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Court of Appeals
Division I
State of Washington

SUPREME COURT NO. _____

COURT OF APPEALS, DIVISION 1, NO. 74654-5-I

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

(Whatcom County Court Case No. 14-2-01483-6)

MILTON LONG, individually and as the Personal Representative of the ESTATE OF DONALD RODENBECK,

Petitioners/Respondents,

vs.

PEACEHEALTH dba PEACEHEALTH ST. JOSEPH MEDICAL CENTER, a Washington Non-profit Corporation,

Appellant.

PETITION FOR REVIEW

Douglas R. Shepherd, WSBA #9514
Bethany C. Allen, WSBA #41180
SHEPHERD and ALLEN
2011 Young Street, Suite 202
Bellingham, WA 98225
(360) 733-3773 or 647-4567

July 31, 2017

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A. IDENTITY OF PETITIONERS

Milton Long, individually and as Personal Representative of the Estate of Donald Rodenbeck (Long), asks the Court to grant review of the Court of Appeals decision identified in Part B.

B. COURT OF APPEALS DECISIONS

Petitioner seeks review of the May 15, 2017, Court of Appeals unpublished opinion reversing the post-trial decision of Judge Matthew Elich. Judge Elich determined Judge Garrett's examination of PeaceHealth's expert witness, Dr. Quigley, were unconstitutional comments on the evidence. See Judge Elich's decision(s), Appendix B1-18. The Court of Appeals erroneously determined Judge Garrett's examination of expert witnesses were "meaningless expressions," and not constitutionally prohibited comments on the evidence. See Opinion, Appendix A1-13. Long filed a timely motion to publish the opinion, which was denied on June 30, 2017. See Court's Order, Appendix A-14.

C. ISSUES PRESENTED FOR REVIEW

1. As a matter of first impression, can a trial court judge's questions of a witness, and words in response to those questions in front of

a jury be "meaningless expression," and not fall within the constitutional prohibition on judicial comments on the evidence[1]? [No.]

2. Did Judge Garrett's words and comments express a belief or disbelief regarding the evidence? [Yes.]

3. Did Judge Garrett enter into the "fray of combat," and assume the role of the attorneys in violation of Article 4, Section 16 of the Washington State Constitution? [Yes.]

4. Was Long prejudiced by Judge Garrett's comments on the evidence? [Yes.]

D. STATEMENT OF THE CASE

Milton Long and Donald Rodenbeck (Rodenbeck) were committed intimate partners for more than 30 years. RP 220. In 2007, when allowed by Washington law, they became registered domestic partners. RP 220; Ex. 1. In 2012, Rodenbeck decided to undergo elective surgery to improve the circulation in one of his legs. RP 235.

On August 10, 2012, Rodenbeck, age 72, was admitted to PeaceHealth's hospital for aortobifemoral bypass surgery. Ex. 49. The surgery was intended to increase his mobility and decrease pain. *Id.* Rodenbeck's surgery was complicated by a cut to his small bowel during

[1] "Judges shall not charge juries with respect to matter of fact, nor comment thereon, but shall declare the law." Constitution of the state of Washington, Article 4, Section 16.

surgery. *Id.*; Ex. 52. Dr. Pietro repaired the bowel during the surgery. *Id.* Dr. Zastrow charted Rodenbeck tolerated the surgery and procedures well. *Id.*

Post-surgery, Rodenbeck was diagnosed with acute blood loss anemia. Ex. 57. A blood transfusion was ordered and administered "stat." *Id.* On August 11, 2012, Rodenbeck was again diagnosed with blood loss anemia. Ex. 59. On the morning of August 12, a second blood transfusion was administered. Ex. 61.

Rodenbeck was a known fall risk due to his surgery and related issues (i.e. medications, central line, etc.). CP 1916; RP 2391-95; RP 207; Ex. 30. Nurse Dimalla testified everyone should know Rodenbeck, while in the care of PeaceHealth, was a fall risk. *Id.* PeaceHealth's charting demonstrated Rodenbeck was tachycardic every time his vitals were checked after surgery. After being diagnosed with blood loss anemia and tachycardia, Rodenbeck, at 6:30 p.m. on August 12, was transferred from the ICU to the Third Floor Recovery unit. Ex. 56.

PeaceHealth policies required a yellow fall risk arm band be placed on all fall risk patients. No armband was placed on Rodenbeck, in violation of written policy. RP 2393. Upon transfer from ICU to the 3rd floor, PeaceHealth caregivers taking over Rodenbeck's care were not aware nor advised he was a fall risk. Nurse Johnson does not remember

being told Rodenbeck was a fall risk. RP 2425. Certified Nursing Assistant Rumyantseva was not advised that Rodenbeck was a fall risk. RP 2445. She did not advise her evening replacement that Rodenbeck was a fall risk. *Id.* PeaceHealth had a "Safe Handoff Communication Patient Care Policy." Ex. 13. The policy applied when transferring Rodenbeck from the ICU to the 3rd floor. *Id.* PeaceHealth did not comply with this written policy. There was no communication of Rodenbeck's risk of falling between any PeaceHealth caregivers. RP 379.

On August 12, just before midnight, a nursing assistant opened the closed door to Rodenbeck's room, turned on the lights and found Rodenbeck on the floor, in a pool of blood, dead and cold to the touch. RP 871; RP 2422; RP 1601-02. It was likely Rodenbeck had been on the floor, dead, a long time. RP 1661-62. At trial, the nursing assistant in charge of Rodenbeck's care, admitted that she incorrectly "accidently" charted the following in Rodenbeck's medical chart after his death: "**up with activities at 23:58**." RP 1603. (Emphasis added.)

On the morning of August 13, 2012, more than one hour after Rodenbeck died, Dr. Zastrow charted Rodenbeck fell unattended, and was found dead lying in a "pool of blood." Dr. Zastrow also charted she expected the Whatcom County Coroner to examine Rodenbeck's death. Ex. 3.

Long was called shortly before midnight. RP 226. PeaceHealth's "head nurse" told Long: "Mr. Rodenbeck fell out of bed." RP 227. She next said she had just been informed Rodenbeck was dead. RP 227. Long told her he was coming to the hospital. *Id.* At PeaceHealth, Dr. Zastrow apologized and said: "Nothing like this has ever happened to me like this before." RP 229-30. Dr. Zastrow told Long that Rodenbeck had gotten up, fell on the floor, dislodged his central line and bled to death on the floor. Dr. Zastrow used the term "bled out." RP 230.

Dr. Zastrow apparently left it up to the PeaceHealth House Manager to contact the coroner.[2] RP 1365. No PeaceHealth employee remembered talking to the coroner. Before someone contacted the coroner and Rodenbeck's body was moved, the "pool of blood" was cleaned and disposed of, Rodenbeck's body was cleaned and moved to the bed and then to the hospital morgue. RP 293. The coroner declined jurisdiction.

On August 15, 2012, PeaceHealth, pursuant to Washington law, reported Rodenbeck's death as an adverse or sentinel event. Ex. 35. On August 16, 2012, Dr. Zastrow completed Rodenbeck's death certificate. Ex. 9. In Section 38, manner of death, "accidental" was first checked. It

[2] Until the Coroner was notified and declined jurisdiction, the actions of PeaceHealth were controlled by RCW 68.50.010, which was activated by Dr. Zastrow's decision to contact the coroner, RCW 68.50.020, which required immediate notification of the coroner before doing anything, and RCW 68.50.030, which prohibited the moving of Rodenbeck's body and/or the disposal of his blood.

was later changed by Dr. Zastrow to "natural." In Section 14, the immediate cause of death was whited out and changed to "unspecified natural causes." *Id.* Dr. Zastrow, on cross-examination, testified as to her changes to Rodenbeck's death certificate as follows:

> Q. On the original I'll represent to you that it does appear that the first line was written over some whiteout. Do you specifically recall making any changes to that death certificate?
> A. It clearly looks like I put whiteout on this document and if you're asking me what exactly I wrote down on a piece of paper almost three years ago the answer is no. . . .

RP 1344.

> Q. Do you know if you checked "accident" before you circled "natural" or did you check "accident" after you circled "natural"?
> A. I don't remember which one I checked first.

RP 1446-47.

On September 4, 2012, after completing its legally required investigation, PeaceHealth reported to the Washington Department of Health that PeaceHealth concluded Rodenbeck's death was an accidental fall resulting in his death, an adverse event.[3] CP 1137-38. PeaceHealth concluded Rodenbeck's death was a "Serious Reportable Event" (SRE). CP 1137-38. A SRE is defined as "an incident involving death or serious

[3] "Adverse events are medical errors that healthcare facilities could and should have avoided. . . . The events may result in patient death . . ." Washington State Department of Health website.

harm to a patient resulting from a lapse or error in a health care facility." RP 2222; RP 2405.

Dr. Owings performed an autopsy. His August 20, 2012, report contained the following history and conclusion(s):

> This patient with known peripheral vascular disease was taken to surgery for aortobifemoral bypass grafting. Surgery was successful and the patient was recovering but then a few days after surgery was found late in the evening deceased on the floor of his room with some blood on the floor . . . [I]t is felt that most likely death resulted from a dysrhythmia . . . complicated by the perisurgical **and postsurgical blood loss** and other stresses. **It is not possible to accurately assign significance to the blood loss through the disconnected central line, though that may have contributed to the development of, or possible sustaining of, a fatal dysrhythmia.**

Ex. 8. (Emphasis added.)

Rodenbeck's heart stopped beating.[4] The heart stops beating when it lacks sufficient oxygen carried by the blood. Judge Garrett did not allow Dr. Owings to testify at trial. Long made an offer of proof regarding the testimony of Dr. Owings. RP 2049; RP 2051; Ex. 79.

During Dr. Zastrow's testimony, she was reviewing notes in her lap, which she prepared after a conversation with counsel for PeaceHealth. RP 1387. Long asked to see the notes. Judge Garrett examined:

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[4] "His dysrhythmia or arrhythmia, the stopping of his heart, originated from the blood loss due to the line being disconnected and he bled out on the floor." RP 307. Long retained expert Dr. Coleman.

> THE COURT: All right. Doctor, these are notes that you made in preparation for your testimony today?
> DR. ZASTROW: Yes, they are.
> THE COURT: Okay. And they are informal notes that you made for yourself?
> DR. ZASTROW: They are informal notes that I made as Mr. Fox and I were discussing some of the nuances of the testimony that's already been given and my thoughts about the conclusions that were drawn or made.
> THE COURT: Okay. And were your notes based on the chart that you see on this slide show there, I don't remember the exhibit number?
> DR. ZASTROW: Yes, yes.
> THE COURT: The exhibit may be marked.
> MR. SHEPHERD: Your Honor, could we ask the jury to please go out for a second based upon --
> THE COURT: Okay, ladies and gentlemen, it shouldn't be long.

RP 1395. There followed a long discussion which included a request by Long to see the notes prepared and reviewed by Dr. Zastrow before testifying the second day. RP 1395-1422. After argument, Judge Garrett marked and sealed, as Exhibit 64, a note reviewed but never provided to Long. RP 1423. Long moved for a mistrial. RP 1416. The motion was denied. RP 1417-18.

The lost blood evidence was the subject matter of unsuccessful pretrial and trial motions, including spoliation. CP 1244; CP 2237. Long's proposed trial instruction on spoliation was not given by Judge Garrett. CP 2266. Dr. Quigley was a PeaceHealth retained expert who had no personal knowledge of the events. Although PeaceHealth cleaned up the blood on the floor without any attempt to take pictures or preserve

the evidence, PeaceHealth asked Dr. Quigley if the amount of blood on the floor was enough to be an actual cause of Rodenbeck's death. RP 1636. Dr. Quigley answered "absolutely not." *Id.* PeaceHealth then asked, "why not?" *Id.*

Dr. Quigley was of the opinion that it took an awful lot of blood loss to result in an "otherwise normal person's" death. *Id.* He then made up, out of whole cloth, that the blood on the floor included IV fluids. *Id.* Dr. Quigley then said that he was "guessing" as to the amount of blood on the floor. The following then occurred:

> MR. SHEPHERD: Your Honor, it's not appropriate for the witness to guess for this jury. I move to strike his last answer.
> THE COURT: I'll overrule. I think the witness was using vernacular as opposed to speculation.

RP 1636. Further, when PeaceHealth rested, it was clear that Dr. Quigley lacked an appropriate foundation for the above opinion. Judge Garrett took it upon herself to resolve this issue:

> MR. FOX: Thank you. Those are all my questions.
> THE COURT: **I have one question, Doctor, and that is, I don't know the technical jargon, you indicated that you're understanding, you indicated that amount of blood that was noted at the scene was not extensive in your view.**
> DR. QUIGLEY: Yes.
> THE COURT: **What's your understanding, obviously you weren't there so you're relying on information from other sources on what the amount of blood was, and what I want to know is that's your information about what the amount of blood was?**

> DR. QUIGLEY: Well, someone described, **I forget**, I really apologize, two inches around the head, which is frankly a trivial amount of blood and fluid. And someone else said it was less than a can of soda, which would be less than two of these put together and that's not enough blood to cause death, it just isn't.
> THE COURT: **Uh-huh, okay. So the information that you've got comes from your reading of the chart notes?**
> DR. QUIGLEY: Depositions.
> THE COURT: **And from the depositions.**
> DR. QUIGLEY: Actually from the depositions. I don't remember recall reading anything in the chart that said anything about blood loss. These were from eyewitnesses who were there and saw the patient and the amount of blood around his head.
> THE COURT: **Okay.**
> MR. FOX: Your Honor that triggers a couple follow ups for me on this subject.

RP 1639-40. (Emphasis added.)

PeaceHealth's next witness was Stacy McInnis regarding the electronic record keeping of PeaceHealth. Judge Garrett allowed Long to exam Ms. McInnis without the jury present to see if she had a foundation for any of her testimony. RP 1695. Judge Garrett then examined Ms. McInnis. RP 1699-1706. Judge Garrett then objected to a follow up question by Long's counsel. RP 1707. Another difficult exchange took place. RP 1707-1710. Long then moved for a new trial arguing the Judge Garrett had taken over the case. RP 1710. Long's second motion for a new trial was denied. RP 1711.

The above actions and comments of Judge Garrett were followed by additional difficult comments by Judge Garrett regarding

PeaceHealth's first testifying retained expert, Nurse Hobson. RP 1481. Nurse Hobson, was a co-author of a publication titled "A Practical Tool to Reduce Medication Errors During Patient Transfer from An Intensive Care Unit." *Id.* Included in Nurse Hobson's writing was the following:

> [Patient safety must become a systems property as opposed to a personal responsibility. . . Patients are especially vulnerable to medication errors during handoff periods, such as at admission or transfer from one unit to another. **This vulnerability is a result of poor communication between care teams.** . . . The intervention (communication) also has wide applicability, including **all inpatient hospital transfers**

Ex. 69. (Emphasis added.) During cross examination, the following exchange between Long's counsel and Judge Garrett occurred.

> THE CLERK: Plaintiff's Exhibit 69 is marked.
> Q. (BY MR. SHEPHERD) I'm going to hand you what's been marked as Exhibit No. 69. Have you seen this article before?
> A. Yeah, my name is on it.
> Q. Is it a learned publication?
> A. Is this in publication?
> Q. Yes.
> A. Yes.
> Q. Did you write in 2004 the following: "What is" --
> A. I was one of the authors, is that what you're asking?
> Q. Yeah.
> MR. SHEPHERD: May I approach, Your Honor, and show her where I'm going to begin?
> THE COURT: You may approach.
> MS. HOBSON: This is over ten years old.
> Q. (BY MR. SHEPHERD) Why don't you read it to yourself to begin with starting right there "one of the institute of medicine's ten rules for health care system redesign", you see that?
> A. So is there a question.
> MR. FOX: Your Honor, we're way beyond the scope.
> **THE COURT: Where are we going with this?**

MS. HOBSON: This is medication reconciliation.
THE COURT: Is there a concern in the case about medication that was given to Mr. Rodenbeck when he arrives.
MR. SHEPHERD: There is concern about poor communication between care teams and --
THE COURT: But, no, you're reading from the document. Why is this relevant?
MR. SHEPHERD: Because she testified that all nurses have to do is tell the patient not to get out of bed and they have complied with the standard of care.
THE COURT: I have read this article yesterday, it seem to be about medication.[5]
MR. SHEPHERD: Your Honor, I'd like the jury out of here before I argue with the Court.
THE COURT: I'm going to ask you to move on and so that you can utilize the time that we have. This line of questioning we'll discuss in private and may resume it with Ms. Hobson telephonically if that's necessary.

RP 1531-33. (Emphasis added.)

Judge Elich determined that Judge Garrett's above comments were in violation of Washington State's Constitution. However, Judge Elich did not have the benefit of the entire transcript so he made no finding regarding prejudice. The Division 1 Opinion does not discuss this finding of Judge Elich.[6]

After Rodenbeck died, but before he was allegedly found, four PeaceHealth employees, including a Dr. Beiser at 11:54 p.m., were in his electronic medical records. Ex. 37. After Rodenbeck was found dead,

[5] The undersigned counsel then and now has no idea how Judge Garrett saw Exhibit 69 a day earlier because it had not been previously provided, marked or discussed.

more than a dozen PeaceHealth employees were in Rodenbeck's medical records, almost continuously until Dr. Zastrow logged out at 7:04 p.m., on August 13, 2012. Ex. 37. When PeaceHealth reported to the State of Washington Department of Health that Rodenbeck had fallen in its hospital and bled to death on the floor, it was well aware of the facts and circumstances of Rodenbeck's death.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Under RAP 13.4(b)(3), review will be accepted if a significant question of law under the Constitution of the State of Washington or of the United States is involved. This present case presents a question of first impression whether a trial court's questions of a witness, and words in response to those questions in front of a jury can be "meaningless expression(s), and not fall within the constitutional prohibition on judicial comments on the evidence.

Under RAP 13.4(b)(1), review will be accepted if the decision of the Court of Appeals is in conflict with a Supreme Court decision. The decision of the appellate court is in direct conflict with existing Supreme Court decisions.

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[6] "1.16 The trial courts' comments were not made during a ruling on the admissibility of Exhibit 69. As there was no immediate ruling to explain, the statements at issue are, and were, comments on the evidence." CP 587; Appendix B-6.

"Art. IV, § 16 prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case." *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Judge Garrett's personal feelings on an issue need not be stated clearly. "[I]t is sufficient if they are merely implied." *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed or disbelieved the particular testimony in question." *Hamilton v. Department of Labor and Industries of State of Wash.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988).

Judge Garrett asked important foundation questions of Dr. Quigley involving a central, disputed factual issue on causation - the amount of blood on the floor. The amount of blood and PeaceHealth's spoliation of evidence was the subject matter of several pre-trial motions. Long argued lack of foundation repeatedly from pre-trial motions through trial. Judge Garrett presided over substantial pre-trial motions and was aware of the issue(s). For reasons known only to her and without explanation, when PeaceHealth ended its examination of Dr. Quigley, Judge Garrett inserted herself into the role of an attorney advocate.

After Judge Garrett finished her questioning of Dr. Quigley with regard to the amount of blood on the floor and his opinions, she concluded with "okay." That word, since well before 1900, has the following meaning: "Approval, agreement . . . approve of or agree to . . . Used to express approval or agreement." *The American Heritage college dic-tion-ar-y* Third Edition, Haughton, Mifflin Company (1997).

The Court of Appeals, in its decision, has carried the law in Washington to where it has never been before and should never go. Courts are required to give words the meaning that they are ordinarily given. *State Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002). The law assumes jurors also give the words used in the court room the proper meaning. To determine the meaning of a word, a court is allowed to "look to the dictionary." *HomeStreet, Inc. v. State, Dept. of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). The law assumes jurors do the same. Parties to a contract in Washington are assumed to give undefined words their plain ordinary meaning. *Boeing Co. v. Aetna Cas. And Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990). The Court of Appeals erroneously concluded that judicial words can be meaningless.

> Every lawyer who has ever tried a case, and every judge who has ever presided at trial, knows that jurors are inclined to regard the lawyers engaged in the trial as partisans, and are

> quick to attend an interruption by the judge, to which they may attach an importance and a meaning in no way intended. It is the working of human nature of which all men who have had any experience in the trial of cases may take notice. Between the contrary winds of advocacy, a juror would not be a man if he did not, in some of the distractions of mind which attend a hard fought and doubtful case, grasp the words and manner of the judge as a guide to lead him out of his perplexity. . . The very fact that he takes a witness away from the attorney for examination may, in the tense atmosphere of trial, lead to great prejudice.

Risley v. Moberg, 69 Wn.2d 560, 564-65, 419 P.2d 151 (1966) (citing *State v. Jackson*, 83 Wash. 514, 523, 145 Pac. 470 (1915)).

Again, the amount of blood on the floor was a central, disputed issue in this case. Further, whether PeaceHealth had properly documented Rodenbeck's fall risk and communicated the fall risk to all care providers was a central, disputed issue in this case. Washington State's constitution prohibits the trial judge from commenting on disputed facts. *Case v. Peterson*, 17 Wn.2d 523, 531, 136 P.2d 192 (1943). When a judge's questions appear to assume the existence of evidence which is disputed, or appear "personally to corroborate and seemingly to indorse the credibility" of a party or its expert witness, the judge improperly comments on the evidence. *Risely v. Moberg*, 69 Wn.2d at 565.

Judicial comments on the evidence are presumed prejudicial. *State v. Levy*, 156 Wn.2d at 723. Whatcom County Superior Court Judge Elich, concluded that on two occasions, Judge Garrett violated the constitutional

prohibition by commenting on the evidence. Judge Elich granted Long a new trial. The standard of review of an order granting a new trial is usually abuse of discretion. *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978); *Schneider v. City of Seattle*, 24 Wn.App. 251, 255, 600 P.2d 666 (Div. 1, 1979).

Whether judicial comments on the evidence are prejudicial is an issue of fact, reviewed for an abuse of discretion. The court is required to review the comments in light of the facts and circumstances of the case. *State v. Stearns*, 61 Wn.App. 224, 231, 810 P.2d 41 (Div. 1, 1991). "All remarks and observations **as to the facts** before the jury are positively prohibited. . . ." *State v. Bogner*, 62 Wn.2d 247, 252, 382 P.2d 254 (1963) (emphasis added).

Factual findings are reviewed for substantial evidence. *City of Seattle v. Swanson*, 193 Wn.App. 795, 815, 373 P.3d 342 (Div. 1, 2016); *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004). "Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair minded, rational person that a finding is true." *Pham v. Corbett*, 187 Wn.App. 816, 825, 351 P.3d 214 (Div. 1, 2015). Substantial evidence supported Judge Elich's findings and conclusions.

In Washington, hospitals must adopt and have patient care policies and procedures designed for employees for patient safety. WAC 246-320-226(3). Death under the circumstances of Rodenbeck requires immediate notification of the coroner. RCW 68.50.020. Failure to do so is a misdemeanor. The coroner has jurisdiction over the body until the coroner says otherwise. RCW 68.50.010. Cleaning up the scene, cleaning the deceased and moving the body is prohibited. RCW 68.50.050. PeaceHealth cleaned up the blood and moved Rodenbeck's body, thereby preventing anyone, including the Whatcom County Medical Examiner and/or the Pathologist who performed the autopsy, from doing a proper investigation into the circumstances surrounding Rodenbeck's death. Dr. Goldfogel, the Whatcom County Medical Examiner, reviewed the classification of the fall by PeaceHealth in its report to the Department of Health and admitted the information PeaceHealth provided the Department of Health was inconsistent with the information that was provided to him when making his jurisdictional determination. CP 1117.

F. CONCLUSION

The Court of Appeals opinion invites confusion with regard to judicial comments, and creates an ambiguous vacuum of “meaningless expressions” with regard to judicial comments. Words have meaning. Jurors rely upon the trial judge for direction. In that regard, a trial judge’s

words and expressions can never "meaningless." As the jury in this matter found PeaceHealth negligent, but that PeaceHealth's negligence was not a cause of Rodenbeck's death, there can be no other conclusion other than the comments were prejudicial.

For the foregoing reasons, Long respectfully requests that the Court GRANT the petition for review, REVERSE the Court of Appeals, and REINSTATE Judge Elich's Supplemental Order granting Plaintiffs' Motion For New Trial.

RESPECTFULLY SUBMITTED THIS 31st day of July 2017.

SHEPHERD and ALLEN

Douglas R. Shepherd, WSBA 9514
Bethany C. Allen, WSBA 41180
2011 Young Street, Suite 202
Bellingham, WA 98225
(360) 733-3773
dougshepherd@saalawoffice.com

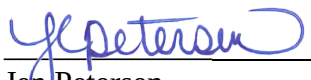
DECLARATION OF SERVICE

I, Jen Petersen, declare that on July 31, 2017, I caused to be served a copy of the following document: **Petition for Review;** and, this **Declaration of Service**, in the above matter, on the following persons, at the following addresses, in the manners described:

Mary Spillane, Esq. Jennifer Koh, Esq. Fain Anderson Vanderhoef Rosendahl O'Halloran Spillane, PLLC 701 Fifth Avenue, Suite 4650 Seattle, WA 98104 mary@favros.com; carrie@favros.com; jennifer@favros.com	(X) U.S. Mail ( ) Fax ( ) Messenger Service ( ) Personal Service (X) Email
Heath Fox, Esq. Lewis, Brisbois, Bisgaard & Smith, LLP 1111 3rd Avenue Suite 2700 Seattle, WA 98104-3224 heath.fox@lewisbrisbois.com	(X) U.S. Mail ( ) Certified Mail ( ) Fax ( ) Personal Service (X) E-Mail

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 31st day of July 2017.



Jen Petersen

APPENDIX A

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MILTON LONG, individually, and as Personal Representative of the ESTATE OF DONALD RODENBECK, Respondent, v. PEACEHEALTH d/b/a PEACEHEALTH ST. JOSEPH MEDICAL CENTER, a Washington Non-Profit Corporation, Appellant.	DIVISION ONE No. 74654-5-I UNPUBLISHED OPINION FILED: May 15, 2017

DWYER, J. — An utterance referencing a witness's prior testimony that does not reasonably convey an attitude or opinion is not a judicial comment on the evidence. The trial judge herein sought clarification of testimony previously given by an expert witness. In so doing, the trial judge first oriented the witness to the subject of the inquiry, then posed three clarifying questions, and concluded by remarking, "Okay." The trial resumed.

The predicate for the trial judge's utterances was prior testimony given by the witness. No reasonable juror could discern from the utterances the judge's attitude or opinion toward the testimony. There was no error. Accordingly, we reverse the order granting a new trial and remand for entry of judgment upon the jury's verdict.

I

Donald Rodenbeck underwent aortobifemoral bypass surgery at PeaceHealth to treat his significant atherosclerotic disease. After two days of observation in the hospital's intensive care unit, Rodenbeck's physician, Dr. Connie Zastrow, approved his transfer to a regular hospital unit in light of his stable vital signs and blood work. However, late in the evening of the transfer and after a nursing staff shift change, a nurse entered Rodenbeck's room and found him face up on the floor with a small to moderately sized pool of blood by his head. She yelled for help. Several nurses arrived soon thereafter. Rodenbeck had no pulse. An intravenous (IV) catheter that had been placed in his neck had become disconnected and was open. Resuscitation attempts were unsuccessful. Rodenbeck was pronounced dead.

Milton Long, the personal representative of Rodenbeck's estate, sued PeaceHealth for wrongful death and medical negligence. A 10-day trial resulted.

At trial, Long presented the testimony of Dr. Kenneth Coleman, a physician and attorney, who opined that Rodenbeck died from a combination of significant undiscovered internal bleeding and a sufficient amount of external blood loss to result in his death. Dr. Coleman testified that he relied on Rodenbeck's medical records in forming his opinions.

PeaceHealth presented the testimony of four expert witnesses, Doctors Zastrow, Gary Goldfogel, Terence Quigley, and Matthew Lacy. PeaceHealth's experts testified that they disagreed with Dr. Coleman's conclusion that Rodenbeck had died from external blood loss because the amount of blood

described by the eyewitnesses was insufficient to have caused Rodenbeck's death. The expert witnesses testified to relying on several sources of information provided by the eyewitnesses—personally speaking with the eyewitnesses, reviewing their deposition testimony, and reviewing Rodenbeck's medical chart notes. But the expert witnesses' testimony varied as to which sources of information in particular each witness relied on in forming the opinions expressed.

After counsel for PeaceHealth finished the direct examination of Dr. Quigley and while the jury was seated, Judge Deborra Garrett, the trial judge, indicated that she wanted to question Dr. Quigley. After confirming with Dr. Quigley that he had testified that the amount of external blood loss was "not extensive," the trial judge inquired into what his sources of information were for that proposition, including whether the sources were chart notes or deposition testimony. Verbatim Report of Proceedings (VRP) at 1639. During their brief exchange, Dr. Quigley indicated that he relied only on the eyewitnesses' deposition testimony. The trial judge then replied, "Okay." VRP at 1640. The trial resumed, with no objection interposed.[1]

The jury returned a special verdict on behalf of PeaceHealth, answering "Yes" to the question of whether PeaceHealth was negligent but answering "No" to the question of whether PeaceHealth's negligence was a proximate cause of Rodenbeck's death.

[1] Long did not object to the trial judge's line of questioning and, immediately after the judge said "Okay," counsel for PeaceHealth indicated that, in light of the judge's questioning, he had a few follow-up questions. VRP at 1640.

After the verdict, Long moved for a new trial, claiming, in his reply brief, that the trial judge had improperly commented on the evidence during her exchange with Dr. Quigley. At the hearing on the motion, Long urged the trial judge to recuse herself from determining whether she had commented on the evidence. The trial judge complied.

Whatcom County District Court Judge Matthew Elich was assigned to rule on the issue. After a hearing, and without the benefit of a complete trial transcript, the substitute judge granted Long's motion for a new trial.[2]

PeaceHealth now appeals.

II

A

We generally review an order granting a new trial for abuse of discretion. Alum. Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000). The abuse of discretion standard recognizes that deference is owed to the trial court because it is "'better positioned than [an appellate court] to decide the issue in question.'" Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 403, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)). This follows from the "oft repeated observation that the trial judge who has seen and heard [the proceedings] is in a better position to evaluate and adjudge than can we from a cold, printed record." State v. Wilson, 71 Wn.2d 895, 899, 431

[2] The substitute judge did not have the benefit of reviewing a transcript of the entire trial because one had not yet been prepared. The only transcript made available to the substitute judge was for the day on which the trial judge allegedly commented on the evidence.

P.2d 221 (1967). Whether a trial judge's utterances constitute an improper comment is a constitutional question that we review de novo. CONST. art. IV, § 16; State v. Woods, 143 Wn.2d 561, 590-91, 23 P.3d 1046 (2001). In review of this case, we have these legal considerations in mind.

B

The Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." CONST. art. IV, § 16. This constitutional provision is violated when a judge's comments "imply to the jury an expression of the judge's opinion concerning disputed evidence, or express the court's attitude towards the merits of the cause." Hansen v. Wightman, 14 Wn. App. 78, 85, 538 P.2d 1238 (1975) (citing State v. Carothers, 84 Wn.2d 256, 267, 525 P.2d 731 (1974); State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970); Risley v. Moberg, 69 Wn.2d 560, 565, 419 P.2d 151 (1966)), overruled on other grounds by Bowman v. Two, 104 Wn.2d 181, 186, 704 P.2d 140 (1985).

To rise to the level of an unconstitutional comment, the judge's opinion or attitude must be "reasonably inferable from the nature or manner of the questions asked and things said." Dennis v. McArthur, 23 Wn.2d 33, 38, 158 P.2d 644 (1945), overruled on other grounds by State v. Davis, 41 Wn.2d 535, 537, 250 P.2d 548 (1952).

C

There is nothing irregular about a trial judge asking questions of a witness. "The court, of course, may question witnesses." Egede-Nissen v. Crystal

Mountain, Inc., 93 Wn.2d 127, 140, 606 P.2d 1214 (1980). It is beyond dispute "[t]hat the court has wide discretionary powers in the trial of a cause and is not prohibited from questioning a witness." Dennis, 23 Wn.2d at 37-38. Indeed, the trial court may call its own witness. State v. Wixon, 30 Wn. App. 63, 77, 631 P.2d 1033 (1981). Our rules of evidence recognize this judicial authority.

CALLING AND INTERROGATION OF WITNESSES BY COURT

> **(a) Calling by Court.** The court may, on its own motion where necessary in the interests of justice or on motion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.
>
> **(b) Interrogation by Court.** The court may interrogate witnesses, whether called by itself or by a party; provided, however, that in trials before a jury, the court's questioning must be cautiously guarded so as not to constitute a comment on the evidence.
>
> **(c) Objections.** Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

ER 614.

This judicial authority arises from pragmatic considerations. While overseeing a trial, a judge may be called upon to rule on evidentiary objections, objections based on previous rulings, motions to dismiss and the like. Additionally, the trial judge must keep track of testimony in order to anticipate, and later rule on, proposed jury instructions. For many reasons, trial judges must keep an accurate contemporaneous account of trial testimony. In order to do so, judges must be able to clarify testimony given by the witnesses. Our case law recognizes that it is within the sound discretion of the trial court to pose clarifying questions to a witness. State v. Brown, 31 Wn.2d 475, 487, 197 P.2d 590, 202 P.2d 461 (1948).

D

The judicial utterances challenged herein are the following:

> [COUNSEL]: Thank you. Those are all my questions.
> [TRIAL JUDGE]: *I have one question, Doctor, and that is, I don't know the technical jargon, you indicated that your understanding, you indicated that amount of blood that was noted at the scene was not extensive in your view.*[3]
> DR. QUIGLEY: Yes.
> [TRIAL JUDGE]: *What's your understanding, obviously you weren't there so you're relying on information from other sources on what the amount of blood was, and what I want to know is what's your information about what the amount of blood was?*[4]
> DR. QUIGLEY: Well, someone described, I forget, I really apologize, two inches around the head, which is frankly a trivial amount of blood and fluid. And someone else said it was less than a can of soda, which would be less than two of these put together and that's not enough blood to cause death, it just isn't.
> [TRIAL JUDGE]: *Uh-huh, okay. So the information that you've got comes from your reading of the chart notes?*[5]
> DR. QUIGLEY: Depositions.
> [TRIAL JUDGE]: *And from the depositions.*
> DR. QUIGLEY: Actually from the depositions. I don't remember reading anything in the chart that said anything about blood loss. These were from eye-witnesses who were there and saw the patient and the amount of blood around his head.
> [TRIAL JUDGE]: *Okay.*
> [COUNSEL]: Your Honor, that triggers a couple follow-ups for me on this subject.

---

[3] Dr. Quigley had previously testified regarding the quantity of blood noted on the floor of Rodenbeck's hospital room:

> Q. Did you see some deposition testimony about the amount of blood seen when Mr. Rodenbeck was found on the floor of his room?
> A. Yes.
> Q. In your opinion were the amounts described sufficient to be an actual cause of death for Mr. Rodenbeck?
> A. Absolutely not.
> Q. Why not?
> A. Well, it takes an awful lot of blood loss to result in someone's death.

VRP at 1635-36.

[4] Dr. Quigley previously testified to having reviewed the eyewitnesses' chart notes and deposition testimony: "Q. Did you review medical records of Mr. Donald Rodenbeck? A. I did. Q. Did you also receive numerous deposition transcripts? A. I did." VRP at 1606-07.

[5] As set forth above, Dr. Quigley had testified that he had reviewed deposition testimony and Rodenbeck's medical chart notes. VRP at 1607, 1635-36.

> [TRIAL JUDGE]: Okay. Why don't you do those follow-up questions then we'll take our morning break and then we'll begin the cross-examination.

VRP at 1639-40 (emphasis added).

The trial judge's first utterance to Dr. Quigley oriented him to the testimony about which the judge was to inquire. The testimony the trial judge referenced was Dr. Quigley's prior testimony regarding the amount of blood noted on the floor of Rodenbeck's hospital room. Because the utterance concerned prior testimony with no reasonably inferable indicia of judicial opinion or attitude, the first utterance was not a judicial comment.

The second utterance revealed the trial judge's inquiry: clarification of Dr. Quigley's sources of information regarding the testimony to which the trial judge had just oriented him. Dr. Quigley had testified to having reviewed both the eyewitnesses' chart notes and deposition testimony in forming his various expert opinions. The trial judge acted well within her discretion by asking a clarifying question regarding past testimony. This was not a comment on the evidence.

The trial judge's third utterance was an attempt to clarify the witness's answer to the court's prior question. From this, we can infer a lack of clarity on the part of the trial judge—or in the judge's notes—as to the actual source of information specified in Dr. Quigley's previous answer. However, we cannot infer the trial judge's attitude or opinion of the witness's testimony. This utterance was not a judicial comment.

The trial judge's fourth utterance confirms the impression that the judge had been mistaken about the source of the information underlying Dr. Quigley's

testimony.[6] The utterance does not inform the listener as to the trial judge's attitude or opinion of the witness's testimony. It was not a judicial comment.

The trial judge's fifth utterance, "Okay," was not a judicial comment. Rather, it was a meaningless expression repeatedly used by the judge to indicate to the parties that the trial judge had finished her line of inquiry or to acknowledge some anticipated action by the parties. Indeed, on the day that Dr. Quigley testified, the trial judge said "Okay" on no less than 21 separate occasions while the jury was seated.[7] Furthermore, in the colloquy set forth above, immediately after the trial judge said "Okay," counsel for PeaceHealth rejoined that the judge's questioning "triggers a couple follow-ups for me on this subject." And, naturally, the trial judge replied, "Okay."[8] There was no comment on the evidence.

E

The parties cite several cases on the issue presented. All were decided in a manner consistent with our analysis herein.

Two cases warrant discussion. In Dennis v. McArthur, 23 Wn.2d 33, our Supreme Court rejected the contention that the trial judge had improperly commented on the evidence while examining a witness. During a medical malpractice trial, a physician who had treated the plaintiff testified that certain types of medical treatment were not to be used when treating pregnant women. The trial judge then posed a series of questions to the witness inquiring into

---

[6] The judge was uncertain whether the source was chart notes, depositions, or both.

[7] VRP at 1588, 1591 (three times), 1614, 1616, 1640 (three times), 1641, 1646, 1658, 1667 (twice), 1668 (twice), 1724, 1762, 1775, 1782, 1806.

[8] VRP at 1640.

whether the witness had diagnosed the plaintiff's case as a pregnancy case. Dennis, 23 Wn.2d at 37-38. After the witness admitted to not having done so, the trial court reiterated, "You had not yet diagnosed her?" Dennis, 23 Wn.2d at 37-38. The Supreme Court held that the trial judge's questioning "does not disclose any grounds for the jury to infer that the court had or expressed any opinion." Dennis, 23 Wn.2d at 38.

The questioning by the trial judge in Dennis was more probing and pointed than the utterances of the trial judge challenged herein. Nonetheless, the Dennis court held that the judicial questioning therein did not constitute a comment on the evidence. As the utterances challenged herein were more innocuous than those challenged in Dennis, our opinion is plainly consistent with the holding of that opinion.

In the second case that bears discussion, the Supreme Court described the circumstances as follows:

> At the close of respondent's case-in-chief, her counsel excused her main witness, an orthopedist who had treated her. He was about to rest her case, when the following occurred—to which error is assigned:
>
> > [Respondent's counsel]: I have no further questions and ask that this doctor be excused.
> > THE COURT: I would just inquire doctor.
> >
> > EXAMINATION BY COURT
> >
> > Q. In your best professional opinion, are you able to express an opinion rather, with reasonable medical certainty and circumstance of the treatments accorded this lady and her complaints to you, as to the approximate cause of the injuries? A. Yes. Q. What is your opinion? A. It would be my opinion that the injury she sustained was the proximate cause

> of the complaints which she had at the time I examined her. Q. What in your opinion with reasonable medical certainty is the cause of the injury in view of the facts as you know them? A. Say that again. Q. What in your opinion is the cause of the injuries that you observed in view of the facts as they have been related to you by the patient? A. It would be my opinion that the injuries resulted from the automobile accident [January 24, 1964] she described to me in January.

In prior cross-examination, the following colloquy occurred:

> A. [By doctor] . . . . We would inquire with regard to the area involved, as to whether she had complaints of long standing duration or previous complaints. Q. Did you ask Mrs. Risley [respondent] if she had any previous complaints? A. Yes. Q. Do you recall what her answer was? A. I noted at the time of my examination that she had no previous difficulty with the involved area prior to the time that she was injured. . . . Q. If she had been under treatment prior to the date of the accident, would that have influenced your opinion [from your examination] one way or another? A. Yes.

Appellants established that respondent had been treated by a chiropractor from October 1 to December 7, 1962, and January 22 until March 28, 1963, for neck and back injuries as well as other complaints. She had a cervical affliction in the neck at the first seven cervical vertebrae in her spine. About February 19, 1963, an industrial insurance claim had been filed with the state. This information was not given to the orthopedist who testified for respondent.

Another medical doctor testified for appellants. In his opinion, the respondent's present condition was the result of a degenerative disease of the cervical spine and this was not related to the accident trauma. A majority of patients with neck strain get over it within 3 to 6 months.

It thus becomes apparent that the trial judge's questioning of respondent's doctor was an essential and vital part of her case. In these questions, the court assumed the existence of these injuries and her condition as a result of the accident in question.

Risley, 69 Wn.2d at 561-62 (footnote omitted).

The Supreme Court noted that the case involved a "relatively short trial" (only 3 witnesses were called), and observed that "the judge's questions appear of great magnitude and importance." Risley, 69 Wn.2d at 565. As analyzed by the Supreme Court, the judge's

> questions assumed the crux of respondent's case—a factual issue for the jury, *viz*, whether she had sustained injuries as a result of this accident. Appellant always contended that respondent did not receive any injuries from the accident. The judge, by assuming this fact, appeared personally to corroborate and seemingly to indorse the credibility of respondent and her doctor. The judge frankly admitted this had a material and substantial influence upon the jury.

Risley, 69 Wn.2d at 565.

No such thing happened in the trial before us. Judge Garrett's questions did no more than clarify testimony already given. None of her utterances revealed her attitudes or opinions of the testimony or of the legitimacy of either party's case. The substitute judge erred by granting a new trial in reliance on the Risley decision.

F

The challenged judicial utterances, individually and collectively, regarded prior testimony given by Dr. Quigley. No reasonable juror would believe that these utterances revealed any judicial opinion of or attitude toward that testimony. Thus, the trial judge did not comment on the evidence. Accordingly, the substitute judge's grant of a new trial must be reversed.[9]

[9] Our resolution of this case confines itself to an analysis of the order granting a new trial and the basis therefor. Long raised a variety of other issues or concerns in his briefing. We purposefully do not address these matters. If properly preserved, these issues may be raised in a direct appeal from the judgment.

Reversed and remanded for judgment to be entered on the jury's verdict.

We concur:

Spearman, J.

Cox, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MILTON LONG, individually, and as Personal Representative of the ESTATE OF DONALD RODENBECK, Respondent, v. PEACEHEALTH d/b/a PEACEHEALTH ST. JOSEPH MEDICAL CENTER, a Washington Non-Profit Corporation, Appellant.	DIVISION ONE No. 74654-5-I ORDER DENYING MOTION TO PUBLISH

The respondent, Milton Long, personal representative of the Estate of Donald Rodenbeck, having filed a motion to publish opinion, and the hearing panel having considered its prior determination and finding that the opinion will not be of precedential value; now, therefore it is hereby:

ORDERED that the unpublished opinion filed May 15, 2017, shall remain unpublished.

DATED this 30th day of June, 2017.

For the Court:

Dwyer, J.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2017 JUN 30 AM 11:43

APPENDIX B

SCANNED
12

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WHATCOM COUNTY
WASHINGTON
BY

IN THE SUPERIOR COURT OF WASHINGTON FOR WHATCOM COUNTY

MILTON LONG, individually, and as Personal Representative of the ESTATE OF DONALD RODENBECK,

Plaintiffs,

vs.

PEACEHEALTH dba PEACEHEALTH ST. JOSEPH MEDICAL CENTER, a Washington Non-Profit Corporation,

Defendant.

Cause No: 14-2-01483-6

SUPPLEMENTAL ORDER GRANTING PLAINTIFFS' MOTION FOR NEW TRIAL

ORIGINAL

SHEPHERD AND ABBOTT
ATTORNEYS AT LAW
2011 YOUNG STREET, SUITE 202
BELLINGHAM, WASHINGTON 98225
TELEPHONE: (360) 733-3773 ♦ FAX: (360) 647-9060
www.saalawoffice.com

THIS MATTER having come before the Court on Plaintiffs' Motion for New Trial – CR 59, by and through their attorneys of record, Shepherd and Abbott; Defendant appearing through its attorneys of record, Johnson Graffe Keay Moniz & Wick; and the Court having reviewed certain of the pleadings and papers filed in the above captioned matter, including those filed in support of, and in response to, the motion submitted by counsel, the Court having heard oral argument by both parties, and being otherwise fully informed, and the Court having considered the following pleadings filed in this matter and all appendices attached thereto:

1. Plaintiffs' Motion for New Trial – CR 59, Dkt. # 333;
2. Declaration of Douglas R. Shepherd Re: Motion for New Trial, Dkt. # 334;
3. Defendant's Response in Opposition to Plaintiff's Motion for New Trial, Dkt. # 342;
4. Second Declaration of Brian P. Waters Re: Plaintiff's Motion for New Trial, Dkt. # 343;
5. Plaintiffs' Reply to Defendant's Response in Opposition to Plaintiffs' Motions for New Trial and Judgment as a Matter of Law, Dkt. # 345, Dkt. # 345;
6. Order Denying Plaintiffs' Motion for New Trial, Dkt. # 349;
7. September 9, 2015 VROP;
8. Defendant's Brief Re: Comments On The Evidence, Dkt. # 356;
9. Plaintiffs' Supplemental Memorandum Regarding New Trial, Dkt. # 357;
10. Supplemental Declaration of Shepherd Re: Motion for New Trial (Court Comments in Presence of Jury), Dkt. # 358;

SHEPHERD AND ABBOTT
ATTORNEYS AT LAW
2011 YOUNG STREET, SUITE 202
BELLINGHAM, WASHINGTON 98225
TELEPHONE: (360) 733-3773 • FAX: (360) 647-9060
www.saalawoffice.com

11. Supplemental Declaration of Shepherd Re: Motion for New Trial (Testimony on Causation), Dkt. # 359; and

12. Supplemental Declaration of Shepherd Re: Motion for New Trial (Court's Comments on Evidence While Jury Was Out), Dkt. # 360.

NOW THEREFORE, this matter having been assigned to the undersigned Elected Judge Pro Tem of the Whatcom County Superior Court (the court) on August 25, 2015, after the trial court, the Honorable Deborra Garrett, recused herself on the issues decided herein, and the matter having come on for hearing before the court on the sole issue of the trial court's comments on the evidence, the court now makes and enters the following:

I -- FACTS RELIED UPON

1.1 On August 12, 2012, Donald Rodenbeck died on the floor of his hospital room while in the care of Defendant PeaceHealth.

1.2 On July 7, 2015, the matter came on for a trial by jury, before the Honorable Judge Deborra Garrett (hereinafter "the trial court").

1.3 On July 24, 2015, the jury answered the following questions:

QUESTION 1: Was the Defendant, PeaceHealth, negligent? YES.

QUESTION 2: Was the Defendant's negligence a proximate cause of the death of Donald Rodenbeck? NO.

1.4 On August 3, 2015, Plaintiffs moved for a new trial, in part alleging there was an irregularity in the proceedings of the trial court, including repeated comments on the evidence by the trial court.

1.5 On August 21, 2015, the trial court heard plaintiffs' motions for new trial and JNOV. Initially, the trial court said that she would deny the motion based

SHEPHERD AND ABBOTT
ATTORNEYS AT LAW
2011 YOUNG STREET, SUITE 202
BELLINGHAM, WASHINGTON 98225
TELEPHONE: (360) 733-3773 • FAX: (360) 647-9060
www.saalawoffice.com

on comments on the evidence, but then immediately recused on that issue. The trial court then denied the motion on all other reasons.

1.6 On August 25, 2015, Presiding Judge, Honorable Ira J. Uhrig, assigned this matter to the undersigned judge (the court) to hear and decide the issue of alleged misconduct of the trial judge.

1.7 The court has the duty and authority to decide the matters found and concluded herein.

1.8 A hearing was held before the undersigned on September 9, 2015. At the close of that hearing, the court invited the parties to submit additional briefs.

1.9 On November 13, 2015, the court filed its Memorandum Decision in this matter, which Decision is attached hereto as Appendix 1 and incorporated herein. If there is any conflict between the findings and conclusions and the memorandum, the memorandum controls.

1.10 Without making specific findings as to other issues raised by the above pleadings or arguments, the court, consistent with CR 59(f), considered all the information provided it.

1.11 The court addresses only the following three violations of Article IV, Section 16, of the Washington State Constitution, alleged by plaintiffs, namely: (1) the trial court's use of the word "vernacular"; (2) the trial court's comments regarding Exhibit 69; and (3) the trial court's questioning of defense retained expert Dr. Quigley in front of the jury.

1.12 Article IV § 16 of the Washington State Constitution prohibits a trial court from conveying to the jury his or her personal attitudes towards the merits of the case.

SHEPHERD AND ABBOTT
ATTORNEYS AT LAW
2011 YOUNG STREET, SUITE 202
BELLINGHAM, WASHINGTON 98225
TELEPHONE: (360) 733-3773 • FAX: (360) 647-9060
www.saalawoffice.com

A. ALLEGED COMMENT NO. 1: DR. QUIGLEY

1.13 At one point during Defendants' direct examination of its retained expert, Dr. Quigley, testified he was "guessing." Plaintiffs objected and asked that the trial court strike the opinion testimony which was based on "guessing."

1.14 The trial court's response or ruling on Plaintiffs' objection to the "I'm guessing" opinion and motion to strike the testimony, which response or ruling was that Dr. Quigley was using the term "guessing" as "vernacular as opposed to speculation", was a permitted explanation of her ruling on the evidence, and not a prohibited comment on the evidence.

B. ALLEGED COMMENT NO. 2: EXHIBIT 69

1.15 During plaintiffs' cross-examination of defense retained expert Nurse Hobson, Plaintiffs marked Exhibit 69. The following exchange then took place between Plaintiffs' counsel and the trial court:

> THE CLERK: Plaintiff's Exhibit 69 is marked.
> Q. (BY MR. SHEPHERD) I'm going to hand you what's been marked as Exhibit No. 69. Have you seen this article before?
> A. Yeah, my name is on it.
> Q. Is it a learned publication?
> A. Is this in publication?
> Q. Yes.
> A. Yes.
> . . . .
> MR. SHEPHERD: May I approach, Your Honor, and show her where I'm going to begin?
> THE COURT: You may approach.
> MS. HOBSON: This is over ten years old.
> Q. (BY MR. SHEPHERD) Why don't you read it to yourself to begin with starting right there "one of the institute of medicine's ten rules for health care system redesign", you see that?
> A. So is there a question.
> MR. FOX: Your Honor, we're way beyond the scope.

SHEPHERD AND ABBOTT
ATTORNEYS AT LAW
2011 YOUNG STREET, SUITE 202
BELLINGHAM, WASHINGTON 98225
TELEPHONE: (360) 733-3773 • FAX: (360) 647-9060
www.saalawoffice.com

THE COURT: Where are we going with this?
MS. HOBSON: This is medication reconciliation.
THE COURT: Is there a concern in the case about medication that was given to Mr. Rodenbeck when he arrives.
MR. SHEPHERD: There is concern about poor communication between care teams and --
THE COURT: But, no, you're reading from the document. Why is this relevant?
MR. SHEPHERD: Because she testified that all nurses have to do is tell the patient not to get out of bed and they have complied with the standard of care.
THE COURT: I have read this article yesterday, it seem to be about medication.
MR. SHEPHERD: Your Honor, I'd like the jury out of here before I argue with the Court.
THE COURT: I'm going to ask you to move on and so that you can utilize the time that we have. This line of questioning we'll discuss in private and may resume it with Ms. Hobson telephonically if that's necessary.
(End of requested proceedings.)

1.16 The trial courts' comments were not made during a ruling on the admissibility of Exhibit 69. As there was no immediate ruling to explain, the statements at issue are, and were, comments on the evidence.

1.17 There is not sufficient information contained in the record before this court to determine that the statements made by the trial court either directly or implicitly conveyed to the jury the trial court's personal opinion regarding the credibility, weight or sufficient of Exhibit 69 or the line of testimony surrounding it.

C. ALLEGED COMMENT NO. 3: DEFENSE EXPERT DR. QUIGLEY:

1.18 Upon the completion of Defendant's direct examination of its retained expert witness Dr. Quigley, the trial court questioned Dr. Quigley as follows:

SHEPHERD AND ABBOTT
ATTORNEYS AT LAW
2011 YOUNG STREET, SUITE 202
BELLINGHAM, WASHINGTON 98225
TELEPHONE: (360) 733-3773 • FAX: (360) 647-9060
www.saalawoffice.com

MR. FOX: Thank you. Those are all my questions.
THE COURT: I have one question, Doctor, and that is, I don't know the technical jargon, you indicated that you're understanding, you indicated that amount of blood that was noted at the scene was not extensive in your view.
DR. QUIGLEY: Yes.
THE COURT: What's your understanding, obviously you weren't there so you're relying on information from other sources on what the amount of blood was, and what I want to know is that's your information about what the amount of blood was?
DR. QUIGLEY: Well, someone described, I forget, I really apologize, two inches around the head, which is frankly a trivial amount of blood and fluid. And someone else said it was less than a can of soda, which would be less than two of these put together and that's not enough blood to cause death, it just isn't.
THE COURT: Uh-huh, okay. So the information that you've got comes from your reading of the chart notes?
DR. QUIGLEY: Depositions.
THE COURT: And from the depositions.
DR. QUIGLEY: Actually from the depositions. I don't remember recall reading anything in the chart that said anything about blood loss. These were from eye-witnesses who were there and saw the patient and the amount of blood around his head.
THE COURT: Okay.

1.19 The amount of blood on the floor at the scene of Donald Rodenbeck's death was a fact crucial to plaintiffs' case with regard to proximate cause.

1.20 Dr. Quigley followed other PeaceHealth witnesses and the trial court's questions vouched for Dr. Quigley, defendants retained expert witness.

1.21 In addition to vouching for Dr. Quigley, the trial courts questions vouched for other PeaceHealth witnesses.

1.22 The trial court's questions addressed a significant issue in Plaintiffs' case, the amount of blood found on the floor.

SHEPHERD AND ABBOTT
ATTORNEYS AT LAW
2011 YOUNG STREET, SUITE 202
BELLINGHAM, WASHINGTON 98225
TELEPHONE: (360) 733-3773 • FAX: (360) 647-9060
www.saalawoffice.com

1.23 By asking a question about the amount of blood found on the floor and then asking follow up questions that either affirmed or established the foundation for Dr. Quigley's answers, the trial court appeared to corroborate and endorse the credibility of Dr. Quigley, and potentially those upon whom Dr. Quigley relied upon for his information.

1.24 A reasonable inference can be drawn about the trial judge's opinion of this evidence based on the questions and comments. This inference is that Dr. Quigley's testimony was credible because, among other things, it was based on eyewitness testimony.

1.25 The trial court conveyed its opinion to the jury about the credibility of those PeaceHealth witnesses.

1.26 The questions and comments in paragraph 1.18 above were improper comments on the evidence by the trial court.

1.23 The questions and comments in paragraph 1.18 above dealt with an issue that went to the heart of Plaintiffs' case and they were asked by the trial court.

1.24 The questions of Dr. Quigley, in paragraph 1.18 above, had the effect of conveying to the jury the personal opinion of the trial court regarding the weight and sufficiency of important evidence introduced by Defendant at trial.

1.25 The questions and comments between the trial court and defense expert Dr. Quigley created a risk of prejudice and potential for Plaintiffs' to be prevented from a fair trial.

1.26 The jury's verdict demonstrates that the trial court's comments were prejudicial, thereby preventing Plaintiffs from having a fair trial.

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SHEPHERD AND ABBOTT
ATTORNEYS AT LAW
2011 YOUNG STREET, SUITE 202
BELLINGHAM, WASHINGTON 98225
TELEPHONE: (360) 733-3773 ♦ FAX: (360) 647-9060
www.saalawoffice.com

II – CONCLUSIONS OF LAW

BASED UPON THE ABOVE FINDINGS OF FACT, the court makes the following conclusions of law:

2.1 Article IV, Section 16 of the Washington State Constitution reads "Judges shall not charge juries with respect to matters of fact, nor comment thereon but shall declare the law."

2.2 Published case law authority, which the court is required to rely upon and follow, is with Plaintiffs and against Defendant.

2.3 The trial court's description of Dr. Quigley's use of the word "guessing" as "vernacular" was not a prohibited comment on the evidence.

2.4 Plaintiff did not meet his burden to prove that the trial court's comments on Exhibit #69 made before the jury conveyed the trial court's personal opinion about that evidence.

2.5 In determining whether words or actions by the trial court are comments on the evidence one looks to the facts and circumstances of the case.

2.6 The facts and circumstances of this case establish that the trial court's examination of Defendant retained expert Dr. Quigley, in front of the jury, violated Article IV, Section 16, of the Washington State Constitution and were prohibited comment(s) on the evidence.

2.7 The trial court's examination of Dr. Quigley, in front of the jury, was prejudicial to plaintiffs, thereby preventing Plaintiffs from having a fair trial.

2.8 Plaintiffs' Motion for New Trial pursuant to CR 59, based upon the trial court's constitutionally prohibited judicial comments on the evidence, is hereby GRANTED.

2.9 The jury's verdict of no proximate cause is set aside.

SHEPHERD AND ABBOTT
ATTORNEYS AT LAW
2011 YOUNG STREET, SUITE 202
BELLINGHAM, WASHINGTON 98225
TELEPHONE: (360) 733-3773 ♦ FAX: (360) 647-9060
www.saalawoffice.com

2.10 Plaintiffs are entitled to a new trial ~~on proximate cause and damages~~.

III - ORDER

PURSUANT TO THE ABOVE FINDINGS OF FACT AND CONCLUSIONS OF LAW, a new trial is so ordered.

DONE IN OPEN COURT THIS 12 day of January 2016.

HONORABLE JUDGE MATTHEW ELICH

Presented by:
SHEPHERD AND ABBOTT

Douglas R. Shepherd, WSBA #9514
Bethany C. Allen, WSBA #41180
Kyle S. Mitchell, WSBA #47344
Attorneys for Plaintiffs

Copy received;
JOHNSON GRAFFE KEAY MONIZ & WICK, LLP

Heath S. Fox, WSBA #29506
Brian P. Waters, WSBA #36619
Of Attorneys for Defendant PeaceHealth

SHEPHERD AND ABBOTT
ATTORNEYS AT LAW
2011 YOUNG STREET, SUITE 202
BELLINGHAM, WASHINGTON 98225
TELEPHONE: (360) 733-3773 • FAX: (360) 647-9060
www.saalawoffice.com

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SUPERIOR COURT FOR THE STATE OF WASHINGTON, WHATCOM COUNTY

Milton Long,

Plaintiff,

v.

PeaceHealth,

Defendant

Cause No. 14-2-01483-6

Court's Decision/CR 59 motion

SUMMARY:

The trial court's use of the word "vernacular" was not a comment on the evidence.

The trial court's statements regarding exhibit # 69 did not convey to the jury her personal opinion about the evidence.

The trial court's questions for Dr. Quigley did convey her personal opinion about the credibility, weight or sufficiency of the evidence and were a prohibited comment on the evidence.

The court grants the motion.

BACKGROUND

Donald Rodenbeck died while in the care of PeaceHealth. On July 23, 2015, following a three week trial, the jury returned a defense verdict on the issue of causation in PeaceHealth's favor. Plaintiff filed post-trial motions for a new trial under CR 59 citing many specific reasons including one allegation that the trial judge commented on the evidence when ruling on the admissibility of exhibit #69.

The trial judge heard oral argument on the motions on August 21, 2015. Exhibit # 69 was not mentioned at that hearing. (See transcript of 8/21/15 hearing). Instead, plaintiff raised and argued additional alleged comments. The trial judge initially said that she would deny the motion based on comment on the evidence but then immediately recused on that issue. She then denied the motion on all of the other reasons for a new trial argued by plaintiff and said the following:

"I am going to refer the issue (comment on the evidence) to the presiding judge for argument on the existing—based on the existing briefs, and the existing motion and

existing briefs lay out the case as I understand it and as the hearing judge would understand it as well". (August 21, 2015 transcript, page 16).

A hearing was held in Whatcom County District Court before elected judge pro tem Matt Elich on September 9, 2015. Despite the trial judge's admonition to limit the hearing to the "existing briefs and materials", the motion and the materials submitted after the September 9, 2015 hearing included two additional alleged comments on the evidence. This decision will address the following three comments as alleged by the plaintiff:

1) Judge Garrett's "vernacular comment" made when overruling an objection by plaintiff, and;
2) Judge Garrett commented when denying admission of plaintiff's proposed exhibit #69;
3) Judge Garrett commented when asking Dr. Quigley foundational questions.

At the close of the hearing, this court invited the parties to submit additional briefs. The court also said that it may review the trial transcript to provide context for the comments made by the trial judge but left that decision until after it reviewed the briefs. After reviewing those briefs the court exercised its discretion and concluded that a review of the trial transcript was not necessary primarily because the materials submitted by the parties provided context and because time constraints preclude a thorough, meaningful review of the transcripts. And, this court is not sitting in an appellate capacity.

In addition to the oral argument on September 9, 2015 the court reviewed the following materials:

1) Plaintiff's motion for new trial dated August 3, 2015;

2) Defendant's response to motion for new trial dated August 14, 2015;

3) Plaintiff's reply to defense response dated August 19, 2015;

4) Second Declaration of Brian Waters dated September 4, 2015;

5) Defendant's brief re: Comment on the Evidence dated October 6, 2015;

6) Plaintiff's documents submitted via notebook w/cover letter dated October 14, 2015.

7) Transcript from September 9, 2015 hearing.

Additionally, the court spent considerable time reviewing the authorities cited by the parties and many, many other cases not cited.

AUTHORITY

Plaintiff alleges three violations of Article IV, Section 16 of the Washington State Constitution which reads: "Judges shall not charge juries with respect to matters of fact, nor comment thereon but shall declare the law".

This "constitutional prohibition forbids only those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at trial". State v. Jacobson, 78 Wn. 2nd 491, 495, 447 P.2d 1 (1970). (Additional citations omitted).

However, an explanation of an evidentiary ruling is not a prohibited comment. St v. Dykstra, 127 Wash App 1, 8, (2005), (additional citation omitted).

1) Use of the word "vernacular":

Plaintiff argues that the trial judge's use of the word "vernacular" in ruling on an objection is a prohibited comment. Parenthetically, in plaintiff's CR 59 motion and the briefing supporting the motion, it's not clear if plaintiff was originally arguing that this exchange was a prohibited comment. (See Plaintiff's Combined Reply to Defendant's Response in Opposition to Plaintiffs' Motions for New Trial and Judgment as a Matter of Law, page 1, 2). But because the parties are treating it as such, this court will address it.

Summarizing, defense counsel was examining Dr. Quigley, a defense expert about the amount of blood found at the scene and at one point Dr. Quigley said, "I'm guessing but"....

Plaintiff objected: "Your honor, it's not appropriate for the witness to guess for this jury. I move to strike his last answer".

The trial court:" I'll overruled. I think the witness was using vernacular as opposed to speculation". (Plaintiffs' Combined Reply brief, page 2).

Though this issue was not briefed in the CR 59 motion as a prohibited comment, plaintiff argued it as such at the 9/9/15 hearing.

It appears from the record that the trial court was explaining her ruling when she used the word "vernacular". An explanation of an evidentiary ruling, made solely to counsel, is not a prohibited comment. St v. Dykstra, 127 Wash App 1, 8 (2005).

Moreover, a trial court, in passing upon objections to testimony, has the right to give its reasons thereof and same will not be treated as a comment on the evidence. St v. Cerney, 78 Wn 2nd 845, 855-56, 480 P.2d 1999 (1971) (holding that a trial court does not make an impermissible comment on the evidence when, in response to an objection, it says "I think the chain of evidence has been established"). (See also St v.

Knapp, 14 Wash App 101, 112-13 (1975) (in response to objection, trial court stated "That's a collateral issue" is a ruling on the admissibility of particular testimony and not an expression of opinion). (Additional citations to authority omitted).

In this case, the trial judge's use of the word vernacular did not convey her personal opinion regarding the credibility, weight or sufficiency of the evidence. Instead, the trial court was giving its reason for the evidentiary ruling and therefore, the court concludes that this was not a prohibited comment.

2) Exhibit #69:

This "comment' occurred while Plaintiff was questioning a defense witness about an article written by the witness years before the trial. Defense counsel appeared to object. The exchange went as follows:

> MR. FOX: Your honor, we're way beyond the scope.
> THE COURT: Where are we going with this?
> MS. HOBSON (the witness): This is medication reconciliation.
> THE COURT: Is there a concern in the case about medication that was given to Mr. Rodenbeck when he arrives.
> MR. SHEPHERD: There is concern about poor communication between care teams and--
> THE COURT: But no, you're reading from the document. Why is this relevant?
> MR. SHEPHERD: Because she testified that all nurses have to do is tell the patient not to get out of bed and they have complied with the standard of care.
> THE COURT: I have read this article yesterday, it seem to be about medication.
> MR. SHEPHERD: Your Honor, I'd like the jury out of here before I argue with the Court.
> THE COURT: I'm going to ask you to move on and so that you can utilize the time we have. This line of questioning we'll discuss in private and may resume it with Ms. Hobson telephonically if that's necessary.

It's not clear from the record if further discussion was had, if the parties and the court addressed the issue outside the presence of the jury or even if the exhibit was admitted into evidence (however the defense argues that it was not admitted).

The defendant argues that explaining an evidentiary ruling to the attorneys is not a comment on the evidence and the trial judge was simply "excluding evidence as irrelevant and politely instructing the plaintiff's counsel to move on." (Defendant's Reply Brief Re:Comment on the Evidence, page 10-13).

If the statements do nothing more than explain the court's ruling on the evidence then the court would agree with the defendant.

However, it's not clear from the record if the trial judge made a ruling on the admissibility of exhibit #69 when the statements were made. In fact, further discussion was deferred until after the witness was released and the jury removed. (Trial transcript, July 20, 2015, page 3-5, Plaintiff's Motion for New Trial, attachment #3). How could the statements made by the trial court in reference to exhibit #69 explain a ruling the trial judge had yet to make?

Since there was no ruling to explain, it's clear to this court that the statements at issue are, and were, comments on the evidence. The question then is whether they are prohibited.

Plaintiff relies primarily on St v. Lampshire, 74 Wn 2nd 888, (1969) in support of his position that the trial judges statement in reference to exhibit #69 are prohibited.

In Lampshire, the defendant was testifying and, in response to an objection by the state, the court said "Counsel's objection is well taken. We have been from bowel obstruction to sister Betsy, and I don't see the materiality, counsel." 74 Wn.2nd 888, 891.

Evidently in that trial the trial court allowed wide latitude in the examination of the defendant and the answers included mention of her daughter's bowel condition and a trip to sister Betsy in Colorado.

The Supreme Court held that this comment, though inadvertent, implicitly conveyed to the jury the trial judge's personal opinion concerning the worth of the defendant's testimony. Id at 892. And, as defendant argued in their response brief, the comment (in Lampshire) was prejudicial because it undermined the credibility of the witness. (Defendant's Response Brief in Opposition to Motion for New Trial, page 5, citing Lampshire at 892).

The trial court's comments in this case do not undermine Ms. Hobson's credibility.

Furthermore, Lampshire is distinguished because the trial court's comments relating to exhibit #69 are also directed at a particular exhibit rather than at an entire line of testimony. (St v. Knapp, 14 Wash App 101,113 (1975) distinguishing Lamshire on this issue and others).

This court has carefully studied all of the cases cited by both parties in support of their respective positions, the facts in those cases, the analysis (if any) and based on that review, this court cannot conclude that the statements made by the trial court either directly or implicitly conveyed to the jury her personal opinion regarding the credibility, weight or sufficiency of exhibit #69 or the line of testimony surrounding it. Perhaps further, more in depth analysis may enlighten the court, but, based on what has been provided and reviewed to date, the court cannot grant the motion on exhibit #69.

3) Dr. Quigley Questions:

Plaintiff claims that on July 22, 2015, after PeaceHealth completed its direct of Dr. Quigley, the trial court inappropriately asked the following questions and made the following comment in front of the jury:

> MR. FOX: Thank you. Those are all my questions.
> THE COURT: I have one question, Doctor, and that is, I don't know the technical jargon, you indicated that you're understanding, you indicated that amount of blood that was noted at the scene was not extensive in your view.
> DR. QUIGLEY: Yes.
> THE COURT: What's your understanding, obviously you weren't there so you're relying on information from other sources on what the amount of blood was, and what I want to know is that's your information about what the amount of blood was?
> DR. QUIGLEY: Well, someone described, I forgot, really apologize, two inches around the head, which is frankly a trivial amount of blood fluid. And someone else said it was less than a can of soda, which would be less than two of these put together and that's not enough blood to cause death, it just isn't.
> THE COURT: Uh-huh, okay. So the information that you've got comes from your reading of the chart notes?
> DR. QUIGLEY: Depositions.
> THE COURT: And from the depositions.
> DR. QUIGLEY: Actually from the depositions. I don't remember recall reading anything in the chart that said anything about blood loss. There were from eye-witnesses who were there and saw the patient and the amount of blood around his head.
> THE COURT: Okay.

The purpose of Art IV, sect 16 is to prevent the jury from being influenced by knowledge conveyed to it by the court of its opinion of the evidence submitted. Jankelson v. Cisel, 3 Wash. App 139, (1970); St. v. Lampshire, 74 Wn.2nd 888, (1968); Heitfeld v. Benevolent and Protective Order of Kgelers, 36 Wn. 2nd 685, (1950). One way this provision can be violated is when the trial judge questions a witness in the presence of the jury.

When a trial judge takes over a witness and asks questions of that witness the judge "has no way to measure the effect of his interruption. The very fact that he takes a witness away from the attorney for examination, may, in the tense atmosphere of the trial, lead to great prejudice". Risley v. Moberg, 69 Wn.2nd 560, 564,565, citing St v. Jackson, 83 Wash. 514,523 (1915).

A trial court, nonetheless, has wide discretionary powers in the trial of a cause and is not prohibited from questioning a witness. " Such a course may constitute a comment on the evidence where it is improperly done. To constitute a comment on the evidence, however, it must appear that the attitude of the court toward the merits of the cause must be reasonably inferable from the nature or manner of the questions asked and things said". St v. Brown, 31 Wn.2nd 475, 486, (1948).

And, as mentioned herein, our state Supreme Court has consistently held that that the constitutional prohibition forbids only those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at the trial. Moreover, in determining whether words or actions amount to a comment on the evidence, we look to the facts and circumstances of the case. St. v. Jacobsen, 78 Wn.2nd 491 (1970).

In this case, plaintiff argues that the amount of blood found on the scene goes to the crux of his case. He argued that throughout the trial with each successive witness the amount of blood diminished saying: "It has gone from a pool of blood to a moderate pool of blood(to a pool of blood) to a small pool of blood to a trivial amount of blood and then it was just fluid"(referring to testimony during the trial, 9/9/15 hearing transcript, page 20 lines 13-21, slides 44 and 45).

Evidently Dr. Quigley followed other witnesses and at one point in his testimony said that the amount of blood that was noted on the scene was not extensive. After the defense was done questioning the doctor, the trial court asked the questions and "vouched" not only the doctor but also for other witnesses and in so doing, commented on the evidence according to the plaintiff.

Plaintiff relies primarily on Risley v. Moberg, 69 Wn.2nd 560 (1966). In Risley, the questions asked by the trial court were "of great magnitude" and "went to the crux of respondent's case-a factual issue for the jury Viz, whether she had sustained injuries from the accident. The judge, by assuming this fact appeared to personally corroborate and seemingly to indorse the credibility of the respondent and her doctor." 69 Wn.2nd 560, 565.

Plaintiff argues that the trial court's questions in this case also addressed an essential issue and a vital part of his case." When they (the questions) appear to assume the existence of evidence which is disputed or appear "personally to corroborate and seemingly to indorse the credibility" of a party or its expert witness, they are improper". (Plaintiff's Combined Reply to Defendant's Response in Opposition..., page 4, see also Plaintiffs' supplemental materials dated 10/14/15).

The defendant argues that Risley is distinguished because that trial court assumed the existence of a disputed fact. The court is inclined to agree with plaintiff's assertion that the questions did assume the existence of disputed facts.

The distinction is not dispositive, however, because even if the court's questions did not assume the existence of a disputed fact, they may still be prohibited if they convey the trial court's opinion to the jury.

Here, these questions addressed a significant issue in plaintiff's case, the amount of blood found on the scene.

A reasonable inference can be drawn about the trial judge's opinion of this evidence based on these questions. The inference is that the testimony is credible because, among other things, it's based on eyewitness testimony. (See St v. Brown, 31 Wn.2nd 475 (1948).

Moreover, simply by asking the question about the amount of blood found on the scene and then asking follow up questions that either affirmed or established the foundation for the doctors answers, the trial court here, like in Risley, appeared to corroborate and endorse the credibility of the doctor and perhaps also those upon whom the doctor relied for his information. And, by implication, the trial court also conveyed its opinion to the jury about the credibility of those witnesses. (See St v. Jacobsen, 78 Wn.2nd 491 (1970) and others, citations omitted.).

This obviously was not done intentionally. And, granted, these were but a few questions in a sea of questions asked in this case. They were questions that couldn't have taken more than a minute or two out of a hotly contested three week trial. But the questions dealt with an issue that went to the heart of plaintiff's case and, unlike all the others, they were asked by the judge, not the attorneys.

This court respectfully concludes that these comments violated Article IV, Section 16.

The court grants plaintiff's motion. Plaintiff is asked to prepare and present an order.

Dated 11/13/15

Matthew S. Elich

Whatcom County District Court Judge

APPENDIX C

RCW 68.50.010

Coroner's jurisdiction over remains.

The jurisdiction of bodies of all deceased persons who come to their death suddenly when in apparent good health without medical attendance within the thirty-six hours preceding death; or where the circumstances of death indicate death was caused by unnatural or unlawful means; or where death occurs under suspicious circumstances; or where a coroner's autopsy or postmortem or coroner's inquest is to be held; or where death results from unknown or obscure causes, or where death occurs within one year following an accident; or where the death is caused by any violence whatsoever, or where death results from a known or suspected abortion; whether self-induced or otherwise; where death apparently results from drowning, hanging, burns, electrocution, gunshot wounds, stabs or cuts, lightning, starvation, radiation, exposure, alcoholism, narcotics or other addictions, tetanus, strangulations, suffocation or smothering; or where death is due to premature birth or still birth; or where death is due to a violent contagious disease or suspected contagious disease which may be a public health hazard; or where death results from alleged rape, carnal knowledge or sodomy, where death occurs in a jail or prison; where a body is found dead or is not claimed by relatives or friends, is hereby vested in the county coroner, which bodies may be removed and placed in the morgue under such rules as are adopted by the coroner with the approval of the county commissioners, having jurisdiction, providing therein how the bodies shall be brought to and cared for at the morgue and held for the proper identification where necessary.

APPENDIX D

RCW 68.50.020

Notice to coroner or medical examiner—Penalty.

It shall be the duty of every person who knows of the existence and location of human remains coming under the jurisdiction of the coroner or medical examiner as set forth in RCW 68.50.010 or 27.44.055, to notify the coroner, medical examiner, or law enforcement thereof in the most expeditious manner possible, unless such person shall have good reason to believe that such notice has already been given. Any person knowing of the existence of such human remains and not having good reason to believe that the coroner has notice thereof and who shall fail to give notice to the coroner as aforesaid, shall be guilty of a misdemeanor. For purposes of this section and unless the context clearly requires otherwise, "human remains" has the same meaning as defined in RCW 68.04.020. Human remains also includes, but is not limited to, skeletal remains.

APPENDIX E

RCW 68.50.050

Removal or concealment of body—Penalty.

(1) Any person, not authorized or directed by the coroner or medical examiner or their deputies, who removes the body of a deceased person not claimed by a relative or friend, or moves, disturbs, molests, or interferes with the human remains coming within the jurisdiction of the coroner or medical examiner as set forth in RCW 68.50.010, to any undertaking rooms or elsewhere, or any person who knowingly directs, aids, or abets such unauthorized moving, disturbing, molesting, or taking, and any person who knowingly conceals the human remains, shall in each of said cases be guilty of a gross misdemeanor.

(2) In evaluating whether it is necessary to retain jurisdiction and custody of human remains under RCW 68.50.010, 68.50.645, and 27.44.055, the coroner or medical examiner shall consider the deceased's religious beliefs, if known, including the tenets, customs, or rites related to death and burial.

(3) For purposes of this section and unless the context clearly requires otherwise, "human remains" has the same meaning as defined in RCW 68.04.020. Human remains also includes, but is not limited to, skeletal remains.

APPENDIX F

WAC 246-320-226

Patient care services.

This section guides the development of a plan for patient care. This is accomplished by supervising staff, establishing, monitoring, and enforcing policies and procedures that define and outline the use of materials, resources, and promote the delivery of care.

Hospitals must:

. . .

(3) Adopt, implement, review and revise patient care policies and procedures designed to guide staff that address:

(a) Criteria for patient admission to general and specialized service areas;

(b) Reliable method for personal identification of each patient;

(c) Conditions that require patient transfer within the facility, to specialized care areas and outside facilities;

(d) Patient safety measures;

(e) Staff access to patient care areas;

(f) Use of physical and chemical restraints or seclusion consistent with C.F.R. 42.482;

(g) Use of preestablished patient care guidelines or protocols. When used, these must be documented in the medical record and be preapproved or authenticated by an authorized practitioner;

(h) Care and handling of patients whose condition require special medical or medical-legal consideration;

(i) Preparation and administration of blood and blood products; and

(j) Discharge planning;

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