No. 91518-1

SUPREME COURT
OF THE STATE OF WASHINGTON

LONNITA HASKINS,

Petitioner,

vs.

MULTICARE HEALTH SYSTEM, a Washington corporation d/b/a TACOMA GENERAL HOSPITAL,

Respondent.

MULTICARE HEALTH SYSTEM'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Discretionary review should be denied under RAP 13.14.4(b)(3) and RAP 13.4(b)(4) because RCW 7.70.080 neither violates the separation of powers doctrine nor is it unconstitutional. Likewise, there is no "irreconcilable conflict" between RCW 7.70.080 and the anachronistic common law collateral source doctrine. Instead, the Supreme Court has repeatedly stated that RCW 7.70.080 *supersedes* and *replaces* the common law collateral source doctrine in medical malpractice cases, implicitly acknowledging that RCW 7.70.080 was a proper exercise of legislative power. The trial court and Court of Appeals applied the proper analysis; discretionary review should be denied.

II. IDENTITY OF RESPONDENT

Respondent MultiCare Health System, Respondent in the Court of Appeals and Defendant in the trial court, respectfully requests that the Court deny discretionary review because it does not meet the criteria of RAP 13.4(b)(3)-(4).

III. RESTATEMENT OF THE ISSUE

Whether the Supreme Court should deny discretionary review because Petitioner Haskins fails to establish that RCW 7.70.080 is unconstitutional, particularly when this Court: (1) has repeatedly analyzed

and explained how the statute works and fulfills specific goals; and (2) has expressly and repeatedly stated that the statute *supersedes* and *replaces* the common law collateral source rule in medical malpractice cases, implicitly acknowledging that RCW 7.70.080 was a proper exercise of legislative authority.

IV. RESTATEMENT OF THE CASE

Respondent MultiCare Health System accepts Petitioner Haskins statement of the case.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. RCW 7.70.080 IS CONSTITUTIONAL AND DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

Medical malpractice claims are governed by RCW 7.70 *et seq*. The Legislature explained that "Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, *certain substantive and procedural* aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care which is provided after June 25, 1976." RCW 7.70.010 (emphasis added).

In the context of medical malpractice cases, evidence—presented by *any party*—of compensation from other sources is admissible. This is an equal opportunity statute: "the plaintiff may present evidence of an

obligation to repay such compensation and evidence of any amount paid by the plaintiff, or his or her representative or immediate family, to secure the right to the compensation." RCW 7.70.080 states:

> **Evidence of compensation from other source.** Any party may present evidence to the trier of fact that the plaintiff has already been compensated for the injury complained of from any source except the assets of the plaintiff, the plaintiff's representative, or the plaintiff's immediate family. In the event such evidence is admitted, the plaintiff may present evidence of an obligation to repay such compensation and evidence of any amount paid by the plaintiff, or his or her representative or immediate family, to secure the right to the compensation. Compensation as used in this section shall mean payment of money or other property to or on behalf of the plaintiff, rendering of services to the plaintiff free of charge to the plaintiff, or indemnification of expenses incurred by or on behalf of the plaintiff. Notwithstanding this section, evidence of compensation by a defendant health care provider may be offered only by that provider.

RCW 7.70.080. This Court has expressly stated that "RCW 7.70.080 *supersedes* the common law collateral source rule" in *medical malpractice* cases. *Adcox v. Children's Orthopedic Hosp.*, 123 Wn.2d 15, 50, 864 P.2d 921 (1993) (explaining that the failure to admit collateral source evidence in a medical malpractice case is error: "we *strongly encourage* trial courts to fully follow the statute in the future") (emphasis added).

Despite this Court's "strong encouragement" advanced since 1993, the Plaintiff's Bar repeatedly argues in their motions *in limine* to the trial

court that RCW 7.70.080 is unconstitutional—exactly as Haskins did here.[1] Likewise, the Defense Bar for health care providers in medical malpractice repeatedly defend its constitutionality—which is why many parties moved for partial publication of the Court of Appeals decision in the case at bar.

In *Adcox*, the Supreme Court had a ripe opportunity to address the constitutionality of RCW 7.70.080. A 12-week-old boy sustained permanent brain damage after suffering cardiac arrest at Children's Orthopedic Hospital. A jury found the hospital negligent in failing to prevent the arrest and awarded damages of approximately $10 million. The hospital appealed, contending the trial court erred in excluding certain evidence of external benefits from the jury. *Id.* at 39. These mitigating benefits included the following types of care for the child: school district care; state medical care; state respite care; state payments of foster care expenses; state insurance pool for the uninsurable; and charitable organizations providing resources. *Id.* at 40 n.11.

In this 1993 opinion, the Court analyzed the statute's words, meaning, and application regarding collateral source evidence. However, instead of deciding that RCW 7.70.080 was unconstitutional, the *Adcox*

[1] CP at 570-72. *See also* Joint Motion to Publish, filed with the Court of Appeals in this case, encouraging publication. Despite the Supreme Court's clear mandate that trial courts should admit RCW 7.70.080-based evidence, plaintiffs continue to ignore precedence. Instead, plaintiffs routinely argue that trial courts should exclude collateral source evidence based on an alleged constitutional defect.

Court decisively explained: (1) why RCW 7.70.080 was necessary; (2) that it replaced the common law collateral source doctrine in medical malpractice cases; (3) the goals of RCW 7.70.080 and how they are met regardless of whether an offset calculation is conducted by a judge or jury; and (4) trial courts should follow RCW 7.70.080 in its entirety. *Id.* at 40-41.

Adcox instructed that RCW 7.70.080 *replaces* the doctrine in medical malpractice cases. *Adcox* explained that in medical malpractice cases, "[t]he primary motivation in doing away with the collateral source rule is the rule allows plaintiffs to recover more than their total damages." *Id.* at 48. The Supreme Court, in a unanimous opinion, acknowledged that "[u]nder the collateral source rule, a plaintiff could recover 100 percent of the damages from liable defendants, even if the plaintiff had already recovered a portion of their damages from another source, such as insurance." *Id.*

The Supreme Court stated that "[b]ecause the rule overcompensated plaintiffs, it became to be viewed as imposing unnecessary costs on society and causing higher insurance premiums." *Id.*, citing *Comment, A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation,* 53 Air L. & Com. 799, 802-03, 827-29 (1987-88).[2]

[2] *See also* Comment, *Who's Swallowing the "Bitter Pill?" Reforming Write-Offs in the State of Washington*, 37 Seatte U. L. Rev. 1371 (2014) (discussing whether Washington

The Supreme Court could have opined that RCW 7.70.080 "irreconcilably conflicts" with the common law collateral source doctrine. Instead, it affirmed that the "primary goal in eliminating the collateral source rule has been to prevent overcompensating plaintiffs in light of the resulting costs to society. This goal is met whether the offset called for in RCW 7.70.080 is conducted by the jury or the trial judge." *Id.* at 41.

Petitioner Haskins relies on *Diaz v. State of Washington* to advance the contention that RCW 7.70.080 is unconstitutional because it violates the separation of powers doctrine. *See* Petition at 8-9. She contends that the Supreme Court "effectively realized that the statute conflicts with and cannot be harmonized with the collateral source rule." *Id.* This is incorrect. The *Diaz* Court unanimously held in 2012, that "the trial court misapplied RCW 7.70.080 by failing *to give effect* to the proviso at the end of the statute: "Notwithstanding this section, evidence of compensation by a defendant health care provider may be offered *only by that provider.*" *Diaz v. State*, 175 Wn.2d 457, 463, 285 P.3d 873 (2012) (emphasis added).

The *Diaz* Court explained that the last sentence of RCW 7.70.080 "is a conciliatory provision allowing health care providers to compensate, or settle claims with, persons who have been harmed by health care services

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should amend its application of the collateral source rule to disallow the recovery of write-offs and whether the amount accepted as payment in full by a medical provider is the reasonable or market value of the services provided).

without fear that the settlement might someday be used against them by the plaintiff or codefendant." *Id.* (emphasis added). Similarly, a health care provider "may wish to settle a claim confidentially, and the proviso facilitates this by preventing parties (other than the health care provider itself) from introducing evidence of the settlement in open court." *Id.*

Diaz is a thoughtfully-worded opinion untangling a host of conflicting statutory procedures of how to account "for prior settlements in medical malpractice actions." *Id.* at 469. The Court carefully addressed the conflicting intersection of RCW 7.70.080, 4.22.060 and 4.22.070. "Where two (or more) statutes conflict, as here, we resolve the conflict by giving preference to the statute that is *more specific* and *more recently enacted.*" *Id.* at 470. Accordingly, with respect to settlements, RCW 4.22.060 and .070 are more recent than RCW 7.70.080. "They are also more specific, dealing specially with the effect of prior releases and settlements on the determination of an injured person's damages." *Id.* The Supreme Court contrasted the former statutes with the latter statute, and stated that "RCW 7.70.080 is not limited to settlements and the entry of judgment but addresses every type of compensation that a plaintiff might receive." *Id.* In the three-way conflict, RCW 4.22.060 and .070 prevailed over RCW 7.70.080.

Significantly, the 2012 *Diaz* decision acknowledged that its analysis "avoids a conflict between the statute and one of our court rules." *Id.* at 470. The Court then explained that ER 408 "bars the admission of settlement evidence to prove liability for or invalidity of a claim or its amount, but not for 'another purpose.'" *Id.* Unfortunately, the trial court misapplied RCW 7.70.080; the misapplication created a conflict with ER 408 with respect to the admissibility of settlement evidence, which the Supreme Court corrected.

Haskins contends that "*Diaz* did not have before it the question [of] whether RCW 7.70.080 was unconstitutional because it conflicted with the collateral source rule." *See* Petition at 10. This position ignores the fact that the Supreme Court apparently did not perceive a conflict. As in *Adcox*, the *Diaz* Court, again, thoroughly: (1) interpreted the very statute Haskins asserts is unconstitutional; (2) analyzed conflicts among statutes governing settlements; and (3) applied a separation of powers analysis to RCW 7.70.080 and ER 408. *Diaz* would have been another prime case to address a purported conflict with the collateral source doctrine.

There is no "conflict." The Supreme Court examined "exactly what RCW 7.70.080 does. RCW 7.70.080 supersedes the common law collateral source rule." *Id.* at 466. If there was any doubt, the *Diaz* Court reiterated

that "RCW 7.70.080 replaces the collateral source rule in medical malpractice cases, as we explained in *Adcox v. Children's Ortho. Hosp. & Med. Ctr.*[.]" *Id.* The *Diaz* Court recapped its holding in *Adcox*: "We said there that the purpose of RCW 7.70.080 is to delegate to the jury the task of determining whether an injured person has already been compensated for the injuries and the task of reducing any verdict by the amount of compensation already paid." *Id.*

Discretionary review should be denied because this Court has consistently explained that RCW 7.70.080 replaces and supersedes the common law collateral source doctrine in medical malpractice cases.

B. NO COURT RULE CONFLICTS WITH RCW 7.70.080.

Here, the Court of Appeals advanced the argument that RCW 7.70.080 is constitutional because it does not conflict with a "formal" court rule, since the collateral source doctrine is a common law creation. Opinion at 14. Because Petitioner Haskins did not identify a specific court rule, the appellate court noted that her argument failed at the first step in a separation of powers analysis. *Id.* Instead, she argued "that the common law collateral source doctrine should be treated *as if* it were a formal court rule for the purpose of a separation of powers analysis." Opinion at 15

(emphasis added). But "[s]he points to no authority to support this argument" and "we are aware of none." *Id.*

Rather than address the appellate court's concern, Haskins contends that distinguishing between a "formal" court rule and a common law doctrine presents a "significant constitutional issue." *See* Petition at 1. However, she fails to acknowledge that regardless of whether the common law collateral source doctrine is a "formal" court rule, the Supreme Court has repeatedly stated RCW 7.70.080 *replaces* and *supersedes* the collateral source doctrine in medical malpractice cases. There are no "significant" constitutional issues here to trigger review under RAP 13.4(b)(3)-(4).

The Supreme Court's rulemaking procedure is explained in GR 9. "The purpose of rules of court is to provide necessary governance of court procedure and practice and to promote justice by ensuring a fair and expeditious process." GR 9(a). In promulgating rules of court, the Supreme Court engages in an extensive and thorough process wherein court rules are proposed, considered, circulated, amended, adopted, and/or repealed. GR 9(d), (f)-(g); *see also* RCW 2.04.190 ("In prescribing such rules the supreme court shall have regard to the simplification of the system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits.")

A "rule of court" is defined as "[a] rule governing the practice or procedure in a given court." Black's Law Dictionary at 1358 (8th ed. 2004). The Court of Appeals opined that the collateral source doctrine is not a formal rule of court. Opinion at 14. The Court explained that it "was not adopted through the Supreme Court rulemaking process, but is, rather, a common law doctrine." *Id.*, citing *Adcox*, 123 Wn.2d at 40 ("RCW 7.70.080 replaces the *common law's* collateral source rule).

The Court of Appeals stated that the cases upon which Haskins relied (*Diaz v. State*, *Putnam v. Wenatchee Valley Med. Ctr.*, *Waples v. Yi*, and *State v. Gresham*) all concerned conflicts with rules of court, namely ER 408, CR 8, CR 11, CR 3(a), and ER 404(b)). Opinion at 15-16. "Haskins tries to equate the common law collateral source doctrine with a formal court rule in order to set up a separation of powers violation." Opinion at 16.

Regardless of whether the common law collateral source doctrine is a court rule, the Court of Appeals, relying on *Adcox*, explained that RCW 7.70.080 *replaces* the common law collateral source doctrine with respect to medical malpractice cases. Opinion at 16. Replace, substitute, supersede, switch, and supplant are not verbs expressing a conflict. There is no conflict.

VI. CONCLUSION

The Supreme Court should deny discretionary review because there is no significant question of law under the Constitution of the State of Washington or of the United States involved in Haskins's Petition. In fact, the law is well settled that RCW 7.70.080 *replaces* and *supersedes* the common law collateral source doctrine in medical malpractice cases. This Court has repeatedly explained the function, purpose, application and goals of RCW 7.70.080.

The trial court and Court of Appeals did not err. Review should be denied and this appeal terminated.

Dated this 4 day of May, 2015.

Respectfully submitted,

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Dated this 4th day of May, 2015.

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If you have any questions, please do not hesitate to contact our office.

Sincerely,

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