Supreme Court No. 102393-6
Division III No. 37545-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DAVID W. MURPHY, individually and as Personal Representative for the Estate of KATHLEEN J. MURPHY,

Petitioner,

v.

MEDICAL ONCOLOGY ASSOCIATES, P.S., a Washington corporation; ARVIND CHAUDRY, M.D., Ph.D.; and BRUCE CUTTER, M.D.,

Respondents.

PETITION FOR REVIEW

Robert A. McGuire, III
WSBA #50649
Attorney for Petitioner

ROBERT MCGUIRE LAW FIRM
113 Cherry Street PMB 86685
Seattle, WA 98104-2205
Telephone/Fax: (253) 267-8530
E-mail: ram@lawram.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Plaintiff-Petitioner David Murphy ("Murphy"), acting both in his individual capacity and as personal representative of the Estate of Kathleen J. Murphy (his mother), sued the cancer doctors who failed to fully disclose to his mother either the risks of her recommended Hodgkin's lymphoma chemotherapy treatment or the existence of alternatives. Kathleen,[1] who suffered from poor lung health, was not told that she had the choice to omit a drug called bleomycin from her treatment with only a negligible resulting reduction in her overall chance for a cure. Bleomycin is a chemotherapy drug that is known for its elevated risk of causing potentially fatal lung toxicity.

Without having received complete disclosure either of bleomycin's risks or of information about the possibility to omit bleomycin from her treatment regimen altogether, Kathleen was unable to make the right medical choice for herself. As a result,

---

[1] For consistency with the Court of Appeals, Ms. Murphy is referred to simply as "Kathleen." (App'x 2 n.1.)

she accepted a chemotherapy treatment that used bleomycin, and soon thereafter she died from acute respiratory distress syndrome caused by bleomycin lung toxicity.

Kathleen's death was needless. Had she been given the full disclosure to which she was entitled, she could have chosen a less risky course of chemotherapy treatment that would still have left her with promising odds of prevailing over Hodgkin's lymphoma, a highly survivable form of cancer. Her family might still have their mother today.

David Murphy, one of Kathleen's sons, brought claims for violation of informed-consent requirements, negligence, and wrongful death after his mother's passing. The case was tried to a jury, but a number of serious errors occurred during jury selection and at trial that denied Murphy his right to a fair trial. The trial court also erroneously denied Murphy's post-trial CR 59 motion for a new trial on his informed-consent claim.

Murphy appealed these errors and sought a reversal for a new trial on all claims or, alternately, a reversal for a new trial

on the informed-consent claim alone. The Court of Appeals affirmed the trial court. Because the issues raised by the trial court and the appellate court's errors implicate three of the factors used by this Court to determine whether to grant discretionary review, this Court should grant the Petition, review the decision below, and reverse.

II. IDENTITY OF PETITIONER

The Petitioner is David Murphy, acting both in his individual capacity and as personal representative of Kathleen's estate. Murphy was both Plaintiff and Appellant below.

III. COURT OF APPEALS DECISION

Division III of the Court of Appeals filed its unpublished opinion in No. 37545-5-III on June 29, 2023. (App'x 1–34.) Division III corrected the opinion and otherwise denied Murphy's motion for reconsideration in an Order filed on August 17, 2023. (App'x 35–36.)

IV. ISSUES PRESENTED FOR REVIEW

1. Did the trial court commit a manifest constitutional error, which resulted in a biased jury, when it failed to strike a venire panelist whose brother had been successfully treated for cancer by one of the defendant doctors?

2. Did the trial court commit a manifest constitutional error, which gave the defendant doctors an unfair advantage in jury selection and resulted in a biased jury, when it failed to strike two venire panelists whose close family members were a former and a then-current patient of one of the doctors?

3. Did the trial court err as a matter of law when it failed to apply RCW 5.60.030 (the deadman's statute) to prohibit testimony by defendant doctors and others about the substance of providers' conversations with Kathleen, the decedent, to obtain her informed consent?

4. Did the trial court abuse its discretion by allowing defendant doctors and others to testify about the substance of informed-consent conversations with Kathleen, the decedent,

even though such testimony was speculative and unduly prejudicial?

5. Did the trial court abuse its discretion by permitting a defense expert witness to testify at length and in detail about the fictional substance of a completely made-up back-and-forth informed-consent conversation that he might have had with Kathleen?

6. Did the cumulative effect of the foregoing errors, even if they were unpreserved, substantially prejudice Murphy's informed-consent claim and deny him a fair trial on that claim?

7. Was it an abuse of discretion for the trial court to conclude that the jury could have inferred compliance with informed-consent requirements under Washington law (defeating the first element of plaintiff's informed-consent claim under RCW 7.70.050(1)(a)), based on testimony that both contradicted the court's own finding and was barred by the trial court's own pretrial orders in limine?

8. Was it an abuse of discretion for the trial court to conclude disclosure of all material facts was not required (defeating the first element of plaintiff's informed-consent claim under RCW 7.70.050(1)(a)), based on a patient-harm exception to Washington's informed-consent requirements that was not supported by properly admitted substantial evidence?

9. Was it an abuse of discretion for the trial court to determine the jury could have reasonably inferred that Kathleen would have consented to ABVD treatment "regardless of the risk," given her commitment to a cure (defeating the second and third elements of plaintiff's informed-consent claim under RCW 7.70.050(1)(b) and (1)(c)), despite the complete lack of substantial evidence to support that inference?

10. Was it an abuse of discretion for the trial court to conclude evidence existed showing bleomycin lung toxicity was not the cause of Kathleen's death (defeating causation, the fourth element of plaintiff's informed-consent claim under

RCW 7.70.050(1)(d)), based solely upon a conclusory statement by a defense expert, unsupported by any foundation?

V. STATEMENT OF THE CASE

A. Substantive Facts

In early June 2015, Ms. Kathleen Murphy was diagnosed with Hodgkin's Lymphoma, a highly survivable form of cancer. At the time of her diagnosis, Kathleen was over 65 years old and was suffering from other health conditions, particularly chronic obstructive pulmonary disease ("COPD") and acute renal failure. Because of these health factors, Kathleen's odds of surviving Hodgkin's were estimated to be between 30 and 40 percent. (RP 324, lines 17–19; RP 774, line 21–RP 775, line 25.)

Beginning on June 2, 20215, Kathleen had an initial consultation with Dr. Arvind Chaudhry, one of the cancer doctors at Medical Oncology Associates, P.S. On June 4, 2015, Dr. Chaudhry was unavailable, so Kathleen was seen by Dr. Rajeev Rajendra, another doctor in Dr. Chaudhry's practice. Dr.

Rajendra ordered several tests, including a pulmonary function test to measure lung health. Pending test results, Dr. Rajendra recommended that Kathleen begin four cycles of chemotherapy treatment using a drug protocol called ABVD. (RP 384–88.)

"ABVD" is a combination of four drugs—adriamycin, bleomycin, vinblastine, and dacarbazine—often used to treat Hodgkin's lymphoma. These drugs fight the cancer, but they are also themselves toxic, each in their own way. Bleomycin poses up to a forty-six percent chance of causing lung toxicity, (RP 824, line 23–RP 825, line 4), which leads to stiffened lungs and can produce up to twenty-seven percent mortality, (RP 397; RP 822, line 10–RP 823, line 3.) The risk of bleomycin toxicity is higher in older patients, (RP 601), and in those with lung and kidney problems like COPD and renal dysfunction. (RP 304–05.) Omitting bleomycin from the ABVD protocol reduces the risks of bleomycin lung toxicity, but it comes with a trade-off since using bleomycin in ABVD improves overall survival rates

by between zero and five percent compared to using AVD alone. (RP 343, lines 10–18; RP 617, line 19–RP 618, line 7.)

Recognizing the potential threat of lung toxicity for Kathleen, Dr. Rajendra noted that, if test results showed that she already had "an existing underlying pulmonary disease, we could omit the bleomycin." (RP 388, lines 7–10.)

Dr. Chaudhry resumed care at Kathleen's next appointment on June 6, 2015, by which time her pulmonary function test had come back, showing results that were abnormally low. (RP 391–94.) These results supported Dr. Chaudhry's testimony at trial that Kathleen had COPD. (RP 401, lines 1–5.) Kathleen's other lab results showed kidney (renal) dysfunction, (RP 403, lines 20–23), which was another risk factor for use of bleomycin.

Despite test results showing contraindications for Kathleen taking bleomycin, Dr. Chaudhry adopted Dr. Rajendra's recommendation that Kathleen should pursue ABVD chemotherapy. (RP 404.) Neither Dr. Rajendra nor Dr.

Chaudhry recorded advising Kathleen that an alternative protocol to ABVD existed whereby bleomycin could be omitted. (RP 402, lines 4–7; RP 404, lines 22–23.)

Nor did Dr. Chaudhry memorialize telling Kathleen that bleomycin might prevent her from taking a drug called a Neulasta, which is a "colony stimulating factor," a type of drug used to help chemotherapy patients grow white blood cells and better resist infections. (RP 297, line 18–RP 301, line 15; RP 405, lines 6–9; RP 410, line 23–RP 411, line 25.)

Following Dr. Chaudhry's recommendation without having been fully informed of all material considerations, Kathleen started her ABVD chemotherapy on June 6, 2015. (RP 402, lines 8–9; RP 404, line 6–RP 405, line 9; RP 410, line 23–RP 411, line 25.) Although the treatment initially appeared to go well, Kathleen quickly developed febrile neutropenia, which meant she was showing signs of having a serious infection. (RP 416.) This infection proved to be C.difficile, which ultimately led to Kathleen being hospitalized for a period. (RP 432, lines

6–20; RP 475, line 24–RP 476, line 22; RP 1009, line 18–RP 1010, line 17.)

Because she was taking bleomycin, Kathleen could not be given Neulasta to treat her neutropenia. (RP 306, line 16–RP307, line 17; RP 436, lines 1–5.) Instead, she had to have her adriamycin dose reduced, (RP 436, lines 6–10), and she fell behind schedule on her chemotherapy, (RP 312, line 22–RP 313, line 7; RP 435, lines 21–25).

Kathleen had further ABVD treatments on July 2, and July 16. (RP 431, 434.) During this time, she began to develop "crackles" or "rales" in her lungs, (*e.g.*, RP 433, lines 11–RP 435, line 8)—sounds like Velcro being pulled apart—which are one of the tell-tale "alarm bell" signs of bleomycin toxicity developing. (RP 641, lines 12–24; RP 667, line 23–RP 668, line 18; RP 671, lines 5–9; RP 708, lines 4–12; RP 728, lines 13–23; RP 788, lines 7–24.)

On July 30, 2015, due to tension between Dr. Chaudhry and Kathleen's family, Dr. Chaudhry withdrew from treating

Kathleen, (RP 437, lines 2–16), and Kathleen's ABVD treatment was postponed, (RP 577, lines 10–20.)

On August 13, 2015, Dr. Bruce Cutter replaced Dr. Chaudhry as Kathleen's oncologist, and she received her next ABVD treatment. (RP 559–62.)

Shortly thereafter, on August 27, after noting diffuse crackles in Kathleen's lower lungs, Dr. Cutter became concerned about bleomycin toxicity. (RP 597, line 17–RP 598, line 14.) Dr. Cutter dropped bleomycin from Kathleen's protocol when she received her next treatment on September 10, 2015. (RP 621, line 6–RP 623, line 12.) Then on September 11, 2015, Dr. Cutter treated Kathleen with Neulasta. (RP 631, line 21–RP 632, line 10.)

Kathleen's condition deteriorated almost immediately. On September 13, 2015, she went to the emergency room in severe respiratory distress and was placed on a ventilator. (RP 637; RP 1090; RP 318, lines 10–24.) The doctor told plaintiff David Murphy over the phone that Kathleen had bleomycin

lung toxicity and acute respiratory distress syndrome (or "ARDS"), which put her at a 55-percent chance of dying. (RP 1096, line 23–RP 1098, line 2; RP 1010, line 18–21; see also RP 318, lines 10–20.)

On September 24, Kathleen died. (RP 1099.) Evidence at trial affirmatively showed that her cause of death was ARDS caused by bleomycin toxicity, likely aggravated by the administration of Neulasta. (*E.g.*, RP 867, lines 5–22; RP 870, lines 1–12; RP 866, line 3; RP 889, line 13–RP 890, line 24.)

Testimony at trial showed that Kathleen was never advised about the lung toxicity risks of bleomycin, about the alternative treatment option to omit bleomycin, or about the fact that taking Neulasta would be contraindicated after ABVD treatment because taking Neulasta after bleomycin might worsen the risks of bleomycin lung toxicity. (RP 1023, line 24–RP 1025, line 4; RP 626, line 1–RP 627, line 3.) Evidence at trial showed that all these risks were material and needed to be

communicated to a patient as part of the process for obtaining valid informed consent. (RP 607–611, line 8.)

B. Procedural History Relevant To This Appeal

Plaintiff David Murphy, acting individually and as personal representative of Kathleen's estate, sued for medical negligence and wrongful death on January 22, 2018, invoking RCW 4.20.060 (survival), RCW 4.20.010, and RCW 4.20.020 (wrongful death). (CR 3; CR 22–23.) Defendants in the case were ultimately narrowed to Dr. Cutter, Dr. Chaudhry, and Medical Oncology Associates, P.S. (CR 26–28; CR 30–33.)

1. Motions in Limine

Murphy filed three motions in limine important to his appeal. First, Murphy invoked RCW 5.60.030 (the deadman's statute) as grounds to bar defendants from testifying about their

conversations with Kathleen.[2] Second, Murphy moved to bar testimony stating legal conclusions. (CR 182.) Third, Murphy moved to bar testimony about a standard of care for obtaining informed consent. (CR 183–84.) The first motion was denied, while the second and third were stipulated and granted. (RP 354–62; RP 213; RP 203–04.)

2. Jury-Selection Errors

During jury selection, (RP 62–183), two venire panelists turned out to be close relatives of a current patient and a former patient of Dr. Chaudhry. The trial court did not strike either panelist, and one was seated as a juror. The handling of these two panelists amounted to constitutional errors.

First, when the trial court asked whether anything would cause any panelists to begin the trial with feelings or concerns

---

[2] "The purpose of the deadman's statute is to prevent interested parties from giving self-serving testimony about conversations or transactions with the deceased, because the deceased is not available to rebut such testimony." *Rabb v. Estate of McDermott*, 60 Wn. App. 334, 339, 803 P.2d 819, 822 (1991).

about their participation as a juror, panelist 15 volunteered that his brother had been treated for cancer by defendant Dr. Chaudhry. (RP 81, line 14–21.) The panelist stated that he personally had met Dr. Chaudhry at the impressionable age of 8 or 9 years old, (RP 81, lines 22–24); that the doctor had treated his brother for cancer fifteen years earlier, (RP 81, line 14 through RP 82, line 6); that the panelist's mother was "very close" with Dr. Chaudhry during his brother's illness, (RP 104, lines 6–8); and that his brother had a "good experience with Dr. Chaudhry," (RP 104, line 18).

When the trial court and counsel tried to explore panelist 15's ability to be fair despite his family's history with Dr. Chaudhry, he gave only half-hearted assurances: "I believe I can be fair." (RP 91, line 5); "I don't feel like I would have a bias I would express anyways or even have it internally." (RP 103, lines 20–21); "I don't think I would have a problem, to answer you very generally." (RP 104, lines 2–3); "I don't believe so because I don't trust anybody's opinion, even my

own sometimes, meaning that because my brother had a good experience with Dr. Chaudhry does not mean that I would or that his mother would have." (RP 104, lines 16–19.) Later in voir dire questioning, however, panelist 15's answers became progressively less responsive. (RP 178, line 16–RP 180, line 2.) The trial court did not act *sua sponte* under RCW 2.36.110 to excuse Panelist 15,[3] and he was eventually seated as a juror.

Second, voir dire revealed that, like panelist 15, panelist 25 also knew Dr. Chaudhry—this time because one of her close family members (her mother) was one of his *current* cancer patients. (RP 82, lines 8–25.) Again, the trial court did not act *sua sponte* under RCW 2.36.110 to excuse panelist 25 for cause based on her having a relationship to Dr. Chaudhry by virtue of a close family member being in his care. (RP 183–88; RP 188, lines 6–10.) Though panelist 25 was not ultimately

---

[3] RCW 2.36.110 provides in pertinent part that, "It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias [or] prejudice…."

seated on the jury, her presence and low seat number on the panel were known to both sides throughout jury selection, which gave the defendant doctors an unfair and insurmountable knowledge advantage over Murphy and his counsel that, in turn, tainted the jury-selection process.

3. Trial Errors

At trial, the court admitted voluminous testimony about the substance of certain conversations between doctors and Kathleen related to informed consent. Many of these conversations are referenced by provider notes in Kathleen's medical records and would have been excluded under RCW 5.60.030 (the deadman's statute), had Murphy's first motion in limine described above properly been granted. Other conversations were either fictionalized or speculative accounts detailing what the doctors presumed to have been said (but not recorded) during the interactions memorialized in Kathleen's medical charts. All this testimony was improper, speculative, and manifestly more prejudicial than probative.

Drs. Chaudhry and Cutter, for example, testified about the substance of multiple conversations with Kathleen to establish their position that they fully disclosed all the risks of bleomycin toxicity and Kathleen's informed consent was obtained. (e.g., RP 1157, lines 4–14 (Dr. Chaudhry.) These two doctors admitted to having no knowledge or recollection of certain conversations with Kathleen, apart from what was recorded in the medical records themselves, (RP 401, line 23–RP 402, line 3; RP 643, lines 11–13; *see also* RP 640, line24–RP 641, line 6; RP 642, line 11), yet they testified about the substance of several of these conversations anyway, (RP 1156, line 25–RP 1157, line 14; RP 646, line 21–RP 648, line 20; RP 651, line 2–RP 652, line 19). Defense expert Dr. Nichols testified in colorful detail about the substance of conversations with Kathleen that he had no part in and about what he *would have* said, had they been his conversations. (*E.g.*, RP 796, line 6–RP 798, line 16; RP 803, line 8–RP 804, line 11.) Murphy did not object to any of this testimony when it was offered, but

the standing objection created by his loss of the deadman's-statute motion in limine covered some of it. In his appeal, Murphy invoked the RAP 2.5(a)(3) alongside the cumulative-error doctrine to cover the rest.

4. Post-Trial Errors

At the close of trial, the jury returned a defense verdict. (RP 1294; CR 267–69.) The trial court entered judgment. (CR 367–79.) Murphy timely moved for a new trial limited to the issue of informed consent under CR 59(a)(7). (CR 274–83.) Murphy argued that the record contained "no evidence or reasonable inference from the evidence to justify the jury's verdict on the issue of informed consent." (CR 274.) The doctors responded that substantial evidence supported the verdict on all four elements of the claim under RCW 7.70.050(1). (CR 310–20.) The trial court agreed with the doctors and denied the motion.

The trial court issued a letter opinion first, (CR 388–89), then a written order of denial, (CR 380–82.) The letter opinion

identified evidence that supported a defense verdict in a discussion that appeared to track statutory elements of the informed-consent claim—namely, whether informed consent was obtained (or was not required under the circumstances), whether Kathleen would have consented to ABVD treatment if informed of the risks and alternatives, and whether the treatment was the proximate cause of her death. (CR 389.) The order reiterated in conclusory terms that testimony and reasonable inference supported the verdict on these four elements. (CR 381, points 3–5.)

5. Court of Appeals

Murphy timely filed a notice of appeal. (CP 383–98.) Murphy sought reversal on three grounds.

First, Murphy invoked the doctrine of manifest constitutional error under RAP 2.5(a)(3) to argue that unpreserved errors in jury selection had resulted in a tainted jury and deprived him of a fair trial.

Second, citing *State v. Clark*, 187 Wn.2d 641, 649, 389 P.3d 462 (2017), Murphy invoked the doctrine of cumulative error, together with the doctrine of manifest constitutional error under RAP 2.5(a)(3), to argue that the trial court's pervasive admission of improper and unduly prejudicial evidence had deprived him of a fair trial as to both preserved *and* unpreserved errors.

Third, Murphy argued that the trial court erroneously denied his CR 59 motion because it misapplied the law and clearly erred by finding that evidence supported the doctors on all four elements of informed consent.

The Court of Appeals rejected Murphy's arguments and affirmed the trial court. (App'x 1.) Murphy timely moved for reconsideration. In response, the Court of Appeals corrected its opinion on one factual matter but otherwise denied the motion on August 17, 2023. (App'x 35.)

VI. ARGUMENT FOR GRANTING REVIEW

Three of RAP 13.4(b)'s considerations governing discretionary review favor granting this Petition for Review.

First, errors of constitutional dimension occurred during jury selection that denied Murphy a fair trial. Such errors involving the fairness of a trial implicate due process and thus raise "a significant question of law under the Constitution of the State of Washington," which warrants review under RAP 13.4(b)(3).

Second, the Court of Appeals decided that the cumulative-error doctrine does not apply to permit review of unpreserved errors unless the individual unpreserved errors themselves are of constitutional magnitude. (App'x 20–21.) This holding presents a significant constitutional question and conflicts with this Court's observation in *State v. Clark*, 187 Wn.2d at 649, that the presence of cumulative error *itself* presents the constitutional issue, not the individual errors

(which, taken singly, may be harmless). Review is warranted under RAP 13.4(b)(1) and (b)(3).

Third, the trial court and Court of Appeals both misinterpreted the substantive requirements of RCW 7.70.050, the statute requiring informed consent for medical treatments. These errors warrant review because they involve an issue of "substantial public interest that should be determined by the Supreme Court" under RAP 13.4(b)(4).

A. The Jury-Selection Errors Raise A Significant Question of Constitutional Law

This Court should grant review and determine the lawfulness of the trial court's jury selection process. The presence of even one biased juror will "taint the entire venire" and render a trial unfair. *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009); *see also State v. Berhe*, 193 Wn.2d 647, 658, 444 P.3d 1172 (2019) ("An 'impartial jury' means 'an unbiased and unprejudiced jury,' and allowing bias or prejudice by even one juror to be a factor in the verdict violates a defendant's constitutional rights and undermines the public's

faith in the fairness of our judicial system."). "[I]f the record demonstrates the actual bias of a juror, seating the biased juror was by definition a manifest error." *State v. Irby*, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015). "The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of prejudice." *Irby*, 187 Wn. App. at 193. "A trial judge has an independent obligation to protect that right, regardless of inaction by counsel...." *Id.* at 192–93; *see also* RCW 2.36.110.

By not *sua sponte* striking venire panelist 15, who became a juror, and panelist 25, whose presence in the venire unfairly advantaged the defendant doctors, the trial court seated a biased jury. Panelist number 15 should have been excused after his voir dire testimony revealed that he, his brother, and his mother had a positive history with one of the defendant doctors in the case.

Panelist 25 should have been struck for cause along with panelist 15 because leaving two different relatives of Dr.

Chaudhry's patients in the venire panel deprived Murphy of a fundamentally fair jury-selection process. Since panelists 15 and 25 were closely related to patients of Dr. Chaudhry, the defendants had the unfair advantage during jury selection of access to Dr. Chaudhry's exclusive knowledge about how his former and current patients—panelist 15 and 25's relatives—fared during the entire course of his care for them. Murphy not only lacked access to this information, but his counsel could not realistically hope to learn enough through the abbreviated process of voir dire questioning to level the playing field. Since both panelists had a good chance of being seated on the jury due to their low seat numbers, and since panelist 15 actually was seated on the jury, the harm from this unfairness was real.

These jury-selection errors were of constitutional magnitude. The constitutional right of due process "requires a fair trial in a fair tribunal." *State v. Blizzard*, 195 Wn. App. 717, 722, 381 P.3d 1241 (2016). Murphy's right to a fundamentally fair proceeding was violated when he was placed at an unfair

disadvantage in jury selection and then saddled with a biased jury. This Court should grant review of these jury-selection issues under RAP 13.4(b)(3).

B. The Cumulative-Error Ruling Involves A Constitutional Question And Conflicts With *Clark*

This Court should grant review to determine whether the Court of Appeals erred by holding that the cumulative-error doctrine precludes review of unpreserved errors even when RAP 2.5(a)(3)'s doctrine of manifest constitutional error has been invoked.

As this Court explained in *State v. Clark*, the cumulative-error doctrine permits reversal when "multiple trial errors, standing alone, might not be of sufficient gravity to constitute grounds for a new trial, [but] the combined effect of the accumulation of errors most certainly requires a new trial."'

State v. Clark, 187 Wn.2d at 649.[4] Importantly for this Petition, *Clark* recognized that cumulative error implicates *constitutional* concerns because pervasive error denies a party a fair trial. *Clark*, 187 Wn.2d at 649.

Despite *Clark*, decisions of the courts of appeals have repeatedly held that the existence of cumulative error does not permit the review of unpreserved issues on appeal. *See, e.g*., *Rookstool*, 12 Wn. App. 2d at 311; *State v. Murry*, 13 Wn. App. 2d 542, 553, 465 P.3d 330 (2020) ("Only if an argument is properly presented to the trial court by timely objection or timely posttrial motion will we consider the cumulative impact of multiple errors.") (citing *Rookstool*), *overruled on other grounds*, *State v. Canela*, No. 100029-4, 2022 Wash. LEXIS 159, at *15 (Mar. 17, 2022).

Murphy appealed a series of errors that resulted in the admission of voluminous testimony about the substance of

---

[4] "[C]umulative error applies to civil cases. Like criminal litigants, civil litigants are entitled to fair trials." *Rookstool v. Eaton*, 12 Wn. App. 2d 301, 311, 457 P.3d 1144 (2020).

certain conversations between doctors and Kathleen related to informed consent. Many of these conversations are referenced by provider notes in Kathleen's medical records. All this problematic testimony manifestly should have been excluded, either under RCW 5.60.030 (the deadman's statute), because it was obviously speculative, or because it was manifestly more prejudicial than probative. That some of these clear errors were not preserved by timely objections is why Murphy invoked RAP 2.5(a)(3) in conjunction with the cumulative-error doctrine.

The Court of Appeals justified relying on cases subordinating cumulative-error review to preservation concerns, instead of adhering to *Clark*'s statement that cumulative error is constitutional in character (and thus amenable to review under RAP 2.5(a)(3) even if incompletely preserved), by distinguishing individual errors from the "cumulative error" they comprise and requiring all individual errors themselves to be constitutional in character. This rationale, however, directly

conflicts with *Clark*, which recognizes that constituent errors contributing to cumulative error individually "might not be of sufficient gravity to constitute grounds for a new trial." *Clark*, 187 Wn.2d at 649.

The proper interplay between cumulative-error doctrine and application of RAP 2.5(a)(3) to unpreserved constitutent errors giving rise to the cumulative error affecting the fairness of a trial should be clarified. This Court should grant review of these issues under RAP 13.4(b)(1) and (b)(3).

C. The CR 59 Informed-Consent Ruling Involves An Issue Of Substantial Public Interest

Finally, this Court should grant review of the rulings by the trial court and Court of Appeals on Murphy's CR 59 motion because they involve the statute that governs the need for medical providers to obtain informed consent. RCW 7.70.050. The proper construction of this statute and the evidence necessary to establish that the statutory mandate has been complied with are issues of substantial public interest—particularly in a time when pandemic illness remains at the

forefront of public concern. The Court should grant review of the issues arising from the CR 59 ruling under RAP 13.4(b)(4).

VII. CONCLUSION

This Court should grant review, reverse the Court of Appeals, reverse the trial court's judgment, and remand for a new trial either as to all claims (if the Court finds merit on the constitutional issues) or just on the informed-consent claim (if the Court finds merit in the CR 59 issues alone).

• • •

Per RAP 18.17(b), I certify that this document contains 4,879 words in applicable sections.

DATED: September 18, 2022

Respectfully submitted,

ROBERT MCGUIRE LAW FIRM

By: *s/ Robert McGuire*
Robert A. McGuire, III, WSBA #50649

113 Cherry Street PMB 86685
Seattle, WA 98104-2205
Telephone/Fax: (253) 267-8530
E-mail: ram@lawram.com

Attorney for Appellant David W. Murphy, both in his personal capacity and in his representative capacity as personal representative for the Estate of Kathleen J. Murphy

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that, on the 18th day of September, 2023, I caused a true and correct copy of the foregoing document to be filed with the Court and thus to be served upon counsel of record listed below, via electronic service through the Washington State Appellate Court portal:

Ronald A. Van Wert
Etter, McMahon, Lamberson, Van Wert
& Oreskovich, P.C.
618 W. Riverside Avenue, Suite 210
Spokane, WA 99201
rvw@ettermcmahon.com
bonita@ettermcmahon.com

Amber L. Pearce
Floyd, Pflueger & Ringer, P.S.
200 West Thomas Street, Suite 500
Seattle, WA 98119
apearce@floyd-ringer.com
sklotz@floyd-ringer.com

Counsel for Respondents

SIGNED at City & County of Denver, Colorado, on September 18, 2022.

By: s/ Robert McGuire
Robert A. McGuire, III, WSBA #50649
Attorney for Appellant David W. Murphy

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

DAVID W. MURPHY, as Personal Representative for the Estate of KATHLEEN J. MURPHY, Appellant, v. MEDICAL ONCOLOGY ASSOCIATES, P.S., a Washington corporation; ARVIND CHAUDHRY, M.D., Ph.D.; RAJEEV RAJENDRA, M.D.; BRUCE CUTTER, M.D.; PROVIDENCE HEALTH & SERVICES, a Washington corporation, d/b/a PROVIDENCE HOLY FAMILY HOSPITAL; HEATHER HOPPE, Pharm.D.; and ERIN WHITE, Pharm.D., Respondents.	)	No. 37545-5-III UNPUBLISHED OPINION

SIDDOWAY, J. — In this medical malpractice action that resulted in a defense verdict below, David Murphy, as the personal representative of the estate of his mother, sued some of the doctors who treated her in her final illness. He contends it was error for the trial court not to strike, sua sponte, at least two prospective jurors for cause and not to exclude, sua sponte, defense evidence that he contends violated the dead man's statute or evidence rules. He also appeals the denial of his motion for a new trial on an informed consent claim.

He fails to demonstrate actual bias on the part of any juror, and assuming without agreeing that defense witnesses provided inadmissible testimony, error was not preserved. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Medical treatment

In late May 2015, Kathleen Murphy was admitted to Holy Family Hospital in Spokane for a worsening of unwellness she had experienced since being hospitalized in the beginning of 2015 for exacerbation of chronic obstructive pulmonary disease (COPD). COPD is a "lung disease of the airways where there is a certain obstructive pattern on how people are able to exhale or inhale." Rep. of Proc. (RP) at 395. It is often caused by long term smoking. Kathleen's[1] treatment providers were aware she was a half-a-pack per day smoker.

Soon after her admission, a tissue biopsy revealed that Kathleen had Hodgkin's lymphoma. Hodgkin's lymphoma is a cancer that primarily affects the lymph nodes and other lymphoid tissue in the body.

On June 2, Kathleen established care with Dr. Arvind Chaudhry, an oncologist with Medical Oncology Associates, P.S. Dr. Chaudhry would later testify that Kathleen had an unusual presentation of Hodgkin's disease. For one thing, the disease is rare in

[1] Given the common last name, and for clarity, we refer to David as "Mr. Murphy" but to other members of the family by their first names. We intend no disrespect.

someone who is 65 years old. In addition, Kathleen had nodules in her lungs and liver in addition to enlarged lymph nodes; if it *was* Hodgkin's disease, that meant it had progressed to other organs. Believing it might be a different type of lymphoma, Dr. Chaudhry deferred a treatment decision pending a report on the pathology. The pathology confirmed that Kathleen had Hodgkin's lymphoma.

On June 4, Kathleen met with Dr. Rajeev Rajendra, one of Dr. Chaudhry's colleagues, because Dr. Chaudhry was unavailable. Present during this meeting were Kathleen's son, Michael, and her daughter, Susan. According to medical records, the meeting lasted 35 to 40 minutes and included discussion of treatment objectives.

Dr. Rajendra ordered a pulmonary function test to measure lung health, information needed to determine whether Kathleen could take a drug called bleomycin. Bleomycin is one drug within a chemotherapy regimen called "ABVD." ABVD is named for its four drug components: adriamycin, bleomycin, velban, and dacarbazine. In Dr. Chaudhry's opinion, ABVD was the best available avenue for the treatment and cure of Hodgkin's disease and gave Kathleen the best shot at curing her cancer. The standard treatment with the ABVD regimen is a cycle every four weeks, with drug infusions on day 1 and day 15 of each cycle. Chemotherapy is most efficacious if the patient is able to stay on schedule with the recommended dosage.

Dr. Chaudhry reviewed Dr. Rajendra's notes before seeing Kathleen the following day, June 5. The medical record of Dr. Chaudhry's visit with Kathleen that morning states, in part, "Dr[.] Raj has discussed chemo options." Ex. D102, at 226. It continues, "She would like to proceed, but focused on eating today. . . . Hope to start this weekend. Will need ABVD." *Id.* at 226-27. Dr. Chaudhry recognized that Kathleen "did not have too much time to wait for all the testing and results." RP at 404. Nevertheless, he wished to have received all of the informative pathology before beginning chemotherapy.

On the morning of June 6, Dr. Chaudhry met again with Kathleen. He recommended ABVD "in-house," meaning in the hospital. RP at 273. His note of the visit adds: "Discussed risks and benefits." Ex. D102 at 220. Kathleen also received printed information about chemotherapy guidelines and drugs. The first administration of ABVD occurred that day.

Kathleen's white blood cell count dropped following the first administration, a condition called "neutropenia." RP at 274. As a result, the second administration of ABVD was postponed, and Dr. Chaudhry decided to reduce the dosage of adriamycin. Kathleen was discharged from the hospital to a nursing facility on June 22.

Kathleen received her delayed second administration of ABVD at the doctors' clinic, on July 2. Medical records of her meeting with a nurse practitioner on that date state, "Discussed risks and side effects of therapy in detail with patient. Written materials

provided. She wishes to proceed." Ex. D101, at 16. Consent paperwork signed by Kathleen at that time listed the chemotherapy drugs and their side effects.

Kathleen had an infection following this second chemotherapy and was readmitted to Holy Family Hospital on July 12. A CT[2] scan showed a mild pulmonary edema at her lung bases. She was discharged on July 15. She agreed to go forward with her third administration of ABVD and received it on July 16.

Sometime after, Kathleen was sent to Valley Hospital after showing low white blood cell counts once more. On July 30, Dr. Chaudhry decided to delay the next administration of ABVD and to reduce the dosage of adriamycin to prevent further episodes of neutropenia. At that point, Dr. Chaudhry had determined to cease providing care to Kathleen as soon as she could be seen by another physician.[3]

On August 13, Dr. Bruce Cutter, another oncologist with Medical Oncology Associates, assumed Kathleen's care and she received her fourth administration of ABVD. An entry in the medical record states that Dr. Cutter, Kathleen, and Susan "had a good talk and all wish to continue care here." Ex. D101, at 10. Dr. Cutter's notes

---

[2] Computed tomography.

[3] Apparently Susan had her own thoughts about how her mother's neutropenia should have been treated, which led to friction with Dr. Chaudhry and his notification that Kathleen should seek treatment from another oncologist. Before trial, the defendants sought an order in limine excluding evidence on this collateral issue. The trial judge agreed that the jury should hear only that the care was transferred, unless Mr. Murphy could demonstrate that the particulars were important.

"emphasized plan is to cure her" and recorded that "[w]e need to be aggressive to do so." *Id.* At a follow-up later that week, Kathleen reported feeling unwell and displayed some shortness of breath with exertion. Dr. Cutter conducted a physical exam and noted no baseline respiratory issues. He attributed her symptoms to her ongoing anemia. Before her next visit, Kathleen received a transfusion of two units of red blood cells.

At her next visit, on August 27, Kathleen presented with diffuse "crackles" in her lower lung bases. Lung crackles, or crepitations, are detectable by stethoscope and often sound like "Velcro opening up." RP at 450.[4] They can be an early indication of bleomycin toxicity, but may be caused by many ailments, including Hodgkin's lymphoma in the lungs. This was the first time Dr. Cutter heard lung crackles in Kathleen. Although Dr. Cutter had growing concerns about the dose delays and modifications affecting Kathleen's chemotherapy, he decided to hold off treatment until the next week, as a start, to do diagnostic testing. A few days later, Kathleen visited the emergency room where complaints of lightheadedness and dizziness were treated.

On September 10, the lung crackles were still present. Given a concern about bleomycin toxicity but the continued goal to aggressively pursue a cure, Kathleen received a fifth administration of chemotherapy consisting of only ADV. The next day,

[4] The "popping sound" is made when the alveoli "try to open up." RP at 450-51.

Dr. Cutter treated Kathleen with Neulasta, which causes bone marrow to produce more white blood cells.

On September 13, Kathleen went to the hospital by ambulance with significant shortness of breath. She was admitted to the intensive care unit (ICU) and placed on a ventilator. The treating physicians diagnosed Kathleen with acute respiratory distress syndrome (ARDS).

Kathleen died on September 24. Her treating physician in the ICU described the cause of death as ARDS, recording it in her medical record as acute cardiopulmonary failure secondary to pneumonia with underlying COPD and Hodgkin's disease.

Litigation

David Murphy thereafter brought suit against a number of medical providers and practices, but by the time of trial he had dismissed claims against all but Medical Oncology Associates, Dr. Chaudhry and Dr. Cutter. He asserted claims for medical malpractice under chapter 7.70 RCW and negligence, personal injury claims that survived Kathleen's death under RCW 4.20.060. On behalf of Kathleen's children, he asserted a claim of wrongful death under RCW 4.20.010 and .020.

In pretrial motions in limine, Mr. Murphy asked the court to preclude Drs. Chaudhry and Cutter from testifying to transactions with and statements made by Kathleen, which he argued were inadmissible under Washington's dead man's statute,

RCW 5.60.030.[5] He acknowledged that testimony by third parties is not excluded by the statute; only parties in interest are precluded from testifying on their own behalf.

The defendants responded that the dead man's statute applies only to actions brought on behalf of the decedent's estate, and because Mr. Murphy also asserted a wrongful death claim for the benefit of Kathleen's children, the statute, by its terms, did not apply.

After hearing argument, the court observed that the parties appeared to agree that the dead man's statute applied to Kathleen's claims that survived her death, but not to the wrongful death claim on behalf of the children. As to the latter claim, then, the evidence was not precluded by the statute. The court observed that testimony about communications between providers and Kathleen might still be inadmissible hearsay. Ultimately, the court offered a tentative, qualified ruling:

> [N]ot knowing what the testimony, what it's going to look like, I'm sort of guessing and putting some parameters on this. If there's—the deadman's

---

[5] RCW 5.60.030 does not generally prevent an interested party from giving evidence by reason of his or her interest in the event of the action, but is subject to the key proviso,

> That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person . . . then a party in interest . . . shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person.

> statute doesn't apply. So if it's not hearsay, then it comes in. If you're not suggesting that it's hearsay, then it comes in.

RP at 361. Mr. Murphy's lawyer had conceded that case law recognizes medical records as an exception to the bar established by the dead man's statute, and the trial court ruled that medical records were "fair game." RP at 360.

During jury selection, and after prospective jurors had heard something about the case, the court asked them whether there was anything about the case that "would cause you to begin this trial with any feelings or concerns regarding your participation as a juror." RP at 81. Sixteen individuals raised their hands, and the court questioned each. One of the prospective jurors, number 15, explained that he raised his hand because "Dr. Chaudhry treated my brother years ago during his cancer as an oncologist." RP at 81. Asked if he had ever met the doctor, number 15 responded that he had, over 10 years earlier, "At a very young age, around just 8, 9 years old." *Id.* A second juror, prospective juror 25, disclosed that Dr. Chaudhry had been her mother's oncologist.

When questioning was turned over to the lawyers, Mr. Murphy's lawyer questioned number 15 briefly about his brother's treatment by Dr. Chaudhry. He did not engage in any individual questioning of number 25. When the court entertained challenges for cause at the conclusion of voir dire, Mr. Murphy had no for-cause challenges.

During the trial, jurors heard testimony from defendants Dr. Chaudhry and Dr. Cutter, and from four other treating providers: two hospitalists who had worked at Holy Family Hospital, Dr. Peter Weitzman and Dr. Jeremy Cope, and two physicians who had cared for Kathleen in the Holy Family ICU: Dr. Jeffrey Elmer and, by deposition, Dr. Donald Howard. They heard testimony from Mr. Murphy and briefly from Susan. They heard from two expert witnesses for Mr. Murphy: Dr. John Sweetenham, an oncologist, and Dr. Michael Fishbein, a pathologist specializing in pathology of the heart and lung. They also heard from two experts for the defense: Dr. Curtis Veal, an internist specializing in pulmonary disease and critical care and Dr. Craig Nichols, an oncologist.

In closing argument, Mr. Murphy's lawyers emphasized the testimony of their expert, Dr. Sweetenham, that while the ABVD regime is the gold standard for treating Hodgkin's lymphoma in younger people, the bleomycin component presents a risk of bleomycin toxicity, and death, in older individuals. Dr. Sweetenham opined that the four to five percent increase in a cure that is presented by including bleomycin is more than offset by the risk of the patient developing bleomycin toxicity. Mr. Murphy's lawyers argued that Kathleen should have been informed of what they contended was a safer course of treatment for her: a regimen that excluded bleomycin.

Mr. Murphy's lawyers spent a considerable part of their argument talking about the informed consent claim, arguing that the lack of detail in the medical records about

the risks and alternatives discussed was evidence that bleomycin toxicity and the alternative of omitting bleomycin had not been discussed. They also argued that the written documentation of informed consent obtained on July 2 proved that obtaining it was overlooked earlier. They reminded jurors of the testimony of their expert pathologist, Dr. Fishbein, that the diffuse alveolar damage to Kathleen's lungs that resulted in her death from ARDS was more probably than not the result of bleomycin toxicity.

Defense lawyers emphasized that all the experts agreed that the ABVD regime for treating Hodgkin's lymphoma had been the gold standard for 40 years. They argued that Drs. Chaudhry and Cutter would have breached the standard of care had they *not* recommended it. They pointed to entries in the contemporaneous medical records that Kathleen's treatment objective was cure, not palliative treatment, as reported not only by her but by her children. They pointed to four medical record entries that they argued reflected advice and consent about treatment and options before the first administration of ABVD. Addressing the July 2 documentation of informed consent, they contended it was obtained as a matter of routine because it was the first administration Kathleen had received at their clinic, since the first administration took place at Holy Family Hospital. They reminded jurors that Dr. Nichols had extensive experience treating patients with bleomycin and expressed the opinion that ABVD was the best treatment option for

Kathleen notwithstanding her age. They pointed out that while it was undesirable that Kathleen's neutropenia had caused delays in her doses, contemporaneous entries in the medical records supported a conclusion that the ABVD treatment had been working, and conflicted with plaintiff's theory that bleomycin toxicity caused the ARDS that was her cause of death. They reminded jurors that the experts agreed that ARDS could be the result of oxygen toxicity or pneumonia.

The jury returned a defense verdict on all claims. Mr. Murphy moved for a new trial on the issue of informed consent, which the court denied. Mr. Murphy appeals denial of his motion for a new trial and the judgment.

I. THE TRIAL COURT DID NOT ERR BY FAILING TO EXCLUDE JURORS SUA SPONTE

Mr. Murphy's first assignment of error is to the trial court's alleged error in failing, sua sponte, to strike certain prospective jurors for cause. For the first time on appeal, Mr. Murphy contends that prospective juror 15, who was seated as juror 8 (and who we generally refer to hereafter as juror 8), was actually biased.[6] He also contends

[6] A threshold issue of whether Mr. Murphy allowed prospective juror 15 to be seated without exhausting his peremptory challenges, thereby precluding his ability to appeal on the basis that juror15 should have been excused, is not addressed by the parties. Appeal is unavailable in such a case, as recently clarified by our Supreme Court in *State v. Talbott*, 200 Wn.2d 731, 521 P.3d 948 (2022). *Talbott* also rejects Mr. Murphy's suggestion that if he was required to exercise a peremptory challenge to exclude prospective juror 25, that would be prejudicially unfair. Opening Br. of Appellant at 35 n.2; *see Talbott*, 200 Wn.2d at 739 (a party's rights are not violated "'simply because [they] had to use peremptory challenges to achieve an impartial jury'") (alteration in original) (quoting *State v. Fire*, 145 Wn.2d 152, 163, 34 P.3d 1218 (2001)).

for the first time on appeal that by failing to strike members of the venire whose close family members were or had been patients of the defending doctors, the court "gave the defendant doctors an unfair advantage in jury selection . . . result[ing] in a biased jury." Opening Br. of Appellant at 5.

Because neither objection was raised in the trial court, Mr. Murphy recognizes that RAP 2.5(a) requires him to demonstrate that "'(1) the error is manifest and (2) the error is truly of constitutional dimension.'" *State v. J.W.M.*, 1 Wn.3d 58, 90, 524 P.3d 596 (2023) (quoting *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). Proof that an alleged error is manifest requires a showing of actual prejudice; stated differently, it requires that the asserted error had practical and identifiable consequences at trial. *Id.* (citing *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). A manifest constitutional error remains subject to a harmless error analysis. *Id.*

Article I, section 21 of the Washington State Constitution provides that "the right of trial by jury shall remain inviolate." In civil proceedings, "'[t]he right to trial by jury includes the right to an unbiased and unprejudiced jury, and a trial by a jury, one or more whose members is biased or prejudiced, is not a constitutional trial.'" *Henderson v. Thompson*, 200 Wn.2d 417, 434, 518 P.3d 1011 (2022) (internal quotation marks omitted) (quoting *Mathisen v. Norton*, 187 Wash. 240, 245, 60 P.2d 1 (1936)); *see also Allison v. Dep't of Lab. & Indus.*, 66 Wn.2d 263, 265, 401 P.2d 982 (1965).

The court has a duty to act on a prospective juror's apparent bias or prejudice. "Both RCW 2.36.110[7] and CrR 6.4(c)(1)[8] create a mandatory duty to dismiss an unfit juror even in the absence of a challenge." *State v. Lawler*, 194 Wn. App. 275, 284, 374 P.3d 278 (2016). Contrary to the doctors' position, a party able to demonstrate the actual bias of a juror may seek relief on appeal even after having been afforded an opportunity for a full and fair voir dire, and after failing to challenge the juror for cause.

A juror demonstrates actual bias when he or she exhibits "a state of mind . . . in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). "Equivocal answers alone do not require that a juror be dismissed for cause." *Lawler*, 194 Wn. App. at 283. A juror who has preconceived ideas need not be excused if the juror credibly states that she or he can set those ideas aside and decide the case on the basis of the evidence presented and the law as instructed by the court. *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987). To excuse a juror based on actual bias, the trial court "must be satisfied, from all the

---

[7] "It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service."

[8] "If the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for cause."

circumstances, that the juror cannot disregard such opinion and try the issue impartially." RCW 4.44.190.

The party challenging a potential juror on the ground of actual bias has the burden of proving the facts necessary to the challenge by a preponderance of the evidence. *Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn. App. 747, 754, 812 P.2d 133 (1991). Because "'the trial court is in the best position to determine a juror's ability to be fair and impartial,'" we review a trial court's decision not to dismiss a juror for manifest abuse of discretion. *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 856, 456 P.3d 869 (2020) (quoting *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991)). A trial court's implicit decision not to dismiss a juror sua sponte is subject to the same review. The trial court's fact-finding discretion includes the power to weigh the credibility of the prospective juror. *Ottis*, 61 Wn. App. at 753-54.

Actual bias has been found in the case of a juror who made an unqualified representation in a questionnaire that she could not be fair to both sides. *Guevara Diaz*, 11 Wn. App. 2d at 846. It has been found in a case in which a juror responded, when asked if she might not be able to give both sides a fair trial, that she was "more inclined towards the prosecution I guess," and said, "I would like to say [the defendant's] guilty." *State v. Irby*, 187 Wn. App. 183, 190, 347 P.3d 1103 (2015). It has been found in a case in which a juror "unequivocally admitted a bias . . . in favor of police witnesses,"

"indicated the bias would likely affect her deliberations," and "candidly admitted she did not know if she could presume [the defendant] innocent in the face of officer testimony indicating guilt." *State v. Gonzales*, 111 Wn. App. 276, 281, 45 P.3d 205 (2002), *overruled on other grounds by State v. Talbot*, 200 Wn.2d 731, 521 P.3d 948 (2022).

In this case, members of the venire were asked early in voir dire to identify themselves and answer a handful of questions, one of which was, "Can you be fair?" RP at 86-87. Juror 8 answered that question, "I believe I can be fair." RP at 91. When the parties were given their opportunity to question the venire, Mr. Murphy's lawyer asked whether anyone had any feelings about medical malpractice, and juror 8 was one of the individuals who raised his hand. He and the lawyer engaged in the following exchange:

> [PROSPECTIVE] JUROR NO. 15: I mentioned earlier my slight experience with Dr. Chaudhry and you mentioning malpractice, I believe it was?
>
> [PLAINTIFF'S COUNSEL]: Yes, negligence.
>
> [PROSPECTIVE] JUROR NO. 15: I—I've had both good doctors and bad doctors in my experience. So I don't feel like I would have a bias I would express anyways or even have it internally. But I have been caught in the medical system, my family and myself, for generations literally. But I've seen both sides of it.
>
> [PLAINTIFF'S COUNSEL]: And thank you again for sharing that. Maybe you could share a little more about your feelings here as far as being able to sit on this jury?

> [PROSPECTIVE] JUROR NO. 15: I don't think I would have a problem, to answer you very generically. Personally, I don't know Dr. Chaudhry at all.
>
> [PLAINTIFF'S COUNSEL]: Okay.
>
> [PROSPECTIVE] JUROR NO. 15: But I know my brother's experience and what little bit I shared of that. And I know my mother was very close with Dr. Chaudhry during my brother's experience. However, like I say, that was years ago for me. But I would—I would have to take this case by case, just as I do everything else.
>
> [PLAINTIFF'S COUNSEL]: Okay, that's good. Thank you.
>
> And I guess the thing—do I have or my client have anything to fear here that because of your experience with your brother, you might lean one way or the other?
>
> [PROSPECTIVE] JUROR NO. 15: I don't believe so, because I don't trust anybody's opinion, even my own sometimes, meaning that because my brother had a good experience with Dr. Chaudhry does not mean that I would or that his mother would have.
>
> [PLAINTIFF'S COUNSEL]: Okay, thank you very much for sharing that.

RP at 103-04.[9]

Juror 8's answers cannot be characterized as even equivocal statements of bias or prejudice. Mr. Murphy points to juror 8's statement that he was 8 or 9 years old at the time of his brother's cancer and speculates that he would have been "impressionable," and that in this "searing context," juror 8 would have perceived Dr. Chaudhry as having

[9] Juror 8 later engaged in a more extensive exchange with defense counsel, after defense counsel asked the venire about any history of having a treatment relationship terminated by their doctor. *See* RP at 178-80. He talked about his relationships with three doctors; some favorable, some not. Mr. Murphy has nothing to say about these additional disclosures by juror 8, other than to dismiss them as "progressively less responsive." Opening Br. of Appellant at 24.

"*saved his brother's life*." Opening Br. of Appellant at 23, 26; Reply Br. of Appellant at 13. Mr. Murphy points to juror 8's statement that his mother was "very close" to Dr. Chaudhry during his brother's care and speculates that no such son "could reasonably be considered free from actual bias." Opening Br. of Appellant at 26. But Mr. Murphy never obtained juror 8's agreement that he had been impressionable, or that he had such attitudes. Rather, juror 8 spoke of "what little bit [he] shared" of his brother's experience, and stated, "Personally, I don't know Dr. Chaudhry at all," and "like I say, that was years ago for me." RP at 104.

Ultimately, what Mr. Murphy is asking us to do is to *infer* bias from the "doctor-to-a-close-family member" relationship. But challenges for implied bias are governed by RCW 4.44.180, which identifies relationships for which a challenge for implied bias may be taken "and not otherwise." Being a close family member of a patient of a party is not identified as a basis for a challenge for implied bias. Accordingly, Mr. Murphy is required to demonstrate juror 8's actual bias, and he fails to do so.

Mr. Murphy's remaining argument is that once it was revealed that prospective juror 25's mother was a current patient of Dr. Chaudhry, the trial court should have excused all similarly-situated venire members sua sponte. This is despite the fact that in introducing herself and answering the question, "Can you be fair?" prospective juror 25 answered, "I can be fair." RP at 95. Mr. Murphy's lawyers did not use their allotted time

in voir dire to ask her any questions. Mr. Murphy argues that this categorical disqualification was nevertheless required because the defense would otherwise have unfair access to information about how the jurors' family members had fared under the defendants' treatment.

Again, Mr. Murphy is required to demonstrate manifest constitutional error. He offers no legal authority or analysis supporting the proposition that a party has a constitutional right to disqualify a prospective juror if the party's adversary might have greater access to information about that juror. "'[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

II. THE TRIAL COURT DID NOT ERR BY FAILING TO INTERCEDE AND, SUA SPONTE, EXCLUDE UNOBJECTED-TO TESTIMONY

Mr. Murphy's next assignment of error is to testimony by Drs. Chaudhry, Cutter, and Nichols supportive of Kathleen's informed consent that he contends was speculative, unduly prejudicial, or violated the dead man's statute. The complained-of testimony was not objected to, but he advances two theories on which he claims to avoid the issue preservation problem. He also argues that because the dead man's statute would have applied to the estate's assertion of Kathleen's claims that survived her death, the trial court should have severed the wrongful death claim sua sponte.

A. The cumulative error doctrine does not apply

Mr. Murphy first seeks to avoid the issue preservation problem by invoking the cumulative error doctrine. The cumulative error doctrine applies "'when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.'" *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 172, 288 P.3d 1140 (2012) (quoting *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)). Mr. Murphy acknowledges that this court has repeatedly held that cumulative error is not a method for obtaining appellate review of unpreserved issues. Opening Br. of Appellant at 37. Instead, cumulative error is "simply a recognition that the net impact of multiple small errors can still result in a prejudicial impact on the trial." *Rookstool v. Eaton*, 12 Wn. App. 2d 301, 311-12, 457 P.3d 1144 (2020). Nevertheless, Mr. Murphy points to our Supreme Court's statement in *State v. Clark*, 187 Wn.2d 641, 649, 389 P.3d 462 (2017), that "cumulative error present[s a] constitutional issue[ ] which we review de novo," and urges us to "follow the Supreme Court's reasoning" by reviewing his assigned error under "RAP 2.5(a)(3)'s manifest constitutional error doctrine." Opening Br. of Appellant at 38.

Cumulative error *does* present a constitutional issue, which *Rookstool* recognizes, analyzing it as implicating the fair trial right. *See* 12 Wn. App. 2d at 309-11. But a party must still present individually harmless *preserved* errors, or individually harmless

manifest constitutional errors, before asking this court to consider whether, cumulatively, they operated to deprive the party of a fair trial. *Clark* does not hold otherwise. The cumulative evidence doctrine does not apply.

B. Mr. Murphy identifies only a narrow basis for a standing objection

Mr. Murphy's second argument is that his motions in limine created a standing objection sufficient to preserve his challenges on appeal. When a party has moved in limine in the trial court to exclude evidence, "giving the trial court opportunity to rule on relevant authority, and the court does so rule, it may not be necessary to object at the time of admission of the claimed erroneous evidence in order to preserve the issue for appeal." *State v. Sullivan*, 69 Wn. App. 167, 170, 847 P.2d 953 (1993). The party losing the motion in limine has a standing objection to the evidentiary issue decided. *Id.* at 170-71. The rule protects the losing party from being required to renew its objection in front of the jury "at the risk of making comments prejudicial to its cause, as well as incurring the annoyance of the trial judge." *Id.* at 171. The rule only applies "[w]hen the trial court has clearly and unequivocally ruled against the exclusion of evidence." *Id.*

Here, the rule afforded Mr. Murphy a standing objection to the trial court's ruling on the dead man's statute-related issue that he lost: its ruling that "the deadman's statute doesn't apply." RP at 361. Mr. Murphy baldly asserts that the standing objection created by his loss on that issue "should be construed to preserve a challenge to Dr. Chaudhry['s]

and Dr. Cutter's speculative testimony," Opening Br. of Appellant at 47, but he provides no authority or reasoning in support. He had no standing objection to speculative testimony. Any objection was required to be asserted during trial.

C. Mr. Murphy fails to demonstrate that the trial court breached a duty or abused its discretion when it did not bifurcate the wrongful death claim sua sponte

Mr. Murphy also argues that when the trial court ruled that the dead man's statute did not apply to the wrongful death claim asserted on behalf of the children, it was an abuse of discretion not to "sever—or at least to *consider* severing—the individual- and representative-capacity claims so that the representative claim would not be prejudiced by the loss of the deadman's statute's testimonial protections." Opening Br. of Appellant at 42. Implicit in this argument is an acknowledgment that because the statute did not apply to the wrongful death claim, the court could not exclude the evidence altogether.[10]

As the court's instructions explained to the jury, Mr. Murphy's survival claim on behalf of the estate was for the personal losses suffered by Kathleen, and the damages sought were her medical expenses and damages for personal injury, pain, suffering, and

[10] Although not addressed by the parties, a limiting instruction might have been an option, although it would doubtless have been difficult for the jury to apply. In *Dennick v. Scheiwer*, 381 Pa. 200, 113 A.2d 318, 319 (1955), the plaintiff sued under a death statute and brought a survival action, and the court held he was "a competent witness generally." The trial court had observed, "'To tell the jury to listen to the defendant in one claim and close its ear in the other might possibly be technically correct but practically senseless.'" *Id.*

loss of enjoyment of life until her death. His wrongful death claim was for the losses suffered by her children, as beneficiaries of the estate, and the damages sought were for the loss of Kathleen's love, care, companionship and guidance. As acknowledged by Mr. Murphy's counsel, the claims were joined by Mr. Murphy "as a matter of judicial economy." Opening Br. of Appellant at 42.

CR 42(b) provides that the court may order a separate trial of any claim or issue, in furtherance of convenience or to avoid prejudice. Mr. Murphy might have sought an order bifurcating the wrongful death claim, but he did not.

We review a trial court's decision whether to order separate trials for abuse of discretion, and will not reverse the court's decision if it rests on tenable bases. *Del Rosario v. Del Rosario*, 116 Wn. App. 886, 901, 68 P.3d 1130 (2003) (citing *Hawley v. Mellem*, 66 Wn.2d 765, 768, 405 P.2d 243 (1965)), *aff'd in part, rev'd in part on other grounds*, 152 Wn.2d 375, 97 P.3d 11 (2004). When a personal representative chooses to join survival and wrongful death claims in the same action, and to proceed with the claims as joined after the ramifications for the dead man's statute are identified, any reasonable judge would infer that the personal representative views a single trial as most convenient and least prejudicial. *And cf. Armstrong v. Marshall*, 146 S.W.2d 250, 252 (Tex. Ct. App. 1940) (since evidence was admissible as applied to the survival action,

and no request was made to limit it to the other cause of action, appellants were in no position to complain of its admission).

Mr. Murphy identifies no legal authority that required the trial court to raise bifurcation under CR 42(b) sua sponte. We find no abuse of discretion.

D. Challenged testimony

Mr. Murphy identifies testimony by each of Drs. Chaudhry, Cutter and Nichols that he contends should have been cut off or struck by the trial court, sua sponte.

1. Testimony by Dr. Chaudhry about Kathleen's ability to understand his communications

Mr. Murphy points out that in questioning by Mr. Murphy's lawyer, Dr. Chaudhry testified he was not present for Dr. Rajendra's discussion with the family on June 5, so his understanding of what was said was limited to what the medical record reflected. Dr. Chaudhry also sometimes testified in response to questions that he did not recall a particular interaction with Kathleen, and would have to rely on the records. From this, Mr. Murphy argues that Dr. Chaudhry's answers to the following questions from Dr. Chaudhry's own lawyer were "speculation, which should not have been admitted," Opening Br. of Appellant at 46:

> Q. . . . Now, let's go back to your actual discussions with Ms. Murphy. Any concerns about her ability to understand what you were saying?
>
> A. Not at all.

> Q. Can you provide any more detail relating to the discussion and the back-and-forth that gave you that impression?
>
> A. So at multiple times, from 6/4 when she spoke to Dr. Raj, 6/5 and 6/6 with me, she was very clear she wanted to go for a cure. And I asked her multiple times. Even in the clinic, she was very clear she wanted to go for a full cure. So there was no doubt in my mind that she and the family had chosen the path of curative therapy.
>
> Q. Did she express to you understanding when you did—when you explained the risks and benefits of the drugs?
>
> A. Yes, she did.

RP at 1156-57. Mr. Murphy also contends that this testimony violated the dead man's statute.

No objection was made to these questions or answers in the trial court. Mr. Murphy had a standing objection to the trial court's ruling that the dead man's statute did not apply, but on appeal, he does not challenge that ruling on the merits—he merely argues that the trial court should have bifurcated the claims, sua sponte, which we reject in section II.C. Assuming without agreeing that the questions called for Dr. Chaudhry to speculate, error was not preserved.

2. Testimony by Dr. Cutter about his August 13 conversation with Kathleen and Susan

Mr. Murphy next points out that when Dr. Cutter was questioned by Mr. Murphy's lawyer, he testified that he could not recall speaking to Dr. Howard about Kathleen on September 15, but he likely did speak to him, based on a note in the medical records. Elsewhere, Dr. Cutter testified that Dr. Elmer was also involved in Kathleen's care "[b]ut

I don't recall what discussions I had with who" and his only independent recollection of his conversation with the doctors was the medical records. RP at 642-43.

Based on that testimony, Mr. Murphy argues that almost four pages of transcribed testimony by Dr. Cutter about the August 13 note of his conversation with Kathleen and her daughter "could only be speculation, and . . . should not have been admitted." Opening Br. of Appellant at 46-47 (identifying testimony at RP 648-52). At no point in that testimony was any objection made. Assuming without agreeing that the questions called for Dr. Cutter to speculate, error was unpreserved.

3. Testimony by Dr. Nichols

Finally, Mr. Murphy contends the trial court should have cut off parts of defense counsel's examination of Dr. Nichols sua sponte. The first occasion was questioning by defense counsel about a note electronically signed by Dr. Rajendra on June 4. Much of what Dr. Nichols stated in response was quoting from the medical record, so we revise the formatting to make Dr. Nichols's relatively limited testimony more easily discerned (the quoted testimony is italicized and set off as appropriate):

> Q. . . . [W]ill you read through that addendum and tell me if it is consistent or inconsistent with what you would expect for documenting informed consent?
>
> A. Okay. So it starts with
>
> "*I had an extensive d/w,*" [discussion with*]*, "*the family, daughter, and son Mike. I discussed the final pathology. I reiterated that I would discuss the pathology again with Dr. Corn to confirm. I next discussed staging;*

> [*workup*] *which would include CT* [*of the chest, abdomen, and pelvis*] *(done); Echo;* [*pulmonary function tests*]*; PICC/,*"
>
> which is the catheter that's put in under the (indicating) clavicle to administer chemotherapy;
>
> "*and a bone marrow biopsy. Port once they decide to proceed with chemotherapy. I discussed that if they decided to proceed with* chemo[therapy]*, which they seem very keen on doing, I recommended 4 cycles of ABVD followed by* [*a*] *restaging PET/CT and then additional 2 cycles of ABVD, switching therapy*---v[ersus] *Switching therapy based on the results of PET/CT based on the Deauville Criteria*."
>
> The Deauville criteria are a graded criteria about how metabolically active the PET scan is.
>
> "*I discussed the chemotherapy agents used and their toxicities for each of these agents. I also discussed the prognosis for advanced stage* [*Hodgkin lymphoma*]*. Finally, they also were concerned about the patient's mentation* [*and*]*---and she feeling sluggish and lethargic, which is very unusual for their mother. I recommended checking for adrenal insufficiency, and if this—that's not the case, doing the LP for CSF,*"
>
> which is cerebral spinal fluid, which is the fluid that surrounds the spinal cord,
>
> "*or even an MRI brain. All of their questions were answered. I spent a total of 35-40 minutes discussing her patho*[logy,]*physiology/staging,* [*workup*]*, treatment options, and answering all their questions.*"
>
> Q. Is that inconsistent or consistent with what you would expect in relation to informed consent regarding the administration of ABVD?
>
> A. It's consistent with my practice and my understanding and experience with the practice in Washington.
>
> Q. And spending 35 to 40 minutes with them in that discussion, is that also consistent with . . .
>
> A. I would say that—I never say excessive, but it's more than is typically spent, yes.

RP at 797-98 (quoting Ex. D102 at 229) (format modified).

Defense counsel then questioned Dr. Nichols about a note Dr. Cutter entered in the medical records on the day he administered AVD, omitting bleomycin. Defense counsel asked Dr. Nichols to read through Dr. Cutter's assessment and "let me know when you're done there." RP at 803. This testimony followed:

> A. (Looking at a document.) I'm done.
>
> Q. And then under "Plan," do you see No. 2?
>
> A. I do.
>
> Q. Indicates the plan that Dr. Cutter had put into play, or intended to put in play?
>
> A. I do.
>
> Q. And then ultimately No. 5, what's that indicate to you?
>
> A. Number 5 says, "I went over the above in detail with both the patient and her doctor."
>
> Q. If Dr. Cutter testified not only consistent with the record there as well as indicated the assessment was discussed and that's what he meant by in No. 5 in relation to "Went over the above in detail," is that consistent with you with providing necessary information for informed consent?
>
> A. Yes.

RP at 803-04. Mr. Murphy contends that all of the foregoing testimony was speculative, unreliable and prejudicial, and should have been excluded. Assuming without agreeing that the testimony was objectionable on any of those bases, error was not preserved.

Finally, Mr. Murphy complains about a line of questioning of Dr. Nichols that is reflected on a full five pages of the trial transcript. Defense counsel began by asking, "[I]f you were meeting with Ms. Murphy . . . what's the material information that you

would have provided to her for what you consider to be informed consent?" and thereafter, "[T]ake us through what you would have said to Ms. Murphy." RP at 789-90. Representative of the nature of Dr. Nichols's response is the following snippet:

> "We are going to give four drugs: [o]ne has—is hard on your heart or can be hard on your heart, can be hard on your bone marrow; one can be hard on your lungs and cause lung stiffening and breathing problems; one can cause muscle aches, constipation, and be hard on your bone marrow; and the other can be hard on your bone marrow and blood and platelet counts. We'll check you carefully. We'll do what we can. But any or all of those drugs, alone or in combination, can rarely cause catastrophic outcomes and death."

RP at 792. At the conclusion of Dr. Nichols's articulation of what he would have said to Kathleen, defense counsel asked if Dr. Nichols would have noted the entire conversation on Kathleen's chart. The doctor answered, "No," explaining, "My chart note would be something like, 'I had a long discussion with Ms. Murphy . . . about her diagnosis, her prognosis, treatment option—general treatment options and general discussion of toxicity and of risk and benefit from the—from ABVD.'" RP at 794. The unstated implication was that Dr. Chaudhry's similarly succinct chart note could summarize what had been a much lengthier discussion with Kathleen. At no point during the questioning did Mr. Murphy object.

Mr. Murphy argues that this testimony was "profoundly and overwhelmingly prejudicial," and the trial court had discretion to strike it sua sponte under *In re Estate of Hayes*, 185 Wn. App. 567, 591-92, 342 P.3d 1161 (2015). Opening Br. of Appellant at

51-52. *Hayes* merely holds that a trial court has ***discretion*** to strike evidence sua sponte, not that it can have a duty to do so. Not only does *Hayes* not recognize any duty, it holds that the court's discretion to strike testimony sua sponte is limited and can be abused, explaining, "'"[I]t is only when the evidence ***is irrelevant, unreliable, misleading, or prejudicial, as well as inadmissible***, that the judge should exercise [the] discretion[ ] . . . to intervene."'" *Id.* at 592 (alteration in original) (quoting *Vachon v. Pugliese*, 931 P.2d 371, 381 (Alaska 1996) (quoting 1 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 55, at 225 (4th ed. 1992))).

Assuming without agreeing that this testimony by Dr. Nichols was excludable under ER 403, error was not preserved.

III. DENYING THE NEW TRIAL MOTION WAS NOT AN ABUSE OF DISCRETION

Finally, Mr. Murphy assigns error to the trial court's denial of his motion for a new trial. In moving for a new trial, Mr. Murphy had argued that because Dr. Rajendra did not testify, Dr. Chaudhry was unaware whether Dr. Rajendra discussed with Kathleen the option of omitting bleomycin, and Dr. Chaudhry admitted that he, himself, did not speak with her about that alternative, the evidence was insufficient to support a defense verdict on the informed consent claim.

The jury was properly instructed that Mr. Murphy's informed consent claim required him to prove each of the following elements:

> First, that the Defendants failed to inform the patient of a material fact or facts relating to the treatment;
>
> Second, that the patient consented to the treatment without being aware or fully informed of such material fact or facts;
>
> Third, that a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts; and
>
> Fourth, that the treatment in question was a proximate cause of injury to the patient.

Clerk's Papers (CP) at 260 (Instr. 15); *see* RCW 7.70.050(1). The jury was further instructed, as to the meaning of "material facts," that

> [a] medical oncologist has a duty to inform a patient of all material facts, including risks and alternatives, that a reasonably prudent patient would need in order to make an informed decision on whether to consent to or reject a proposed course of treatment.
>
> A material fact is one to which a reasonably prudent person in the position of the patient would attach significance in deciding whether or not to submit to the proposed course of treatment.

CP at 259 (Instr. 14); *see* RCW 7.70.050(2).

The trial court's order identified three grounds on which to deny the new trial motion, with the following findings:

> 3. The jury heard testimony that the medical records demonstrated compliance with informed consent consistent with Washington law.
>
> 4. It is reasonable to infer that the jury believed that Ms. Murphy would have consented to the use of ABVD regardless of the risk.
>
> 5. Further, the jury heard testimony that allowed them to infer that Bleomycin was not the proximate cause of Ms. Murphy's death.

CP at 381.

CR 59 permits the trial court to order a new trial following a jury's verdict when "there is no evidence or reasonable inference from the evidence to justify the verdict." CR 59(a)(7). We review the denial of a motion for a new trial for abuse of discretion. *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 290, 78 P.3d 177 (2003). Where the proponent of a new trial argues the verdict was not based on the evidence, appellate courts will look to the record to determine whether there was sufficient evidence to support the verdict. *Coogan v. Borg-Warner Morse Tec Inc.*, 197 Wn.2d 790, 811-12, 490 P.3d 200 (2021) (citing *Palmer v. Jensen*, 132 Wn.2d 193, 197-98, 937 P.2d 597 (1997)). This analysis is akin to the inquiry courts make in considering a motion for judgment as a matter of law under CR 50, where the court is required to view the evidence and reasonable inferences in the light most favorable to the verdict, without regard to contrary evidence or inferences. *Id.* at 812. This substantial evidence review respects the jury's prerogative to evaluate and weigh the evidence. *Id.* (citing *Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 176-77, 422 P.2d 515 (1967)).

There was sufficient evidence to support a jury finding that a reasonably prudent patient under similar circumstances would have consented to Kathleen's course of treatment if informed of material facts. This is an independently sufficient basis for the jury's verdict. Drs. Chaudhry and Cutter testified that they informed Kathleen of material facts, both testified that the treatment provided best met Kathleen's objective of

cure, and Dr. Nichols agreed that he would have pursued the same course of treatment. That testimony, if credited by jurors, supported this finding.

Mr. Murphy complains that the trial court's finding was that "[i]t is reasonable to infer that the jury believed that *Ms. Murphy* would have consented to the use of ABVD regardless of the risk," thereby misanalyzing the essential element as subjective. CP at 381 (emphasis added). But the same evidence that supports the trial court's subjectively-framed finding supports our objectively-framed finding. In our review for abuse of discretion, we may affirm the trial court on any basis that the record supports. *Coogan*, 197 Wn.2d at 820 (citing *State v. Arndt*, 194 Wn.2d 784, 799, 453 P.3d 696 (2019)).

There was also sufficient evidence to support a jury finding that Mr. Murphy failed to prove that the treatment in question was a proximate cause of Kathleen's death. This, too, is an independently sufficient basis for the jury's verdict. While Drs. Sweetenham and Fishbein testified that the underlying lung injury was caused by bleomycin toxicity, aggravated by the Neulasta, Dr. Nichols testified that Kathleen's death was more likely caused by something else, and Dr. Howard testified he would attribute it to ARDS of undetermined etiology.

Since the trial court's decision can be affirmed on both these grounds, we need not reach its third alternative ground (that the medical records, as explained by the testimony, sufficiently demonstrated compliance with the requirement for informed consent).

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Fearing, C.J.

Pennell, J.

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

DAVID W. MURPHY, as Personal Representative for the Estate of KATHLEEN J. MURPHY, Appellant, v. MEDICAL ONCOLOGY ASSOCIATES, P.S., a Washington corporation; ARVIND CHAUDHRY, M.D., Ph.D.; RAJEEV RAJENDRA, M.D.; BRUCE CUTTER, M.D.; PROVIDENCE HEALTH & SERVICES, a Washington corporation, d/b/a PROVIDENCE HOLY FAMILY HOSPITAL; HEATHER HOPPE, Pharm.D.; and ERIN WHITE, Pharm.D., Respondents.	No. 37545-5-III ORDER CORRECTING OPINION AND OTHERWISE DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Appellant's motion for reconsideration and the record and file therein, and is of the opinion that corrections to the opinion filed June 29, 2023, should be made to statements on page 9, and that the motion should otherwise be denied.

The opinion shall be corrected as follows:

The first full paragraph on page 9 is corrected to read:

> During jury selection, and after prospective jurors had heard something about the case, the court asked them whether there was anything about the case that "would cause you to begin this trial with any feelings or concerns regarding your participation as a juror." RP at 81. Two individuals raised their hands, and the court questioned both. One of the prospective jurors, number 15, explained that he raised his hand because "Dr. Chaudhry treated my brother years ago during his cancer as an oncologist." RP at 81. Asked if he had ever met the doctor, number 15 responded that he had, over 10 years earlier, "At a very young age, around just 8, 9 years old." *Id.* A second juror, prospective juror 25, disclosed that Dr. Chaudhry was her mother's oncologist.

Therefore,

IT IS ORDERED, the opinion will be corrected on page 9 as indicated and the motion for reconsideration of this court's decision of June 29, 2021, is otherwise denied.

PANEL: Judges Siddoway, Fearing, Pennell

FOR THE COURT:

George Fearing

GEORGE B. FEARING
Chief Judge

RCW 2.36.110 Judge must excuse unfit person. It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service. [1988 c 188 § 11; 1925 ex.s. c 191 § 3; RRS § 97-1.]

Legislative findings—Severability—Effective date—1988 c 188: See notes following RCW 2.36.010.

RCW 4.20.010 Wrongful death—Right of action. (1) When the death of a person is caused by the wrongful act, neglect, or default of another person, his or her personal representative may maintain an action against the person causing the death for the economic and noneconomic damages sustained by the beneficiaries listed in RCW 4.20.020 as a result of the decedent's death, in such amounts as determined by a trier of fact to be just under all the circumstances of the case.

(2) This section applies regardless of whether or not the death was caused under such circumstances as amount, in law, to a felony. [2019 c 159 § 1; 2011 c 336 § 89; 1917 c 123 § 1; RRS § 183. FORMER PARTS OF SECTION: 1917 c 123 § 3 now codified as RCW 4.20.005. Prior: 1909 c 129 § 1; Code 1881 § 8; 1875 p 4 § 4; 1854 p 220 § 496.]

Retroactive application—2019 c 159: "This act is remedial and retroactive and applies to all claims that are not time barred, as well as any claims pending in any court on July 28, 2019." [2019 c 159 § 6.]

RCW 4.20.020 Wrongful death—Beneficiaries of action. Every action under RCW 4.20.010 shall be for the benefit of the spouse, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused. If there is no spouse, state registered domestic partner, or such child or children, such action may be maintained for the benefit of the parents or siblings of the deceased.

In every such action the trier of fact may give such damages as, under all circumstances of the case, may to them seem just. [2019 c 159 § 2; 2011 c 336 § 90; 2007 c 156 § 29; 1985 c 139 § 1; 1973 1st ex.s. c 154 § 2; 1917 c 123 § 2; RRS § 183-1.]

Retroactive application—2019 c 159: See note following RCW 4.20.010.

Severability—1973 1st ex.s. c 154: See note following RCW 2.12.030.

RCW 4.20.060 Action for personal injury survives. (1) No action for a personal injury to any person occasioning death shall abate, nor shall such right of action terminate, by reason of such death, if such person has a surviving spouse, state registered domestic partner, or child living, including stepchildren, or if leaving no surviving spouse, state registered domestic partner, or children, the person has surviving parents or siblings.

(2) An action under this section shall be brought by the personal representative of the deceased, in favor of the surviving spouse or state registered domestic partner, or in favor of the surviving spouse or state registered domestic partner and children, or if no surviving spouse or state registered domestic partner, in favor of the child or children, or if no surviving spouse, state registered domestic partner, or a child or children, then in favor of the decedent's parents or siblings.

(3) In addition to recovering the decedent's economic losses under this section, the persons listed in subsection (1) of this section are entitled to recover damages for the decedent's pain and suffering, anxiety, emotional distress, or humiliation, in such amounts as determined by a trier of fact to be just under all the circumstances of the case. [2019 c 159 § 4; 2007 c 156 § 30; 1985 c 139 § 2; 1973 1st ex.s. c 154 § 3; 1927 c 156 § 1; 1909 c 144 § 1; Code 1881 § 18; 1854 p 220 § 495; RRS § 194.]

Retroactive application—2019 c 159: See note following RCW 4.20.010.

Severability—1973 1st ex.s. c 154: See note following RCW 2.12.030.

RCW 5.60.030 Not excluded on grounds of interest—Exception—Transaction with person since deceased. No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action. [1977 ex.s. c 80 S 3; 1927 c 84 S 1; Code 1881 S 389; 1877 p 85 S 391; 1873 p 106 S 382; 1869 p 183 S 384; 1867 p 88 S 1; 1854 p 186 S 290; RRS S 1211.]

Purpose—Intent—Severability—1977 ex.s. c 80: See notes following RCW 4.16.190.

RCW 7.70.050 Failure to secure informed consent—Necessary elements of proof—Emergency situations. (1) The following shall be necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his or her representatives against a health care provider:

(a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;

(b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;

(c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;

(d) That the treatment in question proximately caused injury to the patient.

(2) Under the provisions of this section a fact is defined as or considered to be a material fact, if a reasonably prudent person in the position of the patient or his or her representative would attach significance to it deciding whether or not to submit to the proposed treatment.

(3) Material facts under the provisions of this section which must be established by expert testimony shall be either:

(a) The nature and character of the treatment proposed and administered;

(b) The anticipated results of the treatment proposed and administered;

(c) The recognized possible alternative forms of treatment; or

(d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.

(4) If a recognized health care emergency exists and the patient does not have the capacity to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, his or her consent to required treatment will be implied. [2021 c 270 § 2; 2011 c 336 § 252; 1975-'76 2nd ex.s. c 56 § 10.]

Effective date—2021 c 270: See note following RCW 7.70.065.

Severability—1975-'76 2nd ex.s. c 56: See note following RCW 4.16.350.

ROBERT MCGUIRE LAW FIRM

September 18, 2023 - 10:20 AM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	37545-5
Appellate Court Case Title:	David W. Murphy, et al v. Medical Oncology Associates, P.S., et al
Superior Court Case Number:	18-2-00260-0

The following documents have been uploaded:

- 375455_Petition_for_Review_20230918101811D3558543_1251.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 20230918 FILE Murphy Petition for Review FINAL flat.pdf

A copy of the uploaded files will be sent to:

- APearce@floyd-ringer.com
- carolyn@ettermcmahon.com
- davidmurphyeic@gmail.com
- rvw@ettermcmahon.com
- sklotz@floyd-ringer.com

Comments:

Sender Name: Robert McGuire - Email: ram@lawram.com
Address:
113 CHERRY ST
PMB 86685
SEATTLE, WA, 98104-2205
Phone: 253-267-8530

Note: The Filing Id is 20230918101811D3558543