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COURT OF APPEALS
STATE OF WASHINGTON
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NO. 35682-1-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

The Estate of JOHN DEAN STALKUP, by and through SUSAN STALKUP, as Personal Representative; and SUSAN STALKUP, Individually,

Respondents,

v.

THE VANCOUVER CLINIC, INC., P.S. and JAMES HAMPTON, M.D.,

Appellants.

REPLY BRIEF OF APPELLANTS

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I. ARGUMENT IN REPLY

A. This Court is Not Being Asked to Decide Whether It Was Error to Admit Testimony and Permit Argument by Plaintiff Criticizing Dr. Hampton for Not Doing Blood Tests.

Respondent takes issue, Resp. Br. at 33, with how the opening Brief of Appellants portrays her presentation of testimony critical of Dr. Hampton for not doing a cholesterol test on March 8 and not ordering blood tests on June 10. Respondent misses the point.

Dr. Hampton and The Vancouver Clinic are not appealing from the verdict. The verdict was a *defense* verdict; Dr. Hampton and The Vancouver Clinic *won* the trial. What they ask this Court to reverse is not the jury's defense verdict, but the trial court's decision to throw out that defense verdict and put them to a new trial. The point about blood and cholesterol testing testimony is that, despite defendants' efforts to exclude it, the plaintiff chose to put it before the jury. See Appellants' opening brief at 45-46. Whether error was involved in allowing the jury to hear the testimony is beside the point in light of the verdict.

Whether or not error was involved, plaintiff would be unable to complain (and, in fact, did not complain) that the blood-testing testimony she elicited tainted the *defense* verdict, so as to warrant giving her a new trial. Moreover, the blood-testing testimony may well be the reason why the jury answered Question 1 as to negligence "yes" and Question 2 as to

proximate cause “no.” The blood-testing testimony permitted the jury to find persuasive the notion that Dr. Hampton was negligent in prescribing Provacol on March 8 without checking Mr. Stalkup’s cholesterol level, and/or not ordering blood tests on June 10, and thus answering “yes” to Question 1 concerning negligence. But, because there was no expert medical testimony linking a failure to do cholesterol or blood tests to Mr. Stalkup’s death, the jury had no choice but to answer Question 2 concerning proximate cause “no” if its “yes” answer to Question 1 was based on finding Dr. Hampton negligent for failing to order blood tests.

The fact that plaintiff presented the blood-testing testimony, whether or not it was error (prejudicial to the defendants), is important for two reasons. First, under the “strong presumption in favor of jury verdicts,” Brashear v. Puget Sound Power & Light Co., 100 Wn.2d 204, 209, 667 P.2d 78 (1983), the jury *must* be presumed to have found Dr. Hampton negligent for not doing blood tests because that *could* and *would* explain its answers to Questions 1 and 2. Second, because the plaintiff presented the testimony, and could not have sought a new trial because she presented it, and because a trial court on its own motion may grant a new trial only for “any reason for which it might have granted a new trial on motion of a party,” CR 59(d), the trial court was foreclosed from ordering a new trial *sua sponte* because failure-to-do-blood-testing testimony was

presented which may have led the jury to answer Question 1 “yes” and Question 2 “no,” finding negligence but no proximate cause.

B. Contrary to Respondent’s Assertions, the Jury Did Not Have to “Disregard” the Evidence or Engage in “Mere Theory or Speculation” to Find, as It Did, Negligence, but No Proximate Cause.

Respondent’s main theme is that (1) she presented lots of medical testimony that Dr. Hampton was negligent in ways that had nothing to do with cholesterol/blood testing and that Mr. Stalkup’s death was caused by his coronary artery disease and not by a sudden arrhythmia unrelated to his coronary artery disease, and (2) Dr. Hampton and The Vancouver Clinic presented much less testimony to controvert those propositions than she did to support them. Even accepting that as true, it does not matter. What matters is only what the jury found after it weighed the evidence and decided who to believe or disbelieve, not whose witnesses spent more time on the stand or used language that appears more emphatic on the printed page of a transcript.

Respondent asserts, Resp. Br. at 34, that “appellants argue that the jury can disregard any evidence that it wants to and come up with its own decision,” and that, to the contrary, “the jury must have some evidence on which to base its decision.” Respondent, pointing out that a jury’s finding has to be supported by more than a scintilla of evidence, also asserts,

Resp. Br. at 34-35, that the jury in this case would have had to engage in “mere theory or speculation” to find that what her experts proposed as the cause of death was not in fact the cause of death. Respondents’ assertions are incorrect. The decisions she cites do not hold that there must be affirmative testimony disproving causation in order for a jury in a civil case to return a defense verdict based on a finding of no proximate cause, but even if that were the law, defendants presented such testimony.

The jury did not have to “disregard” evidence to reach the verdict it reached. The jury only had to *disbelieve* plaintiff’s experts’ theory of causation. The jury was entitled to *disbelieve* any expert opinion testimony that plaintiff (or defendant) presented. Indeed, at plaintiff’s request, CP 13, the jury was explicitly so instructed, in the language of a standard Washington Pattern Jury Instruction, WPI 2.10. CP 70.

Dr. Hampton and The Vancouver Clinic did not bear the burden of persuasion on the issues of negligence or causation. They did not have to prove a negative, or even to present evidence of a negative. The factual proposition concerning proximate cause in Question 2 to which the jury answered “no” was a factual proposition for which plaintiff alone bore the burdens of production and persuasion. Contrary to respondent’s assertion, Resp. Br. at 34, the jury did not need to have an evidentiary basis for being unpersuaded on the issue of causation, in the same sense that there had to

be evidentiary support for a finding in plaintiff's favor. Even if there *did* need to be an evidentiary basis, beyond the jury's disbelief of plaintiff's experts' theory, for the jury's finding that the negligence they found Dr. Hampton committed was not a proximate cause of Mr. Stalkup's death, there were more than ample evidentiary bases to support that finding.

As more fully explained in the opening Brief of Appellants at pages 32-35 and 40-43, the jury could have (1) found that Dr. Hampton was negligent only for failing to do blood tests, but that such negligence was not a proximate cause of the death, since there was absolutely no evidence that it was; or (2) been persuaded that Dr. Hampton failed to investigate coronary artery disease adequately, but remained unpersuaded that coronary artery disease was proximate cause of the death,¹ or that greater work-up on June 10, 2004 would have prevented the death on June 19, 2004.²

¹ Dr. Hampton's testimony, RP 115, disputing the probability of a connection between coronary artery disease and the arrhythmia to which he and other defense witnesses attributed Mr. Stalkup's coronary arrest was, by itself, more than sufficient to "support" a finding against plaintiff on the causation element of her claim.

² Dr. Evans' testimony, RP 494-95, 500, 511-12, that it was not at all certain that had Dr. Hampton done more to investigate coronary artery disease on June 10, 2004, all of the work-up and treatment would have magically fallen in line and would have been successful in restoring blood flow to the front part of the heart, which was never demonstrated to be impaired, was more than sufficient to "support" a finding against plaintiff on proximate cause.

C. Neither *Brashear* nor *Golladay* Support the Trial Court's Grant of a New Trial.

Respondent contends, Resp. Br. at 25-28, 31, that *Brashear* and *State v. Golladay*, 78 Wn.2d 121, 470 P.2d 191 (1970), overruled in part by *State v. Arndt*, 87 Wn.2d 378 (1976),³ support what the trial court did. Those cases do not.

In *Brashear*, as explained more fully at pages 30-35 of the opening Brief of Appellants, ultimately a new trial was ordered because of instructional error, but the Supreme Court *reversed* the Court of Appeals' holding that the "yes but no" answers on the verdict form were "inconsistent." The same answers given by the jury in this case, *to the same two questions*, are also not inconsistent as a matter of law. Because plaintiff requested the jury instructions that the trial court gave in this case, and because the instructions correctly stated the law, there was no instructional error and *Brashear* does not support the granting of a new trial.⁴ But, because the "yes but no" answers in this case are reconcilable, *Brashear* mandates entry of judgment on the verdict.

³ The court in *State v. Arndt*, by a 4-3 majority, overruled *Golladay* to the extent that *Golladay* stood for the proposition that jury unanimity is required as to the means used to commit the crime charged even when there is substantial evidence to support each of the alternative means charged.

⁴ Neither respondent nor the trial court has explained what was wrong, in retrospect, with the instructions. Respondent and/or the trial court may wish that the verdict form had asked the jury to specify the way(s) in which the jury found Dr. Hampton negligent, but

Contrary to Respondent's argument, Resp. Br. at 27-28, there is no basis for limiting the Supreme Court's reasoning or result in Brashear to cases where contributory negligence is an issue. The decision stands for the "strong presumption in favor of jury verdicts" and the indulgence, in favor Dr. Hampton and The Vancouver Clinic, of all reasonable inferences as to what the jury found. The presumption in favor of jury verdicts applies generally to verdicts, not just to verdicts in cases involving issues of contributory fault.

Respondent is also wrong about State v. Golladay being instructive (as was the trial court), as explained more fully in the opening Brief of Appellant at page 37. Unlike Golladay, this is not a criminal case, nor was the jury instructed on alternative theories, one or more of which lacked evidentiary support. In Golladay, the Washington Supreme Court reversed the defendant's conviction and remanded for a new trial because the jury should not have been instructed on the state's theory of larceny-murder, as that theory was "not within the bounds of the evidence," and because the court, based on the totality of the evidence, could not overcome the presumption that the instruction was prejudicially erroneous. Golladay, 78 Wn.2d at 134, 138-40.

no one requested such a verdict form, and the verdict form used is a standard one that is not error to use.

Here, the jury was not instructed on an alternative theory of liability for which there was no evidentiary support, and even if it had been, Mrs. Stalkup certainly did not object. The jury received no improper instructions, much less improper instructions to which Mrs. Stalkup excepted, or which prejudiced her. For Golladay to have any potential instructiveness in this case, if it has any instructiveness at all for civil cases, the trial court would have needed to have erroneously instructed the jury on an alternative cause of action for which there was no evidentiary support, and the jury would have then had to have found the defendants liable on a general verdict form. No such erroneous instruction was given, nor did the jury find defendants liable. Even if those things had occurred in this case, it would have been defendants, not plaintiff, who were prejudiced and entitled to a new trial. Thus, contrary to respondent's assertions, Golladay is wholly inapposite.

D. The Trial Court's Order Cannot be Treated as a Valid *Sua Sponte* Order for a New Trial Under Civil Rule 59(a)(9).

Respondent argues, Resp. Br. at 32, that the trial court's decision to order a new trial "fits soundly under CR 59(a)(9), 'That substantial justice has not been done.'"⁵ Respondent suggests, Resp. Br. at 36

⁵ Respondent argues (correctly), Resp. Br. at 36, that a party can seek a new trial under that rule. She did not, however, seek a new trial on that ground. In fact, she sought entry of judgment as a matter of law in her favor on negligence and proximate cause, and a new trial only as to damages.

(quoting RP 825 (*italics added*)), that the trial court ruled, in effect, that substantial justice had not been done because it decided to order a new trial as to all issues “*in fairness to both sides.*” But the court cited “fairness to both sides” not as a reason for ordering a new trial, but rather as a reason for ordering a new trial as to all issues, rather than granting the relief plaintiff sought, which was to change the jury’s answer to Question 2 to “yes” as a matter of law, and retry the issue of damages alone. What the court did in ordering a new trial as to all issues was not only unfair to the defendants, but also impermissible under the law.

CR 59(a)(9) does not give a trial court authority to award mulligans on verdicts. “The basic question posed by an order granting a new trial [under CR 59(a)(9)], be it a civil or criminal action, is whether the losing party received a fair trial.” Barth v. Rock, 36 Wn. App. 400, 402-403, 674 P.2d 1265, rev. denied, 101 Wn.2d 1014 (1984) (citations omitted). The fairness of a trial should depend on what happened before the verdict was returned, not just on what the verdict was. “As one commentator has expressed it, ‘the authority of the trial judge to grant a new trial on the ground that substantial justice has not be done is severely limited.’” Cerjance v. Kehres, 26 Wn. App. 436, 440, 613 P.2d 192 (1980). “Granting a new trial for lack of substantial justice, CR 59(a)(9),

should be rare, given the other broad grounds available under CR 59.”
Lian v. Stalick, 106 Wn. App. 811, 825, 25 P.3d 467 (2001).

The decision in Barth is instructive because several features in that case closely parallel features in this case and because it illustrates the kinds of occurrences at trial that permit a court to conclude that substantial justice was not done without impermissibly substituting its judgment for that of the jury. Like this case, Barth was a medical malpractice case. As in this case, the defendants in Barth offered only a modest amount of expert testimony disputing the substantial expert testimony supporting the plaintiff’s theory of causation. As happened in this case, the jury in Barth returned a defense verdict, but the trial judge ordered a new trial.

The Barth court’s explanation for affirming the grant of a new trial might even seem, initially, to echo respondent’s point that the expert testimony she presented had been so strong that the jury *had* to find in her favor on causation:

[A]s stated in the court's reasons for granting a new trial, all of the expert medical testimony laid the cause of Andrea’s death to either Mr. Rock or Dr. Nayebi, except for one witness, Dr. Branford, who testified Andrea had an allergic reaction to sodium pentothal.

Barth, 36 Wn. App. at 403. But any apparent similarities between Barth and this case end there.

In Barth, the trial court did not order a new trial on its own initiative, but rather granted a motion by the plaintiff based on CR 59(a)(9). More importantly, the court did not grant the motion on the ground that the plaintiff had carried her burden of persuasion as a matter of law, but rather because it – the court – had declined, before the verdict, a request by the plaintiff to inform the jury that the defense causation expert’s testimony had included an important misstatement. As the court explained:

[Dr. Branford, the defense expert] testified as follows:

A Well, one of the most recent references to this about pentothol [*sic*] or pentothal response is in a text from England. It’s a two-volume text -- *Grey and Nunn*, which is widely used and respected in this country. And in that book a chapter on this particular aspect of anesthesia is written by Dr. John Dundee, and it is in this article that he talks about the 55 documented cases in literature, and we can give you all those references.

Q Of those 55 cases, now, are they confined to the sodium pentothal reaction?

A Yes.

* * *

Q All right, you say that Dr. Dundee and some of his associates published an article?

A They wrote the chapter in *Grey and Nunn* on drug reaction of this type.

Q And the 55 cases, all of them reaction to sodium pentothal?

A Correct.

It is evident Dr. Branford based his opinion regarding the 55 cases of allergic reaction to sodium pentothal on the Grey and Nunn textbook. He did not have the textbook with him at trial. After exceptions to the jury instructions were taken, counsel indicated he had obtained the textbook and made it available to the court. He told the judge the textbook stated there were 55 reported allergic reactions to barbiturates in general, rather than to sodium pentothal. The court refused to allow this information to be presented to the jury. The only evidence admitted was the following:

“It is hereby stipulated that there exists a book entitled *General Anesthesia, Fourth Edition*, 1980, by Grey and Nunn, in [sic] which has an article by Dr. Dundee.”

Thus, the jury was unaware Dr. Branford's testimony was clearly erroneous and that the textbook he relied on in truth stated there were 55 reported cases of allergic reaction to barbiturates, not sodium pentothal.

Other expert witnesses testified that an allergic reaction to sodium pentothal was an event so rare there are only nine reported cases out of billions of surgeries over a period of 40 years and that Andrea did not experience any of the symptoms which appeared in the nine reported cases. Due to the speculative nature of the theory of allergic reaction to sodium pentothal in this case and the fact Dr. Branford's testimony misled the jury, the trial court did not abuse its discretion in ordering a new trial for failure of substantial justice.

Barth, 36 Wn. App. at 403-05 (“sics” and ellipsis in original). Thus, the court ordered a new trial in Barth because error prejudicial to the plaintiff had occurred, and could (or should) have been corrected, as plaintiff requested, prior to verdict, but was not.

Here, respondent has not complained that the jury heard clearly erroneous testimony from a defense witness. She has not complained of any rulings *at all* that she claims denied her a fair trial. Although the trial court termed its jury instructions and verdict form inadequate after the fact (without specifying which instruction(s) were not adequate or how they or the verdict form should have been phrased differently), CP 203-04, the instructions given and verdict form used were pattern ones that plaintiff had requested and that she did not complain about even after the verdict. No authority permits the “adequacy” of unobjected-to jury instructions and verdict forms to be decided simply by looking at the jury’s verdict. Indeed, as the court explained in Cerjance, 26 Wn. App. at 441:

Nothing in the history or application of the “substantial justice has not been done” ground for a new trial, CR 59(a)(9), suggests that it can be used to avoid the duty of a party to except to instructions and object to trial practices before the party can claim error in those respects. In fact, just the reverse appears. *See* CR 59(a)(8). The parties consented to the jury’s determination of the issues submitted to the jury and are now bound by the jury’s verdict on those issues.

As in Cerjance, the trial court’s order granting a new trial and setting aside the jury verdict should be reversed and the jury verdict reinstated..

Respondent has complained about the verdict but not about the fairness of the trial. As Barth illustrates, there must have been something wrong with the trial in order for a verdict to be set aside on grounds that

substantial justice has not been done. The jury in this case heard conflicting testimony concerning multiple theories of negligence. That the jury ultimately was unpersuaded that any negligence it found Dr. Hampton committed on either March 8, or June 10, 2004 was not proximate cause of Mr. Stalkup's death on June 19, 2004, is not a basis for saying that the trial was not fair, or that substantial justice was not done.

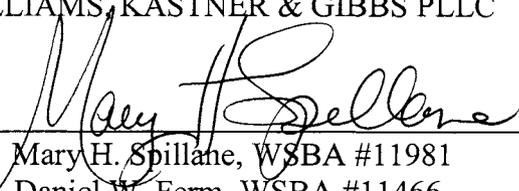
II. CONCLUSION

For the foregoing reasons and those stated in the opening Brief of Appellants, the trial court's order (and supplemental explanatory order) granting a new trial and setting aside the jury verdict should be reversed and the case remanded for entry of judgment on the verdict in favor of Dr. Hampton and The Vancouver Clinic.

RESPECTFULLY SUBMITTED this 24th day of August, 2007.

WILLIAMS, KASTNER & GIBBS PLLC

By

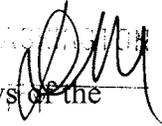

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CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

FILED: 04

BY: 

I hereby certify under penalty of perjury that under the laws of the

State of Washington that on the 24th day of August, 2007, I caused a true and correct copy of the foregoing document, "Reply Brief of Appellants," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

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