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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

NO. 35682-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Appellants.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Respondent accepts appellants' INTRODUCTION, p. 1 with the following major exceptions:

At no time did respondent offer evidence or argue that Dr. Hampton was negligent in what he did or did not do in the March 8, 2004 visit of Mr. Stalkup with Dr. Hampton.

There was no evidence from which a jury could find that Dr. Hampton's negligent treatment on June 10, 2004, was not a proximate cause of Mr. Stalkup's death.

II. ASSIGNMENT OF ERROR

Respondents accept the trial court's grant of a new trial on all issues, and has no assignment of error to present.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

As noted, respondents accept the trial court's grant of a new trial on all issues and therefore has no issues for review.

Respondents will demonstrate that Judge Bennett was well within his discretion in granting a new trial based upon facts presented at the trial and problems related to the instructions.

IV. STATEMENT OF THE CASE.

A. Factual Background.

This case involves the tragic and unnecessary death of John Stalkup, who was forty-nine years of age at the time that he died on June 19, 2004. RP 195. He was a devoted and loving husband to his wife and high school sweetheart, Susan, a wonderful father to his children, Nick and DeAnn. At the time of his death, he also had one grandchild, J.T., who was eight years old. He would now have had two other grandchildren. RP 195, 196.

John and Susan had recently moved back to the Vancouver area, outside of Battle Ground, just over the Cowlitz County line in Amboy. They had been living in California for a few years and came back in January of 2004. RP 202. John was a truck driver for Consolidated Personnel Corporation and he delivered paint on almost a daily basis to stores in Seattle. RP 200. He was just about to be promoted in his job to a driver/supervisor. He was scheduled to start that job July 1, 2004. RP 202.

John was extremely well-liked by his employer. RP 201. He and Susan were very happy to come back to the area to be with their children and their grandchild so that they could be near them and watch them grow and get back to the family. RP 208.

When John and Susan returned they needed to establish care with a doctor. They decided to go to The Vancouver Clinic in Battle Ground, although they ended up with different doctors. On March 8, 2004, John

went to The Vancouver Clinic where he was seen and assigned to Dr. James Hampton, a family practice physician. RP 210, 211.

At the time that he presented to Dr. Hampton, he was concerned about a rash. RP 212. He had some lesions on his back and he needed to re-start a medication called Pravachol that he'd been prescribed a couple years earlier in California to treat him for his elevated cholesterol. RP 212. Dr. Hampton examined the rash, but did not do a complete physical examination. RP 100. He prescribed some Lamisil tablets for his skin problems and said that he would re-start his Pravachol RP 100, 101.

Dr. Hampton did not order any blood tests to assess John's present cholesterol levels at the time, nor did he check the status of his liver function. RP 100,101.

On June 10th, 2004, John called Susan from the truck and said that he needed her to make an appointment that day for him with the doctor. RP 214, 215. At first she thought he was concerned about his rash but then he told her that he was having chest pain and he asked her to make the appointment for him, which she did. RP 215, 216. When he got to the clinic he told the nurse that he had been having chest pain and shortness of breath, which she recorded in the chart. RP 102.

Dr. Hampton noted in his record that John had been having chest pain for about a week. RP 120. He recorded that John first noticed the

chest pain with exertional work activities that involved moving a four by four piece of plywood. RP 121. Dr. Hampton noted that at first John was not too concerned, but when the pain across the middle of his chest continued during every day kind of exertional work activities that he was doing, he did become concerned and was worried about his heart and thought he should go see the doctor. RP 109, 110, 215.

Dr. Hampton's record noted and Dr. Hampton testified that John described the pain as sharp and dull with some pressure in his chest. RP 110, 121. It came on with work exertional activities. Pushing a dolly of paint seemed to aggravate the problem and it seemed to exacerbate his pain. RP 110,121. Importantly, Dr. Hampton indicated that when John performed these exertional activities, he had pain across the middle of his chest. He had to stop and rest and he had to take deep breaths to relieve this pain because it was so intense. RP 109, 110.

Despite this history, Dr. Hampton performed a limited examination. He listened to John's heart and lungs and he took his vital signs and then he palpated his chest on the right and left sides and performed an EKG which Dr. Hampton determined was normal. RP 124. Based upon this cursory examination Dr. Hampton told John that this wasn't a heart problem but it was costochondritis, a chest/muscle wall inflammation and muscle strain. RD 117-119. Dr. Hampton told John to

take eight hundred milligrams of Ibuprofen a day. He told him to put a heating pad on his chest. He told him to take it easy by reducing his activities for a week and then told him that if he wasn't better in about two or three weeks, he should come back and see him. RP 118. So John went home and told his wife and other people that his chest pain was nothing to worry about because the doctor had told him it was just this chest muscle wall problem and it should get better in a couple of weeks. RP 217, 218.

Nine days later, on June 19th, John was out talking to some neighbors on his property who are EMTs and he was telling them about his chest pain that he was continuing to have and they were concerned. But John told them he had been to the doctor and the doctor told him that this was a muscle strain and it would get better in a couple weeks. Despite their concern they, of course, deferred to John's doctor. RP 220.

About an hour or so later, shortly after they had had dinner, John was outside talking to another friend, Jim Harteloo. This friend had loaned them a backhoe that was being used to clear some trees off the property. While they were talking, John suddenly fell to the ground. Jim didn't know what was happening, so he went into the house and he called Susan and asked Susan if John had seizures. He didn't have seizures, so she immediately called 911. RP 222.

The EMT neighbors who were the closest neighbors heard the call come over the 911 system and they immediately came over to lend aid to John. In addition, the paramedics were called and about 20 people showed up. They tried to revive him. After many attempts were unsuccessful, John died at the scene. RP 222, 223.

An autopsy was performed by the Clark County Coroner, Dr. James Wickham. Even though this happened in Cowlitz County, because the Cowlitz County Coroner wasn't available, Dr. Wickham was called in. RP 427. He performed an autopsy and determined that John died as a result of occlusive coronary artery disease. John had a blocked artery that caused his heart to develop an abnormal rhythm, a ventricular tachycardia, which resulted in his sudden death. RP 435, 440.

B. Proceedings Below.

Respondent will respond to appellants' Statement of the Case, B. Proceedings, pp. 5-24 of the Brief of Appellants using the same numerical references.

The brief of the appellants correctly states the basis on which this case was brought. However, respondent does not agree with the statements in appellants' brief as to the proceedings.

1. Defendant's motion in limine was limited to any alleged acts of negligence on March 8, 2004 visit only and did not

preclude discussion of or testimony concerning what did or did not happen on that date.

Defense counsel, Mr. Street brought a motion in limine to preclude the plaintiff from alleging that Dr. Hampton had violated the standard of care by failing to order blood tests to determine Mr. Stalkup's cholesterol levels and the status of his liver functions on the first visit to Dr. Hampton on March 8, 2004 because there was no causal link between ordering those tests **that day** and Mr. Stalkup's ultimate death in June. RP 16. However, there was never any similar motion as to any blood tests that should have been ordered on the June 10, 2004 visit when Mr. Salkup was complaining of chest pain and Dr. Hampton at that time had a duty, as he stated himself, to have coronary artery disease in the differential diagnosis. RP 102. The record is clear that the issue was related to allegations of negligence on March 8. The record states beginning on RP 16:

Judge: Yes. So but just stay away from this ... you can talk about him going to the doctor back then but as far as the negligence alleged in the ... is it April 8th ...

Street: March 22 I think is the date.

Pruzan: March 8.

Street: March 8

Judge: Have the date right. Let's just not go into that in opening or jury selection.

Pruzan: Well ...

Judge: Yes sir?

Pruzan: ... excuse me, Your Honor. In opening statement ... I mean I need to be able to discuss the whole ... the whole scenario ... what happened in March when he first went to go see him and ... and all of those things.

Judge: Well, I'm going to let you do that.

Pruzan: Oh, okay.

Judge: But ... but just ... I wouldn't get into at that March 8th appointment he was negligent and disregard, disregard, disregard.

Pruzan: Okay.

Street: Exactly. And I don't ... I understand that we're both going to address the factual development of the case. What I'm objecting to is an expert opinion that this prior care that's unrelated to the death and never was claimed to be related to the death is negligent...
(Emphasis added)

At no time in this case did plaintiff's counsel elicit "expert opinion" or argue to the jury that Dr. Hampton violated the standard of care in any way on March 8, 2004. Rather, he like defense counsel did discuss the "factual development" of the case and followed the court's order in this regard. At no time did the court order that the parties could not discuss the issue of cholesterol, blood testing or anything else related to the March 8 or June 10 visits. The only prohibition was as to any "expert opinion" that Dr. Hampton violated the standard of care on March 8.

2. Plaintiff's counsel's questioning of Dr. Hampton.

Dr. Hampton was the first witness called in the case and he was asked about what he did and did not do on the March 8th visit. RP 100, 101. Included in that discussion was the evidence concerning Mr. Stalkup's cholesterol levels as Mr. Stalkup had come in specifically asking that Dr. Hampton order cholesterol medication for him on that date. Dr. Hampton was also asked about risk factors for coronary artery disease as it related to the June 10, 2004 visit which was all part of the "factual development" of the case. RP 106. At no time did defense counsel object to any of these questions as they were simply a part of the facts in the case.

Dr. Hampton was called as witness immediately after completion of defense counsel's opening statement in which he went into extensive detail about the March 8 visit including a lengthy discussion of Mr. Stalkup's hyperlipidemia and his need for the Pravachol. He also discussed how and why Dr. Hampton prescribed the medication and his thought processes in doing so. RP 80-84.

3. Testimony by plaintiff's experts.

The first expert witness that plaintiff called was Dr. Cynthia Smyth, an internist. RP 133-34. She was called to testify concerning the standard of care of a reasonably prudent primary care physician. Dr.

Smyth was asked specifically about the June 10, 2004 visit. RP 150. She was never asked any standard of care question concerning the March 8, 2004 visit, nor did she testify about the standard of care on March 8. She confined her testimony to the June 10, visit:

Q. Okay. And what in your opinion, did the standard of care require of him in terms of what he need 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 ... if parts of the heart cells aren't getting enough blood and they aren't happy, they release certain enzymes. And so ... you know ... when patients go to the ER which happens every single day ... patients go to the ER with chest pain they get EKG and they get blood tests. And based on those tests they either get admitted to the hospital or referral to a cardiologist. And so in the office ... you know ... if you get blood tests and you get an EKG and they're normal, it doesn't mean that the patient doesn't have coronary artery disease. It just means that the patient is not having a heart attack right now.

So basically if the tests in the office are abnormal, the patient can't go home, he's got to go straight to the hospital. If the tests are normal, it still doesn't ... you know ... you haven't ruled out coronary artery disease, but you then need a further workup to help look at those blood vessels.

RP 150-151.

As can be seen from this answer the plaintiff was alleging that when Mr. Stalkup came in to see Dr. Hampton on June 10, 2004 there was a failure to do a proper workup and as part of that workup, based upon his symptoms at that time, he needed to have certain blood tests in order to determine whether the patient needed to be hospitalized immediately or referred to a cardiologist. The next question clearly addressed that issue.

Q. So what is your opinion about the standard of care in this case as to whether or not on June 10, 2004, Dr. Hampton should have referred this patient to a cardiologist?

A. Yes. I absolutely think the patient should have been referred to a cardiologist. I think he ... you know ... he ... you know ... presented with classic symptoms of chest pain due to exertion, he had classic angina symptoms, he was over weight, he was on a cholesterol medication. We don't know what that was doing. We don't really know much about the family history because unfortunately his father had died very young...

RP 151.

At no time during the trial was there ever any motion made or order granted stating that the experts could not express an opinion about the need for blood tests on the June 10 visit as part of the workup that should have been done to rule out coronary artery disease.

4. Testimony by Mrs. Stalkup.

Mrs. Stalkup was questioned about the March 8, 2004 appointment with Dr. Hampton, as she was present at the visit with her husband. She was asked about what did and did not happen at that visit as part of the

“factual background” of what happened on that date. She discussed the same issues that were addressed by Mr. Street in his opening statement. RP 80-84, 212.

Obviously, Mrs. Stalkup is not an expert. She was not asked to offer any expert opinions about whether or not Dr. Hampton was negligent at that visit. She was simply asked about her first-hand observations of what happened at the visit.

5. Renewal of Motion in Limine concerning the March 8, 2004 appointment.

The day after Dr. Smyth testified, Mr. Street renewed his motion concerning the March 8, 2004 visit. RP 248. At that time he stated:

Street: So I appreciate that ... that we've been deferring that, but I would seek a ruling at this time that there be no further critical comment in any type of critically phrased language related to an alleged failure to do a blood test on March 8th, 2004.

Judge: Is that an area you plan to pursue?

Pruzan: No. I ... and I didn't ask the doctor anything about the standard of care on March 8th specifically...

Judge: Okay ... and ...

Pruzan: and I'm not going to ask the question of Dr. Cullison.

Judge: ... all right. I ... I'm going to grant your Motion in Limine then, given that concession.

This was the first time that a ruling had been made by the court. It is also clear from the testimony that at no time was Dr. Smyth asked about

her opinion as to the standard of care on the 8th of March as to the failure to order a blood test or on any other matters, nor did she ever voluntarily voice such an opinion.

6. Other expert testimony by plaintiff and defense experts.

The other experts in the case were certainly asked about cholesterol as it relates to how coronary artery disease develops and the risk factors as the case was about coronary artery disease and the failure of Dr. Hampton to properly workup and refer Mr. Stalkup on June 10 to a cardiologist. This was discussed at length in both direct and cross examination by both parties as it was the primary focus of the issues in the case.

At no time did defense counsel object to any questions about cholesterol or any other related matters as they were the focus of the case. He in fact asked Dr. Evans, the defense cardiology expert, about restoring blood flow (revascularization) on direct examination, RP 495, before plaintiff's counsel did so on cross. RP 512.

Dr. Wilson, a defense primary care expert was asked about risk factors and discussed risk factors including cholesterol for coronary artery disease by defense counsel on direct examination on numerous occasions. RP 521, 522, 528, 537, 538, 539, 540, 542, 554. He also asked Dr. Urbach about the use of Pravachol. RP 537.

Defense counsel also asked defense expert Dr. Daniel Urbach questions about risk factors for coronary artery disease including high cholesterol on direct examination prior to any questions by plaintiff's counsel on cross-examination. RP 611, 614.

7. There was no disagreement about whether Mr. Stalkup died of the effects of coronary artery disease.

All of plaintiff's experts and Dr. Wickam, the coroner, opined that Mr. Stalkup died of the effects of coronary artery disease. RP 165, 289, 372, 435. The defense experts and Dr. Hampton did not disagree, nor did they postulate any other reason for his death. RP 115, 504-507, 590, 628. In fact, Mr. Street's opening statement admitted that Mr. Stalkup died of an arrhythmia due to his coronary artery disease. RP 74-75. Mr. Street stated:

It will be important for us all to remember that Dr. Hampton did not cause Mr. Stalkup's death. A disease process did. And we've heard a little bit about it and coronary artery disease has been referred to over the years as one of the silent killers. And many times there are no symptoms that precede what's called a cardiac arrhythmia which leads to sudden death. That's what Mr. Stalkup experienced. In his case, nearly complete occlusion of the LAD ... the left anterior descending artery. One of the silent killers in medicine.

RP 74-75.

Dr. Hampton's testimony as to causation was at best inconsistent. He first testified that he was not "exactly sure what Mr. Stalkup died of." RP 115. He then testified that "**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." RP 115. (Emphasis added) He also testified that "I believe John Stalkup died because of a heart arrhythmia." RP 115. The only thing he wasn't willing to do was say that it was more probable than not that the arrhythmia and the blocked artery were connected. He said that they "possibly" were. He offered no other explanation, however, for Mr. Stalkup's death. RP 115.

Dr. Bradley Evans, the defense cardiologist agreed, despite the impression that the appellants' brief tries to give the court, that Mr. Stalkup died of an arrhythmia due to his coronary artery disease just the same as all of the plaintiff's experts and Dr. Wickam. The following testimony, which was subsequent to the testimony quoted in the appellants' brief and went unquoted in the appellants' brief, establishes Dr. Evan's opinion about this matter beginning on RP 504:

Q. All right. Okay now I want to go back to that question that we were talking about with regard to what the coroner had to say. And whether or not the arrhythmia was due to coronary artery disease. And I direct you please, sir, to page 16, line 19 (of Dr. Evan's deposition). And the question is

Okay. Do you have an opinion as to what caused

his death?

Answer: I think his death was likely due to sudden death.

And what is sudden death?

Typically an arrhythmia.

And due to what in this case?

One would have to say in this case due to coronary artery disease.

Does that help you out in any way in terms of answering this question?

A. I think that we're talking about the same thing. I think he had coronary disease ... in this case he had the presence of coronary disease in the setting of sudden death ...

Q. Well ...

A. ... true ... true ... and unrelated through and through ... I don't know.

Q ... well you said *one would have to say in this case due to coronary artery disease*. Is that still your testimony?

A. I think I tried to explain to you what my thought process was just a little bit ago ...

Q. Well I'm just wanting to make sure.

A. ... our ... our questioning in this day might have been a little different from the questioning in this time, so there are certain subtleties that I'm trying to explain about yes, there was a sudden death. We have coronary disease in this case. So those are probably related but I couldn't ... you know ... put my hand down and say yes they are. (Emphasis added.)

Q. Well, isn't that what you did in the deposition? You said *one would have to say in this case due to coronary artery disease*. So are you changing the testimony? That's all I want to know.

A. Based on the questions that were before that, that is how that line of questioning came out with that answer. So I'm not changing my testimony and I stand by what I said today.

Q. You don't think that ...

A. In fact, as I tried to explain my thought processes.

Q. ... Okay. *And his sudden death was due to an arrhythmia, correct?*

A. Correct.

Q. Okay. And that was the same thing that you were talking about here today?

A. Correct.

Q. And the question was:

*And due to what in this case?
One would have to say in this case due to coronary artery disease.*

So you stand by that testimony.

A. I think they are shades of the same thing.

RP 504-507.

(Transcriber's italics)

Dr. Addison Wilson, one of the defense primary care physician experts was also asked about his views with regard to causation as it relates to whether coronary artery disease caused Mr. Stalkup's death. His testimony is as follows:

Q. And did John Stalkup die of angina – or of coronary artery disease?

A. Probably. Yes. Well, let me qualify that. I'll state what the ... what the ... what was said earlier. He died of an arrhythmia and he had coronary artery disease. I cannot state ... I will ... I'll go back and say he did die of an arrhythmia which may well have been related to his coronary artery disease but I can't state that for certain.

Q. Can you say it on a more probably than not basis? Fifty-one percent?

A. Yes, probably.

RP 590.

The last defense expert, Dr. Daniel Urbach also agreed that Mr.

Stalkup died from the effects of his coronary artery disease. He testified:

Q. And you would agree that Mr. Stalkup died of an arrhythmia due to ischemia, due to blockage of his coronary arteries.

A. That seems most likely.

RP 628.

Finally, defense counsel did not present any testimony concerning any other potential cause of Mr. Stalkup's death.

8. The experts did not disagree whether Mr. Stalkup's death could have been prevented had a more thorough workup been done.

The only two experts who discussed the issue concerning whether Mr. Stalkup would have survived if a timely cardiologic workup had been performed were the cardiologists, Dr. Westcott and Dr. Evans. Dr.

Westcott clearly stated that had a proper workup been done, Mr. Stalkup would have survived. RP 289.

Dr. Evans did not disagree that had the workup been done in a timely fashion before the 19th of June, Mr. Stalkup would have survived.

Dr. Evans gave the following testimony in that regard:

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 were revascularized prior to June 19th, he probably would not have died of sudden death.

A Maybe.

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

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

RP 500.

As just shown in section 7 above, Dr. Evans did in the end agree that Mr. Stalkup died of coronary artery disease. His testimony on pages RP 506-07 confirms this:

Q Well isn't that what you did in the deposition? You said *one would have to say in this case due to coronary artery disease*. So are you changing the testimony? That's all I want to know.

A Based on that questions that were before that, that is how that line of questioning came out with that answer. So I'm not changing my testimony and I stand by what I said today.

Q You don't think that ...

A In fact, as I tried to explain my thought processes.

Q ... okay. And *his sudden death was due to arrhythmia*, correct?

A Correct.

Q Okay. And that was the same thing that you were talking about today?

A Correct.

Q And the question then was: *and due to what in this case? One would have to say in this case due to coronary artery disease.* So you stand by that testimony?

A I think they are shades of the same thing.

(Transcriber's italics)

In addition to this testimony, on direct examination Dr. Evans fully admitted that the arrhythmia was probably due to his coronary artery disease. Dr. Evans was asked the following question by Mr. Street:

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

A Oh, I disagree. He died of sudden cardiac death. He died of sudden cardiac death which is an arrhythmia and he had the presence of coronary disease.

There are people who die of sudden cardiac death that don't have any coronary artery disease. **So he had a physiologic death with an arrhythmia and in his body we found coronary disease. Those are probably related, but I can't tell you for sure that they are.**

(Emphasis added)

Dr. Evans was clear that the arrhythmia and the coronary disease were “probably related.” There is no requirement to prove something “for sure” in a medical negligence case. RP 496-497.

9. Other testimony that was allegedly challenged.

The appellants’ brief sets forth various points that are claimed to have challenged the testimony of the plaintiff’s experts. All of these points are unrelated to the issues on this appeal.

10. Jury instructions and verdict form.

The jury was instructed at the end of the evidence. The jury was advised in the instruction that the plaintiff was claiming that Dr. Hampton was negligent in his care and treatment of John Stalkup. RP 714. The jury was also instructed that the negligence of the defendant had to be a **proximate cause** of Mr. Stalkup’s death, not **the proximate cause** of his death. RP 714.

11. Closing arguments.

At the time of the closing argument plaintiff’s counsel did begin to review the evidence and went back over the factual background which included what was done and not done on the March 8, 2004 visit as it related to the prescription of Pravachol. RP 730. This was completely consistent with the court’s ruling and there was no objection to this statement by defense counsel.

Defense counsel also discussed the March 8 visit in his closing argument. RP 774. He likewise spoke about Pravachol and what Dr. Hampton did prior to prescribing it. He stated:

... specifically with regard to Mr. Stalkup goes back to the March 8 visit that Mrs. Stalkup was at and she says Dr. Hampton was nice, good rapport, good communicator, lots of time. Even asked he ... he didn't want to make the prescription of provacil (sic) until he got the dosage. He asked for the records ... the form to be filled out and the records sent so he could have those if he was going to be taking care of Mr. Stalkup.

RP 773-774.

At no time during the closing argument did defense counsel mention the issue of causation. He let plaintiff's arguments about causation go completely unchallenged. RP 752-780.

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

Respondent agrees with Appellants.

13. Post-trial motions.

The plaintiff moved for a judgment as a matter of law as to the issue of causation and for a new trial on the issue of damages only. CP 94-95. After consideration of the motion and defendant's response, the court determined based upon all of the evidence, the entire proceedings during the nearly two weeks of trial and his experience as a trial judge, that in the interest of justice the proper thing to do in this situation was to

order a new trial. He stated “I know it’s very inconvenient ... but I think in fairness to both sides...” this was the proper course of action. RP 825. As the trial judge he had the best vantage point from which to make this decision, which he obviously did not take lightly.

V. STANDARD OF REVIEW

A. Standard of review is whether the trial court abused its discretion.

Plaintiff agrees that the standard of review where the trial court grants a new trial is as stated in State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981), cited by defendants at pages 28-29:

Except where questions of law are involved, a trial judge is invested with broad discretion in granting motions for new trial. The exercise of that discretion will not be disturbed on appeal absent an abuse of discretion.
(Citations omitted)

A decision which contains an analysis of the distinction between an issue of fact and of law in granting a new trial is Holt v. Nelson, 11 Wn. App. 230, 523 P.2d 211 (1974). In recognizing that the granting of a new trial is within the sound discretion of the trial court when the order is not based solely on rulings as to law, as is the situation in this case, it continued:

While the trial court here has granted a new trial based upon the failure to instruct the jury on the theory of informed consent, intertwined with the ruling was the trial court’s understanding and evaluation of the evidence concerning the duty to inform, the

availability of alternatives and that the patient would have chosen the alternative if given the opportunity.

Holt, 11 Wn. App. at 242-243.

The facts in the instant case are parallel with those in *Holt*.

B. Much stronger showing required to set aside order granting new trial than denying it.

In Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 579 (1997) the often-recognized rule is stated:

A much stronger showing of abuse of discretion will be required to set aside an order granting a new trial than an order denying one because the denying of a new trial “concludes (the parties’) rights.” Baxter v. Greyhound Corp., 65 Wn.2d 421, 437, 397 P.2d 857 (1964).

The provisions of the trial court’s Supplemental Explanatory Order make clear that the trial court was intent on achieving justice for both parties. RP 825, CP 203. Its carefully thought-out ruling should not be overturned.

C. The trial court granted a new trial on its own initiative.

It has long been recognized that a trial court has the inherent power to grant a new trial even though the ground is not one urged by counsel. State v. Higgins, 75 Wn.2d 110, 115, 449 P.2d 393 (1969). The concept is now codified in CR 59.

VI. ARGUMENT

The respondent will respond to the appellants' Argument pp. 29-49 using the same numerical references as appellants.

A. The Trial Court Did Not Err in Granting a New Trial.

The court's basic reason for granting a new trial was that the verdict of the jury was "incomprehensible." This ruling by the court can only be overturned, as shown by both parties, if the court abused its discretion. The court's ruling was made in the interests of justice for both parties and cannot be overturned because the appellants simply allege "that the jury's two findings are irreconcilable – is incorrect." Brief of Appellants p.29. This is nothing more than the appellants substituting their belief for that of the court's.

1. The *Brashear* decision is completely supportive of the court's ruling.

The appellants seek to place great reliance on Brashear v. Puget Power & Light, 100 Wn. 2d 204, 667 P.2d 78. In that case the jury returned a verdict of negligence against the defendant but found no proximate causation. The plaintiff brought a motion for judgment notwithstanding the verdict on the issue of proximate causation and for a new trial on the issue of damage only, just as respondent did in this case. In Brashear the trial court denied the motion and entered judgment in favor of the defendant. The plaintiff appealed and the court of appeals reversed

the trial court, entered a judgment notwithstanding the verdict on the issue of causation and ordered a new trial on the issues of contributory negligence and damages. The supreme court modified the decision of the court of appeals and ordered a new trial on all issues because the jury had not been properly instructed. This is the exact same ruling that Judge Bennett made in this case. He stated in his supplementary order that the jury wasn't properly instructed and therefore on his own motion ordered a new trial. CP 202.

The appellants argue that the verdict in this case was "reconcilable" in this case just as the supreme court discussed in Brashear. That is not correct. In Brashear the supreme court felt that the verdict could be reconciled because there were numerous allegations of contributory negligence. It would have been easy for the jury to have decided that while the defendant was negligent it was the plaintiff's contributory negligence that was the proximate cause of his injuries.

In Brashear the plaintiff, who was employed by Viacom Cablevision went to a home on Mercer Island to make a routine installation. In order to accomplish this he was required to climb a utility pole that was maintained by Puget Power & Light. He went up the pole without a safety harness or putting on insulated gloves. While on the pole he reached for a telephone cable and with his hand on the streetlamp he

received an electrical shock. He lost consciousness and fell to the ground. He sustained very severe injuries.

The plaintiff in Brashear alleged four bases for negligence on the part of Puget Power & Light including failing to equip the streetlight with guards to prevent birds from getting into it; failing to properly inspect the light; failing to ground the lamp; and failing to warn the public about dangers with the poles. On the other hand, the defendant alleged that the plaintiff was negligent in failing to use proper safety equipment; in failing to test the street lamp with a voltage meter; and with making simultaneous contact with a possible voltage source and a ground.

The supreme court quite properly stated in Brashear that:

Here, there was evidence that respondent 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 respondent's own conduct rather than the petitioner's caused his injuries.

In the instant action there was absolutely no allegation of contributory negligence. In fact, defense counsel made a very specific and emphatic statement about that in his opening statement when he said “**Dr. Hampton is not blaming Mr. Stalkup, for heaven's sake.**” RP 76.

Therefore, while in Brashear the verdict of the jury could be reconciled because the jury could have easily found that Puget Power was negligent

in one of the ways that the plaintiff claimed, it could have also found that the proximate cause of plaintiff's injuries was his own negligence in failing to use the proper and appropriate safety equipment including wearing gloves when dealing with high voltage lines and not wearing a safety harness, both of which would have totally prevented his injuries.

2. There were no inferences for the judge to make about evidence in this case to "reconcile" the verdict.

The appellants allege that the court should have found a way to "reconcile" the verdict and entered judgment on behalf of the defendant. However, as the court correctly pointed out in his order there was no way to do that in this case and as shown above, it is not the same as the Brashear case. The reasons cited as to how this could have been done will be shown to be baseless.

a. The blood test issue.

The appellants throughout their brief alleged that the plaintiff made arguments about the failure to order blood tests that are contrary to the evidence.

The motion in limine that was made by the defendant as has been shown was to preclude the plaintiff from alleging that there was negligence on the part of Dr. Hampton for failing to order a blood test on March 8. RP 16, 248. There was never any mention of any negligence by

plaintiff concerning Dr. Hampton's conduct on March 8 and the only testimony about the failure to perform blood tests as being a violation of the standard of care was made by Dr. Smyth who stated that blood tests needed to be performed on June 10 as part of the workup for Mr. Stalkup's complaints on that date which included enzyme testing to determine whether or not he was having a heart attack at that very moment. RP 150-151. There is no way that the jury could have understood that the plaintiff was alleging any negligence on March 8 for anything that Dr. Hampton did or didn't do because there were no such allegations and the appellants have failed to provide the court in thier brief with any such evidence or argument by the plaintiff. The plaintiff, like the defendant, did discuss what happened on March 8 because it was part of the "factual development" of the case as Mr. Street told the court. RP 17.

- b. The only evidence presented to the jury was that coronary artery disease was the cause of Mr. Stalkup's death on June 19, 2004.

The appellants allege that there was "substantial evidence both ways on the issue of whether Mr. Stalkup's arrhythmia and sudden cardiac death was due to coronary artery disease." Brief of Appellants p. 34.

As shown above, there was no evidence presented by the defendants as to any other theory of the cause of Mr. Stalkup's death. Every one of the witnesses agreed that Mr. Stalkup had significant and

severe coronary artery disease as described by the coroner and that he died of an arrhythmia. RP 115, 165, 289, 372, 435, 509-507, 528, 590. There was no evidence put forth by the defendant of any other cause of Mr. Stalkup's death. No one testified on a more probable than not basis that the arrhythmia was due to anything other than the coronary artery disease. The most telling point is that Mr. Street did not even discuss the issue of the cause of Mr. Stalkup's death in his closing argument. RP 752-780. He didn't discuss it because there was no evidence to the contrary. It wasn't an issue that was in dispute at any time in the case. In fact, as previously quoted, Mr. Street, the defense counsel, in his opening statement agreed that Mr. Stalkup died of an arrhythmia due to his coronary artery disease. RR 74-75.

For the appellants to now argue that the jury could have found that Mr. Stalkup's arrhythmia was due to something other than coronary artery disease is completely disingenuous when the issue was admitted in opening statement, no evidence was presented to the contrary and there was no mention of that in closing argument. The jury simply could not reasonably conclude that there was negligence by Dr. Hampton but that Mr. Stalkup died of something other than an arrhythmia due to his coronary artery disease.

Appellants' attempt to argue that the likelihood that the jury found no causation because the arrhythmia was due to something other than coronary artery disease is more persuasive than the plaintiff's contributory negligence of not wearing gloves and a safety harness in Brashear defies belief.

3. State v. Golladay is instructive.

The court in its oral decision cited State v. Golladay, 78 Wn.2d 121, 140 P.2d 191 (1970) for the proposition that "where there are two theories submitted ... one is insufficient, then a new trial is required because we can't speculate on which theory the jury chose to believe." RP 826.

This is precisely what the supreme court ruled in this criminal case in which there were competing theories, for which as to one of them there was no substantial evidence. If the court believed, as it did in our case, that the jury could find negligence on a theory for which there truly was no evidence then a new trial would be warranted.

It should be noted, however, in its Supplemental Explanatory Order the court did not rely on this case and the court clearly set forth its reasoning so that even if this criminal case does not directly apply to a civil case, the Supplemental Explanatory Order is more than sufficient to explain the court's ruling.

B. The Trial Court had Authority to Order a New Trial on Its Own Initiative.

Contrary to appellants' argument, it has long been recognized that a trial court has the inherent power to grant a new trial even though the ground is not one urged by counsel. State v. Higgins, 75 Wn.2d 110, 115, 449 P.2d 393 (1069). The concept is now codified in CR 59 (d):

Not later than 10 days after the entry of judgment, the court on its own initiative may order a hearing on its proposed order for a new trial for any reason for which it might have granted a new trial on motion of a party and in the order shall specify the grounds thereof.

The trial judge's Supplemental Explanatory Order, CP 202, contains a discussion of the facts and their relationship to the jury's verdict. In coming to the conclusion that justice requires a new trial of all issues, the order does not enumerate the ground of CR 59 upon which the granting of a new trial is based. However, it fits soundly under CR 59(a)(9), "That substantial justice has not been done."

In the recent case of Robertson v. Perez, 123 Wn. App. 320, 33, 98 P.3d 420 (2004), the rule is stated:

When a court grants a new trial on the ground that substantial justice has not been done, "the favored position of the trial judge and his sound discretion should be accorded the greatest deference...Oppinski v. Clement, 73 Wn.2d 944, 9511, 442 P.2d 260 (1968) (quoting Baxter v. Greyhound Corp., 65 Wn.2d 421, 440, 397 P.2d 857 (1964)).
(Emphasis added.)

1. Plaintiff did not rely on evidence of failure to perform blood tests on March 8, 2004.

The appellants erroneously imply in their brief on many occasions that there was some order that was entered by the court to prevent discussion of blood tests, cholesterol and cholesterol levels as a risk factor in this case. The appellants on page 39 of their Brief of Appellants state:

The importance of cholesterol and cholesterol levels as a risk factor and cause of coronary artery disease was a recurring theme during trial...

The appellants act as though there was something amiss about this. The only motion that the defendants made in this case was to preclude the plaintiff from alleging that the failure to take a blood test on the March 8 visit was negligent. As has been shown and discussed on numerous occasions no such testimony was elicited and no such argument was made. Certainly both sides talked at length in this case about risk factors, cholesterol and cholesterol levels as shown in the Proceedings portion of this brief. There was no motion made at any time by the defense to limit the discussion of risk factors as it relates to cholesterol. As also previously mentioned, both parties discussed the March 8 visit in closing argument as to what did and didn't happen with regard to ordering Mr. Stalkup's cholesterol medication. RP 730, 774.

2. The court was correct in finding that the jury's verdict was contrary to the evidence.

As has been shown, there was no evidence contrary to what plaintiff alleged as to the cause of Mr. Stalkup's death. In fact, Mr. Street himself agreed to this in opening statement and did not even address the issue in his closing argument. RP 74-75, 752-780.

The testimony of Dr. Evans, contrary to what the appellants try to argue in their brief, did support the plaintiff's position and he did not disagree that the arrhythmia was due to the coronary artery disease. RP 628.

The appellants argue that the jury can disregard any evidence that it wants to and come up with its own decision. However, the jury must have some evidence on which to base its decision. In this case there was no evidence on which they could base their decision of no causation as the court correctly stated. CP 202. The court was not substituting its judgment for that of the jury's. As the appellants note in the footnote on page 42 of Brief of Appellants when citing Rettinger v. Bresnahan, 42 Wn.2d 631, 633-34, 257 P.2d 633 (1953), there must be substantial evidence to support the jury's verdict and not a mere "scintilla" of evidence. The court in Grange v. Finlay, 58 Wn.2d 528, 529, 364 P.2d 234 (1961) defined what this means:

If there is substantial evidence supporting the verdict of the jury, as distinguished from a mere scintilla of evidence, the verdict must stand. By "substantial evidence" is meant that character of

evidence which would convince an unprejudiced, thinking mind in the truth of the fact to which the evidence is directed. These very well established principles are set forth in *Omeitt v. Department of Labor and Industries*, 21 Wn.(2d) 684, 152 P.(2d) 973 (1944), with numerous authorities cited.

Our supreme court further reaffirmed what substantial evidence means in *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980):

There must be “substantial evidence” as distinguished from a “mere scintilla” of evidence to support the verdict – *i.e.* evidence of a character “which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” **A verdict cannot be founded on mere theory or speculation.** *Arnold v. Sanstol*, 43 Wn.2d 94, 98 , 260 P.2d 327 (1953). (Emphasis added)

In order for a jury in this case to believe that Mr. Stalkup died of anything other than an arrhythmia due to his coronary artery disease, especially given what Mr. Street said in his opening statement, would be “mere theory or speculation.”

3. The court’s instructions to the jury.

The appellants argue that because the judge stated in his opinion that the instructions and the verdict form are inadequate and because the plaintiff did not object to those instructions, that somehow the court is precluded from making this ruling.

Plaintiff did not argue for a new trial. She argued for a judgment notwithstanding the verdict and a new trial as to damages only. The court on its own initiative granted the new trial in the interests of justice to both

parties. CP 203. Therefore, to say that the court cannot make its ruling because the plaintiff failed to make objections at trial is erroneous.

CR 59(d) clearly states that:

Not later than 10 days after entry of judgment, the court on its own initiative may order a hearing on its proposed order for a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds thereof.

One of the reasons for which a party can move for a new trial under CR 59(a) is section (9) which states “That substantial justice has not been done”. Another reason under section (7) states “That there is no evidence or reasonable inference from the evidence to justify the verdict or decision.” In this case the trial court stated in its oral opinion “I think it is fairness to both sides...” and he wrote in his Supplemental Explanatory Order, “...the finding of no proximate cause was contrary to evidence, as no evidence supported the conclusion that coronary artery disease did not cause the death. (Court’s Emphasis) CP 204, RP 825. Therefore the court was relying on both of those sections of CR 59 to base his opinion.

4. The plaintiff did not present any prejudicial evidence and there was no error.

The appellants in their brief makes an argument that there was some sort of error committed by the plaintiff. This is completely false. At no time did plaintiff violate the court’s order precluding any evidence of

negligence by Dr. Hampton in failing to order blood tests or anything else on March 8. In addition, even if that were true, there was no objection to any testimony or argument of counsel at the time of any such alleged wrongful conduct by the plaintiff. If the plaintiff violated the court's order as to the motion in limine then it was the defendant's responsibility to make timely objections. None were made as there were no such violations.

The appellants cite In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) for the proposition that "counsel cannot set up error at trial and then complain of it on appeal." First, there was no error and second plaintiff is not appealing. It is the defendants who are appealing this case. Plaintiff has accepted the court's ruling and has made no allegations of error by the court.

5. The court is correct that the verdict is "incomprehensible."

The appellants again in this section of their brief seek to turn this appeal on its head. Plaintiff did not appeal this case, defendants did. The cases cited by the appellants all involve situations in which the appellants are complaining about jury instructions to which it did not properly object at the time. The plaintiff is not the party appealing in this case. It is the defendant who brought the appeal. The plaintiff did not invite any error.

The verdict was incomprehensible as the court stated and has been shown by the evidence cited and the arguments made in this brief.

VII. CONCLUSION

The court based upon CR 59(a) (7) and (9) and CR 59(d) and the case law as cited in this brief was well within the province of his discretion to order a new trial for the reasons that he did. He did not abuse his discretion and this case should be sent back to the trial court for a new trial as ordered.

RESPECTFULLY SUBMITTED this 18th day of July, 2007.

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CERTIFICATE OF SERVICE

07 JUL 19 PM 1:45

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 18th day of July, 2007, I caused a true and correct copy of the foregoing document, Brief of Respondents, to be delivered by messenger service or U.S. Mail, postage prepaid, to the following:

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Court of Appeals, Division Two
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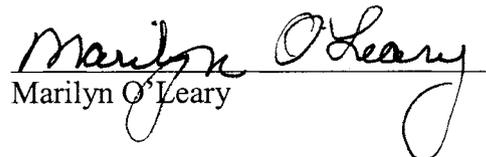
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DATED this 18th day of July, 2007, at Seattle, Washington.


Marilyn O'Leary