

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

BY _____ STATE OF WASHINGTON
07/11/16
COURT OF APPEALS, DIVISION II
CLERK OF COURT

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

Respondents,

v.

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

Appellants.

BRIEF OF APPELLANTS

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I. INTRODUCTION

John Dean Stalkup died of a cardiac arrest at age 49 on June 19, 2004. See RP 47, 119, 194. His wife, Susan Stalkup, individually and as personal representative of her husband's estate, brought this medical malpractice/wrongful death and survival action against Dr. James Hampton, a family practice physician, and his employer, The Vancouver Clinic, claiming that, when Mr. Stalkup was seen by Dr. Hampton on two occasions in March and June of 2004 at The Vancouver Clinic, Dr. Hampton negligently failed to rule out coronary artery disease, and thereby proximately caused Mr. Stalkup's death. CP 3-6. Dr. Hampton and The Vancouver Clinic denied Mrs. Stalkup's claims. CP 7-8.

The case was tried to a jury before Judge Roger A. Bennett in Clark County Superior Court. The jury returned a special verdict in which it answered "Yes" to the first question, which asked whether the defendants were negligent, but "No" to the second question, which asked whether such negligence was a proximate cause of Mr. Stalkup's death. CP 83-84.

After the jury was discharged, Mrs. Stalkup moved for judgment as a matter of law on proximate cause and for a new trial as to damages only. CP 85-93, 94-95. Defendants opposed Mrs. Stalkup's motion, pointing out the evidence from which a reasonable jury could find negligence, but

no proximate cause. CP 141-55; see also CP 96-140. After argument, the court denied plaintiff's post-trial motion, but on its own initiative ordered a new trial as to all issues. RP 823-26; CP 202-04, 205-07. Defendants timely appealed, CP 208-15, and seek entry of judgment on the verdict and dismissal of the complaint.

II. ASSIGNMENT OF ERROR

The trial court erred in (1) entering its "Order Re: Plaintiff's Motion for Judgment on the Issue of Proximate Cause and for a New Trial on the Issue of Damages Only," insofar as that Order grants a new trial; (2) entering its "Supplemental Explanatory Order;" and (3) on its own initiative, after determining that Mrs. Stalkup was not entitled to judgment as a matter of law on proximate cause or a new trial on the issue of damages only, ordering a new trial on all issues instead of entering judgment on the jury's verdict and dismissing Mrs. Stalkup's claims against Dr. Hampton and The Vancouver Clinic.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the evidence presented at trial sufficient to allow the jury to find that the defendants were negligent, but that such negligence was not a proximate cause of Mr. Stalkup's death?

2. Did the trial court lack the authority under CR 59(d) to grant a new trial on all issues on its own initiative when the reasons the

court gave for granting the new trial were not reasons for which it might have granted a new trial on motion by Mrs. Stalkup?

IV. STATEMENT OF THE CASE

A. Factual Background.

John Stalkup moved with his wife, Susan, from California to the Vancouver area in early 2004. RP 201-02. On March 8, 2004, Mr. Stalkup sought medical care at The Vancouver Clinic for a rash and to refill a prescription for Provacol, a cholesterol-lowering drug. RP 47-49, 212. Mr. Stalkup was seen by Dr. James Hampton, a family practice physician. RP 99. Dr. Hampton prescribed Lamisil for the rash and re-prescribed the Provacol. RP 49.

On June 10, 2004, Mr. Stalkup saw Dr. Hampton for a second (and last) time. RP 49, 214-15. Mr. Stalkup had been having chest pain, RP 215, that had begun a week before when he was putting a piece of plywood over his boat, RP 49-50, 120-21, 216. Mr. Stalkup related that history of onset to Dr. Hampton, RP 120-21, and reported that he had pain on exertion, but that the pain subsided when he stopped exerting, RP 121, 217. He denied radiating pain. RP 122, 127.

Dr. Hampton spent about 30 minutes with Mr. Stalkup. RP 130. He checked Mr. Stalkup's vital signs, RP 122-23, listened to his heart and lung sounds, RP 123-24, felt his carotid arteries and pulse, and checked

his abdomen, RP 124. Dr. Hampton palpated Mr. Stalkup's chest wall and confirmed that doing so reproduced Mr. Stalkup's pain. RP 124.

Dr. Hampton told Mr. Stalkup he thought he had costochondritis, an inflammation of the chest wall. RP 118-19, 124. To rule out a heart attack, though, Dr. Hampton did an EKG, which was normal. RP 124-25. Dr. Hampton told Mr. Stalkup to take Ibuprofen and reduce his activity for one to three weeks, to return if his symptoms continued beyond two or three weeks, and to return immediately or go to the emergency room if his symptoms worsened or changed. RP 118-19, 125.

By June 19, 2004, Mr. Stalkup was having pain radiating down his left arm, and his left hand was numb. RP 180. Ibuprofen was not relieving all of his pain. RP 181.

On June 19, Mr. Stalkup was having a contractor excavate a hillside on his property to prepare the ground for a garage. RP 219-20. Some neighbors, Bobbie and Chris Blessing, who are EMTs, RP 221, visited, and when they asked Mr. Stalkup how he was feeling, he told them he was having some pain. RP 220. Mr. Stalkup described the pain in a way that prompted Bobbie Blessing to shake her finger at him and say she had just been certified to use "my paddles" and would "paddle you," (evidently referring to an external defibrillator that is designed to deliver electric shocks to persons experiencing ventricular fibrillation or pulseless

ventricular tachycardia). RP 220. Ms. Blessing told Mr. Stalkup that his symptoms fit a classic picture of a heart attack. RP 181.

Later that evening, after the Stalkups had dinner, Mr. Stalkup went outside and, after an unspecified but relatively brief period of time, Mrs. Stalkup learned that he was lying in the driveway. RP 221-22. Paramedics, including the Blessings, arrived and tried unsuccessfully to resuscitate him. RP 223. The coroner attributed Mr. Stalkup's death to occlusive atherosclerotic cardiovascular disease. RP 435.

B. Proceedings Below.

Mrs. Stalkup, individually and as personal representative of Mr. Stalkup's estate, filed this action against Dr. Hampton and The Vancouver Clinic. CP 1-6. In her complaint, she asserted claims of negligence, CP 4, and "lack of informed consent," CP 5. The case was tried to a jury beginning on August 21, 2006. RP 1. Mrs. Stalkup did not put on evidence in support of a "lack of informed consent" claim, and that claim was dismissed during trial. RP 456-57.

1. Defense counsel, before opening statement, twice moves to exclude evidence of allegedly negligent acts for which plaintiff had no expert testimony establishing a causal link between the acts and Mr. Stalkup's death.

Before *voir dire*, defense counsel, Mr. Street, moved to exclude, under ER 401 and 403, evidence of any claimed negligence for which Mrs. Stalkup had no expert testimony establishing a causal link between

the claimed negligence and Mr. Stalkup's death. Defense counsel specifically referenced claims in Mrs. Stalkup's trial brief that Dr. Hampton had been negligent during Mr. Stalkup's March 8 visit when he prescribed Lamisil and refilled a prescription for Provacol without doing liver function or cholesterol blood tests. RP 10-11, see RP 17.

In response, plaintiff's counsel, Mr. Pruzan, did not argue that his experts would be able to establish a causal connection between the prescriptions, or the failure to do liver function or cholesterol blood tests, and Mr. Stalkup's death. In fact, he conceded that "it's not our claim that he [Mr. Stalkup] died of . . . liver failure or problems with his liver," RP 12, and that he did not "have direct evidence that, for example, he [Dr. Hampton] didn't take a blood test and find out about [Mr. Stalkup's] liver functions that that had a bearing on him dying," RP 12-13. Rather, plaintiff's counsel argued that evidence of Dr. Hampton's claimed negligence on March 8 should be admitted to show "a course of conduct of how this Defendant handled this particular patient," RP 11, that Dr. Hampton "wasn't paying attention to the issue of . . . this man's potential for coronary artery disease," RP 11, and "was treating this patient in a rather loose fashion," RP 12.

Following more colloquy between the court and Mr. Pruzan, the issue came to be characterized as one about a "propensity for negligent

treatment” under Evidence Rule 404.¹ RP 14-15. Defense counsel then noted that plaintiff had never claimed before that “negligence . . . regarding Lamisil or liver function studies” was somehow related to Mr. Stalkup’s death. RP 17. Mr. Pruzan did not dispute the point.

The trial court indicated that plaintiff’s counsel should “stay away from” ascribing negligence to Dr. Hampton’s actions on March 8 during jury selection and opening statements, but would be given the opportunity to brief the issue, at which time the court would entertain further argument. RP 15-17.

After *voir dire* but before opening statement, defense counsel renewed his objection, “pursuant to Rule 404,” explaining that it “has to do with alleged negligent acts that no expert witness to be called by the Plaintiff will testify was a causal factor in the patient’s demise.” RP 43. The trial court asked Mr. Pruzan if he had had time to research the issue, and Mr. Pruzan indicated that he had not, but told the court that “we will not present any evidence or talk about it until you’ve made a ruling.” RP 43. Mr. Pruzan then reiterated that “Unless I bring this briefing, I will not present the evidence . . .” RP 44.

¹ Plaintiff’s counsel was seeking to suggest to the jury that Dr. Hampton’s failure to do blood tests was emblematic of a chronic lack of vigilance in caring for his patients.

2. Plaintiff's counsel questions Dr. Hampton about his failure to measure cholesterol levels on March 8.

Plaintiff called Dr. Hampton as her first witness and questioned him briefly as an adverse witness. RP 99-119. The tenth question plaintiff's counsel put to Dr. Hampton concerned the March 8 visit and was "Did you take a blood test to measure his cholesterol levels?" The eleventh question put to Dr. Hampton was "Is the answer no, you did not?" The twelfth question put to Dr. Hampton was "You prescribed Lamisil [sic] without knowing the [cholesterol] levels?" RP 100-01.

The questioning then turned to the June 10 visit. After eliciting testimony concerning Mr. Stalkup's presenting complaint of chest pain and the evaluation Dr. Hampton had made, RP 101-06, Ms. Stalkup's lawyer sought Dr. Hampton's admission that Mr. Stalkup had had certain risk factors for coronary artery disease:

- Q: Well he was a male, wasn't he?
- A: He was a male. That was necessary to me that was a significant risk factor.
- Q: And he was over the age of forty-five.
- A: Correct. He was over the age of forty-five.
- Q: And he had hyper-lipidemia?
- A: He had high cholesterol, believed to be controlled, yes.
- Q: Well you didn't know if it was controlled. You hadn't seen any records that said it was . . .

A: I had the patient's belief and his own testimony that it was controlled.

Q: Did he bring any records with him so you could see what it was?

A: Did I actually physically know what his numbers were?

Q: Right.

A: No, I did not actually know what his numbers were.

RP 107.

3. Plaintiff's counsel elicits testimony from plaintiff's expert that Dr. Hampton negligently failed to do blood tests.

Plaintiff's second witness, Dr. Cynthia Smith, a Seattle internist, RP 133-34, was offered as an expert with respect to standard of care and causation issues. Plaintiff's counsel elicited testimony from Dr. Smith to explain causes of chest pain, including costochondritis, risk factors for coronary artery disease, and how the disease leads to cardiac arrest. RP 138-46. After Dr. Smith summarized the role of HDL cholesterol and LCL cholesterol, plaintiff's counsel asked her, "And is that why it's important to take blood tests to find out what these results are?" to which Dr. Smith replied "Correct." RP 146-47.

Dr. Smith's testimony with respect to whether Dr. Hampton had met the standard of care included the following:

Q. Do you have an opinion as to whether or not Dr. Hampton complied with the standard of care in his workup of this patient?

- A. I do not believe he, you know, lived up to the standard of care, because I do not think that he adequately ruled out coronary artery disease.
- Q. Okay. And what, in your opinion, did the standard of care require of him in terms of what he needed to do with this patient on June 10, 2004, given the history that he had?
- A. Well, I mean, he got an EKG, which, you know, leads me to believe that he, you know, was having some consideration of coronary artery disease. He at least considered it in his differential, because you wouldn't necessarily get an EKG for costochondritis. ***But he also should have had blood tests done in the office that day, one, to look at cholesterol, which was never looked at to really even see how well or not it was under control, and then, two, there are specific blood tests that can detect if the chest pain is due to ischemia.*** So basically if parts of the heart cells aren't getting enough blood and they aren't happy, they release certain enzymes. . . .

RP 149-50 (emphasis added). Neither Dr. Smith nor any other trial witness gave testimony attributing Mr. Stalkup's cardiac arrest to any failure by Dr. Hampton to do blood tests.

4. Plaintiff's counsel elicits testimony from Mrs. Stalkup that Dr. Hampton failed to do any blood tests.

Mrs. Stalkup was the third witness plaintiff's counsel called. RP

193. On direct examination, she was asked about health complaints her husband had when he saw Dr. Hampton on March 8, 2004:

- A: Basically he just needed to get his medicine refilled and his rash.
- Q: Okay. Dr. Hampton noted in his record that he had been out of the medication for some period of time. Do you know anything about that?

A: That I'm not sure of. I thought he still had some. He might have been out. But I know whenever we left California, we got all of our prescriptions refilled until we could get a doctor up here.

Q: Okay. Now were you aware of any testing that Dr. Hampton did – like blood tests or anything like that on March 8th?

A: He didn't do any.

Q: Okay. Do you have any idea when the last time John's cholesterol levels had been checked?

A: They had been checked in California.

Q: But you don't know when?

A: No I don't.

RP 212.

5. Defense counsel again complains about plaintiff presenting evidence critical of Dr. Hampton's failure to do blood tests when plaintiff's experts could not connect such failure to Mr. Stalkup's death.

The next morning, defense counsel complained that Dr. Smith had given testimony critical of Dr. Hampton for not doing a blood test, when she and plaintiff's other standard of care expert had conceded in depositions that they could not connect failure to do a blood test to Mr. Stalkup's death. RP 248. Defense counsel asked the court to prohibit further comment criticizing Dr. Hampton for not doing blood tests on March 8. RP 248. Plaintiff's counsel then disclaimed an intention to pursue that subject, claimed he had not asked Dr. Smith specifically about the standard of care on March 8, and told the court he would not "ask the

question of Dr. Cullison [plaintiff's other standard of care expert].” “[G]iven that concession,” the court granted defendants’ motion. RP 249. Until closing argument, plaintiff’s counsel made no further reference specific to blood testing for cholesterol levels or ischemia.

6. Plaintiff’s expert’s other standard of care and causation testimony.

Dr. Smith and/or other experts called by the plaintiff testified that the standard of care required that a patient with John Stalkup’s presentation on June 10 promptly be given a stress test for coronary artery disease or referred to a cardiologist for a stress test and/or angiogram, RP 149-52, 155-56, 161, 363, 366, 371-72; that Mr. Stalkup in retrospect had angina pain due to coronary artery disease, RP 163-65, 264-68, 282 and should not have been told that he had costochondritis based on the normal EKG, RP 150-54, 162, 164; that, under proper care, the coronary artery disease would have been diagnosed and treated with a stent, RP 258-62, 279-82, 288-89, and Mr. Stalkup would not have died of the coronary arrest on June 19, 2004, RP 285-89, which plaintiffs’ experts opined was caused by his coronary artery disease, RP 277, 289.

Cholesterol and ischemia continued to be recurring themes of the case, however. Plaintiff’s expert witnesses testified about cholesterol and

cholesterol levels² when explaining how coronary artery disease develops and what the risk factors for the disease include, RP 270-71, 283, 285, 286, 364, 435, 443, and about decreased or insufficient blood flow to the heart as a consequence of coronary artery disease, RP 267-69, 362, 368. Plaintiff's counsel also questioned defense expert, Dr. Bradley Evans, as to whether it would have been possible to "restore blood flow" to Mr. Stalkup's heart had he been diagnosed earlier with coronary artery disease. RP 512. Plaintiff's counsel confirmed that high cholesterol is a risk factor for coronary artery disease when cross-examining defense expert, Dr. Daniel Urbach. RP 624.

7. The experts disagreed as to whether coronary artery disease caused Mr. Stalkup's fatal cardiac arrest.

Plaintiff's experts, Dr. Cynthia Smith, RP 165, Dr. Jeffrey Westcott, RP 289, and Dr. Samuel Cullison, RP 372, opined that Mr. Stalkup died because of coronary artery disease. The Clark County Coroner testified to his conclusion, based on autopsy, that Mr. Stalkup died as a result of occlusive atherosclerotic cardiovascular disease. RP 435. Dr. Westcott opined that a proper diagnostic work-up would have led to a diagnosis of that disease and intervention that likely would have

² Dr. Smith referred to cholesterol or either "HDL" or "LDL" in conjunction with cholesterol no fewer than 22 times. RP 143, 146-47, 150-51, 155. Dr. Jeffrey Westcott referred to cholesterol at least six times, at one point saying that "cholesterol control is critical" in the treatment of people diagnosed with coronary artery disease. RP 283.

prevented the June 19 cardiac arrest. RP 288-89.

Dr. Hampton disputed the conclusion that Mr. Stalkup's heart stoppage was due to coronary artery disease. In response to questioning by plaintiff's counsel, he testified:

Q. Okay. But John died of angina and coronary artery disease, didn't he?

A. No. We're not necessarily exactly sure what Mr. Stalkup died of. We know for a fact that he had a significant blocked artery, the most common, which is LAD. We suspect that he probably also had an arrhythmia at the time of his death. Now, based upon that, we're making assumptions.

Q. Well, do you think it's more likely than not that the coroner's correct that he died of occlusive atherosclerotic heart disease?

* * *

A. I believe John Stalkup died because he had a heart arrhythmia.

Q. Due to coronary artery disease?

A. Possibly due to coronary artery disease.

* * *

Q. Okay. So you – you would dispute that it's not more likely – you would say that it – one cannot say that it's more likely than not that he died of coronary artery disease based upon the autopsy report?

A. I would say I cannot make that determination.

* * *

Q. So I shouldn't put a box – an X in this box³ that in your opinion it's more likely than not that John died of coronary artery disease?

³ The reference to a box is to a box on a chart that plaintiff's counsel used. RP 487.

- A. I'm telling you today that I cannot make that determination greater than 50 percent.

RP 115-16.

Defense expert Dr. Bradley Evans, a cardiologist, RP 471, also disagreed that Mr. Stalkup probably died of coronary artery disease. In his opinion, Mr. Stalkup died because his heart stopped due to a sudden arrhythmia. RP 475, 496-97. Dr. Evans testified that Mr. Stalkup did have coronary artery disease based on the autopsy findings, RP 486, but that it was asymptomatic, RP 499, and that one cannot say, based on the information available, that coronary artery disease probably caused the sudden arrhythmia. RP 486-87, 497. Plaintiff did not object to that testimony on the ground that Dr. Evans did not frame his opinions in terms of reasonable medical probability. Nor did plaintiff's counsel object when Dr. Evans was asked later whether he agreed or disagreed that Mr. Stalkup died of coronary artery disease:

- Q. Last box⁴ says, Mr. Stalkup died of coronary artery disease. Do you agree with that?

- A. I disagree. I think he died of sudden cardiac death. He died of sudden cardiac death, which is an arrhythmia, and he died of sudden cardiac death which is an arrhythmia and he had the presence of coronary artery disease. There are people that die of sudden cardiac death that don't have any coronary disease. So he had physiologic death with an arrhythmia, and in his body we found coronary

⁴ The reference to "Last box" refers to the last box on the chart plaintiff's counsel had used. RP 487; see footnote 3, supra.

disease. Those are probably related, but I can't tell you for sure that they are.

RP 496-97. Dr. Evans then went on to explain on cross-examination by plaintiff's counsel as follows:

Q. Well, Dr. Wickham, the coroner who did the autopsy, told us this morning that the arrhythmia that he sustained was the direct result of the coronary artery disease that he had. Do you disagree with the coroner on that?

A. Coroners look at a – death and try and find anatomy to explain that. And I look at this gentleman and say he died of an arrhythmia and he had coronary artery disease. There are cases that are not infrequent of sudden death where they die of something – where they die of sudden death but they do not have coronary disease.

Q. Well, let me ask it this way. . . . On a more-probable-than-not basis, 51 percent chance, do you think, based on that, that it's more likely than not that he – that his arrhythmia was a – was a direct result of his coronary artery disease?

A. I'm having trouble answering it in the way you're phrasing it, and the reason is that most arrhythmias are caused by the interface of scar tissue and abnormal tissue and normal tissue, and a little pathway forms in there that causes this arrhythmia.

In this gentleman's situation, his heart didn't have any of that scarring. And coronary disease usually causes that scarring, which causes that arrhythmia. So, I guess I'm saying in a more probable than not, I can't assign a percentage for you.

Q. So you don't know one way or the other, is that what you're saying?

A. I said I can't assign a percentage for you.

Q. So you can't say it's more probable than not, you can't say it isn't more probable than not?

A. I – I guess if that's the way that I can't assign a percentage for you means, then that's what that would mean.

Q. Okay. But in any event, you disagree with the coroner? Or you don't disagree. Maybe you can phrase it that way for us.

A. The coroner said he died of coronary disease?

Q. The coroner said that his arrhythmia that he had was due to the coronary artery disease that was blocking his arteries.

A. I'd say you can't say that with certainty.

Q. So you disagree with him?

A. On a percentage basis.

Q. On a more probable than not?

A. On a percentage basis, I'll disagree with him.

RP 500-02. Dr. Evans further testified on cross-examination:

Q. . . . And you agree that he died of coronary artery disease, or are you still not comfortable with that?

A. I say that he died of sudden death in the presence of coronary disease.

Q. Sudden death. Okay. We'll write that down.

So what you're saying is that it could have just been coincidental. Here's a guy with blocked arteries and he has sudden death, and just so happens he has blocked arteries, but it has nothing to do with it?

A. Could have been.

Q. Okay. But you can say it's more likely than not that that's the case?

A. No.

RP 512-13.

8. The experts also disagreed whether Mr. Stalkup's death could have been prevented had Dr. Hampton done a more thorough work-up for coronary artery disease, even if that was the cause of the death.

Plaintiff's expert, Dr. Westcott, opined that Mr. Stalkup had coronary artery disease on June 10, 2004; that some kind of exercise test would have been positive; that an arteriogram would likely have shown the disease; that placing a stent would likely have been a successful procedure; and that, if Mr. Stalkup had been so treated prior to his sudden death on June 19, 2004, he probably would have survived. RP 288-29.

Defense expert, Dr. Evans, did not agree that Mr. Stalkup would necessarily be alive and well today had Dr. Hampton referred Mr. Stalkup to a cardiologist on June 10, 2004. Dr. Evans testified:

- Q. . . . Do you agree that if a referral had been made to a cardiologist, that Mr. Stalkup would certainly have been evaluated in a way that he was diagnosed and definitively treated, and essentially cured and live a normal life expectancy?

* * *

- Q. Do you believe that that would be more probable than not?

* * *

- A. Is the question if Mr. Stalkup was referred to me –

- Q. A reasonably prudent cardiologist.

- A. A reasonably prudent cardiologist, that they would go on to diagnosis and treatment that would have caused him to survive in a more probable than not[?]

- Q. Yes.

A. Okay. If Mr. Stalkup had been referred to a cardiologist, a cardiologist would do a history and physical. And based on that history and physical, whether – they would try and ascertain whether they thought the chest pain was cardiac or non-cardiac. And, if they thought the chest pain was non-cardiac, they may not have done further testing and missed the asymptomatic coronary disease. If they thought the chest pain was cardiac, they may have done a treadmill and – found this coronary disease.

RP 498-99. As Dr. Evans had earlier explained, it was “unknown” whether Mr. Stalkup would have survived with treatment before June 19:

Q. Okay. The next box says, would survive with treatment before June 19, 2004. Do you agree or disagree?

A. Unknown.

Q. Can you explain?

A. Well, it would be dependent on the timing of the treatment. The way this all worked out, he was seen on the 10th. If he'd got a treadmill test on the 12th and an angiogram on the 18th and he was scheduled for surgery on the 25th, he may still have had sudden death.

Q. Does – once a diagnosis is made and a patient is awaiting treatment, is the patient still at risk for a sudden cardiac arrhythmia such as Mr. Stalkup suffered?

A. Yes.

RP 494.⁵ As Dr. Evans further testified on cross-examination by plaintiff's counsel:

⁵ Dr. Evans further testified that “there are times when you may attempt to do a stent or balloon and you won't be able to complete that procedure.” RP 495.

Q. . . . And didn't you also tell me that, with regard to this question, he would survive if there was treatment before June 19th? In other words, if he [Mr. Stalkup] were to be revascularized prior to June 19th, he probably would not have died of this sudden death?

A. Maybe.

Q. Well, didn't you tell me that assuming his death was due to coronary disease, he would not have died that sudden death due to coronary disease if he were revascularized?

A. Assuming his death was due to coronary disease, he would not have died if he'd been revascularized. However, I just said that he died of sudden death in the presence of coronary disease.

RP 500. And, as Dr. Evans further explained on cross-examination:

Q. And if he had treatment, we went over this, and was revascularized, he probably would have survived, prior to June 19th?

A. If his treatment had sort of magically fallen in line and his sudden death had been due to his coronary disease, which I'm having a little problem with here, yes. A lot of assumptions there.

Q. All right. And it's more likely than not, whether he had a stent or he had coronary artery bypass grafting that it would have been successful, based on the statistics that we know of?

A. That it would have been successful in restoring blood flow to that front part of his heart through – and he probably had collaterals, but it would have been successful in restoring blood flow to the front part of the heart.

Q. All right.

A. Which was never demonstrated to be impaired.

RP 511-12. And, as Dr. Evans had otherwise made clear, he did not agree more probably than not that Mr. Stalkup's arrhythmia or sudden cardiac death was due to his coronary artery disease. RP 496-97, 500-02, 512-13.

9. Other testimony of plaintiff's expert witnesses did not go unchallenged on cross-examination.

Dr. Smith acknowledged on cross-examination by defense counsel that she had reviewed cases primarily for plaintiffs' lawyers, and had usually expressed opinions favorable to plaintiffs. RP 169-70. Dr. Smith acknowledged that equally qualified practitioners may disagree about a given patient's case, and that a physician who actually sees the patient is in a better position than someone reviewing a case retrospectively. RP 176-77. Dr. Smith acknowledged that symptoms that Mr. Stalkup related to Bobbie Blessing, his EMT neighbor, a few hours before he died sounded like worsening ones and that Mr. Stalkup "would have had a good outcome" had he promptly sought treatment at an emergency room. RP 180-82.

Dr. Westcott acknowledged on cross examination that the coroner had done only a "gross observational autopsy" without microscopic analysis of the heart muscle that would show whether Mr. Stalkup had a myocardial infarction (heart attack) on June 19 or earlier. RP 276, 291-92.

Dr. Samuel Cullison acknowledged on cross-examination that he had testified at his deposition, a month before trial, that Mr. Stalkup's presentation on June 10 did not include any of the ten classic signs and symptoms of cardiac-related chest pain, RP 388, and that one of three patients in the family practice setting who complains of chest pain has a musculoskeletal problem, and that not every patient with chest pain gets a full cardiovascular workup. RP 395-96. Like Dr. Smith, Dr. Cullison agreed that what Mr. Stalkup had related to Bobbie Blessing hours before his fatal coronary arrest indicated worsening symptoms that Mr. Stalkup had not had on June 10. RP 400.

10. Jury instructions and verdict form.

At the end of the case, the jury was instructed, as requested by plaintiff, CP 13 and 17, in accordance with WPI 1.02, that its members were the sole judges of the credibility of witnesses, CP 62, and, in accordance with WPI 2.10, that it was not required to accept the opinion of any expert witness, CP 70. The only jury instruction given by the court to which plaintiff took exception was Instruction 12, CP 75 and WPI 105.08 (a physician is not liable for selecting one of two or more alternative diagnoses . . .). RP 707-08.

The jury was given a special verdict form, CP 83-84, that was identical in structure to the forms proposed both by plaintiff and by

defendants. Compare CP 83-84 with CP 29-30 (plaintiff's proposed form) and CP 53-54 (defendants' proposed form). The special verdict form asked whether the defendants were negligent and, if the jury's answer was "yes" to that question, whether "such negligence was a proximate cause of the death of John Stalkup?" CP 83. The special verdict form was essentially a customized version of WPI (Civil) Verdict Form No. 45.22. The verdict form was discussed on the record before closing arguments, and neither party objected to it. RP 700-01.

11. Plaintiff's counsel makes reference to Dr. Hampton's failure to order blood tests in closing argument.

The first thing plaintiff's counsel reminded the jury of when he began reviewing the evidence in closing argument was that Dr. Hampton had not tested Mr. Stalkup's blood:

So you'll recall that the first visit for Mr. Stalkup at the Vancouver Clinic was March 8th, 2004 and he went there and at that time, he had some complaints. Dr. Hampton did not do a complete physical at that time. ***No blood tests were ordered.*** Dr. Hampton did not check the status of John's liver function even though preocol (ph) was prescribed – or at least it was going to be re-ordered for him.

RP 730 (emphasis added).

12. The jury returns a verdict finding negligence, but no proximate cause.

The jury returned its verdict on August 29, 2005. CP 83-84. The jury answered "yes" to Question 1, which asked whether the defendants

were negligent, but “no” to Question 2, which asked whether such negligence was a proximate cause of Mr. Stalkup’s death. CP 83.

13. Mrs. Stalkup moves for judgment as a matter of law on proximate cause and for a new trial on damages only.

On September 5, 2006, Mrs. Stalkup moved for judgment as a matter of law on the issue of proximate causation, invoking CR 50(a)(1), and for a new trial on the issue of damages only, invoking CR 59(a)(7). CP 94-95. In a supporting memorandum, she argued that it had been “clear” and that there was “no dispute” that John Stalkup had died of coronary artery disease and that his death would have been prevented had that disease been diagnosed before June 19, 2004. CP 90-91. Mrs. Stalkup asserted in support of her motion that “we now have a ruling by the jury that Dr. Hampton was negligent in failing to properly perform a workup on Mr. Stalkup himself or refer him to a cardiologist on a timely basis.” CP 92. Mrs. Stalkup asserted that “a jury finding that Dr. Hampton’s negligence was not a proximate cause of Mr. Stalkup’s death . . . [therefore] cannot be supported.” CP 92. Plaintiff did not ask the court, in the alternative, to order a new trial as to all issues.

The defendants pointed out in response that the evidence presented at trial did support the jury’s answers to Questions 1 and 2 on the special verdict form (a) because the plaintiff had presented (and cited in

argument) opinion testimony by Dr. Smith that Dr. Hampton should have done blood tests, and (b) because there had been no testimony based on which the jury could have found a causal link between failing to do blood tests and Mr. Stalkup's death. CP 143-45. Defendants explained that the jury could have found that Dr. Hampton was negligent only in failing to do blood tests, in which case it could only have answered "no" to Question 2. CP 144.

Alternatively, the defendants contended, that the jury could have answered "yes" to Question 1 because it was persuaded that Dr. Hampton had been negligent in failing to test more aggressively, or to refer Mr. Stalkup for testing, for coronary artery disease, but "no" to Question 2 because it was unpersuaded that coronary artery disease was the cause of Mr. Stalkup's death and/or that a diagnosis of coronary artery disease between June 10 and 19 would have prevented Mr. Stalkup's death. CP 146-53. Defendants asked the court to deny plaintiffs' motion. CP 155.

After the court heard argument on plaintiff's post-trial motion on October 6, 2006, it announced that it was not going to do what either party requested, but instead was granting a new trial on all issues. RP 825-26. Although the court found that there was substantial evidence from which the jury could have found Dr. Hampton negligent for failing to do blood tests and that there was no evidence that such failure was a proximate

cause of Mr. Stalkup's death, RP 825, the court did not let the jury's verdict stand. The court orally explained its reasoning for instead granting a new trial on all issues as follows:

There are a couple of authoritative cases, I'm thinking primarily of *State v. [Golladay]*. It's a criminal case where the two theories were presented to the jury as a homicide based on either a robbery or a kidnapping [and] there was ample evidence of kidnapping [but] insufficient evidence of robbery.

The [Washington] Supreme Court . . . held that where there are two theories submitted [and] one is insufficient, then a new trial is required because we can't speculate on which theory the jury chose to believe.

RP 826.

On November 14, 2006, the court entered written orders denying plaintiff's motion, CP 205-06, but granting a new trial "on all issues, due to imprecision in the verdict form." CP 202. The court's Supplemental Explanatory Order explained that

There was evidence that Defendant was negligent in (1) failing to diagnose Coronary Artery Disease, (2) not referring Plaintiff [sic] to a specialist to diagnose/treat for Coronary Artery Disease; (3) failing to administer blood tests. Plaintiff relied only upon allegations 1 and 2, not upon 3."

The jury found that Defendant's negligence was not a proximate cause of the death of Mr. Stalkup.

If the jury found Defendant negligent in regard to 1 and 2, the finding of no proximate cause was contrary to the evidence, as no evidence supported the conclusion that Coronary Artery Disease did not cause the death. The

testimony of Dr. Evans was critical of the proposition that proper diagnosis or referral would have saved Mr. Stalkup's life, but Dr. Evans did not testify in appropriate terms of reasonable medical probability.

If the jury's verdict was that Dr. Hampton was negligent in not ordering blood tests, and that negligence was not a proximate cause of death, then the jury would have been sidetracked onto a non-issue that never should have been submitted to them.

The problem is that the verdict for and instructions failed to adequately set out the Plaintiff's theories and therefore failed to properly state the questions which the jury was required to answer. The verdict then, is incomprehensible.

Plaintiff now argues the jury found that Dr. Hampton was negligent in the respect that Plaintiff argued at trial, but we can't be sure.

Defendant argues that the jury found that Dr. Hampton's negligence, whatever it was, was not a proximate cause of the death, but, without knowing in what regard Defendant was found negligent, we can't reach that conclusion.

Both sides are entitled to a new trial. In the new trial, I will grant Defendant's motion to exclude reference to alleged negligent behavior which is not accompanied by testimony that such negligent conduct was a proximate cause of death.

CP 203-04 (underscorings by the court).

V. STANDARD OF REVIEW

A. Review of Verdicts for Inconsistency.

In reviewing a verdict claimed to be inconsistent, the court must try to reconcile the jury's answers to special interrogatories. Alvarez v. Keyes, 76 Wn. App. 741, 743, 877 P.2d 496 (1995); Myhres v.

McDougall, 42 Wn. App. 276, 278, 711 P.2d 1037 (1985). “The rule in this and other jurisdictions is that answers to special interrogatories should, if possible, be read harmoniously.” Van Cleve v. Betts, 16 Wn. App. 748, 757, 559 P.2d 1006 (1977) (holding that a jury’s findings of contributory negligence but no proximate causation were reconcilable).

Given “the strong presumption in favor of jury verdicts,” in determining whether the evidence presented at trial would permit a reasonable jury to answer the verdict questions as the jury did, the party in whose favor the jury found “is entitled to all reasonable inferences.” Brashear v. Puget Sound Power & Light Co., 100 Wn.2d 204, 209, 667 P.2d 78 (1983). If the evidence and reasonable inferences therefrom would permit the jury to find as it did, and the jury was not improperly instructed, then the jury’s verdict must stand. Id.

B. Review of Orders Granting New Trial under CR 59.

The standard of review of a ruling granting or denying a motion for a new trial under CR 59 depends on the basis for the ruling. When the ruling is based on a question of law, review is *de novo*; when such a ruling is based on a question of fact, review is for manifest abuse of discretion. Ramey v. Knorr, 130 Wn. App. 672, 686, 124 P.3d 314 (2005), rev. denied, 157 Wn.2d 1024 (2006); see also State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981) (a trial judge’s grant or denial of a motion

for new trial will not be overturned except for manifest abuse of discretion except where questions of law are involved).

Even when the standard of review is abuse of discretion, a trial court's discretion to grant a motion for a new trial "does not give [it] license to weigh the evidence and substitute its judgment for that of the jury, simply because it may disagree with the verdict." State v. Williams, 96 Wn.2d at 221. A court abuses its discretion by rendering a decision on untenable grounds or for untenable reasons. In re Schuoler, 106 Wn.2d 500, 512, 723 P.2d 1103 (1986).

Where the proponent of a new trial argues the verdict was not based upon the evidence, appellate courts will look to the record to determine whether there was sufficient evidence to support the verdict. . . . Where sufficient evidence exists to support the verdict, it is an abuse of discretion to grant a new trial.

Palmer v. Jensen, 132 Wn.2d 193, 197-98, 937 P.2d 597 (1997).

VI. ARGUMENT

A. The Trial Court Erred in Granting a New Trial Because The Jury's "Yes" Answer to the Negligence Question and "No" Answer to the Proximate Causation Question Can Be Reconciled Under the Evidence the Jury Heard.

The court's basic reason for ordering a new trial – that the jury's two findings are irreconcilable – is incorrect. Based on the evidence the jury heard, and giving Dr. Hampton and The Vancouver Clinic the benefit

of all reasonable inferences, there is more than one way that the jury's findings of negligence but no proximate cause can be reconciled.

1. Under *Brashear*, the test is whether a jury's findings of negligence but no proximate cause can be reconciled.

In *Brashear*, 100 Wn.2d 204, a cable TV installer sued a power company for injuries suffered when he climbed a utility pole and touched an ungrounded lamp. At trial, the plaintiff presented evidence and argument supporting four distinct theories as to how the utility company had been negligent. The trial court evidently submitted the case to the jury using a verdict form like the one used here and got the same answers that the jury in this case gave. *Brashear*, 100 Wn.2d at 206 (“The jury found, in answer to interrogatories, that Puget Power was negligent but that its negligence was not the proximate cause of respondent's injuries”). The trial court entered judgment on the verdict, dismissing the complaint. On appeal, the Court of Appeals ordered entry of judgment notwithstanding the verdict in favor of plaintiff on negligence and causation, and remanded for a new trial on damages and contributory fault, holding that the jury had been instructed incorrectly and that its findings were inconsistent.⁶ *Brashear v. Puget Sound Power & Light Co.*, 33 Wn. App. 63, 651 P.2d

⁶ The Court of Appeals' decision makes it clear that the defendant utility company objected to the instruction at issue, and thus preserved the issue for post-trial motion and appeal. *Brashear v. Puget Sound Power & Light Co.*, 33 Wn. App. 63, 66, 651 P.2d 770 (1982).

770 (1982).

On review, the Supreme Court agreed that the jury had been misinstructed, and ordered a new trial for that reason. The Supreme Court, however, rejected the Court of Appeals' conclusion that the jury's findings were inconsistent and reversed the grant of judgment notwithstanding the verdict for the plaintiff on the issue of the defendant's liability. After discussing the applicable standard of review for judgments notwithstanding the verdict, the Supreme Court explained that:

Although the verdict appears inconsistent when analyzed, as the Court of Appeals did, using the first three theories of negligence, we believe the strong presumption in favor of jury verdicts evident in the above standard requires a contrary result. Under this standard, [the defendant] is entitled to all reasonable inferences. We conclude the standard requires that we infer the jury found the [defendant] was negligent in failing to warn the public of the danger involved in climbing the pole. If we examine the jury's verdict in this light, the apparent inconsistency disappears. The jury merely concluded that the power company had an obligation to warn but that such a warning would not have prevented the accident. Here, there was evidence that [the plaintiff] was aware of the dangers but took none of the proper precautions, such as wearing either his safety belt or gloves, testing for voltage, or avoiding the potentially energized source – any of which would have prevented the accident. These facts would enable the jury to conclude that [the plaintiff's] own conduct rather than the [defendant's] caused his injuries.

Brashear, 100 Wn.2d at 209. The Supreme Court went on to note that:

“Had the jury been properly instructed, our conclusion [that the verdict is

not inconsistent] would warrant reinstatement of the verdict.”⁷ Id.

Brashear thus holds that when a jury’s findings *can* be harmonized based on the evidence, and after giving the defendant the benefit of all permissible inferences, they *must* be harmonized. See also Alvarez, 76 Wn. App. at 743 (“In reviewing a verdict, an appellate court must try to reconcile the answers to special interrogatories”); Myhres, 42 Wn. App. at 278 (stating the same principle); and Van Cleve, 16 Wn. App. at 757 (applying the same rule and also holding that a jury’s findings of contributory negligence but no proximate causation were reconcilable).

The trial court therefore should have presumed the validity of the jury’s verdict and given Dr. Hampton and The Vancouver Clinic, rather than Ms. Stalkup, the benefit of all reasonable inferences as to what the jury’s underlying findings were.

2. Had the trial court done what *Brashear* requires, it would have inferred reasons for the jury’s answers to the verdict form questions that are consistent with the evidence and that make those answers reconcilable.

The trial court should have inferred, as the Brashear court did, that the jury found the defendants negligent in a way for which causation evidence either did not exist or was not persuasive enough to establish in

⁷ It was only because the jury had not been properly instructed, and the Court could “only speculate as to whether, if properly instructed, [the jury] would have reached the same result,” that the Court ordered a new trial. Brashear, 100 Wn.2d at 209.

the jury's mind that such negligence was a proximate cause of Mr. Stalkup's death. The court should have reconciled the jury's answers accordingly. In this case, there was more than one scenario under which the jury's findings of negligence but no proximate cause could be reconciled.

- a. The jury could have found Dr. Hampton negligent only for failing to do blood tests, but that there was no evidence from which it could find that such negligence was a proximate cause of death.

Mrs. Stalkup presented evidence and argument that Dr. Hampton had been negligent in more than one respect. Indeed, her counsel insisted, over defendants' objections, on putting on evidence that Dr. Hampton was negligent in failing to do blood tests for cholesterol and liver function, even though there was no evidence that failing to do blood tests proximately caused Mr. Stalkup's death. Thus, the jury could well have found Dr. Hampton negligent for failing to do blood tests and answered "yes" to the negligence question on that basis, while answering "no" to the proximate cause question because it had no evidence that such negligence was a proximate cause of the death. Under Brashear, the trial court could have inferred, and therefore was required to infer, that the jury's verdict answers meant that the jury found Dr. Hampton negligent in not doing blood tests, but was unable to find such negligence a proximate cause

because it was presented with no evidence to that effect.

- b. The jury could have been persuaded that Dr. Hampton negligently failed to investigate coronary artery disease adequately, but could have been unpersuaded that coronary artery disease caused Mr. Stalkup's death, or that greater workup on June 10 would have prevented Mr. Stalkup's sudden death on June 19, 2004.

There was substantial evidence both ways on the issue of whether Mr. Stalkup's arrhythmia and sudden cardiac death was due to his coronary artery disease. A reasonable jury could have found, based on Dr. Hampton's and Dr. Evans' testimony, see pages 14-18, supra, that it was not established on a more probable than not basis that Mr. Stalkup's death was due to his coronary artery disease, and thus that any failure by Dr. Hampton to do a more thorough work-up on Mr. Stalkup for coronary artery disease, or to timely refer him to a cardiologist, was not a proximate cause of Mr. Stalkup's death.

Under the law and the court's instructions, the jurors were the sole judges of the credibility of witnesses, CP 62, and were not required to accept the opinion of any expert witness, CP 70. Thus, the jury also could have simply rejected as unpersuasive (particularly in light of Dr. Hampton's and Dr. Evans' testimony, see pages 14-18, supra) the testimony of plaintiff's experts that Mr. Stalkup's death was more probably than not due to coronary artery disease, and answered the

proximate cause question “no,” on that basis, even if it found that Dr. Hampton had been negligent in failing to do a more thorough work-up for coronary artery disease or to refer Mr. Stalkup to a cardiologist.

Moreover, the jury could have rejected as unpersuasive (especially in light of Dr. Evans’ testimony, see pages 18-21, supra) the plaintiff’s evidence or theory that, had Dr. Hampton done a more thorough work-up for coronary artery disease or referred Mr. Stalkup to a cardiologist on June 10, 2004, all of the diagnosis and treatment that plaintiff’s experts described Mr. Stalkup as needing would have “magically fallen into line” prior to June 19, 2004, and averted Mr. Stalkup’s death, if in fact his death were due to coronary artery disease.

It was enough in Brashear that there was *a* way to infer reasons for the jury’s “yes but no” answers that reconciled those answers. In this case there are multiple ways to reconcile the same “yes but no” answers. Thus, the trial court erred as a matter of law by ordering a new trial because it considered the verdict “incomprehensible.” Even if the applicable standard of review were abuse of discretion, the order for a new trial should be reversed, because the trial court set aside a verdict for which there was ample evidentiary support, and “[w]here sufficient evidence exists to support the verdict, it is an abuse of discretion to grant a new trial.” Palmer v. Jensen, 132 Wn.2d at 198.

3. State v. Golladay, cited by the trial court as “authoritative,” is neither controlling nor analogous persuasive authority.

The defendant in State v. Golladay, 78 Wn.2d 121, 470 P.2d 191 (1970), was charged in Clark County with first-degree murder under three alternative theories: (1) homicide by premeditated design to effect death, (2) homicide occurring during the commission of or withdrawing from the scene of a rape, or (3) homicide occurring during the commission of or withdrawing from the scene of a larceny, consisting of taking away from the scene of the rape the victim’s purse and shoes. 78 Wn.2d at 122. The defendant was convicted at a jury trial and sentenced to life in prison.

On appeal, the Supreme Court reversed and remanded for a new trial because the evidence to support the larceny charge was insufficient and because the jury, evidently, had returned a general verdict finding guilt but had not been asked to specify under which theory or theories.

The holding of the case is that:

. . . a defendant may be charged with committing a single crime in two or more ways and proof of one will uphold the indictment or information. But before the jury can be instructed on and allowed to consider the various ways of committing the crime alleged, there must be sufficient evidence to support the instructions. Moreover, the instructions must clearly distinguish the alternative theories and require the necessity for a unanimous verdict on either of the alternatives. When such is the case, the prosecutor need not be forced to elect, for fear that half of the jury will find the defendant guilty on one theory and half on another theory.

State v. Golladay, 78 Wn.2d at 137.⁸

Even assuming that the holding in a criminal decision is applicable to this civil case, Golladay would be pertinent by analogy to this case only if the jury here had found for *plaintiff* by answering both Question 1 and Question 2 “yes.” Such a verdict would have enabled the defendants to argue for a new trial based on error in admitting the testimony criticizing Dr. Hampton for not doing blood tests, even though plaintiff had no evidence of any causal link between the lack of blood tests and Mr. Stalkup’s death. The error would have to be presumed prejudicial because one would be unable to say that the jury found negligence in some respect that the evidence tied to Mr. Stalkup’s death.

The jury in this case, however, found *against* the plaintiff. Golladay does not imply that, if the jury in that case had answered “yes” to a question of whether the defendant had killed the victim, and “no” to a question of whether he had killed her in furtherance of one or more of the three criminal enterprises alleged, the State would have been entitled to entry of a verdict of guilty and a judgment of conviction on the ground

⁸ In State v. Arndt, 87 Wn.2d 374, 378, 553 P.2d 1328 (1976), the court, by a 4-3 majority, overruled Golladay to the extent that Golladay stood for the proposition that jury unanimity is required as to the means used to commit the crime charged even when there is substantial evidence to support each of the alternative means charged.

that evidence of rape was overwhelming. But that is essentially the way the trial court here applied Golladay by analogy. It erred in so doing.

B. The Trial Court Lacked Authority to Order a New Trial on Its Own Initiative for the Reasons It Gave.

Civil Rule 59(d) limits the reasons for which a court may order a new trial on its own initiative to reasons “for which it might have granted a new trial on motion of a party.” The reasons the court gave for ordering a new trial are not ones for which it might have granted a new trial on motion by Mrs. Stalkup for a new trial. Therefore, the court lacked authority under CR 59(d) to order a new trial on its own initiative.

1. Contrary to what the court asserted in ordering a new trial, the plaintiff did rely on evidence, that she presented over objection, that Dr. Hampton negligently failed to do blood tests.

The trial court’s Supplemental Explanatory Order states that:

There was evidence that Defendant was negligent in (1) failing to diagnose Coronary Artery Disease, (2) not referring Plaintiff [sic] to a specialist to diagnose/treat for Coronary Artery Disease; (3) failing to administer blood tests. Plaintiff relied only upon allegations 1 and 2, not upon 3.

CP 202-03. That statement inaccurately characterizes the case presented to the jury. Plaintiff did rely on failure to do blood tests.

Plaintiff’s counsel called Dr. Hampton as the first trial witness and promptly elicited Dr. Hampton’s admission that he had not ascertained Mr. Stalkup’s cholesterol levels before prescribing Provacol on March 8,

2004: “Q: Did you take a blood test to measure his cholesterol levels?”
“Q: Is the answer no, you did not?” “Q: You prescribed Lamisil [sic] without knowing the [cholesterol] levels?” RP 100-01. Plaintiff’s lawyer asked the next witness, Dr. Smith, what the standard of care had required Dr. Hampton to do on June 10, 2004. Dr. Smith answered that Dr. Hampton “also should have had blood tests done in the office that day . . . to look at cholesterol, which was never looked at to really even see how well or not it was under control, and then, two, there are specific blood tests that can detect if the chest pain is due to ischemia.” RP 149-50. Plaintiff’s counsel then asked Mrs. Stalkup, the third witness, whether Dr. Hampton had done any blood tests and she, of course, answered that he had not. RP 212.

The importance of cholesterol and cholesterol levels as a risk factor and cause of coronary artery disease was a recurring theme during trial and, in closing, plaintiff’s counsel reminded the jury of the “no blood tests” testimony that it had heard from Dr. Smith and Dr. Hampton:

So you’ll recall that the first visit for Mr. Stalkup at the Vancouver Clinic was March 8th, 2004 and he went there and at that time, he had some complaints. Dr. Hampton did not do a complete physical at that time. ***No blood tests were ordered.*** Dr. Hampton did not check the status of John’s liver function even though preocol (ph) was prescribed – or at least it was going to be reo-ordered for him.

RP 730 (emphasis added). The failure to do blood tests may not have been plaintiff's principal theory of how Dr. Hampton was negligent, but it was a theory that plaintiff's counsel made sure the jury heard and was reminded of, even though he had no evidence linking the lack of a blood test to Mr. Stalkup's death.

2. Contrary to what the court asserted in ordering a new trial, the jury's finding against plaintiff on the issue of proximate causation is not "contrary" to the evidence, regardless of what the jury's negligence finding means.

The trial court reasoned that "no evidence supported the conclusion that Coronary Artery Disease did not cause the death [emphasis by the court]," and that the jury's finding of no proximate cause was therefore "contrary to the evidence" if the jury found Dr. Hampton negligent in failing to diagnose coronary artery disease or refer Mr. Stalkup to a cardiologist. CP 203. That reasoning is erroneous for three reasons.

First, the court's explanation for its reasoning is that, although "[t]he testimony of Dr. Evans was critical of the proposition that proper diagnosis or referral would have saved Mr. Stalkup's life," Dr. Evans "did not testify in appropriate terms of reasonable medical probability." CP 203. But Dr. Evans' opinion testimony was admitted without any objection from plaintiff that it was not properly framed. Plaintiff failed to

preserve, and thus waived, any argument that the verdict was tainted by inadmissible opinion testimony. ER 103(a)(1). Plaintiff therefore could not have moved for, and the court could not have granted, a new trial based on any claimed error in admitting Dr. Evans' opinion testimony. The framing of Dr. Evans' testimony is not a "reason for which [the court] might have granted a new trial on motion by a party." CR 59(d).

Second, it does not matter how Dr. Evans' testimony was framed or even that he testified. It is the province of a jury to believe or disbelieve any witness. Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). Instruction 1, CP 62, informed the jurors that "[y]ou are the sole judges of the credibility of the witnesses [and] of the value or weight to be given to the testimony of each witness." Instruction No. 7, CP 70, told the jury that it was "not . . . required to accept" the opinion of any expert witnesses. Both instructions are standard⁹ and accurate statements of the law. Both were requested by plaintiff. CP 12, 17. Plaintiff objected to neither. They are the law of the case. Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 281, 96 P.3d 386 (2004).

Thus, regardless of how Dr. Evans' testimony was framed or how persuasive the jury found his testimony, the jury was entitled to *disbelieve* the opinion testimony of all of *plaintiff's* causation witnesses, and

⁹ One is part of WPI 1.02, the other is part of WPI 2.10.

especially when their cross-examinations elicited concessions and/or evidence of pro-plaintiff bias from which a jury rationally could doubt the credibility of their opinions. Because it was the province of the jury to believe or disbelieve witnesses and to find the facts, the court's "contrary to the evidence" reasoning is really the substitution of its own judgment as to witness credibility for the judgment of the jury, which is error. Morse, 149 Wn.2d at 575.¹⁰

Third, the trial court's reasoning is incorrect insofar as it suggests that lack of proximate cause was something the defense failed to prove.

¹⁰ See also Bean v. Stephens, 13 Wn. App. 364, 534 P.2d 1047, rev. denied, 86 Wn.2d 1003 (1975), concerning how much deference our appellate courts have accorded to jury findings as to causation. As the Bean court explained, 13 Wn. App. at 369:

We here have a case where the plaintiff walked into a dentist's office with a toothache and walked out with a dental instrument in her alimentary canal. Whatever one may feel about such an occurrence, the fact remains that in this case the jury was the final arbiter of the facts.

The case was tried to a jury of plaintiffs' peers. It was submitted on written instructions as to the law and to which plaintiffs took no exception. The jury found for the defendants on conflicting testimony as to what caused the event in question.

As held in Rettinger v. Bresnahan, 42 Wn.2d 631, 633-34, 257 P.2d 633 (1953):

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

The record discloses substantial evidence which, if believed, supports the verdict of the jury.

The only burden of proof with respect to proximate causation was the plaintiff's burden to persuade the jury, based on sufficient evidence to support such a finding, that professionally negligent conduct not only occurred, but more probably than not was a but-for cause of Mr. Stalkup's death. That is the law in Washington, RCW 7.70.040 and WPI 105.30, and it is the law of the case by reason of Court's Instruction 8, CP 71, to which plaintiff did not object.¹¹ Barrett, 152 Wn.2d at 281. Under the law of the case, the defense bore no burden of proof as to any issue, and thus did not need to present evidence affirmatively refuting plaintiff's causation experts' testimony.

3. Contrary to what the court asserted in ordering a new trial, the court's instructions to the jury with regard to plaintiff's theories of liability were adequate, because plaintiff requested and took no exception to them.

The trial court identified "the problem" as being "that the verdict form and instructions failed to adequately set out the Plaintiff's theories

¹¹ The "burden of proof" includes both the obligation to produce sufficient evidence to permit the finder of fact to find a factual proposition more likely true than not, and the burden of persuading the finder of fact that the factual proposition *is* more likely true than not. See Hatfield v. Columbia Federal Sav. Bank, 68 Wn. App. 817, 825, 846 P.2d 1380, rev. denied, 121 Wn.2d 1030 (1993) ("The function of a 'burden of production' is to identify whether there is an issue of fact suitable for the trier of fact, while a 'burden of persuasion' defines the degree of certainty by which the trier of fact must resolve an issue"), disapproved of on other grounds in Burnside v. Simpson Paper Co., 123 Wn.2d 93, 106, 864 P.2d 937 (1994); and Colonial Imports v. Carlton Northwest, 83 Wn. App. 229, 239, 921 P.2d 575 (1996) (the burden of persuasion refers to how persuaded "the trier of fact (not the appellate court) must be"). Although Mrs. Stalkup met her burden of producing sufficient evidence to get her claim of malpractice to the jury, the jury's verdict establishes, as a matter of finality, that she failed to carry her burden of persuading the jury that negligence by Dr. Hampton more probably than not was a but-for cause of Mr. Stalkup's death.

and therefore failed to properly state the questions which the jury was required to answer.” CP 203. But the plaintiff made no argument, even in her post-trial motion, that the court’s jury instructions were “inadequate” in that or any other respect.¹²

“Inadequacy” of jury instructions would constitute an error of law. A new trial may be granted on motion by a party under CR 59(a)(8), and thus on a court’s initiative under CR 59(d), based on “error in law occurring at the trial and objected to at the time by the party making the application.” A new trial may not be granted under CR 59(a)(8) based on an error in law to which the party seeking the new trial did not object at the time. CR 51(f); Joyce v. Dep’t of Corrections, 116 Wn. App. 569, 600, 75 P.3d 548 (2003) (“A party waives objections to errors in a jury instruction if he or she fails to voice such objections to the trial court”), aff’d in part, rev’d in part on other grounds, 155 Wn.2d 306 (2005). Because plaintiff waived any right to move for a new trial under CR 59(a)(8) based on “inadequate” jury instructions, instructional inadequacy is not a “reason for which [the court] might have granted a new trial on motion by a party.” The court thus lacked authority under CR 59(d) to order a new trial on its own initiative for that reason.

¹² Nor could she have made such an argument, because she took no exception to any of the court’s jury instructions, except Instruction No 12 (a physician is not liable for selecting one of two or more alternative diagnoses . . .). RP 707-08.

4. If the jury got “sidetracked” by the testimony criticizing Dr. Hampton for not doing blood tests, any error in admitting that testimony was error plaintiff invited.

The trial court was right to appreciate, albeit belatedly, the inadmissibility of the testimony criticizing Dr. Hampton for not doing blood tests. The trial court also rightly appreciated that, because the failure to do blood tests was something plaintiff could not tie causally to Mr. Stalkup’s death, admission of that testimony could well have been responsible for the jury’s “no” answer to Question 2, and thus might reasonably have had a material effect on the verdict. Thus, the trial court appreciated that admission of the testimony concerning blood tests had been prejudicial. East Fork Hills Rural Ass'n v. Clark County, 92 Wn. App. 838, 847 n.3, 965 P.2d 650 (1998) (“‘Prejudice’ occurs where, had the challenged evidence been excluded, the outcome of the proceeding might reasonably have been materially affected”). Where the court went wrong, though, is in rewarding plaintiff with a new trial, when it was plaintiff who, over defendants’ objections, presented the prejudicial evidence, and when it was the defendants, not the plaintiff, who were the ones prejudiced by the evidence. Plaintiff should not be rewarded for inviting such error.

Under the doctrine of invited error, “counsel cannot set up an error at trial and then complain of it on appeal.” In re Dependency of K.R., 128

Wn.2d 129, 147, 904 P.2d 1132 (1995) (holding that, where defendant moved to allow testimony by polygraph experts for both sides and court granted the motion, the invited error rule precluded defendant from raising as error the admission of testimony by plaintiff's polygraph expert after defendant's expert proved unable to testify in person and had to testify by telephone). Because it would have been error and/or an abuse of discretion to grant a motion by Ms. Stalkup for a new trial because of an evidentiary error (prejudicial to the defense) that she invited, the trial court lacked authority to order a new trial on its own initiative based on such an error. CR 59(d).

5. The verdict is not "incomprehensible" and, even if it were, its incomprehensibility involves error to which plaintiff never objected, but instead invited.

Contrary to what the trial court stated in its Supplemental Explanatory Order, CP 203, and as explained in Part A above, the verdict is not "incomprehensible." Even it were "incomprehensible," plaintiff still would not be entitled to relief because any error in the verdict form is error that she waived and/or invited.

- a. Plaintiff did not object to use of the verdict form, and thus conceded implicitly that the evidence would allow the "yes" and "no" answers that the jury gave.

Plaintiff's proposed verdict form called for a "yes" or "no" answer to the question of whether there was negligence and, in the event of a

“yes” answer to that question, a “yes” or “no” answer to the question of whether or whether “such negligence” was a proximate cause of injury. CP 29. During the conference on jury instructions after the close of evidence at trial, plaintiff’s counsel did not object to, or express any misgivings about, the similarly-structured form, CP 83-84, that the court proposed to submit to the jury. RP 700-701. By acquiescing in the use of the two-question format for liability findings, both parties – plaintiff included – implicitly acknowledged that it was possible, on the evidence, for the jury to answer “yes” to Questions 1 and 2, or “no” to Question 1 (and thus not to answer to Question 2), or “yes” to Question 1 but “no” to Question 2.

There was nothing unusual, defective, or insufficiently precise about the wording or structure of the verdict form the court used. It is, essentially, WPI (Civil) 45.22. Moreover, while a defect in the wording or structure of the verdict form would constitute an error of law, a trial court cannot grant a new trial on motion of a party under CR 59(a)(8) based on an error of law unless the error was one “objected to at the time by the party making the application.” Because plaintiff made no objection to the verdict form, any defect or lack of precision in the wording or structure of the verdict form is not a basis upon which she could have sought a new trial by post-trial motion, and it is therefore not a “reason for which [the

court] might have granted a new trial on motion by a party.” Again, the court lacked authority under CR 59(d) to order a new trial on its own initiative for that reason.

- b. Plaintiff invited any structural error in the verdict form because she proposed a verdict form that asked the same questions.

Any error in how the verdict form was structured was also invited because plaintiff herself proposed a verdict form that posed essentially the same questions in the same order, and because plaintiff acquiesced in the use of the form the court devised. See Nania v. Pacific Northwest Bell Tel. Co., 60 Wn. App. 706, 709-710, 806 P.2d 787 (1991) (Where party proposed separating certain questions, and had opportunity to review form as changed by the court and did not object, any inconsistency in answers based on structure of form was invited error).

If counsel who had submitted the questions [answered by the jury] saw no inconsistency and raised no objection to the discharge of the jury, we can, at least under the circumstances of this case, see no reason why he should be permitted to try his luck with a second jury.

Gjerde v. Fritzsche, 55 Wn. App. 387, 394, 777 P.2d 1072 (1989), rev. denied, 113 Wn.2d 1038 (1990) (quoting with approval from Strauss v. Stratojac Corp., 810 F.2d 679, 683 (7th Cir. 1987)); see also Sdorra v. Dickinson, 80 Wn. App. 695, 701, 910 P.2d 1328 (1996) (“A court may not vacate a verdict for error of law not involving a lack of substantial

evidence, if the party seeking vacation failed to object or, *a fortiori*, invited the error”).

VII. CONCLUSION

For the foregoing reasons, the trial court’s post-trial orders granting a new trial on all issues and explaining the reasons for doing so should be reversed and the case should be remanded for entry of judgment on the verdict and dismissal of the lawsuit.

RESPECTFULLY SUBMITTED this 15th day of May, 2007.

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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 15th day of May, 2007, I caused a true and correct copy of the foregoing document, "Brief of Appellants," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

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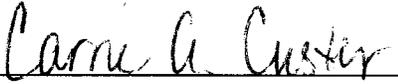
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