



**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....i-iii

A. INTRODUCTION..... 1

B. ASSIGNMENTS OF ERROR AND ISSUES..... 2

C. STATEMENT OF THE CASE..... 4

    1. The facts giving rise to the lawsuit demonstrated that Dr. Lee did not commit malpractice .....4

    2. Plaintiff learned that Dr. Maureen Smith had been an ED physician caring for Mr. Vestal long before this lawsuit was filed .....8

    3. Plaintiff conducted almost no discovery in this litigation .....9

    4. Plaintiff’s mid-trial motion was factually baseless.....12

    5. Dr. Lee received a defense verdict after a hard fought trial.....15

    6. No juror misconduct was reflected in the record.....16

D. ARGUMENT..... 18

    1. The trial court was correct when it rejected Plaintiff’s claim of a violation of CR 12(i)..... 18

    2. The trial court was also correct when it rejected Plaintiff’s claim of a violation of CR 26(e) ..... 26

    3. The trial court was correct again when it rejected Plaintiff’s claim of juror misconduct ..... 31

        a. There was no failure to disclose by Juror Number Six.....32

b. Any comments Ms. Clark may have made not only were appropriate, but they inhered in the verdict and cannot be considered.....33

E. CONCLUSION.....38

APPENDIX

## TABLE OF AUTHORITIES

### WASHINGTON STATE CASES

<u>Aker Verdal A/C v. Neil F. Lampson, Inc.</u> , 65 Wn. App. 177, 828 P.2d 610 (1992).....	29
<u>Aluminum Co. of America v. Aetna Casualty &amp; Surety Co.</u> , 140 Wn.2d 517, 998 P.2d 856 (2000).....	26, 31
<u>Breckenridge v. Valley Gen. Hosp.</u> , 150 Wn.2d 197, 204, 75 P.3d 944 (2003).....	34, 35
<u>Chiappetta v. Bahr</u> , 111 Wn. App. 536, 46 P.3d 797 (2002) <u>rev.denied</u> , 147 Wn.2d 1018 (2002).....	33
<u>Fritsch v. J.J. Newberry's</u> , 43 Wn. App. 904 (1986).....	35
<u>Gardner v. Malone</u> , 60 Wn.2d 836, 376 P.2d 651, 379 P.2d 918 (1962) .	33
<u>Gourley v. Gourley</u> , 158 Wn.2d 460, 145 P.3d 1185 (2006).....	18, 30
<u>Halverson v. Anderson</u> , 82 Wn.2d 746, 513 P.2d 827 (1973).....	32
<u>Hiner v. Bridgestone/Firestone, Inc.</u> , 138 Wn.2d 248, 978 P.2d 505 (1999).....	22
<u>Lockwood v. A.C. &amp; S Inc.</u> , 44 Wn. App. 330, 722 P.2s 826 (1986), <u>aff'd</u> , 109 Wn.2d 235 (1987).....	33
<u>Marshall v. AC&amp;S, Inc.</u> , 56 Wn. App. 181, 782 P.2d 1107 (1989)....	27, 28
<u>Marvik v. Winkelman</u> , 126 Wn. App. 655, 109 P.3d 47 (2005).....	33, 34

<u>Mazon v. Krafchick</u> , 158 Wn.2d 440, 144 P.3d 1168 (2006).....	22
<u>Orwick v. Fox</u> , 65 Wn. App. 71, 828 P.2d 12 (1992).....	25
<u>Richards v. Overlake Hosp. Med. Ctr.</u> , 59 Wn. App. 266, 796 P.2d 737 (1990) <u>rev. denied</u> , 116 Wn.2d 1014 (1991).....	36, 37, 38
<u>Rollins v. King County Metro Transit</u> , 148 Wn. App. 370, 199 P.3d 499 (2009).....	23
<u>Rivas v. Overlake Hosp. Med. Ctr.</u> , 164 Wn.2d 261, 189 P.3d 753 (2008).....	20
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	32
<u>State v. Balisok</u> , 123 Wn.2d 114, 866 P.2d 631 (1994).....	31, 32, 35
<u>State v. Greenwood</u> , 120 Wn.2d 585, 845 P.2d 971 (1993) .....	28
<u>State v. Kendrick</u> , 47 Wn. App. 620, 736 P.2d 1079 (1987) .....	27
<u>State v. Ng</u> , 110 Wn.2d 32, 750 P.2d 632 (1988).....	33
<u>State v. Parker</u> , 25 Wash. 405 (1901) .....	35
<u>Tunstall v. Bergeson</u> , 141 Wn.2d 201; 5 P.3d 691 (2000).....	28
<b>EXTRAJURISDICTIONAL CASES</b>	
<u>State v. Colorado</u> , 224 P.3d 388, 392 (Colo. Ct. App. 2009).....	19, 20
<u>Wilder v. Eberhart</u> , 977 F.2d 673, 676 (1st Cir. 1992).....	21
<b>STATUTES</b>	
RCW 4.22 .....	22
RCW 4.22.015 .....	23

RCW 4.22.070.....	19, 21, 23, 24, 25
RCW 4.22.070(1).....	18, 21, 22
RCW 7.70.030 .....	20

**COURT RULES**

CR 12 .....	3
CR 12(i).....	2, 12, 14, 15, 18, 19 22, 23, 25
CR 26.....	3, 28
CR 26(e).....	3, 14, 15, 26, 27, 28, 30, 31
CR 30 .....	28
CR 30(e).....	28
PCLR 1(h).....	11
RAP 2.5(a) .....	27

**OTHER AUTHORITIES**

BALLENTINE'S LAW DICTIONARY (2010) (citing 41 Am. Jur. 1st Pl § 144; 27 Am. Jur. 2d Eq § 204).....	20
MOORE'S FEDERAL PRACTICE § 59.13[2][c][I][A] at 59-84 to 58-49.....	26
WPI 105.03 .....	20

## A. INTRODUCTION

In this appeal, Plaintiff seeks to shift the blame for his own failure to conduct discovery to the Defendants. He argues that Defendants violated court rules and committed misconduct, because they did not volunteer information that was never requested in discovery in this adversary system. But parties are not required to volunteer information that is not requested in discovery, and Plaintiff's contentions to the contrary are without merit. Plaintiff also alleges juror misconduct, but the record does not support this claim either.

Additional claims are made in this appeal that do not target Dr. Lee. Instead, they target his co-defendant, Franciscan Health System ("FHS"). Dr. Lee does not focus on those arguments in this brief, and has taken other steps in his own briefing to attempt to minimize duplication with FHS's briefing.<sup>1</sup> That said, Dr. Lee agrees with FHS's briefing and incorporates those arguments here by reference to the extent they compliment his own and touch on issues affecting Dr. Lee in this appeal. In the end, Dr. Lee believes that all of Plaintiff's contentions in this appeal are without merit, and requests that the trial court be upheld on all counts.

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<sup>1</sup> For example, detail about the procedural history found in FHS's briefing is not included in this brief, so as to conserve judicial resources.

## **B. ASSIGNMENTS OF ERROR AND ISSUES**

Only Plaintiff's Assignments of Error 3, 6, and 7 pertain to Dr. Lee. App. Br. at 2. Assignments 3 and 6 assert collectively that the trial court erred in refusing to grant a mistrial or new trial. These assertions are based on claims that Dr. Lee (1) should have pleaded an affirmative defense with more specificity even though he did not pursue that affirmative defense at trial, and (2) should have provided supplemental discovery answers that went beyond the responses necessary to answer the questions that were asked.

Assignment 7 asserts that there was juror misconduct that warranted a new trial. This assertion amounts to a claim that a juror who acknowledged some medical training during jury selection and still was left on the jury by Plaintiff should have checked her life experience at the door to the jury room.

The issues related to Plaintiff's appeal that pertain to Dr. Lee are properly identified as:

1. Is a defendant required by CR 12(i) to identify a specific non-party at fault, when that defendant is not pursuing a non-party at fault affirmative defense at trial in the case? [Answer: No]

2. Is it a violation of CR 26(e), when a defendant does not supplement his deposition responses to volunteer information that would be responsive to questions he was never asked? [Answer: No]

3. Is it error to refuse to grant a mistrial or a new trial based upon invalid claims of violation of CRs 12 and 26? [Answer: No]

4. Is it error to reject a plaintiff's contention of juror misconduct when (1) the juror spoke about her medical education in voir dire and Plaintiff kept her on the jury, and (2) the case law holds that bringing life experiences into the jury room is not only not wrong, but that it is "expected?" [Answer: No]

5. Is it error to refuse to grant a new trial based upon an invalid claim of juror misconduct? [Answer: No]

Plaintiff also makes assignments of error regarding her motion to amend her complaint and a jury instruction she requested against FHS. Those assignments do not pertain to Dr. Lee; while Dr. Lee disagrees with Plaintiff's contentions, he will defer to FHS's briefing on them. However, an important additional issue arises out of those assignments of error, and the assignments above, which is:

6. When the errors alleged did not affect the evidence or opinions regarding Dr. Lee's care, and the jury returned a defense verdict in Dr. Lee' favor, if the case is remanded (though Dr. Lee does not believe

it should be), should Dr. Lee's defense verdict remain undisturbed and the remand be limited to the co-defendant? [Answer: Yes]

### C. STATEMENT OF THE CASE

**1. The facts giving rise to the lawsuit demonstrated that Dr. Lee did not commit malpractice.**

On October 1, 2002, 74 year old James Vestal saw his primary care physician, Dr. Louie, with complaints of dark stools for the past day or so. RP 187. Dr. Louie thought this might represent bleeding, and so he told Mr. Vestal to go the emergency room. RP 191, 203. He did this because the results of laboratory tests would come back more quickly in a hospital than they would in a private physician's office. CP 131.

Mr. Vestal went to the Emergency Department (the "ED") at St. Clare Hospital in Lakewood, which is part of the Franciscan Health System ("FHS"). He arrived at about 12:00 p.m. that day. See RP 696-97 He was triaged at 12:10 p.m.<sup>2</sup> Id.

In the ED, Mr. Vestal was evaluated by Dr. James Lee, a board tested and certified emergency medicine physician.<sup>3</sup> RP 695. Dr. Lee

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<sup>2</sup> Triage is an initial screen to prioritize patients on the basis of need or likely benefit from medical treatment.

<sup>3</sup> Dr. Lee grew up in Korea, but did his emergency medicine residency training in the United States. RP 690-94. He then spent almost 20 years as a U.S. military physician. Id. After receiving his honorable discharge in 1994, Dr. Lee began practicing emergency medicine at St. Clare Hospital in 1995, where he has practiced to this day. Id.

suspected that Mr. Vestal had a gastrointestinal (“GI”) bleed. RP 710. Dr. Lee also determined that, while Mr. Vestal certainly needed medical treatment, the treatment did not need to be delivered urgently. RP 722. Instead, Mr. Vestal would be admitted to the hospital as an inpatient, and would receive most of his treatment inpatient. Id.

Still, Dr. Lee got things started in the ED. He took a history from Mr. Vestal and did a physical examination. RP 701-02. He also ordered several things, which included several blood tests to help determine Mr. Vestal’s status and problem, continuous vital signs monitoring to make sure Mr. Vestal was not deteriorating, an EKG to make sure Mr. Vestal’s heart was doing okay presently (Mr. Vestal had significant pre-existing heart disease), a stool test to check for blood, Vitamin K infusion to slowly increase the coagulation of Mr. Vestal’s blood in a managed and safe way, and a chest x-ray to check for fluid buildup or other problems. RP 706-15; 717-18.

Dr. Lee diagnosed a GI bleed, and ordered blood to be delivered to St. Clare’s from the blood bank at St. Joseph’s Hospital in Tacoma where it was kept. RP 714-5. This would allow a transfusion to take place after Mr. Vestal was admitted to the hospital. CP 717-18. Mr. Vestal was awake and alert throughout Dr. Lee’s care, and at 2:37 p.m. Dr. Lee obtained Mr. Vestal’s informed consent to the blood transfusion. RP 752-

53. Dr. Lee also arranged with one of the “hospitalists,” Dr. Meske, to have Mr. Vestal admitted to the hospital.<sup>4</sup> CP 722-23.

Dr. Lee got off work in the ED at 3:00 p.m. that day, and left the hospital some time after that, probably somewhere between 3:10 and 3:30 p.m. RP 737-38; 751-52; see RP 682-87. The medical records for the visit document that at 3:30 p.m. Mr. Vestal was discharged from the ED. See RP 681.

As the record and the briefing shows, there is some confusion about what happened between 3:30 and 5:00 p.m. that day. E.g., RP 682-687. But what is crystal clear about that 3:30 to 5:00 p.m. timeframe is that Dr. Lee was not responsible for the patient then. Id. And he never suggested that he was. Id. In his deposition, Dr. Lee clearly and unequivocally stated that his responsibility ended with the discharge from the ED at 3:30 p.m. E.g., id.

At 5:00 p.m., Mr. Vestal was moved to the Hospital’s Progressive Care Unit as a hospital inpatient. RP 102. The blood transfusion that Dr. Lee had ordered was started. RP 1085-86. There, he had a bowel

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<sup>4</sup> Hospitalists are physicians, often internal medicine specialists, whose practice emphasizes providing care for hospitalized patients; these doctors provide and coordinate care for hospitalized patients. RP 1058-59. ED physicians at St. Clare cannot admit patients to the hospital, but hospitalists can. RP 723.

movement, and then did not feel well. This was followed by vomiting. See RP 372-73. A code was called. See id.

Both the ED staff (Dr. Smith) and inpatient staff responded to the code. Mr. Vestal was also given fresh frozen plasma, which increases the coagulation more rapidly (and with more risk) than the Vitamin K Dr. Lee had ordered. See id. He was also intubated.<sup>5</sup> See id. Mr. Vestal's condition stabilized. See id.; RP 1082-83.

However, at 4:45 a.m. the next morning, Mr. Vestal suffered an irregular heartbeat and a significant drop in blood pressure. CP 60. Hospital staff attempted to resuscitate Mr. Vestal, but the efforts went on long enough that the family requested that they be stopped. Id. Mr. Vestal passed away. Id. Though anyone's passing is a sad event, that does not mean it was the result of malpractice. Sometimes a body is worn down over the years, and it is just time.

Defendants contended, and the jury agreed, that Mr. Vestal's passing was not due to substandard care. CP 676-77. Instead, it was due to his numerous underlying health conditions, including his significant heart disease.

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<sup>5</sup> Intubation is putting a tube down a patient's trachea into his lungs to assist with breathing.

**2. Plaintiff learned that Dr. Maureen Smith had been an ED physician caring for Mr. Vestal long before this lawsuit was filed.**

This lawsuit was brought by Mr. Vestal's son, Plaintiff Gregory Vestal.<sup>6</sup> CP 3-9 In the days following Mr. Vestal's passing, Plaintiff met with Dr. Paul Hildebrand, the director of St. Clare's ED, and other St. Clare medical staff. CP 553. Plaintiff kept notes of this discussion. CP 552-555.

The notes demonstrated that Plaintiff was interested to know, and discussed with Dr. Hildebrand, which ED physicians had cared for Mr. Vestal during his visit. CP 553; 680. Under the heading "Emergency Department," Plaintiff wrote both Dr. Lee's and Dr. Smith's names in his notes, indicating that both of these ED physicians had treated Mr. Vestal. Id. Plaintiff, through his counsel, produced his notes in discovery in this case.

Though that was sufficient, that was not Plaintiffs' only notice of Dr. Smith's involvement. Dr. Smith wrote a chart note on Emergency Department paper; this note showed that she was a physician caring for Mr. Vestal during his stay. CP 687. In addition, after she responded to

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<sup>6</sup> For clarity, the decedent will be referred to as "Mr. Vestal" and Gregory Vestal will be referred to as "Plaintiff" in this brief.

the code, Dr. Smith introduced herself to Plaintiff and spoke with him about Mr. Vestal's condition. CP 687.

Plaintiff may have chosen not to investigate the full scope of Dr. Smith's involvement, but there can be little doubt that her identity was well known to Plaintiff. He had ample opportunity to investigate her role if he had chosen to do so.

**3. Plaintiff conducted almost no discovery in this litigation.**

Just three days before the statute of limitations ran, on September 30, 2005, Plaintiff filed this lawsuit alleging medical malpractice against FHS and against Dr. Lee and his wife. CP 3. Plaintiff also named John and Jane Does I-V in the caption. Id. With the John and Jane Doe designations, Plaintiff made a choice to focus on the care Mr. Vestal received as an inpatient. Id. He specifically stated that these Defendants were members of the "Franciscan Inpatient Team." CP 5:12-14.

In most cases, the first discovery conducted is copious written discovery – interrogatories and requests for production. This particular Plaintiff elected a different strategy. He chose to send only one single interrogatory throughout this entire case. CP 192, 570, 578. And that single interrogatory was not sent to Dr. Lee. CP 680.

That interrogatory was directed to FHS. CP 548. It demonstrated that Plaintiff continued to focus on the strategy he had elected from the outset. Id. The interrogatory asked only for the names of the members of the “Franciscan Inpatient Team.” Id.

Any number of additional questions could have been asked, but simply were not. Just a few examples of potential interrogatories Plaintiff might have wanted to ask FHS are:

- Who staffed the ED on the day in question?
- What shifts were doctors in the ED working?
- What shift did Dr. Lee work on the day in question?
- What was the typical ED shift in October 2002?
- Who was caring for Mr. Vestal between the time of his discharge from the ED at 3:30 p.m. (as documented in the records, which Plaintiff had and which Dr. Lee highlighted for Plaintiff) and 5:00 p.m.?
- Why did Dr. Smith respond from the ED to the code, rather than Dr. Lee?
- Why was Dr. Smith’s note written on ED paper?
- What was Dr. Smith’s role in caring for Mr. Vestal?

The possibilities for questions truly are endless.<sup>7</sup> See PCLR 1(h).

Plaintiff also could have elicited much of the information outlined above through requests for production for pertinent documents. But Plaintiff sent none. CP 680.

Plaintiff could have taken a 30(b)(6) deposition of FHS. He elected not to do so. Id.

Plaintiff could have deposed Dr. Smith, and asked her about her involvement. He did not do that either. Id.

Another discovery tool that is absolutely fundamental to medical malpractice cases, and that might have revealed the information Plaintiff now wishes he had had, is expert depositions. But Plaintiff did not take a single expert deposition in this case. Id.

The only real substantive discovery Plaintiff undertook throughout the three-plus years this case was pending prior to trial were the depositions of the hospitalist, Dr. Meske, after he brought her into the case, and the deposition of Dr. Lee. Id. But, even then, he did not ask either of these physicians questions to elicit information about Dr. Smith or about what shift Dr. Lee worked on the day in question. Id.

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<sup>7</sup> Recognizing this, and the fact that sometimes parties do get a bit carried away with the written discovery, Pierce County has determined it should limit interrogatories to 35 in number in a case such as this. PCLR 1(h). Pierce County also explicitly recognizes that medical malpractice cases are complex and allows an additional 22 weeks for discovery above and beyond what is allowed for “standard” cases. PCLR 1(h).

**4. Plaintiff's mid-trial motion was factually baseless.**

Mid-trial Plaintiff moved for a mistrial based on a claim of violation of CR 12(i). CP 181-200. Plaintiff asserted that (1) by testifying truthfully that he was not at the ED after 3:30 p.m. on October 1, 2002, Dr. Lee was pursuing a defense of non-party at fault; and (2) Dr. Lee's deposition answers were misleading. Id. The briefing on this motion focused on Dr. Lee's deposition. Id.

That deposition was taken July 23, 2007, almost five years after Dr. Lee treated Mr. Vestal that one time in a busy ED. CP 39. Dr. Lee testified that he had no real memory of the events at issue. CP 681. However, since the case was initiated, he had seen a medical record for Mr. Vestal that stated that Mr. Vestal was discharged from the ED at 3:30 p.m. Id. Expressly based upon that record, Dr. Lee testified that his role in Mr. Vestal's care ended at that time. Id. He also testified that he did not know where Mr. Vestal was after 3:30 p.m. that day. Id.

Plaintiff now complains and name calls, stating that Dr. Lee had an obligation to volunteer information about his shift in the ED in October 2002, even though he was never asked about Dr. Lee's shift. In his brief, Plaintiff quotes a number of questions and responses, but none of those called for the information Plaintiff now claims should have been elicited.

Plaintiff does not state exactly which question it is he alleges Dr. Lee should have answered differently or supplemented. However, it appears that Plaintiff's complaint may be that Dr. Lee should have supplemented his answer to this question:

*Q: 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.?*

*[Objection omitted.]*

*A: No.*

App. Br. at 14 (emphasis supplied). There is no evidence in the record to support a need to supplement this answer. Plaintiff's counsel conceded at that he never asked Dr. Lee in his deposition why he did not know. Plaintiff's counsel argued to the trial court:

*Dr. Lee was never specifically asked, why don't you know? But so what?*

CP 197: 14-15.<sup>8</sup> But it is not "so what." That was another important deficiency in the discovery Plaintiff chose to undertake in this case.

Dr. Lee testified that he did not know where the patient was during the 3:30 to 5:00 p.m. timeframe in question. CP 681. If he was not at the

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<sup>8</sup> Plaintiff's counsel then continued on to argue that Dr. Lee had said that the patient was discharged from the ED at 3:30 p.m. and that he (Dr. Lee) was not responsible for his care after 3:30 p.m. CP 197.

hospital, it naturally follows that Dr. Lee would not know who was responsible for caring for the patient during the pertinent timeframe.

Dr. Lee did not change this testimony at trial or at any other time. He believed the patient left the ED at 3:30 p.m. as the medical chart indicated; and he also offered the chart as the basis for that belief. The testimony that Mr. Vestal stayed in the ED after 3:30 p.m. came only from Plaintiff, not from Dr. Lee.

At oral argument on a mid-trial motion on this issue, Plaintiff's counsel argued that there had been a violation of CR 12(i) and complained that Dr. Lee's own counsel should have questioned Dr. Lee in his deposition about when he got off work on October 1, 2002.<sup>9</sup> CP 188:5-14. He also stated that when he asked Dr. Lee's counsel, "why didn't you tell me about this," Dr. Lee's counsel responded, "you didn't ask." CP 190:10-12. In this portion of his argument, Plaintiff's counsel effectively admitted again that he did not ask; he argued:

*I'm not required to ask. He is required to tell me, if he's going to say that his client was not at fault because he wasn't even there.*

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<sup>9</sup> Plaintiff did not raise CR 26(e) until after the trial was over.

Id. As is discussed in more detail below, this is an incorrect statement of the law. The trial court rejected Plaintiff's request for a mistrial. CP 199-200.

**5. Dr. Lee received a defense verdict after a hard fought trial.**

The trial lasted from September 29, 2008 to October 14, 2008. RP 1; CP 676. Among other witnesses, Dr. Lee was examined and cross examined at length. RP 567-690. After the jury heard from all the witnesses in the case, it deliberated. When 10 of the jurors reached agreement, the jury determined:

*Was the defendant Dr. James B. Lee negligent? No*

CP 676.

Plaintiff moved for a new trial, making the same arguments he had made during trial about CR 12(i). CP 475-89. He asserted again that Defendants had failed to comply with CR 12(i)'s requirement that they specifically identify non-parties at fault if they wanted to argue that a non-party was at fault. Plaintiff also alleged for the first time a violation of CR 26(e). The trial court rejected Plaintiff's arguments, and refused to grant a new trial.

In hindsight, Plaintiff may wish that he had elected a different strategy in pursuing his case. He may wish that he had chosen to

diligently pursue discovery and to make the inquiries outlined in Subsection 3 above. In considering this appeal, it is important to keep in mind that, even if Plaintiff had done that, and even if Plaintiff knew all the details of Dr. Smith's care and treatment of Mr. Vestal prior to trial, none of that information would have changed a thing about the defense verdict in Dr. Lee's favor.

In fact, the information that Plaintiff wishes had been volunteered as a gift from his legal adversaries does not go to Dr. Lee's care at all. It does not change the evidence and opinions offered about Dr. Lee. It goes to a timeframe after Dr. Lee was done caring for the patient. The totality of Dr. Lee's care was subject to intense scrutiny the jury, and it withstood that scrutiny. Plaintiff's choice of strategy and associated failure to conduct comprehensive discovery should not now jeopardize the jury's defense verdict for Dr. Lee.

**6. No juror misconduct was reflected in the record.**

Dissatisfied with the verdict, Plaintiff also attempted to attack it with an assertion of juror misconduct. CP 478. In support of that claim, Plaintiff focused on Juror Number Six, Anne Clark. Id. The primary claim was that Ms. Clark had failed to disclose during voir dire that she had attended medical school. CP 475-89. However, Ms. Clark never

attended medical school; and she has testified that she did not tell the jurors that she did. CP 594-95.

Of the five juror declarations before the Court on the issue of Ms. Clark's participation, including two that were gathered by the Plaintiff, only one declaration alleged that Ms. Clark had said she attended medical school. CP 568. This juror was obviously mistaken.

That said, Ms. Clark does have some medical training from community college. CP 594-95. She reported this on her pre-voir dire jury questionnaire. CP 684. On that form, she marked that she had "training education or experience" in the medical field. Id. When asked to explain this on the form, Ms. Clark wrote, "Nursing/Hematology/Lab Work (did not graduate)." Id. Plaintiff chose not to explore these issues in the live voir dire and did not challenge Ms. Clark's participation on the jury in any way. RP 3-141.<sup>10</sup>

Plaintiffs also asserted that Ms. Clark interjected extraneous evidence into the discussions and was extraordinarily persuasive.<sup>11</sup> CP 477-489. Plaintiff stated that Ms. Clark gave her opinion about why Mr.

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<sup>10</sup> In fact, the only time anyone spoke to Ms. Clark during voir dire was very briefly when she was asked about a fear of hospitals, and responded that needles scared her. RP 45 (She was Juror 17 in the venire).

<sup>11</sup> Ironically, Plaintiff claims Ms. Clarke had these extreme powers of persuasion with only the support of the two jurors who voted differently from Ms. Clarke. CP 568:20-25.

Vestal did not have a bleed. But there was considerable evidence and testimony on this issue during the trial. Jurors are expected to weigh in on the evidence and the testimony they heard in the trial; they are expected to form opinions based on that testimony and to discuss those opinions. As is discussed more below, it is also perfectly permissible for them to discuss their own backgrounds in deliberations. The vague assertions in the declarations collected by Plaintiff do not show that anything other than this expected activity occurred in this case. CP 462-466.

The trial court also denied Plaintiffs' motion for a new trial based on claims of juror misconduct.

#### **D. ARGUMENT**

**1. The trial court was correct when it rejected Plaintiff's claim of a violation of CR 12(i).**

Civil Rule 12(i) provides:

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.

In construing the rule, the Court must give effect to the rule's plain language. Gourley v. Gourley, 158 Wn.2d 460, 466, 145 P.3d 1185

(2006). As Rule 12(i)'s plain language makes clear, this rule applies only when a party wishes to pursue the affirmative defense of non-party at fault under RCW 4.22.070.

Analysis of two concepts embodied in this rule is fundamental to properly applying it here. The first is the concept of an affirmative defense. The second is the concept of fault under RCW 4.22.070.

An affirmative defense is just one of two basic types of defenses. The first type is typically referred to simply as a “defense” or sometimes as a “negating defense;” this is a simple denial that negates an element of a claim asserted. In considering a negating defense, the jury need only look at whether the plaintiff has met his burden of proof. See State v. Colorado, 224 P.3d 388, 392 (Colo. Ct. App. 2009). To make that determination, the jury analyzes the relationship between the defense and the substantive element the denial/defense would negate. See id. With a negating defense, if the defendant was successful in negating the element, the defense should prevail because the plaintiff has failed in his burden of proof.

In contrast, the second type of defense is an “affirmative defense.” This is an entirely different thing from a negating defense, and is defined as:

Affirmative Defense. A defense which amounts to something more than a mere denial of the plaintiff's allegations; a defense which sets up a new matter not embraced within the ordinary scope of a denial of the material averments of the complaint.

BALLENTINE'S LAW DICTIONARY (2010) (citing 41 Am. Jur. 1st Pl § 144; 27 Am. Jur. 2d Eq § 204). This is also sometimes called a “confession and avoidance.” Colorado, 224 P.3d at 392.

In the affirmative defense scenario, the defendant raises additional issues, which would serve to relieve it of liability even if plaintiff's contentions were determined to be correct. See id. Because the defendant is the one raising new issues in connection with an affirmative defense (unlike in a negating defense scenario), the defense has the burden of proof of proof on the affirmative defense. See Rivas v. Overlake Hosp. Med. Ctr., 164 Wn.2d 261, 267, 189 P.3d 753 (2008) (defendant carries burden of proof on affirmative defense).

Applying the distinction between the two types of defenses to medical malpractice cases, in every medical malpractice case, the plaintiff has the burden of proof. RCW 7.70.030. This is true even if the defendant chooses, as virtually every medical malpractice defendant does, to put on evidence tending to discredit a plaintiff's theory of negligence; that is simply a choice to assert a negating defense. Id.; WPI 105.03; see

Wilder v. Eberhart, 977 F.2d 673, 676 (1st Cir. 1992) (in a normal medical malpractice action, defendant may introduce testimony to rebut plaintiff's claim without shifting the burden of proof to the defendant).

If the defendant offers only a negating defense, the defendant need not disprove anything. Rather, to prevail, the defendant needs only to convince the trier of fact either that there was no breach of the standard of care or that the alleged breach did not cause injury. Id. This is commonly done through health care provider testimony, expert testimony, and argument.

However, in some instances, a defendant may also choose to pursue an affirmative defense at trial. One such example is where a defendant pleads and pursues a claim that an RCW 4.22.070 allocation of fault is appropriate. This is what Plaintiff contends happened in this instance when Dr. Lee explained that he was not on shift during the timeframe in question. As will be shown, Plaintiff is mistaken. There was no affirmative defense pursued here.

The affirmative defense found at RCW 4.22.070(1) provides in pertinent part:

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.

\* \* \*

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.

(emphasis supplied). By operation of this statute and CR 12(i), if a defendant in an action pursues a claim at trial that a non-party is at "fault" for the alleged injury, that non-party-at-fault's name is put on the jury verdict and the jury is instructed to determine if a proportionate share of the fault should be allocated to that non-party; in such a scenario, the percentage amount allocated to the non-party is never collectible because judgment is never entered on that amount. RCW 4.22.070(1); see Mazon v. Krafchick, 158 Wn.2d 440, 452, 144 P.3d 1168 (2006). This is commonly called an "empty chair" affirmative defense. See Hiner v. Bridgestone/Firestone, Inc., 138 Wn.2d 248, 260, 978 P.2d 505 (1999).

Fault is a term of art for purposes of chpt. RCW 4.22. It does not include all manner of responsibility; instead, it is limited to its definition

in RCW 4.22.015. Rollins v. King County Metro Transit, 148 Wn. App. 370, 377, 199 P.3d 499 (2009). RCW 4.22.015 provides:

“Fault” includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

(emphasis supplied). Bringing all three concepts together, when Plaintiff argues that Dr. Lee violated CR 12(i), plaintiff is actually arguing:

- (1) Dr. Lee did not merely deny that he had liability (and did not merely deny that he was at the hospital after 3:30 p.m.), but instead put on an RCW 4.22.070 affirmative defense, and thereby set up a new matter that would relieve him of liability even if Plaintiff’s averments against him were true;
- (2) To prevail on an RCW 4.22.070 non-party at fault affirmative defense, Dr. Lee attempted to prove that Dr. Smith was at fault – that is, that she was negligent in her care and treatment of Mr. Vestal; and

- (3) That Dr. Lee requested that Dr. Smith's name be added to the verdict form and the jury be instructed that it had an option to allocate a percentage of fault to Dr. Smith.

The record demonstrates that none of those things happened.

For the time that Dr. Lee was present and treating Mr. Vestal, Dr. Lee put on a simple negating defense that he had complied with the standard of care. This was done through his own testimony, the testimony of his expert witness, the cross examination of Plaintiff's expert witness, and Dr. Lee's counsel's argument.

For the 3:30 to 5:00 p.m. timeframe, Dr. Lee augmented his simple negating defense. This augmentation of his defense was along the lines of: "Plaintiff argues that I was here and that I was responsible for the patient. I wasn't. Not only was the standard of care met, but don't hold me liable for something I didn't have any part in."

Though Dr. Lee originally pleaded an RCW 4.22.070 affirmative defense in good faith because an answer is due at the earliest stages of litigation and a defendant must preserve his potential affirmative defenses at that time, Dr. Lee never pursued this affirmative defense. As his counsel explained again in response to Plaintiff's mid-trial motion on this issue:

*Let's make this absolutely clear: I am not raising an affirmative defense that Dr. Smith did something wrong. I don't think that Dr. Smith did something wrong. I'm just saying that when my doctor was involved in the care, here is the period of time he is involved.*<sup>12</sup>

And Dr. Lee never argued at trial that there was anyone at fault for Mr. Vestal's passing.

Not only did Dr. Lee not argue that, but he could not argue that. To make a claim of medical malpractice/fault, Dr. Lee would have had to offer expert testimony against another provider. E.g., Orwick v. Fox, 65 Wn. App. 71, 86, 828 P.2d 12 (1992). He had no such testimony, and he offered no such testimony. And he certainly did not ask for Dr. Smith's name to be added to the jury verdict form.

The record is clear. Dr. Lee simply did not pursue an affirmative defense in this case. Under these circumstances, he could not, and did not, violate Court Rule 12(i) about disclosures needed in connection with an RCW 4.22.070 affirmative defense. The trial court was correct in rejecting Plaintiff's contentions to the contrary.

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<sup>12</sup> If pleading RCW 4.22.070 at the outset of the case did anything at all, it was that it put Plaintiff on notice to further explore who might have fault in this situation. Plaintiff chose not to do that.

**2. The trial court was also correct when it rejected Plaintiff's claim of a violation of CR 26(e).**

After the trial was over and the Plaintiff had lost, Plaintiff asserted that Dr. Lee had violated CR 26(e), and that this was misconduct by Dr. Lee's counsel. This assertion was made in connection with a request for a new trial.

Washington's Supreme Court has held that, several things must happen in order for a new trial to be warranted based upon a claim of attorney misconduct:

As a general rule, the movant must establish that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record. . . . The movant must ordinarily have properly objected to the misconduct at trial, and the misconduct must not have been cured by the court instructions.

Aluminum Co. of America v. Aetna Casualty & Surety Co., 140 Wn.2d 517, 539, 998 P.2d 856 (2000) (quoting with approval 12 James Wm. Moore, MOORE'S FEDERAL PRACTICE § 59.13[2][c][I][A] at 59-84 to 58-49) (ellipses in original). Plaintiff did not properly preserve any CR 26(e) objection during the trial; the first time this rule was raised by Plaintiff was in the motion for a new trial.

During trial, plaintiff had focused on his contentions that there had been aggressive advocacy in this case; that he should not need to ask questions; and that Dr. Lee should have just volunteered information. Error that is not of constitutional magnitude is waived if it is not raised during trial when the trial court would have an opportunity to take corrective action. RAP 2.5(a); State v. Kendrick, 47 Wn. App. 620, 636, 736 P.2d 1079 (1987). Given Plaintiff's failure to preserve the issue, the CR 26(e) argument should not be considered.

However, if the Court will consider the argument despite Plaintiff's failure to raise the issue during trial, it should be noted that it is questionable whether the rule even applies to deposition testimony. Legal research revealed no Washington cases applying the rule to deposition testimony. And, in fact, its application to depositions would seem to be contrary to the "Marshall Rule," which is well-established and provides that a party may not defeat a motion for summary judgment by offering directly contradictory testimony in a declaration without explaining the contradiction. Marshall v. AC&S, Inc., 56 Wn. App. 181, 185, 782 P.2d 1107 (1989).

It would seem that if a party could supplement or correct deposition testimony at any time simply because there was a change in testimony -- and indeed, if a party was bound by court rule to do so -- a

declaration at the summary judgment stage would be permissible with or without explanation, and the Marshall Rule would have no validity at all. That is not the law of this state. Id.

Application of CR 26(e) to depositions also appears to be contrary to CR 30(e) -- the rule specific to depositions -- which requires that deposition corrections be made within 30 days of the transcript's submission to the witness. Where a specific court rule is inconsistent with a more general court rule, the specific rule that must be given effect. Tunstall v. Bergeson, 141 Wn.2d 201; 5 P.3d 691 (2000) ("To resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute."); State v. Greenwood, 120 Wn.2d 585, 592, 845 P.2d 971 (1993) (court rules interpreted pursuant to the principles of statutory construction). Thus, to the extent CR 26 and CR 30 conflict, CR 30 should govern depositions.

If the Court will nevertheless apply CR 26(e) to depositions, the rule's language must be at the forefront of the inquiry. The rule provides in pertinent part:

(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.

As the plain language of the rule makes clear, there no duty of general supplementation of discovery responses. There are specific and limited exceptions to this general rule, but the inquiry does not start with the exceptions. The inquiry starts with the opening language of the rule, which defines to whom the rule applies; it applies to a “party who has responded to a request for discovery.”

Thus, the threshold question is whether pertinent discovery was ever propounded in the first place. Aker Verdal A/C v. Neil F. Lampson, Inc., 65 Wn. App. 177, 181-182, 828 P.2d 610 (1992) (“We hold that, in the absence of a [proper formal] discovery request, a party is not obligated to supplement his or her response to an inquiry.”). As is laid out in detail

above and in FHS's brief, and as Plaintiff's counsel conceded at the motion hearing when he argued "I'm not required to ask," there simply was no discovery request on point for the information Plaintiff complains was not produced.

The inquiry ends there. There was no pertinent deposition question, therefore no answer to supplement. Rule 26(e) does not apply in these circumstances.

However, even if the inquiry did proceed beyond the threshold question to the exceptions to the general rule, the trial court was correct to reject of Plaintiff's argument. Exception number one applies only to questions "directly addressed" to witness information. There was no such direct question here. Therefore, applying the rule's plain language, there was no duty to supplement under exception number one. See Gourley, 158 Wn.2d at 466 (court must give effect to court rule's plain language).

The second exception, which governs when to amend incorrect answers, does not apply either. The answers Dr. Lee gave to his deposition questions were correct when made, and they remained correct. The fact that Dr. Lee went off duty at 3:00 p.m. and left the hospital at some time thereafter did neither changed nor invalidated Dr. Lee's deposition testimony that he believed and the records documented that Mr. Vestal left the ED at 3:30 p.m., that he did not know where the patient was

after 3:30 p.m., and that he was not responsible after 3:30 p.m. This is the same substantive testimony Dr. Lee offered at trial. There was no need for Dr. Lee to supplement under CR 26(e).

Moreover, Plaintiff's contention against Dr. Lee was that he had misdiagnosed the bleed, and that he should have begun infusion of blood and plasma within the first two hours of Mr. Vestal's time at the hospital. RP 389-93. The first two hours had passed by 2:10 p.m. that day. Plaintiff's theory was that when that allegedly critical two hour window was missed, that caused Mr. Vestal's death. Id. Thus, even if Plaintiff could show a violation of CR 26(e) (though he cannot), such a violation would not cause the severe prejudice necessary to warrant a new trial (or a mistrial). See Aluminum Co. of America, 140 Wn.2d at 539-540. It had no influence at all on Plaintiff's theory against Dr. Lee. The trial court was correct in rejecting Plaintiff's contentions to the contrary.

**3. The trial court was correct again when it rejected Plaintiff's claim of juror misconduct.**

A strong affirmative showing of [juror] misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.

State v. Balisok, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994). When determining whether a moving party has made this strong affirmative

showing, the trial court is vested with considerable discretion; its ruling will not be disturbed on appeal unless there was an abuse of discretion. State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 631 (1994); Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973). A trial court abuses its discretion only when its decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

**a. There was no failure to disclose by Juror Number Six**

Plaintiff’s allegation that Juror Number Six, Anne Clark, committed misconduct by failing to disclose that she went to medical school is without factual basis. Ms. Clark’s declaration established that never went to medical school. CP 594 (¶¶ 5, 6). Instead, as was disclosed in her juror questionnaire responses, Ms. Clark took some classes in nursing, hematology, and lab work at El Paso (Texas) Community College in approximately 1978 or 1979. Id. She never received a college degree in any field from any institution. Id.

Plaintiff had the opportunity during voir dire to further explore Ms. Clark’s background. After voir dire, he chose to keep her on the jury. He cannot fairly complain about his choice now.

**b. Any comments Ms. Clark may have made not only were appropriate, but they inhered in the verdict and cannot be considered**

Courts generally are prohibited from examining how a jury or its members reach their verdict. Lockwood v. A.C. & S Inc., 44 Wn. App. 330, 357, 722 P.2s 826 (1986), aff'd, 109 Wn.2d 235 (1987). Juror declarations may be considered only to the extent they do not attest to matters inhering in the verdict. Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962). The individual or collective thought processes leading to a verdict “inhere in the verdict” and cannot be used to impeach a verdict. State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988).

For these purposes, “thought processes” include “juror motives, the effect the evidence had on the jurors, the weight given to the evidence by particular jurors, and the jurors’ intentions and beliefs.” Chiappetta v. Bahr, 111 Wn. App. 536, 541, 46 P.3d 797 (2002), rev. denied, 147 Wn.2d 1018 (2002). In other words:

... a fact inheres in the verdict if it relates to the effect of evidence or events upon the mind of a juror, or is directly associated with the juror’s reasons, intent, motive, or belief, when reaching the verdict.

Marvik v. Winkelman, 126 Wn. App. 655, 661-662, 109 P.3d 47 (2005)

(internal quotations and citations omitted).

Plaintiff claims that Ms. Clark was particularly influential in deliberations. To the extent this claim is credible at all, under the case law, it does not matter. The persuasive power of particular jurors inhered in the verdict and must be disregarded by this Court in considering this appeal. See id.

At the same time, jurors are entitled to rely on their personal life experience to evaluate the evidence presented at trial during the deliberations. For example, Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 204, 75 P.3d 944 (2003), involved an alleged failure to diagnose a brain aneurysm. There, the trial court had granted a new trial to the plaintiff, believing that it had been improper for a juror to share during deliberations his own experiences with his wife's migraine headaches. Id.

The Court of Appeals reversed the trial court. The Washington Supreme Court agreed there had been no misconduct, explaining:

Corson's statements constituted his personal life experiences rather than extrinsic evidence. Corson's use of his experience with his wife's migraine headaches to evaluate the evidence presented at trial is what jurors are expected to do during deliberations. There was no misconduct.

However, it is unnecessary to make this determination. Corson's statements inhered in the verdict. Because a trial court may not

consider postverdict juror statements that inhere in the verdict when ruling on a new trial motion, the trial court abused its discretion by granting a new trial.

Id. (emphasis supplied).

Here, even if Ms. Clark did discuss her opinion of the evidence based on her experiences and education, it was not juror misconduct; it was what jurors are expected to do under the law. She did not bring extrinsic or novel evidence into the case, as is required before a potential finding of misconduct can be made. See Balisok, 123 Wn.2d at 118.

This case is therefore nothing like the cases relied upon by plaintiff. See State v. Parker, 25 Wash. 405 (1901) (jurors failed to disclose knowledge of defendant and knowledge that defendant had stolen sheep and money) or Fritsch v. J.J. Newberry's, 43 Wn. App. 904 (1986) (juror introduced what his lawyer told him about the value of a shoulder injury). Rather, just as in Breckenridge, any statements Ms. Clark made based upon her life experience not only were appropriate, but also inhaled in the verdict.

Plaintiff's attempts to take this case outside the purview of Beckenridge and similar cases by arguing that there was an introduction of extrinsic evidence fail for another, independently sufficient reason. In the declarations he submitted, Plaintiff failed to identify what "extrinsic evidence" Ms. Clark supposedly introduced. For purposes of a juror

misconduct inquiry, “[n]ovel or extrinsic evidence is defined as information that is outside all the evidence admitted at trial, either orally or by document.” Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990), rev. denied, 116 Wn.2d 1014 (1991).

Juror Bennett’s declaration states there was a discussion about symptoms “x, y and z,” but does not further clarify what those were. CP 463 (¶ 8). Juror Grieb’s declaration is equally non-specific about what the supposed extrinsic evidence was. CP 465-466. As such, there was no way that it could have properly been determined that extrinsic evidence had been introduced.

These matters, only superficially addressed in the declarations, were well within the trial evidence. There was expert testimony at trial about the symptoms of an internal hemorrhage, as well as evidence on the degree of impact on Mr. Vestal. Ms. Clark very well could have been discussing those symptoms and signs discussed by the experts.

Juror Chandler states affirmatively in her declaration that Ms. Clark did not raise any issues “beyond the evidence presented at trial or in the records or her opinion of such evidence.” CP 600 (¶ 5). Plaintiff simply never established that any “extrinsic evidence” was introduced into the deliberation process. The fact that Ms. Clark may have been vocal or opinionated is not inappropriate in any way; that is how juries work.

All of these principles are summed up in a case that is entirely on point here, Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990), rev. denied, 116 Wn.2d 1014 (1991). In Richards, “the alleged misconduct was that juror Geisler’s outside experience and expertise in a quasi-medical capacity, which she imparted to the jury, in combination with alleged outside evidence of the mother's illness as being capable of producing the injuries prenatally, prejudiced the jury deliberations so as to deny Richards a fair trial.” Id. at 273. The Court rejected this contention, explaining:

The claimed misconduct was that Geisler had reviewed the medical records which were in evidence in the case and discovered the mother had suffered the flu some 20 weeks into the gestation period. In deliberations, juror Geisler allegedly stated it was her opinion that this illness explained a lot of the "injuries" or birth defects of the child as pre-birth defects and that she did not support the theory advanced by the plaintiffs that the child's problems were the result of the negligence of the doctors. Plaintiffs contend this is extrinsic evidence which affected the verdict.

... in our opinion, a review of the affidavits of the jurors does not establish the introduction of new or novel evidence. The evidence of a viral infection at the 16- to 20-week stage of the pregnancy was before the jury from the testimony of one of the doctors and in the medical reports. Juror Geisler's background was known to the parties at the

time of voir dire and her "medical" knowledge was something she naturally brought in with her to the deliberations, and this was known by all the parties after voir dire. The medical records were introduced into evidence and sent to the jury room with the jury for its use in the deliberations. There was no extrinsic evidence brought into the case and thus there was no misconduct.

Id. at 273-74. Just like the juror in Richards, Ms. Clark's medical knowledge was known to the parties during voir dire and was something she brought with her to the deliberations. She fully disclosed her science classes and training on her juror questionnaire, and the parties had the opportunity to explore this fully during voir dire. Plaintiff elected to keep her on the jury. There was no extrinsic evidence and there was no misconduct. The trial court was correct to reject this claim also.

#### **E. CONCLUSION**

For the foregoing reasons, and those contained in FHS's brief, Dr. Lee respectfully requests that the Court reject Appellant's contentions and affirm the trial court's decisions.

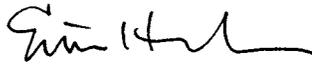
Alternatively, if the trial court is reversed, because the alleged errors about the 3:30 to 5:00 p.m. timeframe do not go to the evidence or opinions regarding Dr. Lee's care, and the jury returned a defense verdict in Dr. Lee's favor, if the case is remanded, Dr. Lee requests that the

defense verdict in his favor remain undisturbed and the remand be limited to the FHS.

DATED this 15th day of April, 2010.

Respectfully submitted,

Fain Anderson VanDerhoef, PLLC



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Christopher H. Anderson, WSBA #19811  
Erin H. Hammond, WSBA #28777  
Attorneys for Overlake Hospital Med. Center



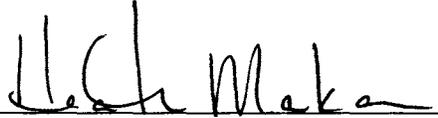
Mr. Steve Fitzer  
Ms. Melanie Stella  
Burgess Fitzer, P.S.  
1145 Broadway, Suite 400  
Tacoma, WA 98402

Legal Messenger  
 E-file/E-mail  
 Facsimile  
 First Class Mail

Ms. Marcia M. Meade  
Attorney At Law  
1310 W. Dean Avenue  
Spokane, Washington 99201-2015

Legal Messenger  
 E-file/E-mail  
 Facsimile  
 First Class Mail

Dated this 15<sup>th</sup> day of April, 2010 at Seattle, Washington.



Heather L. Makar  
Legal Assistant

Fain Anderson VanDerhoef PLLC  
701 Fifth Avenue, Suite 4650  
Seattle, WA 98104  
(206) 749-0094