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No. 36405-1-II

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*WASHINGTON STATE COURT OF APPEALS  
DIVISION TWO*

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TERESA CLUTE and ALLEN CLUTE,

Appellants,

vs.

FURM M. DUNCAN, JR., M.D.,

Respondent.

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**APPELLANTS' REPLY BRIEF**

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**I. STANDARD OF REVIEW**

The undersigned was remiss in not clearly stating the “standard of review” in the Brief of Appellants. “[A]pplications of court rules and statutes are reviewed de novo.” Basin Paving Co. v. Contractors Bonding and Insurance Co., 123 Wn.App. 410, 414, 98 P.3d 109, 110 (2004), citing State v. Carlyle, 84 Wn.App. 33, 35-36, 925 P.2d 635 (1996)(court rule); State v. Johnson, 96 Wn.App. 813, 816, 981 P.2d 25 (1999)(statute).

**II. REPLY TO RESPONDENT’S “SUPPLEMENTAL STATEMENT OF THE CASE”**

Defendant physician discussed the fact that counsel for plaintiffs Clute video taped the deposition of Dr. Yuzpe. The video tape of the deposition is not at issue in this appeal. Plaintiffs Clute are not appealing the trial court’s ruling that the video tape could not be shown. Plaintiffs Clute appeal the trial court’s ruling that the deposition transcript could not be read to the jury.

Nevertheless, it should be noted that defendant physician was advised on the day that Dr. Yuzpe’s deposition was taken that plaintiffs Clute wanted the option of using his deposition at trial. See declaration of counsel for plaintiff Clute dated July 15, 2005:

During discussions about setting up the deposition, I advised Ms. Browning that I would like her agreement for me to video tape the deposition. I advised Ms. Browning that I wanted to video tape the deposition so that I could use it with a focus group or use it at trial if Dr. Yuzpe did not appear in person. Ms. Browning advised me that she would discuss the proposal with others and then would let me know. . . . As of the date of the deposition, Ms. Browning had not further advised me of her position on video taping the deposition. I went ahead and video taped the deposition. During the deposition, I advised Ms. Browning that I may want to show the deposition at the time of trial. Ms. Browning objected.

CP 3. (Emphasis added; paragraphing omitted.)

The above quote also contradicts defendant physician's statement: "Before filing the November 22<sup>nd</sup> motion, counsel for plaintiffs provided no notice to defendant of plaintiffs' intent to use Dr. Yuzpe's deposition in lieu of live testimony at trial." Brief of Respondent at p. 3.

### III. **REPLY TO RESPONDENT'S "ARGUMENT"**

Defendant physician is correct in his argument that the disposition of this appeal is simply a matter of the construction of the meaning of CR 32(a).

The question that arises is as follows: Is CR 32(a) ambiguous? Defendant physician states at p. 10: "The rule, however, is not ambiguous."

**Plaintiffs Clute agree with defendant physician's conclusion that CR 32(a) is not ambiguous.** Without ambiguity, CR 32(a)(3) states that "The deposition of a witness . . . may be used by any party for any purpose if the court finds . . . that the witness resides out of the county and more than 20 miles from the place of trial . . . unless the witness is an out-of-state expert subject to subsection (a)(5)(A) of this rule . . . ." Without ambiguity, CR 32(a)(5)(A) provides: "The discovery deposition **of an opposing party's rule 26(b)(5) expert witness**, who resides outside of the state of Washington, may be used" only if certain notice is given. (Emphasis added.)

With a plain reading of CR 32(a), it is apparent that plaintiffs Clute did not attempt to present "[t]he discovery deposition of **an opposing party's** rule 26(b)(5) expert witness . . . ." (Emphasis added.) Plaintiffs Clute attempted to present the discovery deposition of their own CR 26(b)(5) expert witness.<sup>[1]</sup>

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<sup>[1]</sup> The "plain meaning rule" was discussed 90 years ago by the United States Supreme Court in Caminetti v. U.S., 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms."). See also 2A N. Singer, Sutherland Statutory Construction Sec. 46:1 (7<sup>th</sup> ed. 2007): the plain meaning rule "generally means when the language of the statute is clear and not unreasonable or illogical in its operation, the court may not go outside the statute to give it a different meaning."

Construction of a statute (or court rule) is a question of law that is reviewed de novo. State v. Ammons, 136 Wn.2d 453, 456, 963 P.2d 812 (1998). The court first looks to the statute's (or court rule's) plain language. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). **When faced with a statute (or court rule) that is unambiguous, the court determines the intent of the statute (or court rule) from the plain language alone.** Armendariz, *supra* at 110-11, 156 P.3d at 201.

If the rule was to be interpreted as urged by defendant physician, then there would have been no need for the words "of an opposing party's" retained expert witness to be added to the rule. The rule would only need to state: "The discovery deposition of a retained expert witness, who resides outside of the state of Washington, may be used" only if certain notice is given. The words "of an opposing party's" expert witness were put in for a purpose.

As the court stated in State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318, 320 (2003):

Our primary duty in interpreting any statute is to discern and implement the intent of the legislature. [Citation omitted.] Our starting point must always be "the statute's plain language and ordinary meaning." [Citation omitted.] When the plain language is

unambiguous – this is, when the statutory language admits of only one meaning – the legislative intent is apparent, and we will not construe the statute otherwise. [Citation omitted.] Just as we “cannot add words or clause to an unambiguous statute when the legislature has chosen not to include that language,” [citation omitted], **we may not delete language from an unambiguous statute: “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”** . . . .

(Emphasis added.)

The first two cases cited in the Brief of Respondent support the application of the plain meaning rule in this case. At p. 5 of his brief, defendant physician cited City of Bellevue v. Hellenthal, 144 Wn.2d 425, 28 P.3d 744 (2001) and State v. McIntyre, 92 Wn.2d 620, 600 P.2d 1009 (1979). As the Hellenthal court stated at 431: **“If the language of the rule is clear on its face, we give effect to its plain meaning and assume the rule means exactly what is intended.”** (Emphasis added.)

Moreover, as the McIntyre court stated at 622:

This case involves only the application and interpretation of a rule adopted by this court. In oral argument counsel implied that this court, as the author of the rule, need not adhere to the principles of statutory construction. We disagree. To ignore those principles would contravene the rule recently announced in State v. Everett District Justice Court, 90 Wash.2d 794, 585 P.2d 1177 (1978), where we said at page 797, 585 P.2d at page 1180:

As the author of these rules, this court, of course, is in a position to reveal the actual meaning which was sought to be conveyed. However, we approach them as though they had been drafted by the legislature, and give the words their ordinary meaning, reading the language as a whole and seeking to give effect to all of it.

One of the rules of statutory construction is that language which is clear upon its face does not require or permit any construction. We have said several times: **“Where there is no ambiguity in a statute, there is nothing for this court to interpret.”**

(Emphasis added.)

#### **IV. THE ONLY CASES CITED BY DEFENDANT PHYSICIAN DEALING WITH CR 32(a)(5)(A) ARE NOT APPLICABLE**

Defendant physician cited two cases involving the application of CR 32(a)(5)(A) but neither of the cases is applicable to the case at bar.

At p. 7 of defendant physician’s brief, he cited Kimball v. Otis Elevation Co., 89 Wn.App. 169, 947 P.2d 1275 (1997). **The issue before the court did not involve whether plaintiff could read a deposition of plaintiff’s own retained expert witness that was taken by defendant in the lawsuit.**

At p. 9 of defendant physician’s brief, he cited Hendrickson v. King County, 101 Wn.App. 258, 2 P.3d 1006 (2000). Likewise,

**the issue before the court did not involve whether plaintiff could read the deposition of plaintiff's own retained expert witness who was deposed by a defendant.**

**V. THE CASE PROHIBITING TELEPHONE TESTIMONY DOES NOT SUPPORT DEFENDANT PHYSICIAN'S ARGUMENT**

At p. 10 of defendant physician's brief, a case is cited to suggest that a policy issue in favor of live testimony supports the decision of the trial court. The case cited was Kinsman v. Englander, \_\_\_ Wn.App. \_\_\_, 167 P.3d 622 (2007). Initially, the argument ignores that for a substantial period of time the courts have allowed the reading of a deposition of a witness who resides a certain distance from the place of trial. Additionally, the testimony that was attempted to be introduced in the Kinsman case was **rebuttal testimony** of an 81-year-old woman that was proposed to be given via telephone. **The court had already allowed the direct testimony of the elderly woman to be introduced via a video tape deposition.**

**VI. THE ARGUMENT THAT THE JURY WOULD BE MISLEAD BY THE READING OF A DEPOSITION TAKEN BY DEFENSE COUNSEL INSULTS THE INTELLIGENCE OF THE JURY**

The brief of defendant physician stated at p. 15:

Furthermore, if the exchange of questions answers were read to the jury, it would unfairly mislead them into believing that defendant was in agreement or unable to refute Dr. Yuzpe's testimony. Clearly this would be prejudicial to defendant.

This argument apparent springs from a statement by "drafters" of the 1993 amendment to CR 32(a) in which it was stated: "Moreover, the reading of the discovery deposition suggests to the jury that that the deposing party is vouching for testimony adverse to its position." 3A K. TEGLAND, WASH. PRACT., RULES OF PRACTICE CR 32 n. 14 (5<sup>th</sup> ed. 2006 & Supp. 2007).

This argument is a total insult to the intelligence of juries, which are daily required to make complicated decision and even life and death decisions. It is almost beyond comprehension that skilled defense counsel would not be able to communicate to the jury that the defense did not necessarily agree with the opinions of the witness that defense counsel deposed. Cf. Free v. Peters, 12 F.3d 700, 705 (7<sup>th</sup> Cir. 1993)(court found that an academic study suggesting that there was unfairness to the interests of a party because jurors are subject to confusion had "fatal flaws.") The concurring opinion gives proper respect for the intelligence of our juries:

The jury system continues to be the backbone of the American judicial program. Our faith in the jury is based on our national belief, quite correct in my opinion, that the collective wisdom of twelve people . . . produces a far better result in the search for fairness and truth than any individual opinion or even a consensus of several individual opinions. . . .

. . . .

And even this system of testing “jury comprehension” leaves out an important step in jury selection: voir dire examination. Here, among other things, the judge and the attorneys are able to evaluate the ability of the jurors to reason, to comprehend, to understand questions put to them and how they respond. Many jurors are excused simply because the voir dire demonstrates that they are easily confused or easily swayed by non-significant matters.

All in all, whatever Professor Zeisel’s survey demonstrated about the comprehension of people called for jury service to interpret judicial instructions, it approved little or nothing about the collective ability of a jury to arrive at an intelligent conclusion of fact and interpretation of legal instructions.

**VII. NO DOLLAR AMOUNT OF SANCTIONS IS REASONABLE BECAUSE IT WAS AN ERROR OF LAW TO REJECT THE READING OF THE EXPERT’S DEPOSITION**

Defendant physician argued at pp. 18-20 that the terms awarded against plaintiffs Clute are acceptable because they “were not onerous” and were in fact “reasonable.” The only reason that the trial was continued was because the trial court erroneously ruled that the deposition of plaintiffs’ expert witness could not be

read to the jury. Defendant physician's argument is akin to: "Sure, we ran the red light and damaged your car. But since you can get your car repaired for a nominal amount, you should be happy."

A statement made by defendant physician at p. 19 is really the reason for this appeal: "Rather, plaintiff sought to use defendant's discovery deposition as a substitute for testimony, **taking the chance that the trial court would allow it**, over defendant's certain objection." (Emphasis added.) Trial lawyers should not have to "take a chance" on how the civil court rules will be interpreted on a subject as important as using deposition testimony to support a party's case. Trial lawyers have traditionally known, without "taking a chance," that they could introduce deposition testimony under CR 32(a)(3). The interpretation of CR 32 urged by defendant physician seeks to cause uncertainty where there should be none. **Case law before the 1993 amendments to CR 32 should apply unless the wording of the amendments, in an unambiguous manner, state that party A may not read the deposition that was taken by opposing party B of party's A's expert witness.** There is nothing ambiguous about CR 32(a)(5)(A). It only applies when attempting to read the deposition of "an opposing party's [retained] expert witness . . . ."

## VIII. CONCLUSION

The court should find that CR 32(a)(5)(A) is not ambiguous. It applies only to the discovery deposition of **“an opposing party’s”** retained expert witness who resides outside of the state of Washington. (Emphasis added.) Plaintiffs Clute did not attempt to use the discovery deposition of defendant physician’s retained expert witness.

Since CR 32(a)(5)(A) is not applicable to this case, then the traditional rule for the use of a deposition should have been followed. The traditional rule is set forth at CR 32(a)(3): “The deposition of a witness . . . that . . . resides out of the county and more than 20 miles from the place of trial . . . .”

The court should hold that the trial court erred when it did not allow plaintiffs Clute to read the deposition of Dr. Yuzpe. Moreover, the court should reverse the trial court’s award of \$3,500 terms against plaintiffs Clute.

21 JEB  
RESPECTFULLY SUBMITTED this ~~20~~<sup>th</sup> day of December,  
2007.

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Certificate of Service

I certify that this reply brief was mailed this day via first class United States mail to:

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