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No. 68479-5-I

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

JEFFREY BEDE, as Personal Representative of the Estate of LINDA SKINNER, Deceased,

Plaintiff-Respondent,

v.

OVERLAKE HOSPITAL MEDICAL CENTER, a Washington corporation, and PUGET SOUND PHYSICIANS, PLLC, a Washington corporation,

Defendants-Appellants.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Beth Andrus)

BRIEF OF RESPONDENT

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I. INTRODUCTION

On January 26, 2010, Linda Skinner's son brought her to the emergency department at Overlake Hospital Medical Center ("Overlake") for the second time in two days. She felt feverish and had a severe headache, neck pain, neck stiffness, and a grossly elevated white blood cell count—all signs of meningitis. Dr. Laurie Anderton—the emergency medicine physician responsible for Ms. Skinner's care—was rightly concerned that Ms. Skinner may have been suffering from a bacterial infection and ordered an MRI. Overlake's radiologist read the MRI as abnormal and suggestive of meningitis and recommended that Ms. Skinner receive a lumbar puncture to rule out meningitis. But rather than perform the recommended test or give Ms. Skinner antibiotics, Dr. Anderton sent Ms. Skinner home with pain medications for a neck strain. Sadly, Ms. Skinner in fact had meningitis, but her condition went untreated and she died the next day.

Jeffrey Bede, as the personal representative of his mother's estate, brought suit against Puget Sound Physicians ("PSP")—Dr. Anderton's employer—and Overlake—which is also responsible for Dr. Anderton's conduct. After a three-week trial and five days of deliberations, the jury found for plaintiff and awarded damages totaling $3 million. Unhappy with the jury's verdict, defendants have appealed. Notably, they do not

challenge a single jury instruction and do not—and cannot—claim that any defense, theory, or witness was excluded. Rather, they challenge three of the trial court's discretionary rulings: excluding gruesome and unintelligible (to most people) autopsy photos of Ms. Skinner's head, skull, and brain; allowing plaintiff to present expert testimony on rebuttal; and disallowing additional testimony on surrebuttal.

Each claim of error is grounded in defendants' contention that plaintiff changed his theory of the case at the "eleventh hour," and that this "change" excused their failure to disclose the photos until the day before trial. Defendants are wrong, as plaintiff's theory has *always* been that Ms. Skinner had a *treatable* form of meningitis and died because Dr. Anderton's negligence deprived her of life-saving treatment. Nor did plaintiff somehow change his position with regard to the presence of pus. To the contrary, plaintiff offered as a trial exhibit the Overlake autopsy report that refers to the presence of pus in Ms. Skinner's old surgical site, and two of plaintiff's three experts acknowledged the presence of pus in that surgical site. Plaintiff's other expert witness had no opinion on the subject. Contrary to defendants' contention, there was no change in plaintiff's position regarding the presence of pus.

Indeed, although defendants make much of this issue on appeal, the primary dispute at trial had nothing to do with pus. As the trial court

noted, the only real dispute at trial concerned the *timing* of the migration of the infectious agents from the old surgical site to Ms. Skinner's brain: although both parties' experts agreed that infectious agents from the old surgical were the source of Ms. Skinner's meningitis, plaintiff's experts and two of defendants' three experts believed that the migration occurred several days before Ms. Skinner's visit to Overlake, whereas one of defendants' three experts claimed that it happened "catastrophically" while Ms. Skinner was in the emergency department on January 26. The autopsy photos do not resolve that issue, as the trial court also found. For this reason too, there was no "eleventh hour" change in plaintiff's strategy that would allow defendants to sidestep both the trial court's order on motions *in limine* and the Civil Rules.

It is equally clear that defendants have not established any error—let alone abuse of discretion. Starting with the trial court's decision to exclude the autopsy photos, the trial court so ruled for three *separate and independent* reasons. First, defendants failed to produce the photos before the close of discovery and only did so on the *Friday* before the *Monday* when jury selection and opening statements occurred. Contrary to defendants' argument, the *Burnet* rule does not apply to the trial court's order excluding the photos (that rule is appropriately limited to exclusion of defenses or witnesses) and was complied with in any event. Second,

the autopsy photos were inadmissible under ER 403. Third, the autopsy photos were properly excluded as a sanction for defense counsel's contempt of court.

Nor did the trial court alter its rulings on this point as defendants claim—it merely stated *additional* grounds for excluding the autopsy photos in response to defendants' arguments. Notwithstanding defendants' efforts to undermine and discredit the trial court's rulings, the photos were not produced until just one day before trial, none of the experts asked for—let alone considered—the photos while developing their opinions, and the photos are gruesome, duplicative of information found in the autopsy reports, and incomprehensible to lay people. In short, the trial court did not abuse its discretion or otherwise err by excluding the photos.

The trial court also did not abuse its discretion or otherwise err in permitting plaintiff to present expert testimony on rebuttal and disallowing additional testimony on surrebuttal. As the trial court correctly recognized, a plaintiff, as the party with the burden of proof, is entitled to present rebuttal testimony where, as here, the defense presents contradictory theories during its case. Finally, defendants' suggestion that *they* were entitled to "the last word" and had an absolute *right* to recall their expert in surrebuttal (who, as it turned out, was not available to

testify) is also wrong. In these respects as well, there is no basis to set aside the jury's verdict. This Court should affirm.

II. ISSUES PRESENTED

1. Whether the trial court abused its discretion by excluding autopsy photos of Ms. Skinner's brain (a) because defendants failed to produce the photos during discovery, (b) because the photos are inadmissible under ER 403, and (c) because defense counsel violated the court's order precluding reference to the photos during trial.

2. Whether the trial court abused its discretion by allowing plaintiff to present expert testimony on rebuttal in response to the defense experts' various and contradictory causation opinions and their testimony on standard of care and by disallowing expert testimony in surrebuttal because there was no expert testimony presented on rebuttal that would justify defendants' request to present additional expert testimony.

III. STATEMENT OF THE CASE

A. Factual Background.

Linda Skinner was 64 years old at the time of her death. She was a mother of three adult children—Jeff Bede, Chris Bede, and Samantha Bede Thompson—and grandmother to four minor children. A retired nurse, Ms. Skinner dedicated her life to spending time with and providing guidance to her children as they became parents themselves. RP 659:13-

661:8.[1] To that end, Ms. Skinner moved to Washington, D.C. in 2003 to live with Jeff and his wife and children. *Id.* Having helped Jeff with his children, Ms. Skinner wanted to do the same for Chris. So in January 2010 she moved from Washington, D.C. to the Seattle area to be near Chris, his wife, and their child. *Id.*; RP 438:16-439:12. She flew from Washington, D.C. to Seattle, arriving on January 22, 2010. RP 439:13-22. Shortly afterwards, she began feeling feverish and had body aches, including neck pain. RP 414:25-415:17, 444:1-445:1.

A few days after the flight, on January 25, 2010, Ms. Skinner's son Chris brought her to Overlake's emergency department, where PSP employee Dr. Marcus Trione evaluated her symptoms using what is known as a "differential diagnosis," RP 448:8-25, which requires physicians to consider all available information related to the patient's complaints and develop a list of *potential* causes of the patient's problem. RP 515:3-517:6, 751:25-754:15. Any time the list of potential causes includes one that is life-threatening the physician must treat that condition or rule it out, even if its likelihood of being the cause of the problem is low. RP 515:3-517:6, 751:25-754:15, 1168:7-1169:5. Dr. Trione concluded that Ms. Skinner was suffering from a flu-like illness and a

[1] All citations to the report of proceedings, unless indicated otherwise, refer to the trial transcript, which is sequentially numbered from RP 1 to 2044.

cervical neck strain, likely caused by moving luggage during her trip. RP 1527:6-8, 1539:7-14. He discharged Ms. Skinner with a prescription for medication to treat her flu-like symptoms. RP 1344:11-14.

Ms. Skinner's condition deteriorated overnight, so Chris brought her back to Overlake's emergency department early in the morning on January 26, 2010. Ms. Skinner reported to the triage nurse that she had taken Tylenol and Motrin that morning. RP 1344:7-19. Ms. Skinner's temperature was read as normal upon arrival at Overlake, although Dr. Anderton understood that Tylenol and Motrin would mask any fever. RP 2086:7-16. Ms. Skinner also reported that she was nauseous and had neck and head pain that she described as the worst pain she had ever felt, rating the pain as a 10 on a 1- to 10-point pain scale. RP 1000:18-1001:11. Finally, Ms. Skinner added that her neck was not only painful, but also stiff. RP 1007:16-1008:5.

The triage nurse—knowing that Ms. Skinner's symptoms were consistent with meningitis and because she was concerned that Ms. Skinner might have meningitis—asked Ms. Skinner whether she could touch her chin to her chest. RP 1095:1-1096:8. The nurse asked Ms. Skinner to do that maneuver because someone who is suffering from meningitis either cannot do it at all or can only do so with difficulty. *Id.* Ms. Skinner failed the test; she could not touch her chin to her chest. *Id.*

The nurse also ordered a white blood cell test; the results came back at 19,200 (grossly abnormal) and with a significant "left shift" of neutrophils (17,000), which is evidence of an acute bacterial infection. RP 763:21-764:2, 1005:7-15; Plaintiff's Trial Ex. 1, p. 33.

After Ms. Skinner was triaged, Dr. Anderton became responsible for her care. Dr. Anderton was aware that Ms. Skinner had visited Overlake the day before and had complained of similar symptoms. RP 998:14-999:17. Dr. Anderton was also aware of Ms. Skinner's nausea, 10-rated neck and head pain, and blood test results, and she likewise knew that Ms. Skinner had failed the chin-to-chest test. RP 1000:22-1001:21, 1002:14-1003:25. In these circumstances, a doctor treating a patient with Ms. Skinner's signs and symptoms is obligated to include bacterial meningitis in his or her differential diagnosis and either begin treatment with antibiotics or rule out meningitis by doing a lumbar puncture (a test in which cerebral spinal fluid is removed from the spinal canal with a needle and tested for evidence of infection). RP 777:19-780:6.

But even though Dr. Anderton recognized that Ms. Skinner's signs and symptoms could have been caused by bacterial meningitis, RP 1001:16-1002:1, she did not perform a lumbar puncture as she was trained to do. Instead, Dr. Anderton ordered (a) that Ms. Skinner be given powerful pain- and nausea-reducing medication and (b) that hospital

personnel perform an MRI of Ms. Skinner's neck. RP 1002:14-1003:22, 1009:2-24. Overlake's radiologist subsequently read the MRI as abnormal and specifically stated that there was "[p]rominent enhancement of the meninges in the posterior fossa and the cervical region" and that "[m]eningitis can give this appearance." RP 937:4-13. Because meningitis was part of the radiologist's differential diagnosis based on the MRI *alone*, he recommended that Dr. Anderton perform a lumbar puncture to rule it out. RP 941:24-942:20.

Despite all this information, including the radiologist's specific advice, Dr. Anderton did not do a lumbar puncture. RP 1019:9-21. And even though Ms. Skinner's abnormally high white blood cell count "remained a mystery" to Dr. Anderton, she also did not prescribe antibiotics for Ms. Skinner. RP 1021:25-1022:6, 2087:7-2088:1, 1034:9-19. Instead, Dr. Anderton attributed the enhanced meninges noted in the MRI to a lumbar puncture that Ms. Skinner had years earlier and concluded that Ms. Skinner did not have meningitis. RP 1031:19-1032:2. Dr. Anderton then sent Ms. Skinner home with a diagnosis of "neck pain, vomiting and dehydration." RP 1032:23-1033:13. That, according to plaintiff's expert witnesses, was a violation of the standard of care. RP 789:25-790:24, 543:17-544:19.

Several hours after being sent home by Dr. Anderton, Ms. Skinner became delirious, and Chris brought her back to Overlake for the third time. RP 467:10-469:18. Shortly after arrival, Ms. Skinner suffered a seizure and went into a coma. Plaintiff's Trial Ex. 1, p. 89. Another emergency medicine physician employed by PSP recognized the signs and symptoms of meningitis and immediately prescribed antibiotics and also ordered a lumbar puncture to confirm what he already knew. *Id.*, pp. 54-56. Doctors performed other procedures trying to save Ms. Skinner, but unfortunately by that time the meningitis had progressed to the point where no treatment would be effective, and Ms. Skinner was pronounced brain dead. *Id.*, pp. 89-93. After being told by the ICU physicians at Overlake that there was no hope, her children removed life support the next day, and Ms. Skinner died. *Id.*, p. 93. The death certificate was signed by Dr. William Watts, the internal medicine physician who cared for Ms. Skinner in Overlake's ICU. *Id.*, p. 95. It lists the cause of death as "bacterial meningitis." *Id.*

After her death, Overlake asked Ms. Skinner's children if they would agree to an autopsy, to be performed by pathologists at Overlake. *Id.*, p. 94. They agreed, and an autopsy was performed. The Overlake autopsy report notes the presence of pus in the area where surgery had been performed on Ms. Skinner in 2006 to remove a benign tumor from

her inner ear. *Id.*, p. 99. The Overlake pathologist (whom defendants never called as a witness at trial or even deposed) listed the cause of Ms. Skinner's death as "acute bacterial meningitis." *Id.*, p. 96.

Following the Overlake autopsy, Ms. Skinner's brain was sent to Johns Hopkins University Medical Center for a special autopsy by pathologists who specialize in the brain. *Id.*, pp. 101-05. The Johns Hopkins autopsy report lists the cause of Ms. Skinner's death as "meningitis." *Id.* That report, like the death certificate and the Overlake autopsy report, does not mention any "abscess" or the rupture of any "abscess-like formation" as causing or contributing to Ms. Skinner's death. *Id.*

B. Relevant Procedural Background.

1. Procedural Background Relevant to Defendants' Argument That the Trial Court Abused Its Discretion by Excluding the Autopsy Photos.

Jeff Bede filed suit on July 2, 2010, alleging professional negligence. As is required by RCW chapter 7.70, *et seq.*, the parties retained medical experts who considered hundreds of pages of information, including medical records, literature, and depositions. As required by court rule, the parties collectively disclosed 14 experts as potential witnesses. CP 831-32. Significant here, both sides also reserved the right to withdraw any of their experts. CP 432-34, 1895-96.

Plaintiff, for his part, originally disclosed three experts, two of whom would testify in his case-in-chief. Plaintiff called Dr. David Talan, a physician board-certified in emergency medicine, internal medicine, and infectious disease. Dr. Talan acknowledged the presence of pus and bacteria in the area near the site of Ms. Skinner's 2006 inner ear surgery and testified that the pus and bacteria likely leaked out during Ms. Skinner's flight to Seattle and ultimately caused meningitis. RP 759:10-762:7, 811:12-812:8. Dr. Talan also testified that however the infectious agents got into a place to cause meningitis, Ms. Skinner would be alive today had Dr. Anderton met the standard of care. RP 792:12-22.

Dr. Martin Siegel, a physician who is board-certified in infectious disease, also testified for plaintiff. Dr. Siegel did not offer any opinion on the presence of pus, but did acknowledge the presence of bacteria. RP 582:8-583:3. Dr. Siegel agreed with Dr. Talan that the infectious agents that caused Ms. Skinner to develop meningitis leaked out of the area near the site of her 2006 surgery. RP 555:21-556:16. Also like Dr. Talan, Dr. Siegel testified that Ms. Skinner would be alive today had Dr. Anderton met the applicable standard of care. RP 548:19-549:6, 552:20-553:9.

In addition to Drs. Talan and Siegel, plaintiff disclosed emergency medicine physician Dr. Richard Cummins. CP 1895. Like Drs. Talan and Siegel, Dr. Cummins testified at his deposition that Dr. Anderton violated

the standard of care. CP 1179-80. He also testified that Dr. Trione violated the standard of care when he saw Ms. Skinner on January 25, 2010. CP 1168. Dr. Talan disagreed with that opinion. CP 365-66. Because plaintiff decided not to claim that Dr. Trione was negligent, and to avoid presenting conflicting testimony, plaintiff withdrew Dr. Cummins as an expert witness. CP 359, 1245.

Defendants, for their part, called three expert witnesses on causation: Drs. Kenneth Maravilla, Richard Wohns, and Francis Riedo. Dr. Maravilla testified that during Ms. Skinner's flight to Seattle, the pressure placed on her ears during take-off and landing allowed the bacteria to "leak into the inner--inner part of the skull," ultimately causing meningitis and ventriculitis. RP 1137:10-1138:24. Dr. Wohns, in turn, agreed. RP 2110:24-2112:4. Only Dr. Riedo testified to the contrary. Unlike Drs. Maravilla and Wohns, Dr. Riedo claimed that an "abscess" near Ms. Skinner's ear burst while she was in the emergency department on the morning of January 26, 2010 and rapidly spewed pus and bacteria into her brain, causing "instant meningitis" and setting in motion a chain of events that simultaneously alleviated her pain and doomed Ms. Skinner to die, regardless of any treatment. RP 1435:19-1437:19.

Plaintiff disclosed Dr. John Loeser, a board-certified neurosurgeon, as a rebuttal witness to respond to the conflicting testimony of defendants'

experts. CP 978-86. Like plaintiff's other expert witnesses, Dr. Loeser acknowledged the presence of pus as well as bacteria in the area near Ms. Skinner's old surgical site. RP 1707:14-1708:25, 1712:20-23. He agreed with all of the experts besides Dr. Riedo that the infectious agents leaked out during Ms. Skinner's flight to Seattle and eventually caused meningitis. RP 1709:12-25. Dr. Loeser also testified that whatever term was used to describe the collection of pus and bacteria that was located in the area of Ms. Skinner's 2006 surgery, Ms. Skinner still died of a treatable form of meningitis and would be alive today had Dr. Anderton met the standard of care. RP 1664:3-1672:11, 1450:17-1451:3, 1488:8-16 (Dr. Riedo defining "abscess" as a collection of pus and bacteria in a contained space and conceding that there was never an "abscess" *inside* Ms. Skinner's brain).[2]

In order to assist his expert witnesses, and to prepare for trial, plaintiff requested and was provided by defendants hundreds of pages of medical records related to Ms. Skinner's care at Overlake, both informally before suit was filed and again after he requested all of Ms. Skinner's

[2] The only other expert witness who discussed a possible "abscess" was Dr. Cummins. Although plaintiff made clear during Dr. Cummins' deposition that he did not intend to solicit a causation opinion from Dr. Cummins, CP 1168, defense counsel asked him whether Ms. Skinner had an "abscess" in her inner ear. Dr. Cummins stated that he was "not an expert on that," and confirmed that he was speculating (stating that his testimony was "on shaky ground"), but nevertheless commented that Ms. Skinner may have had an "abscess" in her old surgical site. CP 868-69.

medical records in discovery. CP 900-01. Both times the medical records were provided to plaintiff they included the Overlake and Johns Hopkins autopsy reports. *Id.* The Overlake autopsy photos, in contrast, were *never* produced during discovery. *Id.* Consequently, plaintiff's experts did not have access to the photos when they were formulating their opinions. RP 11:5-22.

On November 28, 2011, plaintiff's counsel made it clear to defendants' counsel that Dr. Cummins would be withdrawn and that plaintiff would not be alleging at trial that Dr. Trione was negligent. CP 359. Two days later, on November 30, the parties collectively filed 61 motions *in limine*. CP 216-57, 281-95, 326-38, 351-54, 370-403. Significant here, defendants asked the trial court (among other relief sought) to enter an order (a) excluding any evidence that had not been produced in discovery and (b) precluding any reference to an opinion of any expert who had been withdrawn. CP 332, 335. The trial court agreed and entered an order granting such relief. CP 854-55.

Defendants did not so much as mention the autopsy photos until Friday, December 16, 2011—just one business day before jury selection and opening statements were set to occur—when Overlake produced the autopsy photos to plaintiff *via* email, explaining that PSP's attorney had asked for them the day before. CP 903. Plaintiff objected and argued that

neither defendants nor their experts should be permitted to offer or discuss the autopsy photos at trial—particularly given the trial court's order granting defendants' motion *in limine* to exclude any evidence that had not been produced in discovery. RP 11:5-14:3. The trial court agreed and entered an order excluding the autopsy photos in accordance with its previous order. *Id.*

This ruling began a saga in which defendants repeatedly sought reconsideration. Defendants filed their first such motion immediately after the trial court's initial ruling, and both sides submitted briefs that discussed the discovery and other issues implicated by the autopsy photos. CP 857-81, 904-09, 953-62. The trial court refused to reconsider its ruling and placed its reasoning on the record. RP 282:22-286:8. But while the trial court refused to admit the autopsy photos, it advised defendants that they "are free to use a diagram, free to use an illustration, in order to support your defense experts' testimony." RP 286:9-12. Consistent with the trial court's remark, defendants used several illustrative exhibits to support their experts' testimony. Defendants' Trial Exs. 130A-141A, 144.

Knowing that the autopsy photos had been excluded and reconsideration denied, PSP's counsel nevertheless asked Dr. Talan on cross-examination—in front of the jury—"[w]ould photos done at an autopsy assist you in determining [whether pus was present in the

ventricles]?" and then followed up with "Did you look at any photos here?" to which Dr. Talan responded "no." RP 910:18-23. Plaintiff, believing that PSP's counsel intentionally violated the trial court's previous order, asked the court to hold defendants in contempt and, among other things, to strike Dr. Riedo's testimony. CP 1911-17.

In response, defendants again asked the trial court to reconsider its ruling excluding the photos. CP 1919-30; RP 976:9-978:20. Defendants then represented that Dr. Riedo "absolutely" could give all of his opinions without relying on the photos and that they "were not necessary to his formation of his opinion." RP 979:13-980:2. Defendants explained that "Dr. Riedo's testimony was fully, fully developed at the time of his deposition" and that he would "testify consistently with [his deposition] when he's in court later this week." RP 979:7-12. Finally, defendants argued that the "appropriate remedy" for violating the trial court's order was "to strike the references to photos, redact references to photos in the autopsy report." RP 978:21-25.

After oral argument, the trial court found that PSP's counsel had willfully violated the court's order excluding the autopsy photos, that a sanction was appropriate, and again placed its reasoning on the record. RP 982:4-987:22. But rather than striking Dr. Riedo's testimony as plaintiff had suggested, the only sanction that the trial court imposed was to

reaffirm its prior decision to exclude the photos, direct the parties to redact the reference to the photos in the Overlake autopsy report, and direct defendants to admonish their experts not to mention the photos during their testimony. *Id.*

Finally, defendants again raised the issue of the autopsy photos in seeking a new trial under CR 59 and claimed in a footnote that the trial court, despite having placed its reasons for excluding the photos on the record more than once, failed to adequately address the *Burnet* factors. CP 1045-60. The trial court again refused to reconsider its ruling excluding the autopsy photos and denied the motion, explaining that:

> The crux of the dispute between Plaintiff's and defense experts was not whether pus migrated from an old surgical site into Ms. Skinner's brain. The dispute was over the issue of *when* this infiltration of pus occurred and how rapidly it occurred. None of the expert declarations submitted by PSP demonstrates how any of the autopsy photographs definitively answers this question. Dr. Riedo, in the supplemental declaration submitted with the motion for new trial says the photos corroborate his opinion that there was a "large pocket" in Ms. Skinner's brain. But this fact was undisputed. All of the experts agreed that Ms. Skinner had a void left by the acoustic neuroma surgery. He also states that they show a "residual collection of pus in this site." Again, this was not disputed by any expert and was clearly disclosed in the autopsy report—a fact brought out by defense counsel during cross examination and closing argument.

CP 1366. The trial court also entered a separate order that summarizes its previous consideration of the *Burnet* factors and explains why the photos were properly excluded. CP 1370-73.

2. Procedural Background Relevant to Defendants' Argument That the Trial Court Abused Its Discretion by Permitting Plaintiff to Present Expert Testimony on Rebuttal and Disallowing Surrebuttal.

Plaintiff disclosed Dr. Loeser as a rebuttal expert when, several weeks before trial, PSP withdrew a pathologist expert it had previously disclosed and replaced him with Dr. Wohns, a neurosurgeon. CP 978-86. Given that Dr. Loeser was designated as a rebuttal witness, he was deposed after Dr. Wohns' deposition and then again after Dr. Riedo's. *Id.*

Before trial began, defendants filed a motion *in limine* to restrict the scope of Dr. Loeser's testimony and require plaintiff to call Dr. Loeser in his case-in-chief or not at all. CP 291-94. Plaintiff opposed the motion, in part because the defense experts had offered conflicting causation theories and it was unclear which of those conflicting theories defendants would pursue at trial. CP 540-43. The trial court denied the motion and also denied defendants' subsequent motion for reconsideration on this point, twice putting its reasoning on the record. RP (12/9/2011) 70:20-77:5, 674:22-675:4, 1567:18-1569:12.

During trial, defendants called Drs. Maravilla, Wohns, and Riedo, and they testified to their conflicting theories of causation. RP 1177:25-

1179:5, 1427:18-1429:4, 2110:24-2114:6. Near the end of the trial, defendants again asked the trial court to preclude Dr. Loeser's rebuttal testimony. The trial court denied that request and again explained its reasoning on the record, noting that Dr. Loeser could testify as to standard of care because defendants' experts (Dr. Riedo in particular) had offered opinions that were relevant to standard of care. RP 1567:16-1569:12. Defendants also asked the trial court to permit them to present surrebuttal testimony. CP 998-1000. The trial court denied that request, explaining that defendants had already been given a full opportunity to present their defenses during their case. RP 1567:24-1569:12.

Following plaintiffs' rebuttal case, the trial court instructed the jury. Based on those instructions—which defendants do not challenge—the jury concluded that defendants were negligent and that their negligence was a proximate cause of Ms. Skinner's death and awarded $3 million in damages. CP 1034-35. Just as they did with regard to the trial court's rulings excluding the autopsy photos, defendants filed post-trial motions requesting a new trial based on the trial court's rulings permitting plaintiff to present expert testimony on rebuttal and disallowing additional testimony on surrebuttal. CP 1045-60, 1231-33, 1376-79. The trial court rejected those arguments in detailed orders. CP 1354-73, 1739-40. This appeal followed. CP 1710-30.

IV. ARGUMENT

Defendants' appeal does not raise any errors of law. Instead, defendants challenge three rulings that are at the very heart of a trial court's discretion. Those decisions must be affirmed unless they were "manifestly unreasonable or [] based on untenable grounds or reasons." *State v. Mee*, 168 Wn. App. 144, 153, 275 P.3d 1192 (2012). Even then, the judgment should be affirmed unless the errors affected the outcome of the trial. ER 103(a); *Qwest Corp. v. Wash. Utilities & Transp. Comm'n*, 140 Wn. App. 255, 260, 166 P.3d 732 (2007) ("Error without prejudice is not grounds for reversal, and error is not prejudicial unless it affects the case outcome."). Considering the painstaking and deliberate way that the trial court evaluated every issue in this case and the care with which it described its reasoning, defendants' suggestion that the trial court abused its discretion is meritless. The judgment should be affirmed.

A. The Trial Court Did Not Abuse Its Discretion or Otherwise Err by Excluding Autopsy Photos of Ms. Skinner's Head, Skull, and Brain.

1. The Trial Court Properly Excluded the Autopsy Photos on Three Separate Grounds.

Defendants' first—and principal—argument is that the trial court abused its discretion by excluding autopsy photos of Ms. Skinner's head, skull, and brain. Two of those photos can be found at CP 1071-72 and in the appendix to defendants' brief. As noted previously, the trial court so

ruled for three *separate and independent* reasons: (1) because defendants failed to produce the photos before the close of discovery; (2) because the autopsy photos were inadmissible under ER 403; and (3) as a sanction for defense counsel's contempt of court. If this Court agrees that any *one* of these rulings was within the trial court's discretion, the judgment should be affirmed. As set forth below, all three grounds are fully supported by the record and controlling case law.

a. The Trial Court Properly Excluded the Autopsy Photos Because Defendants Failed to Produce the Photos Before the Close of Discovery.

In addition to the discovery obligations set forth in CR 26, this case was governed by a case scheduling order that directed the parties to make several disclosures (*e.g.,* primary witnesses, exhibits, and trial witnesses) by pre-set deadlines. CP 2051-53. King County Local Rules also require each party to disclose the exhibits they intend to offer at trial well in advance of the trial date and preclude the introduction of any exhibit that is not properly disclosed absent a showing of good cause. KCLR 4(j). The reason for such rules is obvious: to prevent trial by ambush. *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 835, 696 P.2d 28 (1985). Consistent with this body of law, defendants themselves filed a motion *in limine* asking the trial court to enter an order precluding the introduction of any evidence not previously disclosed. CP 335. The trial

court *granted* that motion. CP 855. It is surprising, yet telling, that this ruling is not mentioned once in defendants' 50-page appeal brief.

Here, these legal principles—as confirmed by defendants' motion *in limine* and the trial court's pretrial order—required that the autopsy photos of Ms. Skinner's head, skull, and brain be excluded because defendants failed to disclose the photos until just one business day before trial. RP 11:13-22, 13:14-19. Applying these legal principles, the trial court excluded the photos. RP 13:23-14:3. Such a ruling, following on the heels of defendants' motion *in limine* and enforcing the Civil Rules, cannot credibly be described as "manifestly unreasonable or [] based on untenable grounds or reasons." *Mee*, 168 Wn. App. at 153.

Rather than accept the trial court's ruling, defendants claimed at trial that there was good cause under KCLR 4(j) for their failure to disclose the exhibit earlier. *See, e.g.,* CP 857-62.[3] That argument, of course, assumes that KCLR 4(j) was the principal basis for the trial court's

[3] KCLR 4(j) is the local rule that governs the exchange of witness and exhibit lists. The rule provides: "In cases governed by a Case Schedule pursuant to LCR 4, the parties shall exchange, no later than 21 days before the scheduled trial date: (A) lists of the witnesses whom each party expects to call at trial; (B) lists of the exhibits that each party expects to offer at trial, except for exhibits to be used only for impeachment; and (C) copies of all documentary exhibits, except for those to be used only for illustrative purposes. In addition, non-documentary exhibits, except for those to be used only for illustrative purposes, shall be made available for inspection by all other parties no later than 14 days before trial. Any witness or exhibit not listed may not be used at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires. See LCR 26 (witness disclosure requirements.)."

ruling excluding the autopsy photos. As noted previously, the trial court excluded the photos based on her pretrial order granting *defendants'* motion *in limine* because they were not produced during discovery. RP 11:5-14:3. As a result, defendants' reliance on the good cause exception in KCLR 4(j) is misplaced.

Assuming that the good cause exception in KCLR 4(j) is applicable, defendants' argument fails because they cannot establish good cause. It is noteworthy that defendants' primary argument in support of their good cause argument was vastly different at trial than it is now on appeal. At trial, defendants repeatedly claimed that good cause existed because the autopsy photos did not become relevant until plaintiff withdrew plaintiff's expert, Dr. Cummins, as a witness and thereby withdrew his testimony that Ms. Skinner may have had an "abscess" in her old surgical site. RP 12:15-13:12; CP 859. Defendants further claimed that plaintiff's withdrawal of Dr. Cummins led to a conflict on that issue that Dr. Riedo believed could be resolved by reference to the autopsy photos. CP 857-62, 963-65. This argument was rightly rejected by the trial court.

First, there was *always* a conflict regarding Dr. Riedo's testimony that Ms. Skinner had an abscess or abscess-like formation near her brain. Drs. Talan and Siegel—who, unlike Dr. Cummins, are infectious disease

doctors—rejected that contention. CP 1080-81, 1194, 1196, 1198. Thus, whether or not Dr. Cummins ultimately testified as an expert witness for plaintiff, defendants were going to have a dispute with plaintiffs' experts about the existence of an abscess. As such, plaintiff's decision to withdraw Dr. Cummins as an expert witness is not a credible basis to find good cause under KCLR 4(j).

Second, plaintiff was well within his rights to withdraw Dr. Cummins when he did. Indeed, defendants themselves filed a motion *in limine* asking the trial court to enter an order precluding any reference to an opinion of any expert who had been withdrawn. CP 332. The trial court agreed and entered an order granting such relief. CP 854. Thus, as the trial court properly concluded, RP 282:22-286:12, defendants had no right to rely on Dr. Cummins' speculative deposition testimony for any purpose, let alone as an excuse for failing to meet their discovery and pretrial disclosure obligations.

Although it was the subject of several oral motions, 12 briefs, and 14 declarations at and after trial, defendants now appear to have abandoned the above argument and, instead, argue that the autopsy photos only became relevant when, at the eleventh hour, plaintiff began to challenge the presence of pus as well as bacteria in the old surgical site

that all of the experts agreed was the source of Ms. Skinner's meningitis.[4] This argument misrepresents the trial court record, as plaintiff acknowledged at trial the presence of pus as well as bacteria in the old surgical site. For example:

- *Plaintiff* offered as a trial exhibit the Overlake autopsy report, which describes pus in the area of Ms. Skinner's old surgical site. Plaintiff's Trial Ex. 1, p. 99.
- Dr. Talan answered "yes" when asked whether the old surgical site contained pus as well as bacteria. RP 811:2-812:8.
- Dr. Loeser likewise agreed that the area of Ms. Skinner's old surgical site from which her meningitis developed contained pus. RP 1707:14-18, 1708:19-25.

Thus, this alleged eleventh hour change—like the abscess argument that defendants asserted at trial—does not establish good cause under KCLR 4(j). For this reason too, the trial court was well within its discretion when it excluded the autopsy photos in accordance with its pretrial order regarding documents produced after the discovery deadline.

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[4] *See* App. Br. 4 (claiming that "*the Estate changed its theory of the case*" and began to question the existence of pus shortly before trial began), p. 23 (claiming that the agreement "evaporated" shortly before trial began), p. 28 n.26 (claiming that "[i]n fact, as shown, the parties' experts *disagreed* over whether pus as well as bacteria was present in the site" once trial began), p. 36 (the "presence of pus in the surgical site . . . was not in dispute ***until the Estate changed its theory of the case just two weeks before trial***"), p. 37 n.36 (stating that "[t]o the extent the Estate would have had to scramble to prepare an expert response to the photos, ***it had nothing to fairly blame but its own change in its theory of the case***"), p. 39 ("The need for the photos did not arise until the Estate changed its theory of the case and began to dispute whether pus was present, and that did not happen until *after* the local rule deadline had passed.") (emphases in original).

b. The Trial Court Properly Excluded the Autopsy Photos Under ER 403.

In addition to being inadmissible because they were not disclosed until the day before trial, the trial court independently concluded that the autopsy photos were inadmissible under ER 403. RP 285:18-286:8. "The trial court has broad discretion in balancing the probative value of evidence against the potentially harmful consequences that might result from its admission. Its ruling will not be overturned absent a showing it was based on untenable grounds or untenable reasons, considering the purposes of the trial court's discretion." *Martinez v. Grant Cnty. Pub. Util. Dist. No. 2*, 70 Wn. App. 134, 138, 851 P.2d 1248 (1993) (citation omitted).

The trial court here did not abuse its discretion (or otherwise err) in excluding the autopsy photos under ER 403. The court noted, for example, that none of defendants' experts had seen the photos "or relied on them in any way to develop their opinions. Thus, they don't appear to be crucial to the presentation of that expert testimony." RP 285:1-4. The trial court nevertheless "assume[d] for sake of argument that they have some probative value." RP 285:4-5. Despite that assumption (favorable to defendants), the trial court concluded that the photos were inadmissible under ER 403 because the photos, "especially those showing the skull with hair," were both "gruesome[] and inflammatory." RP 286:6-8.

The trial court's ruling is consistent with relevant case law. In *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991)—a case that is cited but not discussed in defendants' brief (App. Br. 31, 39, 40)—the court explained that autopsy "[p]hotographs have probative value where they are used to illustrate or explain the testimony of *the pathologist performing the autopsy.*" 117 Wn.2d at 870 (emphasis added) (citing *State v. Jones*, 95 Wn.2d 616, 628, 628 P.2d 472 (1981)); *see also State v. Brett*, 126 Wn.2d 136, 160, 892 P.2d 29 (1995) (same). Here, in contrast, defendants never called as a witness either the Overlake pathologist who did the first autopsy or the neuropathologist at Johns Hopkins who did the special autopsy. Rather, trying to establish probative value, defendants intended to rely on Dr. Riedo—who is not a pathologist or trained as such, who was not present at Ms. Skinner's autopsy, and whose practice does not involve *any* direct observation of the human brain. RP 1446:13-1450:12.[5] That is not sufficient under these authorities.

This Court's opinion in *State v. Sargent*, 40 Wn. App. 340, 698 P.2d 598 (1985), is also instructive. The Court there reversed a first degree murder conviction due to the improper admission of autopsy and other provocative photos after the Court concluded that the same

[5] Dr. Riedo conceded that—unlike pathologists and surgeons—as an infectious disease physician he does not nor is he trained to "open up the brain and get inside and look at the anatomy." RP 1446:13-1447:4.

information in the photos could have been "gleaned" from testimony and diagrams. 40 Wn. App. at 348-49. The Washington Supreme Court cited *Sargent* favorably in *Brett* for the proposition that autopsy photos "should not be admitted when the same information could be revealed in a nonprejudicial manner." *Brett*, 126 Wn.2d at 160. Consistent with this principle, the trial court here made it clear that defendants were "free to use" a diagram and an illustration to support their experts' testimony. RP 286:9-12. *Sargent*, like *Lord* and *Brett*, supports the trial court's ruling.

Defendants nevertheless assail the trial court for allegedly failing to "re-balance" the probative value versus prejudicial effect of the photos after defendants submitted a declaration from one of their expert witnesses claiming that the photos were "crucial" and would "greatly assist" defendants in establishing the cause of Ms. Skinner's death. App. Br. 41. The principal flaw in this argument is that it is both conclusory and wrong. As can be seen by inspecting the photos (CP 1071-72), they are incomprehensible to a lay person. Even accepting that he was qualified to comment on the photos, Dr. Riedo would have testified that they supported his testimony, plaintiff's experts would have disagreed, and the jury would have been unable to resolve the conflict. As such, the photos would have done nothing to assist defendants in avoiding liability.

Nor was there any need to admit such evidence. As noted previously, the presence of pus in Ms. Skinner's old surgical site has never been in dispute. In addition, defendants represented to the trial court that Dr. Riedo "absolutely" could give all of his opinions without relying on the photos and that they "were not necessary to his formation of his opinion." RP 979:13-980:2. And while the trial court refused to admit the autopsy photos, it advised defendants that they "are free to use a diagram, free to use an illustration, in order to support your defense experts' testimony." RP 286:9-12. Defendants then did so. The trial court, therefore, did not abuse its discretion or otherwise err in its analysis of the probative value prong of ER 403.

Turning to the prejudice prong of ER 403, there is no authority supporting defendants' misguided contention that plaintiff does not have standing to object to the photos on that basis. App. Br. 43. Contrary to defendants' argument, plaintiff was not obligated to accept defendants' unsupported contention that only they could possibly have suffered any adverse effect from the introduction of autopsy photos of Ms. Skinner's head, skull, and brain. Moreover, despite their representation to the trial court that they "would not offer all 16 of the photos but only a smaller, less gruesome, selection" (CP 1365), defendants *never* identified that smaller selection of allegedly "less gruesome" photos until they filed their

motion for a new trial, CP 1061-72. For all these reasons, the trial court acted well within its discretion when it excluded the autopsy photos under ER 403. That decision, too, should be affirmed.

c. The Trial Court Properly Excluded the Autopsy Photos as a Sanction for Defense Counsel's Contempt of Court.

Finally, the trial court also excluded the autopsy photos as a sanction for defense counsel's contempt of court. Trial courts have broad discretion in determining whether a party is in contempt, and that discretion is abused only when it is exercised on untenable grounds or for untenable reasons. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). As set forth below, the trial court did not abuse its discretion or otherwise err in excluding the autopsy photos for this additional reason.

Despite the trial court's order excluding the autopsy photos, defendants' counsel on cross-examination of Dr. Talan asked him whether "photos done at an autopsy [would] assist you in determining [whether pus was present in the ventricles]?" and, after he responded "possibly," followed up and asked "[d]id you look at any photos here?" RP 910:18-23. The trial court concluded that these questions violated the court's orders and that sanctions were therefore warranted. RP 985:23-986:2. The court then reaffirmed its prior decision to exclude the photos, directed

the parties to redact the reference to the photos in the Overlake autopsy report, and directed defendants to admonish their experts not to mention the photos during their testimony. RP 987:1-22.

Defendants assert two arguments in support of their contention that the trial court abused its discretion. *First*, defendants claim that the trial court got the facts wrong about the question, thinking at the time that defense counsel's questions to Dr. Talan referred to "the" autopsy photos when the question—according to the trial transcript—asks whether he had seen "any photos here." App. Br. 44. The difference in wording is immaterial; either way, defendants' counsel violated the trial court's pre-trial order by questioning plaintiff's expert about autopsy photos. Thus, it was not an abuse of discretion to exclude the autopsy photos on this additional basis.

Second, defendants argue that "by the time the court was considering whether to sanction the Defendants for the questions asked of Dr. Talan, it should have become *crystal* clear to the court that its initial exclusion ruling *was wrong*," and that it was error to exclude the photos "as a sanction for violating an exclusion ruling ***that never should have been made in the first place***." App. Br. 44-45 (emphasis in original). This argument erroneously assumes that the initial exclusion ruling was wrong. As set forth above, the order was correct. And far from being

"crystal clear" that the trial court's initial ruling was wrong, the trial court reaffirmed that ruling both during and after trial. RP 982:4-987:22; CP 1364-66.

Equally important, defense counsel was not at liberty to conclude otherwise. If defendants' arguments were correct, litigants would be free to violate orders that—they believe—would not withstand appellate review. That is not the law, nor should it be. The Washington Supreme Court squarely rejected such an argument in *Deskins v. Waldt*, 81 Wn.2d 1, 499 P.2d 206 (1972), as follows:

> [W]here the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt. Such order, though erroneous, is lawful within the meaning of contempt statutes until it is reversed by an appellate court.

81 Wn.2d at 5; *see also State v. Breazeale*, 99 Wn. App. 400, 413, 994 P.2d 254 (2000), *aff'd in part, rev'd in part*, 144 Wn.2d 829, 31 P.3d 1155 (2001). Thus, regardless of whether the trial court's order excluding the autopsy photos was correct, the court's contempt finding was appropriate, and the sanction it imposed—excluding the autopsy photos on this additional basis—was well within its discretion.

2. Defendants' Reliance on the *Burnet* Factors Is Misplaced.

Although defendants admit—as they must—that they failed to produce the autopsy photos in discovery, they claim that it was the *trial court* that did something wrong by failing to consider and apply the *Burnet* factors *before* it excluded the photos as a discovery sanction. App. Br. 32-33. If the Court agrees that the autopsy photos were properly excluded under ER 403 or as a sanction for defense counsel's contempt of court, it need not reach defendants' argument regarding *Burnet* because that argument (like *Burnet* itself) is expressly limited to the trial court's exclusion of the autopsy photos as a discovery sanction. If the Court nonetheless reaches the issue, it should reject defendants' argument for two reasons: (1) the *Burnet* factors are not applicable here; and (2) even if they apply, the trial court addressed the *Burnet* factors and supported its ruling accordingly. Each of these two points is addressed below.

a. The *Burnet* Factors Are Not Applicable Here.

The *Burnet* factors are so named because they originate in the Washington Supreme Court's opinion in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). *Burnet* held that "[w]hen 'a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just.'" 131 Wn.2d at 493-94 (brackets omitted) (quoting CR 37(b)(2)).

CR 37(b), in turn, lists various possible sanctions, including "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses." CR 37(b)(2)(B). In *Burnet*, the Supreme Court stated: "When the trial court chooses one of the harsher remedies allowable under CR 37(b), ... it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed, and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial." 131 Wn.2d at 494 (internal quotation marks and citation omitted; ellipsis in original).

The *Burnet* factors do not apply here for at least two reasons. *First*, as the above discussion shows, *Burnet* applies only to sanctions that are imposed under CR 37(b). In a subsequent decision, the Washington Supreme Court made clear that "nothing in *Burnet* suggests that trial courts must go through the *Burnet* factors every time they impose sanctions for discovery abuses." *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006) (holding that *Burnet* factors do not apply to trial court's imposition of sanctions under CR 26(g)). Here, as noted, the trial court excluded the autopsy photos because they were not produced during discovery, not as a *CR 37(b)* sanction. Such an order does not trigger the *Burnet* analysis.

Second, *Burnet* also does not apply here because the trial court did not impose "one of the harsher remedies allowable under CR 37(b)." 131 Wn.2d at 494 (internal quotation marks and citations omitted). In *Mayer*, the Supreme Court explained "that the reference in *Burnet* to the "'harsher remedies allowable under CR 37(b)'" applies to such remedies as dismissal, default, and the exclusion of testimony—sanctions that affect a party's ability to present its case." 156 Wn.2d at 690 (citations omitted). The trial court here did not impose any such sanctions. To the contrary, although the trial court excluded the autopsy photos, it made clear that defendants "are free to use a diagram, free to use an illustration, in order to support your defense experts' testimony." RP 286:9-12. Because that cannot properly be described as "one of the harsher remedies allowable under CR 37(b)," 131 Wn.2d at 494, the *Burnet* factors are inapposite.

In addition to *Mayer* (discussed above), the Supreme Court's discussion of prior case law in *Burnet* confirms the above analysis. A defendant in *Burnet* argued that the sanction imposed by the trial court there was warranted under *Allied Financial Services, Inc. v. Mangum*, 72 Wn. App. 164, 868 P.2d 1 (1993), and *Dempere v. Nelson*, 76 Wn. App. 403, 886 P.2d 219 (1994). In both *Allied* and *Dempere*, the trial court excluded a witness who was not disclosed on the defendants' witness list. *Allied*, 72 Wn. App. at 167; *Dempere*, 76 Wn. App. at 406. The court in

Burnet distinguished both cases based on the severity of the sanctions imposed, noting that the trial court in *Burnet* "not only limited the Burnets' discovery on the credentialing issue, but it also removed that issue from the case." *Burnet*, 131 Wn.2d at 496.

This Court's opinion in *Lancaster v. Perry*, 127 Wn. App. 826, 113 P.3d 1 (2005), is also instructive. In *Lancaster*, the trial court, similar to the trial court here, "entered an order excluding any undisclosed witnesses." 127 Wn. App. at 828. Consistent with that order, the trial court excluded a witness's testimony pursuant to KCLR 26(f) because the defendant failed to properly disclose the witness in his pretrial disclosure statement. *Id.*[6] Like defendants here, the defendant in *Lancaster* argued on appeal that "the trial court was required to follow the standard set forth in *Burnet* before excluding the witness's testimony." *Id.* at 831. This Court disagreed, holding: "*Burnet* does not apply here." *Id.* at 832. The same result applies equally here.

[6] In 2005, when the Court decided *Lancaster*, KCLR 26(f) stated: "'Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions [a]s justice requires.'" *Lancaster*, 127 Wn. App. at 831 (quoting KCLR 26(f)). The rule is now codified at KCLR 26(k)(4).

b. Even If the *Burnet* Factors Applied—Which They Do Not—the Trial Court Addressed Them and Supported Its Ruling Accordingly.

While an evaluation of the *Burnet* factors was not necessary here, the trial court *did* consider them. When consideration of the *Burnet* factors is required, it must be "apparent from the record" that they were considered. *Burnet*, 131 Wn.2d at 494. Here, the trial court did that *multiple* times. *See* RP 11:5-14:3 (discussing, among other things, the prejudice to plaintiff regarding the late disclosure of the photos), 282:22-286:12 (describing defendants' willful discovery violation and concluding that "defendants have not shown good cause for their failure to review the photos, to produce them before the discovery cutoff"). These rulings make it more than apparent from the record that the trial court considered and applied the *Burnet* factors before it excluded the autopsy photos.

The trial court then *confirmed and repeated* its analysis in its Supplemental Order Denying Defendants' Motion for New Trial. CP 1370-73. The court there acknowledged defendants' argument—asserted in a footnote of their motion for a new trial—that the court was required by *Blair v. TA-Seattle East No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011), to address the *Burnet* factors before excluding the autopsy photos. CP 1370. It responded by stating that "[w]hile the Court believes it put its *Blair* [*Burnet*] analysis on the record, the Court wishes to take this

opportunity to articulate the basis for its initial exclusion during trial if the Court's analysis was not adequately documented previously." CP 1371.

The trial court then proceeded to address—*again*—each of the *Burnet* factors: it considered and rejected lesser sanctions (such as a continuance or a monetary sanction), it noted that defendants had not shown good cause for their failure to disclose the autopsy photos during discovery, and it considered the obvious prejudice to plaintiff were it to allow defendants to refer to and rely on the photos despite having produced them on the eve of trial. CP 1371-72. Thus, to the extent that the *Burnet* factors apply here, the trial court considered each and every one of those factors and did not abuse its discretion (let alone err) in excluding the autopsy photos as a discovery sanction.

Defendants attack the trial court's analysis in two ways. Their first such argument is that "the balancing came too late." App. Br. 33. Relying again on *Blair*, defendants claim that the *Burnet* analysis must be performed *during* trial (before the sanction is imposed), not afterwards. *Id.* But as noted above, the trial court *did* consider the *Burnet* factors before excluding the autopsy photos. As *Burnet* makes clear, all that is required in cases involving "harsher remedies" is that it be "apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed, and whether it found that the

disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial." 131 Wn.2d at 494. Here, that consideration is "apparent from the record" as required. *See* discussion on page 38 above.

Defendants' argument also fails because it is based on a misreading of *Blair*. In *Blair*, the appellee attempted to manufacture an analysis of "at least one of the *Burnet* factors, i.e., lesser sanctions," by juxtaposing two trial court orders excluding certain witnesses as a discovery sanction. 171 Wn.2d at 350. The Washington Supreme Court rejected that analysis and concluded that an order imposing discovery sanctions must be supportable at the time it is entered, not in "hindsight" by reference to another order. *Id.* Here, in contrast, plaintiff is not attempting to manufacture an analysis of the *Burnet* factors by juxtaposing multiple orders; that analysis can be found on the record (RP 11:5-14:3, 282:22-286:12) and is *independently confirmed* by the trial court's post-trial ruling. As such, there is no need to remand the case to the trial court to repeat that analysis.

Defendants' second argument regarding the trial court's *Burnet* analysis is that "the trial court's balancing failed on the merits." App. Br. 34. Defendants claim, for example, that "*nothing* in the record supports the notion that PSP's managing partner need only have walked down the

hall and asked Overlake's risk manager for the photos." *Id.* at 35. The record shows that Overlake's counsel provided the photos to PSP's attorney *promptly* upon request. CP 903. In addition, the salient point is that the photos should have been disclosed months earlier, when the autopsy reports were produced. As the trial court *correctly* concluded, the photos were "within the control of Defendant Overlake Hospital throughout the pendency of this lawsuit and easily accessible to Defendant PSP during the same period." CP 1372. The trial court did not err, let alone abuse its discretion, in so holding.

Defendants also claim that they cannot be faulted for failing to produce the autopsy photos earlier because the presence of pus "was not in dispute until the Estate changed its theory of the case just two weeks before trial." App. Br. 36. As set forth above, there was no such change. Regardless, defendants cannot properly withhold *discoverable* evidence simply because *they* do not believe it is essential to their theory of the case. As the trial court aptly noted, defendants and their counsel "need to take their discovery obligations seriously and need to diligently investigate the existence of relevant documents and produce them in a timely manner." CP 1371. In this respect as well, the trial court's *Burnet* analysis—if and to the extent necessary—is not "manifestly unreasonable or [] based on untenable grounds or reasons." *Mee*, 168 Wn. App. at 153.

3. If the Trial Court Erred in Excluding the Autopsy Photos, the Error Was Harmless.

As noted previously, even if a trial court abuses its discretion by excluding admissible evidence, the judgment should be affirmed unless the errors affected the outcome of the trial. ER 103(a); *Qwest Corp.*, 140 Wn. App. at 260 ("Error without prejudice is not grounds for reversal, and error is not prejudicial unless it affects the case outcome."). Washington law is equally clear that the erroneous exclusion of cumulative evidence is considered, at most, harmless error. *See Saldivar v. Momah*, 145 Wn. App. 365, 396, 186 P.3d 1117 (2008) (citing 5 Karl B. Tegland, *Washington Practice: Evidence Law & Practice* § 404.14, at 513 (5th ed. 2007)); *Silves v. King*, 93 Wn. App. 873, 885, 970 P.2d 790 (1999) (erroneous exclusion of cumulative evidence is harmless).

Here, even if the trial court erred in excluding the autopsy photos (which it did not), any such error was harmless. Although they now claim that the photos were extremely relevant to their theory of the case, when defense counsel was specifically asked whether Dr. Riedo could testify and give his opinions without the benefit of the photos he responded "absolutely," as they "were not necessary to his formation of his opinion." RP 979:13-980:2. The clear import of those statements—confirmed by examining the autopsy photos themselves—is that the autopsy photos would not have assisted defendants in avoiding liability for Dr. Anderton's

professional negligence, particularly because defendants' other expert witnesses *disagreed* with Dr. Riedo's opinion that Ms. Skinner had an abscess that ruptured while she was in the emergency department on January 26, 2010. RP 1137:10-1138:24, 1224:11-17.

In addition, although the trial court refused to admit the autopsy photos, it advised defendants that they "are free to use a diagram, free to use an illustration, in order to support your defense experts' testimony." RP 286:9-12. Consistent with the trial court's remark, defendants used several illustrative exhibits to support their experts' testimony. Defendant's Trial Ex. Nos. 130A-141A, 144. The autopsy photos would have been cumulative of those exhibits. They are also cumulative of the autopsy reports, which provide the same information in narrative form. Plaintiff's Trial Ex. 1, pp. 99, 100. As noted, the erroneous exclusion of such cumulative evidence is considered, at most, harmless error. Thus, even if the trial court erred, there is no proper basis to vacate the jury's verdict and the trial court's judgment.

B. The Trial Court Did Not Abuse Its Discretion or Otherwise Err by Allowing Plaintiff to Call Dr. Loeser in Rebuttal and Disallowing Surrebuttal.

Defendants also assign error to the trial court's rulings denying their motions to preclude Dr. Loeser from testifying in rebuttal and their request to present surrebuttal testimony. App. Br. 1. The "question of

admissibility of evidence on rebuttal rests largely on the trial court's discretion, and error in denying or allowing it can be predicated only upon a manifest abuse of that discretion." *State v. White*, 74 Wn.2d 386, 395, 444 P.2d 661 (1968). Likewise, "[i]t is axiomatic that [the question of whether surrebuttal is authorized] ... [is] addressed to the sound discretion of the trial court. The rulings of the court should stand unless we can say there has been a manifest abuse of discretion." *Jarstad v. Tacoma Outdoor Recreation*, 10 Wn. App. 551, 561, 519 P.2d 278 (1974).

The trial court's reasoning regarding defendants' motion to preclude Dr. Loeser from testifying in rebuttal can be found at RP 1567-69. The court began by noting that it had reviewed its notes of the trial testimony of Drs. Dobson, Maravilla, Riedo, and Wohns so that it could properly evaluate the parties' respective arguments. RP 1568:4-9. Based on that review, the court noted that there was "disagreement on standard of care." RP 1568:15-16. The trial court therefore concluded: "I am going to allow Loeser to testify in rebuttal in the plaintiff's case, and I am going to allow him to opine as to the standard of care." RP 1568:18-20; *see also* RP 1568:21-1569:5 (same).

Attacking that ruling, defendants cite decisions precluding plaintiffs from withholding substantial evidence on a subject for which they bear the burden of proof "*merely in order to present this evidence*

cumulatively at the end of a defendant's case." App. Br. 47 (citing several decisions). Attempting to fit this case into that prohibition, defendants suggest that Dr. Loeser's testimony was cumulative of the testimony of plaintiff's other experts, Drs. Talan and Siegel, but delivered by a physician with impressive credentials. *Id.* at 48. But earlier in their brief, defendants complain that Dr. Loeser "went substantially beyond Drs. Siegel and Talan." *Id.* at 30.

Regardless, the fact that Dr. Loeser's testimony was—to some degree—cumulative of the testimony of Drs. Talan and Siegel and that it also addressed standard of care does not mean that the trial court abused its discretion in allowing it for at least two reasons. *First*, defendants seek a new trial not only on the issue of causation, but also on standard of care. App. Br. 45. This confirms—as the trial court concluded—that Dr. Riedo (who had been disclosed solely on the issue of causation) actually gave back-door standard-of-care opinions. *Second*, the Washington Supreme Court has expressly recognized that "[f]requently true rebuttal evidence will, in some degree, overlap or coalesce with the evidence in chief." *White*, 74 Wn.2d at 395. Common sense confirms that point: it is frequently essential to provide the necessary context for rebuttal testimony by reference to earlier testimony. Dr. Loeser's testimony was no different

in that regard, and the trial court did not err—let alone abuse its discretion—by permitting such testimony.

Turning to surrebuttal, the trial court explained that the "primary reason" for denying surrebuttal "is that the defense has had ample opportunity to elicit opinions from its expert witnesses that sets up this dispute, and I don't believe there's any need for any surrebuttal." RP 1569:6-12. Defendants relegate a single paragraph of the argument section of their brief to this issue, complaining that the trial court "erroneously gave the Estate the benefit of a new expert [Dr. Loeser] seeming to offer the final, definitive word on causation." App. Br. 50. Clearly, *someone* has to have the last word. As set forth above, the trial court here did not err in permitting Dr. Loeser to testify on rebuttal. While defendants would have preferred to have the final word on causation, "[i]t is not the function of surrebuttal to provide the defendant an opportunity to present evidence cumulative or confirmatory of that which has been, or ought to have been, presented in his case-in-chief." 14 Karl. B. Tegland, *Washington Practice: Civil Procedure* § 30.21, at 240-41 (2d ed. 2009). In this respect as well, the trial court did not abuse its discretion.

Finally, even if the trial court somehow abused its discretion with regard to rebuttal or surrebuttal, any such error was harmless. As to rebuttal, defendants' argument is that plaintiff was erroneously allowed to

present cumulative testimony. App. Br. 49-50. But the "admission of evidence which is merely cumulative is not prejudicial error." *State v. Todd*, 78 Wn.2d 362, 372, 474 P.2d 542 (1970). As to surrebuttal, defendants argue on appeal (as they did at trial) that Dr. Riedo should have been permitted to respond to Dr. Loeser's testimony. App. Br. 50. Yet the record shows that Dr. Riedo was not available to testify in surrebuttal due to a scheduling conflict. CP 1334-35. Thus, even if the trial court erred in precluding such testimony (which it did not), the error was harmless.

V. CONCLUSION

The jury returned a verdict in plaintiff's favor following a three-week trial during which defendants had a full and fair opportunity to challenge plaintiff's theory and present their conflicting theories to the jury. The trial court did not err—let alone abuse its discretion—in excluding the autopsy photos, permitting Dr. Loeser to testify on rebuttal and denying defendants' request to present surrebuttal. The trial court's judgment on the jury's verdict should therefore be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the state of Washington, that on October 24, 2012, I caused the foregoing ***Brief of Respondent*** to be filed with the Court of Appeals (original and one copy); and caused to be served on the following counsel of record in the manner listed below:

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