

NO. 62554-3-I  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JONATHAN KUHN, an individual; and JOAN KUHN and DAN KUHN,  
husband and wife and their marital community,

Respondents,

v.

BILL S. SCHNALL, M.D., and JANET G. SCHNALL, husband and wife  
and their marital community; RICHMOND PEDIATRIC CLINIC, INC.,  
P.S., a Washington professional service corporation,

Appellants.

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JEFF HAWLEY, an individual; PAUL HAWLEY, an individual;  
and RICH HAWLEY and BEV HAWLEY, husband and wife,

Respondents,

v.

BILL S. SCHNALL, M.D., and RICHMOND PEDIATRIC CLINIC,  
INC., P.S., a Washington professional service corporation,

Appellants.

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DANIEL FEWEL, an individual;  
and KATHLEEN FEWEL and JOE FEWEL, husband and wife,

Respondents,

v.

BILL S. SCHNALL, M.D., and JANET G. SCHNALL, husband and wife  
and their marital community; RICHMOND PEDIATRIC CLINIC, INC.,  
P.S., a Washington professional service corporation,

Appellants.

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BRIEF OF APPELLANTS

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FILED  
COURT OF APPEALS  
DIVISION I  
2008 MAR 27 PM 3:13

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## I. ASSIGNMENTS OF ERROR

- A. The trial court erred by granting plaintiffs a new trial.
- B. The trial court erred by not entering final judgment on the jury's special verdict in the first phase of the trial held below.

## II. ISSUES PERTAINING TO BOTH ASSIGNMENTS OF ERROR

1. After trial of a tort lawsuit, may a trial court grant the plaintiff a new trial because of two jurors' failures, during voir dire, to disclose certain personal experiences on a questionnaire, when:

(a) the jurors did not omit the information from their questionnaire answers dishonestly;

(b) there is no evidence, and the trial court did not find, that either juror was biased against the plaintiff;

(c) the jury found in the plaintiff's favor on liability and awarded him substantial damages; and

(d) the amounts awarded as damages were within the range of the evidence and the trial court declined to find the awards inadequate?

2. Did Juror 1's "no" answer to Question 9b on her voir dire questionnaire, and/or Juror 6's "no" answer to Question 11 on her questionnaire, result in the concealment of information that would have made one or both of them subject to a challenge for cause by plaintiffs?

3. Does a basis exist for inferring juror bias against Paul Hawley, despite the fact that the jury found in favor of his brother Jeff?

4. Does a basis exist for inferring juror bias against Bev and Rich Hawley, on their derivative claims under RCW 4.24.010, despite the jury's finding in favor of their son, Jeff?

5. Does a court trying a tort case have subject matter jurisdiction to ask the jury whether the tort defendant is a criminal?

6. Did plaintiffs establish that this a "civil action arising from violation of [RCW 9.68A.090]" within the meaning of RCW 9.68A.130?

7. Did juror misconduct taint the "Phase 2" verdict as to Jeff Hawley, Paul Hawley, and/or Daniel Fewel?

### III. STATEMENT OF THE CASE

#### A. Background

Bill Schnall, M.D., practiced as a board certified pediatrician at Richmond Pediatric Clinic, Inc., P.S. ("the Clinic"), in Shoreline for nearly 30 years, 7/1RP 209-210, over the course of which he had more than 150,000 patient visits. 7/1RP 229. The cases on appeal here concern four of Dr. Schnall's and the Clinic's former patients: Jonathan Kuhn, born in November 1986, CP 576 (¶ 2); Jeff Hawley, born in November 1982, CP 5095 (¶ 2); Jeff's brother Paul, born in February 1986, CP 5095 (¶ 3); and Daniel Fewel, born in December 1989, CP 1693. All four were

adults by the time of trial in mid-2008, and Jeff had turned 18 in 2000.

Aside from Jeff and Paul Hawley being brothers, the four young men have two things in common: they used to have the same pediatrician, Dr. Schnall, and since 2006 they have had the same lawyers. By the time of trial in mid-2008, plaintiffs were making two main allegations. One was that Dr. Schnall became over-involved in the boys' lives in the course of addressing their behavioral/mental health issues, thereby interfering with and damaging parent-child relationships.<sup>1</sup> The other was that he had examined the boys' scrota and penises too closely and was too inquisitive about masturbation after the boys became adolescents.<sup>2</sup> Counsel for plaintiffs contended that Dr. Schnall had been out to "groom" the boys "for sexual contact." *E.g.*, CP 575-76, 578-79; CP 5094, 5098; CP 5065, 5068. As even plaintiffs' pediatric care expert agreed, Jonathan, Jeff, and Daniel had been "clearly troubled" teenage boys with preexisting behavioral and/or psychological problems before Dr. Schnall's allegedly tortious interactions with each occurred. 6/9RP 53, 79.<sup>3</sup>

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<sup>1</sup> *E.g.*, CP 578 (¶ 12) (Kuhn); CP 5067 (¶ 12) (Hawley); CP 5097 (¶ 13) (Fewel).

<sup>2</sup> *E.g.*, CP 578-79 (¶¶ 12-14) (Kuhn); CP 5098 (¶¶ 13-14) (Hawley); CP 5067-69 (¶¶ 12-13) (Fewel).

<sup>3</sup> A psychiatrist noted in 2003 that Jonathan Kuhn "has a pattern of chaotic, explosive relationships with family," and that "[i]n addition to depression, Jonathan appears to struggle with long-standing personality issues[, and] has developed a sense of entitlement, he can disregard the rights of others, has engaged in illegal activity without remorse, lies, can be overly dramatic for effect. . . ." 6/18 RP 83. Jeff Hawley was involuntarily committed by his parents for behavioral and substance abuse problems.

B. This Litigation.

1. Filing of the three lawsuits.

Daniel Fewel and his parents, Kathleen and Joe, sued Dr. Schnall and the Clinic in January 2006. CP 5064-76. Daniel alleged medical negligence, corporate negligence, vicarious liability, sexual battery, and outrage; his parents alleged loss of consortium. CP 5070-72. The Hawley brothers and their parents, Bev and Rich, sued on October 20, 2006, asserting the same causes of action as the Fewels, plus negligent infliction of emotional distress (NIED). CP 5094-5111. Jonathan Kuhn filed a complaint essentially identical to the Hawleys' three days later. CP 3-17.<sup>4</sup>

The trial court's key contested discretionary pretrial rulings went in plaintiffs' favor. Three warrant mention for this appeal. The court consolidated the Fewel, Hawley, and Kuhn lawsuits in August 2007, CP 138-40; plaintiffs were permitted to amend their complaints to add claims

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6/4RP 31; 6/30RP 120-130. Since about the second grade, Daniel Fewel has struggled with the issue of his sexual identity; by high school, it had become harder for him "to hold things back," 6/18RP 22-23, and, in 2004 or 2005, his mother discovered that he secretly cross-dresses. 6/17RP 151-52, 6/19RP 26. Daniel's psychologist, Dr. Bruce Olson, testified that "Dan's family has some genetic predisposition for risk for mental illness [and h]e had early food and other allergies; speech and language cognition and processing problems; possible AD/HD, which would have been of the inattentive type, not the acting out – active and out-of-control type . . . [and probably] a history of depression and anxiety and some obsessional features. He also from early on had some sexual identity issues and, I think, was moving towards having an identity disorder. A major diagnosis, I think, was major depression, and I think that's what led him into the relationship with Dr. Schnall. . . ." 6/18RP 186-87.

<sup>4</sup> Jonathan Kuhn's complaint was amended in March 2007 to add loss of consortium claims by his parents. CP 35-116. Daniel Fewel was eventually allowed to assert a NIED claim. *See* CP 4114 (special verdict form).

for attorney fees under RCW 9.68A.130 based on allegations that Dr. Schnall had “communicated” with Jeff, Paul, Jonathan, and Dan, while they were minors, “for immoral purposes,” in violation of RCW 9.68A.090, CP 444-55, 504, 524-74, 575-622, 5151-56, and defendants were not allowed to inform the jury that the police and/or prosecutors had decided not to arrest Dr. Schnall or charge him with any crime, 6/2RP 44-45, 51-53, 55-57. The court instructed the jury not to speculate as to “whether defendant Schnall has or has not been arrested or prosecuted for any of his acts with his patients.” CP 4073.

2. Trial.

The case came on for jury trial on May 27, 2008, and did not end until July 17. Prospective jurors were given a questionnaire to complete. *See* CP 4311-4316. Question 9b asked: “Have you, or has anyone close to you, ever . . . [b]een a defendant in a lawsuit . . .”? Question 11 asked: “Have you . . . ever experienced . . . sexual abuse . . . , and at what age?” Voir dire was not reported.

The court decided to try the issues of tort liability and damages and then, if the jury found liability, to hold a second phase at which the same jury would make findings on plaintiffs’ “communicating with minors for immoral purposes” allegations. *See* 7/14RP 35.

3. Pediatric standard of care opinion testimony.

To address pediatric standard of care issues, plaintiffs called Dr. Herschell Lessin from Poughkeepsie, N.Y., 6/9RP 18, and defendants called Dr. Gary Spector from Seattle. 6/26RP 108. Drs. Spector and Lessin agreed on many things, including that pediatricians are supposed to examine their patients' genitalia during routine physical exams<sup>5</sup> and that it is appropriate for pediatricians to initiate discussion of sexuality and masturbation with their adolescent patients.<sup>6</sup>

Dr. Lessin accepted as true the stories the boys had told in their depositions, citing their similarity,<sup>7</sup> and opined that Dr. Schnall's conduct toward the boys violated the standard of care in myriad respects. 6/9RP 37-59. For example, Dr. Lessin opined that Dr. Schnall had showed excessive interest in the boys' genitalia and inquired too intrusively about masturbation. 6/9RP 38-43. Dr. Lessin opined that Dr. Schnall became overly involved in the boys' lives, 6/9RP 33-34, separated them from their families to the point where they came to rely on him, 6/9RP 54, "so that he was the only one that was important in their lives," 6/9RP 54, and retained control by threatening to abandon them, 6/9RP 58. Dr. Lessin declined,

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<sup>5</sup> 6/9RP 38-39, 90, and 6/10RP 18; 6/26RP 113.

<sup>6</sup> 6/9RP 38; 6/26RP 133-35.

<sup>7</sup> 6/9RP 37, 50-51, 6/10RP 6, 15.

however, to accuse Dr. Schnall of a sexual-gratification motive.<sup>8</sup>

Dr. Spector opined that the boys' deposition accounts of the attention Dr. Schnall had paid to their genitalia was implausible, in light of their stories having changed over time, 6/26RP 114-16,<sup>9</sup> 158-59, 161-63, 184-85, 190-92, 217-18, and in light of observations that nondefendant health care providers have made about them, 6/26RP 116, 185, 190-91.<sup>10</sup> Dr. Spector tended to accept Dr. Schnall's version of what he had and had not done and what the records showed, defended Dr. Schnall's conduct and decisions, 6/26RP 112-14, 126-39, 143-94, and testified that he could see no indications of "grooming" or sexual motivation, 6/26RP 112-13. Dr. Spector noted that Dr. Schnall had referred Jonathan, Jeff and Daniel to, or had recommended that they consult, specialists, including psychiatrists or psychologists,<sup>11</sup> which Dr. Spector noted is inconsistent

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<sup>8</sup> Invited on direct examination to express his "opinion on why this man was doing what he was doing with these patients," Dr. Lessin equivocated: "it was issues of getting control over the patients' lives, separating from their family, having them come to rely on Dr. Schnall for all aspects of their lives," and that "[i]t's hard to know what the intent was." He opined that "There are many appearances. There's the appearance of sexualization of the exam . . . but it also shows a power issue, a control issue. There are all sorts of potential intents here . . ." 6/9RP 53-54, 80-81.

<sup>9</sup> For example, Jeff Hawley's trial testimony about Dr. Schnall regularly handling his penis at examinations, 6/4RP 20-26, conflicted with his statement to an interviewer in 2005 denying that Dr. Schnall had ever touched him inappropriately. Ex. 78 ("No, no I would have punched him"). Daniel Fewel likewise had denied being touched sexually, *see* 6/26RP 158-59, but claimed at trial that Dr. Schnall had touched his genitalia inappropriately, 6/17RP 130-35, 156-57.

<sup>10</sup> *See* footnote 3.

<sup>11</sup> 6/24RP 192, 217 (Jonathan); 7/1RP 7; 7/9RP 72-73 (Jeff); 6/23RP 35, 38-39; 7/2RP 66, 87, 89-92, 125-27 (Daniel).

with a secret plan to groom for sexual contact. 6/26RP 157-58. Dr. Spector testified that Dr. Schnall did act inappropriately and below the standard of care as to Jeff Hawley on one occasion in April 2004, 6/26RP 183, when Jeff was 21 years old.<sup>12</sup>

The jury was instructed, per WPI 2.10, that “[y]ou are not . . . required to accept [any expert’s] opinion,” and that “you may also consider the reasons given for the opinion and the sources of [the expert’s] information, as well as considering the factors . . . given to you [in other instructions] for evaluating the testimony of any other witness” to determine the weight to be given an expert’s testimony. CP 4067.

4. Testimony as to each patient-plaintiff’s psychological condition and future mental health care needs.

The jury heard firsthand and at great length from each of the former pediatric patient plaintiffs, on direct examination, cross-examination, and in response to juror questions,<sup>13</sup> as well as from each of

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<sup>12</sup> On that occasion Jeff, 21, was in the yard at Dr. Schnall’s residence following his release from jail after being arrested for a domestic violence assault on a girlfriend, and Dr. Schnall demanded that Jeff strip off his clothes and submit to a “hosing down” to punish him for violating a good-conduct agreement they had made; Jeff refused and ended his relationship with Dr. Schnall. 6/4RP 83-90, 6/5RP 95-97; 7/9RP 105-06.

<sup>13</sup> Jonathan Kuhn: 6/11RP 4-12, 24-108, 113-202; 6/16RP 117-23, 133-71; 6/17RP 11-54, 95-101. Jeff Hawley: 6/3RP 142-62; 6/4RP 17-137; 6/5RP 10-109, 120-39. Paul Hawley: 6/5RP 139-97, 199-210; 6/10RP 88-184. Daniel Fewel: 6/17RP 102-164, 168-83; 6/18RP 5-57, 59-65, 155-63.

the six parent plaintiffs.<sup>14</sup>

Each side called mental health professionals to opine about the former pediatric patients' psychological state and future mental health care needs. Plaintiffs presented no expert testimony that any of the patient plaintiffs has psychological injuries that more probably than not will make him unemployable in the future, or that Jonathan and/or Jeff and/or Daniel more probably than not will fail to earn a four-year college degree. (Paul Hawley already has a four-year WSU degree and a job with a large engineering firm. 6/5RP 140-41.)

5. Testimony pertaining to economic damages.

a. Past economic damages.

Plaintiffs sought past economic damages for the parents only. Based on the trial evidence, the jury could have awarded the Kuhns up to "around \$25,000," 6/30RP 62, and their counsel asked the jury to award \$24,800, 7/10RP 102. Based on the evidence presented to the jury, the jury could have awarded the Fewels up to \$107,000, 6/23RP 71; 6/24RP 28-31, and could have awarded the Hawleys up to \$71,741, 6/30RP 94-95, which is close to the \$71,770 that their counsel asked the jury to award, 7/10RP 97.

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<sup>14</sup> Joan Kuhn: 6/24RP 161-85, 188-222; 6/25RP 5-21. Dan Kuhn: 6/30RP 55-62, 65-78. Bev Hawley: 6/30RP 190-219; 7/1RP 3-71. Rich Hawley: 6/30RP 79-108, 113-57. Kathleen Fewel: 6/19(p.m.)RP 5-97; 6/23RP 7-76. Joe Fewel: 6/17RP 164-68; 6/24RP 15-70.

The defense maintained that there was no liability to Jonathan, Paul, or Daniel, 7/10RP 175, and that Jonathan's, Jeff's, and Daniel's mental health problems preexisted the mentoring efforts by Dr. Schnall (mentoring efforts that their parents had initially welcomed but later came to think were predatory), or were not problems Dr. Schnall had caused, 7/10RP 109, 134-35, 167-69, 176-78, 180, and asked the jury to award the parents no damages. 7/10RP 185-86. Defendants also argued that the evidence showed that Dr. Schnall's allegedly tortious controlling behavior toward Jeff had started after Jeff turned 18 (after which time any harm to Jeff ceased to be harm on account of which Jeff's parents could recover any damages under RCW 4.24.010). 7/10 RP 139-45.<sup>15</sup>

b. Future economic damages

Future economic damages were sought only for the patient plaintiffs, not for any of the parents.

(1) Future economic damages - Jonathan Kuhn.

Dr. Robert Olsen opined that Jonathan Kuhn needs 12 to 20 hours of therapy and two to five years of continuing medication to treat obsessive-compulsive disorder (OCD), phobias, and depression that Dr.

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<sup>15</sup> Referring to, among other evidence, Ex. 77, page 2, and Ex. 78, pages 2, 6, and 18 (pages stamped 9, 13, and 25) reflecting statements Jeff had made in 2005 denying that Dr. Schnall had ever touched him inappropriately when examining him and that the relationship with Dr. Schnall that plaintiffs claimed had been too controlling began after he turned 18. Both sides' pediatric experts agreed that pediatricians customarily see patients through college, or about age 22. 6/10RP 19; 6/26RP 121.

Olsen attributes to Dr. Schnall, and 150 to 200 hours or more of psychotherapy for psychological injuries. 6/12RP 38. Dr. Olsen charges \$250 for psychotherapy. 6/12RP 42. He did not testify as to the cost of medications or the therapy for OCD, phobias and depression.

Dr. Jennifer Wheeler opined that Jonathan should have weekly therapy for five years to “work through some of the confusion about his identity and his sexual orientation, given what Dr. Schnall has kind of led him to think and led him to fear,” 6/16RP 123-24, and that the cost per session would range from \$100 to \$150, 6/16RP 125. She recommended that Jonathan have academic/career counseling, 6/16RP 125-26, as well as vocational counseling during college so he will be less averse to accepting acting roles dealing with issues of abuse, 6/16RP 126-27, but she did not provide a cost estimate for such counseling. She also testified that the Kuhns should have family therapy once a month for six to 12 months, 6/16RP 125, but again did not provide a cost estimate.

Dr. Kevin McGovern opined for the defense that Jonathan should have weekly behavioral cognitive therapy for 24 to 36 weeks. 7/2RP 181-82.

Plaintiffs’ counsel asked the jury to award Jonathan Kuhn future economic damages of \$388,000, of which \$294,000 was for lost future income. 7/10RP 98-99. No expert, however, had testified that Jonathan

was going to drop out of college or be unable to find employment.<sup>16</sup>

Defense counsel argued in closing that, under the evidence, Jonathan's future economic losses are, at most, \$7,200, 7/10RP 196.

(2) Future economic damages - Jeff Hawley.

Dr. Wheeler opined that Jeff Hawley should have weekly individual therapy for at least two years (a hundred or more sessions), 6/16RP 74-77. Dr. Wheeler opined that the Hawleys should have 25 sessions of family therapy over six months. 6/16RP 79-80. Dr. Wheeler did not provide cost estimates for the individual or family therapy (but did not indicate that the cost would differ from that of the therapy she recommended for Jonathan Kuhn, which was \$100 to \$150 per session). Dr. Robin Baxter opined that Jeff should have therapy for PTSD caused by a 2004 incident (*see* 7/9RP 105-06; as to which Dr. Schnall admitted negligence, *see* 7/10RP 130-31), that would cost \$150 to \$300 an hour. 6/19(a.m.)RP 90, 100-101. Plaintiff did not elicit testimony from Dr. Baxter as to how frequently or for how long Jeff should have the therapy.

Plaintiffs' economist, Prof. Peter Nickerson, testified that, if Jeff does not finish college, he will earn \$587,000 less in lifetime income than if he does finish college, 6/30RP 177-78, and that the market rate for the

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<sup>16</sup> Plaintiffs' counsel came up with \$294,000 by suggesting that the jury could find that Jonathan is twice as likely as Jeff Hawley not to get a college degree. 7/10RP 99. The \$294,000 figure is half of the \$587,000 figure that Prof. Nickerson gave for Jeff's future lost income if Jeff fails to get a degree. *See* 6/30RP 177-78.

individual and family counseling Dr. Wheeler recommended is \$47,421, 6/30RP 178. Dr. Wheeler testified that Jeff is “at relatively increased risk” of not obtaining a four-year college degree because of psychological problems, 6/16RP 79, but did not opine that Jeff probably cannot complete college or probably will not do so.

Dr. McGovern testified for the defense that Jeff needs to continue or resume going to AA meetings and to school, and should have 24 to 36 sessions of cognitive behavioral therapy, which would cost \$150 to \$200 per session. 7/2RP 160-61. Defense counsel argued in closing that the largest award that the evidence credibly would permit the jury to make to Jeff for future therapy expenses is \$7,200. 7/10RP 195, 200. Defense counsel pointed out that no qualified witness had testified that Jeff cannot or will not finish college. 7/10RP 199.

(3) Future economic damages - Paul Hawley.

Dr. Wheeler opined that Paul Hawley needs individual weekly dialectical behavior therapy for two years. 6/16RP 97. She did not quote cost figures (but also did not indicate that the cost would differ from that of the therapy she recommended for Jonathan, which was \$100 to \$150 per session).

Dr. McGovern opined for the defense that Paul would benefit from treatment, over six to nine months, to address his anger and concerns

about Dr. Schnall, as well as family issues and his sexuality, but does not need dialectical behavioral therapy. 7/2RP 172-74. Defense counsel argued in closing that the evidence supported an award of no more than \$4,800 in future economic damages to Paul. 7/10RP 196.

(4) Future economic damages - Daniel Fewel.

Plaintiffs' evidence concerning Daniel Fewel's economic damages was incoherent. Dr. Bruce Olson opined that, because of his level of psychological functioning, Daniel Fewel (age 18 at the time of trial) currently cannot live or work independently. 6/18RP 167-69; 6/23RP 104-05. Plaintiffs' counsel, however, did not elicit from Dr. Olson (or any other qualified expert) a prognostic opinion as to whether Daniel is or will remain unemployable, *see* 6/23RP 104 ("I don't know what he could do in the future"),<sup>17</sup> and/or that Daniel will be unable to live independently in the future. Dr. Olson testified that he believes Daniel will probably need therapy and medications for the rest of his life, 6/23RP 102-03, but did not provide parameters as to how frequently or for how many hours a year or other period, or at what cost.<sup>18</sup> Dr. Olson testified that there exists the possibility that Daniel will need "day" or even long-term residential psychotherapy treatment, and that he is "concerned about the risk of

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<sup>17</sup> *See also* 6/23RP 153-54 ("Daniel's picture is evolving, and it's just not static. . . . [H]e's just turned 18, and it's evolving, and it's complex").

<sup>18</sup> Dr. Olson did testify that his own clinical rate is \$168 an hour. 6/23RP 107.

suicide,” 6/23RP 99-101. Dr. Wheeler recommended that Daniel have individual weekly psychiatric therapy and continue pharmacological treatment for at least five years, 6/19(a.m.)RP 32-33, treatment for a possible thought disorder to which he may be genetically predisposed that may need to be as an inpatient, *id.* at 35-36, and group therapy, *id.* at 36-37. Dr. Wheeler would not opine on a more-probable-than-not basis that Daniel will have long-term significant psychological problems. 6/19(a.m.)RP 38-39, 58. Nor did she testify to the cost of the recommended therapies for Daniel.

Prof. Nickerson testified that if Daniel enters the labor force with no more than a high school diploma, he will earn \$470,000 less in future income than if he has a college degree. 6/30RP 170-71. Prof. Nickerson testified that if Daniel is unable to enter the labor force at all, his lifetime lost income will be \$1,247,000. 6/30RP 168-69. Prof. Nickerson testified that the present value of the cost of 25 years of outpatient counseling, if Daniel needs it, would be \$380,000, 6/30RP 172, and that if Daniel needs to be institutionalized for five years the cost would be \$250,000 per year, 6/30RP 175-76.

Dr. Christopher Varley testified for the defense that Daniel needs psychotherapy (although not because of a condition attributable separately to his experience with Dr. Schnall, as opposed to psychiatric conditions he

would have anyway, 6/25RP 75-76), and recommended cognitive behavioral therapy, 6/25RP 71-74, without specifying for how long or at what cost. Dr. Varley opined that it cannot be predicted at this time whether Daniel will complete his education and function well enough to be employed, 6/25RP 80, but that there is no indication that Daniel will need inpatient or residential treatment, 6/25RP 81-82.

Defense counsel argued in closing that the evidence supported an award of no more than \$52,000 in future economic damages to Daniel, but that, because of expert testimony that it is difficult to sort out problems attributable to Dr. Schnall and to other things, *see* 6/18RP 186-89 (Dr. Olson) and 6/19(a.m.)RP 15-16 (Dr. Wheeler) only one-third, or \$17,333, could plausibly be awarded to Daniel for future-therapy expenses, 7/10RP 198-99.

6. Limited concession of negligence as to Jeff Hawley.

Dr. Schnall acknowledged that he acted inappropriately toward Jeff Hawley in demanding that Jeff submit to a hosing-down in 2004 (when Jeff was 21) after being arrested for domestic violence. 7/9RP 105-06. In closing, defense counsel admitted negligence as to that behavior, 7/10RP 130-31, and suggested the jury should award Jeff \$75,000 in noneconomic damages for it, 7/10RP 200.

7. “Phase 1” instructions to the jury and special verdict form.

The court’s instructions to the jury for the first (tort claims) phase of the trial consisted mostly of, or were based on, Washington pattern civil-case jury instructions, including WPI 1.02 (Introductory), CP 4062-64, and WPI 2.10 (Expert Testimony), CP 4067. During trial, plaintiffs abandoned their intentional tort claims (sexual battery and intentional infliction of emotional distress/outrage), *see* CP 4258, lines 3-4, and the jury was not instructed on them. The “Phase 1” instructions also included a damages instruction based on WPI 30.01.01 (“[t]he law has not furnished us with any fixed standards by which to measure noneconomic damages”). CP 4104-06. The jury was given a nine-page special verdict form on which to answer as many as 113 questions of fact. CP 4112-20.

Before instructing the jury for Phase 1, the court conferred with counsel about jury instructions, including those that would be given in the second (criminal code violation) phase of the trial if the jury found liability on the tort claims in Phase 1. 7/14RP 36-44. The defense renewed objections it had already made to Phase 2, CP 5151-56, including that it was error to submit the “communication” issues to the jury at all because there has been no criminal conviction, 7/14RP 39-42; CP 5153-54. The defense also excepted to the court’s failure to instruct the jury, if the court proceeded with Phase 2 of the trial, that “[i]n order to

communicate with a minor for immoral purposes, a person . . . must have the predatory purpose of promoting children’s exposure to and involvement in sexual misconduct,” citing *State v. Hosier*, 157 Wn.2d 1, 8-10, 133 P.3d 936 (2006), and *State v. McNallie*, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993), 7/14RP 40-41, CP 4030,<sup>19</sup> particularly since “a pediatrician’s normal duties include touching the genital areas.” The court declined to include the words “predatory purpose” in its Phase 2 instructions, explaining:

that [the] proposition is true as a matter of law, but I believe it’s accurately included in the core instruction where it defines it as communicating with a minor for immoral purposes of a sexual nature. By definition, any kind of communication with a minor that’s immoral and of a sexual nature would be predatory.

7/14RP 37, *see* CP 4132.<sup>20</sup>

8. Plaintiffs’ counsel’s closing argument as to damages.

In closing argument, plaintiffs’ counsel Ronald Bemis suggested noneconomic damage awards of \$5-6 million of Jeff; \$4-5 million for Paul; \$4-6 million each for Jonathan and Dan; and \$300,000 for each of the six parents. 7/10RP 95, 97, 101, 105-06. Mr. Bemis acknowledged the court’s instruction that the law has “no fixed standards,” for an award

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<sup>19</sup> *See also* CP 4327.

<sup>20</sup> The court also refused defendants’ request, CP 4111, that it instruct the jury, if it held Phase 2, that plaintiffs bore the burden of proving that Dr. Schnall’s purpose in “communicating” with the plaintiffs as minors had been immoral. 7/18RP 37.

of noneconomic damages, 7/10RP 56, and told the jury that the amount to award is “your decision,” 7/10RP 86, and that “you can give less, you can give more” than the amounts he suggested. 7/10RP 95.<sup>21</sup>

9. Jury’s “Phase 1” verdict; filing of verdict.

The jury found that Dr. Schnall had violated the standard of care in his interactions with Jeff, Jonathan and Dan, but not Paul; that he had caused injury to Jeff, Jonathan and Dan; and that he had violated the standard of care within the scope of his employment with the Clinic. CP 4113-14. The jury found that Dr. Schnall had negligently inflicted emotional distress, causing injury, only as to Jeff, CP 4114, and that the Clinic had negligently supervised Dr. Schnall, but that such negligent supervision had not caused injury to any of the patient-plaintiffs, CP 4114-15 (Q. 10).<sup>22</sup> The jury found that the Clinic had not breached a “special relationship” duty to any of the plaintiff-patients. CP 4115 (Q. 7).

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<sup>21</sup> Mr. Bemis did not argue that any of the patient-plaintiffs had suffered certain harm as a result of Dr. Schnall’s alleged malpractice and certain other harm as a result of Dr. Schnall’s alleged negligent infliction of emotional distress (or because of tortious acts/omissions by the Clinic). The “Phase 1” verdict form, CP 4112-20, did not provide for separate damages awards for each possible tort finding. In that respect, the form was structured as plaintiffs had requested. *See* CP 4009, 4019-20.

<sup>22</sup> Plaintiffs requested separate questions for malpractice commission and malpractice causation, and separate questions for NIED infliction and injury-causation. CP 3121-23.

The jury awarded the following damages:

	<u>Future economic damages</u>	<u>Noneconomic damages</u>
Jonathan:	\$ 30,000	\$ 50,000
Jeff:	\$ 30,000	\$ 75,000
Daniel:	\$150,000	\$150,000

	<u>Past economic damages</u>	<u>Noneconomic damages</u>
Joan Kuhn:	\$ 12,400	\$ 0
Dan Kuhn:	\$ 12,400	\$ 0
Bev Hawley:	\$ 0	\$ 0
Rich Hawley:	\$ 0	\$ 0
Kathleen Fewel:	\$ 35,000	\$ 25,000
Joe Fewel:	\$ 35,000	\$ 25,000

CP 4116-17. Some awards were subject to 15 to 25% contributory negligence findings.<sup>23</sup> CP 4118-20.

The jury was polled. 7/16RP 8-20. The court was satisfied that ten or more jurors had joined in answers to each question, and filed the verdict. 7/16RP 20, 40-41. The jury then was informed (for the first time, *see* CP 4251 (lines 9-11), and 4337 (¶ 3)) that it would be receiving more instructions and another round of closing arguments and would have to

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<sup>23</sup> The contributory negligence findings are not material to this appeal because they were not a reason for the trial court's decision to grant plaintiffs a new trial.

answer more questions on another verdict form. 7/16RP 20. Without recessing, the court then gave its “Phase 2” jury instructions, 7/16RP 20-21; CP 4127-35, and proceeded to closing arguments. The court instructed the jury that a person communicates with a minor “for immoral purposes” when he or she communicates for “immoral purposes of a sexual nature” by “words or conduct.” CP 4132. After the court gave its Phase 2 jury instructions, plaintiffs’ counsel made closing argument, 7/16RP 21-29, followed immediately by that of Dr. Schnall’s counsel, 7/16RP 29-37.<sup>24</sup>

Dr. Schnall’s counsel asserted in his “Phase 2” closing argument, among other things, that the Supreme Court has “suggested” that the “immoral purpose of a sexual nature” language means that the conduct must have a predatory purpose; the court sustained objections and instructed the jury to disregard those statements. 7/16RP 32. Shortly thereafter the jury retired to deliberate. 7/16RP 38.

The jury did not return a verdict on July 16; by the end of that day, however, the jury had voted to reach “no” answers as to Jeff, Paul, and Daniel on the question whether Dr. Schnall had communicated with them

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<sup>24</sup> Counsel for the Clinic did not present argument because the jury’s “Phase 1” verdict had found the Clinic liable only vicariously.

for immoral purposes when they were minors, and had split 9-no, 3-yes as to Jonathan. CP 4333 (¶ 3), 4337 (¶ 3), 4986 (¶ 6), 5158 (¶ 3).

10. Press coverage of “Phase 1” verdict.

There was media coverage of the July 16 “Phase 1” jury verdict during the evening of July 16 and the next morning, reporting the liability findings and damages awards and that the jury had begun a second phase of deliberations. CP 4479-80 (¶¶ 9-10). The articles reported on the questions the jury was answering during the trial’s second phase, that King County Prosecutor Norm Maleng had determined that “there wasn’t a criminal charge his office could pursue” against Dr. Schnall, and that the second phase of the trial would determine whether the plaintiffs could recover attorney fees “which plaintiffs’ attorneys say amount to \$1.8 million.” *Id.*; CP 4252.

After the jury returned on July 17 (by which time the news media had reported as described above), to resume deliberations as to Jonathan, *id.*, it informed the court that it had reached a verdict as to three plaintiffs, 7/17RP 2. Shortly thereafter, the jury announced that it had reached a verdict. 7/17RP 8. As to each of the four patient-plaintiffs, the jury answered “no” to the question of whether Dr. Schnall had communicated with the plaintiff for immoral purposes. CP 4122.

C. Motion by Plaintiffs for New Trial, Directed Verdict, Sanctions, and Additur; Defendants' Response Opposing Motion.

Plaintiffs filed a motion seeking a new trial and other or alternative relief. CP 4206-4242. Plaintiffs submitted affidavits of Juror 9, CP 4168-4170, and Juror 11, CP 4202-05. Juror 11 complained that Juror 12 had said “[t]hroughout the entire course of deliberations,” that “his physical exams while an adolescent were uncomfortable,” and that “he influenced the jurors to think the boys were not abused but simply blew those uncomfortable exams out of proportion.” CP 4304. Juror 11 asserted that, on July 17, jurors had brought into the jury room, and some jurors had discussed information in, or read aloud, the *Seattle Times*' July 16 article. CP 4203-04. Juror 9 also related juror discussion, on July 17, of the contents of news media coverage following the jury's Phase 1 verdict. CP 4169. Plaintiffs also argued that Dr. Schnall's counsel's Phase 2 closing argument statements about “predatory purpose,” 7/16RP 31-32, had been flagrant misconduct requiring a new trial of Phase 2, CP 4228-29.

Plaintiffs asked the trial court to find that the Phase 1 damages awards were so low as unmistakably to indicate that they were the result of juror passion or prejudice against plaintiffs, CP 4234-36, 4374, citing “a huge gulf” (CP 4377) between what Mr. Bemis had suggested in closing argument the jury could award and what the jury actually did award, CP

4234-36, 4348-49, 4377-78, and the expenses they had incurred for the litigation, CP 4348 (¶ 5), CP 4373, 4377, and “their reasonable litigation fees (which exceed \$1.8 million),” CP 4373. Plaintiffs asserted that the damages awards were “in contravention of uncontested evidence,” CP 4236, and “cannot be explained by the evidence,” CP 4235. Plaintiffs also argued that the jury’s Phase 1 verdict form answers on certain liability questions were inconsistent, CP 4237-40.

Defendants opposed plaintiffs’ new trial motion, CP 4247-82, 4991-99, and submitted declarations of Juror 1, 5157-60; Juror 6, CP 4433-35; and Juror 8, CP 4337-38. Those jurors declared that the jury had voted “no” as to Jeff, Paul and Dan, and had been split 9-3 as to Jonathan, before retiring at the end of July 16, and each related her recollection of discussion about media coverage of the Phase 1 verdict on July 17.

In supplemental submissions, CP 5000-02, 5003-44, 5046-60, plaintiffs argued that a new trial should be granted for the additional reason that Jurors 1 and 6 (also referred to as “Juror A”) had not disclosed certain information on voir dire questionnaires. A supplemental affidavit of Juror 11 asserted that Juror 6 (or A) had “broke[n] down” during the “first stage” of deliberations<sup>25</sup> and said she had been sexually abused by a

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<sup>25</sup> Juror 11 did not say whether the “first stage” referred to “Phase 1” or to the initial “Phase 2” deliberations on July 16.

family member when she was younger and had been in therapy as a child. CP 5001. Plaintiffs showed that Juror 6 had answered “no” to Question 11 on the juror questionnaire (“Have you . . . ever experienced . . . sexual abuse . . . of any kind, and at what age?”). CP 5040, 5048-50.

Juror 11 also asserted in her supplemental affidavit that Juror 1, “the doctor’s wife, who worked at her husband’s medical clinic,” had “told us that the subjects of this lawsuit was very common [sic], she saw it (what had been alleged to have been misconduct on the part of Schnall towards the boys) all the time.”<sup>26</sup> CP 5001. Plaintiffs showed that Juror 1 had answered “no” to Question 9b (“Have you, or has anyone close to you, ever . . . [b]een a defendant in a lawsuit. . . .?”), CP 5032, 5047-49, but that a person with her husband’s name had been sued for medical malpractice in 1985 and 1995, CP 5004-05, 5013, 5022, and that a woman at her home had been served with process for the 1985 lawsuit, CP 5028.

In a supplemental declaration, Juror 6 stated that she experienced during trial the surfacing of blocked-out memories of childhood sexual abuse, and that she had mentioned her personal experience only in general terms during deliberations on July 17. CP 4984-86. Juror 1’s

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<sup>26</sup> What Juror 11 took Juror 1’s supposed statement to mean – whether it was supportive of or dismissive of plaintiffs’ complaints – was never explained or clarified, and the trial court made no finding that it reflected bias. Indeed, the trial court ruled that it could not consider and was not considering anything Juror 11 said about Juror 12 sharing his personal experiences with medical exams because “that is “exactly [what] we expect jurors to bring to bear in the course of deliberations.” CP 4483.

supplemental declaration stated that Juror 6 mentioned a personal experience with sexual abuse on July 17 but “did not share very much.” CP 4989. Juror 1 added that she had been unaware of or did not remember the malpractice lawsuits against her husband until after trial. CP 4989. No juror testified, and plaintiffs did not contend, that Juror 1 referred during deliberations to having been party to a lawsuit. *See* CP 5050.

D. Court’s Ruling Granting All Plaintiffs a “Complete New Trial”.

There was no evidentiary hearing on plaintiffs’ new-trial motion.

The trial court believed Juror 1, CP 4513, and accepted that “Juror One’s failures [to disclose that her husband had been sued for medical malpractice at least twice and that she had been a defendant in at least one such lawsuit] were honest and inadvertent, CP 4477-78 (FF 1-2)<sup>27</sup>. The trial court likewise believed Juror 6, CP 4514, and accepted that her failure to disclose her experience with sexual abuse at a young age also was an honest failure, CP 4478 (FF 4).

The trial court did not find the jury’s “Phase 1” verdict answers inconsistent. The trial court ruled that Juror 11’s account of statements Juror 12 had made during deliberations were inadmissible because they inhere in the verdict and are “exactly the type of personal experience we expect jurors to bring to bear in the course of deliberations.” CP 4483.

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<sup>27</sup> “FF” refers to the trial court’s Findings of Fact and “CL” refers to the trial court’s Conclusions of Law in its order granting plaintiffs’ motion for new trial.

The trial court found that Dr. Schnall's counsel's "Phase 2" closing argument statements about "predatory purpose" had been inappropriate, but not that they constituted misconduct warranting a new trial. CP 4482-85, 4525-26. The trial court did not find any problem with the amount of damages awarded to Jeff, Jonathan, Dan, the Kuhn parents or the Fewel parents. Although plaintiffs requested additur, CP 4208, 4236-37, 4374, 4382, 4497, 4509, the trial court did not grant them that relief.

The trial court granted plaintiffs "a complete new trial." CP 4475-4529. Defendants timely appealed. CP 4530-4759.

#### IV. ARGUMENT

##### A. Grounds Did Not Exist For Granting New Negligence (Phase 1) Trials to the Plaintiffs Who Won.

This case presents an issue of first impression. Washington appellate courts seem never to have been asked to decide whether a new trial may be granted to a plaintiff who has prevailed on the issue of liability and who has been awarded substantial damages in an amount the trial court has declined to find inadequate. For reasons explained below, but that may be self-evident, the answer should be no. If there is nothing in the result about which the plaintiff can validly complain, he has had a fair trial.

Another aspect of this appeal that may seem puzzling is that the defendants, having *lost* at trial, are appealing from an order that grants

them a new trial as well, albeit one they did not ask for. But this was no ordinary trial; it took six weeks and was hugely expensive. Defendants would rather accept the jury's verdict and get on with their lives than repeat the experience, even with the possibility that a new trial would result in more no-liability findings or in damages awards closer to the low end of the range permitted by the evidence. Dr. Schnall has retired, and vindication in court would not affect his viability as a practicing pediatrician. Defendants' choice must be respected, and the trial court's order must be reversed, if the trial court's reasons for granting plaintiffs a new trial are untenable and/or legally invalid.

1. Three of the negligence plaintiffs won on liability and they, and the parents of two of them, received awards of damages that were substantial, within the range of the evidence, and not inadequate.

A trial court lacks the power to substitute its own judgment for the jury's as to what amount to award within the range of the evidence. *See Green v. McAllister*, 103 Wn. App. 452, 462, 14 P.3d 795 (2000) ("Regardless of the court's assessment of the damages, it may not, after a fair trial, substitute its conclusions for that of the jury on the amount of damages" (quoting *Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967))). Plaintiffs asked the trial court to find their damages awards inadequate under CR 59(a)(5), and to give defendants the choice of

additur or a new trial. The court made no finding of inadequate damages as to any of the seven plaintiffs to whom the jury awarded damages, nor did it indicate indirectly that it considered any damages awards inadequate by exercising the additur authority that it had under RCW 4.76.030.<sup>28</sup>

A jury verdict “must be upheld unless the court finds from the record that the damages are outside the range of substantial evidence in the record, shock the conscience of the court, or appear to have been arrived at as the result of passion or prejudice.” *Green*, 103 Wn. App. at 462 (citing RCW 4.76.030; *Henderson v. Tyrrell*, 80 Wn. App. 592, 631, 910 P.2d 522 (1996); *Thompson v. Berta Enters., Inc.*, 72 Wn. App. 531, 542, 864 P.2d 983, *rev. denied*, 124 Wn.2d 1028 (1994)). Decisions hold that it is an abuse of discretion to grant the losing party a new trial when sufficient evidence exists to support the verdict, and that it is an abuse of discretion to deny the losing party’s motion for new trial where the verdict is contrary to the evidence. *Palmer v. Jensen*, 132 Wn.2d 193, 198-99, 937 P.2d 597 (1997).<sup>29</sup>

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<sup>28</sup> RCW 4.76.030 provides in pertinent part that “[i]f the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict . . .”

<sup>29</sup> Citing *McCue v. Fuqua*, 45 Wn.2d 650, 653, 277 P.2d 324 (1954), and *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 637, 865 P.2d 527 (1993), *rev. denied*, 124 Wn.2d 1005 (1994), respectively.

The five-figure economic damages awards made in Phase 1 were within the range of the evidence. On noneconomic damages, the jury was instructed that “[t]he law has not furnished us with any fixed standards by which to measure noneconomic damages,” and that “you must be governed by your own judgment, by the evidence in the case, and by these instructions” in determining any noneconomic damages awards. CP 4105-06. Even plaintiffs’ expert, Dr. Lessin, acknowledged that Jonathan, Jeff and Daniel had pre-existing psychological problems before Dr. Schnall’s allegedly tortious interactions with each occurred. 6/9RP 53, 79.<sup>30</sup> The jury was instructed that a plaintiff could have “no recovery . . . for any injuries or disabilities that would have resulted from natural progression of [a] pre-existing [mental] condition even without [tortious conduct by a defendant].” CP 4092, 4093. The noneconomic damages sought in this case were pain-and-suffering damages for psychological injury. The determination of pain-and-suffering damages is peculiarly within the province of the jury. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 646, 771 P.2d 711, 780 P.2d 260 (1989); *Bingaman v. Grays Harbor Comm’t’y Hosp.*, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985). Plaintiffs did not complain about the court’s damages instructions. Thus, pain-and-suffering damages were peculiarly for the jury to determine.

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<sup>30</sup> *And see* footnote 3.

CR 59(a)(5) and RCW 4.76.030 allow a trial court to find that a damages award is so low as unmistakably to indicate jury passion or prejudice. CR 59(a)(7) allows a court to find that a damages award is unsupported by (below the range of) the evidence. The trial court in this case made neither finding.

Where an award is not contrary to the evidence, this court will not find it to be the result of “passion or prejudice” based solely on the award amount. As this court said in *James v. Robeck*, 79 Wn.2d 864, 870-71, 490 P.2d 878 (1971), “where it can be said that the jury . . . could believe or disbelieve some of [the evidence] and weigh all of it and remain within the range of the evidence in returning the challenged verdict, then it cannot be found *as a matter of law* that the verdict was unmistakably so excessive or inadequate as to show that the jury had been motivated by passion or prejudice solely because of the amount.” [Emphasis added.]

*Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 454, 191 P.3d 879 (2008).

Unless the trial court makes a CR 59(a)(5) or (7) finding, a damages award “must be upheld.” *Green*, 103 Wn. App. at 462. Thus, as a matter of law, seven plaintiffs suffered no prejudice by reason of the liability findings in their favor,<sup>31</sup> and none of them received damages

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<sup>31</sup> The seven plaintiffs who won in Phase 1 could not have “done better” at trial had Jeff, Jonathan and Daniel all prevailed on their NIED and malpractice claims against Dr. Schnall (only Jeff prevailed on his NIED claim as well as on his malpractice claim) or if the jury also found the Clinic directly as well as vicariously liable. The verdict form did not provide for separate damages-award lines for injury associated with different legal theories of liability and plaintiffs’ counsel did not ask the jury to award different or

awards that are inadequate under CR 59(a)(5) or unsupported by the evidence under CR 59(a)(7). The “Phase 1” verdict must be upheld as to those seven plaintiffs, and judgment must be entered on it.

2. Jurors 1 and 6 did not dishonestly conceal information that would have enabled plaintiffs to challenge them for cause.

The trial court’s rationale for granting plaintiffs a new Phase 1 trial was that Jurors 1 and 6 did not disclose information in voir dire that “could have led to a successful challenge for cause,” CP 4478 (FF 2) or that “would have provided a basis for a challenge for cause,” CP 4478 (FF 6) and CP 4483 (CL 1). Rules governing review of grants of new trials because of juror nondisclosure during voir dire do not fit this case because the decided cases have involved concealed bias, expressed during deliberations, against the party who lost at trial. *E.g., Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 155-60, 776 P.2d 676 (1989) (affirming grant of new trial to California resident suing for injury incurred in Seattle grocery store where jury foreperson had denied bias against Californians during voir dire but had repeatedly expressed view that Californians are “sue happy” during deliberations); *Mulka v. Keyes*, 41 Wn.2d 427, 249 P.2d 972 (1952) (affirming grant of new trial to defendant in surgery

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additional amounts if it found for any plaintiff on more than one legal theory. The parents’ claims were derivative of claims of injury to their sons, and did not depend on which theory of liability a son prevailed on. Thus, if anything can be “wrong” with the Phase 1 trial from the perspective of Jeff, Jonathan, Dan, the Kuhn parents and the Fewel parents, it is not the liability findings.

malpractice case where court was informed after trial that a juror had said she would not take anyone to the defendant's clinic);<sup>32</sup> *Allyn v. Boe*, 87 Wn. App. 722, 730-31, 943 P.2d 364 (1997) (affirming grant of new trial to defendant in timber trespass case because juror who said during deliberations that she knew plaintiff's appraiser and "he would testify to anything," had "said nothing when asked [in voir dire] if [knowing the witness] would prevent her from giving both sides a fair trial").

A variation on these holdings was reached in *State v. Briggs*, 55 Wn. App. 44, 776 P.2d 1347 (1989), in which the Court of Appeals ordered a new trial for a man convicted of robbery, assault and attempted rape. Victims testified that their attacker stuttered. The defendant had a profound stutter. Jurors had been asked in voir dire whether they had a history of speech problems; the juror in question had not responded. After trial, defense lawyers learned that the juror had told others during deliberations that he used to have a stutter that was amenable to control. The court vacated the conviction:

When a juror withholds material information during voir dire and then later injects that information into deliberations, the court must inquire into the prejudicial effect of the combined, as well as the individual, aspects of

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<sup>32</sup> Although the decision in *Mulka* does not indicate what the juror had been asked in voir dire, it states that "[w]e have also reviewed the record as to questions asked of the juror on the voir dire by the court and each counsel. We conclude that the trial court exercised a sound discretion in declining to grant a new trial on the ground of misconduct of this juror." *Mulka*, 41 Wn.2d at 433-34.

the juror's misconduct. *See [Smith v.] Kent*, 11 Wn. App. [439] at 448-49 [523 P.2d 446 (1974)]. . . .

The *Kent* case stands for the proposition that this kind of misconduct is prejudicial. The plaintiff in *Kent* was injured when a dump truck traveling ahead of her automobile threw a large rock through her windshield. The plaintiff's theory was that the rock came from the defendant's truck and, thus, the defendant's negligence was responsible for the injury. The defense theory was that the rock was picked up from the roadway and thrown by the truck's rear wheels and, thus, the injury was an unforeseeable accident. During voir dire, one of the jurors failed to disclose a history of driving heavy equipment trucks. . . . During deliberations, however, the nondisclosing juror argued that his experiences as a truck driver confirmed the defense's theory of the accident. . . .

*Briggs*, 55 Wn. App. at 53 (citations other than to *Kent* omitted).

In this case, Jurors 1 and 6 did not disclose during deliberations any bias against plaintiffs that they concealed during voir dire as the jurors in *Robinson*, *Mulka*, and *Allyn* did, nor did they profess during deliberations an expertise that their voir dire questionnaire answers left undisclosed, as was the case in *Briggs* and *Kent*. Even if one tries to apply juror-concealment-of-bias rules, however, the trial court's stated reasons for granting plaintiffs a new trial of "Phase 1" issues are untenable and must be reversed.

The general rule now is that a juror's misleading or false answers during voir dire warrant a new trial upon motion of an aggrieved party only if accurate answers would have provided grounds for a challenge *for*

*cause*. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 313, 868 P.2d 835 (1994), *cert. denied*, 513 U.S. 849 (1994). Information known to a prospective juror during voir dire but not revealed upon request will be held prejudicial to the losing party if it is material and would have provided the objective basis needed to challenge *for cause*. *State v. Tigano*, 63 Wn. App. 336, 342, 818 P.2d 1369 (1991), *rev. denied*, 118 Wn.2d 1021 (1992). That a truthful disclosure would have provided a basis for a *peremptory* challenge is legally insufficient to warrant a new trial. *In re Det. of Broten*, 130 Wn. App. 326, 337 n.4, 122 P.3d 942 (2005) (citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 555-56, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)), *rev. denied*, 158 Wn.2d 1010 (2006). Appellants have found no decisions standing for the proposition that disclosure of the type of experience that Juror 1 or Juror 6 innocently failed to disclose in voir dire is grounds for a challenge *for cause*. Plaintiffs cited no such authority to the trial court.<sup>33</sup>

The cases cited in the preceding paragraph are criminal cases. In *Lord*, the petitioner who had lost at trial and who was seeking review was under a sentence of death. The court applied the challenge-for-cause

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<sup>33</sup> It also was disingenuous for plaintiffs' counsel to complain after trial that Juror 6 had not answered "yes" to voir dire questionnaire Question 11, because, as defendants asserted, CP 4994-95, and plaintiffs did not dispute (and also the court implicitly acknowledged, *see* CP 4512), plaintiffs' counsel did not challenge prospective jurors who disclosed personal experiences with abuse, but rather sought to keep them on the panel.

standard and rejected his request for a new trial on grounds that a juror had falsely stated in voir dire (on a questionnaire and on individual questioning) that he had not heard anything about the case, when in fact he was a pressman for the *Tacoma News Tribune* and had read that paper's articles about the case. *Lord*, 123 Wn.2d at 312. The Supreme Court held, in effect, that Mr. Lord's capital murder trial had been fair enough.<sup>34</sup> That a death-penalty trial can be "fair enough" despite juror nondisclosure in voir dire was re-confirmed in *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 267, 172 P.3d 335 (2007) ("It is well settled that a litigant is entitled to a fair trial but not a perfect one, for there are no perfect trials.")

A tort plaintiff is entitled to no fairer a trial than someone on trial for his life. The standard for granting a new trial for juror nondisclosure is the same for civil cases as it is in criminal trials.

A juror's misrepresentation or failure to speak when called upon during voir dire regarding a material fact can amount to juror misconduct. *Robinson [v. Safeway Stores, Inc.]*, 113 Wn.2d [154,] at 158, 776 P.2d 676 [(1989)]

[W]hen there is strong evidence to the effect that a juror was biased *when he entered upon the case* and swore falsely on *voir dire*, concealing his bias, the trial court will not abuse its discretion in granting a motion for new trial. The misconduct consists of his deception of the

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<sup>34</sup> The State would duly have put Mr. Lord to death, except that, on habeas review, the Ninth Circuit vacated the sentence and ordered a new trial on grounds not having to do with juror nondisclosure. *See Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999).

court and counsel as to his incompetence as an impartial juror.

*Robinson*, 113 Wn.2d at 158 (quoting *Nelson v. Placanica*, 33 Wn.2d 523, 528-29, 206 P.2d 296 (1949)) (emphasis present).

*Allyn v. Boe*, 87 Wn. App. 722, 729, 943 P.2d 364 (1997), *rev. denied*, 134 Wn.2d 1020 (1998).

The trial court in this case expressly “believe[d]” Juror 1 and Juror 6, CP 4513-14, and found that neither juror knowingly “swore falsely” during voir dire in order to deceive:

2. The Court is willing to accept that Juror One’s failures [to disclose that her husband had been a defendant in at least two medical malpractice lawsuits, and that she had been a defendant in at least one medical malpractice lawsuit] were honest and inadvertent failures to disclose. . .

\* \* \*

4. While the Court is willing to accept that [Juror 6’s] failure to disclose the [childhood] sexual abuse was an honest failure, it was a failure nonetheless.

CP 4478. Just as importantly, the court did not find that either Juror 1 or 6 was biased in light of what she had honestly neglected to disclose.<sup>35</sup>

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<sup>35</sup> What was learned after trial about Juror 1’s previous experience with litigation does not indicate that she would have been subject to a challenge *for cause* had she disclosed that her physician husband had been sued for medical malpractice before 1996; she had had no personal involvement as a litigant in any of the cases (only one of which named her as a “Jane Doe” defendant because of the marital relationship and none of which seem to have been resolved by motion or trial). CP 4988-89.

3. The jury's verdict negates any possible inference that either Juror 1 or Juror 6 concealed, in voir dire, bias against the plaintiffs that expressed itself either in deliberations or in the jury's Phase 1 verdict.

The jury found *in favor* of Jonathan Kuhn, Jeff Hawley and Daniel Fewel on liability. The jury awarded them and the Kuhn and Fewel parents substantial damages for psychological injury in amounts within the range of the evidence that the court did not find inadequate. Because the verdict was in Jonathan's, Jeff's, and Daniel's *favor*, and for substantial damages, the court could not have inferred, and did not infer, that Juror 1 and/or Juror 6 had concealed bias against any of the seven winning plaintiffs when they inadvertently failed to answer one question on their voir dire questionnaires accurately.

The disparity between what plaintiffs had hoped the jury could be persuaded to award as noneconomic damages and what the jury did award was not indicative of juror bias, and the court did not find that it was. As plaintiffs' counsel characterized the import of the jury instruction on noneconomic damages, "you can give less, you can give more" than the amounts he suggested. 7/10RP 95. Plaintiffs' disappointment with the jury's unwillingness to award them huge noneconomic damages is not a reason to let them try a second time for bigger awards.

B. Grounds Did Not Exist for Granting Paul Hawley a New Negligence (Phase 1) Trial.

Even though Paul Hawley did lose at trial, there are not grounds for granting a new trial just to him. For one thing, his was by far the weakest of the four patient plaintiffs' cases. Unlike Jonathan and Dan and his brother Jeff, Paul Hawley disavowed any claim that Dr. Schnall had exercised control over him. *See* 6/5RP 174. Paul testified to other instances of genital handling, 6/5RP 151-53, but was impeached with inconsistent prior statements, *see* Ex. 91 (p. 2) and 6/5RP 202-05, and was left making what amounted to a claim that he is ashamed to have gotten an erection once, when he was 12, while Dr. Schnall was examining his scrotum and diagnosing a varicocele (swollen blood vessel in the scrotum). 6/5RP 153-55; 6/10RP 15-17; 6/26RP 186, 189; Ex. 91 (p. 1).

While it was for the jury to believe or disbelieve Paul Hawley's account of his physical exams, that really has nothing to do with this appeal. Paul was among those granted a new trial because of juror nondisclosure in voir dire. None of the post-trial juror affidavits or declarations purports to describe any juror bias against Paul Hawley, and the court made no finding that there had been any such bias. Nor may juror bias against Paul Hawley be inferred because of inaccurate answers honestly given by Jurors 1 and/or 6 on their voir dire questionnaires, in

light of the fact that the jury found in favor of Paul's brother, Jeff, and awarded Jeff six-figure damages. Paul Hawley got a fair trial. He should not have another one.

C. Grounds Did Not Exist for Granting Bev and Rich Hawley New Trials on the Issue of Damages.

The Hawley parents were not Dr. Schnall's patients and did not assert claims against the Clinic as its patients. Their claims were authorized by RCW 4.24.010, which permits recovery for injury to a minor child. The Hawley parents were entitled to recover only on account of injury, if any, suffered by Jeff and/or Paul, while either or both were minors. The jury found against Paul's liability claim. Thus, the parents were entitled to such damages as the jury found they incurred because of harm that Jeff suffered, *as a minor*, due to Dr. Schnall's malpractice.

None of the post-trial juror affidavits or declarations purports to describe any juror bias against Bev or Rich Hawley. Nor may juror bias against either or both of them be inferred because of inaccurate answers honestly given by Jurors 1 and/or 6 on their voir dire questionnaires, in light of the fact that the jury found in Jeff Hawley's favor and awarded him gross damages of \$105,000.

The malpractice that Dr. Schnall admitted as to Jeff occurred in 2004, when Jeff was 21. In statements Jeff made before the litigation

started, he emphatically denied having been touched inappropriately, Ex. 78, (18th page) (“No, he never did touch me inappropriately,” and “I would have punched him”), and that Dr. Schnall did not take on his mentoring role until after Jeff turned 18, Ex. 78 (second-fourth pages). Neither Jeff nor his parents are entitled to a new trial or to have a new jury make findings as to whether Jeff suffered some injury before he turned 18.

D. There Should Be No Retrial of Phase 2, Whether or Not Phase 1 Is Retried.

The trial court granted a new Phase 2 trial because of a different kind of “juror misconduct,” *i.e.*, that several jurors disobeyed its instructions and paid attention to and injected information obtained from news media reports about the case into “Phase 2” deliberations. CP 4479 (FF 8) – CP 4482 (FF 18). The court made a finding that the attention paid to the news media reports created “more than a reasonable possibility that the verdict was influenced by extrinsic evidence,” CP 4484 (CL 2(a)). While such reasoning is properly reviewed according to rules established in “injection of extrinsic evidence” juror misconduct decisions,<sup>36</sup> the order granting a new Phase 2 trial in this case should be reversed for reasons

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<sup>36</sup> “Deciding whether juror misconduct occurred and whether it affected the verdict are matters for the discretion of the trial court, and will not be reversed on appeal unless the court abused its discretion.” *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 203, 75 P.3d 944 (2003), but “[a] strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury,” *id.* (quoting *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994)).

independent of juror misconduct and, even applying the rules of juror misconduct, the evidence establishes that it influenced the “Phase 2” verdict only as to Jonathan Kuhn, such that only he would be entitled to a new “Phase 2” trial.

1. The trial court lacked subject matter jurisdiction to ask the jury whether Dr. Schnall violated a criminal statute.

Washington Superior Court judges may not bring criminal charges, and civil juries do not decide criminal charges. A court acquires subject matter jurisdiction over a criminal case upon its “commencement,” which occurs when the State files an initial pleading, either by indictment or information. CrR 2.1; *State v. Barnes*, 146 Wn.2d 74, 81, 43 P.3d 490 (2002). A superior court’s subject matter jurisdiction to adjudicate a violation of a criminal statute is not invoked unless the defendant is validly charged by information or indictment. *State v. Rodgers*, 146 Wn.2d 55, 59, 43 P.3d 1 (2002). No prosecuting authority filed an indictment or information accusing Dr. Schnall of violating RCW 9.68A.130 (or any criminal statute). Thus, the trial court never acquired subject matter jurisdiction over the question of whether Dr. Schnall communicated with minors for immoral purposes. Dr. Schnall’s failure to argue lack of subject matter jurisdiction in the trial court did not waive the argument for appeal, because lack of subject matter jurisdiction is not

waivable. *Skagit Surveyors and Engrs., LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998); RAP 2.5(a)(1).

2. Plaintiffs failed to establish a fact upon which relief could be granted under RCW 9.68A.130, i.e., that this is an action “arising from violation of” RCW 9.68A.090.

Plaintiffs failed to establish an essential fact without which relief could not be granted under RCW 9.68A.130. RAP 2.5(a)(2). RCW 9.68A.130 provides that “[a] minor prevailing in a civil action arising from violation of this chapter is entitled to recover the costs of the suit, including an award of reasonable attorneys’ fees.” The “violation of this chapter” that plaintiffs alleged in amended complaints and on which the trial court predicated “Phase 2” of the trial, is “communication with a minor for immoral purposes.” CP 587 (¶ 45); CP 601 (¶ 37); CP 619 (¶ 45). That offense is defined by RCW 9.68A.090:

(1) Except as provided in subsection (2) of this section, a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.

(2) A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if the person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state or if the person communicates with a minor or with someone the person believes to be a minor for immoral purposes through the sending of an electronic communication.

RCW 9.68A.090 is codified under RCW Title 9, “Crimes and Punishments”; violating it is a crime. The section is part of an act that addresses exploitation of minors for sexual purposes such as pornography:

The legislature finds that the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The care of children is a sacred trust and should not be abused by those who seek commercial gain or personal gratification based on the exploitation of children. The legislature further finds that the protection of children from sexual exploitation can be accomplished without infringing on a constitutionally protected activity. The definition of “sexually explicit conduct” and other operative definitions demarcate a line between protected and prohibited conduct and should not inhibit legitimate scientific, medical, or educational activities.

RCW 9.68A.001. Chapter 9.68A is not an expression of legislative concern about a young man’s perception, years later, as to how carefully or how much time it took for his pediatrician to examine his genitalia at physical exams. The purpose of RCW 9.68A.090 is to prohibit communication with children “for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.” *State v. Hosier*, 157 Wn.2d at 9 (quoting *State v. McNallie*, 120 Wn.2d at 933). Nothing in the legislative history suggests that the legislature enacted RCW 9.68A.130 imagining that it would encourage lawyers to sexualize allegations of medical malpractice in order to assert claims for awards against doctors who have not even been charged with, much less convicted

of, any violation of RCW 9.68A. Section 130 was meant to enable victims of people convicted of sexual-exploitation crimes against children to recover, in subsequent civil actions, attorney fees as well as damages for what the criminal conviction – not a finding of negligence within the scope of a doctor’s employment – has established as a violation of Chapter 68A. Had the legislature meant to make it easy to haul a pediatrician, whose job *requires* him or her to touch the genitalia of minors, *see* 6/9RP 38-39; 6/10RP 18-19; 6/26RP 113, before a civil jury to defend himself against criminal charges because a former patient remembers being embarrassed at having his genitalia touched during a physical exam, the legislature could, should, and would have said so. Because a violation of RCW 9.68A.090 was not established and could not have been established, plaintiffs failed to prove a fact essential to recovery under RCW 9.68A.130. RAP 2.5(a)(2).

3. Because the “Phase 1” verdict established that Jonathan’s and Daniel’s injuries arose out of health care, their exclusive remedy was under RCW 7.70.040.

When injury results from health care, any legal action is governed exclusively by RCW chapter 7.70. *Berger v. Sonneland*, 144 Wn.2d 91, 109, 26 P.3d 257 (2001); *Branom v. State*, 94 Wn. App. 964, 968-69, 974 P.2d 335, *rev. denied*, 138 Wn.2d 1023 (1999). RCW 7.70.030 authorizes recovery for injury occurring as the result of health care under one or more

of three theories.<sup>37</sup> Plaintiffs pled one such theory (violation of the standard of care, RCW 7.70.040). The jury's "Phase 1" verdict establishes that Jonathan's and Daniel's injuries are ones arising out of health care, because Dr. Schnall was held liable to them only for malpractice. A remedy under RCW 9.68A.130 is not available to them.

4. By dropping their intentional tort claims during trial of Phase 1, plaintiffs waived any right they arguably could have had to seek, in Phase 2, a finding as to Dr. Schnall's "purpose" for acting negligently.

Plaintiffs dropped all intentional tort claims – outrage/intentional infliction of emotional distress, and “sexual battery” – during trial. The jury was asked whether Dr. Schnall had negligently caused injury in either or both of two ways, and answered yes as to one. Had the jury found that Dr. Schnall *intended* harm, plaintiffs would at least have had a rationale for arguing that Phase 2 questions as to his “purpose” made sense. But after plaintiffs chose to waive asking the jury if Dr. Schnall committed a tort intentionally, it did not make sense, and was patently unfair to Dr. Schnall, for the court to allow them to ask the jury whether his negligent conduct had had a criminal purpose. *See, e.g., C.J.C. v. Corp. of Catholic*

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<sup>37</sup> The statute provides in pertinent part that “[n]o award shall be made in any action or arbitration for damages for injury occurring as the result of health care which is provided after June 25, 1976, unless the plaintiff establishes one or more of the following propositions: (1) That injury resulted from the failure of a health care provider to follow the accepted standard of care; (2) That a health care provider promised the patient or his representative that the injury suffered would not occur; (3) That injury resulted from health care to which the patient or his representative did not consent.”

*Bishop of Yakima*, 138 Wn.2d 699, 711, 985 P.2d 262 (1999) (“By definition, a negligent actor does not act intentionally”).

5. Any juror misconduct tainting the “Phase 2” affected deliberations only as to Jonathan Kuhn.

The exposure of some jurors to media coverage of the “Phase 1” verdict occurred after their Phase 1 verdict was reached and filed. All of the juror testimony of record indicates that the jury had already voted and reached “Phase 2” “no” verdicts as to Jeff and Paul Hawley and Dan Fewel, and had split 9-“no” and 3-“yes” as to Jonathan Kuhn before recessing for the day on July 16; even Juror 11 did not dispute that (see CP 5000-02). If any new trial is held as to Phase 2 issues because of juror exposure to media coverage after they had recessed for the day on July 16, any such new trial should pertain only to Jonathan Kuhn.

Also, because the jury absolved the Clinic of direct liability to any plaintiff, there is no reason for the Clinic to be party to a new “Phase 2” trial even if the Court rules that a new “Phase 2” trial is warranted.

6. Statements in defense counsel’s “Phase 2” closing argument did not warrant granting a new trial.

The trial court told Dr. Schnall’s counsel that the requirement of a predatory purpose for “communicating with a minor for immoral purposes” is correct under the law but that it was omitting such language from its “Phase 2” instruction because it believed its instruction effectively

made that point. 7/14RP 37; CP 4132. What counsel could say in closing argument was not addressed. Dr. Schnall's counsel acknowledges that the reference in his "Phase 2" closing argument to the Supreme Court requiring a "predatory purpose" intruded on the trial court's authority to instruct the jury and was inappropriate for that reason. The trial court found that defense counsel had acted in good faith and had not intended to violate its jury-instruction ruling, CP 4482-83 (FF 20), CP 4526, and did not rule that the reference justified a new trial, CP 4484-85, 4526.

Any misconduct was cured by the court immediately sustaining objections and instructing the jury to disregard. *And see A.C. v. Bellingham Sch. Dist.*, 125 Wn. App. 511, 521-22, 105 P.3d 400 (2004) ("A mistrial should be granted [based on misconduct of counsel] only when "nothing the trial court could have said or done would have remedied the harm done. . .")" (quoting *Aluminum Co. of Am. v. Aetna Cas. & Surety Co.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000) (quoting 12 James Wm. Moore, *Federal Practice* § 59.13 [2][c][I][A], at 59-48 to 58-49 (3d ed. 1999)).

## V. CONCLUSION

Even a litigant on trial for his life is not entitled to perfect trial. *Elmore*, 162 Wn.2d at 267. CR 59 does not provide a remedy for a plaintiff who is disappointed that a tort damages award fell short of a

hoped-for bonanza. Defendants are disappointed that they did not prevail on liability as to Jonathan Kuhn and Daniel Fewel, and wish the damages awards to all seven winning plaintiffs were closer to the lower range of what the evidence allowed, but they cannot say that the evidence the jury heard fails to support the verdict – and neither can plaintiffs. The order granting plaintiffs motion for a new trial should be reversed. The four patient-plaintiffs’ claims under RCW 9.68A.130 should be dismissed. The case should be remanded for entry of final judgment on the “Phase 1” verdict.

RESPECTFULLY SUBMITTED this 27th day of August, 2009.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 27th day of August, 2009, I caused a true and correct copy of the foregoing Brief of Appellants to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

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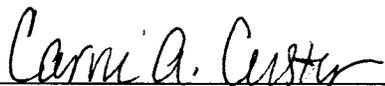
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