

NO. 63776-2-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JACK FLETCHER, as Personal Representative
of the Estate of LEO FLETCHER, deceased,
and on behalf of all statutory beneficiaries,

Appellant,

v.

THE STATE OF WASHINGTON, by and through the UNIVERSITY
OF WASHINGTON, UNIVERSITY OF WASHINGTON MEDICAL
CENTER, and THE UNIVERSITY OF WASHINGTON SCHOOL
OF MEDICINE; and DOES 1 THROUGH 10, entities and/or
individuals, their spouses and the marital communities comprised
thereof,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

In this medical malpractice/wrongful death action, the principal question the jury had to answer was whether Harborview's admitted negligence in transfusing Mr. Fletcher with Type A blood, when his blood type was Type O, proximately caused Mr. Fletcher's death. The jury heard from experts presented by the Estate that the transfusion of Type A blood caused an acute hemolytic transfusion reaction which led to Mr. Fletcher's demise. The jury also heard from experts presented by Harborview, as well as from treating physicians, that the transfusion of Type A blood did not cause any acute hemolytic reaction, and that Mr. Fletcher died as a result of complications occurring from the multiple severe traumatic injuries he sustained in the violent truck wreck that led to his hospitalization. Having heard all the competing expert testimony, the jury answered "No" to the question whether Harborview's admitted negligence was a proximate cause of Mr. Fletcher's death.

Dr. Curtis Veal was one of several experts called on behalf of Harborview in support of its theory of causation. Contrary to the Estate's assertions, the record reveals that (1) there was no change in Dr. Veal's testimony about leaky lungs; (2) the admitted change in Dr. Veal's testimony as to whether a single occasion of reddish urine sediment or "pink urine" signified hemolysis was minor and immaterial, as Dr. Veal

had always made it clear in his deposition that any such hemolysis had been trivial, and did not reflect what is typically seen with an acute hemolytic reaction; and (3) the fact that Dr. Pearl, the Estate's late-disclosed rebuttal expert, testified before Dr. Veal was of no consequence, as Dr. Pearl disclaimed having the expertise to address hemolytic transfusion reactions.

The trial court properly exercised its discretion in not striking Dr. Veal's testimony and in denying the Estate's motion for new trial based upon the Estate's claim of surprise, defense counsel misconduct, and/or prejudice relative to Dr. Veal's trial testimony. The Estate cites no authority establishing that a trial court must strike any expert testimony at trial that is arguably different from the expert's deposition testimony, or that it must grant a new trial on that basis. Here, the trial court properly exercised its discretion and concluded that any arguable differences in Dr. Veal's trial testimony from his deposition testimony were adequately dealt with by the Estate's lengthy cross-examination and attempted impeachment, and that there were no trial irregularities that denied the Estate substantial justice or otherwise justified the granting of a new trial.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court properly exercise its discretion in not striking Dr. Veal's expert testimony?

2. Did the trial court properly exercise its discretion in denying the Fletcher Estate's motion for new trial?

III. COUNTERSTATEMENT OF THE CASE

A. Leo Fletcher's Late Morning Truck Wreck of October 14, 2003.

Leo Fletcher, age 89, was not wearing his seatbelt on October 14, 2003, when the pickup truck he was driving to haul cattle on a steep gravel mountain road missed a curve and plunged 40 to 50 feet down an almost sheer embankment, rolling over at least once before crashing into a large tree and stopping. CP 177 (pp. 11-13), 180 (p. 25), 145 (p. 38); 4/2 RP 126.

EMTs arrived on scene at 12:25 p.m., more than an hour after the wreck. CP 177 (p. 11), 178 (p.16). They rappelled down, removed timber and brush to gain access to the truck, and determined that Mr. Fletcher was still alive. CP 177-78 (pp. 11-14). They noted that he had a head laceration and a broken leg, only moaned in response to questions, and had a respiration rate of 28 with snoring. CP 179-80 (pp. 20-23), 190 (p. 62). The EMTs extricated Mr. Fletcher from the truck through a side window, slid him onto a backboard, rolled him onto his back, immobilized his neck with a collar, splinted his leg, and raised him back up to the road. CP 178-79 (pp. 16-20), 181 (p. 26), 183 (p. 37), 191-93 (pp. 67-75).

Thirty-two minutes after arriving on the scene, the EMTs put Mr. Fletcher in an ambulance, where his pulse was measured at 202 beats per minute; four minutes later they got him to Dayton General Hospital. CP 182 (pp. 32-33), 183 (p. 37), 184 (38), 189 (p. 61). Upon arrival at Dayton General, Mr. Fletcher had a pulse of 200 beats per minute, but no detectable blood pressure. CP 142 (p. 26). The hospital trauma team gave him IV fluids, elevated his systolic pressure to 108, and then sent him by air ambulance to St. Mary Medical Center in Walla Walla, which had more diagnostic imaging capability. CP 141-42 (pp. 25-26).

B. Mr. Fletcher's Care at St. Mary Medical Center.

Imaging at St. Mary Medical Center revealed that, in addition to a facial laceration and fractures of both right lower leg bones just below the knee, Mr. Fletcher had fractures of at least two ribs, his thoracic spine, and his seventh cervical spine, as well as a partially torn aorta and a traumatic brain injury with bleeding inside the skull. CP 138 (pp. 10-11), 139-140 (p. 17-18), 140 (p. 20), 141 (pp. 22-23), 156-57 (pp. 83-89); 4/2 RP 130. Mr. Fletcher, who had diabetes, chronic kidney disease, and a pacemaker, also had bleeding into his chest cavity and areas of collapsed alveoli in the bases of both lungs. CP 111 (pp. 11-13), 157-58 (pp. 89-92); 4/2 RP 126. His blood was typed in case he needed a transfusion, and his blood type was Type O positive. CP 146 (p. 42), CP 147 (p. 46).

The surgeon in charge at St. Mary decided that Mr. Fletcher needed to be at a trauma center because of his torn aorta, and Harborview, a Level 1 trauma center, agreed to accept him. CP 145 (p. 40), 149 (p. 57), 151 (p. 62). Mr. Fletcher was given Dilantin, an anti-seizure drug, because of his closed head injury. CP 151 (pp. 62-64); 4/8 RP 11, 4/9 RP 56. Then, at about 5:30 p.m., strapped to a backboard and wearing a cervical collar, he was taken by ambulance to the Walla Walla airport to be flown by plane to Seattle. CP 89 (p. 9), 90 (pp. 14-15), 93 (p. 28), 100 (p. 55), 101 (p. 60), 149 (p. 57).

Mr. Fletcher became agitated and could not stick out his tongue on request, so the transfer team administered sedatives and a paralytic drug and placed an endotracheal tube to protect his airway and reduce the risk of vomiting and aspiration into his lungs during the flight to Seattle. CP 89 (pp. 11-12), 92-93 (pp. 23-25), 99 (p. 50). They also gave him lidocaine to reduce pressure in his brain. CP 92 (pp. 22-23). During the flight, Mr. Fletcher's blood pressure was labile, with his systolic pressure ranging between 220 and 82. CP 94 (p. 32), 101 (p. 59).

C. Mr. Fletcher's Course at Harborview, October 15-29.

Mr. Fletcher arrived at Harborview at 8:10 p.m., about nine hours after his truck wreck. 4/9 RP 18. He was kept on a ventilator (breathing tube) throughout his course at Harborview. 4/7 RP 35-36. On October 15,

he was given transfusions of four units of Type A blood.¹ 4/1 RP 9, 4/7 RP 53-54.

On October 20, a bronchoscopy showed that Mr. Fletcher had developed a lung infection. 4/9 RP 25-26. Testimony that any lung infection was probably hospital-acquired and a result of Mr. Fletcher being on the ventilator, 4/7 RP 7-8; 4/9 RP 26, was not disputed. The Estate did not present any expert testimony that the development of the lung infection signified hospital negligence.² No trial witness attributed Mr. Fletcher's lung infection to his transfusion with Type A blood.

¹ The blood Mr. Fletcher received on October 15 was Type A negative, *see* CP 209 (p. 54), and his blood type was O positive, CP 147 (p. 46). The + and – refer to rH factor. It is irrelevant that Mr. Fletcher received rH negative, as opposed to rH positive blood. 4/1 RP 46 (Dr. Nester); CP 209 (p. 54) (Dr. Jacob).

² During cross-examination of both Dr. Lisa McIntyre, Mr. Fletcher's attending physician at Harborview from October 23 until he died, 4/7 RP 12, and Dr. Martin Schreiber, the defense critical care expert, the Estate's counsel tried to suggest, that, when Mr. Fletcher arrived at Harborview, the trauma team casually assumed that he had been intubated at St. Mary's because of respiratory distress, and thus needed to be kept on the breathing tube, and thereafter failed to actively consider whether he still needed a breathing tube. 4/7 RP 45-48, 4/2 RP 196. Dr. McIntyre testified that it is standard practice for each physician who sees a patient to evaluate the need for assistance in breathing and that such practice would have been followed with Mr. Fletcher, 4/7 RP 48-50, and that the intubation was necessary because his mental status made him unable to protect his airway, as well as to provide supplemental oxygen and stabilize his CO₂ concentration to protect his injured brain, 4/7 RP 35, 48-50. Dr. Schreiber responded similarly, 4/2 RP 196-97. Dr. Curtis Veal, the other defense critical care expert, testified that Mr. Fletcher's condition would have deteriorated much more rapidly on October 15 had the flight crew not taken the precaution of intubating him. 4/9 RP 20-21. None of the Estate's medical experts opined that Mr. Fletcher could have breathed on his own during his hospitalization at Harborview, or that any failure by Harborview physicians or staff to properly evaluate Mr. Fletcher's respiratory status contributed to his pneumonia. Indeed, Dr. James Pearl, the Estate's pulmonary critical care expert, testified that he had "no reason to suspect" that Mr. Fletcher's treatment at Harborview would have been different but for the Harborview trauma team's assumption that he had been intubated because of respiratory distress before he arrived at Harborview. 4/8 RP 14.

On October 21, when Mr. Fletcher again needed more blood and a sample taken for typing alerted Harborview staff to the presence of two blood types in his system, 4/1 RP 9-11, 45-46, 4/2 RP 22, Dr. Teresa Nester, a transfusion medicine physician and Associate Medical Director at the Puget Sound Blood Center, which per Harborview's request had supplied the Type A blood given to Mr. Fletcher on October 15, went to Harborview to determine what effect the error had had on the patient. 4/1 RP 2, 9-20. Dr. Nester explained at trial that there are different kinds of transfusion reactions, a few of which can be extremely dangerous and even fatal to the patient because they involve immediate (acute) destruction of transfused red blood cells (hemolysis) by antibodies to the wrong blood type. 4/1 RP 3-8. Dr. Nester determined that Mr. Fletcher was having a delayed transfusion reaction to the Type A blood that he had been given on October 15, but that he had not experienced an acute hemolytic reaction, 4/1 RP 11-15, 20-21, 26, 28, 40, 47, in light of, among other factors, the fact that she saw no indication as of October 21st that his urine had been red. 4/1 RP 5, 20-21, 40-42, 48-49, 57, 67-68.

Mr. Fletcher's condition deteriorated further after October 20. 4/7 RP 69. After consultation with his physicians, Mr. Fletcher's family authorized the withdrawal of life support on October 23. 4/7 RP 11-12, 73. Mr. Fletcher died on October 29, 2003. CP 5 (§ 2.9); 4/7 RP 76.

D. Wrongful Death Lawsuit Against Harborview.

The personal representative of Mr. Fletcher's estate brought a wrongful death and survival action against the State and University of Washington, of which Harborview Medical Center is an agency (collectively "Harborview"). CP 3-7.

No one disputed that Mr. Fletcher arrived at Harborview with an array of very severe traumatic injuries, and Harborview admitted that it was negligent in transfusing Mr. Fletcher with Type A blood, but denied that such transfusion was a proximate cause of Mr. Fletcher's death. CP 9-10. Thus, discovery and trial were about causation and damages. To resolve the disputed issue of causation, the jury had to weigh the Estate's medical experts' opinions that Mr. Fletcher had suffered an acute hemolytic transfusion reaction that led to pulmonary edema and failure of his kidneys and other organs against other expert medical testimony, offered mostly by Harborview, that, if Mr. Fletcher had a transfusion reaction, it was delayed and mild, and that he had died because of the truck wreck trauma, his age, and a ventilator-associated lung infection and ensuing failure of his previously diseased kidneys. *See* CP 29-30.

1. Witnesses testified out of order at trial.

This was not a trial in which the plaintiff's case-in-chief was presented in full, followed by the defense case and then rebuttal. Expert

testimony was presented as witnesses were available, without regard to affiliation, with some witnesses testifying by videotaped perpetuation depositions. Medical witnesses testified in the following order:

<i>Date</i>	<i>Witness</i>	<i>Called by</i>	<i>Type of Witness</i>
April 1	Dr. Teresa Nester	Plaintiff	Fact (transfusion medicine)
	Dr. James Edwards (by deposition)	Plaintiff	Fact (emergency room, St. Mary Hosp.)
April 2	Dr. Edwards (cont'd)		
	Dr. Donald Siegel	Defense	Expert (transfusion medicine)
	Dr. Martin Schreiber	Defense	Expert (critical care)
April 6	Dr. Bradley Brimhall	Defense	Expert (transfusion medicine)
	Kimberly Reed (by deposition)	Plaintiff	Fact (respiratory therapist)
	Dr. Michael Luce (by deposition)	Plaintiff	Fact (treating family physician)
April 7	Dr. William Brady	Plaintiff	Expert (pathologist)
	Dr. Lisa McIntyre	Defense	Fact (attending at Harborview/critical care)
April 8	Dr. Harry Jacob (by deposition)	Plaintiff	Expert (hematologist)
	Dr. James Pearl	Plaintiff	Expert (critical care)
April 9	Dr. Curtis Veal	Defense	Expert (critical care)

See the Clerk's Minutes, CP 237-243, and the Witness Record, CP 354-55.

The Estate's only complaint on appeal about the order of proof is its claim that it was prejudiced because its critical care expert, Dr. Pearl, could not testify after Dr. Veal. That the defense experts outnumbered the Estate's experts is not something to which the Estate assigns error or makes any argument on appeal.

2. Expert testimony supporting the Estate's causation theory.

The Estate's causation theory was that transfusion of the wrong type of blood can trigger, and did trigger in Mr. Fletcher, an acute (immediate) hemolytic transfusion reaction, in which red blood cells are destroyed (hemolyzed), the patient's kidneys are overwhelmed, fluid builds up in the patient's lungs and eventually other body tissues, leading to kidney failure, liver failure, congestive heart failure, and death. CP 199-201. In aid of that causation theory, the Estate presented testimony of two experts, Dr. Harry Jacob, a hematologist and editor-in-chief of the journal Hematology and Oncology Today, CP 195-232, and Dr. Pearl,³ a pulmonary critical care expert.⁴ 4/8 RP 2-42. The Estate also elicited some pertinent (although not supportive) opinion testimony from Dr. Teresa Nester, 4/1 RP 2-35, 48-60, 63-72, who it called as a fact witness because of her October 2003 investigation of the transfusion error's effect on Mr. Fletcher.⁵ 4/1 RP 9-21.

a. Dr. Jacob's testimony for the Estate.

Dr. Jacob, the Estate's hematology expert, opined that, soon after the initial transfusion of the wrong type blood on October 15, Mr. Fletcher

³ Dr. Pearl had been listed by the Estate, belatedly, as a "rebuttal" witness, and was not deposed until April 3, 2010, during trial, five days before he testified. *See* CP 30, 63.

⁴ The Estate also called a pathologist, Dr. William Brady, *see* CP 240, but did not arrange to have his testimony transcribed for appeal.

⁵ That Dr. Nester gave opinion testimony at trial is not something to which the Estate has assigned error or made any argument in its opening brief.

suddenly began showing clinical signs of an acute hemolytic transfusion reaction. According to Dr. Jacob, the fact that Mr. Fletcher's hematocrit⁶ did not rise after he had been given four units of blood indicated that the new blood was either being lost or destroyed by hemolysis, and no bleeding was noted to account for loss of the blood. CP 204 (pp. 34-35), CP 205. In addition, Mr. Fletcher's lactic acid levels rose, CP 204 (p. 35), hemoglobin showed up in his plasma, CP 206-07 (pp. 45-46), his blood pressure rose, CP 207 (pp. 47-48), CP 208 (p. 53), and reddish sediment, residue of destroyed red blood cells, was noted in his urine (hemoglobinuria), CP 209 (pp. 56-57). And he needed more air pressure through the ventilator to keep his blood oxygenated to a survival level, indicating pulmonary edema, CP 208 (pp. 52-53), CP 212 (pp. 66-67), or what the Estate's brief refers to as "leaky lungs."

b. Dr. Nester's testimony as a fact witness called by the Estate.

The Estate elicited testimony from Dr. Nester that one reason she concluded in October 2003 that Mr. Fletcher had *not* had an acute hemolytic reaction to the Type A blood transfusions was that "you typically see red serum and red urine" with acute hemolytic transfusion reaction, and Mr. Fletcher had not had either. 4/1 RP 5, 11-12, 21. The Estate also

⁶ Hematocrit is a measure of the ratio of red cells in the blood to the total blood volume. See CP 205 (39-40) (Dr. Jacob); 4/2 RP 46-47 (Dr. Siegel).

elicited from Dr. Nester the opinions that Mr. Fletcher must have been bleeding internally before he came to Harborview in light of his low hematocrit readings, and that the fact that his hematocrit did not rise dramatically after being given four units of blood could be accounted for by the diluting effect of the volume of fluids he received intravenously. 4/1 RP 18-19.

On cross-examination, Dr. Nester explained that, with acute hemolytic transfusion reaction, one would expect to see an increase in serum potassium, “coke-colored” urine for 12 to 36 hours after administration of incompatible blood, persistent low blood pressure, and a change in creatinine level, none of which occurred in Mr. Fletcher’s case. 4/1 RP 39-42.

On the Estate’s re-direct, Dr. Nester reiterated that Mr. Fletcher “did not have red urine.” 4/1 RP 52. No testimony was presented at trial that Mr. Fletcher had shown signs of red blood cells in his urine except on October 15, when his urine was noted to be pinkish instead of amber or yellow.⁷ CP 209 (pp. 56-57), 4/9 RP 79-80, 4/2 RP 82-83, 185.

⁷ In some instances, that chart note was attributed to October 16, *see* 4/2 RP 187, but no witness testified that there was more than one entry indicating pink urine and reddish sediment in the urine.

c. Dr. Pearl's testimony for the Estate.

Dr. Pearl, the Estate's pulmonary critical care expert, testified that he was not a hematologist or an expert in blood or blood transfusion, and disclaimed any expertise to express opinions about transfusion reactions, 4/8 RP 3, 7, 15-16, 40, or to comment on Dr. Nester's conclusion that Mr. Fletcher did not have an acute transfusion reaction, 4/8 RP 22. He testified that systemic inflammatory response syndrome (SIRS), as well as adult respiratory distress syndrome (ARDS) and whole body edema (anasarca), like Mr. Fletcher had, could be due many different things, including traumatic injury, infection, shock, or possibly even an incompatible blood transfusion. 4/8 RP 4-6.

Asked by the Estate to assume that Mr. Fletcher had an acute hemolytic transfusion reaction at Harborview, Dr. Pearl testified that Mr. Fletcher's organ failures during his course at Harborview would be consistent with such a reaction, 4/8 RP 20-21, and that the transfusion reaction contributed to Mr. Fletcher's demise to an extent that he could not quantify. 4/8 RP 14-15, 20-21.⁸ Dr. Pearl characterized Mr. Fletcher's probability of dying from his truck wreck injuries as "substantial," 4/8 RP

⁸ Dr. Pearl, having disclaimed the necessary expertise, did not opine that Mr. Fletcher had an acute hemolytic transfusion reaction or that an acute hemolytic transfusion reaction *probably* was a cause of Mr. Fletcher's organ failures or death.

38, and could not say that Mr. Fletcher would have survived those injuries had the transfusion error not occurred. 4/8 RP 32-33.

On the subject of pinkish urine, the Estate's counsel asked Dr. Pearl only what the likely cause of blood in the urine would be, given Mr. Fletcher's history, and Dr. Pearl answered that it could be related to trauma or irritation from a bladder catheter. 4/8 RP 25-26.

3. Expert testimony supporting Harborview's, and rejecting the Estate's, causation theories.

In addition to the opinion testimony that Dr. Nester gave as a fact witness (see above), the jury also heard causation opinions from a defense transfusion medicine expert, Dr. Donald Siegel, 4/2 RP 5-121,⁹ from two defense critical care experts, Dr. Martin Schreiber, 4/2 RP 122-205, and Dr. Curtis Veal, 4/9 RP 2-93, and from the critical care surgeon, Dr. Lisa McIntyre, 4/7 RP 2-97, who had been Mr. Fletcher's attending physician at Harborview, 4/7 RP 12, 81.

a. Dr. Siegel's testimony for Harborview.

Dr. Siegel explained that patients in fully half of the studied cases of incompatible blood transfusions show no signs or symptoms of adverse effects, 4/2 RP 55-59, and disagreed with Dr. Jacob's testimony that Mr.

⁹ A typographical error at page 5 of the transcript for April 2 shows a date of "April 13, 2009." Trial was over before April 13. The cover page shows the correct date. The Witness Record, CP 354, and the Clerk's Minutes, CP 238, also show Dr. Siegel testifying on April 2.

Fletcher had blood in his urine because of an acute hemolytic transfusion reaction, explaining that pink urine following the transfusion of Type A blood had been limited to only one episode. 4/2 RP 38, 51-52.

b. Dr. Schreiber's testimony for Harborview.

Dr. Schreiber testified on direct that Mr. Fletcher suffered multiple and very serious injuries in the truck wreck, 4/2 RP 129-130, and showed numerous signs of shock and internal bleeding before his transfer to Harborview, 4/2 RP 131-32. He explained that the kind of trauma Mr. Fletcher suffered in the truck wreck inflames body tissues and makes capillaries "leaky," and that the fluids given to keep Mr. Fletcher's blood pressure from falling too low because of blood loss would have made even more fluid leak out of the capillaries and into tissues, with the resulting swelling or edema that Mr. Fletcher was noted to have at Harborview. 4/2 RP 131-37. Dr. Schreiber saw no evidence in the records of anything physiologically associated with a transfusion reaction. 4/2 RP 137.

Dr. Schreiber testified that Mr. Fletcher's traumatic brain injury had been very severe because it involved a clot under the skull adjacent to the brain and bleeding in the brain ventricles, and that the tear in his aorta was another very severe injury. 4/2 RP 138-40. He explained that elderly people are at least twice as likely as younger patients to die because of rib fractures because the pain causes trouble with coughing and clearing of

airway secretions and leads to pneumonia. 4/2 RP 138, 141. He further testified that Mr. Fletcher “was having lung failure very early after injury” and was already on a ventilator within a few hours, 4/2 RP 174, and that he also had a bruised lung, which put him at high risk for respiratory distress syndrome, which has around a 40% mortality rate, 4/2 RP 140-41. Dr. Schreiber estimated that Mr. Fletcher’s chance of survival from his truck wreck trauma was less than 50%. 4/2 RP 145-46.

Dr. Schreiber disagreed with Dr. Jacobs’ opinion that Mr. Fletcher had symptoms of progressive kidney failure between the time of the October 15 Type A blood transfusions and October 19, and opined that inflammation from massive tissue injury set Mr. Fletcher’s organs up for failure, and that Mr. Fletcher’s development of ventilator-associated pneumonia, after about a week at Harborview, accelerated the process. 4/2 RP 146-50. Dr. Schreiber attributed the kidney failure that developed after about October 21, at the same time as the liver failure, to the severity of the truck wreck trauma and the toxic effect that contrast used for a CT scan (done on the night of October 20, 4/9 RP 27, to see if the aortic injury was worsening) had on Mr. Fletcher’s kidneys. 4/2 RP 151.¹⁰

¹⁰ In light of Dr. Schreiber’s testimony, if nothing else, the Estate’s assertion, *App. Br. at 19*, that no medical witness, other than Dr. Veal, related Mr. Fletcher’s pre-Harborview admission clinical findings to pulmonary edema,” is not true.

Dr. Schreiber also disagreed with Dr. Jacobs' opinion that the absence of a dramatic increase in Mr. Fletcher's hematocrit following the Type A blood transfusions meant red blood cells were being hemolyzed, and explained that "too many processes [had been] going on" to draw such a conclusion from the hematocrit, and opined that Mr. Fletcher's demise was not caused by a transfusion reaction. 4/2 RP 152-54.

c. Dr. McIntyre's testimony for Harborview.

Dr. McIntyre, Mr. Fletcher's surgical critical care attending physician at Harborview, not only testified about the care that had been provided, but also gave her opinion on the cause of Mr. Fletcher's death. Dr. McIntyre explained that Mr. Fletcher could not have tolerated surgery, because repairing his torn aorta to prevent sudden rupture would have required too stressful of a surgical procedure, as well as the use of a blood thinner, which his head injury precluded. 4/7 RP 14. In her opinion, Mr. Fletcher died of respiratory failure due to his initial injuries and age, and worsened by the pneumonia he developed from being on the respirator. 4/7 RP 7-8, 10, 22, 27, 93. According to Dr. McIntyre, Mr. Fletcher would have died even without a transfusion reaction. 4/7 RP 68.

d. Dr. Veal's testimony for Harborview.

Dr. Veal, like Dr. Schreiber, disagreed with Dr. Jacobs' opinion that Mr. Fletcher had suffered an acute hemolytic transfusion reaction, 4/9

RP 21-22, 41, 48, 54, 67-68, 77-2, and described the process by which trauma victims often become swollen as a result of administration of fluids to maintain blood pressure. 4/9 RP 22-23. Dr. Veal opined that Mr. Fletcher had succumbed to pneumonia and probably would have died even if the transfusion error had not occurred. 4/9 RP 35. Expanding on Dr. Schreiber's testimony, *see* 4/2 RP 131-32, that Mr. Fletcher had shown signs of the kind of trauma that inflames body tissues and makes capillaries "leaky" even before his arrival at Harborview, Dr. Veal explained that Mr. Fletcher was already in a "very tenuous" condition when he was found at the scene of the truck wreck, given the respiration rate, blood pressure, oxygen saturation, and blood pH readings obtained from then until his arrival at Harborview, 4/9 RP 6-17, and that Mr. Fletcher developed a ventilator-associated pneumonia on or about October 20 that "began the end of his course,"¹¹ 4/9 RP 26.

E. The Estate's Complaints that Dr. Veal's Trial Testimony Differed from His Deposition Testimony.

1. Changes the Estate claims Dr. Veal made to his opinions.

The Estate argues, *App. Br. at 3-4, 13-19, 23*, that Dr. Veal's trial testimony differed from his deposition testimony in two respects that

¹¹ Dr. Veal explained that an autopsy finding of no pus in the air sacs of Mr. Fletcher's lungs did not mean that he had not developed pneumonia on October 20, because Mr. Fletcher had been given an array of antibiotics, and the autopsy had found heavy lungs with inflammation consistent with one of the bacteria cultured from Mr. Fletcher's lungs before he died. 4/9 RP 33.

surprised its counsel and prejudiced its right to a fair trial, especially because Dr. Pearl, the Estate's rebuttal expert on critical care medicine issues, had already testified and could not rebut Dr. Veal. First, the Estate asserts that Dr. Veal opined at trial that Mr. Fletcher had "leaky lungs" even before he was mistakenly given Type A blood at Harborview, but had not so testified at his deposition. *Id.* Second, the Estate asserts that Dr. Veal testified at trial that a finding of pink urine or reddish sediment in Mr. Fletcher's urine after he was transfused with the wrong type of blood probably did *not* signify hemolysis, but at deposition had opined that it probably *did* signify hemolysis.¹² *Id.*

2. Dr. Veal's deposition testimony.

a. The main opinion Dr. Veal expressed at deposition.

The main medical opinion that Dr. Veal expressed at his deposition was that Mr. Fletcher died because the multiple, severe traumatic injuries Mr. Fletcher sustained in the truck wreck initiated an "inflammatory cascade" common in trauma patients and septic patients that led to microvascular leakiness that caused the blood vessels to "burn" and the

¹² Although the Estate published Dr. Veal's deposition at trial, 4/9 RP 37, and provided it to the trial court in connection with a request for an instruction concerning Dr. Veal's allegedly changed testimony, CP 22, the Estate chose not to designate the whole deposition for inclusion in the Clerk's Papers, instead including only the nine pages from Dr. Veal's deposition that it submitted in connection with its motion for new trial, CP 51-59. Harborview has designated the entire deposition of Dr. Veal, CP 248-353, which the Estate's counsel had put before the trial court at the time of his request for an instruction concerning Dr. Veal's testimony, CP 22.

lungs to “leak,” sepsis with pneumonia, renal insufficiency that was exacerbated by contrast used for a CT scan on October 20, and multiple organ system failure. CP 260-66, 269-70, 311-12, 316-17, 319, 323.

b. Dr. Veal’s deposition testimony concerning “leaky lungs”.

In deposing Dr. Veal, the Estate’s counsel limited his questioning to Mr. Fletcher’s course at Harborview. The Estate’s counsel did not ask Dr. Veal any questions that called for Dr. Veal to explain what, if any, significance any respiratory rate, oxygen saturation, blood pressure, or other findings before Mr. Fletcher arrived at Harborview had on his causation opinions. Nor did the Estate’s counsel ask Dr. Veal to elucidate all of the clinical findings and chart entries in Mr. Fletcher’s medical records that provided material support for his causation opinions.¹³ Even after Dr. Veal testified in the deposition that (unspecified) clinicians who cared for Mr. Fletcher knew “they were dealing with a man who’d had multiple traumas, that he was going to be leaky very soon, and that volume resuscitation and organ profusion [sic] were going to be the key things to provide for him in this first 24, 48, 72 hours,” CP 277, the Estate’s counsel chose not to ask whether Dr. Veal was referring in part to

¹³ The Estate has never complained that Harborview’s pre-deposition disclosures concerning Dr. Veal’s opinions did not allow the Estate’s counsel to adequately prepare for Dr. Veal’s deposition.

clinicians at Dayton General or St. Mary, or why he attributed such knowledge to them.

c. Dr. Veal's deposition testimony regarding acute hemolysis and pink urine.

On the subjects of hemolysis and pink urine, Dr. Veal repeatedly acknowledged in his deposition that Mr. Fletcher had hemolyzed, but insisted that the hemolysis had been trivial and did not materially contribute to Mr. Fletcher's demise. CP 260-65, 266, 269-70, 311-12, 316-17, 319, 323. After testifying that he did not know what explained a finding of reddish sediment in Mr. Fletcher's urine on the afternoon of what the Estate's counsel represented had been October 16, 2004, but that "it could very well have been hemolysis," CP 289, Dr. Veal, upon repeat questioning, acceded that "it probably was hemolysis," CP 292. Dr. Veal, however, never acceded to the proposition that there had been an *acute* hemolytic transfusion reaction to the transfusion of Type A blood, but instead testified that Mr. Fletcher did not develop the things that are typically seen with an acute hemolytic reaction.¹⁴ CP 289-90. He also disputed the Estate's assertion that there had been reddish sediment in Mr. Fletcher's urine "quite often." CP 291-92.

¹⁴ Asked to explain in his deposition why Mr. Fletcher's hematocrit had not risen after he was given the Type A blood transfusions unless he was having a hemolytic reaction, Dr. Veal testified (as had Dr. Nester, 4/1 RP 19, and Dr. Siegel, 4/2 RP 89) that the fluids Mr. Fletcher was given intravenously probably had a diluting effect that kept the hematocrit level from rising. CP 293.

3. Dr. Veal's trial testimony.

a. Dr. Veal's trial testimony about "leaky lungs".

On direct examination at trial, Dr. Veal testified that, when the paramedics found Mr. Fletcher, Mr. Fletcher's condition was "very tenuous," because his heart rate was 160, his respiratory rate was 28 and described as snoring, and his oxygen saturation readings were 72% and rose only to 78% after being extricated from the wrecked truck and given oxygen. 4/9 RP 7. He explained that the oxygen saturation levels meant that Mr. Fletcher was not breathing effectively, because a normal level would be 98%, and that the snoring indicated that either he was not taking deep enough breaths or that his lungs had been injured. 4/9 RP 7-8.

Dr. Veal testified that Mr. Fletcher's blood pressure of 80 over 52 upon arrival at Dayton Hospital was very low and meant that Mr. Fletcher was not perfusing his kidneys, brain or other organs with blood very well. 4/9 RP 9. He further testified that, by the time of Mr. Fletcher's transfer to St. Mary Hospital, Mr. Fletcher's blood pressure and oxygen saturations had responded well to IV saline fluids and oxygen, but that his blood pressure then dropped to 79 over 42, prompting administration of more fluids, which brought it up to an acceptable level for about 30 minutes before it dropped again to 82 over 35, prompting the administration of more fluids, which were continued. 4/9 RP 10-12.

Dr. Veal testified that measurements by the airlift team showed low blood gas pH and oxygen levels. 4/9 RP 14-15. He explained that those readings indicate that Mr. Fletcher's "lungs were getting congested because he was already leaking because of his injury," meaning that the initial trauma from the truck wreck was causing his body to weep or leak fluids into his tissues, producing the blood pressure drops and other low readings that responded temporarily to IV fluid administration. 4/9 RP 16.

On cross-examination, the Estate's counsel challenged Dr. Veal to "find somewhere" in his deposition "where you attributed leaky lungs to something prior to the pneumonia and sepsis [that had developed by October 20, at Harborview]," and asked Dr. Veal to agree that, in his deposition, he did not "relate leaky lungs to have occurred prior to [Mr. Fletcher's] admission at Harborview." 4/9 RP 39. Dr. Veal explained that he had testified in his deposition that Mr. Fletcher's lungs "had already been injured with the initial [truck wreck] trauma which generated [an] inflammatory response," 4/9 RP 40,¹⁵ and, while admitting that he had not used the word "leaky" in so testifying at his deposition, stated that "I think we both know what I was talking about," 4/9 RP 40. Moreover, when asked, in broad terms, whether he was saying something different at trial than he said at his deposition about leaky lungs, Dr. Veal responded: "In

¹⁵ He had so testified in his deposition. CP 259-61, 323.

broad terms, I'm not saying anything different." 4/9 RP 45. Then, when asked to agree that he didn't attribute leaky lungs in his deposition to anything that occurred before October 20, Dr. Veal responded, 4/9 RP 45:

I'm uncomfortable with the question. I certainly did not intend to convey that I didn't think his lungs were leaky from the initial trauma. I was trying to make it clear that I thought the trauma initiated this whole process.

b. Dr. Veal's trial testimony about pink urine and hemolysis.

During his direct testimony at trial, Dr. Veal made no reference to pink urine or reddish urine sediment. *See* 4/9 RP 2-35. On cross-examination by the Estate, he testified that there had been no evidence of hemolysis during either the first 12-24 hours after the transfusion error or the ensuing five days, adding "Not substantial hemolysis." 4/9 RP 77.

The Estate asked Dr. Veal whether sediment in the urine had probably meant hemolysis, and Dr. Veal answered "No, sir. I don't think so." 4/9 RP 79. Dr. Veal acknowledged changing his opinion on that point from what he had acceded to at his deposition, attributing the change to having spent more time reviewing things and realizing that the pink urine/reddish sediment finding had been "a single kind of notation, whereas, if he had major hemolysis, you would have seen it present for awhile [and i]t would have been much darker than pink." 4/9 RP 79-80. When asked whether his opinion as to causation substantially rested on his

belief at trial that there was no evidence of hemolysis, Dr. Veal responded “No” and explained that his opinion rested on the fact that Mr. Fletcher did not show the physiological evidence of an acute hemolytic reaction to mismatched blood “[b]ecause the timing was all wrong.”¹⁶ 4/9 RP 80.

F. The Estate’s Motions to Strike Dr. Veal’s Testimony Or for a Curative Instruction.

After that exchange near the end of Dr. Veal’s cross-examination, the Estate’s counsel stated: For the record, I’ll state I move to strike his entire testimony.” 4/9 RP 80. When the trial court then asked if there were any other questions, as it was 4:00 p.m. on Thursday, April 9, the Estate’s counsel indicated that he was not quite through with Dr. Veal and asked to be allowed to continue Dr. Veal’s cross-examination for a half hour on the next court day, Monday, April 13. 4/9 RP 80-81. The trial court gave the Estate’s counsel another five minutes of cross-examination on Thursday, April 9. 4/9 RP 81. The Estate’s counsel then completed his cross-examination, 4/9 RP 81-86, did not renew his request to strike, or

¹⁶ The Estate’s assertions that Dr. Veal “attempts to disassociate evidence of hemolysis, by presence of sediment in the urine, with physiology,” App. Br. at 26, and that Dr. Veal’s “[c]hanging his testimony to exclude sediment in Mr. Fletcher’s urine as hemoglobinuria, as a possibility or probability, and then to exclude it as a category of physiological evidence is ludicrous,” App. Br. at 31, misstates Dr. Veal’s testimony. Nowhere did Dr. Veal say that hemolysis was not some form of physiological evidence. What Dr. Veal tried to convey was that there was no physiological evidence of an acute reaction to having received mismatched blood, not because of his belief that there was no evidence of hemolysis, but “[b]ecause the timing was all wrong.” 4/9 RP 80.

ask the trial court to rule on his prior statement that he was moving to strike, Dr. Veal's testimony, *see* 4/9 RP 81-93.

The day after Dr. Veal testified, the trial court e-mailed counsel for both parties and asked them to provide by e-mail any further concerns they had regarding the court's intended instructions. CP 27. In response to that e-mail and to the issues raised by Harborview's counsel concerning certain of the court's intended instructions, CP 24-26, the Estate's counsel sent an e-mail letter not only addressing the instructions at issue, but also setting forth his belief that there had been a "material change" in Dr. Veal's trial testimony from his deposition testimony that was "so potentially prejudicial" that he was requesting "a revised expert testimony jury instruction," or that the court "at least advise the jury of the requirement to have disclosed [the change in testimony], and the failure to do so." CP 22. The Estate's counsel indicated that he was attaching a copy of Dr. Veal's deposition (and the E-trans viewer program for it) for the court's review. CP 22. He specifically disclaimed wanting a new trial, and he did not renew, or seek a ruling, on any request to strike Dr. Veal's testimony. CP 22. The trial court, by e-mail response dated Sunday, April 12, 2009, CP 19-20, indicated with respect to Dr. Veal's testimony, CP 20:

Dr. Veal: When a witness arguably changes his testimony, the remedy is impeachment. With the cross going on for twice the length of the direct, there was ample opportunity

for this and it was accomplished. When an attorney violates the discovery rules, there are other remedies. I don't intend to give a jury instruction that is both a prohibited comment on the evidence and an immaterial comment on counsel.

G. The Jury's Verdict.

Following closing arguments, the jury retired to deliberate on April 13, 2009. CP 244-45. On April 15, 2009, the jury returned its verdict, answering "No" to Question No. 1 on the verdict form which asked whether the admitted negligence of the defendant was "a proximate cause of the death of Leo Fletcher" CP 247. On May 19, 2009, the trial court entered judgment on the jury's verdict. CP 81-83.

H. The Trial Court's Denial of the Estate's Motion for New Trial.

Thereafter, the Estate moved for a new trial. CP 28-39. The Estate asserted that "plaintiff's counsel, and apparently defense counsel, were both surprised by Dr. Veal's change in testimony," CP 36, and argued, as he does on appeal, *App. Br. at 22-32*, that a new trial was warranted under CR 59(a)(1) and (2) because of alleged misconduct of counsel in not learning of and disclosing Dr. Veal's allegedly changed testimony, under CR 59(a)(3) because of alleged surprise, under CR 59(a)(8) because of an alleged error of law in not striking Dr. Veal's testimony, and under CR 59(a)(9) because substantial justice allegedly was not done. *See* CP 33-39. Harborview opposed the motion, CP 62-67, and, on June 8, 2009, the trial

court denied the motion for new trial, explaining that it could not find “that any trial irregularities denied the plaintiff substantial justice or otherwise would justify the relief being sought,” CP 78, 84. The Estate has appealed. CP 79-84.

IV. STANDARD OF REVIEW

Both a trial court’s denial of a motion to strike and a trial court’s denial of a motion for new trial are reviewed for abuse of discretion. *Tortes v. King County*, 119 Wn. App. 1, 12, 84 P.3d 252 (2003), *rev. denied*, 151 Wn.2d 1010 (2004) (motion to strike); *Hoskins v. Reich*, 142 Wn. App. 557, 566, 174 P.3d 1250, *rev. denied*, 164 Wn.2d 1014 (2008) (motion for new trial).

An abuse of discretion occurs when a decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” . . . A discretionary decision rests on “untenable grounds” or is based on “untenable reasons” if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is “manifestly unreasonable” if “the court, despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take.’”

Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (citations omitted).

When the basis for seeking a new trial involves “the assessment of occurrences during the trial and their potential effect on the jury,” appellate courts “accord great deference to the considered judgment of the

trial court in ruling on such a motion.” *Levea v. G.A. Gray Corp.*, 17 Wn. App. 214, 226, 562 P.2d 1276, *rev. denied*, 89 Wn.2d 1010 (1977).

“A trial court may be affirmed on any basis supported by the record and the law.” *State v. Kelley*, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992) (citing *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989); *Hadley v. Cowan*, 60 Wn. App. 433, 444, 804 P.2d 1271 (1991)).

V. ARGUMENT

A. The Estate’s Arguments that Dr. Veal Materially or Prejudicially Changed His Testimony Are Disingenuous.

The trial court did not abuse its discretion in denying either the Estate’s motion to strike or the Estate’s motion for new trial based on any alleged change in Dr. Veal’s testimony. Indeed, in arguing that Dr. Veal changed his testimony and that it was unable to rebut his changed testimony, the Estate disingenuously omits material information of record that demonstrates that there was no change in Dr. Veal’s testimony about “leaky lungs,” that the change in his testimony about pink urine and hemolysis was minor and immaterial, and that it was of no consequence that Dr. Pearl testified before Dr. Veal, because Dr. Pearl disclaimed the expertise to address hemolytic transfusion reactions.

1. Dr. Veal did not change his testimony about leaky lungs.

Dr. Veal testified at trial that Mr. Fletcher had leaking lungs before he arrived at Harborview in light of various respiratory, blood pressure, oxygen saturation, and blood pH readings. 4/9 RP 8-16, 19-20, 24, 39. Although Dr. Veal had not given that exact testimony at his deposition, that was because the Estate's counsel's did not ask Dr. Veal any questions that called for Dr. Veal to explain what, if any, significance such readings had on his causation opinions and did not ask Dr. Veal to elucidate all of the clinical findings or chart entries that provided material support for his opinions. Moreover, Dr. Veal had testified in his deposition that Mr. Fletcher's lungs had already been injured with the initial truck wreck trauma which generated an inflammatory response, and that it was that "inflammatory cascade" that led to his microvascular "leakiness" and that caused his blood vessels to "burn" and his lungs to "leak" and that ultimately led to his major organ failure and death. CP 259-66, 269-70, 311-12, 316-17, 319-20, 323. Thus, as Dr. Veal made clear under the Estate's cross-examination at trial, 4/9 RP 39-40, 45, there was no change in his testimony on the subject of "leaky lungs." It is not grounds for a new trial that an adversary's expert could not "find somewhere" in his deposition specific testimony he had not been called upon to give, *see* 4/9 RP 39, and the Estate cites no authority suggesting otherwise.

To make out even a colorable claim for a new trial based on surprise for purposes of CR 59(a)(3), the Estate would have to show not only that its counsel was surprised by the testimony of Dr. Veal at trial concerning “leaky lungs,” but that the surprise could not have been guarded against by ordinary prudence. CR 59(a)(3).¹⁷ Because the Estate’s counsel could have asked, but did not ask, Dr. Veal questions at his deposition to elicit all of the findings that Dr. Veal relied upon for his causation opinions, or to determine whether Dr. Veal related “leaky lungs” to the initial truck trauma or only to readings or findings that were made after Mr. Fletcher’s transfer to Harborview, the Estate cannot satisfy the “could not have been guarded against” prong of CR 59(a)(3).

Although the Estate cannot validly claim surprise, it acknowledges by citing *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 815 P.2d 798 (1991), *App. Br. at 26-27*, that “[t]he decision to grant a new trial on the basis of surprise is a matter within the trial court’s discretion, as only the trial court can assess the impact of the surprise evidence.” *Kramer*, 62 Wn. App. at 561-62. The Estate fails to show that the trial court’s assessment of the impact of Dr. Veal’s “leaky lungs” testimony – that it was handled adequately by cross-examination and impeachment, CP 29,

¹⁷ CR 59(a)(3) provides as one of the “causes materially affecting the substantial rights” of the party aggrieved for which a new trial may be granted: “Accident or surprise which ordinary prudence could not have guarded against.”

and that no trial irregularities denied the Estate substantial justice or would otherwise justify a new trial, CP 78 – was manifestly unreasonable or otherwise untenable.

2. The change in Dr. Veal’s opinion as to whether pink urine/reddish urine sediment indicated hemolysis was not material, was adequately handled with impeachment, and did not go unrebutted.
 - a. The change in opinion concerned a narrow and minor point; Dr. Veal’s basic opinion – pink urine did not indicate an *acute* hemolytic reaction – did not change.

Dr. Veal’s retraction at trial of his deposition testimony acceding that reddish sediment in Mr. Fletcher’s urine probably was “hemolysis” was an insignificant change of testimony. In context, it is clear that Dr. Veal meant that he was taking issue with the proposition that there had been an *acute* hemolysis or acute hemolytic reaction, because (a) that had been his position in his deposition, *see* CP 260-65, 266, 269-70, 311-12, 316-17, 319, 323, as Mr. Fletcher did not develop the things that are typically seen with an acute hemolytic reaction, CP 289-90; and (b) Dr. Veal had already testified at trial, even before the exchange about pink urine on cross-examination, 4/9 RP 79-80, that there had been no evidence of *substantial* hemolysis for five days after the Type A transfusions, 4/9 RP 77. Moreover, immediately after the exchange during cross-examination at trial concerning his deposition testimony, Dr. Veal testified

that “if [Mr. Fletcher] had *major* hemolysis, you would have seen [the pink urine] present for a while [and i]t would have been much darker than pink.” 4/9 RP 80 (italics added).

Thus, the difference between Dr. Veal’s deposition testimony and his trial testimony was that, at trial, he was no longer willing to concede, as he had at his deposition, that the pink urine/reddish sediment was even probably a sign of *nonacute hemolysis*. The decisive controversy at trial was not whether the pink urine/reddish sediment that Mr. Fletcher was noted to have on one occasion was or was not due to hemolysis, but rather it was whether Mr. Fletcher had or had not suffered an *acute* hemolytic transfusion reaction that caused his death. Thus, the change in Dr. Veal’s opinion concerned a narrow and very minor point, and did not represent a change in the basic substance of his causation opinion testimony. Even at his deposition, Dr. Veal had made clear that any hemolysis in his view played a trivial role. CP 266.

b. Impeachment by the Estate adequately addressed any change in the testimony.

To the extent there was a discrepancy between Dr. Veal’s deposition and trial testimony, it was dealt with by impeachment. Not only was it dealt with by impeachment, but the Estate’s impeachment likely left the jury with the impression – an impression both unfair to Dr.

Veal and unhelpful to Harborview – that Dr. Veal had agreed at his deposition that the reddish urine sediment probably meant *acute* hemolysis, even though the Estate’s counsel knew Dr. Veal had been consistent in testifying that had been no more than trivial hemolysis.

The very minor change of testimony on a point that several other witnesses had addressed hardly required the trial court to find a prejudicial effect on the Estate’s case. The Estate cites no authority for the proposition that a trial court abuses its discretion by finding that impeachment adequately dealt with a witness’ change of testimony. “Where no authorities are cited in support of a proposition, the [appellate] court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 883, 167 P.3d 610 (2007), *rev. denied*, 163 Wn.2d 1042 (2008) (quoting *State v. Logan*, 102 Wn. App. 907, 911, 10 P.3d 504 (2000) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962))). And the Estate should not be heard to complain that its impeachment of Dr. Veal was an inadequate response to his trial testimony about the meaning of pink urine, when its counsel may well have succeeded in creating the false impression that Dr. Veal had conceded at his deposition that pink urine meant there had been an *acute*

hemolytic transfusion reaction, when, in fact, Dr. Veal never made any such concession.

3. The fact that Dr. Pearl had already testified by the time Dr. Veal testified did not leave Dr. Veal's testimony about pink urine/reddish sediment un rebuttable or un rebutted.

It is disingenuous for the Estate to argue that, because Dr. Pearl, its critical care expert rebuttal witness, had already testified on April 8, Dr. Veal's April 9 testimony about pink urine/reddish sediment went un rebutted, especially when Dr. Pearl had disclaimed the necessary expertise to address acute hemolytic transfusion reactions, and when Dr. Veal's opinion concerning it had been expressed by other experts well before Dr. Pearl testified.

Dr. Pearl disclaimed the expertise to opine about transfusion reactions. 4/8 RP 3, 16, 40. He declined to comment on Dr. Nester's opinion that Mr. Fletcher had not suffered an acute hemolytic transfusion reaction, 4/8 RP 22, which she had based on, among other things, the lack of findings of red urine for 12 to 36 hours after the transfusions of Type A blood.¹⁸ 4/1 RP 5, 40, 52. Thus, it is of no consequence that Dr. Pearl

¹⁸ The Estate has never complained that Dr. Nester, a fact witness, should not have been allowed to give opinion testimony and, in fact, called her to testify and asked questions of her eliciting such opinion testimony. Even if the Estate had assigned error to the admission of opinions by Dr. Nester despite her status as a fact witness, her opinions were admissible because she formed them during the course of her work as a physician rather than for purposes of litigation. See *Carson v. Fine*, 123 Wn.2d 206, 216, 867 P.2d 610 (1994) (waiver of physician-patient privilege by filing lawsuit for personal injury "extends to all knowledge possessed by the plaintiff's doctors, be it fact or

testified before Dr. Veal stated his opinions concerning the acute-versus-delayed transfusion reaction issue.

Moreover Dr. Veal's testimony on the subject of pink urine/reddish sediment did not introduce new opinion testimony into the trial. It covered ground that had been plowed by medical witnesses who had testified before Dr. Pearl and was redundant of the testimony of at least two medical witnesses. Fact and expert witnesses called by each side had already addressed the existence, timing, and significance of an array of clinical findings (or lack thereof) during Leo Fletcher's course at Harborview, specifically including reddish sediment in the urine. Dr. Nester, called by the Estate, and Dr. Schreiber, a defense critical care expert, both of whom testified before Dr. Pearl, gave opinions about reddish sediment in the urine that were the same as the opinion Dr. Veal expressed later in the trial, and Dr. Jacob who testified for the Estate, had already given his contrary opinion that the reddish sediment/pink urine finding on October 15 had been evidence of an acute hemolytic transfusion reaction.¹⁹ Thus, Dr. Veal's trial testimony that the reddish

opinion"); *Christensen v. Munson*, 123 Wn.2d 234, 240, 867 P.2d 626 (1994) (following the rule of *Carson*, trial court did not err in allowing one of plaintiff's treating physicians to offer opinion evidence favorable to the defense).

¹⁹ The Estate does not assign error to the trial court's decision to let medical witnesses testify out of order. If the Estate had assigned error to that decision, the decision was a discretionary one and the record provides no basis for suggesting that the trial court's reasons for its decision were untenable. "[T]he right to open and close presentation of

sediment did not signify “hemolysis” did not introduce new, unrebuttable evidence into the case.

This is not a case where one party’s expert’s change of testimony could not be dealt with effectively by impeachment, or was so unexpected, so material, and so prejudicial that, if not stricken, deprived the opposing party of a fair trial. The minor change in Dr. Veal’s testimony did not materially affect the outcome of the case. Nothing Dr. Veal said was new to the jury. Nothing Dr. Veal told the jury on the subject of transfusion reaction was something Dr. Pearl was incompetent to rebut. The jury very likely (and sensibly) accepted the opinion of Mr. Fletcher’s attending physician, Dr. McIntyre, that Mr. Fletcher died not because he was mistakenly given Type A blood, but because he had suffered multiple traumatic injuries in his rollover truck accident at the age of 89 and developed pneumonia from having to be on a respirator. 4/7 RP 7-8, 10, 22, 27, 68, 93.

evidence does not [mean] that the trial court’s normally broad discretionary control over the conduct and procedures of trial is so circumscribed as to eliminate the possibility of calling witnesses out of order, even over objection.” *Wilson v. Overlake Hosp. Med. Ctr.*, 77 Wn. App. 909, 912, 895 P.2d 16 (1995). Nor is there a record of any objection by the Estate to the order in which witnesses testified. Indeed, what the record shows is that the Estate had not timely disclosed Dr. Pearl as a potential expert witness, and was fortunate that the trial court allowed him to testify at all. CP 63. The defense was unable to depose Dr. Pearl until April 3, 2009, after trial was underway, *see* CP 43, and after Harborview had already presented testimony by critical care expert Dr. Martin Schreiber, *see* 4/2 RP 122-205, who would, under a more conventional trial schedule, have been able to anticipate and address at trial any opinions Dr. Pearl had disclosed in deposition about which Harborview saw fit to have Dr. Schreiber comment.

- B. Harborview did not violate its supplementation of discovery obligations under CR 26(e), but, even if it could be said that it did, the trial court did not abuse its discretion or commit an “error in law” in not striking Dr. Veal’s testimony or not granting the Estate’s motion for new trial.

Claiming that Harborview’s counsel’s failure to discover and advise the Estate’s counsel before trial of the alleged changes in Dr. Veal’s testimony constitutes either an irregularity in the proceedings or misconduct of defense counsel, the Estate argues that it is entitled to a new trial under CR 59(a)(1)²⁰ and/or CR 59(a)(2)²¹. *See App. Br. at 22-26.* And, claiming that the trial court committed an error of law in finding that the impeachment of Dr. Veal was adequate to deal with arguable changes in his testimony and in not striking Dr. Veal’s testimony as a discovery sanction, the Estate argues that it is entitled to a new trial under CR 59(a)(8).²² *See App. Br. at 27-29.*

Contrary to the Estate’s assertions, there was no material change in the subject matter or substance of Dr. Veal’s testimony, Harborview did not violate its discovery obligations, and the trial court did not abuse its

²⁰ CR 59(a)(1) provides as one of the “causes materially affecting the substantial rights” of the party aggrieved for which a new trial may be granted: “Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.”

²¹ CR 59 (a)(2) provides as another of the “causes materially affecting the substantial rights” of the party aggrieved for which a new trial may be granted: “Misconduct of prevailing party or jury”

²² CR 59(a)(8) provides as yet another of the “causes materially affecting the substantial rights” of the party aggrieved for which a new trial may be granted: “Error in law occurring at the trial and objected to at the time by the party making the application.”

discretion, much less commit some error of law, in finding that any arguable change in Dr. Veal's testimony had been adequately dealt with by impeachment, and not striking his testimony or granting a new trial.

1. The subject matter and substance of Dr. Veal's causation opinion testimony did not change.

Dr. Veal was not a party and testified as an expert witness, not a fact witness. CR 26(e)(1)(B) obligates a party to seasonably supplement a prior response "to include information thereafter acquired" to a discovery question directly addressed to "the identity of each person expected to be called as an expert at trial, the subject matter on which he is expected to testify, and the substance of his testimony." Here, the Estate was well aware that the *subject matter* that Dr. Veal was going to address as an expert for Harborview was causation (*i.e.*, why Mr. Fletcher died), and that the *substance* of Dr. Veal's causation testimony was that Mr. Fletcher died, not from an acute hemolytic transfusion reaction, but from the "inflammatory cascade" that resulted from the multiple, severe traumatic injuries Mr. Fletcher sustained in his violent truck wreck. Dr. Veal's causation opinion did not change from deposition to trial. No duty to supplement under CR 26(e)(1)(B) arose with respect to the subject matter or substance of Dr. Veal's testimony.

2. There is no evidence that Harborview expected the minor change in Dr. Veal's testimony about pink urine/reddish sediment.

Under CR 26(e)(2):

A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which:

(A) he knows that the response was incorrect when made; or

(B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

Here, the Estate has never shown that Harborview *expected* the change in one very minor aspect of the opinion testimony Dr. Veal gave at his deposition concerning whether pink urine/reddish sediment signified hemolysis. In its post-trial motion, the Estate effectively conceded that Harborview did not expect it when it asserted that “plaintiff’s counsel, *and apparently defense counsel*, were *both* surprised by Dr. Veal’s change in testimony [emphasis added].” CP 36. Moreover, at trial, after Dr. Veal acknowledged that, upon further review, he had changed his opinion as to whether the pink urine/reddish sediment was hemolysis, the Estate asked Dr. Veal whether he had communicated that change of opinion to Harborview’s counsel. Dr. Veal answered that “I don’t think we talked about that specific point.” 4/9 RP 79. The Estate chose not to inquire further. Although the Estate, referring to “apparent failure[s]” by defense

counsel, tries to insinuate that defense counsel must not have advised its experts of the need “to communicate [to defense counsel] the substance of any material change in their opinion[s],” *App. Br. at 23*, and failed “to make a direct inquiry of experts, such as Dr. Veal, as to any change in their opinions, at the time the specific request for any updates was made” by the Estate, *App. Br. at 23*, its insinuations are nothing more than speculation, as they never asked Dr. Veal what defense counsel had done in that regard.

The Estate has not shown that Harborview knew that any prior response it had given about the subject matter or substance of Dr. Veal’s was no longer true, or that its failure to disclose any change amounted to a knowing concealment. The Estate’s insinuations that defense counsel knew or should have known Dr. Veal’s opinion concerning pink urine had changed, and should have told the Estate’s counsel of that such change, are unfounded.

3. The trial court was not required to find impeachment an inadequate remedy for any change in Dr. Veal’s testimony, nor was it required to strike Dr. Veal’s testimony, or to grant the Estate a new trial even if it believed defense counsel should have found out about, and told the Estate’s counsel before trial of, any change in Dr. Veal’s testimony.

CR 26(e)(4) provides that “failure to seasonably supplement in accordance with this rule will subject the party to such terms and

conditions as the trial court may deem appropriate.”

The Estate appears to contend that the error-of-law standard of review applies to the extent that its post-verdict motion was based on CR 59(a)(8) (“error in law”), and that the “error in law” consisted of not enforcing CR 26(e), which requires supplementation or amendment of discovery responses, against Harborview. *See App. Br. at 22, 27-28.* Contrary to what the Fletcher Estate may be trying to argue, the standard of review, to the extent that its appeal is based on CR 59(a)(8), is abuse of discretion. *Rice v. Janovich*, 109 Wn.2d 48, 56, 742 P.2d 1230 (1987); *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. at 551-52.

Even if the minor change in Dr. Veal’s opinion about reddish sediment in the urine had constituted something requiring supplementation under CR 26(e), CR 26(e)(4) did not require the trial court to find a violation by Harborview of its supplementation obligation, because the record does not show that Harborview’s counsel was aware of the changed opinion and concealed it. The Estate, again, fails to offer authority for the proposition that the remedy for a party’s technical failure to notify an adversary of a minor change in an expert’s opinion is either striking of the expert’s testimony or a new trial. The trial court did not abuse its discretion, much less commit an “error in law,” in finding that the Estate’s lengthy impeachment of Dr. Veal adequately dealt with any arguable

change in his testimony, or in not striking Dr. Veal's testimony, or in denying the Estate's motion for new trial.

Indeed, even if the Estate had shown or the trial court had found (which neither did) that Harborview failed to seasonably supplement or amend a prior discovery response concerning Dr. Veal's testimony in violation of CR 26(e), the trial court's ability to exclude Dr. Veal's testimony was not limitless. As the court explained in *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 69-70, 155 P.3d 978 (2007) (citations omitted):

We generally review a trial judge's management of a trial for abuse of discretion. . . . But decisions that preclude a party from calling an expert as a sanction for discovery violations are different. . . . The standard is more rigorous. . . . And while we might question such a limitation on a trial judge's traditional authority to manage his or her courtroom, the difference is now well ensconced in Washington law.

Before the trial court can exclude a witness as a sanction for the failure to comply with a discovery time table, the court must consider, on the record, lesser sanctions. . . . And the court must find that the disobedient party's refusal to obey a discovery order was willful or deliberate and that it substantially prejudiced the opponent's ability to prepare for trial. . . . Indeed, the court must find that the failure to comply amounted to "intentional nondisclosure, willful violation of a court order, or other unconscionable conduct." . . . The failure to support a decision to exclude a witness with these essential findings is an abuse of discretion. . . .

Our Supreme Court has concluded that it is an abuse of discretion for the trial court to imposed the severe sanction

of limiting discovery and excluding expert witness testimony without first having considered, on the record, a less severe sanction. . . .

The trial court made no findings of any discovery violation, much less findings of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct by Harborview or its counsel. Nor did the Estate show that any such discovery misconduct occurred. Thus, it would have been an abuse of the trial court's discretion to strike Dr. Veal's testimony or grant a new trial.

C. Substantial Justice Was Done; The Estate Was Not Entitled to a New Trial Under CR 59(a)(9).

The Estate asserts that substantial justice was not done, and that it was therefore entitled to a new trial under CR 59(a)(9).²³ In so doing, the Estate fails to mention what the case law makes clear – that “[g]ranting a new trial for lack of substantial justice, CR 59(a)(9) should be rare, given the other broad grounds available under CR 59.” *Lian v. Stalick*, 106 Wn. App. 811, 825, 25 P.3d 467 (2001).

Moreover, the trial court, who was in the best position to judge whether substantial justice had not been done, found otherwise. The trial court explicitly noted that it could not find “that any trial irregularities denied the plaintiff substantial justice or otherwise would justify the relief

²³ CR 59(a)(9) sets forth as one of the “causes materially affecting the substantial rights” of an aggrieved party for which a new trial may be granted: “That substantial justice has not been done.”

being sought.” CP 78, 84. When the basis for seeking a new trial involves “the assessment of occurrences during the trial and their potential effect on the jury,” appellate courts “accord great deference to the considered judgment of the trial court in ruling on such a motion.” *Levea*, 17 Wn. App. at 226.

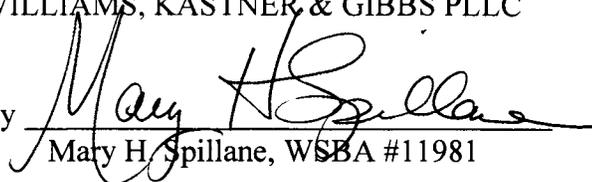
VI. CONCLUSION

For the foregoing reasons, the trial court’s decisions in not striking Dr. Veal’s testimony and in denying the Estate’s motion for new trial were not manifestly unreasonable or based on untenable grounds or untenable reasons. The trial court did not abuse its discretion in ruling as it did. The trial court’s judgment on the jury’s verdict in favor of Harborview should be affirmed.

RESPECTFULLY SUBMITTED this 1st day of September, 2010.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 1st day of September, 2010, I caused a true and correct copy of the foregoing document, "Brief of Respondents," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 1st day of September, 2010, at Seattle, Washington.



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