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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RONALD and DEBORAH TETER, husband and wife,

Respondents,

v.

ANDREW DECK, M.D.,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

Plaintiffs Ronald and Deborah Teter claimed that Dr. Andrew Deck, a urologist, was negligent in failing to earlier convert a laparoscopic procedure to remove Mr. Teter's right kidney to an open procedure once a laceration of the abdominal aorta, a known complication of the surgery, occurred. The Teters claimed that, as result of that alleged failure, Mr. Teter developed a compartment syndrome in his left leg requiring fasciotomy, and persistent pain, immobility, and neurological deficits in his left leg and foot. Dr. Deck claimed that the aortic laceration occurred late in the three-hour surgery, and that, when the injury was discovered, the procedure was promptly converted to an open procedure so that the injury could be repaired. He further claimed that Mr. Teter's compartment syndrome was not due to any delay in converting from a laparoscopic to an open procedure, and that Mr. Teter's persistent leg and foot complaints are not due to the surgery, but to diabetic neuropathy.

Although Judge Chris Washington had handled the pre-trial proceedings in the case for over two years, the case was reassigned to Judge Steven Gonzalez on the scheduled trial date. After twelve days of trial, the jury, within two hours of starting deliberations, returned a defense verdict. That there was substantial evidence to support the jury's defense verdict is not in question.

Rather, what is in question is whether Judge Gonzalez abused his discretion in vacating the judgment and granting a new trial because of: (1) what Judge Gonzalez concluded was an abuse of discretion and error by Judge Washington in ordering the exclusion of one of the Teters' experts, Dr. Thomas Fairchild, a urologist, due to the Teters' repeated violations of the court's discovery orders requiring them to identify their experts and disclose summaries of the experts' opinions; and (2) what Judge Gonzalez characterized as prejudicial misconduct by defense counsel in "questioning witnesses to elicit inadmissible testimony, and to expose the jury to the contents of exhibits that had not been admitted into evidence," in making speaking objections, and in providing an erroneous schedule of anticipated witnesses over the last two days of trial.

The first cited reason for granting a new trial is erroneous because the exclusion order was a proper exercise of Judge Washington's discretion and was supported by undisputed evidence that, despite being given additional time on multiple occasions, the Teters violated at least five orders concerning expert disclosures without excuse. The second cited reason for granting a new trial is erroneous because the record fails to reflect prejudicial misconduct by defense counsel, much less prejudicial misconduct warranting a new trial, as opposed to some lesser sanction. Moreover, even if prejudicial misconduct occurred, the prejudice could

have been cured by a corrective instruction, but none was requested. The trial court should not have invalidated the jury's verdict, vacated the judgment, or granted a new trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its March 13, 2009 Order Granting Plaintiff's Motion for New Trial.

2. The trial court erred in entering its April 22, 2009 Order Denying Motion for Reconsideration.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the record on defendant's motion to exclude plaintiffs' expert urologist reflects Judge Washington's (a) consideration of plaintiffs' unexcused, unexplained and repeated violations of expert disclosure orders, including at least four different orders directing them to identify their expert witnesses and disclose summaries of the experts' opinions; (b) repeated unsuccessful attempts to remedy the prejudice to defendant from these violations by granting multiple extensions of time for the required expert disclosures, extending the discovery cutoff, and continuing the trial date; (c) express finding of prejudice to defendant's ability to prepare for trial; and (d) consideration of alternative lesser sanctions, did Judge Gonzalez abuse his discretion in granting a new trial based on an erroneous conclusion that Judge Washington's exclusion

order had been an abuse of discretion and an error of law?

2. Where plaintiffs advised Judge Gonzalez of their intention to file a motion for reconsideration of Judge Washington's exclusion order but failed to do so, a 12-day trial proceeded to verdict based on the order and the lack of a motion for reconsideration, and judgment was entered on the verdict, did Judge Gonzalez abuse his discretion in granting a new trial based on an erroneous conclusion that the exclusion order had been an abuse of discretion and an error of law?

3. Where defense counsel's questions, asked to lay foundation for the admission of certain exhibits and to elicit expert interpretation of medical records, were not intended to and did not elicit inadmissible evidence, and were not prejudicial, did the trial court abuse its discretion in granting a new trial for that reason?

5. Did the trial court abuse its discretion in granting a new trial because of non-prejudicial speaking objections by defense counsel?

6. Where time constraints precluded the defense from calling two witnesses, both of whom had been designated as trial witnesses by plaintiffs, did the trial court abuse its discretion in granting a new trial based on defendant's announced intent to call the witnesses?

7. Where plaintiffs failed to request a curative instruction as to the alleged misconduct of defense counsel, and any alleged prejudice

could have been cured by a curative instruction, did the trial court abuse its discretion in granting a new trial based on the alleged misconduct?

IV. STATEMENT OF THE CASE

A. The Treatment Forming the Basis of the Lawsuit.

On September 9, 2004, Dr. Deck and Dr. David Lauter performed a laparoscopic procedure to remove Mr. Teter's right kidney because of a mass suspicious for cancer. 1/15 RP 390-91, 449-50; Ex. 4. During the procedure, 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 Dr. Michael Towbin, a vascular surgeon, was called in and successfully repaired the aortic laceration. Exs. 4, 1002 (pp. 007-009). Mr. Teter developed compartment syndrome in his left leg¹ post-operatively and underwent a left leg fasciotomy² performed by orthopedic surgeon Dr. Robin Fuchs. Exs. 10, 12; 1/14 RP 171, 180-81, 185-86. Mr. Teter's condition gradually improved and, on September 17, 2004, he was transferred to an acute rehabilitation facility *See* Ex. 14. As of October 29, 2004, when Mr. Teter returned to see Dr. Fuchs following his rehabilitation, Dr. Fuchs found that Mr. Teter had painless

¹ A compartment syndrome is a condition where the circulation or function of the tissue within a specific compartment of the body, here the left leg, is being compromised because of increased pressure in that compartment. 1/14 RP 175.

² A fasciotomy involves making an incision on each side of the leg through the skin to release the fascia that surrounds the muscles, so that the pressure in the leg compartment is released. 1/14 RP 185.

range of motion of his left hip, knee, foot, and ankle, soft leg compartments, and overall good function except for some loss of sensation in the deep peroneal nerve and some decreased function in the extensor hallucis tendon that lifts up the first toe. 1/14 RP 202-04, 206; Ex. 1009.

The Teters sued Dr. Deck,³ claiming that he negligently failed to timely convert the laparoscopic procedure to an open one, and thereby caused Mr. Teter's post-operative compartment syndrome and complaints of pain and disability. CP 1-5; *see* 1/30 RP 2162-63. At trial, the Teters presented expert testimony from Dr. John Powelson, a general surgeon experienced in performing laparoscopic nephrectomies, that the aorta was lacerated early in the surgery, that Dr. Deck negligently failed to timely convert from a laparoscopic to an open surgery, and that the failure to do so caused Mr. Teter's compartment syndrome. 1/21 RP 808, 868, 913-14.

Dr. Deck denied the Teters' claims. CP 13-20; *see* 1/30 RP 2213-19. He presented expert testimony from Dr. Peter Schulam, a urologist, and Dr. Thomas Biehl, a general surgeon experienced in laparoscopic surgery, that Dr. Deck's conduct in the surgery complied with the applicable standard of care. 1/26 RP 1246, 1293, 1318; 1/27 RP 1518, 1525-26. They testified that, because there was no bleeding evident until about three hours into the surgery, and the blood pressures, heart rates and

³ The Teters also sued Dr. Lauter, but he was later dismissed as a defendant. CP 28-29.

fluid levels were inconsistent with early laceration, the injury to the aorta occurred late in the surgery, and Dr. Deck had no reason to convert to an open surgery earlier than he did. 1/26 RP 1296-98; 1/27 RP 1554-58.

Dr. Dan Neuzil, a vascular surgeon, called by Dr. Deck testified that Dr. Deck's conduct was not the cause of the compartment syndrome because Mr. Teter's leg had received sufficient blood supply during the entire surgery, and that the length of the surgery, which would not have been reduced by an earlier conversion to an open procedure, was more likely than not the cause of the compartment syndrome. 1/29 RP 2016, 2061-62, 2066-69. Dr. Paul Nutter, a physical medicine and rehabilitation specialist, testified that Mr. Teter's ongoing leg complaints were due to a peripheral neuropathy caused by his diabetes. 1/28 RP 1648, 1663.

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

The Teters filed this lawsuit on April 21, 2006. CP 1-7. Trial was set for October 8, 2007. CP 863. Effective January 8, 2007, the case was transferred to Judge Washington. CP 868. In May 2007, the trial date was continued to March 17, 2008, CP 869-70, and in February 2008, it was continued to September 22, 2008. CP 871-72.

Scheduling discovery proved difficult when the Teters failed to make their experts available for deposition. *See* CP 873-924. On June 2, 2008, Dr. Deck filed a motion to compel the Teters to provide their

primary witnesses for deposition or, alternatively, to exclude the witnesses from testifying at trial. *Id.* Although Judge Washington did not exclude the witnesses, on June 12, 2008, he directed that:

Plaintiffs shall provide names and available times, and dates for the depositions of plaintiffs' primary witnesses by June 20, 2008. . . . If the depositions cannot be completed reasonably before trial, the court will consider a continuance of the trial date or other remedies. [CP 969-71.]

The Teters failed to comply with that order. On July 11, they moved to continue the trial date again. CP 972-1011. Dr. Deck opposed that motion, CP 1012-1104, and requested sanctions for the Teters' violation of the court's June 12th order. CP 1021. Although Judge Washington denied the motion to continue the trial date, rather than impose sanctions for the Teters' violation of his June 12th order, he extended the discovery cutoff to August 29, 2008. CP 1192-93.

By August 21, the Teters still had not identified all of their expert witnesses or provided descriptions of the experts' anticipated testimony. Dr. Deck moved for a pre-trial conference, citing the Teters' continuing violation of the court's June 12th order and noting that only one week remained until the extended discovery cutoff. CP 1172-78.

On September 2, 2008, after the extended discovery cutoff had passed, the Teters served a trial witness list, CP 1270-74, in which they listed for their urology expert, "Replacement urologist/William Y.

Duncan, III, M.D.,” CP 1271. Dr. Duncan, the urology expert the Teters had originally named back in October 2007, CP 1335, had become ill during his deposition on January 11, 2008, CP 718, and the Teters’ counsel, on January 22, 2008, had advised defense counsel that:

[D]ue to Dr. Duncan’s various health issues we may be substituting another urologist for him. We are currently 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.]

On September 17, 2008, Judge Washington held the pre-trial conference. *See* CP 1379. Judge Washington again declined to impose sanctions on the Teters for violating his prior order and instead continued the trial date to January 12, 2009, and directed the Teters to identify their experts and provide “a concise summary of the opinions expected to be offered regarding the standard of care, causation, and damages” by October 1, 2008. CP 1379-81. He also issued a new Case Schedule, setting a new discovery cutoff of November 24, 2008. CP 764.

The Teters failed to comply with Judge Washington’s September 17th order. In their October 1, 2008 “Plaintiff’s Witness Disclosures (Per the Court’s September 17, 2008 Conference,” CP 1413-15, they continued to list their urology expert as “Replacement urologist/William Y. Duncan, III, M.D” and conceded that they could not “say with certainty at this time what a replacement witness will specifically testify to . . . ,” CP 1414.

On October 22, 2008, at another pre-trial conference, Judge Washington again declined to sanction the Teters for their continuing violations of his orders, instead again extending their disclosure deadline and ordering that they disclose their urology expert and a summary of his/her opinions by October 29, 2008. CP 719. The Teters again failed to comply with the extended deadline. CP 1417.

Judge Washington convened yet another pre-trial conference on November 12, 2008. *See* CP 719, 1417, 1419. He again declined to impose sanctions on the Teters for violating his orders, and instead 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. CP 719-20. Later that day, the Teters responded by identifying Dr. Robert Golden as their urologist expert. CP 1419-20. In their disclosure, they stated that Dr. Golden would testify about standard of care, causation, and damages, but did not identify the specific opinions he held. *Id.* It was apparent that Dr. Golden's review was not complete, as the Teters stated that he had reviewed "a limited number of documents," CP 1419, and would "be given an opportunity to review additional documents," CP 1420.

Less than two weeks later, on November 24, 2008, coincidentally the date the court had set as the discovery cutoff, the Teters' counsel

advised defense counsel that, due to a personal conflict, they had stricken Dr. Golden, CP 1434, 1436, stating that “we will determine shortly if there will be a replacement for Dr. Golden,” CP 1436. Then, on December 10, 2008, the Teters’ counsel advised defense counsel that they intended to replace Dr. Golden with Dr. Thomas Fairchild of Spokane. CP 1442. On December 12, 2008, the Teters provided their witness disclosure regarding Dr. Fairchild, which was almost identical to the disclosure they had provided regarding Dr. Golden, *see* CP 1419-20, failed to provide a concise summary of Dr. Fairchild’s specific opinions, and stated that Dr. Fairchild had reviewed a limited number of documents and would be given the opportunity to review more. CP 1448-49. Thereafter, the Teters’ counsel suggested that defense counsel take Dr. Fairchild’s deposition on short notice, at highly irregular and virtually impossible times. CP 1387-88 (¶¶ 4-5); *see also* CP 1395-96.

On December 29, 2008, Dr. Deck moved to exclude Dr. Fairchild as a trial witness, documenting the Teters’ multiple violations of the court’s discovery orders requiring identification of experts and disclosure of summaries of expert opinions, and the prior court orders granting extensions and continuances in lieu of excluding witnesses. CP 1384-1471. In opposing the motion, the Teters did not offer any explanation or excuse for their multiple failures to comply with the court’s disclosure

orders, but claimed no prejudice to Dr. Deck because Dr. Fairchild could be made available for deposition before or during the trial. CP 1472-1564.

On January 12, 2009, the scheduled trial date, the case was brokered to Judge Steven Gonzalez. 1/12 RP 9. Judge Washington's last order, granting Dr. Deck's motion to exclude Dr. Fairchild, was entered that same day. CP 1565-68. Judge Washington ruled that the Teters were prohibited from calling Dr. Fairchild or any other "replacement urologist" at trial, and found that (1) the Teters had failed to comply with the Case Schedule Order, any of the three (October 1, October 29, or November 12, 2008) court-ordered deadlines for disclosing Dr. Fairchild, and the September 17th order requiring a concise summary of the purported testimony of their experts on standard of care, causation, and damages; (2) the Teters did not provide Dr. Deck with a reasonable opportunity to depose Dr. Fairchild; and (3) Dr. Deck and his counsel had been prejudiced in their trial preparation by the failure to properly disclose Dr. Fairchild. *Id.*

On January 13, 2009, Teters' counsel advised Judge Gonzalez that they would "be filing a motion to reconsider" the order excluding Dr. Fairchild,⁴ 1/13 RP 85-86, but they never did.⁵

⁴ Judge Gonzalez asked if they would be asking Judge Washington to reconsider his ruling, and the Teters' counsel indicated that they would file their motion and defer to Judge Gonzalez on how to proceed from there. 1/13 RP 86.

⁵ On January 27, 2009, the day the Teters rested their case, the Teters made an offer of proof as to what Dr. Fairchild's testimony would have been had Judge Washington not

C. The Verdict, Judgment, and Grant of New Trial.

The case proceeded to trial, with 21 witnesses testifying over 9 days. *See* CP 184-87. On January 30, 2009, after deliberating less than two hours, the jury returned its verdict finding Dr. Deck not negligent. CP 619, 110-11. Judgment on the verdict was entered on February 18, 2009. CP 216-19. The Teters then moved for a new trial, arguing that Judge Washington erroneously excluded Dr. Fairchild, that the jury was erroneously instructed on the standard of care, and that defense counsel had engaged in prejudicial misconduct by purportedly violating certain orders in limine, questioning witnesses on issues that were inadmissible or after multiple objections had been sustained, and purportedly misrepresenting which witnesses would be called. CP 220-616.

On March 13, 2009, Judge Gonzalez granted the motion for some, but not all, of the reasons the Teters had argued. CP 708-14. Specifically, Judge Gonzalez ordered a new trial under CR 59(a)(8), finding that Judge Washington's exclusion of Dr. Fairchild was "an abuse of discretion, and a reversible error of law," CP 710 (¶ 3),⁶ and under CR 59(a)(1) and (2),

excluded his testimony, 1/27 RP 1626-28, that was more detailed than the Teters' insufficient and untimely witness disclosure, *see* CP 1448-49. In response to the offer of proof, Judge Gonzalez did not overturn Judge Washington's exclusion order. 1/27 RP 1633.

⁶ In granting a new trial on this basis, Judge Gonzalez effectively reversed Judge Washington's order excluding Dr. Fairchild, even though no motion to reconsider that order had ever been filed.

finding that defense counsel committed misconduct in “questioning witnesses to elicit inadmissible testimony, and to expose the jury to the contents of exhibits that had not been admitted into evidence,” CP 712 (¶ 4), making “numerous and improper speaking objections,” *id.*, and making “misleading representations . . . about witnesses the defendant was intending to call,” CP 713 (¶ 5). Judge Gonzalez did not find any error in his jury instructions, nor did he find that defense violated any orders in limine with respect to eliciting testimony as to what Dr. Lauter and anesthesiologist Dr. Colston did or did not do during the surgery, or with respect to limitations on expert testimony. CP 710-12 (stricken ¶¶ 4-6.)

Dr. Deck’s motion for reconsideration, CP 715-800, was denied, CP 847-88, and Dr. Deck timely appealed, CP 801-12; 849-62.

D. Facts Relevant to Defense Counsel’s Alleged Misconduct.

On January 12, 2009, the first day of trial, Judge Gonzalez advised counsel that protocol in his courtroom required counsel not to make speaking objections, but only to support objections with citation to a specific evidence rule, by number, heading, or title. 1/12 RP 59. On January 14, 2009, the third day of trial, after the Teters’ counsel had tried to show the jury an unmarked and unidentified illustrative exhibit, 1/14 RP 173-74, Judge Gonzalez advised counsel that nothing, even illustrative, should be shown to the jury without first being identified and marked for

the record. 1/14 RP 298. After having been reminded that she needed to ask permission to approach a witness, 1/14 RP 332, defense counsel, on January 15, 2009, asked for clarification as to Judge Gonzalez's expectations as to courtroom protocol, and Judge Gonzalez indicated that he preferred a formal courtroom, that he did not want speaking objections, that he expected counsel to ask the first time before approaching any witness, to first mark as an exhibit and move to publish anything counsel wanted to show to the jury, and to show any exhibit to opposing counsel before showing it to a witness or the jury. 1/15 RP 370-73.

1. Defense counsel's allegedly improper speaking objections.

Even though Judge Gonzalez, at the outset of trial, directed counsel to avoid speaking objections, 1/12 RP 59; 1/15 RP 371, there were multiple occasions when counsel for both sides went beyond stating the ground or evidence rule supporting the objection. It was not just defense counsel who at times made speaking objections to questions asked of witnesses or to the court's rulings on objections. The Teters' counsel also made multiple 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, 1660,⁷ 1706; 1/29 RP 2034 ("Your Honor, the witness knows better . . ."), and at times argued

⁷ These objections, made by different plaintiffs' lawyers, also violated court rules limiting the right to make objections to the attorney conducting the cross examination of the witness. 1/28 RP 1660:7-10 and 1660:18-20. *See* CR 43(a)(2). The trial court did not reprimand plaintiffs' counsel for this rule violation.

with the court's rulings on objections, *see e.g.*, 1/14 RP 375; 1/15 RP 375; 1/20 654-55, 662, 735. Yet, the trial court did not reprimand the Teters' counsel for these violations of protocol.

As for defense counsel making speaking objections, the order granting new trial does not specify any particular speaking objections that the court found so prejudicial as to warrant a new trial. *See* CP 712-13. While it is true that defense counsel made 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, neither the Teters in their motion for new trial, *see* CP 220-47, nor the court in its order granting new trial, *see* CP 712-23, cited any specific prejudice from those objections. While the following transcript excerpts bear out the court's displeasure with defense counsel's speaking objections, the transcript does not bear out any prejudice from them.

On the first day of testimony, defense counsel objected to a question posed to Mr. Teter about his medical bills, stating "Your Honor, object to this based upon the depositions and the subpoenas and the outstanding discovery request." 1/14 RP 310. The court overruled the objection and instructed the jury to disregard the speaking objection. *Id.*

During the direct examination of Dr. Powelson, defense counsel objected to testimony concerning procedures during a left nephrectomy,

stating “Objection, irrelevance, since they were doing a right.” 1/21 RP 852. The court overruled the objection. *Id.* Later during Dr. Powelson’s direct examination, after the witness disregarded the court’s instruction to identify the medical textbook from which he was about to read a quotation to the jury, defense counsel objected, stating “Your Honor, I would ask for further – he’s identifying a document that he’s reading from. When it was published. Who published it. What year it was published. I believe that’s important.” 1/21 RP 877-78. The court again overruled the objection. *Id.* Then, during Dr. Powelson’s cross-examination, when defense counsel contested the court’s ruling sustaining an objection to one of her questions with argument, the court reprimanded her in front of the jury for making a speaking objection:

Q Were you aware that he, as of September, 2004, had performed more laparoscopic nephrectomies than you have performed in your career?

Mr. Menzer: Objection, relevance, Your Honor.

The Court: One second, please. Sustained.

By Ms. Elliott:

Q Are you aware that he’s done more than 200 laparoscopic nephrectomies?

Mr. Menzer: Same objection.

The Court: Sustained.

Ms. Elliott: Your Honor, experience is in question here. I believe that it’s relevant.

The Court: I believe that I’ve spoken already about my opinion of speaking objections, and I won’t tolerate more. Next question, please. [1/21 RP 960-61.]

During the cross-examination of Dr. Biehl, after a question by the Teters' counsel as to the aorta being a "very vulnerable structure," the court again reminded defense counsel not to make speaking objections:

Ms. Elliot: Your Honor, object to this, since their expert said that this complication was not negligence.

The Court: No speaking objections.

Ms. Elliot: Objection, relevance.

The Court: Overruled. Next question. [1/27 RP 1572-73.]

Then, during questioning of defense anesthesiology expert, Dr. Caplan, after defense counsel twice questioned the court's rulings sustaining certain objections, 1/28 RP 1808 ("Aren't I entitled to call two witnesses?"), and 1/28 RP 1811 ("He can't explain what - "), the court responded:

The Court: Sustained, counsel. And if you talk one more time that way, you will be fined. You got it? Next question, please. [1/28 RP 1811.]

2. Defense Counsel's Allegedly Improper Questioning.

The trial court's order does not identify any specific questioning of witnesses by defense counsel that the court perceived was done "to elicit inadmissible testimony" or "to expose the jury to the contents of exhibits that had not been admitted into evidence". *See* CP 708-14. Although the Teters argued in their new trial motion that defense counsel, purportedly in violation of an in limine order excluding evidence of fault of non-parties, improperly sought to elicit testimony as to what Dr. Lauter and Dr.

Colston (the anesthesiologist) did or did not do during the surgery, *see* CP 240-42, Judge Gonzalez did not include such reasons in the order granting new trial. CP 711-12 (stricken ¶ 5). Similarly, although the Teters argued that defense counsel attempted to elicit testimony exceeding in limine limitations placed on expert testimony, CP 236-40, Judge Gonzalez also did not include those reasons in his order. CP 712 (stricken ¶ 6).

a. Questioning of Dr. Caplan.

The only other questioning by defense counsel that the Teters argued in their new trial motion constituted improper attempts to elicit inadmissible testimony were questions asked of Dr. Caplan to interpret the medical records to arrive at the time when Dr. Colston determined “fluid resuscitation was complete,” *see* CP 240, 519-22; 1/28 RP 1802-05, and to determine the surgery “start time,” *see* CP 240-41, 515; 1/28 RP 1790-91. Ultimately, Dr. Caplan was permitted to testify that a hematocrit was obtained at 10:30, that it was important to obtain the hematocrit after fluid resuscitation was complete, CP 521-22, 1/28 RP 1803-05, and that, from his review of the records, the surgery start time was between 9:10 and 9:20, CP 515; 1/28 RP 1791.⁸

As to fluid resuscitation, the questioning went as follows:

⁸ Others had been permitted to testify as to the anesthesia and surgery start times using the same intra-operative record. 1/26 RP 1389, 1430-31; 1/27 RP 1537, 1541.

Q. Then it states on the addendum,⁹ “after fluid resuscitation is complete.” Can you tell when the fluid resuscitation was started or completed?

A. Not from this record.

* * *

Q. From your education, training, and experience, what is your – what do you believe – when he wrote “after fluid resuscitation was complete,” what do you believe he’s talking about?

Mr. Menzer: Your Honor, lack of foundation, hearsay.

The Court: Sustained.

* * *

By Ms. Elliott:

Q. Doctor, Do you have an opinion, with reasonable medical probability, when the fluid resuscitation was complete?

Mr. Menzer: Same objection in reference to this document.

The Court: Sustained.

By Ms. Elliott:

Q. Based upon the facts – based upon that information.

Mr. Menzer: Your Honor, same objection. Lack of foundation, the record speaks for itself, and hearsay.

The Court: Sustained.

By Ms. Elliott:

Q. Well, Doctor, when was the hematocrit of 31 obtained?

A. About 10:30.

Q. What is the significance of that in relationship to when the fluid resuscitation was complete?

Mr. Menzer: Same objection, Your Honor, with reference to this document.

The Court: Sustained.

By Ms. Elliott:

Q. Based upon looking at the anesthesia record, the lab

⁹ The “addendum” refers to an addendum the anesthesiologist, Dr. Colston, had placed in the progress notes of the hospital chart, Ex. 7, which had been admitted into evidence by the Teters during Dr. Colston’s testimony. 1/26 RP 1409.

reports, and all the medical records you have reviewed, can you determine when the fluid resuscitation was complete?

Mr. Menzer: Same objections, Your Honor.

The Court: Sustained.

By Ms. Elliott:

Q. How long before you ordered hematocrit would you complete your fluid resuscitation?

Mr. Menzer: Your Honor, same objections.

The Court: Sustained.

By Ms. Elliott:

Q. Why do you wait until you complete your fluid resuscitation before you order a hematocrit?

Mr. Menzer: Assumes facts not in evidence, Your Honor.

The Court: Overruled.

A. It gives you a more reliable understanding about the patient's blood count.

By Ms. Elliott:

Q. Why?

A. Because if you do it before the fluid resuscitation is complete, the blood count will seem artificially high. [1/28 RP 1802-05.]

The questioning as to the surgery start time went as follows:

Q. From looking at the intraoperative nursing note, what time does the – approximately what time did the surgery start, according to the nurses?

Mr. Menzer: Your Honor, objection, hearsay.

The Court: Sustained.

Mr. Menzer: Lack of foundation.

Ms. Elliott: It isn't – I believe it's –

The Court: Sustained.

By Ms. Elliott:

Q. Doctor, from your review of the records, do you have an opinion what time the surgery started?

Mr. Menzer: Same objection.

The Court: You may answer.

A. Yes, between 9:10 and 9:20. [1/28 RP 1790-91.]

b. Laying foundation for Exhibits 1001 and 1002.

As to questioning which the court characterized as exposing the jury to the contents of inadmissible evidence, this was apparently a reference to defense counsel's attempt to lay the foundation for the admission of defendant's Exhibits 1001 and 1002 for identification. *See* CP 241-42. Exhibit 1001, consisting of 161 pages, comprised Dr. Deck's office chart for his care of Mr. Teter. 1/28 RP 1893, 1896. Defense counsel offered the exhibit, and the Teters objected. 1/28 RP 1895-96. After extensive argument, the court expressed reservations about its admissibility, but did not specifically sustain or overrule the objection. 1/28 RP 1896-1902. However, it never admitted the exhibit and, at the close of final arguments, stated that it was not in evidence. 1/30 RP 2254.

Exhibit 1002, as originally marked, consisted of 21 pages of Evergreen Hospital's medical record, which included some of the pages in Dr. Deck's office chart, such as a patient history and report of physical examination. *See* 1/29 RP 1919. Defense counsel offered the entire exhibit, but plaintiffs objected. 1/22 RP 1090; 1/21 RP 985-86. The court initially reserved ruling, 1/21 RP 985-86, but subsequently sustained the objection, 1/27 RP 1533-34, except as to pages 001 (the consent form for

the surgery), 002-003 (Dr. Deck's pre-op history and physical) and 007-009 (Dr. Towbin's operative report), which were admitted into evidence as Exhibit 1002, CP 106; *see* 1/14 RP 333; 1/22 RP 1090; 1/28 RP 1920. Other pages that had been included as part of the original Exhibit 1002 were admitted separately as Exhibit 4 (Dr. Deck's operative report) and Exhibit 5 (the anesthesia record). 1/15 RP 441-42. Despite its refusal to admit all of Exhibit 1002, the court noted on the record that experts could properly testify regarding documents that were not admitted to the extent they had relied upon them in forming their opinions. 1/27 RP 1533. The only parts of Exhibits 1001 and 1002 that were not admitted and to which the jury was exposed were pages separately admitted as Exhibits 4 and 5, or portions that experts had relied upon in forming their opinions.

c. Attempt to use Dr. Towbin's report.

At one point, while Dr. Neuzil was on the stand, defense counsel mistakenly stated that plaintiffs' Exhibit 6, Dr. Towbin's operative report, had been admitted. 1/29 RP 2040. When the Teters' counsel pointed out that Exhibit 6 had not been admitted, defense counsel commented that "[i]t's been shown to the jury multiple times," and then offered it "since Dr. Towbin testified regarding his report." 1/29 RP 2041. The court instructed the jury to "disregard all of counsel's remarks." *Id.* The court sustained the Teters objection that Exhibit 6 should have been admitted

while Dr. Towbin was on the stand. *Id.* Dr. Towbin's report was also included in Exhibit 1002, which defense counsel then again moved to admit, but the Teters' renewed objection was sustained. 1/29 RP 2041-42. As it turned out, Dr. Towbin's operative report, pages 007-009 of Exhibit 1002, had been previously admitted without objection, 1/22 RP 1090; CP 106, and defense counsel was allowed to publish and use it with Dr. Neuzil, *see* 1/29 RP 2069-72.

d. The events of January 28, 2009.

There were other misunderstandings that occurred during trial that clearly displeased the court. At the end of the court day on January 27, 2009, the court advised counsel, "We'll be in recess until tomorrow morning at 9:00. If the parties can be here at quarter of, we might have a chance to talk about jury instructions." 1/27 RP 1633. The next day, Judge Gonzalez began the day's proceedings at 9:00 with the comment, "I had hoped to have had a discussion about jury instructions by now. I'm not sure what happened." 1/28 RP 1638. After Mr. Keefe, one of the defense attorneys, apologized and explained that they had a computer issue and had to coordinate the appearance of the morning's first witness who was on his way with the lead defense counsel, Ms. Elliott, the court accepted the apology but docked the defense the time lost. *Id.*; *see also* 1/28 RP 1642. Lead defense counsel arrived 10 minutes later,

accompanied by the day's first witness, Dr. Nutter. *See* 1/28 RP 1646.

Before Ms. Elliott arrived, the Teters accused defense counsel of ethical violations in connection with their announcement the day before that Bonnie Ellison and Dr. David Lauter would be testifying over the next two days. 1/28 RP 1638-41. Mr. Keefe indicated that he did not know how to respond to the Teters' counsel's accusation without Ms. Elliott being present. 1/28 RP 1641. When Ms. Elliott arrived, the court did not address the matter with her, but asked if she had a witness, and the defense called Dr. Nutter to the stand. 1/28 RP 1646.

During Dr. Nutter's testimony, defense counsel had some difficulty establishing foundation for Dr. Nutter to refer to certain documents. She tried to have Dr. Nutter go over the note he had written of his examination of Mr. Teter. 1/28 RP 1655-56. The Court sustained the Teters' objection to Dr. Nutter reading from his note which was not admitted into evidence. *Id.* Defense counsel asked the court if Dr. Nutter was not going to be able to read from his note unless it was admitted, and the court responded: "Counsel, you know proper procedure." 1/28 RP 1656. Defense counsel then, after eliciting Dr. Nutter's testimony that he was relying on his report, it was relevant to his opinions, and his testimony would be more accurate if he could refer to it, moved to admit the note, but the court sustained the Teters' objection and noted: "It is not even marked as an

exhibit at this point.” 1/28 RP 1656-58.

Defense counsel then told Dr. Nutter to use any records that he needed to refresh his recollection, if needed, to explain his examination of Mr. Teter, and the following colloquy ensued, 1/28 RP 1663-64:

Mr. Lipman: Objection, Judge.

The Court: Sustained. The witness will not review any documents without leave of the court. Next question, please.

Ms. Elliott: Could we have leave of the court for him to use his report?

The Court: He may use documents properly identified in the record as an exhibit. You will follow proper protocol.

Defense counsel then had Dr. Nutter’s note marked as an exhibit and had him identify it, but, when she tried to establish whether it would help him explain his testimony if he could refer to it, the court sustained the Teters’ objections. 1/28 RP 1664-66. Ultimately, without being able to refer to his report, Dr. Nutter testified about his examination of Mr. Teter and his opinions. 1/28 RP 1666-80.¹⁰

After the noon recess, outside the presence of the jury, the Court expressed frustration with defense counsel, 1/28 RP 1708-09:

The Court: Let me just say that I have found the performance this morning exasperating. Counsel knows

¹⁰ Defense counsel also showed Dr. Nutter what had been marked as Exhibit 1010, an EMG, and, after the court sustained an objection that the document had not been admitted, and an objection that the witness had not testified that his recollection needed refreshing, the court ultimately allowed Dr. Nutter to testify about the EMG. 1/28 RP 1660-62.

how to mark exhibits in advance, show them to the witness, and knows what refreshing recollection is. I expect no more speeches in front of the jury this morning.

Then, during Dr. Deck's testimony, defense counsel attempted to lay foundation for admission of Defendant's Exhibit 1001, Dr. Deck's office chart. 1/28 RP 1893-95. During argument over the admissibility of the exhibit, the following colloquy occurred, 1/28 RP 1898:

[By Ms. Elliott:] . . . [Y]ou're (sic) ruling is that he can't -- without having them admitted, he can't look at them, and I'm going to be asking him many questions about his medical judgment.

The Court: I've never said he can't look at things if they have not been admitted.

Ms. Elliott: Not with him, but with other witnesses.

The Court: Never have I said that, counsel. Never.

At the end of argument regarding the exhibit's admissibility, Judge Gonzalez indicated that, before making a decision he intended to spend some more time reviewing the document. 1/28 RP 1902.

Judge Gonzalez then went on to "make a record" about his "displeasure with some of the conduct in this case." 1/28 RP 1903-04. In addition to citing lead defense counsel's lateness to court that morning, he also noted that she had not been present for the Teters' proffer regarding Ms. Ellison and Dr. Lauter, and expressed concern that the proffer contradicted defense counsel's representations regarding Dr. Lauter's

scheduled testimony. 1/28 RP 1903. Judge Gonzalez then stated:

I'm also concerned about attempts to circumvent the court's ruling on admissibility of documents. It certainly appears that way by putting issues before the jury regarding documents in a purported attempt to lay foundation.

For disregard for protocol and rules of evidence which are repeated – and this is not the first court in which they have occurred¹¹ – for continued speaking objections after clear direction from me not to do so, and what can only be described as feigned ignorance when I say that a document must be marked before it's shown to a witness, it certainly doesn't mean it has to be admitted before a witness can refer to it to refresh recollection. It is fairly fundamental and basic how you refresh and when you can refresh a witness's recollection. It is in this context that I will be considering this exhibit [Defendant's Exhibit 1001] this evening. [1/28 RP 904.]

Defense counsel began her response by apologizing for arriving at 9:10 a.m. that morning, explaining her understanding that the day's start time was 9:00. 1/28 RP 1904-05. The court replied, "We were starting trial at 9:00. We were going to discuss jury instructions, which I asked counsel to review, so we could address them in the morning." 1/28 RP 1905. Counsel then expressed disagreement with the court's other comments regarding her conduct, and frustration with her inability to respond to details of the Teters' proffer that was made in her absence. 1/28 RP 1905-08.

¹¹ Appellant's counsel has not found any basis in the record for this apparently gratuitous and puzzling remark that "this is not the first court in which they have occurred."

3. Statements About Witnesses the Defense Intended to Call.

During an unreported side bar on January 27, 2009, defense counsel indicated that on January 28 she intended to call Bonnie Ellison, who worked at Mr. Teter's place of employment, and that on January 28 or 29 she intended to call Dr. Lauter. 1/28 RP 1639-41. As it came to pass, due to court-imposed time constraints, neither witness was called. Plaintiffs obtained a declaration from Ms. Ellison stating that she had been informed by a staff member of defense counsel's firm on the morning of January 27 that she would not be called on January 28. CP 600-01. Plaintiffs also solicited an email dated January 28 from Dr. Lauter's attorney, indicating that he had not heard that Dr. Lauter was going to testify that week. CP 582.

The evidence submitted by defense counsel in opposition to plaintiff's motion for new trial included averments that neither the staff member's decision that Ms. Ellison need not be called nor her phone call to Ms. Ellison on January 27 had been communicated to defense counsel prior to the time she represented to the court that Ms. Ellison would be called to testify the following day. CP 642-43. Eliminating defense witnesses became a necessity in light of the trial court's schedule for the completion of testimony by January 28, even though plaintiffs did not rest their case until late in the morning of January 27. CP 642; 1/27 RP 1483-

84; 1/29 RP 1916.

Consistent with defense counsel's advice to the court and plaintiffs' counsel on January 27, Dr. Lauter had been subpoenaed by the defense to testify at 3:00 p.m. on January 28. CP 652-53. A staff member in defense counsel's office had contacted Dr. Lauter's office directly regarding the timing of his anticipated testimony, which had to be scheduled around his surgery schedule. CP 643; 662.

V. ARGUMENT

A. Standard of Review.

Judge Gonzalez granted plaintiffs' motion for new trial based in part on his finding "that the exclusion of Dr. Fairchild was an abuse of discretion, and a reversible error of law." When a new trial is granted on the ground of an error of law, no element of discretion is involved and the appellate court reviews the trial court's decision *de novo*. *Detrick v. Garretson Packing Co.*, 73 Wn.2d 804, 812-13, 440 P.2d 834 (1968).

When a motion for new trial is granted on any other ground, the standard of review is abuse of discretion. *Id.* The trial court abuses its discretion where its determination is manifestly unreasonable or was based upon untenable grounds or made for untenable reasons. *Roberson v. Perez*, 123 Wn. App. 320, 333, 96 P.3d 420 (2004), *rev. denied*, 155 Wn.2d 1002 (2005). To justify a new trial on grounds of misconduct of

the prevailing party, the misconduct must materially affect the substantial rights of the moving party. To rise to the level of misconduct, counsel's questioning must have been objected to and "must not have been cured by court instructions." *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000) ("*ALCOA*") (quoting *Moore's Federal Practice* § 59.13(2)(c)(1)(a), at 58-48 to 58-49 (*Daniel R. Coquillette et al. eds.*, 3rd ed. 1999)). The test is whether the alleged misconduct engendered such a feeling of prejudice in the jurors' minds that it deprived the litigant of a fair trial. *ALCOA*, 140 Wn.2d at 537.

B. Judge Washington's Order Excluding Dr. Fairchild Was a Proper Exercise of His Discretion.

Exclusion of a witness as a sanction for intentional or willful violations of discovery orders is within the sound discretion of the trial court. *Lampard v. Roth*, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984); *Dempere v. Nelson*, 76 Wn. App. 403, 406, 886 P.2d 210 (1994). "A party's untimely designation of a witness without reasonable excuse will justify an order excluding the witness." *Scott v. Grader*, 105 Wn. App. 136, 140, 18 P.3d 1150 (2001). Here, Judge Gonzalez erred in granting a new trial based on his conclusion that Judge Washington had abused his discretion and committed a reversible error of law in excluding Dr. Fairchild. Judge Washington's exclusion of an expert whose identity and

opinions were not timely disclosed in violation of multiple discovery orders was a proper exercise of his discretion.

In determining that Judge Washington's order was erroneous, Judge Gonzalez cited two deficiencies in the language of the order: (1) it did not recite that Judge Washington had considered whether a lesser remedy was available; and (2) it did not recite that plaintiffs' failure to comply with discovery orders amounted to intentional or willful discovery violations or other unconscionable conduct.¹² CP 709. Because the record reflects that Judge Washington did consider whether a lesser remedy was available, and that plaintiff intentionally and willfully violated discovery orders, the absence of an explicit recitation in the order so stating does not make the order erroneous. To determine otherwise would be to improperly honor form over substance. *First Federal Sav. & Loan Ass'n of Walla Walla v. Ekanger*, 93 Wn.2d 777, 781-82, 613 P.2d 129 (1980).

First, the predicate of plaintiffs' motion for new trial was the purported importance of the order excluding Dr. Fairchild. Plaintiffs' actions prior to the filing of defendant's motion to exclude the witness, however, tell a different story. Plaintiffs knew from the time of the January 11, 2008 deposition of their initial urologist expert, Dr. Duncan,

¹² Judge Gonzalez also found that, "... the record in the case does not support this determination." CP 709.

that he was in ill health and would not be able to testify at trial. CP 718. They then indicated uncertainty whether they would name a replacement. CP 1407. Ultimately, they waited another 10 months, until November 12, 2008, to name a replacement, which is inconsistent with their later contention that having a urologist expert was critically important to them.

Second, a replacement apparently mattered so little to the Teters that they willfully ignored the Case Schedule and multiple court orders to disclose their urologist expert and his/her opinions. On June 11, 2008, Judge Washington ordered the Teters to disclose their experts and summaries of the experts' opinions by June 20, 2008, but they did not do so. They then did not comply with the court's September 17, 2008, disclosure order, when on their October 1, 2008 witness list they listed "Replacement urologist/Dr. Duncan." CP 1413-15. Nor did they comply with the court's October 22, 2008 order, requiring them to name their replacement urologist by October 29, 2008. CP 719; 1417. Only when, on November 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, did the Teters name Dr. Golden as a replacement. CP 719-20; 1419-20. Then, when Dr. Golden withdrew less than two weeks later, without a complete summary of his opinions having been

disclosed, the Teters expressed uncertainty about naming another replacement, CP 1436, but subsequently, on December 10, 2008, after the extended discovery cut-off, named Dr. Fairchild. CP 1442.

Dr. Deck's motion to exclude Dr. Fairchild established a record of the Teters' repeated violations of court orders mandating expert witness disclosures; the multiple opportunities extended to them to cure their violations; the prejudice suffered by Dr. Deck as a result of those violations; the court's prior efforts to balance the equities by denying defendant's motions for sanctions and instead extending the Teters' disclosure deadlines (once by extending the discovery deadline and twice by continuing the trial date and discovery deadline). The Teters' response included no excuse for their multiple violations of the court's disclosure orders. CP 1472-1549; 1553-64.¹³

Third, the absence of a mystical incantation in the language of the order that the violations of the party being sanctioned were "intentional or willful" does not make the order erroneous. The intentional and willful nature of the Teters' violations are reflected in the record: Their violations of the orders of June 11, 2008, September 17, 2008, October 22, 2008, and

¹³ The violation of an explicit court order without reasonable excuse must be deemed willful. *Lampard v. Roth*, 38 Wn. App. at 202; *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn. 2d 674, 686-87, 41 P.3d 1175 (2002). The court should exclude testimony if there is a showing of intentional or tactical nondisclosure. *Lampard*, 38 Wn. App. at 202.

November 12, 2008, were unexcused and unexplained and therefore willful. “A party’s disregard of a court order without reasonable excuse or justification is deemed willful.” *Magana v. Hyundai Motor America*, ___ Wn.2d ___, 220 P.3d 191, 198 (2009) (citing *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002)). Where the record reflects that the court found that the violation was willful or deliberate and substantially prejudiced the opponent’s ability to prepare for trial, the order is a proper exercise of the court’s discretion. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (citing *Snedigar v. Hodderson*, 53 Wn. App. 476, 487, 768 P.2d 1 (1989)).

Here, Judge Washington found that the Teters failed to comply not only with the Case Schedule Order but also any of three deadlines (October 1, October 29 and November 12, 2008) ordered by the court. CP 1567-68.¹⁴ He also found that the Teters failed to comply with the court’s September 17, 2008 order requiring them to provide a concise summary of the opinions of their expert witnesses and did not provide Dr. Deck with a reasonable opportunity to depose Dr. Fairchild. Finally, he found that these violations prejudiced Dr. Deck and his attorneys in their trial

¹⁴ The record actually reflects the Teters’ failure to comply with two other expert disclosure deadlines, set forth in the orders of June 11, 2008, and August 29, 2008. CP 969-71; 1192-93.

preparation. CP 1567-68.¹⁵ These findings document the intentional and willful nature of plaintiffs' violations, especially since the record reflects that the Teters never offered a reasonable excuse for their violations and the violations occurred after the Teters had requested and received several extensions of time.¹⁶

Fourth, in ruling on Dr. Deck's motion, Judge Washington considered the alternative of lesser sanctions. The Teters argued that the motion to exclude Dr. Fairchild should be denied because an alternative remedy was available – another continuance of the trial date. CP 1563. Dr. Deck replied with a discussion of why a lesser sanction would not remedy plaintiffs' violations, but also offered an alternative sanction¹⁷

¹⁵ The sanction of exclusion is not always dependent upon a reflection in the record that lesser sanctions were considered and the violation was intentional or willful. Where a party violated an earlier order that imposed a less severe sanction for noncompliance with witness disclosure deadlines, the court may impose the sanction of witness exclusion for a subsequent violation without the findings otherwise required. *Scott v. Grader*, 105 Wn. App. at 141. The obvious reason for this rule is that the harsh sanction of exclusion should be anticipated as the consequence for a subsequent violation. Here, in lieu of imposing lesser interim sanctions, Judge Washington ignored the Teters' earlier violations and extended more time to them to make their disclosures. But he also gave them fair warning that, if they did not identify their urologist expert and disclose his/her opinions by November 12, 2008, they would not be able to call a urologist expert at trial. CP 719-20. When they failed to identify Dr. Fairchild until December 10, 2008, they should have anticipated that the sanction of exclusion would be imposed. It was not an abuse of the trial court's discretion to impose that sanction.

¹⁶ The requests for more time were all made after the deadlines ordered by the court had passed, never before. Plaintiffs simply ignored the orders, and only when defendant asked for sanctions did plaintiffs ask for more time.

¹⁷ The alternative Dr. Deck proffered, but did not believe would have cured the prejudice, was to require the Teters to make Dr. Fairchild available for deposition in Seattle at a mutually convenient time and place before trial, with the Teters paying all associated costs and fees of the deposition and an expedited transcript. CP 67.

(albeit one that would not have cured the prejudice). CP 66-67. Judge Washington expressly considered the Teters' response and Dr. Deck's reply in making his decision on the motion. CP 1567. Because he considered those documents, it is apparent on the face of the record that Judge Washington considered lesser sanctions, and the absence from his order of the mystical incantation that "lesser sanctions were considered" should not be fatal to his order. *Burnet*, 131 Wn.2d at 494 ("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.") (emphasis supplied). "There is no magic in words." *State ex rel. Public Utility Dist. No. 1 of Skagit County v. Wylie*, 28 Wn.2d 113, 147, 182 P.2d 706 (1947). See also *Abrams v. City of Seattle*, 60 Wash. 356, 364, 111 Pac. 168 (1910).¹⁸

Dr. Deck recognizes that, in *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 696, 41 P.3d 1175 (2002), the Court held that "[b]efore resorting to the sanction of dismissal, the trial court must clearly indicate on the record that it had considered

¹⁸ "Practically speaking, it is immaterial whether to the duty of explaining the cause of the accident which the law imposes upon appellant we apply the term 'burden of proof' or the term 'preponderance of the evidence.' As suggested by counsel for respondents, **there can be no magic in any particular form of words.** To grant a new trial on the theory that the instruction given was so erroneous as to be prejudicial would we think be a miscarriage of justice." *Id.* (emphasis supplied).

less harsh sanctions under CR 37. Its failure to do so constitutes an abuse of discretion.” Even if this Court were to conclude that it is not apparent from the record that Judge Washington considered lesser sanctions, or that Judge Washington did not make a sufficient record of his consideration of lesser sanctions, the remedy is not a new trial, but a remand to Judge Washington for a new determination of whether Dr. Fairchild should have been excluded, with specific findings on the record. *See Rivers*, 145 Wn.2d at 700 (“We remand to the trial court for a new determination whether the complaint should be dismissed, with specific findings on the record . . . whether the considered less severe sanctions than dismissal before resorting to the drastic remedy of dismissal.”). To the extent that Judge Gonzalez believed that Judge Washington did not make a sufficient record, Judge Gonzalez should have allowed Judge Washington to make a new determination with specific findings on the record.

C. The Order Granting New Trial Based Upon the Pre-Trial Order Excluding Dr. Fairchild Was Procedurally Defective.

The proper procedure for the Teters to argue in the trial court that the order excluding Dr. Fairchild was erroneous was through a motion for reconsideration of the order, which under CR 59 should have been brought within 10 days after entry of the order. Indeed, just one day after Judge Washington entered his order excluding Dr. Fairchild, plaintiffs informed

the trial judge, Judge Gonzalez, that “we will be filing a motion to reconsider,” 1/13 RP 85, which they never did. Instead, they waited until after 21 witnesses testified, the jury returned an adverse verdict, and judgment was entered on that verdict to challenge the order excluding Dr. Fairchild, and did so not by means of an untimely motion for reconsideration to Judge Washington, but by a motion for new trial to Judge Gonzalez.

In much the same way that KCLR 7(b)(7), “Reopening Motions,” prohibits a party from remaking a motion to a different judge without showing by affidavit, *inter alia*, any new facts or other circumstances that would justify seeking a different ruling from another judge, parties should not be permitted to do what the Teters did here, and wait until after the verdict went against them to ask Judge Gonzalez to determine the propriety of Judge Washington’s order and grant them a new trial based on Judge Gonzalez’s after-the-fact determination that Judge Washington had erred in his order excluding Dr. Fairchild, and that the Teters had been prejudiced because defense counsel argued (not improperly) in closing that the Teters presented no expert urologist to testify on standard of care. *See* CP 710. If Judge Gonzalez had the authority to reconsider Judge Washington’s order, the Teters should have asked him to do so before the jury returned its verdict. It was not within Judge Gonzalez’s purview after

the verdict and entry of judgment to act as an appellate court and reverse Judge Washington's order as an abuse of discretion or reversible error.

D. Defense Counsel's Alleged Misconduct Was Not Prejudicial and Did Not Warrant the Order Granting a New Trial.

The record reflects that Judge Gonzalez was angry and upset with defense counsel's conduct during the trial. However, because the Teters were not prejudiced by her conduct, even if it did violate court protocol, a new trial was not warranted.

The alleged misconduct cited in the order granting new trial includes: Defense counsel (1) asked questions to elicit inadmissible evidence, and to expose the jury to inadmissible evidence by questioning witnesses about exhibits that had not been admitted into evidence, (2) made speaking objections, and (3) made misleading representations about witnesses who were to be called to testify. CP 712-13. To support an order granting a new trial under CR 59(a)(2), the misconduct of the prevailing party must materially affect the substantial rights of the moving party. Because the record fails to establish prejudice from the alleged misconduct, it was error for the trial court to grant a new trial.

"Washington law on the standard for counsel misconduct as grounds for a new trial in a civil case is scant." *ALCOA*, 140 Wn.2d at 538. The *ALCOA* court approved the following test for evaluating a

motion for new trial based on alleged prejudicial misconduct of counsel:

As a general rule, the movant must establish that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record. . . . The movant must ordinarily have properly objected to the misconduct at trial, . . . and the misconduct must not have been cured by court instructions.

Id. at 539 (quoting *Moore's Federal Practice* § 59.13(2)(c)(1)(a), at 58-48 to 58-49). The test is whether the alleged misconduct engendered such a feeling of prejudice in the jurors' minds that it deprived the litigant of a fair trial. *ALCOA*, 140 Wn.2d at 537.

1. Questions asked to lay foundation for admission of exhibits, or to interpret medical records were not misconduct, did not elicit inadmissible evidence and caused no prejudice.

The order granting new trial cites ER 103(c) and "defense counsel's questioning witnesses to elicit inadmissible testimony, and to expose the jury to the contents of exhibits that had not been admitted into evidence." CP 712. Although the order did not identify the questions the court considered improper, presumably, the court was referring to defense counsel's questions posed to lay the foundation for admission of Dr. Deck's medical chart and Evergreen Hospital's medical records, which had been marked as Exhibits 1001 and 1002 for identification, respectively, and/or her questions posed to expert witness Dr. Robert Caplan regarding his interpretation of the anesthesiologist's report

concerning fluid resuscitation.

That defense counsel at times had problems with the framing of her questions that led to objections that were sustained does not mean that she committed misconduct, or that the testimony she sought to elicit was not admissible. Indeed, ultimately, much of the testimony defense counsel sought to elicit was elicited. *See* pages 19-26, *supra*.

The questions posed by defense counsel to lay the foundation for the admissibility of Exhibits 1001 and 1002 did not improperly suggest inadmissible evidence to the jury. Nor have the Teters shown prejudice from defense counsel's questions regarding Exhibits 1001 and 1002, or her questions posed to Dr. Caplan. The jury was instructed to reach its verdict solely on the evidence, CP 160-61, and the jury is presumed to have followed the court's instructions. *State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998) Only exhibits admitted into evidence were delivered to the jury room. 1/30 RP 2258. Similarly, as to the questions posed to Dr. Caplan concerning fluid resuscitation, or the start time of the surgery, to which the Teters' objections were sustained and which elicited no responsive testimony, the Teters failed to show any prejudice.¹⁹ The

¹⁹ Compare *Osborn v. Lake Washington School Dist. No. 414*, 1 Wn. App. 534, 462 P.2d 966 (1969), where the trial court's order granting a new trial was affirmed because the school district's counsel had deliberately elicited the prejudicial testimony that the student plaintiff had been committed to a home for boys, despite a pretrial order excluding such evidence.

absence of prejudice is even more apparent when one considers that the testimony was ultimately elicited from Dr. Caplan and had been elicited from others using the same document that the Teters wanted to prevent Dr. Caplan from using. *See* footnote 8, *supra*, and accompanying text.

In this trial, both sides made frequent objections with every witness, some of which were sustained and some of which were overruled. The fact that either side found the need to object as frequently as they did is not enough to establish prejudice. The jury was instructed that the parties had the right and the duty to make objections and that the jury should not let the objections influence them or make any assumptions or draw any conclusions based on objections. CP 162. The jury is presumed to have followed the court's instructions. *Foster*, 135 Wn.2d at 472.

2. Speaking objections which peeved the court but did not prejudice the Teters did not warrant a new trial.

A speaking objection occurs when an attorney goes beyond stating the legal ground for an objection. *See Black's Law Dictionary* 1103 (8th ed. 2004) ("An objection that contains more information [often in the form of argument] than needed by the judge to sustain or overrule it"). While generally disfavored, speaking objections are neither specifically allowed nor prohibited by the Evidence Rules. Tegland, Karl B., *5 Washington Practice: Evidence Law and Practice*, § 103.8 (4th ed. Supp. 2006). On

the first day of trial, Judge Gonzalez advised counsel that protocol in his courtroom required objections to be supported with only a citation to a specific Evidence Rule, by number or title. 1/12 RP 59. Neither the Teters' counsel nor Dr. Deck's counsel consistently followed that direction. The protocol violations by Dr. Deck's counsel, but not by the Teters' counsel, seemed to irritate the trial judge, resulting in more than one reprimand.

While certain speaking objections can be prejudicial, either because they impermissibly coach the witness or make argument to the jury, no showing of prejudice was made here to support the grant of a new trial. During trial, the Teters did not object to defense counsel's speaking objections or request a specific curative instruction.²⁰ In their motion for new trial, the Teters did not argue or cite to any prejudice from defense counsel's speaking objections. CP 220-47. Nor did Judge Gonzalez in the order granting new trial cite any specific prejudice from speaking objections, noting only in conclusory fashion that "all" of the misconduct described in paragraph 4 of the order "prejudiced plaintiffs." CP 712-13. Finally, prejudice from speaking objections 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

²⁰ Although the court, on its own, instructed the jury to disregard speaking objections.

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.

No reported Washington case discusses speaking objections during trial. However, in *City of Mission Hills v. Sexton*, 284 Kan. 414, 160 P.3d 812 (2007), the Kansas Supreme Court affirmed the trial court’s denial of a motion for mistrial based on a speaking objection by opposing counsel. In *Sexton*, the plaintiffs appealed the trial court’s denial of their motion for mistrial based on the City Attorney’s statement during Mr. Sexton’s testimony and in the presence of the jury, “Your Honor, I’m going to move to strike the witness’ testimony as being an improper valuation in violation of the statute. He’s clearly been – based upon his deposition testimony, had values assigned to each one of these categories and added them up.” In denying the motion, the trial court observed that, although the City Attorney gave more information than needed, this may have been because of a “long gap” as the judge paused to think through the evidence being presented by the witness and consider the objection. In addition, the trial judge concluded that there had been no prejudice to the plaintiffs. On review, the Kansas Supreme Court agreed that the plaintiffs had failed to show how the City Attorney’s speaking objection had been prejudicial. *Id.* at 439-40.

Here, where defense counsel’s speaking objections did not

prejudice the Teters, but peevied the trial judge to the extent that he felt some punishment was required, the proper action would have been to sanction counsel with a monetary fine rather than to penalize counsel's 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"²¹). Indeed, the trial judge recognized this distinction, threatening at one point in the trial to fine defense counsel if the conduct he found offensive continued. 1/28 RP 1811. By setting aside the verdict and granting a new trial for non-prejudicial violations of "protocol," the trial court also unreasonably burdened the resources of the superior court, the taxpayers who support the court system and King County residents who serve as jurors.

3. Statements about the anticipated calling of two witnesses who ultimately were not called did not warrant a new trial.

In their motion for new trial, the Teters argued that they were prejudiced by defense counsel's January 27 representation that Dr. Lauter and Ms. Ellison would testify over the following days because they had spent time on the evening of January 27 preparing to examine Dr. Lauter. CP 579. They did not, however, specify how much time was involved,

²¹ 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. 48 Wn.2d at 600.

nor did they identify any activities they were unable to perform because of the time spent preparing to examine Dr. Lauter.²² Presumably, not much time was involved at all, since Dr. Lauter had been a defendant in the case for over two years and had been designated on the Teters' final pre-trial witness list as a witness they expected to call. CP 748. Moreover, earlier in the trial, on January 21, 2009, during the Teters' case, plaintiffs' counsel had advised the court and defense counsel that they intended to call Dr. Lauter as a witness the following morning. 1/21 RP 1036.²³ Later than evening, they advised defense counsel they would not be calling Dr. Lauter. CP 670. Despite the Teters' on again, off again plans to call Dr. Lauter as a witness in their case, and their last minute cancellation of his testimony, defense counsel did not assert prejudice.

Ms. Ellison, a co-worker of Mr. Teter, was a very minor witness, scheduled to testify for 15 minutes or less. CP 659. She, too, was listed on the Teters' final witness list as a witness they expected to call. CP 748.

Despite Dr. Deck's submission of declarations establishing that what happened was the sort of innocent miscommunication between trial counsel and staff which can happen in the maelstrom of a multi-week trial,

²² At one point, the Teters' counsel cited having to prepare for Dr. Lauter and Ms. Ellison as a reason why closing arguments should not begin until January 30, 2009, which is when closing arguments did begin. 1/29 RP 1913-14; 1/30 RP 2159.

²³ They later said: "[W]e may decide we will not call Dr. Lauter . . . [b]ut Dr. Lauter will be here, and if Ms. Elliott [defense counsel] wants to call him as her witness, she can do so. Of course, we would have some cross . . ." 1/21 RP 1037.

CP 641-44, 657-66, and the lack of evidence of actual prejudice, the trial court concluded that defense counsel made misleading representations about witnesses Dr. Deck was intending to call to testify, “to the prejudice of plaintiffs,” and that the “misconduct of counsel in this regard is adequate reason to grant a new trial under CR 59(a)(1) and (2).” CP 713. Given the daily decision making about which witnesses to call that occurs in the heat of trial, and given a record that fails to specify the nature of any prejudice to the Teters, it was reversible error for the trial court to vacate the judgment and grant a new trial based on the statements of defense counsel on January 27 respecting who they intended to call as witnesses on January 28 and 29. Even if counsel’s representations were prejudicially misleading, the proper remedy would have been for the trial court to grant additional time to the Teters’ counsel to make up for whatever time they lost preparing to examine Dr. Lauter.²⁴

4. Because the Teters failed to request a curative instruction, their motion for new trial based on the alleged misconduct lacked merit.

The Teters did not timely preserve the issue of misconduct as a basis for vacating the judgment by requesting a curative instruction.

²⁴ The trial court did not find that defense counsel intentionally misled the Teters’ counsel. See CP 713 (¶ 5). Even if it had so found, a proper remedy would have been to sanction defense counsel, not to vacate the judgment and grant a new trial. *Ryan*, 48 Wn.2d at 600 (“the client should not be penalized because of his counsel’s conduct”).

With respect to the allegation that defense counsel asked questions to expose the jury to the contents of exhibits which had not been admitted into evidence, the motion to vacate the judgment was not supported with any showing of exhibit contents to which the jury was improperly exposed or how plaintiffs were prejudiced. If the alleged misconduct did occur, any prejudice could have been cured had the Teters requested a curative instruction directing the jury to disregard the questions and/or the referenced exhibit contents.

Similarly, while the court expressed concern respecting speaking objections by defense counsel, the Teters demonstrated no resulting prejudice. Nor did the Teters object to the speaking objections or request a curative instruction. Finally, with respect to the Teters' bald assertion that they were prejudiced when defense counsel failed to timely advise their counsel that Ms. Ellison and Dr. Lauter would not be called as defense witnesses, they did not ask for relief, whether by curative instruction, or by a brief postponement to make up for the time allegedly lost in preparing to examine Dr. Lauter.

A new trial should not be granted because of misconduct by counsel 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. *Harclan*, 56 Wn.2d 596, 354 P.2d 928 (1960); *McUne v. Fuqua*, 42 Wn.2d 65, 253 P.2d 632 (1953). The “existence of a mere possibility or remote possibility of prejudice is not enough” to grant a motion for a new trial. *Spratt v. Davidson*, 1 Wn. App. 523, 526, 463 P.2d 179 (1969). The question is whether there is reasonable doubt that the plaintiff received a fair trial. *Id.* at 525 (citing *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651, 379 P.2d 918 (1962)).

In *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991), our Supreme Court summarized the law governing motions for new trial based on misconduct of counsel:

We have consistently held that unless prosecutorial conduct is flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect, ***any objection to such conduct is waived by failure to make an adequate timely objection and request a curative instruction.*** Thus, in order for an appellate court to consider an alleged error in the State’s closing argument, the defendant must ordinarily move for a mistrial or request a curative instruction. The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial. ***Moreover, “[c]ounsel 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.”***

114 Wn.2d at 661 (emphasis supplied) (citing *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960); *State v. Atkinson*, 19 Wn. App. 107, 111, 575

P.2d 240, *review denied*, 90 Wn.2d 1013 (1978)). Accordingly, the Teters' failure to both object *and* seek a curative instruction when the perceived misconduct occurred precludes a post-trial determination that the misconduct merits a new trial. This case demonstrates the Supreme Court's concern that it would be fundamentally unfair for a party to let misconduct go unremarked at the time in order to use it as a life preserver after an adverse verdict. The proper remedy is a timely request for curative instruction. Because none was made to the specific conduct cited by the court in the order granting new trial, the motion for new trial lacked merit and should have been denied. Under these circumstances, it was reversible error for the trial court to vacate the judgment and grant a new trial based on alleged misconduct.

5. The trial court's displeasure with defense counsel is insufficient to support its order granting a new trial.

The Teters were not prejudiced by any of the conduct described by Judge Gonzalez in the record he made on January 28, 2009, or in his order granting a new trial. He was plainly unhappy with defense counsel, but he should not have allowed those feelings to invalidate the jury's verdict or deny Dr. Deck's right to judgment on the verdict. In the event this Court affirms the order granting new trial and remands to the superior court, it should do so with instructions that the retrial be conducted before a

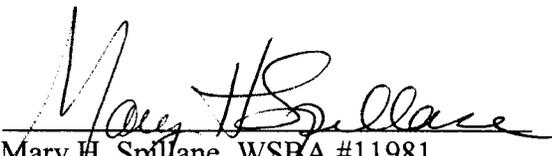
different trial judge as the record reflects that Dr. Deck is unlikely to receive a fair trial before Judge Gonzalez. In the interest of the appearance of fairness, a new superior court should conduct further proceedings on remand where it appears that a trial court judge will have difficulty setting aside a previously expressed opinion. *See In re Custody of R.*, 88 Wn. App. 746, 762-63, 947 P.2d 745 (1997); *see also In re Marriage of McCausland*, 129 Wn. App. 390, 118 P.3d 946 (2005), *rev'd on other grounds*, 159 Wn.2d 607 (2007).

VI. CONCLUSION

The order granting new trial should be reversed, and the judgment on the jury's verdict should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of January, 2010.

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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 21st day of January, 2010, I caused a true and correct copy of the foregoing document, "BRIEF OF APPELLANT," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

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