular speaking objection by defense counsel is identified that allegedly prejudiced the jury. Nor is the manner in which the alleged misconduct caused prejudice specified. The order generically states that the record included "many examples" of defense counsel's "improper speaking objections" and questions "expos[ing] the jury to the contents of exhibits that had not been admitted into evidence." We are left, however, to speculate as to which "improper speaking objection" prejudiced the Teters and in what way. Likewise, we must guess at what

contents of which unadmitted exhibits the jury was improperly exposed to and whether and in what way the Teters may have been prejudiced.

We hold that the findings relied upon by the trial court are too general and nonspecific to support a conclusion that the proceedings were so irregular or that the alleged misconduct was so flagrant that the Teters did not receive a fair trial. Additionally, even if we were to assume the specific questions and objections identified by the Teters in their briefing were the same specifics relied upon by Judge Gonzalez, none of those questions or objections appeared so out of the ordinary or so irregular or flagrant as to deprive the Teters of a fair trial.

Moreover, our Supreme Court has held that a plaintiff alleging prejudicial misconduct so severe as to warrant a new trial cannot sit on his or her hands and wait for an adverse jury verdict before moving for a new trial. In Nelson v. Martinson, 52 Wn.2d 684, 328 P.2d 703 (1958), plaintiffs sued the owner of a cow for injuries sustained when their car struck the cow. The jury returned a defense verdict, plaintiffs moved for a new trial, and the trial court granted the motion on grounds that defense counsel's cross-examination and closing argument were improper. Nelson, 52, Wn.2d at 688-89. The Supreme Court reversed and reinstated the defense verdict, holding that plaintiffs waived any argument regarding counsel's alleged misconduct:

We hold, in the instant case, that any misconduct on the part of appellant's counsel could have been cured by an instruction and, therefore, . . . the respondents waived any objection they might otherwise have been able to urge on this appeal.

Further, the respondents were aware of all the acts of misconduct set forth in the order of the trial court when they voluntarily submitted their case to the jury. They did not move for a mistrial

but were willing to wait and gamble on a favorable verdict and then, for the first time, when the verdict was adverse, they claimed error.

Id. at 689. Here, as in Nelson, the Teters did not request curative instructions and never once moved for a mistrial. Instead, they “gamble[d] on a favorable verdict[,]” and claimed error only after the jury found against them. Id. As was the case in Nelson, the order granting a new trial here was error.

Alleged representations about witness scheduling.

The motion for a new trial was also granted on grounds that “defense counsel made misleading representations to the Court and to plaintiffs’ counsel about witnesses the defendant was intending to call to testify.” According to counsel for the Teters, they suffered prejudice in that they were forced to prepare for the testimony of Dr. Lauter, who was stricken as a witness when the defense ran out of time.

We disagree. First, the Teters waived this argument just as they waived their arguments about defense counsel’s alleged prejudicial misconduct. See Nelson, 52 Wn.2d at 688-89. Second, even if the argument had not been waived, it is difficult to understand how the Teters suffered prejudice by being “forced” to prepare for the testimony of Dr. Lauter. Dr. Lauter was originally one of the defendants in this case, actually performed the surgery with Dr. Deck, was listed on trial witness disclosures, and was under subpoena to testify at trial. This was a twelve-day trial with a large pool of potential lay and medical expert witnesses, as well as court-imposed time limits for the parties to present their cases. Under the circumstances, it is difficult to discern any prejudice the Teters may have suffered because Dr. Deck chose not to call Dr. Lauter

as a witness. In addition, to the extent any prejudice may have occurred, it was insufficient to warrant setting aside the jury verdict.

Alleged Instructional Error

The Teters further contend the order granting a new trial was properly granted because the trial court erroneously instructed the jury as to the standard of care. Judge Gonzalez rejected this argument, as do we. Instructions are adequate if they allow each party to argue its theory of the case, are not misleading, and when read as a whole properly inform the jury of the applicable law. Douglas v. Freeman, 117 Wn.2d 242, 256-57, 814 P.2d 1160 (1991). The standard of care instruction given by the court reads as follows:

A physician owes to the patient a duty to comply with the standard of care for one of the profession or class to which he or she belongs.

An [sic] urologist has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent urologist in the State of Washington acting in the same or similar circumstances at the time of the care and treatment in question.

Failure to exercise such skill, care, and learning constitutes a breach of the standard of care and is negligence.

This instruction permitted the parties to argue their theories of the case. Counsel for the Teters repeatedly argued during closing that Dr. Deck had very limited experience with the particular laparoscopic procedure used in the case, and that he "violated the standard of care for a reasonably prudent physician in the State of Washington[.]"

The Teters do not contend the instruction inaccurately states the law. Rather, they claim the instruction is misleading and improper because it permitted counsel for Dr. Deck to cast doubt upon their standard of care expert, who was a general surgeon,

not a urologist. The Teters do not explain, however, why the instruction is improper, and neither of the cases they cite so hold. In Richards v. Overlake Hosp. Medical Center, 59 Wn. App. 266, 796 P.2d 737 (1990) and Atkins v. Clein, 3 Wn.2d 168, 100 P.2d 1 (1940), the standard of care instructions were faulty, not because they permitted the defense to challenge the credibility of plaintiffs' expert, but rather because they incorrectly stated that a specialist was held only to that degree of skill and care used by a reasonably prudent general practitioner. Richards, 59 Wn. App. at 276; Clein, 3 Wn.2d at 170-71.

The instructions here permitted each party to argue its theory of the case, were not misleading, and when read as a whole, properly informed the jury of the applicable law.⁵

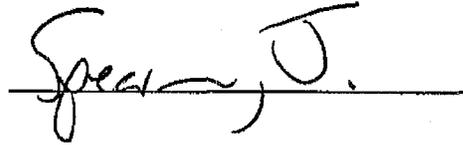
⁵ We note that, like the court's instruction to the jury, the Teters' proposed instruction also would have permitted the defense to challenge the Teters' expert on grounds he was not a urologist:

A health care professional owes to the patient a duty to comply with the standard of care for one of the profession or class to which he or she belongs.

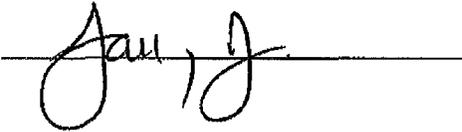
A urologist who holds himself out as a specialist in laparoscopic surgery has a duty to exercise the degree of skill, care and learning expected of a reasonably prudent laparoscopic surgeon in the State of Washington acting in the same or similar circumstances at the time of the care or treatment in question. Failure to exercise such skill, care and learning constitutes a breach of the standard of care and is negligence.

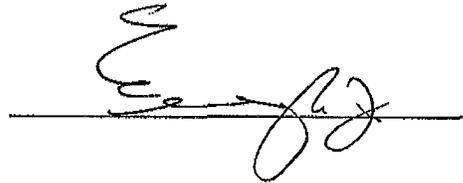
CONCLUSION

For the reasons described above, we conclude that the trial court erred in granting the Teters' motion for a new trial. Accordingly, we reverse the order granting a new trial, reinstate the jury verdict dismissing the claims against Dr. Deck, and reinstate the vacated judgment on the verdict.

A handwritten signature in cursive script, appearing to read "Spear, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Jan, J.", written over a horizontal line.

A handwritten signature in cursive script, appearing to read "E. J.", written over a horizontal line.

Honorable Christopher Washington

SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING

RONALD and DEBORAH TETER,
wife and husband,

Plaintiffs,

vs.

ANDREW DECK, M.D., and
DAVID J. LAUTER, M.D.,

Defendants.

NO. 06-2-13627-6 SEA

~~PROPOSED~~ ORDER GRANTING
DEFENDANT DR. DECK'S MOTION
TO STRIKE PLAINTIFFS'
~~IMPROPERLY DISCLOSED~~ EXPERT
WITNESS, DR. THOMAS
FAIRCHILD

THIS MATTER having come before the Court on Defendant Dr. Deck's Motion to Strike Plaintiffs' ~~Improperly Disclosed~~ Expert Witness, Dr. Thomas Fairchild, and the Court having received and considered the following:

1. Defendant Dr. Deck's Motion to Strike Plaintiffs' ~~Improperly Disclosed~~ Expert Witness, Dr. Thomas Fairchild, with the following exhibits:

(A) January 22, 2008, letter from plaintiffs' attorney Matt Menzer acknowledging that the plaintiffs may need to name a "replacement urologist" for their prior expert, Dr. William Duncan;

(B) Order of the Honorable Chris Washington, dated October 15, 2008, memorializing Judge Washington's September 17, 2008, order requiring the plaintiffs to disclose each witness they intend to call at trial, as well as a summary of the witnesses' opinions, no later than October 1, 2008;

[PROPOSED] ORDER GRANTING DEFENDANT
DR. DECK'S MOTION TO STRIKE DR. FAIRCHILD - 1



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- (C) Plaintiffs' Witness Disclosures (Per the Court's September 17, 2008 Conference), received by defense counsel on October 3, 2008, stating only that the plaintiffs would call an unnamed "replacement urologist;"
- (D) October 29, 2008, letter from plaintiffs' attorney Matt Menzer to defense attorney Nancy Elliott, confirming that Mr. Menzer was "not yet able" to identify a "replacement urologist;"
- (E) Plaintiffs' Witness Disclosures (Per the Court's September 17, 2008 Conference) Regarding Robert Golden, M.D., dated November 12, 2008, identifying Dr. Golden for the first time as a purported expert witness for trial;
- (F) Notice of Deposition and Subpoena Duces Tecum to Robert Golden, M.D., setting Dr. Golden's deposition for November 24, 2008;
- (G) Fax from plaintiffs' purported expert Dr. Golden, sent to defense counsel on November 20, 2008, stating that Dr. Golden had informed the plaintiffs' attorneys that he could not participate in this case;
- (H) November 24, 2008, letter from Nancy Elliott to Matt Menzer, confirming that Dr. Golden would be stricken as a witness;
- (I) November 25, 2008, letter from Matt Menzer to Nancy Elliott, confirming that Dr. Golden has been stricken and stating that the plaintiffs would "determine shortly if there will be a replacement for Dr. Golden;"
- (J) December 12, 2008, letter from plaintiffs' attorney Avi Lipman to Nancy Elliott informing Ms. Elliott that the plaintiffs would purportedly call Dr. Thomas Fairchild as an expert witness at trial. This letter included Dr. Fairchild's CV, an inadequate disclosure of his alleged opinions and testimony, and an offer to conduct Dr. Fairchild's deposition in Spokane on December 19, 2008;
- (K) December 15, 2008, letter from Avi Lipman to Nancy Elliott suggesting Friday December 19, Saturday December 20, or Sunday December 21, 2008, for Dr. Fairchild's deposition in Spokane;



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(L) December 15, 2008, letter from Avi Lipman to Nancy Elliott suggesting that Ron Teter's deposition take place on Friday December 19, 2008, instead of Dr. Fairchild's deposition;

(M) December 16, 2008, letter from Avi Lipman to Nancy Elliott cancelling Ron Teter's deposition and suggesting Friday December 19, Saturday December 20, or Sunday December 21, 2008, for Dr. Fairchild's deposition in Spokane;

(N) December 16, 2008, letter from Nancy Elliott to Avi Lipman advising Mr. Lipman that the defendant does not agree to Dr. Fairchild as a testifying witness based on the plaintiffs' very late disclosure, and that Ms. Elliott is not available for depositions on December 19-21;

(O) December 19, 2008, letter from Avi Lipman to Nancy Elliott confirming, among other things, that the plaintiffs did not disclose Dr. Fairchild until at least December 10, 2008;

(P) Plaintiffs' Notice of Unavailability, dated December 23, 2008, indicating the unavailability of plaintiffs' counsel for any purpose, including depositions, from December 24, 2008, until January 2, 2009.

- 2. Declaration of Jake Winfrey;
- 3. Plaintiffs' Response, if any;
- 4. Defendant Dr. Deck's Reply;

AND THE COURT having reviewed the authorities stated in the pleadings, and having reviewed and considered the court file, and being otherwise advised in the premises, it is now hereby ORDERED as follows:

- 1. Defendant Dr. Deck's Motion to Strike Plaintiffs' ~~Improperly Disclosed~~ Expert Witness, Dr. Thomas Fairchild, is GRANTED;
- 2. The plaintiffs failed to comply with the Case Schedule Order or any of the three deadlines order by this Court (October 1, October 29, or

[PROPOSED] ORDER GRANTING DEFENDANT DR. DECK'S MOTION TO STRIKE DR. FAIRCHILD - 3



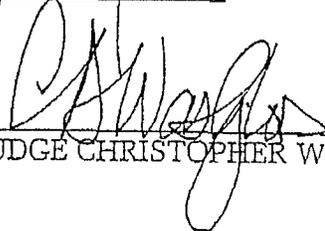
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November 12, 2008) with respect to their disclosure of Dr. Fairchild;

- 3. With respect to Dr. Fairchild, the plaintiffs failed to comply with the Court's September 17, 2008, order requiring the plaintiffs to provide a concise summary of the purported testimony of their expert witnesses on the issues of standard of care, causation, and damages;
- 4. The plaintiffs did not provide defendant Dr. Deck with a reasonable opportunity to depose Dr. Fairchild;
- 5. Dr. Deck and his attorneys have been prejudiced in their trial preparation by the plaintiffs' failure to properly disclose Dr. Fairchild; and
- 6. The plaintiffs are prohibited from calling Dr. Thomas Fairchild or any other "replacement urologist" as an expert witness at trial, based on the plaintiffs' multiple violations of the Court Rules and the Orders of this Court.

DATED this 12th day of January, 2007.


 JUDGE CHRISTOPHER WASHINGTON

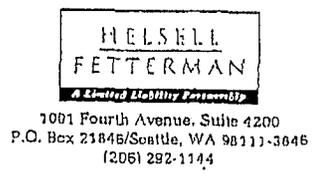
Presented By:

HELSELL FETTERMAN LLP

By JTDW

Nancy C. Elliott WSBA #11411
 Jake Winfrey WSBA #29747
 Attorneys for defendant Dr. Deck

[PROPOSED] ORDER GRANTING DEFENDANT DR. DECK'S MOTION TO STRIKE DR. FAIRCHILD - 4



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FILED
KING COUNTY WASHINGTON
MAR 16 2009
SUPERIOR COURT CLERK
ANDRE JONES
DEPUTY

HONORABLE STEVEN C. GONZALEZ
Date of Hearing: March 10, 2009
Without Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

RONALD and DEBORAH TETER,
husband and wife,

Plaintiffs,

v.

ANDREW DECK, M.D.,

Defendant.

No. 06-2-13627-6 SEA

~~PROPOSED~~ ORDER GRANTING
PLAINTIFFS' MOTION FOR NEW
TRIAL

[Clerk's Action Required]

SA

THIS MATTER having come on regularly before the undersigned judge of the above entitled court upon the Motion of Plaintiffs for a New Trial, and the Court having considered said motion, reviewed the pleadings and files in this matter, specifically including the following:

1. Plaintiffs' Motion for a New Trial, and accompanying trial transcripts and other exhibits;
2. Declaration of Matthew N. Menzer in Support of Plaintiffs' Motion for a New Trial;
3. Declaration of Avi J. Lipman in Support of Plaintiffs' Motion for a New Trial;
4. Declaration of Bonnie Ellison;
5. Defendant's Response [Opposition] to Plaintiffs' Motion for a New Trial;
6. Defendant's Exhibits and Declarations;
7. Plaintiffs' Reply with Excerpt of Opening;
8. _____;

SA

SA

~~PROPOSED~~ ORDER GRANTING PLAINTIFFS' MOTION FOR
NEW TRIAL - Page 1

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ORIGINAL
Page 708

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- 9. Plaintiffs' Reply Brief in Support of Motion for a New Trial;
- 10. _____; and
- 11. _____;

and being otherwise fully advised in this matter, now makes the following Order and Statement of Reasons pursuant to CR 59(f);

1) The trial court's exclusion of Dr. Fairchild, plaintiffs' expert urologist from Spokane, Washington (and one of two plaintiff experts on liability and causation issues) was an abuse of discretion. As detailed in plaintiffs' Offer of Proof, Dr. Fairchild's testimony went to the critical liability issues in this case – breach of the standard of care and proximate causation. Contrary to long-standing Washington law, *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 155 P.3d 978, 980 (2007) (emphasis added), and *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997), the trial court failed to determine, before imposing the most severe sanction of excluding Dr. Fairchild's testimony at trial, that there were no lesser remedies available. The defense motion to exclude this witness did not argue that no lesser remedies were available to the Court, and the Court's Order of January 12, 2009 granting the defense motion does not reflect that the Court considered the issue or determined that no such lesser remedies were available. The record does, however, reflect that the lesser remedies of deposing Dr. Fairchild on a date certain before or during trial, or granting the defense a brief continuance of the trial date were available. In fact, one of the defense experts was made available to plaintiffs for deposition after trial began.

2) Additionally, the trial court's January 12, 2009 Order does not include the necessary determination that any failure to comply with a discovery order amounted to "intentional disclosure; willful violation . . . or other unconscionable conduct." *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693 at 706, 732 P.2d 974 (1987). Furthermore, the record in the case does not support this determination. Dr. Fairchild was

1 disclosed to the defense a month before trial. He was the second replacement urologist for
2 plaintiffs. After their original expert, Dr. Duncan, became too ill to continue, plaintiffs named a
3 first replacement, Dr. Golden, without any defense objection. Dr. Golden, in turn, withdrew two
4 weeks later due to a perceived conflict of interest. Plaintiffs disclosed Dr. Fairchild three weeks
5 after Dr. Golden withdrew and thirty-three (33) days before trial. Plaintiffs offered the
6 defendant several dates before trial to depose Dr. Fairchild, and the defense had multiple experts
7 available to respond to the testimony that Dr. Fairchild would have provided at trial.

8 3) The jury returned a verdict in favor of defendant, finding plaintiffs had not
9 proven that the defendant breached the standard of care of a "reasonably prudent urologist".
10 With no urologist to testify on their behalf, (and just one non-urologist expert left to testify on
11 liability and causation issues) plaintiffs were substantially and severely prejudiced by the trial
12 court's exclusion of Dr. Fairchild. Defense counsel's closing arguments to the jury emphasized
13 that plaintiffs did not present the testimony of an expert urologist and that they only provided
14 the testimony of one expert, a general surgeon from out-of-state. This Court finds that the
15 exclusion of Dr. Fairchild was an abuse of discretion, and a reversible error of law. *Burnet v.*
16 *Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). A new trial is warranted on
17 this ground alone under CR 59(a) (8).

18 ~~4) Under the particular circumstances of this case, the use of defendant's proposed~~
19 ~~standard of care instruction (Instruction No. 10) pursuant to WPI 105.01, which defined the~~
20 ~~applicable standard of care in terms of a "reasonably prudent urologist", was error. Plaintiffs'~~
21 ~~proposed instruction pursuant to WPI 105.02, which defined the standard of care in terms of a~~
22 ~~reasonably prudent "laparoscopic surgeon", was proper and should have been given in this case.~~
23 ~~The standard of care issues in the case arose out of a laparoscopic nephrectomy, a procedure that~~
24 ~~requires specialized training and experience to perform. Furthermore, both sides introduced~~
25 ~~testimony that the procedure is performed by both urologists and general surgeons who have~~
26 ~~that specialized training and experience. The defense capitalized on Instruction No. 10 to~~

1 ~~repeatedly argue to the jury in closing that because plaintiffs' sole expert witness, Dr. Powelson,~~
2 was a general surgeon, plaintiffs were not able to establish that Dr. Deck, a urologist, had
3 breached the standard of care. The Washington Supreme Court has upheld the granting of a
4 new trial under similar circumstances, finding reversible error. *Atkins v. Clein, et al.*, 3 Wn.2d
5 168, 180 P.2d 1 (1940). Under CR 59(a) (8), an erroneous and prejudicial jury instruction is
6 error of law and proper ground for granting a new trial. *Kennett v. Yates*, 41 Wn.2d 558, 564-
7 65, 250 P.2d 962 (1952). It was an error of law to instruct the jury with the more general
8 standard of care instruction, WPI 105.01, when a modified version of WPI 105.02, relating to
9 specialists, was consistent with plaintiffs' theory of the case and the evidence provided at trial. (S)
10 Prejudice is presumed here when an erroneous instruction is given on a material issue, such as
11 the standard of care. *Nordeen v. Rucker*, 83 Wash. 126, 128-29, 145 P. 219 (1915). Under
12 ~~the facts and circumstances of this case, the legal error was not harmless.~~

13 ~~5) Defense counsel violated the Court's *in limine* Order precluding argument or~~
14 ~~testimony regarding the alleged fault and roles of non-parties, including the settling defendant~~
15 ~~Dr. Lauter and the treating anesthesiologist Dr. Colston. Defense counsel repeatedly sought to~~
16 ~~elicit testimony on these prohibited topics from the defense witnesses who testified regarding~~
17 ~~the surgery. The defendant compounded this misconduct in his testimony during direct~~
18 ~~examination by answering questions about what he saw and did during surgery with the~~
19 ~~pronoun "we" instead of "I" (referring to Drs. Lauter and/or Colston). This continued despite~~
20 ~~sustained objections and a least one directive from this Court to desist. Furthermore, in closing~~
21 ~~argument, defense counsel improperly referred to what Drs. Colston and Lauter did or did not~~
22 ~~do during the surgical procedure. A motion for a new trial is properly granted under CR 59(a)~~
23 ~~(1) and (2) when counsel misconduct materially affects the substantial rights of the aggrieved~~
24 ~~party. The Court's Order *in Limine* was designed to prevent such prejudice to plaintiffs.~~

25 ~~Defense counsel's repetitive violations of these orders prejudiced plaintiffs and are sufficient~~
26

1 grounds for a new trial. *Osborn v. Lake Washington School District No. 414*, 1 Wn. App.
2 534, 462 P.2d 966 (1969). S
SC

3 ~~6) Additionally, defense counsel violated this Court's orders limiting expert~~
4 ~~testimony, that is, only Drs. Schulam and Biehl were to testify on standard of care issues and~~
5 ~~only Dr. Neuzil was to testify to causation. For example, under direct examination Dr. Neuzil~~
6 ~~testified that Dr. Deck met the standard of care. In her closing argument, Ms. Elliott took~~
7 ~~advantage of this and other violations of the Court's order to emphasize that all the defense~~
8 ~~expert witnesses – Drs. Schulam, Biehl, Neuzil and Caplan – supported the defendant on the~~
9 ~~standard of care issues and outweighed the opinions of plaintiffs' sole expert, Dr. Powelson. By~~
10 ~~violating the Court's order, defense created an unbalanced and prejudicial trial, which warrants~~
11 ~~a new trial under CR 59(a) (1) and (2)~~. S

12 4.) Furthermore, defense counsel ~~deliberately and~~ repeatedly violated the Evidence
13 Rules, including ER 103(c), which obligates counsel to prevent inadmissible evidence from S
14 being suggested to the jury. The trial record ^{includes many examples of,} ~~is replete with~~ defense counsel's questioning
15 witnesses to elicit inadmissible testimony, and to expose the jury to the contents of exhibits that
16 had not been admitted into evidence. Defense counsel also made numerous and improper
17 speaking objections. At one point, these violations became so egregious that this Court was
18 compelled to warn defense counsel in open court that monetary sanctions would be imposed on
19 her if she did not stop. The record reflects that this Court also expressed concern during trial
20 about defense counsel's "attempts to circumvent the Court's ruling on admissibility of
21 documents"; "putting issues before the jury regarding documents in a purported attempt to lay
22 foundation"; "disregard for protocol and rules of evidence which are repeated"; "for continued
23 speaking objections after clear direction from me not to do so"; and "what can only be described
24 as feigned ignorance when I say that a document must be marked before it's shown to a
25 witness." All of this misconduct, which forced plaintiffs to repeatedly object to improper
26 questions and unfairly and improperly exposed the jury to inadmissible evidence, prejudiced

1 plaintiffs and is grounds for a new trial under CR 59(a)(1) and (2) *Shaw v. Prudential*
2 *Insurance Co.*, 166 Wn. 652, 657-59, 8 P.2d 431 (1932), *State v. Simmons*, 59 Wn.2d 381
3 (1962).

4 S.8) Moreover, on January 27, defense counsel made ~~false~~ ^{misleading} representations to the
5 Court and to plaintiffs' counsel about witnesses the defendant was intending to call to testify.
6 ~~These representations violated the Rules of Professional Conduct and this Court's Order~~
7 ~~requiring the parties to disclose to each other and the Court the witnesses that were going to be~~
8 ~~called. It appears that counsel made these false representations in order to gain a strategic,~~
9 ~~advantage at trial by forcing plaintiffs' counsel to prepare for the examination of witnesses that~~
10 ~~the defense did not actually intend to call. Plaintiffs' counsel reasonably relied on these false-~~
11 ~~assertions to the prejudice of plaintiffs. The misconduct of counsel in this regard is adequate~~
12 reason to grant a new trial under CR 59(a) (1) and (2).

13 C.9) The cumulative effect of defense counsel's misconduct throughout the trial
14 proceedings warrants a new trial, as it casts doubt on whether a fair trial occurred. *Snider v.*
15 *Washington Water Power Co.*, 66 Wash. 598, 120 P. 88 (1912). Doubt exists when it cannot
16 be known what effect the cumulative impact of the misconduct had on the jury. This Court need
17 not determine that a fair trial was not had; only that it cannot definitively state that one was. *Id.*
18 Under all the facts and circumstances here, this Court finds that due to the cumulative effect of
19 defense counsel's misconduct, plaintiffs are entitled to a new trial.

20 Based upon the forgoing statement of reasons,

21 IT IS HEREBY ORDERED, ADJUDGED AND DEC REED that Plaintiffs' Motion for
22 New Trial is hereby granted. ~~The judgment entered is vacated.~~

23 (SL) DONE IN OPEN COURT this 13th day of March, 2009

24 The new trial date is
25 August 10, 2009. A new
26 trial schedule will
/// issue.

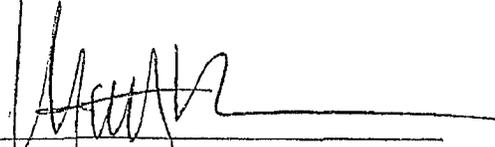
HONORABLE STEVEN C. GONZALEZ

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR
NEW TRIAL - Page 6

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1 Presented by:

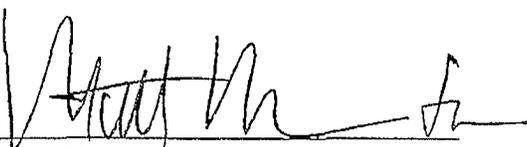
2 MENZER LAW FIRM, PLLC

3
4 By 

5 Matthew N. Menzer, WSBA 21665

6 Attorneys for Plaintiffs

7
8 McNAUL EBEL NAWROT & HELGREN, PLLC

9
10 By 

11 Avi Lipman, WSBA 37661

12 Attorneys for Plaintiffs

13
14 Copy Received; Notice of Presentation Waived by:

15 HELSELL FETTERMAN, LLP

16
17 By _____

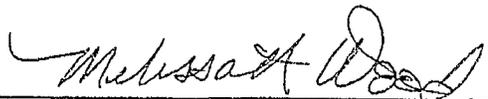
18 Nancy C. Elliott, WSBA 11411

19 Dan J. Keefe, WSBA 25181

20 Attorneys for Defendant Deck

21 **CERTIFICATE OF SERVICE**

22
23 The undersigned certifies under penalty of perjury under the laws of the State of
24 Washington, that on the 3rd day of March, 2009, I mailed or caused delivery of a true copy of
25 this document to Nancy Elliott at Helsell Fetterman.

26 

Melissa Wood