

63336-8

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NO. 63336-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RONALD and DEBORAH TETER, husband and wife,

Respondents,

v.

ANDREW DECK, M.D.,

Appellant.

2010/11/17 PM 12:09
COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

REPLY BRIEF OF APPELLANT

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I. ARGUMENT IN REPLY

A. Judge Washington Properly Excluded Dr. Fairchild and It Was Error for Judge Gonzalez to Order a New Trial on the Ground that Judge Washington Had Abused His Discretion or Erred.

Relying on *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), the Teters argue, *Resp. Br. at 36-39*, that Judge Gonzalez properly reversed Judge Washington's order excluding Dr. Fairchild's testimony as an abuse of discretion and an error of law. Under *Burnet*, before a court may impose one of the harsher remedies allowable for violation of a discovery order, it must be apparent from the record that the court explicitly considered the alternative of a lesser sanction, and whether the disobedient party's discovery order violation was willful and substantially prejudiced the opposing party's ability to prepare for trial. *Id.* at 494. The Teters' argument, however, ignores that the *Burnet* requirements do not apply in cases where the trial court merely enforces a sanction that an earlier order specified would occur if the disobedient party persisted in its failure to comply, and they erroneously equate "the record" from which the *Burnet* requirements must be apparent with the trial court's order itself.

1. The *Burnet* requirements did not apply to the order striking Dr. Fairchild.

In *Scott v. Grader*, 105 Wn. App. 136, 18 P.3d 1150 (2001), the court held that the "*Burnet* requirements" do not apply to an exclusionary

order entered after a prior order had forewarned the disobedient party that exclusion would be the remedy if the party's failure to provide discovery in accordance with the court's orders persisted. In *Scott*, defendant Grader identified an expert witness after the discovery cut-off. Grader had no reasonable excuse for waiting until the last minute to obtain an expert. Plaintiff Scott moved to exclude Grader's expert as untimely designated. The trial court denied the motion, but its order put Grader on notice that the expert would be allowed to testify only if the expert provided certain discovery to plaintiff. When the expert failed to do so, Scott moved again to exclude the expert. The order granting the motion was affirmed on appeal despite the absence of the "*Burnet* requirements." *Id.* at 142-43.

Here, the Teters had no reasonable excuse for their untimely expert designation.¹ Even if they were unaware until August 11, 2008, that Dr. Duncan would be unavailable to testify at trial, *Resp. Br. at 9*, they did not contact Dr. Golden until November 10, 2008. CP 348-49. In the interim, they violated the trial court's disclosure orders of August 29, 2008, October 1, 2008, and October 29, 2008. Each deadline passed without a motion for relief. The Teters simply ignored the deadlines.

¹ The fact that the Teters retained Dr. Fairchild only 22 days after Dr. Golden withdrew, CP 1519, belies their "difficulty finding doctors willing to testify against other physicians" explanation, *Resp. Br. at 5*, for their delay from August 11, 2008, to November 12, 2008, in naming a substitute for Dr. Duncan, and reinforces the intentional nature of their violations of discovery deadlines.

The exclusionary order here, as in *Scott*, was entered on a second motion to exclude, and after Judge Washington had given the Teters multiple opportunities to comply with his discovery orders. In September 2008, Dr. Deck had moved to exclude the trial testimony of the Teters' witnesses² because of their violations of the Amended Case Scheduling Order and the discovery orders of June 11, 2008, and July 22, 2008.³ CP 1339-59. The 159 pages of pleadings in support of the motion, CP 1179-1338, documented the Teters' multiple intentional violations of the court's discovery orders and the prejudice suffered by Dr. Deck. The record on the motion also included a discussion of alternative sanctions available, including continuance of the trial date and the assistance of the court in compelling the Teters to complete discovery. CP 1356. The motion was determined at a pretrial conference on September 17, 2008, and reduced to written form on October 15, 2007. CP 1379-81. Although Judge Washington did not grant Dr. Deck's motion to exclude, he amended the Amended Case Scheduling Order to extend the discovery cut-off (to November 24, 2008) and to continue the trial date (to January 12, 2009), CP 764-65, and pointedly directed the Teters to:

² Dr. Fairchild was not included as one of the witnesses Dr. Deck sought to exclude by that motion, because he was not named as a witness until three months later.

³ Dr. Deck had also previously requested sanctions for the Teters' violation of the June 11, 2008, discovery order. CP 1012-23.

prepare and serve by Wednesday, October 1, 2008 an identification and disclosure of each witness whom they intend to call at trial. The description of the expert witnesses shall include a concise summary of the opinions expected to be offered regarding the standard of care, causation and damages. [CP 1379-81.]

This order put the Teters on notice that their experts would be allowed to testify at trial only on a specified condition, that they complied with the October 1 disclosure deadline. The Teters not only failed to comply with the October 1 deadline, but also when, on October 22, 2008, the court extended the deadline to October 29, 2008, they failed to comply with that deadline. And when the court extended the deadline once more, to November 12, 2008, the court's order again put the Teters on notice that they would not be allowed to call a urologist expert at trial, unless they identified their urologist expert and disclosed his/her opinions *that day*. CP 719-20. The Teters responded to that order by identifying Dr. Golden on that date, but without disclosing what specific opinions he held. CP 1419-20. After notifying Dr. Deck on November 24, 2008 (the discovery cut-off under the Second Amended Case Scheduling Order) that they were striking Dr. Golden, the Teters, still out of compliance with the court's orders, did not identify Dr. Fairchild until December 10, 2008, and when they provided their witness disclosure as to him on December 12, 2008, still did not specify what opinions he held. CP 1448-49. Because the

Teters failed to comply with the specified conditions set forth in the earlier orders, the court excluded the testimony of Dr. Fairchild on the second motion to exclude. Under these circumstances, even if the “*Burnet* requirements” were not apparent from the record on the second motion, which they were, the exclusionary order was a proper exercise of Judge Washington’s discretion.⁴ *See Scott*, 105 Wn. App. at 142-43.

2. The *Burnet* requirements are apparent from the record.

Even if the *Burnet* requirements applied here, evidence in *the record* shows that each was satisfied – intentional violation, lesser sanctions considered, and prejudice to opponent. The Teters’ argument is predicated on their assertion, *Resp. Br. at 12*, that: “The order striking Dr. Fairchild . . . did not contain the legally required findings” They argue that, because *the order* did not recite that each *Burnet* requirement had been shown, its entry was an abuse of discretion and an error of law justifying a new trial. This argument lacks merit. The determinative issue is whether *the record* shows that the discovery violation was intentional, that the opponent suffered prejudice and that the court considered the

⁴ Another reason the Teters were on notice that repeated violations of case scheduling orders could lead to serious consequences is found in the Order Setting Case Schedule. CP 863-67. That order, which dates to the original case filing, provided that the trial court “may” impose sanctions set forth in KCLR 4(g) and CR 37 for failure to comply with the governing Case Schedule Order. KCLR 4(g)(1) expressly provides that failure to comply “may be grounds for imposition of sanctions, including *dismissal*, or terms”. Dismissal, entry of a default judgment and the striking of pleadings are included in CR 37(b)(2) as authorized sanctions for failure to comply with a court order.

alternative of lesser sanctions. *See, e.g., Rivers v. Washington State Conf. of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002) (“it must be apparent *from the record* that (1) the party’s refusal to obey the discovery order was willful or deliberate, (2) the party’s actions substantially prejudiced the opponent’s ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed”) (footnote omitted; emphasis added).

The record documents cited by the trial court, listed at CP 1566, show each of the three prerequisites to entry of the order excluding the testimony of Dr. Fairchild. With respect to the “willful or deliberate violation” element, the Teters do not deny that they violated the court’s orders of June 11, 2008, September 17, 2008 (as reflected in the written order of October 15, 2008), and October 22, 2008.⁵ The only violation they address is their failure to identify Dr. Fairchild by November 12, 2008, which they characterize as “technical and unintended,” and which they attribute to the unexpected withdrawal of Dr. Golden. *Resp. Br. at 40*. It is undisputed that the Teters did not contact Dr. Golden until

⁵ In their “Restatement of the Facts”, the Teters simply ignore these violations. Instead, they go to great lengths to shift the focus away from their violations of the trial court’s orders, by citing their counsel’s self-serving letters and declarations to accuse Dr. Deck counsel of discovery rule violations. *See Resp. Br. at 5-11*. But, they do not show any instance where Judge Washington found that Dr. Deck violated any discovery rule, they do not cite any discovery order that Dr. Deck violated, and they ignore the fact that whether Dr. Deck ever violated any discovery rule or order is irrelevant to the issue whether the Teters’ violations of court orders were willful or deliberate.

November 10, even though Dr. Duncan had withdrawn on August 11. CP 348 at ¶ 3.⁶ And, the Teters have offered no reasonable excuse or explanation for their failures to comply with the court's other orders or to their failure to provide a summary of Dr. Golden's or Dr. Fairchild's specific opinions despite the court orders requiring them to do so. A party's disregard of a court order without reasonable excuse or justification is deemed willful. *See, e.g., Lampard v. Roth*, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984).⁷

As to "the consideration of lesser sanctions" element, besides the fact that the record shows that the court had considered and imposed lesser and alternate remedies in the past for the Teters' repeated discovery order violations, the order excluding Dr. Fairchild's testimony was entered only after the court expressly considered the Teters' argument for a lesser sanc-

⁶ The Teters assert, *Resp. Br. at 8-9*, that, until August 11, 2008, they thought Dr. Duncan had overcome the health problems which sidelined him in January 2008, and so did not begin looking for a replacement until then. Even if that were true, they did not communicate their intent to use him as an expert to Dr. Deck. *See* CP 1407 (January 22, 2008 letter stating that due to health problems the Teters may be substituting a replacement for Dr. Duncan); CP 275-76 (August 14, 2008 declaration stating that Dr. Duncan was suffering from additional health problems); and CP 1413-15 (October 1, 2008 witness disclosure stating that Dr. Duncan would be replaced). Nor have the Teters ever described their replacement efforts between August 11 and November 10, 2008, or even between October 1 and November 10, 2008. In fact, as of August 2008, they represented that they were prepared to try the case without Dr. Duncan, if only the court would limit or exclude some defense experts, CP 1577, which Judge Gonzalez ultimately did, limiting Dr. Deck to two standard of care and two causation experts, 1/12 RP 16, 20.

⁷ Contrary to the Teters' assertions, *Resp. Br. at 40*, this is not a case like *Estate of Fahnländer*, 81 Wn. App. 206, 211, 913 P.2d 426, *rev. denied*, 130 Wn.2d 1002 (1996), where plaintiff's eleventh-hour substitution of an expert did not involve any intentional violation of any scheduling order.

tion (“The Court Should Not Exclude Dr. Fairchild’s Expert Testimony Because Alternative Remedies Are Available”), CP 1563, and Dr. Deck’s reply, CP 66-67, explaining why a lesser sanction would not suffice.

Finally, the record shows the substantial prejudice to Dr. Deck which would have resulted had the trial court allowed Dr. Fairchild to testify. After the Teters had ignored its prior discovery orders, and after extending the discovery cut-off and continuing the trial date for that reason, on September 17, 2008, the court sought to minimize the prejudice to Dr. Deck by directing that the Teters, by October 1, 2008, identify their witnesses and, for each expert witness, include a concise summary of each expert’s opinions. CP 1379-80. Had the Teters complied with this order, Dr. Deck would have had sufficient time to consult his experts, depose the Teters’ expert, perhaps retain a rebuttal expert or file appropriate pretrial motions, and develop a trial strategy to address the expert’s opinions.

Instead, on December 10, 2008, more than two months after the deadline, the Teters identified Dr. Fairchild for the first time. CP 1524. Two days later, they provided a witness disclosure as to Dr. Fairchild, CP 1530-31, which did not include a “concise summary” of his opinions.⁸ By

⁸ The “Witness Disclosure” recited that the Teters’ “generally believed” that Dr. Fairchild would testify that Dr. Deck’s care and treatment fell below the standard of care, that he “may” also testify to informed consent issues, and, possibly, rebut “some” unidentified defense expert opinions. It further recited, “Given his recent agreement to testify on behalf of the plaintiffs, Dr. Fairchild will be given the opportunity to review additional

December 29, 2008, when Dr. Deck moved to strike Dr. Fairchild, he had still not been provided with any meaningful summary of Dr. Fairchild's opinions. CP 1387; *see* CP 1568 (¶ 3). The order granting the motion expressly states that the court considered the record evidence cited above, CP 1565-67, and concluded that the Teters "did not provide Dr. Deck with a reasonable opportunity to depose Dr. Fairchild" and that "Dr. Deck and his attorneys have been prejudiced in their trial preparation by the plaintiffs' failure to properly disclose Dr. Fairchild." CP 1568 (¶¶ 4, 5).

3. King County Local Civil Rules Strictly Limit Requests Asking One Judge to Reverse Another.

The Teters contend, *Resp. Br. at 35*, that KCLR 7(b)(7), which allows the remaking of a motion to a different judge only where specified conditions are satisfied, does not apply because Judge Washington's order was made in response to Dr. Deck's motion, while Judge Gonzalez's order was made in response to their motion for a new trial. While the rule may not technically apply, the policies behind it certainly do, including promoting finality and comity and discouraging forum shopping. Moreover, Judge Washington, who marshaled this hotly contested lawsuit through discovery for over two years, and whose personal experience with the contested issues and intimate knowledge of the facts, the orders and

documents relating to this case. Should undersigned counsel determine Dr. Fairchild is likely to testify differently than is described above, plaintiffs' counsel will promptly supplement the instant disclosure." CP 1530-31.

the legal issues governing discovery in the case, was uniquely situated to rule on whether Dr. Fairchild should be allowed to testify.

The Teters were plainly unhappy with Judge Washington's discretionary order. Rather than ask him to reconsider, they waited until after the jury's adverse verdict, then sought a different outcome by asking Judge Gonzalez to rule that Judge Washington had abused his discretion and made an error of law.⁹ The tactic of asking one judge to reconsider a prior adverse order made by another judge is exactly the evil which KCLR 7(d)(7) was designed to discourage. Whether or not that rule technically applies, the tactic employed by the Teters of asking one judge to essentially act as an appellate court and review, after verdict, the propriety of a discovery order entered by another judge should not be condoned.

If Judge Washington's order was somehow deficient because one (or more) of the *Burnet* requirements was not apparent from the record, it was for Judge Washington, not Judge Gonzalez, to make a new determination whether Dr. Fairfield should have been excluded, with specific findings on the record. Substantively and procedurally, Judge Gonzalez erred in granting a new trial on the basis that Judge Washington's order

⁹ They waited until after the verdict, even though they had told Judge Gonzalez on January 13, 2009, that they were going to file a motion for reconsideration, and would defer to him whether he or Judge Washington should decide the motion. 1/13 RP 85-86. Why they did not move to reconsider before verdict is now painfully apparent. As the Teters as much as admit, *Resp. Br. at 35*, they did not want to run the risk that Judge Washington would reconsider and enter a more "legally adequate order."

was an abuse of discretion and an error of law.

B. Defense Counsel's Alleged Misconduct Was Not Prejudicial and Did Not Warrant the Order Granting a New Trial.

1. Neither Dr. Deck nor his counsel violated any *in limine* rulings; nor did Judge Gonzalez find that they did.

The Teters go to great lengths, *Resp. Br. at 17-24*, to argue that Judge Gonzalez properly granted a new trial because Dr. Deck and his counsel committed misconduct relating to *in limine* rulings precluding evidence or argument concerning fault of non-parties and limiting Dr. Deck to two standard of care and two causation experts. Yet, none of the Teters' citations to the record bear out any attempt by Dr. Deck or his counsel to assign fault to Dr. Lauter, Dr. Colston, or any other nonparty, or to have his designated standard of care experts testify about causation or his designated causation experts testify about standard of care.

With respect to the Teters' claim that Dr. Deck's counsel sought to elicit standard of care opinions from causation experts or causation opinions from standard of care experts, the witness examinations they cite and quote from, *Resp. Br. at 22-24*, do not support their claim. The Teters quote from the testimony of Dr. Neuzil, who was one of Dr. Deck's causation experts, and claim that Dr. Deck's counsel tried to elicit standard of care opinions from him. Yet, every question they quote that Dr. Deck's counsel asked of Dr. Neuzil was a causation question. The

Teters quote not a single question Dr. Deck asked of Dr. Neuzil that was designed to elicit a standard of care opinion. That Dr. Neuzil at one point got confused and answered a question designed to elicit his opinion as to “whether the care provided by Dr. Deck in his surgery on September 9th, 2004, was a proximate cause of Mr. Teter’s injury to his leg” with the statement that it was his opinion “[t]hat he [Dr. Deck] provided more than adequate care”, 1/29 RP 2014-15, does not reflect misconduct by defense counsel. Indeed, defense counsel immediately tried to correct Dr. Neuzil and focus him back on causation. *Id.* And, in any event, the jury was instructed to disregard Dr. Neuzil’s answer, *id.*, and is presumed to follow the court’s instruction. *State v. Fondren*, 41 Wn. App. 17, 25, 701 P.2d 810, *rev. denied*, 104 Wn.2d 1015 (1985).

With respect to the Teters’ claim that Dr. Deck or his counsel violated Judge Gonzalez’s grant of the Teters’ motion, made during trial, CP 420-24, to prohibit “the defense from putting on evidence or argument regarding the potential fault of Dr. Lauter, Dr. Colston, or any other non-party”, neither Dr. Deck nor his counsel violated that *in limine* ruling. They never once tried to suggest that Dr. Lauter, Dr. Colston, or anyone else was negligent. Defense counsel merely tried to elicit evidence about what happened during the surgery and to explain why there was no need for an earlier conversion to an open procedure. Dr. Deck did not perform

Mr. Teter's surgery alone. Dr. Lauter was Dr. Deck's co-surgeon,¹⁰ Dr. Colston provided anesthesia, and Dr. Deck had discussions with them about what they all were observing and doing, and whether they should convert to an open procedure. Indeed, the Teters, in their motion to exclude "fault of others" evidence, recognized that testimony about Dr. Deck's discussions with Dr. Lauter and Dr. Colston about whether to convert to an open procedure had some relevance. CP 422-23. They themselves elicited such testimony from Dr. Colston. 1/26 RP 1410-14.

The testimony and argument that the Teters cite for their claim that Dr. Deck and his counsel repeatedly violated the *in limine* ruling concerning "fault of others", *Resp. Br. at 18-21*, does not bear out their claim. Not one question the Teters quoted, *Resp. Br. at 18-20*, as being asked of Dr. Caplan about the anesthesia addendum that the Teters' counsel had questioned Dr. Colston about, 1/26 RP 1402-06, 1409-14, suggests any attribution of fault to nonparties. Nor did Dr. Deck's use of the word "we" in responding to questions about what was done during the surgery or his testimony concerning his discussions during surgery with Drs. Lauter and Colston constitute an attempt to suggest fault or

¹⁰ Even the Teters' counsel referred to Dr. Lauter as the "co-surgeon" in opening statement. 1/13 RP 103. For them to argue later that there was something improper about Dr. Deck or his witnesses referring to the "co-surgeons" or the "surgeons", see *Resp. Br. at 18 (citing 1/28 RP 1797-98)*, when in fact there were two surgeons for the operation, is disingenuous.

negligence of nonparties. *See Resp. Br. at 20.* Nor did Dr. Deck's counsel's closing argument remarks cited by the Teters, *Resp. Br. at 20-21*, attempt to attribute fault to Drs. Lauter or Colston or anyone else. Defense counsel merely argued logically that the fact that no one else on the surgical team who could see what was going on suggested that they should earlier convert to an open procedure reinforced the reasonableness of Dr. Deck's decision-making in that regard.

Nothing the Teters have cited bears out their claim that Dr. Deck or his counsel violated the trial court's "limitation of experts" or "fault of others" *in limine* rulings. Even more importantly, however, Judge Gonzalez refused to find that Dr. Deck or his counsel committed any violations of those *in limine* rulings, much less that there was any such violation that justified a new trial.¹¹ Judge Gonzalez specifically struck from the order granting new trial the findings the Teters proposed concerning violations of *in limine* rulings. CP 711-12 (stricken ¶¶ 5, 6).

¹¹ The Teters erroneously assert, *Resp. Br. at 16*, that "[o]n appeal, Dr. Deck ignores misconduct relating to *in limine* rulings, apparently because Judge Gonzalez found that misconduct was not *independent* grounds for granting a new trial." [Emphasis in original.] The reason Dr. Deck did not deal with "misconduct relating to *in limine* rulings" in his opening appellate brief is because Judge Gonzalez made no findings of misconduct relating to *in limine* rulings, and struck all such proposed findings from his order granting new trial. *See* CP 711-12 (stricken ¶¶ 5, 6).

2. It was not misconduct, much less misconduct warranting a new trial, for defense counsel either to seek to have the defense anesthesiology expert interpret the medical records or to try to lay a foundation for the admission of Exhibits 1001 and 1002.

The Teters argue, *Resp. Br. at 24-25 (citing 1/28 RP 1803-05)*, that it was somehow misconduct for defense counsel to try to have Dr. Caplan (Dr. Deck's anesthesiology expert) "interpret medical records to pinpoint when Dr. Colston determined fluid resuscitation was complete", because it "forced Mr. Teter to make six objections". That the trial court sustained certain objections based on "lack of foundation", "the record speaks for itself" or "hearsay", does not mean that defense counsel committed misconduct, much less prejudicial misconduct, in trying to establish the foundation for the evidentiary point she was trying to elicit. *See 1/28 RP 1802-05*. Ultimately, the point defense counsel was trying to elicit – that a hematocrit or blood count taken before fluid resuscitation is complete will be artificially high – was elicited despite objections from the Teters' counsel that the trial court *overruled*. *1/28 RP 1805-06*.

The Teters also argue, *Resp. Br. at 25-27*, that defense counsel committed misconduct, "forcing Mr. Teter to object repeatedly", in trying to get Exhibits 1001 (Dr. Deck's office chart) and 1002 (the Evergreen Hospital records) admitted. With respect to Exhibit 1001, defense counsel offered it, and the Teters objected. *1/28 RP 1895-96*. After extensive

argument, outside the presence of the jury, the trial court indicated it wanted to spend some time reviewing the exhibit, expressed reservations about its admissibility, but did not sustain or overrule the objection at that time. 1/28 RP 1896-1902. Ultimately, the exhibit was not admitted. *See* 1/30 RP 2254.

While the Teters claim, *Resp. Br. at 26*, that “[d]efense counsel’s efforts with respect to Exhibit 1002 were especially egregious,” the portions of the record they cite do not bear out their claim. That defense counsel unsuccessfully moved for the admission of Exhibit 1002 during Dr. Towbin’s testimony, 1/22 RP 1090, 1091-92, Dr. Biehl’s testimony, 1/27 RP 1534, and Dr. Caplan’s testimony, 1/28 RP 1787-88, or had to be reminded that the fact that the experts relied upon those records did not make them admissible, does not amount to misconduct, much less prejudicial misconduct warranting a new trial. And, the mere fact that defense counsel referred to Exhibit 1002 multiple times while examining Dr. Caplan (or any other witness), *see Resp. Br. at 26*, with the trial court *overruling* many of the Teters’ objections to her doing so, 1/28 RP 1776-87, is also not misconduct, much less misconduct warranting a new trial.

Ultimately, as discussed more fully, *App. Br. at 18-28, 41-46*, the questions defense counsel asked as to experts’ interpretation of the medical records, including Dr. Caplan’s interpretation, or to lay

foundation for admission of Exhibits 1001 and 1002, and defense counsel's offering of those exhibits, were not misconduct, did not elicit inadmissible evidence, and did not cause any prejudice. While it is true that the Teters' counsel made numerous objections during trial, a lot of those objections were overruled. Also, the fact that Juror No. 7, near the end of trial, reportedly phoned the court's law clerk and stated that he was "very frustrated and feels like strangling a couple of lawyers and wants to become the alternate if at all possible", provides no basis for inferring that it was the Teters' counsel's sustained objections that upset the juror, or that, as a result of the juror's frustration, either party was denied a fair trial.

Contrary to the Teters' assertions, *Resp. Br. at 42-43*, this is simply not a case like *State v. Simmons*, 59 Wn.2d 381, 384-87, 368 P.2d 378 (1962), where "[t]he implications and innuendoes inherent in many questions asked the defendant on cross-examination [were] completely inexcusable and [could have] no conceivable justification." Nor is it a case like *Shaw v. Prudential Ins. Co.*, 166 Wash. 652, 657-59, 8 P.2d 431 (1932), where counsel, despite the trial court's clear ruling that certain evidence was not admissible, continued to pursue the matter, and repeatedly emphasized in the jury's presence what the inadmissible and highly prejudicial evidence would be. This also is not a case like *Storey v.*

Storey, 21 Wn. App. 370, 372-75, 585 P.2d 183 (1978), *rev. denied*, 91 Wn.2d 1017 (1979), where the defendant repeatedly responded to questions with improper, unresponsive answers and flagrantly and intentionally volunteered testimony about plaintiffs for the purpose of placing them in a bad light.¹²

Here, the questions posed by defense counsel about which the Teters complain did not improperly suggest or elicit inadmissible evidence, much less inadmissible evidence prejudicial to the Teters, and do not justify the granting of a new trial. Contrary to the Teters' assertions, *Resp. Br. at 45*, the defense threw no "evidential harpoon" or "skunk" into the jury box, much less one that could not be extracted without exacerbating the pain or eliminating the smell.

3. Defense counsel's statements about anticipated calling of witnesses who ultimately were not called did not justify the grant of a new trial.

The Teters assert, *Resp. Br. at 28* (citing *CP 579-80, 586-87*), that "[d]efense counsel specifically represented she would call Ms. Ellison to

¹² The federal cases relied upon by the Teters, *Resp. Br. at 43*, are equally inapposite. Here, defense counsel did not engage in "an unending barrage of improper comments, questions, objections, and even facial expressions, always made in the presence of the jury, which continued right up until the verdict," like counsel did in *Ballarini v. Clark*, 841 F. Supp. 662 (E.D. Pa. 1993), *aff'd*, 96 F.3d 1431 (3d Cir. 1996). Nor did the trial court find that defense counsel violated *in limine* orders or used prohibited evidence in closing argument, as was found in *O'Rear v. Fruehauf Corp.*, 554 F.2d 1304 (5th Cir. 1977), and *Lucent Techs. v. Extreme Networks, Inc.*, 229 F.R.D. 459, 461-63 (D. Del. 2005).

the stand on Wednesday, and that she was exchanging emails with Dr. Lauter's attorney to arrange for Dr. Lauter's appearance on Wednesday or Thursday," and argue that those representations were not true. Yet, as to Ms. Ellison, the evidence submitted by defense counsel showed that there had been a miscommunication between trial counsel and staff that resulted in staff cancelling Ms. Ellison's testimony on the morning of January 27, 2008, unbeknownst to trial counsel. And, other than the Teters' counsel's declaration statements that defense counsel had represented that she had been exchanging e-mails with Dr. Lauter's attorney, *see* CP 579-80, 586-87, nothing in the record shows any such representation, and in fact the record shows defense counsel's denial of having exchanged e-mails with Dr. Lauter's attorney. CP 662. What defense counsel had done was try to call Dr. Lauter's attorney, CP 662, and send him a fax, CP 662, 682, only to learn that he was out of town, CP 662, and subpoenaed Dr. Lauter to testify at 3:00 pm on January 28, 2009, CP 652, 675.

The Teters claim, *Resp. Br. at 27-28, 46*, that they were prejudiced by defense counsel's representations on January 27, 2008, that the defense was planning to call Dr. Lauter, Dr. Likosky,¹³ and Bonnie Ellison to testify later that week, because "there is no time to waste during a trial."

¹³ The record shows that defense counsel was making every effort to have Dr. Likosky testify, but could not accomplish it given the time constraints, and so notified the Teters' counsel the morning of January 28, 2009 that Dr. Likosky would not be called. *See* CP 643, 663-64; 1/28 RP 1643.

Yet, the Teters have never shown how they were actually prejudiced, or how they were any more prejudiced by defense counsel's failure to call those witnesses than defense counsel was prejudiced by the Teters' own on again, off again plans to call Dr. Lauter in their case, and their ultimate last minute cancellation of his testimony. *See* 1/21 RP 1036-37; CP 670. The Teters have never claimed that, because they had been preparing for those witnesses, they were ill-prepared for the other witnesses who were called on January 28 and 29, 2009. Nor could they claim that they were prejudiced in their ability to prepare for closing argument, which the court put over until January 30. 1/29 RP 1913-14; 1/30 RP 2159.

What happened with these three witnesses is what sometimes happens in the maelstrom of a multi-week trial and when available time for witnesses begins to run out. Even if the trial court could properly infer that counsel's representations concerning these witnesses were misleading, the record still does not establish any real prejudice to the Teters, much less prejudice that deprived them of a fair trial so as to justify the grant of a new trial. If counsel's representations amounted to a form of attorney misconduct, the proper remedy would have been to sanction counsel, not to penalize Dr. Deck, deprive him of the jury's verdict in his favor and force him to face a new trial. "[E]xcept in aggravated and unusual

situations, the client should not be penalized because of his counsel's conduct." *Ryan v. Ryan*, 48 Wn.2d 593, 600, 295 P.2d 1111 (1956).

C. There Was No Instructional Error, Much Less Instructional Error Warranting a New Trial.

The Teters argue, *Resp. Br. at 47-49*, that Judge Gonzalez's order granting new trial can be affirmed on the ground that Judge Gonzalez erred in instructing the jury on the applicable standard of care. Judge Gonzalez did not grant a new trial on that basis and, in fact, rejected the Teters' proposed findings that it was error for the court to give its Instruction No. 10 defining the applicable standard of care in terms of a "reasonably prudent urologist", as opposed to a "reasonably prudent laparoscopic surgeon". CP 710-11 (stricken ¶ 4). Because there was no error in the court's instruction on the applicable standard of care, and because it would have been error to give the Teters' proposed instruction, Judge Gonzalez properly declined to grant a new trial on that basis.

Jury instructions are sufficient if they permit 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). No more is required. *Id.* at 257. The trial court has discretion in the wording or language of its instructions. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996).

Moreover, it is not error for a trial court to refuse to give a proposed instruction that is incorrect in any respect. *Sutton v. Shufelberger*, 31 Wn. App. 579, 581, 643 P.2d 920 (1982) (citing *Hinzman v. Palmanteer*, 81 Wn.2d 327, 501 P.2d 1228 (1972)). “It is error for a trial court to give an instruction which is not supported by the evidence.” *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

Here, the court’s instructions allowed both parties to argue their theories of the case, were not misleading, and properly informed the jury of the applicable law. The Teters’ proposed instruction, on the other hand, was not supported by the evidence and thus would have been error to give.

Court’s Instruction No. 10, CP 403, in accord with WPI 105.01, correctly told the jury in pertinent part:

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 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.

Dr. Deck is a urologist. 1/28 RP 1876-77. Urology is the specialty in which he is board-certified. *Id.* That is the profession or class to which he belongs. The trial court, therefore, properly instructed the jury that Dr.

Deck had a duty to comply with the standard of care applicable to a “reasonably prudent urologist.”

There was nothing misleading about the instruction. Both parties were free to argue from the evidence adduced at trial their theories as to what the standard of care required of a “reasonably prudent urologist” acting in the same or similar circumstances in performing a laparoscopic nephrectomy. Contrary to the Teters’ assertion, *Resp. Br. at 48*, nothing in Court’s Instruction No. 10 prevented them from arguing “that both urologists and general surgeons perform laparoscopic nephrectomies and are subject to the same standard of care.” The instruction was a correct statement of the law and there was no error in giving it.

The Teters’ proposed standard of care instruction, CP 406, would have told the jury that:

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.

While the Teters assert that this instruction was necessary as a proper “specialist” instruction, *Resp. Br. at 47-48*, it was not. There was

no evidence establishing the existence of any recognized “laparoscopic surgeon” specialty. Nor was there any evidence that Dr. Deck held himself out as a specialist in laparoscopic surgery, or as a specialist in anything other than urology. As such it would have been error to give the Teters’ proposed instruction. *Ager*, 128 Wn.2d at 93 (“It is error for a trial court to give an instruction which is not supported by the evidence”).

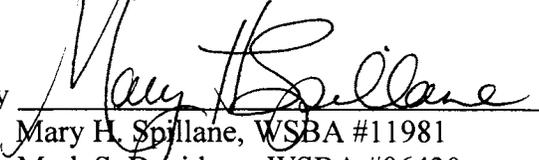
The cases cited by the Teters, *Resp. Br. at 48*, are not to the contrary. This is not a case like *Atkins v. Clein*, 3 Wn.2d 168, 170-71, 100 P.2d 1, 104 P.2d 489 (1940), where the court gave conflicting and inconsistent instructions – one holding the defendant to the standard of care of a specialist and another holding him to the standard of care of physicians generally. Nor is this a case like *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 275-77, 796 P.2d 737 (1990), where the challenged instruction erroneously stated that “[i]f a family practitioner holds himself out as qualified to provide pediatric care, or assumes the care or treatment of a condition which is ordinarily treated by a pediatrician, he has a duty to possess and exercise the degree of skill, care and learning of a reasonably prudent family practitioner . . .,” rather than the degree of skill, care and learning of a reasonably prudent pediatrician. Here, Court’s Instruction No. 10 contained no such erroneous statement of the law, nor was it inconsistent or in conflict with any other instruction.

II. CONCLUSION

For the foregoing reasons and those set forth in the opening Brief of Appellant, the order granting new trial should be reversed, and the judgment on the jury verdict in favor of Dr. Deck reinstated. In the event this Court does not reverse the order granting new trial, it should remand with instructions that the retrial be conducted before a different judge than Judge Gonzalez, for the reasons set forth in the opening Brief of Appellant.

RESPECTFULLY SUBMITTED this 17th day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 17th day of May, 2010, I caused a true and correct copy of the foregoing document, "REPLY BRIEF OF APPELLANT," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 17th day of May, 2010, at Seattle, Washington.



Carrie A. Custer