

FILED

DEC 04 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 31567-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

SHELLY BALSER and JOHN BALSER,

Respondents,

v.

PROVIDENCE HEALTH & SERVICES,
a Washington Corporation, d/b/a MT. CARMEL HOSPITAL,

Appellant.

BRIEF OF APPELLANT

Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466
WILLIAMS, KASTNER & GIBBS PLLC
Attorneys for Appellant

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

III. STATEMENT OF THE CASE 4

 A. Shelly Balser Has Physical Therapy for Elbow and
 Shoulder Pain..... 4

 B. Balser Sues, Claiming She Has a Nervous-System Injury 11

 C. The Jury Finds No Negligence 24

 D. Balser Moves for a New Trial, Claiming Willful
 Misconduct by Defense Counsel During Discovery that
 Left Balser’s Counsel Unprepared for Defense Expert
 James Strandy’s Testimony 25

 E. The Court Finds Misconduct in the Defense’s Failure to
 Disclose “Important” Information and Grants Balser’s
 New-Trial Motion 26

IV. ARGUMENT 28

 A. Standard of Review..... 28

 B. There Was No Misconduct 29

 1. The trial court’s misconduct finding is a
 conclusion of law subject to *de novo* review
 because what happened is not in dispute..... 29

 2. The trial court’s conclusions as to misconduct are
 incorrect because the facts do not support it 30

 3. If the misconduct finding is one of fact, it lacks
 substantial supporting evidence 31

C.	Contrary to the Trial Court’s Findings, Strandy’s Experimentation Testimony Could Not Have Been “Important” Enough to Be Unfairly Prejudicial to Balser’s Case.....	33
1.	The experimentation testimony confirmed points of human physiology that were not in dispute	33
2.	The experimentation testimony was consistent with the contemporaneous records and the uncontradicted testimony of Jennifer Dunlap	35
3.	An inference of “importance” cannot permissibly be inferred from the questions jurors had for Strandy that the court did not ask.....	36
D.	Even if Discovery Misconduct Did Prejudice Balser’s Case, It Was Error to Grant Her a New Trial Because She Gambled on the Verdict.....	37
E.	The Order Granting Balser a New Trial May Not Be Sustained Under CR 59(a)(1) or CR 59(a)(9) Independently of CR 59(a)(2).....	40
F.	Reinstatement of the Judgment on the Defense Verdict is Required Even if the Trial Court’s Grant of a New Trial Is Analyzed as a Sanction for Discovery Misconduct.....	42
V.	CONCLUSION.....	43

TABLE OF AUTHORITIES

	Page(s)
STATE CASES	
<i>Agranoff v. Morton</i> , 54 Wn.2d 341, 340 P.2d 811 (1959).....	37
<i>Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.</i> , 140 Wn.2d 517, 539, 998 P.2d 856 (2000).....	37
<i>Anfinson v. FedEx Ground Package Sys., Inc.</i> , 174 Wn.2d 851, 281 P.3d 289 (2012).....	28
<i>Bennett v. Smith Bundy Berman Britton, P.S.</i> , 176 Wn.2d 303, 291 P.3d 886 (2013).....	40
<i>Blair v. TA-Seattle E. No. 176</i> , 171 Wn.2d 342, 254 P.3d 797 (2011).....	2, 43
<i>Breckenridge v. Valley Gen. Hosp.</i> , 150 Wn.2d 197, 75 P.3d 944 (2003).....	36
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997).....	2, 42, 43
<i>Carabba v. Anacortes Sch. Dist. No. 103</i> , 72 Wn.2d 939, 435 P.2d 936 (1967).....	38
<i>City of Bellevue v. Kravik</i> , 69 Wn. App. 735, 850 P.2d 559 (1993).....	37
<i>Cox v. Charles Wright Academy, Inc.</i> , 70 Wn.2d 173, 422 P.2d 515 (1967).....	36
<i>Gildon v. Simon Prop. Group, Inc.</i> , 158 Wn.2d 483, 145 P.3d 1196 (2006).....	29
<i>Grundy v. Brack Family Trust</i> , 151 Wn. App. 557, 213 P.3d 619 (2009), <i>rev. denied</i> , 168 Wn.2d 1007 (2010).....	29

<i>Jones v. Hogan</i> , 56 Wn.2d 23, 351 P.2d 153 (1960).....	37
<i>Knecht v. Marzano</i> , 65 Wn.2d 290, 396 P.2d 782 (1964).....	41
<i>Kohfeld v. United Pac. Ins. Co.</i> , 85 Wn. App. 34, 931 P.2d 911 (1997).....	41
<i>Lamborn v. Phillips Pac. Chem. Co.</i> , 89 Wn.2d 701, 575 P.2d 215 (1978).....	41
<i>Leschi Improv. Council v. Wash. State Highway Comm.</i> , 84 Wn.2d 271, 525 P.2d 774(1974).....	30
<i>Magaña v. Hyundai Motor Am.</i> , 167 Wn.2d 570, 220 P.3d 191 (2009).....	25
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006).....	42
<i>McCoy v. Kent Nursery, Inc.</i> , 163 Wn. App. 744, 260 P.3d 967 (2011), <i>rev. denied</i> , 173 Wn.2d 1029 (2012).....	41
<i>Nelson v. Martinson</i> , 52 Wn.2d 684, 328 P.2d 703 (1958).....	37, 39
<i>Robinson v. Safeway Stores</i> , 113 Wn.2d 154, 776 P.2d 676 (1989).....	29
<i>State v. Sisouvanh</i> , 175 Wn.2d 607, 290 P.3d 942 (2012).....	28
<i>State v. Strine</i> , 176 Wn.2d 742, 293 P.3d 1177 (2013).....	37
<i>Strandberg v. N.P.R. Co.</i> , 59 Wn.2d 259, 367 P.2d 137 (1961).....	38
<i>Sun Life Assurance Co. v. Cushman</i> , 22 Wn.2d 930, 158 P.2d 101 (1945).....	38

Teter v. Deck,
174 Wn.2d 207, 274 P.3d 336 (2012).....37, 38, 39

Warren v. Hart,
71 Wn.2d 512, 429 P.2d 873 (1967).....38

FEDERAL CASES

NLRB v. Marcus Trucking Co.,
286 F.2d 583 (2d Cir. 1961)30

RULES

CR 26.....33

CR 26(b)(5)(A)25

CR 26(e)(1)(A)25

CR 26(e)(1)(B)25

CR 37.....33

CR 59(a)28, 42, 43

CR 59(a)(1).....1-2, 25, 28, 40, 41

CR 59(a)(2).....1-2, 25, 28, 32, 40, 41

CR 59(a)(3).....28

CR 59(a)(9).....1-2, 25, 28, 40, 41, 42

I. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its March 18, 2013 Order for New Trial.

2. The trial court erred in failing to find that plaintiff had gambled on the verdict and thereby waived any claim of error with respect to James Strandy's experimentation testimony.

3. The trial court erred in concluding or finding that the defense committed misconduct. (Findings of Fact 21-32, 37, 39-42, CP 306-08, Appendix ("App.") at 4-6. and Conclusions of Law 1-7, CP 308-09, App. at 6-7).

4. The trial court erred in finding that James Strandy's experimentation testimony was "important," "material," and/or prejudicial to Shelly Balser's physical therapy malpractice case. (Findings of Fact 14-17, 25-29, 31-32, 40-42, CP 305-08, App. at 3-6, and Conclusions of Law 3-7, CP 309, App. at 7).

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issues pertaining to Assignments of Error 1, 3, and 4:

1. Are the trial court's findings that misconduct occurred findings of fact or a conclusion of law, and

(a) if they are a conclusion of law, is the conclusion correct and did it give the trial court discretion to grant Balser a new trial under CR

59(a)(1), (2) and/or (9), or

(b) if they are findings of fact, does substantial evidence support them?

2. Does substantial evidence support the trial court's finding that Strandy's experimentation testimony was "important" or "material" testimony and was prejudicial to Balser's case?

3. If the grant of a new trial is treated as a sanction for pre-trial discovery misconduct, was it reversible error for the trial court to impose such a severe sanction without making the findings required by *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), and *Blair v. TA-Seattle E. No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011)?

Issues pertaining to Assignment of Error No. 1 and 2:

4. In a lawsuit based on alleged malpractice by a physical therapist, does the "gamble on the verdict" rule preclude a trial court from granting the plaintiff a new trial on the ground that the defendant committed misconduct by not disclosing, in advance of a defense expert's discovery deposition, that his standard-of-care opinion was based in part on an experiment he performed on his assistant, even though the proposition of human physiology that the expert's experiment confirmed was not contested by any medical witness at trial, and even though:

(a) plaintiff's counsel was informed at the expert's deposition that the expert had performed experimentation concerning the therapy at issue and could have asked, but did not ask, the expert questions concerning experimentation;

(b) plaintiff's counsel made no pretrial motion to limit or exclude testimony by the expert concerning his experimentation;

(c) plaintiff's counsel did not object on any ground to the testimony when the expert described his experimentation at trial;

(d) plaintiff's counsel cross-examined the defense expert concerning his experimentation;

(e) plaintiff's counsel did not move to strike the expert's trial testimony concerning the experimentation or request any limiting or curative instruction concerning the testimony; and

(g) plaintiff's counsel did not move for a mistrial during trial because of the experimentation testimony?

5. Even if a trial court may grant a plaintiff a new trial under such circumstances, may it do so when it acknowledges – as the trial court did here, CP 308 – that it “does not know whether it [the alleged misconduct of defense counsel in not disclosing the defense expert's experiment before his deposition] could have been cured or not cured” if

the plaintiff had objected to the experiment testimony at trial, had moved to strike it, or had asked for a curative instruction?

III. STATEMENT OF THE CASE

A. Shelly Balsler Has Physical Therapy for Elbow and Shoulder Pain.

Shelly Balsler's osteopathic primary care physician prescribed a course of physical therapy for elbow and shoulder pain.¹ On March 28, 2005, Balsler began seeing Thomas Kaluzny, P.T., a Mt. Carmel Hospital employee with 30 years of physical therapy experience, for treatment.² Kaluzny examined Balsler and confirmed that she had shoulder and elbow pain.³ As part of Balsler's therapy, Kaluzny administered Russian "e-stim" (electrical muscle stimulation or EMS) treatment,⁴ which he had found effective in reducing muscle pain and tendon inflammation.⁵ Balsler had undergone several Russian "e-stim" treatments before, during a course of occupational therapy that had concluded in February 2005, and she felt it helped her pain.⁶

¹ RP 462; Ex. 8, pp. 168-69; Ex. 3, p. 737.

² Ex. 3, pp. 731-33; RP 1094.

³ RP 289, 958; Ex. 3, p. 728.

⁴ Ex. 3, pp. 731-33. "Russian" EMS originated as a way to improve peak muscle performance in Russian Olympic athletes. RP 287, 299-300, 1020, 1104.

⁵ RP 1098-99, 1103, 1100. Kaluzny has never had a patient suffer nerve damage from electrical stimulation, RP 1134-35, and is aware of no report of that ever happening to anyone anywhere, RP 1105-06. No trial witness testified to the existence of any literature or case reports linking EMS to nerve damage.

⁶ Ex. 3, pp. 751, 770-73; RP 956-57.

EMS uses pulses of alternating current to induce contractions in a muscle.⁷ EMS differs from transcutaneous electrical nerve stimulation (TENS) in that TENS stimulates nerve fibers in the skin and sensory nerve endings, whereas EMS applies deeper neuromuscular stimulation to induce muscle contraction. RP 298.

The Mt. Carmel Hospital physical therapy department used (and still uses) a Dynatron device to deliver the electrical pulses for Russian EMS.⁸ The electrical pulses are conducted over wire “leads” that end in electrodes set inside 2” x 2” square pads placed on the skin.⁹ The therapist places one electrode pad above a “motor point” of the muscle (where the nerve from the spine that stimulates contraction enters the biggest part of the muscle, the “muscle belly”), and the other electrode on the muscle belly itself.¹⁰ The Dynatron can generate up to 50 microvolts, and Kaluzny always set the level of electrical current to begin at zero, “ramp” up for two seconds to a level of between 13 and 20 microvolts for ten seconds, then ramp back down to zero for two seconds, wait ten seconds, and then repeat that process.¹¹ The Dynatron had four leads, allowing alternating (or reciprocal) stimulation of two muscles, with one

⁷ RP 265, 284, 299, 340.

⁸ RP 262, 284, 1106.

⁹ RP 90-91, 275, 1142-44, 1365; CP 333-34.

¹⁰ RP 1108, 1111-12.

¹¹ RP 1114, 1120-21.

contracting while the other rested.¹²

There is no dispute that EMS electrodes should be placed to avoid the stellate ganglia or the heart.¹³ The stellate ganglia are bundles of nerves that lie deep under the skin and the sternocleidomastoid muscles, which rotate the neck, RP 1226, along both sides of the neck vertebrae.¹⁴ The stellate ganglia are part of the autonomic nervous system.¹⁵ The autonomic nervous system, acting largely below the level of consciousness, controls visceral functions such as heart rate, digestion, respiratory rate, salivation, perspiration, and pupillary dilation.¹⁶ It has two parts: the sympathetic and parasympathetic systems. RP 141-43. The former activates the body's "fight or flight" response to stimuli primarily by secreting the neurotransmitters epinephrine or norepinephrine; the latter counteracts the sympathetic system, primarily through the secretion of acetylcholine. RP 141. The two parts are offsetting or complementary; Balser's expert Dr. Alan Jacobs gave the example of the sympathetic, high-activity, system making the heart beat faster when a person needs to run, and the parasympathetic system slowing the heart rate down when a person is resting. RP 142. Nerve fibers in both stellate ganglia serve the parotid

¹² RP 285, 1114, 1119, 1143, 1149.

¹³ RP 267-68, 1141, 1158.

¹⁴ RP 158-59, 307-08, 1218.

¹⁵ RP 89-90, 145-46.

¹⁶ RP 138-42; and *see* CP 21-22 (¶¶4.1-4.3); CP 334.

(salivary) glands and the heart, among other organs. RP 157-59, 1219.

Balser had EMS treatments with Kaluzny on March 28, March 31, April 4, and April 11, 2005, and felt they were helping her.¹⁷ On April 19, Kaluzny induced alternating or reciprocal contractions of Balser's right bicep and right trapezius muscles.¹⁸ He had not previously targeted the trapezius.¹⁹ As Balser's expert witness Dr. Jacobs explained, the trapezius muscle "spans from the medial shoulder area into your neck and all the way up behind the back of your head...." RP 209.

According to Kaluzny, with Balser lying in a small room wearing a hospital patient gown, he placed one pair of electrode pads for each muscle: one pad on the mid muscle belly of the biceps, a second on the long head of the biceps tendon, a third on the mid muscle belly of the trapezius, and the fourth across the acromioclavicular joint on the top of the deltoid muscle, over the motor point of the trapezius,²⁰ but not on a motor point of the deltoid, RP 292. The deltoid and trapezius muscles both lie at the top of the shoulder and overlap.²¹

¹⁷ Ex. 3, pp. 728-29, 731-33.

¹⁸ RP 1116, 1131.

¹⁹ Ex. 3, pp. 731-32.

²⁰ RP 1117-18, 1123, 1143, 1150, 1365.

²¹ RP 209, 306-07, 353, 365-66, 582, 1157. Balser's expert witness Dr. Alan Jacobs explained that the deltoid is "your shoulder muscle on the lateral [rear] aspect of your thorax on the top." RP 209.

Following his standard procedure, RP 1111-14, Kaluzny adjusted the current's intensity, first for the biceps and then for the trapezius, in each case turning it up to a level between 13 and 20 microvolts so that it produced enough of a contraction without making Balser uncomfortable or causing pain, RP 1119-21, 1123.²² With the trapezius, Kaluzny was looking for a contraction that resulted in the shoulder lifting.²³ Once the muscles were alternately contracting as intended²⁴ and Balser confirmed she was comfortable, RP 947, 1123, Kaluzny left the room, saying he would return in 20 to 30 minutes. RP 903. Balser did not feel heat from any electrode and had no skin irritation. RP 947. The shoulder movements did not cause any pain. RP 945-46. She had no tingling sensations during the treatment. RP 971.

After what Balser estimates was five to ten minutes, RP 903, she felt her heart "pounding out of my chest," got up, opened the door, and asked a woman outside – Jennifer Dunlap, with whom Balser already was acquainted²⁵ – to summon Kaluzny.²⁶ When Kaluzny arrived, Balser told

²² Kaluzny did not record at what microvolt level he left the machine set. RP 285-86; Ex. 3, p. 733. Balser's physical therapy expert disclaimed any opinion that Kaluzny used too high an intensity level, noting that Balser reported being comfortable. RP 341.

²³ RP 1121-22, 1126-26, 1131.

²⁴ RP 937-39, 943-47, 1159.

²⁵ Balser had seen Dunlap for physical therapy in 2004. Ex. 3, pp. 694-97. In addition, Dunlap and Balser worked in the same building and Balser's daughter had babysat for Dunlap. RP 911, 1085.

²⁶ RP 903, 1083-84, 1370.

him her heart was racing, but she was not hysterical and did not complain of pain, numbness, tingling, or dry mouth.²⁷ Someone turned the machine off, Kaluzny measured Balser's pulse and blood pressure, and, according to the emergency room records someone reported Balser's pulse as 152 and her blood pressure as 172/107.²⁸ Balser's husband drove Balser to the emergency room, which took about five minutes; Kaluzny called ahead to advise that Balser was on her way and to relate why.²⁹

After Balser reached the emergency room at 8:36 a.m.,³⁰ her pulse was 103 and her blood pressure was 151/74.³¹ She complained of a dry mouth and "tight" neck as well as tachycardia (rapid heartbeat), but denied any pain.³² The emergency room record states that Balser had been undergoing physical therapy with electrodes placed "on her right shoulder."³³ Laboratory tests and chest x-ray were normal, as was an electrocardiogram (except for the initial tachycardia).³⁴ Balser's heart rate and blood pressure returned to normal levels without any medical intervention, and

²⁷ RP 280, 1133.

²⁸ RP 280-81, 1083, Ex. 4, p. 197.

²⁹ RP 281, 842-43, 904, 960, 1130; Ex. 4, p. 197.

³⁰ Ex. 4, p. 194.

³¹ Ex. 4, p. 195.

³² Ex. 4, pp. 196-98.

³³ Ex. 4, p. 198.

³⁴ RP 586; Ex. 4, pp. 200-04.

she was discharged at 10:56 a.m.³⁵ Balser's attending physician, Dr. John Frlan, speculated that her symptoms might have been due to electrical stimulation of her vagus or phrenic nerve, but did not determine a cause and "ruled out ... any serious medical possibility," including electrical injury.³⁶ Balser was told that she had had "an episode of rapid heart rate and elevated blood pressure" the cause of which was unknown, and that she should return promptly if she experienced a sustained rapid heart rate.³⁷ Balser took the next two days off from work. RP 907.

Balser saw Dr. Kathleen Schuerman, her osteopathic primary care physician, on April 22, 2005.³⁸ According to the record of that visit, Balser reported that, on April 19, Kaluzny had "changed the positioning of the TENS [sic] unit, and put it up on her right shoulder ...," that Balser went to the emergency room on April 19, that her heart rate had "slowed down nicely [there] without any intervention," and that she "has felt fine ever since."³⁹ Balser saw Dr. Schuerman again on May 25, 2005, and reported that "all of the symptoms regarding her tachycardia have resolved."⁴⁰ On May 30, however, Balser went to the emergency room

³⁵ RP 216, 587; Ex. 4, p. 195.

³⁶ Ex. 4, p. 199; RP 589.

³⁷ Ex. 4, p. 207.

³⁸ Ex. 8, p. 169.

³⁹ *Id.*

⁴⁰ Ex. 8, p. 170.

complaining that the previous evening she had re-experienced heart palpitations and dry mouth.⁴¹ She has since reported experiencing anxiety and dry mouth often, and tachycardia less often.⁴²

B. Balser Sues, Claiming She Has a Nervous-System Injury.

Balser sued Mt. Carmel Hospital, alleging negligence resulting in nerve damage.⁴³ CP 22-23. Balser theorized that the Russian EMS treatment on April 19, 2005 damaged some nerves in her right stellate ganglion that serve salivary glands and the heart, leaving the sympathetic and parasympathetic halves of her autonomic nervous systems out of balance.⁴⁴ She claims the nerve damage makes her drink water constantly because she no longer produces saliva and makes her randomly experience “profound *fight or flight* episodes.”⁴⁵ She claims she has given up coffee, chocolate, social activities, television-watching, and travel to minimize the anxiety that seems to trigger or worsen her symptoms.⁴⁶

⁴¹ Ex. 5, p. 120.

⁴² *E.g.*, Ex. 8, pp. 175, 177, 182, 185-86, 189, 191, 203-05, 207, 212.

⁴³ Balser also alleged failure to obtain informed consent, CP 24-25 (¶¶ 9.3-12.1), but the case went to trial solely on the medical negligence claim, *see* CP 48-49, 69, 335-38. Balser’s husband, John, also a plaintiff in the case, asserted a claim for loss of spousal consortium. CP 23 (¶8.2). Because Mr. Balser’s right to any recovery depended on the jury finding for Mrs. Balser on the issue of liability, for simplicity, respondent describes the facts as if Mrs. Balser were the sole plaintiff.

⁴⁴ CP 335; RP 95-96, 164, 183-85, 193, 254.

⁴⁵ CP 335.

⁴⁶ *Id.*

The trial focused on two issues: (1) whether Balsler really has an injury to her right stellate ganglion or has a panic disorder instead, and (2) where Kaluzny placed the upper EMS electrode to make Balsler's trapezius muscle contract. Balsler did not dispute Kaluzny's testimony about where he had placed EMS electrodes to make her right biceps muscle contract, or his testimony that he placed the lower of the other pair of electrodes on the trapezius mid muscle belly. RP 1117. The dispute over electrode placement concerned only Kaluzny's placement of the fourth electrode.

Balsler testified that Kaluzny placed the fourth electrode "above my collar bone by my neck in that little dip,"⁴⁷ referring to the right clavicular fossa. Kaluzny acknowledged that EMS electrodes should not be placed in the clavicular fossa,⁴⁸ and insisted that he has never placed one there on any patient,⁴⁹ and did not place one there on Balsler.⁵⁰ Kaluzny testified that he placed the fourth electrode on the top of the deltoid muscle, across the acromioclavicular joint.⁵¹ RP 1117.

Balsler testified that she first realized several months after her April 19, 2005, emergency room visit that her dry mouth, anxiety, and occa-

⁴⁷ RP 902, 995.

⁴⁸ RP 268, 1141.

⁴⁹ RP 1096, 1158.

⁵⁰ RP 292, 1135, 1151, 1159.

⁵¹ As Balsler's expert Cathleen Gephart, a physical therapist, explained, the acromioclavicular joint is at the end of the scapula, at the tip of the shoulder. RP 306.

sional tachycardia symptoms could be due to an injury to her stellate ganglion. Balser attributed her realization to Kaluzny's colleague, Jennifer Dunlap, giving her a copy of a part of the Dynatron manual. RP 911-12. The manual pages advised that electrodes should be placed to avoid the stellate ganglia. RP 267. Balser and her husband conducted research on the Internet, concluded that her symptoms matched those of stellate ganglion injury, and provided the fruit of their research to Dr. Schuerman on October 5, 2005.⁵² Dr. Schuerman began ascribing Balser's complaints (other than the pre-existing ones of elbow and shoulder pain) to "stellate ganglion injury."⁵³

All medical witnesses who addressed the subject agreed that contraction of the trapezius muscle makes the shoulder lift or shrug.⁵⁴ It was undisputed that Balser's trapezius muscle was contracting when Kaluzny left Balser alone.⁵⁵ (Balser insisted her shoulder was lifting, not shrugging,⁵⁶ but no medical witness identified lift or shrug as a distinction that mattered.) It was undisputed that the stellate ganglia lie deep – a matter of centimeters – under the skin of the clavicular fossa and under the

⁵² RP 912-13 and 968-69; Ex. 8, p. 185.

⁵³ *E.g.*, Ex. 8, pp. 186-212.

⁵⁴ RP 309 (Gephart), 1031 (Strandy), 1224 (Dr. Murphy).

⁵⁵ RP 937, 939, 947, 1159.

⁵⁶ RP 937-38, 943-47.

sternocleidomastoid (neck-rotating) muscle.⁵⁷ Balsler did not claim, and there was no evidence suggesting, that her skin had been burned or even irritated where she claims Kaluzny placed the fourth electrode.

Balsler's physical therapist expert, Cathleen Gephart, opined that, assuming – as Balsler's counsel had asked her to – that Kaluzny placed the fourth electrode where Balsler testified he did and not where he claims he did, then Kaluzny violated the standard of care.⁵⁸ Neither Gephart nor any other medically trained witness testified that the trapezius (or any other shoulder) muscle will contract if one electrode is placed on the mid muscle belly of the trapezius and another is placed in the clavicular fossa. Both Kaluzny, RP 1159, and defense neurologist Dr. Lawrence Murphy, RP 1233, testified that such a placement of electrodes would not induce trapezius contractions. No witness with medical expertise contradicted Kaluzny and Dr. Murphy on that point, although Gephart opined that the trapezius might twitch or contract slightly if an electrode pad is placed partly over the trapezius motor point and partly in the clavicular fossa.⁵⁹

Balsler's neuroendocrinologist expert, Dr. Alan Jacobs, opined that because Balsler's subjective symptoms followed the electrical stimulation on April 19, 2005, they probably reflect a "thermal burn" injury to her

⁵⁷ RP 217, 1218.

⁵⁸ RP 297, 303, 317, 336, 384.

⁵⁹ RP 308-10, 340.

stellate ganglion.⁶⁰ Dr. Jacobs admittedly worked backwards from Balser's symptoms to infer their cause,⁶¹ and assumed Kaluzny had placed an electrode over her stellate ganglion and not on the mid muscle body of the trapezius.⁶² Dr. Jacobs admitted that no test has confirmed nerve damage.⁶³ Dr. Jacobs admitted that there was no evidence of injury to nerves that lie between Balser's skin and right stellate ganglion.⁶⁴

Physical therapist James Strandy testified as the hospital's first witness. RP 1012. During his direct examination, he was asked, and testified – without objection – as follows:

Q Why if the proximal lead were in the triangle as you called it would there be no shoulder lift?

A Because I tried it myself.

Q What do you mean you tried it yourself?

A Experimented on my assistant because I was curious myself to see if they could actually stimulate the upper trapezius with electrode in that area, and you can't.

Q Explain the nature of your experiment.

A Well, in this case been going on for a long time, but I was just curious because we never put an electrode in that area. It just contraindicated because of the symptoms I

⁶⁰ RP 164, 179, 184-85, 217.

⁶¹ RP 162, 173, 200.

⁶² RP 200-01, 211. Dr. Jacobs did not opine that the EMS treatment administered to Balser on April 19, 2005 had damaged (or even affected) her vagus or phrenic nerves, the stimulation of which Dr. Frlan, the emergency room physician, had speculated (Ex. 4, p. 198) might have triggered her tachycardia.

⁶³ RP 222, 231, 234, 242.

⁶⁴ RP 225-26.

described going down the arm, and so I wanted to see what that would be like.

So I got a willing assistant to come out, and we used the Russian electrical stimulation and first put it on the trapezius and deltoid and got the desired contraction we wanted, and then I used the proximal; in other words, the electrode here in the dip of the neck or the triangle area, and you don't get any contraction of trapezius because you're not over the motor point, but you do get a fairly strong neurogenic symptom down the arm. You feel it flow down your arm pretty readily, and it's very – you can sense that pretty well.

Q Did the assistant as the power intensity was turned on or turned up get that sensation immediately or was there some time delay?

A We start – obviously, it starts out with no intensity at all, and then we ramp it up, okay, and I believe as of 13 microvolts with that individual.

Q Once you got to 13 microvolts, what symptoms were communicated by your assistant?

A Obviously, visually, she didn't have any shoulder shrug or contraction of her trapezius. That's why I was curious whether or not you could really contract the upper trapezius with an electrode in that position, but she said, "I do feel some sensation going down my arm." I said, "What kind of sensation do you feel, Karen. I feel the sensation of paresthesia or tingling or numbness."

RP 1036-38.⁶⁵

Strandy then was asked about how the Dynatron is operated, RP 1038-39, after which he repeated part of his experiment testimony:

⁶⁵ Balser had testified that she felt no tingling sensation during the April 19, 2005 EMS treatment session. RP 971.

Q All right. And, sir, at what level did your assistant identify neurogenic symptoms when the electrode was placed in the triangle?

A 13 microvolts.

RP 1039.

Balser's counsel began her cross-examination of Strandy by establishing that he had not related the experiment at his deposition, and that Strandy's assistant is bigger than Balser. RP 1042-1043.⁶⁶

On redirect, defense counsel asked Strandy:

Q Now, do you recall the line of questioning by [Balser's counsel] suggesting that you were withholding things at your deposition not notifying her of any experimentation?

A Yes.

Q I'm going to read to you a question that I, in fact, asked you at your deposition at line 16, and I'd like you to give the jury the answer you provided to [Balser's counsel] or to me at the time of your deposition.

"Question: In addition to the records, literature and your experience, have you, also, performed any kind of work or experimentation relative to Russian electrical stimulation," and how did you answer at the time of your deposition?

A "Yes."

RP 1064.

⁶⁶ Strandy testified that his assistant is about 5'8" tall and weighs less than 160 pounds, RP 1042-43, while the medical records in evidence show that Balser weighed 61.23 kg – 134.98 lbs. – on April 19, 2005, Ex. 4, p. 195, and was 60.25 inches (5' ¼") tall on February 2, 2005, Ex. 8, p. 166.

On re-cross examination (starting at RP 1067), Balser's counsel argued with Strandy over whether her deposition questions had called on him to disclose his experimentation.

Q Okay. And then I asked, "What research have you done," and your answer was?

A "I looked at different forms of research. I use a variety types of electrotherapy or high volt stimulation or microcurrent or interferential current. I use a fair bit of direct current or current for muscles. I do a lot of different research over the years on difference types, electrotherapy a lot of different forms."

I thought you meant what type of research as far as literature review.

Q Okay. So I didn't use the word experiment, so you didn't tell me about your experiment; is that correct?

A Well, I did elude [sic, allude] to you on Page 18 that I know for a fact this is what you get.

* * *

Q (By [Balser's counsel]) What line are you on, sir?

A I'm sorry. You asked a question on line 4, and you said, "Question: And you have had a triangle those two pads are linked up to serve one another in the process which, where does the current flow," and I answer, "Are we talking about this case or in general?" You said, "In general."

I said, "In general if you put a pad in the triangle, you would not get any contraction. What you would get is a neurogenic sensation down the arm because it is fed over the brachial plexus or at least the upper divisions of the brachial plexus, and you would not get a shoulder shrug."

Q Okay. And from that, I'm supposed to understand that you were eluding [sic, alluding] to doing some experiments; is that correct?

A I would think that – excuse me for saying this – I think you’re in the deposition you would have said how do you know that for sure, Mr. Strandy. I did it myself. I was waiting to state that, but [defense counsel] brought that up later on in the deposition.

Q Okay. And I was supposed to figure out from whatever [defense counsel] said how to phrase a question so you could tell me about your experiment; is that correct?

A That’s correct.

RP 1067-70. Baiser’s counsel did not move to strike Strandy’s experimentation testimony or request a special jury instruction concerning it.

The opportunity then came for juror questions. The trial court asked Strandy some, RP 1070-71, then excused the jury and told counsel:

[T]here were four questions. One of them I thought was a good question, I read that. Here are the three questions, and I just want to give you a heads up.

First question. Since you were willing to “experiment” on your assistant to see if you could induce movement in the shoulder by placing an electrode in the triangle, is it fair to assume you were not concerned with creating injury to her ganglion? Why or why not? Cervical ganglion? Why or why not? That’s one juror who by the way has excellent handwriting for whatever that’s worth. [CP 31].

Second one. Was the assistant, Karen, afraid to have her stellate ganglion damaged to test the hypothesis of achieving the shoulder shrug? [CP 32].

Next one. Did your assistant experience any side effects after placing electrodes in triangular area such as increased high blood pressure, tachycardia, dry mouth or any other sympathetic system symptoms? How long was the machine turned on with electrodes in the triangular area? [CP 33].

So all three of these are in reference to that issue, and I thought I'd give you a heads up before I asked Mr. Strandy those questions.

RP 1071-72. Balser's counsel objected to Strandy being asked those three juror questions, complaining that she had not been told about the experiment in the hospital's answers to her interrogatories:

[I]n answering interrogatories, there was absolutely no disclosure that this witness would have any opinions about experiments at all. I believe that this is something that should have been disclosed. I asked the witness, I'll find the page, do you have any other opinions. You know, we shouldn't be playing word games in depositions.

Number two, this – had I known about this, I would have made different motions, would have done additional discovery. Also, this is an experiment that the staff person is not the same size as Ms. Balser.

We don't have any details from what Mr. Kaluzny did as far as how much he had it turned up, what the on/off cycle is, any of that.

So I don't think it's appropriate to be feeding this engine as far as the experimentation with the jury. I think it's highly prejudicial, those questions. It's a waste of time to ask them because we don't know whether we're comparing apples and apples or apples and oranges.

Additionally, it just isn't fair....

RP 1072-73. Defense counsel then related what had occurred at Strandy's deposition:

[Balser's counsel] concluded her very late deposition of ... Mr. Strandy with the catch all question do you have any other opinions, and as vague and as broad as that was, I was nervous of this kind of position being taken by the plaintiff at the time of trial.

So contrary to normal practice, I asked my own expert questions about what he expected to testify to at the time of trial to place plaintiff's counsel on notice, and it couldn't be any more clear than Page 41, line 16, which Mr. Strandy has read before the jury.

"In addition to records, literature and your experience, have you, also, performed any kind of work or experimentation relative to Russian electrical stimulation?" He says yes. It's the last question I asked. [Balsler's counsel] then covers many pages of examination never asking about experiments.

RP 1074.

Balsler's counsel then reiterated her complaint about the experiment not having been disclosed before the deposition, and explained why she had not asked Strandy about experimentation after defense counsel examined Strandy:

[M]eaning absolutely no disrespect to [defense counsel] whatsoever, but [he] tends to be verbose and have a lot of surplus words in his discussions, and perhaps I don't listen as closely as I should to [him].

RP 1076. Balsler's counsel argued that she would have objected if she had known about the experiment:

Under ER 403, if we assume that I had known about this, I would have been making an ER 403 objection because this is an experiment... [T]here are too many variables here to be saying that these – this experiment is relevant...

Ms. Balsler is 4'11". The woman was 5'8". She was medium. Ms. Balsler is tiny. We don't know what the settings were by Mr. Kaluzny. How are they going to match it up? This experimentation is highly prejudicial under ER 403. It should not be allowed.

RP 1076-78. Balser's counsel, however, either at that point during trial or at any time prior to verdict, never actually made a relevance or undue prejudice objection, or moved to strike the experiment testimony, or requested any other form of relief, such as a special jury instruction or mistrial, regarding the experiment testimony. The court then said:

All right, Counsel. With regard to this, it's unfortunate this situation has occurred.

... Mr. Strandy was asked if he'd done experimentation and research, he said yes. Research was followed up. Experimentation was not followed up I guess would be the best way to put it.

* * *

Obviously, the jury wants to know something about this, but by the same token, all in all, I think that it is unfair to the plaintiff. This is something that should have been directly disclosed. Apparently, it was not disclosed, and we, also, have Mr. Strandy's answer on cross to this, which is, well, you didn't ask me the question basically.

The whole thing is just a difficult situation, but in the end, counsel, what I'm going to do is I'm not going to ask questions five, six and seven. I'll just put numbers on them, and I've read them into the record.

The problem with not asking ... is it leaves this whole issue just out there because the jury already knows something.

So we're going to take a break now for a few minutes, and I am going to grant the plaintiff's motion not to ask unless the plaintiff reconsiders.

RP 1075-78. The court did not ask Strandy any of the jurors' experiment-related questions.

Jennifer Dunlap, the physical therapist with whom Balser was acquainted and who spoke with Balser after April 19, 2005,⁶⁷ testified for the defense that Balser told her that Kaluzny had placed “the leads” on the back of her neck and had pointed to “the upper trapezius area.” RP 1087.

Dr. Murphy, the defense neurologist, opined that Balser has no nerve injury associated with electrical stimulation.⁶⁸ He explained that Balser’s report of reduced dry mouth symptoms while she was temporarily taking lorazepam to relax her for an MRI in June 2005,⁶⁹ is consistent with a panic disorder explanation for her dry mouth complaints but not with an injury to her right stellate ganglion.⁷⁰ Dr. Murphy noted that damage to stellate ganglion nerves would be reflected by abnormal serum catecholamine levels, but that Balser’s were normal in August 2005.⁷¹

Without referring to Strandy’s experiment, Dr. Murphy testified that placing an EMS electrode on the motor point of the trapezius should produce a lift/shrug/elevation of the shoulder, RP 1224, and that placing an electrode on the sternocleidomastoid (neck-rotating) muscle would

⁶⁷ RP 911, 1085.

⁶⁸ RP 1233, 1235-37.

⁶⁹ See Ex. 9, p. 217.

⁷⁰ RP 1243-45.

⁷¹ RP 1239-42; Ex. 20. Dr. Murphy also explained that, because the left stellate ganglion also serves the parotid (salivary) glands on both sides, loss of parotid gland function does not occur due to impairment of function of the stellate ganglion on only one side, and that a stellate ganglion on one side can be blocked or removed entirely without permanently imbalancing the sympathetic and parasympathetic systems because nerves in each stellate ganglia serve glands on the opposite side, RP 1219-22, 1266-67.

cause a contraction of that muscle that would turn the head, RP 1225-26, but not a shoulder muscle response, RP 1233. That testimony could not have surprised Balser's counsel, because Dr. Murphy had so testified in his deposition on April 11, 2012, a month before Strandy's May 10, 2012 deposition (CP 121). CP 234-35.⁷²

Dr. Murphy also explained at trial that it would be nearly impossible to cause nerve injury by placing an electrode on the sternocleidomastoid muscle without also damaging the skin because the stellate ganglia lie so deeply. RP 1230-32.⁷³

Balser did not call any medical witness in rebuttal. Testifying as a rebuttal fact witness, Balser did not contradict Dunlap's testimony, RP 1087, that Balser had pointed to the top rear of her shoulder when relating where Kaluzny had placed the electrode. *See* RP 1364-68.

C. The Jury Finds No Negligence.

On June 21, 2012, the jury found that the defendant had not been negligent and did not reach questions of proximate causation or damages.

⁷² Dr. Murphy testified in his deposition in part that "I would say ... it's unlikely, based on the description of Ms. Balser herself, that she experienced a shoulder shrug at the time of the electrical stimulation, that in fact there was electrode placement over the stellate ganglion. ... [I]f you're postulating that the electrode was over the stellate ganglion, then one would not anticipate there would have been a shoulder shrug or any sort of muscular response."

⁷³ The hospital also called Duane Green, Ph.D., a clinical psychologist, who opined that Balser has a panic disorder with agoraphobia, an undifferentiated somatic form [*sic*, somatoform] disorder, and a phobia regarding health care access. RP 1310.

CP 69. The court entered judgment on the defense verdict. CP 70-71.

D. Balser Moves for a New Trial, Claiming Willful Misconduct by Defense Counsel During Discovery that Left Balser's Counsel Unprepared for Defense Expert James Strandy's Testimony.

Balser moved for a new trial under CR 59(a)(1),(2) and/or (9), CP 93 and 101, on the ground that defense counsel had been guilty of "willful violation of the rules of discovery." She cited CR 26(b)(5)(A) and 26(e)(1)(A) and (B), CP 93, and *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 220 P.3d 191 (2009), CP 98-100.

Balser argued that a new trial should be ordered for willful misconduct because she had not been informed of Strandy's experimentation in defendant's response to her Interrogatory No. 47, which had asked for a summary of the grounds for defense experts' opinions, CP 94-95. Balser argued that defense counsel should have supplemented the hospital's answer to Interrogatory 47 to describe Strandy's experiment before Balser's counsel deposed Strandy. CP 97.

The hospital responded that Balser's interrogatory had asked for a *summary* of the grounds for Strandy's opinions, which defendant's answer had provided. CP 104, 113; *see also* 89-90. And, the hospital reminded the court, CP 105-06, 114, that at Strandy's deposition, after Balser's counsel finished her relatively brief questioning of Strandy, defense counsel (1) had then questioned Strandy to elicit from him additional areas

about which he might testify at trial, as well as additional bases for his standard of care opinions, CP 122-25, including the fact that he had performed “experimentation relative to Russian electrical stimulation,” CP 125; and (2) had afforded Balser’s counsel the opportunity to examine Strandy further, which Balser’s counsel did but, inexplicably, without inquiring about experimentation, *see* CP 126-35. The hospital also argued that Balser had gambled on the verdict and waived any right to seek a new trial. CP 102, 109-12, 114-15.

E. The Court Finds Misconduct in the Defense’s Failure to Disclose “Important” Information and Grants Balser’s New-Trial Motion.

The trial court orally granted Balser’s motion for a new trial, CP 272, 310-11, based on what became, in its written order (CP 310-12), forty-two “Findings of Fact,” CP 304-08, and seven Conclusions of Law, CP 308-09. Findings of Fact 25-35 and 41-42 state:

25. The Court finds that information about the experimentation should have been disclosed. There should not have been any ambiguity about that because it goes to a significant decision the jury has to make. ...

26. It is clear from the questions that the jury asked that the jury focused on this experiment right away. The jury only asked four questions and three of them were on this subject. It was an important issue to them [as] the finders [of] the fact[s]. ...

27. The Court finds that the information is important and it should have been disclosed. The information should have been disclosed and it is material. ...

28. The Court has no idea how it would have played out at trial. That is, whether or not the plaintiff may have requested specifically that it not be addressed through a motion *in limine* or perhaps used in some other fashion. ...
29. The Court finds since the information was not disclosed, plaintiffs' counsel did not have the opportunity to deal with this issue and to deal with this conduct by the expert in the context of this case. ...
30. The Court has considered whether in light of all the record this constituted prejudice. ...
31. The Court considered that the problem is that there was a lot of information given to the jury; medical information, physiological information, physical therapy information. One could make an argument that if you sift through it all, the jury had sufficient information to deal with this experiment. The problem is that the way the experiment information came out at trial and the apparent interests that the jury had, through their questions, which ultimately were not asked of Mr. Strandy, indicated to the Court, that this indeed was important in the context of this trial. ...
32. The Court finds that when looking at the entire record, it still remains prejudicial. ...
33. The Court did not get an objection to this matter at all. ...
34. During trial the discussion was centered around whether or not the Court should ask these juror questions. The Court deferred to the plaintiff because the plaintiff made it very clear that this was new information and did not want to have the questions asked so Mr. Strandy could discuss his experimentation because plaintiffs' counsel had not been advised of it. There still was no objection. ...
35. During trial nobody asked the Court to give of [sic] a curative instruction or strike a part [of] his testimony. ...

* * *

41. The failure to disclose is material. It is prejudicial to the plaintiffs in the context of the entire record, particularly the liability record. ...

42. Whether the misconduct could have been cured if there was a request to do so; the Court does not know whether it could have been cured or not cured, but the Court finds that it was important. ...

CP 306-08 (citations to court's oral decision omitted). The stated bases for granting a new trial were CR 59(a)(1), (2) and (9). CP 309 (Conclusion of Law 7).⁷⁴ The hospital timely appealed. CP 313-25.

IV. ARGUMENT

A. Standard of Review.

Orders granting new trials under CR 59(a) are reviewed for abuse of discretion. A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). When a decision is reached by applying the wrong legal standard, it is made for “untenable reasons” for purposes of abuse-of-discretion review. *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012). “An abuse of discretion is found if the

⁷⁴ CR 59(a)(1) allows a court to grant a new trial for “[i]rregularity 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.” CR 59(a)(2) allows a court to grant a new trial for misconduct of the prevailing party or the jury. CR 59(a)(9) allows a court to grant a new trial when substantial justice has not been done. Balseer did not seek a new trial based on CR 59(a)(3) (accident or surprise which ordinary prudence could not have guarded against).

trial court relies on unsupported facts, takes a view that no reasonable person would take, *applies the wrong legal standard*, or bases its ruling on an erroneous view of the law.” *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006) (italics supplied).

A finding of fact is reviewed under the substantial evidence test, *Robinson v. Safeway Stores*, 113 Wn.2d 154, 157, 776 P.2d 676 (1989), but a conclusion of law mislabeled as a finding of fact is treated on appeal as a conclusion of law and is reviewed *de novo*, *Grundy v. Brack Family Trust*, 151 Wn. App. 557, 567, 213 P.3d 619 (2009), *rev. denied*, 168 Wn.2d 1007 (2010).

B. There Was No Misconduct.

1. The trial court’s misconduct finding is a conclusion of law subject to *de novo* review because what happened is not in dispute.

In “Finding” No. 42, CP 308, App. at 6, the trial court labels as “misconduct” defense counsel’s failure, as discussed in the trial court’s earlier Findings Nos. 21-23, 37, 39-41, CP 306-08, App. 4-6, to more directly disclose the fact that Mr. Strandy had conducted an experiment. Such a finding of misconduct is a conclusion of law, not a finding of fact, and thus is subject to review *de novo*. *Grundy*, 151 Wn. App. at 567. “A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal

effect.”” *Leschi Improv. Council v. Wash. State Highway Comm.*, 84 Wn.2d 271, 283, 525 P.2d 774(1974) (quoting *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 590 (2d Cir. 1961)). What happened (or did not happen) was documented by interrogatory answers and Strandy’s deposition transcript, and did not depend on the trial court’s evaluation of anyone’s credibility. Balser’s allegation of “misconduct” thus raised what was a legal issue: the legal *effect* of what had happened (or not happened) before, or at, Strandy’s deposition.

2. The trial court’s conclusions as to misconduct are incorrect because the facts do not support it.

Balser had requested in interrogatories a summary of the basis for expert opinions, which the hospital provided. CP 89-90. That Strandy had performed experimentation was disclosed before his deposition was concluded. CP 125. Defense counsel specifically asked Strandy in his deposition whether, “[i]n addition to the records, literature and your experience, have you also performed any kind of work or experimentation relative to Russian electrical stimulation,” to which Strandy answered “Yes.” CP 125. Immediately thereafter, defense counsel stated: “I just want to make sure counsel is aware of those fields before I conclude. I have no other questions.” *Id.* Balser’s counsel was then allowed to and did inquire further but inexplicably asked Strandy nothing about his

“experimentation.” CP 126-35. Strandy’s experiment was a simple one; it took him fewer than three pages of trial transcript to relate it. RP 1036-39.

Counsel for the hospital has found no authority supporting the conclusion that counsel, as a matter of law, commits “misconduct” when counsel, during the deposition of his or her expert, alerts opposing counsel to the fact that the expert has performed “experimentation,” and affords opposing counsel the opportunity to inquire about the experimentation, but opposing counsel neither does so nor seeks to continue the deposition or re-depose the expert. Balser’s counsel’s excuse for not asking Strandy about experimentation at his deposition was that defense counsel “tends to be verbose and have a lot of surplus words in his discussions,” which made her not “listen as closely as I should to [him].”⁷⁵ RP 1075-76. Opposing counsel’s admission that she paid less close attention than she should have is inconsistent with a claim either of surprise or of misconduct on the part of defense counsel to whom she did not listen.

3. If the misconduct finding is one of fact, it lacks substantial supporting evidence.

No court order or rule required the hospital’s summary of grounds for Strandy’s opinions to be more detailed than what was disclosed at

⁷⁵ Defense counsel’s questioning of Strandy at the deposition is less than four pages long, did not “include a lot of surplus words,” and cannot fairly be called “verbose.” See CP 122-25. Nor can the question defense counsel asked Strandy about whether he had performed any “experimentation” be fairly characterized as verbose or containing a lot of surplus verbiage. See CP 125.

Strandy's deposition. Balser's Interrogatory No. 47, CP 89, asked for a summary of the grounds for Strandy's opinions, and the hospital's summary disclosure of the grounds for Strandy's opinions, CP 89-90, was supplemented at his deposition by disclosure of the fact that not only had he relied on his experience and consulted literature, but also he had performed some experimentation, CP 125. What defense counsel and Strandy said was sufficient to put reasonably attentive and diligent counsel on inquiry notice concerning "experimentation," and plaintiff's counsel was afforded the opportunity to inquire further in deposition concerning that "experimentation," but did not do so. At trial, Balser's counsel sought to excuse her failure to ask Strandy any deposition questions about "experimentation" on the basis that defense counsel "tends to be verbose and have a lot of surplus words in his discussions," which made her not "listen as closely *as I should* to [him]." RP 1075-76 (italics added). Balser's counsel also had ample opportunity, after Strandy's deposition and before trial, to seek further information or move to preclude Strandy from testifying about his experimentation, but did not do so.

If the "finding" of misconduct was indeed a finding of fact rather than a conclusion of law, substantial evidence to support the trial court's finding of misconduct on defense counsel's part is lacking for purposes of CR 59(a)(2). If the new trial ruling is treated as a sanction imposed under

CR 26 or 37, it lacks substantial supporting evidence for the same reason.

C. Contrary to the Trial Court's Findings, Strandy's Experimentation Testimony Could Not Have Been "Important" Enough to Be Unfairly Prejudicial to Balser's Case.

1. The experimentation testimony confirmed points of human physiology that were not in dispute.

Strandy was the first defense witness to testify at trial that a lift or shrug of the shoulder would not be stimulated if an EMS electrode is placed just above a patient's collarbone.⁷⁶ Strandy was the only trial witness who professed to have confirmed that by experimentation. What the trial court failed to appreciate in terming the experimentation testimony "important," however, is that Strandy cited the experiment to confirm a fact of human physiology that was not in dispute.

Even before Strandy testified, plaintiff's expert, Cathleen Gephart, P.T., had testified that some shoulder muscle response might be stimulated by placing an electrode partly over the trapezius and partly within the clavicular fossa, RP 308-10, 340, implicitly conceding that a shoulder muscle response would be expected only if the electrode was at least partly outside the clavicular fossa. After Strandy testified, Kaluzny and Dr. Lawrence Murphy, the hospital's neurology expert, both testified that placing an electrode in the clavicular fossa would not produce a shoulder

⁷⁶ Strandy had so testified in his deposition, *see* RP 1070, as had Dr. Murphy, CP 234-35.

muscle response.⁷⁷ Murphy had so testified in his pretrial deposition, CP 234-35, taken before Strandy was deposed.⁷⁸ No witness for either side testified affirmatively that placing an EMS electrode entirely in the “dip” above the collarbone, where Balsler claims Kaluzny did, would induce a shoulder muscle contraction. After Strandy testified, no witness relied upon, or even referred to, Strandy’s experiment, and neither side’s counsel referred to the experiment in closing argument. The electrode-placement dispute at trial concerned whether Kaluzny had placed the electrode in the clavicular fossa or on the shoulder, not partly in the clavicular fossa and partly on the shoulder.

Balsler’s counsel cross-examined Strandy concerning his experimentation testimony and did not object to it or move to strike it on any ground. After verdict, the trial court characterized the experiment testimony as “important,”⁷⁹ but failed to recall or appreciate that the medical experts had not been in disagreement as to what Strandy’s experiment purported to confirm, *i.e.*, that one cannot induce a shoulder muscle contraction by placing an EMS electrode in the clavicular fossa. Testimony on an undisputed point of human physiology could not have been, and was not, “important” considering the trial testimony as a whole.

⁷⁷ RP 1125, 1159, 1233.

⁷⁸ Compare CP 121 and 204.

⁷⁹ CP 307 (“Findings” Nos. 27-32).

2. The experimentation testimony was consistent with the contemporaneous records and the uncontradicted testimony of Jennifer Dunlap.

Strandy's experimentation testimony impliedly corroborated Kaluzny's testimony that he had placed the electrode in question on Balser's shoulder, and not in the "dip" above her collarbone, because her shoulder had been lifting when he left the room on April 19, 2005. The experiment evidence was of marginal importance, however, because placement of the electrode on the shoulder was consistent not only with Strandy's testimony but with multiple other pieces of evidence besides Kaluzny's testimony – the emergency room record,⁸⁰ Dr. Schuerman's April 22, 2005 record entry⁸¹; and Jennifer Dunlap's uncontradicted testimony (RP 1087) – that established that, before Balser was given the Dynatron manual pages that said to avoid the stellate ganglia, prompting her to self-diagnose a stellate ganglion injury, she had pointed to her shoulder to indicate where Kaluzny had placed the electrode. Strandy's experiment testimony proved, by the end of trial, to be cumulative of uncontradicted testimony by Dr. Murphy, RP 1233, as well as by Balser's own expert, Ms. Gephart, RP 308-10, 340. Characterizing the experiment testimony as "important" enough to have prejudiced Balser's case

⁸⁰ Ex. 4, p. 195.

⁸¹ Ex. 8, p. 169.

overstates the effect the testimony could have had.

3. An inference of “importance” cannot permissibly be inferred from the questions jurors had for Strandy that the court did not ask.

The fact that jurors tendered questions concerning Strandy’s experiment⁸² does not mean that the experiment testimony was “important” in the sense that the testimony probably carried significant weight during jury deliberations. After verdict, it is not permissible to consider how jurors weighed particular evidence because the effect of evidence “inheres in” the verdict.

“[T]he effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence ... are all factors inhering in the jury’s processes in arriving at its verdict, and, therefore inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.”

Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 205, 75 P.3d 944 (2003) (quoting *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967)). Counsel for the hospital has found no authority for the proposition that it may be inferred that certain trial evidence was “important” based on juror questions asked during trial but not put to the witness and thus not answered.

⁸² See RP 1072; CP 31-33, and Findings of Fact Nos. 26, 31, CP 307.

D. Even if Discovery Misconduct Did Prejudice Balser's Case, It Was Error to Grant Her a New Trial Because She Gambled on the Verdict.

A well-established rule, applicable to criminal and civil cases alike, is that a party may not wait and lose a gamble on a favorable verdict before claiming that misconduct by opposing counsel prejudiced her right to a fair trial. *E.g.*, *State v. Strine*, 176 Wn.2d 742, 749-50, 293 P.3d 1177 (2013); *Teter v. Deck*, 174 Wn.2d 207, 225, 274 P.3d 336 (2012) (terming “correct” the basic premise that “a party may not wait and gamble on a favorable verdict before claiming error”); *Nelson v. Martinson*, 52 Wn.2d 684, 689, 328 P.2d 703 (1958); *City of Bellevue v. Kravik*, 69 Wn. App. 735, 743, 850 P.2d 559 (1993).

If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.

Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960) (citing *Agranoff v. Morton*, 54 Wn.2d 341, 340 P.2d 811 (1959)).

It is ... a well-recognized and frequently applied principle that a party litigant will be deemed to have waived, or will be considered as being estopped to rely upon, matters constituting grounds of new trial which come to his attention or knowledge during the course of trial, or of which he should, by the exercise of reasonable diligence, have acquired knowledge, *where he fails to make objection at the time and seek to have the defects cured*. In other words, one is not entitled to a new trial when it appears that he had knowledge of the irregularity of which he complains

and did not promptly seek to have the defect corrected at the trial of the case, or that his failure to obtain such knowledge and have the defect corrected was due to his own fault or lack of diligence....[Italics in original.]

Sun Life Assurance Co. v. Cushman, 22 Wn.2d 930, 943, 158 P.2d 101 (1945) (quoting 39 *Am. Jur.*, *Right to New Trial; Waiver and Loss*, § 14). When a litigant becomes aware of misconduct by the adverse party, “it is not the duty of the trial court to take the initiative when no affirmative action by the court is asked.” *Id.* at 944.

A party’s failure to object to and seek a curative instruction or mistrial waives the right to seek a new trial based upon an adversary’s alleged misconduct unless the alleged misconduct was so flagrant that no instruction could have cured it. *Teter*, 174 Wn.2d at 225; *Carabba v. Anacortes Sch. Dist. No. 103*, 72 Wn.2d 939, 952-54, 435 P.2d 936 (1967); *Warren v. Hart*, 71 Wn.2d 512, 518, 429 P.2d 873 (1967); *Strandberg v. N.P.R. Co.*, 59 Wn.2d 259, 264, 367 P.2d 137 (1961). While a motion for mistrial may not always be necessary, the complaining party still must have objected to the misconduct at trial and requested a curative instruction. *See Teter*, 174 Wn.2d at 226. Indeed, as the Washington Supreme Court has recently articulated the standard for granting a new trial, the grant of a new trial is proper where: “(1) the conduct complained of is misconduct; (2) the misconduct is prejudicial; (3) the moving party

objected to the misconduct at trial; and (4) the misconduct was not cured by the court's instructions." *Teter*, 174 Wn.2d at 226 (citing *Aluminum Co. of Am. ["ALCOA"] v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000), and characterizing that decision's standard as new).

A new trial was not warranted here under the *ALCOA* test articulated in *Teter* because Balser's counsel made no objection whatsoever until after verdict. A new trial was not warranted here under the traditional (*Nelson v. Martinson*) test because Balser sought no relief from the trial court before verdict and because the trial court expressly found, after verdict, that the prejudice to Balser resulting from her counsel being unprepared for Strandy's experiment testimony might or might not have been cured – and thus just as likely as not *would* have been cured – if Balser had objected or sought some form of relief before the verdict. CP 308 ("Finding" No. 42). If the prejudice might have been cured, it was by definition not incurable. Because Balser failed to establish incurable prejudice, she is subject to the "failure to object is failure to preserve" rule, under which she waived any claim of prejudicial misconduct by failing to object. The trial court evidently was mindful of the legal standard it was bound to apply, because it considered the question of curability, but the court ultimately did not apply the correct legal standard to Balser's new trial motion and granted her a new trial despite the

“gamble on the verdict” rule and the court’s inability to find incurability.

When a trial court has applied the wrong legal standard, an appellate court ordinarily remands for application of the correct standard. *E.g.*, *Bennett v. Smith Bundy Berman Britton, P.S.*, 176 Wn.2d 303, 307, 291 P.3d 886 (2013). A remand would be futile here, however, because the trial court did not fail to *make* a finding as to curability of prejudice; it affirmatively found that *it could not find* either that the prejudice was not curable or that the prejudice would have been curable had Balser objected, moved to strike, or requested a curative instruction. CP 308 (“Finding” No. 42). Thus, the proper course is for this Court to remand for reinstatement of judgment on the defense verdict.

E. The Order Granting Balser a New Trial May Not Be Sustained Under CR 59(a)(1) or CR 59(a)(9) Independently of CR 59(a)(2).

The authorities discussed above pertain to orders for new trials based on CR 59(a)(2) (misconduct of adverse party). The trial court, in its Order for New Trial, also cited CR 59(a)(1) (irregularity preventing a party from having a fair trial) and CR 59(a)(9) (“that substantial justice has not been done”) as bases for the grant of a new trial. The trial court engaged in no analysis under subparagraphs 1 or 9 independently of its “misconduct” analysis. Nor could the new trial order be affirmed based on separate CR 59(a)(1) or CR 59(a)(9) analysis.

Balser has never cited any “irregularity” other than what she contended was “misconduct” under CR 59(a)(2). Nor has Balser cited authority allowing a trial court to grant a new trial under CR 59(a)(1) on the ground of misconduct of opposing counsel without applying the “gambling on the verdict” rule applicable to motions based on claimed misconduct of trial counsel pursuant to CR 59(a)(2).

As for CR 59(a)(9), granting new trials under that rule for “lack of substantial justice” is, and is supposed to be, rare because of the other broad grounds for relief under CR 59(a)(1)-(8). *Knecht v. Marzano*, 65 Wn.2d 290, 297, 396 P.2d 782 (1964); *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 769, 260 P.3d 967 (2011), *rev. denied*, 173 Wn.2d 1029 (2012); *Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 41, 931 P.2d 911 (1997). Even though CR 59(a)(9) allows a court to grant a new trial on a ground not listed in CR 59(a)(1)-(8), the trial court here did not cite any basis for granting Balser a new trial other than misconduct by the hospital, and CR 59(a)(2) is the rule specifically applicable to misconduct of an adverse party. And, almost by definition, if Balser gambled on the verdict and lost, the “gambling on the verdict” case law establishes that she was not deprived of substantial justice within the meaning of CR 59(a)(9). *See Lamborn v. Phillips Pac. Chem. Co.*, 89 Wn.2d 701, 710, 575 P.2d 215 (1978) (recognizing that deprivation of substantial justice under CR

59(a)(9) does not occur when plaintiff, who lost at trial, could have but did not request jury instruction that would have addressed claimed error).

F. Reinstatement of the Judgment on the Defense Verdict is Required Even if the Trial Court's Grant of a New Trial Is Analyzed as a Sanction for Discovery Misconduct.

New trials typically are granted under CR 59(a) because of what occurred at trial, not because of “misconduct” during pre-trial discovery. What the trial court did here was, essentially, to order a new trial as a sanction for misconduct that consisted of not answering with enough detail an interrogatory that asked for a summary of the grounds for expert opinions, or of not providing sufficient detail, when at Strandy’s discovery deposition defense counsel asked Strandy a question, the answer to which apprised Balser’s counsel that Strandy’s opinions were based in part on “experimentation” he had conducted.

A trial court may impose a range of sanctions for willful discovery misconduct. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997); *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 690, 132 P.3d 115 (2006). However, certain requirements apply to a decision to impose a harsh or severe sanction for discovery misconduct:

In punishing a discovery violation, ... “the record must show three things – the trial court’s consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it.” *Mayer*, 156 Wn.2d at 688 (relying on *Burnet*, 131 Wn.2d at 494).

Blair v. TA-Seattle E. No. 176, 171 Wn.2d 342, 348, 254 P.3d 797 (2011). Moreover, no decision holds or suggests that a plaintiff to whom an allegedly insufficient discovery disclosure is made is licensed to gamble and wait until after verdict to make her first request for relief based upon the allegedly insufficient disclosure.

Even if CR 59(a) may be used to impose a sanction for insufficient disclosure of the bases for an expert's opinion during pre-trial discovery, and even if insufficient disclosure renders the "gambling on the verdict" rule inoperative, the trial court in this case did not comply with *Blair* and *Burnet*. The trial court made no finding that defense counsel had violated a discovery rule willfully. Nor did it make a record reflecting its consideration of a lesser sanction than the grant of a new trial. Even if a lesser sanction may not have been available after verdict, and even if the nonavailability of a sanction short of a new trial is not Balser's fault, the trial court still did not find a *willful* violation of the discovery rules. Failure to make a proper record satisfying all three *Blair* requirements requires reversal, and may not be corrected on remand. *Blair*, 171 Wn.2d at 350-51.

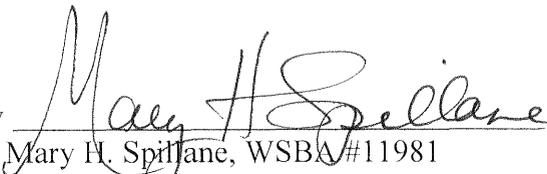
V. CONCLUSION

The trial court erred in concluding that there was discovery misconduct by defense counsel that left Balser's counsel unprepared to

deal at trial with experiment testimony by defense expert James Strandy. Because Balser sought relief concerning the “experimentation” testimony only after losing a gamble on the verdict, she waived any claim of error as to that testimony. Moreover, she was not entitled to a new trial as a result of the experiment testimony because the trial court was unable to conclude that any prejudice from that testimony could not have been cured before verdict. The case should be remanded for reinstatement of the judgment on the jury’s defense verdict.

RESPECTFULLY SUBMITTED this 2nd day of December, 2013.

WILLIAMS, KASTNER & GIBBS PLLC

By 
Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 2nd day of December, 2013, I caused a true and correct copy of the foregoing document, "Brief of Appellant," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Respondents:

Marcia M. Meade, WSBA #11122
DAWSON & MEADE
1310 West Dean Ave
Spokane, WA 99201
Ph: (509) 328-4266
Email: M@d-mlaw.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Respondents:

Robert F. Sestero, Jr., WSBA #23274
Christopher J. Kerley, WSBA #16489
Markus W. Louvier, WSBA #39319
EVANS, CRAVEN & LACKIE P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201
Ph: (509) 455-5200
Fx: (509) 455-3632
Email: rsestero@ecl-law.com
ckerley@ecl-law.com
mlouvier@ecl-law.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

DATED this 2nd day of December, 2013, at Seattle, Washington.



Carrie A. Custer, Legal Assistant

APPENDIX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

FILED

MAR 18 2013

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

SHELLY M. BALSER, *and* JOHN BALSER,)

Plaintiff)

vs.)

PROVIDENCE HEALTH & SERVICES a)
Washington Corporation d/b/a MOUNT)
CARMEL HOSPITAL)

Defendant)

NO. 2010-02-02613-9

~~PROPOSED~~ FINDING OF
FACTS AND CONCLUSION OF
LAW

I. BASIS

Plaintiffs moved for a new trial under CR 59(a) and for monetary sanctions pursuant to CR 37. The Court considered the following pleadings filed by the parties

1. Plaintiffs' Motion Under CR 59(a) for New Trial
2. Plaintiffs' Memorandum in Support of New Trial
3. Transcribed Testimony of James H. Strandy, P.T.
4. Declaration on Offer of Proof in Support of New Trial and Sanctions
5. Defendant's Response in Opposition to Plaintiffs' Motion for New Trial
6. Affidavit of Markus W. Louvier in Opposition to Plaintiffs' Motion for New Trial.
7. Plaintiffs' Reply to Defendant's Response to Motion for New Trial.
8. Declaration on Offer of Proof in Support of New Trial and Sanction.

The Court consider the testimony that occurred in trial as to James Strandy and the questions posed by the jury during trial. Further the Court considered the deposition of

1 James Strandy, arguments of Counsel for the respective parties, the files and records
2 herein.

3 **II. FINDINGS**

4 That after being fully appraised in the matters and consideration of the foregoing
5 the Court makes the following findings:

6 1. Although there was a tremendous amount of testimony with regard to damages,
7 in the end that meant nothing because this was a liability case. (Oral Ruling p. 2:14-16)

8 2. This is a medical negligence case that focused on an easily ascertainable
9 procedure that a lay person could understand. (Oral Ruling p. 2:8-11)

10 3. On the issue of liability this was not a procedure that was complex and it was not
11 difficult to understand. (Oral Ruling p. 2:11-13)

12 4. The jury had to make a decision on liability because Mr. Kaluzny was saying "I
13 followed the standard of care where I placed these pads in this Russian stimulation." Ms.
14 Balsler is saying "no, you did not place those where you said you placed them, you placed
15 them somewhere else." (Oral Ruling 2:18-23)

16 5. The "somewhere else" constituted a violation of the standard of care. (Oral
17 Ruling 2:23-24)

18 6. The standard of care testimony on both sides indicated that the physical
19 therapist has to be very aware of where these pads are placed in this particular area of the
20 body, and that placing them in the wrong spot is, in fact, a violation of the standard of care
21 because it could seriously injure a patient. (Oral Ruling p. 2:24 to p. 3:6)

22 7. Placement of these pads, where were these pads placed, that was the theme.
23 (Oral Ruling p. 3:6-7). The jury had to decide the critical issue of the placement of the
24 pads. (Oral Ruling p.3:12)

25 8. The context of the testimony was about the standard of care and the very
26 specific way a physical therapist must place these pads. (Oral Ruling p. 3:14-17)

1 9. Once the jury made the decision about where the pads were placed, then the rest
2 of it would just flow naturally. It would either be a defense verdict or some type of
3 damages would be awarded to the plaintiff. (See Oral Opinion p.3:8-11)

4 10. . The Court has considered the *Aluminum Co. of America v. Aetna Cas. & Sur.*
5 *Co.*, 140 Wn.2d 517, 998 P.2d 856 (2000) and other cases on this issue. (Oral Decision p.
6 5:10)

7 11. James Strandy testified as an expert witness on the standard of care for the
8 Defendant.

9 12. At the conclusion of his testimony the jury posed four questions, three of
10 which related to Mr. Strandy's experiment. (Oral Decision p. 3:20-22)

11 13. Before the jurors' questions and during the testimony, the Court did not get an
12 immediate objection to Mr. Strandy's testimony. (Oral Decision p.3:18-20)

13 14. It was clear that these jurors knew what the issue was in this case. So this
14 testimony is important because it went to the heart of the matter. From that standpoint, it
15 is material testimony. (Oral Decision p.3: 22 to p.4:1)

16 15. The Court's analysis has to start there; is this important testimony? (Oral
17 Decision p.4:5-6)

18 16. Mr. Strandy is not just one more witness out of ten witnesses who have
19 testified to the same thing. His testimony is material testimony. (Oral Decision p.4:2-5).

20 17. After determining Mr. Strandy's testimony on the experiment was important,
21 the Court then looks to how this testimony came about. (Oral Decision p. 4:5-8)

22 18. During trial the Court reviewed the deposition testimony that was referenced in
23 the argument about whether or not the Court should ask these three questions of Mr.
24 Strandy that the jurors had posed. At that time Mr. Sestero reiterated that he had asked a
25 question in the deposition where the word "experimentation" came up, and therefore the
26 plaintiff was on notice that that might be an issue. (Oral Decision p. 5:18-24)

27
28 FINDING OF FACTS AND CONCLUSION OF LAW Page 3 of 7

DAWSON & MEADE, P.S.
1310 W. Dean
SPOKANE, WASHINGTON 99201-2015
(509) 328-4266

1 19. The Court considered that Ms. Meade did not pick up on the experimentation
2 issue at the time of the deposition. (Oral Decision p.5:7-8)

3 20. In *Aluminum Co. of America* and the other cases, the issue is what is the line
4 between what you should have done as opposed to appropriate advocacy on behalf of
5 one's client. (Oral Decision p.5:10-13)

6 21. The Court does not have a bright line where that disclosure/advocacy occurs.
7 (Oral Decision p.5:10-14). The law has a lot of cases about this. Every case is different.
8 The cases are all fact driven. The cases are fact driven by what was going on in the trial or
9 prior to the trial. Looking at them all, the Supreme Court has pulled out some things the
10 court needs to look at and assess in analyzing this problem, but there are not any bright
11 line solutions. (Oral Decision p.5:14-20)

12 22. The question for the Court to consider is that should the defense have said to
13 Ms. Meade that Mr. Strandy performed an experiment on one of his colleagues that is
14 relevant to his testimony and his position on the standard of care. (Oral Decision p. 4:25
15 to p. 5:4)

16 23. The Court has considered that is it enough to just say to the expert in
17 deposition something to the effect, is that all the research? Any experimentation? And
18 Mr. Strandy said yes. (Oral Decision p.5:4-7)

19 24. One of the issues the Court must make a finding about is did defense counsel
20 fail to provide this information directly to the plaintiff. That is not indirectly through a
21 hint that there was experiment in a deposition, but directly, that Mr. Strandy conducted an
22 experiment. (Oral Decision p.5:21 to p.6:1)

23 25. The Court finds that information about the experimentation should have been
24 disclosed. There should not have been any ambiguity about that because it goes to a
25 significant decision the jury has to make. (Oral Decision p.6:2-5).

26
27
28 FINDING OF FACTS AND CONCLUSION OF LAW Page 4 of 7

DAWSON & MEADE, P.S.
1310 W. Dean
SPOKANE, WASHINGTON 99201-2015
(509) 328-4266

1 26. It is clear from the questions that the jury asked that the jury focused on this
2 experiment right away. The jury only asked four questions and three of them were on this
3 subject. It was an important issue to them the finders the fact. (Oral Decision p. 6:10-14)

4 27. The Court finds that the information is important and it should have been
5 disclosed. (Oral Decision p. 6:14-15). The information should have been disclosed and it
6 is material. (Oral Decision p. 6:23).

7 28. The Court has no idea how it would have played out at trial. That is, whether
8 or not the plaintiff may have requested specifically that it not be addressed through a
9 motion *in limine* or perhaps used in some other fashion. (Oral Decision p. 15-19)

10 29. The Court finds since the information was not disclosed, plaintiffs' counsel did
11 not have the opportunity to deal with this issue and to deal with this conduct by the expert
12 in the context of this case. (Oral Decision p. 6:19-21)

13 30. The Court has considered whether in light of all the record this constituted
14 prejudice. (Oral Decision p.6:24-25)

15 31. The Court considered that the problem is that there was a lot of information
16 given to the jury; medical information, physiological information, physical therapy
17 information. One could make an argument that if you sift through it all, the jury had
18 sufficient information to deal with this experiment. The problem is that the way the
19 experiment information came out at trial and the apparent interests that the jury had,
20 through their questions, which ultimately were not asked of Mr. Strandy, indicated to the
21 Court, that this indeed was important in the context of this trial. (Oral Decision p. 6:2-12)

22 32. The Court finds that when looking at the entire record, it still remains
23 prejudicial. (Oral Decision p.6:12-14)

24 33. The Court did not get an objection to this matter at all. (Oral Decision p.7:16-
25 17)

26 34. During trial the discussion was centered around whether or not the Court
27 should ask these juror questions. The Court deferred to the plaintiff because the plaintiff

1 made it very clear that this was new information and did not want to have the questions
2 asked so Mr. Strandy could discuss his experimentation because plaintiffs' counsel had not
3 been advised of it. There still was no objection. (Oral Decision p.7:17-22)

4 35. During trial nobody asked the Court to give of a curative instruction or strike a
5 part his testimony. (Oral Decision p.7:23-25)

6 37. The entirety of the record and failure to make an objection, are probably the
7 two strongest issues that the defense has in this matter. Failure to disclose is the strongest
8 issue for the plaintiff in this case and that it is material. (Oral Decision 8:12-16)

9 38. The trial judge is to balance all of this and determine where the parties are at
10 this point. (Oral Decision p.8:17-18)

11 39. The Court finds that the plaintiffs did not receive a fair trial, irrespective of
12 what the Court think the ultimate outcome of this case would be even with that
13 information. The Court is not the finder of fact. Another jury may look at this differently.
14 (Oral Decision p.8:20-23)

15 40. The failure to disclose the information about Mr. Strandy performing
16 experiments specifically relating to the placement of these pads, which was the critical
17 liability issue in this case, is such that Court grants the motion for a new trial in this case.
18 (Oral Decision p.9:3-8)

19 41. The failure to disclose is material. It is prejudicial to the plaintiffs in the
20 context of the entire record, particularly the liability record. (Oral Decision p.9:8-11)

21 42. Whether the misconduct could have been cured if there was a request to do so;
22 the Court does not know whether it could have been cured or not cured, but the Court
23 finds that it was important. (Oral Decision p.9:11-15)

24 **III. CONCLUSIONS OF LAW**

25 1. The defendant had a duty directly and unambiguously to disclose the
26 experiment done by James Strandy.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

2. The defendant had a duty directly and unambiguously to disclose that the results of the experiment were a basis of James Strandy's opinion on the standard of care.

3. The failure to disclose directly and unambiguously the experiment and the relationship to Mr. Strandy's opinions was misconduct.

4. The misconduct was material to the issue of liability.

5. The misconduct was prejudicial.

6. The misconduct prevented the plaintiffs from having a fair trial.

7. The remedy for this material and prejudicial misconduct is to grant the plaintiffs a new trial under CR 59(a)(1)(2) and (9).

DONE this 18 day of March, 2013.


KATHLEEN M. O'CONNOR
JUDGE KATHLEEN M. O'CONNOR

Presented by:

DAWSON & MEADE, P.S.


Marcia M. Meade, WSBA 11122
Attorney for Plaintiffs

Approved as to form and content
Notice of Presentment Waived

EVANS, CRAVEN & LACKIE, P.S.

Electronically approved Christopher Kerley

Robert F. Sestero, Jr., WSBA # 23274
Christopher J. Kerley, WSBA # 16489
Attorneys for Defendant