No. 44655-3-II

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

LONNITA HASKINS,

Appellant,

vs.

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

Respondent/Cross-Appellant.

RESPONDENT/CROSS-APPELLANT MULTICARE HEALTH SYSTEM'S RESPONSE BRIEF AND OPENING BRIEF IN SUPPORT OF CROSS APPEAL

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I. INTRODUCTION

This appeal arises from over a two-week medical negligence jury trial that resulted in a defense verdict. Appellant Lonnita Haskins contends that the trial court erred by not submitting a *res ipsa loquitur* jury instruction. However, the trial court ruled, as a matter of law, that the doctrine did not apply because there was extensive evidence presented to the jury that the occurrence (ureteral stents slipping out) producing the injury (temporary renal failure) was *of a kind that does happen in the absence of negligence*.

In this case, no one witnessed the stents dislodge; Haskins has no memory about what happened. However, Haskins' experts and her treating surgeon admitted that stents can become dislodged in the absence of nursing negligence. MultiCare's experts and its employees testified that stents inadvertently dislodge of their own accord by parastalting out; by the patient rolling over in the bed; by a patient pulling them out due to confusion or drowsiness from heavy post-operation narcotics; or by the surgeon not tying the securing suture tight enough. Post-operative nurses testified that the stents dislodge frequently and in the absence of nursing negligence. Haskins was not entitled to a *res ipsa loquitur* instruction because her facts did not meet the criteria. The trial court's decision was

legally sound and should be affirmed.

Haskins asserts that the trial court erred by sustaining an objection to Haskins' counsel inviting prospective jurors to reimagine Haskins' burden of proof on an erroneous percentage basis. The law does not mathematically quantify the burden of proof in civil cases, nor does Washington Pattern Jury Instruction 21.01 apply a percentage. "Each courtroom comes equipped with a 'legal expert' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards."[1] The trial court correctly sustained MultiCare's objection and applied the relevant legal standard.

On cross appeal, and to the extent that the judgment is vacated and remanded, MultiCare maintains that the trial court erred as a matter of law in excluding its designated ER 615(2) representative and fact witness. Finally, MultiCare submits that the trial court erred in refusing to submit to the jury an instruction that personal injury awards on non-taxable.

II. RESTATEMENT OF THE ISSUES ON APPEAL

Whether the trial court correctly ruled, as a matter of law, that Haskins' case did not meet the criteria for a *res ipsa loquitur* jury instruction because everyone, including Haskins' own experts,

[1] State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002).

acknowledged that the occurrence producing injury is a kind which commonly happens in the absence of someone's negligence?

Whether the trial court, in granting Haskins' motion in limine properly ruled as a matter of law that evidence of collateral source payments is admissible in medical malpractice cases under RCW 7.70.080?

Whether the trial court correctly ruled, as a matter of law, that the burden of proof in a civil case is proof by a "preponderance of the evidence," and therefore, properly sustained an objection when Haskins argued a different standard during voir dire?

III. ASSIGNMENT OF ERROR ON CROSS APPEAL

The trial court erred by failing to allow MultiCare's selected ER 615 corporate designee to remain in the courtroom throughout the trial.

The trial court erred by failing to submit to the jury MultiCare's proposed instruction that "Any award to plaintiffs will not be subject to federal income tax and therefore you should not add or subtract for such taxes in fixing the amount of any award."

IV. STATEMENT OF THE ISSUES ON CROSS APPEAL

Whether the trial court misinterpreted ER 615(2) as a matter of law by refusing to allow MultiCare to designate an employee, who was also a fact witness at trial, as its corporate representative pursuant to ER 615(2)?

Given the public's general lack of knowledge about the statutory exclusion of taxes on personal injury awards and the strong potential for jury confusion, did the trial court abuse its discretion by not instructing the jury that personal injury awards are not subject to federal taxation?

V. RESTATEMENT OF THE CASE ON APPEAL

1. Pertinent Facts of Ms. Haskins' Healthcare

Lonnita Haskins (DOB 06/24/54) was diagnosed with stage IIIb cervical cancer in 2007. She underwent pelvic surgery, chemotherapy, beam radiation, and seed radiation to treat her cancer. As a result of these treatments, she developed recurrent urinary tract infections and chronic kidney disease. She was awarded permanent Social Security disability benefits at that time.

In January 2009, she was diagnosed with a vesicovaginal fistula[2]—another complication of her cancer and treatment. (RP (1/22/13) at 59:15-

[2] A vesicovaginal fistula is an abnormal opening between the genital and urinary tracts that causes involuntary discharge of urine into the vaginal vault. Common causes include radiation therapy and surgery for gynecologic malignancy.

25) Among the options to treat the fistula, Dr. Bahman Saffari (who is not MultiCare's employee or agent) and Haskins agreed that the doctor would perform urinary diversion surgery and create an "Indiana pouch."[3] The surgery was performed at Tacoma General Hospital, owned and operated by MultiCare.

The pouch is created from a segment of colon tissue that is surgically harvested and sewn to form a pouch. (Supp. RP (1/16/13) at 46:12-15) The ureters are cut and surgically implanted into the pouch so that they will carry urine from the kidneys through the ureters and into the pouch. A stoma is then brought out to the abdominal skin.

Dr. Saffari elected to place bilateral ureteral stents, effectively "drainage tubes," into her kidneys. The stents start in the kidney, traverse through the ureters, down in the pouch, and then out of the patient's body into external drainage bags. The stents were sutured to the inside of the abdominal wall. (Second Supp. RP (1/24/13) at 29:2-6) The bags were placed next to Haskins, in her bed. (RP (1/17/13) at 244:23-25) Dr. Saffari also connected a Malecot urostomy tube, which exited through the stoma. (Second Supp. (1/24/13) at 34:10-12)

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[3] An Indiana pouch is a form of urinary diversion in which a neobladder is surgically constructed from a segment of ascending colon and ileum, and into which the ureters are anastomosed. The goal of this procedure is to create a continent reservoir that the patient must catheterize to eliminate urine.

The goal of the Indiana pouch surgery is to establish "continent diversion" so that the patient does not have to wear an external urine drainage bag on her body for the rest of her life. Instead, the patient can periodically empty the pouch through the stoma.

However, Indiana pouch surgery has a significant complication rate. (Supp. RP (1/16/13 at 47:8-11) Dr. Saffari testified that the complication rate is 30 percent to 40 percent. (Supp. RP (1/16/13) at 49:10-13) Haskins' expert estimated the complication rate from this surgery at 50 percent. (RP (1/22/13) at 53:21-24)

In the recovery room, immediately after Haskins' surgery, complications arose with her pouch—mucous was clogging the drains and tubes; the nurses had trouble irrigating them; leaking occurred; and there were problems with urine output. (Supp. RP (1/16/13) at 49:22-25 to 50:1-9); (Second Supp. RP (1/24/13) at 30:8-12)

On March 10, the first day *after* her surgery, her left ureter stent connection to the urine bag came apart. (Second Supp. RP 1/24/13 at 30:14-15) No one knows how or why. By noon, Dr. Saffari was paged three times for complications arising from the surgery. (RP (1/22/13) at 112:14-17) This was not surprising. Dr. Jacoby, an urologist for MultiCare, testified that there are basically three levels of complications.

(Second Supp. RP (1/24/13) at 19:4) The intermediate level of complications includes stent dislodgment, and post-operative abscesses. (Second Supp. RP (1/24/13) at 19:10-12) Accordingly, the nursing staff was directing most of their attention to Haskins' bags, tubes, and stents. (Second Supp. RP 1/24/13 at 31:1-4)

On March 11, the evening nurse assessed Haskins at 4 p.m. and verified that her stents were secure. (RP (1/17/13) at 275:4-8) A Certified Nurse Assistant ("CNA") Ashley Barker, was assisting the nurse. The CNA's duties in caring for patients included taking and recording vital signs in the medical chart, recording intake and outtake from each patient, answering call lights, and assisting patients with their needs. (RP (1/17/13) at 196:5-13)

CNA Ashley Barker graduated from college, earning her Certified Nursing Associate certificate. (RP (1/17/13) at 242:16-17) She worked at a nursing home, then gained hospital experience at Harrison Hospital before joining the nursing staff at Tacoma General in 2007. (RP (1/17/13) at 242:17-22) In 2008, Ms. Barker began nursing school, earning her nursing degree in 2010. (RP (1/17/13) at 242:24-25)

At the time of Haskins' stay at Tacoma General, Ms. Barker was certified and trained in handling and securing all types of lines and

drains—from an IV drain to a complicated drain in the brain, leg, or kidney. (RP (1/17/13) at 243:5-10) "We were always taught to make sure that they aren't tugged on or pulled on so that the can become dislodged." We take every precaution we can to secure them as needed, handle them carefully" so that the drains are not pulled out. (RP (1/17/13) at 243:10-16)

Toward the end of her shift, at 9:59 p.m., Ms. Barker emptied Haskins' urine bags. (RP (1/17/13) at 248:2-4) The tubing goes into the top of each bag, but is emptied from the bottom. (RP (1/17/13) at 251:23 to 252:1) Ms. Barker testified that she lifted the bag just enough to drain the urine to gravity into a plastic cylinder—not pulling or adding traction to the drain. (RP (1/17/13) at 244:13-15; 245:5-9)

"We take every precaution we can to secure them as needed, handle them carefully, as I said, so that they're [the stents] not pulled out, and just to be aware of them." (RP (1/17/13) at 243:13-16) When asked if she had hanged Haskins' bag over the edge of the bed, Ms. Barker responded: "No. That is not something I would ever do for any patient." (RP (1/17/13) at 245:12-13) Ms. Barker agreed that it would violate the standard of care if any healthcare provider hung ureteral stent bags, collection bags, over the side of the bed. (RP (1/17/13) at 249:15-19)

When the nursing shifts changed, the oncoming and outgoing nurses met at 11 p.m. to give and receive "report" on the patients, their history, medications, and any other concerns. (RP (1/17/13) at 224:21-25) During report, the CNAs answered call lights. (RP (1/17/13) at 225:21-22) Haskins pushed the call light at that time and asked to see the nurse. (RP (1/17/13) at 226:2-4) Haskins reportedly was concerned that her drains were not putting out urine, even though substantial urine had been emptied from the bags a short time earlier. (RP (1/17/13) at 230:9-10)

The off-going nurse, Shaleeni Fortner RN, performed a complete "head to toe" assessment of Haskins and did not see anything wrong. (RP (1/17/13) at 280:16-20) Nurse Fortner also asked her charge nurse, Nurse Debra Dick RN, to assess Haskins to double check "as a second pair of eyes" that she did not miss anything. (RP (1/17/13) at 280:21-24) Ms. Dick fully assessed Haskins and confirmed that nothing was wrong. (RP (1/17/13) at 281:3-6)

The oncoming shift nurse, Rebecca Sumey RN, visited Haskins at 11:45 p.m. and noted that there was no urine output in either bag, then paged Dr. Saffari. (RP (1/17/13) at 232:21-22; 233:20) Ms. Sumey noted that the urine bags were lying on the bed beside Haskins. (RP (1/16/13) at 154:16) Dr. Saffari arrived the next morning, March 12, and ordered an

interventional radiology consult to have her percutaneous nephrostomy tubes placed. (Supp. RP (1/28/13) at 133:4-9)

When Dr. Saffari completed Haskins' discharge summary several days later, he wrote in the summary that Haskins told him on March 12, that she felt that the stents were probably dislodged when the CNA emptied the urine bags. Dr. Saffari testified that Haskins thought that the CNA had hung the bags over the bed. (RP (1/16/13) at 35:14-20)

Haskins has no memory of what occurred or what she did or did not tell Dr. Saffari. (Supp. RP (1/28/13) at 129: 16-24) In fact, she testified that she asked Dr. Saffari what happened, and not the other way around. (RP (1/28/13) at 130:8-9) Also, Haskins confirmed that *she never saw a bag hanging over the side of her bed.* (RP (1/28/13) at 130:12-16)

None of the nursing staff witnessed the stents dislodge; none of the nursing staff placed the urine bags over the edge of the bed. (RP (1/16/13) 51:18-21) Dr. Saffari, who was not with Haskins at the time, did not witness the stents dislodge and did not recall whether the urine bags were over the edge of the bed. (RP (1/16/13) at 51:22-23) He simply does not remember. (RP (1/16/13) at 52:16-17)

2. Haskins Filed Suit Against MultiCare

In February 2011, Haskins filed an Amended Complaint against

MultiCare, but did not name Dr. Saffari as a party. (CP 17-22) She alleged that the nursing staff caused both ureteral stents to become dislodged "by improper handling of the nephrostomy bags and/or tubing." (CP 20) Haskins alleged the doctrine of *res ipsa loquitur*, among eight other legal theories. (CP 21)

3. Haskins' and MultiCare's Experts Testified that Stents Can and Do Dislodge in the Absence of Negligence.

1. Dr. Saffari, Haskins Treating Surgeon: Stents Slip Out

At trial, Dr. Saffari agreed that "ureteral stents can become dislodged by a mechanism other than nursing care." (Supp. RP (1/16/13) at 54:15-18) In fact, Dr. Saffari has had instances in his own practice where ureteral stents became dislodged—*unrelated to nursing care.* (Supp. RP (1/16/13) at 54:19-24)

Likewise, Dr. Saffari testified that stents can slip out simply from patient movement or motion. (Supp. RP (1/16/13(at 55:3-5) He confirmed that he could not rule out the possibility that Haskins inadvertently dislodged her own stents:

> Q: In this case, you can't rule out that Ms. Haskins inadvertently dislodged her own stents, correct?
>
> A: I cannot rule that out.

(Supp. RP (1/16/13) at 55:6-8)

2. Dr. Dorigo, Haskins' Expert: Stents Slip Out

Dr. Dorigo testified that the stents "are very easy to be pulled out." (RP (1/22/13) at 39:5-6) They are slippery and prone to movement. (RP (1/22/13) at 58:4-5) Likewise, he confirmed *during direct exam* that stents can be dislodged in the absence of negligence:

> Q: Now, is it true, is it not, that sometimes stents can get dislodged even in the absence of somebody doing something wrong? Would you agree with that?
>
> A: Theoretically, yes.

(RP (1/22/13) at 40:5-6) Dr. Dorigo confirmed that he had discussed this possible occurrence previously in his own deposition.

3. Karen Huisinga, Haskins' Expert: Relied on an Article that Stents Can "Pass by Itself."

Ms. Huisinga never testified that "stents would not have been [or cannot be] dislodged without hospital negligence." (*See* App. Opening Br. at 13) Rather, she opined that the hospital violated the standard of care by not properly securing the stents, which she theorized allowed them to become dislodged. (RP (1/22/13) at 96:23 to 97:1; 97:8-9)

However, Ms. Huisinga's research file contained an article titled "Frequently asked questions about ureteral stents" wherein one FAQ asks: "Does the stent ever pass by itself?" and the answer to this FAQ is "Yes, but this is uncommon." (RP (1/22/13) at 106:4-9) Ms. Huisinga testified

that she had never seen it happen (and she has not been a practicing nurse for over 20 years), but acknowledged that article was part of her research for this case. (RP (1/22/13) at 106:16-19)

4. Dr. Jacoby, MultiCare's Expert: Stents Slip Out

Dr. Jacoby, an urologist whose medical specialty has the most hands-on experience working with ureteral stents, testified that stent dislodgment is a complication commonly associated with Indiana pouch surgeries. (RP (1/24/13) at 12:16-18; 19:10-11) She testified that the ureteral stents are coated to reduce the friction in the body so that they're more comfortable:

> Q: Do ureteral stents slip out of the kidneys following surgery; is that an understood phenomenon?
>
> A: It definitely can happen. Tubes fall out all the time.
>
> Q: Can it happen in the absence of nursing negligence?
>
> A: Yes.
>
> Q: Can they come out a distance of a foot or more?
>
> A: Yes. These stents are really long.

(RP (1/24/13) at 25:5-16) Dr. Jacoby testified that stents can inadvertently dislodge of their own accord by parastalting out. "[I]n other words, the kidney—the ureter has its own muscular movement, and it's kind of pushing the urine through. It can just push the stents out because they're

coated, or even if they're uncoated, stents—they can just push them out because it's sort of a foreign body." (RP (1/24/13) at 25:1-6)

Dr. Jacoby, who has been practicing in Washington for over 20 years and is a published author in the field of urology, confirmed that ureteral stents usually come out due to the patient rolling around in bed. (RP (1/24/13) at 13:8-9; 13:18-19; 26:7-8) "*That's usually the case. A lot of times patients are confused and they pull out their own catheters. We see it all the time.*" (RP (1/24/13) at 26:8-10)

The jury heard testimony that Haskins was taking a high dosage of narcotics for pain relief after her surgery, including a continuing dose of Dilaudid, and other pain medication. (Supp. RP (1/16/13) at 30:1-7); (Second Supp. RP (1/24/13) at 31:9-14) The potent narcotics may relieve pain, but also makes a patient drowsy and confused. (Second Supp. RP 1/24/13 at 31:10) "[T]he stents are really easy to slip out, and she could have rolled over while she was sleeping and calm. She didn't have to thrash around wildly for the stents to come out." (RP (1/24/13) at 63:14-17)

Likewise, it is possible for patient movement to exert a tiny force that would move the ureteral stents but not move the Malecot drain because the Malecot drain is flanged and anchored "like a Molly bolt"

inside the abdominal wall—it is designed to be very difficult to pull out. (RP (1/24/13) at 27:7-9; 27:17-20)

Ureteral stents can also come out if the suture is not tied tight enough. "[I]f there is an air knot or something and the suture wasn't tied tight enough, then it would be really easy to pull them out." (RP (1/24/13) at 28:15-18)

5. Cheyenne Haines RN, MultiCare's Expert: Stents Slip Out

Cheyenne Haines, a nurse at Swedish Hospital with over 20 years' experience in acute post-operative nursing care, testified that MultiCare's nurses exercised the degree of care, skill and learning expected of reasonably prudent nurses and nursing assistants under the circumstances in Haskins' care. (RP (1/28/13) at 32:17-23)

> Q: So, Ms. Haines, if the standard of care was met, then how were these ureteral stents dislodged; why did they come out of the patient's kidneys?
>
> A: Unfortunately, it's something that happens. I work on a post-op floor. I see it happen all the time that drains become dislodged. It's not due to nursing negligence. ... Just the nature of drains, if you put these tubes in a person's body, I think there are just a certain percentage of those that are going to become dislodged[.]" (RP (1/28/13) at 33:1-15) In fact, "I see it happen quite frequently." (RP (1/28/13) a at 33:21)
>
> Q: Fully dislodged, meaning, come completely out of the patient's body?

A: Yes, yes.

Q: Do those things happen in the absence of nursing negligence?

A: Yes.

(RP (1/28/13) at 34:14-19) Ms. Haines testified that a line or drain as long as 14 inches can come out of a patient's body in the absence of nursing negligence. (RP (1/28/13) at 34:20-23) She has seen a line *several feet long become completely dislodged without any apparent reason.* (RP (1/28/13) at 35:8-18)

Ms. Haines also confirmed that it is possible for a patient, through movement, to inadvertently dislodge the ureteral stents, but not dislodge the Malecot drain because the stents are thin and long and not anchored like a Malecot. (RP (1/28/13) at 35:23 to 36:2)

6. Nurse Rebecca Sumey RN, MultiCare Employee: Stents Slip Out

Ms. Sumey testified at trial that Haskins was restless at times. (RP (1/16/13) at 178:4) She has observed patients' lines and drains becoming misplaced or coming out altogether "not infrequently." (RP (1/16/13) at 182:14-16) This includes IV lines and Foley catheters, which are advanced up the patient's urethra into the bladder, with an inflated balloon tip (to prevent it from coming out), but which comes out anyway—particularly when patients pull them out. (RP (1/16/13) at 182:17 to 183:8) Ms.

Sumey confirmed that "ureteral stents can slip out." (RP (1/16/13) at 183:11)

7. The Trial Court Admitted Evidence of Collateral Source Payments.

Haskins receives Social Security disability compensation, and is covered by Medicaid-Medicare insurance. (Supp. RP (1/28/13) at 104:24 to 105:9) She moved *in limine* for a ruling that RCW 7.70.080 is limited to admitting evidence of collateral source payments *already made* (and conversely that the statute does not permit evidence of *future* collateral source benefits).

Haskins argued that "[w]e believe that the statute language is just patently clear. It says that the healthcare provider can introduce evidence of where the plaintiff has [] already been compensated." (RP (1/15/13) at 4:13-16)

The trial court agreed and granted Haskins' motion *in limine*, ruling that a plain reading of RCW 7.70.080 allows evidence of past collateral source payments. (RP (1/24/13) at 89:5-17)

D. "Preponderance of Evidence" Is Not a Percentage

During voir dire on January 14, 2013, Haskins' counsel repeatedly referred to the burden of proof as "51 percent," asking potential jurors if they were uncomfortable with "the way the law is now, it's only 51

percent." (RP (1/14/13) at 13:11-12). This prompted a colloquy among potential jurors and Haskins' counsel as they speculated whether the burden of proof should be 70/30 percent or a higher percentage. (RP (1/14/13) at 12-14)

MultiCare's counsel objected to this line of voir dire "because this isn't the law. There is no percentage in the verdict." (RP (1/14/13) at 14:21-22) The Court sustained the objection and ruled that "you're not going to be instructed that 51 percent is the cut-off line or 73 percent is the cut-off line. You'll be given an instruction on what the preponderance of the evidence means, but it's not phrased in a percentage." (RP (1/14/13) at 14:24 to 15:3)

In response, Haskins' counsel remarked "***the Court's correct.*** What you will get is an instruction that says more likely than not." (RP (1/14/13) at 15:9-10) Thereafter, Haskins' counsel referenced the correct standard.

In closing statements, MultiCare's counsel discussed Haskins' burden of proof, asking "what does the burden of proof mean for you? And as we learned, even during the voir dire process two plus weeks ago, it's not a percentage. This isn't math. This is people using words and knowing that they mean to themselves. What does it take to persuade you?

(RP (1/29/13) at 42:6-11)

Haskins submitted a proposed Jury Instruction on January 14, 2013, that included Washington Pattern Instruction 21.01 (meaning of burden of proof—preponderance of the evidence). (CP 124) WPI 21.01 does not assign a percentage to establish "preponderance" of the evidence, nor does the 2013 Supplement change any wording or add any case law to the citations for WP1 21.01.

VI. STATEMENT OF THE CASE ON CROSS APPEAL

A. The Trial Court Excluded MultiCare's ER 615(2) Designated Representative During Witness Testimony.

MultiCare selected its nursing employee (and former Certified Nursing Assistant) Ashley Barker RN, as its representative to attend trial pursuant to ER 615. (CP 167) Ms. Barker was also disclosed as a fact witness. In one sentence, Haskins moved *in limine* "to exclude witnesses to be called in this case from the courtroom," relying on ER 615 (and without specific reference to MultiCare's courtroom designee).

On January 14, 2013, Haskins argued that Ms. Barker was "a critical witness," but not a party to the lawsuit or an agent of MultiCare. (Second Supp. RP (1/14/13) at 3:15; 3:24-25) After accusing MultiCare of engaging in a "very clever ploy," Haskins argued that Ms. Barker should not be allowed to sit at trial as the hospital's representative. (Second Supp.

RP (1/14/13) at 4:3-5) "[T]hey aren't allowed to just pick anybody at random. They're entitled to pick someone who is a representative of the hospital as an officer or someone that is involved in management, and so forth." (Second Supp. RP (1/14/13) at 5:9-13) Conversely, Haskins argued that MultiCare "can make anyone from the hospital hierarchy their representative." (Second Supp. RP (1/14/13) at 5:23-24)

Ms. Barker is a nursing employee of MultiCare and is within "the hospital hierarchy." MultiCare argued that it is a corporation's right to have a representative at trial—and not the plaintiff's right to select the representative for it. (Second Supp. RP (1/14/13) at 4:15-17) "The rule allows us to make the call as to the one person." (Second Supp. RP (1/14/13at 5:3-4)

The trial court granted Haskins' motion *in limine*, ruling that MultiCare could not designate its employee and fact witness as its representative per ER 615. (RP (1/14/13 at 6:2-22) MultiCare moved the court for reconsideration, which the court denied. (CP 166-70)

B. The Trial Court Refused to Give a Jury Instruction that Personal Injury Awards Are Non-Taxable.

MultiCare proposed a jury instruction which states as follows: "Any award to plaintiff will not be subject to federal income tax, and therefore you should not add or subtract for such taxes in fixing the amount of any

award." (CP 163) The trial court declined to submit the instruction to the jury "because it would conflict with the no insurance instruction." (RP 1/29/13) at 184:15-17)

VII. LEGAL ARGUMENT IN OPPOSITION TO APPELLANT'S OPENING BRIEF

A. The *De Novo* Standard of Review Applies to a Trial Court's Refusal to Give a *Res Ipsa Loquitur* Jury Instruction.

Whether *res ipsa loquitur* applies under a given set of facts is a question of law, reviewed *de novo*. Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003).

B. The Elements of *Res Ipsa Loquitur* Were Not Supported by Substantial Evidence.

Haskins alleged *res ipsa loquitur* in her amended complaint. (CP 21) However, the trial court refused to submit a *res ipsa loquitur* instruction to the jury because "I think there's plenty of evidence to indicate that this [dislodged stent] could have occurred without negligence[.]" (RP (1/29/13) at 187:13-15) "I think there's plenty of evidence for them to rule that there was no negligence in this particular case and that the hospital wasn't actively involved in having this slippage occur." (RP (1/29/13) at 187:21-24)

Where applied, *res ipsa loquitur* profoundly changes the elements of proof required of a plaintiff and the defenses available to a defendant:

> The doctrine of *res ipsa loquitur* spares the plaintiff the requirement of having to prove specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant were not negligent. In such cases the jury is permitted to infer negligence. The doctrine permits the inference of negligence on the basis that the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person.

Pacheco, 149 Wn.2d at 436 (citations omitted). "The practical effect of the doctrine is to rely on circumstantial evidence to permit a presumption or inference of negligence and place upon the defendant the burden of coming forward with evidence rebutting or overcoming the presumption." A.C. v. Bellingham Sch. Dist., 125 Wn. App. 511, 516-17, 105 P.3d 400 (2004). "*Res ipsa loquitur* is to be used sparingly and only in exceptional cases." Tinder v. Nordstrom, Inc., 84 Wn. App. 787, 789, 929 P.2d 1209 (1997). *Res ipsa loquitur* applies only when the evidence shows:

> (1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.

Pacheco, 149 Wn.2d at 436.

First, the doctrine cannot apply unless "the incident producing the injury must be of a kind that ordinarily does not occur in the absence of

negligence." A.C., 125 Wn. App. at 517; *see also, e.g.*, Miller v. Jacoby, 145 Wn.2d 65, 74, 33 P.3d 68 (2001). The burden rests with the plaintiff: "The party requesting the instruction must first show that the injury is of a type that does not occur absent negligence." A.C., 125 Wn. App. at 520.

Here, Haskins adduced no evidence to establish the applicability of *res ipsa loquitur*. Ureteral stent dislodgment is a common and well-known risk of Indiana pouch surgery (or any stent therapy). It can and does occur in the absence of negligence; Haskins offered no competent expert testimony to the contrary.

Haskins' own expert, Dr. Dorigo, testified that yes, it was theoretically possible that "sometimes stents can get dislodged even in the absence of somebody doing something wrong." Ms. Huisinga testified that her own research revealed an article about the body passing ureteral stents spontaneously.

Dr. Saffari, her treating surgeon, agreed that "ureteral stents can become dislodged by a mechanism other than [negligent] nursing care." In fact, Dr. Saffari has had instances in his own practice where ureteral stents became dislodged, and *unrelated to nursing care*. Nor could he rule out the possibility that Haskins may have inadvertently dislodged her own stents.

Dr. Jacoby testified that tubes fall out all the time in the absence of negligence. Ureteral stents can dislodge of their own volition by parastalting out; by patients rolling over and causing them to dislodge; by patients pulling them out while sleeping or confused; or when a stent is not sutured tight enough in surgery.

Swedish nurse Cheyenne Haines RN testified that she sees tubes and drains become dislodged "all the time." And it's not due to nursing negligence. MultiCare nurse Rebecca Sumey RN testified that she has observed patients' lines and drains becoming misplaced or dislodged altogether "not infrequently."

In short, the first element of *res ipsa loquitur* was not met and the trial court was correct in ruling that the doctrine did not apply here. The Washington Court of Appeals has routinely upheld a trial court's decision not to apply the doctrine of *res ipsa loquitur* where the plaintiff fails to establish the first required element. *See* Andrews v. Burke, 55 Wn. App. 622, 631, 779 P.2d 740 (1989); Swanson v. Brigham, 18 Wn. App. 647, 571 P.2d 217 (1977).

On January 29, 2013, both parties presented oral argument about whether Haskins' *res ipsa loquitur* instruction should be given to the jury. (RP (1/29/13) at 142-148) MultiCare noted that every one of Haskins'

own experts admitted that the complication of slipped stents can and does occur in the absence of negligence. (RP (1/29/13) at 143:16-17) Accordingly, Haskins did not meet her burden with *substantial evidence* to demonstrate the first prong of the *res ipsa* test. MultiCare also argued that the third prong was not satisfied because there was an issue of fact about whether Haskins' own acts caused or contributed to the dislodgment. (RP (1/29/13) 143:22 to 144:3) Conversely, Haskins argued extensively that the doctrine applied. (RP (1/29/13) 144:5 to 148:10)

After taking extra time to review the cases cited by Haskins, the trial court ruled that it was declining to give a *res ipsa loquitur* instruction. "I think there's plenty of evidence to indicate that this could have occurred without negligence[.]" (RP (1/29/13) at 187:13-15) "I think there's plenty of evidence for them to rule that there was no negligence in this particular case and that the hospital wasn't actively involved in having this slippage occur." (RP (1/29/13 at 187:21-24) This was a correct legal ruling that the Court of Appeals should affirm.

C. Evidence of Collateral Source Payments Was Properly Admissible.

Interpretation of statutes and evidentiary rules is a question of law the appellate court reviews *de novo*. Lawson v. City of Pasco, 168 Wn.2d 675, 678, 230 P.3d 1038 (2010). Here, it is baffling why Haskins is

appealing the trial court's ruling *granting her own motion in limine*.

She moved *in limine* for a ruling that RCW 7.70.080 is limited to collateral source payments *already made.* Haskins argued that "[w]e believe that the statute language is just patently clear. It says that the healthcare provider can introduce evidence of where the plaintiff has [] already been compensated." (RP (1/15/13) at 4:13-16)

In her opening brief, Haskins also contends that she "objected" to the permitting "the hospital to submit evidence of collateral source payments pursuant to RCW 7.70.080." (*See* App. Opening Br. at 30-32) However, *she never objected.* Rather, she solicited the trial court for a ruling that RCW 7.70.080 is limited to collateral source payments already made (rather than future payments).

Indeed, the trial court agreed and granted Haskins' motion *in limine*, ruling that a plain reading of RCW 7.70.080 allows evidence of past collateral source payments. (RP (1/24/13) at 89:5-17)

To the extent that the Court of Appeals addresses Haskins' invited error of granting her own motion, MultiCare responds that the failure to admit collateral source evidence in a medical malpractice case is error. "[W]e strongly encourage trial courts to fully follow the statute in the

future." Adcox v. Children's Orthopedic Hosp., 123 Wn.2d 15, 50, 864 P.2d 921 (1993).

Legislative intent may be inferred from legislative history of the enactment itself. Ropo, Inc. v. City of Seattle, 67 Wn.2d 574, 409 P.2d 148 (1965). In creating RCW 7.70.080, the legislature recognized that public funds would be within the scope of admissible collateral source evidence in medical malpractice actions:

> [I]f a patient was receiving either welfare or unemployment payments while recuperating from a malpractice injury, the defendant could argue to the Jury that these public payments partially compensated the plaintiff.

ESHB 1470, Bill Summary.

The purpose of damages is compensatory. Nelson v. Western Steam Navigation Co., 52 Wn. 177, 184, 100 P. 325 (1909). The Nelson court held it was error to instruct the jury it could award medical expenses when those expenses were rendered free of charge to the plaintiff, noting that the fundamental conception of damages was compensation, and that a plaintiff should not recover for a service of value where no charge had been made. Id.

The intent of RCW 7.70.080 is to allow the admission of evidence of all payments except those directly from family assets. Evidence of

those collateral sources was clearly admissible. The trial court did not err in granting Haskins' own motion *in limine.*

Haskins cites Diaz v. State of Washington to advance the contention that RCW 7.70.080 is unconstitutional because it purportedly violates the separation of powers doctrine. (*See* App. Opening Br. at 30-31) The Diaz court addressed the admissibility of prior settlements, not the admissibility of benefits. In Diaz, the Court specifically stated 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 the provider." Diaz v. State of Washington, 175 Wn.2d 457, 463, 285 P.3d 873 (2012). The Court explained that RCW 7.70.080 "supersedes the common law collateral source rule." Id. at 465.

The Diaz Court analyzed the intersection of RCW 7.70.080, 4.22.060, and 4.22.070, however, each statute refers to *prior settlements,* not benefits. The Court's decision in Diaz does not question the constitutionality of RCW 7.70.080. The state legislature created a statutory cause of action in derogation of common law when it enacted RCW 7.70 and its subsections; this is a constitutional exercise of legislative powers. Finally, any purported error is *harmless* because the jury never reached the question of Haskins' damages. *See* Ford v. Chaplin, 61 Wn. App. 896, 812

P.2d 532 (1991) (holding that any error relating to damages is harmless when the verdict establishes that the defendant is not liable).

D. The Burden of Persuasion is "Preponderance of the Evidence" Not 51 Percent.

Before *voir dire* and opening statements, Haskins proposed a correct statement of the law in her proposed jury instruction, submitted on January 14, 2013, and patterned after WPI 21.01:

> When it is said that a party has the burden of any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably than not true.

(CP 124)

Preponderance of the evidence is not a percentage; it is not math. It is a burden of persuasion. The Supreme Court's comment in Anderson v. Akzo Nobel Coatings, 172 Wn.2d 593, 608, 260 P.3d 857 (2011), upon which Haskins relies, was only *dictum*. Further, this *dictum* relied on a footnote in a law review article published 47 years ago.

As part of a Frye analysis and scientific probability standard for expert testimony, the Court noted that the standard in most civil cases is a mere "preponderance." Id. at 608. The Court further noted that "[i]n order to establish a causal connection in most civil matters, the standard of

confidence required is a 'preponderance' or more likely than not, or more than 50 percent." Id. (citing Lloyd L. Wiehl, *Our Burden of Burdens*, 41 Wash. L. Rev. 109, 110 n.4 (1966). However, a reference to "more than 50 percent" was not the Akzo's Court "holding" and certainly not a rule of law. Haskins neither relied on nor cited Akzo before the trial court made its ruling. The trial court correctly submitted WPI 21.01 to the jury as the long-established meaning of the burden of proof.

"Each courtroom comes equipped with a 'legal expert' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards." State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). Haskins' sole reliance on dictum for the proposition that "preponderance of the evidence" is defined as 51 percent is unavailing. The trial court correctly defined the legal burden of proof in submitting WPI 21.01 to the jury.

VIII. LEGAL ARGUMENTS IN SUPPORT OF CROSS APPEAL

I. ER 615(2) Does Not Authorize a Trial Court to Exclude a Corporate Party's Properly Designated Representative.

Interpretation of an evidentiary rule is a question of law, which the Court of Appeals reviews *de novo*. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). "Once the rule is correctly interpreted, the trial

court's decision to admit or exclude evidence is reviewed for an abuse of discretion." State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). "Failure to enforce the requirements of rules can constitute an abuse of discretion." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

An abuse of discretion occurs if the court's decision is manifestly unreasonable or rests on untenable grounds. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006). A decision rests on untenable grounds if it "'rests on facts unsupported in the record or was reached by applying the wrong legal standard.'" Id. at 76 (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). A decision is manifestly unreasonable if it adopts a view that no reasonable person would take. Id.

Here, the trial court misinterpreted ER 615(2) by ignoring the plain and unambiguous language of the rule:

> At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. ***This rule does not authorize exclusion*** of (1) a party who is a natural person, or ***(2) an officer or employee of a party which is not a natural person designated as its representative by its attorney***, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

ER 615 (emphasis added).

As a matter of law, Ashley Barker is MultiCare's employee and MultiCare's designated representative by its attorney. The trial court erred in its interpretation and application of ER 615(2) in its initial ruling, and in its denial of MultiCare's motion for reconsideration. Having failed to legally apply the rule, the trial court also abused its discretion in excluding Ms. Barker from the courtroom. In effect, MultiCare's designated representative was excluded.

No published Washington State case addresses a fact witness sitting with counsel as a designated representative. But the majority of cases from federal jurisdictions have upheld trial court decisions which permitted a fact witness to sit with counsel as a designated representative. *See* Kurtis A. Kemper, J.D., Annotation, *Exclusion of Witnesses under Rule 615 of Federal Rules of Evidence*, 181 A.L.R. Fed. 549, §23(a) at 608 (2002). Although ER 615 differs slightly from the corresponding federal rule, federal case law is instructive in interpreting the Washington Rule. See Tegland 5A, Washington Practice: Evidence § 615.1 (5th ed.).[4]

[4] ER 615 is very similar to Fed. R. Evid. 615. The only significant difference is that ER 615 gives the trial court more discretion because it provides that the court *may* order witnesses excluded when a party makes a request, whereas Fed. R. Evid. 615 states that the court *shall* order witnesses excluded. (emphasis added).

For example, in Queen v. Washington Metropolitan Area Transit Authority, 268 U.S. App. D.C. 480, 842 F.2d 476, 481-82 (D.C. Cir. 1988), a pedestrian who was struck by a bus, challenged on appeal the court's refusal to exclude the driver of the bus involved in the accident from the courtroom during opening arguments and during the testimony preceding that of the bus driver. The court held the bus driver, as the defendant's designated representative, fell within the plain language of Rule 615(2) of the Federal Rules of Evidence. Id. at 481 (rejecting the claim that the exception only applied to officers and agents of parties empowered to bind the corporation through their testimony). The district court acknowledged that the bus driver's deposition had been taken before trial, thereby giving plaintiff's counsel prior statements with which to impeach the bus driver, which the court noted "would seem to prevent [the bus driver] from credibly modifying at trial the important elements of her account of the accident." Id. at 482 n.9. By the same rationale, individual party witnesses (like Lonnita Haskins) are never excluded.

In Roberts ex rel. Johnson v. Galen of Virginia, Inc., 325 F.3d 776, 784-785 (6th Cir. 2003) the court held that "Corporations are allowed to choose ***any... employee as their designated representative***," noting that:

> A party will often appoint as its representative the officer or ***employee most knowledgeable about the case***. Thus, this second exception can give that crucial witness the opportunity to hear the other witnesses and tailor his testimony accordingly. Notwithstanding this risk, Rule

> 615(2) recognizes the exception in order to afford a party that is not a natural person a right comparable to the right the first exception affords to natural persons. This seems appropriate since criminal cases will always and civil cases will often match a party that is not a natural person against a party that is a natural person. Failure to equalize Rule 615 treatment of parties within the same case may not pose constitutional problems, but still smacks of unfairness.

Roberts ex rel. Johnson, 325 F.3d at 784 n.1 (emphasis added) (quoting Charles Alan Wright & Victor James Gold, 29 *Federal Practice and Procedure* § 6245, at 76 (1997) (footnote omitted)).

In U.S. ex rel. Bahrani v. ConAgra, Inc., 624 F.3d 1275, 1303 n.14 (10th Cir. 2010) the court upheld the trial court's denial of the plaintiff's request to exclude a corporation's designee who was also a fact witness. The trial court ruled:

> I think each side's entitled to have an advisory witness, and the designated witness can be present throughout the trial to assist counsel. ***It would be grossly unfair, in my view, to require the defendants to have some representative of the company who knew absolutely nothing about the case*** or wasn't there to try and advise them.

U.S. ex rel. Bahrani, 624 F.3d at 1296.

If the Court in inclined to vacate the judgment and remand this case, then it should reverse the trial court's ruling that excluded MultiCare's employee and designated representative from sitting through trial, in derogation of ER 615(2). This Court should follow the majority of

cases from federal jurisdictions, which have permitted a fact witness to sit with counsel as a designated representative.

Like Queen: (1) MultiCare's designated representative falls within the plain language of ER 615(2); and (2) Ms. Barker's deposition was taken before trial, thereby giving plaintiff's counsel prior statements with which to impeach her, which "would seem to prevent [her] from credibly modifying at trial the important elements of her account[.]"

B. The Trial Court Erred in Refusing to Submit a Jury Instruction that Personal Injury Awards Are Non-Taxable.

The standard of review that the Court applies to jury instructions depends on the decision under review. The instructions must be sufficient to allow the parties to argue their theory of the case. Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 165, 876 P.2d 435 (1994). Whether or not that standard has been met is a question of law. Cox v. Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). And, of course, whether the trial court's instructions to the jury are accurate statements of the law is also a question of law that the Court reviews *de novo*. State v. Becklin, 163 Wn.2d 519, 525, 182 P.3d 944 (2008). But once these threshold requirements have been met, the appellate court then reviews the trial judge's wording, choice, or the number of instructions for abuse of discretion. Stiley v. Block, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

MultiCare submits that the trial court erred, as a matter of law, by not allowing it to argue it theory—which is the law—that personal injury awards are non-taxable. MultiCare's proposed jury instruction states as follows: "Any award to plaintiff will not be subject to federal income tax, and therefore you should not add or subtract for such taxes in fixing the amount of any award." (CP 163) The trial court declined to submit the instruction to the jury "because it would conflict with the no insurance instruction." (RP 1/29/13) at 184:15-17)

Washington State has not implemented a state income tax, however, all citizens of this state are subject to federal taxation under the tortured and convoluted (and forever changing) tax code administered by the Internal Revenue Service.

Mercifully, 26 U.S.C. § 104 (a)(2) is plain and unambiguous. It states, in relevant part, as follows:

> § 104. Compensation for injuries or sickness.
>
> (a) In general. Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 [26 USCS § 213] (relating to medical, etc., expenses) for any prior taxable year, *gross income does not include—*
>
> (2) *the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness*;

26 U.S.C. § 104 (a)(2) (emphasis added).

This statute also explains that gross income does not include: amounts received under workmen's compensation acts as compensation for personal injuries or sickness; amounts received through accident or health insurance for personal injuries or sickness; amounts received as a pension, annuity or similar allowance for personal injuries or sickness resulting from active service in the armed forces; and amounts received by an individual as disability income attributable to injuries from terroristic or military action. 26 U.S.C. § 104 (a)(1), (3)-5).

C. The Cases Interpreting 26 U.S.C. § 104(a)(2) Favor Submitting a Jury Instruction Regarding Taxation of Damages.

The seminal case from which MultiCare's proposed jury instruction arises is Domeracki v. Humble Oil & Refining Co., 443 F.2d 1245 (3d Cir. 1971), *cert denied* 404 U.S. 883, 30 L. Ed. 2d 165, 92 S. Ct. 212 (1971), wherein a longshoreman filed suit for personal injuries sustained while loading a ship in port. The defendant submitted, and the district court refused, the following instruction:

> I charge you, as a matter of law, that any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the federal income tax law. Should you find that plaintiff is entitled to an award of damages, then you are to follow the instructions already given to you by this Court in measuring those damages, and in no event should you either add to or subtract from that award on account of federal income taxes.

Id. at 1248-49. The jury awarded the longshoreman $270,982 in damages. The Third Circuit Court, in a case of first impression, ruled that the trial court erred by refusing to submit the above-referenced instruction to the jury.

The Third Circuit Court's analysis began with a plain reading of 26 U.S.C. § 104 (a), noting that "[i]t is true, as stated in the requested charge, that awards received by settlement or verdict in personal injury actions are not taxable under the federal income tax laws." Id. at 1249 (citing Section 104 of the Internal Revenue Code of 1954, 26 U.S.C.). The Domeracki Court acknowledged that "whether this is a fact of which a jury should be apprised, upon a defendant's request for a proper cautionary instruction, is an open question in this Circuit. Other courts, both state and federal, which have considered the question have answered it in different ways," although a majority of commentators "appear to favor an appropriately worded charge." Id. at 1249.

With the foregoing in mind, the Third Circuit began its analysis "with the elementary rule of damages in personal injuries actions: a plaintiff should be compensated (1) for monies of which he has been deprived and which presumably he would have received had he not been injured, including wages and earnings, past and future; and (2) for the

expenses, inconveniences, and suffering which have been thrust upon him by virtue of his injuries." Id. at 1249-50. Accordingly, the purpose of personal injury compensation is "neither to reward the plaintiff, nor to punish the defendant, but to replace plaintiff's losses." Id. at 1250.

The Domeracki Court stated that "[i]nsofar as wages are concerned, an injured plaintiff loses only his net or take-home pay, that is, his gross earnings, less taxes. He does not in fact 'lose' his gross earnings." Id. at 1250. The Court noted that in most jurisdictions, "the courts hold that the gross earnings of the plaintiff, rather than net earnings after taxes, are admissible as evidence for the jury's consideration in calculating this item of damages. Thus, the jury is presented not with evidence of wages which plaintiff has actually lost, but sums which, in fact, may be considerably higher depending upon his particular income tax bracket." Id. at 1250.

One way to avoid this result is to submit a cautionary instruction to the jury. "The avowed purpose of such a request is to discourage a jury from enlarging an award to the extent it erroneously believes that the plaintiff will be called upon to pay income taxes." Id. at 1250.

The Domeracki Court readily recognized the problems which could result from the introduction of income tax evidence, observing that

"shifting tax rates, together with other variables, could give rise to great conjecture, at least as to *in futuro* earnings." Id. The Court acknowledged that "the tax computation itself could completely overshadow the basic issues of liability and damages." Id.

The Domeracki Court addressed the confusion and concern that trial courts in Washington have expressed in the past. The Court stated that although "some courts and writers have confused the evidentiary issue with the question of a cautionary instruction, we believe that the considerations relating to the former issue have no relevance to the second." Id. at 1250-51. As such (and exactly like the issue in the present case on cross appeal before Division II):

- The instruction requested in this case would not require the introduction of any additional evidence.
- No reference to any IRS regulation or to any specific statute would be necessary.
- No tax expert would need to be summoned as a witness.
- No tax tables would be hauled into the courtroom.
- No additional computation would be required.
- In brief, such an instruction would not open the trial to matters irrelevant to traditional issues in personal injury litigation, and thus would in no way complicate the case or confuse the jury.

Id. at 1251.

With respect to policy considerations, the Domeracki Court ruled that "there are positive and persuasive reasons for giving the instruction." Id. While this opinion was written in 1971, the policy discussion and rationale still ring true for today. The Domeracki Court acknowledged that it was keenly aware of "the pervasive impact of taxation -- federal, state, and local -- in the lives of Americans." Id. As both private citizens and as judges, members of the Domeracki Court took judicial notice "of the widespread attention given by the media to the tax consequences affecting winners of the Irish Sweepstakes, state-conducted lotteries, and contests conducted on television."[5] Id. at 1251. In sum, the Court took "judicial notice of the 'tax consciousness' of the American public." Id.

With respect to members of the general public, the Domeracki Court recognized (as did the court in Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952)), "that few members are aware of the special statutory exception for personal injury awards contained in the Internal Revenue Code." Id. Accordingly, '"there is always danger that today's

[5]The Domeracki Court relied on a Second Court opinion wherein a dissenting judge opined that "[i]t is likely that many jurors, without such an instruction ... would believe that damage awards are taxable, and would weight this factor against the defendant. ... The public press has carried many reports of large sums won on television quiz programs or in lotteries and sweepstakes. These accounts almost always point out that a very large percentage of the winnings must be paid to the government as income tax. It would be natural enough for the layman to conclude that the plaintiff's receipts from the judgment would be taxed." McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 41, (2nd Cir. 1960) (*en banc*) (Lumbard, C.J., dissenting).

tax-conscious juries may assume (mistakenly of course) that the judgment will be taxable and therefore make their verdict big enough so that plaintiff would get what they think he deserves after the imaginary tax is taken out of it.'" Id. at 1251 (quoting II Harper & James, The Law of Torts § 25.12, at 1327-28 (1956)).

In this cross appeal, MultiCare invites the Court to consider that the "very purpose of a cautionary instruction is merely to dispel a possible misconception in the minds of the jury that the government will make a valid claim to a portion of the award. Its effect is simply to dissuade juries from improperly increasing the award because of this mistaken belief." Id. at 1251.

In a similar case, the Ninth Circuit, adopted the holdings and rationale stated in Domeracki. The Ninth Circuit held as follows:

> We find ourselves in complete agreement with these sentiments. We cannot believe that, in the absence of such an instruction, many jurors would not assume that the award would be taxable and thus be inclined to increase their damage award accordingly. The benefits of informing the jury of the true tax consequences are so clear, and the burden in terms of time and the possibility of confusion so minimal, that we believe the balance is overwhelmingly in favor of giving such an instruction. To put the matter simply, giving the instruction can do no harm, and it can certainly help by preventing the jury from inflating the award and thus overcompensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable.

Burlington N., Inc. v. Boxberger, 529 F.2d 284, 297 (9th Cir. 1975).

In sum, "given the absence of complications that an instruction would engender, the tax consciousness of the American public, and the general lack of knowledge about the statutory exclusion," the Domeracki Court held that "in personal injuries actions the trial courts in this Circuit must, in the future, upon request by counsel, instruct the jury that any award will not be subject to federal income taxes and that the jury should not, therefore, add or subtract taxes in fixing the amount of any award." Domeracki, 443 F.2d at 121. This is precisely the instruction that MultiCare seeks if the judgment is vacated and remanded to the trial court.

IX. CONCLUSION

MultiCare respectfully requests that the Court affirm the trial court's ruling that Haskins' proposed *res ipsa loquitur* jury instruction was inapplicable, in light of the evidence. MultiCare also submits that the trial court properly ruled as a matter of law (in granting Haskins' motion in limine) that evidence of collateral source payments is admissible under RCW 7.70.080. Additionally, the trial court correctly ruled that Haskins' burden of proof was "preponderance of the evidence" and not a mathematical percentage.

Finally, if the Court vacates and remands this case to the trial court, then MultiCare respectfully requests that the Court: (1) reverse the trial court's ER 615(2) ruling and allow MultiCare's designated

representative and fact witness to remain in the courtroom throughout the trial; and (2) reverse the trial court's decision rejecting MultiCare's proposed jury instruction that personal injury awards are not subject to federal taxation.

Dated this 6 day of November, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 6th day of November, 2013, I caused to be served a true and correct copy of the foregoing via U.S. mail, postage prepaid and addressed to the following:

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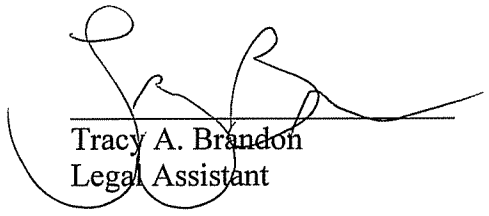

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FLOYD PFLUEGER AND RINGER PS

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