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STATE OF WASHINGTON
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NO. 85342-8

SUPREME COURT OF THE STATE OF WASHINGTON

RONALD and DEBORAH TETER, husband and wife,

Petitioners,

v.

ANDREW DECK, M.D.,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT ANDREW DECK, M.D.

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ORIGINAL

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I. INTRODUCTION

On April 21, 2011, this Court issued its opinion in *Blair v. TA-Seattle East No. 176*, ___ Wn.2d ___, ___ P.3d ___, 2011 Wash. LEXIS 318 (April 21, 2011) (No. 83715-5), holding that the trial court abused its discretion in imposing a witness exclusion sanction without, on the record, setting forth the reason for its sanction and making clear its findings of prejudice and willfulness and consideration of lesser sanctions pursuant to *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), and its progeny. This Court vacated the sanction orders, and reversed the summary judgment for the defendant that was based on plaintiffs' inability to prove causation and damages without the excluded witnesses.

This supplemental brief distinguishes *Blair* from this case, and explains why Judge Washington's order excluding Dr. Fairchild was proper and should not have formed a basis for Judge Gonzalez's grant of a new trial, and why, even if there is a defect in the record on the exclusion order, this Court should, consistent with *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002), remand for a new determination whether Dr. Fairchild should have been excluded as a sanction for the Teters' repeated violations of discovery orders.

II. STATEMENT OF FACTS RELEVANT TO THE PROPRIETY OF THE ORDER EXCLUDING DR. FAIRCHILD

The Teters filed this lawsuit on April 21, 1006, CP 1-7, and trial

was originally set for October 8, 2007, CP 863. Effective January 8, 2007, the case was assigned to Judge Chris Washington. CP 868. In May 2007, trial was continued to March 17, 2008, CP 869-70, and in February 2008, it was again continued to September 22, 2008, CP 871-72.

After the Teters failed to make their experts available for deposition, Dr. Deck, on June 2, 2008, moved to compel the Teters to provide their primary witnesses for depositions or to exclude the witnesses from testifying at trial. *See* CP 873-924. Judge Washington did not exclude the witnesses, but instead entered an order directing the Teters to provide names and available times and dates for the depositions of plaintiffs' primary witnesses by June 20, 2008, and stating that, if the depositions were not completed reasonably before trial, "the court will consider a continuance of the trial date or other remedies." CP 969-71.

Without any explanation whatsoever, the Teters failed to comply with that order. Instead, on July 11, 2008, three weeks after they should have complied with the order, they moved to continue the trial date again. CP 972-1011. Dr. Deck opposed the motion, CP 1012-1104, and requested sanctions for the Teters' violation of the June 12th discovery order, CP 1021. Judge Washington denied the motion to continue the trial date, and, rather than grant Dr. Deck's request for sanctions, extended the discovery cutoff to August 28, 2008. CP 1192-93.

By August 21, the Teters still had not identified all of their expert witnesses or provided descriptions of the experts' anticipated testimony. Dr. Deck moved for a pre-trial conference, citing the Teters' continuing violation of the June 12th order. CP 1172-78. On September 2, 2008, after the extended discovery cutoff passed, the Teters served a trial witness list, CP 1270-74, listing for their urology expert, "Replacement urologist/William Y. Duncan, III, M.D.," CP 1271. Dr. Duncan, the urology expert the Teters had originally named back in October 2007, CP 1335, had become ill during his deposition on January 11, 2008, CP 718, and the Teters' counsel, back on January 22, 2008, had advised defense counsel that they were looking for a replacement. CP 1407.

On September 17, 2008, Judge Washington held the pre-trial conference. He again declined to impose sanctions on the Teters for violating his prior order and instead continued the trial date to January 12, 2009, and ordered the Teters to identify their experts and provide "a concise summary of the opinions expected to be offered regarding the standard of care, causation, and damages" by October 1, 2008. CP 1379-81. The Teters again, without explanation, failed to comply with that order. Instead, in their October 1, 2008 witness disclosure, they continued to list their urology expert as "Replacement urologist/William Y. Duncan, III, M.D." and conceded that they could not "say with certainty at this time

what a replacement would specifically testify to” CP 1414.

On October 22, 2008, at another pre-trial conference, Judge Washington still declined to sanction the Teters for their continuing violations of his orders, instead again extending their disclosure deadline and ordering that they disclose their urology expert and a summary of his/her opinions by October 29, 2008. CP 719. Without explanation, the Teters again failed to comply.¹ CP 1417. On November 12, 2008, at another pre-trial conference, Judge Washington ordered that, unless the Teters identified their urologist expert and disclosed his/her opinions *that day*, they would not be allowed to call a urologist expert at trial. CP 719-20; *see* CP 1417, 1419. Later that day, the Teters identified Dr. Robert Golden as their urologist expert. CP 1419-20. In their disclosure, they stated that Dr. Golden would testify about standard of care, causation, and damages, but did not identify any of his specific opinions.² *Id.* Less than

¹ Despite telling Dr. Deck back in January 2008, that they would be looking for a replacement for Dr. Duncan, CP 1407, the Teters claimed that, once the trial was continued to September 2008, Dr. Duncan’s health was no longer a concern. CP 276, ¶ 4. Yet they never advised Dr. Deck of that or that Dr. Duncan was back on as their urology expert; nor did they offer Dr. Deck the opportunity to complete the deposition of Dr. Duncan that had ended early because of his health problems. And, although the Teters claimed that it was not until August 11, 2008, that they became aware that Dr. Duncan had additional health problems that prevented him from testifying at trial, CP 276, ¶ 4, they never explained what efforts they made to replace him between August 11, 2008 and November 10, 2008, when they finally identified Dr. Golden (without providing any specificity as to the opinions he would express). Indeed, as of August 2008, the Teters represented that they were prepared to try the case without Dr. Duncan, if only the court would limit or exclude some defense experts, CP 1577, which Judge Gonzalez ultimately did, limiting Dr. Deck to two standard of care and two causation experts, 1/12 RP 16, 20.

² It was apparent that the Teters had not even Dr. Golden all he needed to formulate his

two weeks later, on November 24, 2008, the date the court had set as the discovery cutoff, the Teters struck Dr. Golden due to a personal conflict, CP 1434, 1436, and stated that “we will determine shortly if there will be a replacement” CP 1436.

On December 10, 2008, the Teters advised defense counsel that they intended to replace Dr. Golden with Dr. Fairchild, CP 1442, and two days later, just one month before trial, provided a witness disclosure for him, which, like the disclosure for Dr. Golden, failed to provide a concise summary of his opinions, indicated only that he would testify about standard of care, causation and damages, and stated that he had reviewed a limited number of documents and would be given an opportunity to review more. CP 1448-49. The Teters then suggested that defense counsel take Dr. Fairchild’s deposition on short notice, at highly irregular and virtually impossible times. CP 1387-88 (¶¶ 4-5); *see also* CP 1395-96.

Dr. Deck moved to exclude Dr. Fairchild as a trial witness, documenting the prejudice to his trial preparation from the Teters’ multiple violations of the court’s discovery orders requiring identification of experts and disclosure of summaries of expert opinions, and the prior court orders granting extensions and continuances in lieu of excluding

opinions, as they stated that he had reviewed “a limited number of documents,” CP 1419, and would “be given an opportunity to review additional documents, CP 1420.

witnesses. CP 1384-1471. In opposing the motion, the Teters did not offer any reasonable explanations for their multiple failures to comply with the court's disclosure orders, but claimed there was no prejudice to Dr. Deck because Dr. Fairchild could be made available for deposition before or during the trial. CP 1472-1564. In their opposition, they expressly asked the court to consider a lesser sanction. CP 1563. In reply, Dr. Deck asserted that a lesser sanction would be inappropriate, but nevertheless discussed an alternative lesser sanction. CP 66-67.

On January 12, 2009, the scheduled trial date, Judge Washington entered his order granting the motion to exclude Dr. Fairchild. CP 1565-68. In that order, Judge Washington ruled, consistent with the sanction he had presaged in the November 12, 2008 order with which the Teters failed to comply, that the Teters were prohibited from calling Dr. Fairchild or any other "replacement urologist" at trial, expressly stating that he had considered all of the pleadings filed by the parties in connection with the motion to exclude Dr. Deck, and expressly finding that the Teters had failed to comply with the Case Schedule Order, any of three (October 1, October 29, or November 12) court-ordered deadlines with respect to the disclosure of Dr. Fairchild, and the September 17th order requiring a concise summary of the experts' expected testimony on standard of care, causation, and damages, and that Dr. Deck had been prejudiced by the

Teters' failure to properly disclose Dr. Fairchild. CP 1565-68.

On January 12, the same day that Judge Fairchild entered the order excluding Dr. Fairchild, the case was brokered to Judge Steven Gonzalez for trial. 1/12 RP 9. On January 13, 2009, the Teters' counsel advised Judge Gonzalez that they would "be filing a motion to reconsider" the order excluding Dr. Fairchild,³ 1/13 RP 85-86, but they never did. Nor did they ever ask Judge Gonzalez to allow them to call Dr. Fairchild as a witness notwithstanding Judge Washington's exclusion order. Although they did make an offer of proof on January 27, 2009, at the close of their case, as to what Dr. Fairchild's testimony would have been, 1/27 RP 1626-28,⁴ they still did not ask Judge Gonzalez to revisit Judge Washington's ruling and allow them to call Dr. Fairchild.

The Teters' untimely pretrial disclosure of Dr. Fairchild, devoid of any specificity as to his opinions, contained none of the more detailed

³ Judge Gonzalez asked if they would be asking Judge Washington to reconsider his ruling, and the Teters' counsel indicated that they would file their motion and defer to Judge Gonzalez on how to proceed from there. 1/13 RP 86.

⁴ In that offer of proof, the Teters claimed that, had Dr. Fairchild been called to testify, he would have testified (1) that it was violation of the standard of care for Dr. Deck to fail to convert from a laparoscopic to an open procedure at the beginning of the case given the elevated heart rate (tachycardia), the lowered blood pressure (hypotension), and the flash of blood that occurred after the initial trocar insertion, as well as Dr. Deck's relative inexperience, the trocar insertion technique, and the risk of vascular injury associated with laparoscopic nephrectomies under the circumstances; (2) that the hematocrit reading returned at approximately 10:40 am was an additional basis for which a reasonably prudent urologist should have converted in compliance with the standard of care; and that Dr. Deck's failure to do so comply with the standard of care proximately caused injury to Mr. Teter, including compartment syndrome, and resultant additional surgeries and range of pain and dysfunction attested to by other witnesses. 1/27 RP 1626-28.

information included in the Teters' offer of proof, *compare* CP 1448-49 with 1/27 RP 1626-28, notwithstanding the fact that Judge Washington had ordered them to provide Dr. Deck with a concise summary of the opinions expected to be offered by their experts regarding the standard of care, causation, and damages, CP 1379-81, *see* CP 719-20, 1417, 1419.

Moreover, the Teters' offer of proof was duplicative of the testimony already given at trial by another of the Teters' experts, Dr. John Powelson.. Specifically, Dr. Powelson, , a general surgeon experienced in performing laparoscopic nephrectomies, *see* 1/21 RP 808-09, 820-23, testified to his expert opinions that Dr. Deck breached the standard of care when he failed to convert from a laparoscopic to an open procedure at the beginning of the case based on a number of signs indicative of an injury to the aorta, and that such breach of the standard of care proximately caused an interruption in the blood supply to the lower extremities and resultant compartment syndrome. 1/21 RP 808, 826-28, 857-65, 868, 877-82, 887-89, 913-14, 1018-20. He testified that Mr. Teter's aorta was lacerated early in the surgery after the initial trocar placement, with a number of worrisome signs of bleeding, such as the drop in blood pressure (hypotension), the increase in heart rate (tachycardia), the flash of blood on the monitor that was mentioned in the operative report, and the blood found inside the cannula when the trocar was removed. 1/21 RP 830-31,

859-68. He testified that, with those four signs occurring early in the case, the standard of care dictated conversion to an open procedure. 1/21 RP 868. He further testified that the low blood count (hematocrit) that was returned about an hour and a half into the case was another basis upon which a reasonably prudent physician performing a laparoscopic nephrectomy should have converted to an open procedure. 1/21 RP 868-72. He testified that the gasless/blind trocar insertion technique Dr. Deck used was the most dangerous portion of a laparoscopic procedure and carries the risk of major vascular injury, 1/21 RP 873, 878-80, and that the blind trocar insertion and Dr. Deck's relative inexperience heightened the need for him to convert to an open procedure. 1/21 RP 879-82.

Dr. Powelson's testimony, though much more detailed, was virtually identical to what the Teters claimed in their offer of proof Dr. Fairchild's testimony would have been. 1/27 RP 1626-28.⁵ The only difference would have been that Dr. Fairchild would have been testifying as a urologist, while Dr. Powelson testified as a general surgeon,

⁵ The only difference is that Dr. Fairchild would have been testifying as a urologist and Dr. Powelson as a general surgeon. Any argument now that this was a significant difference would be inconsistent with the Teters' pre-trial equivocation as to whether they would even call a urologist expert. *See, e.g.*, January 22, 2008 letter from the Teters' counsel ("due to Dr. Duncan's various health issues we *may* be substituting another urologist for him," CP 1407, emphasis supplied); August 2008 representation that they were prepared to try the case without Dr. Duncan, if only the court would limit or exclude some defense experts, CP 1577, which Judge Gonzalez ultimately did, 1/12 RP 16, 20; November 24, 2008 letter from the Teters' counsel ("we will determine shortly *if* there will be a replacement for Dr. Golden," CP 1436, emphasis supplied).

experienced in laparoscopic nephrectomies.⁶ Yet, neither the offer of proof nor any trial testimony reflected a difference in the standard of care for general surgeons as opposed to urologists performing laparoscopic nephrectomies. *See* 1/21 RP 821-24.

It was only after the jury returned its verdict in favor of Dr. Deck, when the Teters moved for a new trial, that the Teters requested any relief from Judge Washington's order excluding Dr. Fairchild from Judge Gonzalez. Judge Gonzalez granted the Teters motion for new trial in part based upon his conclusion Judge Washington abused his discretion and erred as a matter of law in excluding Dr. Fairchild. *See* CP 710, ¶ 3.

III. ARGUMENT

A. This Case is Distinguishable from *Blair*.

Blair is distinguishable from this case in a number of ways. First, Judge Washington entered his order excluding Dr. Fairchild only after the Teters, despite being shown extraordinary leniency (including trial continuances, discovery deadline extensions, and post-deadline disclosure extensions), violated without reasonable excuse a series of discovery orders requiring disclosure of their experts and their anticipated opinions,

⁶ Any argument now that this was a significant difference would be inconsistent with the Teters' pre-trial equivocation as to whether they would even call a urology expert. *See n.5, supra*. Moreover, neither the offer of proof nor any trial testimony reflected a difference in the standard of care for general surgeons and urologists performing a laparoscopic nephrectomy.

including the November 12, 2008 order, *see* CP 719-20, 1417, 1419, which explicitly told them that, unless they disclosed their urology expert and his opinions that day, they would not be allowed to call a urology expert at trial. In *Blair*, the record did not reflect either a series of unexplained violations of multiple court orders, or multiple attempts by the trial court to get plaintiffs to comply with its witness disclosure orders through means less severe than witness exclusion.

Second, unlike the record in *Blair*, the record in this case, shows that Judge Washington entered findings supporting his order excluding Dr. Fairchild and considered the *Burnet* factors. His order details not only the Teters' violations of multiple discovery orders (violations for which the record reveals no reasonable excuse),⁷ but also his finding that Dr. Deck had been prejudiced by the Teters' failure to properly disclose Dr. Fairchild. CP 1565-68. Moreover, his order expressly recites that he considered the Teters' opposition to the motion to exclude (in which the Teters discussed the alternative of a lesser sanction), as well as Dr. Deck's reply (in which Dr. Deck discussed why a lesser sanction would be inappropriate). And, his multiple prior orders on Dr. Deck's motions for sanctions reflect his consideration, and his imposition, of lesser sanctions

⁷ A party's disregard of a court order without reasonable excuse or justification is deemed willful. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 584, 220 P.3d 191 (2009); *Lampard v. Roth*, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984); *Rivers*, 145 Wn. 2d at 686-87.

(including continuances, extensions of discovery deadlines, and post-deadline disclosure extensions), albeit to no avail in securing the Teters' compliance. Thus, unlike *Blair*, the record reflects that the trial court considered, imposed to no avail, and ultimately rejected lesser sanctions, even if the exclusionary order did not expressly so state.

Third, the record in this case shows that the Teters, while stating that they would be moving for reconsideration of Judge Washington's order, never did. They intentionally chose not to seek timely affirmative relief from the order either from Judge Washington or from Judge Gonzalez, electing to gamble on a verdict, and, having lost that gamble, to seek post-trial relief.

And, finally, unlike the orders excluding witnesses in *Blair* which resulted in a summary judgment dismissal of their claims, the order excluding Dr. Fairchild did not deprive the Teters of the ability to present their case to the jury. Indeed, even the Teters belated offer of proof at the close of their case-in-chief, which was the first disclosure they made concerning the substance of Dr. Fairchild's opinions, established that his testimony would have been duplicative of that already given by Dr. Powelson. Thus, unlike what happened in *Blair*, the exclusion of Dr. Fairchild did not deprive the Teters of their day in court.

For the reasons set forth below, these are not distinctions without a

difference.

- B. Where the Offending Party Failed to Offer a Reasonable Excuse for its Multiple Violations of Discovery Orders, and the Record Reflects that the Trial Court Considered Lesser Sanctions, the Failure to Recite Such Facts in the Order Should Not Invalidate an Order Excluding a Witness.

As this Court stated in *Blair*, “[a]lthough a trial court generally has broad discretion to fashion remedies for discovery violations, when imposing a severe sanction such as witness exclusion, *‘the record must show three things – the trial court’s consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it.’*” *Blair*, 2011 Wash. LEXIS 318 at *8 (quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006), which cited *Burnet*, 131 Wn.2d at 494) (emphasis added).

The order excluding Dr. Fairchild expressly found that the Teters’ repeated discovery violations had prejudiced Dr. Deck.

Although the order included no express finding of willfulness, the Teters’ failure to provide a reasonable or legitimate explanation for their multiple violations of the trial court’s discovery orders established the willfulness factor required by *Burnet*. A party’s disregard of a court order without reasonable excuse or justification is deemed willful. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 584, 220 P.3d 191 (2009); *Lampard v. Roth*, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984); *Rivers*,

145 Wn. 2d at 686-87.⁸ A finding of willfulness would have been merely a statement of the obvious, especially given the Teters' repeated violations of multiple court orders that gave the Teters more and more time to comply, albeit to no avail in securing their compliance.

As for the trial court's consideration of lesser sanctions, the record reflects that Judge Washington not only considered, but also imposed, lesser sanctions before resorting to exclusion of Dr. Fairchild. On multiple occasions, rather than resort to exclusion of witnesses, Judge Washington gave continuances, extensions of discovery deadlines, and even post-deadline disclosure extensions. It was only after the Teters failed to comply with his November 12, 2008 order that told them that the failure to disclose their urology expert and his opinions that day would result in their not being allowed to call a urology expert at trial, that Judge Washington let the hammer fall and excluded Dr. Fairchild. Moreover, the trial court's order excluding Dr. Fairchild states that he considered the briefing filed by the Teters and Dr. Deck, briefing that discussed the alternative of lesser sanctions. Thus, the record reflects that Judge

⁸ A footnote in *Blair* states that "if willfulness follows necessarily from the violation of a discovery order, then the on-the-record finding of willfulness that *Burnet* requires is meaningless." 2011 Wash. LEXIS 318 at *11-12 n. 3. However, it is the offending party's failure to offer any reasonable excuse for the violation from which willfulness necessarily follows, not the mere violation itself.

Washington did consider lesser sanctions before entering the order excluding Dr. Fairchild.

C. Blair Did Not Overrule *Scott v. Grader*, Which Holds that a Trial Court Need Not Engage in a *Burnet* Analysis When a Harsh Sanction Is Imposed as Punishment for Violating an Earlier Discovery Order.

The motion to exclude Dr. Fairchild was Dr. Deck's sixth request for sanctions for the Teters' violations of discovery orders. Before Dr. Deck filed that motion, the trial court had shown extraordinary leniency to the Teters while attempting to cure the prejudice to Dr. Deck from their repeated failures to comply with discovery orders by extending discovery deadlines and continuing the trial date on multiple occasions. Finally, in the face of the Teters' continued failure to identify their urology expert and to disclose his or her opinions, Judge Washington, on November 12, 2008, Judge Washington stated that, unless the expert was identified and his or her opinions were disclosed *that day*, the Teters would not be allowed to call a urologist expert at trial. *See* CP 719-20, 1417, 1419. While Dr. Golden was disclosed on November 12, 2008, his opinions were not. And, after they withdrew Dr. Golden 12 days later, they did not disclose Dr. Fairchild until December 10, 2008, and even then did not disclose his opinions. Indeed, his opinions were never disclosed until the Teters' offer of proof on the day they rested their case.

The order excluding Dr. Fairchild, like the order excluding the defendant's expert in *Scott v. Grader*, 105 Wn. App. 136, 18 P.3d 1150 (2001), was entered on a subsequent motion to exclude, after the Teters were given multiple opportunities to comply with Judge Washington's discovery orders and, after they were put on notice that their continued failure to disclose their urology expert and his opinions would result in exclusion. Just as the *Scott* court held that, under such circumstances, the trial court was not required to engage in a *Burnet* analysis before entering the final exclusion order, so this Court should hold here. The *Blair* court did not overrule *Scott*, nor should it here. Where the trial court has entered multiple orders on motions for sanctions, the record of the prior motions and orders establishes willfulness, prejudice and consideration of lesser sanctions, thus eliminating the need for findings as to those *Burnet* factors.

D. Neither the Teters' Multiple Violations of Discovery Orders Nor Their Failure to Seek Relief from Judge Washington's Order Excluding Dr. Fairchild Until After the Adverse Jury Verdict Should be Rewarded by Giving Them a New Trial.

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

permits a litigant to gamble on a favorable jury verdict, and when it is adverse, raise issues of inadequacy of the pleadings, improper process, or surprise.” *Holmes v. Toothaker*, 52 Wn.2d 574, 580, 328 P.2d 146 (1958) (citing *Davenport v. Taylor*, 50 Wn.2d 370, 311 P.2d 990 (1957)). Yet, in the context of seeking relief from Judge Washington’s order, that is exactly what the Teters chose to do here.

After initially announcing their intent to move for reconsideration of the order excluding Dr. Fairchild, 1/13 RP 85-86, the Teters failed to do so. They did not ask either Judge Washington or Judge Gonzalez to reconsider the order because of its lack findings as to willfulness or lesser sanctions. Presumably, they elected not to move for reconsideration because they knew that doing so would have allowed the trial court to cure any deficiency in the order.

Nor did the Teters ask Judge Gonzalez during trial to allow them to call Dr. Fairchild notwithstanding Judge Washington’s order because his testimony was somehow essential to their case. Instead they merely made an offer of proof as to what his testimony would have been had he testified. 1/27 RP 1626-28. Presumably, the Teters felt that calling Dr. Fairchild would not have changed the outcome of the trial,⁹ and they

⁹ Because the offer of proof reflects that Dr. Fairchild’s testimony would have been duplicative of the testimony of Dr. Powelson, the Teters suffered no harm from the exclusionary order, even if it was deficient as to form. *Compare* CP 1448-49 *with* 1/27

intended to use Judge Washington's order as a potential life preserver in the event of an adverse verdict.

The Teters' failure to seek timely relief from Judge Washington's order should have precluded them from seeking post-judgment relief on that basis. *See e.g., State v. Swan*, 114 Wn.2d at 661; *Holmes* 52 Wn.2d at 580; *DeHaven v. Gant*, 42 Wn. App. 666, 669, 713 P.2d 149 (1986) ("Failure to raise an objection at the trial court precludes a party from raising it on appeal"). The Teters were well aware that they could challenge the order excluding Dr. Fairchild, as evidenced by their express statement before trial started of their intent to move for reconsideration. By electing to forego a request for timely relief and proceed to trial without the testimony of Dr. Fairchild, they waived their right to complain later that they should receive a new trial based on the order. They could have sought affirmative relief from the order prior to the verdict, but chose not to ask Judge Gonzalez to be allowed to call Dr. Fairchild. Presumably, Judge Gonzalez, who, in his order granting new trial, found that Judge Washington's order erroneous, would have allowed Dr. Fairchild to testify. The Teters' choice to gamble on the verdict should not be rewarded with a new trial.

RP 1626-28, Ironically, the offer of proof was the first disclosure to Dr. Deck of Dr. Fairchild's opinions, since the Teters had never complied with the trial court's multiple discovery orders directing them to disclose the opinions of their expert urologist. *See CP* 969-71; 1021; 1172-78; 1379-81; 1414; 719-20; 1417.

- E. Even If the Order Excluding Dr. Fairchild is Somehow Deficient, As in *Rivers*, the Proper Remedy is to Remand to the Trial Court that Entered the Order to Determine Whether Exclusion Was A Proper Sanction, and, If So, for Entry of the Requisite Findings.

After finding the trial court's sanctions order dismissing the plaintiff's complaint deficient for lack of consideration of two of the *Burnet* factors, this Court, in *Rivers*, 145 Wn.2d at 700, remanded the case to the trial court for a new determination of whether the complaint should be dismissed and for entry of specific findings on the record as to the *Burnet* factors. Should this Court conclude that Judge Washington's order was deficient, and that the Teters did not waive their right to challenge the order by lying in the weeds until after the jury's verdict, then the proper remedy should be a remand to Judge Washington for a *new* determination of whether Dr. Fairchild should have been excluded because of the Teters' willful violations of discovery orders prejudicial to Dr. Deck and for entry of specific findings in support of that determination.

Although this Court, in a footnote in *Blair*, 2011 Wash LEXIS 318 at *15-16 n. 6, that its reversal of the summary judgment dismissal order that resulted from the orders excluding witnesses "did not allow the trial court to make after-the-fact findings" supporting its earlier witness exclusion orders, as "[t]he reversal of summary judgment means the case will proceed toward trial with the opportunity for appropriate pretrial

motions or discovery.” In that footnote the *Blair* court did not cite to *Rivers* or explain why a remand for new findings was appropriate in *Rivers*, but not in *Blair*.

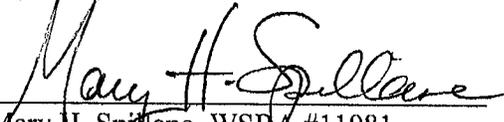
Unlike *Blair*, neither *Rivers* nor this case involved reversal of a summary judgment that was premised on the exclusion of witnesses necessary to prove the plaintiffs’ case. Remand here would be reasonable and appropriate here, since the expense and burden of a new trial will be avoided if Judge Washington makes a new determination, supported by on-the-record *Burnet* findings, that exclusion of Dr. Fairchild was the proper sanction. If he were to so conclude, the Teters’ multiple and discovery order violations should not be rewarded with a new trial.

IV. CONCLUSION

Blair does not require reversal of the Court of Appeals decision reinstating the judgment on the jury’s verdict. That decision should be affirmed or the case remanded for a new determination whether Dr. Fairchild’s exclusion was the proper sanction.

RESPECTFULLY SUBMITTED this 2nd day of May, 2011.

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By 

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 2nd day of May, 2011, I caused a true and correct copy of the foregoing document, "Supplemental Brief of Respondent Andrew Deck, M.D.," to be delivered by U.S. Mail, postage prepaid and electronic mail, to the following counsel of record:

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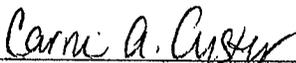
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Attached for filing in .pdf format is the Supplemental Brief of Respondent Dr. Andrew Deck in *Teter v. Deck*, Supreme Court Cause No. 85342-8. The attorney filing this brief is Mary H. Spillane, WSBA #11981, phone: (206) 628-6656, e-mail address: mspillane@williamskastner.com.

Respectfully submitted,

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