

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
May 02, 2011, 12:52 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

No. 85342-8

SUPREME COURT
OF THE STATE OF WASHINGTON

RONALD and DEBORAH TETER, husband and wife,

Petitioners,

v.

ANDREW DECK, M.D.,

Respondent.

RONALD AND DEBORAH TETERS' SUPPLEMENTAL BRIEF

One Union Square
600 University, 27th Fl.
Seattle, WA 98101-3143
(206) 467-1816

McNAUL EBEL NAWROT &
HELGREN PLLC
Peter M. Vial, WSBA No. 6408
Barbara H. Schuknecht, WSBA No.
14106
Avi J. Lipman, WSBA No. 37661

705 Second Avenue, Suite 800
Seattle, Washington 98104
Phone (206) 903-1818

MENZER LAW FIRM, P.L.L.C.
Matthew N. Menzer
WSBA No. 21665
Attorneys for Plaintiffs/Petitioners

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. PRINCIPAL ISSUES PRESENTED FOR REVIEW	1
III. SUPPLEMENTAL STATEMENT OF THE CASE	2
A. Dr. Fairchild’s Exclusion.....	2
1. The Impact of <i>Blair</i>	2
2. The Parties’ Discovery Disputes	3
B. Defense Counsel’s Misconduct.	7
C. Judge Gonzalez’s New Trial Order and Dr. Deck’s Appeal.....	9
IV. ARGUMENT.....	12
A. The Court of Appeals Erred in Upholding Dr. Fairchild’s Exclusion.....	12
B. The Court of Appeals Erred By Rejecting Judge Gonzalez’s Prejudice Findings and Imposing New Preservation of Error Requirements	16
V. CONCLUSION	20

TABLE OF AUTHORITIES

Page

Cases

Aluminum Co. of Am. (Alcoa) v. Aetna Cas. & Sur. Co.,
140 Wn.2d 517, 998 P.2d 856 (2000).....17, 18, 19

Ballarini v. Clark Equip. Co.,
841 F. Supp. 662 (E.D. Pa. 1993),
aff'd, 96 F.3d 1431 (3d Cir. 1996).....18

Blair v. TA-Seattle East No. 176, No. 83715-5
(filed April 21, 2011).....*passim*

Burnet v. Spokane Ambulance,
131 Wn.2d 484, 933 P.2d 1036 (1997).....*passim*

Delegan v. White,
59 Wn.2d 510, 368 P.2d 682 (1962).....19

Eickerman v. Eickerman,
42 Wn.2d 165, 253 P.2d 962 (1953).....19

In re Estate of Fahlander,
81 Wn. App. 206, 913 P.2d 426, *review denied*,
130 Wn.2d 1002 (1996).....16

Lucent Techs. v. Extreme Networks, Inc.,
229 F.R.D. 459 (D. Del. 2005).....18

Magana v. Hyundai Motor Am.,
167 Wn.2d 570, 220 P.3d 191 (2009).....12, 13, 15, 16

Mayer v. Sto Indus., Inc.,
156 Wn.2d 677, 132 P.3d 115 (2006).....12, 13, 16

Nelson v. Martinson,
52 Wn.2d 684, 328 P.2d 703 (1958).....19

Palmer v. Jensen,
132 Wn.2d 193, 937 P.2d 597 (1997).....18

<i>Rivers v. Wash. State Conf. of Mason Contractors</i> , 145 Wn.2d 674, 41 P.3d 1175 (2002).....	3, 13, 16
<i>Shaw v. Prudential Ins. Co.</i> , 166 Wash. 652, 8 P.2d 431 (1932).....	18
<i>Snider v. Wash. Water Power Co.</i> , 66 Wash. 598, 120 P. 88 (1912).....	17
<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991).....	18
<i>State v. Simmons</i> , 59 Wn.2d 381, 368 P.2d 378 (1962).....	18
<i>Story v. Story</i> , 21 Wn. App. 370, 585 P.2d 183 (1978).....	19
<i>Teter v. Deck</i> , Ct. App. No. 63336-8-1 (filed Oct. 25, 2010)	<i>passim</i>

Other Authorities

14A Karl B. Tegland, WASH. PRACTICE, CIVIL PROCEDURE (2d ed. 2009).....	17
--	----

Rules

CR 37(b)(2).....	11
CR 59(a)(2).....	16
RPC 3.4.....	8
ER 103(c).....	16
RAP 9.1-9.5	11
RAP 10.3	3

I. INTRODUCTION

The Honorable Steven Gonzales – the trial judge below and an accomplished trial lawyer before moving to the bench – made the wrenching decision to order a new trial and discard the work he, the jury, and the parties completed during a three week trial. He did so for two independently dispositive reasons: (1) the predecessor judge’s last-minute exclusion of the Teters’ substitute urology expert (in a suit against a urologist) was legally flawed and an abuse of discretion; and (2) cumulative prejudice caused by defense counsel’s misconduct throughout trial.

The Court of Appeals improperly reversed. On the first point, its decision violates *Burnet* and its progeny, including the newly issued *Blair* decision. On the second point, the Court of Appeals improperly substituted its judgment for that of the trial court and announced – ex post facto – unworkable requirements for persistent misconduct cases.

If the very judge responsible for ensuring a fair trial determines that counsel’s repeated misconduct rendered the proceedings unfair, then the Court of Appeals may not substitute its later assessment for that judge’s firsthand and well-documented determination. The Teters respectfully ask this Court to reverse the Court of Appeals’ reversal of Judge Gonzalez’s new trial order and remand this matter for a new trial.

II. PRINCIPAL ISSUES PRESENTED FOR REVIEW

1. Under *Blair v. TA-Seattle East No. 176*, No. 83715-5 (filed April 21, 2011) (“*Blair*”) and other decisions following *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), does a trial court

abuse its discretion and enter a legally insufficient order by excluding a critical substitute expert without finding willfulness, without considering lesser sanctions, and with only a conclusory finding of prejudice? If so, may the Court of Appeals affirm the exclusion based on its interpretation of the record of different discovery disputes?

2. May an appellate court reverse a new trial order based on the cumulative prejudicial effect of defense counsel's misconduct by (a) substituting its judgment for that of the trial court; and (b) finding the right to a new trial waived by noncompliance with the appellate court's newly announced and unworkable standards for preserving error?

III. SUPPLEMENTAL STATEMENT OF THE CASE

A. Dr. Fairchild's Exclusion

1. The Impact of *Blair*

The Court of Appeals reversed the witness exclusion section of Judge Gonzalez's new trial order pursuant to an improper analysis akin to that rejected in *Blair*. Here, as in *Blair*, Division I excused a trial court's failure to make express *Burnet* findings by making its own findings, based on its own reading of "the record as a whole." *Blair* rejected the notion "an appellate court can consider the facts in the first instance as a substitute for the trial court findings that our precedent requires." *Blair* at 10. The trial court must make those findings, either in writing, in colloquy between the bench and counsel, or during oral argument. *Id.* at 7.

Blair is dispositive. Here there was no oral argument or colloquy, the exclusion order does not find willfulness or show consideration of a

lesser sanction, and the order's prejudice finding is conclusory. The Teters expect, however, that Dr. Deck will try to distinguish *Blair* on the ground that "the record below [really does] speak[] for itself." *Id.* at 8. Since Dr. Deck's assertions about the record below have been inaccurate, the Teters provide the requisite RAP 10.3 "fair" description below.

2. The Parties' Discovery Disputes

Ron Teter's life was changed forever after Dr. Deck lacerated his abdominal aorta. 1/14 RP 255-71, 275-95. Dr. Deck responded aggressively to the Teters' lawsuit. He withheld discovery; piled on duplicative experts he often identified at the last minute; refused to cooperate in scheduling depositions; and blamed the Teters when depositions he scheduled unilaterally or on dates he knew the Teters' attorney was unavailable, did not take place.¹ While the Teters' discovery efforts were also imperfect, it is a significant "surrounding circumstance" that both parties contributed to their discovery disputes. *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 695, 41 P.3d 1175 (2002). So, too, is the circumstance that their disputes did not involve the Teters' original and replacement urology experts (Dr. William Duncan, Dr. Robert Golden, or Dr. Thomas Fairchild) since Dr. Deck deposed Dr. Duncan in January 2008 and, for tactical reasons, rejected multiple opportunities to depose Dr. Duncan's replacement. Specifically:

- January 21, 2007: Dr. Duncan, a urologist familiar with

¹ *E.g.*, CP 329-30, 335-36, 743-45, 925-28, 937-39, 1008, 1095-96, 1129-30, 1571-75, 1713-14, 1719-20, 1737-44; *see* CP 1135-49 (unilateral scheduling letters); CP 1576-1736 (Teters' motions to exclude witnesses).

laporoscopic procedures, submitted a declaration outlining how, in his opinion, Dr. Deck (a) made inadequate disclosures, (b) breached the standard of care, and (c) thereby proximately caused harm to Mr. Teter. CP 296-302.

- January 11, 2008: Dr. Deck deposed Dr. Duncan. CP 875, 885.

- January 22, 2008: The Teters gave Dr. Deck “advance notice” that Dr. Duncan’s upcoming back surgery and a recent bout with the flu, meant they “*may be substituting another urologist*” to “testify at trial *in March*” 2008. CP 745 (emphasis added); *see* CP 276.

- February 15, 2008: At the request of all parties, trial was continued from March 17 to September 22, 2008. CP 933-36, 987-88. Dr. Duncan’s health *in March 2008* was no longer a concern. CP 276.

- June 2, 2008: Dr. Deck moved to require the Teters to schedule depositions. CP 873-81. Dr. Deck excluded “*plaintiffs’ expert Dr. Duncan,*” from the motion’s scope, as Dr. Duncan had already been deposed. CP 875, 885 (emphasis added).

- June 11, 2008: Judge Washington entered the requested order, which necessarily did not apply to *plaintiffs’ expert Dr. Duncan*. CP 1188-89 (emphasis added).

- Aug. 11, 2008: The Teters learned Dr. Duncan had fallen, been hospitalized with severe complications, and could not testify at the September 2008 trial. CP 275-76, 1576-77.

- Aug. 15, 2008: The Teters moved to strike or limit Dr. Deck’s untimely disclosed experts, or be given time to identify rebuttal witnesses

and replace Dr. Duncan with another urologist. CP 1576-88, at 1576-77. (Dr. Deck's belated disclosures also led the Teters to file several other exclusion motions. CP 1647-51, 1671-74, 1695-1700, 1712-17).

- Aug. 21, 2008: Dr. Deck countered with a motion for pretrial conference. CP 1172-75. He did not mention the Teters' experts and his discussion of discovery disputes concerned depositions of "Ron Teter's health care providers and multiple fact witnesses[.]" CP 1175.

- Sept. 2, 2008: The Teters filed their pretrial witness list naming "Replacement Urologist/William Y. Duncan, III, M.D." CP 1271.

- Sept. 12, 2008: Dr. Deck moved to exclude eight or nine of the Teters' treating physician and fact witnesses. He did not seek exclusion of Dr. Duncan or Dr. Duncan's potential replacement. CP 1339-57.

- Sept. 17, 2008: Judge Washington held a pretrial conference; he did not rule on the pending motions to strike. *See* CP 1379-81.

- Oct. 1, 2008: The Teters filed a witness disclosure that identified their urology expert as "Replacement Urologist/William Y. Duncan, III, M.D.," and disclosed that the replacement expert's opinions would largely be the same as Dr. Duncan's. CP 1376, 1414. The record contains no objection by Dr. Deck to the disclosure's timing or adequacy.

- Oct. 15, 2008: Judge Washington signed an order memorializing the September 17 conference. CP 1379-81. The order directed the Teters to, by October 1, 2008, identify intended trial witnesses and provide concise summaries of their experts' expected opinions on standard of care, causation, and damages. *Id.* Dr. Deck was directed to do

the same by October 15, 2008. *Id.* The order did not find the Teters' October 1 urology expert disclosure inadequate or in any other way violative of a replacement expert deadline, or threaten sanctions. *Id.*

The court also issued an amended case schedule setting November 24, 2008 as the discovery cutoff. CP 764. The parties extended that cutoff; the Teters were forced to depose Dr. Deck's witnesses up to and during trial. *E.g.*, CP 329-30, 335-36, 345, 804; 1/12 RP 81-82.

- Oct. 22, 2008: Judge Washington scheduled another pretrial conference for this date. *See* CP 1379-81. That unreported conference did not result in Judge Washington signing or entering any order.

- Oct. 29, 2008: The Teters told Dr. Deck they needed additional time to replace Dr. Duncan and hoped to do so by November 12, 2008. CP 304. The record contains no objection by Dr. Deck.

- Nov. 12, 2008: After another unreported conference, Judge Washington entered an *order compelling Dr. Deck to produce operative reports*. CP 1743-44. The Teters named a replacement urology expert, Dr. Golden, and confirmed that his opinions would reflect Dr. Duncan's. CP 306-07. Dr. Deck scheduled Dr. Golden's deposition: CP 1422-28.

- Nov. 18, 2008: Although still believing Dr. Deck had committed malpractice, Dr. Golden withdrew as the Teters' urology expert after learning of a personal conflict with Dr. Deck's office. CP 348-49.

- Dec. 10, 2008: The Teters informed Dr. Deck that Dr. Fairchild would replace Drs. Golden and Duncan and would testify to the same liability and causation issues. CP 338. Two days later, the Teters filed a

formal witness disclosure for Dr. Fairchild. CP 1448-49.

- Dec. 16, 2008: Dr. Deck rejected all deposition dates proposed for Dr. Fairchild, informed the Teters he would move to strike Dr. Fairchild, and made clear he would depose Dr. Fairchild only if his motion to strike were denied. CP 735-36; *see* CP 329, 332, 334-35, 345.

- Dec. 29, 2008: Dr. Deck moved to strike Dr. Fairchild. CP 1391-1549.

- Jan. 12, 2009: On the morning trial began and without hearing argument, Judge Washington granted Dr. Deck's motion after the new judge, Judge Gonzalez, asked him to rule. CP 351-54; 1/12 RP 7-12. It is undisputed that Dr. Fairchild's exclusion severely prejudiced the Teters, who had no urologist to testify in a malpractice suit against a urologist, and who were left with just one expert, a general surgeon, to testify on negligence and causation. CP 710; 1/13 RP 86-87, 1/21 RP 807-1027.

B. Defense Counsel's Misconduct.

Throughout trial, defense counsel asked witnesses improper questions, made improper objections, and tried repeatedly to get evidence before the jury after it had been ruled inadmissible. CP 562, 712-13. That "feigned ignorance" of evidence rules and procedure forced the Teters to object repeatedly. Once, for example, defense counsel asked basically the same question six times after the original objection was sustained. 1/28 RP 1802-05.² The wrangling caused by defense counsel's "feigned

² Other "feigned ignorance" and examples of harmful persistence include: 1/21 RP 813-19, 960-61, 973-75, 1005-06, 1011, 1013-15; 1/28 RP 1660, 1663-66, 1686-87, 1787-88, 1798, 1807-11, 1846-47; 1/29 RP 1934-35.

ignorance” left one juror feeling like “strangling a couple of lawyers.”

1/29 RP 1917. Worse, it conveyed to the jury the mistaken message the Teters were fighting to hide critical evidence.

So persistent was defense counsel’s evidentiary misconduct that Judge Gonzalez had to remind her of “RPC 3.4,” 1/21 RP 1013; warned that if defense counsel “talk[ed] one more time that way” a fine would be imposed, 1/28 RP 1811; and said:

[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).

Defense counsel also misled the court and the Teters about what witnesses would be called.³ That adversely affected the Teters’ trial presentation. CP 713. Not only did the Teters forgo calling one of those witnesses (Dr. Lauter) in their case in chief, their attorney “spent two evenings ... preparing for Dr. Lauter ... when we’ve got too much to do as it is.” CP 596; *see also* CP 579-82, 593-98; 1/21 RP 1036-37, 1/22 RP 1046-47, 1/29 RP 1913. Judge Gonzalez thus admonished:

[THE COURT:] *I’m also very concerned about the ... disclosure*

³ *See* CP 561-62, 579-607, 659-60, 696-98, 722-24; 1/27 RP 1498-1501, 1/28 RP 1638-43, 1902-08.

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).

C. Judge Gonzalez's New Trial Order and Dr. Deck's Appeal

The jury entered a verdict for Dr. Deck. CP 110-11. The Teters sought a new trial based on Dr. Fairchild's exclusion and/or defense counsel's misconduct. CP 220-616. Judge Gonzalez had ample time to review the evidence submitted to Judge Washington to assess compliance with *Burnet* and its progeny.⁴ Consistent with that precedent, Judge Gonzalez found Dr. Fairchild's exclusion was "an abuse of discretion, and a reversible error of law." CP 710.

Having presided over the trial, Judge Gonzalez also was well-equipped to assess the prejudicial effect of defense counsel's conduct on the jury and the Teters. He found that "*[a]ll 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). He concluded "*[t]he cumulative effect of defense counsel's misconduct*

⁴ Judge Washington may not have taken that opportunity. He ruled on the first day of trial, shortly after Judge Gonzalez asked him to do so and without oral argument. 1/12 RP 7-12.

throughout the trial proceedings warrants a new trial, as it casts doubt on whether a fair trial occurred.” CP 713 (emphasis added).

Judge Gonzalez ordered a new trial. CP 708-14. Dr. Deck appealed. The Court of Appeals reversed. With respect to Dr. Fairchild’s exclusion, the court reversed based on an apparent rejection of this Court’s holdings in *Burnet* and its progeny, and a misreading of the record.

The Court of Appeals erroneously found, for example, that the Teters “first stated they were seeking a replacement [urologist] in January 2008, but never disclosed anyone specific, and never made anyone available for deposition.” *Teter v. Deck*, Ct. App. No. 63336-8-1 (filed Oct. 25, 2010) (“*Teter*”) at 3. But the Teters had merely said they “*may be substituting*” a urologist “*to testify at trial in March.*” CP 745 (emphasis added). Once the March trial was continued, everyone expected Dr. Duncan would testify, a fact confirmed by Dr. Deck’s later reference to “*plaintiffs’ expert Dr. Duncan*” in his June 2008 motion to compel the depositions of *other* witnesses. CP 875, 885 (emphasis added).

The Court of Appeals also mistakenly found that over “a five-month period,” the Teters defied “at least five” orders regarding their urology expert. *Teter* at 8. The five orders included unrelated summer 2008 orders. *Id.* at 2-4. Only two orders even arguably pertain to Dr. Duncan’s replacement: the October 15 amended case schedule setting a discovery cutoff the parties did not observe; and the October 15 order. CP 764, 1379-81. The Court of Appeals found the Teters violated the October 15 order by failing to identify and disclose their replacement urologist’s

opinions by October 1. *Teter* at 4. But the October 15 order did not find the October 1 disclosure the Teters filed two weeks before to be inadequate. *See* CP 1379-81. Nor was it. Further, given the scarcity of available urologists qualified to testify as to Dr. Deck's negligence in the procedure at issue, *see* CP 347; it would have been unreasonable to require the Teters to identify and make further disclosures for a replacement urologist in the two weeks between September 17 and October 1, 2008.⁵

The Court of Appeals further mistakenly found the Teters violated orders purportedly entered at the October 22 and November 12 conferences. *Teter* at 4-5. No such orders are in the record. The only order entered after those conferences compelled Dr. Deck to produce documents. CP 1743-44. Defense counsel did submit a declaration claiming Judge Washington ordered the Teters to name Dr. Duncan's replacement or face exclusion, but counsel did so *to support Dr. Deck's motion to reconsider Judge Gonzalez's new trial order*. CP 719-20. By then, defense counsel's credibility was in doubt. *See* CP 713 at ¶ 5. But even if counsel's self-serving, belated declaration should or could be considered,⁶ it would not support exclusion. Under *Blair* and *Burnet*, defense counsel had to show that Judge Washington found the Teters

⁵ Because trial was imminent when they first learned of Dr. Duncan's fall and unexpected unavailability for the September trial, the Teters sought leave of court before searching for a replacement expert. *See* CP 1577.

⁶ The Court of Appeals treated counsel's declaration as the legal equivalent of a CR 37(b)(2) order. No court rule permits that equation; indeed, the Rules of Appellate Procedure preclude reliance on one party's representations about proceedings. RAP 9.1-9.5 (record may consist of a transcribed, narrative, or agreed-to-by-the-parties report of proceedings; clerk's papers; and exhibits).

willfully disobeyed a court order and substantially prejudiced Dr. Deck's ability to prepare for trial. *Blair* at 7-10. Counsel did not and could not do so. CP 719-20.

In addition to misapprehending the record regarding the Teters' urology experts, the Court of Appeals also rejected Judge Gonzalez's misconduct findings. In so doing the Court of Appeals artificially segregated individual incidents underlying the new trial order and rejected Judge Gonzalez's first-hand assessment of their cumulative effect. *Teter* at 11-14. The Court of Appeals then buttressed its flawed analysis by announcing and imposing on the Teters, new preservation of error requirements that are unworkable in a cumulative misconduct case.⁷ *Id.* In short, the court erred in several critical ways. The Teters ask this Court to reverse and remand this matter for a new trial before Judge Gonzalez.

IV. ARGUMENT

A. The Court of Appeals Erred in Upholding Dr. Fairchild's Exclusion

To enable meaningful review, a trial court must explain, on the record, the reasons for imposing the severe sanction of witness exclusion. *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 583, 220 P.3d 191 (2009); *Burnet*, 131 Wn.2d at 494; see *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006). This allows reviewing courts to assess whether the trial court relied on unsupported facts, applied the

⁷ In a similar vein, the Court of Appeals also commented unfavorably on the Teters' decision not to seek reconsideration of Dr. Fairchild's exclusion. *Teter* at 5. Under *Burnet*, however, the Teters were not required to seek reconsideration. See 131 Wn.2d at 498-99.

wrong legal standard, or adopted an unreasonable view. *Magana*, 167 Wn.2d at 583; *Mayer*, 156 Wn.2d at 684. The exclusion order thus must show the trial court found a willful violation of discovery rules and resultant substantial prejudice to the moving party, and explicitly considered lesser sanctions. *Blair* at 7-10; *Magana*, 167 Wn.2d at 583-84; *Rivers*, 145 Wn.2d at 684-87; *Burnet*, 131 Wn.2d at 494, 497. Conclusory findings will not suffice. *Rivers*, 145 Wn.2d at 696.

The Court of Appeals held instead that a trial court need not expressly consider these factors on the record if “the record as a whole” shows they were satisfied. *Teter*, at 9-10. *Blair* makes clear, however, that *Mayer* and *Burnet* do not allow reviewing courts to “consider the facts in the first instance as a substitute for the trial court findings that our precedent requires.” *Blair* at 10. Instead, the trial court’s findings must be “affirmatively stated on the record,” and the court must “clearly indicate on the record that it has considered less harsh sanctions[.]” *Rivers*, 145 Wn.2d at 694, 696; accord *Blair* at 7-10; *Mayer*, 156 Wn.2d at 686-88; *Burnet*, 131 Wn.2d at 494, 497. This ensures that the trial court performs the requisite analysis and actually exercises discretion about other sanctions, and it allows reviewing courts to assess whether the trial court relied on unsupported facts or erroneous legal standards.

Even if a trial court could exclude a witness without giving express consideration to the *Burnet* factors on the record, and even if it were appropriate for appellate courts to scour the record for evidence, the record here would not support exclusion. No order directs the *Teters* to take

action regarding their urology expert(s), warns of potential exclusion, or finds willful misconduct. Nor was any motion filed challenging the Teters' urology expert disclosures. Rather, the record shows the Teters timely identified Dr. Golden and identified his replacement, Dr. Fairchild, a month before trial (while the Teters were still deposing Dr. Deck's witnesses and getting his documents), and that Dr. Deck's alleged prejudice from Dr. Fairchild's December 10 disclosure was self-inflicted.

Dr. Deck claims willfulness is shown here because "the Teters violated multiple discovery orders without reasonable explanation or excuse." Deck Ans. to Petit. ("Ans.") at 10; *see Teter* at 10. The Teters dispute that, but the crux points are that the Teters did not violate any order related to their urology expert (there were none) and alleged violations of other discovery orders do not obviate the need for explicit willfulness findings. As explained in *Blair*: "if willfulness follows necessarily from the violation of a discovery order, then the on-the-record finding of willfulness that *Burnet* requires is meaningless." *Blair* at 9 n.3. Further, the record must establish that the trial court considered whether there were valid reasons for the alleged violation. *Id.* Here there is no evidence of a violation, much less of such consideration. That is a fatal omission given the Teters' compelling reasons for identifying Dr. Fairchild on December 10, 2008: Dr. Golden's unforeseeable withdrawal on November 18 and Dr. Duncan's earlier unforeseeable fall and hospitalization.

Dr. Deck also argues that “the record as a whole” supports Judge Washington’s conclusory recital of prejudice. He claims the record does so because it shows the Teters’ “multiple violations of court orders ... and the frequent motions Dr. Deck had to file to obtain the disclosures to which he was entitled.” Ans. at 11. But Dr. Deck never challenged the disclosures for any of the Teters’ three urology experts and his June 2008 motion excluded “*plaintiffs’ urology expert*,” from its scope. CP 875, 885 (emphasis added). Tellingly, Dr. Deck did not make this untenable prejudice argument to Judge Washington. CP 356-68.

Dr. Deck alternatively claims prejudice resulting from the Teters’ inadequate disclosure of Dr. Fairchild’s opinions. Ans. at 11-12. Judge Washington rightly rejected that claim, *see* CP 351-54; which was based solely on speculation that “Dr. Fairchild *might* still develop new and undisclosed opinions” somehow different than Dr. Duncan’s, CP 360 (emphasis added). When the Teters named Dr. Fairchild as their second replacement expert, trial was a month away, discovery and depositions were ongoing, and Dr. Deck believed a three hour deposition would suffice. CP 329-30, 334-36. Such circumstances cannot support a finding of substantial prejudice. *See Magana*, 167 Wn.2d at 587-90.

Dr. Deck lastly claims prejudice because the Teters did not give him “a reasonable opportunity to depose Dr. Fairchild.” Ans. at 12. The Teters proposed at least five deposition dates, all of which Dr. Deck rejected or refused to even acknowledge. CP 329, 332, 334-35, 345. Dr. Fairchild was not deposed because Dr. Deck decided to seek exclusion,

not because he did not have a reasonable opportunity. CP 735-36.

Nothing in *Burnet* or its progeny permit a reviewing court to use prior court orders on different issues to establish that the trial court “considered, *on the record*, a less severe sanction[.]” *Burnet*, 131 Wn.2d at 497 (emphasis added). The rule is, the “trial court must clearly indicate on the record that it has considered less harsh sanctions under CR 37. Its failure to do so constitutes an abuse of discretion.” *Rivers*, 145 Wn.2d at 696. *Blair* makes clear that failure to meet this requirement is rarely excused, and certainly not when, as here, a trial court never made the requisite findings or considered lesser sanctions on the record, and its prior orders never referenced (and in most cases had absolutely nothing to do with) the excluded witness or his predecessors. *Blair* at 9-10.

Witness exclusion is a severe sanction. To the Teters’ knowledge, no Washington court has blessed excluding a replacement expert retained for wholly non-tactical reasons, particularly in circumstances like those at issue here. *See In re Estate of Fahnlander*, 81 Wn. App. 206, 209-11, 913 P.2d 426, *review denied*, 130 Wn.2d 1002 (1996). Judge Gonzalez properly found Judge Washington had abused his discretion and entered a legally insufficient exclusion order. Under *Burnet*, *Magana*, *Mayer*, *Rivers*, and now *Blair*, the Court of Appeals erred in reversing that ruling.

B. The Court of Appeals Erred By Rejecting Judge Gonzalez’s Prejudice Findings and Imposing New Preservation of Error Requirements

Under CR 59(a)(2), trial courts have discretion to grant new trials 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). Such conduct warrants a new trial if it was prejudicial in the context of the entire record, or if the trial judge cannot determine the cumulative effect of the misconduct on the jury or whether a fair trial was achieved. *Aluminum Co. of Am. (Alcoa) v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000); *Snider v. Wash. Water Power Co.*, 66 Wash. 598, 606-09, 120 P. 88 (1912).

Here, defense counsel persisted in asking objectionable questions. Judge Gonzalez found that “feigned ignorance ... 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 supports his finding. *See supra* at 7-8 & n.2. Regardless, prejudice is presumed when, as here, counsel persists in asking objectionable questions. In such cases “[p]rejudice results even though the objections are sustained; [parties] 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.” 14A WASH. PRACTICE § 30.40 at 281. In part that is because:

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.

State v. Simmons, 59 Wn.2d 381, 386, 368 P.2d 378 (1962); *see also Shaw v. Prudential Ins. Co.*, 166 Wash. 652, 657-59, 8 P.2d 431 (1932).⁸

The Court of Appeals was not present at trial and did not see defense counsel's misconduct affecting the jury and infusing unfairness. It did not see how the Teters' attorneys were affected by time wasted preparing to question witnesses Dr. Deck falsely said would testify. Yet the Court of Appeals rejected Judge Gonzalez's prejudice findings in favor of its own remote assessment. *Teter* at 11-14. That was error, as "[t]he trial court is in the best position to most effectively determine if ... misconduct prejudiced a [party's] right to a fair trial," *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991); and a strong showing of an abuse of discretion is required to set aside a new trial order, *Alcoa*, 140 Wn.2d at 539; *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). Those standards were not met here.

Further, as explained in the Teters' Petition, the Court of Appeals erred by requiring that to preserve cumulative misconduct error a party must object and repeatedly seek curative instructions⁹ and move for a

⁸ Federal law is in accord. *Ballarini v. Clark Equip. Co.*, 841 F. Supp. 662, 666-67 (E.D. Pa. 1993) (cumulative impact of counsel's premeditated improper commentary, questions, and objections warranted new trial because of its potential effect on the jury), *aff'd*, 96 F.3d 1431 (3d Cir. 1996); *Lucent Techs. v. Extreme Networks, Inc.*, 229 F.R.D. 459, 461-63 (D. Del. 2005) (counsel's repeated violations of court's evidentiary rulings and admonishment unfairly influenced and prejudiced the jury).

⁹ The Teters twice asked for curative instructions. Their requests were denied. CP 420-24; 1/29 RP 2135.

mistrial; and the new trial order must include findings on every incident of misconduct. *Teter* at 11-14. No case – including the case the Court of Appeals cited, *Nelson v. Martinson*, 52 Wn.2d 684, 328 P.2d 703 (1958) – supports imposing these requirements in any misconduct case, let alone one involving cumulative prejudice arising from multiple near-daily incidents. Instead, *Alcoa* makes clear that a proper objection will suffice. 140 Wn.2d at 539.

Nor would the Court of Appeals' new preservation of error standards be helpful to courts or parties. To comply with those standards in a cumulative misconduct case would exacerbate prejudice, as:

The pain resulting from an evidential harpoon frequently is exacerbated by extraction, and the prejudice may be compounded by an instruction to disregard.

Story v. Story, 21 Wn. App. 370, 375, 585 P.2d 183 (1978). And to require specific findings for multiple daily acts of misconduct would contravene rules limiting findings of fact to ultimate facts on material issues. *E.g.*, *Eickerman v. Eickerman*, 42 Wn.2d 165, 169, 253 P.2d 962 (1953) (also stating that findings should not include evidentiary facts); *Delegan v. White*, 59 Wn.2d 510, 513, 368 P.2d 682 (1962) (same).

The Court of Appeals further erred by holding the Teters had gambled on a favorable verdict and thereby waived the right to a new trial, simply because they did not comply with its newly created preservation of error requirements.¹⁰ *Teter* at 12-14. Not only is it inappropriate to

¹⁰ Some requirements – such as requesting a curative instruction for conduct occurring outside the jury's presence – are inexplicable. *Teter* at 13-14; see 1/28 RP 1638-43, 1902-08, 1/29 RP 1913. That the Court of Appeals relied

retroactively apply new preservation standards, Judge Gonzalez rejected Dr. Deck's gambling on the verdict argument. CP 774-75, 847-48. Judge Gonzalez was far better positioned than was the Court of Appeals to assess the motives of the parties and attorneys before him, and how defense counsel's misconduct affected the jury and the Teters.

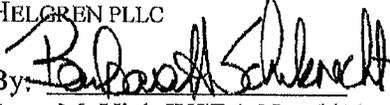
In short, Judge Gonzalez had ample reason to find that the cumulative effect of defense counsel's persistent misconduct prejudiced the Teters and denied them a fair trial. The Teters properly preserved misconduct-related error. Ordering a new trial was well within Judge Gonzalez's discretion and the Court of Appeals erred in reversing him.

V. CONCLUSION

For all of the reasons stated herein, the Teters respectfully ask the Court to reverse the Court of Appeals, reinstate Judge Gonzalez's new trial order, and remand this matter for a new trial before Judge Gonzalez.

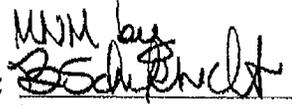
DATED this 2nd day of May 2011.

MCNAUL EBEL NAWROT &
HELGREN PLLC

By: 

Peter M. Vial, WSBA No. 6408
Barbara H. Schuknecht, WSBA 14106
Avi J. Lipman, WSBA No. 37661
600 University Street, Suite 2700
Seattle, Washington 98101
Telephone (206) 467-1816

MENZER LAW FIRM, PLLC

By: 

Matthew N. Menzer, WSBA 21665
705 Second Ave., Suite 800
Seattle, Washington 98104
Telephone (206) 903-1818

upon them in ordering reversal indicates, however, the extent to which it misapprehended the record.

