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No. 63336-8-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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RONALD and DEBORAH TETER, husband and wife,

Respondents,

v.

ANDREW DECK, M.D.,

Appellant.

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BRIEF OF RESPONDENTS

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## I. INTRODUCTION

In September 2004, appellant Deck, a urologist, performed surgery on respondent Ronald Teter. Mr. Teter's abdominal aorta was cut during the procedure and he lost half of his blood. Mr. Teter nearly died, developed a painful condition called compartment syndrome, and suffered permanent nerve damage. That has been life-changing. Mr. Teter has undergone multiple surgeries, changed his work responsibilities, and given up outdoor activities he loves. He continues to suffer chronic pain.

Mr. Teter filed suit against Dr. Deck. Both Dr. Deck and Mr. Teter had difficulty disclosing witnesses and making them available for depositions. Although both sides struggled to meet discovery obligations, Dr. Deck convinced the court to exclude Mr. Teter's replacement expert urologist, Dr. Fairchild, who was to testify on standard of care, proximate cause and informed consent issues. The exclusion was unwarranted, however, and the court failed to consider whether lesser sanctions would suffice, whether Mr. Teter had reasonable excuse for his delay in identifying the replacement expert, or whether the delay *substantially* prejudiced Dr. Deck's ability to prepare for trial.

The unwarranted loss of his expert urologist's trial testimony "substantially and severely prejudiced" Mr. Teter. That prejudice was exacerbated by the misconduct of Dr. Deck's trial counsel, who repeatedly sought to elicit inadmissible testimony from defense experts and expose the jury to exhibits that had not been admitted into evidence, and who

misled Mr. Teter's attorneys and the court about what witnesses she intended to call.

The jury returned a verdict for Dr. Deck. Mr. Teter moved for a new trial. Citing the erroneous exclusion of Mr. Teter's expert and the cumulative effect of defense counsel's misconduct, the trial court granted Mr. Teter's motion. In so doing the trial court properly exercised its discretion and correctly applied pertinent law. Mr. Teter respectfully asks this Court to affirm the trial court and remand this matter for a new trial.

## **II. RESTATEMENT OF ISSUES**

1. Does a trial court abuse its discretion in granting a new trial based on an erroneous, and legally improper and unsupported pre-trial expert witness exclusion ruling and attorney misconduct where there was (a) no willful or intentional refusal to obey a discovery order, (b) no *substantial* prejudice to defendant's ability to prepare for trial, or (c) no consideration of lesser remedies; and where defense counsel repeatedly sought to expose the jury to inadmissible evidence and made misrepresentations to the court and opposing counsel?
2. Should this Court affirm the trial court's order granting a new trial on the alternative ground that the trial court erred by failing to give a specialist standard of care instruction that reflected the trial testimony and issue presented to the jury?

## **III. RESTATEMENT OF FACTS**

### **A. Facts Relevant to Mr. Teter's Malpractice Claim**

In the summer of 2004, Ronald Teter was diagnosed with a tumor in one of his kidneys. His doctor referred him to appellant Deck. Dr. Deck, a urologist, recommended removal of Mr. Teter's kidney by a procedure known as a laporoscopic nephrectomy. 1/14 RP 248-50. Unlike a conventional open procedure, a laporoscopic nephrectomy is

performed through small openings in the abdomen into which the surgeon inserts instruments and a video camera. The surgeon then “sees” the procedure on a video monitor. 1/21 RP 845-47, 857-58.

Dr. Deck had limited experience with laporoscopic nephrectomies. He asked a more experienced surgeon, Dr. Lauter, to act as co-surgeon. 1/28 RP 1885-88. That was not enough to prevent harm to Mr. Teter. Using a new technique, Dr. Deck inserted the first cutting instrument, a “trocar,” into Mr. Teter’s abdominal cavity. 1/15 RP 393-95, 415-22. Immediately after the insertion, the anesthesiologist, Dr. Colston, reported that Mr. Teter was experiencing a “profound” drop in blood pressure and an increased heart rate. CP 57-58; 1/26 RP 1396-97, 1401, 1410-14. That, coupled with a contemporaneous flash of blood on the video screen, suggested a major laceration with serious internal bleeding. 1/21 RP 858-65. Dr. Colston informed Drs. Deck and Lauter of these potentially life-threatening events. CP 57-58; 1/21 RP 1410; 1/29 RP 1987-88.

The camera used in a laparoscopy allows surgeons to “see” only portions of the surgical field. Based on what they could see, Dr. Deck did not believe there was a major laceration or that Mr. Teter was seriously bleeding. 1/29 RP 1938-41. Rather than converting to an open procedure, which would have afforded a complete view of the operating field and the lacerated aorta, Drs. Deck and Lauter proceeded with the laparoscopy. *Id.* Dr. Colston ordered a lab test to measure blood loss. The test indicated that Mr. Teter had lost some 1.5 liters of blood. Dr. Colston reported that result to Drs. Deck and Lauter. Despite these warnings, the doctors

declined to convert to an open procedure. CP 57-58; 1/26 RP 1410-14; 1/29 RP 1954.

Roughly three hours after beginning surgery, the doctors removed Mr. Teter's kidney. 1/29 RP 1957. That relieved pressure on the laceration and Mr. Teter's bleeding became evident. CP 57-58; 1/29 RP 1957-59. Dr. Deck converted to an open procedure, 1/29 RP 1957-59; and Dr. Colston called in a vascular surgeon who repaired the laceration, and saved Mr. Teter's life. CP 57-58. It was too late, however, to reverse the damage caused by the blood loss and resulting lack of blood flow to Mr. Teter's left leg. 1/21 RP 828.

Mr. Teter developed serious complications, including "compartment syndrome" (elevated pressure in one area of the body, a "compartment," that causes, among other things, nerve and muscle damage) in his lower left leg and foot. 1/21 RP 904-08, 913-16. He suffered excruciating pain and endured emergency surgery, extensive skin grafts, partial nerve removal, and extensive physical therapy. 1/14 RP 255-60, 266-71, 288-92. Mr. Teter still has chronic pain. He has had to quit the outdoor activities he loves – camping, hunting and fishing. He has had to transfer to a less strenuous job. He has been forced to resign himself to a life of taking pain medicines that cannot fully relieve his unremitting pain. At time of trial, Mr. Teter's physicians were recommending he have a spinal cord stimulator surgically implanted to reduce his pain. 1/14 RP 268-69, 276-88, 292-97.

Mr. Teter brought suit against Drs. Deck and Lauter,<sup>1</sup> alleging they should have converted the laparoscopic procedure to an open one as soon as they had reason to suspect internal bleeding, i.e., upon the flash of blood and sudden change in vital signs at the start of surgery, and/or upon Dr. Colston's report of apparent substantial blood loss. CP 1-12. Had they done so, they would have seen the lacerated aorta and internal bleeding and stopped the blood loss before Mr. Teter developed compartment syndrome. *Id.* Dr. Deck asserts that he fully complied with the standard of care and Mr. Teter's blood loss did not cause his compartment syndrome. CP 13-20.

**B. Procedural Facts: Pre-Trial**

In bringing his suit, Mr. Teter faced the same hurdles as do most medical malpractice plaintiffs – limited resources, defendants represented by well-funded lawyers able to drive up plaintiff's costs, and difficulty finding doctors willing to testify against other physicians. This case was made even more difficult, however, because Dr. Deck adopted an extraordinary non-cooperation defense strategy designed to complicate discovery, increase fees and costs, and create arguments for excluding Mr. Teter's witnesses. Thus while Dr. Deck's appeal brief suggests that only Mr. Teter violated discovery rules and only he was responsible for every trial continuance, that is not the case.

<sup>1</sup> Dr. Lauter settled with Mr. Teter in July 2008 and the case went to trial against Dr. Deck as the sole defendant. CP 28-29; 1/12 RP 24.

### **1. Trial Continuances**

Trial in this matter was continued three times, but not once at the sole request of Mr. Teter. Dr. Lauter sought the first continuance (from October 2007 to March 2008) based on his attorney's scheduling conflict. CP 869-70; *see* CP 934. All parties sought the second continuance (to September 22, 2008) so they could engage in further discovery and explore settlement. CP 933-36, 987-88. Dr. Deck implies that Mr. Teter's failure to make witnesses available necessitated this continuance, but that is not true. As Mr. Teter wrote on January 22, 2008, less than two months before the March 2008 trial date: (1) he was still awaiting Dr. Deck's witness disclosure due on January 9, 2008; (2) Dr. Deck still had not provided potential deposition dates for his liability experts; (3) Dr. Deck's own deposition was incomplete; and (4) Dr. Deck was still adding new expert witnesses to testify in new fields of expertise. CP 743-45.

The trial court ordered the third trial continuance after Dr. Deck and Mr. Teter moved to exclude one another's witnesses for discovery violations. Mr. Teter sought to exclude or limit Dr. Deck's experts because Dr. Deck either had not made them available for depositions or had them testify on matters beyond the scope of their pretrial witness disclosures. Supp. CP [Doc. 168, 8/14/08 Mot.]; Supp. CP [Doc. 199, 8/28/08 Mot.]; Supp. CP [Doc. 206A, 9/03/08 Supp. Mot.]; Supp. CP [Doc. 209, 9/09/08 Mot.]; Supp. CP [Doc. 219A, 9/15/08 Mot.]. Dr. Deck answered with a motion to exclude testimony by some of Mr. Teter's treating physicians. CP 1339-57.

The trial court responded by holding a pretrial conference, continuing trial to January 12, 2009, and attempting to push both parties to fully identify their trial witnesses and complete discovery. CP 1379-81. The court's efforts were only partially successful. Mr. Teter was forced to file a motion to compel, Supp. CP [Doc 251, 11/03/08 Menzer Decl.]; Supp. CP [Doc. 263, 11/10/08 Stmt.]; Supp. CP [Doc. 266, 11/12/08 Order]; and seek CR 11 sanctions, Supp. CP [Doc. 272, 11/12/08 Mot.]. Both parties were deposing one another's witnesses throughout December 2008 and Dr. Deck still had not made all of his experts available for deposition when trial began on January 12, 2009. CP 329-36, 345, 804; 1/12 RP 21, 81-82; *see* CP 532-33 (identifying Dr. Deck's experts).

**2. The Parties' Discovery Scheduling Problems and Circumstances, and the Erroneous Exclusion of Mr. Teter's Replacement Urology Expert, Dr. Fairchild**

Most witnesses in this case were either treating physicians or medical experts. Coordinating depositions with their schedules and those of the lawyers proved difficult. Although Dr. Deck claims otherwise, both parties struggled to make witnesses available for depositions before trial. As shown above, some six weeks before the March 2008 trial date, Dr. Deck still had not provided potential deposition dates for himself and several of his experts, and he was still naming new experts. CP 743-45.

The situation in the weeks before the September 2008 trial date was no different. *See* CP 1129-30. Dr. Deck compounded these problems by proposing deposition dates he knew would not work for Mr. Teter's counsel, abruptly cancelling agreed upon deposition dates, or failing to

respond to Mr. Teter's deposition scheduling proposals. *See, e.g.*, CP 972-1011, 1129-30; Supp. CP [Doc. 120, 7/11/08 Menzer Decl.]. By so doing, Dr. Deck was trying to obstruct discovery of his own experts and create arguments for excluding Mr. Teter's physician witnesses. CP 1129, 1339-57. His conduct forced Mr. Teter to move to exclude several Dr. Deck experts, or to limit their testimony at the trial scheduled to begin in September 2008. Supp. CP [Doc. 168, 8/14/08 Mot.]; Supp. CP [Doc. 199, 8/28/08 Mot.]; Supp. CP [Doc. 206A, 9/03/08 Supp. Mot.]; Supp. CP [Doc. 209, 9/09/08 Mot.]; Supp. CP [Doc. 219A, 9/15/08 Mot].

Critically, although Dr. Deck failed to make his expert witnesses available for depositions, that was not the case with Mr. Teter. Dr. Deck deposed Mr. Teter's two liability experts in January 2008. CP 885 at ¶ 3. The deposition of Mr. Teter's expert urologist, Dr. William Duncan (who was to testify at trial on standard of care, proximate cause and informed consent), ended early because Dr. Duncan was recovering from the flu and experienced an irregular heartbeat. CP 276 at ¶ 4. Dr. Deck claims this incident gave Mr. Teter notice in January 2008 that Dr. Duncan was too ill to serve as his urology expert. CP 718-19 at ¶ 6; App. Br. at 9, 32-33. That is not true. While Dr. Duncan's illness and a pending back surgery raised questions whether Dr. Duncan would be able to testify in March 2008, CP 745; once trial was continued to September 2008 Dr. Duncan's health issues were no longer a concern, CP 276 at ¶ 4.

But on August 11, 2008, Dr. Duncan advised Mr. Teter that he had fallen, ruptured his spleen, developed an MRSA infection, and believed he would be unable to testify at the trial scheduled to begin in September. CP 275-76 at ¶ 3. After the court continued trial to January 2009, it again became possible Dr. Duncan could still testify. *Id.* Mr. Teter nevertheless searched for a replacement urology expert. CP 1414.

Finding an expert willing to testify on behalf of a medical malpractice plaintiff is not an easy task. Nevertheless, on November 12, 2008 – two months before the scheduled trial date and in compliance with the replacement expert disclosure date Dr. Deck claims the trial court set, *see* CP 719-20 – Mr. Teter notified Dr. Deck and the court that Dr. Robert Golden, a Spokane urologist experienced in laparoscopic nephrectomy, had agreed to replace Dr. Duncan and testify for Mr. Teter. CP 306-07. Dr. Deck did not object to the timing of this disclosure and noted Dr. Golden’s deposition for November 24. CP 309, 1422-28. Unfortunately, and certainly due to no wrongdoing or tactical maneuvering by Mr. Teter, Dr. Golden determined that he knew Dr. Deck’s partner and given his relationship with that partner, could not serve as Mr. Teter’s expert. As Dr. Golden informed the court in a declaration:

[O]n or about November 18, 2008...I learned that I have a longstanding professional and personal relationship with one of Dr. Deck’s partners. Based solely on that discovery, I decided not to proceed as an expert in this case. I notified Mr. Lipman [counsel for Mr. Teter] of my decision soon after learning the identity of Dr. Deck’s partner.

CP 349 at ¶ 5. Dr. Golden gave Dr. Deck direct notice of this decision on November 20, 2008. CP 1430-31.

Mr. Teter scrambled to find a second replacement urology expert. *See* CP 1474-76. On December 10, 2008 – *still more than a month before trial and while the depositions of both parties' witnesses were still ongoing* – he notified Dr. Deck that Dr. Thomas Fairchild, another Spokane urologist, would testify on his behalf. CP 315. Dr. Deck indicated he would only need to depose Dr. Fairchild for about three hours and tentatively agreed to do so on December 19. CP 272-73, 317-18. After Dr. Deck cancelled that deposition on the ground one of his two trial attorneys decided she had a conflict on that date, Mr. Teter proposed at least five other December and early January dates for Dr. Fairchild's deposition. CP 329-45.

Mr. Teter's efforts to make Dr. Fairchild available for deposition were all in vain. Dr. Deck rejected each proposed deposition date because he had decided to use Dr. Golden's fortuitous (for Dr. Deck) conflict-based withdrawal as reason to move to exclude Mr. Teter's replacement urology expert. CP 735-36. Dr. Deck so moved on December 29, 2008. CP 356-68. Mr. Teter responded by explaining the circumstances described above, pointing out Dr. Deck's equally if not more egregious failure to comply with discovery obligations, and Dr. Deck's failure to establish the requisite grounds for imposing so severe a sanction. CP 260-349. Mr. Teter further argued that if Dr. Fairchild was excluded, he would not have an expert urologist to testify on his behalf and would be left with

only a general surgeon (Dr. Powelson), to counter Dr. Deck's army of experts (an army that at the very least included a urologist, a general surgeon, a vascular surgeon and an anesthesiologist). CP 260-71, 532-33. In total, the parties presented nearly 200 pages of materials to the trial court in connection with Dr. Deck's motion to exclude Dr. Fairchild. CP 63-68, 260-349, 1384-1467.

### **3. Reassignment of Case to Judge Gonzalez and In Limine Rulings**

During the pretrial matters described above, this case was assigned to King County Superior Court Judge Chris Washington. CP 868. In early January 2009, the parties learned Judge Washington would not be available for the January 12 trial. Anxious to avoid further delay, Mr. Teter moved on shortened time to have the case assigned to a different judge with a date certain for trial. Supp. CP [Doc 325, 1/07/09 Mot.]; Supp. CP [Doc. 324, 1/07/09 Lipman Decl.]. The court reassigned the case to Judge Steven Gonzalez. Trial began January 12, 2009. 1/12 RP.

The parties had submitted their motions in limine to Judge Washington. *E.g.* CP 260-61, 356, 1550; Supp. CP [Doc. 310, 1/5/09 Mot.]. Judge Washington did not rule on their motions before the case was reassigned. 1/12 RP 7-12. On the first day of trial Judge Gonzalez asked Judge Washington about the motions. 1/12 RP 9. Within hours, Judge Washington signed three orders: one denying Dr. Deck's motion to exclude Mr. Teter's "duplicative lay witnesses;" one leaving decisions on the scope of Dr. Deck's experts' testimony to Judge Gonzalez; and one

striking Dr. Fairchild. Supp. CP [Doc. 356, 1/13/09 Ord.]; CP 351-54, 535-36; 1/12 RP 11-12; *see* 1/12 RP 12-26. The order striking Dr. Fairchild – an order drafted by Dr. Deck – did not contain the legally required findings that Mr. Teter acted unconscionably or willfully or intentionally violated a court order, that Dr. Deck suffered *substantial* prejudice from the December 10 witness substitution, or that the court considered any lesser sanctions. CP 351-54.

Judge Gonzalez ruled on the remaining in limine issues. CP 83-92, 1/12 RP 26-79. Two rulings are relevant to this appeal. One precluded Dr. Deck from presenting evidence or argument about the potential fault of any non-party, including Dr. Deck’s co-surgeon, Dr. Lauter, and Dr. Colston, the anesthesiologist. CP 420-24, 578-79 at ¶ 3. The other limited defendants to presenting no more than two experts on any issue, including standard of care and causation. 1/12 RP 15, 19. As shown below, Dr. Deck did all he could to circumvent these rulings.

**C. Facts Re Trial and Mr. Teter’s CR 59 Motion**

Over an eleven-day period, the jury heard witnesses and arguments by counsel. Although trials often are contentious, this one was particularly so. Due largely to defense counsel’s misconduct, the jury sat through an inordinate number of objections and sidebars. (January 28 is illustrative. *See, e.g.*, 1/28 RP 1654-49, 1663-67, 1686-87, 1704-06, 1798, 1800-03, 1807-12). Not surprisingly, this upset and distracted the jury. Toward the end of trial, one juror became so frustrated he informed the court he felt “like strangling a couple of lawyers and want[ed] to be an

alternate, if at all possible.” 1/29 RP 1917; *id.* at 2111-14. It also invited the jury to speculate about the significance of the evidence to which Mr. Teter was forced to continually object.

The jury found that Mr. Teter had not met his burden of proof on Dr. Deck’s negligence. CP 110-11. Mr. Teter moved for a new trial on three fundamental grounds: (1) the exclusion of Dr. Fairchild; (2) misconduct by plaintiff’s counsel; and (3) instructional error. CP 220-616. Finding that the exclusion of Dr. Fairchild was an abuse of discretion and reversible error of law, and that the cumulative effect of defense counsel’s repeated attempts to suggest inadmissible evidence to the jury and her misleading representations regarding what witnesses she would call cast doubt on whether a fair trial occurred, the trial court granted Mr. Teter’s motion. CP 708-14. The bases for these rulings, as well as additional new trial grounds considered by the trial court, are described below.

#### **1. The Exclusion of Dr. Fairchild**

During trial, Mr. Teter made a detailed offer of proof regarding Dr. Fairchild’s testimony. 1/27 RP 1626-28. Mr. Teter explained that Dr. Fairchild’s testimony was central to the core liability issues in the case: breach of the standard of care and proximate cause. *Id.* In addition, Dr. Fairchild would have provided expert testimony supporting Mr. Teter’s informed consent claim, a claim Mr. Teter had to abandon after Judge Washington excluded Dr. Fairchild. 1/12 RP 30-31.

Mr. Teter’s new trial motion explained why, for the reasons outlined above (Dr. Duncan’s fall and infection, Dr. Golden’s conflict-

based withdrawal, and the lack of prejudice to Dr. Deck from a witness substitution made a month before trial while both parties' witnesses were still being deposed), the trial court abused its discretion and committed legal error in striking Dr. Fairchild. CP 220-28. In addition, Mr. Teter demonstrated that the order Dr. Deck drafted and Judge Washington signed was legally inadequate. *Id.*; see CP 351-54. Specifically, the order did not establish that Judge Washington considered lesser sanctions, find that Mr. Teter willfully or deliberately refused to obey a discovery order or engaged in unconscionable conduct, or find that the December 10 witness substitution *substantially* prejudiced Dr. Deck's ability to prepare for trial. CP 224-25; see CP 351-54. Further, since Dr. Deck did not address those issues in his motion to strike, CP 356-68, there was no way Judge Washington could have conducted the requisite analysis.

Judge Gonzalez specifically identified these omissions in his order granting Mr. Teter's motion for a new trial. CP 708-10. In addition to expressly confirming the significance of Dr. Fairchild's proposed testimony and how his exclusion "substantially and severely prejudiced" plaintiffs, CP 709-10, Judge Gonzalez stated:

1) ...[T]he trial court failed to determine, before imposing the most severe sanction of excluding Dr. Fairchild's testimony at trial, that there were no lesser remedies available. The defense motion to exclude this witness did not argue that no lesser remedies were available to the Court, and the Court's Order of January 12, 2009 granting the defense motion does not reflect that the Court considered the issue or determined that no such lesser remedies were available. The record does, however, reflect that the lesser remedies of deposing Dr. Fairchild on a date certain before or during trial, or granting the defense a brief

continuance of the trial date were available. In fact, one of the defense experts was made available to plaintiffs for deposition after trial began.

2) Additionally, the trial court's January 12, 2009 Order does not include the necessary determination that any failure to comply with a discovery order amounted to "intentional disclosure; willful violation ... or other unconscionable conduct"...Further, the record in the case does not support this determination. Dr. Fairchild was disclosed to the defense a month before trial. He was the second replacement urologist for plaintiffs....Plaintiffs disclosed Dr. Fairchild three weeks after Dr. Golden withdrew and thirty-three (33) days before trial. Plaintiffs offered the defendant several dates before trial to depose Dr. Fairchild, and the defense had multiple experts available to respond to the testimony that Dr. Fairchild would have provided at trial.

CP 709-10. On appeal, Dr. Deck makes no attempt to address or rebut these findings. Instead he tries to trivialize the critical flaws in the order and repeats his unfounded claims about Mr. Teter's alleged history of liability expert-related discovery violations. His arguments are legally and evidentially insufficient. *See infra* at 36-40.

## **2. Defense Counsel's Deliberate and Repeated Attempts to Solicit or Suggest Inadmissible Evidence to the Jury**

Attorneys have an obligation under ER 103(c) to prevent inadmissible evidence from being suggested to the jury.<sup>2</sup> Counsel for Dr. Deck paid no heed to that rule and sought repeatedly to elicit inadmissible testimony and evidence, even after the Court ruled in limine and/or

<sup>2</sup> ER 103(c) provides: "In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury."

sustained numerous objections. By so doing, defense counsel created a situation where the jury was likely to conclude Mr. Teter made repeated evidentiary objections in order to hide damaging information. As Judge Gonzalez found:

Defense counsel repeatedly violated the Evidence Rules, including ER 103(c), which obligates counsel to prevent inadmissible evidence from being suggested to the jury. The trial record includes many examples of 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. Defense counsel also made numerous and improper speaking objections. At one point, these violations became so egregious that this Court was compelled to warn defense counsel in open court that monetary sanctions would be imposed on her if she did not stop. The record reflects that this Court also expressed concern during trial about defense counsel's "attempts to circumvent the Court's ruling on admissibility of documents"....*All of this misconduct, which forced plaintiffs to repeatedly object to improper questions and unfairly and improperly exposed the jury to inadmissible evidence, prejudiced plaintiffs and is grounds for a new trial....*

CP 712-13 (emphasis added). Judge Gonzalez further found "[t]he cumulative effect of defense counsel's misconduct throughout the trial proceedings warrants a new trial, as it casts doubt on whether a fair trial occurred." CP 713 (emphasis added).

In moving for a new trial based on Dr. Deck's ER 103(c) violations, Mr. Teter provided many examples of misconduct. CP 231-42. On appeal, Dr. Deck ignores misconduct relating to in limine rulings, apparently because Judge Gonzalez found that misconduct was not *independent* grounds for granting a new trial. But Mr. Teter's ER 103(c)

arguments and the trial court's broadly worded ER 103(c) and cumulative effect findings clearly encompassed that misconduct. CP 231-42, 712-13. Further, Judge Gonzalez recognized that no matter what the basis, repeated objections can prejudice a jury. Indeed, courts make in limine rulings excluding certain categories of evidence in order to avoid that very prejudice. *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) (purpose of motion in limine is to avoid requiring counsel to object to contested evidence when it is offered during trial).

Consistent with this approach, Mr. Teter's ER 103(c) new trial argument was broad-based:

Beyond her duty to follow the Court's orders *in limine*, defense counsel was obligated, pursuant to Evidence Rule 103(c), to prevent inadmissible evidence from being suggested to the jury. It was particularly improper for defense counsel to continue to question witnesses on either issues that had been held by the court to be either inadmissible, or after multiple objections had been sustained. *In the instant case, the trial record is filled with defense counsel's continued and repetitive questioning of witnesses in an attempt to elicit inadmissible testimony after the Court ruled and/or sustained numerous objections. (See Sections III.B.1(a) and (b), supra and the transcript excerpts quoted therein).*

CP 240 (emphasis added). The examples to which he referred are described below.

**a. Fault-of-others violations**

As shown above, Mr. Teter's ER 103(c) argument expressly incorporated examples provided in Section III.B.1(a) of his motion. CP 240. In that section, Mr. Teter recapped Dr. Deck's counsel's repeated

violations of in limine orders and rulings precluding Dr. Deck from trying to dilute his responsibility for the decision not to convert to an open procedure by implicating others (particularly Drs. Lauter and Colston). CP 231-36; *see also* CP 420-24, 578-80.

The testimony of Dr. Deck's anesthesiology expert, Dr. Caplan, is illustrative. Dr. Caplan's purported role was to "explain the anesthesia record and Mr. Teter's condition and vital signs during the surgery[.]" CP 532. But defense counsel kept asking Dr. Caplan to testify about Dr. Lauter's and Dr. Colston's involvement, even after Judge Gonzalez sustained repeated objections to such testimony:

Q: Now, the addendum then states, "the surgeons were notified, but peritoneal hemorrhage was not evident." What is the significance of that sentence to you?

A: It means that the surgeon – the co-surgeons and the anesthesiologist were talking about observations.

MR. MENZER: Your Honor, objection, per the Court's prior ruling.

THE COURT: Sustained.

Q: It says "surgeons." What does that mean to you?

MR. MENZER: Same objection.

THE COURT: Sustained.

Q: Who was talking in the room? You said they were talking. You have to give names.

MR. MENZER: Same objection, your Honor.

THE COURT: Sustained. The jury will disregard.

Q: It says – without saying who, what was going on when it said, "surgeons were notified, but peritoneal hemorrhage was not evident?"

MR. MENZER: Your Honor, the record speaks for itself. Same objection.

THE COURT: Sustained. Move on, counsel.

1/28 RP 1797-98 [CP 517-18].

Despite the court's admonition, defense counsel refused to desist:

Q: ...First of all, from your review of the records and the deposition of Dr. Colston, did he see 1500 cc's of blood loss?

MR. MENZER: Objection to the form of the question, hearsay, and –

THE COURT: Sustained.

....

Q: Doctor, do you have an opinion, with reasonable medical probability, based upon what you've reviewed in this case and your knowledge and education, whether Dr. Colston saw 1500 cc's of blood loss?

MR. MENZER: Lack of foundation.

THE COURT: Sustained.

Q: Did Dr. Lauter, from this report and your opinions, agree there was a 1500 cc blood loss?

MR. MENZER: Objection, your Honor.

THE COURT: Sustained.

1/28 RP 1807-10 [CP 524-27].

Q: You were talking about the places you can look. In this case, Dr. Lauter stated there was only –

MR. MENZER: Objection to the form of the question.

Q: The record indicates Dr. Lauter felt blood loss was not evident because there was only 100 cc's in the

suction canister. What does that mean, 100 cc's in the suction canister?

MR. MENZER: Same objection.

THE COURT: Sustained.

Q: He can't explain what –

THE COURT: Sustained, counsel....

1/28 RP 1810-11 [CP 527-28].

Dr. Deck was no more willing to abide by the court's orders than was his attorney. During direct examination, Dr. Deck persistently answered questions about what *he* observed, thought or did during surgery with the pronoun "we," or interjected the statements of Drs. Lauter and Colston. Dr. Deck continued to do so even after the court sustained repeated objections and specifically instructed Dr. Deck to modify his language. *E.g.*, 1/15 RP 395; 1/29 RP 1934-35, 1938-45, 1954-55.

Despite the trial court's prohibition against implying that individuals other than Dr. Deck were responsible for the decision not to convert to an open procedure, defense counsel did exactly that during closing argument. First she argued that Dr. Lauter, the co-surgeon, and Dr. Colston, the anesthesiologist, did not tell Dr. Deck to convert to an open procedure at an early stage:

We have four eyes looking .... We have four eyes, two doctors, who can see it through the camera, but we have the whole surgical team who can see it on the monitors.... they have the nurses, the anesthesiologist ... Dr. Lauter and Dr. Deck .... No one said or felt that this should be converted to an open procedure.

1/30 RP 2216 [CP 374].

Then she implied that Drs. Lauter and Colston were responsible for Dr. Deck's decision not to convert, and continued to do so even after the trial court sustained objections to such argument:

...You heard from Dr. Deck about the open dialogue with Dr. Lauter and Dr. Colston throughout the surgery .... You heard from Dr. Colston he never recommended they do convert to an open procedure.

MR. MENZER: Your Honor, objection.

THE COURT: Sustained.

[MS. ELLIOTT] You heard that Dr. Deck and Dr. Lauter were talking through the surgery. How Dr. Lauter and Dr. Deck thoroughly looked for the source of the bleeding, and they could not find the source of the bleeding ...

...All of this is evidence that Dr. Deck acted reasonably prudent and was a caring physician, and that he acted within the standard of care...

1/30 RP 2225-26 [CP 383-84]; *see also* 1/30 RP 2213-14 [CP 372] (re "co-surgeon" Dr. Lauter's experience with laparoscopic surgery); 1/30 RP 2218 [CP 376] ("the surgeons" looked for blood, but didn't find any); 1/30 RP 2224-25 [CP 382] (Dr. Deck brought in Dr. Lauter because injury to aorta was known complication); 1/30 RP 2225-26 [CP 398-99] (Dr. Deck talked to "everybody" in the room; "no one" suggested he convert; "they" continued surgery).

In short Dr. Deck and his attorney tried repeatedly to suggest to the jury that others were at fault for Mr. Teter's condition, despite being prohibited from so doing by an in limine ruling, and despite repeated from-the-bench rulings. As such, these examples are properly considered as evidence of Dr. Deck and his attorney's ER 103(c) misconduct.

**b. Limitation-of-experts violations**

Judge Gonzalez also ruled before trial that Dr. Deck could present no more than two standard of care and/or two causation experts. 1/12/RP 15, 19. Defense counsel assured the court that only Drs. Schulam and Biehl would testify on the standard of care and only Dr. Neuzil would testify on causation. 1/12 RP 20-21; CP 532-33. During trial, however, defense counsel violated the ruling and dishonored her assurance by seeking standard of care and/or causation testimony from non-designated witnesses. With Dr. Neuzil, for example, counsel linked causation questions with “care” questions and, in violation of ER 103(c), continued to do so even after the court sustained Mr. Teter’s objections.

Q: Doctor, are you familiar with the medical care in Mr. Teter’s case provided by Dr. Deck?

A: I am.

....

Q: *And did you form some opinions regarding the care in this case?*

A: Yes, I did.

....

Q: Do you have an opinion, with reasonable medical probability, whether the care provided by Dr. Deck in his surgery on September 9<sup>th</sup>, 2004, was a proximate cause of Mr. Teter’s injury to his leg?

A: *I’m a little bit confused. I mean, I have an opinion.*

Q: *Okay. What is your opinion?*

A: *That he provided more than adequate care.*

Q: No, I’m asking about whether the care caused –

MR. MENZER: Your Honor, excuse me. Move to strike that.

THE COURT: The jury will disregard that answer.

1/29 RP 2014-15 [CP 543-44] (emphasis added).

Q: Okay. Doctor, do you have an opinion, with reasonable medical probability, whether an injury to an aorta during a laparoscopic surgery is a known complication?

MR. MENZER: Objection, relevance.

THE COURT: Sustained.

1/29 RP 2026 [CP 546].

Q: Okay. Now, doctor, was the fact – do you have an opinion whether the fact that the patient was laying on his left side and required resuscitation – fluid resuscitation after 12:05, was caused by Dr. Deck?

MR. MENZER: Objection, your Honor. Scope of this witness's testimony.

THE COURT: Sustained.

Q: Doctor, do you have an opinion whether your explanation of how the injury occurred, was that proximately caused by the care provided by Dr. Deck?

MR. MENZER: Same objection.

THE COURT: Sustained.

1/29 RP 2067-68 [CP 547-48].

Q: Doctor, from everything you've reviewed and your training and your education, training and experience, can you explain to the jury why Dr. Deck's care was not the proximate cause of injury to Mr. – was not the cause of the compartment syndrome?

MR. MENZER: Your Honor, same objection.

THE COURT: Sustained.

1/29 RP 2074 [CP 550-51].

Despite the trial court's rulings, during closing defense counsel argued that based upon the testimony of all of Dr. Deck's experts, the standard of care evidence overwhelmingly favored the defense.

You are receiving a Special Verdict Form. I can make this whole procedure very short for you. You can read the instructions, follow the instructions....And you can, based upon the evidence and opinions of Dr. Schulam, Dr. Neuzil, Dr. Caplan, Dr. Biehl, and the records and the facts of this case, and the fact that the only issue is was it necessary for Dr. Deck to convert? *That's the only issue. And did he act as a reasonably prudent urologist? What testimony has the plaintiff produced that is competent that he did not act as a reasonably prudent urologist?*

1/30 RP 2239-40 [CP 397] (emphasis added.); *see also* 1/30 RP 2234-35 [CP 392-95] (highlighting that all of Dr. Deck's experts testified he met the standard of care); 1/30 RP 2222-24 (Mr. Teter did not meet burden of proof because his liability expert, Dr. Powelson, was not a urologist or laparoscopic nephrectomy specialist and did not practice in Washington).

Such evidence, detailed for Judge Gonzalez in Section III.B.1(b) of Mr. Teter's motion, CP 236-40, provided additional examples of Dr. Deck and his attorneys' flagrant disregard of evidentiary rulings. Since Mr. Teter expressly incorporated those examples into his ER 103(c) misconduct argument, CP 240, Judge Gonzalez properly relied upon them to find ER 103(c) misconduct.

**c. Additional violations**

Defense counsel's refusal to abide by trial court rulings was not limited to matters precluded by in limine orders, it also encompassed

evidentiary rulings on relevance, hearsay, and exhibits. Counsel tried, for example, to have Dr. Deck's anesthesiology expert, Dr. Caplan, interpret medical records to pinpoint when the anesthesiologist, Dr. Colston, determined fluid resuscitation was complete. Mr. Teter objected on hearsay and lack of foundation grounds. 1/28 RP 1803 [CP 520]. Judge Gonzales sustained the objection, but defense counsel continued to ask the same basic question. That forced Mr. Teter to make six objections (in the space of a few transcript pages) before defense counsel moved to a different subject. 1/28 RP 1803-05 [CP 520-22].

Defense counsel was equally calculating and obstinate in attempting to get certain exhibits admitted. Exhibit 1001 was defendant's complete 161-page office chart for Mr. Teter covering pre-surgery office visits, parts of the hospital record from the surgery at issue, and records relating to post-surgery treatment by Dr. Deck and many other providers. *See* CP 105; 1/28 RP 1896 [CP 555]. Exhibit 1002 was a compilation of records from the Evergreen Hospital relating to Mr. Teter's surgery and hospitalization. *See* CP 106. Mr. Teter objected to the wholesale admission of both exhibits on hearsay, irrelevance, and ER 403 grounds, and because they contained evidence barred by specific pre-trial in limine rulings. 1/28 RP 1896-1902 [CP 555-61]. Defense counsel still sought their wholesale admission,<sup>3</sup> forcing Mr. Teter to object repeatedly.

<sup>3</sup> Although a highly experienced trial attorney, defense counsel refused even to acknowledge basic evidentiary prohibitions against the wholesale admission of such materials. 1/28 RP 1896-1902 [CP 555-61]; CP 660.

Defense counsel's efforts with respect to Exhibit 1002 were especially egregious. Although the trial court admitted specific pages of the exhibit, 1/14 RP 332-33, 1/22 RP 1089-90, 1/26 RP 1294-95; defense counsel tried repeatedly to have it admitted in its entirety, 1/22 RP 1090-92, 1/27 RP 1531-34, 1/28 RP 1787-88. She referred to Exhibit 1002 multiple times while examining Dr. Deck's anesthesiology expert, Dr. Caplan. 1/28 RP 1776-87 [CP 502-11]; *see* CP 532. The court finally had to admonish defense counsel that her continuing references to the exhibit were inappropriate:

MS. ELLIOTT: Your Honor, that has been admitted as an exhibit. It's a part of Exhibit 1002, which I move for the admission again.

MR. MENZER: Your Honor, the anesthesia record has already been admitted as plaintiffs' Exhibit 5. Object to the wholesale admission of 1002 on grounds of relevance, hearsay, lack of foundation, and the Court's prior rulings on motions.

THE COURT: As counsel well knows, and as I mentioned already in this trial, an expert may rely upon documents. That does not make them admissible as substantive evidence themselves. The objection is sustained.

1/28 RP 1787-88 [CP 512].

[THE COURT:] 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 ...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 is fairly fundamental and basic how you refresh and when you can refresh a witness's recollection.

1/28 RP 1904 [CP 562] (emphasis added).

In short, the record is replete with examples of defense counsel's blatant disregard of evidentiary rulings. Judge Gonzalez reasonably interpreted that disregard as manifesting counsel's intent to violate ER 103(c). That being the case, it was well within Judge Gonzalez's discretion to order a new trial based on prejudicial attorney misconduct.

**3. Misconduct Involving Defense Counsel's False Assertions to the Court and to Counsel**

Judge Gonzalez also based his new trial order on defense counsel's non-evidentiary misconduct. Specifically, Judge Gonzalez found that defense counsel made affirmative misrepresentations about what witnesses she intended to call. He ruled:

[O]n January 27, defense counsel made misleading representations to the Court and to plaintiffs' counsel about witnesses the defendant was intending to call to testify. Plaintiffs' counsel reasonably relied on these assertions to the prejudice of plaintiffs. The misconduct of counsel in this regard is adequate reason to grant a new trial under CR 59(a)(1) and (2).

CP 713. Judge Gonzalez additionally used counsel's misrepresentations to support his finding that defense counsel's cumulative misconduct cast doubt on whether Mr. Teter received a fair trial. CP 713.

By way of background, at the beginning of trial and at Dr. Deck's request, Judge Gonzalez ordered the parties to give three days notice of what witnesses they would be calling. CP 90 at ¶ 12. On Tuesday, January 27, defense counsel informed the Court and Mr. Teter they would be calling Dr. Lauter, neurologist Dr. Likosky, and Bonnie Ellison, Mr.

Teter's supervisor at work, later that week. CP 579-80, 586-87. Defense counsel specifically represented she would call Ms. Ellison to the stand on Wednesday, and that she was exchanging emails with Dr. Lauter's attorney to arrange for Dr. Lauter's appearance on Wednesday or Thursday. CP 579-80, 586-87.

These representations were not true. That same Tuesday morning, Ms. Elliott's assistant had telephoned Ms. Ellison and told her she would not be called as a witness. CP 587, 590, 600-02. According to Dr. Lauter's attorney, defense counsel never exchanged emails with him during the week of January 26-28, 2009. CP 579-80, 582. Counsel never called Dr. Likosky, but waited until the last minute to inform Mr. Teter and the court of that decision. CP 580; 1/28 RP 1638-43 [CP 571-76]. Mr. Teter's attorneys had no way to know these facts in advance, however, and so wasted considerable time preparing to examine witnesses Dr. Deck never intended to call. 1/28 RP 1640-41 [CP 573-74]; CP 579.

Judge Gonzalez expressed concern about defense counsel's misrepresentations:

[THE COURT:] I'm also very concerned about the issues regarding disclosure of witnesses and the timing of notifying opposing counsel and the Court, and the accuracy of representations to the Court about the availability of witnesses and which witnesses would be called.

*... I'm concerned about the representation from Dr. Lauter's counsel that counsel was unaware that Dr. Lauter was being requested to testify. That is different from the representation made to the Court by defense counsel that efforts were being made to procure him.*

1/28 RP 1903 [CP 561-62] (emphasis added). Defense counsel tried to excuse her behavior by claiming she ran out of time due to Mr. Teter's allegedly overlong presentation of his case and thus had to drop several witnesses at the last minute. 1/28 RP 1905-06; CP 564. But that also was not true. As Judge Gonzalez well knew, he had given each party equal time to present his case and regularly informed them how much time remained. *E.g.*, 1/13 RP 151-52; 1/20 RP 623; 1/28 RP 1642.

Mr. Teter cited defense counsel's misrepresentations in his motion for a new trial, pointing out that counsel was seeking some strategic advantage with her misrepresentations and her conduct violated RPC 3.3(a)(1) and RPC 8.4. CP 242-44. In response, and as he does on appeal, Dr. Deck reasserted his baseless "ran out of time" claim. CP 630-32; App. Br. at 29. Dr. Deck also made a dubious claim that a paralegal had unilaterally and erroneously decided to tell Ms. Ellison she would not be called. CP 659-60, 722-24; *see* CP 696-98. As Mr. Teter pointed out, even if that were true, the fact remained that defense counsel falsely told the court and Mr. Teter that she was personally exchanging emails with Dr. Lauter's attorney, when in fact she had not communicated with him at all. CP 696-98. Judge Gonzalez agreed that was misconduct. CP 713.

#### **4. Instructional Error**

Another ground asserted by Mr. Teter in support of his CR 59 motion was that the trial court erroneously instructed the jury on the standard of care. CP 228-30. Although the trial court rejected

instructional error as a basis for granting a new trial, CP 710-11, this court can affirm on any ground Mr. Teter asserted below.<sup>4</sup>

The instructional error issue concerns whether, based on the evidence at trial, the court should have instructed the jury on the standard of care for a “reasonably prudent laparoscopic surgeon,” as proposed by Mr. Teter; rather than the standard of care for a “reasonably prudent urologist,” as Dr. Deck proposed. CP 228-30, 402-03, 405-06.<sup>5</sup> (Pursuant to RAP 10.4(c), copies of the court’s instruction and Mr. Teter’s proposed instruction are included in the Appendix).

As shown above, it was Dr. Deck’s error while performing laparoscopy, not an error in performing general urology surgery, which led to Mr. Teter’s aorta being slashed and his compartment syndrome. Recognizing this, defense counsel stressed Dr. Deck’s experience and skill in laparoscopic procedures to the jury. During opening argument, for example, Ms. Elliott described Dr. Deck as follows:

The evidence will show that Dr. Deck obtained privileges at Evergreen Hospital to perform the exact surgery he performed on Mr. Teter on September 9<sup>th</sup>, 2004. He obtained those privileges in 2002. Not several months before the surgery; several years.

Prior to performing the surgery on Mr. Teter on September 9<sup>th</sup>, 2004, he had performed 120 nephrectomies. He had removed the kidney 120 times. 70 of those times had been laparoscopically. ...

...

<sup>4</sup> *Sargent v. Safeway Stores, Inc.*, 67 Wn.2d 941, 944-45, 410 P.2d 918 (1966); *Larson v. City of Seattle*, 25 Wn.2d 291, 294-96, 171 P.2d 212 (1946).

<sup>5</sup> 1/29 RP 2118-29 [CP 408-17].

Dr. Deck had participated as a resident in between 50 and 55 laparoscopic kidney surgeries while he was a resident at University of Washington and throughout the area. ... he did them at several different hospitals in the area in order to get qualified to complete his residency and to become Board Certified. So he'd done those, plus the ones that he had performed with Dr. Lauter....

1/13 RP 134-35 [CP 701-03].

In closing, Ms. Elliott again emphasized Dr. Deck's experience with laparoscopic procedures. She argued:

You've learned that there were experienced surgeons. ... [Dr. Deck] had done 70 laparoscopic procedures, 50-55 during his residency, and he finished his residency board certified and privileged at the hospital to perform this surgery. And the majority of the ones that he did with the Optiview were with Dr. Lauter...

1/30 RP 2214 [CP 372-73].

Consistent with this emphasis, Dr. Deck's testimony focused on his laparoscopic training, the procedure itself, and its risks and advantages, not on general urology issues. 1/28 RP 1879-88; 1/29 RP 1934-57. Both sides offered testimony to the effect that urologists and general surgeons who receive the proper specialized training can perform a laparoscopic nephrectomy without any difference or distinction in their roles. 1/21 RP 807-09, 821-23; 1/27 RP 1518, 1520-23.

Dr. Deck's training, knowledge and skills as a urologist were never in issue; Mr. Teter's claims only involved the specific surgical technique used, i.e., laparoscopy. But by failing to instruct the jury that it should hold Dr. Deck to the standard of care of a reasonably prudent laparoscopic surgeon, CP 406, the court created a misleading and confusing distinction

between a urologist performing a laparoscopic nephrectomy and a general surgeon performing the same procedure. That allowed defense counsel to argue to the jury that Mr. Teter had offered no evidence that Dr. Deck breached the relevant standard of care since (due to the exclusion of Dr. Fairchild, a urologist and laparoscopic surgeon), Mr. Teter's only medical expert was Dr. John Powelson, a general surgeon experienced in laparoscopy. 1/21 RP 807-08. Defense counsel thus argued:

You also learned from the expert testimony that Dr. Deck went above and beyond the standard of care of a reasonably prudent urologist. The standard of care – I told you on the 13<sup>th</sup> you would get sick of me explaining what the standard of care was. One of your instructions, Number 10, states what the standard of care is.

It says, “a urologist has a duty to exercise the degree of skill, care and learning expected of a reasonably prudent urologist in the state of Washington acting in the same or similar circumstances at the time of the care or treatment in question.” *What that means is Dr. Deck has the duty to act reasonably prudent, use care, as another urologist would when he was performing surgery on Mr. Teter...*

*The plaintiffs want you to believe that he failed to comply with the standard of care, but the plaintiffs did not produce one urologist to testify that he failed to comply with the standard of care. They produced a general surgeon –*

MR. MENZER: Your Honor, excuse me. Objection.

THE COURT: The jury will decide.

1/30 RP 2222-23 [CP 380-81] (emphasis added).

[MS. ELLIOTT] What you did hear from all of those doctors, *except for Dr. Powelson, who is not a urologist*, is that Dr. Deck acted as a reasonably prudent urologist in the surgery he performed on Mr. Teter. You will recall on the

13<sup>th</sup> I advised you that's what you would hear, and you heard it from competent expert witnesses.

....

*The issue in this case is the standard of care. The standard of care is explained to you in jury instructions ... Number 10 states, "a urologist has a duty to exercise the degree of skill, care and learning expected of a reasonably prudent urologist in the state of Washington."*

1/30 RP 2235-36 [CP 393] (emphasis added).

#### **5. Dr. Deck's Motion for Reconsideration**

Judge Gonzalez granted Mr. Teter's motion for new trial on the multiple grounds described above. CP 708-14. Dr. Deck sought reconsideration based in part on legal arguments about Judge Gonzalez's ability to consider Dr. Fairchild's exclusion and whether Mr. Teter preserved his misconduct of counsel allegations. CP 715-812. Mr. Teter rebutted those arguments in his opposition, CP 813-46, and Judge Gonzalez denied Dr. Deck's motion for reconsideration, CP 847-48.

### **IV. LEGAL ARGUMENT**

#### **A. Standard of Review**

A trial court has substantial discretion in deciding whether to grant a new trial. This Court reviews an order granting or denying a new trial for abuse of discretion. Discretion is abused when a decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. A stronger showing of abuse is required to set aside an order granting a new trial than to set aside an order denying one. *E.g., Mega v. Whitworth College*, 138 Wn. App. 661, 671, 158 P.3d 1211 (2007), *review denied*,

163 Wn.2d 1008 (2008); *Rowe v. Vaagen Bros. Lumber, Inc.*, 100 Wn. App. 268, 278, 996 P.2d 1103 (2000).

A limited exception to the abuse of discretion standard exists when the trial court bases its decision on a pure legal question. *Rowe*, 100 Wn. App. at 278. With the possible exceptions of the legal sufficiency of Judge Washington's order striking Dr. Fairchild and of the court's standard of care instruction, this is not such a case.

**B. Judge Gonzalez Properly Determined That Excluding Dr. Fairchild Was Prejudicial Error Warranting a New Trial**

Judge Gonzalez ruled that in striking Dr. Fairchild, Judge Washington abused his discretion and committed legal error. CP 709-10. Judge Gonzalez also found Dr. Fairchild's exclusion was enormously prejudicial to Mr. Teter since without Dr. Fairchild's testimony, Mr. Teter had to abandon his informed consent claim and could not proffer evidence that Dr. Deck breached the standard of care of a urologist. *Id*; see 1/12 RP 29-31. Judge Gonzalez thus determined that under CR 59(a)(8), Dr. Fairchild's exclusion alone was grounds for a new trial. CP 709-10.

On appeal, Dr. Deck does not challenge Judge Gonzalez's finding of prejudice. Instead he argues Judge Gonzalez lacked the power to examine Judge Washington's ruling and Judge Washington did not err in striking Dr. Fairchild. Neither argument enjoys evidentiary or legal support, and neither is persuasive. Simply put, Dr. Deck has failed to demonstrate that Judge Gonzalez abused his discretion in finding Judge Washington's erroneous exclusion of Dr. Fairchild warranted a new trial.

**1. Judge Gonzalez Properly Considered Judge Washington's Exclusion Order**

“The basis for all of the stated grounds for a new trial is the inherent power of the court to correct any errors in its proceedings that have had any material effect on the outcome of the trial.” 4 Karl B. Tegland, WASH. PRACTICE, RULES PRACTICE, CR 59 ¶ 1 at 466 (5<sup>th</sup> ed. 2006). Only a judge who presides over a trial has the knowledge and power to make that assessment.

Nevertheless, and without citing a single case, Dr. Deck asks this Court to overturn the new trial order because Judge Gonzalez somehow lacked the authority to assess on a CR 59 post-trial motion, the propriety of Judge Washington's order excluding Dr. Fairchild. Dr. Deck does cite KCLR 7(b)(7), but that rule is inapposite, as it concerns a party “remak[ing] the same motion to a different judge[.]” Mr. Teter did not “remake” a motion; the subject motion to exclude Dr. Fairchild *was made by Dr. Deck*. CP 356-58.

Dr. Deck alternatively argues that to seek a new trial based on Judge Washington's ruling, Mr. Teter first had to move for reconsideration (apparently so Dr. Deck would have an opportunity to draft a legally adequate order for Judge Washington to sign. *See* App. Br. at 38). Again, Dr. Deck cites no supportive authority. Nor, to Mr. Teter's knowledge, does any such authority exist. The purpose of a motion for new trial is to correct errors occurring during trial without an appeal. 4 WASH. PRACTICE, *supra* CR 59 ¶ 1 at 466. Such errors can occur inside or outside the courtroom, before, during or after the trial. *Id.* It is therefore

irrelevant to the authority of the trial judge whether he or she, or someone else altogether, committed the error in issue.

The procedure for preserving error regarding erroneously excluded evidence is to object and make an offer of proof. 5 Karl B. Tegland, WASH. PRACTICE, EVIDENCE LAW & PRACTICE §§ 103.18-19 (5<sup>th</sup> ed. 2007). Mr. Teter did exactly that. 1/12 RP 30-31; 1/27 RP 1626-28. Having done so, he could move for a new trial or file a direct appeal. *See* 4 WASH. PRACTICE, *supra* CR 59 ¶ 3 at 467-48. Mr. Teter chose to file the more efficient and less costly CR 59 motion. *Id.* That was his right and it was well within Judge Gonzalez's inherent power to rule on that motion.

**2. Judge Gonzalez Properly Exercised His Discretion and Correctly Applied the Law in Ordering a New Trial Based On the Erroneous Exclusion of Dr. Fairchild and the Inadequate Exclusion Order**

Washington law is clear:

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.

*Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (emphasis added; internal citation and quotation marks omitted). Under *Burnet*, a trial court abuses its discretion by imposing the severe sanction of excluding expert witness testimony absent: (1) a willful or deliberate refusal to obey a discovery order; (2) substantial prejudice to the opponent's ability to prepare for trial; and (3) a determination that no

lesser remedies are available. *Id.* at 494-96; *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 687, 132 P.3d 115 (2006); *see also Barci v. Intalco Aluminum Corp.*, 11 Wn. App. 342, 349-50, 522 P.2d 1159 (1974) (listing additional witness-specific factors).

To ensure against such an abuse, before a trial court can exclude an expert witness as a discovery sanction it must explicitly consider, *on the record*, lesser remedies and determine that none are available or sufficient. Judge Washington's January 12, 2009 order does not mention lesser remedies or include a finding or determination on issue. CP 351-54. Nor is there anything in the record indicating Judge Washington gave any thought to whether a lesser sanction would have sufficed.<sup>6</sup>

The court must also explicitly find, *on the record*, that the witness's proponent's failure to timely disclose the witness amounted to "intentional nondisclosure, willful violation of a court order, or other unconscionable conduct." *Burnet*, 131 Wn.2d at 494 (citation omitted). The exclusion order at issue contained no such finding. CP 351-54. Nor would there have been any basis for such a finding, as Mr. Teter's belated identification of Dr. Fairchild as his second replacement urology expert resulted from the unexpected conflict-based withdrawal of his first (timely-designated) replacement urology expert. Even Dr. Deck does not

<sup>6</sup> Dr. Deck claims he made a suggestion at the end of his motion to strike reply, i.e., that he depose Dr. Fairchild in Seattle at Mr. Teter's expense, which evidences Judge Washington's consideration of lesser sanctions. CP 67; App. Br. at 36. Judge Washington's order provides no support for that claim and Dr. Deck's belated suggestion was disingenuous given his earlier refusal to cooperate in scheduling Dr. Fairchild's deposition. CP 735-36; *see supra* at 10-11.

claim that the two weeks it took Mr. Teter to replace Dr. Golden with Dr. Fairchild was an intentional, tactical, or without reasonable excuse violation of a court order.

Finally, before a trial court can exclude an expert witness it must explicitly find that the delayed disclosure *substantially* prejudiced the moving party's ability to prepare for trial. Here Judge Washington's order included a conclusory statement that Dr. Deck had been prejudiced, but he did not find the prejudice to be *substantial* and failed to provide a single evidentiary fact demonstrating what prejudice he found Dr. Deck had incurred. CP 354. The reason for these omissions is readily apparent: no facts support any finding of prejudice, let alone a finding of *substantial* prejudice. To reiterate, it is uncontested the parties were deposing one another's witnesses throughout December 2008 and even during trial, CP 329, 334-36, 709; Dr. Deck admitted he needed only a three hour deposition of Dr. Fairchild, CP 317; and Dr. Deck's only genuine reason for not scheduling that short deposition was to create an argument for seeking Dr. Fairchild's exclusion. CP 735-36.

On appeal, Dr. Deck argues that these omissions in Judge Washington's order are trivial, i.e., that the absence of a "mystical incantation" in an exclusion order should not render it ineffective. App. Br. at 34. Requiring a trial court to explicitly establish it gave due consideration to the prerequisites for a requested remedy is not a trivial requirement. It is one our Supreme Court established in *Burnet* (and has since reaffirmed repeatedly) to ensure trial courts actually consider these

critical factors. *Burnet*, 131 Wn.2d at 494-98. Absent any indication Judge Washington actually considered the prerequisites for imposing the severe sanction of excluding an expert witness, Judge Gonzalez had ample legal and evidentiary reason to find that Judge Washington abused his discretion and committed legal error in striking Dr. Fairchild.

Alternatively, Dr. Deck argues that even though Judge Washington's order was inadequate, the record before him would have supported a properly drafted order. That is not the case. In fact, Mr. Teter conclusively established with documentary evidence submitted to Judge Washington, that Dr. Deck premised his motion to strike on inaccurate representations.

Tellingly, Dr. Deck asserted to Judge Washington (and this Court) that Mr. Teter's delay in naming Dr. Fairchild was inexcusable because Mr. Teter knew in January 2008 that his original expert, Dr. Duncan, would not testify. CP 357; App. Br. at 9, 32-33. That is untrue. While Dr. Duncan likely could not have testified in March 2008, he would have been available in September 2008 and January 2009 had he not fallen and suffered serious medical complications. CP 275-76; *see supra* at 8-9.

Dr. Deck now also claims the ruling was justified by Mr. Teter's alleged violations of discovery orders having nothing to do with his urology expert. App. Br. at 33-34. If a history of violating discovery orders were enough to justify exclusion, Judge Washington should have excluded several, if not all, of Dr. Deck's experts. *E.g.*, CP 261; Supp. CP [Doc. 310, 1/05/09 Mot.]. Obviously, he did not do so.

Mr. Teter's alleged discovery problems never involved his liability experts. CP 873-81; *see supra* at 6-9. Dr. Deck admits Judge Washington gave Mr. Teter until November 12, 2008 to identify a replacement urology expert and Mr. Teter met that deadline. CP 306-07, 719-20. While Mr. Teter later had to name a second replacement urology expert, that was due to his first replacement's unforeseeable conflict-based withdrawal. It is an abuse of discretion for a court to impose the severe sanction of exclusion for such a technical and unintended discovery violation. *In re Estate of Fahnländer*, 81 Wn. App. 206, 209-11, 913 P.2d 426 (1996) (abuse of discretion to bar substitute expert when counsels' and original expert's incompatible schedules prevented original expert's deposition and nothing indicated plaintiff's eleventh-hour identification of substitute expert was a trial tactic or an intentional violation of any discovery rule or scheduling order).

The conclusion is inescapable. Judge Washington had no tenable basis for granting Dr. Deck's motion to strike and as a result, failed to enter a legally sufficient order. That being the case, Judge Gonzalez properly exercised his discretion in ruling that the erroneous exclusion of Dr. Fairchild warranted a new trial.

**C. Judge Gonzalez Did Not Abuse His Considerable Discretion in Ordering a New Trial Based on Attorney Misconduct**

**1. Evidentiary Misconduct**

Not only is affirmance of Judge Gonzalez's new trial order warranted for the reasons stated above, it is warranted by Judge

Gonzalez's findings of counsel-misconduct. Under CR 59(a)(2), a trial court has discretion to grant a new trial based on "[m]isconduct of prevailing party[.]" Under ER 103(c), such misconduct includes "continu[ing] to question a witness on matters that have been held by the court to be inadmissible;" and "the persistent asking of questions which counsel knows are objectionable." 14A Karl B. Tegland, WASH. PRACTICE, CIVIL PROCEDURE § 30.33 at 262 (2d ed. 2009). A trial court has discretion to grant a new trial for such conduct if it was prejudicial in the context of the entire record. See *Aluminum Co. of Am. (Alcoa) v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000).

As shown above, *supra* at 15-29, the record unequivocally demonstrates that defense counsel continued to question witnesses on inadmissible matters and persisted in asking questions she knew were objectionable. While Dr. Deck tries to minimize those incidents on appeal, substantial evidence supports Judge Gonzalez's finding that defense counsel's repeated violations of the Evidence Rules, including ER 103(c), "forced plaintiffs to repeatedly object to improper questions and unfairly and improperly exposed the jury to inadmissible evidence, prejudiced plaintiffs, and is grounds for a new trial[.]" CR 712-13.

The record also demonstrates that defense counsel's conduct prejudiced Mr. Teter. Specifically, the never-ending evidentiary wrangling was so disturbing that one juror asked to be relieved from deliberations. 1/29 RP 1917; *id.* at 2111-14; see *supra* at 12-13. Even were that not the case, prejudice is presumed when, as here, counsel

persists in asking questions she knows are objectionable. As Mr. Tegland explains, in such cases “[p]rejudice results even though the objections are sustained; [plaintiffs] should not be put in the unfavorable position of having to make constant objections.” 14A WASH. PRACTICE, *supra* § 30.33 at 262 (emphasis added). When a party’s infringements “are repeated after warning it quickly becomes a case where prejudice is conclusively implied.” *Id.* § 30.40 at 281.

Several Washington cases are illustrative. In *State v. Simmons*, 59 Wn.2d 381, 384-87, 368 P.2d 378 (1962), a new trial was warranted where counsel questioned witnesses in a manner designed to elicit numerous objections. The Court rejected the “naïve” argument (much like Dr. Deck makes here) that no prejudice resulted since the trial court had sustained objections to most of the offending questions. It explained:

The cross-examiner must have known that objections would be sustained to the questions, which were obviously designed to prejudice the [opposing party] and put [the opposing party] in the unfavorable position of having to make constant objections.

*Simmons*, 59 Wn.2d at 386. In *Shaw v. Prudential Insurance Co.*, 166 Wash. 652, 657-59, 8 P.2d 431 (1932), the trial court found counsel’s repeated questioning on a topic about which the witness lacked personal knowledge and for which the court sustained multiple objections, resulted in prejudice requiring a new trial. And in *Storey v. Storey*, 21 Wn. App. 370, 372-75, 585 P.2d 183 (1978), defendant’s persistence in giving unresponsive answers and testifying to inadmissible matters created incurable prejudice and grounds for a new trial under CR 59(a)(2)).

Federal decisions are also instructive. In *Ballarini v. Clark Equipment Co.*, for example, the trial court granted a new trial after finding counsel's continuous misconduct, improper commentary, questions, and objections in front of the jury to be harmful and prejudicial. 841 F. Supp. 662 (E.D. Pa. 1993), *aff'd*, 96 F.3d 1431 (3d Cir. 1996). The *Ballarini* court described the misconduct as "an unending barrage of improper comments, questions, objections, and even facial expressions, always made in the presence of the jury, which continued right up until the verdict." 841 F. Supp. at 666. As did Judge Gonzalez, the court looked at the "cumulative impact" of counsel's "premeditated" conduct and its potential effect on the jury and concluded that if nothing else, the conduct placed the court in an adversarial position in the eyes of the jury. *Id.* at 667; *see also O'Rear v. Fruehauf Corp.*, 554 F.2d 1304 (5<sup>th</sup> Cir. 1977) (defense counsel's violation of *in limine* orders and use of prohibited evidence in closing argument warranted a new trial); *Lucent Techs. v. Extreme Networks, Inc.*, 229 F.R.D. 459, 461-63 (D. Del. 2005) (new trial granted where defense counsel "crossed the line" with repeated violations of court's evidentiary rulings by introducing evidence and argument in violation of pretrial rulings and despite the court's admonishment).

Dr. Deck has utterly failed to address authorities such as these. He ignores that the cumulative effect of his and defense counsel's misconduct gave Judge Gonzalez ample reason to question whether Mr. Teter had a fair trial. CR 713. That, by itself, is reason to grant a new trial. *Snider v. Wash. Water Power Co.*, 66 Wash. 598, 606-09, 120 P. 88 (1912) (new

trial warranted when trial judge could not determine what cumulative effect the misconduct had upon the jury, or whether a fair trial had been achieved).

Faced with the undeniable evidence of his and his attorneys' misconduct and repeated violations of ER 103(c), Dr. Deck alternatively asks the Court to reverse Judge Gonzalez's new trial order on failure-to-preserve-error grounds. To the extent Dr. Deck premises that request on Mr. Teter's alleged failure to object, the examples detailed above provide ample reason to reject his request for lack of evidentiary support. *See supra* at 15-29. Further, while Mr. Teter may not have objected to every instance of misconduct, a critical basis for Judge Gonzalez's misconduct and prejudice findings was that defense counsel "forced plaintiffs to repeatedly object to improper questions[.]" CP 712. As for Dr. Deck's claim that Mr. Teter failed to request curative instructions, Mr. Teter twice (unsuccessfully) requested a limiting instruction telling the jury not to consider evidence of the fault of others. CP 420-24; 1/29 RP 2135.

Not only does Dr. Deck misapprehend the evidence, he misapprehends applicable law. The very case on which Dr. Deck relies for other propositions, *Alcoa*, makes clear that to preserve misconduct-based error, a party moving for a new trial need only "have properly objected to the misconduct at trial,... and the misconduct must not have been cured by court instructions." 140 Wn.2d at 539 (citation omitted).

In any event, Dr. Deck fails to cite a single case making a request for a curative instruction a prerequisite to obtaining a new trial based on

repeated instances of misconduct. *Adair v. Weinberg*, 79 Wn. App. 197, 204, 901 P.2d 340 (1995), for example, concerned invited improper argument, not uninvited, continuous attempts to suggest inadmissible evidence to the jury. *City of Seattle v. Harclaon*, 56 Wn.2d 596, 597-98, 354 P.2d 928 (1960), involved a failure to object, not a failure to request a corrective instruction. *McUne v. Fuqua*, 42 Wn.2d 65, 253 P.2d 632, 257 P.2d 636 (1953), involved a single, flagrant inflammatory remark that an objection and curative instruction could have corrected.

In fact, the Supreme Court effectively distinguished *McUne* on that ground in *Riley v. Dep't of Labor & Indus.*, 51 Wn.2d 438, 443-44, 319 P.2d 549 (1957), where the Court noted that with recurring misconduct such as occurred here, a curative instruction will not cure the harm.<sup>7</sup> Or, as the *Story* court colorfully explained: “[t]he pain resulting from an evidential harpoon frequently is exacerbated by extraction, and the prejudice may be compounded by an instruction to disregard.” 21 Wn. App. at 375; *see also O’Rear*, 554 F.2d at 1309 (noting re cautionary instructions that “[y]ou can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn’t do any good.”).

In short, Judge Gonzalez had ample basis for finding that defense counsel engaged in repeated instances of misconduct, the misconduct

<sup>7</sup> Dr. Deck also cites prosecutorial misconduct decisions. App. Br. at 50-51. These cases are inapposite. CR 59 does not apply to criminal cases. *State v. Keller*, 32 Wn. App. 135, 139, 647 P.2d 35 (1982). Further, in civil cases reviewing courts apply “a standard that more generally upholds trial court decisions” on new trial motions. *Alcoa*, 140 Wn.2d at 539.

prejudiced Mr. Teter and deprived him of a fair trial, and Mr. Teter did all he reasonably could to preserve misconduct-related error. Granting a new trial on this basis was well within Judge Gonzalez's discretion.

## **2. Defense Counsel's Misrepresentations**

Consistent with his attempt to minimize the significance of the bases for Judge Gonzalez's order granting a new trial, Dr. Deck argues that his attorneys' misrepresentations about what witnesses they intended to call and their non-existent communications with those witnesses, were insufficiently prejudicial to warrant a new trial. App. Br. at 46-48. That argument fails for at least three reasons.

First, as Dr. Deck's counsel well knows, there is no time to waste during a trial. After spending hours in court, attorneys return to their offices to prepare witness examinations, motions or other written materials to present to the judge, and to deal with other cases. For defense counsel to make Mr. Teter's lawyers waste their limited time by preparing examinations for three witnesses defense counsel did not intend to call, was tactic-based prejudicial misconduct of the most egregious sort.

Second, Dr. Deck's "insignificance" arguments ignore the effect of defense counsels' misrepresentations on the court and the judicial system. As this Court observed in affirming sanctions imposed on counsel for making misrepresentations to a trial court:

The driving force behind the decision was the court's appreciation of its obligation to insist upon candor from attorneys. Misleading the court is never justified. As stated in *Fisons*: "Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse

will instead resort to it in self-defense.” *Fisons*, 122 Wn.2d at 355 (citation omitted).

*Goble v. Gabel*, 149 Wn. App. 119, 136, 202 P.2d 355 (2009).

Third, even if defense counsel’s affirmative misrepresentations were insufficient by themselves to create grounds for a new trial, it was reasonable for Judge Gonzalez to rely upon them as additional support for his finding that the cumulative effect of misconduct by the defense warranted a new trial under CR 59(a)(2). CP 713.

**D. The Trial Court’s Instructional Error Provides Additional Grounds for Granting a New Trial**

This Court can affirm an order granting a new trial on any ground argued to the trial court. *Supra* at 30 n.4. Applied here, this rule allows the Court to affirm the trial court based upon Judge Washington’s rejection of Mr. Teter’s laparoscopic standard of care instruction in favor of one describing a urologist’s standard of care.

An erroneous and prejudicial jury instruction is a proper ground for granting a new trial. *See, e.g., Kennett v. Yates*, 41 Wn.2d 558, 564-66, 250 P.2d 962 (1952). Washington Courts frequently grant and uphold new trials on the basis of improper or confusing instructions. *Brashear v. Puget Sound Power & Light Co.*, 100 Wn.2d 204, 667 P.2d 78 (1983); *Kennett*, 41 Wn.2d at 564-65; *Mega v. Whitworth*, 138 Wn. App. at 672; *see also* 15 Karl B. Tegland, WASH. PRACTICE: CIVIL PROCEDURE § 38.18 at 50 (2d ed. 2009).

Under Washington law, the failure to give a clear standard of care instruction for a “specialist,” when consistent with plaintiffs’ theory of the

case, is reversible error. In *Atkins v. Clein*, 3 Wn.2d 168, 170-71, 100 P.2d 1, 104 P.2d 489 (1940), the Washington Supreme Court upheld the granting of a new trial where such a proper “specialist” standard of care instruction conflicted with the more general standard of care instruction also given to the jury. The court reached a similar result in *Richards v. Overlake Hospital*, 59 Wn. App. 266, 275-77, 796 P.2d 737 (1990) (failure to give instruction that family care doctor was to be judged by standard of care of a pediatrician was error, but harmless under the unique facts of the case). Indeed, prejudice is presumed when an erroneous instruction is given on a material issue. *Nordeen Iron Works v. Rucker*, 83 Wash. 126, 128-29, 145 P. 219 (1915); see also *Hall v. Corp. of Catholic Archbishop*, 80 Wn.2d 797, 804, 498 P.2d 844 (1972) (use of inconsistent or contradictory instructions is prejudicial because it is impossible to know what effect they may have on the verdict). The standard of care in a medical malpractice case is such an issue.

As explained above, this case primarily concerned laparoscopy, not urology. Mr. Teter’s theory of the case, borne out by the trial testimony, was that both urologists and general surgeons perform laparoscopic nephrectomies and are subject to the same standard of care. By instructing the jury on the standard of care for urologists, Judge Gonzalez failed to inform the jury of the proper standard, which in turn allowed Dr. Deck to misleadingly argue that Mr. Teter failed to prove a breach of the standard of care. That severely prejudiced Mr. Teter and is additional reason to affirm Judge Gonzaelez’s new trial order.

**E. Judge Gonzalez Should Have the Opportunity to Retry This Case On Remand**

Dr. Deck asks this Court to order that a new judge preside at the retrial of this matter. The Court should reject his request. Notably, Dr. Deck nowhere claims that Ms. Elliott – the source of most misconduct referenced in Judge Gonzalez’s new trial order – will again serve as trial counsel. Nor is there reason to believe that will be the case since Ms. Elliott “withdrew as attorney of record” for Dr. Deck, new trial counsel from a separate law firm substituted in her place, and she is not a signatory on the appeal brief. Supp. CP [Doc. 439, 10/02/09 Notice]. Moreover, Dr. Deck has not attempted to show an appearance of bias or lack of impartiality by Judge Gonzalez, which showing is a prerequisite for an order such as he requests. *Santos v. Dean*, 96 Wn. App. 849, 856-57, 982 P.2d 632 (1999). “Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit.” *Id.* at 857 (citation omitted). That, coupled with Ms. Elliott’s withdrawal, makes this case one in which any question about disqualification is best left to the trial judge. *See id.*

**V. CONCLUSION**

Judge Gonzalez properly exercised his discretion in granting Mr. Teter a new trial based on the erroneous exclusion of Mr. Teter’s medical expert and the misconduct of Dr. Deck’s trial counsel. In addition, instructional error deprived Mr. Teter of a fair trial. For these reasons, as well as all of the additional reasons stated above, Mr. Teter respectfully

asks the Court to affirm the trial court's ruling and remand this matter for a new trial before Judge Gonzalez.

DATED this 26<sup>th</sup> day of March, 2010.

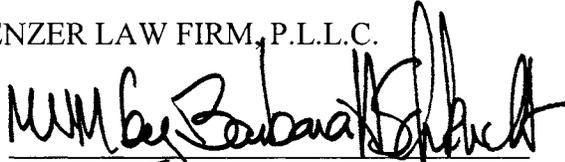
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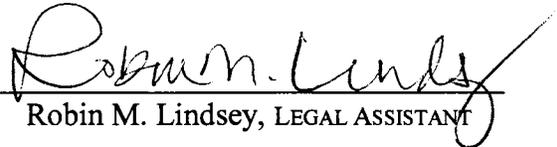
Attorneys for Respondent

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington that on March 26, 2010, I caused to be served a true and correct copy of the foregoing Brief of Respondents upon counsel of record as stated below:

Mary H. Spillane and Mark S. Davidson	<input checked="" type="checkbox"/>	Via Messenger
Williams Kastner & Gibbs PLLC	<input type="checkbox"/>	Via U.S. Mail
601 Union Street, Suite 4100	<input type="checkbox"/>	Via Overnight Delivery
Seattle, Washington 98101	<input type="checkbox"/>	Via Facsimile
	<input checked="" type="checkbox"/>	Via E-mail
Nancy C. Elliott	<input checked="" type="checkbox"/>	Via Messenger
Merrick Hofstedt & Lindsey PS	<input type="checkbox"/>	Via U.S. Mail
3101 Western Avenue, Suite 200	<input type="checkbox"/>	Via Overnight Delivery
Seattle, Washington 98121-3017	<input type="checkbox"/>	Via Facsimile
	<input checked="" type="checkbox"/>	Via E-mail
David L. Martin, Esq.	<input checked="" type="checkbox"/>	Via Messenger
Lee Smart Cook Martin & Patterson, P.S.	<input type="checkbox"/>	Via U.S. Mail
701 Pike Street, Suite 1800	<input type="checkbox"/>	Via Overnight Delivery
Seattle, Washington 98101	<input type="checkbox"/>	Via Facsimile
	<input checked="" type="checkbox"/>	Via E-mail
Matthew N. Menzer	<input checked="" type="checkbox"/>	Via Messenger
Menzer Law Firm, P.L.L.C.	<input type="checkbox"/>	Via U.S. Mail
705 Second Avenue, Suite 800	<input type="checkbox"/>	Via Overnight Delivery
Seattle, Washington 98104	<input type="checkbox"/>	Via Facsimile
	<input checked="" type="checkbox"/>	Via E-mail

DATED this 26<sup>th</sup> day of March, 2010, at Seattle, Washington.

By:   
Robin M. Lindsey, LEGAL ASSISTANT

## **APPENDIX**

Court's Instruction No. 10

Plaintiffs' Proposed Instruction No. 9

PHOTOCOPY

**FILED**  
KING COUNTY, WASHINGTON

JAN 30 2009

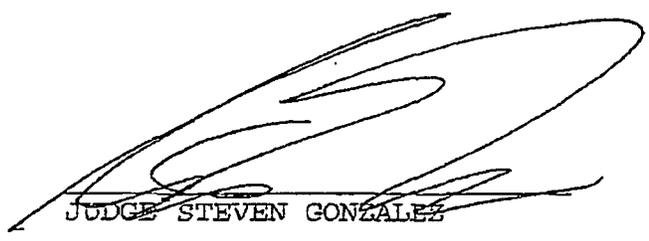
SUPERIOR COURT CLERK  
ANDRE JONES  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

RONALD and DEBORAH TETER,	)	
	)	
	)	No. 06-2-13627-6 SEA
Plaintiffs,	)	
	)	
v.	)	
	)	
ANDREW DECK, M.D.,	)	
	)	
Defendant.	)	
_____	)	

COURT'S INSTRUCTIONS TO THE JURY

JANUARY 29<sup>th</sup>, 2009



JUDGE STEVEN GONZALEZ

**ORIGINAL**

INSTRUCTION NO. 10

A physician owes to the patient a duty to comply with the standard of care for one of the profession or class to which he or she belongs.

An urologist has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent urologist in the State of Washington acting in the same or similar circumstances at the time of the care or treatment in question.

Failure to exercise such skill, care, and learning constitutes a breach of the standard of care and is negligence. —

The degree of care actually practiced by members of the medical profession is evidence of what is reasonably prudent. However, this evidence alone is not conclusive on the issue and should be considered by you along with any other evidence bearing on the question.

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CLERK  
SEATTLE, WA

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

RONALD and DEBORAH TETER,  
husband and wife,

Plaintiffs,

v.

ANDREW DECK, M.D.,

Defendant.

No. 06-2-13627-6 SEA

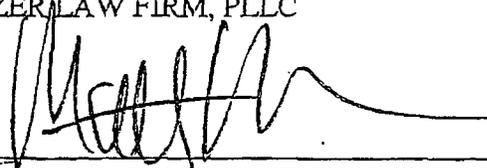
PLAINTIFFS' PROPOSED JURY  
INSTRUCTIONS FOR TRIAL

(CITED)

Pursuant to CR 51, plaintiffs Ronald and Deborah Teter respectfully submit the attached Proposed Jury Instructions for Trial. Plaintiffs reserve the right to supplement or modify these proposed instructions or to offer substitutes, depending upon the evidence presented at trial and the instructions proposed by the defense.

DATED this 5<sup>th</sup> day of January, 2009.

MENZER LAW FIRM, PLLC

By: 

Matthew N. Menzer, WSBA 21665

Attorneys for Plaintiffs

INSTRUCTION NO. 9

A health care professional owes to the patient a duty to comply with the standard of care for one of the profession or class to which he or she belongs.

A urologist who holds himself out as a specialist in laparoscopic surgery has a duty to exercise the degree of skill, care and learning expected of a reasonably prudent laparoscopic surgeon in the State of Washington acting in the same or similar circumstances at the time of the care or treatment in question. Failure to exercise such skill, care and learning constitutes a breach of the standard of care and is negligence.

The degree of care actually practiced by members of the medical profession is evidence of what is reasonably prudent. However, this evidence alone is not conclusive on the issue and should be considered by you along with any other evidence bearing on the question.