IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SUMMER V. RICHARDS, as duly appointed personal representative of the estate of BRIAN W. RICHARDS; SUMMER V. RICHARDS Individually; SUMMER V. RICHARDS as duly appointed guardian of the estate and person of BRAEDEN F. RICHARDS, DOB 2-9-2002; SUMMER V. RICHARDS as duly appointed guardian of the estate and person of LAELA L. RICHARDS, DOB 9-16-2004; and SUMMER V. RICHARDS, as duly appointed Guardian of the estate and person of CHENAYA R. RICHARDS, DOB 5-11-2006, Appellants, v. AMERICAN MEDICAL RESPONSE NORTHWEST INC., a foreign corporation doing business in Washington; SCOTT SQUIRES; and LEWIS FOX, Respondents.	No. 42141-1-II UNPUBLISHED OPINION

Bridgewater, J.P.T.[1] — Following a defense verdict for American Medical Response Northwest Inc. (AMR) in a wrongful death suit, Summer Richards appeals from the trial court's denial of a new trial and all interlocutory rulings. We hold that: (1) a monetary sanction against AMR for discovery abuse was appropriate; (2) no proximate cause was proven for negligent retention and supervision by AMR of its employees; (3) the trial court did not abuse its discretion when it ruled that a witness's prior felony conviction for second degree encouragement of child

[1] Judge C. C. Bridgewater is serving as a judge pro tempore of the Court of Appeals, Division II, pursuant to CAR 21(c).

sex abuse was not a crime of dishonesty and not relevant; and (4) Summer[2] waived any objection she had to jury instructions. We affirm.

FACTS

A. Emergency Medical Services

Emergency medical service providers include firefighters, paramedics, and emergency medical technicians (EMTs). AMR is a private ambulance and emergency response company, which contracts with Clark County to be the sole provider of ambulance services. AMR employed Scott Squires and Lewis Fox as a paramedic and EMT, respectively. Although Squires and Fox worked for AMR, a private company, they worked under the license, supervision, and jurisdiction of the state-appointed physician medical program director for Clark County, Dr. Lynn Wittwer.

B. Cardiac Arrest

After coming home from work, 32-year-old Brian Richards told his wife Summer that he was experiencing chest pain and pain radiating down his arm, making his fingertips numb. When the pain did not subside, Summer took him to an urgent care clinic. Dr. Arthur Simons examined Brian and ordered a 12-lead electrocardiogram (EKG). The EKG showed normal results. Dr. Simons explained that the hospital could perform better testing than what he could do in his office; Brian declined to go to the hospital that evening, but he agreed to go to the hospital or call 911 if he had more chest pains. Brian also agreed to return in the morning for blood tests. Dr. Simons told Brian that they would schedule a stress test.

[2] We use Brian and Summer Richards's first names for clarity; we intend no disrespect.

Early the next morning, Brian awoke with chest pain so severe that he woke up Summer and asked, "[W]hat do I do? What do I do? I don't want to die." Verbatim Report of Proceedings (VRP) at 911. Brian took aspirin and called 911. The fire department arrived first and fire fighter Travis Hardin initiated care by obtaining a 4-lead EKG. Squires and Fox arrived shortly thereafter and obtained a verbal report and the 4-lead EKG from the fire fighters. Squires and Fox did not obtain a 12-lead EKG, violating Clark County patient care protocol.

According to Summer, Brian told the emergency responders that he had felt pain in his arm and numbness in his fingertips. Also according to Summer, Squires and Fox did not examine Brian; they told him that his symptoms might be heartburn, and they related that taking vinegar helps with heartburn. Brian responded that if his symptoms were just because of heartburn, he did not want transport to the hospital and he signed the transport refusal paperwork.

According to Squires, Squires evaluated the EKG strip obtained by the fire fighters and determined that the results were normal. Then, Squires and his team evaluated Brian, including obtaining vitals and a brief medical history. Brian appeared calm and told Squires that the pain was gone. Brian also told Squires that in addition to chest pain, he had felt arm pain and he felt a burning sensation up into his neck. Squires thought that Brian appeared to be experiencing heartburn, but he recommended transport to the hospital. Brian told Squires that he already had an office appointment with Dr. Simmons later that morning, and he declined the transport to the hospital. One of the fire fighters signed the transport refusal form.

Squires did not contact his medical control physician regarding Brian's refusal, violating Clark County protocol. Because the fire fighters had obtained a hospital transport refusal form,

Squires and Fox did not obtain a separate patient refusal form from Brian, again violating AMR and Clark County protocol. Squires's pre-hospital care report lacked an assessment record and lacked Brian's vital signs. Shortly thereafter, all the emergency responders departed the scene. Squires and Fox had been on the scene for approximately 11 minutes.

Brian returned to Dr Simon's clinic later that morning for laboratory testing. No doctor examined him and he did not discuss his 911 phone call or intense chest pain with anyone at the clinic. Later that evening, Brian died at home. An autopsy determined that Brian died from occlusive atherosclerotic cardiovascular disease.

C. Informal Discipline

Squires contacted Heather Tucker, AMR's clinical education director, and told her that he had erroneously entered and transmitted information from a different call into the pre-hospital care report for Brian. Tucker reviewed the records from Squires's response and contacted Dr. Wittwer because of Squires's protocol violations. Dr. Wittwer, in turn, recommended that the Department of Social and Health Services (DSHS) investigate Squires. In response, DSHS investigated Squires and informally disciplined him. Squires stipulated to the complaints and allegations against him, namely, that in response to Brian's call: (1) he did not prepare paramedic-level documentation; (2) he delegated obtaining patient refusal documentation to a nonparamedic; (3) he did not document information regarding patient contact or treatment; (4) he did not obtain a 12-lead EKG; (5) he did not address the obvious hypertension; and (6) he did not contact medical control for assistance after Brian's refusal to accept medical treatment. DSHS imposed a two-year probation on Squires's paramedic practice.

D. Procedural Facts

1. Pre-trial

In December 2008, Summer brought a wrongful death action based on medical malpractice against AMR, Squires, Fox, and Dr. Simmons.[3] Summer also claimed that AMR negligently retained and supervised Squires and Fox.

In March 2009, Richards sought discovery from AMR, including any "communication, report, statement, memorandum, [or] recording" made by AMR or any of its employees regarding Brian's incident. Clerk's Papers (CP) at 157. In response, AMR produced only Brian's EKG strip, Squires's pre-hospital care report, and some of Squires's notes. Under the Public Records Act, chapter 42.56 RCW, Summer obtained Tucker's 3-page investigative report from DSHS. The report concluded that because Squires had violated Clark County and AMR protocols, Clark County operations should: (1) review the case, (2) recommend that DSHS suspend Squires's lead paramedic status, and (3) determine whether paramedic certification for him was appropriate. Summer did not disclose that she had obtained the report to either AMR or the trial court.

In September 2009, Summer sought further discovery from AMR, requesting AMR's written policies, protocols, and procedures for EMTs in Clark County, and pre-hospital care reports generated by Squires or Fox near the time (60 days or less) of Brian's death. Regarding the policies, protocols, and procedures, AMR responded that its EMTs "use the guidelines from Dr. Wittwer's office previously provided to [them]." CP at 39. Regarding the pre-hospital care reports, AMR produced reports only for the day of Brian's 911 call. AMR objected to

[3] Dr. Simmons is not a party to this appeal.

production of additional pre-hospital care reports, stating that they were not reasonably calculated to lead to the discovery of admissible evidence and that patient privacy laws protect that information.

In February 2010, Summer moved to compel discovery, telling the trial court that she believed that AMR disingenuously denied the existence of its own policy documents. When the trial court heard oral argument on the matter, AMR had new counsel; Summer told the trial court that because AMR's new counsel was much more cooperative, she was not requesting sanctions and she "just want[ed] the materials." VRP at 5. The trial court gave an oral order requiring AMR to make its "best effort" to produce requested discovery by March 19, 2010, or state with specificity why AMR objected. VRP at 14. AMR timely produced discovery responses regarding policies, protocols, and procedures; however, AMR refused to provide additional pre-hospital care reports generated by Squires and/or Fox. Summer moved again to compel production of the pre-hospital care reports; the trial court ordered production and AMR produced them.

Based on deposition testimony that Tucker conducted an investigation and she kept a file, Summer sought production of Tucker's file; Summer still did not disclose that she had already obtained Tucker's three-page investigation report. Summer also sought production for "all e-mails related to" Brian's case. CP at 161. AMR objected to the e-mail request and responded:

> [T]here are no e-mails responsive to this request that are not either privileged due to the attorney-client privilege, or as work product prepared in anticipation of litigation.

CP at 161.

In November 2010, AMR produced Tucker's three-page investigation report but AMR

could not locate the rest of the file. Summer moved to compel production of (1) Tucker's complete investigative file and (2) all nonprivileged AMR e-mail regarding Brian's incident. Summer argued that AMR produced the three-page investigation report "[s]hortly before" she deposed AMR's clinical manager. CP at 161. She further argued that Tucker's investigative report was a "smoking gun" that established AMR's liability and that AMR's claim that it could not find the complete file was "troubling." CP at 161. Summer also argued that AMR's position, that there were no nonprivileged e-mails, was untenable.

On December 3, 2010, the trial court ordered AMR to (1) conduct an exhaustive search for Tucker's complete investigative file; (2) conduct an exhaustive search for all e-mail related to Brian; (3) produce all discovered documents no later than December 17, 2010; and (4) produce a CR 30(b)(6) designee to answer questions regarding the e-mails by December 10.

After the order, AMR conducted the searches, including a system-wide e-mail search resulting in 197 pertinent e-mails. AMR disclosed the e-mails to Summer on December 17; however, AMR asserted that the e-mails were subject to attorney/client privilege. AMR timely produced a CR 30(b)(6) deponent, who testified that he performed the system-wide e-mail search, that he was the only AMR employee who could conduct such a search, and that this was the first time he had been asked to conduct a system-wide search.

In January 2011, Summer moved for discovery sanctions under CR 37 based on the cumulative effect of AMR's delayed production. During the sanctions hearing, the trial court expressed concern that AMR had disclosed the e-mails only after a court order to do so. AMR responded that before the court ordered an exhaustive search, AMR had based its e-mail

production on the e-mail accounts of six deposed witnesses who testified that they looked for pertinent e-mails on their computers without finding anything. AMR further responded that it had complied with the order to conduct an exhaustive search and found and disclosed 197 privileged e-mails. The parties agreed to have the trial court review these e-mails in camera to determine if a privilege applied.

The trial court stated that there had been "an abuse in the answer to the interrogatories by the first attorney," however, the second attorney had cooperated. VRP at 97. The trial court also stated that it had noted "willfulness" but did not see how there was prejudice. VRP at 106. The trial court expressed frustration with Summer's lack of candor[4] about possessing Tucker's three-page report since 2009, and stated that it would continue to consider the sanctions issue. After an in camera review of AMR's 197 e-mails, the trial court found that the e-mails fell within the attorney/client privilege and ordered them sealed.

The trial court granted Summer's sanction motion and awarded her $43,295 for attorney fees and costs related to her motions to compel AMR to comply with discovery requests. The sanctions award also ordered AMR to pay costs for any reopened depositions. Summer did not reopen depositions; AMR paid the award judgment and Summer acknowledged satisfaction of judgment.

2. Evidence at Trial

Dr. Michael Kwasman, a cardiologist, testified that chest pain that moves to the arm is a

[4] AMR learned that Summer obtained Tucker's three-page investigative report by public records request and alerted the trial court to this fact in its response to Summer's sanctions motion.

symptom of heart problems. Dr. Kwasman also testified that blood tests can show that a person has had a heart attack but that they take four to six hours to show results. Dr. Kwasman further testified that because a 12-lead EKG looks at more areas of the heart, he believed that if the paramedics had used a 12-lead EKG on Brian, it would have shown some abnormality. Dr. Kwasman testified that if Squires and Fox had transported Brian to the hospital and if the hospital admitted him, the hospital cardiologist would have conducted a stress test, which would have revealed his serious but treatable heart issues.

Dr. Marvin Wayne, an emergency room doctor and the medical program director for Whatcom County, testified that based on Brian's symptoms, he believed that a paramedic should have telephoned his medical control physician to help convince Brian to go to the hospital. But Dr. Wayne could not say with certainty that Squires's failure to obtain a 12-lead EKG was significant.

Dr. Wittwer testified that his responsibilities as the appointed medical program director for Clark County include: (1) recommending certification, (2) providing clinical protocols and clinical oversight, (3) ensuring continuing education, and (4) reviewing performance and protocol compliance and that he considered his recommendation for recertification or disciplinary action to be one of his main charges. Dr. Wittwer testified that the State granted certification and that he did not have the right to revoke someone's certification, which the State viewed as a property right. But Dr. Wittwer testified that he did have authority to suspend certification in the case of imminent public danger. Dr. Wittwer testified that once or twice before Brian's 911 telephone call occurred, he had met with Squires to discuss sloppy documentation or charting issues. Dr.

Wittwer also testified that after Squires's response to Brian's 911 telephone call, he sent a letter "chew[ing] [Squires] out" for his failure to document the call properly. VRP at 1033.

David Fuller, the general manager for AMR in Vancouver testified that he had authority to terminate Squires's and Fox's employment. Fuller also testified that if he wanted to forbid Squires and Fox from working together he could have done so. Fuller verified that prior to Brian's 911 telephone call, he had terminated Squires's employment after Squires was tardy nine times and that about one year later, AMR had rehired Squires. Fuller also verified that Squires had received an "administrative remark" for not getting signatures for billing information. VRP at 1322. Additionally, Fuller verified that Squires had been in a preventable collision and that Squires submitted his recertification paperwork late.

Fuller verified that Fox had received "administrative remarks" for: (1) weaving in and out of traffic, (2) posting his ambulance in the wrong location, (3) putting a hole in a wall with his head, and (4) sleeping on his shift. Fuller also verified that on one year's performance review, Fox received a grade of "unsatisfactory performance" in the areas of initiative, interpersonal skills, productivity, quality, and signatures. CP at 1322, 1329. On the same review, Fox received a grade of "improvement desired" for adaptability, flexibility, decision-making, judgment, and job knowledge. CP at 1322, 1329.

The trial court granted AMR's motion to preclude any evidence regarding defense witness Hardin's current Oregon felony conviction for second degree encouragement of child sex abuse. Hardin, who had been a fire fighter and who had responded to Brian's 911 telephone call, gave his deposition from jail. The trial court stated it had reviewed the *Alexis* factors[5] and the factors "are

all met" with the exception of probative value versus prejudicial effect. VRP at 1363. The trial court said that the purpose of admitting conviction evidence is for impeachment, and sanitized conviction evidence (i.e., generically referring to the conviction as a felony) took away the impeachment purpose; yet here, if the conviction evidence included that the crime was child pornography, "then it clearly becomes too prejudicial." VRP at 1364. Summer argued that a person who is willing to commit a felony is also a person who is more likely to perjure himself, therefore, the court should admit the evidence in sanitized form. The trial court disagreed. Because Hardin was incarcerated and therefore unavailable, the parties agreed that one of AMR's attorneys would read portions of Hardin's deposition testimony to the jury.

At the close of Summer's case, AMR moved to dismiss, as a matter of law, Summer's negligent retention and supervision claims. The trial court took the issue under advisement, stating that the claim against AMR was "real weak" and that a negligent retention claim here was a "different" situation because of the emergency medical services certification and de-certification process, which involved a physician and the State. VRP at 1522. The trial court further stated that a negligent retention claim was also difficult here because any potential termination involved a union-type shop.

[5] *State v Alexis*, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980). These factors include (1) the length of the witness's criminal record, (2) the remoteness of the prior conviction, (3) the nature of the prior crime, (4) the age and circumstances of the witness when convicted, (5) the centrality of credibility to the issue, and (6) the impeachment value of the prior crime.

After reading all the briefing, the trial court dismissed Summer's negligent retention and supervision claims against AMR. The trial court noted that because of the dual supervision issues and also because of union representation, it would be merely speculative to say AMR could have supervised or retained Squires's and Fox's employment differently. But the trial court also noted that Fuller had testified that he could have fired Squires and Fox and that he could have had them not work together. Nonetheless, the trial court stated that there had been no showing that such action would have made any difference, noting that the fact that somebody can take different steps in handling an employee does not mean that the employer was negligent. The trial court concluded that therefore, the jury could only speculate without any evidence of negligence at all.

3. Jury Instructions, Deliberation, and Verdict

After both parties submitted proposed jury instructions, they agreed to discuss them with the trial court, off the record, and to make exceptions on the record the next day. AMR had proposed a qualified immunity instruction based on RCW 18.71.210. The following morning, the trial court presented what it believed to be the agreed instructions based on their discussion. The trial court identified the qualified immunity instruction as instruction 16.

The parties reviewed the instructions on the record with an opportunity to object. The trial court asked the parties if there were obvious errors; Summer did not object to instruction 16. Later, the trial court invited the parties to take formal exception, specifically asking if the jury instructions were correct statements of law and then asking if, as given, the instructions allowed the parties to argue their theories of the case. Summer responded affirmatively to both questions. The trial court then asked if there were any other reasons not to give the instructions. Summer

objected to instruction 16, saying, "[I]t's never been given before." VRP at 2518. Her co-counsel responded, "That's not true. [The trial court] found another one." VRP at 2518. The trial court responded that it had given the instruction before.

The jury found that both Squires and Fox provided emergency medical services to Brian in good faith. The jury also found that neither Squires nor Fox acted with gross negligence that was a proximate cause of Brian's death. Additionally, the jury found that neither Squires nor Fox acted with willful or wanton misconduct that was a proximate cause of Brian's death.

Summer moved for a new trial under CR 59. In a post-judgment declaration supporting her motion, Summer affirmed that, in the off-the-record jury instruction discussion, she had objected to the content of instruction 16 on the basis that it would confuse the jury. She also affirmed that she had asked that the trial court to add another paragraph from the statute. The trial court denied Summer's motion for new trial. Summer appeals.

ANALYSIS

Summer argues that the trial court erred by: (1) failing to order meaningful sanctions for AMR's discovery abuse, (2) dismissing her claim that AMR negligently retained and supervised two employees, (3) precluding her impeachment of a defense witness based on his felony conviction, and (4) issuing a jury instruction that omitted applicable provisions of the law. There was no error.

I. Discovery Abuse Sanctions

Summer argues that the trial court erred by failing to order meaningful sanctions for AMR's discovery abuse. Specifically, Summer argues that default is the only meaningful remedy.

We hold that the trial court did not abuse its discretion.

A. Standard of Review

The trial court is in the best position to determine appropriate discovery sanctions, thus we normally defer to the trial court's decision. *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 583, 220 P.3d 191 (2009). A trial court exercises broad discretion in imposing discovery sanctions under CR 26(g) or 37(b); and we will not disturb its determination absent a clear abuse of discretion. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). An abuse of discretion occurs when a decision is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Mayer*, 156 Wn.2d at 684 (quoting *Assoc. Mortg. Investors v. G. P. Kent Constr. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558, *review denied*, 87 Wn.2d 1006 (1976)).

B. Threshold Matters

We reject AMR's threshold arguments that the issue of discovery sanctions is not properly before this court because (1) Summer appeals from her final judgment and not from the judgment and order granting sanctions, (2) estoppel by judgment precludes relitigation, (3) RAP 2.5 bars appellate review, and (4) the record is insufficient to review.

AMR first argues that Summer's sanction issue is not properly before this court because she failed to appeal from the order granting sanctions. We reject this argument because we will review a trial court order not designated in the notice of appeal if the order prejudicially affects the decision designated in the notice. RAP 2.4(b); *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 134, 750 P.2d 1257 (1988). Here, Summer moved the trial court to sanction AMR by

striking AMR's answer. By refusing to strike AMR's answer and instead ordering payment of attorney fees, the sanctions order prejudicially affected the final judgment. Thus, Summer's appeal from her final judgment properly places the sanctions issue before this court.

AMR next argues that because Summer acknowledged and collected on the judgment for attorney fees, estoppel by judgment precludes relitigation. We reject this second threshold argument because estoppel by judgment precludes only relitigation; it does not preclude appeal. *See Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 330, 941 P.2d 1108 (1997) (discussing doctrine of res judicata and estoppel by judgment).

AMR's next threshold argument is that because Summer acknowledged and collected on the judgment for attorney fees, RAP 2.5 bars this appeal. We reject this argument because RAP 2.5 provides that a party may proceed with an appeal after receiving the benefits of the judgment; if that party would be entitled to the benefits regardless of the outcome of the appeal. RAP 2.5(b)(1)(iii); *Scott v. Cascade Structures*, 100 Wn.2d 537, 541, 673 P.2d 179 (1983). Here, if we were to determine that the trial court should have imposed a harsh remedy, such as default, Summer would still be entitled to her attorney fees award under CR 37(a)(4), for her successful motion to compel.

AMR's final threshold argument is that Summer failed to ensure a sufficient record for this court to review her sanctions argument and she has thereby waived the issue. We reject this argument because the record includes memoranda from both sides discussing the available sanctions and the record also includes the trial court's discussion of its sanctions decision. Therefore, the record is sufficient for our review and we now consider the merits of Summer's

sanctions argument.

C. Monetary Sanctions

Summer argues that given AMR's egregious discovery abuse, the trial court's sanction requiring AMR to pay her attorney fees for three motions to compel and to pay for any reopened depositions, was far too minimal a sanction to be meaningful. Summer specifically argues that default is the only meaningful remedy. We hold that Summer fails to show prejudice requiring a different sanction.

When a party fails to provide discovery, the trial court may order sanctions "as are just." CR 37(b)(2). "The purposes of sanctions orders are to deter, to punish, to compensate and to educate." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993). When punishing a discovery violation "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." *Burnet v. City of Spokane Ambulance*, 131 Wn.2d 484, 495-96, 933 P.2d 1036 (1997).

Remedies such as dismissal, default, and exclusion of testimony are among the "harsher" remedies under CR 37(b). *Mayer*, 156 Wn.2d at 690. If a trial court imposes one of the "harsher remedies" under CR 37(b), then the record must clearly show the three *Burnet* factors: (1) willful or deliberate violation of the discovery rules and orders, (2) substantial prejudice to the other party's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would have sufficed. *Magaña*, 167 Wn.2d at 584; *Burnet* 131 Wn.2d at 494. Although monetary compensatory sanctions do not trigger the three-part *Burnet* test, we use the test to examine whether the trial court abused its discretion by not imposing a "harsh" sanction. *Mayer*,

156 Wn.2d at 689.

D. Willfulness

Summer identifies four instances of AMR's discovery abuse: (1) AMR's denial of the existence of its patient care protocols, (2) AMR's withholding of pre-hospital care reports, (3) AMR's claim that it was unable to find its internal investigative files, and (4) AMR's claim that it had searched for e-mails. During the sanctions hearing, the trial court stated that it thought there were some disturbing issues and that AMR had willfully abused discovery. We deem a party's disregard of a court order without reasonable excuse or justification to be willful. *Magaña*, 167 Wn.2d at 584.

Regarding patient care protocols, Summer sought AMR's written policies, protocols, and procedures in September 2009. AMR did not produce the discoverable material until after the trial court issued an order compelling it to do so.

Regarding pre-hospital care reports, in September 2009, Summer sought pre-hospital care reports generated by Squires or Fox near the time (60 days or less) of Brian's death. AMR refused to provide the pre-hospital care reports until after the trial court repeatedly and specifically ordered their production on April 13, 2010. A party cannot simply ignore or fail to respond to the request. *Magaña*, 167 Wn.2d at 584.

Regarding AMR's internal investigative file, in July 2010, Summer sought production of an investigative file after learning through deposition testimony that Tucker made such a file. In November 2010, AMR produced Tucker's 3-page investigation report, but AMR could not locate the rest of the file.

Regarding production of e-mail, in May 2010, Summer sought “all e-mails” related to the case. CP at 161. In response, AMR merely searched the e-mail accounts of six deposed witnesses. AMR conducted an exhaustive e-mail search only after the trial court ordered it to do so. A corporation must conduct an extensive search all of its departments when responding to discovery. *Magaña*, 167 Wn.2d at 585-86.

Here, the trial court reasonably deemed AMR’s various delayed discovery, requiring court-ordered compulsion to be evasive and willful discovery abuse.

E. Prejudice

This prong of the test looks not to whether abusive discovery prevented Summer from obtaining a fair trial but whether it prejudiced her ability to prepare for trial. *Magaña*, 167 Wn.2d at 589. Summer argues that AMR’s discovery abuse prejudiced her because it harmed her ability to prepare and present her case. Specifically, Summer argues that AMR’s delay forced her to spend time and resources pushing AMR to produce relevant information. But Summer does not explain how she was prejudiced when: (1) she obtained the “smoking gun” document (Tucker’s three-page report) early on through a public records request, (2) AMR produced relevant documents after being ordered to do so, and (3) the trial court ordered AMR to pay Summer’s attorney fees and associated costs for motions to compel and to pay deposition costs. VRP at 26.

In *Magaña*, our Supreme Court concluded that discovery abuse caused Magaña to suffer substantial prejudice in preparing for his second trial because if discovery had been timely disclosed, Magaña would have further investigated Hyundai and would have further developed evidence. *Magaña*, 167 Wn.2d at 588. Significantly, after the discovery delay in *Magaña*,

"evidence was lost and much of what remained was too stale for effective use." *Magaña*, 167 Wn.2d at 588-89. Magaña's experts supported this conclusion by testifying that the late discovery from Hyundai would have been invaluable and useful during the first trial. *Magaña*, 167 Wn.2d at 580. In contrast, Summer does not point to lost or stale evidence. When AMR asked Summer's experts if they required other information to form opinions, the experts said that they did not.

Additionally, in *Magaña*, the trial court made findings of fact that discovery abuse prejudiced Magaña, and our Supreme Court held that because substantial evidence supported those findings, this court should not substitute its own discretion for that of the trial court. *Magaña*, 167 Wn.2d at 589. In contrast, here the trial court struggled to see how there was prejudice. The trial court noted that Summer already had the information it sought through discovery and chose not to use that information when deposing witnesses for tactical reasons. We conclude that the trial court did not abuse its discretion by determining that the abusive discovery did not prejudice Summer's ability to prepare for trial. *Magaña*, 167 Wn.2d at 589.

E. Lesser Sanctions

"[T]he least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed." *Fisons*, 122 Wn.2d at 355-56. In *Magaña*, the trial court found that a monetary sanction alone would not address the prejudice. *Magaña*, 167 Wn.2d at 592. Here, the trial court directed the parties to brief available sanctions and after reviewing the briefing, imposed a monetary penalty of attorney fees and associated costs. Summer does not show prejudice to her ability to prepare for trial; but she does show that AMR caused her to

spend valuable time and money to push for AMR's compliance. The trial court's sanction served that purpose. We conclude that the trial court imposed the least severe sanction that would be adequate here, and we hold that the trial court did not abuse its discretion imposing a monetary, rather than a harsher sanction.

II. Dismissal of Negligence Claim.

Summer argues that the trial court erred by dismissing her claim that AMR negligently retained and supervised two employees. We hold that Summer did not present evidence of proximate cause linking any of AMR's actions to the death.

A. Standard of Review

We review de novo the trial court's judgment as a matter of law dismissing Summer's claim that AMR negligently retained and supervised Squires and Fox. *Winkler v. Giddings*, 146 Wn. App. 387, 394, 190 P.3d 117 (2008). We apply the same standard used by the trial court in granting a CR 50 motion; thus, we accept Summer's evidence as true and grant her all permissible favorable inferences. *Winkler*, 146 Wn. App. at 394.

B. Negligence

The elements of a negligence claim are (1) duty to the plaintiff, (2) a breach of that duty, and (3) injury proximately caused by the breach. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 151 P.3d 201 (2006). An employer may be liable for harm caused by an incompetent or unfit employee if (1) the employer knew, or in the exercise of ordinary care, should have known of the employee's unfitness before the occurrence and (2) retaining the employee was a proximate cause of the plaintiff's injuries. *Lynn*, 136 Wn. App. at 306-07 (quoting *Betty Y. v. Al-Hellou*, 98 Wn.

App. 146, 148-49, 988 P.2d 1031 (1999)).

The question before this court is the same as the question before the trial court, whether Summer produced enough evidence to support the elements of her negligent retention and supervision claims. *Winkler*, 146 Wn. App. at 394. Because we review the trial court's claim dismissal de novo, we need not examine the trial court's analysis. But the trial court's analysis is particularly helpful here because of its familiarity with the evidence presented. The trial court stated that Summer made "no showing" that supervising Squires and Fox differently (i.e. putting them on different shifts) "would change anything." VRP at 1833. The trial court further explained its ruling, saying that the fact that an employer can take different steps in handling an employee does not mean that the employer was negligent. The trial court then concluded that without evidence to show that retaining and supervising Squires and Fox differently would have made a difference in preventing Brian's death, the jury could only speculate.

Summer offered no evidence to support proximate cause between AMR's retention and supervision of Squires and Fox and Brian's death. Even assuming, without deciding, that AMR owed Brian a duty of reasonable care, Summer points to no evidence overlooked by the trial court that shows that AMR knew or, in the exercise of ordinary care, should have known that Squires and Fox were unfit to be a paramedic and EMT in its ambulance company before Brian's 911 telephone call. *Lynn*, 136 Wn. App. at 306-07.

Instead, Summer provided evidence showing that Squires was repeatedly tardy to work, he had previously failed to obtain billing information, he was in a preventable auto collision, and he submitted his recertification paperwork late. Summer also provided evidence that Fox had

received administrative remarks for weaving in and out of traffic, he posted his ambulance in the wrong location, he put a hole in a wall with his head, and he had slept on his shift. None of this evidence shows that Squires and Fox had a history of poor patient care. Viewing this evidence in the light most favorable to Summer, this evidence would not convince an unprejudiced, thinking mind that AMR knew or should have know that when Squires and Fox responded to Brian's 911, they might provide improper patient care. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 531, 70 P.3d 126 (2003); *Lynn*, 136 Wn. App. at 306-07.

Additionally, none of this evidence shows that had AMR supervised Squires and Fox differently, Brian's death would not have occurred. In other words, none of this evidence shows that AMR's supervision of Squires and Fox was a proximate cause of Brian's death. *Lynn*, 136 Wn. App. at 306-07. For example, there is no evidence that AMR impeded the proper training provided by Dr. Wittwer's office or that AMR instructed employees not to follow Clark County protocols. Therefore, even assuming that AMR owed Brian a duty of reasonable care, Summer did not present evidence supporting injury proximately caused by the breach. *Lynn*, 136 Wn. App. at 306. Because Summer failed to make a prima facie case, we conclude that the trial court properly dismissed her negligent retention or supervision claim against AMR.

III. Hardin's Felony Conviction

Summer argues that the trial court erred by precluding her impeachment of a defense witness based on his felony conviction for second degree encouragement of child sex abuse. We hold that the trial court properly precluded highly prejudicial evidence of unidentified probative value.

A. Standard of Review

We review a trial court's decision regarding the admissibility of prior conviction evidence under ER 609 for abuse of discretion. *State v. Rivers*, 129 Wn.2d 697, 704-05, 921 P.2d 495 (1996). Abuse occurs when the trial court's ruling is manifestly unreasonable or when the trial court exercises discretion on untenable or unreasonable grounds. *State v. Bankston*, 99 Wn. App. 266, 268, 992 P.2d 1041 (2000). As the appellant, Summer bears the burden of proving abuse of discretion. *Bankston*, 99 Wn. App. at 268.

B. ER 609(a)

ER 609(a) provides, in pertinent part, that a witness's criminal conviction is admissible if it is elicited from the witness or established by public record during the witness's examination, but only if the crime (1) was punishable by imprisonment of more than one year and the court determines that the probative value of admitting the evidence outweighs the prejudice to the party against whom it is offered or (2) the crime involved dishonesty or false statement. Summer does not argue that this was a crime of dishonesty.

The sole purpose of impeachment evidence is to enlighten the jury regarding the defendant's credibility. *State v Calegar*, 133 Wn.2d 718, 723, 947 P.2d 235 (1997). Convictions not involving dishonesty or false statements are not probative of the witness's veracity until the party seeking admission thereof shows that the prior conviction disproves the veracity of the witness. *State v Hardy*, 133 Wn.2d 701, 708, 946 P.2d 1175 (1997). The trial court must state for the record the factors favoring admission or exclusion of prior conviction evidence. *State v. Jones*, 101 Wn.2d 113, 122, 677 P.2d 131 (1984), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 134, 761 P.2d 588 (1988). These factors include (1) the length of the

witness's criminal record, (2) the remoteness of the prior conviction, (3) the nature of the prior crime, (4) the age and circumstances of the witness when convicted, (5) the centrality of credibility to the issue, and (6) the impeachment value of the prior crime. *State v. Alexis*, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980).

C. Weighing Factors on the Record

Summer argues that the trial court unequivocally abused its discretion because it did not weigh the *Alexis* factors on the record. AMR responds that although the trial court used the *Alexis* factors, it did not need to do an analysis because Summer failed to show that the evidence was probative. We agree with AMR.

"In exercising its discretion, the trial court is required to follow the balancing procedure in a meaningful way." *Rivers*, 129 Wn.2d at 706. "Before admitting a prior offense under ER 609(a)(1), the trial court is required to balance the [*Alexis*] factors on the record." *Calegar*, 133 Wn.2d at 722. The party seeking admission of the prior conviction must show that the prior conviction disproves the veracity of the witness. *Hardy*, 133 Wn.2d at 708.

Here, the trial court stated on the record that it had reviewed the *Alexis* factors and that with the exception of probative value versus prejudicial effect, the factors were met. After reviewing the probative/prejudicial question, the trial court concluded that admitting evidence of a generic felony lacked probative value, yet admitting evidence that the crime was child pornography was "clearly . . . too prejudicial." VRP at 1364. Summer does not contest that the *Alexis* factors were in fact satisfied; nor does she explain how the trial court's further analysis of "met" factors would have been meaningful. We conclude that the trial court's analysis is sufficient for review of its exclusion of prior conviction evidence not involving dishonesty or false statements.

D. Prejudicial NonProbative Evidence

Although Summers had the burden to demonstrate that Hardin's specific conviction had

some relevance to his ability to tell the truth, Summer did not make that argument. Instead, she argued that the trial court should admit evidence of a generic felony conviction because "if someone is willing to commit a felony and serve time for a felony, that means that they're also more likely to be willing to perjure themselves."[6] VRP at 1364-65. Our Supreme Court has specifically disapproved of the reasoning that all prior felonies have some probative value because they "are evidence of non-law-abiding character," which is material circumstantial evidence concerning veracity. *Calegar*, 133 Wn.2d at 725, 727 (disapproving of the reasoning in *State v. Begin*, 59 Wn. App. 755, 801 P.2d 269 (1990)). Similarly, the trial court rejected Summer's argument that a generic felony conviction was probative of perjury.

Here, the trial court concluded that Hardin's sanitized conviction evidence lacked probative value, yet his conviction containing the information about his crime was too prejudicial. Thus, because it served no impeachment purpose, the trial court excluded the prior conviction evidence. There is nothing manifestly unreasonable about the trial court's determination, and we hold that it did not abuse its discretion. *Bankston*, 99 Wn. App. at 268.

IV. Jury Instruction

Summer argues that the trial court erred by spontaneously including jury instruction 16, which over-emphasized AMR's case, omitted applicable provisions of the statute, and thereby deprived her of her ability to argue her theory of the case.

We will consider a claimed error in a jury instruction only if the appellant raised the

[6] On appeal and in her written response to AMR's motion, Summer argues that Hardin's crime was clandestine, furtive, and secretive in nature, and that these qualities are probative of veracity. But Summer's argument depended on presenting Hardin's conviction to the jury in sanitized form, namely, generically referring to Hardin's encouragement of child sex abuse conviction as a felony.

specific issue by exception at trial. *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 702, 853 P.2d 908 (1993). The rule requires that parties make specific exceptions to jury instructions that apprise the trial court of the issues in question and enable the trial court to correct any mistakes. *Van Hout*, 121 Wn.2d at 703; CR 51(f).

Here, Summer objected to jury instruction 16, saying only "it's never been given before." Both Summer's co-counsel and the trial court informed her that she was mistaken, and she said no more about it. In contrast, Summer affirmatively told the trial court the jury instructions (including instruction 16) were correct statements of law and that the instructions allowed her to argue her theory of the case. We conclude that because Summer did not alert the trial court to the alleged errors she now raises, Summer waived any alleged instructional error. We will not consider her arguments.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bridgewater, J.P.T.

We concur:

Hunt, J.

Van Deren, J.