Notes on City's Motion to Exclude Witnesses/Exhibits and to Dismiss

Elizabeth Campbell, MPA <neighborhoodwarrior@gmail.com> Wed, Sep 19, 9:40 PM
To: Elizabeth Campbell <neighborhoodwarrior@gmail.com>

I did do research on the City's motion.

Four Seasons Hotel Case
https://web6.seattle.gov/Examiner/case/HC-18-001
City references Four Seasons Hotel et al, HC 18-001 - HC 18-004 for the proposition that it supports City's request to exclude Campbell's witnesses and exhibits; in Four Seasons the filing deadline for the appellants' witness and exhibits lists was June 18, 2018, the appellants filed their witness and exhibits lists on June 25, 2018; the City filed theirs on June 27, 2018, two days after the June 25, 2018 deadline for their list.

The City noted in their Motion in Campbell/DPCA that the Four Seasons appellants did not file their lists until July 6, 2018 - this is not true. After the appellants filed their witness/ exhibit list on June 25th they amended it and filed their 1st amended list on June 27, 2018, then they amended it again, and filed it on July 6, 2018. Therefore by the July 6th date they had filed their list three times; late the first time by seven days, but after that the lists were amended.

The City in Campbell/DPCA claims that the hearing examiner dismissed the Four Seasons appellants' exhibits due to the fact that they had filed their witness and exhibits list late - "[T]he City moved to exclude the appellant's untimely-filed exhibit list...the Deputy Examiner granting the City's motion and excluded the exhibits. This characterization is false - in that the exhibits were excluded, but not for the reason the City is claiming in Campbell/DPCA. I listened to the portion of the hearing that dealt with the CIty's motion to exclude the exhibits at the time of hearing, and I also spoke this last weekend to the appellant whose exhibits were excluded, Andrew Konstantaras. Before I talked to him I listened to the hearing audio. What Downs, the City attorney in both cases attacked was that he had not gotten the physical copies of the exhibits long enough before the hearing and that he hadn't had a chance to read through them.

Downs motion at hearing was based on the fact that he received the first amended list of exhibits on June 29th which Downs stated was untimely. Exhibits were received on July 5th were due on July 2nd - that was untimely. Claimed all the exhibits were not listed on the exhibit lists. Konstantaras responded at the hearing were the exhibits were in large part documents given to him by the City - therefore he did not believe he needed to provide a list of the City's own documents that he was bringing to the hearing.

Downs said that the City did not receive the exhibits on July 2nd, he received them on July 5th, that the City staff only looked at the medical literature, but they did not look at their own documents. Then there were the City documents that were brought to the hearing by Konstantaras, those Downs also asked to have excluded. Hearing examiner excluded all of the appellants' exhibits/documents that were produced by the City.

Port of Seattle v. Equitable Capital Group, Inc.
https://law.justia.com/cases/washington/supreme-court/1995/60397-9-1.html

The court observed that, despite a January 8, 1993 order requiring all experts to clearly state their opinions based upon the facts provided by January 11, 1993, Dr. Whitelaw "significantly changed the database to include new categories of properties and new properties, changing the comparables from 88 to 237, based, primarily, on the database that he's been using all along. The factors in the coefficients in this model have changed significantly, as has its value".[24] The court granted the Port's motion to exclude the expert testimony of Dr. Whitelaw.

In excluding the testimony, the trial court noted that Appellant's expert obtained two widely disparate conclusions on fair market value. Prior to the deadline of January 11, 1993, the expert determined a fair market value of $4.3 million based upon 88 comparables. After the deadline, the expert determined a fair market value of $65 to $70 million based upon 237 comparables.

[1] By not complying with the pretrial order of January 8, 1993 and the complete change of his database with expansion of his comparables from 88 to 237 after January *210 11, 1993, Dr. Whitelaw effectively deprived the Port of the opportunity to investigate his comparables. The trial court properly rejected his testimony which would have resulted in prejudice to the Port.

Equitable also argues that the trial court erred in excluding the expert testimony of Thomas Dantzler,[25] who would have testified concerning the fair market value[26] of the property.[27] Mr. Danzler's determination of fair market value ostensibly was based upon his ownership interest in the property,[28] his extensive knowledge about property values and their determinants in the vicinity of the Seattle-Tacoma International Airport, and his knowledge of the prices of property bought and sold in the vicinity.[29]

The trial court excluded Mr. Dantzler's testimony concerning the fair market value of the property because he did not identify the theory, technique or method he used in formulating his opinion of the value per foot of the property.[30] The court observed that he "c[a]me up with a value per foot[] and ... multiplie[d] that times what he believe[d] to be the potential buildable square feet".[31] The court further observed that Mr. Dantzler had "done no sort of discounted cash flow or income valuation analysis" and concluded there was "no basis [for the court] to know *211 how he came up with his per foot value".[32] The trial court excluded his testimony.

SUMMARY AND CONCLUSIONS

The trial court did not err in excluding the testimony of Dr. William E. Whitelaw, the Appellant's expert witness, on fair market value.

Neither did the court err in excluding the testimony of *220 Thomas Dantzler on fair market value. Although Equitable correctly asserts that landowners have a right to testify concerning the fair market value of their property, that is not an absolute right. Mr. Dantzler's testimony was not based upon a reliable foundation. His opinion of fair market value of the property was reached by projecting millions of square feet of building space upon the speculation of building numerous high rise office towers and multiplying it by $12. He provided no method, reasoning, or explanation for the projected millions of square feet which, multiplied by $12, resulted in a fair market value of $33.6 million.

Falk v. Keene
http://courts.mrsc.org/appellate/053wnapp/053wnapp0238.htm
See also Taylor v. Cessna

Finally, appellant raises the issue of whether it was error for the trial court to exclude two of plaintiffs' expert pathologists as witnesses. Although the issue is unlikely to arise on retrial, because of the importance and necessity of the trial court having broad discretion to regulate discovery, especially in complex cases such as this one, we address this issue. Plaintiffs had failed to reveal their intent to call these witnesses until the trial was virtually set to begin. We conclude that the trial court did not err in striking these witnesses. Appellants' only excuse for failing to properly note these witnesses in compliance with the pretrial order, to which no objection or assignment of error has been made and which provided for the exclusion of witnesses as a sanction for noncompliance, was their attorney's inadvertent mistake. The absence of a reasonable excuse for noncompliance with a discovery order is sufficient to support a finding that the noncompliance was willful. TAYLOR v. CESSNA AIRCRAFT CO., 39 Wn. App. 828, 836, 696 P.2d 28, REVIEW DENIED, 103 Wn.2d 1040 (1985). Appellant has failed to assert a reasonable excuse. Therefore, the trial court did not abuse its discretion by excluding the testimony of these pathologists as a sanction for violation of the pretrial order. FRED HUTCHINSON CANCER RESEARCH CTR. v. HOLMAN, 107 Wn.2d 693, 706-07, 732 P.2d 974 (1987).

Taylor v. Cessna

The trial court's finding Cessna's conduct was reasonable is not supported by the evidence. We emphasize in particular the subpoenas duces tecum which requested any and all information in Cessna's possession relating to fuel system modification or alteration in the 210 aircraft, and made no mention of the Sedco valve. If, as Cessna claims, the test was of a 210 model and not the 200 series in general, information regarding it clearly fell within Taylor's request. Whether a 206 model or a Sedco fuel selector valve was involved is immaterial; all information reasonably calculated to lead to admissible evidence is discoverable. CR 26(b)(1). Under any fair reading of Taylor's discovery

requests, we are constrained to disagree with the trial court's finding of reasonableness.

It is not for the defense to unilaterally decide what is relevant. GAMMON v. CLARK EQUIP. CO., SUPRA. Cessna's remedy was to seek a protective order, not to withhold discoverable material based upon its interpretation of what Taylor's theories were. CR 26(c); GAMMON v. CLARK EQUIP. CO., SUPRA. ACCORD, ROZIER v. FORD MOTOR CO., 573 F.2d 1332, 50 A.L.R. Fed. 914 (5th Cir. 1978).

[5] A new trial based upon the prevailing party's misconduct does not require a showing the new evidence would have materially affected the outcome of the first trial. CR 60(b)(4). SEE ROZIER v. FORD MOTOR CO., SUPRA (interpreting identical federal rule).

"[I]t cannot be stated with certainty that all of this would have changed the result of the case. But, as said by the Supreme Court, a litigant who has engaged in misconduct is not entitled to "the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent." Minneapolis, St. Paul & S.S. Marie Ry. Co. v. Moquin, 1931, 283 U.S. 520, 521-522, 51 S.Ct. 501, 502, 75 L.Ed. 1243. SEABOLDT v. PENNSYLVANIA R.R., 290 F.2d 296, 300 (3d Cir. 1961). ACCORD, GAMMON v. CLARK EQUIP. CO., SUPRA; ROZIER v. FORD MOTOR CO., SUPRA.

The trial court also denied a new trial based on newly discovered evidence, CR 60(b)(3), finding the tests were not material to the issues litigated and would not have affected the outcome of the trial. In light of our holding Taylor is entitled to a new trial under CR 60(b)(4), we do not reach this issue. We note, however, Taylor could not litigate issues he did not know existed; we do not condone Cessna's actions which deprived Taylor of an alternate theory upon which to argue liability.

Taylor argues the trial court should have ordered additional discovery at Cessna's expense, or an evidentiary hearing before rendering its decision on the second new trial motion. The voluminous record in this case has been continuously growing since the accident occurred in 1976, and contains over 2,000 pages of trial transcript, depositions, exhibits, legal memoranda, motions and rulings. The trial court had more than enough information before it to render a decision.

Taylor discusses sanctions at length, arguing they are mandatory in a discovery violation case. We find the trial court's award of $4,857.06 in connection with the second new trial motion to be reasonable. CR 37. We believe that sum and the expense to Cessna of a new trial to be a sufficient sanction

Sacred Heart

The Burnets contend that the Court of Appeals erred in affirming the trial court's order limiting discovery, in effect removing their claim that Sacred Heart was negligent in granting hospital privileges to the doctors who treated Tristen at that hospital. In the Burnet's view, the Court of Appeals's decision constituted a sanction for discovery abuse, a sanction which they argue was not warranted because “the trial court never found that there was a violation of a court order, or a willful non-disclosure,” and was, in any case, excessive. Pet. for Review at 1. Sacred Heart responds that, even in light of the Court of Appeals's recharacterization of the issue as a “compliance problem with a scheduling order,” that court did not err in determining that the trial court did not abuse its discretion in entering an order limiting claims and discovery. Answer to Pet. for Review at 8.

Although the Court of Appeals affirmed the trial court, it rejected the trial court's ruling that the claim of corporate negligence had not been properly pleaded. The Court of Appeals was correct in that regard because, as it noted, the issue of corporate negligence was placed into contention by the complaint “together with interrogatory answers and with pretrial proceedings.” Burnet, slip op. at 9 (citing Schoening v. Grays Harbor Community Hosp., 40 Wash.App. 331, 336-37, 698 P.2d 593) (indicating that even where a “complaint is not a vision of precise pleading[,] . [a] claim is adequately pleaded if it contains a short, plain statement showing that the pleader is entitled to relief, and a demand for judgment based thereon.”), review denied, 104 Wash.2d 1008 (1985).

Despite rejecting the theory upon which the trial court ruled, the Court of Appeals was not foreclosed from upholding the trial court's ruling on the well-recognized basis that "on appeal, an order may be sustained on any basis supported by the record." Hadley v. Cowan, 60 Wash.App. 433, 444, 804 P.2d 1271 (1991) (citing LaMon v. Butler, 112 Wash.2d 193, 200-01, 770 P.2d 1027, cert. denied, 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989)). The issue we must decide, therefore, is whether the record and law support the Court of Appeals's conclusion that the trial court's order was a justifiable response to "compliance problem with a scheduling order." Burnet, slip op. at 10.

The trial court's order excluding from the case the issue of negligent credentialing by Sacred Heart, and limiting discovery on that issue, was precipitated by a motion Sacred Heart made pursuant to Civil Rule 26. That rule authorizes a trial court to direct that the parties confer on the subject of discovery.[3] It also provides that following a discovery conference, the trial court may enter an order identifying the issues for discovery purposes, setting limits on discovery, and determining "such other matters, . as are necessary for the proper management of discovery in the action." CR 26(f).

When "a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just[.]" CR 37(b)(2). Among the sanctions available for violations of this rule is "[a]n order refusing to allow the disobedient party to support . designated claims . or prohibiting him from introducing designated matters in evidence[.]" CR 37(b)(2)(B).

This rule is consistent with the general proposition that a trial court has broad discretion as to the choice of sanctions for violation of a discovery order. Phillips v. Richmond, 59 Wash.2d 571, 369 P.2d 299 (1962). Such a "discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Associated Mortgage Investors v. G.P. Kent Constr. Co., 15 Wash.App. 223, 229, 548 P.2d 558, review denied, 87 Wash.2d 1006 (1976). Those reasons should, typically, be clearly stated on the record so that meaningful review can be had on appeal. When the trial court "chooses one of the harsher remedies allowable under CR 37(b), . it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed," and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial. Snedigar v. Hodderson, 53 Wash.App. 476, 487, 768 P.2d 1 (1989) (citing to due process considerations outlined in Associated Mortgage), rev'd in part, 114 Wash.2d 153, 786 P.2d 781 (1990). We have also said that " 'it is an abuse of discretion to exclude testimony as a sanction [for noncompliance with a discovery order] absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.' " Fred Hutchinson Cancer Research Ctr. v. Holman, 107 Wash.2d 693, 706, 732 P.2d 974 (1987) (quoting Smith v. Sturm, Ruger & Co., 39 Wash.App., 740, 750, 695 P.2d 600, 59 A.L.R.4th 89, review denied, 103 Wash.2d 1041 (1985)).

The Burnets assert that they did not willfully violate the court's discovery order. Thus, they rely on Hutchinson to support their argument that the trial court erred in entering an order prohibiting discovery on their corporate negligence claim and excluding that issue from the case.

Sacred Heart responds that the Burnets willfully violated the discovery order because they were "without reasonable excuse." Allied Fin. Servs., Inc. v. Mangum, 72 Wash.App. 164, 168, 864 P.2d 1 (1993), 72 Wash.App. 164, 871 P.2d 1075 (1994). The Court of Appeals apparently agreed with Sacred Heart, concluding the Burnets' explanation that their "experts could shed no light on whether a viable credentialing claim existed without access to the file which [Sacred Heart] steadfastly refused to provide, first as a matter of confidentiality and later as a matter of immunity," was not a reasonable excuse for the Burnets' failure to specifically describe the contents of their experts' opinions as required by discovery scheduling order. Burnet, slip op. at 11. Sacred Heart also attacks the Burnets' reliance upon Hutchinson, asserting that the Burnets

ignore[ ] the more recent decision in Physicians Insurance Exchange v. Fisons Corp. In the context of a violation of discovery rules, the court held that

. intent need not be shown before sanctions are mandated.

Rather, the court held:

The wrongdoer's lack of intent to violate the rules . may be considered by the trial court in fashioning sanctions.

Answer to Pet. for Review at 16 (citations omitted).

In emphasizing the above-quoted portions of the Fisons ' opinion, Sacred Heart overlooks or de-emphasizes the underlying principles enunciated therein. See Washington State Physicians Ins. Exch. & Ass'n. v. Fisons Corp., 122 Wash.2d 299, 858 P.2d 1054 (1993). Some of those guiding principles are as follows: the court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery; the purpose of sanctions generally are to deter, to punish, to compensate, to educate, and to ensure that the wrongdoer does not profit from the wrong. Fisons, 122 Wash.2d at 355-56, 858 P.2d 1054.

Sacred Heart also cites two post-Fisons decisions in which the Courts of Appeals upheld the respective trial courts' imposition of sanctions for what were considered to be "willful" violations of discovery rules. In one of the cases, Allied Fin. Servs. v. Mangum, 72 Wash.App. 164, 168, 864 P.2d 1 (1993), 72 Wash.App. 164, 871 P.2d 1075 (1994), the trial court excluded witnesses for the defendants because they could not provide an explanation for failing, up to the time of trial, to name any of their witnesses. In the other case, Dempere v. Nelson, 76 Wash.App. 403, 405, 886 P.2d 219 (1994), review denied, 126 Wash.2d 1015, 894 P.2d 565 (1995), the trial court excluded a witness that the party identified only 13 days before trial.

We note, initially, that the sanction that was imposed in this case is significantly more severe than the sanctions imposed in either Allied or Dempere. Here, the trial court not only limited the Burnets' discovery on the credentialing issue, but it also removed that issue from the case. Furthermore, the circumstances of this case are far different than those which the Court of Appeals faced in the two above-cited cases. One major difference is that although several years had transpired from the initiation of the Burnets' claim until their expert witnesses were named, deposed, and their opinions was clearly identified, a significant amount of time yet remained before trial. That being the case, Sacred Heart could not be said to have been as greatly prejudiced as the non-wrongdoing parties in Allied and Dempere, who engaged in the sanctionable conduct on the eve of trial.[4] In addition, unlike the situation in Allied and Dempere, the record here reveals that some of the delay in completing discovery was due to what can only be described as bickering between counsel for the opposing parties. While some of the responsibility for this unfriendly atmosphere can be attributed to the Burnets' counsel, we are satisfied, after reviewing the voluminous record, that Sacred Heart's counsel bears a portion of the responsibility for the acrimonious spirit that developed, and which had the effect of delaying the identification and refinement of the issues before the court.

More importantly, though, we agree with the Burnets that its negligent credentialing claim against Sacred Heart, and discovery relating to it, should not have been excluded absent a trial court's finding that the Burnets willfully violated a discovery order. In that regard, we rely upon Hutchinson and note that there was no finding by the trial court of willful violation on the part of the Burnets. Indeed, the record would not support such a finding.

In any case, we are satisfied that it was an abuse of discretion for the trial court to impose the severe sanction of limiting discovery and excluding expert witness testimony on the credentialing issue without first having at least considered, on the record, a less severe sanction that could have advanced the purposes of discovery and yet compensated Sacred Heart for the effects of the Burnets' discovery failings.[5] See Fisons, 122 Wash.2d at 355-56, 858 P.2d 1054. Furthermore, even if the trial court had considered other options before imposing the sanction that it did, we would be forced to conclude that the sanction imposed in this case was too severe in light of the length of time to trial, the undisputedly severe injury to Tristen, and the absence of a finding that the Burnets willfully disregarded an order of the trial court. See Lane v. Brown & Haley, 81 Wash.App. 102, 106, 912 P.2d 1040 ("[T]he law favors resolution of cases on their merits."), review denied, 129 Wash.2d 1028, 922 P.2d 98 (1996).

The dissent concludes that the sanction imposed by the trial court was appropriate, preferring to interpret the civil rules for superior court in a way that facilitates what it describes as the "case management powers of the trial courts." Dissenting op. at 1048. While we are not unmindful of the need for efficiency in the administration of justice, our overidding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action. See CR 1. Because we believe it would be an injustice to deny Tristen Burnet's parents and her representatives an opportunity to present a potentially valid negligent credentialing claim against Sacred Heart, the case should be remanded for a trial on that issue.

Finally, it should be noted that the dissent faults the Burnets for not moving to modify the trial court's order prior to trial, characterizing this as a "fail[ure] to mitigate any harm arising from the alleged error." Dissenting op. at 1046. The dissent further suggests that by such a "failure," the Burnets "did not effectively preserve the error for appellate review." Dissenting op. at 1046. We observe, first, that this issue was not raised by Sacred Heart at the trial court or at the Court of Appeals. Consequently, there was no briefing by either party on the issue. Furthermore, the dissent fails to acknowledge relevant rules concerning preservation of error. Where, as here, the issue was clearly before the trial court, and its prior rulings demonstrated that a motion to modify the order would not have been granted, a party

cannot be reasonably held to have waived the right to assert the error on appeal merely by declining to engage in the useless act of repeating their arguments in a motion to amend the trial court's order. East Gig Harbor Improvement Ass'n v. Pierce County, 106 Wash.2d 707, 709-10 n. 1, 724 P.2d 1009 (1986) ("As long as the trial court had sufficient notice of the issue to know what legal precedent was pertinent this court will not refuse to consider the issue.") (citing Osborn v. Public Hosp. Dist. 1, 80 Wash.2d 201, 492 P.2d 1025 (1972)). See also Phillips v. Kaiser Aluminum & Chem. Corp., 74 Wash.App. 741, 753-54, 875 P.2d 1228 (1994) (where a trial court has ruled before trial that the jury would only consider certain matters, the plaintiff "was not required to propose an instruction that he knew would not be given").

In conclusion, we reverse the Court of Appeals affirmance of the trial court's protective order. While the judgment with respect to Sacred Heart's liability for the alleged negligence of its nurses is not disturbed, the case is remanded for further proceedings on the Burnets' claim that Sacred Heart was negligent in granting hospital privileges to Dr. Graham and Dr. Donlan.

Reversed and remanded.

Although we have adopted rules which provide for strong case management by trial court judges in order to speed up the administration of justice in our courts,[1] the majority determines the trial court here abused its discretion in exercising its case management authority under our civil rules. Yet, the trial court did not abuse its discretion under our rules for discovery conferences and pretrial conferences, and properly limited discovery on a theory when the Burnets did not comply with the pretrial discovery order. I would affirm the trial court.

FACTS

As the majority recounts in its opinion, this case arose out of conduct which occurred in 1983 and 1985. The original lawsuit was filed in 1984 and has gone through numerous permutations before reaching us in its present form. Various defendants have settled with the Burnets. New sets of defendants have been joined. The case is 12 years old. It has also been the subject of previous appellate review. See Burnet v. Spokane Ambulance, 54 Wash.App. 162, 772 P.2d 1027, review denied, 113 Wash.2d 1005, 777 P.2d 1050 (1989). The case has also been characterized by constant conflicts between counsel in which the lawyers heaped personal abuse upon one another. The trial court imposed some $8,000 in sanctions on counsel for plaintiff alone.

The present controversy relates to an order entered by the Court in response to Sacred Heart's October 12, 1990 motion, requiring the Burnets to identify all of their experts by December 1, 1990, and make them available for deposition no later than 60 days thereafter. In response to interrogatories submitted prior to the entry of the discovery order, the Burnets filed supplemental answers on April 18, 1991, asserting that Sacred Heart Hospital (Sacred Heart) was negligent in failing to properly review the credentials of two of its physicians who treated Tristen Burnet.

In response to the supplemental answers, Sacred Heart asked the trial court to convene a conference pursuant to CR 16 and 26(f) and to enter a protective order prohibiting discovery on the Burnets' credentialing claim because they had not pleaded such a cause of action.[2] Sacred Heart specifically argued to the trial court that the Burnets could not

amend their complaint to assert a negligent credentialing issue. The trial court entered an order granting Sacred Heart's motion because a claim for corporate negligence pertaining to credentialing of Sacred Heart staff physicians was not then at issue in the case and there could be no discovery on it. The trial court, however, did not foreclose a CR 15 motion by the Burnets to amend their complaint to specifically assert the issue of corporate negligence predicated on negligent credentialing. Subsequently, the Burnets amended their complaint several times, but failed to properly assert a negligent credentialing claim. On November 4, 1992, the Burnets sought leave to file another amended complaint adding this claim. As no disposition of this motion appears in the record it was apparently struck and not heard. The Burnets also raised the negligent credentialing issue before trial, but the trial court adhered to its July 8, 1991 order. Burnet v. Spokane Ambulance, No. 14052-1-III (Aug. 10, 1995), slip op. at 5.

ANALYSIS

A. CR 16/CR 26(f) Conferences

Sacred Heart moved under CR 16 and CR 26(f) for a conference before the trial court. The combination of the rules as authority for the conference ultimately held by the trial court created unnecessary confusion.

CR 16, based on a federal counterpart and adopted in 1967, provides as follows:

(a) Hearing Matters Considered. By order, or on the motion of any party, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) Such other matters as may aid in the disposition of the action.

b) Pretrial Order. The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions.

Generally, the purpose of a CR 16 conference is to compel the parties to disclose their claims and defenses, and to allow the parties and the court to assess the need for amendments to the parties' pleadings. See 3A Orland and Tegland, Washington Practice (4th ed.1992) 404-05. In entering orders based on the pretrial conference, the trial court enjoys substantial discretion in dealing with cases. Such orders have addressed evidentiary rulings, witness lists, and agreed facts. Id. at 406. The trial court may even limit the number of expert witnesses. Vasquez v. Markin, 46 Wash.App. 480, 491, 731 P.2d 510 (1986), review denied, 108 Wash.2d 1021 (1987).

Once entered, the pretrial order controls the subsequent handling of the case, unless modified. Stempel v. Department of Water Resources, 82 Wash.2d 109, 115, 508 P.2d 166 (1973). A pretrial order may be modified if a party can demonstrate a manifest injustice will result from the enforcement of the order:

The general rule is that new theories will not be entertained after the parties have entered into pretrial conference and a pretrial order has been issued as a result. The parties are bound by the facts agreed to and established by the order.

Esmieu v. Schrag, 92 Wash.2d 535, 537, 598 P.2d 1366 (1979) (citations omitted).

CR 26(f) is of more recent vintage. Adopted in 1985, the rule states:

Discovery Conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.

Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party.

Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by rule 16.

Again, the rule provides for substantial judicial discretion in the entry of the order and expressly provides the order may be "altered or amended whenever justice so requires."

B. The Discovery Conference Order Entered by the Trial Court

The trial court entered two key orders in this case. It ordered the Burnets to disclose experts by December 1, 1990 and to make them available for deposition no later than February 1, 1991. The Burnets subsequently revived the physician credentialing claim when they filed supplemental answers to interrogatories on April 18, 1991. These answers were filed long after the discovery cut off date of December 1, 1990. This action prompted Sacred Heart's request for a discovery conference. As a result of the conference, the trial court entered an order on July 8, 1991 which found "claims based on the doctrine of corporate negligence regarding credentialing have not been sufficiently pleaded nor have responses to discovery given sufficient notice of any such claim against Sacred Heart Medical Center" and ordered:

[N]o claim of corporate negligence regarding credentialing is at issue in this litigation and there shall be no further discovery from defendant Sacred Heart Medical Center on that issue.

Clerk's Papers at 194-95. Sacred Heart also argued the Burnets should not be permitted to amend their pleadings to include a negligent credentialing claim. However, no such bar to amendment appears in the order.

Although there has been some confusion in the case as to whether this order was based on CR 16 or CR 26(f), as the majority notes, Majority op. at 1039 n.1; 1040 n.3, the operative effect of the order is the same whether based on CR 16, or CR 26(f). The order was a proper exercise of the trial court's discretion to manage the case.

It is the proper function of the trial court to exercise its discretion in the control of litigation before it. Doe v. Puget Sound Blood Ctr., 117 Wash.2d 772, 777, 819 P.2d 370 (1991). The trial court possesses broad discretion to manage discovery in a fashion that will implement full disclosure of relevant information and at the same time protect against harmful side effects. To that end, the court can issue protective orders regulating the extent and manner of

discovery. State v. Hamilton, 24 Wash.App. 927, 935-36, 604 P.2d 1008 (1979) (citations omitted), review denied, 94 Wash.2d 1007 (1980). See also Rhinehart v. The Seattle Times Co., 98 Wash.2d 226, 232, 654 P.2d 673 (1982), affirmed, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984); Penberthy Electromelt Int'l, Inc. v. U.S. Gypsum Co., 38 Wash.App. 514, 521, 686 P.2d 1138 (1984). Thus, the entry of orders by the trial court on discovery matters is within the discretion of the trial court and we review such orders only when the trial court has abused its discretion.

[Quoted text hidden]