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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 FOR THE COUNTY OF RIVERSIDE - RIVERSIDE BRANCH

11 **PATRICIA BEHR**, an individual,)

Case No. INC 052881

12)
Plaintiff,)

[Honorable William E. Burby,
Department HA1]

13 vs.)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT'S SUPPLEMENTAL
MOTION FOR A NEW TRIAL AND
FOR SANCTIONS**

14 **THOMAS REDMOND**, an)
15 individual, and DOES 1 - 30,)
Inclusive,)

Judgment Entered: February 11 , 2009
Date and time of Hearing: April 17, 2009
8:30 A.M.

17)
Defendants.)

Place of Hearing: Department HA1
Hawthorne Facility

18 _____)

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21 **I. INTRODUCTION**

22 Code of Civil Procedure § 657, subdivision 4 authorized the court to grant a motion for a
23 new trial where the moving party has discovered new, material evidence which could not, with
24 reasonable diligence, have been discovered and produced at trial. "The essential elements which
25 must be established are (1) . . . the evidence is newly discovered; (2) . . . reasonable diligence has
26 been exercised in its discovery and production; and (3) . . . the evidence is material to the movant's
case.

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3 *Schultz v. Mathias* (1970) 3 Cal.App.3d 904, 909-910, 83 Cal.Rptr. 888. “Material” in this context
4 means “likely to produce a different result.” *In re Marriage of Smyklo* (1986) 180 Cal.App.3d 1095,
5 1101, 226 Cal.Rptr. 174.

6 **II. SUMMARY OF RELEVANT FACTS**

7 Patricia Behr’s “pitch” to the jury was that she was a naif regarding sexually transmitted
8 diseases, and because of Thomas Redmond’s extensive research into his prostate cancer she
9 “entrusted” herself to him regarding any disease issues. She supposedly did no self-protective
10 investigation regarding herpes because, “Immediately after learning from Redmond that he had
11 herpes, Behr relied upon Redmond for information related to the virus and upon his promise to
12 always be truthful to her.” (Special Interrogatory Response 9, EXH. 16)

13 She also stated under oath (S. I. Resp.11, EXH. 16), . . . “that during the 51-plus years of her
14 life prior to meeting Redmond, she never once experienced any symptoms typically associated with,
15 or indicative of, the herpes virus. Additionally, other than Redmond, she has not had sexual
16 relations with any person that she knew or has since learned was infected with herpes.”

17 She claimed that she did not remonstrate with Redmond once she learned he had herpes
18 because she was “in shock” or “in denial.”

19 Newly discovered evidence demonstrates that none of the foregoing is true. As shown by
20 the Affidavit of Ronald Ramsdell (and attached exhibits), attached in support of this Motion and
21 made a part hereof by reference, the true story of Patricia Behr was not given to the jury by either
22 she or her counsel. The story is as follows:

23 Patricia Behr was introduced to Ronald Ramsdell at a cocktail party in 1989. The two
24 commenced dating. On their second date, Behr and Ramsdell had unprotected sex. Behr did not ask
25 Ramsdell to use protection, she did not inquire whether he had any sexually transmitted diseases,
26 and she did not tell him she had herpes.

1 Ramsdell moved in with Behr and three of her sons in her home at 7632 Newton Avenue
2 South, Richfield, Minnesota. This allowed him to leave his St. Paul apartment, and he could
3 continue his relationship with Behr, assist her with expenses and lend some male influence to her
4 sons. The two together for almost three years from 1989 to 1992, although there were several
5 months in 1990 or 1991 during which they were broken up.

6 Two or three months after Ramsdell moved in with Behr in 1989, he developed small white
7 blisters in his groin and pubic area. He didn't go to a doctor because he had no medical insurance
8 at the time. However, he checked into the blisters and came to the belief that they were genital
9 herpes.

10 Ramsdell confronted Behr about the blisters and told her she must have given him herpes as
11 he was not having sex with anybody else. Behr denied that she had herpes, said she couldn't have
12 given it to him, and started to argue about it. Ramsdell didn't want to argue with her, so he told her
13 they could end the argument and find out for sure by getting tested. Behr finally stopped arguing,
14 said there was no need to have tests, and admitted that she did in fact have herpes. She apologized
15 for what had happened and said she didn't think she could infect Ramsdell because she wasn't
16 having an outbreak. She also provided him with some prescription white ointment for use during
17 outbreaks.

18 Because of increasing turmoil, Ramsdell moved out for several months, during which Behr
19 begged him to come back as both she and the boys needed him. Against his better judgment, he did
20 so. Ramsdell then learned from Behr that while they were split up she was having a relationship
21 with a man she thought was wealthy and who was giving her money and expensive presents. It
22 turned out that he was borrowing the money, and after his sources dried up he started robbing banks
23 so he could continue his relationship with Patricia. He got caught by the FBI, was convicted and
24 was sent to jail.

25 During their entire relationship Ramsdell found Behr to be volatile, physically aggressive
26 toward him, jealous, and in other ways displeasing. The relationship ended when during an

1 argument she threw a full, heavy glass of orange juice at Ramsdell. It missed, broke some objects
2 in the living room, and Behr then became even more enraged, actually physically assaulting
3 Ramsdell. He wrestled her to the floor and held her down so she couldn't hit at him any more.
4 During the todo one of the boys called the police.

5 The pair calmed down, but as soon as Behr saw the police car she commenced histrionics
6 and told the police that Ramsdell had beaten and choked her. He was arrested and charged with
7 some sort of assault. The charges were dismissed after Ramsdell's investigator obtained statements
8 from neighbors which thoroughly discredited both her and her lifestyle. (Ramsdell Aff. Exhs. C and
9 D)

10 In 1995 Ramsdell noticed an article in the Minneapolis paper that Patricia Behr had sued a
11 car sales company named Walser Mazda and its sales manager, Joseph Gingerelli, for sexual
12 harassment. Ramsdell knew that if anybody had done any sexual harassment it would most likely
13 have been Behr, so he called Walser Mazda to talk to Gingerelli about his knowledge of Behr. Mr.
14 Gingerelli told Ramsdell that he couldn't talk about the case, so Ramsdell let it drop. Ramsdell then
15 heard that Behr had left Minnesota, but little else until the events surrounding this case.

16 On February 25 or 26, 2009, Ramsdell got a call from his friend, Bruce Cedarholm, who had
17 seen a news story which stated that Patricia Behr received a verdict of nearly \$7 million because of
18 getting herpes from a 77-year-old man. The story astonished both Ramsdell and Cedarholm because
19 Patricia Behr gave *Ramsdell* herpes in 1989, and Ramsdell told Cedarholm about it at the time.

20 Ramsdell confirmed the story on line. Since he believed that Patricia Behr "set up" Tom
21 Redmond by falsely claiming that he gave her herpes, and that a great injustice had been done, he
22 contacted Redmond's attorney, conferred with him, and gave his Affidavit. It is the information
23 contained in Ramsdell's Affidavit which not only supports, but compels, the granting of a new trial
24 on the grounds of newly discovered evidence.

25 **III. ARGUMENT**

26 The case of *Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 79 Cal.Rptr.2d

1 641, is perhaps the best example of the granting of a new trial being justified by newly discovered
2 evidence. There a quadriplegic plaintiff was further injured by the escape of sand-grain size silicon
3 glass pellets from a special bed ordered for him to prevent bedsores. The defendant manufacturer
4 was not forthcoming with regard to requests for incident reports during the discovery phase of the
5 case, producing only a couple of innocuous reports basically exonerating the manufacturer from any
6 fault. The jury found in its favor. After the trial the plaintiffs' attorney received information from
7 an attorney in another jurisdiction that the latter had brought a motion for and compelled the
8 production of two dozen incident reports in a similar case. Those reports not only put the lie to
9 defendant's production to plaintiff Sherman, but to the deposition testimony of the defendant's
10 quality control manager. The trial court denied post-trial motions for a new trial and for discovery
11 sanctions. The Court of Appeals reversed, saying:

12 As we will explain, throughout the litigation, KCI failed to produce and concealed
13 the existence of crucial documents relating to material issues in the Shermans' lawsuit.
14 Compounding that inexcusable dereliction of its discovery obligations, at trial KCI created
15 the false impression its product rarely malfunctioned and then with only transient,
16 inconsequential effects on the consumer. In truth, the dozens of undisclosed incident reports
told a far different story about both the frequency and gravity of the problem. To the
Shermans' prejudice, *the jury never had a chance to evaluate liability against the backdrop
of the big picture.* 79 Cal.Rptr.2d at 643 (emphasis supplied).

17 It cannot be contended seriously that lying to the jury about having genital herpes long prior
18 to the relationship which is alleged to have caused the infection is any less odious than lying about
19 the frequency and severity of product malfunctions. And if ever a jury was deprived of evaluating
20 the big picture, it was this one.

21 The newly discovered facts: Patricia Behr had unprotected sex on her second date with
22 Ronald Ramsdell in 1989 without inquiring about STDs. After Ramsdell moved in with her Behr
23 infected him with genital herpes. When confronted, she denied it. When pressed to get tested, rather
24 than do so she admitted that she did have herpes. She even provided a prescription ointment to
25 Ramsdell to apply to his blisters.

26 Behr's discovery response: "during the 51-plus years of her life prior to meeting Redmond,

1 she never once experienced any symptoms typically associated with, or indicative of, the herpes
2 virus. Additionally, other than Redmond, she has not had sexual relations with any person that she
3 knew or has since learned was infected with herpes.” (EXH. 16, Spec.Interrog.Resp.11)

4 Behr’s trial testimony: “I broke my rule about being careful.” “I entrusted myself to him.”
5 “It was my worst nightmare.” “I *am* the disease.” “I’m damaged goods.” Pure hogwash, but 9/12
6 of the jury bought it. The majority would not have done so had defendant known of Ronald
7 Ramsdell and been able to present his testimony to them.

8 Ramsdell’s testimony explains many conundrums inherent in the evidence as it was
9 presented:

10 1. Behr could not admit that Redmond told her about his herpes prior to their first encounter,
11 or she would not have had a case. However, she had to have *some* way to explain how she new
12 Redmond had herpes. Voila! The Valentine’s Day disclosure.

13 2. Why didn’t she insist on protection? It didn’t matter. *She already had herpes!*

14 3. Why didn’t the subject of herpes come up with a doctor or her nurse practitioner for a
15 year after she claimed to have had symptoms? She didn’t need to say anything about it. *She already*
16 *knew she had genital herpes!* What she *didn’t* have was “denial.”

17 4. Why in June, 2004, did she request an HIV (AIDS) test, rather than a herpes test?
18 Because she was worried she’d had sex with somebody who might have HIV, and it wasn’t
19 Redmond. Besides, *she already knew she had genital herpes!* And it wasn’t until July, 2004, that
20 Redmond told her he wasn’t going to mix business with pleasure.

21 5. Why did she get tested for herpes in February, 2005? Because she wanted proof in case
22 Redmond ceased to fund her failing business. She couldn’t rely on earlier records, because they
23 would have proved she had herpes before she met Redmond, and she hadn’t been tested yet in Palm
24 Springs. *There didn’t seem to be a downside.*

25 6. Why didn’t she accuse Redmond until she sued him after he shut off the money spigot?
26 Doing so would have imperiled the funds, and again, she didn’t need to. Redmond played into her

1 hands by being honest, *and she already had her target!*

2 7. Why did Dr. Richardson testify that her outbreak in February, 2005, seemed like a
3 recurrence rather than an initial outbreak? Because it was – she already had genital herpes.

4 8. Dr. Bierman’s opinion on causation, based entirely on Behr’s veracity and her Palm
5 Springs medical records, would have been rendered laughable had defendant been able to cross-
6 examine him about Ramsdell’s testimony regarding Behr’s pre-existing herpes.

7 9. Why was there no evidence that Thomas Redmond ever infected any other woman,
8 including his wives, with herpes? Because he was careful, he didn’t infect any of them, and *he*
9 *didn’t infect Behr.*

10 Defendant has established all of the elements dictating a new trial on the basis of newly
11 discovered evidence. The evidence is newly discovered, as defendant’s counsel did not learn of it
12 until he was called by witness Ramsdell. Counsel cannot think of any way by which he could have
13 discovered or produced the evidence, as knowledge of it was peculiarly within the knowledge of
14 Behr and Ramsdell, and Ramsdell’s friend who was told about Behr infecting Ramsdell. And there
15 can be no more material evidence than that Thomas Redmond could not have infected Patricia Behr
16 with herpes because she already had it.

17 **IV. CONCLUSION**

18 What Justice Shonenshine said about the defendant’s conduct in *Sherman v. Kinetic*
19 *Concepts, Inc., supra*, at 79 Cal.Rptr.2d at 649 – “We are appalled that but for a fluke phone call
20 from a Texas attorney, the Shermans would have remained forever unaware they had been cheated
21 out of a fair trial” – easily may be paraphrased to apply to this case. “It is appalling that but for a
22 person who knew Patricia Behr infected his friend with herpes twenty years ago seeing a salacious
23 news item, Thomas Redmond might have remained forever unaware that he had been cheated out
24 of evidence which would have exonerated him.”

25 The *Sherman* case is further instructive as to what should happen here. It held that the trial
26 judge should not have denied discovery sanctions pertaining to the concealed evidence of

1 malfunctions and appropriately excoriated the defendant:

2 [T]he court had not only the power, but the duty to sanction KCI, in a monetary
3 amount *at least* sufficient to cover all the costs incurred by the Shermans, including attorney
4 fees, in going through a trial which must now be redone. Because KCI's conduct subverted
5 justice, this was the sanction necessary 'to prevent abuse of the discovery process and
6 correct the problem presented. [Citations omitted.]

7 We publish our opinion not only because this is a case of first impression, but
8 because we wish to send a loud and clear message to litigants and counsel alike: We will not
9 tolerate the disgraceful tactics which hallmark the defense in this action. We intend to insure
10 that any victory achieved by such methods and challenged in this court will be short-lived
11 and costly. 79 Cal.Rptr.2d at 649

12 Defendant Redmond's motion for new trial should be granted, conditioned upon plaintiff or
13 her counsel paying *all* of defendant's expenses and attorney fees to date.

14 RESPECTFULLY SUBMITTED this 10th day of March, 2009

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FRISBEE & BOSTOCK, PLC

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By: _____

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Robert M. Frisbee

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Attorneys for Defendant Thomas Redmond

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PROOF OF SERVICE

STATE OF ARIZONA, COUNTY OF MARICOPA

I am a resident of the County of Maricopa, State of Arizona. I am over the age of 18 years and not a party to the within action; my business address is 1747 Morten Avenue East, Suite 108, Phoenix, Arizona 85020.

On March 10th, 2009, I personally the foregoing documents described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT’S MOTION FOR A NEW TRIAL AND FOR SANCTIONS** with the Clerk of this Court and on all interested parties in this action as follows:

Clerk of Riverside County Superior Court
Hawthorne Court
9174 Indiana Avenue
Riverside, CA 92503
Attn: Dept HA1

Sean Murphy, Esq.
SLOVAK BARON & EMPEY LLP
1800 East Tahquitz Canyon Way
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(BY MAIL) I am “readily familiar” with my firm’s practice of collection and processing correspondence for mailing. Under that practice it is deposited with the U. S. Postal Service on that same day with postage thereon fully prepaid in Phoenix, Arizona in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Affidavit.

(BY OVERNIGHT MAIL) I caused such envelopes to be delivered via Federal Express, Next Day Air, to the offices and addresses listed above.

(BY FACSIMILE TRANSMISSION) I caused such document to be transmitted by fax to the persons on the attached Service List.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 10th, 2009, at Phoenix, Arizona.

Robert M. Frisbee

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