

STATE OF WASHINGTON, COURT OF APPEALS,

DIVISION II

COA No. 38887-II

FILED
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BY E

**GREGORY R. VESTAL, as Personal Representative of the
ESTATE OF JAMES VESTAL, Deceased,**

Appellant,

v.

**FRANCISCAN HEALTH SYSTEM-WEST, d/b/a ST. CLARE
HOSPITAL, a Washington non-profit public benefit
corporation, and JAMES B. LEE and "JANE DOE" LEE,
husband and wife, individually and marital community
composed thereof; LORETTA MESKE and "JOHN DOE
MESKE, wife and husband, individually and the marital
community composed thereof; "JOHN DOE" and "JANE
DOE" I through V, husband and wife, individually and
the marital community composed thereof,**

Respondents.

APPELLANT'S OPENING BRIEF

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I. IDENTIFICATION OF PARTIES

A. Appellant. Appellant is Gregory Vestal, who is the Personal Representative of the Estate of James Vestal, deceased.

B. Respondents. Respondents are Franciscan Health System-West, d/b/a St. Clare Hospital, James B. Lee, Jane Doe Lee, Loretta Meske and John Doe Meske.

II. TRIAL COURT'S DECISION

This is a health care negligence action against physicians and a hospital. Pre-trial Mr. Vestal moved to amend the Complaint to reflect the hospital's corporate failure to provide care. The motion was denied. In trial motion for mistrial, motion to amend and other relief were made by Mr. Vestal. The motions were denied. A verdict was returned for the Defendants. Juror Misconduct was shown. A motion for New Trial was made and denied. An appeal was filed.

III. ASSIGNMENT OF ERROR

1. When Plaintiff had delayed amending the Complaint to engage in legislatively expected mediation, it was error to deny the Motion to Amend the Complaint to clarify that Franciscan Health System-West (Herein "FHS-West) was independently accountable for the failure to provide care to Mr. Vestal.

2. It was an error of law for the bench to make a dispositive decision on the issue of vicarious liability and independent liability in the face of a CR 15 motion.

3. When Defendant health care providers for the first time in Opening Statement shifted accountability to a previously unnamed health care provider and that Dr. Lee had left the hospital at 3:00 p.m. it was error under both CR 12(i) and CR 26(e) to deny motion for mistrial.

4. It was error pursuant to violation of both CR 12(i) and CR 26(e) to deny the motion to Amend the Complaint after the Opening Statements after Dr. Smith, was asserted to be the accountable individual, and that Dr. Lee had left the hospital at 3:00 p.m.

5. It was error to fail to give a curative instruction, when the record demonstrated a violation of CR 12(i) and CR 26(e).

6. It was error to fail to grant a new trial as a remedy to the pleading violation of CR 12(i) and to the discovery violations of CR 26(e) by Defendants.

7. It was error to fail to grant a new trial as a remedy to the juror misconduct of Juror No. 6.

IV. ISSUES PRESENTED ON REVIEW

1. When original Complaint alleged liability as respondent superior against the defendant corporation and thereafter in discovery from co-individual defendant the proof is that the defendant corporation independently failed to comply with its independent duties, absence proof of actual prejudice for clarifying the theories of allegations of liability is it error to deny a CR 15 motion to amend based upon the defendant corporation's assertion of undue delay?

2. When in Opening Statement, make it known that defendants have failed to comply with CR 12(i) and a defendant has probably willfully violated CR 26(e) and the defendants' wrongful pleading and discovery conduct has substantially prejudiced the plaintiff's rights is it untenable and unreasonable to fail to grant a motion for a mistrial?

3. Is a due process right violated, when a CR 15 motion to amend is converted into a fact finding exercises on the factual issues of vicarious liability and independent liability of a named corporate defendant.

4. When a juror injects extraneous matters, *inter alia* juror's alleged expert health care knowledge and opinion's about the condition of the deceased, is it an abuse of discretion to fail to grant a new trial?

V. STATEMENT OF THE CASE

A. Overview of Factual Dispute

1. Health Care Circumstances at Issue

The morning of October 1, James Vestal, deceased, was ashen, grey and kind of drained. RP 187. His son, Gregory Vestal took him to his physician's office. RP 191. There, Dr. Louie examined him, and told his son that Mr. Vestal needed to go to the emergency room. RP 191, 203, 540. His son drove him to the emergency room. RP 191-203.

After waiting in admissions, Mr. Vestal was admitted to the emergency room at 12:10 p.m. RP 215-16, 568. Around 12:30 p.m. James Lee, M.D. saw, Mr. Vestal. RP 217-19. Dr. Lee asked questions and examined Mr. Vestal. RP 217-19, 573. He found Mr. Vestal to be pale, weak and his condition severe. RP 600-01. To Dr. Lee the pale finding meant that Mr. Vestal did not have enough blood either due to his heart or lack of blood. RP 610-11. RP 218. Dr. Lee learned Mr. Vestal's routine medications, including Coumadin, which was a blood thinner. RP 573. Dr. Lee ordered tests to be performed. RP 652-53. The test showed abnormalities, including a coagulopathy (clotting factors) of Mr. Vestal's blood and the amount of blood he had. RP 610-11, 652-53.

One test was the INR. RP 453. Dr. Lee recognized that Mr. Vestal's INR with a result of 10.3 was abnormal. RP 582. The INR shows how a patient's blood is clotting. RP 358. For a patient on a therapeutic level of Coumadin the INR should be 2 to 3. RP 365, 652-53. He thought Mr. Vestal's high INR indicated he had Coumadin Toxicity. RP 590.

Dr. Lee believed that Mr. Vestal had a GI (gastrointestinal) Bleed. RP 722. Dr. Lee indicated he was actively bleeding. RP 620-23. Dr. Lee returned to his bedside to tell him that he thought he had a GI bleed. RP 226. Dr. Lee said he needed blood. RP 239. Blood was ordered. RP 239, 454, 600-01, 611. At 2:30 p.m., Dr. Lee knew two units of blood were ready. RP 618-20. He ordered two units of blood transfused. RP 619-23.

Dr. Lee called Loretta Meske, M.D. to have Mr. Vestal admitted under her care. RP 612, 617, 687, 723, 1058-59. Dr. Lee testified he believed he told Dr. Meske about the testing and what treatment was ordered, as well as his clinical impression he had a GI Bleed. RP 613, 723.

Dr. Meske admitted Dr. Lee called her. RP 1066-67,1073-74. Dr. Lee gave her some data, indicating Mr. Vestal was stable. There was other data that she did not recall receiving from Dr. Lee. RP 1127-32.

About 2:30 p.m., Dr. Lee last saw Mr. Vestal. RP 755-57. Then, a nurse said the blood was in route. RP 239. After Dr. Lee left the bedside,

Gregory Vestal observed the nurse disconnecting his father from the monitor and moved his gurney against the wall. RP 226-29. The location against the wall had a structure that prevented the staff at the nurses' station to see Mr. Vestal on the gurney. RP 229. His son remained at the gurney with him for the next couple hours. RP 230. During that time, neither physician nor nurse saw or examined Mr. Vestal. RP 230, 559.

Around 4:55 p.m. Mr. Vestal was wheeled on the gurney to the second floor of the hospital. RP 232. In his room he was moved to a bed, and was hooked to a monitor. RP 236, 245-49. Dr. Meske observed that Mr. Vestal was as white as a ghost, did not look well, was clammy, and in distress. RP 1073. Just before 5:20 p.m., Mr. Vestal vomited a large amount of material, he called out his son's name and his eyes rolled back. RP 249. The nurse immediately told Gregory Vestal to hit the Code Blue button. RP 249. Staff rushed into the room. RP 250, 1131-32.

Dr. Maureen Smith responded to the 5:20 p.m. code. RP 1131-32. Dr. Meske had no contact with Dr. Smith, before the code was called. RP 1131-32. The first time Gregory Vestal saw Dr. Smith have contact with his father was at the code on the second floor of the hospital. RP 559.

After that initial code several more codes were called. RP 252. During this time, Dr. Meske gave Mr. Vestal three units of blood, two

units of plasma and several liters of intravenous fluids. RP 765. On October 2, 2002, Mr. Vestal succumbed to death. CP 6. Dr. Meske charted that the cause of death was massive gastrointestinal bleeding resulting in hemodynamic instability and cardiopulmonary arrest. RP 404. The massive bleed caused the cardiopulmonary arrest. *Id.*

2. Vestal's Proof of Violation and Proximate Cause

Mr. Vestal presented proof of the standard of care, and violation of the standard of care and the proximate cause of the injury and death. RP 367-406. Among other matters Mr. Vestal's expert witness Mark Kogan, M.D. testified as to the abnormal INR:

So, again, on those blood tests his INR was 10.3. A normal person, again, is 1. And someone who is on Coumadin, for whatever reason, usually you want it somewhere in the range of a 3ish. This is an extraordinarily high INR and extremely dangerous. It's something in the setting of GI bleeding you need to correct immediately. The way you correct that is with fresh frozen plasma. The problem here is not so much -- whatever he had as the source of the bleeding, whether it's an ulcer or something else that was causing it, the problem is not so much that it's an ulcer. The problem is a coagulation problem. If you replace those factors and normalize that back down to 1 or somewhere a lot closer than 1, it's more likely than not that he's going to stop bleeding without doing anything else. So the real problem here is the coagulation problem. So in this setting, that clearly needs to be corrected as quickly as possible.

RP 365:9 to p. 66:2

B. Pertinent Procedural and Discovery Record

1. Complaint and Answers

September 30, 2005, the Complaint was filed. CP 3-9. Allegations were made as to Jane Doe and John Doe I through V. CP 5-6, 9. Mr. Vestal pled that FHS-West was accountable “under the theory of Respondent Superior ...” doing business as St. Clare Hospital. CP 4:13-16; 5:16-17. (Emphasis in original.) The Complaint alleged:

The Defendant JAMES B. LEE AND/OR THE Defendants “JOHN DOE” AND/OR “JAND DOE” 1 through V, as employees and/or agents of the Defendant FRANSCISCAN HEALTH SYSTEM-WEST, negligently and/or recklessly failed to diagnose the condition from which Plaintiff’s Decedent was suffering misdiagnosed the condition from which Plaintiff’s Decedent was suffering, and failed to adequately and appropriately treat the condition from which Plaintiff’s Decedent was suffering. (Emphasis added.)

The acts and/or omissions herein complained of against the Defendant JAMES B. LEE and/or the Defendants “JOHN DOE” and/or “JANE DOE” 1 through V, constitute a failure by those Defendants to exercise that degree of care, skill and learning expected of a reasonably prudent physician and/or health care provider acting in circumstances set forth herein. (Emphasis added.)

CP 6:7-16.

On November 7, 2005, FHS-West pled in its Answer and

Affirmative Defense:

Plaintiff's damages, if any, were caused by others over whom FHS-West has no control or right to control and should be apportioned by relative fault, comparative negligence, and contributory negligence in accordance with Washington law; CP 630.

On November 29, 2005, Dr. Lee pled in his Answer:

Plaintiff's damages, if any, were caused by the actions of parties or unnamed non-parties over whom these defendants had no control. CP 635-36.

On August 18, 2006, an Order Amending the Caption to denominate Jane Doe and John Doe I to be Defendants Lorette Meske and John Doe Meske was agreed and signed by all the parties, including counsel for Defendants Meske. CP 637-40. On November 22, 2006, Dr. Meske asserted the Affirmative Defense:

That plaintiffs' injuries and damages were caused by others who have no agency relationship with these defendants. CP 643.

2. Discovery before Motion to Amend

With Dr. Meske a party, discovery continued, including the depositions of Drs. Lee and Meske, *e.g.* CP 18, 33-60. The discovery showed that there was a conflict between these physicians as to where Mr. Vestal was between 3:30 and 5:00 p.m. CP 18-19, 40, 47, 49.

In discovery, Dr. Lee persistently testified that Mr. Vestal "left" the emergency room at 3:30 p.m. CP 40, 47. Dr. Lee claimed he did not

know where Mr. Vestal was between 3:30 p.m. to 5:00 p.m. CP 40, 49¹. Pre-trial the health issue for Mr. Vestal was GI bleeding. CP 25. Dr. Lee wrote an order a blood transfusion. CP 44:2-3, 16-17. Dr. Lee testified that the blood should be available in one or two hours. CP 44:6-8.

Dr. Meske testified on the duty when Mr. Vestal was admitted to the hospital, but still in the emergency room. CP 34-38. She stated:

Question by Mr. Boyle . . . [Y]ou know that in the case of Mr. Vestal, he remained in the Emergency Department for a period of time after admission; were you aware of that?

Answer by Dr. Meske. Yes.

Q. So, as in the case of Mr. Vestal, there are occasions when the patient, although technically in your care, remains in the control, for want of a better way of putting it, of the Emergency Department?

A. Correct.

Q. And that would technically, in your opinion, remain the obligation, if you would, of the emergency physician, to treat any changes in condition or to provide ongoing treatment if necessary?

A. I think, technically and practically, that's true.

CP 36: 5-21.

Implicating the accountability of the emergency room staff of St. Clare Hospital, Dr. Meske testified:

¹ Dr. Lee testified differently at trial. This will be addressed below.

Question by Mr. Boyle. Is that when the care transfers to you or to your team?

Answer by Dr. Meske. Technically, but many times those patients remain in the emergency room for several hours, and they're still under the care of the emergency room staff at that point. And typically, if there's any change in the condition or if something new has come up, they'll call us again to let us know. I mean, the emergency room doctor is still there taking care of them.

CP 35:4-12.

3. Motion to Amend Complaint

Mr. Vestal submitted that the discovery indicated:

[T]here was a period of time during which [Mr. Vestal], while technically under the care of one or both of the Defendant doctors, **was not under ANYONE'S CARE.** It is the responsibility of the Defendant Franciscan Health System-West, d/b/a St. Clare Hospital, is to insure that the necessary care and level of care be provided to Mr. Vestal, regardless of which agents or employees are actually the persons tasked with such duties. (Emphasis in Original)

CP 18:7-11.

All of the above discovery indicted that FHS-West's employees and agents had failed to timely provide care and follow the physician's orders among other matters. CP 18: 4-6. After review of the above addressed discovery, Mr. Vestal's counsel notified all attorneys for defendants of the "intention to amend the complaint, to clarify the negligence of all the Defendants, including the corporate negligence of"

FHS-West. CP 19:19-22, 501:9-21. In response to the notification, Dr. Lee, Dr. Meske and FHS-West suggested a mediation to see if the case would settle. CP 19:22-23. Given the number of parties, it took months to set up and hold mediation, which was unsuccessful. CP 19:23-24.

The mediation was on April 24, 2008 and Motion to Amend was filed on May 15, 2008. CP 16, 19. In moving, Mr. Vestal provided an extensive offer of proof (CP 17-49) and briefing (CP 50-53). In hearing, he addressed why the data learned in discovery justified amending. CP 496-505. May 23, 2008, this motion was denied. CP 91-92.

In trial, Mr. Vestal renewed the Motion to Amend. CP 183-98, RP 517-34. The details are addressed below.

C. Misleading Deposition Responses and Post Deposition Failure to Comply with CR 26(e)

Dr. Lee testified that he saw Mr. Vestal at 12:30 p.m. and 2:30 p.m. CP 40. Dr. Lee spoke to Dr. Meske between 1:30 and 2:30 p.m. CP 47:23 to 48:1. In deposition, Dr. Lee testified repeatedly that Mr. Vestal left the Emergency room at 3:30 p.m.: e.g. CP 40:19-14:

Question by Mr. Boyle. When, in your opinion, Dr. Lee, did your responsibility for the care of Mr. Vestal end?

Answer by Dr. Lee. During ER stay, patient supposed to be under my care. Patient left emergency room around 15:30.

Q. If the patient left the emergency room at 15:30, where did he go until 5:00 p.m.?

A. I do not know.

Pre-trial Dr. Lee repeatedly represented Mr. Vestal "left" the Emergency Room at 3:30 p.m.

Question by Mr. Boyle. You heard Dr. Meske testify that you were responsible for the patient until he arrived at the floor. She was technically responsible, but you had him; do you disagree with that?

Answer by Dr. Lee. I was responsible during ER stay and until 3:30, I understand. The patient left emergency room 3:30.

Q. How do you know he left the emergency room at 3:30?

A. It's documented on this paper.

Q. Where did he go from 3:30 until 5:00?

A. I don't know.

In deposition, Dr. Lee again testified:

Question Mr. Boyle. Let me ask it that way. If he's still in your Emergency Department after he's been admitted, is it your responsibility, as a physician, or is it Dr. Meske's, once you've admitted him?

MR. ANDERSON: Object to the form; incomplete hypothetical. Go ahead and answer if you can.

Answer Dr. Lee. I do not know who has the responsibilities, but I continue the care for that patient because patient is in the emergency room, usually.

Q. Usually, you would continue the care for the patient while he's in the Emergency Department, is what you're saying?

A. Yes.

Q. But you have no recollection if Mr. Vestal remained in your Emergency Department after 3:30 p.m.?

A. After 3:30, patient left the emergency room; that's all what I know. The rest of them, I do not know.

RP 47:15-22.

In deposition Dr. Lee denied knowing who was responsible:

Question Mr. Boyle. Do you have any idea of who was responsible for him as a physician, who the physician responsible for him was, between 3:30 p.m. and 5:00 p.m.?

MR. FITZER: Object to the form. But go ahead and answer it, please.

Answer Dr. Lee. No

CP 468:5-8 (quote Dr. Lee deposition p. 48:17-22).

In his Opening Statement, Dr. Lee's attorney said that Dr. Lee left the hospital at 3:00 p.m. and the care was turned over to another:

By Mr. Anderson . . . The evidence in this case will be that regardless of the allegations of care or location or blood pressure or anything else after three o'clock, the evidence will be that Dr. Lee was not on duty. Instead, at three o'clock, another board-certified emergency physician came into the emergency department, a doctor named Maureen Smith, and she relieves Dr. Lee. She took over the patient care. She patient in the emergency department, and then it became her responsibility, not Dr. Lee's.

CP 655:17 to p. 656:1

At trial, Dr. Meske's Counsel also invoked Dr. Smith.

. . . Now, there are two points where Dr. Meske and Mr. Vestal intersected on that sad day. The first was somewhere between 2:30 and three o'clock when Dr. Meske received a call from Dr. Lee.

...

. . . She [Dr. Menske] was not told that this patient was critically ill. And she never received any information from the time of that telephone conversation until five o'clock from either Dr. Lee or Dr. Smith that there was anything wrong with this patient or that any monitoring had produced a problem.

CP 673:4-7, 674:11-17

Thereafter, Mr. Vestal moved for relief by (1) instruction to the jury, (2) to be allowed to add defendant as agent of hospital, and (3) a mistrial. CP 183:7-13, 189:7-15. Mr. Vestal provided an extensive offer of proof and reasoning for the relief requested. CP 183-91, 196-98, 199-203. All of Vestal's request for relief were denied. CP 202-03.

Before Dr. Lee testified, the motion to amend was renewed. RP 517-34. Mr. Vestal requested that the jury be instructed that Dr. Smith, who was an agent of FHS-West, was one of the Jane Doe denominated in the Complaint. RP 517-34. The motions were denied. RP 534.

Dr. Lee testified that Dr. Smith assumed responsibility for Mr. Vestal's care, after Dr. Lee's shift. RP 680, 738. He said at RP 680:8-24:

Answer by Dr. Lee On or about end of my shift, knew incoming doctor came. The name is Dr. Maureen Smith. She is the emergency medicine physician. After then, we make board run. We call "board run" because all the patients name is on the list, so we discuss the case by case about symptoms, diagnosis, plans.

After then, after finish board run, Dr. Smith she agree to assume the care for those patients. Then I transfer my responsibility as emergency physician, transfer to Dr. Meske. That was about end of my shift, sir.

Question by Mr. Boyle. So your testimony then would be that you did, in fact, hand over the care of Mr. Vestal to Dr. Smith and leave the ER sometime around three o'clock on October 1st?

A Exact time, I do not know, but it was about that time, yes, sir.

Dr. Lee testified this routine hand off of responsibility is not documented, but it does occur. RP 738.

D. Exceptions to Jury Instruction

Mr. Vestal requested jury instruction on the accountability of Jane Doe and that FHS-West was accountable for the conduct of Jane Doe between 3:00 p.m. to 5:00 p.m. CP 517-24. At the time of jury instruction exceptions, Mr. Vestal requested and excepted to there being no instruction on the accountability of FHS-West for Mr. Vestal between 3:00 p.m. to 5:00 p.m. CP 1234-35.

E. Juror Misconduct

The jury voir dire included a written Juror Questionnaire. Juror No. 6² (CP 469:24 to p. 470:3, 471-72) answered to the question "Have you or anyone in your family had any training, education, or experience in any of the following areas. One of the choices was "medical field". Juror No. 6 checked that she did. CP 471. Then she wrote "Nursing/Hemotology/Lab work (did not graduate). CP 471.

During jury deliberations, Juror No. 6 announced that she had gone to Medical School. CP 463:12-19. Juror No. 6 detailed what she learned in school to answer questions that other jurors had from trial. CP 466:9-12. During deliberations Juror No. 6 told the other jurors she knew the symptoms of a serious bleed, the diagnosis of a bleed and the treatment. CP 462:14-15, 466:4-18. Juror No. 6 offered extrinsic proof during deliberations. CP 461-63, 465-66. The extrinsic evidence presented by Juror No. 6 during deliberations influenced the jury. *Id.*

² Juror No. 6 was Juror No. 17 during voir dire. She became Juror No. 6 after voir dire.

F. Post Trial Motions

Post verdict Mr. Vestal identified juror misconduct. CP 461-64, 465-66, 477-89, 602-03, 607-10. Mr. Vestal moved for new trial on multiple grounds. *Id.* The motion for a new trial was denied. CP 604-06.

V. SUMMARY OF ARGUMENTS

In discovery, the Plaintiff learned the hospital was both vicariously and independently accountable. The defendant hospital did not show actual prejudice to the amending of the Complaint to clarify that this corporate defendant's liability was both vicarious and corporate (independent). It was untenable to deny the motion to amend.

The defendant physician repeatedly represented in his answers to discovery questions that he was accountable for the patient in the emergency room. The defendant physician repeatedly claimed he did not know where the patient was during a specific timeframe. At some point after the deposition, the defendant physician realized his answers in depositions were misleading and incorrect. Thereafter he failed to supplement his responses as CR 26(e) expects.

In trial, the defendant physician blindsided the plaintiff by telling the jury that another nonparty physician was responsible for the deceased during the contested timeframe. This newly related evidence

was substantial and greatly prejudiced the plaintiff. The trial court erroneously failed to grant a mistrial or instruct the jury to ameliorate the prejudice from the defendant's wrongful gamesmanship. When the jury returned a verdict in favor of the defendant, the trial court erred in failing to grant a new trial as a remedy for the injustice caused by defendants' tactical games of hiding the name of a CR 12(i) party.

A juror introduced extraneous matters into the deliberation. It was error to fail to grant a new trial for this juror misconduct.

VI. ARGUMENT

A. Under the Established Factors for Granting or Denying a Motion to Amend the Complaint, the Trial Court's Decision Was a Manifest Abuse of Discretion.

1. Standard of Review for Amending Pleadings

Mr. Vestal submits it was a manifest abuse of discretion to deny his motion to amend the Complaint. The standard of review of trial court's denial of a motion to amend is a manifest abuse of discretion standard. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999) citing with approval *Caruso v. Local 690, Int'l Bhd. Of Teamsters*, 100 Wn.2d 343, 351, 670 P.2d 240 (1983).

2. Discovery Confirmed Much of What the Complaint Pled As to The Allegedly Negligent Care. It Is Not Unreasonable to Delay Amending the Complaint Until After an Attempt to Resolve the Dispute in Mediation.

In the interest of judicial economy, Washington's legislature so favors plaintiff-patient and defendant-health care providers mediation that it is mandatory. RCW 7.70.100

According to Dr. Lee, Mr. Vestal left the emergency room at 3:30 p.m. On the other hand, his son observed his father remained in the ER, and from 2:30 p.m. up to 5:00 neither a physician nor staff attended to him. Mr. Vestal's records show no care from 2:30 to 5 p.m. Yet by 2:30 p.m. Dr. Lee diagnosed an active GI Bleed and Comadin Toxicity, and determined a blood transfusion was needed Dr. Lee that Mr. Vestal was still in the ER and what should be done about his declining condition and what to do about transfusing the blood he ordered to be transfused at 2:30 p.m.

3. Given the Evidence Found in Discovery Justice Required that Complaint Be Amended to Place at Issue Both the Vicarious and the Independent Corporate Roles of the Defendant Hospital. When No Actual Prejudice Was Proven, It Was Untenable to Deny the Motion to Amend the Complaint.

The hospital record does not show that Dr. Lee turned Mr. Vestal over to Dr. Smith. Whether it was Dr. Smith or the emergency nurses,

FHS-West, as the corporate "superior" as to both Dr. Smith and the nurses, had a duty to see that between 2:30 and 5 p.m. someone was looking after Mr. Vestal, including to follow up with the order and direction to transfuse the blood that Dr. Lee ordered and checking to see that Mr. Vestal's condition was not dangerously deteriorating. To address the merits of the matter, the jury should have considered both the vicarious and the independent duties of FHS-West as well as the question of Dr. Lee's and Dr. Meske's actions.

Looking to CR 15(a) the *Caruso* Court held "a party may amend his pleading only by leave of court . . . and leave shall be freely given when justice so requires." *Caruso*, 349. Going to the heart of the rationale of CR 15 the *Caruso* observed that "[t]he purpose of pleadings is to 'facilitate a proper decision on the merits'" *Caruso*, 349 citing with approval *Conley v. Gibson*, 355 U.S. 41, 48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). Mr. Vestal's request to amend the Complaint was so that the dispute could be decided on the merits.

Pre-trial Mr. Vestal did not seeking to add parties. The original Complaint identified that Jane Doe and John Doe I through III were agents or employees of FHS-West. Originally, Mr. Vestal knew that Dr. Lee was an agent or employee of FHS-West. Then after filing, he learned

Lorette Meske, M.D. was also an agent or employee of FHS-West, hence she was substituted by stipulation as one of the Jane Doe. CP 637-40. From the beginning FHS-West was on notice that one of its Jane Doe or John Doe was allegedly negligent.

Fundamentally, FHS-West could not operate the St. Clare Hospital Emergency Room without an ER physician and nurses. The ER physician, *e.g.* Dr. Lee, and the ER nurses were either agents or employees of FHS-West. After discovery, when Mr. Vestal sought to amendment, he did not know the name of Jane Doe or John Doe in the emergency room, who should have been accountable along with Dr. Lee for Mr. Vestal's care from 3 to 5 p.m.³ Whoever the person was, FHS-West was the respondent superior of that agent or employee. FHS-West's Jane Doe or John Doe should have told Dr. Lee that Mr. Vestal was still in the ER and what should be done about his declining condition and what to do about transfusing the blood that Dr. Lee ordered to be transfused at 2:30 p.m. If there was no agent or employee responsible to alert Dr. Lee, then FHS-

³ Obviously, Dr. Lee was seeing other patients, besides Mr. Vestal, in the ER. Dr. Lee should be able to expect that the FHS-West nurses would alert him as to the status of ER patients, including that Mr. Vestal was still in the ER for hours.

West as a corporation was independently accountable for ensuring that a person was so designated to care for Mr. Vestal and alert Dr. Lee.

Likewise, if Mr. Vestal did leave the emergency room at 3:30 p.m., then the person(s) transporting of him was an employee of FHS-West. If both Dr. Lee's and Dr. Meske's testimony was true, it took more than 2 hours to move Mr. Vestal by elevator up one floor. If that was true, FHS-West was both independently and vicariously responsible for that 2 hour transportation time. Under either scenario—left in the ER after discharge or 2 hour transport within the hospital—FHS-West was the respondent superior, and also, independently accountable for Mr. Vestal's care.

Whether FHS-West was accountable for the fault under a vicarious liability theory or independently under a corporate liability theory, FHS-West was an actor. The dispute was (1) where was Mr. Vestal during that time; (2) who was responsible for monitoring his condition; and (3) who was responsible for following up on order to transfuse him with blood. The care Mr. Vestal needed from 3 to 5 p.m. was not dependant upon whether (a) FHS-West's agent's or employee's failure to act or (b) FHS-West independently as an corporation had no plan in place to cover the gap between discharge from the ER through transport to the actual physical admission to a hospital room. For Mr.

Vestal the amendment of the Complaint was to provide a vehicle to have the matter decided upon the merits rather than upon a procedural hole.

CR 15 "was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result." *Caruso*, 349. Thus, the issue as to whether an abuse of discretion has occurred turns upon whether prejudice to FHS-West would occur. Factors, which the trial court may consider in determining whether permitting amendment would cause prejudice to the non-moving parties include unfair surprise, jury confusion, and undue delay. *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.* 166 Wn.2d 475, 484, 209 P.3d 863 (2009) citing with approval *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999).

The Motion to Amendment of the Complaint was not an "unfair surprise" in three respects. First, amending the complaint to hold FHS-West independently accountable for the time between 3:00 to 5:00 p.m. was not a surprise. Mr. Vestal came to FHS-West' emergency room, and he was admitted first to the emergency room and then to the hospital. FHS-West knew he was under the care of either its employee(s) or agent(s) from 12:10 p.m. forward. Mr. Vestal had originally alleged FHS-West was accountable through its employee or agents either as

Respondent Superior or under vicarious liability. CP 5. FHS-West as a corporation could only act through employees and agents.

Second, Mr. Vestal had advised before the failed mediation that he intended to amend the Complaint. FHS-West did not deny Mr. Vestal's assertion that the amendment did not occur earlier, because of the mediation. In the interest of judicial economy, it was reasonable for an attempt to resolve the matter in mediation first.

Third, FHS-West knew its emergency room had 24-hour coverage. FHS-West was in a position to know about Dr. Lee handing off the care of Mr. Vestal allegedly to Dr. Maureen Smith well before the claim was filed. FHS-West knew its two agents—Drs. Lee and Meske—were in conflict as to when Mr. Vestal left emergency room. It was not a surprise to FHS-West that Mr. Vestal was potentially held in the emergency room after admission to the hospital at 3:30 p.m. until his arrival on the second floor at 5:00 p.m. FHS-West knew that the ball had been dropped by either its agents, Drs. Lee and Smith, or its employees, who were in the emergency room working under the direction of either Dr. Lee or Dr. Smith. Asserting that FHS-West was responsible in either circumstance was not a surprise. The care at issue was either in FHS-West's emergency room or on the second floor of the hospital. The health services to Mr. Vestal was

either through its agents or employees. The time of accountable was between 3:00 to 5:00 p.m., which was a time that both Drs. Lee and Meske denied being the physician responsible for Mr. Vestal. Ultimately, the denial of Drs. Lee and Meske for this timeframe is a none issue, since each was an agent of FHS-West as far as the care of Mr. Vestal. *Adamski v. Tacoma Gen. Hosp.*, 20 Wn. App. 98, 579 P.2d 970 (1978)(ostensible agency exist when an emergency room a patient reasonably believes that the emergency room physician is an agent of the hospital.)

It is disingenuous for either Dr. Lee or Dr. Meske would object to FHS-West as a respondent superior or independently as a corporation being accountable for the care between 3:00 p.m. to 5:00 p.m. If part or all fault was shifted to the 3:00 to 5:00 p.m. timeframe to FHS-West, it only benefited Drs. Lee and Meske. Likewise, Drs. Lee and Meske would be disingenuous claiming surprise that some other professional at FHS-West was responsible for Mr. Vestal between 3:00 to 5:00 p.m., when they both denied responsibility for the same timeframe.

The jury would not have been confused if FHS-West was accountable under either Respondent Superior through its agents and employee or independently as a corporation, which operates through its agents and employees. Between 3:00 and 5:00 p.m. Mr. Vestal was in

FHS-West facility. It is not confusing for a jury to determine either Dr. Lee was there until 5:00 p.m. and did nothing, or Mr. Vestal was taken to the floor at 3:30 p.m. but Dr. Meske failed to provide care to him until 5:00 p.m. or unknown agent or employee in the emergency room failed to check on Mr. Vestal after the 3:00 p.m. board hand off.

On the factor of undue delay there is a caveat in applying this factor. The *Caruso* Court observed the law was

We have held that undue delay on the part of the movant in proposing the amendment constitutes grounds to deny a motion to amend only "**where such delay works undue hardship or prejudice upon the opposing party**". *Appliance Buyers Credit Corp. v. Upton*, 65 Wn.2d 793, 800, 399 P.2d 587 (1965). (Emphasis added)

Caruso, 100 Wn.2d at p. 349.

The delay in amending the complaint did not work a hardship on FHS-West. The "care" that Mr. Vestal claimed he needed between 3:00 to 5:00 p.m. was the same as had been pled and testified to by Mark Kogan, M.D. The breach in the standard of care was the same as had been pled and testified to by Mark Kogan, M.D. and Gregory Vestal. FHS-West argued that having to secure a nursing expert on the duty owed and that it had not had a nursing breach is not a hardship. The "care" was the same (a) monitor Mr. Vestal and (b) give him the blood that Dr. Lee

ordered and confirmed was ready at 2:00 p.m. and (c) notify either Dr. Lee, the unknown (to Mr. Vestal) emergency room physician or Dr. Meske of any change in Mr. Vestal's condition. After all, FHS-West was claiming contrary to Gregory Vestal that patient was hooked up to a monitor and the nurses were looking after him.

It was not an undue hardship for FHS-West to look to its own corporate documentation to note when Dr. Lee left the emergency room that day or to know the nurses that worked in the emergency room during that two hour time frame. FHS-West was well aware that Mr. Vestal had originally alleged that FHS-West was accountable due to the conduct of its employees and agents. FHS-West was well aware that it could determine from its own records, who was working as an emergency room physician and as nurse during that two-hour window of time. As *Cambridge Townhomes, LLC* found when a defendant is well aware of the circumstances of the legal dispute, hardship and prejudice do not exist, even if, in theory a delay occurred in the amending of the complaint.

The denial of the motion to amend under the circumstances was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Wilson*, 137 Wn.2d at p.506 citing with approval *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

B. Standard of Review for Mistrial and New Trial

Mr. Vestal made a motion for a mistrial when he learned in opening statement that he had been bamboozled by the defendants. In reviewing a motion for granting or denying a mistrial the test considers whether the "prevailing party has engaged in misconduct that "materially affect[s] the substantial rights" of the losing party." *Aluminum Co. of America v. Aetna Casualty & Surety Co.*, 140 Wash.2d 517, 537, 998 P.2d 856 (2000). On review, the trial court is accorded discretion. The trial court's denial of the motion will only be over turned when there is a "substantial likelihood" the prejudice affected the jury's verdict. *Aluminum Co. of America*, 537, citing with approval. *State v. Crane*, 116 Wn.2d 315, 332-33, 804 E2d 10, *cert. denied*. 111 S. Ct. 2867 (1991).

An order denying a new trial will not be reversed except when the trial court has abused its discretion. *Detrick v. Garretson Packing Co.*, 73 Wn. 2d 804, 812, 330 P.2d 834 (1968). A new trial order predicated on legal rulings, no element of discretion is involved. *Detrick*, 812. A stronger showing of abuse is required when a new trial is granted rather than denied. *Gardner v. Malone*, 60 Wn.2d 836, 846, 376 P.2d 651 (1962). This standard does not apply when the order for a new trial is predicated upon errors in law. When the order is predicated upon a

ruling as to law, there is no element of discretion involved. *Worthington v. Coldwell*, 65 Wn.2d 269, 278, 396 P.2d 797 (1964).

A trial court may grant a new trial when important rights of a party are material affected and substantial justice has not occurred. *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). A new trial order predicated on legal rulings, no element of discretion is involved. *Detrick v. Garretson Packing Co.*, 812.

When a new trial motion is based upon CR 59(a)(8), which when an error of law has occurred, there is no element of discretion involved. *Worthington v. Coldwell*, 278. When the CR 59(a)8 motion is predicated upon an error of law there is no discretion, a new trial is mandatory. *E.g. State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548 (1977).

C. Compliance with CR 12(i) Is Not Optional. Failure to Identify a Non-Party at Fault Has the Capacity Substantially Prejudice a Plaintiff.

Dr. Lee, Dr. Meske and FHS-West all knew from the complaint and from their first hand knowledge of the facts involving the care of Mr. Vestal, deceased. Dr. Lee, Dr. Meske and FHS-West failed to make any reasonable investigation as to the involvement of Maureen Smith, M.D. in the emergency room. CR 12(i) makes it clear that a defendant has an affirmative duty to identify with specificity any non-party that defendant

claims is at fault. It is obvious that the defendant health care providers were playing a game of hide the existence of the emergency room physician that followed Dr. Lee's shift. Mr. Vestal due process rights were substantially prejudiced by this gamesmanship.

1. Standard of Review Affirmative Defense Nonparty.

Here the defendant health care providers each answered and asserted that fault, if any, was caused by a third party. What they did not do until the trial was provide the name of that purported third party. Here the defendants technically circumvented RCW 4.22.070, but tactically with the jury put a nonparty at fault in the liability mix. In Opening Statements Dr. Lee and Dr. Meske presented to the jury the potential fault of Maureen Smith, M.D. Mr. Vestal promptly requested relief from this tactical gamesmanship of shifting fault to a nonparty.

Generally, the rule of law is that affirmative defenses are waived unless they are (1) affirmatively pleaded; (2) asserted in a motion under CR 12(b); or (3) tried by the express or implied consent of the parties. *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 549 P.2d 9 (1976). Here, the affirmative defense of defective product was neither pled nor asserted in a CR 12(b) motion. Here, Mr. Vestal objected through out to the consideration of this affirmative defense. Therefore, the matter should

be considered *de novo* on appeal. See *e.g.*, *Allis-Chalmers Corp. v. Sygitowicz*, 18 Wn. App. 658, 571 P.2d 224 (1977) and also *Dewey v. Tacoma Sch. Dist. 10*, 95 Wn. App. 18, 23, 974 P.2d 847 (1999) citing with approval *Trask v. Butler*, 123 Wn. 2d 835, 872 P.2d 1080 (1994).

2. It Was Fundamentally Unfair for Defendants to Put the Conduct of a Nonparty at Issue After Failing to Comply with CR 12(i).

Mr. Vestal consistently objected to asserting the affirmative defense of nonparty. The established law supports his position that allowing the assertion of Dr. Smith's fault for the first time at trial is reversible error, since it does substantially compromise his rights.

Claiming the fault of a nonparty is an enumerated affirmative defense. CR 8(c). Not only does CR 8(c) require such a disclosure the requirement to give is also set for in CR 12, which provides that :

(b) How presented. **Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, . . .**

(i) Nonparty at fault. Whenever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. The identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded. (Emphasis added.)

CR 8 and CR 12 are straightforward. In *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 549 P.2d 9 (1976) the basic rule of pleading an affirmative defense was addressed. The Court stated at 87 Wn. 2d at p. 76:

In general, if such defenses are not affirmatively pleaded, asserted with a motion under CR 12(b), or tried by the express or implied consent of the parties, such defenses are deemed to have been waived and may not thereafter be considered as triable issues in the case. (Citations omitted). While the affirmative defense requirement is not to be construed absolutely, particularly where it does not affect the substantial rights of the parties, *Mahoney v. Tingley*, 85 Wn.2d 95, 529 P.2d 1068 (1975), this is not the case to abrogate the requirement.

Dr. Lee testified he turned the responsibility of Mr. Vestal to Dr. Smith. Dr. Meske asserting Dr. Smith was at fault because she did not notify her of the change in his condition. These tactical comments affect a substantial right of Mr. Vestal. Dr. Lee, Dr. Meske and FHS-West all knew of Dr. Smith, when answering the Complaint. They should have named her. All Defendants failed to comply with CR8.

The purpose behind the requirements of CR 8(c) is to avoid surprise. *Mahoney v. Tingley*, 85 Wn.2d 95, 529 P.2d 1068 (1975). The underlying rationale of requiring a clear and concise pleading of an affirmative defense in the Answer is due process. The due process

consideration is a fair notice. As confirmed in *Dewey v. Tacoma Sch. Dist.*

10, 95 Wn. App. 18, 23, 974 P.2d 847 (1999)

Under the liberal rules of procedure, pleadings are intended to give notice to the court and the opponent of the general nature of the claim asserted. *Lewis v. Bell*, 45 Wash. App. 192, 197, 724 P.2d 425 (1986). Although inexpert pleading is permitted, insufficient pleading is not. *Lewis*, 45 Wash. App. at 197. "A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests." *Lewis*, 45 Wash. App. at 197 (citation omitted); *Molloy v. City of Bellevue*, 71 Wash. App. 382, 385, 859 P.2d 613 (1993) (complaint must apprise defendant of the nature relief should contain: "(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled." CR 8(a).

CR 8 requires both all parties to clearly and concisely to provide notice of their respective legal positions in the Complaint and Answer. The Court has held [a] party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along". *Dewey*, 26, citing with approval *Molloy*, 71 Wash. App. at 385-86 (rejecting plaintiff's "veiled attempt" to amend his complaint by raising a theory of wrongful termination in response to defendant's summary judgment motion).

CR 8 requires a defendant "in short and plain terms" a defense to each claim in the Answer, including any affirmative defense. It is logical

and fair that the same notice requirements apply to both a plaintiff and defendant as to the Complaint and Answer. In addressing fundamental fairness the *Dewey* Court observed at 95 Wn. App at p.25:

The reasoning of *Trask v. Butler*, 123 Wash. 2d 835, 872 P.2d 1080 (1994), is persuasive. The court held that to give effect to CR 8:

[A] litigant must plead more than general facts in a complaint to properly allege a CPA [Consumer Protection Act] cause of action. If no reference is required to the CPA, a litigant would not have to amend their complaint to assert a violation. If this were the rule, a litigant could simply await trial and surprise their adversary with a CPA claim so long as enough facts were intermixed in the complaint. In hindsight it is easy to view facts and agree they support a CPA claim. It is a much more difficult, if not an impossible task, to predict whether a plaintiff will raise such a claim when it is not alleged in the complaint. *Trask*, 123 Wash. 2d at 846. A complaint must at least identify the legal theories upon which the plaintiff is seeking recovery. *Molloy*, 71 Wash. App. at 389.

The case law is replete with dismissals of plaintiff's causes of action for failing clearly plead a specific cause of action. According to CR 8(c) and CR 12(i) the law demands the same "timely" and "clear" pleading of an affirmative defense. Here, Dr. Lee, Dr. Meske and FHS-West all Answered that there were other "nonparties" at fault. The unfair advantage to Dr. Lee, Dr. Meske and FHS-West occurred with the opening statements and the presentation of the evidence. Tactically, Dr. Smith

was to excuse the conduct of all the defendants. They intended that the jury excuse them and shifted fault to Dr. Smith, who was not a party.

D. A New Trial Should Be Granted for Violations of CR 26(e).

In *Agranoff v. Jay*, 9 Wn. App. 429, 435, 512 P.2d 1132, review denied, 82 Wn.2d 1013 (1973) the Court reminded that:

We must keep uppermost in our minds that the fundamental reason for our judicial system is justice, which we attempt to reach by searching for the truth under a system of fairness. The courtroom is not a ball park, nor the trial a ball game. The trial is serious and the rules governing that search for truth are to be so treated. See 47 Wāsh. L. Rev. 439 (1972).

Most recently in *Magana v. Hyundai Motor Am.* Case No. 80922-4 (Nov. 25, 2009), the Court underscored that “need not tolerate deliberate and willful discovery abuse”. *Magna*, Opinion page 1. Here, the defendant health care providers collectively with Dr. Lee were playing games with who was responsible for the care, treatment and evaluation of Mr. Vestal from 3:00 to 5:00 p.m. Before trial Dr. Lee was adamant that Mr. Vestal left the emergency room at 3:30 p.m., that he was one responsible for him in the emergency room and that Dr. Lee did not know who was responsible for his care after 3:30 p.m. All the while Dr. Lee knew he left the hospital at 3:00 p.m. and had turned the care over to Dr. Smith. On this record it is clear that Dr. Lee deliberately misled Mr.

Vestal. Certainly, well before the opening remarks both Dr. Lee's and Dr. Meske's legal counsel knew that at 3:00 p.m. Dr. Lee had turned the responsibility for Mr. Vestal over to Dr. Smith.

1. A Party Has an Obligation to Truthfully Answer Oral Interrogatories in Deposition. A Party Should Seasonably Supplement Deposition Testimony, When the Party Knows That Incorrect Information Was Given As to the Identify of the Person Whom Assumed Responsibility of the Deceased.

Under the Civil Rule of Procedure the party "answering" discovery questions, whether deposition or interrogatories, to supplement the answers has an affirmative duty to supplement. The inquiring party is not required to ask for a supplementation. The pertinent portion of the plain language of the rule reads:

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, . . . (Emphasis added.)

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, (Emphasis added)

This matter comes to review under the charging appellate error that it was untenable for the trial court to fail to grant a mistrial. As a practical matter, Mr. Vestal was in trial when he learned of Dr. Lee's willful disregard of the basic rules of discovery to supplement seasonably discovery inquiries. Logically when a party blindsides an opponent, the applied law should be the same whether it be in the context of a motion for mistrial, or request to impose CR 37 sanctions for failing to seasonably supplement discovery. In both circumstances, the trial court is addressing the same due process problem. The opposing party is entitled to know the names and locations of persons with knowledge of discoverable matters. Whether before trial, in trial or after trial, the trial court is addressing circumstances where the problem is how fairly to manage the withholding of substantial evidence that otherwise should have been provided under CR 26, and the law's expectation that any incorrect response should be seasonably supplemented.

Logically, on review the consideration is whether:

(1) one party willfully or deliberately violated the discovery rules and orders, (2) the opposing party was substantially prejudiced in its ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would have sufficed.

Magana, pp. 11-12 citing with approval *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

2. Dr. Lee's Conduct Was Willful and a Deliberate Violation of the Rules of Discovery

CR 26(e) does not permit a party to remain silent, when the party knows the names of persons having knowledge of discoverable matters. Dr. Lee was required by CR 26(e) to supplement the deposition interrogatory answers. At some point before Opening Statements Dr. Lee, and his counsel, knew his deposition answers were incorrect.

Obviously, it did not *spontaneously* pop into Mr. Anderson's head and out his mouth at the very moment he spoke in Opening Statement about Dr. Smith. Under CR 26(e), and case law the facts and dispute of this case require that Dr. Lee and his counsel correct that deposition answer, when Dr. Lee knew that his deposition answer was incorrect. The withholding of the information about Dr. Lee's hand off to Maureen Smith, M.D. was willful and intended deliberately to mislead Mr. Vestal. Dr. Lee and his counsel knew about Dr. Lee's incorrect deposition answer before the trial. The only tenable conclusion to be reached is that Dr. Lee and his counsel Mr. Anderson willful and deliberated failed to seasonably

supplement the deposition responses, when Dr. Lee realized his earlier responses were incorrect.

3. Mr. Vestal Was Substantially Prejudiced in His Ability to Prepare and Then Try His Action.

In trial, Dr. Lee's counsel and then Dr. Lee professed that he handed Mr. Vestal off to Maureen Smith, M.D. Before trial, Mr. Vestal had plausible proof that James Vestal, deceased, was abandoned in the Emergency Room by Dr. Lee. The proof was from Gregory Vestal, his son, that after Dr. Lee saw him around 2:30 p.m. that Dr. Lee never again checked upon or had treatment given to his father. Mr. Vestal had substantial proof, through Dr. Lee's admission that he was the one responsible for Mr. Vestal, while he was Dr. Lee's patient in the Emergency room. Claiming, Mr. Vestal was handed off to Dr. Smith, allowed Dr. Lee to slip off the hook for the time from 3:00 through 5:00 p.m. The failure to disclose the incorrect deposition testimony substantially prejudiced Mr. Vestal's trial preparation and the trial.

Had Mr. Vestal been told he certainly would have had the option to Amend the Complaint before trial and join Dr. Maureen Smith as a defendant. It would have allowed Mr. Vestal to make further inquiry of Dr. Lee as to what he did or did not tell Dr. Smith about the availability of

and need for blood. Certainly, Mr. Vestal would have had the opportunity to learn under oath in discovery from Dr. Smith whether what Dr. Lee claimed about the alleged hand off was true.

Dr. Lee's failure to supplement seasonably allowed Dr. Meske to assert it was not her fault because both Dr. Lee and Dr. Smith failed to follow up after the initial phone contact. It allowed FHS-West to imply that as a hospital it was off the hook, because there was another Emergency Room physician, who took over for Dr. Lee, when he left the hospital at 3:00 p.m. Dr. Lee's failure did clearly prejudice Mr. Vestal, as to his claims against all three of these defendant health care providers.

4. The Trial Court Untenably Failed to Address What Obviously Was a Deliberate "Game" By the Defendants In Withholding Until Trial the Participation of Dr. Smith. The Only Sanction Was A Mistrial.

When the judicial task is to address the appropriate sanction for a discovery violation, the rule of law emphasized by the *Magana* Court at Opinion at p. 20 is:

A court should issue sanctions appropriate to advancing the purposes of discovery. *Burnet*, 131 Wn.2d at 497. The discovery sanction should be proportional to the discovery violation and the circumstances of the case. *Id.* at 496-97. "[T]he least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should

insure that the wrongdoer does not profit from the wrong." [*Washington State Physicians Ins. Exch. & Ass'n. v. Fisons*, 122 Wn.2d at 355-56 [299, 858 P.2d 1054 (1993)] (footnote omitted).

CR 26 is unambiguous, therefore the rule is that reasonable supplementation is expected of "any matter ...which is relevant to the subject matter involving the pending claim." CR 26(b)(1). It was relevant to the negligence claim, whether Dr. Lee turned the care of Mr. Vestal over to Dr. Smith. It was relevant to the claim that Dr. Lee did know who was taking care of Mr. Vestal between 3:00 and 5:00 p.m. The reality was that Dr. Lee was affirmatively using a previously undisclosed fact to defeat the Mr. Vestal's claim. The information was substantial and went to the heart of the claim, hence the only tenable remedy was a mistrial.

It is untenable to allow Dr. Lee to get away with failing to comply with seasonably supplementing a discovery response that he knew was incorrect and went to the heart of the claim. When balancing a party's right to the due process that is accorded by full and truthful discovery against the cost to all the parties the cost of a mistrial at the time of Opening Statements, is the only as well as the most reasonable sanction. Failing to grant the mistrial did nothing but encourage and reward the failure to comply with the expectations of CR 26(e).

At the time of Mr. Vestal's motion for a mistrial, the Court has objective evidence that Dr. Lee obviously failed to supplement his discovery. Learning of the obvious failure to correct and incorrect answers, the trial court was tasked with ruling in a manner that first addressed Mr. Vestal's due process rights and second deal with a discovery violation. It was untenable for the trial court to reward and encourage discovery violations that "suppressed evidence that was relevant, because it [went] to the heart of" Mr. Vestal's claim. *Magana*, p. 18 citing with approval *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 325, 54 P.3d 665 (2002).

5. Dr. Meske and FHS-West Were Complicit in the Discovery Cover up of Dr. Lee

It is clear that Dr. Meske and FHS-West knew that Dr. Smith was the physician in charge from 3:00 to 5:00 p.m. They failed to answer the Complaint and affirmatively identify Dr. Smith as CR 12(i) required them to do. They engaged in the same tactical deception by knowingly remaining silent in the face of known incorrect answers.

6. Post Trial the Remedy Is a New Trial

Once the trial court was advised of discovery violation, the trial proceeded with no relief for Mr. Vestal. The trial court knew how Dr. Lee, Dr. Meske and FHS-West maximized the benefit of the discovery violation. It was obvious that there was a big hole in Mr. Vestal's proof for that time that Dr. Smith was allegedly the accountable physician. The substantial prejudice to Mr. Vestal was all too apparent. The conduct of Dr. Lee, along with the complicity of Dr. Meske and FHS-West, was misconduct of the magnitude to justify a new trial under CR 59(a)(1). It was error to fail to grant a new trial.

E. Juror Misconduct Requires As a Matter of Law that a New Trial Be Granted

Juror No. 6 engaged in misconduct in two respects. The jury knew in *voir dire* that the dispute involved allegations of medical negligence against physicians. Juror No. 6 did not speak up that she had gone to medical school. Then in deliberations she injected the extrinsic evidence of attending medical school and related extrinsic evidence of symptoms, diagnosis and treatment. Juror No. 6's misconduct is analogous to that of that in *State v. Parker*, 25 Wash. 405, 65 Pac. 776 (1901) and *Fritsch v. J. J. Newberry's, Inc.*, 43 Wn. App. 904, 907 720 P.2d 845 (1986).

In *State v. Parker*, a juror failed to disclose in *voir dire* his knowledge of the defendant, and he knew the "gang" that defendant belong. Another juror injected that defendant had stolen sheep and money. The reviewing court found the juror's conduct reprehensible, thus juror misconduct. The verdict was reversed based upon the trial court's failure to grant a new trial based upon this juror misconduct.

In *Fritsch*, misconduct occurred when a juror introduced what his lawyer told him the value is of a shoulder injury. The court found that introduced evidence could be objectively established without exploring the reasoning of the jury. The *Fritsch* Court observed:

It goes without saying, juror Sauser's statement presented evidence outside the record affecting a material issue in this case -- damages. Finally, statements such as juror Sauser's are in the nature of expert testimony. It is akin to a jury bringing a book or text into the jury room which was never admitted in evidence but is relied upon by the jury in arriving at its verdict. *Kirby v. Rosell*, 133 Ariz. 42, 648 P.2d 1048 (Ct. App. 1982); *Johnson v. Haupt*, 5 Kan. App. 2d 682, 623 P.2d 537 (1981). As noted in *Halverson*, such statements are not subject to objection, cross examination, explanation or rebuttal.

It is juror misconduct for a juror to bring information outside the record. *Allyn v. Boe*, 87 Wn. App. 722, 943 P.2d 364 (1997)(a dispute involving tree loss). In *Allyn*, a juror in *voir dire* swore he could be fair even though he knew one of the parties. Then in *voir dire* the juror

presented his personal "opinions" of the creditability of the party, based upon matters outside of the record.

What Juror No. 6 did was to inject extrinsic matters into the deliberations. What Juror No. 6 introduced for the first time in deliberations materially affected the foundation of the factual issues that this jury was to decide. It was as if an undisclosed "expert witness" was allowed to sit in the jury room and express undisclosed and untested opinions about the facts that were at issue. Those extrinsic opinions, and purported facts were not subject to cross examination, challenge for competency or bias. Mr. Vestal was denied a trial by a fair and impartial trial by this juror's misconduct. The remedy is a new trial. CR 59(a)(2).

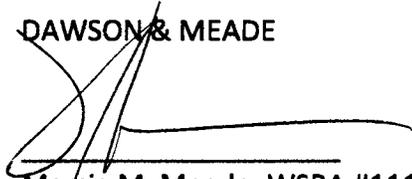
VII. CONCLUSION

Mr. Vestal litigated with fairness. The same conclusion cannot be reached as to the defendants. The Court has consistently held that gamesmanship that results in an unfair tactical advantage to an opponent will not be tolerated. The least restrictive remedy at the time was to grant a mistrial. It was untenable to fail to grant the mistrial. The remedy that remains is a new trial.

The juror introduced extraneous matters into the deliberations.
The injection of the extraneous materials was confirmed by two jurors.
The remedy is a new trial.

RESPECTFULLY SUBMITTED this 31 day of December 2009.

DAWSON & MEADE

A handwritten signature in black ink, appearing to be 'Marcia M. Meade', written over a horizontal line. The signature is stylized with a large loop at the beginning and a long horizontal stroke at the end.

Marcia M. Meade, WSBA #11122
Co-Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 31 day of December, 2009, I caused a true and correct copy of the Appellant's Opening Brief to be served as indicated below.

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Attorney at Law Overnight Mail
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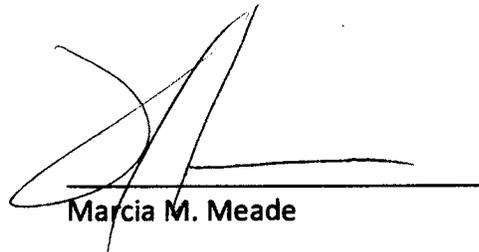
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STATE OF WASHINGTON
BY WJ
10/21/09 4:01 PM PST
COUNTY OF SPOKANE

I declare under penalty of perjury that the foregoing is true and correct. EXECUTED on this 31st day of December, 2009, at Spokane, Washington.



Marcia M. Meade

APPENDIX A Statutes and Court Rules

RCW 4.22.070 Percentage of fault -- Determination -- Exception -- Limitations.

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

[1993 c 496 § 1; 1986 c 305 § 401.]

NOTES:

Effective date -- 1993 c 496: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993." [1993 c 496 § 3.]

Application -- 1993 c 496: "This act applies to all causes of action that the parties have not settled or in which judgment has not been entered prior to July 1, 1993." [1993 c 496 § 4.]

Preamble -- Report to legislature -- Applicability -- Severability -- 1986 c 305: See notes following RCW 4.16.160.

RCW 7.70.100 Mandatory mediation of health care claims -- Procedures. (redacted)

(1) No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action. The notice required by this section shall be given by regular mail, registered mail, or certified mail with return receipt requested, by depositing the notice, with postage prepaid, in the post office addressed to the defendant. If the defendant is a health care provider entity defined in RCW 7.70.020(3) or, at the time of the alleged professional negligence, was acting as an actual agent or employee of such a health care provider entity, the notice may be addressed to the chief executive officer, administrator, office of risk management, if any, or registered agent for service of process, if any, of such health care provider entity. Notice for a claim against a local government entity shall be filed with the agent as identified in RCW 4.96.020(2). Proof of notice by mail may be made in the same manner as that prescribed by court rule or statute for proof of service by mail. If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the date the notice was mailed, and after the ninety-day extension expires, the claimant shall have an additional five court days to commence the action.

(2) The provisions of subsection (1) of this section are not applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name.

(3) After the filing of the ninety-day presuit notice, and before a superior court trial, all causes of action, whether based in tort, contract, or otherwise, for damages arising from injury occurring as a result of health care provided after July 1, 1993, shall be subject to mandatory mediation prior to trial except as provided in subsection (6) of this section.

CR 8 GENERAL RULES OF PLEADING

(a) **Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) **Defenses; Form of Denials.** A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in rule 11.

(c) **Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitation, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) **Effect of Failure To Deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) **Pleading To Be Concise and Direct; Consistency.**

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice. The adoption of this rule shall not be considered an adoption or approval of the forms of pleading in the Appendix of Forms approved in rule 84, Federal Rules of Civil Procedure.

CR 12 DEFENSES AND OBJECTIONS

(a) When Presented. A defendant shall serve his answer within the following periods:

(1) Within 20 days, exclusive of the day of service, after the service of the summons and complaint upon him pursuant to rule 4;

(2) Within 60 days from the date of the first publication of the summons if the summons is served by publication in accordance with rule 4(d)(3);

(3) Within 60 days after the service of the summons upon him if the summons is served upon him personally out of the state in accordance with RCW 4.28.180 and 4.28.185 or on the Secretary of State as provided by RCW 46.64.040.

(4) Within the period fixed by any other applicable statutes or rules. A party served with a pleading stating a cross claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court.

(A) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the courts action.

(B) If the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in section (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in section (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, or if more particularity in that pleading will further the efficient economical disposition of the action, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after the notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the courts own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in section (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(i) Nonparty at Fault. Whenever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. The identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded.

CR 15 AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated "proposed" and unsigned, shall be attached to the motion. If a motion to amend is granted, the moving party shall thereafter file the amended pleading and, pursuant to rule 5, serve a copy thereof on all other parties. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments To Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

(e) Interlineations. No amendments shall be made to any pleading by erasing or adding words to the original on file, without first obtaining leave of court.

[Adopted effective July 1, 1967; Amended effective September 1, 2005.]

CR 26 GENERAL PROVISIONS GOVERNING DISCOVERY (Redacted)

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that: (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

...

(e) **Supplementation of Responses.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.

...

CR 37 FAILURE TO MAKE DISCOVERY: SANCTIONS

(a) **Motion for Order Compelling Discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, and upon a showing of compliance with rule 26(i), may apply to the court in the county where the deposition was taken, or in the county where the action is pending, for an order compelling discovery as follows:

(1) **Appropriate Court.** An application for an order to a party may be made to the court in which the action is pending, or on matters relating to a deposition, to the court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the county where the deposition is being taken.

(2) **Motion.** If a deponent fails to answer a question propounded or submitted under rules 30 or 31, or a corporation or other entity fails to make a designation under rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under rule 33, or if a party, in response to a request for inspection submitted under rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, any party may move for an order compelling an answer or a designation, or an order compelling inspection in accordance with the request. When taking a deposition

on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to rule 26(c).

(3) Evasive or Incomplete Answer. For purposes of this section an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure To Comply With Order.

(1) Sanctions by Court in County Where Deposition Is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or rule 35, or if a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination;

(E) Where a party has failed to comply with an order under rule 35(a) requiring him to produce another for examination such orders as are listed in sections (A), (B), and (C) of this subsection, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure To Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe the fact was not true or the document was not genuine, or (4) there was other good reason for the failure to admit.

(d) Failure of Party To Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Production or Inspection. If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his or her deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for production of documents or inspection submitted under rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just,

and among others it may take any action authorized under sections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. For purposes of this section, an evasive or misleading answer is to be treated as a failure to answer.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 26(c).

(e) Failure To Participate in the Framing of a Discovery Plan. If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

CR 59 NEW TRIAL, RECONSIDERATION, AND AMENDMENT OF JUDGMENTS (Redacted)

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.