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SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF KING

DAGMAR VON HEYDT, a
Washington resident,

Plaintiff,

v.

MICHELLE EBERT AND JASON
BRUER, and the marital community
composed thereof,

Defendants.

Case No. 18-2-24119-7 SEA

**ORDER FOR REMOTE JURY TRIAL
BY ZOOM**

The Court orders that trial in this matter be held entirely over Zoom.

I. BACKGROUND

This matter was filed on September 26, 2018.

On October 28, 2020, the Court continued trial in this matter to November 23, 2020, at which time the Court anticipated beginning an in-person jury trial at the Meydenbauer Center in Bellevue, Washington. Dkt. 235.

When the Court entered its Order on October 28, 2020 for an in-person civil jury trial, the seven-day average of daily positive coronavirus cases in King County was 216; that number had risen 145 percent to 529 by November 17, 2020.¹

On November 15, 2020, Governor Jay Inslee issued a Proclamation noting that “from the latter part of October through the first two weeks of November, 2020, COVID-

¹ Public Health – Seattle & King Cty., *COVID-19 Outbreak Summary*, available at <https://www.kingcounty.gov/depts/health/covid-19/data/daily-summary.aspx> (last visited Nov. 17, 2020 3:17 p.m.).

1 19 cases have doubled in Washington, and COVID-19 related hospitalizations have risen
2 sharply, putting our people, our health system, and our economy in as dangerous a position
3 as we faced in March 2020.”²

4 In addition, the Governor noted in the Proclamation that “a significant risk factor
5 for spreading the virus is prolonged, close contact with an infected person indoors,” and
6 that “several factors increase the risk for person-to-person COVID-19 transmission,”
7 including: (1) “the more that people and groups interact”; (2) “the longer those interactions
8 last”; (3) “the closer the contact between individuals”; and (4) “the denser the occupancy
9 for indoor facilities.”³

10 In response to the conditions cited in the Proclamation, the Governor prohibited
11 “Indoor Social Gatherings” with individuals outside of one’s household, absent a period of
12 prior quarantine or combination of quarantine and a negative coronavirus test.⁴

13 The restrictions in the Proclamation do not apply to courts.⁵

14 On November 13, 2020, the Court held a conference with the Parties and informed
15 the Parties that, in the Court’s view, it would be best to hold the entire jury trial over Zoom
16 rather than in-person; the Parties expressed their agreement. Dkt. 251.

17 On November 17, 2020, Defendants emailed the Court to object to a Zoom jury trial,
18 stating their concern that Plaintiff could be covertly coached during Plaintiff’s Zoom trial
19 testimony.

20 Also on November 17, 2020, the Court held a conference with the Parties to hear
21 Defendants’ objections on the record. During the hearing, Defendants reiterated their

22 ² State of Wash. Office of the Governor, *Proclamation 20-25.8 Stay Safe – Stay*
23 *Healthy Rollback of Cty.-by-Cty. Phased Reopening Responding to a COVID-19 Outbreak*
24 *Surge*, at 1-2 (Nov. 15, 2020) (the “Proclamation”), available at
https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-25.8.pdf.

25 ³ *Id.* at 2.

⁴ *Id.* at 3.

⁵ *Id.*

1 concern that Plaintiff could be coached during her remote testimony. In addition,
2 Defendants objected that they have the constitutional right to an in-person jury trial where,
3 for example, they can observe juror body language.

4 **II. FINDINGS AND CONCLUSIONS**

5 **A. The Washington Supreme Court Allows Trial Courts to Take Measures to** 6 **Protect the Public Health While Conducting Court Business**

7 The Washington Supreme Court allows trial courts to take measures to conduct court
8 business in a way that preserves public health. During the current public health crisis, the
9 Washington Supreme Court requires that courts “follow *the most protective* public health
10 guidance applicable in their jurisdiction,” and requires courts to “*continue using remote*
11 *proceedings for public health and safety whenever appropriate.*” Fourth Revised &
12 Extended Order Re Court Operations, *In the Matter of Statewide Response by Wash. State*
13 *Courts to the COVID-19 Pub. Health Emergency*, at 3 (Wash. Oct. 13, 2020) (the “Fourth
14 Supreme Court Order”) (emphasis added). Specifically as to jury trials, the Washington
15 Supreme Court has not limited “the authority of courts to adopt measures to protect public
16 health and safety that are more restrictive” than the orders of the Washington Supreme
17 Court, “as circumstances warrant.” Order Re: Modification of Jury Trial Proceedings, *In*
18 *the Matter of Statewide Response by Wash. State Courts to the COVID-19 Pub. Health*
19 *Emergency*, at 5 (Wash. June 18, 2020). Thus, under applicable Washington Supreme Court
20 orders, the Court has the ability to fashion trial solutions that are the most protective of
21 public health and appropriate for the proceedings.

22 **B. Zoom Satisfies the Right to a Jury Trial**

23 The Parties have the right a trial by jury, but it need not be in person. “The right of
24 trial by jury shall remain inviolate.” Wash. Const. art. I, § 21. Use of the word “inviolate”
25 in this constitutional guarantee “connotes deserving the highest protections,” protections

1 such that the right to a jury trial “must not diminish over time and must be protected from
2 all assaults to its *essential guarantees*.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656
3 (1989) (citation omitted) (emphasis added). Those essential guarantees include the right to
4 have a jury “determine the facts of the case from the evidence adduced, in accordance with
5 the instructions given by the court.” *Furnstahl v. Barr*, 197 Wn. App. 168, 175 (2016)
6 (quotation marks omitted). Here, as outlined in attached Zoom Jury Trial Procedures,
7 Appendix A, the Parties will receive the essential guarantees provided for in the Washington
8 Constitution, because the jury will receive testimony over Zoom and receive exhibits
9 electronically, will receive the Court’s instructions on the law, and will be given a virtual
10 jury room in which to determine the facts.

11 **C. There is Good Cause for All Testimony to Occur by Zoom, and There Is No**
12 **Material Risk that Witness Testimony Will be Compromised**

13 **1. The increased instances of coronavirus in King County are compelling**
14 **circumstances supporting good cause for remote testimony.**

15 There is good cause to allow all witness testimony to be by Zoom. “For good cause
16 in compelling circumstances and with appropriate safeguards, the court may permit
17 testimony in open court by contemporaneous transmission from a different location.” CR
18 43(a)(1). Such good cause and compelling circumstances exist, for example, where in-
19 person testimony could threaten an individual’s health. *In re Marriage of Swaka*, 179 Wn.
20 App. 549, 557 (2014) (“If Alexandra was required to travel to Washington for trial she
21 would have to choose between irritating her son’s medical condition or leaving him in a
22 foreign country.”). Here, given that the seven-day average of daily positive coronavirus
23 cases has increased 145 percent in King County since the Court ordered an in-person jury
24 trial, and given the Governor’s finding that coronavirus is often spread during indoor
25 gatherings, and given that Washington residents are otherwise nearly completely prohibited

1 from gathering with anyone outside of their own households, the Court concludes that
2 compelling circumstances exist providing good cause for all witnesses to testify over Zoom.

3 **2. Defendants’ concerns about the potential for misconduct are**
4 **unfounded.**

5 Court and ethics rules still apply to an all-Zoom trial. Defendants’ concerns that
6 Plaintiff could be covertly coached during testimony are unfounded. As an initial matter, a
7 trial conducted over Zoom is still a trial, and ethics rules still apply. Thus, for example,
8 counsel are expected to be candid with the Court, RPC 3.3, act fairly to opposing parties,
9 RPC 3.4(a), refrain from assisting a witness to testify falsely, RPC 3.4(b), act with decorum
10 RPC 3.5(b), and not fail to disclose a material fact, RPC 4.1. The Court has no reason to
11 conclude that counsel would violate the Rules of Professional Conduct merely because the
12 trial is being conducted over Zoom. Furthermore, the King County Superior Court has been
13 holding civil bench trials entirely over Zoom for several months now and is not aware of
14 any significant incidences supporting Defendants’ concerns. All rules still apply, and the
15 Court expects the Parties, counsel, and witnesses to follow them.

16 **D. Zoom Breakout Rooms Satisfy the Statutory Jury Room Requirement**

17 A virtual space for the jurors to deliberate in meets statutory requirements.
18 Washington law provides that jurors “must be kept together in a room provided for them,
19 *or some other convenient place.*” RCW 4.44.300 (emphasis added). The “statute is
20 designed to insulate the jury from out-of-court communications that may prejudice their
21 verdict.” *State v. Crowell*, 92 Wn.2d 143, 147 (1979). Here, given that the jury will be in
22 a Zoom breakout room during breaks, deliberations, and other times when the Court needs
23 to address the Parties outside of the presence of the jury, the breakout room satisfies the
24 requirement that the jury be in a convenient place. Moreover, the jury will be insulated in
25 the breakout room from communications that may prejudice them, because participants in

1 breakout rooms are “completely isolated in terms of audio and video from the main
2 session.”⁶

3 **E. Court Will Not Be Closed, and the Public Will Have Access to the Trial**

4 The all-Zoom jury trial satisfies the requirement for public access to the trial. By
5 Washington Supreme Court order, courts “should develop protocols for allowing public
6 observation of video . . . hearings.” Fourth Supreme Court Order at 12. “Any limitations
7 placed on public access to court proceedings due to the public health emergency must be
8 consistent with” controlling authority. *Id.* at 12-13. Such authority would be applicable to
9 a court “closure.” *State v. Bone-Club*, 128 Wn.2d 254, 258 (1995). Here, the Court will
10 not be closed; to the contrary, the trial judge will be on the bench in the King County
11 Courthouse, the courthouse will be open to the public, the courtroom will be unlocked, and
12 video and audio will be available to members of the public in the gallery. Thus, the public
13 will be able to observe the full jury trial.

14 **III. CONCLUSION**

15 For the reasons stated above, the Court orders that trial in this matter be held entirely
16 over Zoom.

17 IT IS SO ORDERED.

18 DATED November 17, 2020.

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David S. Keenan
Judge
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⁶ Zoom, *Participating in Breakout Rooms, available at*
<https://support.zoom.us/hc/en-us/articles/115005769646>.

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Appendix A
Zoom Jury Trial Procedures

A. Trial Format

The entire trial will be over Zoom with a link(s) provided by the Court. Judge Keenan will be physically present in the courtroom at the King County Courthouse. The Parties, counsel, witnesses, and jurors will not be physically present in the courthouse and will participate entirely by Zoom.

B. Electronic Exhibit Management

1. **The parties shall upload exhibits using ShareFile no later than November 20, 2020 at 12:00 p.m.**

The Parties can find ShareFile access information and a training video on the Superior Court Clerk's website at:

<https://www.kingcounty.gov/courts/clerk/documents/Electronic%20Exhibits.aspx>.

2. **The jury will access admitted exhibits during deliberations using ShareFile.**

After closing arguments, the clerk will make a copy of the ShareFile folder containing only those exhibits which were admitted into evidence. The jury will be provided electronic access to and instruction in the use of ShareFile.

C. Remote Trial Access and Appearance for Witnesses

The Court will provide a remote access link, including any passwords, identification numbers, and other information necessary to access any remote portion of the proceedings over the internet.

Counsel are required to share the link and access information with the parties and witnesses.

Counsel are required to ensure in advance of any remote witness testimony that parties, counsel, and witnesses have sufficient hardware and internet access to testify

1 remotely. Counsel must ensure that parties, counsel, and witnesses have sufficient
2 bandwidth to fully participate in the trial, including testifying and viewing exhibits.⁷

3 Counsel must test the ability to access and use the Zoom platform in advance of trial for
4 each party, attorney, and witness, including internet speed.⁸

5 Counsel must ensure that, at the time of a witness's testimony, the witness is able
6 to testify in a distraction-free setting.

7 It is presumed that parties, counsel, and witnesses appearing remotely will appear
8 with video and audio enabled. No party, attorney, or witness may appear solely by audio
9 (whether by Zoom without video enabled or by phone) without prior permission from the
10 Court.

11 No other individual will be allowed to participate in the trial remotely via the Zoom
12 platform without prior permission of the Court. Parties, counsel, and witnesses should not
13 share the remote access information for the trial with anyone not authorized in this order to
14 participate in the trial via Zoom without prior permission from the Court.

15 When a participant remotely accesses the trial via the link provided by the Court,
16 the participant will first enter a virtual waiting room. The Court will admit individuals into
17 the trial from the virtual waiting room.

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21 ⁷ Counsel, parties, and witnesses can find system requirement information for
Zoom at: [https://support.zoom.us/hc/en-us/articles/201362023-System-requirements-for-
Windows-macOS-and-Linux](https://support.zoom.us/hc/en-us/articles/201362023-System-requirements-for-Windows-macOS-and-Linux).

22 General information for Zoom at: [https://support.zoom.us/hc/en-
us/articles/206175806-Top-Questions](https://support.zoom.us/hc/en-us/articles/206175806-Top-Questions).

23 Information about common troubleshooting problems for video issues at:
24 <https://support.zoom.us/hc/en-us/articles/202952568-My-Video-Camera-Isn-t-Working>.

24 Information about common troubleshooting problems with audio at:
<https://support.zoom.us/hc/en-us/articles/202050538-Audio-Echo-In-A-Meeting>.

25 ⁸ Counsel, parties, and witnesses may wish to test their internet speeds at sites such
as <https://www.speedtest.net/>.

1 The Court will only allow parties, counsel, witnesses, and those with prior
2 permission to access the remote trial. The Court has the ability to mute, remove, and block
3 individuals not authorized to access the remote trial.

4 This order governs how the Court, parties, counsel, and witnesses will conduct the
5 trial via the Zoom platform. Nothing in this order is intended to limit any public right to
6 observe the trial.

7 **D. Witnesses Excluded**

8 Pursuant to ER 615, witnesses are excluded from the trial until they are called. Until
9 a witness is excused and not subject to recall, a witness may not observe, listen to, or
10 otherwise access, through any means, the testimony of other witnesses or other proceedings
11 for this case.

12 **E. No Recording**

13 No one is authorized to record the proceedings by any means without prior
14 permission from the Court.

15 **F. The Court Record**

16 The official record will be captured and maintained only through a means authorized
17 and conducted by the Clerk of the Court.

18 **G. Calling Remote Witnesses During Trial**

19 The party calling witness testifying remotely is responsible for notifying the
20 witness when the witness is to be called so that the witness can access the trial remotely.
21 Any witness appearing remotely must appear with video and audio enabled, absent prior
22 permission from the Court.

23 From the time the witness is placed under oath until the witness is released, the
24 witness shall not communicate with anyone other than the Court and examining counsel
25 without permission of the Court. Witnesses may not refer to any documents or other

1 information sources during their testimony unless and until the witness is directed to do
2 so.

3 **H. Handling Exhibits Remotely During Trial**

4 **1. Substantive exhibits.**

5 During the trial, witnesses testifying remotely should be examined using copies
6 (electronic or hard-copy) of exhibits provided to the witness in advance or shared with the
7 witness using Zoom's screen-sharing function during examination, with the Court's
8 permission.

9 Authenticating, establishing the admissibility of, and offering exhibits remotely
10 should be done according to the Rules of Evidence just as they would during an in-person
11 trial. The witness appearing remotely should be directed to access the witness's copy of
12 the exhibit or counsel may screen-share the exhibit. If the exhibit is admitted, the Clerk
13 will admit the original previously provided to the Court. Witnesses should destroy or
14 return hard copies of exhibits following the trial.

15 **2. Illustrative exhibits.**

16 Illustrative exhibits must be marked and transmitted to the Court in advance.

17 If it is not possible to mark an illustrative in advance (e.g., because the exhibit was
18 created during trial while examining a witness), the Court may allow alternate means of
19 marking and admitting the exhibit for illustrative purposes, including, e.g., allowing the
20 examining attorney to show the exhibit via Zoom's screen-sharing feature or allowing a
21 witness to electronically annotate an illustrative exhibit and later providing a copy of the
22 exhibit to the Clerk.

23 **3. Playing video depositions during trial.**

24 Any party intending to offer video deposition testimony remotely during the trial
25 must notify the Court in advance. The offering party should be prepared to play the

1 deposition on the offering party's computer and to utilize Zoom's screen-sharing function
2 or another authorized means to broadcast the deposition to the Court and other remote
3 participants.

4 **I. Juror Questions for Witnesses**

5 As with an in-person civil jury trial, jurors in this Zoom trial will be allowed to
6 propose written questions to witnesses. The Court will provide jurors with a link to an
7 electronic form to submit questions. The jurors will be placed in the breakout room while
8 the Court discusses juror questions for witnesses with the Parties. The questions will be
9 filed in the court record just as they would during an in-person trial.

10 **J. Deliberations**

11 Jurors will deliberate in the Zoom breakout room. As described above, jurors will
12 have access during their deliberations to a ShareFile folder with only those exhibits admitted
13 into evidence. Jurors will be able to seek the Court's assistance from the breakout room
14 using the Ask for Help function in Zoom.

15 **K. Professionalism During Remote Portions of the Trial**

16 **1. Cross-talk and microphones.**

17 When the Court, a party, counsel, or a witness is speaking, please avoid interrupting
18 the speaker.

19 During remote portions of the trial, generally, all participants other than the Court,
20 the witness, and the examining and defending attorneys should mute their microphones.

21 Remote participants using multiple devices in a single workspace to access the trial
22 should avoid audio feedback issues by, e.g., only using the microphone and speakers on one
23 device at a time, or utilizing headphones.

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2. Objections.

When an objection is made during remote testimony, please stop talking and let the Court rule on the objection.

3. Disconnection.

In the event that the Court, a party, counsel, a witness, or anyone else necessary to the proceedings becomes disconnected from a remote portion of the trial, the trial will stop while the Court works to reconnect the individual.

Counsel must ensure that a witness has an alternative means of communicating with counsel in the event of disconnection.

4. Limiting distractions.

To the extent possible, remote trial participants should conduct themselves in the same way they would if they were physically present in a courtroom. Remote participants should silence electronic devices other than devices necessary for remote participation, and generally take steps to minimize anything in their remote workspaces that would distract from the integrity of the proceedings. The Court understands that conducting trial from remote locations may present challenges. The Court asks all remote participants to do their best to maintain professionalism in order to conduct a fair and efficient trial.

5. Screen names.

When remotely accessing the trial, remote participants shall ensure that their Zoom screen name and the legal name they are using in these proceedings are the same. If a remote participant attempts to access the trial via Zoom with a name the Court does not recognize, the Court may decline to admit that person from the virtual waiting room.

6. Decorum.

Parties, counsel, and witnesses appearing remotely should dress in professional attire just as they would when appearing in-person.

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L. Post-Trial Evidence Handling

Electronic exhibits which were not offered during the trial will not be retained by the Clerk’s Office.

Hard-copy exhibits not offered during the trial and deposition transcripts not published must be retrieved by 4:00 p.m. no later than three court days after the trial has concluded, and will otherwise be discarded by the Clerk’s Office.

Parties may be asked to provide their electronic authorization for the destruction of exhibits admitted during trial.

M. Technology Support

Parties, counsel, and witnesses should familiarize themselves with the Zoom platform prior to trial. The Court is unable to provide Zoom technical assistance or advice beyond what is contained in this order.

King County Superior Court
Judicial Electronic Signature Page

Case Number: 18-2-24119-7
Case Title: VON HEYDT VS EBERT ET ANO
Document Title: ORDER RE FOR REMOTE JURY TRIAL
Signed by: David Keenan
Date: 11/18/2020 9:00:00 AM



Judge/Commissioner/ProTem: David Keenan

This document is signed in accordance with the provisions in GR 30.
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