

No. 67371-8-I

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

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COURT OF APPEALS  
STATE OF WASHINGTON  
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AFRIQUE V. NERO, individually and as Guardian of C.A. NERO, a  
minor,

Plaintiff/Appellant,

vs.

VIRGINIA MASON MEDICAL CENTER, a Washington non-profit  
corporation; CYRUS CRYST, M.D. and JANE DOE CRYST, and the  
marital community composed thereof; and JOHN DOES 1-10,

Defendants/Respondents/Cross-Appellants.

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**RESPONDENTS' OPPOSITION TO APPELLANT'S OPENING  
BRIEF AND RESPONDENTS' OPENING BRIEF IN SUPPORT OF  
CROSS APPEAL**

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## I. INTRODUCTION

This appeal arises from a two-week medical negligence jury trial that resulted in a defense verdict. The jury heard two weeks of testimony with respect to the standard of care Appellant Nero received after her successful kidney transplant, including whether she gave informed consent to certain post-transplant care, and whether she complied with her prescribed treatment.

The claims and defenses in this trial did not remotely involve racial discrimination. During the entire two-week jury trial, not a single witness was asked a question by any party in direct, cross, or re-direct examination about any sort of alleged racial bias of any party, including Respondent Dr. Cryst.

In fact, the only interjection of “race” or “racial anger” in this case arises exclusively and surprisingly from Ms. Nero in this appeal.

Exhibit 132, which is one of hundreds of Dr. Cryst’s clinic notes regarding Ms. Nero’s treatment, contains an un-redacted comment from Ms. Nero’s mother that is the subject of this appeal. This medical record was used during the direct examination of Respondent Dr. Cryst—as one of many records used to track Dr. Cryst’s care of Ms. Nero over the course of three years, including her noncompliance with medical instructions, refusal of best treatment options, and her statements made to and relationships with her medical providers. Exhibit 132 was highly relevant to every aspect of this medical negligence action. However, it was never admitted to interject “race”

or “racial anger” into the trial, nor did any witness testify about any “racially charged evidence.”

Exhibit 132 was admitted, without objection, by Appellant Nero and Respondents in their respective ER 904 Submissions, and again by Appellant Nero in her Trial Brief. All of Ms. Nero’s submissions were un-redacted. Moreover, Ms. Nero never moved *in limine* to exclude or redact any portion of Virginia Mason Medical Center medical records.

The trial court properly exercised its discretion in admitting un-redacted Exhibit 132. The trial court ruled that the statement in the medical record was made by Ms. Nero’s mother; that the mother had been examined and cross examined during trial (though not about Exhibit 132); that her comment in the medical record was not unduly confusing or unusually inflammatory; nor was it horribly profane or made in a wild moment of anger.

The trial court did not abuse its discretion. Accordingly, the trial court’s ruling should be affirmed.

## **II. RESTATEMENT OF THE ISSUE ON APPEAL**

Whether this Court should affirm the trial court’s judgment in favor of Respondents by finding that the trial court did not abuse its discretion when it admitted Appellant Afrique Nero’s medical records, which Appellant Nero

and Respondents both admitted as evidence at trial, without objection, pursuant ER 904?

### **III. ASSIGNMENT OF ERROR ON CROSS APPEAL**

The trial court erred by failing to submit Respondents' proposed jury 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 ISSUE ON CROSS APPEAL**

Whether the trial court failed to properly inform the jury of the applicable law when it declined to admit Respondents' jury instruction that Ms. Nero's award of general damages, if any, would be tax free?

### **V. RESTATEMENT OF THE CASE ON APPEAL**

#### **A. Appellant Nero's Kidney Disease, Transplant and Post-Surgery Medical Care.**

Africque Nero, a woman now 41 years old, was diagnosed with kidney disease while she was in college. (RP 842:5-10 (May 12, 2011)) She returned to her mother's home in Alaska and treated with nephrologists there, including Steven Tucker, M.D., for 13 years. (PR 844:18-25 (May 12, 2011)) Around 2001, Ms. Nero's kidney function declined to the point where she

began receiving a dialysis. (RP 493:10-22 (May 10, 2011); RP 848:2-14 (May 12, 2011))

In 2002, Ms. Nero was placed on a kidney transplant wait list. (RP 497:11-13 (May 10, 2011)) After several years, a kidney was available for transplant in Seattle. (RP 498:12-17; 501:12-15 (May 10, 2011)) Ms. Nero flew to Seattle for the transplant surgery, and also met with Dr. Cryst, who would be providing her nephrology care in the immediate post-operative period. (RP 503-04 (May 10, 2011))

In June 2004, Ms. Nero had a successful kidney transplant at Virginia Mason Medical Center. (RP 858:22-25—859:1-2 (May 12, 2011)) She was advised by the transplant team and pharmacist about all of the medications she needed to take, and the necessity of taking these approximately 12 or 13 medications, including CellCept, an immunosuppressant, exactly as prescribed to keep the body from rejecting the kidney. (RP 860-63; RP 874; RP 884:9-12 (May 12, 2011))

Within seven days after the transplant, Ms. Nero experienced severe stomach pain and took Aleve, an over-the-counter nonsteroidal anti-inflammatory medication, four times per day. (RP 865:6-17 (May 12, 2011)) She advised Dr. Cryst of her stomach pain, and on that same day, Dr. Cryst

arranged for Ms. Nero to see a gastroenterologist. (RP 867:16-23; RP 964:1-13 (May 12, 2011)) Ms. Nero had gastritis; Dr. Cryst strongly advised Ms. Nero to not take Aleve again because of the adverse effect it has on kidney functions. (RP 874-75 (May 12, 2011)) Dr. Cryst also lowered the CellCept dosage. (RP 874 (May 12, 2011))

Subsequently, she and her mother returned to Alaska for follow-up treatment with Dr. Tucker. Upon her return and seven weeks after her transplant, Ms. Nero began having stomach pain; Dr. Tucker recommended that she go to the emergency room. (RP 896:3-9 (May 12, 2011)) Ms. Nero testified that she was angry and upset that Dr. Tucker did not go the emergency room to see her. (RP 986-97 (May 12, 2011)) She was afraid that the emergency room doctors did not know what they were doing, and that she might lose her kidney. (RP 897:13-15 (May 12, 2011))

Ms. Nero testified at trial that Dr. Tucker was “jealous” of Dr. Cryst and that she and Dr. Tucker had argued about it. (RP 897:16-25; 989:1-6 (May 12, 2011)) According to Ms. Nero, “I didn’t see a doctor for two months because Dr. Tucker and I broke our relationship up in the argument[.]” (RP 899:13-19 (May 12, 2011))

During this two-month period, Ms. Nero did not have the required post-kidney transplant lab work done. (901:23-25—902:1-2 (May 12, 2011)) Instead, she and her mother packed up, sold her mother's house, moved to Seattle, and eventually resumed medical care with Dr. Cryst. (RP 899:20-25; 902:11-23 (May 12, 2011))

Ms. Nero testified that when she first met with Dr. Cryst in 2004, he spent a lot of time with her, and also repeatedly made himself available to her for same day appointments when she called and wanted to be seen that day. (RP 937:11-18 (May 12, 2011))

In November 2004, Ms. Nero's serum creatinine level (a measure of kidney functional) was elevated. (RP 906:1-4 (May 12, 2011)) Dr. Cryst was very concerned and wanted Ms. Nero to go to the hospital for a steroid pulse and a needle biopsy on the kidney. (RP 907:1-6 (May 12, 2011))

Ms. Nero, who has a self-described needle phobia, was also concerned about the side effects of taking a steroid, and generally was very upset. (RP 908 (May 12, 2011)) She stated to the hospital nurse that she "would rather lose this kidney than go through any more of this." (RP 908:8-22 (May 12, 2011)) In fact, the needle biopsy showed that her body was rejecting the

kidney. (RP 909:14-19 (May 12, 2011)) She was discharged from the hospital on November 17, 2004.

Ms. Nero was upset about Dr. Cryst's care as soon as she knew that the transplanted kidney was failing. (RP 917:3-6 (May 12, 2011))

By July 2007, she believed that Dr. Cryst had withheld information from her about a connection between CellCept and the kidney rejection, and that Dr. Cryst did not see that the rejection was occurring from the CellCept early enough. (RP 916-17 (May 12, 2011)) It was also her personal belief that the CellCept had caused her gastrointestinal problems, and that, because Dr. Cryst would not listen to her, he did not make changes in a way that would save her kidney. (RP 930 (May 12, 2011))

Ms. Nero re-started dialysis, fully understanding the necessity of dialyzing three times per week for the correct amount of time, which Dr. Cryst and the Auburn Kidney Center heavily and repeatedly emphasized. (RP 932-33 (May 12, 2011)) Unfortunately, despite ongoing calls and reminders from Dr. Cryst, Ms. Nero cancelled, skipped or was a "no call, no show" for many, many dialysis appointments. (RP 933-34; RP 944-46; RP 949:10-17; RP 954:5-15; RP 956:24-25; 957:1-4 (May 12, 2011))

Sometimes Ms. Nero would not show up for dialysis for five days in a row. (RP 944:21-25; 945:1-3 (May 12, 2011)) She testified that patients are not treated as well in a dialysis center as cancer patients are treated, so she felt disgruntled. (RP 936:1-23 (May 12, 2011)) In fact, “they insist on treating us like we’re a bunch of toddlers about things. Oh, I’m going to call your doctor because you’re not doing what we tell you, or, I’m going to tell on you. I mean, it’s elementary school behavior.” (RP 947:4-9 (May 12, 2011))

In 2007, Dr. Cryst was the first of many nephrologists who advised Ms. Nero to switch from a tunnel dialysis catheter to an arteriovenous fistula, because it was difficult to dialyze her due to the flow rate and infection risk of catheters. (RP 941:3-6; 956:10-15 (May 12, 2011)). In fact, Ms. Nero was had recurring infections related to the catheters. (RP 958:6-12 (May 12, 2011)) She was placed on “inactive status” on the transplant list because of an ongoing infection related to the catheter. (*Id.*) After the latest infection cleared, Ms. Nero was taken off the transplant list due to her own dialysis compliance issues. (RP 958:18-20 (May 12, 2011))

Virginia Mason terminated her treatment because Dr. Raker (the vascular surgeon) would no longer continue to place what he thought to be

unsafe catheters, but Ms. Nero testified that treatment was terminated because she and her mother filed a complaint with the hospital after being taken off the transplant list. (RP 941:7-14 (May 12, 2011)) Ms. Nero obtained a copy of her medical records from Virginia Mason and began interviewing other doctors to be her new nephrologist. (RP 1-4 (May 12, 2011))

With respect to her separation from Dr. Cryst's medical care, she testified as follows:

Q: By that time, you felt there were some problems with Dr. Cryst's care?

A: Yes.

Q: Whatever it was, you felt there were problems by then, correct?

A: Yeah. I sensed his reactions to my suffering and to how I was reacting, that it was time to move on.

(RP 962:5-12 (May 12, 2011))

**B. Thousands of Pages of Medical Records Were Admitted as Evidence During Ms. Nero's Two-Week Trial.**

On June 8, 2009, Ms. Nero filed a lawsuit against Virginia Mason Medical Center and Dr. Cryst, alleging medical negligence. (CP at 3-11) On May 9, 2011, a two-week trial ensued before the Honorable Carol Shapira, in King County.

Prior to trial, Ms. Nero filed her “ER 904 Submission,” which included hundreds of pages of her un-redacted medical records from Virginia Mason Medical Center, among other providers. (CP at 238-242) Within those hundreds of pages is Dr. Cryst’s three-page un-redacted clinic note from his May 30, 2007, clinic visit with Ms. Nero and her mother, which is the subject of Ms. Nero’s appeal. (Appellant’s Opening Brief at 2, 5-13) Ms. Nero also submitted the same un-redacted May 30, 2007, clinic note (among other medical records) in support of her Trial Brief. (CP at 816, 825-27)

Likewise, Virginia Mason Medical Center and Dr. Cryst filed their “Notice of Admissibility of Documents Pursuant to ER 904” which also included Ms. Nero’s voluminous medical records from Virginia Mason (over 700 pages)—including Dr. Cryst’s un-redacted May 30, 2007, clinic note. (CP at 233-36)

On the last day of trial, the court heard extensive oral argument on the admissibility of Dr. Cryst’s May 30, 2007, clinic note, and ruled as follows:

I’m going to stop you. I’m not going to redact. This is Ms. Nero, the mom, this is her statements. [sic] Again, if she had called Dr. Cryst a name, if he had called her a name, I would take that out.

She was here to be examined and cross-examined. I don’t think it’s unduly confusing or unusually inflammatory. So again, I would feel differently if it was, again, some horribly profane or wild moment of anger. This is not. It’s a statement. It’s in the medical records and the parties—

(RP 2009:9-19 (May 19, 2011))

Accordingly, Exhibit 132, which contained a comment from Ms. Neros' mother that is the subject of this appeal, was admitted. During the two-week trial, over one-hundred exhibits were admitted into evidence, comprising over 4,000 pages in 11 volumes of three-ring binders.

Appellant Nero states that "these racially charged notes were published to the jury during trial." (Appellant's Opening Brief at 6, citing RP 1824:21—1825:13 (May 18, 2011)) This is incorrect and misleading. Dr. Cryst was asked during direct examination about his May 30 clinic note with respect to treatment and not wanting to upset Ms. Nero or her mom. In its entirety, the Report of Proceedings at 1824:21 to 1825:13, upon which Ms. Nero relies, reports the direct examination of Dr. Cryst as follows:

Q: At the end of May, she had come out of the hospital, and you had a clinic visit; right? This is the May 30.

A: Um-hum.

Q: You—you note that you did not discuss access for dialysis at that point even though it was the only practical modality. Why didn't you talk about it again with her on that date?

A: I don't remember exactly the time, but lots of times these discussions would really inflame her. She'd get really angry and—and we—it just—I guess I didn't want to make her upset at that.

Q: When you record that she really does not want to hear anything to the contrary, would she

sometimes shut you down in terms of where the conversation was going?

A: Oh, yes.

(RP 1824:21—1825:13 (May 18, 2011))

After Dr. Cryst testified, several jurors submitted written questions to him. (CP at 2131-33). All questions related to Ms. Nero’s medical care and prescription records. (CP at 2131-33) Conversely, no juror asked Dr. Cryst about his doctor-patient relationship with Ms. Nero; the impact of her race, if any, on her medical care; or how and why Ms. Nero’s doctor-patient relationship grew “strained.” (Appellant’s Opening Brief at 4)

In fact, during the entire two-week jury trial, not a single witness—including Ms. Nero’s mother, Cynthia Nero—was asked a question in direct, cross, and re-direct examination about any alleged accusation of Dr. Cryst mistreating Ms. Nero based on her race, or feeling threatened by her mother. Notably, Appellant’s Opening Brief is void of any reference to the Report of Proceedings to support her contention that “racially charged notes” were interjected into the trial. (Appellant’s Opening Brief at 6)

Ms. Nero, who had survived years of kidney disease, dialysis, a successful kidney transplant, followed by her body rejecting the kidney, and more dialysis was—like anyone in her circumstance—understandably frustrated, and at times angry, with her medical situation.

Dr. Cryst, who is the Chief of Nephrology at Virginia Mason Medical Center, helps and empathizes with his patients as they transition from a successful transplant surgery to a healthy life with a different kidney. When Dr. Cryst was asked how he deals with patients who come in with anger and frustration about the transplant process, Dr. Cryst answered as follows:

Well, it's – it's rare, but not entirely uncommon. And you just have to realize that they're ill, and they have health problems. And you try to work with them the best you can. But, generally, by spending time with them and explaining things, people calm down and they get through it, and we move forward.

(RP 1829:16-21 (May 18, 2011))

The following day, Ms. Nero called her rebuttal expert, then closing arguments ensued. (RP 1998-2191 (May 19, 2011)) After some deliberation, the jury returned a defense verdict. This appeal followed.

## **VI. STATEMENT OF THE CASE ON CROSS APPEAL**

Plaintiff moved *in limine* to “exclude evidence relating to whether a recovery by Plaintiff would or would not be subject to federal income taxation or any other form of taxation.” (CP at 335) In response, Virginia Mason Medical Center and Dr. Cryst stated that “[a]ny jury award to the plaintiffs in this case would not be subject to federal income tax. The jury deserves to be apprised of this fact in jury instructions, and defendants have submitted a proposed instruction to that effect.” (CP at 422)

Virginia Mason Medical Center and Dr. Cryst submitted a proposed instruction, which states: “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.” (CP at 455) This proposed instruction contained numerous citations to cases and a federal statute. (CP at 455)

Virginia Mason Medical Center and Dr. Cryst argued that it is the law that general damages are not taxed, and that Washington should follow other jurisdictions in instructing the jury that there is no federal income tax on any recovery for pain and suffering by plaintiffs. (RP 105-109 (March 18, 2011))

The trial court granted Ms. Nero’s motion *in limine* to exclude evidence relating to whether a recovery by Plaintiff would or would not be subject to federal income taxation or any other form of taxation. (RP 109:23-24 (March 18, 2011)) The trial court also stated it would not instruct the jury 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.” (RP 111:17-22 (March 18, 2011))

On May 19, 2011, the trial court submitted 22 instructions to the jury. (CP at 2205-29) None of the instructions addressed the legal effect of taxation on a jury’s award of general damages.

In closing argument, Ms. Nero asked the jury to award her general damages in the range of \$1 million to \$2 million. (RP 2123:5-6 (May 19, 2011))

## **VII. LEGAL ARGUMENTS IN OPPOSITION TO APPELLANT'S OPENING BRIEF**

### **A. The Standard of Review Is Abuse of Discretion.**

An appellate court reviews a trial court's evidentiary rulings for abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Thus, even where an appellate court disagrees with a trial court, it may not substitute its judgment for that of the trial court unless the basis for the trial court's ruling is untenable. Moreover, an appellate court may affirm a trial court's ruling on any grounds the record supports. *State v. Frodert*, 84 Wn. App. 20, 25, 924 P.2d 933 (1996).

Here, the trial court properly exercised its discretion in admitting over 700 pages of Ms. Nero's medical records from Virginia Mason Medical Center, including Exhibit 132, a document containing her mother's comment.

### **B. The Trial Court Properly Exercised Its Discretion in Admitting Respondent Nero's Medical Records When She Squarely Put Her Medical Care on Trial.**

Evidence of Ms. Nero's noncompliance with medical instructions, refusal of best treatment options, and her statements made to and

relationships with her medical providers was highly relevant to every aspect of this medical negligence action.

The threshold for relevant evidence is low: It need only have “any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without it.” ER 401. All relevant evidence is admissible unless an exception applies. ER 402. The rules of evidence are construed to secure fairness in administration “to the end that the truth may be ascertained and proceedings justly determined.” ER 102. In order to secure a fair proceeding in which the jury was allowed to fully assess the truth of the allegations against Dr. Cryst, evidence of Ms. Nero’s active participation in her health care was allowed.

Under ER 403, the objecting party has the burden of proving – not merely a prejudicial effect – but an *unfairly* prejudicial effect. The probative value must be *substantially* outweighed by the danger of unfair prejudicial effect. ER 403.

Ms. Nero requested that the trial court suppress a vast amount of evidence relating to her presentation as a patient, including her long-standing medical noncompliance issues, her refusal of recommended medical care, her strained relationships with multiple medical providers, and even her own comment in November of 2004 that she would rather lose her transplanted kidney than continue certain treatments. (CP at 314-40) This evidence was all contained in Ms. Nero’s medical records and testimony from her providers. It

was relevant to the issues of the standard of care, causation, damages, bias, failure to mitigate, intentional conduct, and the statute of limitations.

The trial court did not abuse its discretion in admitting Exhibit 132, along with thousands of other pages of medical records. The trial court's grounds and rationale were solidly tenable in admitting Exhibit 132.

**C. The Trial Court Properly Exercised Its Discretion in Admitting Respondent Nero's Medical Records When She, Herself, Submitted Those Records Pursuant to ER 904—as Did Respondents.**

During trial, Ms. Nero repeatedly objected to the admission of many medical records and documents which she herself submitted pursuant to ER 904. These medical records were clearly relevant as they discuss details of the very treatment which was at issue at trial. Their relevance is confirmed by the fact that in most instances, both sides submitted these records under ER 904—including, but not limited to Dr. Cryst's May 30 clinic note, which was admitted as Exhibit 132.

The Washington State Supreme Court has clarified that the purpose of ER 904 is to expedite the admission of documentary evidence. *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 260, 944 P.2d 1010 (1997). When one party designates documentary evidence under ER 904, this designation creates an "expectation of admission." *Id.* Naturally, this "expectation of admission" applies to both parties, including the party who designates the evidence. *Hendrickson v. King County*, 101 Wn. App. 258,

268, 2 P.3d 1012 (2000). Therefore, if the original proponent of the evidence decides not to offer the document as evidence, the document may be offered by the opposing party, and the original proponent will be deemed to have waived any objection. *Id.* Thus, **“ER 904 requires the proponent of evidence to examine it carefully before offering it.”** *Id.*

Here, Ms. Nero was obligated under the rules of evidence to carefully examine every page of her medical records before offering it. If she wanted to exclude what she now claims to be “racially charged evidence” (Appellant’s Opening Brief at 1), then it was incumbent upon her to: (1) not offer the medical record in her ER 904 Submission; (2) only offer a redacted medical record in her ER 904 Submission; and/or (3) move to exclude the record, in whole or part, *in limine*. Contrary to these options, Ms. Nero introduced as admissible Dr. Cryst’s un-redacted May 30, 2007, medical record in both her ER 904 Submissions, and with her Trial Brief. Any error at this stage lies squarely with her acts and omissions.

*Hendrickson v. King County*, 101 Wn. App. 258, 2 P.3d 1012 (2000) is directly on point. In *Hendrickson*, the plaintiffs objected when the defendants sought to introduce medical records that had been designated by the plaintiffs under ER 904. The plaintiffs argued that one party’s designation does not make the evidence automatically admissible by another party. Although the trial excluded the records, the appellate court concluded that the trial court erred in its ruling. *Id.* at 268. Under *Hendrickson*, medical

records designated by one party are automatically admissible by the other party. *Id.* See *Tornetta v. Allstate Ins. Co.*, 94 Wn. App. 803, 973 P.2d 8, review denied 138 Wn.2d 1012 (1999) (holding that in the absence of a timely objection, a document offered pursuant to ER 904 is deemed admitted).

ER 904(c)(2) states, in relevant part, as follows: “If an objection is made to a document on the basis of admissibility, the grounds for the objection shall be specifically set forth, except objection on the grounds of relevancy need not be made until trial.”

Appellant Nero contends that she did not waive any objection to the admissibility of Dr. Cryst’s May 30 clinic note. (Appellant’s Opening Brief at 13 n.3) However, Ms. Nero did not object to Virginia Mason Medical Center’s submission of her un-redacted medical records under ER 904(c)(2). Accordingly, all evidentiary objections, *except relevance*, are deemed waived and the documents were properly admissible at trial.

At trial, *Ms. Nero never objected on relevancy grounds*. A close reading of the Report of Proceedings, upon which Ms. Nero relies, reveals that her sole argument regarding admissibility of Exhibit 132 was grounded in its probative value, not its relevance. (Appellant’s Opening Brief at 13, citing RP 2006:21—2007:20, 2008:22—2009:8 May 19, 2011)) However, she waived that argument when she submitted her own un-redacted medical

records under ER 904, and failed to object to Virginia Mason Medical Center's submission to those same records under ER 904.

The only question—reserved for the trial court—is its relevance. Here, the trial court properly exercised its discretion in admitting Exhibit 132 because the probative value of Ms. Nero's noncompliance with medical instructions (such as the necessity of consistently receiving dialysis, refusal of best treatment options, and her statements made to and relationships with her medical providers outweighed any potential prejudice of Ms. Nero's mother's statement. The trial court found that Ms. Nero's mother's statement was neither unusually inflammatory nor horribly profane. (RP 2009:9-19 (May 19, 2011)) The trial court also found that the statement did not include name calling, nor was it made in a wild moment of anger. (*Id.*). Accordingly, Exhibit 132 was properly admitted.

**D. The Trial Court Did Not Abuse its Discretion in Admitting Exhibit 132 Because the Medical Record Was Not Unusually Inflammatory.**

Appellant Nero contends that a jury of her peers entered a defense verdict solely due to a comment made by her mother, and contained in the third paragraph of Dr. Cryst's three-page May 30, 2007, clinic note. (Appellant's Opening Brief at 6) Notably, she is not concerned with any witness' testimony during two weeks of trial, nor does she question any of the

other thousands of pages of medical records that were admitted into evidence. Rather, her sole focus on appeal is an isolated paragraph in one of Dr. Cryst's hundreds of medical records, wherein he contemporaneously records as follows:

Ricky has made me uncomfortable emphatically stating she will not be mistreated based on race. Her mother joins in with statements like "don't make us go all black on you now." These statements are not appropriate and make me uncomfortable even said in a laughing way. I feel they are taunting me. It is always my goal to treat all my patients fairly regardless of ethnic background. I do not correct these statements because it only takes me farther from the real point of these clinic visits—Ricky's renal failure.

Exhibit 132, paragraph 3, page 2 of 3.

First, Ms. Nero never moved *in limine* to exclude this paragraph of her medical record. If she was truly concerned about any alleged appeal to "latent bias against vocal, assertive African American women" (Appellant's Opening Brief at 12), then it was her responsibility to move *in limine* to exclude these sentences. She did not.

Second, Ms. Nero submitted her medical records—including the one that is the subject of her appeal—in her ER 904 Submissions. She did not redact a single sentence from any of her ER 904 documents. On the last day of trial, she offered an objection to the admissibility of Exhibit 132, belatedly claiming it was "unduly prejudicial," despite the fact that the jury did not hear

one *iota* of testimony regarding this discrete portion of this medical record. In fact, Ms. Nero fails to submit any testimonial evidence to support her contention that “latent bias against vocal, assertive African-American women” was interjected into the two-week trial. (Appellant’s Opening Brief at 12)

The trial court properly ruled that this portion of the medical record was not unduly confusing or unusually inflammatory. Rather, it was a statement in the medical records, made by Ms. Nero’s mother, who was available for direct and cross examination (but was never questioned about Exhibit 132). (RP 2009:9-19 (May 19, 2011))

Third, Ms. Nero’s reliance on *abortion cases* (holding that the prejudicial effect of a woman having an abortion far exceeds its probative value) is unavailing. No one can rationally dispute that the topic of abortion is explosive. It is a socially, politically, and emotionally volatile subject throughout the country, including the Pacific Northwest.

Abortion is an undeniable emotional and political lightning rod. *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 462, 746 P.2d 285 (1987) (acknowledging that “the prejudicial nature of this evidence is beyond question”); *Garcia v. Providence Med. Ctr.*, 60 Wn. App. 635, 806 P.2d 766

*Garcia* is actually a case involving the prejudicial effect regarding *abortions*. The *Garcia* Court noted that it did not believe “that deep-seated feelings on this highly personal and controversial issue could be sufficiently flushed out during voir dire.” *Garcia*, 60 Wn. App. at 644. In the case at bar, there is absolutely no evidence that the jurors engaged in actual prejudice, nor does Ms. Nero demonstrate actual prejudice.

Similarly, in *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 230 P.3d 583 (2010), the plaintiff, unlike Ms. Nero, moved *in limine* to exclude evidence of his immigration status. This Supreme Court case triggered enormous briefing from *amici curiae*, including the ACLU, Northwest Immigrants’ Rights Project, Centro de Ayuda Solidaria a los Amigos, National Employment Law Project, Latino Bar Association of Washington, and Legal Voice.

In *Salas*, our Supreme Court acknowledged that “immigration is a politically sensitive issue” and that “issues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder’s duty to engage in reasoned deliberation.” *Salas*, 168 Wn.2d at 672. The *Salas* Court ruled that the plaintiff’s immigration status was relevant to the issue of lost future earnings, but that the probative value was substantially outweighed by the danger of unfair prejudice, such that a Mexican’s

immigration status would likely “stimulate an emotional response rather than a rational decision.” *Id.* at 671.

In contrast to *Salas*, Ms. Nero failed to move *in limine* to exclude what she believed to be inadmissible under ER 403. In fact, Ms. Nero *actively introduced* Dr. Cryst’s May 30, 2007, clinic note in her ER 904 Submissions and with her Trial Brief. Accordingly, *Salas* undercuts Ms. Nero’s arguments.

Inexplicably, Ms. Nero relies on a criminal case involving profoundly egregious prosecutorial misconduct wherein the prosecutor, on direct examination of a witness, refers to police as “po-leese”; comments to a black witness on the stand that “black folk don’t testify against black folk”; and asks a witness about black “code on the streets” that favor against “snitching.” *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011).

*Monday* addressed an intentional interjection of racial bias into a criminal trial. The gravity of *Monday* invoked constitutional violations, not commentary on the Rules of Evidence. *Monday* is inapposite.

In sum, *Salas*, *Kirk*, *Garcia*, and *Monday* fail to support Ms. Nero’s contention that a jury of her peers entered a defense verdict solely due to a

comment made by her mother, as contained in Dr. Cryst's May 30, 2007, clinic note—which she claims triggered racial bias.

## **VIII. LEGAL ARGUMENTS IN SUPPORT OF CROSS APPEAL**

### **A. The Standard of Review Is De Novo.**

Whether a jury instruction correctly states the applicable law is a legal question subject to *de novo* review. *State v. Linehan*, 147 Wn.2d 638, 643, 56 P.3d 542 (2002), *cert. denied* 538 U.S. 945 (2003). The trial court has considerable discretion with respect to the wording of instructions and how many are necessary for the parties to present their theories fairly. *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92 n.23, 896 P.2d 682 (1995).

Instructions are sufficient if they (1) permit each party to argue its theory of the case; (2) are not misleading; and (3) when read as a whole properly inform the trier of fact of the applicable law. *Keller v. City of Spokane*, 146 Wn.2d 237, 250, 44 P.3d 845 (2002); *Pederson's Fryer Farms v. Transamerica Ins. Co.*, 83 Wn. App. 432, 447, 922 P.2d 126 (1996) *review denied*, 131 Wn.2d 1010 (1997).

### **B. A Jury Should Be Informed that Any Award to the Plaintiff Is Tax Free.**

Since the jury in this case never reached the issue of damages, it may tempting to consider it “harmless error” that the trial court refused to instruct the jury that any award to the plaintiff is tax free. However, if this Court

vacates the judgment and remands this case for a new trial, then a jury instruction consistent with this Court's decision will be offered.

The jury instruction proffered by Respondents is not merely academic or trivial, but rather directly affects the final outcome. The proposed instruction states as follows: "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." In this case, Appellant Nero asked for general damages in the range of \$1 million to \$2 million.

The bases for this proposed instruction is a federal statute and numerous cases, including 26 U.S.C. § 104 (except in the case of amounts attributable to certain deductions, "gross income does not include ... (t)he amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness"); *Janson v. North Valley Hosp.*, 93 Wn. App. 892, 905, 971 P.2d 67 (1999) ("tax-conscious jurors may mistakenly assume that a plaintiff's recovery will be subject to federal taxation and therefore increase an award to ensure that the plaintiff is fully compensated") (citing with approval *Norfolk & W.R.R. Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980) (error to refuse to instruct the jury that an award of damages would be tax free)); *Burlington N., Inc. v. Boxberger*, 529 F.2d 284, 297-98 (9th Cir. 1975) (trial court reversed for failure to give instruction that compensatory damages are not subject to federal income tax).

## IX. CONCLUSION

Under Washington law, Ms. Nero had no basis for objecting to the admission of her own medical records that she submitted under ER 904. No timely objections were made to the medical records in question; in fact, both parties actually submitted the records under ER 904. Under Washington law, these records are automatically admissible and can be offered as evidence at trial by either party. The trial court's ruling should be affirmed.

Finally, the trial court erred as a matter of law by not permitting the jury to be informed that general damages are not tax-free. The trial court's ruling should be reversed.

Dated this 13 day of February, 2012.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on the 13<sup>th</sup> day of February, 2012, 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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FILED  
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STATE OF WASHINGTON  
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No. 67371-8-I

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

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AFRIQUE V. NERO, individually and as Guardian of C.A. NERO, a  
minor,

Plaintiff/Appellant,

vs.

VIRGINIA MASON MEDICAL CENTER, a Washington non-profit  
corporation; CYRUS CRYST, M.D. and JANE DOE CRYST, and the  
marital community composed thereof; and JOHN DOES 1-10,

Defendants/Respondents/Cross-Appellants.

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**ERRATA**  
**RESPONDENTS' OPPOSITION TO APPELLANT'S OPENING**  
**BRIEF AND RESPONDENTS' OPENING BRIEF IN SUPPORT OF**  
**CROSS APPEAL**

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## ERRATA

On page 11, paragraph 1, line 4 of Respondents' Opposition to Appellant's Opening Brief and Respondents' Opening Brief in Support of Cross Appeal, filed and served on February 13, 2012, the number "4,000" should be changed to "approximately 2,500." This substitution reflects the number of pages actually admitted, rather than the number of pages offered.

Dated this 17 day of February, 2012.

Respectfully submitted,

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