IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JACK FLETCHER, as personal representative of the Estate of LEO FLETCHER, deceased, and on behalf of all statutory beneficiaries, Appellant, v. THE STATE OF WASHINGTON, by and through the UNIVERSITY OF WASHINGTON, UNIVERSITY OF WASHINGTON MEDICAL CENTER, and THE UNIVERSITY OF WASHINGTON SCHOOL OF MEDICINE; Respondents, and DOES 1 through 10, entities and/or individuals, their spouses and the marital communities comprised thereof, Defendants.	)	NO. 63776-2-I DIVISION ONE UNPUBLISHED OPINION FILED: June 13, 2011

Lau, J. — In this medical negligence and wrongful death action, the estate of Leo Fletcher appeals the judgment on the jury's verdict in favor of the State of

Washington.[1] The estate challenges the trial court's denial of its motion to strike expert testimony and CR 59 motion for a new trial. Because the estate demonstrates no abuse of discretion by the trial court, we affirm the judgment on the jury's verdict in favor of the State.

FACTS

Before the car accident, Leo Fletcher was an active, 89-year-old rancher, but he suffered from several underlying medical conditions, including coronary artery disease, diabetes, chronic kidney disease, twice normal creatinine, and abnormal heartbeat, which required a pacemaker.

On October 14, 2003, Fletcher drove his pickup truck off a steep gravel road and plunged approximately 50 feet down an embankment, rolling over at least once before crashing into a large tree. Emergency medical technicians (EMTs) arrived and removed him from the truck approximately an hour after the accident. He had a "laceration to his head," a "single lower extremity fracture," "his face appeared blue and swollen," and "he was pale, cold, and damp in his appearance." EMTs were on scene for 32 minutes, "getting him stabilized with full spinal immobilization, putting the collar on him, getting him out of the vehicle, rolling him back over, [and] immobilizing the leg." Four minutes later, an ambulance transporting Fletcher arrived at Dayton General Hospital.

When Fletcher arrived at Dayton, he had no detectable blood pressure and a pulse of 200. He received intravenous fluids and oxygen and was then transported to

[1] We refer to respondents collectively in this opinion as the "State."

Providence St. Mary Medical Center in Walla Walla, Washington.

CT (computerized-aided tomography) imaging at St. Mary showed a head injury with bleeding inside the skull. He also suffered a partially torn aorta and fractures of both lower right leg bones, at least two ribs, and his thoracic and seventh cervical spine. He also had bleeding into his chest cavity and areas of collapsed alveoli in the base of both lungs.

On the evening of October 14, about nine hours after the accident, Fletcher was flown to Harborview Medical Center, a level one trauma center in Seattle "for neurosurgical specialties and thoracic vascular evaluation for aortic injury." Fletcher was on a ventilator (breathing tube) throughout his course at Harborview. On October 15, Fletcher, who had type O blood, was mistakenly transfused with four units of type A blood. An X ray also revealed a pulmonary edema.[2]

On October 20, a bronchoscopy revealed a lung infection. Undisputed testimony established that this infection was probably caused by the breathing tube. Fletcher's condition deteriorated after October 20. On October 21, medical staff discovered the mistaken blood transfusion. Dr. Teresa Nester[3] went to Harborview to determine what effect the error had on the patient. She stated that it was unusual that his reaction occurred five days later. On October 23, Fletcher's family authorized his withdrawal from life support, and Fletcher died on October 29, 2003.

---

[2] The estate refers to pulmonary edema as "leaky lungs." Appellant's Br. at 11.

[3] Dr. Nester, a transfusion medicine physician and Associate Medical Director at the Puget Sound Blood Center, at Harborview's request, supplied the type A blood given to Fletcher on October 15.

The personal representative of Fletcher's estate brought a wrongful death and survival action against the State and the University of Washington. Harborview Medical Center is an agency of the university. The complaint alleged that the resident medical doctor, registered nurses, and other professional staff "failed to exercise the degree of care, skill and learning expected of a reasonably prudent health care provider[ ]" and "such failures were negligent and were proximate causes of, and/or substantial contributing factors to the death of Leo Fletcher."

Harborview admitted it was negligent in transfusing Fletcher with type A blood. But it denied such transfusion was the proximate cause of Fletcher's death. Harborview maintained that "if Fletcher had a transfusion reaction, it was delayed and mild, and that he died because of the truck wreck trauma, his age, and a ventilator-associated lung infection and ensuing failure of his previously diseased kidney." Resp'ts' Br. at 8. The estate, on the other hand, alleged that Fletcher died from an acute hemolytic transfusion reaction leading to pulmonary edema ("leaky lungs") and failure of his kidneys and other organs.

Before trial, the estate asked the State for an update regarding expert witness testimony. The State responded that it was "not presently aware of any material changes in the testimony of our experts which has taken place since the time of their depositions."

At trial, the estate presented expert testimony that an acute hemolytic reaction to the erroneous transfusion caused Fletcher's death.[4] This included deposition

[4] As is common in medical malpractice trials, expert witnesses for both sides testified out of order to accommodate witness schedules.

testimony from hematologist Dr. Harry Jacob, who testified that the blood transfusion was a substantial factor in causing Fletcher's death.

The estate also called Dr. Nester as a fact witness because she investigated the erroneous transfusion. Dr. Nester testified that Fletcher did not suffer an acute hemolytic transfusion reaction but experienced a delayed hemolytic transfusion reaction.[5] The estate's pulmonary critical care expert, Dr. James Pearl, testified that the transfusion contributed to Fletcher's death. But he could not say to what degree it contributed or whether Fletcher would have survived without the transfusion.

The State presented expert testimony that Fletcher died from injuries caused by the car accident rather than the transfusion. Transfusion medicine expert Dr. Donald Siegel testified that half of patients who receive incompatible blood transfusions show no adverse symptoms. He disagreed with Dr. Jacob that "pink in the urine" evidenced "massive intravascular hemolysis." RP (Apr. 2, 2009) at 51.

Similarly, critical care expert Dr. Martin Schreiber testified that he did not "believe that [Fletcher's] demise was caused by a transfusion reaction." RP (Apr. 2, 2009) at 154. He also testified that Fletcher "was having lung failure very early after [the] injury." RP (Apr. 2, 2009) at 174.

---

[5] Dr. Nester explained the distinction between a delayed hemolytic reaction and an acute hemolytic reaction: "[Acute] means intravascular hemolysis. Delayed hemolytic transfusion usually happen[s] several days after the transfusion of incompatible red cells, and usually the antibody class is IGG. So most commonly we see a drop in hematocrit, but we don't see red serum, red urine, shock, disseminated intravascular coagulopathy. So, in a sense, delayed hemolysis is extravascular. It is where the spleen's job is to remove antibody-coated cells. So it sees the antibody-coated transfused red cell and removes it from circulation." RP (April 1, 2009) at 8.

Dr. Lisa McIntyre, Fletcher's surgical critical care attending physician at Harborview, opined that Fletcher died from respiratory failure due to the injuries suffered during the car accident and his age and worsened by pneumonia developed from the respirator. Dr. McIntyre concluded that Fletcher would have died even without a transfusion reaction.

Dr. Curtis Veal testified consistent with the testimony of other defense experts. In his deposition testimony, Dr. Veal said that although pink urine indicated hemolysis (caused by the transfusion), the injuries, not the transfusion, caused Fletcher's death. Dr. Veal did not specify precisely when fluids began leaking from Fletcher's lungs. At his deposition, Dr. Veal testified in relevant part:

- He is board certified in critical care.
- Fletcher died as a result of "injury suffered in a motor vehicle collision."
- Fletcher "was injured in the manner . . . that resulted in the initiation of an inflammatory cascade that we see routinely in trauma patients and septic patients."
- "Pneumonia was a major contributor to his death."
- "Hemolysis was certainly—there was evidence that it was present. I mean, he got very jaundiced." But although "hemolysis could have played a role; I think it was a trivial role at worst."
- In his differential diagnosis, "the most probable to least probable [causes of kidney failure] were contrast exposure, sepsis, and then plus/minus hemoglobin."
- Fletcher withstood the ABO incompatible blood "remarkably well."
- When asked about lung failure, Dr. Veal responded, "[H]is lungs had already been injured with the initial trauma, which generated inflammatory response, the what I believe to be septic episode beginning on the 20th when he had the purulent secretions in his bronchoscopy and they got the organisms out. And those things made the lungs very leaky and damaged and stiff."
- The reason the erroneous transfusion "wasn't caught early on is that he did not manifest clinical signs of ABO transfusion reaction. He weathered that remarkably well, and the findings of hemolysis later on was incidental, period."
- In response to the estate's assertion that the urine was "quite often dark and yellow" and "quite often had sediment in it," Dr. Veal said "And I can't—I can't say 'quite often.' I know I saw that notation in the record."

- He did not know what explained amber urine with reddish sediment on October 16, but it "could very well have been due to hemolysis;" "it probably was hemolysis."
- "I think the ABO blood reaction absolutely must have had some detrimental effect on his opportunity to survive. In this sort of circumstance, any little thing that happens can lower one's likelihood of survival. Did it cause his death? I do not believe it did."
- "I would assign a far, far, far lower value on [the ABO blood transfusion reaction as a contributory cause of death] than I would, say – well, I think the biggest thing which I think is the superimposed sepsis on the 21st."
- Fletcher would still have died if he did not receive the erroneous transfusion.
- There was "no evidence of hemolysis of the magnitude you would . . . need to see to cause the deterioration on the 21st."
- "I have read [Dr. Jacob's] testimony. And I don't believe that this time course of renal worsening is compatible with having it be due to hemolysis."

As the final witness at trial, Dr. Veal testified in part:

- On the day of the accident, Fletcher's "lungs were getting congested because he was already leaking because of his injury." RP (Apr. 9, 2009) at 16.
- "There was no physiological response to the blood transfusion." RP (Apr. 9, 2009) at 22.
- "His lungs had been kind of hazy from early in his admission because of the leak." RP (Apr. 9, 2009) at 25.
- "His death was caused by a motor vehicle accident. But his more proximal cause of death, I believe, was a combination of hospital acquired infection with ventilator associated pneumonia and renal failure." RP (Apr. 9, 2009) at 34.

On cross-examination, the estate sought to impeach Dr. Veal about a perceived change in his trial testimony from his deposition testimony about when leaky lungs first occurred:

> Q: Why don't you just peruse your deposition for a moment. I did look for statements where you made – attributed leaky lungs occurring, starting with the air flight. I just didn't find it.
>
> A: I don't remember specifically addressing the timing. I remember we did spend a great deal of time talking about this. I'm just opening randomly to page 32 where I'm talking about lungs are leaky and fluids all going into what is referred to as the third space.
>
> Q: But my statement again is, I do not recall you stating that that occurred with the air flight, but I believe – do you recall stating that actually occurred as a result of sepsis and causing the lungs to be leaky?

A: No, sir, I did not say that that was solely due to sepsis. It was clearly present at the initiation of his hospitalization.

Q: Why don't you turn to page 22 of your deposition. I asked you the question: Is the renal failure in your mind that was primary in causing the lung failure? What was your answer?

A: I said: No, sir, in that his lungs had already been injured with the initial trauma which generated an inflammatory response and what I believe to be septic episode beginning on the 20th when he had the purulent secretions in bronchoscopy and they got the organisms. Those things made the lungs very leaky and damaged and stiff.

Q: Those things taken in the context together made the lungs leaky?

A: Yes, sir.

Q: Isn't it a fact, though you never attributed leaky lungs prior to the time of the sepsis – let's put it this way: Find somewhere in your deposition where you attributed leaky lungs to something prior to the pneumonia and sepsis in your deposition?

[The State]: Your honor, that is not an appropriate question.

Q: Would you agree that you did not relate leaky lungs to have occurred prior to his admission at Harborview?

A: I said, no, sir, in that his lungs had already been injured with the initial trauma which generated inflammatory response.

Q: All right. Then you didn't say "leaky" there, did you? Continue on.

A: I will continue if you insist. But, no, I don't say "leaky" there, but I think we both know what I was talking about.

Q: Well, regardless, are you stating that the lungs were leaking as of the air flight?

A: Yes, sir.

RP (Apr. 9, 2009) at 38-40.

The estate also cross-examined Dr. Veal about a perceived change in his trial testimony from his deposition regarding whether Fletcher's pink urine evidenced hemolysis. While Dr. Veal adhered to his opinion that hemolysis did not cause Fletcher's death, he recanted his previous deposition testimony that the pink urine evidenced hemolysis. Dr. Veal explained this change in testimony by citing additional time to review the records.

In the jury's presence, the estate moved to strike Dr. Veal's entire testimony.

> Counsel: For the record, I'll state I move to strike his [Dr. Veal's] entire testimony.
>
> The Court: Any other questions. It's 4:00 o'clock. We are going to have closing arguments on Monday tying together all the various witnesses.
>
> Any other questions to elicit information from this witness while he is here?
>
> Counsel: I'm not quite through with the witness. But for the record, I'd like to continue his deposition for about a half an hour on Monday. I mean his testimony.
>
> The Court: Are you available on Monday?
>
> The Witness: If the court orders me to be here, I'll have to get coverage.
>
> The Court: Take five more minutes, see what you get.
>
> Remember you'll have a chance to argue to the jury on Monday tying together all the testimony of all the witnesses.

RP (Apr. 9, 2009) at 80-81.

The court allowed the estate another five minutes to cross examine Dr. Veal, who was the final witness. At the close of the evidence, the court excused the jurors to return on Monday for closing argument without objection. The estate commented no further or objected to Dr. Veal's inconsistent testimony. And the estate never (1) sought a specific ruling or renewed its motion to strike, (2) requested additional time to cross- examine Dr. Veal, or (3) moved for a continuance to present additional evidence. The State conducted no redirect questioning of Dr. Veal. The jurors then posed further questions to Dr. Veal, and the estate asked follow up questions. The State asked no additional questions.[6]

The next day, Friday April 10, the court e-mailed both counsel, requesting them to e-mail any concerns about the court's proposed jury instructions. In response, the estate addressed certain jury instructions and Dr. Veal's changed testimony:

With respect to Dr. Veal, I am much troubled by the material change in his

[6] CR 43(k) allows jurors to submit written questions to witnesses in civil cases.

> testimony from his deposition of July 2, 2008. It is impractical and overly burdensome, however, to move for a mistrial and force the plaintiff to go through the expense, and delay, emotional stress of a new trial. However, the fact that it was not reported to plaintiff is so potentially prejudicial, that I am requesting a revised expert testimony jury instruction No. 3 which is attached.[7] I have also attached a copy of Dr. Veal's deposition testimony and the E-trans viewer program, if you don't have it. A careful reading of his deposition testimony will reveal that he did not discuss any pre-hospitalization leakiness of Mr. Fletcher's lungs, nor did he discuss any of the differential of blood gases or other indicators that he stated he relied on to give that opinion at trial. Further, he stated, beginning at p. 42, L. 22, that sediment in the urine could have been hemolysis. At p. 45, LL. 18, Dr. Veal stated that it probably was hemolysis. However, at trial, he clearly stated that his opinion rested on the fact that Mr. Fletcher showed no signs of hemolysis. I believe that it is important that the court consider the failure to disclose this change in expert testimony, and at least advise the jury on the requirement to have disclosed it, and the failure to do so.
>
> The trial court responded,
>
> When a witness arguably changes his testimony, the remedy is impeachment. With the cross going on for twice the length of the direct, there was ample opportunity for this and it was accomplished. When an attorney violates the discovery rules, there are other remedies. I don't intend to give a jury instruction that is both a prohibited comment on the evidence and an immaterial comment on counsel.

(Emphasis added.)

After the jury returned a defense verdict, the estate moved for a new trial under CR 59(a)(1), (2), (3), (8), and (9), which the court denied.

Standard of Review

Both a trial court's denial of a motion to strike and a trial court's denial of a motion for new trial are reviewed for abuse of discretion. Tortes v. King County, 119 Wn. App. 1, 12, 84 P.3d 252 (2003) (motion to strike); Hoskins v. Reich, 142 Wn. App. 557, 566, 174 P.3d 1250 (2008) (motion for new trial).

[7] The only remedy requested for the perceived change in testimony was the estate's proposed curative instruction 3. But the instruction is not in our record.

> An abuse of discretion occurs when a decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." A discretionary decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'"

Mayer v. Sto. Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (citation omitted) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

ANALYSIS

1. Change of Testimony Claim

The parties disagree over whether Dr. Veal gave inconsistent material testimony at trial on the leaky lungs and pink urine issues. The estate argues that because Dr. Veal substantially changed his testimony regarding those issues, the court erred by not striking his entire testimony and later by denying its motion for a new trial. The estate asserts:

> Dr. Veal's testimony in discovery was consistent with that of the Fletcher Estate's theory of causation, that pulmonary edema or leaky lungs, and reddish sediment in Mr. Fletcher's urine, were clinically observed only after the time of the transfusion of the wrong blood type into Mr. Fletcher. The record is devoid of any medical witness, except in Dr. Veal's trial testimony, to clearly link any pre-Harborview admission clinical findings to pulmonary edema, or "leaky lungs." Then, without disclosure, Dr. Veal changes his testimony radically in those two areas.

Appellant's Br. at 19.

The State counters that because Dr. Veal made no change to his leaky lungs testimony and an insignificant change to his pink urine testimony, impeachment, rather than striking the testimony or granting a new trial, was the proper remedy. We first

determine whether Dr. Veal changed his pink urine and leaky lungs opinions.

a. Leaky Lungs Opinion. The estate specifically argues that Dr. Veal changed his testimony about when the lungs began to leak fluid. The estate claims that Dr. Veal testified at his deposition that leaking began on October 20, but at trial, he testified that leaking began before Fletcher's arrival at Harborview on October 14. Dr. Veal's deposition indicates no one ever asked him to express an opinion on when the lungs began to leak. When specifically asked about the cause of a lung infection at his deposition, Dr. Veal testified:

> Q: Is it the renal failure in your mind that was primary in causing the lung failure?
>
> A: No, sir, in that his lungs had already been injured with the initial trauma, which generated inflammatory response, the what I believe to be septic episode beginning on the 20th when he had the purulent secretions in his bronchoscopy and they got the organisms out. And those things made the lungs very leaky and damaged and stiff.
>
> And, yes, when he went into renal failure and was having a difficult time draining fluid, that promoted his lungs getting wetter and wetter. But I don't think it was the renal failure that caused his pulmonary failure. Not quite that simple.

The estate inferred from this testimony that the leaking began on October 20. But as the above-quoted testimony shows, Dr. Veal testified in his deposition that Fletcher's lungs had already been injured by the car accident, which triggered an inflammatory response. It was this "inflammatory cascade" that led to his microvascular "leakiness" and ultimately caused his blood vessels to "burn" and his lungs to "leak" culminating in his major organ failure and death.

Dr. Veal's deposition testimony also noted, "He was leaky from the very beginning." "The clinicians caring for him knew that they were dealing with a man

who'd had multiple trauma[s], that he was going to be leaky very soon, and that volume resuscitation and organ profusion were going to be the key things to provide for him in the first 24, 48, 72 hours."

At trial, Dr. Veal testified that Fletcher had leaking lungs before he arrived at Harborview based on respiratory, blood pressure, oxygen saturation, and blood pH (potential hydrogen) readings. His trial testimony on cross-examination made clear there was no change in his testimony on the leaky lungs issue. Because the record shows no inconsistent testimony by Dr. Veal on the leaky lungs issue, the estate fails to demonstrate grounds to support its motions to strike and for a new trial. The court therefore properly declined to strike this evidence or grant a new trial.

b. Pink Urine Opinion. Turning to the pink urine and hemolysis issue, Dr. Veal acknowledged his trial testimony varied from his earlier deposition testimony on this issue. As the above-cited deposition testimony shows, Dr. Veal testified that the reddish sediment in Fletcher's urine showed he had hemolyzed, but the hemolysis was trivial and did not materially contribute to Fletcher's death. He also testified that he could not explain the finding of reddish urine on October 16, 2004 but, "it could well have been due to hemolysis," and "it probably was hemolysis" Dr. Veal, however, maintained throughout his deposition that no acute hemolytic transfusion reaction occurred as a consequence of the type A blood transfusion. He also disagreed that there had been reddish sediment in Fletcher's urine "quite often." In particular, the estate claims the unexpected change in testimony denied it an opportunity to recall Dr. Pearl to rebut the changed testimony.

In contrast, Dr. Veal testified at trial on cross-examination that there had been no evidence of hemolysis during either the first 12 to 24 hours after the error or in the next five days. Responding to the estate's question whether sediment in the urine had probably meant hemolysis, Dr. Veal answered, "No sir, I don't think so." RP (Apr. 9, 2009) at 79. He also acknowledged that this testimony changed from his deposition testimony. He attributed the change to a more careful records review and an isolated finding of red sediment in the urine, "whereas, if he had major hemolysis, you would have seen it present for a while [and] it would have been much darker than pink." RP (April 9, 2009) at 79-80. His opinion on causation—hemolysis did not contribute to cause Fletcher's death—remained unchanged. And the record indicates he never ceded to the estate's position that Fletcher suffered an acute hemolytic transfusion reaction to the type A blood transfusion.

The estate also contends surprise and prejudice from Dr. Veal's "material" change in this testimony. In particular, it claims the unexpected change in testimony denied it an opportunity to recall Dr. Pearl in order to rebut Dr. Veal's changed testimony. According to the estate, the material inconsistency justified striking Dr. Veal's entire testimony or a new trial under CR 59(a)(1), (2), (3), (8), and (9). The State counters that any difference in Dr. Veal's testimony was neither material nor prejudicial and cured by cross-examination and impeachment.

Our review of the evidence shows that any change in Dr. Veal's pink urine and hemolysis testimony was not material in the context of the principal issue at trial and the evidence presented. Dr. Veal testified at his deposition that hemolysis from the

blood transfusion did not cause Fletcher's death. He also explained that the hemolysis had a minor impact on Fletcher's ability to survive but was not a significant factor or cause of his death. His deposition testimony made clear that any hemolysis played a "trivial role at worst" and was "incidental, period." At trial, he no longer conceded, as he had at his deposition, that the pink urine was probably an indication of nonacute hemolysis.

That he retracted his deposition testimony acknowledging reddish sediment in Fletcher's urine probably was hemolysis constitutes an insignificant change in testimony. Dr. Veal's basic opinion—pink urine did not indicate an acute hemolytic reaction—remained the same.

And Dr. Veal's pink urine testimony presented no new opinion evidence at trial.[8] An array of fact and expert witnesses for both parties testified extensively about Fletcher's treatment and course at Harborview, including the significance of reddish sediment in the urine.[9] Estate witness Dr. Nester and defense critical care expert Dr. Schreiber gave opinions similar to Dr. Veal's trial opinion about reddish sediment in the urine. Estate critical care expert Dr. Jacob gave contrary opinion testimony that the

[8] The principal dispute at trial was whether Fletcher suffered an acute hemolytic transfusion reaction that caused his death.

[9] With the exception of Dr. Veal, all the witnesses for both parties testified before Dr. Pearl. Therefore, the estate's claim that Dr. Veal's changed testimony on pink urine stood unrebutted because Dr. Pearl had already testified is not persuasive. In addition, Dr. Pearl disclaimed expertise to render an opinion on acute hemolytic transfusion reactions. We also note the record shows no offer of proof. Therefore, the record is silent on what rebuttal evidence Dr. Pearl would have given if called to rebut Dr. Veal's changed testimony.

October 15 finding of pink urine evidenced acute hemolytic transfusion reaction. Based on the above reasoning, we conclude any perceived change in Dr. Veal's testimony about pink urine and hemolysis was neither significant nor prejudicial.

2. Motion for New Trial[10]

We next consider whether this insignificant change in testimony justified a new trial under CR 59. The estate claims that under CR 59(a)(1)[11] and (2)[12] the State's failure to disclose Dr. Veal's changed pink urine and hemolysis testimony constitutes either irregularity in the proceedings or misconduct by defense counsel. It also claims the trial court committed an error of law[13] by granting impeachment rather than striking Dr. Veal's testimony as a discovery sanction. And under CR 59(a)(3),[14] Dr. Veal's

---

[10] Because we concluded above no change in Dr. Veal's leaky lungs opinion occurred, we do not address this evidence under CR 59.

[11] CR 59(a)(1) provides as one of the "causes materially affecting the substantial rights" of the party aggrieved for which a new trial may be granted: "Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial."

[12] CR 59(a)(2) provides as another of the "causes materially affecting the substantial rights" of the party aggrieved for which a new trial may be granted: "Misconduct of prevailing party or jury . . . ."

[13] CR 59(a)(8) provides as yet another of the "causes materially affecting the substantial rights" of the party aggrieved for which a new trial may be granted: "Error in law occurring at the trial and objected to at the time by the party making the application."

[14] CR 59(a)(3) provides as one of the "causes materially affecting the substantial rights" of the party aggrieved for which a new trial may be granted: "Accident or surprise which ordinary prudence could not have guarded against." A decision to grant a new trial on ground of surprise is within the sound discretion of trial court, as only the trial court can assess the effect of the surprise evidence. Kramer v. J.I. Case Mfg. Co., 62 Wn. App. 544, 815 P.2d 798 (1991).

changed testimony constitutes a "surprise." Under the CR 59(a)(9)'s[15] catch-all provision, it claims substantial justice has not been done. We conclude the estate's CR 59 challenges are not persuasive.

First, as discussed above, Dr. Veal's changed testimony was insubstantial, and impeachment and cross-examination adequately addressed any change in his testimony. In Levea v. G.A. Gray Corp., 17 Wn. App. 214, 288, 562 P.2d 1276 (1977) (quoting Freeman v. Intalco Aluminum Corp., 15 Wn. App. 677, 680, 552 P.2d 214 (1976)), we held:

> [T]the primary question presented by a motion for new trial is whether the losing party received a fair trial. State v. Taylor, 60 Wn.2d 32, 371 P.2d 617 (1962). In commenting on the deference to be given the trial judge, the court in Baxter v. Greyhound Corp., 65 Wn.2d 421, . . . 440, 397 P.2d 857 . . . (1964), stated . . . :
>
> > And, it is in this area of the new-trial field that the favored position of the trial judge and his sound discretion should be accorded the greatest deference, particularly when it involves the assessment of occurrences during the trial which cannot be made a part of the record, other than through the voice of the trial judge in stating reasons for the action taken.

Here, the trial court was in a superior position to assess the overall impact of Dr. Veal's changed testimony on the fairness of the trial and any appropriate remedy. Indeed, after the estate's counsel moved to strike "for the record," counsel requested additional time to cross-examine Dr. Veal, which the court granted. RP (Apr. 9, 2009) at 80. But he requested no other remedy from the court until e-mail exchanges occurred about the proposed jury instructions. The estate informed the court it sought

---

[15] CR 59(a)(9) sets forth as one of the "causes materially affecting the substantial rights" of an aggrieved party for which a new trial may be granted: "That substantial justice has not been done." Motions for a new trial under this provision are rarely granted in view of the multiplicity of other grounds available under the rule. Kohlfield v. United Pacific Ins. Co., 85 Wn. App. 34, 931 P.3d 911 (1997); Holaday v. Merceri, 49 Wn. App. 321, 742 P.2d 127 (1987).

no new trial but, instead, requested a curative instruction. The court denied the requested instruction as an improper comment on the evidence and counsel.[16] And it ruled that when Dr. Veal "arguably change[d] his testimony," impeachment was the remedy. (Emphasis added.) He also ruled that the discovery rules provide other remedies for any discovery violations. Under the circumstances here, the estate fails to demonstrate the trial court abused its considerable discretion by granting impeachment rather than striking the evidence or granting a new trial.

We turn next to the estate's discovery violation claim. The record shows no evidence the State knew beforehand that Dr. Veal would give different testimony at trial about pink urine and hemolysis.[17] But even if a discovery violation occurred, the estate fails to demonstrate that the trial court's imposition of a lesser sanction—impeachment—was an abuse of discretion where the State did not know beforehand about a change in testimony and the change was not significant. "The choice of sanctions for a discovery violation is discretionary and the particular facts and circumstances of each case will determine whether the discretion has been abused." Hampson v. Ramer, 47 Wn. App. 806, 813, 737 P.2d 298 (1987).

---

[16] The estate assigns no error to this ruling. And it made no motion to continue so it could secure evidence to meet the changed testimony.

[17] Fletcher contends that Dr. Veal's "material change" in testimony violated CR 26(e)(1) and 26(e)(2). CR 26(e)(1)(B) requires supplementation to discovery responses regarding "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." And CR 26(e)(2) provides, "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."

> When the trial court "chooses one of the harsher remedies allowable under CR 37(b), . . . it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed," and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial. Snedigar v. Hodderson, 53 Wn. App. 476, 487, 768 P.2d 1 (1989). We have also said that "it is an abuse of discretion to exclude testimony as a sanction [for noncompliance with a discovery order] absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct."

Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (quoting Fred Hutchinson Cancer Research Cen. v. Holman, 107 Wn.2d 693, 706, 732 P.2d 974 (1987)).

The estate relies on Port of Seattle v. Equitable Capital Group, Inc., 127 Wn.2d 202, 898 P.2d 275 (1995). An expert testified before the discovery deadline that a property had a $4.3 million fair market value. Then, after the discovery deadline, the expert changed his property valuation to between $65 million and $70 million. Port of Seattle, 127 Wn.2d at 209-10. Our Supreme Court affirmed the trial court, concluding, "The trial court properly rejected his testimony which would have resulted in prejudice to the Port." Port of Seattle, 127 Wn.2d at 210.

Port of Seattle does not apply. The expert there materially altered his opinion, increasing his property valuation opinion by more than a factor of 10. Unlike Port of Seattle, here, Dr. Veal's changed testimony on pink urine and hemolysis was not significant.

The estate alleges no "'intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.'" by the State or its counsel. Burnet, 131

Wn.2d at 494 (quoting Fred Hutchinson, 107 Wn.2d at 706). Nor is there any evidence in the record that such conduct occurred.

Based on the above reasoning, we conclude the trial court properly exercised its discretion by denying the estate's CR 59 motion for new trial.

CONCLUSION

Because the trial court properly exercised its considerable discretion by granting impeachment as a remedy for Dr. Veal's changed testimony on pink urine and hemolysis, no change occurred on his leaky lung testimony, and no CR 59 grounds support a new trial, we affirm the court's judgment on the jury's verdict in the State's favor.

Dwyer, J.

WE CON CUR:

Cox, J.