

No. 71616-6

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

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RAUL SWAIN and KATHLEEN SCHONS, individually and as guardians  
of minor child JAXOM SWAIN-SCHONS,

Plaintiffs-Respondents,

v.

SWEDISH HEALTH SERVICES d/b/a SWEDISH MEDICAL CENTER  
and MICHAEL C. SHANNON, M.D.,

Defendants-Appellants.

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**BRIEF OF RESPONDENTS**

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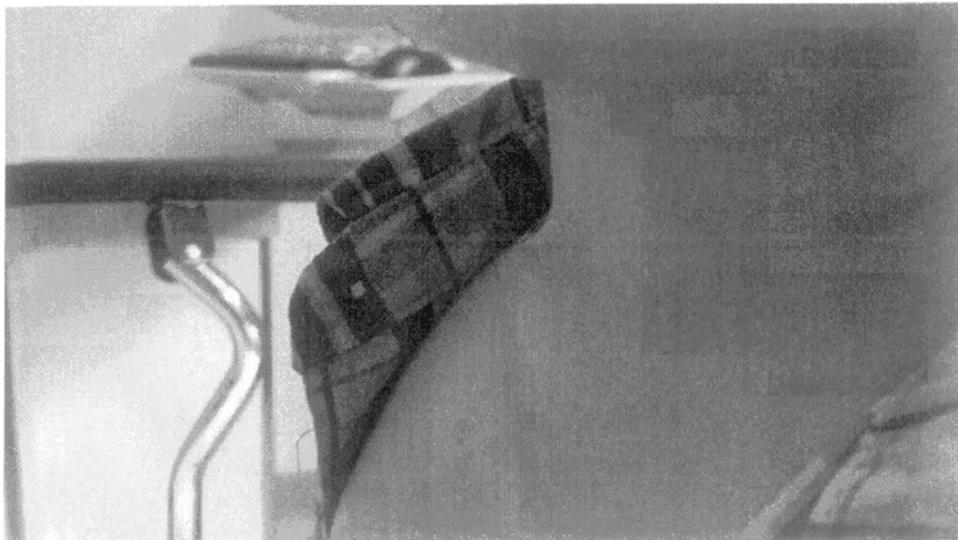
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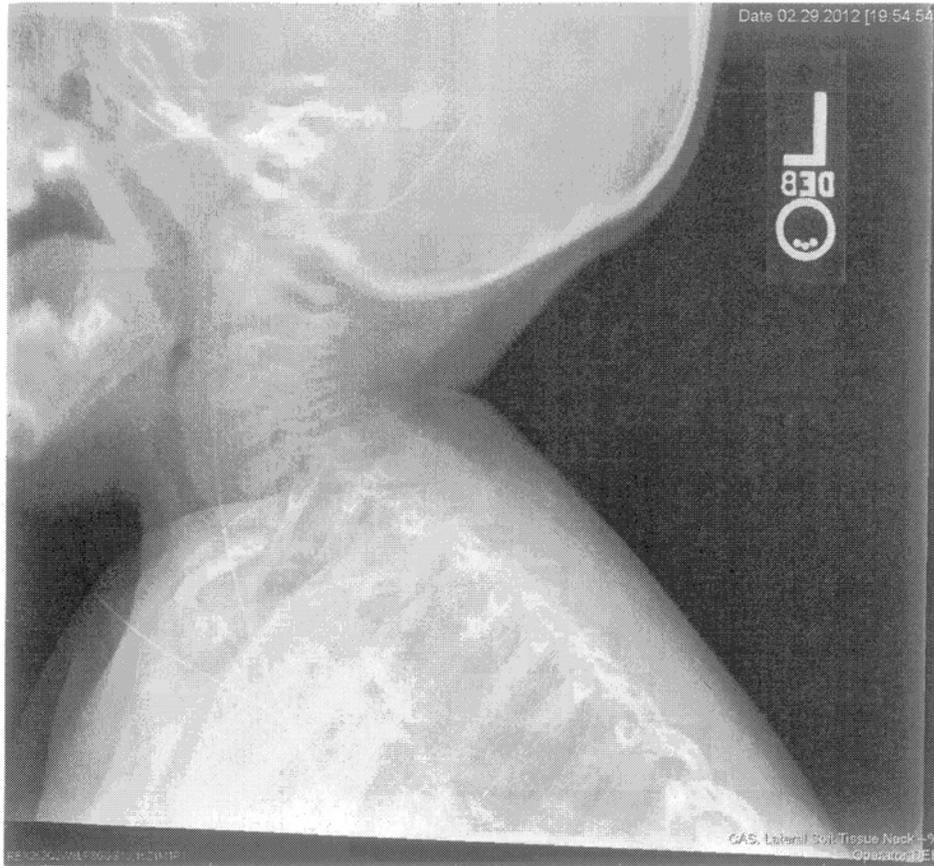
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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is an appeal in a medical malpractice case against Dr. Michael Shannon, a pediatric intensivist who left a 50 cm guidewire inside of two-year-old Jaxom Swain-Schons' body following a femoral IV procedure at Swedish Medical Center (also a Defendant). After Dr. Shannon inserted the guidewire into Jaxom's thigh and failed to remove it, it separated into two pieces and traveled up his body (likely carried by blood flow), through his heart, to the base of his neck and brain. Six months later, when one of those pieces began to poke through the skin on Jaxom's neck, the following photo and x-ray were taken showing tenting of Jaxom's skin and the location of the two pieces of the guidewire in his body:





Ex. 5-00001; Ex. 8-00005. As will be discussed below, the guidewire caused substantial trauma and discomfort while it traveled through Jaxom's body for six months and this trauma continued even after the guidewire was removed. Recognizing that harm to Jaxom and his parents, and Dr. Shannon's clear violation of the standard of care, the jury found Dr. Shannon liable and awarded compensatory damages totaling \$500,000 to Jaxom and \$250,000 to each of his parents.

Dr. Shannon did not dispute at trial – nor does he dispute on appeal – that he failed to remove the guidewire from Jaxom after completing the femoral IV procedure. Instead, he argued at trial that the guidewire included both an inner wire and an outer “coil,” that the outer coil separated from the inner wire as a result of a “product defect,” and that only the outer coil remained in Jaxom’s body. As will be discussed below, a fatal flaw in this argument is that Dr. Shannon is liable, *as a matter of law*, because he left a foreign object inside of a patient. In addition, Defendants *never pled non-party fault* of the product manufacturer as required by CR 12(i). If the Court agrees that Dr. Shannon is liable as a matter of law, then it does not have to reach *any* of Defendants’ arguments on appeal.

But even ignoring that independent ground for affirmance, the trial court did not abuse its discretion in permitting a treating physician to testify on rebuttal regarding the reasons that she concluded – as a treating physician – that the x-rays showed pieces of a wire and not pieces of a coil in Jaxom’s body. As will be discussed below, this testimony was offered to rebut expert testimony that Defendants disclosed for the first time *after* the trial court’s deadline for disclosing expert witnesses and *after* the close

of discovery. The trial court did not err – let alone commit manifest abuse of discretion – in concluding that this was proper rebuttal testimony and that Plaintiffs had complied with all applicable disclosure requirements.

Nor did the trial court abuse its discretion in refusing to allow Defendants' expert to testify regarding product failure reports or in admitting evidence regarding Dr. Shannon's on-call shift length or his failure to use a checklist to avoid leaving a foreign object in a patient's body. The product failure reports are inadmissible under both state and federal law, and the shift-length and checklist evidence was admissible to rebut Defendants' argument that an experienced physician like Dr. Shannon would never leave a guidewire inside a patient and bolster Plaintiffs' standard-of-care argument. This Court should affirm.

## **II. ISSUES PRESENTED**

1. Whether the trial court abused its discretion in permitting a treating physician to testify on rebuttal where the witness was properly disclosed and her testimony was directly responsive to expert testimony presented by Defendants in their case-in-chief.

2. Whether the trial court abused its discretion in refusing to allow Defendants' expert to testify regarding product failure reports

because the testimony was inadmissible under ER 703 as well as under a controlling federal statute precluding any use of the reports in civil trials.

3. Whether the trial court abused its discretion in admitting evidence regarding the defendant physician's on-call shift length and his failure to use a checklist to avoid leaving a foreign object in a patient's body.

4. Whether the judgment in favor of Plaintiffs should be affirmed on the alternative ground that the defendant physician is liable, *as a matter of controlling case law*, because he left a foreign object inside of a patient.

### III. STATEMENT OF THE CASE

#### A. Factual Background.

##### 1. Dr. Shannon Left A Complete Guidewire In Jaxom's Body Following A Femoral IV Procedure.

As a newborn and toddler, Jaxom was a very healthy child and was developing normally and meeting all developmental milestones on time. 12/10 RP 89. But on August 14, 2011, Jaxom's mother, Kathleen Schons, heard crying coming from Jaxom's bedroom and went in to find that Jaxom was having a febrile seizure. *Id.* at 89, 91. A febrile seizure is a convulsion in a child triggered by a fever. *Id.* at 97. Most of the time,

febrile seizures do not cause any harm and are not related to any serious long-term health problems. *Id.*

Jaxom's father, Raul Swain, called 911, but Jaxom seemed fine when the paramedics arrived. *Id.* at 90. Nevertheless, Kathleen and Raul decided to take Jaxom to the nearby Mill Creek Swedish clinic. *Id.* at 92. While they were at the urgent care clinic, Jaxom had another febrile seizure. *Id.* at 93. In response to these seizures, nurses at the clinic attempted to start an IV in Jaxom's arm to administer medication. *Id.* When they were unable to do so, they decided to transfer Jaxom to the Pediatric Intensive Care Unit at Swedish's First Hill Campus to make sure that no serious medical problem was causing the seizures. *Id.* at 94.

Swedish sent an ambulance to the urgent care clinic in Mill Creek to pick up Jaxom and take him to Swedish's First Hill Campus. *Id.* Dr. Shannon, a pediatric intensivist at Swedish, was in the ambulance along with a nurse. *Id.* When the nurse had trouble getting an IV started in Jaxom's arm, Dr. Shannon decided that Jaxom would need a "central line IV" inserted in his femoral vein, near the groin area, when he reached Swedish. *Id.* at 95.

Inserting a central line IV is not difficult. The skin is first cleaned and local anesthetic is applied. 12/11 RP 25. The femoral vein is then identified and a hollow needle is advanced into the vein. *Id.* A metal guidewire is then passed through the hollow needle and into the vein. *Id.* The needle is then removed and the central line catheter, which is a hollow plastic tube, is advanced over the guidewire and into the vein. *Id.* Finally, the guidewire is removed so that medication and fluids can be injected through the catheter. *Id.* at 20-21. Throughout this procedure, the metal guidewire should *never* leave the physician's hand. *Id.* at 25, 27, 31, 53.

Dr. Shannon performed this procedure after he and Jaxom arrived at Swedish. 12/10 RP 95. At the time that Dr. Shannon did so, he had worked 41 hours and had about 7 hours left on his 48-hour shift. 12/18 RP 27. In addition, he did not use a checklist (as other healthcare providers do) to ensure that all foreign objects have been removed from the patient and properly discarded. *Id.* at 24. Tragically, that is precisely what happened here. As numerous witnesses would later testify, Dr. Shannon left the entire guidewire inside Jaxom's body. 12/11 RP 41-42, 53; 12/11 RP 144-147; 12/18 RP 71-72, 74.

**2. Physicians At Children's Removed The Guidewire Six Months Later.**

Three days after Jaxom was discharged by Swedish, Kathleen and Raul took Jaxom back to Swedish because they noticed that he was walking funny at times and with a wide gait. 12/10 RP 98. Jaxom also complained of neck pain and a headache. *Id.* The physicians at Swedish told Jaxom's parents that these symptoms were probably due to the medications Swedish had given Jaxom and that the symptoms should go away without treatment. 12/12 RP 17; Ex. 2-00006-10.

The symptoms continued. In October 2011, Jaxom was still walking funny. 12/12 RP 19. By December 2011, Jaxom had begun behaving abnormally: his body would sometimes stiffen and he experienced severe pain episodes that caused him to cry uncontrollably. *Id.* at 18-19. Because these issues were not subsiding, Kathleen took Jaxom to see a neurologist. *Id.* at 19-20, 35. Unfortunately, the neurologist could not figure out the cause of the symptoms. *Id.* at 20.

In February 2012, about six months after Dr. Shannon had performed the femoral IV procedure at Swedish, Kathleen and Raul noticed a small bump on Jaxom's neck near his collarbone. 12/10 RP 100. They took Jaxom to see his pediatrician and explained that Jaxom had

been complaining of neck pain and that there now appeared to be a cyst on his neck. *Id.* The pediatrician prescribed antibiotic cream. *Id.*

Several days later, after they noticed that the “cyst” appeared larger and had moved, Raul and Kathy became increasingly worried and took Jaxom to the Everett Clinic. *Id.* at 101-02. The physicians there took a series of x-rays, which showed that Jaxom had two long metal wires in his body. *Id.* at 103. One of those x-rays (Ex. 5-00001) is reproduced on page 2 above and can also be found, along with several others (Ex. 5-00001-2; Ex. 8-00005 and 8-00003), in the appendix to this brief. Alarmed by these images, the clinic physicians directed that Jaxom be transferred by ambulance to Seattle Children’s Hospital. 12/10 RP 104.

On March 1, 2012, physicians at Children’s removed the guidewire from Jaxom’s body. 12/11 RP 135. The longer piece of the guidewire was removed by making an incision in Jaxom’s neck and came out without complication. *Id.* at 129. The shorter piece was removed through Jaxom’s femoral vein, and it took longer than expected to dislodge the wire from the base of Jaxom’s brain. *Id.* at 134-35. It eventually broke free and was removed as well. *Id.* at 135.

Once removed, the wires were sent to the Children's pathology lab for testing. *Id.* at 137-38; Ex. 6-00015. The wires were 16 and 33 centimeters in length, totaling approximately 50 cm. *Id.* After reviewing the x-rays and before removing the wires from Jaxom's body, the surgeon at Children's Hospital noted that they appeared to be wires left from a previous central line placement. Ex 6-00008. This, according to trial testimony, was the entire guidewire that Dr. Shannon inserted into Jaxom when he performed the femoral IV procedure six months earlier. 12/11 RP 41-42, 53; 12/11 RP 144-47; 12/18 RP 71-72, 74. The wires were then disposed of by Children's Hospital in accordance with its policies for biohazard waste. 12/16 RP 209.

**3. The Guidewire Caused Significant Harm While It Travelled Through Jaxom's Body For Six Months And Thereafter.**

Jaxom experienced significant pain and discomfort – as described above – while the guidewire travelled through his body for six months. On top of that, Kathleen and Raul saw some of Jaxom's developmental milestones regress after these events. Jaxom had been nearly potty trained when he was 20 months old, but after the surgeries he showed no interest in potty training for quite some time. 12/10 RP 114. Jaxom had given up his pacifier before these events, but went back to using it for comfort after

his surgeries. 12/12 RP 26. He was also less outgoing, very shy, and reluctant to try new things for quite some time. 12/10 RP at 113.

These events also caused significant harm to Jaxom's parents. Because the x-rays showed seemingly unexplainable metal wires in Jaxom's body, the police investigated whether Kathleen and Raul had abused their child. *Id.* at 104-05; Ex. 7. While at the clinic, before she knew what had happened to her son, Kathleen was pulled out of Jaxom's room and questioned by a police officer. *Id.* at 105. The officer informed her that because of the suspicious circumstances, the matter would be turned over to Child Protective Services ("CPS"). *Id.* at 107. CPS investigated Kathleen and Raul over the next several months. *Id.* at 117. CPS eventually closed the case after they realized that Dr. Shannon had left the guidewire in Jaxom. *Id.*; Ex. 7.

Kathleen and Raul also testified that they were extremely scared to watch their two-year-old son get wheeled in for surgery to remove the guidewire and were devastated when complications arose during the removal of the wire from Jaxom's brain. 12/10 RP 109-10; 12/12 RP 24-25. After his surgery, Jaxom was very clingy, and it was difficult for Kathleen to spend time with both of her boys when Jaxom needed so

much individualized support. 12/10 RP 145. Kathleen testified that she felt like a hovering and overly protective mother for a long time after these events and that it was stressful to experience that change in her parenting style. *Id.* Kathleen and Raul also testified that it was humiliating and stressful to be questioned by the police and CPS. *Id.* at 107, 117-18.

**B. Relevant Procedural Background.**

**1. Plaintiffs Alleged, And The Jury Found, That Dr. Shannon Violated The Standard Of Care When He Left A Complete Guidewire In Jaxom's Body Following The Femoral IV Procedure.**

Jaxom and his parents filed suit in April 2012, alleging medical negligence. CP 1-7. As trial approached, both parties disclosed their fact and expert witnesses. Regarding the applicable standard of care, Plaintiffs disclosed Dr. Kenneth Schenkman, a pediatric intensivist at Seattle Children's Hospital, who testified that the standard of care for a reasonably prudent physician requires the physician to remove the guidewire after the central line is in place and discard it in the biohazard waste bin. CP 782; 12/11 RP 30-32. Dr. Schenkman also testified that the *only* way a guidewire can be left in a patient's body is if the doctor breaches the standard of care and is negligent when performing the procedure. 12/11 RP 10; 42.

Defendants' expert largely agreed, as did the jury. Defendants' standard-of-care expert, Dr. Miles Ellenby, admitted at trial that a doctor's failure to remove a guidewire, absent any wire malfunction, is a violation of the standard of care. 12/17 RP 72. Dr. Ellenby also conceded that the standard of care requires inspecting the guidewire after removing it, something that Dr. Shannon admitted he did not do. *Id.* at 19. The jury, too, found that Dr. Shannon was negligent. CP 676.

**2. The Trial Court Permitted Defendants To Present An Undisclosed "Product Defect" Defense In Their Case-In-Chief And Likewise Permitted Plaintiffs To Call The Treating Radiologist To Respond To That Defense On Rebuttal.**

In addition to their *timely* disclosure of Dr. Ellenby's standard-of-care testimony, Defendants subsequently disclosed three witnesses who would purportedly testify that the pieces of wire in Jaxom's body were *not* wire at all but rather an outer "coil" that separated from the inner wire as a result of a "product defect." The first witness was Keith Cline, a metallurgist. CP 462. Although the case had been pending for a year and a half, the discovery cutoff had passed, and trial at that time was a month away, this was the *first time* that Defendants disclosed their intent to argue that the guidewire used in the procedure was defective. CP 385, 466, 1209-1214; 12/9 RP 20-21, 57-69. Defendants then disclosed two

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additional witnesses regarding this defense: Dr. Timothy Larson, a radiologist, and Steven Marshall, the supply chain operation manager at Swedish First Hill Campus. CP 497. These witnesses, too, were disclosed long after the discovery cutoff. CP 385, CP 1215-1216; 12/9 RP 20-21, 57-59.

Plaintiffs immediately moved in limine to preclude both the product defect defense and the related testimony. CP 382-406. As to the product defect defense, Plaintiffs emphasized that Defendants had not asserted a product defect defense and had not pled non-party fault by the guidewire manufacturer as required to assert such a defense under CR 12(i). CP 388.<sup>1</sup> As to all of this evidence, Plaintiffs emphasized that because Defendants had not timely disclosed this defense or testimony, they did not have the opportunity or the time to retain an expert witness to counter Defendants' new defense. CP 403. The trial court denied these requests. CP 621-22.

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<sup>1</sup> CR 12(i) states: "Nonparty at Fault. Whenever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. The identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded."

Because Defendants were permitted to offer this new defense in their case-in-chief, Plaintiffs chose to call Dr. Theresa Chapman, Jaxom's treating radiologist at Children's Hospital, to testify on rebuttal that the x-rays showed pieces of wire and not pieces of coil. On February 29, 2012, after she reviewed the x-rays of the pieces of the guidewire in Jaxom's body and before the wires were removed, Dr. Chapman wrote in her report: "There are 2 thin metallic densities in the chest, *consistent with wires.*" Ex. 6 at 9 (emphasis added). Given the conclusion in her report, Dr. Chapman's testimony – as a treating physician – was directly responsive to Defendants' new product defect defense. *Id.*

Although Plaintiffs had disclosed Dr. Chapman as one of their fact witnesses in April 2013, more than seven months before trial commenced (CP 1036), Plaintiffs' counsel confirmed on the second day of trial his intention to call Dr. Chapman as a rebuttal witness: "Dr. Chapman, we have just found out is available Wednesday morning. We may call her a week from today. We may call her, briefly, in rebuttal depending on how things go in the defense case." 12/11 RP 175. In response, Defendants did not argue that Dr. Chapman should not be permitted to testify; instead,

they argued only that “if they are going to call Dr. Chapman, they have got to call her ... in their case in chief.” *Id.*

The trial court agreed with Plaintiffs that Dr. Chapman could testify on rebuttal. She reasoned:

It seems, if what Dr. Chapman is going to say, is she looked at these x-rays and they were not coiled, they were straight wires, that would then rebut presumably your Dr. Larson who is going to say he looked at the fluoroscopy or the x-ray or something and saw coiled architecture....

Right now, we don't have anybody that has actually testified that anybody saw coiled architecture....

It would be rebuttal if nobody has testified yet it is coiled, right? So then she is going your witness is going to say, we looked at the x-ray, it is coiled. She is going to come in afterwards and say, no, I looked at the x-ray and it was not coiled. That is rebuttal.

*Id.* at 179-80. In other words, because the trial court had permitted Dr. Larson and others to testify during Defendants' case-in-chief that the wire in Jaxom's body showed a coil and not an intact wire, she likewise permitted Dr. Chapman to testify on rebuttal that the pieces were “not coiled.” *Id.*

Consistent with her earlier report and the trial court's reasoning, Dr. Chapman's testimony directly rebutted that of Dr. Larson. Looking at the x-rays, Dr. Chapman testified: “This is what wires look like. They are

radio dense with very smooth margins.” 12/18 RP 73. She also explained the reason why she knew it was a guidewire as opposed to an “outer coil”: she could tell from the location of the guidewire as depicted in the x-rays that it had dissected through the jugular vein and into the chest wall and “is literally lifting the skin upward. Poking out of the skin. A coil would not have the strength to do that.” *Id.* at 75-76.

After Dr. Chapman finished testifying, Defendants’ attorney reiterated his objection to the portion of Dr. Chapman’s testimony in which she testified that the wires were not coils. Counsel explained: “I had no objection to her saying wires. I didn’t object. But when it goes over into coils, that’s a new topic. It’s not in her report.” *Id.* at 82. The trial court refused to strike that testimony because it was clear from the earlier colloquy, recounted above, that Dr. Chapman would testify that she looked at the x-rays and the pieces of wire she saw were straight wires and “weren’t coils.” *Id.*

**3. The Trial Court Refused To Allow Defendants’ Expert To Testify Regarding Product Failure Reports And Admitted Evidence Regarding Dr. Shannon’s On-Call Shift Length And His Failure To Use A Checklist To Avoid Leaving A Foreign Object In A Patient’s Body.**

Two other evidentiary rulings are also relevant here. First, the trial court did not allow Mr. Cline to testify regarding Manufacturer And User

Facility Device Experience (“MAUDE”) reports, which document adverse experiences with medical devices. When asked whether he could identify any other metallurgists who rely on MAUDE reports, Mr. Cline answered “No.” 12/16 RP 60. The trial court therefore granted Plaintiffs’ motion in limine to exclude this evidence because Defendants had not established, as required by ER 703, “that other metallurgists rely on MAUDE reports.” *Id.* at 71. The court also noted: “My impression of him on the stand was he didn’t even know about a MAUDE report until he was presented it from defense counsel.” *Id.* at 70.

Second, the trial court permitted Plaintiffs to offer evidence that Dr. Shannon had worked 41 hours of a 48-hour shift when he left the guidewire in Jaxom’s body and that he did not use a checklist to ensure that all foreign objects have been removed from the patient and properly discarded. 12/9 RP 91-92. The court concluded that the shift-length evidence was relevant and not unfairly prejudicial and that Plaintiffs’ standard-of-care expert could properly refer to the checklist because it could have helped Dr. Shannon “mitigate” the potential consequences of his fatigue. *Id.* at 92.

**4. The Trial Court Denied Defendants' Motion For A New Trial And Entered Judgment On The Jury Verdict In Favor Of Plaintiffs.**

The jury found that Dr. Shannon was negligent and awarded compensatory damages totaling \$500,000 to Jaxom and \$250,000 to each of his parents. CP 676-77. Defendants thereafter filed a post-trial motion for a new trial repeating the above arguments. CP 705-36. The trial court denied the motion and entered judgment on the jury's verdict in Plaintiffs' favor. CP 1100-02, 1105-06. Defendants timely appealed. CP 1107-16.

**IV. ARGUMENT**

**A. The Trial Court Did Not Abuse Its Discretion In Permitting Dr. Chapman To Testify On Rebuttal, Excluding Expert Testimony Regarding The MAUDE Reports, Or Admitting The Shift-Length And Checklist Evidence.**

**1. The Trial Court Did Not Abuse Its Discretion In Permitting Dr. Chapman To Testify On Rebuttal Because Her Testimony Was Directly Responsive To Expert Testimony Presented By Defendants In Their Case-In-Chief And Plaintiffs Complied With All Applicable Disclosure Requirements.**

Defendants' lead argument is that the trial court erred in allowing Dr. Chapman to testify on rebuttal. Brief of Appellants at 13-19. Although Defendants repeatedly claim only that the trial court "erred," they eventually recognize, as they must, that the standard of review requires them to establish that the trial court "manifestly abused its discretion." *Id.* at 19. That is the applicable standard of review. *See State*

v. *White*, 74 Wn.2d 386, 395, 444 P.2d 661 (1968) (“question of admissibility of evidence on rebuttal rests largely on the trial court’s discretion, and error in denying or allowing it can be predicated only upon a manifest abuse of that discretion”).

The trial court did not manifestly abuse its discretion (or even err) in permitting Dr. Chapman to testify on rebuttal. Plaintiffs first disclosed Dr. Chapman as one of their fact witnesses in April 2013, more than seven months before trial commenced. CP 1036. The disclosure statement specifically indicates that Dr. Chapman was one of Jaxom’s “[h]ealth care providers from Seattle Children’s Hospital.” *Id.* In August 2013, still more than three months before trial, Plaintiffs provided to Defendants their ER 904 Notice of Intention to Offer Documents to be Deemed Authentic and Admissible. CP 1197-1200. That notice included Dr. Chapman’s report, which contains her conclusion, *as a treating physician*, that “[t]here are 2 thin metallic densities in the chest, *consistent with wires.*” Ex. 6-00009 (emphasis added); CP 1197-1200 (Item 6, medical records of Seattle Children’s Hospital). Accordingly, Defendants knew that Dr. Chapman could testify for Plaintiffs and could easily determine the scope of her testimony *months* before trial.

Similarly, when Plaintiffs first informed Defendants and the trial court that Plaintiffs would call Dr. Chapman as a rebuttal witness rather than in their case-in-chief, Plaintiffs' counsel stated:

Here, Dr. Chapman is a factual witness. She was a treater. And what she did was looked at the x-rays at Children's Hospital and she wrote clearly in her report that these were two wires.

So she wasn't part of the surgical team. She wasn't the pathologist. But based on the radiologic graphs, she saw these as two wires. She didn't see wire fragments. She didn't see coils of wires. She saw wires.

And Dr. Larson [Defendants' radiologist] is going to come in and say, no, that's not what those were. Those are coils in there. And she [Dr. Chapman] is a fact witness to respond to that.

12/11 RP 177-78. Here again, Plaintiffs provided a complete description of Dr. Chapman's testimony, including why she was a proper rebuttal witness.

The trial court agreed with the above analysis. Focusing first on Plaintiffs' ongoing case-in-chief, the trial court recognized: "Right now, we don't have anybody that has actually testified that anybody saw coiled architecture." *Id.* at 179. Instead, as the trial court also recognized, that concept would not be introduced until Dr. Larson (Defendants' radiologist) testified during Defendants' case-in-chief that "we looked at

the x-ray, it is coiled.” *Id.* at 180. Then, referring to Dr. Chapman’s anticipated testimony, the trial court logically concluded: “She is going to come in afterwards and say, no, I looked at the x-ray and it was not coiled. *That is rebuttal.*” *Id.* (emphasis added). The trial court did not err, let alone manifestly abuse its discretion, in recognizing the responsive nature of Dr. Chapman’s testimony.

On this record, Defendants’ contrary arguments are misguided at best. Defendants complain, repeatedly, that Plaintiffs did not disclose Dr. Chapman as an expert witness. Brief of Appellants at 14-15. But far from being a “willful failure to comply with the discovery rules” (Brief of Appellants at 17), Plaintiffs did not disclose Dr. Chapman as an expert witness because she was not an expert witness and was not called to testify as such. Instead, as Plaintiffs’ counsel made clear at trial, Dr. Chapman was “a factual witness. She was a treater.” 12/11 RP 177. Defendants’ reliance on disclosure obligations regarding expert witnesses (Brief of Appellants at 13-14) is therefore misplaced.

Defendants nevertheless claim that Dr. Chapman gave “expert opinions ... not included in her report.” *Id.* at 16. That is incorrect. Consistent with her report (quoted on page 15 above), Dr. Chapman

testified: “This is what wires look like. They are radio dense with very smooth margins.” 12/18 RP 73. And consistent with Plaintiffs’ description of her forthcoming testimony (quoted on page 21 above), Dr. Chapman explained the reason why she concluded that the x-rays showed a wire and not a coil: she could tell from the location of the guidewire as depicted in the x-rays that it had dissected through the vein and into the chest wall and “is literally lifting the skin upward. Poking out of the skin. A coil would not have the strength to do that.” *Id.* at 75-76. This is fact testimony, and it was properly disclosed as such.

Nor did Dr. Chapman conduct any improper “experiments,” as Defendants also claim. Brief of Appellants at 16. To the contrary, Dr. Chapman explained at trial that she merely “examined a guidewire to see the coiled portion separated from the central wire” and observed “what a coil looks like under a radiograph.” 12/18 RP 74. The sole purpose of this examination was to testify, consistent with her treating physician report, that “what we are seeing on” the x-rays “are wires” and that Defendants’ assertion that the x-rays show “the coiled portion stretched out and not guidewires” is “not possible.” *Id.* Here again, Dr. Chapman

was testifying as a *fact witness* regarding the x-rays that she reviewed and interpreted on February 2, 2012 as *Jaxom's treating physician*.

In addition to misconstruing Dr. Chapman's testimony, Defendants also misapply Washington law. In *Smith v. Orthopedics Int'l, Ltd., P.S.*, 170 Wn.2d 659, 244 P.3d 939 (2010), the court reiterated the longstanding rule that "a treating physician fact witness may testify as to both facts and medical opinions in an action for alleged medical negligence, so long as the testimony is limited to the medical judgments and opinions which were derived from the treatment." *Id.* at 673 (internal quotation marks omitted). Dr. Chapman's medical judgment and opinion, as derived from her treatment of Jaxom, was that "[t]here are 2 thin metallic densities in the chest, consistent with wires." Ex. 6-00009. Dr. Chapman's trial testimony reiterated and reinforced that original conclusion. For this reason too, Plaintiffs were not required to designate and disclose Dr. Chapman as an expert witness.<sup>2</sup>

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<sup>2</sup> Defendants recognize that treating physician fact witnesses can testify regarding "medical judgments and opinions" under *Smith* (Brief of Appellants at 15), but they fail to properly apply that rule to Dr. Chapman's testimony as is done in the text above. Defendants also cite *Johnson v. State, Dept. of Transp.*, 177 Wn. App. 684, 313 P.3d 1197 (2013), in support of their argument, but the court in that case did not address the permissible scope of a treating physician's testimony. Instead, it merely held that a prevailing plaintiff cannot recover costs associated with a treating physician's testimony  
(continued . . .)

But even if the Court were to conclude that Dr. Chapman provided snippets of undisclosed expert testimony, that does not mean that the trial court abused its discretion in permitting Dr. Chapman to testify or in denying Defendants' motion for a new trial. Under *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997), testimony may be excluded as a discovery sanction only if the trial court explicitly finds that (1) a party willfully violated the discovery rules, (2) that violation substantially prejudiced the opposing party, and (3) sanctions less than exclusion are insufficient. Defendants acknowledge this test (Brief of Appellants at 14), but they ignore the fact that they *never* asked the trial court to conduct this analysis. Therefore, any argument that the trial court erred by failing to exclude Dr. Chapman's testimony under *Burnet* is waived. See *Buecking v. Buecking*, 179 Wn. 2d 438, 454, 316 P.3d 999 (2013) ("party's failure to raise an issue at trial waives the issue on appeal") (internal quotation marks omitted).

In any event, none of the *Burnet* considerations supports exclusion of Dr. Chapman's testimony. Starting with whether Plaintiffs willfully

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( . . . continued)

under Washington's Law Against Discrimination. *Id.* at 700. No such issue is presented here.

violated the discovery rules, Plaintiffs disclosed Dr. Chapman as a treating physician fact witness and disclosed her report *months* before trial. *See* discussion on page 20 above. Plaintiffs did not disclose Dr. Chapman as an expert witness because they did not intend to call her as an expert witness and did not expect her to testify as such. And to avoid any unfair surprise, Plaintiffs' counsel announced on the second day of trial his intention to call Dr. Chapman as a rebuttal witness. *See* discussion on page 15 above. On this record, there is no basis to find a willful violation of the discovery rules.

Moreover, to the extent that Dr. Chapman provided snippets of expert testimony, it was necessitated by Defendants' failure to disclose their product defect defense or their three product defect witnesses (Mr. Cline, Dr. Larson, and Mr. Marshall) until *after* the trial court's deadline for disclosing expert witnesses and *after* the close of discovery. *See* discussion on pages 13-14 above. Having deprived Plaintiffs of the opportunity and time to retain an expert witness to counter Defendants' new defense, Defendants can hardly claim that Plaintiffs intentionally violated the discovery rules by eliciting testimony to refute their product defect defense and rebut their erroneous assertions. On this record, the

invited error doctrine should apply. See *Grange Ins. Ass'n v. Roberts*, 179 Wn. App. 739, 774, 320 P.3d 77 (2013) (“Under the invited error doctrine, a party may not set up an error at trial and then complain of it on appeal.”).

Turning to prejudice (the second *Burnet* consideration), the Washington Supreme Court’s opinion in *Christensen v. Munsen*, 123 Wn.2d 234, 867 P.2d 626 (1994), is instructive. In *Christensen*, there were two treating physicians: the first was Richard Munsen, the defendant, and the second was Dr. Richard Mills, who treated the plaintiff after she decided to see another glaucoma specialist. *Id.* at 237-38. On the first day of trial, the defendant announced that he would call Dr. Mills as his glaucoma expert. *Id.* at 241. The trial court permitted the defendant to do so because it found that “the plaintiffs have known about Dr. Mills for a considerable period of time. He is a treating physician. They [were] free to talk to him at any time and arrange informal discovery. His opinions were evident to them [three months before trial] and they were free to follow up on those if they chose to.” *Id.* at 243. The Supreme

Court upheld the trial court's ruling because the plaintiff had not been "impermissibly prejudiced." *Id.*<sup>3</sup>

The same reasoning applies here as well. Similar to the plaintiff in *Christensen*, Defendants here knew several months before trial that Dr. Chapman could testify at trial as a treating physician (CP 1036), that Plaintiffs would offer her report as a trial exhibit (as evidenced by Plaintiffs' ER 904 Notice (CP 1197-1200) and the parties' Joint Statement of Evidence (CP 1201-1208)), and that Dr. Chapman had concluded in her report that "[t]here are 2 thin metallic densities in the chest, *consistent with wires*" (Ex. 6-00009 (emphasis added)). Indeed, Defendants themselves listed the report as one of their exhibits. CP 1201-1208; Ex. 107. Also like the plaintiff in *Christensen*, Defendants were free to issue a subpoena for Dr. Chapman's deposition. Defendants chose not to do so. On this record, as in *Christensen*, Defendants cannot establish that they were impermissibly prejudiced by any alleged violation of the discovery rules.

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<sup>3</sup> Although not relevant here, the Supreme Court also concluded in *Christensen*, as did the trial court, that Dr. Mills' testimony did not violate the trial court's order prohibiting duplicative expert testimony. *Id.*

Defendants' contrary arguments are without merit. Defendants claim, for example, that Dr. Chapman's testimony "eviscerated the defense theory that ... the wire's outer wrapping separated from its inner core without Dr. Shannon's knowledge." Brief of Appellants at 18. But that is not because of any violation of the discovery rules as is required to show prejudice under *Burnet*. 31 Wn.2d at 494. Rather, it is because Defendants' product defect defense was ill-conceived from the outset. For example, Defendants' experts performed various experiments with a guidewire to show that the guidewire that Dr. Shannon used must have malfunctioned, and they specifically represented that it was the *same* guidewire. 12/16 RP 143-144, 182; 12/16 RP 127-128. They subsequently discovered that the two guidewires were *different colors* and then *admitted* in the presence of the jury that "[w]e simply provided them [referring to their expert witnesses] with a current exemplar guidewire." 12/17 RP 70-71. In addition, Defendants' own witnesses admitted that they had never seen a wire separate in the manner in which Defendants alleged. 12/16 RP 58; 12/16 RP 193; 12/17 RP 41.

On top of that, Dr. Larson, Defendants' radiologist, admitted on cross examination that in order to break the wire in the manner Defendants claimed it broke during the procedure, he was required to use pliers and apply excessive force and that neither occurred during the procedure:

Q And so what you ultimately had to do is you had to use a pair of pliers to get these welds to break, right?

A To grab it and pull, yes.

...

Q And you would have had to, you grabbed it and you had to pull it until it broke?

A Yes.

Q And it was actually hard to get a grip on the first weld that you broke I think there at the top of the J tip, right?

A Yes.

Q Okay. Now, you would agree with me that watching the video that you did, that there is no pliers involved in putting a guidewire into a child?

A Correct.

Q There is no reason there should be the kind of force that you applied to this guidewire – there shouldn't be that kind of force applied to the wire during a central line placement as far as you know, right?

A Correct.

12/16 RP 112. These critical flaws in Defendants' product defect defense, and not Dr. Chapman's testimony, are what eviscerated the defense.

Defendants also claim that “[w]hile Swain-Schons [sic] willful failure to comply with the discovery rules severely prejudiced Dr.

Shannon, that prejudice was exacerbated by the trial court’s decision to allow this undisclosed expert testimony for the first time on rebuttal.” Brief of Appellants at 17. As discussed at length above, this assertion is riddled with error: Dr. Chapman did not testify as an expert witness, Plaintiffs fully and timely disclosed Dr. Chapman’s testimony and her report, there was no willful failure to comply with the discovery rules, and the trial court properly admitted Dr. Chapman’s testimony on rebuttal because the testimony was offered to rebut an argument – Defendants’ product defect defense – that would not be presented to the jury until Defendants’ case-in-chief. Contrary to Defendants’ accusation, Dr. Chapman’s testimony was not “classic sandbagging.” *Id.* at 18. Instead, as the trial court correctly found, “That is rebuttal.” 12/11 RP 180.

Defendants also cannot satisfy the third consideration in *Burnet* – that sanctions less than exclusion would have been insufficient. 131 Wn.2d at 494. Contrary to Defendants’ argument that “no lesser sanction would have cured the prejudice caused by Dr. Chapman’s surprise testimony” (Brief of Appellants at 19), any surprise could have been eliminated if Defendants had merely asked the trial court for leave to (i) depose Dr. Chapman before she testified and/or (ii) present additional

testimony on surrebuttal. Indeed, when Plaintiffs moved to exclude the testimony of Steven Marshall, who Defendants disclosed as a witness a *week* before trial, Defendants argued that there was no prejudice under *Burnet* because “[w]e provided them the documents” and “[w]e said, if you want to depose him, you can do so.” 12/9 RP 61. Plaintiffs then deposed Mr. Marshall during trial. *Id.* at 66-67. Defendants could have done the same thing with Dr. Chapman. But they did not request any such deposition, nor did they request leave to present additional testimony on surrebuttal. For these additional reasons, the trial court did not err – let alone abuse its discretion – when it permitted Dr. Chapman to testify.

Finally, even if Plaintiffs failed to timely disclose Dr. Chapman’s testimony, and even if that testimony should have been excluded under *Burnet*, any such error was in any event harmless. Dr. Chapman was not the first witness to testify that Defendants had misinterpreted the radiology report and that the “tenting” of Jaxom’s skin revealed a critical flaw in the defense theory. Treating pathologist Dr. Desiree Marshall testified that “coiled architecture” did not mean that the wire was broken or had come uncoiled, but instead the wires had “fine coil architecture to them, like the way they were constructed.” 12/16 RP 25. And Dr. George Drugas, the

treating surgeon, testified that the guidewire was causing “tenting of the skin.” 12/11 RP 125. The photographs and x-rays shown to the jury plainly showed the same. *See* Ex. 5-00001; Ex. 8. Dr. Chapman’s testimony merely confirmed the impossibility of Defendants’ proffered defense. Any error in admitting that testimony was harmless.

In short, Dr. Chapman properly testified, *as a treating physician fact witness*, in response to Defendants’ product defect defense. Plaintiffs, in turn, complied with all applicable disclosure obligations. But even if this Court were to hold, contrary to the trial court, that Dr. Chapman provided snippets of undisclosed expert opinion testimony, Defendants never argued that the trial court should exclude that testimony under *Burnet* and there was in any event no proper basis to do so. Either way, the trial court did not err, let alone manifestly abuse its discretion, in permitting Dr. Chapman to testify and denying Defendants’ motion for a new trial.

**2. The Trial Court Did Not Abuse Its Discretion In Refusing To Allow Defendants' Expert To Testify Regarding Product Failure Reports Because The Testimony Was Inadmissible Under ER 703 As Well As Under A Controlling Federal Statute Precluding Any Use Of The Reports In Civil Trials.**

Defendants also claim that the trial court abused its discretion when it did not allow Mr. Cline to testify regarding Manufacturer And User Facility Device Experience (“MAUDE”) reports, which document adverse experiences with medical devices. Brief of Appellants at 19-24. Defendants correctly acknowledge that the standard of review is abuse of discretion and, further, that reversal is not warranted unless they are also able to show that the trial court’s error was prejudicial. *Id.* at 22. Defendants’ argument fails on both grounds: they cannot establish error and they cannot establish prejudice.

Starting with error, testimony regarding the MAUDE reports is inadmissible for two separate and independent reasons. The first reason is that Defendants did not – and could not – satisfy the “reasonably relied upon” test in ER 703. There is no dispute that the MAUDE reports are replete with hearsay. But as Defendants note, an expert witness can rely on inadmissible facts and data, including hearsay, if the proponent is able to show that the evidence is ““of a type reasonably relied upon by experts

in the particular field in forming opinions or inferences upon the subject.” Brief of Appellants at 20 (quoting ER 703). In addition, “[t]he word ‘reasonably’ in ER 703 gives trial courts discretion in determining whether the underlying information is sufficiently reliable to form the basis of an expert’s opinion.” *In re Det. of McGary*, 175 Wn. App. 328, 340, 306 P.3d 1005 (2013) (quoting 5B Karl B. Tegland, *Washington Practice: Evidence Law and Practice*, § 703.2 at 226 (5th ed. 2007)). Expert testimony regarding the MAUDE reports was admissible under ER 703, therefore, *only* if Defendants satisfied these specific requirements. And even then, there would be other grounds to exclude the reports.

Defendants claim that they satisfied the ER 703 requirements during Mr. Cline’s voir dire (Brief of Appellants at 21-22), but their recitation of his testimony is both one-sided and inaccurate. When Mr. Cline was examined by the trial court and cross-examined by Plaintiffs’ counsel, he testified as follows:

- When asked how he obtained the MAUDE reports, Mr. Cline testified that “Mr. Leedom’s office [Defendants’ counsel] supplied them to me.” 12/16 RP at 56. And when asked if he found any MAUDE reports *other than* those he received from Defendants’ counsel, he admitted that he “couldn’t find any others.” *Id.* at 59.
- Contradicting his testimony that the information in MAUDE reports is “reasonably relied upon by experts in [his] particular

field” (*id.* at 42), Mr. Cline admitted on cross-examination that he is “not an expert in the manufacturing and design of guidewires” and is “not familiar with some other metallurgist who is an expert in guidewires” (*id.* at 59-60).

- When asked if the MAUDE reports referred to the same guidewire as the one used by Dr. Shannon, Mr. Cline admitted that “I do not know that it is exactly the same,” that he did not know if it was the same metal, and that there “are differences” in the manufacturing process. *Id.* at 50.
- Mr. Cline admitted that he was not aware that federal law proscribes the use of MAUDE reports in civil litigation (as discussed below) and that the FDA website specifically explains that “this passive surveillance system has limitations, including the potential submission of incomplete, inaccurate, untimely, unverified, or biased data.” *Id.* at 45.<sup>4</sup>
- Mr. Cline was ultimately asked: “You actually don’t know for a fact that other metallurgists rely on MAUDE reports, do you?” *Id.* at 60. He replied: “I have never had a specific conversation with a metallurgist about it.” *Id.* at 61. Nor could Mr. Cline identify *by name* any other metallurgist who relies on MAUDE reports. *Id.* at 60.

Defendants do not acknowledge *any* of this testimony in their argument.

After hearing Mr. Cline testify, the trial court granted Plaintiffs’ motion in limine to exclude testimony regarding the MAUDE reports on several grounds. The court began by expressing concern regarding the manner by which Mr. Cline obtained the reports:

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<sup>4</sup> Counsel was quoting “MAUDE - Manufacturer and User Facility Device Experience,” available at <http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfmaude/textsearch.cfm>.

You know, this is the thing that bothers me about this particular situation is it would have been one thing if Mr. Cline got up and said he did some research on his own and he found these reports and they informed his decision. But the reports were provided by defense counsel, obviously, for purposes of litigation because he was their expert hired to formulate an opinion consistent with the defense here.

12/16 RP 70. The trial court then turned specifically to the “reasonably relied upon” standard in ER 703 and found that Defendants had not established “that other metallurgists rely on MAUDE reports” as required to establish admissibility of expert testimony regarding the reports under ER 703. *Id.* at 71. Lastly, the court added: “it bothers me as well that there is really no other reporting here. I don’t know how he can rely on them when there is no reporting here that has a failure similar where we are talking about the inner core separating from the outer core.” *Id.* Given Mr. Cline’s many concessions on cross-examination, the trial court did not abuse its discretion in granting Plaintiffs’ motion in limine on these grounds.

Moreover, in addition to the above findings, the trial court also relied on its first-hand observation of Mr. Cline’s testimony – particularly on cross-examination. Addressing that issue, the trial court stated: “My impression of him on the stand was he didn’t even know about a MAUDE report until he was presented it from defense counsel.” *Id.* at 70. This

(accurate) impression raises serious concerns regarding the reliability of the underlying information and the trustworthiness of Mr. Cline's testimony. *See McGary*, 175 Wn. App. at 340 (trial court should not allow expert testimony if the underlying information is "relied on only in preparing for litigation" or is not "sufficiently reliable to form the basis of an expert's opinion"). Contrary to Defendants' argument, this Court should not second-guess the trial court's findings based on Defendants' lopsided review of the trial court transcript. *See In re Welfare of M.R.H.*, 145 Wn. App. 10, 24, 188 P.3d 510 (2008) ("Because only the trial court has the opportunity to hear the testimony and observe the witnesses, its decision is entitled to deference and this court will not judge the credibility of the witnesses or weigh the evidence.").

But even if the trial court misapplied ER 703, which it did not, there is second reason to affirm the trial court's ruling. The controlling federal statute, 21 U.S.C. § 360i(b)(3), states:

- No report made under paragraph (1) by--
- (A) a device user facility [*e.g.*, a hospital],
  - (B) an individual who is employed by or otherwise formally affiliated with such a facility, or
  - (C) a physician who is not required to make such a report,
- shall be admissible into evidence or otherwise used in any civil action involving private parties unless the facility,

individual, or physician who made the report had knowledge of the falsity of the information contained in the report.

The statute could not be more clear: MAUDE reports are not admissible and cannot be “otherwise used” in “any civil action involving private parties.” *Id.* As noted above, the FDA has explained why this is so: because MAUDE reports may contain “incomplete, inaccurate, untimely, unverified, or biased data.” 12/16 RP 45. Plaintiffs cited and relied on this statute in the trial court (12/9 RP 41-43), but the court ruled instead on ER 703 grounds. 12/16 RP 45. If necessary, this Court can properly affirm on this alternative ground. *See Grange Ins. Ass’n v. Roberts*, 179 Wn. App. 739, 757, 320 P.3d 77 (2013) (“An alternative ground also exists to affirm the trial court on this issue.”).

Defendants suggest an alternative reading of Section 360i(b)(3) based on the district court’s opinion in *Contratto v. Ethicon, Inc.*, 225 F.R.D. 593 (N.D. Cal. 2004). Brief of Appellants at 23. The court in *Contratto* addressed a different issue: “whether the statute [referring to Section 360i(b)(3)] prohibits plaintiff’s *discovery* of these reports.” 225 F.R.D. at 595 (emphasis added). Addressing that narrow issue, the court concluded: “Strictly construed, section 360i(b)(3) does not prohibit *discovery* of user facility reports and voluntary physician reports in a civil

action between a consumer and a manufacturer.” *Id.* at 596 (emphasis added). The issue here, in contrast, is whether the reports can be “otherwise used” in a civil action involving private parties. Although there is a passing reference to “admissibility” in *Contratto* (*id.*), the court was not asked to and did not decide that issue.

Moreover, even if the district court’s discovery ruling in *Contratto* were relevant here, which it is not, the Eighth Circuit reached a contrary result in *In re Medtronic, Inc.*, 184 F.3d 807 (8th Cir. 1999). The court there held: “to the extent that compliance with any discovery order by the district court requires divulgence of the contents of reports within the scope of 21 U.S.C. § 360i(b)(3), the orders are invalid.” 184 F.3d at 811. Unlike the district court’s decision in *Contratto*, the Eighth Circuit’s decision in *Medtronic* is an appellate decision and is consistent with the plain language of Section 360i(b)(3). If and to the extent necessary, Section 360i(b)(3) provides an alternative grounds for affirmance.

Lastly, even if Defendants could establish error, which they cannot, they cannot establish prejudice. As noted above, when asked if the MAUDE reports referred to the same guidewire as the one used by Dr. Shannon, Mr. Cline admitted that “I do not know that it is exactly the

same,” that he did not know if it was the same metal, and that there “are differences” in the manufacturing process. 12/16 RP 50. The trial court likewise commented: “I don’t know how he can rely on them when there is no reporting here that has a failure similar where we are talking about the inner core separating from the outer core.” *Id.* at 71. Without the information necessary to establish relevance, there is no basis to conclude that allowing Mr. Cline to discuss the MAUDE reports could have affected the outcome of the trial.

In addition, Defendants in any event presented this evidence to the jury – at least in part. Despite the trial court’s ruling that there should be an offer of proof by Mr. Cline outside the presence of the jury before the admissibility of the MAUDE reports could be decided, Defendants’ counsel asked two of Plaintiffs’ experts whether they were familiar with MAUDE reports regarding the guidewire in this case – describing them as “reports made to the FDA regarding products where there is adverse events [sic].” 12/9 RP 51; 12/11 RP 74, 159. And although Mr. Cline was not permitted to discuss the MAUDE reports in his testimony, none of his ultimate opinions was excluded. 12/16 RP 72-104. For these reasons too, even if the trial court erred in excluding expert testimony regarding the

MAUDE reports (which it did not), Defendants cannot establish that the ruling was prejudicial.

**3. The Trial Court Did Not Abuse Its Discretion In Admitting Evidence Regarding Dr. Shannon's On-Call Shift Length And His Failure To Use A Checklist To Avoid Leaving A Foreign Object In A Patient's Body.**

Defendants' final argument is that the trial court erred in admitting evidence regarding Dr. Shannon's on-call shift length and his failure to use a checklist to avoid leaving a foreign object in Jaxom's body. Brief of Appellants at 24-26. As noted previously, the court concluded that the shift-length evidence was relevant and not unfairly prejudicial and that Plaintiffs' standard-of-care expert could properly refer to the checklist because it could have helped Dr. Shannon "mitigate" the potential consequences of his fatigue. 12/9 RP at 92. Although Defendants' argument is couched entirely in terms of alleged error, the standard of review is abuse of discretion. *See State v. Foxhoven*, 161 Wn.2d 168, 176, 163 P.3d 786 (2007) ("The trial court is generally the proper court to weigh the relevance of evidence, and this court reviews such a determination for abuse of discretion.").

The trial court did not abuse its discretion (or otherwise err) in admitting the shift-length and checklist evidence. From the very outset of

this case, starting with opening statements, Defendants' counsel suggested that Dr. Shannon could not have left the guidewire inside Jaxom's body because he "is a very accomplished pediatric intensive care specialist" who has "placed thousands of central lines." 12/10 RP 40-41. Counsel also told the jury that Dr. Shannon's experience "is going to be important in this case when you consider the facts." *Id.* at 41. In response to that assertion, Plaintiffs responded by showing *how* and *why* a knowledgeable and experienced physician like Dr. Shannon could leave a guidewire inside a patient: because he had worked 41 hours of a 48-hour shift and did not use a checklist to ensure that all foreign objects had been removed from the patient and properly discarded. 12/18 RP 24, 27. This evidence was directly relevant to rebut Defendants' "experienced physician" argument.

The evidence also was relevant to bolster Plaintiffs' standard-of-care argument. In accordance with WPI 105.01, "Negligence—General Health Care Provider," the trial court instructed the jury that "[t]he degree of care actually practiced by members of the medical profession is evidence of what is reasonably prudent." CP 693. Addressing that specific issue, Plaintiffs' standard-of-care expert testified that other

members of the medical profession (a) do not work 48-hour shifts and (b) use a checklist to avoid leaving a foreign object in a patient's body. 12/11 RP 35-36, 91-92. Accordingly, while Plaintiffs and their expert acknowledged at trial that working a 48-hour shift does not, *by itself*, violate the standard of care and that failing to use a checklist also does not, *by itself*, violate the standard of care, the evidence is still relevant to show (a) how other physicians ensure that they comply with the standard of care and (b) why Dr. Shannon left the guidewire inside of Jaxom. The trial court did not err in so holding.

Finally, even if Defendants could show error, they cannot show prejudice. Plaintiffs' counsel made clear in his closing argument that the purpose of the shift-length and checklist evidence was to explain how and why a knowledgeable and experienced physician like Dr. Shannon could leave a guidewire inside a patient:

It's true that Dr. Schenkman said it doesn't violate the standard of care to work 48 hours and it doesn't violate the standard of care to not use a checklist. ... Why? Why did he say that? It doesn't violate the standard of care.

Because the truth of the matter is there is probably lots of times when Dr. Shannon is working 48 hours and he doesn't violate the standard of care, and he does central lines exactly the way you are supposed to.

And so you can't say in and of itself working a 48 hour shift is a violation of the standard of care. And there

is probably lots of times, without using a checklist all these years, the vast majority of the time I am sure Dr. Shannon has met the standard of care. But what Dr. Schenkman talked about is this is why we have checklists and why we don't work such long shifts is because even in experienced doctors, this combination is not good.

12/18 RP 268-89. The trial court, in turn, instructed the jury that “this evidence alone is not conclusive on the issue and should be considered by you along with any other evidence bearing on the question.” CP 693. On this record, any error in admitting the evidence was, at most, harmless.

**B. The Judgment In Favor Of Plaintiffs Can Also Be Affirmed On The Alternative Ground That Dr. Shannon Is Liable, As A Matter Of Law, Because He Left A Foreign Object Inside A Patient.**

At the close of the evidence, Plaintiffs moved for a directed verdict on the issue of negligence based on longstanding Washington law that holds physicians negligent as a matter of law when they leave a foreign object inside a patient. *Numerous* cases so hold. *See, e.g., Ripley v. Lanzer*, 152 Wn. App. 296, 308, 215 P.3d 1020 (2009) (“[W]hen a surgeon inadvertently introduces into a wound a foreign substance, closes up the wound, leaving that foreign substance in the body, there being no possibility of any good purpose resulting therefrom, that act constitutes negligence.”); *Bauer v. White*, 95 Wn. App. 663, 668, 976 P.2d 664 (1999) (“Simply put, it is not reasonable prudence to unintentionally leave a

foreign substance in a surgical patient.”).<sup>5</sup> In addition, Defendants’ product defect defense – their only defense to liability – fails because they *never pled non-party fault* as required by CR 12(i).

After hearing oral argument regarding the motion, the trial court ruled: “I will deny the motion and we will see what the jury does.” 12/18 RP 162. We now know what the jury did: it agreed with Plaintiffs that Dr. Shannon violated the standard of care. CP 676. If this Court concludes that the trial court committed reversible error in any of the ways asserted by Defendants, the jury’s verdict should be upheld on the ground that Dr. Shannon is liable, as a matter of law, because he left a foreign object inside of a patient. If the Court so rules, it does not have to reach any of Defendants’ arguments. But at the very least, this is an alternative ground for affirmance.

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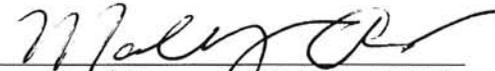
<sup>5</sup> See also *Conrad v. Lakewood Gen. Hosp.*, 67 Wn.2d 934, 937, 410 P.2d 785 (1966) (affirming directed verdict against physician who left a surgical instrument inside plaintiff and noting “There should be no question in Washington as to whether such inadvertence, in and of itself, constitutes negligent conduct.”); *McCormick v. Jones*, 152 Wash. 508, 510-11, 278 P. 181 (1929) (“[T]he court can say, as a matter of law, that, when a surgeon inadvertently introduces into a wound a foreign substance, closes up the wound, leaving that foreign substance in the body, there being no possibility of any good purpose resulting therefrom, that act constitutes negligence.”).

## V. CONCLUSION

For the foregoing reasons, the trial court's judgment on the jury's verdict should be affirmed.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of December, 2014.

PETERSON | WAMPOLD | ROSATO | LUNA | KNOPP

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CERTIFICATE OF SERVICE

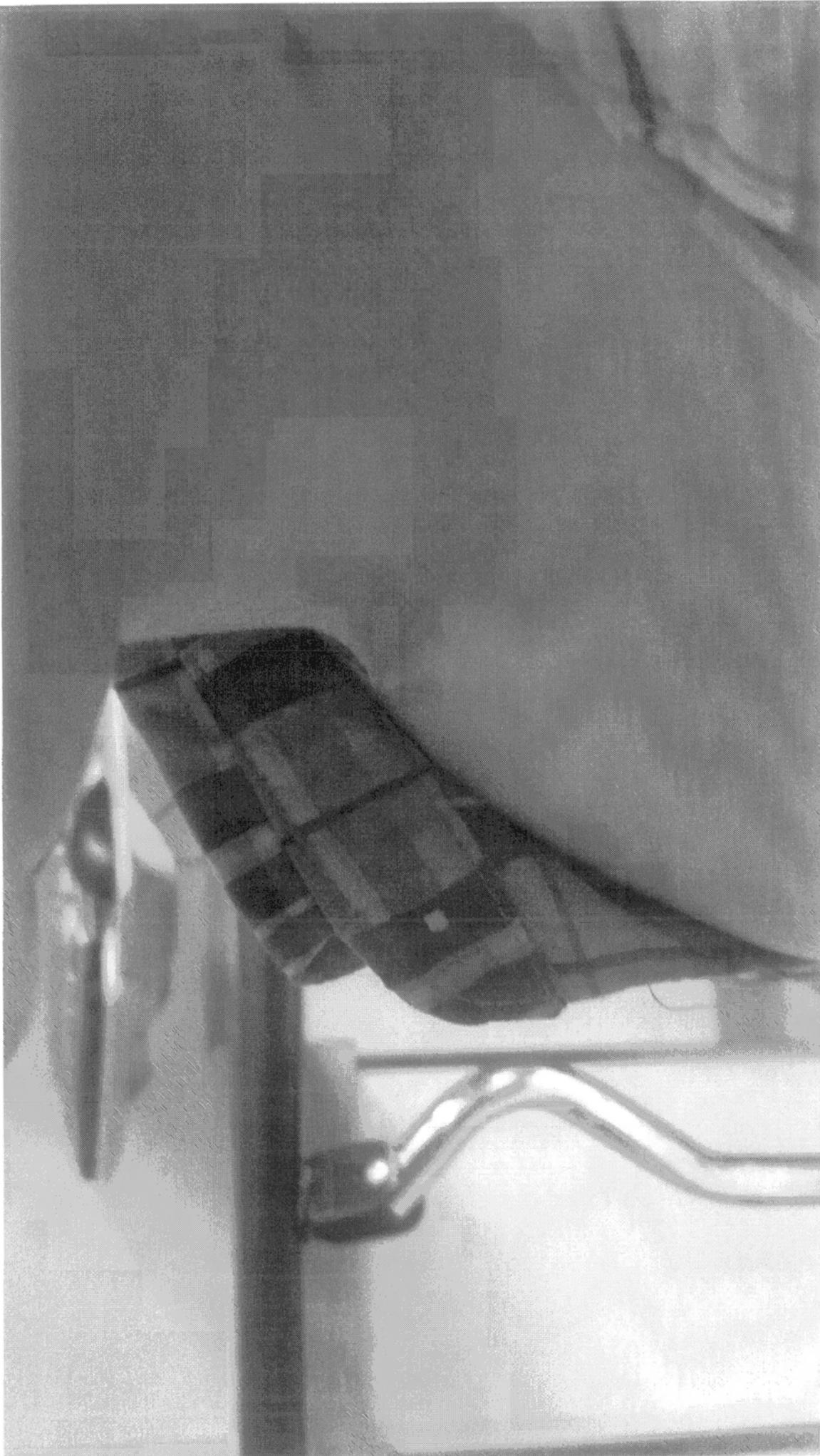
I certify that on the 23<sup>rd</sup> day of December, 2014, a copy of this document was sent as stated below.

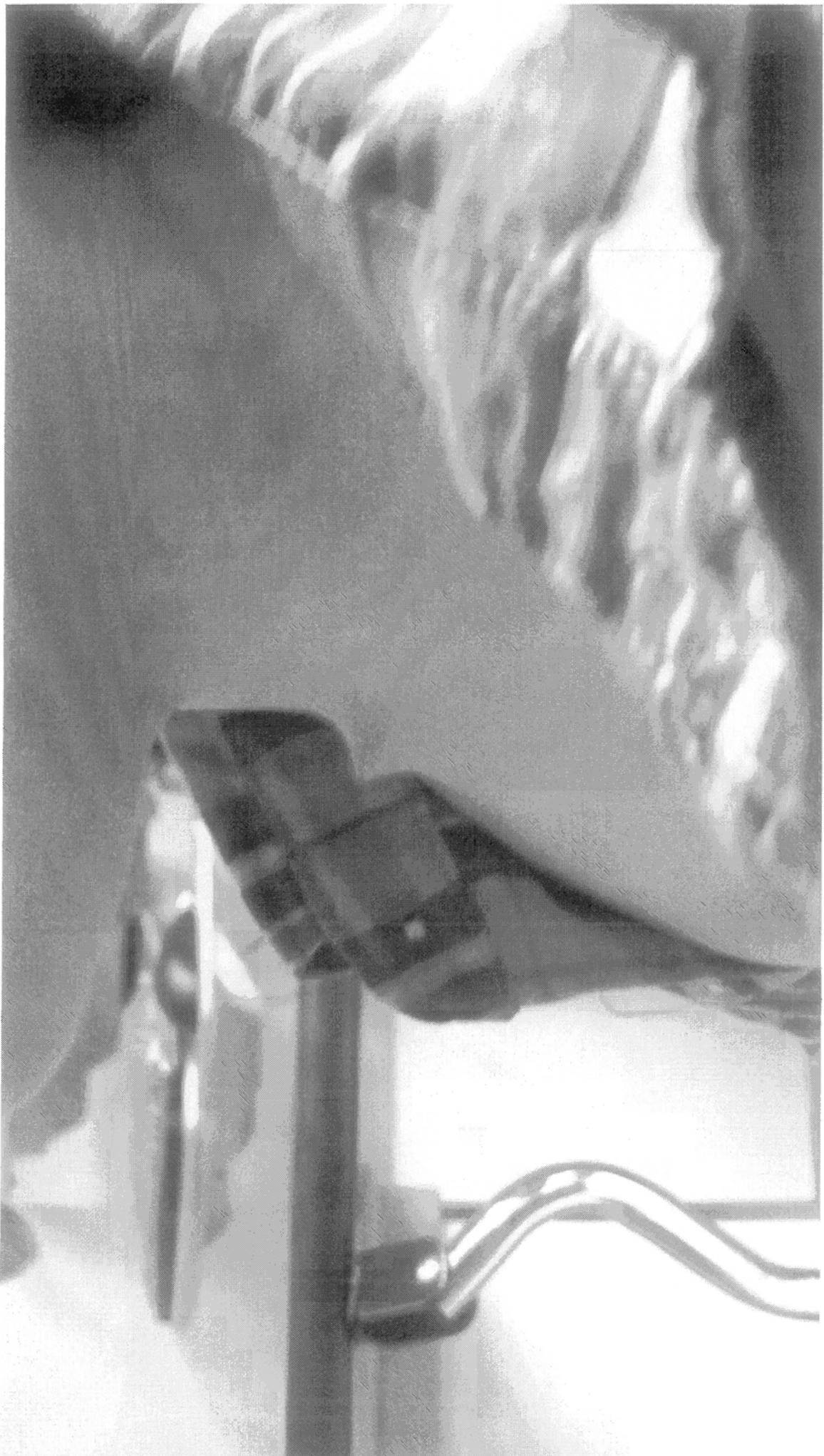
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Howard M. Goodfriend Smith Goodfriend PS 1619 8th Avenue N. Seattle, WA 98109-3007	<input type="checkbox"/> via efilng/email <input checked="" type="checkbox"/> via messenger <input type="checkbox"/> via US Mail <input type="checkbox"/> via fax

SIGNED in Seattle, Washington this 23<sup>rd</sup> day of December,  
2014.

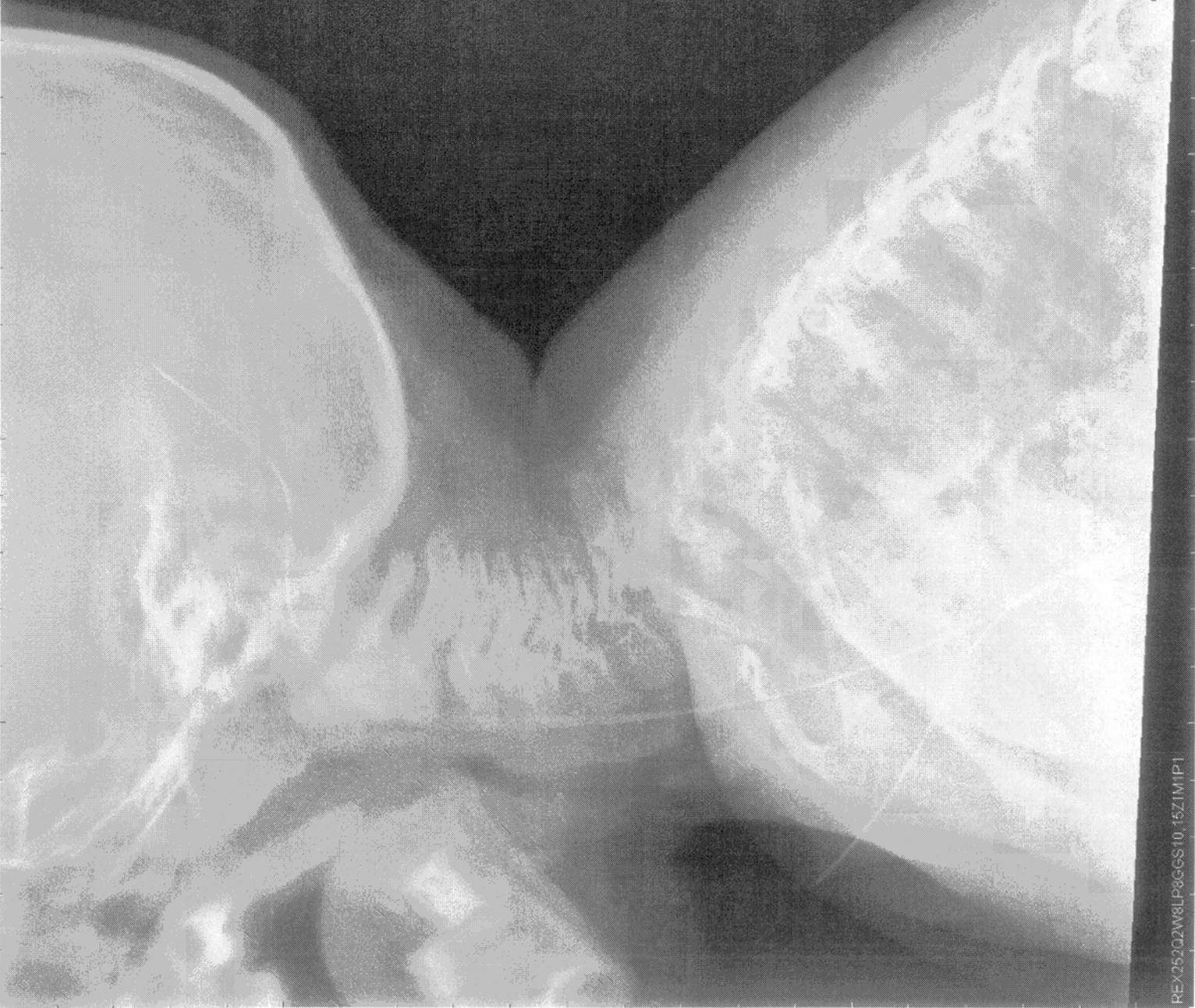
  
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# Appendix





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