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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 63776-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JACK FLETCHER, *Appellant,*

v.

STATE OF WASHINGTON, et ux., et al., *Respondent.*

APPELLANT'S APPEAL BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON



TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENT OF ERROR.....	1
	<i>Assignments of Error</i>	
	No. 1.....	1
	No. 2.....	2
	<i>Issue Pertaining to Assignment of Error</i>	2
	<u>Premises of the Issues</u>	2
	<u>Issues</u>	2
III.	STATEMENT OF THE CASE.....	5
IV.	SUMMARY OF ARGUMENT.....	19
V.	ARGUMENT.....	21
	A. Irregularity in the Proceedings.....	22
	B. Misconduct of Prevailing Party or Jury.....	25
	C. Surprise.....	26
	D. Error in Law.....	28
	E. Substantial Justice.....	29
VI.	CONCLUSION.....	32

TABLE OF AUTHORITIES

Cases

<i>Barth v. Rock</i> , 36 Wn. App. 400, 402, 674 P.2d 1265 (1984)	29, 31
<i>Berry v. Coleman Systems Co.</i> , 23 Wn. App. 622, 624-25, 596 P.2d 1365 (1979)	30
<i>Baxter v. Greyhound Corp.</i> , 65 Wn.2d 421, 437, 397 P.2d 857 (1964)	22, 30
<i>Commonwealth v. Metcalfe</i> , 184 Ky. 540, 212 S.W. 434; 37 Wash.L.Rev. 367	22
<i>Detrick v. Garretson Packing Co.</i> , 73 Wn.2d 804, 812-13, 440 P.2d 834 (1968)	29
<i>Dickerson, v. Chadwell, Inc.</i> , 62 Wn. App. 426, 429, 814 P.2d 687 (1991).	27
<i>Johnson v. Howard</i> , 45 Wn.2d 433, 275 P.2d 736 (1954)	22
<i>Koboski v. Cobb</i> , 161 Wash. 574, 577, 297 Pac. 771 (1931)	21
<i>Kramer v. J. I. Case Manufacturing Co.</i> , 62 Wn. App. 544, 815 P.2d 798 (1991)	27
<i>Lyster v. Metzger</i> , 68 Wn.2d 216, 221, 412 P.2d 340 (1966).	27
<i>Moore v. Smith</i> , 89 Wn.2d 932, 942, 578 P.2d 26 (1978)	29
<i>Nelson v. Martinson</i> , 52 Wn.2d 684, 328 P.2d 703 (1958)	22
<i>Noble v. Safe Harbor Family Preservation Trust</i> , 167 Wn.2d 11, 18, 216 P.3d 1007 (2009).	22
<i>Olpiniski v. Clement</i> , 73 Wn.2d 944, 442 P.2d 260 (1968)	30, 31
<i>Port of Seattle v. Equitable Capital Group, Inc.</i> , 127 Wash.2d 202, 209,898 P.2d 275 (1995).	25
<i>Razor v. Retail Credit Co.</i> , 87 Wn.2d 516, 533, 554 P.2d 1041 (1976)	27

<i>State v. Hall</i> , 74 Wn.2d 726, 727, 446 P.2d 323 (1968)	29
<i>State v. McKenzie</i> , 56 Wn.2d 897, 355 P.2d 834 (1960)	26
<i>State v. Gobin</i> , 73 Wn.2d 206, 208, 437 P.2d 389 (1968)	29
<i>State v. Higgins</i> , 75 Wn.2d 110, 115, 449 P.2d 393 (1969)	21
<i>State v. Taylor</i> , 60 Wn.2d 32, 371 P.2d 617 (1962)	22, 30

Regulations

CR 26(e)	20
CR 26(e)(1).....	23
CR 59	25, 26
CR 59(a)	20, 21
CR 59(a)(1)	19, 22, 23
CR 59(a)(2)	20
CR 59(a)(3)	20, 26
CR 59(a)(8)	20, 27
CR 59(a)(9)	20, 29, 30
14 L. Orland and K. Tegland, <i>Washington Practice</i> ,	22
<i>Trial Practice — Civil</i> § 326 (5th ed., 1996)	

I. INTRODUCTION

This matter involves the trial of claims against the State of Washington by and through the University of Washington School of Medicine, as the operator of Harborview Medical Center, in Seattle, Washington (collectively “Harborview”) for the death of Leo Fletcher. This matter was brought by Jack Fletcher, as Personal Representative of the Estate of Leo Fletcher, and himself and his three adult siblings, who survived Leo Fletcher (collectively “the Fletcher Estate”). The trial was held in King County Superior Court, before the Honorable William L. Downing, Judge, between March 30, 2009, and April 16, 2009. The Fletcher Estate claimed that a medical error, where due to a breach of the applicable standard of care, Mr. Fletcher received, by transfusion, four units of the wrong type of blood, causing Mr. Fletcher’s death. Harborview admitted the medical error, but claimed that Mr. Fletcher died of complications due to injuries he received in a motor vehicle accident, his age, and various pre-existing conditions. After 2-1/2 days of deliberation, a defense verdict was rendered by the jury.

II. ASSIGNMENT OF ERROR

No. 1

The trial court erred in failing to strike the testimony of Curtis Veal, M.D., one of Harborview’s primary expert medical causation witnesses, when Dr. Veal changed his substantive testimony and opinion at trial, from that

given during discovery, regarding fundamental evidentiary elements of the Fletcher Estate's medical theory of causation.

No. 2

The trial court erred when, after failing to strike Dr. Veal's testimony, it failed to grant the Fletcher Estate's motion for a new trial.

Issues Pertaining to Assignments of Error

Premises of the Issues:

Leo Fletcher, a relatively healthy but elderly cattle rancher, was injured in a motor vehicle accident in Eastern Washington, and was treated there, initially. He was then flown to Seattle, and was admitted to Harborview Medical Center in Seattle ("Harborview"). A medical error occurred shortly after Mr. Fletcher's admission which the Fletcher Estate claims was causal of his death, 15 days later. Mr. Fletcher's blood was mislabeled, and, as a result, he received the wrong blood type in transfusions. Harborview admitted the medical error, but denied causation. The Fletcher Estate's medical theory of causation of Mr. Fletcher's death relied upon objective, clinically observed, physiological evidence which it claimed occurred after, and as a result of the transfusions. The Fletcher Estate claimed that transfusion of the wrong blood into Mr. Fletcher caused an antibody reaction that destroyed the transferred red blood cells, and caused his circulatory system to leak fluid into his body's tissues. This resulted in

post-transfusion observations of pink urine and reddish sediment accumulating in his urine, and swelling of body tissues, including lung tissues, due to fluid leaking from the circulatory system.

The Fletcher Estate deposed Harborview's critical care expert witness, Dr. Curtis Veal, who agreed that the sediment observed in the urine probably was a result of red blood cell destruction. This testimony, however, contradicted that of other defense medical expert witnesses. Also, in testifying about fluid leaking into lung tissues, Dr. Veal only identified a date five days post-transfusion as to when Mr. Fletcher's lungs were "leaky." Dr. Veal never stated there was any clinical evidence of "leaky lungs" prior to Mr. Fletcher's admission to Harborview, or the subsequent transfer. Less than one month prior to trial, in writing, the Fletcher Estate's attorney requested that Harborview update all expert witness testimony. Harborview's attorney replied that there were no additions or changes.

At trial, testimony by all of Harborview's expert medical witnesses was scheduled to be completed by Tuesday, April 7, 2009, including testimony from Dr. Veal. Accordingly, the Fletcher Estate scheduled its critical care expert rebuttal witness, Dr. Pearl, a Salt Lake City, Utah, physician, to testify on Wednesday, April 8, 2009. On Monday April 6, 2009, Harborview advised the court and the Fletcher Estate that Dr. Veal, a Seattle physician, could not testify until Thursday, April 9, 2009, due to unexplained

exigencies. Dr. Pearl, by then, was only available to testify on Wednesday, April 8, 2009, after which he would not be available, for any further testimony, for several weeks.

The Fletcher Estate's rebuttal witness, Dr. Pearl, did testify on Wednesday, April 8, 2009, and Harborview's Dr. Veal, then testified on Thursday, April 9, 2009, as the last trial witness. During his trial testimony, Dr. Veal reversed his substantive testimony about the sediment in Mr. Fletcher's urine being evidence of red blood cell destruction. Further, for the first and only time from any witness, Dr. Veal identified what was, purportedly, clinical evidence of "leaky lungs" occurring in Mr. Fletcher prior to his admission to Harborview. The Fletcher Estate's attorney moved to strike Dr. Veal's testimony. The court did not respond, but dismissed the jury to return for final argument.

The judge, in his only comment on the record regarding Dr. Veal's testimony, stated that the only method for dealing with a change in testimony was impeachment of the witness by examination, which the Fletcher Estate's attorney was allowed to do, and that the issue of discovery sanctions of an attorney could be dealt with separately.

Consistent with Washington law, the trial court should have stricken the testimony of the expert, Dr. Veal, as a sanction for breach of discovery rules.

Issues:

Under these premises:

(1) Did the trial court commit reversible error in failing to strike the testimony of Dr. Veal, as requested by appellant's attorney;

(2) Did the trial court commit reversible error, prejudicing the rights of the Fletcher Estate, by incorrectly interpreting or applying Washington law, when it determined that impeachment of a witness at trial was the only remedy for a failure of a party to disclose substantive changes in its expert witnesses testimony.

(3) Did the trial court commit reversible error based on an incorrect ruling on law, or otherwise abuse its discretion, in failing to grant the Fletcher Estate's motion for a new trial.

III. STATEMENT OF THE CASE

On October 14, 2003, Leo Fletcher was injured in a motor vehicle accident. CP 4. He died on October 29, 2003, at age 89. CP 5. It is claimed that he died from a hemolytic blood transfusion reaction due to the medical negligence of Harborview. CP 216.

According to Mark Vandine, who maintained property across from the mountainside pasture that Leo was attending to the day of the motor vehicle accident, up until that day, Leo was a cattle rancher who was accustomed to hiking up and down the approximate 1000 foot change in

elevation on his property mending fences, carrying metal fence posts and tools, attended to his cattle, offloading and onloading them, hauling them to and from, and would even cut pine trees down with a handsaw. CR 166-167.

Vandine observed that Leo was at the top of the class for an 89 year old, and was on the extreme side of people you would meet – a person “extraordinaire.” CP 170.

Leo’s mind was so sharp that he remembered circa 2000, the exact depth and water level from surface of a well that was dug by him and his father in 1941. CP 107.

Also, Leo remembered back over 60 years to his youth and identified various landmarks including the trees and fence posts, which were used in a subsequent survey over a property line dispute, and Leo’s recollections turned out to be virtually exact (within half a foot). CP 167-68.

Accessing Leo’s historical memory was like going to a library and opening up a book, Vandine concluded. CP 168.

Dr. Luce, primary care physician, stated Leo’s health, prior to his death, was way better than the average, as Leo was quite vigorous and would probably be mistaken for a younger man. CP 111.

From a functional standpoint, although Leo had various health conditions, none were such that he couldn’t carry on the vigorous daily activity associated with cattle, horses, mending fences, or sawing trees with a

hand saw. CP 111.

Dr. Luce concluded that, prior to his death, Leo could do any and all work that he wanted to do, some of which Dr. Luce knew was strenuous. CP 111.

According to Kris Darby, Deputy Chief of EMS for Columbia County Fire District No. 3, Dayton, Washington, Mr. Darby attended to Mr. Fletcher at the single motor vehicle accident scene on October 14, 2003. CP 175, 177. Mr. Fletcher's airway was open, he was breathing on his own, and he was maintaining circulation. CP 181. Further, based on external physical observations, there was no significant chest trauma or abdominal trauma to Mr. Fletcher. CP 183. A deformity or injury to his leg, however, was noted. CP 181. Darby found no evidence of any significant internal bleeding. CP 183. Based on Darby's recollection, review of the available records, and the time of extrication and placing Mr. Fletcher in an ambulance, Darby believed that Mr. Fletcher might have been considered in serious condition at that time, but not critical. CP 182-184.

From the scene, Mr. Fletcher was transported to Dayton General Hospital (Dayton, Washington). CP 184. From Dayton (General Hospital) Mr. Fletcher was transported by air ambulance to nearby St. Mary Medical Center in Walla Walla, Washington. CP 141. Due to the weather, Mr. Fletcher was physically cold at the scene, but as he warmed up and

received some oxygen and fluids, he became more responsive. CP 141-142, 178 – 180.

Emergency physician Dr. Edwards, at St. Mary Medical Center, in Walla Walla, performed a physical examination on Mr. Fletcher. CP 142-143. A bruised area to Mr. Fletcher's head with a slight abrasion was noted, as was an obvious deformity to his right knee or leg. CP 142. Examination of Mr. Fletcher's head, eyes, ears, nose, and throat were otherwise normal, and Dr. Edwards concluded there was no significant brain injury, based upon preliminary testing, as Mr. Fletcher's pupils and reflex tests were normal. CP 142-144. Based on other standard tests, Dr. Edwards concluded there was no obvious, severe spinal cord injury. CP 144. Additionally, Mr. Fletcher didn't appear to need any transfusion of blood, and no major bleeding was suspected. CP 146. It was determined Mr. Fletcher's blood type was O, RH positive. CP 147.

After further testing was performed, and imaging taken, it was determined that Mr. Fletcher's injuries from the MVA were:

- a subdural hematoma from a sheer type injury to his brain, leaving some accumulation of blood between the brain surface and Mr. Fletcher's skull;
- a non-serious epidural hematoma (blood accumulation outside of the spinal cord);

- non-serious spinous process fractures of his cervical and thoracic spine, indicating a hyperextension flexion injury;
- right sided rib fractures at the first and second levels;
- a hematoma or accumulation of blood, in front of sternum or central bony area of the chest;
- a fracture of the right tibial plateau, which is the upper area of the large right leg bone; and
- a tear in the lining of the large artery leading from the heart to the lower extremities, is causing an outward bulge in the artery, which had not ruptured.

CP 137 - 141.

Cognitively Mr. Fletcher was virtually normal while at St. Mary Medical Center. CP 152. The subdural hematoma indicated a concussive effect, but, if the hematoma did not worsen, Mr. Fletcher could have returned to normal, after a period of time. CP 138.

Due to concerns of a potential aneurysm (complete tear of the lining and wall of the aorta leading to bleeding into the chest cavity), it was determined to transfer Leo to Harborview Medical Center in Seattle. CP 149-150. Otherwise, Leo would have probably remained in the care of St. Mary's. CP 150. When Leo left St. Mary's care, he was relatively stable, and was in

no apparent circulatory or respiratory distress. CP 153-154. However, before Leo left St. Mary, at the request of a Harborview staff physician, Leo was given an anti-epileptic drug (due to having received a head injury), which could act as a sedative. CP 151.

Mr. Fletcher was also not noted to be in any significant respiratory distress when starting air transport to Seattle, according to respiratory therapist Reed. CP 90. During transport, Mr. Fletcher was strapped to a backboard with a c-collar, and was becoming agitated, not following commands. CP 89. Mr. Fletcher's agitation, however, was considered a very normal response or reaction to the circumstances. CP 93. Due to his agitation, Mr. Fletcher was intubated, as a precaution, to maintain his airway.

CP 92 – 93. Intubation is placement of a breathing tube through the mouth and into a patient's windpipe (trachea). CP 89. Drugs administered for the intubation could cause a drop in blood pressure and further sedated Mr. Fletcher. CP 89, 93. The transport crew was provided three units of Type O blood at St. Mary, which were not utilized during the transport, and which were provided to Harborview on Mr. Fletcher's delivery there. CP 96.

After arrival at Harborview at about 8:10 p.m., October 14, 2005, due to an admitted breach of the applicable standard of care in the actions of a resident physician and one or more nurses, Mr. Fletcher's blood samples were mislabeled, and an incorrect blood type (type A) was assigned to him. CP 9-

10, Veal p. 18. Beginning about 3:00 a.m., October 15, 2003, approximately 7 hours after arrival at Harborview, Mr. Fletcher began to receive what would be, by the end of the day, four units of incorrect type A blood. CP 209 - 212, RP 4/9/09, Veal, p. 18. Unfortunately, because Mr. Fletcher's blood type was "O," this led to blood cell destruction, release of hemoglobin (hemolysis), and hemoglobinuria (hemoglobin or blood in the urine), turning Mr. Fletcher's urine pink. CP 203, 209.

Transfusion of type A blood into a type O blood recipient causes the recipient's immune system to respond by releasing antigens (antibodies) to attack the A red blood cells. CP 198-200. These antibodies attack and perforate the walls of the A blood cells, causing them to release their contents (primarily hemoglobin) which is toxic to the body's organs. CP 200-201. The perforation or destruction of the red blood cells is termed hemolysis. CP 199. These same antibodies, unfortunately, perforate the small capillaries of the body's circulatory system. CP 201. This perforation causes fluid (plasma) from the blood stream to leak, generally, into the tissues of the body. CP 201. This leakage or water logging of tissues is termed edema. CP 201. This leakage or edema also occurs, in the lungs, which becomes a significant problem. CP 201. Pulmonary edema is the term for leaky lungs. RP 4/9/09, Veal, p. 44.

After arrival at Harborview, an initial chest x-ray did not reveal any

pulmonary edema (“leaky lungs”), but a chest x-ray taken later in the day on October 15, 2005, did reveal pulmonary edema. RP 4/7/09, McIntyre, pp. 30-31.

While at Harborview, Mr. Fletcher was never provided interventional treatment for any of his trauma-related injuries. He was merely provided supportive treatment. RP 4/7/09, McIntyre, pp. 88-89. While at Harborview, a thoracic surgeon evaluated the injury to Mr. Fletcher’s aorta (the reason he was transferred to Harborview) and it was his conclusion that non-intervention would result in a 5% risk of death, while treatment (surgery) would carry a 50% risk of death. RP 4/7/09, McIntyre, p. 71. Eventually, the Harborview staff recommended withdrawal of life support due to multi-organ system failure. RP 4/7/09, McIntyre, pp. 87-88. A discharge report prepared by Harborview’s medical staff confirmed Mr. Fletcher suffered hemolysis due to transfusion of the wrong blood type, which caused a transfusion reaction. RP 4/7/09, McIntyre pp. 78-79.

Prior to trial, the Fletcher Estate’s attorney requested supplementation of Harborview’s expert witness testimony, and the response from its attorney was that he was not aware of any changes in testimony at that time. CP 61. Curtis Veal, M.D., from Seattle, testified as Harborview’s critical care expert witness. RP 4/9/09, Veal, p. 3. He was originally scheduled to testify on Tuesday, April 7, 2009, along with other medical witnesses for

Harborview. CP 42-43. Dr. Pearl, the Fletcher Estate's rebuttal critical care expert witness, from Salt Lake City, was scheduled to testify on Wednesday, April 8, 2009. CP 43. However, on Monday, April 6, 2009, Harborview's attorney advised the Fletcher Estate's attorney and the court that, due to unspecified exigencies, Dr. Veal could not testify until Thursday, April 9, 2009. CP 42-43. The Fletcher Estate's attorney advised that Dr. Pearl could only testify on Wednesday, April 8, 2009, and would not be available for any further rebuttal for at least several weeks thereafter, as he had commitments to his clinical practice and a hospital in which he was on staff and training a fellow in critical care. CP 43-44. Therefore, the Fletcher Estate's rebuttal critical care expert witness, Dr. Pearl, testified on Wednesday, April 8, 2009, and the last witness in the trial heard by the jury was Harborview's critical care expert witness, Dr. Veal, who testified on Thursday, April 10, 2009. RP 4/9/09, Veal, p. 1.

Mr. Fletcher was hospitalized at Harborview on October 14, 2003. CP 4,5. The first reference Dr. Veal made about leaky lungs in his discovery deposition was in conjunction with pneumonia and sepsis Dr. Veal claims Mr. Fletcher had on October 20, 2003 (six days post-admission to Harborview). CP 52-53. Further, in his discovery deposition he did agree with the Fletcher Estate that the reddish sediment which accumulated in Mr. Fletcher's urine bag was probably due to hemolysis. CP 59.

At trial, for the first time, Dr. Veal testified that certain blood gas readings taken from Leo's blood during the flight from Walla Walla to Seattle, and prior to admission at Harborview evidenced Mr. Fletcher as having leaky lungs. RP 4/9/09, Veal, p. 14-16.

In cross examination at trial, Dr. Veal testified:

Q. Why don't you just peruse your deposition for a moment. I did look for statements where you made – attributed leaky lungs occurring, starting with the air flight. I just didn't find it.

A. I don't remember specifically addressing the timing. I remember we did spend a great deal of time talking about this. I'm just opening randomly to page 32 where I'm talking about lungs are leaky and fluids all going into what is referred to as the third space.

Q. But my statement again is, I do not recall you stating that that occurred with the air flight, but I believe – do you recall stating that actually occurred as a result of sepsis and causing the lungs to be leaky?

A. No, Sir, I did not say that that was solely due to sepsis. It was clearly present at the initiation of his hospitalization.

Q. Why don't you turn to page 22 of your deposition. I asked you the question: Is the renal failure in your mind that was primary in causing the lung failure? What was your answer?

A. I said: No, Sir, in that his lungs had already been injured with the initial trauma which generated an inflammatory response and **what I believe to be septic episode beginning on the 20th when he had the purulent secretions in bronchoscopy and they**

got the organisms. Those things made the lungs very leaky and damaged and stiff.

Q. Those things taken in the context together made the lungs leaky?

A. Yes, Sir.

Q. Isn't it a fact, though, you never attributed leaky lungs prior to the time of the sepsis – Let's put it this way: find somewhere in your deposition where you attributed leaky lungs to something prior to the pneumonia and sepsis in your deposition?

Mr. Johnson: Your honor, that is not an appropriate question.

Q. (By Riccelli) Would you agree that you did not relate leaky lungs to have occurred prior to his admission at Harborview?

A. I said, no, sir, in that his lungs had already been injured with the initial trauma which generated inflammatory response.

Q. All right. Then you didn't say "leaky" there, did you? Continue on.

A. I will continue if you insist, but, no, I don't say "leaky" there, but I think we both know what I was talking about.

Q. Well, regardless, are you stating that the lungs were leaking as of the air flight?

A. Yes, Sir.

RP 4/9/09, Veal, pp. 38-40. (emphasis supplied)

Also in his discovery deposition, Dr. Veal testified:

Q. Well, what explained the reddish sediment viewed by the nurse in her chart notes on the 16th of October at 4:40 p.m.?

MR. JOHNSON: Asked and answered. Go ahead.

Q. (BY MR. RICCELLI.) You said it could have been hemolysis.

THE WITNESS: Should I answer it again?

Q. (BY MR. RICCELLI.) Well --MR. JOHNSON: (Nodding.)

THE WITNESS: Okay.

A. Yeah, I think it -- it probably was hemolysis.

CP 59. (emphasis supplied)

Dr. Veal then fully admits recanting his testimony and changing his opinion from time of discovery concerning the critical issue of hemoglobinuria, or evidence of blood contents in Mr. Fletcher's urine as evidence of hemolysis.

Q. Didn't pink urine indicate hemolysis?

A. He had pink urine documented on one single occasion with nothing on either side of that, just like he did have that single hemolysis blood specimen flanked by a normal one.

Q. Doesn't pink urine indicate hemolysis?

A. Absolutely not necessarily.

Q. Doesn't sediment in his urine probably indicate hemolysis?

- A. **No, sir, I don't think so.**
- Q. **Turn to page 45 of your deposition, please.**
- A. **This was in July of 2008. Yeah, I had done a lot more reviewing of this stuff since then.**
- Q. **Do you want me to ask you the question?**
- A. **No, I can tell the jury. I acceded to the suggestion that it could have been hemolysis on July 2nd of 2008, yeah.**
- Q. **So your opinion has changed since the time of your deposition?**
- A. **It certainly has, because I have had a lot more time to review this.**
- Q. **Did you communicate that change to Mr. Johnson?**
- A. **I don't think we talked about that specific point. But one of the things that put that in perspective was looking at the nurses' notes very carefully on either side of that. And it was a single kind of notation. Whereas, if he had major hemolysis, you would have seen it present for a while. It would have been much darker than pink.**
- Q. **Does your opinion today rest upon the fact that you believe now there was no evidence of hemolysis?**
- A. **I believe now there was no evidence of hemolysis. I don't see it.**
- Q. **Does your opinion substantially rest upon that fact?**
- A. **Upon which fact?**

Q. **That there was no evidence of hemolysis.**

A. **My opinion as to his injury rests upon the fact that he showed no physiological evidence to having received mismatched blood. That's the basis of that opinion.**

Q. Because there was no evidence of hemolysis?

A. No. Because the timing is all wrong.

Q. **For the record, I'll state I move to strike his entire testimony.**

The Court: **Any other questions, it's 4:00 o'clock. We are going to have closing arguments on Monday tying together all the various witnesses.**

RP 4/9/09, Veal, pp. 79-80. (emphasis added)

Note that the Fletcher Estate's counsel moved to strike Dr. Veal's testimony, but the court made no ruling, nor even acknowledge the motion.

The Fletcher Estate's attorney later requested some type of corrective or curative instruction to strike or otherwise deal with Dr. Veal's testimony. In an e-mail which the court incorporated into the record, the court stated:

Dr. Veal: When a witness arguably changes his testimony, the remedy is impeachment. With the cross going on for twice the length of the direct, there was ample opportunity for this and it was accomplished. When an attorney violates the discovery rules, there are other remedies. I don't intend to give a jury instruction that is both a prohibited comment on the evidence and an immaterial comment on counsel.

CP 20.

This is the only statement made by the court with respect to Dr. Veal's changed testimony or the Fletcher Estate's objection to it. Post trial, the Fletcher Estate moved for a new trial, which motion was denied, and which denial forms the procedural basis of this appeal. CP 28-41, 78.

IV. SUMMARY OF ARGUMENT

The facts and circumstances of the case with respect to Dr. Veal's testimony constitute an irregularity in the proceedings that, when it occurred, was irreparable in its prejudicial effect on The Fletcher Estate's right to a fair trial. CR 59(a)(1).

In his discovery deposition, Dr. Veal's testimony in discovery was consistent with that of the Fletcher Estate's theory of causation, that pulmonary edema or leaky lungs, and reddish sediment in Mr. Fletcher's urine, were clinically observed only after the time of the transfusion of the wrong blood type into Mr. Fletcher. The record is devoid of any medical witness, except in Dr. Veal's trial testimony, to clearly link any pre-Harborview admission clinical findings to pulmonary edema, or "leaky lungs." Then, without disclosure, Dr. Veal changes his testimony radically in those two areas.

Harborview's trial counsel's apparent failure to make any inquiry of Harborview's experts (at least Dr. Veal) and update discovery with respect to

their testimony, as requested and as is obligated by CR 26(e), is in the nature of inexcusable neglect tantamount to misconduct of a prevailing party. CR 59(a)(2). Further, these circumstances constitute surprise to the Fletcher Estate. CR 59(a)(3). Surprise is that which ordinary prudence could not have guarded against. Further, the judge committed an error in law by concluding impeachment was the only available remedy, where there is a change in expert testimony, and where that change in testimony was not disclosed, prior to trial. CR 59(a)(8), CR 26(e). Finally, substantial justice was not accomplished by the trial, as appellant was denied the opportunity to properly prepare for and provide competent medical testimony to rebut Dr. Veal's changed testimony concerning evidence critical to the Fletcher Estate's theory of medical causation. CR 59(a)(9). As a result, appellant was irrevocably prejudiced by the trial court's failure to properly deal with the change in testimony both by failing to strike Dr. Veal's testimony, and in subsequently failing to grant a new trial.

V. ARGUMENT

The Fletcher Estate moved the trial court to grant a new trial based upon the following subdivisions of CR 59(a):

- (a) Grounds for New Trial or Reconsideration. The verdict or other decision may be vacated and a new trial granted to all

or any of the parties and on all or part of the issues when such issues are clearly and fairly separable and distinct, on the motion of the party aggrieved for any one of the following causes materially affecting the substantial rights of such parties:

- (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;
- (2) Misconduct of prevailing party or jury;
...
- (3) Accident or surprise which ordinary prudence could not have guarded against;
...
- (8) Error in law occurring at the trial and objected to at the time by the party making the application;
- (9) That substantial justice has not been done.

CR 59(a)

The object of a motion for new trial is to afford the court an opportunity to correct errors in the proceedings before it without subjecting the parties to the expense and inconvenience of an appeal. *Koboski v. Cobb*, 161 Wash. 574, 577, 297 Pac. 771 (1931). It has been established that a trial court has the inherent power to grant a new trial on its own motion or upon any ground which might have been urged by counsel. *State v. Higgins*, 75 Wn.2d 110, 115, 449 P.2d 393 (1969). Generally, the reversal of a trial court's order denying a new trial, when the order is not predicated solely on ruling on law, requires a showing of abuse of discretion. The showing of

abuse required to overturn an order is lesser, however, than that required to overturn an order granting a new trial, as an order denying a new trial is final, and concludes the opportunity for a party to obtain justice, while granting a new trial places the parties where they were, before. See *Baxter v. Greyhound Corp.*, 65 Wn.2d 421, 437, 397 P.2d 857 (1964). *Johnson v. Howard*, 45 Wn.2d 433, 275 P.2d 736 (1954); *Nelson v. Martinson*, 52 Wn.2d 684, 328 P.2d 703 (1958). *State v. Taylor*, 60 Wn.2d 32, 371 P.2d 617 (1962); *Commonwealth v. Metcalfe*, 184 Ky. 540, 212 S.W. 434; 37 Wash.L.Rev. 367. Further, a trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons, including error in ruling on law. *Noble v. Safe Harbor Family Preservation Trust*, 167 Wn.2d 11, 18, 216 P.3d 1007 (2009).

A. Irregularity in the Proceedings

CR 59(a)(1) is a general provision allowing the court to grant a new trial for any multitude of incidences or occurrences at the trial. See 14 L. Orland and K. Tegland, *Washington Practice, Trial Practice — Civil* § 326 (5th ed., 1996). As such, there is considerable overlapping of this ground and the grounds of other causes for granting a new trial. These occurrences are discussed in the section below, but can be viewed either by the court as irregularities which denied the Fletcher Estate the opportunity for a fair trial

which, cumulatively, allow for the court to grant a new trial under CR 59(a)(1), and/or otherwise, as misconduct, as discussed below.

The first irregularity affecting the trial was the apparent failure of Harborview's trial attorney to initially advise Harborview's expert witnesses of the obligation to communicate to him the substance of any material change in their opinion. See CR 26(e)(1). This was followed by Harborview's attorney's apparent failure to make a direct inquiry of experts, such as Dr. Veal, as to any change in their opinions, at the time the specific request for any updates was made by the Fletcher Estate's attorney the request was made in early March, 2009, less than one month prior to trial. Harborview's attorney responded he knows of no changes. This resulted in the Fletcher Estate being unaware of the change in Dr. Veal's testimony and inability to preclude it with a pre-trial discovery motion or motion in limine, or rebut it at trial. Further, as both changes in Dr. Veal's testimony were new evidence, the testimony violated the Order on Plaintiff's Motion in Limine (Amended), as agreed by both parties attorney's and filed on March 20, 2009. CP 12-17. That order specifically prohibited introduction of evidence not previously disclosed. CP 15.

Where there is a failure to update an expert's testimony, the Washington Supreme Court has approved the sanction of excluding the expert testimony.

We address exclusion of Appellant's expert testimony, particularly the testimony of Dr. William E. Whitelaw.

The trial court noted that, even assuming reliability of the analytic method used by Dr. Whitelaw to appraise the fair market value of vacant commercial property in a metropolitan area, his supplemental answers filed by Equitable just 7 days before trial had been revised and significantly changed by him from earlier answers to interrogatories. 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.” 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.

By not complying with the pre-trial order of January 8, 1993 and the complete change of his database with expansion of his comparables from 88 to 237 after January 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.

Port of Seattle v. Equitable Capital Group, Inc., 127 Wash.2d 202, 209, 898 P.2d 275 (1995).

In *Port of Seattle, supra*, striking the testimony of an expert witness seven days before trial was appropriate as the other party had little time to

prepare in order to address the changed testimony. Here, the Fletcher Estate had no time to prepare for Dr. Veal's changed testimony, and could not reasonably call its rebuttal witness back.

B. Misconduct of Prevailing Party or Jury

As discussed above, irregularity and other potential causes of a new trial tend to overlap. The reply by Harborview's attorney assuring no change in expert testimony implicitly assumes some prior discussion about the topic with Harborview's experts. Here, Dr. Veal denies any such discussion. The apparent failure of Harborview's counsel to advise Harborview's experts about reporting changes in testimony, or to make inquiry of its expert witnesses, prior to trial, yet assuming there was no change, is, at minimum, inexcusable neglect and tantamount to misconduct, regardless of intent.

Misconduct of counsel is not mentioned in CR 59, but is clearly a ground for new trial (or a mistrial) and can be considered as included in the language of the rule relating to the parties, whom they represent.

The varieties of misconduct of counsel are numerous. No attempt will be made to cover them all here, but many examples are cited at appropriate points throughout these volumes. Misconduct of counsel can occur on voir dire, during opening statements, during the course of the trial, in final argument, and otherwise. Injecting the subject of insurance into the trial in violation of ER 411 is just one familiar example.

4 Wash. Prac., Rules Practice CR 59 (5th ed.)

Whether considered an irregularity and/or misconduct, the result should be the same. The only reasonable remedy available, at the time of testimony was to strike it, and thereafter, grant of a new trial. Objectively, it is reasonable to conclude that Dr. Veal's testimony may have had a material effect upon the deliberations of the jury. Dr. Veal's testimony, including that portion which was not disclosed prior to trial, represented a material and prejudicial change in testimony from Dr. Veal's discovery deposition. Further, one need only read the provided excerpt of his testimony to appreciate the importance of the testimony, as he attempts to disassociate evidence of hemolysis, by presence of sediment in the urine, with physiology. Sediment in urine is, by its very nature, physiological evidence.

C. Surprise

CR 59(a)(3) allows for a new trial where there is surprise that ordinary prudence could not have guarded against. Certainly, the Fletcher Estate was prudent, in requiring, in writing, updated testimony.

Here the Fletcher Estate's counsel did object to the testimony by requesting that it be stricken, and otherwise evidenced his surprise, on cross examination of Dr. Veal. See, e.g., *State v. McKenzie*, 56 Wn.2d 897, 355 P.2d 834 (1960). Regardless, a decision to grant a new trial due to surprise is well within the trial court's discretion as the trial court has the ability to assess the effect of the surprise evidence on the disposition of the case.

Kramer v. J. I. Case Manufacturing Co., 62 Wn. App. 544, 815 P.2d 798 (1991).

D. Error in Law

The trial court made error in law occurring at the trial and objected to at the time by the Fletcher Estate, as contemplated by CR 59(a)(8). In addressing the standards applicable to granting a new trial for error in law, the appellate courts have stated:

A trial court may grant a new trial for an "[e]rror in law occurring at the trial and objected to at the time by the party making the application." CR 59(a)(8). To be grounds for a new trial, the error of law complained of must be prejudicial. *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 533, 554 P.2d 1041 (1976); and *Dickerson, v. Chadwell, Inc.*, 62 Wn. App. 426, 429, 814 P.2d 687 (1991).

Rulings on admission of evidence are rulings based on law. *Lyster v. Metzger*, 68 Wn.2d 216, 221, 412 P.2d 340 (1966).

In this instance, the court made an error in law with respect to failing to strike the testimony of Dr. Veal as it concluded the only remedy to changed testimony was impeachment (by cross examination) which the Fletcher Estate's attorney was allowed to do. However, consider the following:

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.

CR 26(e)

Further, as the Washington criminal rules are descendent from the

Federal Rules of Civil Procedure:

The federal advisory committee suggests as possibilities the exclusion of evidence, continuance, “or other action, as the court may deem appropriate.” Advisory Committee Note, 48 F.R.D. at 508. The sanctions of CR 37 are not applicable; failure to supplement is not mentioned in CR 37(d), and the sanctions of CR 37(b) depend upon the violation of a court order under CR 35 or 37(a). A previous court order will generally not have been made with reference to supplementation.

Most of the sanctions imposed under the rule which have been reported are in the form of exclusion of evidence at trial. Holiday Inns, Inc. v. Robertshaw Controls Co., 560 F.2d 856 (7th Cir. 1977) (excluding evidence on alternative trial theory); Davis v. Marathon Oil Co., 528 F.2d 395 (6th Cir. 1975), certiorari denied 429 U.S. 823, 97 S.Ct. 75, 50 L.Ed.2d 85 (1976) (excluding testimony of witness who, with diligence, could have been known long before trial); Tabatchnick v. G.D. Searle & Co., 67 F.R.D. 49 (D.N.J. 1975) (excluding testimony of surgeon). A new trial has also been granted. Voegeli v. Lewis, 568 F.2d 89 (8th Cir. 1977) (failure to advise plaintiff of change of opinion of expert).

3A Wash. Prac., Rules Practice CR 26 (5th ed.)

E. Substantial Justice

The appellate court has aptly summarized the latitude of the court in granting a new trial under CR 59(a)(9) as follows:

A trial court has discretion in ruling on a motion for a new trial, *State v. Hall*, 74 Wn.2d 726, 727, 446 P.2d 323 (1968); *State v. Gobin*, 73 Wn.2d 206, 208, 437 P.2d 389 (1968), and an order granting or denying a new trial will not be reversed except for abuse. *Detrick v. Garretson Packing Co.*, 73 Wn.2d 804, 812-13, 440 P.2d 834 (1968). Also, a much stronger showing of abuse will ordinarily be required to set aside an order granting a new trial than one denying a new trial. *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978). Here the court stated one of the reasons for granting a new trial was insufficient evidence to support the verdict, and thus substantial justice was not done. We agree.

Barth v. Rock, 36 Wn. App. 400, 402, 674 P.2d 1265 (1984).

A court has the discretion to grant a new trial where, in the court's own determination, substantial justice has not been done. CR 59(a)(9). In addressing this provision, the Court of Appeals, Division III, has stated:

CR 59(a)(9) provides that a trial judge may grant a new trial when substantial justice has not been done. This court in *Berry v. Coleman Systems Co.*, 23 Wn. App. 622, 624-25, 596 P.2d 1365 (1979), discussed the court's discretion to order retrial on "substantial justice" grounds and, quoting from *Olpinski v. Clement*, 73 Wn.2d 944, 442 P.2d 260 (1968), stated as follows:

The trial court has the duty to see that justice prevails. He has the power in the exercise of his discretion to grant a new trial where substantial justice has not been done, but, to facilitate appellate review, he must state his reasons. We stated, in *Baxter v. Greyhound Corp.* [65 Wn.2d 421, 397 P.2d 857 (1964)], *supra* at 440:

The basic question posed by an order granting a new trial upon this ground, be it a civil or criminal action, is whether the losing party received a fair trial. *State v. Taylor, supra* [60 Wn.2d 32, 371 P.2d 617 (1962)]. And, it is in this area of the new-trial field that the favored position of the trial judge and his sound discretion should be accorded the greatest deference, particularly when it involves the assessment of occurrences during the trial which cannot be made a part of the record, other than through the voice of the trial judge in stating reasons for the action taken.

If the trial judge, in the exercise of his best judgment determines that a fair trial has not been had, he has the alternative, in an appropriate situation, of granting a partial, a conditional, or an unconditional new trial. This decision, in turn, calls for a weighing of factors and values such as the complexity of the issues, the length of the trial, the degree and nature of the prejudicial incidents, the nature and amount of the verdict, the cost of retrial, the probable results, the desirability of concluding litigation, and such other circumstances as may be apropos to the particular situation.

Olpinski v. Clement, 73 Wn.2d 944, *supra* at 951, 442 P.2d 260. *Barth v. Rock*, 36 Wn. App. 400, 402-03, 674 P.2d 1265 (1984).

Here, it is clear that Dr. Veal substantially based his opinion testimony on his altered conclusion that there was a lack of physiological evidence to support hemolysis, as a hemolytic blood transfusion reaction. Changing his testimony to exclude the sediment in Mr. Fletcher's urine as hemoglobinuria, as a possibility or probability, and then to exclude it as a category of physiological evidence is ludicrous.

Here, the Fletcher Estate will also rely on the Appellate Court's substantial experience and knowledge in matters of litigation and the need to strictly regulate discovery requirements to disclose expert testimony, and sanction its failure. To allow the trial court's denial of a new trial in this instance can only serve as a dangerous precedent to apparently condone failure to comply with discovery rules, and encourage gamesmanship and, at least, the appearance of impropriety in the conduct of litigation, by attorneys. Additionally, one can only imagine the damage to judicial economy, as increased instances of discovery abuse could only lead to increased motion practice and appeals, where such testimony is allowed, rather than stricken.

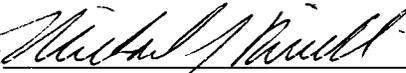
It is well within an appeal court's discretion to grant the remedy of a new trial where, considering the complete conduct and result of the trial, a party did not receive substantial justice, and/or where the court made a significant evidentiary ruling based on an error in law.

VI. CONCLUSION

The circumstances surrounding Dr. Veal's change in testimony constitute a substantial and prejudicial irregularity in the trial of this matter, was essentially the result of misconduct, whether or not intentional; was certainly a surprise which was objected to by the Fletcher Estate; represents an error in law with respect to failure of the court to strike the testimony; and, when considering the nature of the testimony and related circumstances, was prejudicial to the Fletcher Estate, and yielded a trial in which a substantial justice was not done. In conclusion, the Fletcher Estate, hereby respectfully requests the court to vacate the judgment and jury verdict which have been entered in this matter, and grant a new trial.

RESPECTFULLY SUBMITTED this 25th day of June, 2010.

MICHAEL J RICCELLI PS

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 2010, I caused a true and correct copy of the Brief of Appellant to be served on the following in the manner indicated below:

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