No. 44655-3-II

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

LONNITA HASKINS,

Appellant,

vs.

MULTICARE HEALTH SYSTEM, a Washington corporation d/b/a TACOMA GENERAL HOSPITAL,

Respondent/Cross-Appellant.

RESPONDENT/CROSS-APPELLANT MULTICARE HEALTH SYSTEM'S REPLY BRIEF IN SUPPORT OF CROSS APPEAL

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I. REPLY IN SUPPORT OF CROSS APPEAL

A. The Trial Court Misinterpreted ER 615(2) and Abused Its Discretion in Excluding the Hospital's Properly Designated Representative.

Haskins does not address and apparently does not dispute that a trial court's interpretation of an evidentiary rule is a question of law, which the Court of Appeals reviews *de novo*. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). "Once the rule is *correctly* interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) (emphasis added). "Failure to enforce the requirements of rules can constitute an abuse of discretion." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Here, MultiCare first contends that the trial court misinterpreted ER 615(2) as a matter of law by ignoring the plain and unambiguous language of the rule:

> At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. ***This rule does not authorize exclusion*** of (1) a party who is a natural person, or ***(2) an officer or employee of a party which is not a natural person designated as its representative by its attorney***, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

ER 615 (emphasis added).

Haskins does not address and apparently does not dispute that as a matter of law, Nurse Ashley Barker is MultiCare's employee and MultiCare's designated representative by its attorney within the confines of ER 615(2). Even if she is also a fact witness, ER 615(2) plainly does not authorize the court to exclude a designated corporate representative from the courtroom.

Instead, Haskins focuses on the first sentence of ER 615 (which is not the subject of MultiCare's cross appeal) and entirely ignores the language of ER 615(2). Haskins speculates that "there was a clear risk" that Nurse Barker's testimony "could have been colored by what she heard" from other witnesses or in opening statements "consciously or otherwise." (*See* Appellant's Reply Brief at 15-16) First, this assertion is untethered to the purpose of ER 615(2), which is to allow a corporation to designate—within its discretion—its corporate designee. Second, this sort of hopeless speculation about risks, colorable testimony or conscious/unconscious perceptions could easily apply to the trial testimony of Lonnita Haskins—who is "a party who is a natural person" within the orbit of ER 615(1).

The trial court erred in its interpretation and application of ER 615(2) in its initial ruling, and in its denial of MultiCare's motion for reconsideration. Having failed to legally apply the rule, the trial court also

abused its discretion in excluding Nurse Barker from the courtroom in derogation of ER 615(2). MultiCare's designated representative should have been allowed to stay in the courtroom per ER 615(2) in the same manner that Lonnita Haskins was allowed to remain in the courtroom per ER 615(1).

Oddly, Haskins argues (without legal support) that the trial court should be allowed to exclude "fact witnesses whose paramount importance is giving truthful testimony rather than assisting counsel." (*See* Appellant's Reply Brief at 16) This argument does not make sense within the context of ER 615(2), and suggests that a corporate designee's truthful testimony conflicts with assisting counsel. There is no legal basis for such an argument.

Finally, Haskins conflates the trial court's authority to exclude witnesses (as set forth in the first sentence of ER 615) with the court's lack of authority to exclude party witnesses, such as Lonnita Haskins (ER 615(1)), and corporate designees, such as Nurse Barker (ER 615(2)).

The trial court misinterpreted ER 615(2) and abused its discretion by failing to enforce the requirements of the rule. If this case is remanded on appeal, then MultiCare requests that the Court reverse the trial court's ruling and provide MultiCare the option of designating Nurse Barker as its corporate designee per ER 615(2).

B. The Trial Court Erred in Refusing to Submit a Jury Instruction that Personal Injury Awards Are Non-Taxable.

The trial court erred by excluding MultiCare's proposed jury instruction (which is an undisputedly correct statement of the law) that personal injury awards are non-taxable. MultiCare's proposed jury instruction states as follows:

> Any award to plaintiff will not be subject to federal income tax, and therefore you should not add or subtract for such taxes in fixing the amount of any award.

CP 163.[1]

The trial court declined to submit the instruction to the jury "because it would conflict with the no insurance instruction." ((RP 1/29/13) at 184:15-17) Haskins contends that MultiCare failed to adequately object to the trial court's failure to give this instruction, and therefore, did not properly preserve the issue on cross appeal. (*See* Appellant's Reply Brief at 17) However, Haskins' contention is unsupported by the record.

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[1] The Clerk's Papers only include MultiCare's *uncited* instructions. (CP 150-65) However, MultiCare submitted a cited set to both the trial court and Haskins, which contains 10 single-spaced lines of legal citations to cases favorable to instructing the jury that damage awards are not taxable. Accordingly, Haskins' assertion that neither she nor the trial court were apprised of the reasons for giving the proposed instructions are unavailing. (*See* Appellant's Reply Brief at 17)

Haskins submitted an altered version of Washington Pattern Instruction No. 2.13 with respect to insurance and future collateral source payments from Medicare and Medicaid. CP 138; *see also* ((RP 1/29/13) at 172) MultiCare objected to the proposed modified version and set forth the grounds for its objection, namely that the collateral source rule is abrogated by statute in medical malpractice cases, and that an instruction regarding the subject of insurance should not be given. ((RP 1/29/13 at 172:14-23; 173:13-14) The trial court ruled that the jury should not speculate about insurance, and therefore unaltered WPI 2.13 was the correct instruction. ((RP 1/29/13 at 173:15-21)

Shortly, thereafter the parties discussed MultiCare's proposed jury instruction that any award to the plaintiff would not be subject to federal income tax. ((RP 1/29/13 at 184:5-19) The proposed instruction was similar to the language of unmodified WPI 2.13—namely, that the jury should not speculate by adding or subtracting for such taxes in fixing the amount of the award. CP 163. The trial court declined to submit MultiCare's proposed instruction because "I think it would conflict with the no insurance instruction [WPI 2.13] [.]"[2] ((RP 1/29/13 at 184:15-17) MultiCare stated "Thank you, Your Honor. We'll just take an exception to

[2] It is unclear what conflict, if any exists between MultiCare's proposed instruction regarding taxation and WPI 2.13.

that and preserve the issue." (RP 1/29/13 at 184:18-19)

Based on the foregoing, MultiCare submits that it properly preserved the error of the trial court's failure to give this instruction.

Haskins does not dispute that all citizens of this state are subject to federal taxation or that a damage award is not taxable. Instead, she argues that "there is no WPI on this issue" as *a fait accompli*. (*See* Appellant's Reply Brief at 18) However, whether a WPI exists is nonresponsive to MultiCare's argument that a jury should be instructed to not add or subtract to any award to the plaintiff based on federal income tax. The proposed instruction is similar to WPI 2.13, wherein the jury is "not to make or decline to make any award, or increase or decrease any award, because you believe that a party may have medical insurance, liability insurance, workers' compensation, or some other form of compensation available." WPI 2.13.

Haskins also fails to address the seminal case from which MultiCare's proposed jury instruction arises: Domeracki v. Humble Oil & Refining Co., 443 F.2d 1245 (3d Cir. 1971), *cert denied* 404 U.S. 883, 30 L. Ed. 2d 165, 92 S. Ct. 212 (1971). Domeracki was the sole focus of MultiCare's Opening Brief on Cross Appeal.

Inexplicably, Haskins asserts that MultiCare "cites two federal cases, one from 1975 and one from 1979 in support of the instruction." (*See* Appellant's Reply Brief at 18) However, those unidentified cases from 1975 or 1979 do not appear anywhere in MultiCare's Opening Brief. Haskins also contends that Washington "rejected" consideration of tax consequences of an award in Janson v. North Valley Hosp., 93 Wn. App. 892, 971 P.2d 67 (1999) (interpreting Norfolk v. W. Ry. Co. v. Liepelt, 444 U.S. 490, 100 S. Ct. 755 (1980)). However, the *Janson* Court merely distinguished between damages awarded in federal cases versus damages awarded in state cases. The *Janson* Court ruled that "[i]f this case were tried under federal law, ***Liepelt* would apply and the jury would be instructed as requested by Ms. Janson.**" Janson, 93 Wn. App. at 906 (emphasis added)).

In sum, "given the absence of complications that an instruction would engender, the tax consciousness of the American public, and the general lack of knowledge about the statutory exclusion," personal injury cases must, in the future, and upon request by counsel, instruct the jury that any award will not be subject to federal income taxes and that the jury should not, therefore, add or subtract taxes in fixing the amount of any

award. Domeracki, 443 F.2d at 121. This is precisely the instruction that MultiCare seeks if the judgment is vacated and remanded to the trial court.

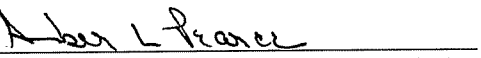
II. CONCLUSION

If the Court vacates the judgment and remands this case to the trial court, then MultiCare respectfully requests that the Court: (1) reverse the trial court's ER 615(2) ruling and allow MultiCare's designated representative and fact witness to remain in the courtroom throughout the trial; and (2) reverse the trial court's decision rejecting MultiCare's proposed jury instruction that personal injury awards are not subject to federal taxation.

Dated this 8th day of January, 2014.

Respectfully submitted,

FLOYD, PFLUEGER & RINGER, P.S.



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CERTIFICATE OF SERVICE

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