

No. 71616-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RAUL SWAIN and KATHLEEN SCHONS, individually and as
guardians of minor child, JAXOM SWAIN-SCHONS,

Respondents,

v.

SWEDISH HEALTH SERVICES d/b/a SWEDISH MEDICAL
CENTER, and MICHAEL C. SHANNON, M.D.,

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MARIANE C. SPEARMAN

REPLY BRIEF OF APPELLANTS

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COURT OF APPEALS
STATE OF WASHINGTON

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I. INTRODUCTION

The trial court found that the previously undisclosed expert rebuttal testimony by treating physician Dr. Teresa Chapman “was pretty devastating,” (2/14 RP 52), entirely refuting respondents Swain-Schons’ assertion that its admission did not prejudice appellant Dr. Michael Shannon. Dr. Chapman’s rebuttal testimony was expert, not fact testimony, as it was based not on her treatment of Jaxom, which was limited to reviewing radiology images, but on her post-treatment experiments with the guidewire used by Dr. Shannon. It should not have been admitted at all, and especially not on rebuttal, when Dr. Shannon had no opportunity to respond.

The trial court further erred in refusing to allow Dr. Shannon’s expert to testify regarding reports of similar guidewire failures, and in allowing Swain-Schons to present evidence regarding the length of Dr. Shannon’s shift and a checklist used by a different hospital, both of which were irrelevant to whether Dr. Shannon violated the standard of care. This Court should vacate the judgment and remand for a new trial.

II. REPLY ARGUMENT

A. Dr. Chapman’s testimony – based on her “examination” of a guidewire, not her “treatment” of Jaxom – should have been excluded because Swain-Schons failed to timely disclose it.

Trial by ambush is forbidden. *Lybbert v. Grant Cnty., State of Wash.*, 141 Wn.2d 29, 40, 1 P.3d 1124 (2000). Established law, including King County local rules and basic principles of fairness required Swain-Schons to disclose – before trial – any expert testimony from Jaxom’s treating radiologist Dr. Chapman that was not based directly on her treatment of Jaxom. (App. Br. 13-19) Swain-Schons concede as much, but argue in contravention of the law and the record, that Dr. Chapman’s undisclosed rebuttal testimony was strictly “factual,” not expert. The trial court manifestly abused its discretion in allowing on rebuttal previously undisclosed expert testimony that it recognized was “devastating” to Dr. Shannon’s defense.

An expert witness is one who uses “scientific, technical, or other specialized knowledge [to] assist the trier of fact to understand the evidence or to determine a fact in issue.” ER 702. Here, Dr. Chapman testified on rebuttal as an expert. She testified based on her technical knowledge that it “is not possible” that the

wire pieces seen on x-rays were only the outer coil of the guidewire, rather than intact wires, and that a “coil” “[c]ertainly couldn’t lift skin up.” (12/18 RP 68, 74; *see also* 12/18 RP 64-65 (outlining Dr. Chapman’s qualifications))¹

Although Washington courts have recognized that a “treating physician fact witness” may sometimes offer “medical judgments and opinions” they must be limited to those “*which were derived from the treatment*” of the plaintiff. *Smith v. Orthopedics Int’l, Ltd.*, P.S., 170 Wn.2d 659, 668, ¶ 14, 244 P.3d 939 (2010) (emphasis in original). Here, Dr. Chapman’s testimony went far beyond “her treatment” of Jaxom. As plaintiff’s counsel conceded, Dr. Chapman based her testimony not on her treatment, but on her *post-treatment* “examin[ation of] a guidewire to see the coiled portion separated from the central wire.” (12/18 RP 74; 2/14 RP 11, 31) The trial court itself recognized that Dr. Chapman’s testimony went beyond the opinions she expressed in the report that was derived from her treatment of Jaxom. (2/14 RP 49 (“admittedly, she didn’t say they were wires and not coils”))

¹ Dr. George Drugas did not testify that the tenting of the skin could not have been caused by the outer coil of the wire, only that there was “tenting of the skin.” (12/11 RP 125) Thus, Dr. Chapman *was* the only physician to testify that the “tenting’ of Jaxom’s skin revealed a critical flaw in the defense theory.” (Resp. Br. 32)

Whether Dr. Chapman “experimented” on the wire, or “examined” it, as Swain-Schons argue, is a distinction without a difference. (Resp. Br. 23) In either case, it is undisputed that Dr. Chapman based her testimony regarding the characteristics of the wire, and in particular whether it was strong enough to perforate the skin, not on her review of Jaxom’s x-rays, but on her separate examination of a guidewire given to her by plaintiff’s counsel. Dr. Chapman’s “examination” of the wire to determine how the coiled portion separates from the central wire is – by definition – an experiment: “. . . an act or operation for the purpose of discovering something unknown or of testing a principle, supposition, etc.” “Experiment,” Dictionary.com., <http://dictionary.reference.com/browse/experiment> (Random House 2015) (last accessed February 12, 2015).

Dr. Chapman’s testimony, which the trial court itself called “devastating,” plainly prejudiced Dr. Shannon, contrary to Swain-Schons’ assertion. (Resp. Br. 27-30; 2/14 RP 52) She testified not simply that what she saw “on the x-rays are wires,” as Swain-Schons contend (Resp. Br. 23-24, 28), but that based on her post-treatment experiment with a guidewire it was “not possible” that the radiology images showed “coils,” and, moreover, that the outer coil of the

guidewire did not have the strength to perforate through the skin. (12/18 RP 68, 74) The trial court recognized that the undisclosed portion of Dr. Chapman's testimony was critical, noting that after her rebuttal testimony "everyone realized that this whole tenting thing wouldn't have happened with a coil." (2/14 RP 52) Had Swain-Schons disclosed all of Dr. Chapman's testimony, Dr. Shannon would have deposed Dr. Chapman. (Resp. Br. 28, 32) Because she was listed as a fact witness, he did not. (12/18 RP 80)

While it was improper to admit Dr. Chapman's undisclosed testimony at all, it was especially prejudicial to admit it on rebuttal. Swain-Schons examined in their case-in-chief both Jaxom's surgeon Dr. Drugas and their expert Dr. Schenkman on whether Jaxom could have been injured by the coiled exterior portion of the wire. (12/11 RP 99-102, 144-46) There was no reason they could not have examined Dr. Chapman on the same topic in their case-in-chief. *Kremer v. Audette*, 35 Wn. App. 643, 648, 668 P.2d 1315 (1983) (plaintiff should not be allowed "to present . . . evidence cumulatively at the end of defendant's case") (quoting *State v. White*, 74 Wn.2d 386, 394-95, 444 P.2d 661 (1968)).

Swain-Schons' "disclosure" on the second day of trial that Dr. Chapman would testify on rebuttal, rather than in their case-in-

chief, did not alleviate the prejudice to Dr. Shannon. (Resp. Br. 15, 21) To the contrary, their disclosure worsened the prejudice by misrepresenting that Dr. Chapman would focus on her treatment of Jaxom and limit her testimony to the scope of her report. (12/11 RP 177-78 (“Dr. Chapman is a factual witness. She was a treater. And what she did was looked at the x-rays at Children’s Hospital and she wrote clearly in her report that these were two wires. . . . She saw wires.”)) By then presenting Dr. Chapman’s undisclosed expert opinion that the wire fragments could not be *coils*, Swain-Schons engaged in classic “sandbagging.” (App. Br. 18)

Swain-Schons attempt to shift the blame for their non-disclosure to Dr. Shannon fails. (Resp. Br. 26) Swain-Schons argue that Dr. Chapman’s “snippets of expert testimony” were necessitated by Dr. Shannon’s purported “failure to disclose [his] product defect defense or [his] three product defect witnesses.” (Resp. Br. 26) Dr. Shannon did not present a “product defect defense” that required disclosure under CR 12; Dr. Shannon never sought to apportion fault to the guidewire manufacturer under RCW 4.22.070 based on a “defect.” He instead presented an explanation for how the guidewire was retained in Jaxom irrespective of fault.

In any event, Swain-Schons knew as early as September 2013 when they deposed several of Dr. Shannon's experts that Dr. Shannon would argue that he was not negligent because the wire separated unbeknownst to him. (CP 441-42, 444-50) *Dixon v. Crawford, McGilliard, Peterson & Yelish*, 163 Wn. App. 912, 919 n.7, ¶ 14, 262 P.3d 108 (2011) ("Where failure to plead a defense affirmatively does not affect substantial rights of the parties, the noncompliance will be considered harmless."), *rev. denied*, 173 Wn.2d 1015 (2012). Swain-Schons' allegations of untimely witness disclosure also ignore that the discovery cutoff was moved to October 7, 2013, and thus Dr. Shannon's disclosures were timely. (CP 1215-16)²

Swain-Schons nondisclosure of Dr. Chapman's expert testimony required its exclusion. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (testimony must be excluded where nondisclosure is willful, results in prejudice, and lesser sanctions will not suffice). Dr. Shannon asked the trial court to exclude or strike Dr. Chapman's testimony that went beyond the opinions actually disclosed in her report before, during, and after

² The sole exception was Dr. Larson, Dr. Shannon's radiology expert, who Swain-Schons deposed before trial. (CP 483, 496-500)

her testimony. (12/11 RP 175-77, 179-82; 12/18 RP 73-74, 78-80, 82-83) He did not “waive” his argument that it should have been excluded. That Dr. Shannon did not mention “*Burnet*” by name in seeking this relief does not establish waiver. (*Compare* Resp. Br. 25 with *Jones v. City of Seattle*, 179 Wn.2d 322, 344, ¶ 48, 314 P.3d 380 (2013) (“a colloquy might satisfy *Burnet* in substance even if the judge fails to invoke that case by name”). In any event, Dr. Shannon timely cited *Burnet* to the trial court when seeking a new trial. (CP 730)

Swain-Schons had no reasonable excuse for failing to disclose Dr. Chapman’s highly prejudicial testimony (App. Br. 17), nor do they offer one on appeal other than their mistaken assertion that she was merely a “fact witness.” Because Swain-Schons did not disclose Dr. Chapman’s prejudicial expert opinions until the moment they were offered, Dr. Shannon could not have deposed Dr. Chapman regarding them. Nothing short of excluding or striking Dr. Chapman’s testimony would have sufficed. The trial court manifestly abused its discretion.

B. Dr. Shannon’s expert metallurgist should have been allowed to explain the significance of MAUDE reports because they were the “type” of evidence relied on by expert metallurgists.

ER 703 allows experts to base their opinions on any evidence “of a type” reasonably relied upon by experts in their field. Dr. Shannon’s expert metallurgist’s testimony that metallurgists rely on reports, such as Manufacturer and User Facility Device Experience (MAUDE) reports, that document instances of metallic device failure more than satisfied ER 703. The trial court abused its discretion in refusing to allow Mr. Cline to refer to the MAUDE reports in his testimony and in refusing to allow the jury to review them as illustrative exhibits that supported his expert opinion that Dr. Shannon was fault free.

ER 703 allows an expert to discuss facts or data that are not admissible in evidence if they are “of a type reasonably relied upon by experts in the particular field in forming opinions.” ER 703’s liberal language that the evidence need only be “of a type relied upon by experts” recognizes that experts rely on a broad range of materials and that experts will rarely rely on identical materials in different cases. *Hickok-Knight v. Wal-Mart Stores, Inc.*, 170 Wn. App. 279, 315, ¶ 72, 284 P.3d 749 (2012) (medical and social

histories “were the type of evidence” relied upon by medical professionals and thus were admissible), *rev. denied*, 176 Wn.2d 1014 (2013); *In re Young*, 122 Wn.2d 1, 58, 857 P.2d 989 (1993) (psychological reports and criminal history “are the types of materials reasonably relied on” by medical professionals and thus were admissible).

Swain-Schons ignore the plain language of ER 703 in arguing that Mr. Cline could not testify regarding the MAUDE reports or use them as illustrative exhibits because he did not testify that other metallurgists rely specifically on MAUDE reports. (Resp. Br. 35-37) Mr. Cline testified that metallurgists rely on any reports – including MAUDE reports – that document the failure of a metallic device. (12/16 RP 41, 54-55, 58) By reviewing previous reports of failure metallurgists avoid “reinvent[ing] the wheel” when they start a failure analysis. (12/16 RP 55, 58) MAUDE reports are squarely “a type” of report relied on by metallurgists.

The trial court’s refusal to allow Mr. Cline to discuss the MAUDE reports prejudiced Dr. Shannon. Mr. Cline was precluded from explaining to the jury that guidewires can and do fail in the manner alleged by Dr. Shannon, and from rebutting the testimony of Swain-Schons’ expert and a treating physician that they had

never heard of guidewires failing. (12/11 RP 100-02, 159) Without Mr. Cline's explanation of the MAUDE reports the jury was left with the mistaken impression that guidewires do not fail.

Nor were the MAUDE reports inadmissible under federal law, as Swain-Schons claim. (Resp. Br. 38-40) The purpose of 21 U.S.C. § 360i(b)(3) is to promote candid reporting of medical device malfunctions, which might be chilled if such reports could be used in malpractice suits against the reporter. Protecting the Identities of Reporters of Adverse Events and Patients; Preemption and Disclosure Rules, 59 Fed. Reg. 3944, 3946 (proposed January 27, 1994) (stating the "adverse event reporting system depends substantially on the guarantee of confidentiality given the identity of the reporter under FDA regulations"). The statute thus sensibly restricts the use of MAUDE reports in litigation involving the author of a report, but not in other lawsuits, because the reporting of adverse events would not be chilled by such use. This interpretation also comports with the Supreme Court's direction "to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a

result.” *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961).³

The case cited by Swain-Schons is not to the contrary. (See Resp. Br. 40 citing *In re Medtronic, Inc.*, 184 F.3d 807 (8th Cir. 1999)) *Medtronic’s* passing discussion of 21 U.S.C. § 360i concerned the disclosure of “the names of patients, physicians and facilities involved with other allegedly defective Medtronic pacemakers.” 184 F.3d at 808. Here, as in *Contratto*, *Medtronic* has no application because Dr. Shannon did not seek to use the identity of reporters (which would chill the submission of reports), but the reports themselves. *Contratto*, 225 F.R.D. at 598 n.8. This Court should reverse and remand for a new trial based on the trial court’s narrow construction of ER 703, which conflicts with its plain language.

³ Swain-Schons fail to distinguish *Contratto v. Ethicon, Inc.*, 225 F.R.D. 593 (N.D. Cal. 2004), which adopted this reasoning. *Contratto* did not hold only that MAUDE reports were *discoverable*, but that “a better interpretation is that admissibility or discovery of these reports is prohibited only in civil actions involving the maker of the report.” *Compare Contratto*, 225 F.R.D. at 596 *with* Resp. Br. 39-40.

C. The trial court’s admission of Dr. Shannon’s on-call shift length and the checklist used by a different hospital, which Swain-Schons concede did not establish standard of care violations, was irrelevant and prejudicial.

Swain-Schons concede that evidence Dr. Shannon worked a 48-hour shift and did not use a procedure checklist used by another facility did not establish standard of care violations. (Resp. Br. 44) Nonetheless, they argue that the evidence was properly admitted to show “why Dr. Shannon left the guidewire inside of Jaxom.” (Resp. Br. 44) To the contrary, evidence that undisputedly does not establish a standard of care violation invites the jury to create its own lay standard of care in contravention of RCW 7.70.030-040. (App. Br. 24-26) This Court should vacate the judgment and remand for a new trial free from the taint of irrelevant and prejudicial evidence.

The shift-length and checklist evidence was both irrelevant and prejudicial. Swain-Schons assertion that they relied on this evidence only to explain “why Dr. Shannon left the guidewire inside of Jaxom” and that they never argued that this evidence “by itself” established standard of care violations, ignores that they repeatedly referred to it, and they invited the jury to find that working a 48-hour shift and not using a checklist were in fact standard of care

violations. (12/10 RP 27-28; 12/11 RP 35-39, 91-93, 122, 131, 143-44; 12/17 RP 67-68, 79, 85; 12/18 RP 177, 182) Repeatedly directing the jury's attention to irrelevant evidence improperly "changed the focus of the trial" from whether Dr. Shannon's actions fell below the standard of care, as established through expert testimony, to whether Dr. Shannon engaged in conduct that undisputedly did not violate the standard of care. *First State Ins. Co. v. Kemper Nat. Ins. Co.*, 94 Wn. App. 602, 615, 971 P.2d 953, *rev. denied*, 138 Wn.2d 1009 (1999). Asking the jury to resolve an irrelevant question is necessarily prejudicial and requires reversal. *First State*, 94 Wn. App. at 615.

D. Dr. Shannon was not negligent as a matter of law.

This Court should reject, as the trial court did, Swain-Schons argument that they were entitled to judgment as a matter of law. (12/18 RP 161-62) Leaving a foreign object in a patient's body raises an *inference* of negligence that a defendant is free to rebut with a non-negligent explanation. Here, Dr. Shannon did just that and it was for the jury to resolve – after being presented properly disclosed testimony and all admissible evidence – whether Dr. Shannon was negligent.

Washington courts recognize that under the doctrine of res ipsa loquitur “inadvertently leaving a foreign object in a patient’s body raises the inference of negligence.” *Ripley v. Lanzer*, 152 Wn. App. 296, 308, ¶ 26, 215 P.3d 1020 (2009). That inference “establishes a prima facie case sufficient to present a question for the jury.” *Ripley*, 152 Wn. App. at 314, ¶ 44. But the inference is rebuttable; a defendant is entitled “to come forward with evidence to rebut the inference of negligence.” *Ripley*, 152 Wn. App. at 314, ¶ 44. Thus, even if res ipsa loquitur applies, it only “rais[es] genuine issues of material fact for a jury to decide.” *Ripley*, 152 Wn. App. at 315, ¶ 46; *Pacheco v. Ames*, 149 Wn.2d 431, 440, 69 P.3d 324 (2003) (fact that defendant physician drilled on wrong side of mouth raised inference of negligence, but defendant’s testimony that mislabeled x-ray caused mistake created jury issue); *see also Curtis v. Lein*, 169 Wn.2d 884, 895, ¶¶ 18-19, 239 P.3d 1078 (2010) (“As with any other permissive evidentiary inference, a jury is free to disregard or accept the truth of the inference. . . . Whether the inference of negligence arising from res ipsa loquitur will be convincing to a jury is a question to be answered by that jury.”).

Here, Dr. Shannon put forth a non-negligent explanation that rebutted the *inference* of negligence permitted by the cases

relied on by Swain-Schons. (Resp. Br. 45-46) Dr. Shannon explained that the pieces of medical guidewire that had been found in Jaxom's vein came from the wire's thin outer wrapping, which unbeknownst to him, had separated from its inner core during the central line placement. None of the cases cited by Swain-Schons held that a defendant was negligent as a matter of law when, as here, he offered a non-negligent explanation for the injury.⁴ This Court should refuse to affirm the trial court's verdict on this basis.

III. CONCLUSION

This Court should vacate the judgment and remand for a new trial.

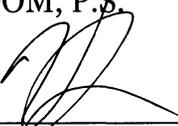
⁴ See *Ripley*, 152 Wn. App. at 317-18, ¶¶ 55-56 (reversing summary judgment in physician's favor because plaintiff was not required to present expert testimony that leaving foreign object inside patient was negligence) (Resp. Br. 45); *Bauer v. White*, 95 Wn. App. 663, 976 P.2d 664 (same) (Resp. Br. 45-46), *rev. denied*, 139 Wn.2d 1004 (1999); *Conrad v. Lakewood Gen. Hosp.*, 67 Wn.2d 934, 938, 410 P.2d 785 (1966) (affirming directed verdict against physician that did not offer a non-negligent explanation) (Resp. Br. 46 n.5); *McCormick v. Jones*, 152 Wash. 508, 514, 278 P. 181 (1929) (no non-negligent explanation) (Resp. Br. 46 n.5).

Dated this 12th day of February, 2015.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 12, 2015, I arranged for service of the foregoing Reply Brief of Appellants, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 12th day of February, 2015.



Victoria K. Vigoren