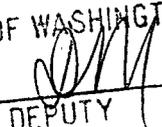


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COURT OF APPEALS
DIVISION II

2016 MAR 18 AM 10:03

STATE OF WASHINGTON

BY  DEPUTY

NO. 48189-8-II

In the Court of Appeals of the State of Washington
Division 2

LINDA YEAGER, Appellant

v.

JOHN O'KEEFE, Respondent

APPELLANT'S BRIEF

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A) ASSIGNMENT OF ERROR

The trial court erred by ruling Dr. Kedar's deposition transcript inadmissible at trial under CR 32(a)(3)(B) regarding *Yeager v. O'Keefe*, Thurston County Superior Court Case No. 14-2-00099-2.

B) ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court abuse its discretion by applying the wrong legal standard by reading CR 32(a)(3)(B) to only apply to non-expert witnesses?
2. Did the trial court abuse its discretion by applying the wrong legal standard by reading CR 32(a)(5) to apply to ER 702 experts, as opposed to CR 26(b)(5) experts.

C) STATEMENT OF THE CASE

1. On January 28, 2011, Appellant Linda Yeager and Respondent John O'Keefe were involved in a two-vehicle motor vehicle collision that occurred in Lacey Washington. RP 13, 251-254. A vehicle driven by Mr. O'Keefe rear-ended a vehicle driven by Ms. Yeager. *Id.* Mr. O'Keefe admitted liability, and admitted some of Ms. Yeager's injuries and damages were proximately caused by the collision, but denied other injuries or damages were proximately caused by the collision. RP 13.
2. In 2012 or 2013, Ms. Yeager began to see Dr. Eyal Kedar of Virginia Mason Medical Center in his capacity as a treating

rheumatologist/physician. RP 341-42; CP 20, 103-04. Ms. Yeager continued to see Dr. Kedar through at least June of 2015. CP 20.

3. On January 14, 2014, Ms. Yeager, through counsel, filed a Complaint for Damages, initiating negligence lawsuit against Mr. O'Keefe, in *Yeager v. O'Keefe*, Thurston County Superior Court Case No. 14-2-00099-2. CP 1-2.
4. On June 17, 2015, Ms. Yeager, through counsel, filed a Supplemental Disclosure of Primary Witnesses that identified Dr. Kedar as a "medical professional[]" witness who, as Ms. Yeager's "current rheumatologist" would "testify...and offer opinions as to [Ms. Yeager's] collision related injuries." CP 19-20. Dr. Kedar was not identified as a "retained expert" or "CR 26b)(5) expert" or even "expert." *Id.*; *cf.* CP 9-10, 13-18 (disclosure of "medical expert" "Dr. Samuel Coor").
5. Sometime before August 21, 2015, a jury trial was scheduled for the week of September 14, 2015 before the Honorable Mary Sue Wilson. CP 21.
6. On August 21, 2015, Ms. Yeager, through counsel, filed a Witness and Exhibits List that again listed Dr. Kedar as a "witness[] who may testify at trial." CP 24.

7. On or before August 10, 2015, Ms. Yeager, through counsel, subpoenaed Dr. Kedar to testify at trial. RP 345.
8. On August 23, 2015, Mr. O'Keefe, through counsel, deposed Dr. Kedar at Virginia Mason. CP 26; RP 344, 346, 352. During that deposition, Dr. Kedar “offer[ed]...opinions on causation related to the car accident.” RP 388. Specifically, Dr. Kedar testified Ms. Yeager “developed diffuse pain syndrome following the motor vehicle accident [that] is consistent with fibromyalgia.” RP 628.
9. On August 28, 2015, Ms. Yeager, through counsel, filed a Notice of Intent to Offer Testimony by Deposition of Eyal Kedar, M.D. CP 26. In that Notice, Ms. Yeager indicated she “intend[ed] to offer portions of the transcript...of the deposition of Eyal Kedar, MD taken on August 23, 2015 at...trial” “pursuant to CR 32(5).”
10. On September 11, 2015, Mr. O'Keefe, through counsel, objected to Dr. Kedar's deposition being used. RP 155.
11. On September 15, 2015, on the second day of trial, Ms. Yeager; through counsel, indicated both that the initial Notice provided an incorrect citation—the rule in question is CR 32(a)(5), not the non-existent CR 32(5)—and advanced an alternate rule under which the deposition could be used at trial: CR 32(a)(3)(B). RP 155.

12. On September 15, 2015, the Court ruled it would not “allow the presentation of [Dr. Kedar] by deposition.” RP 163. The Court premised its ruling on a finding that Dr. Kedar was an “expert witness[]” as the term is used in Civil “Rule 32(a)(5).” *Id.*
13. On September 16, 2015, Ms. Yeager, through counsel, filed a Motion to Allow Testimony of Eyal Kedar, MD, again arguing CR 32(a)(3)(B) applied. CP 105-07. Accompanying that Motion was a Declaration of Eyal Kedar, MD, which clarified Dr. Kedar was “a treating physician of Linda Yeager;” that Dr. Kedar’s “legal domicile is in Bellevue, King County, Washington” which is “more than 20 miles from” Thurston County Superior Court; and that Dr. Kedar was “not available to appear in person for testimony at trial due to [his] patient schedule.” CP 103-04. Accompanying oral argument for that Motion was an additional citation of authority: *Kimball v. Otis Elevator*, 89 Wn. App. 167 (1997). RP 337-38.
14. On September 16, 2016, the third day of trial, the Court declined to “revisit[its earlier] decision,” and reiterated it was still “not...allow[ing Dr. Kedar's] testimony to be presented by deposition transcript.” RP 387-88. The Court based its ruling on a finding that Dr. Kedar “was designated...as an expert witness” and

that, based upon the Court's review of "the deposition transcript excerpts that [Ms. Yeager] offer[ed]," because Dr. Kedar's opinion testimony concerns "a critical medical issue in this case," he cannot be properly characterized as "anything other than an expert witness." RP 388.

15. On September 18, 2015, the jury returned a verdict for Ms. Yeager, finding \$556.40 in "past medical expenses" and \$1750.00" in "non-economic damages." CP 128.
16. On October 7, 2015, a Judgment for Plaintiff was entered in the amount of \$1779.64 (reducing the jury award by \$526.76 pursuant to RCW 4.84.010). CP 129-31.
17. On October 27, 2015, Ms. Yeager filed a Notice of Appeal to Court of Appeals, Division II.

D) ARGUMENT

"At trial...any part or all of a deposition, so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition...in accordance with [certain enumerated] provisions." CR 32(a). One such provision indicates "[t]he deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds...(B) that the witness resides out of the county and more

than 20 miles from the place of trial, unless it appears that the absence of the witness was procured by the party offering the deposition or unless the witness is an out-of-state witness expert subject to subsection (a)(5)(A) of this rule.” CR 32(a)(3).

“The trial court is vested under this rule with discretion to admit the deposition testimony of witnesses.” *Sutton v. Shufelberger*, 31 Wn. App. 579, 585 (1982). “A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 7 (2014) (internal citation omitted). “A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *Id.* (internal citation omitted). Generally if a discretionary “decision is based on an improper legal rule,” that decision is an abuse of discretion, and the proper remedy is to “remand to the trial court to apply the correct rule.” *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 540 (2005).

“[I]nterpretation of a court rule...is subject to de novo review.” *State v. McEnroe*, 174 Wn.2d 795, 800 (2012). Court rules are “interpret[ed]...using the rules of statutory construction.” *Id.* Court rules should be “giv[en]...its plain meaning...discerned from reading the rule as a whole, harmonizing its provisions, and using related rules to help

identify the [drafter's] intent embodied in the rule.” *State v. Chhom*, 162 Wn.2d 451, 458 (2007).

The plain meaning of CR 32(a)(3)(B) is that a witness's deposition testimony “may be used by any party for any purpose” if (1) the deposition testimony is “admissible under the Rules of Evidence applied as though the witness were then present and testifying;” (2) “the witness resides out of the county and more than 20 miles from the place of the trial;” (3) “the absence of the witness was [not] procured by the party offering the deposition; and (4) “the witness is [not] an out-of-state expert subject to subsection (a)(5)(A)” of CR 32. CR 32(a).

Here, Dr. Kedar's deposition testimony would have been admissible under the Rules of Evidence applied as though he were present and testifying. *See* RP 390 (if Ms. Yeager could “get [Dr. Kedar] in person before” the trial concluded, “he[would] obviously [be] allowed” to testify). And Dr. Kedar resided in King County, not Thurston County, and moreover more than twenty miles from the Thurston County Courthouse in Olympia. CP 103-04. Dr. Kedar was absent from trial. *Id.*; *see also* RP 574. The record contains no evidence Ms. Yeager or her attorney procured Dr. Kedar's absence; to the contrary, Dr. Kedar was subpoenaed to appear at trial more than a month before the trial began. RP 345.

Finally, Dr. Kedar was not an out-of-state expert subject to CR 32(a)(5)(A). “The discovery deposition of an opposing party's rule 26(b)(5) expert witness, who resides outside the state of Washington, may be used if reasonable notice before the trial date is provided to all parties and any party against whom the deposition is intended to be used is given a reasonable opportunity to depose the expert again.” CR 32(a)(5)(A).

Specifically, Dr. Kedar was not out-of-state. *See* CP 103-04; RP 160 (Dr. Kedar is “not out of state”). Furthermore, although the trial court found Dr. Kedar was an “expert” in the ER 702 sense—*see* RP 388—the trial court could not have found, and moreover did not find, he was a CR 26(b)(5) expert witness. RP 341-42; CP 20, 103-04. Finally, Dr. Kedar was undoubtedly not Mr. O'Keefe's CR 26(b)(5) expert witness. CP 19-21, 24-25, 28-29.

Therefore, Dr. Kedar's deposition testimony met the test for admission under CR 32(a)(3)(B), and should have been admitted. The trial court's error in refusing to admit Dr. Kedar's deposition testimony arose from a misreading of CR 32 in finding that CR 32(a)(5) was the *only* means of admitting the deposition of an expert witnesses. RP 388. Essentially, the trial court was reading the term “witness” in CR 32 to mean *non-expert witness*. There is nothing in CR 32 to support such a reading, however. From a plain reading, CR 32(a)(3)(B) applies to any

“witness, whether or not a party,” with the exception of an out-of-state opposing party's CR 26(b)(5) expert witness. Therefore, the trial court based its ruling that Dr. Kedar's deposition testimony was inadmissible by applying the wrong legal standard. That ruling, therefore, was an abuse of discretion, and this Court should reverse the judgment, and remand for a new trial.

In the alternative, if the trial court was correct that CR 32(a)(5) is the sole mechanism for the introduction of expert deposition testimony, the trial court still erred by using the wrong definition of “expert witness.”

“CR(a)(5) allows for the use of the deposition of an expert witness under two special circumstances, both of which refer to CR 26(b)(5) provisions regarding discovery of facts known and opinions held by experts, acquired or developed in anticipation of litigation or for trial.” *Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 175 (1997). “Under CR 26(b) generally, only opinions acquired and developed in anticipation of litigation are expert opinions; professionals who have acquired facts and opinions not in anticipation of litigation, but from some other involvement, are not expert witnesses.” *Id.* Where a doctor providing ER 702 expert medical opinion testimony “was not hired by either party” and “reviewed [the plaintiff's] medical records and examined her...to evaluate her medical condition in relation to her Department of Labor and

Industries claim...well before th[e] lawsuit was filed by” the plaintiff, that doctor “was not an expert witness” as the term is used in CR 32. *Id.* at 175-76.

Here, Dr. Kedar was Ms. Yeager's “treating” physician. RP 341-42; CP 20, 103-04. Ms. Yeager began seeing Dr. Kedar in 2012 or 2013, well before litigation in this matter commenced in 2014. *Id.*, CP 1-2. Dr. Kedar was not retained by Ms. Yeager in anticipation of litigation. RP 341. The trial court could not find, and did not find, that Dr. Kedar was Ms. Yeager's CR 26(b)(5) retained expert. Rather, the trial court simply found Dr. Kedar was an ER 702 expert. RP 388. This is insufficient to implicate CR 32(a)(5) and disallow CR 32(a)(3)(B). Therefore, the trial court based its ruling that Dr. Kedar's deposition testimony was inadmissible by applying the wrong legal standard. That ruling, therefore, was an abuse of discretion, and this Court should reverse the judgment, and remand for a new trial.

E) CONCLUSION

The trial court abused its discretion in denying the admission of Dr. Kedar's deposition testimony by applying the wrong legal standard by either wrongfully concluding CR 32(a)(5) is the exclusive means for admitting expert witness deposition testimony, or by wrongfully concluding CR 32(a)(5)'s use of the phrase “expert witness” refers to ER

702, not CR 26(b)(5). Therefore, this Court should reverse the judgment in this matter and remand for a new trial.

DATED this 16th day of March, 2016.



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPELLANT'S BRIEF was delivered this 16th day of March, 2016 to ABC Legal Messengers, with appropriate instructions to forward the same to counsel for the Respondent as follows:

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