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STATE OF WASHINGTON

BY  DEPUTY

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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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 the marital community composed thereof; LORETTE  
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.

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BRIEF OF RESPONDENT FRANCISCAN HEALTH SYSTEM-WEST

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## I. INTRODUCTION

The trial court had tenable reasons for making each of the discretionary rulings to which plaintiff assigns error, including those denying plaintiff's May 2008 and October 2008 motions to amend the complaint he had filed in 2005. Juror 6 did not commit misconduct.

Plaintiff lost at trial because his expert, a gastroenterologist, failed to persuade the jury that the defendants, an emergency room physician and an internist, had committed malpractice. Plaintiff did not lose because he blamed the wrong doctors for malpractice but, even he did, that was his counsel's fault. Defense counsel did not "bamboozle" plaintiff's counsel or "shift accountability" at trial to a doctor whose role they had hidden until trial instead of naming as a nonparty at fault pursuant to CR 12(i).

Dr. Lee's deposition testimony was neither false nor misleading. Even if "I don't know" answers to deposition questions must be supplemented pursuant to CR 26(e) if the deponent later learns the information he didn't know when deposed, plaintiff failed to show that Dr. Lee learned before trial in September 2008 that Dr. Maureen Smith had worked the emergency room shift after his on October 1, 2002. The trial court thus did not abuse its discretion by denying plaintiff a new trial based on the contention that Dr. Lee had violated an obligation to supplement his July 2007 deposition testimony before trial.

## II. COUNTERSTATEMENT OF THE CASE

### A. The Parties and Their Role in the Health Care at Issue.

James Vestal died of pulmonary arrest at St. Clare Hospital, which is operated by Franciscan Health System-West (FHS), the morning of October 2, 2002. Ex. 1 (p. 1-000003). Contributing causes were gastrointestinal bleeding, diabetes, and vascular disease. *Id.*

Mr. Vestal, who was 74 and diabetic, had high blood pressure, severe peripheral artery disease, coronary artery disease, a nonhealing ulcer on his foot, and a history of coagulopathy and deep vein thrombosis for which he was taking the blood-thinner Coumadin. RP 160-62, 194, 813-16, 819, 827; Ex. 1 (1-000002, 06-07, 011-012, 014). The morning of October 1, 2002, Mr. Vestal's son Gregory took him to see his primary care doctor, Dr. Louie, because Mr. Vestal had had a "black stool," RP 187, and felt weak, RP 191, although he seemed alert, RP 193. Dr. Louie told him he had "a GI bleed," and should go to the emergency room, so Gregory drove him to St. Clare Hospital shortly after noon. RP 191, 203; Ex. 1 (1-000005). Mr. Vestal was able to walk with his walker, and was pale but alert and not in pain. RP 206-07, 218-19; Ex. 1 (1-000005-08).

Dr. James Lee, a board-certified emergency physician employed by Northwest Emergency Physicians, RP 695, was on duty when Mr. Vestal arrived at the emergency room. Dr. Lee reviewed the triage nurse's

assessment and data, examined Mr. Vestal, ordered tests, diagnosed an internal bleed, and had Mr. Vestal put on oxygen, connected to a saline IV drip and an extra IV drip line as an emergency portal, and connected to a machine that monitored cardiac function. RP 701, 704-13, 736; Ex. 1 (p. 1-000005-07). Dr. Lee made the judgments that Mr. Vestal's condition was stable, that he was alert, that there was no ongoing bleeding, and that therefore Mr. Vestal did not need an emergency transfusion of 0-negative blood or fresh plasma, but by 12:52 p.m. had ordered two units of typed and cross-matched packed red blood cells from the blood bank to transfuse, when it arrived, as replacement for blood lost due to bleeding, and discontinued Coumadin and ordered Vitamin K to counteract its anti-clotting effects. RP 714-18, 721, 732-35, 750; Ex. 1 (1-000005, 07).

Dr. Lee then arranged by telephone for Dr. Lorette Meske to admit Mr. Vestal to the Progressive Care Unit (PCU).<sup>1</sup> Dr. Meske, a hospitalist, an internist who limits her practice to caring for hospitalized patients, was a member of the Franciscan Inpatient Team. CP 173, 570-71. Dr. Lee last saw Mr. Vestal at 2:37 p.m., to explain the transfusion process and obtain consent to it. RP 752-53; Ex. 1 (0-1000079).

Dr. Lee's eight-hour shift ended at 3:00 p.m., although he may not

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<sup>1</sup> Emergency physicians do not have privileges to admit patients to St. Clare Hospital (or to most hospitals). RP 722-24; *see* RP 426; Ex. 1 (p. 1-000007 and 77).

have left the Emergency Department precisely then. RP 738, 751. At 3:30 p.m., Mr. Vestal was discharged from the Emergency Department to the PCU, by which time Dr. Lee had left the hospital. Ex. 1 (1-000008, time entry "1530"); RP 752. Mr. Vestal was not physically moved to the PCU until about 5:00 p.m., and remained in the Emergency Department until then. Ex. 1 (1-000008 and 105); *see* CP 661 (lines 20-25).

In the PCU, Mr. Vestal got up and had a bowel movement and then, about twenty minutes later, vomited. Dr. Maureen Smith responded to a code call from the Emergency Department, followed by Dr. Meske. Ex. 1 (1-000010). James Vestal was stabilized and moved to Intensive Care, Ex. 1 (1-000013), where he was seen by his cardiologist and a gastroenterologist, Ex. 1 (1-000014-16), but his condition worsened and did not respond to blood transfusions and other interventions, and he died shortly before 6:00 a.m. on October 2. Ex. 1 (1-000003, 17).

B. Proceedings Below.

1. Filing of the lawsuit and pretrial discovery.

On September 30, 2005, two days short of three years after his father's death, Gregory Vestal filed this lawsuit against FHS, Dr. Lee, and "Doe" defendants. CP 3-9. A case schedule order, issued pursuant to Pierce County Superior Court Local Rule ("PCLR") 1(b), set a discovery cutoff date of January 12, 2007 and a trial date of March 29, 2007. CP

646. Less than two weeks after filing suit, plaintiff's trial counsel propounded a single interrogatory to FHS (the only interrogatory he propounded during the litigation to any defendant, CP 192, 570, 578), asking FHS to:

State the full name, home address and telephone number, employee badge number or identification number, position, job description, and all acts and/or involvement performed, for every member of **Franciscan Inpatient Team**, who provided care to, examined, or evaluated, reported on or about, consulted concerning, or otherwise was in any way involved with the Deceased, James Vestal, at St. Clare Hospital on October 1, 2002, and/or October 2, 2002.

CP 548 (**bold type** in original).

FHS answered the interrogatory by giving Dr. Meske's name because she had been a member of the Franciscan Inpatient Team at St. Clare Hospital; Dr. Lee and Dr. Maureen Smith had been *Emergency Department* physicians, so FHS did not name either of them in its answer to the interrogatory. CP 342, 570-71. Plaintiff's complaint indicated that plaintiff's counsel understood the distinction, because it alleged that Dr. Lee had been an Emergency Department physician at St. Clare Hospital. CP 4 (¶ VI), and that the "Doe" defendants had been "part of what is identified as 'Franciscan Inpatient Team.'" CP 5 (¶ VIII). The complaint alleged that FHS was liable vicariously for acts or omissions of Dr. Lee, CP 4-5 (¶ VI), and of the "Doe" defendants, CP 5 (¶ VIII).

Plaintiff produced to defendants five pages of typed notes reflecting inquiries Gregory Vestal made of Dr. Paul Hildebrand, the Emergency Department director, CP 553, and other staff during the month after James Vestal's death. CP 491 (¶ 5), CP 551-55. The notes included four separate references to Dr. Smith, including:

**ER doctors were Lee and Smith** [emphasis added]. In the ward was Meske. Lag time? No lasix, not sure? Cardi-oarhythmia [sic]? Heart caused death? The heart was not beating strong enough? [CP 553].

In April 2006, counsel for all parties signed a Confirmation of Joinder of Parties, Claims and Defenses pursuant to PCLR 4, advising the court that a status conference was needed because an additional party would be joined and remained to be served, but not because an additional claim or defense would be raised. CP 68. Dr. Meske was the additional party, and an agreed order was entered in August 2006, amending the case caption to add her as a named defendant. CP 58-59.<sup>2</sup>

On October 2, 2006, the case schedule was amended to set a new discovery cutoff date of January 14, 2008, and a new trial date of March 31, 2008. CP 65. During the ensuing 14 months, plaintiff's counsel took no depositions of any defense expert witnesses, CP 580, and did not

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<sup>2</sup> Plaintiff asserted below that "Dr. Meske was added as a defendant [in 2006] based upon Dr. Lee's representation that Mr. Vestal's care was turned over to Dr. Meske at 1530." CP 487 (lines 8-9). The assertion was made without citation to any evidence.

depose Dr. Smith, CP 571, or any St. Clare Hospital or FHS administrator. On July 23, 2007, some 57½ months after the events at issue, plaintiff's counsel deposed Dr. Meske and Dr. Lee. CP 81-82.

Plaintiff has never contended that his counsel asked Dr. Meske any question that required her to name or refer to Dr. Smith. Nor did plaintiff's counsel ask Dr. Lee any questions about Dr. Smith. With respect to Dr. Lee's responsibility for Mr. Vestal's emergency room care 57½ months earlier, Dr. Lee testified several times that he had been the responsible physician until the patient left the emergency room at 3:30,<sup>3</sup> and that he did not know where the patient was between 3:30 and 5:00 p.m. Lee Dep. at 14, 39, 44-45.<sup>4</sup> Asked whether he had "any idea of who was responsible for [Mr. Vestal] as a physician . . . between 3:30 p.m. and 5:00 p.m.," Dr. Lee answered "no," and that he usually continues to care for a patient after the patient is admitted to the hospital while the patient remains in the emergency room, Lee Dep. at 48, 49. Plaintiff's counsel did not ask Dr. Lee what hours he worked on October 1, 2002, or how one could ascertain what doctors had provided, or been responsible for, Mr.

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<sup>3</sup> *E.g.*, "During ER stay, patients supposed to be under my care. Patient left emergency room about 1530, 3:30." CP 185.

<sup>4</sup> According to the Index to Clerk's Papers designated in late February 2010 by FHS, Dr. Lee's deposition and Trial Ex. 1 were sent to the Court of Appeals under separate cover, apparently without "CP" page numbers. Therefore, citations in this brief are to the actual pages of the Lee deposition.

Vestal's Emergency Department care from 3:30 to 5:00.<sup>5</sup>

2. Denial of May 2008 motion to amend complaint.
  - a. Attempt to add a new claim that FHS was liable under a "corporate negligence" theory based on a "systemic problem".

Discovery closed on January 14, 2008. CP 65. In February 2008, the parties stipulated to trial before Pro Tem Judge Joe Gordon, Jr., starting September 29, 2008. CP 10-15. No pretrial deadlines were amended. On May 15, 2008, plaintiff filed a motion for leave to amend his complaint. CP 16-49. In a declaration, plaintiff's trial counsel asserted that, after deposing Drs. Lee and Meske in July 2007, he had decided to amend plaintiff's complaint "to clarify the negligence of all the Defendants, including the corporate negligence of [FHS]," but that he had chosen not to do so until after an April 2008 mediation. CP 19.

Presumably to comply with CR 15(a), plaintiff's counsel attached a proposed Amended Complaint to the motion for leave to amend. CP 21-32. The material difference between that document and the original complaint, CP 3-9, was that the proposed amendment would have added an allegation that FHS "is liable under the doctrine of Corporate negligence for the negligent and/or reckless failure to provide adequate

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<sup>5</sup> In response to a deposition question by his own counsel, Dr. Lee testified that the recorded discharge time of 3:30 p.m. indicated to him that Mr. Vestal had at least left the examination room in the Emergency Department by that time. Lee Dep. at 60. Plaintiff's counsel did not follow up on that question and answer. Lee Dep. at 61.

policies, procedures and protocols, necessary and required to treat [Mr. Vestal's] medical conditions and immediate medical needs.” CP 28 (¶ XXVII).<sup>6</sup> Plaintiff's causes of action would otherwise have remained the same. The proposed amended complaint included no specific allegations that there were “Doe” defendant health care providers whose identities plaintiff's trial counsel had been unable to learn but who he contended were responsible for particular negligent acts or omissions.

In his memorandum supporting the May 2008 motion to amend, CP 50-53, plaintiff's trial counsel claimed that there had been neither undue delay nor inexcusable neglect in seeking leave to amend, and that his proposed amendment would not prejudice the defendants because “the facts which support the amendment remain unchanged,” but that “it is anticipated that the claims in the amended complaint will be further clarified and supported by additional discovery through the depositions of the other employees or agents of the Defendants . . .” CP 53.

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<sup>6</sup> Non-material differences were that (1) the proposed amended complaint described Mr. Vestal's medical course in greater detail, CP 24-27 (¶¶ XI-XXIII); (2) a new paragraph would have been added the naming of Dr. Meske as a defendant in August 2006, CP 23 (¶¶ VII-VIII); (3) the allegations of negligence against both Dr. Lee and Dr. Meske would have been made more explicit, CP 25-27 (¶ XV-XVI, XVIII-XXI); and (5) allegations would have been added to the effect that Mr. Vestal had remained in the Emergency Department for a period of “three or more hours” without being monitored or treated despite orders by Dr. Lee, after consultation with Dr. Meske, to admit him to the PCU, CP 24-25 (¶¶ XI-XII). All of those were more specific allegations in support of a negligence cause of action that was already in play based on the malpractice claims asserted in the original complaint.

b. FHS's opposition to the motion to amend.

FHS opposed plaintiff's motion to amend. CP 647-58, 54-86. FHS argued that a new corporate liability claim based on failure to provide "policies, procedures and protocols" had not been the subject of discovery and would require FHS to prepare an entirely new defense after two years of litigation, with new witnesses and experts, two years after plaintiff had represented to the court that no new claims would be added, ten months after the depositions of Drs. Lee and Meske, and four months after the close of discovery. CP 650, 65-67. FHS also pointed out that amendment would be futile unless plaintiff could support his new corporate liability claim with competent expert opinion testimony, but that plaintiff's sole medical expert had affirmatively disclaimed any criticisms of FHS in his deposition. CP 656-57.

c. Trial court's ruling denying amendment.

Plaintiff's trial counsel filed no reply in support of the motion for leave to amend. At the hearing on the motion, plaintiff's trial counsel told the court that his proposed new "corporate negligence" theory sought to hold FHS liable for "a systemic problem" that "was not and cannot be attributable directly to any specific acts or employees . . .," but that had left Mr. Vestal, according to his son Gregory, "in the emergency department pushed up against the wall" without care from 3:30 to 5:00

p.m. on October 1, 2002. CP 494, 498, 499. Plaintiff's trial counsel did not represent that he could present expert medical testimony tying a lack of care between 3:30 and 5:00 p.m. to Mr. Vestal's death.

The trial court found that there had been undue delay in moving to amend, CP 525, and that corporate negligence was "a new type of claim that . . . would certainly require considerable work on the part of Franciscan to prepare for[, including] new experts and witnesses[, involving] considerable expense" and that FHS would be prejudiced "by the fact that this motion is being brought four months before the trial date that I'm sure would have to be moved if the motion were granted." CP 524-26. The court denied the motion to amend. CP 91-92, 524-25.

3. Trial proceedings.

a. Voir dire.

Prospective jurors filled out a questionnaire before counsel questioned them. CP 679, 684-85. Prospective juror 17, who ultimately was seated as Juror 6, CP 594 (¶ 3), indicated on her questionnaire that she had "some college/junior college" education and answered "Nursing/Hematology/Lab work (did not graduate)" to a question asking whether she "had any training, education or experience" in a medical field.<sup>7</sup> CP

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<sup>7</sup> She also reported on the questionnaire that a family member had taken anticoagulant medication; and listed "House, CSI, Discovery Health Channel" as "medical shows" that she watched on TV. CP 685.

684. Plaintiff has not argued that Juror 6 falsely answered any questions she was asked in voir dire, or that she failed to respond to questions asked of the panel concerning medical training or education.

b. Opening statements; references to Dr. Smith.

After the jury was empanelled on September 30, CP 94, plaintiff's trial counsel gave his opening statement. CP 105-19. Dr. Lee's counsel then gave the first opening statement for a defendant. CP 119-53, 155-72. He explained the roles of the different types of physicians in a hospital, Mr. Vestal's medical history, what Dr. Lee had done and ordered for Mr. Vestal and why. CP 120-53. Dr. Lee's counsel told the jury that Mr. Vestal had not received a blood transfusion immediately after Dr. Lee ordered one because his condition was stable and it takes time to obtain and transfuse blood when a patient is stable. CP 148-51. Dr. Lee's counsel told the jury that the evidence would show that Dr. Lee had not been responsible for Mr. Vestal's care after 3:00 because his shift had ended then and he had been relieved by Dr. Maureen Smith, but that Mr. Vestal remained in a room near the Emergency Department nursing station, and was monitored, not ignored, from 3:30 until he was moved to the PCU at 5:00. CP 155-57. Dr. Lee's counsel explained that Mr. Vestal had died not because of anything Dr. Lee or Dr. Meske could have done but did not do, but rather because of his preexisting heart disease. CP 161-

65. Dr. Lee's counsel addressed opinion testimony expected from plaintiff's standard-of-care expert, Dr. Mark Kogan, CP 165-169, and explained that the weight of the medical testimony would show that Dr. Lee complied with the standard of care and did not cause Mr. Vestal's death. CP 169-72. Dr. Lee's counsel mentioned Dr. Smith three times in his opening statement, CP 156, 168, 169, at no time asserting that she had been negligent.

Dr. Meske's counsel gave a short opening statement emphasizing that Dr. Meske had been told Mr. Vestal was stable and that Dr. Meske had not been asked to assess or treat Mr. Vestal while Mr. Vestal was in the Emergency Department. CP 172-78. Dr. Meske's counsel mentioned Dr. Smith twice, CP 175, at no time asserting that she had been negligent.

FHS's counsel reserved opening statement. CP 178.

- c. Plaintiff's counsel's claim that he had learned from defense opening statements that Drs. Lee and Meske were seeking to put the blame on Dr. Smith.

The next day, October 1, plaintiff's counsel complained that he had "learned yesterday that the allegation is made by the defendant, Dr. Lee, that apparently there may be some other non-party at fault in this." CP 183. He asked the court to instruct and admonish the jury "as to this issue" or allow him "to add an additional defendant as an agent of the hospital," *id.*, explaining that he meant "this other physician who took

over the care at three o'clock, apparently or allegedly," CP 189. Plaintiff's counsel did not submit a proposed amended complaint. Later, plaintiff's counsel proposed a third alternative, that being that "this case be mistried." CP 189. Five days later, on October 6, plaintiff's trial counsel renewed his requests to amend his client's complaint, RP 517-19, and for the jury be instructed "to the effect that they can find a John Doe or Jane Doe liable for [the] 'care' between 3:00 and [5:00]." RP 520. Counsel did not submit a proposed amended complaint or a proposed instruction.

Plaintiff's counsel complained to the trial court that Dr. Lee, at his deposition in July 2007, should have, but had not, disclosed that he had left work or that his shift had ended at 3:00 when asked when his responsibility for Mr. Vestal's care had ended, but had instead answered "During ER stay, patients supposed to be under my care. Patient left emergency room about 1530, 3:30." CP 185. Counsel for plaintiff complained that *Dr. Lee's counsel* had failed to ask Dr. Lee at his deposition when Dr. Lee got off work on October 1, 2002, or whether Dr. Lee had turned Mr. Vestal's care over to another emergency room physician, and reiterated his request to be allowed to amend his complaint, arguing that the defense had not complied with CR 12(i). CP 188-89. Plaintiff's counsel did not represent that he was prepared to call any expert to testify that physician negligence during the period from 3:30 to 5:00

proximately caused Mr. Vestal's death. Plaintiff's counsel complained that "when I told [Dr. Lee's counsel] yesterday, 'why didn't you tell me about this[?],' his answer was, 'You didn't ask.'" CP 190. Plaintiff's counsel implicitly admitted that he hadn't asked, arguing that "I'm not required to ask. He is required to tell me, if he's going to try and say that his client was not at fault because he wasn't even there." CP 190.

d. Dr. Lee's counsel's denial of any contention that Dr. Smith was negligent.

Dr. Lee's counsel explained to the court that plaintiff had not propounded any interrogatories to Dr. Lee, that Dr. Lee had answered truthfully the questions plaintiff's counsel had chosen to ask him at his deposition about responsibility for Mr. Vestal's care, and pointed out that Gregory Vestal's notes from 2002 show that he was told of Dr. Smith's ER role and wrote it down, CP 192-94. Dr. Lee's counsel disclaimed any contention that Dr. Smith was at fault. CP 192-94.

The trial court ruled that CR 12(i) had not required Dr. Lee to identify Dr. Smith, and denied plaintiff's requests for relief. CP 202-03.

e. Opinion testimony by plaintiff's medical expert.

Plaintiff sought to prove malpractice by Drs. Lee and Meske through the standard-of-care and medical causation opinion testimony of Dr. Mark Kogan, a California gastroenterologist, who was critical of both physicians. RP 297-98, 378-406. It was undisputed that FHS would have

vicarious liability for any malpractice by Drs. Lee or Meske. CP 506.

Dr. Kogan opined that Dr. Lee had misdiagnosed Mr. Vestal's condition, RP 367-69, 372, 378-86, and had caused his death by not giving a replacement blood transfusion and fresh plasma within two hours of his arrival at the Emergency Department on October 1, RP 386-92, which was no later than shortly after noon, RP 216; Ex. 1 (1-00005, "12:10" entry).<sup>8</sup> Asked by plaintiff's counsel what the "outside point" was by which Mr. Vestal's blood volume should have been restored, Dr. Kogan answered "two hours at a maximum," RP 389, and that, if that had been done, the "code" event that occurred at 5:25 p.m. later on October 1, 2002, would not have happened, CP 393, and "I don't think [Mr. Vestal] would have died," RP 391-92.

Dr. Kogan opined that Dr. Meske's care had been substandard because she failed to have Mr. Vestal resuscitated as soon as he arrived at the PCU, and because she gave him a drug, Lasix, that made his condition worse, RP 406, but Dr. Kogan did not express an opinion that either of those things caused or contributed to Mr. Vestal's demise.

Dr. Kogan testified that the records suggest that "the patient [was] sitting in the hallway" of the Emergency Department and was "not getting

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<sup>8</sup> Plaintiff's counsel implied at one point during trial that James and Gregory Vestal actually may have arrived at the Emergency Department before noon. See RP 334.

the care that he needed” for a “couple-hour” period after Dr. Lee’s notes indicate he had told Mr. Vestal that “she [Dr. Meske] would see him in the hospital.” RP 406-07. Plaintiff’s counsel, however, did not elicit from Dr. Kogan during his testimony or in any offer of proof any opinion that, to a reasonable degree of medical probability, if different care had been provided during the two hours prior to Mr. Vestal’s arrival at the PCU, Mr. Vestal’s death the next morning would have been prevented. *See* RP 407-11, 491-503.<sup>9</sup>

The defense experts, Dr. James Leggett, a cardiologist, and Dr. Michael Halperin, an emergency care physician, both of whom practice at Overlake Hospital in Bellevue, RP 807, 927-30, disputed Dr. Kogan’s opinions, and told the jury that Dr. Lee and Dr. Meske had exercised judgment and provided treatment within the standard of care, RP 829-30, 934, 941-44, 946-52, 961, 964, 966-70, 973-75, 979-81, and had not caused either the “code” event at 5:25 p.m. or Mr. Vestal’s death, RP 829, 833, 953-54, 971.

f. Plaintiff’s counsel’s examination of Dr. Lee at trial.

Plaintiff’s counsel examined Dr. Lee at length as an adverse witness in his case in chief. RP 567-690. Besides challenging what Dr.

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<sup>9</sup> Although plaintiff’s counsel asserted during his cross-examination of defense expert Michael Halperin, M.D., that Dr. Kogan had “testified that there was a very little likelihood that [Mr. Vestal] would have died if he had been adequately resuscitated prior to 5:00 p.m.,” RP 1006-07, the transcript of Dr. Kogan’s testimony does not bear that out.

Lee had done on October 1, 2002, plaintiff's counsel tried to show that Dr. Lee had responded evasively to questions at his deposition concerning where Mr. Vestal had been after 3:30 p.m. on October 1 and who had been responsible for Mr. Vestal's care. RP 620-21, 642-45, 647-48, 655-56, 679-89. Plaintiff's counsel did not ask or attempt to ask Dr. Lee whether he knew at the time of his deposition that Dr. Smith had worked the shift after his on October 1, 2002, or when he had learned or remembered that Dr. Smith had worked the shift after his.

g. Defense verdict; motion by plaintiff for a new trial.

The jury found by answers to special interrogatories that neither Dr. Lee nor Dr. Meske had been negligent, and thus did not reach the separate question of causation. CP 676-77. The trial court entered judgment on the defense verdict on December 4, 2008. CP 616-20.

Plaintiff timely moved for a new trial, CP 475-89, claiming that Juror 6 (the juror who had written "Nursing/Hematology/Lab work (did not graduate)" on her voir dire questionnaire) had committed misconduct warranting a new trial under CR 59(a)(2), and citing declarations of Jurors 1 and 2. CP 478; *see* CP 462-64, 465-66. Juror 1 testified that Juror 6 said she had "gone to medical school," professed to "know" what the symptoms of a serious bleed are, and opined that Mr. Vestal did not have a serious bleed because he did not have those symptoms. CP 463 (¶ 8).

Juror 1 did not say what symptoms Juror 6 had professed to “know” were those of a serious bleed, but asserted that “the knowledge of symptoms, diagnosis and treatment” that Juror 6 related were things “we had not heard during the trial.” CP 463 (¶ 8). Juror 1 testified it was his “impression that the other jurors were influenced by [Juror 6].” CP 463.

Juror 2 testified that Juror 6 had told other jurors “about her education” and “what she knew about the chemistry, drug interactions, heart attacks, strokes, or GI bleeds, and other matters,” and had seemed to be “very knowledgeable on what we were deliberating,” “spoke more than any other juror during deliberation,” and “influenced other jurors.” CP 466 (¶¶ 5, 8). Juror 2 did not testify that Juror 6 said she had gone to medical school, and did not say what Juror 6 had professed to know about “chemistry, drug interactions, heart attacks, strokes, or GI bleeds.”

Plaintiff also argued that he should have a new trial due to “discovery misconduct,” claiming that the defendants had been obliged, but had failed, to identify Dr. Smith as a non-party at fault pursuant to CR 12(i), CP 478-80, 483-85, and because Dr. Lee had violated an obligation under CR 26(e) to amend his deposition testimony before trial and tell plaintiff that his shift had ended at 3:00 on October 1, 2002 and that responsibility for any emergency room care had been transferred to Dr. Smith. CP 480, 482-83. Plaintiff asked for a new trial pursuant to CR

59(a)(9) due to “procedural bamboozling” and “ganging up” by the defense. CP 487-88.<sup>10</sup>

4. Defendants’ response to, and the trial court’s ruling denying, plaintiff’s new trial motion; appeal.

Defendants submitted declarations of Jurors 6, 11, and 13. Juror 6 denied having gone to medical school or having said that she had gone to medical school, CP 594, and testified that opinions she offered during deliberations had been based on the evidence and her life experiences, CP 595. Juror 11 testified that Juror 6 referred to classes she had taken in chemistry and had voiced unspecified opinions, but that she had not understood Juror 6 to say she had gone to medical school. CP 597. Juror 13 testified that Juror 6 referred to taking science courses years earlier but not graduating, and denied that Juror 6 was especially influential. CP 600.

Defendants argued that Juror 6 had not committed misconduct in failing to disclose that she had gone to medical school because she had not gone to medical school, CP 566 and 582, and, citing appellate court decisions including *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 796 P.2d 737 (1990), *rev. denied*, 116 Wn.2d 1014 (1991), that is not misconduct for a juror to rely, in deliberations, on personal experience or

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<sup>10</sup> Plaintiff cited, as his final ground for a new trial, the denial of a motion in limine. CP 480, 488-89. Because plaintiff has not designated such a ruling for inclusion in the Clerk’s Papers, and offers no assignment of error or argument about the ruling in his opening brief, FHS concludes that any such argument has been abandoned.

on medical training that was disclosed in voir dire, CP 567-68, 582-86.

Defendants denied having misled plaintiff's trial counsel into being oblivious of Dr. Smith's role. FHS pointed out that plaintiff's trial counsel had had Greg Vestal's notes from 2002 indicating an ER role for "Dr. Smith" but had chosen to propound to FHS, during the entire litigation, the single interrogatory asking the identities of Franciscan Inpatient Team members. CP 570-71, 578-80. FHS also reminded the court that no defendant had contended that Dr. Smith was negligent or that some act or omission by Dr. Smith caused Mr. Vestal's death. CP 572, 589-90.

The trial court denied plaintiff's motion for new trial, CP 604-06, and plaintiff timely appealed, CP 611-23.

### III. STANDARD OF REVIEW

Orders denying motions for leave to amend complaints are reviewed for abuse of discretion. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 728-29, 189 P.3d 168 (2008). Orders denying motions for new trials are reviewed for abuse of discretion. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 454, 191 P.3d 879 (2008). An abuse of discretion occurs "only when [a trial court] takes a view that no reasonable person would take," *id.* at 450, such that its decision is "manifestly unreasonable or based on untenable grounds," *Turner v. Stime*, 153 Wn. App. 581, 588, 222 P.3d 1243, 1246 (2009).

An appellate court reviews de novo any challenged jury instructions that the trial court gave, *Hough v. Stockbridge*, 152 Wn. App. 328, 342, 216 P.3d 1077 (2009), but, if a party did not propose an appropriate instruction, it cannot complain about the court's failure to give it, *Hoglund v. Raymark Indus., Inc.*, 50 Wn. App. 360, 368, 749 P.2d 164 (1987), *rev. denied*, 110 Wn.2d 1008 (1988).

Interpretation of a court rule presents an issue of law subject to de novo review. *Gourley v. Gourley*, 158 Wn.2d 460, 466, 145 P.3d 1185 (2006).

#### IV. ARGUMENT

A. Plaintiff's First and Second Assignments of Error Are Without Merit Because the Trial Court Had Tenable Reasons for Denying Plaintiff's May 2008 Motion for Leave to Amend His Complaint.

1. The May 2008 Order denied leave to amend plaintiff's 2005 complaint to add a "corporate liability" claim against FHS, not a new theory of malpractice by a "Doe" for whom FHS would be vicariously liable.

Plaintiff argues, *App. Br. at 22-24*, that he should have been allowed to amend his complaint in May 2008 because FHS was vicariously liable for a "Doe" provider's failure to properly care for Mr. Vestal while he remained in the emergency room before being moved to the PCU, or because FHS "as a corporation was independently accountable for ensuring" that someone was "designated to care for Mr. Vestal and alert Dr. Lee," or because, if Dr. Lee left at 3:30, FHS was both

independently and vicariously liable for the care Mr. Vestal received between 3:30 and 5:00 p.m. Plaintiff's argument is confusing. His brief never makes clear what legal theory he is complaining the trial court's ruling prevented him from asserting at trial, and never shows that he was prepared to prove such a theory.<sup>11</sup>

Plaintiff seems to argue that he was prejudiced by the court's refusal in May 2008 to allow him to add a vicarious liability claim against FHS, *see App. Br. at 20-24*, even though that was not the point of his motion to amend, *see CP 16-20*. The complaint plaintiff filed in September 2005 alleged that FHS was vicariously liable for negligence of Drs. Lee and "Doe," CP 5 (¶¶ VI-VIII), and Dr. Meske was identified as a "Doe" by order entered in August 2006, CP 58-59. The purpose of the proposed amended complaint was to add a new "corporate negligence" claim against FHS, based on allegations that FHS had not provided "policies, procedures and protocols, necessary and required to treat the medical conditions and immediate medical needs of . . . James Vestal." CP 28 (¶ XXVII), CP 52.

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<sup>11</sup> Plaintiff asserts, incoherently, that "[i]t 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 3:30 and 5:00 p.m." *App. Br. at 26*. Whatever plaintiff's point may be, the motion to amend was directed at FHS, not Dr. Lee or Dr. Meske, and it was FHS's objections to the amendment that the trial court considered and accepted. *Compare CP 647-58 and CP 524-26*. Dr. Lee filed a three-sentence "no position" response to the motion to amend, CP 87-88, and Dr. Meske filed a one-sentence joinder in FHS's comments, CP 89-90.

2. The court had tenable reasons for ruling denying the May 2008 motion to amend.

By the time plaintiff sought leave to amend his complaint in May 2008, the January 14 discovery deadline had long since passed after allowing plaintiff 27½ months to conduct discovery. Plaintiff's counsel had used that 27½ months to depose Drs. Lee and Meske and to propound the one interrogatory to FHS, CP 548, asking what "**Franciscan Inpatient Team**" members had provided care to Mr. Vestal. In April 2006, plaintiff had stipulated that no new claims would be added. CP 68. At the hearing on the motion to amend, plaintiff's counsel explained only that his proposed new "corporate negligence" theory was that FHS had "a systemic problem" that "was not and cannot be attributable directly to any specific acts or employees . . ." CP 494, 497, 499. He did not dispute FHS's argument, CP 656-57, that he would need expert opinion testimony to support a "corporate negligence" theory, but had never disclosed an expert witness with opinions relevant to a "corporate negligence" theory based on any failure by FHS to provide "policies, procedures and protocol," much less ones that would have prevented Mr. Vestal's death.

The trial court found that there had been undue delay in moving to amend four months after the close of discovery based on deposition testimony given ten months earlier. CP 524-25. The court ruled that

corporate negligence was “a new type of claim that . . . would certainly require considerable work on the part of Franciscan to prepare for[, including] new experts and witnesses[, involving] considerable expense” and prejudice to FHS “by the fact that this motion is being brought four months before the trial date that I’m sure would have to be moved if the motion were granted.” CP 524-26. Those were tenable reasons for denying plaintiff’s motion, not a “a view that no reasonable person would take.” *Brundridge*, 164 Wn.2d at 450. Moreover, an amendment would have proven futile, because plaintiff does not argue that he was prepared to support a corporate negligence claim with expert testimony. Denying a motion for leave to amend a complaint is not an abuse of discretion if the amendment would be futile. *Rodriguez*, 144 Wn. App. at 709.

3. Plaintiff fails to show prejudice from the May 2008 ruling.

Plaintiff fails to explain how the trial court’s denial of his motion for leave to amend in May 2008 prejudiced his case or trial preparation. He never made a record showing that he was or would have been prepared to offer the expert testimony necessary to explain and support a “corporate negligence” theory. To the extent he contends that the May 2008 denial of his motion to amend left his trial counsel unable to deal with the revelation, in Dr. Lee’s counsel’s opening statement, that Dr. Lee had worked in the Emergency Department only until 3:00 on October 1, 2002,

and that Dr. Smith had worked the following shift, his argument makes no sense and does not support his first two assignments of error that concern the May 2008 denial of his motion to amend.

Plaintiff's May 2008 motion had nothing to do with enabling his counsel to deal with such a revelation. His counsel told the court in May 2008 that the proposed new "corporate negligence" theory "was not and cannot be attributable directly to any specific acts." CP 497. Plaintiff's trial counsel's theory was that Dr. Lee misdiagnosed Mr. Vestal's GI bleed. CP 24-25 (¶¶ XI, XIII, XV). He presented expert testimony at trial that Dr. Lee's failure to give James Vestal blood and frozen plasma within two hours of his arrival at the Emergency Department – and thus well before 3:30 p.m. – was what caused Mr. Vestal's death, *see* RP 389-93, and did not offer expert testimony, and never represented that he could present expert testimony, that any later interventions would more probably than not have saved or prolonged Mr. Vestal's life.

B. Plaintiff's Fourth Assignment of Error Is Without Merit Because the Trial Court Also Had Tenable Reasons for Denying Plaintiff's October 2008 Motions During Trial to "Amend" His Complaint in Some Unspecified Way.

1. Plaintiff fails to explain why his October 2008 motions to "amend" should have been granted.

Plaintiff's trial counsel not only brought the May 2008 motion to amend discussed above, but also moved twice during trial in October 2008

to “amend” in ways he described only vaguely. CP 183, 189; RP 517-19, 528. Plaintiff’s fourth assignment of error is to the denial specifically of his motion to “amend” after opening statement during trial in October. Plaintiff’s arguments concerning the October rulings, however, are jumbled together with ones having to do with the May ruling, *see App. Br. at 19-28*, and never get to the point.

Plaintiff asserts, *App. Br. at 22*, but with apparent reference to his *May 2008* motion to amend, that “[a]fter discovery, when Mr. Vestal sought to amendment [sic], 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.” That is both beside the point and disingenuous. It is beside the point because plaintiff’s original complaint had referred to “Doe” health care providers and alleged that FHS is vicariously liable for their unspecified malpractice, CP 5 (¶¶ VII-VIII), so the issue was whether a “Doe” actor had done something negligent, not who the “Doe” actor was. Plaintiff’s “did not know” argument is disingenuous because the plaintiff, Greg Vestal, had been told, within a few weeks of his father’s death, that “Dr. Smith” had been one of two “ER doctors.” CP 553.

Plaintiff offers a two-page set of assertions about FHS’s liability that is bereft of citations to authority, *App. Br. at 22-23*, recites some

black-letter law about amending pleadings, *App. Br. at 24*, and then launches into a discussion about why his counsel waited until after the April 2008 mediation to move to amend based on Dr. Lee's and Dr. Meske's July 2007 deposition testimony, *App. Br. at 25*. None of that has anything to do with the merits of plaintiff's motion to "amend" during trial after his trial counsel learned that Dr. Lee's shift ended at 3:00 p.m. on October 1, 2002.

Plaintiff then makes assertions about what FHS knew without citing any record support, *App. Br. at 25*, and argues that his motion(s) to amend presented no prospect of jury confusion, *App. Br. at 26-27*, even though jury confusion was not a basis for the trial court's rulings. Aside from asserting that the defendants could not have claimed surprise if the court had allowed his unspecified proposed "amendment" during trial, *App. Br. at 27-28*, plaintiff never explains why he deserved the right to "amend" during trial, or what difference the failure to allow him to "amend" during trial made in how the case was tried.

Plaintiff's arguments on appeal, like his arguments below, are not really legal arguments in support of a right to "amend." Rather, plaintiff's arguments continue to try to fix blame on the trial court and defense counsel for his trial counsel's failure to account for Dr. Smith during discovery. And, plaintiff's arguments fail to take into account the futility

of his unspecified proposed amendment during trial, when his own expert was not prepared to assign any causal effect to care provided during the time Dr. Smith was in charge of the Emergency Department.

Even if this Court overlooks the incoherence of plaintiff's argument(s) as to why the trial court should have let him "amend" his complaint during trial in October 2008, there simply was no abuse of discretion, because the request to "amend" during trial was predicated on plaintiff's trial counsel's claim that he had been surprised to learn of Dr. Smith's role during the opening statement of Dr. Lee's counsel. *See* CP 198. For reasons further discussed in Part E below and in Dr. Lee's brief, any such surprise was due to choices that plaintiff's trial counsel made, or things plaintiff's trial counsel failed to pursue during discovery.

2. Plaintiff failed to preserve his assignment of error concerning the trial court's denial of his October 2008 motions to "amend".

CR 15(a) provides in pertinent part that "[i]f a party moves to amend a pleading, a copy of the proposed amended pleading, denominated 'proposed' and unsigned, shall be attached to the motion." At no time during the trial did plaintiff bring a written motion to amend, with a proposed amended complaint attached. Nor did he tender a proposed amended complaint and make such a document of record for consideration on appeal. Plaintiff's fourth assignment of error thus was waived.

C. Plaintiff Waived His Fifth Assignment of Error Concerning the Trial Court's Refusal to Give a "Curative Instruction".

With respect specifically to plaintiff's fifth assignment of error, plaintiff asserts that he "requested [a] jury instruction on the accountability of Jane Doe and that FHS-West was [sic] accountable for the conduct of Jane Doe between 3:00 p.m. and 5:00 p.m.," *App. Br. at 16*, and that "[a]t the time of jury instruction exceptions [he] 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.," *App. Br. at 16*. Plaintiff cites, and there is, nothing in the record reflecting the text of any proposed jury instruction.

A party waives a jury instruction objection when the party does not propose a correct *written* instruction and does not specifically object to instructions the party believes to be incomplete or erroneous. *E.g., Madigan v. Teague*, 55 Wn.2d 498, 501, 503, 348 P.2d 403 (1960). Court rules so provide as well. RAP 10.4(c) provides that "[i]f a party presents an issue which requires study of a . . . jury instruction . . . the party should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief." CR 51(b) and (c) require the filing of one copy of a party's proposed instructions and that they be typewritten or printed. CR 51(e) provides that "[t]he trial court may

disregard any proposed instruction not submitted in accordance with this rule.” CR 51(d)(2) provides that “[w]here the refusal to give a requested instruction is an asserted error on review, a copy of the requested instruction shall be placed in the record on review.” Here, there is no showing that plaintiff’s trial counsel complied with CR 51 concerning his request for a proposed jury instruction as to Jane Doe’s or FHS’s accountability between 3:00 and 5:00 p.m. The trial court thus was entitled to disregard any such request for a curative or other instruction. Plaintiff cannot comply with RAP 10.4(c). His fifth assignment of error was waived.

D. Plaintiff’s Third Through Sixth Assignments of Error Are Without Merit Because No One Hid Dr. Smith from Plaintiff, and the Trial Court Did Not Abuse Its Discretion In Rejecting Plaintiff’s Argument that Defendants Had “Bamboozled” His Trial Counsel.

1. Civil lawsuits are litigated under an adversary system in which each side is responsible for its own marshalling of facts and evidence.

In Washington and American jurisdictions generally, civil lawsuits are litigated under an adversary system of justice, not a collaborative one. Like any civil litigant, the plaintiff in this case was entitled to truthful and complete answers to all questions that his trial counsel asked in discovery, whether in writing through interrogatories or orally in depositions. See CR 30(h)(4) and CR 33(a). But plaintiff was entitled to truthful and complete answers *only to questions his counsel chose to ask*, and only

from those to whom the questions were directed. It was not any defendant's counsel's duty to ask questions *for* plaintiff's counsel, or to provide information responsive to questions that plaintiff's counsel did not ask but could have asked (and perhaps should have asked). See *State v. Smith*, 101 Wn.2d 36, 44-45, 677 P.2d 100 (1984) (responsibility for asking the proper questions in pursuit of a defense belongs exclusively to the defendant's attorney).<sup>12</sup>

Even if one speculates that Dr. Lee's counsel or FHS's counsel learned before trial what Dr. Lee did not know or remember at the time of his July 2007 deposition, *i.e.*, that he had worked only until 3:00 p.m. on October 1, 2002 and that Dr. Smith had worked the shift after his, there still was no duty on the part of *Dr. Lee* to supplement his deposition testimony. Not only was the testimony truthful when given, but plaintiff has cited no authority (and FHS is aware of none) that requires a party to supplement deposition answers based on what the party's counsel knows

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<sup>12</sup> In the context of criminal cases, but not of civil cases, because of constitutional protections against deprivation of liberty without due process of law, a limited exception to a strictly adversary system of justice requires a prosecutor to disclose potentially exculpatory information to an accused. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). See *State v. Benn*, 120 Wn.2d 631, 650, 845 P.2d 289 (1993) ("The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.") (quoting *United States v. Badgley*, 473 U.S. 667, 675, 105 S.Ct. 3375, 87 L.Ed.2d481 (1985)), and see *Hatten v. Dept. of Motor Vehicles*, 15 Wn. App. 656, 657, 551 P.2d 145, *rev. denied*, 87 Wn.2d 1015 (1976) (*Brady* is limited to criminal cases).

or learns from sources other than the party. Indeed, it would appear inconsistent with defense counsel's duties to their clients to volunteer to plaintiff's counsel that he had neglected to ask about Dr. Smith.<sup>13</sup>

2. Plaintiff propounded no discovery to FHS that called for FHS to tell his counsel about Dr. Smith.

With respect specifically to FHS, an obligation on its counsel's part to inform plaintiff's counsel of Dr. Smith's role in Mr. Vestal's care never arose because the only interrogatory plaintiff propounded to FHS, in 2006, was emphatically limited to the identities of "**Franciscan Inpatient Team**" members. CP 548. Plaintiff's counsel had showed in 2005 that he understood that Emergency Department physicians were not the same as Franciscan Inpatient Team members, because the complaint he signed alleged that Dr. Lee was the former, CP 4 (¶ VI), and that the "Doe"

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<sup>13</sup> See RPC 3.4 ("A lawyer shall not: (a) unlawfully *obstruct* another party's access to evidence or unlawfully *alter, destroy or conceal* a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; (b) *falsify evidence*, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law; (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery . . ." [emphases added]). Comment 1 to RPC 3.4 states that "[t]he procedure of *the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties*. Fair competition in the adversary system is secured by prohibitions against *destruction or concealment* of evidence, improperly influencing witnesses, *obstructive* tactics in discovery procedure, and the like." [Emphasis supplied.] Sitting passively by when opposing counsel fails to ask questions that might elicit material information does not constitute destruction, concealment, or obstruction, and plaintiff does not argue or cite any authority suggesting that it does. To the extent that a lawyer has a professional responsibility obligation to make timely disclosure of evidence potentially helpful to his adversary, even when his adversary has not asked for it, that obligation arises under RPC 3.8, entitled "Special Responsibilities of a Prosecutor," not as a general matter for counsel for a civil litigant.

defendants, later stipulated to include Dr. Meske, CP 58-59, were “part of what is identified as ‘Franciscan Inpatient Team’,” CP 5 (¶ VIII). Plaintiff’s counsel did not take a CR 30(b)(6) deposition of FHS, and he deposed no defense experts, whose interrogations might have elicited references to Dr. Smith (because of the chart note by her, transcribed on Emergency Department stationery, Ex. 1 (1-000010), concerning the “code” call “to the floor”). Plaintiff did depose Dr. Meske, but asked no question of her that he claims called for her to name or refer to Dr. Smith.

It is based solely on Dr. Lee’s deposition answers that plaintiff complains defendants hid Dr. Smith and then “shifted responsibility” to her in opening statements. Plaintiff’s arguments in support of his third through sixth assignments of error based on several of the Civil Rules are addressed separately below.

3. There is no merit to plaintiff’s contention that defendants, including FHS, failed to comply with CR 8(c) or 12(i).

In support of his Assignments of Error 4-6, *App. Br. at 2*, plaintiff argues that it was an abuse of discretion for the trial court not to let him “amend” his complaint during trial, or give a “curative” instruction, or deny a mistrial, or deny a new trial, because his counsel was unprepared for the references to Dr. Smith in defense counsel’s opening statements.

To the extent those assignments of error rely on arguments based on CR 8(c) and CR 12(i), *App. Br. at 30-44*, they are without merit.

Plaintiff argues, *App. Br. at 30-31*, that CR 12(i) requires a tort-case defendant to affirmatively plead the identity, and thus the name, if known, of any nonparty whom the defendant intends to claim is at “fault.” Plaintiff also argues, *App. Br. at 32*, that CR 8(c) requires that an affirmative defense be pled. That those rules so provide, however, has no relevance here.

The problem with plaintiff’s CR 12(i) argument is that none of the defendants claimed that Dr. Smith was at fault. CR 12(i) provides:

***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 supplied.)

The converse of CR 12(i) is that, if a party does not claim that a nonparty is at fault for purposes of RCW 4.22.070(1), the party is not obliged to plead the affirmative defense and is not obliged to identify any nonparty. Thus, contrary to what plaintiff argues, *App. Br. at 30 (Header C)*, compliance with CR 12(i) is “optional”; the rule only applies when a

defendant chooses to claim fault of a non-party.<sup>14</sup>

Apparently as support for his CR 8(c) argument, but maybe also as support for his CR 12(i) argument, plaintiff argues, *App Br. at 30*, that “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.” Plaintiff cites no authority for the proposition that any defendant owed, under CR 8, a duty to the plaintiff to “investigate,” so this Court need not consider the argument. *King County v. Seawest Inv. Assocs., LLC*, 141 Wn. App. 304, 317, 170 P.3d 53 (2007) (courts may assume that where no authority is cited, counsel has found none after search), *rev. denied*, 163 Wn.2d 1054 (2008); RAP 10.3(a)(6).<sup>15</sup>

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<sup>14</sup> To claim fault of a nonparty in a medical malpractice case, a defendant also would have to present (or elicit from one of plaintiff’s witnesses) expert opinion testimony that violation by the nonparty of an applicable standard of care proximately caused the injury for which plaintiff is seeking damages. *Davies v. Holy Fam. Hosp.*, 144 Wn. App. 483, 492, 183 P.3d 283 (2008) (“Expert medical testimony is generally required to establish the standard of care and to prove causation in a medical negligence action.”); *Guile v. Ballard Comty. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689, *rev. denied*, 122 Wn.2d 1010 (1993) (same). Here, the defendants did not argue that Dr. Smith was negligent, or elicit testimony that she was.

<sup>15</sup> Although plaintiff does not rely on CR 11, that rule does obligate a litigant, and it obligated the defendants here, not to sign a pleading, motion, or legal memorandum without a good faith belief that it was well grounded in fact formed after inquiry reasonable under the circumstances, CR 11(a)(1), and not to deny an adversary’s factual contentions without believing the denial is warranted by evidence or because of lack of information or belief, CR 11(a)(4). Plaintiff has not argued, however, that any defendant filed any pleading, motion, or legal memorandum in violation of CR 11(a)(1), or denied any of his factual contentions in violation of CR 11(a)(4). And no authority of which FHS is aware interprets CR 11 as a rule requiring a defendant to share with plaintiff all fruits of his counsel’s “reasonable inquiry” into the facts of a case.

Plaintiff argues that the purpose of CR 8(c) is to avoid surprise and promote “due process,” *App. Br. at 33-34*, citing *Mahoney v. Tingley*, 85 Wn.2d 95, 529 P.2d 1068 (1975). *Mahoney* does not support the argument plaintiff makes. It was a contract case in which the court *rejected* a plaintiff’s argument that the defendant should have been precluded from relying on a liquidated damages clause because of a failure to plead it as an affirmative defense. The other authorities plaintiff cites or discusses, *App. Br. at 34-35*, have to do with *complaints*, and stand at most for the proposition that civil case defendants are entitled to some minimum level of notice of what they are being sued for and why. They do not stand for the proposition that “due process” requires counsel for defendants to share their work product and strategy with the plaintiff and disclose to plaintiff’s counsel all facts upon which their clients deny the plaintiff’s liability allegations, even if plaintiff had the opportunity to ask about such facts in discovery but chose not to or otherwise neglected to ask. Plaintiff cites no authority for the proposition that CR 8(c) is a general-disclosure requirement that excuses a party in our adversary system from the obligation to marshal facts for himself. CR 8(c) is not such a rule.

Similarly, plaintiff baldly asserts, *App. Br. at 38*, that “[t]he opposing party is entitled to know the names and locations of persons with knowledge of discoverable matters.” That is true in civil litigation only if

the “opposing party” asks for the information. A party is entitled to obtain “name and location” information (among many other kinds of information), CR 26(b)(1), but it is up to that party or that party’s counsel to seek the information by one of the methods of discovery authorized by the discovery rules, because CR 26(a) provides that “[p]arties *may obtain* discovery by one or more of the following methods: . . . [emphasis supplied],” not that parties *are entitled to receive* discovery of information they have not asked for by one of the authorized discovery methods.

Thus, plaintiff was not entitled to an amendment of his complaint during trial, a “curative” instruction, a mistrial, or a new trial because of any violation by any defendant of CR 8(c) or CR 12(i).

4. The trial court did not abuse its discretion in rejecting plaintiff’s argument that Dr. Lee breached a duty under CR 26(e) to supplement his deposition answers.

Plaintiff argues, alternatively, *App. Br. at 36-44*, that it was an abuse of discretion for the trial court not to let him “amend” during trial, or give a “curative” instruction, or declare a mistrial, or grant him a new trial, because Dr. Lee violated CR 26(e), and left plaintiff’s counsel unprepared for defense counsel’s references to Dr. Smith in opening statements. There is no merit to plaintiff’s CR 26(e) argument.

The record establishes that plaintiff’s counsel, for reasons only he knows, never propounded an interrogatory and never asked anyone a

deposition question to which FHS or Dr. Lee knew the answer should have been “Dr. Smith,” or that Dr. Lee’s shift had ended at 3:00 p.m., or that Dr. Smith had been responsible for the care of Emergency Department patients before 5:00 p.m. Because plaintiff’s counsel never asked such a question, neither FHS nor Dr. Lee needed to supplement any answer to such a question. There was no violation of CR 26(e).

There is no basis in the record from which this Court could conclude that Dr. Lee *did* know, or *did* have an idea, at the time of his July 2007 deposition, that Dr. Smith had been responsible for Mr. Vestal’s care back on October 1, 2002, between 3:30 and 5:00 p.m., (or even that Dr. Smith had been on duty that afternoon 57½ months earlier). Thus, there is no reason to suppose that Dr. Lee’s testimony was false. Plaintiff offers no citation to any authority for the proposition that CR 26(e) requires that an “I don’t know” deposition answer, although truthful when given, be supplemented if the deponent learns before trial the information he did not know at the time of his deposition. This Court need not consider an argument unsupported by citation to authority. *Seawest Inv. Assocs.*, 141 Wn. App. at 317; RAP 10.3(a)(6).

Even if this Court were to hold, despite plaintiff’s lack of citation to authority in his opening brief, that CR 26(e) *does* require a party to supplement an “I don’t know” deposition answer under such

circumstances, plaintiff's trial counsel never asked or sought to ask Dr. Lee at trial *when* Dr. Lee had remembered or learned, after his July 2007 deposition, that Dr. Smith had been responsible for Mr. Vestal's Emergency Department care from 3:30 to 5:00 p.m. back on October 1, 2002, or that Dr. Smith had worked the shift after his that day. Plaintiff asserts, *App. Br. at 18*, that "[a]t some point after the deposition, [Dr. Lee] realized his answers in depositions were misleading and incorrect [but] he failed to supplement his responses as CR 26(e) expects." But plaintiff cites nothing in the record to support that assertion, and an appellate court may decline to consider an argument for which support in the record is inadequate. *See Milligan v. Thompson*, 110 Wn. App. 628, 634, 42 P.3d 418 (2002).

All one could conclude from the record is that Dr. Lee knew or remembered after his counsel gave his opening statement at trial that Dr. Smith had worked the shift after his on October 1, 2002, not that Dr. Lee remembered or learned that *before* trial. One cannot conclude from the record that, whenever Dr. Lee learned or remembered that fact – even if it was before trial —he had in mind his deposition testimony from July 2007, and “realized” that he had given “misleading” or “incorrect” answers to questions plaintiff's counsel had asked him at his deposition 15 months earlier and to which he had not known the answer.

Because the plaintiff fails to cite anything of record to support his assertion about what Dr. Lee “realized” and when Dr. Lee “realized” it, this Court should decline to consider plaintiff’s fourth, fifth, and sixth assignments of error based on alleged violation by Dr. Lee of CR 26(e), *Milligan*, 110 Wn. App. at 634. But, if the Court does consider the argument, the Court should reject the argument because there is no support in the record for plaintiff’s contention. Even if an “I don’t know” deposition answer, although truthful when given, is one that must be supplemented if a party-deponent remembers or learns, before trial, the information the party did not know or remember at the time of his deposition, the trial court could not have found, and this Court cannot conclude that Dr. Lee remembered or learned before trial what he said in deposition he did not know.

5. Plaintiff offers no reasoned argument why it was error for the trial court to deny his alternative motion for a mistrial.

Even apart from the lack of merit in the arguments based on CR 8(c), 12(i) and 26(e) that plaintiff offers in support of his third assignment of error (failure to grant a mistrial), plaintiff never explains, much less cites authority for, why it was error for the trial court not to grant a mistrial when he asked for one (as alternative relief) on October 6 (RP

520).<sup>16</sup> This Court thus does not have to, and should not, consider the argument at all. *Seawest Inv. Assocs.*, 141 Wn. App. at 317; *Bonneville v. Pierce County*, 148 Wn. App. 500, 518, 202 P.3d 309 (2008), *rev. denied*, 166 Wn.2d 1020 (2009) (“We will not consider assertions that are given only passing treatment and are unsupported by reasoned argument”).

6. The trial court did not abuse its discretion by refusing to grant plaintiff a new trial on grounds of “bamboozlement”.

Plaintiff does not expressly assign error to the denial of his new trial motion to the extent that motion was based on arguments that defense counsel “bamboozl[ed]” and “gang[ed] up” on his trial counsel by not alerting him to Dr. Smith’s role in Mr. Vestal’s care. *See* CP 487-88. Plaintiff does argue, *App. Br. at 29*, however, that his trial counsel was bamboozled and that defense counsel were responsible for his trial counsel’s bamboozlement. To the extent such assertions are entertained by this Court as a standalone argument that it was an abuse of discretion for the trial court not to grant plaintiff a new trial, the “bamboozlement” argument is without merit for reasons explained above in connection with plaintiff’s arguments based on CR 8(c), 12(i), and 26(e). Self-inflicted bamboozlement is not a reason to grant a party a new trial.

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<sup>16</sup> Plaintiff offers case authority pertaining to the standard under which mistrial motion rulings are reviewed on appeal, *App. Br. at 29*, but not pertaining to the merits of his request for a mistrial.

E. The Trial Court Did Not Abuse Its Discretion in Denying Plaintiff's Motion for A New Trial Because of Juror Misconduct.

1. The trial court could not have found that Juror 6 lied about her medical education in voir dire, or even that Juror 6 said during deliberations that she had gone to medical school.

Juror 6 disclosed on her pre-voir dire questionnaire that she had some "training, education or experience in a medical field," because she wrote "Nursing/Hematology/Lab work (did not graduate)." CP 684. Plaintiff's trial counsel could have questioned Juror 6 about her "medical field" education, but the transcript shows that he made no effort to do so. RP 89-141. Plaintiff does not claim that his counsel asked questions of the panel during voir dire to which Juror 6 should have responded with more information about her medical training or views.

Juror 1 alone claimed that Juror 6 stated during deliberations that she had "gone to medical school." CP 463 (¶ 8). Juror 2 did not attribute such a statement to Juror 6, *see* CP 465-66; Juror 6 denies making such a statement, CP 593-95; and Jurors 11 and 13 denied hearing such a statement, CP 596-97 and 599-600. Plaintiff presented no evidence that Juror 6's questionnaire answer understated the extent of her medical education or that she did, in fact, attend medical school. Based on the showing plaintiff made, the trial court would have abused its discretion had it found that Juror 6 understated her medical education in voir dire.

2. Plaintiff did not show that Juror 6 introduced new evidence into jury deliberations.

During trial, the jury heard extensive testimony from Dr. Lee and experts for both sides on the issue of whether Mr. Vestal had presented with symptoms that should have led Dr. Lee to diagnose an upper or lower GI bleed and whether or not the bleed likely was serious and ongoing, and how it was and should have been treated.<sup>17</sup>

Juror 1 testified by declaration that Juror 6 stated during deliberations that she “knew” what the symptoms of a serious bleed are and that Mr. Vestal had not had them, and that she “related knowledge of symptoms, diagnosis and treatment that we had not heard during the trial.” CP 463. Juror 1 did not say *what* knowledge about symptoms, diagnosis or treatment Juror 6 had “related,” or what Juror 6 had said that differed from, or went beyond, what the jury had heard from the medical witnesses. Testimony by Jurors 6, 11 and 13 confirms only that Juror 6 related unspecified opinions about the testimony during deliberations that drew upon her personal experiences. CP 594-95, 597, 600.

Based on the record plaintiff made, Juror 6 did nothing wrong, and certainly did nothing that required the trial court to grant plaintiff’s motion

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<sup>17</sup> RP 324-31, 334-35, 337-40, 342-49, 356-70, 379-82, 384-88, 390, 429-45, 449-55 (Dr. Kogan); RP 568-633, 636-40, 646, 650-54, 657-61, 663-74, 697-736, 749-50, 759-64, 770-71, 774-78, 784-96 (Dr. Lee); RP 829-33(Dr. Leggett); RP 941-51, 953-71, 973-75, 984-95, 997-99, 1003-06, 1008, 1016-32 (Dr. Halperin).

for a new trial. Jurors are *expected* to contribute observations based on their personal experiences during deliberations. *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 204, 75 P.3d 944 (2003). In *Breckenridge*, a medical malpractice lawsuit based on alleged failure to diagnose a brain aneurysm, the trial court had granted a new trial because a juror had shared during deliberations his own experiences with his wife's migraine headaches. The Court of Appeals reversed and reinstated the defense verdict; the Supreme Court affirmed the Court of Appeals, stating:

[The juror's] statements constituted his personal life experiences rather than extrinsic evidence. ***[The juror'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.*** [Emphasis added.]

*Breckenridge*, 150 Wn.2d at 204.

*Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 796 P.2d 737 (1990), *rev. denied*, 116 Wn.2d 1014 (1991), which was cited to the trial court, CP 566-68, is so closely on point that plaintiff's juror-misconduct argument should be rejected simply because he fails to acknowledge *Richards*, much less distinguish it. In *Richards*, a child suffered neurological injury due to alleged neonatal-care negligence. After a defense verdict, the plaintiff sought a new trial on grounds of misconduct by a juror who had disclosed during voir dire that she had

some medical training, was an occupational therapist, and had worked with retarded children. The claimed misconduct in *Richards* was much more specific than what Juror 1 claims Juror 6 said in this case:

. . . that [the juror] 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, [the] juror . . . 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 . . . negligence . . . .

*Richards*, 59 Wn. App. at 273. The Court of Appeals held that the juror had not thereby injected new evidence into the jury’s deliberations:

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. [The juror’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.

*Richards*, 59 Wn. App. at 274.

Here, plaintiff’s counsel likewise knew after voir dire, based on the questionnaires, that Juror 6 would bring to the jury’s deliberations some medical education about which he could have inquired further during voir dire. As in *Richards*, medical records and testimony about what the

records said and meant was introduced during trial, and the records went to the jury room for deliberations. *Ex. 1.*

Even more importantly, however, plaintiff has never identified specifically what Juror 6 said that constituted something “new or novel” from an evidentiary standpoint. If it was not an abuse of discretion for the *Richards* court to rule that specific statements by a juror that were pertinent to a central issue of fact did not constitute the introduction of new evidence warranting a finding of juror misconduct, it certainly was within the discretion of the trial court in this case to reject plaintiff’s argument that vaguely-described assertions of medical expertise by Juror 6 constituted the introduction of new evidence.

Moreover, the *Richards* court held that the plaintiff had effectively waived the very type of argument that plaintiff makes in this case, *App. Br. at 46*, that views the juror had expressed in deliberations based on her medical training amounted to extrinsic *expert* testimony:

The *Richards* also allege the comments made by [the juror] at the time of deliberation were not within the realm of the kind of life experiences that a juror is expected to bring into the deliberations. The *Richards* contend that the information imparted by [the juror] was highly specialized and was uttered in the vein of being an expert. The interpretation of the evidence interjected by [the juror] may well be outside the realm of a typical juror’s general life experience and would not usually be introduced into the jury’s deliberations. [Citations omitted.] However, in this case, on voir dire [the juror’s] background was fully

disclosed and the Richards did not remove her from the jury . . . [T]here was full disclosure on voir dire by the juror in question about her background. The Richards knew this and chose to let her remain on the jury.

*Richards*, 59 Wn. App. at 274. The same is true here; plaintiff's counsel let Juror 6 remain on the jury despite knowing of her medical training. The record does not reveal what "medical" knowledge Juror 6 professed to have in deliberations but, whatever it was, plaintiff knew she had some medical knowledge, chose not to inquire further, and chose to let her remain on the jury.

3. The extent to which Juror 6's views influenced other jurors inheres in the verdict and could not have been the basis for granting a new trial.

Jurors 1 and 2 testified in declarations that Juror 6 was influential during jury deliberations. CP 463, 466. That testimony was inadmissible. Washington law does not allow jurors to impeach a verdict with information related to a factor that "inheres in the verdict." *Gardner v.*

*Malone*, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962).

Generally, 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." [Further citations omitted].

*Marvik v. Winkelman*, 126 Wn. App. 655, 661-62, 109 P.3d 47 (2005).

"Juror affidavits may not be used to contest the thought processes involved in reaching a verdict." *Chiappetta v. Bahr*, 111 Wn. App. 536,

541, 46 P.3d 797, *rev. denied*, 147 Wn.2d 1018 (2002). “Thought processes” include “the effect the evidence had on the jurors [and] the weight given to the evidence by particular jurors.” *Id.* A trial court is required “to make an *objective* inquiry into whether the extraneous evidence, if indeed any existed, could have affected the jury’s determination and *not a subjective* inquiry into the actual effect of the evidence on the jury . . . .” *Richards*, 59 Wn. App. at 273.<sup>18</sup>

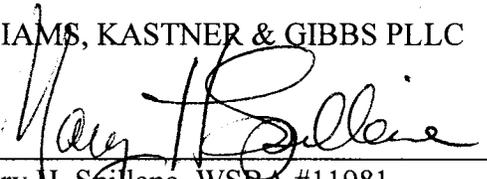
#### V. CONCLUSION

The trial court had tenable reasons for denying plaintiff’s May 2008 and October 2008 motions to amend his complaint, for denying his motion for a new trial and, and for not granting plaintiff other relief to which his opening brief refers. Judgment was properly entered on the jury’s defense verdict. This Court should affirm.

RESPECTFULLY SUBMITTED this 15th day of April, 2010.

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By

  
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<sup>18</sup> Moreover, even if the testimony of Jurors 1 and 2 concerning Juror 6’s influence on other jurors had been admissible, the testimony by Jurors 11 and 13 contradicting it, CP 597 and 600, would have been admissible as well, refuting plaintiff’s unimpressive evidence of Juror 6’s “influence.”

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

I hereby certify under penalty of perjury that ~~under~~ <sup>by</sup> SE the laws of the

DEPUTY

State of Washington that on the 15th day of April, 2010, I caused a true and correct copy of the foregoing document, "BRIEF OF RESPONDENT FRANCISCAN HEALTH SYSTEM-WEST FRANCISCAN HEALTH SYSTEM-WEST," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

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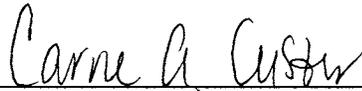
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