

FILED  
August 24, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 74654-5-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Appellant.

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BRIEF OF APPELLANT

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## I. INTRODUCTION

In this medical negligence/wrongful death action, Milton Long, Donald Rodenbeck's registered domestic partner, sued PeaceHealth claiming that, after an aortobifemoral bypass surgery Dr. Connie Zastrow performed on Mr. Rodenbeck, PeaceHealth was negligent in Mr. Rodenbeck's postoperative assessment and care and thereby proximately caused his death from alleged exsanguination after falling to the floor and disconnecting his central IV catheter. PeaceHealth denied Mr. Long's claims, and asserted that Mr. Rodenbeck died not from exsanguination, but from an unexpected fatal cardiac dysrhythmia.

After a hotly contested three-week trial, the jury returned a special verdict finding PeaceHealth was negligent, but that its negligence did not proximately cause Donald Rodenbeck's death. Mr. Long then moved for judgment as a matter of law and for new trial. After presiding over the trial and denying the rest of Mr. Long's post-trial claims for relief, Whatcom County Superior Court Judge Deborra Garrett recused herself from considering his claims that she had commented on the evidence.

Whatcom County District Court Judge Matthew Elich was assigned to consider those issues, and after holding a hearing and considering the parties' supplemental briefing, granted a new trial, concluding that Judge Garrett's questioning of Dr. Terence Quigley, one

of PeaceHealth's experts, regarding the sources of information he relied upon to form his opinions, constituted a comment on the evidence prejudicial to Mr. Long. Because Judge Elich's factual findings are not supported by the record, and the facts and circumstances of the case do not justify a new trial, this Court should reverse Judge Elich's order granting a new trial and remand for entry of judgment on the jury's verdict.

## II. ASSIGNMENTS OF ERROR

Whatcom County District Court Judge Elich erred in:

(1) Entering the January 12, 2016 "Supplemental Order Granting Plaintiff's Motion for New Trial."

(2) Entering the November 13, 2015 memorandum decision, "Court's Decision/CR 59," insofar as it granted Plaintiff's Motion for New Trial on grounds that Judge Garrett commented on the evidence by asking clarifying questions of a defense expert witness, Dr. Terence Quigley.

(3) Concluding that Judge Garrett violated the constitutional prohibition on judicial comments on the evidence by asking clarifying questions of Dr. Quigley.

(4) Concluding that Mr. Long was prejudiced by the clarifying questions Judge Garrett asked of Dr. Quigley.

(5) Making the following Findings of Fact, CP 568-69, regarding Judge Garrett's questioning of Dr. Quigley:

(a) Finding of Fact 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.”

(b) The highlighted portion of Finding of Fact 1.20: “Dr. Quigley followed other PeaceHealth witnesses and *the trial court’s questions vouched for Dr. Quigley*, the defendant[’]s retained expert witness.”

(c) Finding of Fact 1.21: “In addition to vouching for Dr. Quigley, the trial court[’]s questions vouched for other PeaceHealth witnesses.”

(d) Finding of Fact 1.22 “The trial court’s questions addressed a significant issue in Plaintiffs’ case, the amount of blood found on the floor.”

(e) Finding of Fact 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.

(f) Finding of Fact 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.”

(g) Finding of Fact 1.25: “The trial court conveyed its opinion to the jury about the credibility of those PeaceHealth witnesses.”

(h) Finding of Fact 1.26 that states: “The questions and comments in paragraph 1.18 above were improper comments on the evidence by the trial court.”

(i) The highlighted portion of the second (incorrectly-

numbered) Finding of Fact 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.”

(j) The incorrectly-numbered second Finding of Fact 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.”

(k) The incorrectly-numbered second Finding of Fact 1.25: “The questions and comments between the trial court and defense expert Dr. Quigley created a risk of prejudice and potential for Plaintiffs’ [sic] to be prevented from having a fair trial.”

(l) The incorrectly-numbered second Finding of Fact 1.26: “The jury’s verdict demonstrates that the trial court’s comments were prejudicial, thereby preventing Plaintiffs from having a fair trial.”<sup>1</sup>

### III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(1) Did Judge Elich err as a matter of law in granting a new trial where none of Judge Garrett’s complained-of remarks constituted an improper comment on the evidence or resulted in prejudice? (Assignments of Error No. 1-5).

(2) Did Judge Elich err in concluding that Judge Garrett com-

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<sup>1</sup> In an abundance of caution, and even though Judge Elich did not grant a new trial on that basis, PeaceHealth also assigns error to Finding of Fact 1.16, CP 567, in which Judge Elich found, as to an alleged comment during Nurse Hobson’s cross-examination, that: “The trial courts’ [sic] 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.” That finding is inconsistent with Finding of Fact 1.17, in which he found that “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 [sic] of Exhibit 69 or the line of testimony surrounding it.”

mented on the evidence when the record demonstrates that she did not (a) assume the existence of any disputed fact; (b) use words or phrasing that allowed the jury to infer that she personally believed an expert's testimony; or (c) communicate her opinion about the credibility, weight, or sufficiency of any evidence? (Assignments of Error Nos. 1-6).

(3) Did Judge Elich err in concluding that Mr. Long suffered prejudice as a result of Judge Garrett's clarifying questions of Dr. Quigley where the record demonstrates that the challenged remarks had no possible impact on the outcome of the trial? (Assignments of Error Nos. 1-5).

(4) Did Judge Elich err in entering factual findings not supported by the record regarding (a) the significance of the quantity of blood found on the floor to Mr. Long's case; and (b) the meaning and effect of Judge Garrett's words and phrasing? (Assignments of Error Nos. 1-5).

#### IV. STATEMENT OF THE CASE

##### A. Factual Background.

Donald Rodenbeck consulted Dr. Connie Zastrow, a vascular surgeon at PeaceHealth, for treatment of significant vascular disease limiting his ability to walk more than a block before experiencing pain in his legs. RP 1238, 1241. Dr. Zastrow found that he had significant atherosclerotic disease, narrowing his aorta and plugging up his iliac and femoral arteries. RP 1244-45. Of the treatment options Dr. Zastrow presented,

Mr. Rodenbeck chose aortobifemoral bypass surgery. RP 1242, 1245-49.

1. Mr. Rodenbeck's surgery.

The surgery, which Dr. Zastrow performed on August 10, 2012, was lengthy and technically challenging, with significant, albeit not unexpected, blood loss. RP 1247, 1263-64, 1268. Scar tissue from his previous abdominal surgeries complicated the surgery, resulting in a bowel tear that a general surgeon was called in to repair. RP 1250, 1259-61. The urologist, who placed stents in the ureters to protect them during the bypass surgery, discovered a bladder tumor, but deferred treatment of it because Mr. Rodenbeck could not give consent and was on blood thinners. RP 1255-59. Dr. Zastrow successfully completed the bypass, and, after Mr. Rodenbeck recovered from anesthesia, transferred him to the Intensive Care Unit (ICU) for monitoring. RP 1264. Because the risk for bleeding is the highest in the first twenty-four hours after any vascular surgery, Dr. Zastrow ordered a hemogram every six hours to test his blood count. RP 1265-66. Mr. Rodenbeck's hemoglobin, which had been 13 on admission, was 10 immediately after the surgery. RP 295, 297.

2. Mr. Rodenbeck's care in the ICU.

Mr. Rodenbeck arrived in the ICU the night of August 10 with a central IV catheter in his neck, a radial arterial line in his wrist to continuously monitor blood pressure, and an epidural catheter for pain medica-

tion. RP 1264, 1273. When he arrived in the ICU, he was completely awake, alert and oriented. RP 916. His hemoglobin was 7.6 at 9:55 p.m.<sup>2</sup> and, after he was given a transfusion of one unit of packed red blood cells at 11:28 p.m., rose to 8.9. RP 298.

Nurse Arlene Dimalla cared for Mr. Rodenbeck in the ICU on August 11 and 12. RP 909-10, 922. When she first woke him on August 11, she found him oriented to name and place, but a little disoriented as to time, which was not unusual given that he was waking up after a major surgery and was on a lot of pain medication. RP 914-15. Thereafter, each time she assessed him, she found him fully alert and oriented, without cognitive dysfunction. *See* RP 916, 927, 929-30. Throughout the time she cared for him, Mr. Rodenbeck had stable vital signs, except for an increased heart rate with activity. RP 922-24, 927.

At 3:15 a.m. on August 12, Mr. Rodenbeck's hemoglobin was low at 6.8, but, after another transfusion of packed red blood cells rose to 8.2, which Dr. Zastrow thought was a normal response.<sup>3</sup> RP 301, 313, 927-28,

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<sup>2</sup> Dr. Zastrow attributed the drop in hemoglobin to 7.6 to expectable post-surgical oozing of blood, the effects of heparin, and dilution of blood from all of the fluids being administered post-operatively. RP 1266-67. She did not think the drop was due to active bleeding as Mr. Rodenbeck's blood pressures, urine output, and central venous pressures were not dropping, his heart rate was not increasing, and his hemoglobin rose to 8.9 after transfusion. RP 298, 1268-69. His hemoglobin of 8.8 at 11:00 a.m. and 8.3 at 5:15 p.m. on August 11 indicated a stable trend and a low likelihood of active bleeding. RP 1271-72.

<sup>3</sup> Again, given the stability of Mr. Rodenbeck's vital signs and the amount of fluids being administered to him, Dr. Zastrow did not believe that the hemoglobin of 6.8 indicated

1220, 1273-74. Mid-morning on August 12, Nurse Dimalla took Mr. Rodenbeck on a walk around the nurse's station. RP 923. He had a lot of pain when he got up and his heart rate increased to as high as, but did not remain sustained at, the 140s, and returned to normal when he got back in bed. RP 922-24. Dr. Zastrow was in the ICU at the time and Nurse Dimalla updated her on the heart rate increase with ambulation.<sup>4</sup> RP 924.

Overall, Dr. Zastrow thought Mr. Rodenbeck did reasonably well in the entire post-op period. RP 1264. About 10:40 a.m. on August 12, based on her assessment and her review of Mr. Rodenbeck's vital signs and blood work, Dr. Zastrow felt that his condition was stable and approved transferring him from the ICU to a regular hospital floor, with vital signs to be taken every four hours. RP 932-33; 1274-76, 1329.

About 5:00 p.m. on August 12, Nurse Dimalla phoned Karen Starkovich, the third (surgical) floor nurse who would be taking over Mr. Rodenbeck's care, to discuss his condition. RP 936-38; *see also* RP 1006-07, 1034. About 6:25 p.m., Nurse Dimalla took Mr. Rodenbeck by wheel-

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that he was actively bleeding. RP 1273-77, 1280.

<sup>4</sup> According to Dr. Zastrow, that Mr. Rodenbeck's heart rate increased with ambulation was a fairly normal post-surgical response. RP 1277-78. Dr. Zastrow did not find the fact that, when the physical therapist came at 1:00 p.m. on August 12 and sat Mr. Rodenbeck up, Mr. Rodenbeck's heart rate went up into the 140s, and peaked at 149, and the therapist elected not to get him out of bed, concerning or alarming in the absence of other clinical changes, because Mr. Rodenbeck's heart rate went right back down when he was returned to bed. RP 1283-84. Had she been told of that tachycardic episode it would not have changed anything she would have done for him. RP 1284, 1373, 1375.

chair to the third floor and, because Nurse Starkovich was not immediately available, transferred his care to the float nurse after they settled him in, checked his epidural pump, and reviewed his epidural medications and rate. RP 938-40, 1009, 1733-34. By the time Nurse Dimalla left, third floor nursing staff was checking his vital signs. CP 939.

3. Mr. Rodenbeck's care on the third floor.

Sometime between 6:30 and 7:00 p.m., Nurse Starkovich performed an assessment of Mr. Rodenbeck's condition and determined that he understood his situation, was fully cognizant, and was able to use his call light. RP 1012-13, 1021, 1734-35. In addition to other visits to his room that evening, Nurse Starkovich saw Mr. Rodenbeck around 9:40 p.m. to give him his medications, and at 10:00 p.m. to change his three dressings, which took about twenty minutes. RP 1036, 1735-38, 1740-41. Nurse Starkovich did not have any concerns about Mr. Rodenbeck's cognitive status. RP 1007, 1038, 1730. When not sleeping, he was alert, conversant, and joking, but did not want to get out of bed, wanting instead to wait for physical therapy to see him in the morning. RP 1007.

Certified Nursing Assistant (CNA) Nadia Rummyantseva also saw Mr. Rodenbeck to take his vital signs and do safety checks, RP 1031, 1735, 2430, 2438, 2441-43, and the ICU stat nurse, Jackson Nung, RN, came to assess Mr. Rodenbeck to make sure he was stable and not in need

of transfer back to the ICU, RP 1735, 1739-40, 1807-08, 1810-12.

Because technically all patients on the third surgical floor are fall risks, Nurse Starkovich goes over with every one of them how the call light works, and reminds them that they are a fall risk and so are not supposed to get up without assistance. RP 1021-23. CNA Rummyantseva also showed Mr. Rodenbeck how to use the call light and instructed him to use it to get help. RP 2432-33, 2435-36, 2447.<sup>5</sup>

CNA Rummyantseva's shift ended at 11:30 p.m., and she passed down care to CNA Kaitlyn Ekema, who came on to relieve her at 11:00 p.m. RP 1593, 2443-44. Nurse Starkovich's shift also ended at 11:30, and so about 11:00 p.m., she began the process of transferring care by giving report to her replacement, Taylor Little, RN. RP 891, 893, 899.

4. Mr. Rodenbeck's cardiac arrest.

CNA Ekema began her shift at 11:00 p.m. by reviewing the records and getting reports on her patients and then visiting each patient to check vital signs. RP 1593, 1598-99. When she entered Mr. Rodenbeck's room, she found him lying face up on the floor and yelled for help. RP 1594. The charge nurse, Sheila Johnson, RP 891, 1600, 2423-24, who happened to be walking by, went in, saw Mr. Rodenbeck on the floor,

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<sup>5</sup> Mr. Rodenbeck knew how to use the call light, as he used it at 8:21 p.m. and 9:18 p.m. RP 1034, 1147-50.

checked his pulse, found none, and began chest compressions. RP 1594, 2421-22. CNA Ekema pressed the code button to summon the code team. RP 1594, 2421. Nurses Starkovich and Little also went into the room and saw Nurse Johnson giving chest compressions as members of the code team began arriving and took over the resuscitation efforts.<sup>6</sup> RP 887-88, 1742-43, 1744, 1814-15. Despite the code team's efforts, Mr. Rodenbeck could not be revived and was pronounced dead. RP 1285. Hospital staff notified Mr. Long, and moved Mr. Rodenbeck's body to the bed and cleaned the floor in preparation for Mr. Long's arrival. *Id.*; RP 292-93.

Hospital personnel also called Dr. Zastrow, who was at home asleep, and notified her that Mr. Rodenbeck had been found on the floor in a pool of blood and that the code team was trying to resuscitate him. RP 1284-85. By the time Dr. Zastrow arrived at the hospital, resuscitation efforts had been stopped, Mr. Rodenbeck's body had been placed back into bed, and the floor had been cleaned. RP 1285. Dr. Zastrow, with Nurse Starkovich's and others' assistance, did a head-to-toe examination of the body to look for any signs of bleeding, laceration, or other injury from a fall, but found no evidence of trauma. RP 1285, 1756-57.

Nurse Johnson thought that Mr. Rodenbeck was dead when she

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<sup>6</sup> Nurse Little did not participate further, as Nurse Starkovich said she would take care of things. RP 896, 898-99.

first saw him on the floor and found no pulse. RP 2422. Dr. Zastrow was told that, when Mr. Rodenbeck was found on the floor, he was pulseless and had no heart rhythm, his IVs, epidural catheter, and Foley catheter had been disconnected, and the stopcock on the central IV catheter in his neck was open, which would explain why there was some blood around his head. RP 1286, 1289; *see also* RP 292. CNA Ekema described seeing, while showing with her hands, a small amount of blood near the right side of Mr. Rodenbeck's head and neck that was "definitely smaller than a piece of paper." RP 1594-95. Nurse Little also saw, indicating with her hands, a "small amount" of blood on the floor near one side of his shoulders and head. RP 888. Nurse Starkovich characterized the blood she saw as a moderately sized pool of blood, light red, mixed with IV fluids, pretty liquid, and not coagulated.<sup>7</sup> RP 1743, 1761, 1782. And, Dr. Zastrow was told by the ER physician who ran the code that there was only a small amount of blood that he did not think was impressive. RP 1286.

5. Mr. Rodenbeck's autopsy findings.

The hospital's house manager contacted the Medical Examiner's office about a potential unwitnessed fall involving Mr. Rodenbeck, raising the concern that he was found on the ground in blood. RP 2455-56, 2458,

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<sup>7</sup> As Mr. Long's counsel elicited in his cross-examination of Dr. Quigley, Nurse Starkovich had quantified the amount of blood as 50 to 100 cc. RP 1658.

2459. The medical examiner, Dr. Gary Goldfogel, spoke with the house manager, the nurse caring for the patient at the time, and one other person, and requested the medical records. RP 2461, 2468. Convinced that bleeding from the central catheter, not trauma, provided the best explanation for the amount of blood on the ground, which was not excessive, he declined jurisdiction over the case. RP 2459-60; *see also* RP 2455, 2469, 2473.

Dr. Zastrow obtained Mr. Long's consent to an autopsy, RP 1289-90, which Dr. Owings conducted and found evidence of severe coronary artery disease and fibrosis, or scarring in the heart, putting Mr. Rodenbeck at risk for sudden dysrhythmia, RP 1944-45, but no evidence of external trauma, RP 1947, and only 450 cc of internal bleeding, well within the range Dr. Zastrow would expect given the nature of Mr. Rodenbeck's surgery, RP 1339-40. Given no evidence of injury from a fall or other competing causes, Dr. Owings concluded that dysrhythmia was the probable cause of death. RP 1946-49; *see also* RP 1336-40.

B. Procedural Background.

On June 30, 2014, Mr. Long, individually and as personal representative of Mr. Rodenbeck's estate sued PeaceHealth, claiming that it failed to follow the appropriate standard of care and thereby caused Mr. Rodenbeck's death. CP 4-9. PeaceHealth denied Mr. Long's claims. CP 21-25. The case was tried to a jury before Whatcom County Superior

Court Judge Deborra Garrett from July 7 to July 24, 2015. *See* CP 26-46.

1. Mr. Long's theory of the case and expert testimony.

At trial, Mr. Long presented expert testimony on standard of care and causation from physician/attorney Kenneth Coleman, M.D.,<sup>8</sup> and on nursing standard of care from RNs Deanna Johnson<sup>9</sup> and Gayle Nash.<sup>10</sup> As described in the jury instructions, Mr. Long's theory of negligence was that PeaceHealth, through its employees, was negligent in (1) failing to follow its policies and procedures; (2) transferring Mr. Rodenbeck from the ICU to the third surgical floor, (3) failing to properly assess and monitor his condition after transfer to the third floor, and (4) failing to communicate pertinent medical information between caregivers. CP 60. Mr. Long's theory of causation was that Mr. Rodenbeck bled to death on the floor after getting out of bed, fainting, and disconnecting his central IV catheter. RP 292, 305, 307, 309, 348.

Both Dr. Coleman and Mr. Long's nursing experts opined that Mr. Rodenbeck was not hemodynamically stable on August 12, RP 302-03, 446-47, 640, and criticized the third floor nursing staff for failing to notify

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<sup>8</sup> RP 279. Dr. Coleman has practiced as a family practice and emergency room physician and as a hospitalist, RP 279, but has not cared for a post-operative patient like Mr. Rodenbeck during the first 72 hours after surgery, RP 336-37.

<sup>9</sup> Nurse Johnson currently works in a same-day outpatient surgery center, and has not worked as an ICU or medical-surgical nurse since 2003. RP 489-92, 496.

<sup>10</sup> Nurse Nash has not worked as a full-time staff nurse or handled complex surgery patients since 1988. RP 716-19.

Dr. Zastrow of the 3:15 p.m. tachycardic event Mr. Rodenbeck had that day when physical therapy tried to get him out of bed. RP 317-18, 398-99, 441. Dr. Coleman further opined that Dr. Zastrow should not have waited 24 hours after the second transfusion to recheck Mr. Rodenbeck's hemoglobin, and that she had a duty to rule out ongoing internal hemorrhage that day, but failed to do so. RP 312, 317-19. Mr. Long's nursing experts further opined that both ICU and third floor nursing staff failed to comply with applicable nursing standards of care, various hospital policies and procedures, and/or Joint Commission standards with regard to such things as assessments and reassessments, fall risk screening and precautions, hourly rounding, use of bed alarms, and safe handoffs when transferring Mr. Rodenbeck's care between units or between shifts on the third floor. RP 379-92, 398-99, 405-06, 408-12, 422-25, 434-35, 441-42, 448, 456-57, 581-82, 626-31, 640-44, 646-68, 714.

Dr. Coleman opined that Dr. Zastrow's and hospital staff's failure to comply with the appropriate standard of care proximately caused Mr. Rodenbeck's death, based on his belief that further investigation of Mr. Rodenbeck's hemodynamic status would have revealed continued internal bleeding which would have been treated. RP 319-21. He disagreed with the autopsy conclusion that Mr. Rodenbeck died of a fatal arrhythmia, RP 305, insisting instead that Mr. Rodenbeck bled to death externally, after

getting out of bed, fainting, falling to the floor, and disconnecting his central IV line. RP 292, 305, 307, 309, 348. It was important to Dr. Coleman's opinions that Mr. Rodenbeck was found in a pool of blood as, in his view, Mr. Rodenbeck's heart had to be beating for blood to come out of his open central IV line. RP 289, 291, 348, 350. According to Dr. Coleman, a pool of blood from the central IV line could only have formed if Mr. Rodenbeck was alive when he fell to the floor. RP 289, 291, 305.

The fact that Mr. Rodenbeck was found in a pool of blood was important to Dr. Coleman's opinions, CP 292, but the size of the pool of blood was not. RP 348-49, 357-58. Dr. Coleman did not think it important to determine the amount of blood on the floor, RP 348, and specifically stated that his opinion as to the cause of death did not depend on the size of the pool of blood. RP 357-58. According to Dr. Coleman, Dr. Zastrow did not order sufficient blood tests, so "we don't know how dilute his blood was at the time he went down" and as Mr. Rodenbeck was already "significantly anemic," it "really wouldn't take very much" external blood loss "for him to have a cardiac arrest." RP 349.

2. PeaceHealth's theory of the case and expert testimony.

PeaceHealth's theory was that Dr. Zastrow reasonably and appropriately monitored Mr. Rodenbeck's recovery, that nursing personnel provided appropriate and attentive postoperative care, and that Mr.

Rodenbeck died not from exsanguination after fainting, falling to the floor and disconnecting his central IV, but died unexpectedly from a fatal heart dysrhythmia. *See, e.g.*, RP 2236-37, 2257-60; RP 2359-90.

PeaceHealth presented expert testimony on standard of care from Dr. Terence Quigley,<sup>11</sup> and RNs Dawn Padley<sup>12</sup> and Deborah Hobson,<sup>13</sup> who disagreed with Mr. Long's experts' conclusions that Mr. Rodenbeck was hemodynamically unstable, RP 1125-28, 1612, or that the standard of care required hospital staff to notify Dr. Zastrow of the 3:15 p.m. tachycardic event that occurred when physical therapy tried to get Mr. Rodenbeck out of bed on August 12, RP 1117-19, 1486-87, 1628-29.

Nurses Hobson and Padley testified that the nurses who cared for Mr. Rodenbeck postoperatively complied with the applicable standards of care, RP 1111, 1114-16, 1122, 1132-33, 1155-56, 1484-85, 1859, and disagreed with Mr. Long's nursing experts' various criticisms of the nursing care, such as assessments and reassessments, fall risk screening and precautions, hourly rounding, use of bed alarms, and safe handoffs, RP 1121-24, 1131-33, 1137, 1144, 1151-52, 1155-60, 1486-91, 1495,

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<sup>11</sup> Dr. Quigley is a practicing vascular surgeon and the Chief of Surgery at Northwest Hospital. RP 1605.

<sup>12</sup> Nurse Padley had worked as a post-surgical unit charge nurse doing bedside nursing on a daily basis at Hoag Memorial Hospital in California for 17 to 18 years prior to her being promoted to department director in March 2014. RP 1099-1101.

<sup>13</sup> Nurse Hobson is a surgical ICU nurse at Johns Hopkins Hospital where she has worked for the past 35 years. RP 1482.

1502-04, 1534-35, 1540, 1544. Dr. Quigley testified that Dr. Zastrow's preoperative workup and performance of the surgery was "excellent," RP 1609, disagreed with Dr. Coleman's opinions regarding Mr. Rodenbeck's hemodynamic instability and the timing of transferring him from the ICU, RP 1612, 1622-24, 1631-32, and opined that Mr. Rodenbeck's post-operative monitoring was "totally appropriate," RP 1633.

As for causation, PeaceHealth presented expert testimony not only from Dr. Zastrow and Dr. Goldfogel (by deposition), but also from Dr. Quigley, and Dr. Matthew Lacy, a forensic pathologist and former practicing internal medicine physician, RP 1932-35. Both Dr. Zastrow and Dr. Quigley disagreed with Dr. Coleman's claims that Mr. Rodenbeck had ongoing internal bleeding rendering him hemodynamically unstable. According to Dr. Zastrow, by the morning of August 12, Mr. Rodenbeck had a significant amount of excess IV fluid in his system and diluting his blood, but had consistent and stable vital signs with no evidence of ongoing internal bleeding, and his condition was normal for a patient recovering from vascular surgery. RP 1273-77. According to Dr. Quigley, Mr. Rodenbeck's hematocrits and vital signs gave no clues of active bleeding, nor did the autopsy reveal any evidence of hemorrhage. RP 1622-24. And, as both Dr. Zastrow and Dr. Quigley explained, the 450 cc of blood found in Mr. Rodenbeck's retroperitoneal space at autopsy

was well within the range one would expect after the surgery that Mr. Rodenbeck had. RP 1339-41, 1625-26.

Drs. Zastrow, Quigley, Lacy, and Goldfogel all disagreed with Dr. Coleman's theory that Mr. Rodenbeck died from external blood loss. RP 1345, 1635-36, 1936-38, 2470-71. Based on the eyewitness accounts they had as to the amount of blood on the floor when Mr. Rodenbeck was found, they all opined that the amount of blood was too small for external bleeding to have been the cause of his death.<sup>14</sup> RP 1345-46, 1635-36, 1653, 1656, 1936-38, 2470-71. As Dr. Goldfogel put it, "it would take a lot more blood" than a pool extending "for a few inches around the patient's head" to be "consistent with exsanguination as the cause of death."<sup>15</sup> RP 2470-71. And, as Dr. Lacy explained, death from external bleeding generally involves a loss of thirty to fifty percent of a person's total blood volume, which for a man Mr. Rodenbeck's size would be roughly two liters of blood, significantly more than the 50 to 100 ml of blood Nurse Starkovich estimated, or the 100 to 200 ml of blood that would make a pool of blood the size that other witnesses described having seen using hand gestures. RP 1937-40; *see also* RP 888, 1594-95.

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<sup>14</sup> Both Dr. Quigley and Dr. Goldfogel testified that it usually looks like there is more blood on the floor than there actually is. RP 1651, 2460, 2470.

<sup>15</sup> Dr. Goldfogel testified that after speaking to hospital personnel, he "was convinced" that bleeding from the central catheter provided the best explanation for the amount of blood found on the floor. RP 2459-60.

Drs. Quigley and Lacy, consistent with Dr. Owings' autopsy conclusion, RP 1946-47, opined that Mr. Rodenbeck died from a cardiac dysrhythmia. RP 1646-47, 1666, 1940-41, 1949. They disagreed with Dr. Coleman that the existence of the pool of blood meant Mr. Rodenbeck was alive and his heart beating after he fell to the floor. As Dr. Lacy noted, "people bleed after death due to gravity," RP 1961, and the amount of blood the witnesses described "could have oozed out" from the open central catheter "even after his death, I don't think it plays any substantial role," RP 1941. As Dr. Quigley noted, even if the heart is not pumping, some blood will leak out of the central line. CP 1635, 1656, 1665.

3. The jury's verdict.

Having heard the testimony of more than twenty witnesses over ten trial days, *see* CP 26-46, the jury, on July 24, 2014, returned a special verdict in favor of PeaceHealth, answering "Yes" to the question whether PeaceHealth was negligent, but "No" to the question whether such negligence was a proximate cause of Mr. Rodenbeck's death. CP 46, 71-73.

4. Mr. Long's post-trial motions.

Mr. Long filed motions for judgment as a matter of law<sup>16</sup> and for a new trial. In his motion for new trial, Mr. Long alleged "repeated

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<sup>16</sup> In his judgment as a matter of law motion, he claimed that there was undisputed testimony from multiple experts admitting that blood loss contributed to the death, requiring a finding that PeaceHealth's negligence was a proximate cause of the death. CP 74-88.

comments on the evidence,” but cited only an excerpt in which he tried to cross-examine Nurse Hobson about Exhibit 69, an article she had written about medication reconciliation.<sup>17</sup> CP 148, 152, 184-89, *see also* CP 262. In that excerpt, the trial court asked about the relevance of the exhibit and whether there was a concern in the case about medication given to Mr. Rodenbeck, noting that the article “seem[s] to be about medication.” CP 187-88. Ex. 69 was not admitted into evidence. CP 2258.

PeaceHealth responded to the “comment on the evidence” allegation, pointing out that what the trial court said about Ex. 69 did not undermine the credibility of any party’s testimony or constitute a comment on the evidence, and was not prejudicial. CP 262-63.

In his reply on motion for new trial, Mr. Long argued for the first time that the trial court had also commented on the evidence when, after Dr. Quigley’s direct examination, the court asked him about his sources of information regarding the amount of blood on the floor:

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.

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<sup>17</sup> As additional grounds for a new trial, Mr. Long alleged errors in jury selection and instructions, exclusion of rebuttal evidence, and admission of expert testimony. CP 148-56. He also claimed that there was no substantial evidence supporting the jury’s verdict and that the trial court erred in denying his motion for a directed verdict. CP 148, 156-57.

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 what'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 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.

CP 295-96; RP 1639-40.

5. Judge Garrett's rulings on Mr. Long's post-trial motions.

At the hearing on his post-trial motions, Mr. Long added yet another claim that Judge Garrett had commented on the evidence, when he asserted for the first time that, when she ruled on his counsel's objection to Dr. Quigley's reference to "guessing," and stated that she thought "the witness was using vernacular," she commented on the evidence. 8/21/15 RP 7-8. The context of Judge Garrett's remark was as follows:

Q. [By Mr. Fox] 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, an otherwise normal person could lose half their blood volume and survive that. Half your blood volumes would be a tremendous amount of bleeding. In addition to that this is an IV so you don't just have blood, you have IV fluids that are mixed with it probably on a 50-50 basis so half of what you see is just IV fluid, I'm guessing but --

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 overruled [sic]. I think the witness was using vernacular as opposed to speculation.

RP 1635-36.<sup>18</sup> Judge Garrett responded to Mr. Long's assertion that that was somehow a comment on the evidence, stating:

In my view he was repeating testimony he had already given, and when he said he would be guessing it was as to something that wasn't important, which is why I said what I said. I didn't intend it as a comment on the evidence. I didn't think there was a comment on the evidence. I'm not going to grant a new trial on that basis.

8/21/15 RP 8.

Mr. Long's counsel asked Judge Garrett to recuse herself as to the

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<sup>18</sup> Although Mr. Long had not referenced that excerpt from Dr. Quigley's trial testimony in his motion for new trial, *see* CP 147-57, he did reference it in his reply, but then only in support of a claim that a new trial should be granted because of admission of speculative expert testimony, not as an alleged comment on the evidence. CP 293-94.

allegations of comments on the evidence. *Id.* at 7-8. Judge Garrett indicated that the allegations “surprised” her, observed that the alleged comments “don’t sound like comments on the evidence to me,” and stated that she did not “recall having any opinion to comment on, much less commenting on the evidence.” *Id.* at 7. Judge Garrett denied Mr. Long’s motions for judgment as a matter of law and for a new trial, *id.* at 14; CP 299-300, 301-02, but, at Mr. Long’s counsel’s insistence, decided to refer the claimed incidents of comments on the evidence to the presiding judge “based on existing briefing only,” *id.* at 15; CP 298, 302. When PeaceHealth’s counsel questioned Judge Garrett’s decision to recuse on the issue of comments on the evidence, Judge Garrett stated that she had “made clear what [her] decision would be,” acknowledged that recusal was not necessary, but decided that, given Mr. Long’s “very explicit objection and statements in support of that objection, a better course is to refer the issue to another judge.” 8/21/15 RP 14-16.

6. Hearing before Judge Elich on comments on the evidence.

Whatcom County District Court Judge Matthew Elich, serving as a pro tem judge in superior court, heard argument on the allegations of comments on the evidence on September 9, 2015. CP 303. Mr. Long argued that, when Judge Garrett overruled his objection to Dr. Quigley’s reference to guessing, her “vernacular” statement told the jury that his

testimony had “proper foundation.” 9/9/15 RP 16. Next, he argued that Judge Garrett vouched for Dr. Quigley and established the foundation for his opinions by asking him questions and then finishing “not by saying thank you, but okay,” thereby telling “the witness that she is satisfied with his opinion now.” *Id.* at 22-23. Mr. Long’s counsel also complained that Judge Garrett’s statements regarding Exhibit 69 were “the tip of the iceberg of what I was facing repeatedly during this trial,” with the judge interrupting him and “trying [his] case.” *Id.* at 39-42. Mr. Long also offered a detailed review of his perspective on the case to provide context with respect to the element of proximate cause. *Id.* at 26-63.

In response, PeaceHealth also tried to place the alleged comments on the evidence in context for Judge Elich. *See id.* at 65-70. As for Judge Garrett’s ruling on Mr. Long’s objection to Dr. Quigley’s reference to “guessing”, PeaceHealth argued that Judge Garrett was merely explaining her ruling when she stated that she thought Dr. Quigley was just using “vernacular,” and that it was perfectly appropriate under the case law for her to do so. *Id.* at 64-65, 71. As to Judge Garrett’s questioning Dr. Quigley about the foundation for his opinions concerning the amount of blood on the floor, PeaceHealth argued that Judge Garrett was second guessing herself about Mr. Long’s earlier objection and “exploring every conceivable aspect of his objection” by asking the clarifying foundational

questions she asked. *Id.* at 65, 71-72. PeaceHealth also noted that the questioning benefitted the plaintiff because it established that Dr. Quigley did not have any foundation for his opinion about the amount of blood other than from the deposition testimony of witnesses who saw the blood, *id.* at 65, 72, and that Judge Garrett, with her questions, was not saying she believed Dr. Quigley, thought he was really credible, or thought the jury should believe his testimony, *id.* at 68-69. She merely asked a couple of foundational questions. *Id.* at 69.

At the end of the hearing, Judge Elich indicated that he would get a transcript of the day's hearing and invited the parties to submit supplemental briefing, *id.* at 80-83, which they did, *see* CP 326-45, 346-55. Judge Elich indicated that, after reviewing those materials, he would decide whether or not he needed to "review the entire transcript of the three-week trial" to get himself in the same position as Judge Garrett who tried the case. 9/9/15 RP 80-81. As he explained, *id.* at 81:

I think that that might be a critical issue somewhere down the road, because you can't just take comments that were made or allegedly made or questions that were asked and clearly were asked by a judge, pull them out of the record and reach an informed conclusion or determination as to whether or not they were prejudicial to a party. You can't do that. It would be irresponsible I think for me to do that without gaining more knowledge and I appreciate the efforts of both of you to try to put this into context.

7. Judge Elich's order granting motion for a new trial.

Without obtaining or reviewing the transcript of the entire trial, Judge Elich, on November 13, 2015, filed his memorandum decision granting a new trial, CP 572-79, and, on January 12, 2016, entered a supplemental order incorporating the memorandum into findings of fact and conclusions of law.<sup>19</sup> CP 562-71. While he did not grant a new trial based on Judge Garrett's reference to "vernacular" or her questioning of the relevance of Exhibit 69, he found that Judge Garrett "vouched for Dr. Quigley" and conveyed her opinion as to the credibility of Dr. Quigley and other PeaceHealth witnesses by asking questions about Dr. Quigley's sources of information regarding the amount of blood on the floor. CP 568-69. Concluding that Judge Garrett's questions to Dr. Quigley "dealt with an issue that went to the heart of Plaintiffs' case," Judge Elich found they "created a risk of prejudice and potential for Plaintiffs' [sic] to be prevented from a fair trial." CP 569. He also found that the "jury's verdict demonstrates that the trial court's comments were prejudicial." *Id.*

PeaceHealth timely appealed from Judge Elich's grant of a new trial based on Mr. Long's claim that Judge Garrett prejudicially commented on the evidence in her questioning of Dr. Quigley. CP 580.

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<sup>19</sup> The findings provide that the memorandum controls if there is any conflict. CP 585.

## V. STANDARD OF REVIEW

Appellate courts generally review an order granting new trial for abuse of discretion. *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). But, to the extent such an order is predicated on a ruling of law, “no element of discretion is involved” and the deference an appellate court “ordinarily gives a trial court’s granting of a new trial does not apply.” *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 768, 818 P.2d 1337 (1991) (quotations omitted). Where the order is predicated on issues of law, “the appellate court reviews for error of law only.” *Dybdahl v. Grenesco, Inc.*, 42 Wn. App. 486, 489, 713 P.2d 113 (1986). “Whether a trial court’s remark constitutes a prohibited comment on the evidence and, if so, whether prejudice resulted, are questions of law.” *Dybdahl*, 42 Wn. App. at 489.

## VI. ARGUMENT

Const. art. IV, § 16 provides that: “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” “This constitutional provision is violated if a court’s statements indicate to the jury the court’s opinion concerning the truth or falsity of evidence or the court’s lack of confidence in the integrity of a witness,” *Dybdahl*, 42 Wn. App. at 490, or if the jury can infer from the court’s statements “the court’s attitude toward the merits of the case or the court’s

evaluation relative to the disputed issue,” *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). A trial judge violates this constitutional provision by conveying to the jury her personal opinion as to the credibility, weight, or sufficiency of the evidence in the case. *State v. Eisner*, 95 Wn.2d 458, 462, 626 P.2d 10 (1981) (citation omitted).

A. Judge Elich erred as a matter of law in ruling that Judge Garrett’s questions of Dr. Quigley violated the constitutional prohibition on commenting on the evidence or warranted a new trial.

To constitute an impermissible comment on the evidence, “the jury must be able to infer from what the court said or did not say that he [or she] personally believed or disbelieved the testimony in question.” *Egede-Nissen v. Crystal Mt., Inc.*, 93 Wn.2d 127, 139, 606 P.2d 1214 (1980) (quoting *State v. Browder*, 61 Wn.2d 300, 302, 378 P.2d 295 (1963)).

The purpose of Const. art. 4, §16 is to prevent the jury from being influenced by knowledge conveyed to it by the trial judge as to his opinion of the evidence submitted. In keeping with this purpose, we have consistently held that 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 the trial.

*State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).<sup>20</sup> “In determining whether words or actions amount to a comment on the evidence,”

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<sup>20</sup> “The touchstone of error in a trial court’s comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury.” *Lane*, 125 Wn.2d at 838.

appellate courts “look to the facts and circumstances of the case.” *Jacobsen*, 78 Wn.2d at 495. Whether a trial court’s remark constitutes a prohibited comment on the evidence is a question of law. *Dybdahl*, 42 Wn. App. at 489.

Judge Elich’s grant of a new trial is premised upon this exchange after the direct examination of Dr. Quigley, CP 568; RP 1639-40:

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 what’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 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.

Judge Elich found, albeit erroneously, that, with that exchange, Judge

Garrett had asked questions that “assume[d] the existence of disputed facts,” CP 579, “vouched for Dr. Quigley ... [and] other PeaceHealth witnesses,” “either affirmed or established the foundation for Dr. Quigley’s answers,” appeared to “corroborate and endorse the credibility of Dr. Quigley, and potentially those upon whom Dr. Quigley relied,” conveyed “[a] reasonable inference” that she thought “Dr. Quigley’s testimony was credible because ... it was based on eyewitness testimony,” conveyed her opinion as to “the credibility of those PeaceHealth witnesses,” and “conveyed her “personal opinion ... regarding the weight and sufficiency of important evidence.” CP 568-69. He also found, albeit erroneously, that Judge Garrett’s questions “addressed a significant issue in [Mr. Long’s] case,” and that “the amount of blood on the floor” was a “crucial” fact at “the heart” of Mr. Long’s case. *Id.*

Contrary to Judge Elich’s findings, Judge Garrett’s clarifying questions to Dr. Quigley did not assume the existence of any disputed fact, did not allow the jury to infer her personal beliefs as to Dr. Quigley’s credibility, and did not communicate her opinion as to any material issue.

1. Judge Garrett’s questions of Dr. Quigley did not assume the existence of any disputed fact, allow the jury to infer that she personally believed or disbelieved his testimony, or communicate her opinion about the credibility, weight, or sufficiency of any evidence in the case.

Judge’s Elich’s findings of fact as to the clarifying questions Judge

Garrett asked of Dr. Quigley are not supported by the record. First, Dr. Quigley had already testified on direct examination that he relied on the medical records and depositions to form his opinions. RP 1606-07. Turning to the subject of whether the amount of blood on the floor would be sufficient to cause death, PeaceHealth specifically asked for Dr. Quigley's opinion based on "deposition testimony." RP 1635-36. Judge Garrett's questions merely confirmed that Dr. Quigley's source of information for the amount of blood on the floor was deposition testimony from those who had seen the blood, something that was not in dispute.

Second, it was undisputed who saw the blood on the floor. Only CNA Ekema, Nurse Starkovich, the code team, and members of the third floor nursing staff had any opportunity to see the blood. It was undisputed that no one documented the size of the blood pool with photographs, drawings, or diagrams before it was cleaned from the floor. Dr. Zastrow and the experts for both parties could and did rely solely on "eye-witness" accounts to form opinions as to the amount of the blood on the floor. *See* RP 1345-46, 1635-36, 1653, 1936-38, 2470-71. Thus, Dr. Quigley's reference to "eye-witnesses" in response to Judge Garrett's questions was nothing new or a subject of dispute.

Third, Mr. Long's counsel himself repeatedly challenged witnesses concerning their sources and the accuracy of their sources of information

about the amount of blood they believed was on the floor. He did so with Dr. Zastrow, RP 1345-46, 1358-60, 1372, 1451, Dr. Quigley, 1651-53, 1658, and Dr. Lacy, RP 1956-57. All of them made clear that they were relying on eyewitness accounts. RP 1345-46, 1635-36, 1358-60, 1372, 1936-38, 1451, 1956-57; *see also* RP 2470-71 (Dr. Goldfogel). As Mr. Long challenged the accuracy of and variations in the eyewitnesses' accounts of the amount of blood on the floor, Judge Garrett's questioning only confirmed that Dr. Quigley's opinion concerning the cause of death was based on such eyewitness deposition testimony, without commenting upon the credibility of that eyewitness testimony and leaving it to the jury to decide the believability of that testimony.

Fourth, Mr. Long's theory of causation depended on the existence of blood on the floor, not on the amount of that blood. Dr. Coleman testified that his opinion that Mr. Long died from external bleeding did not depend on the size of the blood pool, as Mr. Rodenbeck was already so anemic that even a small amount of external bleeding could cause cardiac arrest RP 343-49, 357-58. Thus, the fact that Dr. Quigley relied on eyewitness depositions, just like every other expert, including Dr. Coleman, was nothing more than an undisputed peripheral issue.

The Supreme Court's "oft repeated interpretation of Art. 4, § 16, of the state constitution is that the assumption of admitted facts is not a

comment on the evidence.” *Browder*, 61 Wn.2d at 302; *Schneidmiller v. Tacoma Railway & Power Co.*, 130 Wash. 415, 417-18, 227 P. 853 (1924) (no violation of constitutional prohibition where judge’s questions elicited facts already in the record); *cf. Eisner*, 95 Wn.2d at 463 (judge’s questions elicited totally new evidence sufficient to support additional charges).

Fifth, Judge Elich did not identify anything in Judge Garrett’s words that can reasonably be described as conveying her personal feelings about Dr. Quigley’s credibility or expressing a preference for eyewitness testimony. Instead, her words indicate a mere reference to his opinion as to the amount of blood and a request for clarification of his source of information, given her observation to Dr. Quigley that “obviously you weren’t there so you’re relying on information from other sources.” RP at 1639. Contrary to Judge Elich’s findings, Judge Garrett’s words and phrasing neither suggested, nor had the potential to suggest, her personal opinion as to Dr. Quigley’s credibility or what she believed about the foundation for his opinions.

Where a judge’s statement “adverting to or assum[ing] an admitted or undisputed peripheral fact” does not reveal the court’s attitude toward the merits of the case or allow an inference as to the court’s evaluation of a disputed issue, it “does not constitute constitutionally inhibited comment.” *State v. Louie*, 68 Wn.2d 304, 313-14, 413 P.2d 7 (1966). “The

court, of course, may question witnesses,” as long as its questions are not “phrased in a manner indicative of the court’s attitude towards the merits of the cause.” *Egede-Nissen*, 93 Wn.2d at 140. Any ambiguous, and therefore meaningless, statement by the court, such as Judge Garrett’s response of “okay,” cannot constitute a comment in violation of the constitutional prohibition. *State v. Hansen*, 46 Wn. App. 292, 301, 730 P.2d 706 (1986); 9/9/15 RP 22-23.

Sixth, Judge Elich did not identify any word or phrase to support his findings, CP 568-69, that Judge Garrett “vouched” for other PeaceHealth witnesses or conveyed her personal opinion as to the “weight and sufficiency of important evidence introduced by the Defendant at trial.” Nothing in Judge Garrett’s clarifying questions to Dr. Quigley communicated or allowed an inference that she preferred eyewitness statements to chart notes, or that she had any personal attitude toward the credibility of any witness or the weight or sufficiency of any evidence.

Judge Garrett merely clarified Dr. Quigley’s previous testimony, just as Mr. Long’s counsel attempted to clarify the testimony of every expert who attempted to base opinions on the cause of death on the size of the pool of blood in which Mr. Rodenbeck was found. Judge Garrett’s clarifying questions were not improper comments on the evidence. “That the court has wide discretionary powers in the trial of a cause and is not

prohibited from questioning a witness, is beyond controversy.” *State v. Brown*, 31 Wn.2d 475, 486, 197 P.2d 590 (1948) (quoting *Dennis v. McArthur*, 23 Wn.2d 33, 38, 158 P.2d 644 (1945)). “[A]sking clarifying questions ... is also within the sound discretion of the court.” *Brown*, 31 Wn.2d at 487. Judge Garrett did not violate the constitutional prohibition on judicial comments on the evidence and Judge Elich erred in concluding otherwise and granting a new trial on that basis.

2. Mr. Long’s and Judge Elich’s reliance on *Risley v. Moberg* is misplaced.

In his memorandum decision granting a new trial, Judge Elich relied upon *Risley v. Moberg*, 69 Wn.2d 560, 419 P.2d 151 (1966), CP 579, which Mr. Long had cited and relied upon in his briefing, CP 295-96. In *Risley*, a personal injury action arising from a car accident, the plaintiff called only three witnesses at trial: herself, the defendant, and her treating orthopedist. *Risley*, 69 Wn.2d at 565. At the close of the plaintiff’s case, the court asked the orthopedist a series of questions assuming “as a fact that the plaintiff had suffered injuries as a result of the collision,” *id.* at 561-62, even though the defense theory of the case was that the plaintiff’s condition “was the result of a degenerative disease of the cervical spine ... not related to the accident trauma,” *id.* at 562. After the jury returned a verdict for the plaintiff, the defendant moved for a new trial. *Id.*

Although the trial judge acknowledged that the testimony he elicited from the doctor “established an essential element of plaintiff’s case” and “substantially affected” the jury’s conclusions, the trial judge denied the motion for new trial. *Id.* at 563.

On appeal, the Supreme Court reversed, observing that “the judge’s questions appear of great magnitude and importance” “in the context of this relatively short trial.” *Id.* at 565. By assuming “the crux” of the plaintiff’s case, the trial judge “appeared personally to corroborate and seemingly to indorse the credibility of [the plaintiff] and her doctor.” *Id.* Because, as the trial “judge frankly admitted,” “this had a material and substantial influence upon the jury,” the Supreme Court concluded “the effect was prejudicial” to the defendant, and granted a new trial. *Id.*

Here, Judge Garrett’s questions of Dr. Quigley did not assume anything other than the undisputed fact that “obviously [he] wasn’t there so [he’s] relying on information from other sources on what the amount of blood was.” RP 1639-40. Her questions certainly did not assume “the crux” of PeaceHealth’s case. Nor did they give any appearance that she was personally corroborating or endorsing anyone’s credibility. Nor were the questions of “great magnitude and importance,” as even Judge Elich acknowledged “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.” CP 579.

The circumstances in this case are much more like those of *State v. Hansen*, 46 Wn. App. at 301, than *Risley*. In *Hansen*, a psychologist testified that the defendant’s use of cocaine immediately before and during an abduction and sexual assault prevented him from forming the specific intent required to prove kidnapping and rape charges. *Id.* at 293, 295. On cross-examination, the psychologist was asked to explain the disparity between the amount of the defendant’s daily cocaine use he described in his report and the amount he described at trial. *Id.* at 295. He responded that the precise figure didn’t matter because he didn’t think “two, three, four grams” made “much difference in terms of the effect.” *Id.* The trial judge then asked him to answer either “yes” or “no” to the “simple question” of whether “it amounted to two grams a day.” *Id.* When he said “no,” the judge stated: “He’s changed.” *Id.* The appellate court held that, because the judge’s comment went to the quantity of cocaine use upon which the expert based his report – variations in which were irrelevant to his evaluation – the issue was “peripheral and unimportant” and the remark was not a prohibited comment on the evidence.” *Id.* at 301.

Unlike in *Risley*, where the trial judge’s questions assumed the disputed issue of whether the plaintiff’s injury resulted from the collision, here Judge Garrett merely referred to Dr. Quigley’s previously stated

opinion and asked him to clarify his prior undisputed identification of the sources of his information. Just as the quantity of cocaine listed in the psychologist's report in *Hansen* was not relevant to his expert opinion regarding the effects of the cocaine at trial, the source of Dr. Quigley's information as to the size of the blood pool was peripheral and unimportant to his ultimate opinion that Mr. Rodenbeck did not die from external bleeding. As Mr. Long's counsel himself repeatedly pointed out, Dr. Quigley's, like the other experts', information about the amount of blood was based on the eyewitnesses' descriptions. Accepting all the variations in those descriptions, it was Dr. Quigley's opinion that the amount of blood on the floor was insufficient to cause Mr. Rodenbeck to have died from external bleeding. RP 1635-36; 1639-40. And, Dr. Coleman, who also relied on the eyewitness descriptions, testified that the actual quantity of blood was unimportant. RP 348-49, 357-58.

Judge Garrett's questions did not touch on, much less corroborate any material disputed issue. She did not comment on the evidence.

3. Judge Elich erred in finding that Judge Garrett's questions of Dr. Quigley were prejudicial so as to warrant a new trial.

Even if a trial judge comments on the evidence, which Judge Garrett did not do, if the judge's remark is relevant only to a minor matter with no conceivable impact on the outcome of the trial, there is no

prejudice and a new trial is not necessary. *Blackburn v. Groce*, 46 Wn.2d 529, 536-37, 283 P.2d 115 (1955); *Hansen v. Wightman*, 14 Wn. App. 78, 85, 538 P.2d 1238 (1975) (in view of incidental nature of comment and because of corrective instruction given, court's comments were not prejudicial); *Heitfeld v. Benevolent & Protective Order of Keglers*, 36 Wn.2d 685, 699, 706, 220 P.2d 655 (1950) (placed in proper perspective as a "very small portion" of a three-week trial, court's remarks were not prejudicial). Whether prejudice resulted from a comment on the evidence is a question of law. *Dybdahl*, 42 Wn. App. at 489.

Despite acknowledging that Judge Garrett's questions took less "than a minute or two out of a hotly contested three week trial," CP 579, Judge Elich nonetheless found that they addressed a "crucial," "significant" issue at "the heart of Plaintiff's case," and "created a risk of prejudice and potential for [Mr. Long] to be prevented from a fair trial," and that "[t]he jury's verdict demonstrates that [Judge Garrett's] comments were prejudicial." CP 568-69.

But, the existence of a "risk" or "potential" for prejudice is not the proper test. "The test is, Was the party complaining of the comment prejudiced thereby?" *Blackburn*, 46 Wn.2d at 536. In *Blackburn*, the trial judge repeatedly remarked on counsel's attempt to impeach the plaintiff by demonstrating a discrepancy between an allegation in his complaint

and his testimony at trial regarding the number of inches his car projected onto the highway at the time of a collision. *Id.* at 534-36. The trial judge described the matter as “minor,” encouraged counsel to “be sensible,” and stated that the suit should be tried on the evidence rather than the complaint. *Id.* at 535. Although “the trial judge did, by his comments, let the jury know that he attached little or no importance to the circumstances relied on for impeachment,” the Supreme Court could not “conceive that the difference between eighteen inches and ‘two or three feet’ would have impaired the witness’ credibility with the jury in the slightest degree, had there been no comment.” *Id.* at 537. Because there was no actual prejudice from the judge’s remarks, a new trial was not necessary. *Id.*

In addition to failing to articulate any actual prejudice to Mr. Long, Judge Elich failed to accurately assess the significance of Judge Garrett’s remarks in the context of the trial as a whole. As discussed above, the sources of information upon which Dr. Quigley relied to form his opinions were admitted and undisputed before Judge Garrett asked her clarifying questions. Nothing in Judge Elich’s findings establish that the outcome of this three-week trial was in any way impacted by Judge Garrett’s questions clarifying the sources of his information that spanned less than two minutes of a three-week trial, especially when Mr. Long’s counsel engaged in the same kind of clarification of the sources of information

relied upon by the experts who disagreed with the opinion of his expert, Dr. Coleman, regarding the cause of Mr. Rodenbeck's death.

Mr. Long's failure to object at the time to Judge Garrett's questions of Dr. Quigley suggests that even he did not consider them potentially prejudicial during trial. He did not raise any issue concerning those questions until his reply brief on his motion for new trial. CP 295-96. "The absence of any reaction at the time by ... counsel would seem to suggest the incident was considered inconsequential." *State v. Hansen*, 46 Wn. App. at 301. Even though Mr. Long's "[f]ailure to object denie[d] the trial court an opportunity to mitigate the effect of its conduct on the jury," *Egede-Nissen*, 93 Wn.2d at 141, Judge Garrett instructed the jury, both at the beginning of trial and in final jury instructions, to disregard any statement that it may have perceived as a comment on the evidence. RP 89-90; CP 48. Juries are presumed to follow the court's instructions. *Hizey v. Carpenter*, 119 Wn.2d 251, 271, 830 P.2d 646 (1992); *Dybdahl*, 42 Wn. App. at 491.

Moreover, other experts testified to their consideration of the same eyewitness accounts of the amount of blood on the floor, and Mr. Long's counsel made certain that the jury understood that the experts who were testifying contrary to Dr. Coleman's conclusion that Mr. Rodenbeck died from external bleeding were doing so based on such eyewitness accounts,

no matter how flawed Mr. Long thought they were. *See* RP 1345-56, 1358-60, 1451 (Dr. Zastrow); RP 1651-53, 1658-59 (Dr. Quigley); RP 1956-57 (Lacy); *see also* RP 2470-71 (Dr. Goldfogel). That testimony, whether elicited on direct examination without objection as to foundation by Mr. Long or on cross-examination by Mr. Long’s counsel, establishes that Judge Garrett’s questions of Dr. Quigley did not prejudice Mr. Long, did not deprive him of a fair trial, and had no impact on the outcome of the trial. *Blackburn*, 46 Wn.2d at 537; *State v. Hansen*, 46 Wn. App. at 301.

Judge Elich’s findings of prejudice are entitled to no deference in this case. First, whether prejudice resulted from a comment on the evidence is a question of law. *Dybdahl*, 42 Wn. App. at 489. Second, while it is generally presumed that “[t]he trial judge is in the best position to rule on whether the moving party is entitled to a new trial as a matter of law based on what occurred during litigation,” *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 128-29, 847 P.2d 945 (1993), Judge Elich was not the trial judge in this case. Unlike Judge Garrett, he did not observe the trial proceedings, hear all the evidence, or observe the demeanor of the witnesses, counsel, litigants, or jury as the case unfolded. Nor did Judge Elich have the benefit of the entire trial transcript, having considered only the parties’ briefing, supporting materials, and argument, and having determined “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[d] a thorough, meaningful review of the transcripts.” CP 563-64; 573. Thus, because this Court, having the entire transcript and relevant record before it, is in a better position than Judge Elich to consider all the facts and circumstances in assessing whether Judge Garrett commented on the evidence and, if so, whether prejudice resulted, and because the questions “[w]hether a trial court’s remark constitutes a prohibited comment on the evidence and, if so, whether prejudice resulted, are questions of law,” *Dybdahl*, 42 Wn. App. at 489, Judge Elich’s findings and conclusions are entitled to no deference.

B. Mr. Long’s other allegations of comments on the evidence, if considered on review, do not justify a new trial.

Judge Elich correctly refused to find that Judge Garrett’s remark when ruling on Mr. Long’s objection to Dr. Quigley’s reference to “guessing” and when responding to PeaceHealth’s objection to Mr. Long’s attempted use of Exhibit 69 to impeach Nurse Hobson constituted impermissible comments on the evidence warranting a new trial. Judge Elich’s rulings on those two issues should be affirmed.

That a trial judge may give reasons for ruling upon an objection is well settled in Washington. *Riblet v. Ideal Cement Co.*, 54 Wn.2d 779, 785, 345 P.2d 173 (1959); *State v. Rio*, 38 Wn.2d 446, 452, 230 P.2d 308

(1951). “A trial court, in passing upon objections to testimony, has the right to give its reasons therefore and the same will not be treated as a comment on the evidence.” *State v. Cerny*, 78 Wn.2d 845, 855-56, 480 P.2d 199 (1971) (trial court’s response to objection that it thought “the chain of evidence has been established” not a comment on the evidence).

Comments addressed to counsel rather than the jury, and from which the jury cannot infer that the trial judge believed or disbelieved the testimony being elicited, do not violate the constitution. *Riblet*, 54 Wn.2d at 785 (court’s remarks that “I think the average housewife is an expert on dust. She may answer,” and “It is rather time consuming, but he may put it in the record,” addressed to counsel in ruling on objections were not improper comments on the evidence:); *Rio*, 38 Wn.2d at 452 (not improper for court overruling objection to say to counsel: “I want to hear this brought out without you continually objecting that it is immaterial. I realize to you it is not material but I can’t see it that way, to me it is material and I want to hear it brought out in an orderly manner”); *State v. Knapp*, 14 Wn. App. 101, 113-14, 540 P.2d 898 (1975) (not a comment on evidence where court directed remarks phrased in legal terms solely to counsel while ruling on admissibility and giving reasons for ruling).

In his motion for new trial, CP 152, Mr. Long relied on *State v. Lampshire*, 74 Wn.2d 888, 447 P.2d 727 (1968), to support his claim that

Judge Garrett commented on the evidence while ruling on objections. In *Lampshire*, the defendant, a woman in her early twenties, was charged with five counts of carnal knowledge involving three boys. *Id.* at 889-90. Because no physical evidence was produced at trial, “[t]he question before the jury was solely one of credibility of the witnesses.” *Id.* at 890-91. The trial court allowed wide latitude in the direct examination of the defendant until the prosecutor objected to the materiality of certain testimony. *Id.* at 891-92. The trial judge stated: “Counsel’s objection is well taken. We have been from bowel obstruction to sister Betsy, and I don’t see the materiality, counsel.” *Id.* at 891. The Supreme Court held that “the remark implicitly conveyed to the jury [the judge’s] personal opinion concerning the worth of the defendant’s testimony” and so undermined the defendant’s credibility in a case “where the result hinged upon the jury’s belief of the testimony of the witnesses,” that the defendant was deprived of a fair trial. *Id.* at 892, 894. Thus, the improper comment in *Lampshire* “went far beyond a mere ruling on the evidence,” and involved “an expression of the trial court’s personal opinion of the weight and sufficiency of a whole line of testimony.” *Knapp*, 14 Wn. App. at 114.

1. Judge Garrett’s use of the word “vernacular” in overruling an objection was neither a comment on the evidence nor prejudicial.

While explaining his reasons for believing that Mr. Rodenbeck did

not die as a result of external blood loss, Dr. Quigley testified that the blood on the floor was mixed with IV fluids. When he stated that it was “probably on a 50-50 basis so half of what you see is just IV fluid, I’m guessing but –,” Mr. Long interrupted, objecting to speculation. RP 1635-36. Judge Garrett overruled the objection, explaining that Dr. Quigley was “using vernacular as opposed to speculation.” RP 1636.

Judge Garrett made the statement to explain her ruling, addressed counsel, and did not phrase her explanation in terms suggesting her assessment of the truth value of Dr. Quigley’s testimony. *Knapp*, 14 Wn. App. at 113. To the extent her choice of the word “vernacular” was ambiguous, it cannot be considered an improper comment. *State v. Hansen*, 46 Wn. App. at 301. Whatever the merits of the ruling and remark, because it did not convey Judge Garrett’s personal attitude toward Dr. Quigley’s testimony or credibility, it was not a comment on the evidence in violation of the constitution. *Riblet*, 54 Wn.2d at 785; *Rio*, 38 Wn.2d at 452; *Knapp*, 14 Wn. App. at 113-14. And, given the jury instructions to disregard any perceived comment, RP 89-90, CP 48, which juries are presumed to follow, Mr. Long was not prejudiced. *Hizey*, 119 Wn.2d at 271; *Dybdahl*, 42 Wn. App. at 491. Judge Elich properly denied the motion for a new trial on this ground.

2. Judge Garrett's response to PeaceHealth's objection to Mr. Long's cross-examination of Nurse Hobson as to Exhibit 69 were neither comments on the evidence nor prejudicial.

PeaceHealth called Nurse Deborah Hobson as an expert to testify as to the applicable nursing standard of care. RP 1482. Nurse Hobson opined that PeaceHealth nurses provided proper care in all respects, including communication with Dr. Zastrow, safe handoff procedures, and fall risk assessment. RP 1485-95.

Mr. Long conducted an extensive cross-examination. RP 1496-1515; 1520-45. When he asked Nurse Hobson to read from Exhibit 69, which she identified as her article about medical reconciliation, PeaceHealth objected as beyond the scope of direct examination. RP 1531-32. Judge Garrett asked: "Where are we going with this? ... Is there a concern in the case about medication that was given to Mr. Rodenbeck ...? ... Why is this relevant?" RP 1532. Judge Garrett then stated she had "read this article yesterday, it seems to be about medication." *Id.* After counsel for Mr. Long asked to have the jury excused before he "argue[d] with the Court," Judge Garrett said: "I'm going to ask you to move on 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 1533.

At the hearing before Judge Elich, Mr. Long highlighted the fact

that Judge Garrett repeatedly interrupted him and then refused to excuse the jury to allow him to argue with her about the relevance of the article to his cross-examination strategy. 9/9/15 RP at 39-42. However, he did not explain how, by her questions or statements, Judge Garrett communicated to the jury her personal opinion or attitude as to the truth value of Nurse Hobson's testimony or any other evidence. *Id.*

Judge Garrett did not comment on the evidence. She addressed her questions and comments solely to counsel for Mr. Long, not to Nurse Hobson or the jury. Judge Garrett did not prohibit any line of questioning, but indicated that it could be addressed outside the presence of the jury and then perhaps resumed. She focused only on the legal matter of the relevance of Exhibit 69 and did not phrase her remarks "in terms of the believability or credibility of the witness or her testimony." *Knapp*, 14 Wn. App. at 113. Her remarks were legitimate manifestations of her duty to manage the trial fairly and expeditiously. *See Jones*, 69 Wn App. at 127 (court does not violate constitutional prohibition by preventing waste of time). Because Judge Garrett's remarks did not allow the jury to draw any inference as to her personal beliefs as to any testimony or evidence, they did not constitute improper comments on the evidence. *Riblet*, 54 Wn.2d at 785; *Rio*, 38 Wn.2d at 452; *Knapp*, 14 Wn. App. at 113-14.

Moreover, there is no possibility that these questions and

statements resulted in prejudice to Mr. Long or deprived him of a fair trial. Both at the beginning of trial and in her final instructions, Judge Garrett instructed the jury to disregard any statement that it may have perceived as a comment on the evidence. RP 89-90; CP 48. Juries are presumed to follow the court's instructions. *Hizey*, 119 Wn.2d at 271; *Dybdahl*, 42 Wn. App. at 491. And Nurse Hobson's testimony was only relevant to the element of negligence, for which the jury returned a finding for Mr. Long.

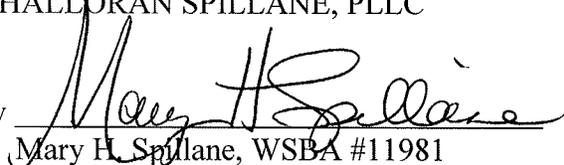
#### VII. CONCLUSION

For the foregoing reasons, Judge Elich's "Supplemental Order Granting Plaintiff's Motion for New Trial" should be reversed and the case remanded for entry of judgment on the jury's verdict.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 24th day of August, 2016, I caused a true and correct copy of the foregoing document, "Brief of Respondent," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 24th day of August, 2016, at Seattle, Washington.

  
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