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NO. 62821-6-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

(King County Superior Court Cause No. 06-2-17528-0 SEA)

**SHARLA TAVARES, individually and as Guardian of the Estate of
MIRIAM TAVARES, a minor, and ERIK TAVARES**

Respondents/Cross-Appellants,

vs.

**EVERGREEN HOSPITAL MEDICAL CENTER, aka KING
COUNTY PUBLIC HOSPITAL DISTRICT #2**

Appellant/Cross-Respondent.

**APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Steven Gonzalez, Judge**

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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**FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2009 OCT 27 AM 10:54**

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I. LEGAL ARGUMENT

A. Miriam's Bodily Injury Verdict and Her Parents' Loss of Consortium Verdicts Were Not Legally Inconsistent.

Whether the jury's verdict in favor of Miriam Tavares is consistent or inconsistent with its verdict against her parents is determined under the Supreme Court's analysis in *Guijosa v. Wal-Mart Stores, Inc.*¹ In that case, plaintiff Guijosa was detained by Wal-Mart personnel after an alleged shoplifting incident at a Wal-Mart store. Guijosa sued Wal-Mart for discrimination and violating the Washington Consumer Protection Act. The jury returned verdicts that Wal-Mart did not discriminate against Guijosa, but did violate the CPA.

After the verdicts, the trial court discharged the jury and granted Wal-Mart's motion for JNOV to vacate the CPA verdict because 1) the jury's finding of no discrimination precluded a "per se" CPA violation based on a violation of the public interest element of the CPA; and 2) Guijosa had not presented evidence that Wal-Mart had committed a separate CPA violation under the 5-part test in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*:²

¹144 Wn.2d 907, 32 P.3d 250 (2001).

²105 Wn.2d 778, 785-93, 719 P.2d 531 (1986).

Division II affirmed the JNOV, concluding that the discrimination and CPA verdicts were inconsistent because “the jury could only find a violation of the CPA if it also found Wal-Mart liable for discrimination.”³

The Supreme Court granted review and ruled that the verdicts were *not* inconsistent because the discrimination verdict and the CPA verdict were independent and separately determinable. This was because the jury *could have* found a CPA violation in the absence of discrimination, *if* there were “facts in evidence of other acts or practices” that met the five elements of a CPA violation under *Hangman Ridge*:

However, the instructions do not limit the jury to finding a CPA violation only if it also finds discrimination. Rather, if there were facts in evidence of other acts or practices, the jury could have considered all of the propositions set out in Jury Instruction 23 (the *Hangman Ridge* elements) in relation to such acts or practices. The jury’s verdict of CPA violations was determinable separately from its verdict that Wal-Mart did not discriminate. The general verdicts on the two claims are independent; they are not inconsistent.⁴

³144 Wn.2d at 920.

⁴*Id.* The Supreme Court ultimately affirmed the JNOV because there was insufficient evidence to support a CPA verdict under *Hangman Ridge*:

“The trial court found that neither the evidence in the record nor any reasonable inference from that evidence satisfied all of the *Hangman Ridge* elements. We agree.” 144 Wn.2d at 921.

The Supreme Court further noted that the jury’s answers on both the discrimination and CPA verdicts “constitute general verdicts because ‘the jury pronounces generally upon all or any of the issues in favor of either the plaintiff or defendant.’”⁵

In this case, the jury returned the following general verdicts, which resolved all of the issues in favor of Miriam and against her parents:

QUESTION 1: Was there negligence by the defendant that was a proximate cause of injury or damage to the plaintiff(s)?

Miriam Tavares	<u>Yes</u>
Sharla Tavares	<u>No</u>
Erik Tavares	<u>No</u>

CP 2322-23.

Miriam’s bodily injury claims and her parents’ loss of services and consortium claims were independent causes of action.⁶ The jury’s verdicts were not legally inconsistent under the analysis in *Guijosa* because although all three causes of action derived from the hospital’s negligence toward Miriam, the elements of proximate cause and injury/damage were legally independent and separately determinable for

⁵*Id.* at 918, *citing* CR 49.

⁶*Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 774, 733 P.2d 530 (1987).

each verdict. This is because the jury *could have* determined that the hospital's negligence proximately caused Miriam's bodily injury but did not cause one or both of her parents a loss of consortium, *if* there were any "facts in evidence" to support such a determination.⁷

B. Since the Verdicts Were Not Legally Inconsistent, Sharla and Erik Tavares Did Not Waive Their Right to Seek JNOV.

In *Guijosa*, the Supreme Court held that the rule requiring a party to bring inconsistent verdicts to the court's attention before the jury is discharged does not apply to general verdicts that are not inconsistent:

Plaintiffs assert that the failure to object to an alleged inconsistency in verdicts before the jury is discharged waives any later argument based on that inconsistency. However, the rule requiring a party to bring inconsistent verdicts to the court's attention does not apply in this case because the jury's general verdicts are not inconsistent.⁸

Since the jury's general verdicts in favor of Miriam and against Sharla and Erik were not legally inconsistent, waiver does not apply.

⁷*Guijosa*, 144 Wn. 2d at 920. See also *Streight v. Conroy*, 279 Or. 289, 566 P.2d 1198 (Or. 1978) and *Waterfield v. Quimby*, 277 Ark. 472, 644 S.W.2d 241 (1982), which hold that a verdict in favor of one spouse on a bodily injury claim is separately determinable from, and not legally inconsistent with, a verdict against the other spouse on a loss of consortium claim, if there is evidence that the other spouse did not suffer a loss of consortium.

⁸144 Wn.2d at 920.

C. Even if the Verdicts Were Inconsistent, There Would Be No Grounds for a New Trial on Miriam’s Claims.

The hospital cites the old South Carolina and New York cases of *Rhodes v. Winn-Dixie Greenville, Inc.*⁹ and *Coleman v. NYC Transit Authority*¹⁰ in contending that “If the Court finds the verdict inconsistent, it should remand for a new trial on all issues, as there is no rational basis for parsing out which of the two verdicts should stand and which should be retried.”¹¹ The hospital claims Miriam’s verdict is inconsistent and irrational based on Dr. Keys’s testimony that even if she had stayed at the hospital instead of going home to dinner, she would not have performed the emergency C-section in time to rescue Miriam anyway.¹²

This contention fails because 1) Washington courts do not follow the *Winn-Dixie/Coleman* inconsistent verdicts rule, but instead decide motions for JNOV by testing whether each verdict has a legally sufficient

⁹249 S.C. 526, 155 S.E.2d 308 (1967).

¹⁰28 Misc.2d 694, 208 N.Y.S.2d 186 (1960).

¹¹Appellant’s Reply Brief, p. 23.

¹²*Id.* at 3-5, 23.

evidentiary basis under CR 50(a)(1)¹³; and 2) under *Faust v. Albertson*¹⁴, the jury could have determined that Dr. Keys's testimony was not credible because of inconsistency, faulty memory, self-interest or fraternal bias, or it could have based its verdict in favor of Miriam on other direct and circumstantial medical evidence.

1. **Under CR 50(a)(1), an Inconsistent Verdict Is Valid if It Has a Legally Sufficient Evidentiary Basis.**

In *Guijosa v. Wal-Mart Stores, Inc.*¹⁵, the Supreme Court held that motions for JNOV (now called “motions for judgment as a matter of law”) are decided under the test in CR 50(a)(1), which provides:

If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim ... that cannot under the controlling law be maintained without a favorable finding on that issue.

Under CR 50(a)(1), JNOV was required on the CPA verdict in *Guijosa* because it lacked a “legally sufficient evidentiary basis.” But the

¹³The *Winn-Dixie/Coleman* inconsistent verdicts rule mechanically requires a new trial on both inconsistent verdicts, even if one is supported by the law and evidence and the other is not.

¹⁴166 Wn.2d 653, 211 P.3d 400 (2009).

¹⁵144 Wn.2d 907, 32 P.3d 250 (2001).

discrimination verdict was not subject to JNOV because it was separately determinable and had a legally sufficient evidentiary basis. Under *Guijosa* and CR 50(a)(1), the jury's verdict in favor of Miriam is not subject to JNOV because it has a legally sufficient evidentiary basis, even if it is inconsistent with the verdicts against her parents.

2. **Under *Faust v. Albertson*, the Jury Could Disbelieve Dr. Keys's Testimony on Whether She Would Have Monitored the Patient and When She Would Have Intervened.**

In *Faust v. Albertson*, the Supreme Court held that a jury may decide any fact issue by circumstantial evidence, whose value is equivalent to direct evidence:

Typically, plaintiffs "may establish any fact by circumstantial evidence." *Tabak v. State*, 73 Wash. App. 691, 696, 870 P.2d 1014 (1994). Before juries, circumstantial and direct evidence are viewed as equivalently valuable.¹⁶

It also held that a jury can weigh conflicting testimony and determine that a witness is not credible because of inconsistency, faulty memory, self-interest, or bias stemming from fraternal ties:

Credibility determinations lie with the jury, and it was entitled to weigh these conflicting statements about timing and [the drunk driver] Kinkaid's whereabouts on the day of the collision.

¹⁶166 Wn.2d 653, 658, 211 P.3d 400 (2009).

[Since] observations by other lodge patrons [that Kinkaid was not apparently intoxicated] were challenged by other observational evidence, as well as impeached as self-interested testimony, the jury was entitled to weigh this evidence against all else presented at trial. Lodge members did testify to Kinkaid's appearance, but Faust [who had sued the lodge for overserving Kinkaid] alleged a "conspiracy of silence" due to the ties of membership in the fraternal organization and impeached their testimony on the grounds of faulty memory and inconsistent statements.¹⁷

The hospital relies on two aspects of Dr. Keys's testimony in support of its argument that Miriam's verdict was inconsistent, irrational and requires a new trial. First, Dr. Keys testified that if the hospital nurses had told her that Sharla Tavares was a VBAC patient with a history of placental abruption, protein S deficiency and prothrombin DNA who had arrived at the hospital with complaints of cramping and increased contractions, she "probably would have ran home to get dinner...." instead of examining her. 9/30 RP 180-81. Dr. Keys further testified that if she had stayed at the hospital and watched the fetal heart monitor at Sharla's bedside from 8:45 p.m. on, she would have (a) waited until 9:02 or 9:03 to take Sharla to the operating room, (b) waited another 5-10 minutes until 9:13 to mobilize the necessary staff, supplies and equipment, and (c) waited another 4-5 minutes until 9:18 "to do the C-section and get Miriam

¹⁷*Id.* at 663.

out.”¹⁸ The hospital claims Dr. Keys’s testimony proves that its nursing negligence and failure to have an obstetrician available didn’t matter because Dr. Keys or another obstetrician either would have left the hospital or delayed the C-section for 33 minutes between 8:45 and 9:18, by which time Miriam would have suffocated long enough to develop cerebral palsy anyway.

Under *Faust v. Albertson*, the jury could have disbelieved Dr. Keys’s testimony because it was inconsistent with the observational evidence that it really only took her 3 minutes to do the C-section after she drove back to the hospital from dinner, ripped Sharla’s hospital bed out of the wall, and ran it down the halls to the operating room. 9/18 RP 126; 9/17 RP 83-84; 9/22 RP 80. Or the jury could have concluded from other medical expert evidence that Miriam would not have suffocated in utero and developed cerebral palsy, even if Dr. Keys had delivered her at 9:18.¹⁹

Under *Faust*, the jury also could have concluded that Dr. Keys’s testimony also was not credible because of the self-interest and fraternal

¹⁸Appellant’s Reply Brief, p. 4.

¹⁹See pp. 11-20 of Respondent’s Brief for the other direct and circumstantial medical expert evidence that Miriam’s injury was proximately caused by the hospital’s corporate and nursing negligence, including its failure to have an obstetrician available to do a C-section.

ties stemming from her and Dr. Stemmerman's close relationships with the hospital, its labor and delivery nurses, and its risk manager. 9/30 RP 175. Dr. Stemmerman and Dr. Keys practice as "Evergreen Women's Care" and maintain their offices in the professional plaza attached to the hospital. 9/30 RP 175. Dr. Stemmerman was a hospital employee and its Chief of Women's and Children's Services. 9/17 RP 203; 9/30 RP 174-75. On the first business day after Miriam was born, Dr. Stemmerman met with the hospital's risk manager to plan their defense of Miriam's birth trauma claims. 9/17 RP 212-13. The meeting had no medical purpose, and Dr. Stemmerman did not tell the Tavareses about it. 9/17 RP 213-14.

Conversely, Dr. Keys's self-interest and bias ran against the Tavareses who had sued Dr. Stemmerman, Evergreen Women's Care, and the hospital. Dr. Keys resented the Tavareses' allegations that Dr. Stemmerman's lack of skill, care and learning, the hospital nurses' inexperience and incompetence, and the hospital's unsafe staffing violated the standard of care and caused Miriam's anoxic birth injury. CP 20-25. At her first deposition, Dr. Keys tried to prevent the Tavareses from establishing that the hospital's nursing negligence and failure to have an obstetrician available proximately caused Miriam's injury. She did this by

refusing to testify when she would have performed a C-section, if she had stayed at the hospital to monitor Sharla. CP 3504-3510. Dr. Keys only provided that testimony at a second deposition under the compulsion of a court order. CP 3571-3584; 3613-3615.

The jury also heard testimony that Dr. Keys had a faulty memory of Miriam's fetal heart monitor tracing. Dr. Keys testified that she looked at the fetal monitor tracing and saw it was "non-reassuring" with "variable decelerations", "late decelerations", "minimal variability", and "bradycardia for more than a minute." Exhibit 9; 9/30 RP 192-93. But Nurse Short testified that it was probably Dr. Keys who inaccurately wrote in the hospital Delivery Record on the night Miriam was born that the fetal monitor had been "reassuring." Exhibit 9; 9/30 RP 55. Nurse Short testified that physicians, not nurses, fill out the bold black Fetal Monitor Interpretation boxes on the Delivery Record. 9/30 RP 55. Dr. Keys was the only physician who interpreted Miriam's fetal monitor tracing before she was born because she was the only obstetrician in the hospital.

Since Dr. Keys knew the "reassuring" fetal monitor interpretation in the Delivery Record was inconsistent with Miriam's fetal heart tracing, the jury reasonably could have concluded that Dr. Keys was not credible

because she developed a faulty memory of the tracing right after Miriam was born and inaccurately marked it “reassuring.” Or the jury could have concluded that Dr. Keys wrote an inaccurate Delivery Record to create the false impression that the hospital nurses did not have advance warning that Miriam was in fetal distress and needed an obstetrician to deliver her.

In this case, as in *Faust*, there also was evidence of fraternal silence. Erik Tavares testified that when Dr. Keys came to Sharla’s room a day or two after Miriam was born, she ignored his question on why this had happened to Miriam:

I approached her and just asked flat out, I just said, "Dr. Keys, why did this happen?" and I was ignored completely. I mean, as if, you know, I was three feet away, and she didn’t even turn and look at me.... 9/17 RP 90.

From this circumstantial evidence, the jury could conclude that Dr. Keys was not credible because starting from the hour after Miriam was born, she maintained a fraternal silence about the warning signs of Miriam’s fetal distress, the cause of Miriam’s brain injury, and the time when she would have done a C-section, just as Dr. Stemmerman and the hospital maintained a fraternal silence about their risk management meeting two days after Miriam was born.

D. The Hospital's Negligence Proximately Caused Miriam's Bodily Injury and Her Parents' Consequential Loss of Services and Consortium.

A parent's loss of consortium "injury ...is derivative" of her child's bodily injury.²⁰ Consequently, the jury's determination that the hospital was negligent to Miriam also establishes its negligence to her parents, whose loss of services and consortium claims derive solely from Miriam's bodily injury.

The uncontradicted "facts in evidence" from the lay, medical and vocational records and testimony at trial established that Miriam is severely disabled and her parents have sustained, and will continue to suffer, a significant loss of parental services and consortium for as long as they or Miriam live. The Tavareses thus established injury/damages under RCW 4.24.210.

The hospital does not dispute that the Tavareses proved the negligence and injury/damage elements of their loss of consortium claims. But it argues the jury could have found that Miriam's injury and her parents' loss of consortium had different proximate causes—*i.e.* that "Miriam had sustained significant injury before Mrs. Tavares arrived at

²⁰*Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 774, 733 P.2d 530 (1987).

Evergreen” and therefore the jury “could properly have concluded that Sharla and Erik’s claimed damages were not proximately caused by Evergreen’s alleged negligence.”²¹ This argument fails, however, because under the jury instructions and clearly established legal authority, the jury’s verdict that the hospital’s negligence proximately caused Miriam’s bodily injury inescapably means that the hospital’s negligence also proximately caused her parents’ loss of services and consortium.

Under the burden of proof instruction, the jury initially had to find, and did find, in its verdict for Miriam “that the negligence of the defendant [hospital] was a proximate cause of injury to the plaintiff.”²²

Under the concurring cause and particular susceptibility instructions, the jury further had to find, and did find, that Miriam’s bodily injury was *not* solely caused by a preexisting condition or by a natural progression of a preexisting condition.²³ The concurring cause instruction said “if you find the sole proximate cause of injury or damage to the plaintiff was a preexisting medical condition, then your verdict should be

²¹Appellant’s Reply Brief, p. 22.

²²Instruction No. 12 (WPI 21.02). CP 2313.

²³Instruction Nos. 13 (WPI 15.04) and 21 (WPI 30.18.01). CP 2314, 2318.

for the defendant.” CP 2314. The particular susceptibility instruction said, “there may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the pre-existing condition even without this occurrence.” CP 2318.

Under these instructions, the jury would have returned a verdict for the hospital, if it had found that Miriam’s bodily injury was solely caused by a preexisting condition or resulted from a natural progression of a preexisting condition. But the jury did not do that. Instead, it returned a verdict for Miriam against the hospital. CP 2322-23.

Alternatively, if the jury had found that a divisible portion of Miriam’s bodily injury occurred before she was in the hospital, it would have segregated her damages under Instruction No. 22 between the preexisting injury and the injury that was proximately caused by the hospital’s negligence.²⁴ But the jury did not do that either. Instead, the

²⁴Instruction No. 22 provides:

If you find that the defendant was negligent and was a proximate cause of the plaintiff’s injury, and if you find that any brain injury to plaintiff Miriam Tavares occurred both before and after she arrived at the defendant hospital on May 30, 2003, then the defendant hospital has the burden of proof for segregating that injury before and after she arrived at the hospital. If you further find that the injury is indivisible, then the defendant hospital is responsible for the entire injury. CP 2319.

jury's verdict awarded Miriam \$348,208 in medical expenses, which was the exact amount of her total medical expenses up to the time of trial. CP 2322-23. The verdict did not allocate any of Miriam's medical expenses to any preexisting injury. 9/11/08 RP 147; 10/1/08 RP 26.

Under these instructions, either the jury found that the hospital's negligence was the sole proximate cause of Miriam's injury, or it found that the hospital's negligence and a preexisting condition proximately caused an indivisible injury. In either event, the jury concluded that the hospital's negligence proximately caused Miriam's entire, indivisible injury. If the jury had found that Miriam had a separate or divisible preexisting injury, it would have returned a defense verdict or segregated her medical expense damages.

E. JNOV and a New Trial Are Required because the Verdicts against Sharla and Erik Tavares Are Inconsistent with Clearly Established Legal Principles.

Washington follows "the widely held rule that damages for loss of consortium are consequential... damages"²⁵ that are "derivative" of a

²⁵*Thompson v. Grange Ins. Ass'n*, 34 Wn. App. 151, 161-62, 660 P.2d 307 (citations omitted), *review denied*, 99 Wn.2d 1011 (1983).

spouse's or child's bodily injury.²⁶ In *Malarkey Asphalt Co. v. Wyborney*, the Court of Appeals held that JNOV is required when a verdict "is inconsistent with clearly established legal principles."²⁷

The jury's verdict that the hospital's negligence proximately caused Miriam's indivisible bodily injury, but did not cause her parents' resulting loss of services and consortium is inconsistent with the legal principle of derivative injury/consequential harm, which is clearly established in *Thompson v. Grange Ins. Ass'n* and *Reichelt v. Johns-Manville Corp.* Accordingly, Sharla and Erik Tavares are entitled to JNOV and a new trial on their loss of services and consortium claims.

F. JNOV and a New Trial Also Are Required because the Verdicts Denying Sharla and Erik Tavareses' General Damages Claims Are Contrary to the Evidence.

In *Palmer v. Jensen*, the jury awarded the plaintiff who was injured in an auto accident \$8,414.89—the exact amount of her medical bills—but no general damages.²⁸ The Supreme Court held the plaintiff was entitled to a new trial on her general damages because "a plaintiff who

²⁶*Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 774, 733 P.2d 530 (1987).

²⁷62 Wn. App. 495, 510, 814 P.2d 1219 (1991).

²⁸132 Wn.2d 193, 196, 937 P.2d 597 (1997).

substantiates her pain and suffering with evidence is entitled to general damages” in addition to her medical expenses.²⁹ It held that the trial court “abused its discretion when it denied plaintiff’s motion for a new trial” because “the jury’s verdict providing no damages for Palmer’s pain and suffering was contrary to the evidence.”³⁰

In this case, as in *Palmer*, the jury awarded Miriam the exact amount of her \$348,208 in medical expenses, but denied her parents’ consequential general damages claims. The verdicts against Miriam’s parents were contrary to the evidence because they did not include their consequential general damages. Under *Palmer v. Jensen*, a new trial is required on Sharla and Erik Tavareses’ general damages claims.

G. A Contributory Fault Defense May Not Be Reinstated on Remand because a Pregnant Woman Does Not Owe a Legal Duty of Reasonable Care to Avoid an Unintentional Injury to Her Fetus.

Washington courts have not recognized a legal duty that requires a pregnant woman to refrain from negligent conduct that could result in unintentional harm to her unborn child. The leading cases from other

²⁹*Id.* at 201.

³⁰*Id.* at 203.

jurisdictions hold that no such duty exists.³¹ In this case, the hospital has not proven that any prenatal duty of care ran from Sharla to Miriam. Even if such a duty did exist, there is no evidence that it was breached.

Dr. Stemmerman testified at trial that she told Sharla Tavares that she was a reasonable candidate for VBAC and had better odds of delivering vaginally than most women, if she tried to VBAC. 9/17 RP 179. At an office visit on May 20, 2003 during the 40th week of the pregnancy, Dr. Stemmerman discussed the “*pros and cons* of VBAC and induction and C-section” with the Tavareses. 9/17 RP 186, 200-01. Dr. Stemmerman testified that the Tavareses “wanted to schedule an induction at around 42 weeks, as opposed to scheduling a C-section, then I went ahead and scheduled induction” for May 31 at 42 weeks. 9/17 RP 189. Just like the Tavareses, Dr. Stemmerman also “was trying to balance the risk of inducing her versus the risk of letting her stay pregnant a little bit longer, keeping our fingers crossed and hoping that she would go into labor.” 9/17 RP 206.

³¹*Stallman v. Younquist*, 125 Ill.2d 267, 531 N.E.2d 355 (1988); *Chenault v. Huie*, 989 S.W.2d 474 (Tex. App. 1999); *Remy v. McDonald*, 440 Mass. 675, 801 N.E.2d 260 (2004). (See Respondents/Cross-Appellants’ Second Statement of Additional Authorities).

Two days later on May 22, Sharla called Dr. Stemmerman's office and asked to move up the induction date from May 31 to May 27. 9/17 RP 201. But Dr. Stemmerman didn't consider that to be medically necessary, "so we put her on the waiting list" for May 27. 9/17 RP 202.

Dr. Stemmerman further testified that a delivery at 42 weeks, which was "my limit" for this pregnancy, 9/17 RP 189, "is within the standard of care for a pregnancy, as long as you're monitoring the baby, and the fetal antepartum testing is reassuring, which was occurring." 9/17 RP 207. She testified there was nothing "emergent or urgent about [Sharla's] condition", 9/17 RP 191, that she did not write in any of her notes that she ever told Sharla Tavares to schedule a C-section, 9/17 RP 215-16, and that Sharla never refused a C-section, 9/17 RP 215-16, or refused her medical advice. 9/17 RP 207.

Thus, the record does not support the hospital's assertion that the Tavareses "rejected their physicians' very strong recommendations that they not proceed with VBAC post-dates" or that "the jury heard evidence that Erik and Sharla rejected two physicians' strong recommendations that they proceed with an elective C-section and not have a VBAC post-dates." Appellant's Reply Brief, pp. 23-24. Dr. Stemmerman herself testified at

trial that Sharla was *not* post-dates: “Technically she’s still not post date, she’s just past her due date, which is different than post dates, just to clarify that point.” 9/17 RP 186-87.

Dr. Stemmerman’s prenatal records do not say that she recommended a C-section. Exhibit 104; 9/17 RP 214-15. Sharla testified that Dr. Stemmerman “never told us that she strongly wanted us to have a second C-section”, and that her perinatologist did not make that recommendation either. 9/22 RP 105-06. Three weeks before she testified at trial, Dr. Stemmerman settled with the Tavareses for negligently misadvising them that 42 weeks, rather than 38 to 40 weeks, was the standard of care for delivering Miriam. 9/2/08 RP 3-4.

In *Zellmer v. Zellmer*, the Washington Supreme Court

expressly rejected the “reasonable parent” standard [for tort liability] and concluded the better approach was to continue to recognize a limited form of parental immunity in cases of ordinary negligence when a parent is acting in a parental capacity.³²

The hospital thus has not proven that Sharla or Erik had a legal duty under Washington law to avoid unintentional infliction of prenatal

³²164 Wn.2d 147, 188 P.3d 497 (2008), *citing Jenkins v. Snohomish County PUD*, 105 Wn.2d 99, 713 P.2d 79 (1986); *Talarico v. Foremost Ins. Co.*, 105 Wn.2d 114, 712 P.2d 294 (1986); *Baughn v. Honda Motor Co. Ltd.*, 105 Wn.2d 118, 712 P.2d 293 (1986).

Cox v. Hugo, 52 Wash.2d 815, 329 P.2d 647 (1958) (disallowing contribution claim against parent who failed to prevent child from wandering into neighbor's yard where she was burned by trash fire.³⁸

The consideration of medical options about the timing and method of delivering a baby involves parental discretion “to determine how the physical, moral, emotional, and intellectual growth of their children can best be promoted.” The hospital does not contend that Sharla and Erik engaged in wanton misconduct in considering and deciding those medical options. Since there was no wanton misconduct, the Tavareses were not legally at fault. *See Jenkins v. Snohomish County PUD*,³⁹ *Baughn v. Honda Motor Co. Ltd.*, *supra*, and *Cox v. Hugo*, *supra*, all rejecting attempts to impute fault to parents through contribution claims.

Under *Zellmer*, *Jenkins*, *Baughn* and *Cox*, even if a pregnant woman had a legal duty of reasonable care to avoid unintentional prenatal injury to her child, and the Tavareses had breached that duty, there still would be no legal basis to reinstate the hospital's contributory fault defense because the Tavareses did not engage in wanton misconduct.

³⁸*Id.*

³⁹105 Wn.2d 99, 713 P.2d 79 (1986).

NO. 62821-6-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

(King County Superior Court Cause No. 06-2-17528-0 SEA)

**SHARLA TAVARES, individually and as Guardian of the Estate of
MIRIAM TAVARES, a minor, and ERIK TAVARES**

Respondents/Cross-Appellants,

vs.

**EVERGREEN HOSPITAL MEDICAL CENTER, aka KING
COUNTY PUBLIC HOSPITAL DISTRICT #2**

Appellant/Cross-Respondent.

**APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Steven Gonzalez, Judge**

CERTIFICATE OF SERVICE

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**FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 OCT 27 AM 10:54**