NO. 101537-2

SUPREME COURT OF THE STATE OF WASHINGTON

M.N., A.B., G.T., and W.N., individually and on behalf of all others similarly situated,

Petitioners,

v.

MULTICARE HEALTH SYSTEM, INC., a Washington corporation,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTIES

Respondent MultiCare answers the Petition for Review.

II. COURT OF APPEALS DECISION

The plaintiffs in this class action allege that MultiCare was negligent in hiring and supervising Nurse Weberg, whose acts of drug diversion may have exposed only a small number—individuals who were her patients and received injectable medications from her—to Hepatitis C. Those plaintiffs' claims are not at issue in this appeal and remain below. At issue are the claims of those plaintiffs who were not Weberg's patients, of whom all who chose to test were negative for the Hepatitis C strain attributable to Weberg, and whom subsequent investigation confirmed Weberg did not expose to Hepatitis C ("the Class"). Their claims encompass purported emotional distress from a letter MultiCare non-negligently sent to

thousands, in an abundance of caution, offering complimentary testing. Approximately a third of the Class did not get tested.[1]

In an August 23, 2022 opinion, *M.N. v. MultiCare Health Sys., Inc.*, 23 Wn. App. 2d 558, ___ P.3d ___ (2022), Division II affirmed summary judgment dismissal of the Class's claims "because M.N. and G.T. cannot establish the legal causation prong of proximate cause." *Slip Op. at 1*.[2] In so affirming, it correctly applied this Court's well-settled legal causation principles to the action's case-specific facts. *Slip Op. at 6-11*.

Weighing logic, common sense, justice, policy, and precedent, Division II found that legal causation did not support "extend[ing] MultiCare's liability to damages which are caused primarily by MultiCare's decision to broadly issue the

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[1] The Class's assertion that "[t]he Plaintiffs are patients who received the letter and got their blood tested," ignores that 34% of the Class did not undergo testing. CP 349-50, 368, 384, 599-600.

[2] Division II initially issued an unpublished opinion, but subsequently granted Plaintiffs' Motion to Publish. MultiCare cites the slip opinion because it is attached as an appendix to the Class's Petition.

notification letter" because doing so would hold MultiCare liable, not for any negligent act, but "rather for its attempt to provide notice and an apology" to plaintiffs. *Slip Op. at 9-10.*

Division II's opinion correctly reflects this Court's decisions, including its longstanding view that a negligent act should have some end to its legal consequences and its cautious approach to claims grounded in subjective emotional distress. Division II's decision based on legal causation does not conflict with either *Berger v. Sonneland*, 144 Wn.2d 91, 26 P.3d 257 (2001), or any other decision of this Court the Class cites, which do not even address legal causation. Nor does Division II's fact-based decision, resting on a narrow well-established legal principle, raise an issue of substantial public interest.

III. ISSUE COUNTERSTATEMENT

Is legal causation absent under this case's narrow facts where the Class attempted to rest liability for primarily emotional distress damages on MultiCare's decision to broadly issue the notification letter?

IV. CASE COUNTERSTATEMENT

A. Facts.

In 2018, MultiCare learned that two Good Samaritan ED patients tested positive for Hepatitis C. CP 349. MultiCare established a command center to investigate. CP 283, 355-57. Despite numerous preliminary hypotheses, MultiCare's investigation revealed that Weberg had administered narcotics to both patients, and that Weberg had engaged in drug diversion. CP 349-51, 357-63.

MultiCare worked hand-in-hand with the Centers for Disease Control (CDC) and Tacoma-Pierce County Health Department (TPCHD), accepting their guidance to develop a list of individuals to whom MultiCare would send notification letters and offer complimentary testing. CP 349, 358, 363-64. The record does not support the Class's contention, *Pet. at 7-8*, that the CDC or TPCHD "directed" MultiCare to notify the number of individuals it notified.

Rather, MultiCare intended to conduct broad-based testing in an abundance of caution: "the last thing that we [MultiCare] wanted to do is not identify anybody who might have developed an infection related to a visit." CP 287. Thus including thousands whom Weberg never treated, MultiCare sent a letter to the 2,762 individuals who had received an injection in the ED while Weberg was on duty for a seven-month period. CP 349, 357-58, 362-64, 367-69.

In conjunction with the CDC and TPCHD, MultiCare designated as "high risk" for Hepatitis C exposure only the 208 patients Weberg had actually treated, while designating as "low risk" the remaining 2,554 patients to whom she provided no care. CP 349-50, 383-84. This internal risk stratification prioritized MultiCare's focused efforts in ensuring that as many as possible in the "high risk" group were tested. CP 382-84.

1,863 of the 2,762 individuals to whom MultiCare sent notification letters underwent testing: 175 of the 208 in the "high risk" group and 1,688 of the 2,554 in the "low risk" group. CP

349-50, 599. Testing identified only 13 Hepatitis C cases that the CDC suspected could be linked to Weberg based on viral genetic matching. CP 350-51, 365-66. All 13 were in the "high risk" group, meaning Weberg had treated and injected them with narcotics in the ED. CP 350-51, 366. The "low risk" group produced no genetically-matched Hepatitis C cases. CP 350-51, 366, 368-69.

Contrary to the Class's insinuation that "[l]uckily, no one in this Class has thus far tested positive for Hepatitis linked to Weberg," *Pet. at 1-2*, testing is complete and has been for years. CP 349-51, 368-69. None in the Class tested positive for Hepatitis C linked to Weberg. CP 366.

Dr. Bachman, Good Samaritan's Chief Medical Officer, testified that after months of testing and investigation, the CDC, TPCHD, and MultiCare concluded that the "low risk group had literally become a no risk group." CP 368-69. No evidence supports that anyone in the "low risk" group (what would become the Class) was ever exposed to or at risk of contracting

Hepatitis C from Weberg. *See id.* The Class's assertion that "it remains an open question even now exactly which and how many patients were exposed," *Pet. at 5*, is unsubstantiated.

B. Procedure.

Two weeks after MultiCare sent the notification letters, Plaintiff M.N. filed this class action. CP 1-14. She subsequently filed an amended complaint adding Plaintiffs A.B., G.T, and W.N. CP 27-44. They claimed to represent not only Weberg's patients (A.B. and W.N.), but also all other individuals who received MultiCare's notification letter (M.N. and G.T.), totaling 2,762 individuals. CP 27-33, 38. They asserted as damages:

> [T]he need for necessary medical care, treatment, and services received …; … inconvenience and loss of time associated with such medical care …; … serious emotional distress, including but not limited to living with the knowledge that they could have or potential (*sic*) will contract a bloodborne pathogen disease, such as Hepatitis C.

CP 43. Because not all plaintiffs underwent testing, much less needed treatment, their only global damages claim was for emotional distress from receiving the notification letter which

they do not contend MultiCare negligently sent. *See* CP 41-43.

Plaintiffs moved to certify one Class. CP 46-63. MultiCare opposed that motion, CP 184-98, and the trial court certified two Classes: a 208-person "Weberg Treatment Class" whom Weberg actually treated, and a 2,584-person "General Treatment Class" whom Weberg did not treat, but who received MultiCare's letter, CP 315, 318, 322.

MultiCare subsequently moved to dismiss the General Treatment Class.[3] CP 325-44. Because Weberg did not treat the Class, and negative testing confirmed they were never exposed to or at risk of contracting Hepatitis C from her, MultiCare asserted that they could not pursue a claim for emotional distress that the letter had purportedly caused. CP 332-37. Further, because the Class could not establish that Weberg had cared for them or impacted the care they did receive, they failed to articulate cognizable chapter 7.70 RCW claims, and also could

[3] Consistent with the Petition for Review, MultiCare refers to the General Treatment Class as "the Class."

not establish proximate cause. CP 337-43.

The trial court granted summary judgment dismissing the Class's claims. CP 660-61. It thereafter entered the parties' stipulated CR 54(b) order as to the Class's claims and stayed further proceedings pending appeal. CP 739-49.

C. Appeal.

Division II affirmed, concluding that legal causation principles did not support extending liability to MultiCare for broadly issuing a notification where the Class's fear arose, not from being treated by Weberg, but from the notification itself. *Slip Op. at 9-10.*

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

No RAP 13.4(b) consideration warrants this Court's review. Division II, applying well-established precedent, narrowly decided this appeal on a fact-specific basis, concluding that the Class failed to satisfy legal causation.

Citing RAP 13.4(b)(1) (conflict with decisions of this Court), *Pet. at 13-20,* and RAP 13.4(b)(4) (issue of substantial

public interest), *Pet. at 20-27*, the Class misconstrues Division II's decision in numerous ways: ignoring that it rests on the narrow, purely legal ground of legal causation; contending that some (but not all) Class members sustained a legally cognizable "physical injury" when they did not; arguing that *Berger v. Sonneland*, 144 Wn.2d 91 (2001), permits standalone emotional distress claims absent objective symptomatology when here it does not; and overstating the public's interest in a limited, fact-specific case.

A. Division II's Decision Does Not Conflict with Any Decision of This Court.

The Class incorrectly argues, *Pet. at 15-20*, that Division II's decision conflicts with this Court's decisions allowing emotional distress damages from physical injuries and *Berger v. Sonneland*. Nothing in *Berger* or cases allowing emotional distress damages from physical injuries precludes Division II from concluding that the Class failed to establish legal causation. That is all Division II did here.

Regardless, this Court's decisions allowing emotional

distress damages from physical injuries do not apply because the needle stick is not what caused the Class's claimed emotional distress. And *Berger* held only that the objective symptomatology requirement does not apply when the plaintiff's case falls squarely under chapter 7.70 RCW, which the Class's case does not.

1. Division II's legal causation analysis is consistent with this Court's decisions.

The Class has not cited any decisions of this Court that conflict with Division II's legal causation analysis. Division II did not base its holding on physical harm, *Pet. Br. at 13-17*, or objective symptomatology, *Pet Br. at 17-20*. It based its holding instead on the narrow, legal causation prong of proximate cause.

"Proximate cause is defined as a cause 'that in natural and continuous sequence, unbroken by independent cause, produces the injury complained of and without which the ultimate injury would not have occurred." *Collins v. Juergens Chiropractic, PLLC*, 13 Wn. App. 2d 782, 793-94, 467 P.3d 126 (2020) (citation omitted), *rev. denied*, 196 Wn.2d 1027 (2020). It

consists of two prongs: cause in fact and legal causation. *Id*. at 794.

Legal causation encompasses a "'policy determination[] as to how far the consequences of a defendant's acts should extend'" and "whether those acts are 'too remote or insubstantial to trigger liability.'" *Id.* (quoting *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 437, 378 P.3d 162 (2016)). It concerns "whether liability *should* attach as a matter of law" in any given situation even when other negligence elements may be met. *Christen v. Lee*, 113 Wn.2d 479, 508, 780 P.2d 1307 (1989) (emphasis original) (citing *Baughn v. Honda Motor Co.*, 107 Wn.2d 127, 146, 727 P.2d 655 (1986); *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985); *Schooley v. Pinch's Deli Market*, 134 Wn.2d 468, 479, 951 P.2d 749 (1998). To determine legal causation, courts "evaluate 'mixed considerations of logic, common sense, justice, policy, and precedent.'" *N.L.*, 186 Wn.2d at 437.

Weighing logic, common sense, justice, policy, and precedent, Division II concluded that liability should not attach

to the Class's claims against MultiCare. The Class's claims were primarily for emotional distress relating to their purported fear that Weberg may have exposed them to Hepatitis C "because Hepatitis was present in the emergency department when Weberg was working." *Slip Op. at 9.* As Division II correctly noted, however, the Class "did not receive injections from Weberg, and the only reason the General Treatment Class believed they were at risk of contracting Hepatitis is because MultiCare sent them the notification letter." *Id.* The Class's basis for liability concerned a nurse who never treated them, did not alter the care they received at MultiCare, and never exposed them to Hepatitis C. What caused their emotional distress was receiving an apologetic notification letter that no one contends MultiCare negligently sent. *Id.*

Division II not only properly recognized that the Class's damages claims were divorced from any allegedly negligent act, but also correctly appreciated that the Class "is attempting to hold MultiCare responsible not for its negligence but rather for

its attempt to provide notice and an apology," which Washington policy disfavors. *Slip Op. at 10.* Numerous authorities illustrate this policy. RCW 5.64.010 renders inadmissible offers by a healthcare provider defendant to pay for expenses, statements regarding remedial measures, and statements and gestures of apology, fault, sympathy, commiseration, condolence, or compassion. RCW 5.66.010 prohibits using benevolent gestures expressing sympathy to prove liability. ER 407 prohibits evidence of subsequent remedial measures to prove fault. The policy concern behind these rules is "that the introduction of such evidence may provide a disincentive for people to take safety precautions." *Hyjek v. Anthony Indus*., 133 Wn.2d 414, 418-19, 944 P.2d 1036 (1997).

Division II thus recognized, *Slip Op. at 10*, that well-settled authorities opposed allowing the Class to use a non-negligent letter that apologized to, sympathized with, and discussed remedial measures for the Class to establish MultiCare's liability. It appropriately concluded that "imposing

liability against MultiCare in this case would be contrary to Washington policy." *Slip Op. at 10.* MultiCare's remedial actions to prevent harm by laudably casting a wide net to notify thousands and offer complimentary screening should not, as a matter of law, trigger liability. *Slip Op. at 9-10.*

The Class has not cited any proximate cause or legal causation decision of this Court, much less one that conflicts with Division II's decision. Nor can it. Using well-settled legal causation principles and recognized policy considerations consistent with this Court's decisions, Division II correctly concluded that the Class could not establish legal causation.

2. The needle stick is not a "physical injury" that caused emotional distress.

Ignoring that Division II did not decide this appeal on the nature of damages, the Class incorrectly contends, *Pet. at 16*, that Division II disregarded authorities permitting emotional distress damages "as a matter of course" when an individual sustains a physical injury. This argument poses numerous problems.

First, 34% of the Class did not undergo testing and therefore never had the needle stick from a blood draw, making any such "physical injury" claim unavailable across a significant percentage of the Class. CP 349-50, 599-600.

Second, the Class manufactures a conflict with this Court's decisions when there is none. That some Class members may have sustained a "physical injury" in the form of a needle stick did not somehow preclude Division II from deciding that legal causation was lacking. Division II recognized that some Class members had a needle stick, *Slip Op. at 9 n.8, Slip Op. at 10*, and used this fact to inform its legal causation analysis. Consistent with this Court's "'view that a negligent act should have some end to its legal consequences,'" Division II found a single needle stick that some underwent for a rule-out test insufficient to trigger liability after weighing logic, common sense, justice, policy, and precedent. *Kloepfel v. Bokor*, 149 Wn.2d 192, 199, 66 P.3d 630 (2003) (quoting *Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976)).

Third, Division II's decision nevertheless followed this Court's decisions on the nature of damages because, contrary to the Class's arguments, their emotional distress is "not a consequence of physical injury:" the needle stick is not what caused their claimed emotional distress. *See Slip Op. at 10.* This Court has long held that "in cases where emotional distress is not a consequence of physical injury … Washington courts have been cautious about extending a right to recovery." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp*., 122 Wn.2d 299, 320, 858 P.2d 1054 (1993). Division II appropriately exercised such caution here.

The Class's argument, *Pet. at 14, 16*, that those members who underwent testing sustained a physical injury overlooks that their emotional distress is not a consequence of the purported physical injury. The cases the Class cites, including *Green v. Floe,* 28 Wn.2d 620, 636, 183 P.2d 771 (1947), and *Redick v. Peterson*, 99 Wash. 368, 370, 169 P. 804 (1918), highlight this flaw. In those decisions, this Court allowed recovery for

damages from the plaintiffs' mental anguish following physical injuries sustained in car crashes. Both decisions underscore "'[t]he general rule [] that in an action for a physical injury the recoverable damages may include compensation for mental anguish or suffering **which results so directly from that injury as to be the natural, legitimate, and proximate consequence thereof**.'" *Green*, 28 Wn.2d at 636 (quoting 15 Am. Jur. 592, § 175) (emphasis added). This is not so with the needle stick.

It was not the needle stick but the notification letter that caused the Class's claimed emotional distress. The complaint emphasizes this, alleging that the Class "suffered serious emotional distress, including but not limited to living with the knowledge that they could have or potential (*sic*) will contract a bloodborne pathogen disease, such as Hepatitis C." CP 43. It was fear in the imagined possibilities that the notification letter, not the needle stick, created. As such, the Class's claimed emotional distress did not "result[] so directly" from the needle stick "as to be the natural, legitimate, and proximate consequence

thereof." *Green*, 28 Wn.2d at 636. Division II's decision does not conflict with the decisions the Class cites. [4]

Given the connection lacking between the needle stick and their claimed emotional distress, the Class appears to argue, *Pet. at 15*, that because this Court in *State v. Baird*, 187 Wn.2d 210, 220, 386 P.3d 239 (2016), called blood draws "highly invasive" in passing, anyone who has had a blood draw is automatically entitled to emotional distress damages. This reaching argument takes half a sentence far out of context. *Baird* establishes no such

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[4] In similar cases, courts in other jurisdictions have found that a needle stick could not alone support a claim for damages. *See, e.g., Dillard v. Torgerson Props*., No. 05-2334, 2006 U.S. Dist. LEXIS 77463, *13 (D. Minn. Oct. 16, 2006) (affirming summary judgment dismissal in case of accidental needle stick without actual exposure to virus because the plaintiff's "mental distress was not caused by the puncture wounds. Rather, the distress arose from the fear of contracting a communicable disease as a result of needle pricks."); *Exeter Hosp., Inc. v. Kwiatkowski*, No. 14-cv-009-SM, 2016 U.S. Dist. LEXIS 150426, *12-13 (D.N.H. Oct. 31, 2016) ("the needle stick that the negative results claimants may have had to endure as part of the testing process (the only specific physical injury Exeter Hospital identifies) is not a physical manifestation of emotional distress associated with the fear of having potentially contracted Hepatitis C.").

thing. It evaluated whether the State could offer a driver's refusal to submit to an alcohol breath test as evidence of guilt at a criminal trial, and it concluded that, regardless of the invasiveness, *i.e.*, a blood draw versus a breath test, the State was still required to obtain a warrant to avoid an unconstitutional search absent exigency. *Id.* at 219-21. *Baird* is inapplicable and does not support the Class's arguments.

Because the needle stick is not what caused it, the Class's claimed emotional distress is not a consequence of physical injury consistent with those decisions permitting emotional distress damages following a physical injury. Regardless, Division II did not base its determination that the Class failed to establish legal causation on the type of damages being claimed, but on policy considerations regarding MultiCare's liability and how attenuated the Class's claimed damages were from Weberg's conduct. *Slip Op. at 9 and n.8*.

3. Division II's decision does not conflict with *Berger v. Sonneland*.

Claiming that Division II incorrectly relied on the Class's failure to prove objective symptomatology, the Class contends, *Pet. at 17-20*, that Division II's decision conflicts with *Berger v. Sonneland*, 144 Wn.2d 91. They appear to argue that because Division II mentioned "emotional distress without a corresponding physical harm or objective manifestation," *Slip Op. at 10*, it decided these requirements applied to the Class. In so grasping, the Class again invents a nonexistent conflict. Division II did not hold that the Class was required, but failed, to establish objective symptomatology. Division II decided this appeal on an entirely separate, but not inconsistent, ground—legal causation—a ground *Berger* does not even address.

Division II considered the fact that the Class's claims largely sounded in emotional distress only insofar as evaluating logic, common sense, justice, policy, and precedent to conclude that the Class failed to establish legal causation. *Slip Op. at 10*. Division II correctly recognized that "the majority of injuries

complained of—anxiety, fear, humiliation, and inconvenience—are quintessentially emotional distress damages." *Slip Op. at 7, n.7.* Its decision reflects this Court's longstanding caution regarding claims resting on subjective emotional distress due to "concerns that feigned claims of emotional distress would lead to intolerable and interminable litigation." *Bylsma v. Burger King Corp.*, 176 Wn.2d 555, 560, 293 P.3d 1168 (2013).

Further, even if Division II had decided this appeal based on objective symptomatology—which it did not—*Berger* does not dictate that the Class here would be excused from proving objective symptomatology. *Berger* is unlike this case in significant ways.

In *Berger*, the plaintiff sued her physician, claiming he had improperly disclosed her confidential information. 144 Wn.2d at 94-95. This Court concluded that the plaintiff's claims came within chapter 7.70 RCW because the physician disclosed the confidential information to obtain more facts to treat the patient, making the conduct "health care." *Id.* at 110. It distinguished

Estate of Sly v. Linville, 75 Wn. App. 431, 878 P.2d 1241 (1994), in which a physician made misrepresentations that did not constitute "health care" because they did not "occur while the physician was 'utilizing the skills which he had been taught in examining, diagnosing, treating or caring for' the patient." *Berger*, 144 Wn.2d at 108-09 (citation omitted).

Because the plaintiff's claims in *Berger* were statutory chapter 7.70 RCW claims, they correspondingly were not common law negligent infliction of emotional distress claims. *See id.* at 112-13. This Court found insufficient support to extend the objective symptomatology requirement beyond common law negligent infliction of emotional distress and appreciated that the plaintiff's chapter 7.70 RCW action already required, as guardrails, expert testimony to prove standard of care and causation. *Id.* at 110-13.

Berger thus allows courts to relax the objective symptomatology requirement only if plaintiffs' claims fall squarely within chapter 7.70 RCW. The Class's claims do not.

Chapter 7.70 RCW governs only "damages for injury occurring as the result of health care." RCW 7.70.030. *Berger* defines "heath care" under chapter 7.70 RCW as "the process in which a physician is utilizing the skills which the physician had been taught in examining, diagnosing, treating or caring for the plaintiff as the physician's patient." 144 Wn.2d at 109 (brackets, internal quotations, and citation omitted). That the Class sued MultiCare, a health care provider, and were at some point MultiCare's patients is not enough to bring their claims within chapter 7.70 RCW's reach under *Berger*. *See Berger,* 144 Wn.2d at 108-09 (discussing and contrasting *Estate of Sly*); *Beggs v. Dep't of Soc. & Health Servs.*, 171 Wn.2d 69, 79, 247 P.3d 421 (2011) ("everything within a doctor-patient relationship is not necessarily health care"). Rather, the Class must articulate an injury occurring from the "health care" they received at MultiCare, *i.e.*, from a health care provider's examination, diagnosis, and treatment of them as patients. *Berger*, 144 Wn.2d at 109. The Class cannot do so.

By definition, the Class were not Weberg's patients. CP 315, 318, 322. There is no evidence that Weberg administered narcotics to individuals who were not her patients, or that she examined, treated, cared for, diagnosed or interacted with the members of the Class in any way while they were in the ED. That Weberg was somewhere in the building when the Class were also there as patients receiving appropriate care from others is not enough to create a chapter 7.70 RCW claim. The Class does not assert claims regarding the health care that MultiCare or its agents provided to them as patients. Nor do they dispute that they received appropriate care at MultiCare. Unlike the *Berger* plaintiff's claim, the Class's claim does not fall within chapter 7.70 RCW.[5]

Not only is *Berger* inapplicable, but Division II's decision, based on a different legal theory, does not conflict with it.

[5] To the extent the Class asserts a corporate negligence claim, *Berger* did not address common law corporate negligence.

B. Division II's Decision Does Not Involve an Issue of Substantial Public Interest.

Ignoring that Division II's decision is narrow, fact-based and unique to this case, the Class claims that Division II's decision "created bad policy on an issue of substantial public interest," *Pet. at 21*. It does not.

The Class argues, *Pet. at 21-23*, that Division II's legal causation analysis was flawed to the extent based on a policy concern that extending liability would discourage facilities from providing full disclosure to patients because they claim MultiCare was already required to notify those it did. In so arguing, the Class distorts the facts. No record evidence supports that the CDC, TPCHD or anything else required MultiCare to notify the number of individuals it did. Neither the CDC nor TPCHD "directed" MultiCare's actions. MultiCare established a command center and openly and voluntarily worked with these agencies, eliciting their help and accepting their guidance. CP 283-90. MultiCare chose to notify thousands of individuals who were not Weberg's patients and despite whom it, the CDC, and

TPCHD categorized as "low risk." *Id.* MultiCare did so to ensure no one fell through the cracks. CP 287.

To incongruously claim, as the Class does, that MultiCare "cannot be said to have acted voluntarily," *Pet. at 23,* is not only factually wrong but legally unsound. Division II appropriately considered the policy implications of its decision, ensuring that they aligned with precedent from this Court in both cautiously approaching emotional distress claims and encouraging defendants to provide notification and apology without fear of incurring liability. *Slip Op. at 8-10.*

The Class also attempts, *Pet. at 26-27,* to create an issue of substantial public interest by inaccurately framing Division II's decision as breaking novel ground: "[n]o prior case holds that a policy of 'encouraging medical institutions to be open, transparent, and overinclusive' outweighs the need to hold tortfeasors liable for its acts," *Pet. at 27.* Not so. Multiple statutes encourage medical institutions to be open, transparent, and overinclusive by prohibiting parties from using offers to pay,

statements regarding remedial measures, and gestures of apology and sympathy to establish liability. *See, e.g.,* RCW 5.64.010; RCW 5.66.010; ER 407. And this Court has recognized the policy underlying these rules is "that the introduction of such evidence may provide a disincentive for people to take safety precautions." *Hyjek*, 133 Wn.2d at 418-19. Division II's weighing of this policy against the Class's attenuated damages claims does not provide any additional or different guidance for healthcare institutions or future cases than these statutes and precedent already provide.

The Class next argues, *Pet. at 23-26*, that Division II incorrectly determined the Class was attempting to hold MultiCare liable for the notification letter alone. Division II correctly recognized that if there had been no notification letter, the Class would have suffered no emotional distress. It then explained how the Class's damages claims were divorced from MultiCare's alleged negligence in hiring and supervising

Weberg, with the effect that liability, if extended, would necessarily rest on the notification:

> The General Treatment Class's claims arise from the fear of contracting a communicable disease after having received MultiCare's notification letter. MN and GT contend that they have a "reasonable, specific, and fact-based fear of having contracted Hepatitis C" because Hepatitis was present in the emergency department when Weberg was working and Hepatitis C is actually transmitted through injections. Br. at Appellant at 39. But the General Treatment Class did not receive injections from Weberg, and the only reason the General Treatment Class believed they were at risk of contracting Hepatitis is because MultiCare sent them a notification letter.
>
> ***
>
> [T]he General Treatment Class is attempting to hold MultiCare responsible not for its negligence but rather for its attempt to provide notice and an apology.

Slip Op. at 9-10. These attenuated damages weighed against the important public policies and precedent that supported Division II's holding.

Finally, it is difficult to conceive how any purported "substantial public interest" resides in Division II's narrow

decision applying well-settled precedent to case-specific facts. This case uniquely involves plaintiffs whose claimed damages are exceptionally divorced from the alleged negligent event in specific ways, as the nurse whom MultiCare allegedly negligently hired and supervised never treated the Class, did not alter the care they received, and never exposed them to Hepatitis C. What caused the Class's claimed emotional distress was receiving MultiCare's apologetic notification letter that no one contends it negligently sent. Despite the Class's parade of horribles, *Pet. at 26-27*, conceptualizing a flood of analogous cases is difficult.

Division II applied longstanding, narrow legal causation principles and this Court's decisions to the unique facts present in this case. Its decision is not of substantial public interest so as to warrant this Court accepting review.

VI. CONCLUSION

Because the Class has failed to establish that any RAP 13.4(b) consideration applies, this Court should decline review.

I declare that this document contains 4,933 words.

RESPECTFULLY SUBMITTED this 9th day of January, 2023.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 9th day of January, 2023, I caused a true and correct copy of the foregoing document, "Respondent's Answer to Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

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