

NO. 85342-8

SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

RONALD and DEBORAH TETER, husband and wife,

Petitioners,

v.

ANDREW DECK, M.D.,

Respondent.

DR. ANDREW DECK'S ANSWER TO PETITION FOR REVIEW

Mary H. Spillane, WSBA #11981
Mark S. Davidson, WSBA #6430
WILLIAMS, KASTNER & GIBBS PLLC
Attorney for Respondent Andrew Deck,
M.D.

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

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I. IDENTITY OF RESPONDING PARTY

Respondent Andrew Deck, M.D., defendant and appellant in the courts below, asks that the Teters' petition for review be denied.

II. COURT OF APPEALS DECISION

In its unpublished decision filed October 25, 2010, the Court of Appeals reversed the trial court's grant of a new trial after a defense verdict in this medical malpractice action, holding that the trial court had erred in granting a new trial, because the judge who had presided over discovery matters had not abused his discretion in excluding one of the Teters' experts, and because the record did not support a conclusion that defense counsel had engaged in prejudicial misconduct.

III. COUNTERSTATEMENT OF THE CASE

A. The Treatment Forming the Basis of the Lawsuit.

Dr. Deck and Dr. David Lauter performed laparoscopic surgery to remove Mr. Teter's right kidney because of a mass suspicious for cancer. 1/15 RP 390-91, 449-50; Ex. 4. Mr. Teter's abdominal aorta was lacerated, a known complication of the surgery. 1/15 RP 391-93. The procedure was converted to an open procedure, and the aortic laceration was successfully repaired. Exs. 4, 1002 (pp. 007-009). Mr. Teter developed left leg compartment syndrome, underwent a fasciotomy, and, within a few months, his overall condition improved except for some loss

of sensation and some weakness of the tendon that lifts the first toe. Exs. 10, 12, 1009; 1/14 RP 171, 180-81, 185-86, 202-04, 206.

The Teters sued Dr. Deck.¹ CP 1-5. At trial, the Teters presented expert testimony from a general surgeon experienced in laparoscopic nephrectomies who opined that the aorta was lacerated early in the surgery, and that Dr. Deck negligently failed to timely convert to an open surgery, thereby causing Mr. Teter's compartment syndrome. 1/21 RP 808, 868, 913-14. Dr. Deck presented expert testimony that his conduct of the surgery complied with the applicable standard of care, 1/26 RP 1246, 1293, 1318; 1/27 RP 1518, 1525-26, and that Mr. Teter's diabetes, not Dr. Deck's conduct, was the cause of Mr. Teter's compartment syndrome, 1/28 RP 1648, 1663; 1/29 RP 2016, 2061-62, 2066-69.

B. The Exclusion of Dr. Fairchild as an Expert Witness.

After the lawsuit was filed in April 2006, trial was set for October 8, 2007. CP 1-7, 863. As of January 8, 2007, the case was assigned to Judge Chris Washington. CP 868. In May 2007, he continued the trial date to March 17, 2008, and, in February 2008, he continued it again to September 22, 2008. CP 869-72. The Teters failed to make their experts available for deposition, and in June 2008, Dr. Deck moved to compel them to provide their primary witnesses for deposition or to exclude the

¹ The Teters also sued Dr. Lauter, but later dismissed him from the case. CP 28-29.

witnesses from testifying at trial. CP 873-924. On June 11, 2008, Judge Washington ordered the Teters to identify their primary witnesses and provide dates for their depositions by June 20, 2008, and specified that he would “consider other remedies” if the depositions of plaintiffs’ witnesses could not be completed reasonably before trial. CP 969-71.

The Teters failed to comply, and Dr. Deck requested sanctions. CP 1012-1104. Instead, Judge Washington extended the discovery cutoff. CP 1192-93. One week before that extended cutoff, Dr. Deck moved for a pre-trial conference because the Teters still had not identified all their experts or provided descriptions of their anticipated testimony. CP 1172-78. After the discovery cutoff had passed, the Teters served a trial witness list, CP 1270-74, listing, “Replacement urologist/William Y. Duncan, III, M.D.” as their urology expert. Dr. Duncan was the Teters’ original urology expert, who they said they needed to replace back in January 2008.² CP 1335. On September 17, 2008, Judge Washington held the pre-trial conference, continued the trial date to January 12, 2009, again extended the discovery cutoff, and directed the Teters to identify their experts and provide concise summaries of their opinions by October 1, 2008. CP 764, 1379-81. When the Teters again failed to do so, Judge

² Back in January 2008, when the trial was set for March 17, 2008, the Teters’ counsel had advised defense counsel that they needed to find a substitute for Dr. Duncan because of his health issues, and were “looking for someone who can quickly step in and timely complete his or her deposition and be available to testify at trial in March.” CP 1407.

Washington, on October 22, 2008, ordered them to disclose their urology expert and a summary of his/her opinions by October 29, 2008. CP 719. Again, without explanation, the Teters failed to comply. CP 1417.

On November 12, 2008, Judge Washington ordered that, unless the Teters identified their urologist expert and disclosed his/her opinions *that day*, they would not be allowed to call a urologist expert at trial. *See* CP 719-20, 1417, 1419. Later that day, the Teters identified Dr. Robert Golden as their urologist expert, but they did not provide a summary of his specific opinions. CP 1419-20. Less than two weeks later, on the extended discovery cutoff date, the Teters struck Dr. Golden because of a conflict of interest. CP 1434. Then, on December 10, 2008, they identified Dr. Thomas Fairchild as their urology expert, CP 1442, and two days later, provided a witness disclosure for him that did not contain a concise summary of his specific opinions, but instead stated that he had not completed his document review.³ CP 1448-49.

Dr. Deck moved to exclude Dr. Fairchild as a trial witness. CP 1384-1471. In opposition, the Teters proposed alternative relief but did not offer any excuse for their multiple failures to comply with the court's disclosure orders. CP 1472-1564. In reply, Dr. Deck explained why a

³ As they had with Dr. Golden, CP 1419-20, the Teters stated that Dr. Fairchild had reviewed "a limited number of documents" and would "be given the opportunity to review additional documents." CP 1448-49.

lesser sanction would be inappropriate. On January 12, 2009, the day the case was brokered to Judge Steven Gonzalez for the start of trial, 1/12 RP 9, Judge Washington issued his order excluding Dr. Fairchild. CP 1565-68. The Teters advised Judge Gonzalez that they would be filing a motion to reconsider, 1/13 RP 85-86, but they never did. After the jury returned its verdict finding Dr. Deck not negligent, the Teters in their motion for new trial asked Judge Gonzalez to revisit Judge Washington's exclusion order. Judge Gonzalez then decided that Judge Washington's exclusion of Dr. Fairchild had been "an abuse of discretion, and a reversible error of law," and granted the Teters a new trial. CP 710(¶ 3).

C. The Alleged Misconduct of Counsel and the Claim of Prejudice.

In granting a new trial, Judge Gonzalez also found that defense counsel committed misconduct in making "numerous and improper speaking objections," "questioning witnesses to elicit inadmissible testimony, and to expose the jury to the contents of exhibits that had not been admitted into evidence," and making "misleading representations . . . about witnesses the defendant was intending to call." CP 712-13 (¶ ¶ 4, 5).

With respect to speaking objections, on multiple occasions during trial, counsel for both sides went beyond stating the ground or evidence

rule supporting an objection.⁴ Neither the Teters in their new trial motion nor Judge Gonzalez in granting a new trial cited any specific prejudice from defense counsel's speaking objections. CP 220-47; CP 712-23. Nor does the transcript reveal any. In fact, the court instructed the jury to disregard speaking objections, 1/29 RP 1967, and reprimanded counsel in front of the jury for making them. 1/21 RP 960-61; 1/28 RP 1811.

Judge Gonzalez also did not identify any specific questioning of witnesses by defense counsel that he perceived as intended to "elicit inadmissible testimony." *See* CP 708-14. The only defense counsel questions that the Teters cited in their new trial motion as improper attempts to elicit inadmissible testimony and that Judge Gonzalez did not specifically reject,⁵ were questions asked of Dr. Caplan to interpret the records to determine when fluid resuscitation was complete, *see* CP 240, 519-22; 1/28 RP 1802-05, and when the surgery started, *see* CP 240-41, 515; 1/28 RP 1790-91. Ultimately, Dr. Caplan was permitted to testify to those issues. CP 521-22; 1/28 RP 1803-05; CP 515; 1/28 RP 1791.

⁴ As for the Teters' speaking objections, *see e.g.*, 1/14 RP 333, 336, 348, 350, 354-55; 1/20 RP 762, 769, 780; 1/28 RP 1657-58, 1660, 1706; 1/29 RP 2034. As for defense counsel's speaking objections, *see e.g.*, 1/14 RP 310; 1/15 RP 378, 391, 395, 402; 1/21 RP 852, 877-78, 960-61; 1/26 RP 1357-60; 1/27 RP 1572-73 1/29 RP 1967.

⁵ Although the Teters argued that defense counsel sought to elicit testimony as to what Dr. Lauter or the anesthesiologist did or did not do during the surgery, purportedly in violation of an order in limine excluding evidence of fault of nonparties, CP 240-42, or sought to elicit testimony exceeding in limine limitations on expert testimony, CP 236-40, Judge Gonzalez did not so find. CP 711-12 (stricken ¶¶ 5, 6).

As for Judge Gonzalez's finding that defense counsel's questioning exposed the jury to the contents of inadmissible evidence, that apparently was a reference to defense counsel's attempt to lay foundation for admission of two defense exhibits, Exs. 1001 and 1002, *see* CP 241-42, to which the Teters objected,⁶ 1/22 RP 1090; 1/21 RP 985-86; 1/28 RP 1893-96. Ultimately, the only parts of Exhibits 1001 and 1002 to which the jury was exposed were the few pages that were admitted as Ex. 1002, 1/30 RP 2254; CP 106; *see* 1/14 RP 333; 1/22 RP 1090; 1/28 RP 1920, a few more pages separately admitted as Exhibits 4 and 5, 1/15 RP 441-42, or portions that experts had relied upon in forming their opinions, 1/27 RP 1533.

Finally, as for defense counsel's statements about witnesses the defense intended to call, during an unreported side bar on January 27, 2009, defense counsel indicated that she intended to call Bonnie Ellison the next day and Dr. Lauter on January 28 or 29. 1/28 RP 1639-41. As it turned out, a staff member of defense counsel's firm had advised Ms. Ellison on the morning of January 27 that she would not be called on January 28, CP 600-01, but had not advised defense counsel of that communication before the end-of-day side bar on January 27. CP 642-43.

⁶ If instead it was a reference to defense counsel's attempt to use Dr. Towbin's operative report with Dr. Neuzil, that report had been admitted into evidence, 1/22 RP 1090; CP 106, there was just confusion about the exhibit number under which it had been admitted, and defense counsel was ultimately allowed to use it with Dr. Neuzil. *See* 1/29 RP 2040-42, 2069-72.

As of January 28, although Dr. Lauter's attorney had not heard that his client was going to testify that week, CP 582, consistent with defense counsel's advice to the court, Dr. Lauter had been subpoenaed to testify at 3:00 p.m. on January 28, CP 652-53, and defense counsel's staff had been in contact with Dr. Lauter's office regarding the timing of his anticipated testimony. CP 643; 662. Ultimately, Ms. Ellison and Dr. Lauter were not called, as eliminating witnesses became a necessity in light of the trial court's determination that testimony would be completed by January 28, even though plaintiffs had not rested their case until the late morning of January 27. CP 642; 1/27 RP 1483-84; 1/29 RP 1916.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

- A. The Court of Appeals Decision that Judge Washington's Sanctions Order Excluding Dr. Fairchild Was a Proper Exercise of Discretion and Not a Valid Basis for Judge Gonzalez to Grant a New Trial is Not in Conflict with *Burnet* or Its Progeny So As to Warrant Review Under RAP 13.4(b)(1) or (2).

The Teters contend, *Pet. at 8-13*, that the Court of Appeals decision that Judge Washington did not abuse his discretion in striking Dr. Fairchild as a trial witness conflicts with the "requirements" of *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), and its progeny. It does not. *Burnet* held that, when imposing sanctions pursuant to CR 37(b), the trial courts' reasons "should, typically, be clearly stated on the record so that meaningful review can be had on appeal." *Burnet*,

131 Wn.2d at 494 (emphasis added). And,

when the trial court ‘chooses one of the harsher remedies allowable under CR 37(b), . . . it must be *apparent from the record* that the trial court explicitly considered whether a lesser sanction would probably have sufficed,’ and whether it found that the disobedient party’s refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent’s ability to prepare for trial.

Id. (quoting *Snedigar v. Hodderson*, 53 Wn. App. 476, 487, 768 P.2d 1 (1989), *rev’d in part*, 114 Wn.2d 153 (1990)) (emphasis added).

The Teters wrongly interpret the phrase “should, typically” as a requirement. As this Court has observed, nothing in *Burnet* suggests that trial courts must go through the *Burnet* factors every time they impose sanctions for discovery abuses. *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006). And, where, as here, the sanctions order was merely enforcing an earlier order that had forewarned the remedy of exclusion for continued failure to comply with the court’s orders, *Burnet* does not apply. *Scott v. Grader*, 105 Wn. App. 136, 142-43, 18 P.3d 1150 (2001). Nothing in *Burnet* or its progeny required Judge Washington to recite the *Burnet* factors in his final order enforcing earlier orders.

In support of their argument that the Court of Appeals decision conflicts with *Burnet* and its progeny, the Teters rely heavily on *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002), where the Court reversed the trial court’s sanction of dismissal and

remanded for specific findings on the record as to whether the *Burnet* factors of willfulness and consideration of lesser sanctions were satisfied. *Id.* at 699, 700. *Rivers* is distinguishable because there satisfaction of the *Burnet* factors was not apparent from the record. Here, as the Court of Appeals correctly found, the *Burnet* factors are apparent from the record.

The concern that *Burnet* and its progeny addresses is not, as the Court of Appeals correctly noted, “whether the trial court included the words ‘willful’ and ‘lesser sanction’ on the last order to be issued, rather, the proper question is whether *the record as a whole* reflects that the court found that the violation was willful, and that the court considered lesser sanctions.” *Slip Op. at 9-10 (emphasis in original)*. Here, the record as a whole establishes that the Teters’ violations of multiple discovery orders were willful and prejudicial and that the court considered lesser sanctions.

First, it is apparent from the record that the Teters violated multiple discovery orders without reasonable explanation or excuse. The Teters, without excuse, violated Judge Washington’s orders of June 11, 2008,⁷ September 17, 2008,⁸ and October 22, 2008. In addition, on November

⁷ The Teters assert, *Pet. at 11*, that “no order pertaining to [their] urology expert could have been entered before September 17, 2008.” However, neither the provisions of the June 11th order, requiring prompt disclosure of primary witnesses, which by court rule includes disclosure of expert witnesses and a summary of their opinions, KCLCR 26(b), nor the Teters’ failure to comply with the order are disputed.

⁸ Oddly, the Teters contend, *Pet. at 4*, that the September 17th order “did not direct [them] to name a replacement expert by October 1.” The order, however explicitly

12, 2008, Judge Washington ordered that, unless they identified their urologist expert and disclosed a summary of his/her opinions *that day* he would enter an order precluding them from calling a urologist expert at trial. They did not name Dr. Fairchild until December 10, 2008, nearly a month later and just one month before trial. Even then, the Teters did not disclose a summary of his specific expert opinions. "A party's disregard of a court order without reasonable excuse or justification is deemed willful." *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 584, 220 P.3d 191, 198 (2009) (citing *Rivers*, 145 Wn.2d at 686-87).

Second, the substantial prejudice to Dr. Deck from the Teters' multiple violations of court orders and court rules is also apparent from the record and the frequent motions Dr. Deck had to file to obtain the disclosures to which he was entitled. As late as December 10, 2008, when Dr. Fairchild was first named by the Teters, Dr. Deck still had not received a concise summary of the specific expert opinions to which Dr. Fairchild intended to testify. Dr. Deck was left with insufficient time to acquaint his experts with Dr. Fairchild's opinions (which still remained to be

stated, CP 1379-80:

[P]laintiffs shall prepare and serve by Wednesday, October 1, 2008, an identification and disclosure of each witness whom they intend to call at trial. The identification and disclosure will include a concise summary of the facts and opinions expected to be offered by each witness. The description of the expert witnesses shall include a concise summary of the opinions expected to be offered regarding the standard of care, causation and damages.

disclosed) so that they could be rebutted, or to effectively depose Dr. Fairchild and prepare to cross-examine him at trial. CP 65-66, 1568. The record amply supports Judge Washington's findings that Dr. Deck was not provided "with a reasonable opportunity to depose Dr. Fairchild" and that he and his attorneys were "prejudiced in their trial preparation by the plaintiffs' failure to properly disclose Dr. Fairchild." CP 1568 (§§ 4, 5).

Third, the court's consideration of lesser sanctions is also apparent from the record. It is reflected in the Teters' opposition to the exclusion motion, where they proposed another trial date continuance, CP 1563, and in Dr. Deck's reply, CP 66-67 ("No lesser sanction would remedy the plaintiffs' discovery violations"), both of which Judge Washington expressly considered in entering his order excluding Dr. Fairchild, CP 1567. Moreover, as the Court of Appeals correctly noted, *Slip Op. at 10-11*, "the record reflects that Judge Washington only excluded Dr. Fairchild after months of giving the Teters opportunities to comply with multiple orders, including the order that the Teters disclose a urology expert and opinion on November 12, 2008 or face exclusion of that witness."

Even though it is apparent from the record that the *Burnet* factors were satisfied, the Teters argue, *Pet. at 14-15*, that review is warranted because the Court of Appeals decision conflicts with other decisions of the Courts of Appeal. Contrary to the Teters' claims, *Pet. at 13-14*, Division

III in *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 155 P.3d 978 (2007), did not expressly hold that a trial court's exclusion order must recite the *Burnet* factors, only that the court must find them on the record. In *Peluso*, 138 Wn. App at 71, Division III found the trial court abused its discretion because the *Burnet* factors were not apparent from the record, a result consistent with this Court's, as well as Division I's, precedents. To the extent, however, the *Peluso* court, like the Teters here, interpreted *Burnet's* holding that trial courts "should, typically" state on the record the reasons sanctions were imposed as a *requirement* that they recite the *Burnet* factors in every exclusion order, it cannot be reconciled with this Court's holding in *Mayer*, 156 Wn.2d at 688-89, or with *Burnet* itself.

The other Court of Appeals' cases that the Teters cite as conflicting with the Court of Appeals decision here, *Pet. at 14-15*, are equally unavailing. In *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 770, 82 P.3d 1223 (2004), Division II approved the trial court's sanctions order despite the absence of express findings of willfulness and substantial prejudice, where those factors were apparent from the record. Similarly, in *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 324-29, 54 P.3d 665 (2002), Division II affirmed a default judgment for discovery violations, citing *Burnet's* holding and stating that the *Burnet* factors must be "apparent from the record." Finally, Division III's opinion in *In re Estate*

of *Fahnländer*, 81 Wn. App. 206, 211, 913 P.2d 426, *rev. denied*, 130 Wn.2d 1002 (1996), is distinguishable as the party whose expert witness was stricken had not violated any discovery rule or scheduling order.

Even if Judge Washington's findings and order needed more fleshing out, the remedy was not for Judge Gonzalez or the Court of Appeals to grant a new trial, but for the matter to be remanded to Judge Washington to determine if the *Burnet* factors had been satisfied and to make specific findings on the record.⁹ *Rivers*, 145 Wn.2d at 700. Here, the Teters did not move for reconsideration of Judge Washington's order, as they advised Judge Gonzalez they intended to do. Had they done so, Judge Washington would have had the opportunity to make (or reject) the specific findings the Teters now argue he was required to include in his exclusion order. Instead, the Teters chose to gamble on the verdict, and, having lost that gamble, to seek post-trial relief.¹⁰

B. The Court of Appeals Decision Rejecting Judge Gonzalez's Findings of Alleged Prejudicial Misconduct of Defense Counsel Is Not in Conflict with Supreme Court Precedent.

The Teters assert, *Pet. at 16*, that the Court of Appeals applied the

⁹ As the Court of Appeals noted, *Slip Op. at 9*, the issue was not whether another judge, such as Judge Gonzalez, might have exercised discretion differently, but whether Judge Washington's exercise of his discretion was manifestly unreasonable, or based on untenable grounds or untenable reasons.

¹⁰ Parties "may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

wrong standard of review, in conflict with this Court's decisions in cases like *Aluminum Co. of Am. v. Aetna Cal. & Sur. Co.*, 140 Wn.2d 517, 998 P.2d 856 (2000) ("*ALCOA*"), when it determined that defense counsel's alleged misconduct was not prejudicial. To the contrary, the Court of Appeals properly applied the test this Court articulated in *ALCOA* for evaluating a motion for new trial based on alleged prejudicial misconduct of counsel. In so doing, it properly concluded that Judge Gonzalez erred in granting a new trial because the trial court's findings were too general and nonspecific to support a conclusion that prejudicial misconduct occurred, none of the specific questions and objections that the Teters claimed constituted prejudicial misconduct appeared so out of the ordinary, irregular, or flagrant as to have deprived the Teters of a fair trial, and the Teters' claim of prejudice was belied by the fact that the Teters never requested any curative instructions or moved for a mistrial, but instead gambled on a favorable verdict and claimed prejudicial error only after the jury found against them. *Slip Op at 11-13; see ALCOA at 537* ("The criterion for testing abuse of discretion is: '[H]as such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial?'"(citations omitted)) and 539 (noting that a mistrial should be granted "only when 'nothing the trial court could have said or done would have remedied the harm done to the defendant.'"

(citations omitted), and agreeing that there are two prongs to the analysis in cases of alleged attorney misconduct: “were counsel’s remarks improper and, if so, did such remarks have a prejudicial effect (i.e., was there substantial likelihood that the remarks affected the jury’s verdict?)”); *see also Spratt v. Davidson*, 1 Wn. App. 523, 526, 463 P.2d 179 (1969) (The “existence of a mere possibility or remote possibility of prejudice is not enough” to grant a motion for a new trial).

Nothing in *ALCOA* or any of the other cases the Teters cite compels a reviewing court to blindly uphold a trial court’s nonspecific, conclusory findings of prejudicial attorney misconduct, without regard to whether the record, or even any examples cited by the complaining party support a finding of prejudicial attorney misconduct. Nor do the cases the Teters cite support their suggestion, *Pet. at 17*, that the mere fact that they made frequent and numerous objections was sufficient to warrant the grant of a new trial. As the Court of Appeals correctly observed, Slip Op. at 6: “The trial of this case was very contentious. Counsel for both sides objected repeatedly and frequently.” Some objections were sustained, others were overruled. Under such circumstances, it cannot be said, as the Teters imply, that the frequency of objections alone establishes prejudice, especially where, as here, the jurors were instructed, CP 162, that the parties had the right and the duty to make objections and that they should

not let the objections influence them or make any assumptions or draw any conclusions based on objections. *See State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998) (“A jury is presumed to follow court’s instructions”).

Contrary to the Teters’ assertions, *Pet. at 17*, this case is not like either *State v. Simmons*, 59 Wn.2d 381, 368 P.2d 378 (1962), or *Shaw v. Prudential Ins. Co. of Am.*, 166 Wash. 652, 8 P.2d. 431 (1932). *Simmons* was a criminal case in which the factual issue was a close one, the prosecutor’s misconduct was intentional and the defendant did not receive a fair trial “for a variety of reasons” including the trial court’s improper denial of defendant’s offer of proof and seating of a juror whose son had been sentenced by the defendant (a municipal judge). *Simmons*, 59 Wn.2d at 387-93. In *Shaw*, defense counsel made an offer of proof in the jury’s presence and elicited highly improper evidence which the trial court had previously excluded. *Shaw*, 166 Wash. at 659. Those cases, in which the judgments were reversed as a result of showings of actual prejudice, are not inconsistent with the Court of Appeals decision in this case.

Here, no such actual prejudice from the alleged misconduct existed. In granting a new trial, Judge Gonzalez, without providing any specifics, found that defense counsel committed misconduct in making “numerous and improper speaking objections,” “questioning witnesses to elicit inadmissible testimony, and to expose the jury to the contents of

exhibits that had not been admitted into evidence,” and making “misleading representations . . . about witnesses the defendant was intending to call. CP 712-13 (¶¶ 4, 5). Yet, neither the Teters nor Judge Gonzalez ever identified any specific resulting prejudice.

With respect to speaking objections, both sides made them. *See footnote 4, supra*. While some speaking objections can be prejudicial, because they either impermissibly coach the witness or make argument to the jury, the record does not reflect that that occurred here.¹¹ The Teters did not object to any speaking objections at the time, nor did they request any curative instructions.¹² Neither the Teters in their motion for new trial, CP 220-47, nor Judge Gonzalez in his order granting new trial, CP 712-13, cited to any specific prejudice from defense counsel’s speaking objections. And, any such prejudice was highly unlikely in light of Judge Gonzalez’s reprimands of defense counsel, 1/21 RP 960-61; 1/28 RP 1811, his admonition to the jury to disregard counsel’s speaking objections, 1/14 RP 310, and his instruction to the jury that “the lawyers’ remarks, statements and arguments are not evidence.” 1/15 RP CP 161.

¹¹ If some punishment for making improper objections was required, the proper action would have been to fine counsel rather than to penalize her client by vacating the judgment and granting a new trial. *See Ryan v. Ryan*, 48 Wn.2d 593, 600, 295 P.2d 1111 (1956) (“except in aggravated and unusual situations, the client should not be penalized because of his counsel’s conduct”). The *Ryan* court described an “aggravated and unusual” situation as one where a breach of a canon of professional conduct was so flagrant that, as a matter of law, the breach prevented a fair trial. *Ryan*, 48 Wn.2d at 600.

¹² Judge Gonzalez, though, on his own, instructed the jury to disregard. 1/14 RP 310.

With respect to defense counsel's allegedly improper questioning of witnesses, the trial court did not identify any particular questions that it deemed improper or that elicited inadmissible testimony or exposed the jury to contents of exhibits that had not been admitted. That defense counsel at times had problems framing her questions that sometimes led to objections that were sustained does not mean that she committed misconduct. And, because much of the testimony defense counsel sought to elicit and virtually all of the exhibits she offered were ultimately admitted, the Teters were not prejudiced. The record is devoid of any showing as how or why any piece of evidence defense counsel sought to elicit and that was not admitted was prejudicial or deprived the Teters of a fair trial. The jury was instructed to reach its verdict solely on the admitted evidence, CP 160-61, and the jury is presumed to have followed the court's instructions. *Foster*, 135 Wn.2d at 472. Only exhibits admitted into evidence were delivered to the jury room. 1/30 RP 2258.

As for defense counsel's January 27 representation that Dr. Lauter and Ms. Ellison would be called to testify over the next two days, the Court of Appeals determination, *Slip Op. at 13-14*, that the Teters failed to establish any prejudice does not, as the Teters claim, *Pet. at 19*, conflict with "strict prohibitions against making misrepresentations to the court" or *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d

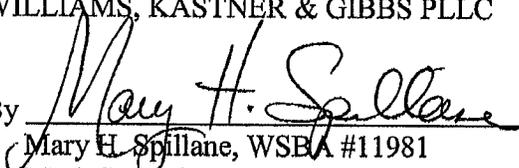
299, 355, 858 P.2d 1054 (1993). Neither *Fisons* nor any other authority the Teters cite suggests that prejudice warranting a new trial must be presumed when planned witnesses are not called because the defense ran out of time. Here, the Teters did not establish prejudice. They did not specify how much time they spent preparing for these witnesses (both of whom were on their own witness list) or identify any activities they were unable to perform because of the time spent preparing for them, or make any other showing of prejudice to warrant setting aside the jury verdict.¹³

V. CONCLUSION

The criteria for acceptance of review under RAP 13.4(b) have not been satisfied. The Teters' petition for review should be denied.

RESPECTFULLY SUBMITTED this 18th day of January, 2011.

WILLIAMS, KASTNER & GIBBS PLLC

By 

Mary H. Spillane, WSBA #11981

Mark S. Davidson, WSBA #06430

Attorneys for Respondent

¹³ The Teters argue, *Pet. at 18*, complain that the Court of Appeals applied *Nelson v. Martinson*, 52 Wn.2d 684, 328 P.2d 703 (1958), in holding that the Teters did not timely preserve the issue of misconduct by requesting a curative instruction, and claim *Nelson* is inapposite because the plaintiff there had not objected to the misconduct. Yet, *Nelson* is consistent with other cases holding that a new trial should not be granted because of attorney misconduct unless it was so flagrant that the court could not have cured its prejudicial effect through an instruction to the jury to disregard it. *Adair v. Weinberg*, 79 Wn. App. 197, 204, 901 P.2d 340 (1995); *City of Seattle v. Harclaon*, 56 Wn.2d 596, 354 P.2d 928 (1960); *McUne v. Fuqua*, 42 Wn.2d 65, 253 P.2d 632 (1953); *Swan*, 114 Wn.2d at 661.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 18th day of January, 2011, I caused a true and correct copy of the foregoing document, "DR. ANDREW DECK'S ANSWER TO PETITION FOR REVIEW," to be delivered by U.S. Mail, postage prepaid, to the following counsel of record:

Counsel for Petitioners:

Matthew N. Menzer, WSBA #21665
MENZER LAW FIRM, PLLC
705 Second Ave., Suite 800
Seattle, WA 98104
Ph: (206) 903-1818

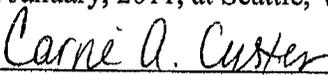
Counsel for Petitioners:

Avi J. Lipman, WSBA #37661
Peter M. Vial, WSBA # 06408
Barbara H. Schuknecht, WSBA # 14106
MCNAUL EBEL NAWROT &
HELGREN, PLLC
600 University St., Suite 2700
Seattle, WA 98101
Ph: (206) 467-1816

Co-counsel for Respondent:

Nancy C. Elliott, WSBA #11411
MERRICK HOFSTEDT &
LINDSEY PS
3101 Western Ave Ste 200
Seattle WA 98121-3017
Ph: (206) 682-0610

DATED this 18th day of January, 2011, at Seattle, Washington.



Carrie A. Custer

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Attached for filing in .pdf format is Dr. Andrew Deck's Answer Petition for Review in *Teter v. Deck*, Supreme Court Cause No. 85342-8. The attorneys filing this answer are Mary H. Spillane, WSBA No. 11981, e-mail address: mspillane@williamskastner.com and Mark S. Davidson, WSBA No. 06430, e-mail address: mdavidson@williamskastner.com.

Respectfully submitted,

Carrie A. Custer
Legal Assistant to Mary H. Spillane, Daniel W. Ferm and Arissa M. Peterson
Williams Kastner
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Main: 206.628.6600
Direct 206.628.2766
Fax: 206.628.6611
ccuster@williamskastner.com
www.williamskastner.com

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