

No. 71315-9-I

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

BECKY S. ANDERSON,

Respondent,

v.

DONALD R. PAUGH; WENATCHEE VALLEY
MEDICAL CENTER, P.S.; LINDA K. SCHATZ; and
WENATCHEE ANESTHESIA ASSOCIATES,

Appellants.

BRIEF OF APPELLANTS LINDA K. SCHATZ, M.D. AND
WENATCHEE ANESTHESIA ASSOCIATES

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A. INTRODUCTION

Appellants Linda K. Schatz, M.D. and Wenatchee Anesthesia Associates (“WAA”) ask the Court to reverse a judgment that was entered against them in King County Superior Court on December 5, 2013. The trial arose from an intraoperative fire that occurred during a surgery performed on plaintiff/respondent Becky S. Anderson. Dr. Schatz, a partner in WAA, was the anesthesiologist during the procedure.

The jury awarded \$18 million dollars to Ms. Anderson. After a five percent reduction for fault assigned to settling defendant Central Washington Hospital (“CWH”), judgment was entered in the amount of \$17.1 million. This judgment was joint and several against the four appellants in this matter: Dr. Schatz, WAA, and codefendants Donald R. Paugh, M.D., who performed the surgery, and his employer, Wenatchee Valley Medical Center, P.S. (“WVMC”).

The judgment should be reversed due to errors by the trial court that inflated Ms. Anderson’s past and future damages by millions of dollars. Regarding past damages, the trial court refused to apply the statutory collateral source rule, which expressly allows a defendant in a medical malpractice action to present evidence that the plaintiff’s expenses have been paid by a collateral source. This ruling prevented the

defendants from showing that the reasonable value of Ms. Anderson's prior medical care was roughly \$2 million dollars less than the amount claimed.

With respect to future damages, the trial court prohibited the defendants from conducting a Civil Rule 35 physical examination to verify the extent of Ms. Anderson's injuries. This ruling hampered the defendants' ability to challenge Ms. Anderson's assertion that she would be confined to a ventilator for the rest of her life. This presumption increased Ms. Anderson's future economic damages by several million dollars. The trial court thus deprived the defendants of their right to a fair trial on damages.

B. ASSIGNMENTS OF ERROR

Errors Assigned

1) The trial court erred in excluding evidence that Ms. Anderson's past medical expenses had been paid by Medicare.

2) The trial court erred in: (a) prohibiting a defense expert from conducting a CR 35 physical examination of Ms. Anderson; (b) permitting plaintiff's counsel to attack the defense expert's credibility based on the lack of an examination; and (c) precluding the defendants from explaining why such examination had not occurred.

Issues Pertaining to Assignments of Error

1) Under RCW 7.70.080, payments from a collateral source are admissible in medical negligence actions. The trial court excluded evidence that Medicare paid Ms. Anderson's past medical expenses, based on a case that refused to apply RCW 7.70.080 only where the collateral payments came from a settling defendant. Did the trial court err in excluding relevant evidence of collateral payments from a non-party?

2) A CR 35 examination must be allowed where the plaintiff's condition is in controversy and there is good cause. The defendants' expert needed to examine Ms. Anderson to determine whether she could undergo a procedure that would drastically lower her future medical expenses. Did the trial court err in prohibiting this examination and then allowing impeachment of the expert based on the lack of an examination?

C. STATEMENT OF THE CASE

1. Background

The underlying surgery occurred at CWH. CP 4. Dr. Paugh used a laser to remove a vocal cord polyp that was causing Ms. Anderson to experience a hoarse voice. RP 11/19/13 at 229, 11/20/13 at 23. During this procedure, a fire ignited in Ms. Anderson's airway, damaging her trachea and lungs. CP 4.

Ms. Anderson brought medical malpractice allegations against Dr. Schatz, WAA, Dr. Paugh, WVMC, and CWH. CP 1-6. She also brought product liability claims against Medtronic, Inc. and Medtronic Xomed, Inc. (together “Medtronic”) and against Laser Engineering, Inc. CP 6. Medtronic manufactured the endotracheal tube used during the surgery. CP 3. Ms. Anderson voluntarily dismissed Laser Engineering, Inc. and settled with CWH, and the case proceeded to trial against the remaining defendants. RP 10/16/13 at 44-45.

2. The defendants’ requests for a CR 35 physical examination

In pretrial discovery, Ms. Anderson submitted a written Life Care Plan prepared by her expert, Tony Choppa. Mr. Choppa’s Life Care Plan assumes that for the rest of Ms. Anderson’s life she will more or less remain in her current condition, will likely be ventilator dependent, and will need 24-hour nursing care. CP 171; RP 11/7/13 at 99-100, 143. The presumed permanent need for the ventilator increased Ms. Anderson’s future medical expenses by millions of dollars. RP 10/16/13 at 143.

In an effort to evaluate the nature and extent of Ms. Anderson’s injuries and explore alternative treatment options, the defendants retained Dr. Ralph Gilbert, an internationally recognized otolaryngologist. CP 212. After reviewing medical records and videos from plaintiff’s first

bronchoscopy, Dr. Gilbert testified at his deposition on August 12, 2013, that plaintiff is not “required to stay in this current state” and there are options available to her that could greatly improve her quality of life including “the placement of a long T-tube” which would enable her to “come off of the ventilator almost instantaneously.” CP 255, 259. Under questioning from plaintiff’s counsel, Dr. Gilbert testified that while he believed a T-tube was an option for Ms. Anderson and had successfully treated another patient with similar but worse injuries, he could not say for certain that a T-tube would work for Ms. Anderson without first examining her. CP 254, 256-58.

Two days later, on August 14, 2013, the defendants asked plaintiff’s counsel to make Ms. Anderson available for an examination by Dr. Gilbert. CP 261. Dr. Gilbert was willing to fly to Spokane, Washington to conduct the examination at Ms. Anderson’s place of residence and at no cost to Ms. Anderson. *Id.* Plaintiff’s counsel did not respond to or even acknowledge this request. CP 171.

Having heard nothing from plaintiff’s counsel, defense counsel sent an e-mail to plaintiff’s counsel on August 28, 2013, requesting the examination once again. CP 263. The defendants proposed that Dr. Gilbert

would simply observe one of Ms. Anderson's routine bronchoscopies. CP 451-53.

Plaintiff's counsel refused the request, and the parties engaged in a discovery conference on August 29, 2013. CP 171. During the conference, plaintiff's counsel stated that Ms. Anderson would not appear for the examination because: (1) her medical condition is not at issue; and (2) the discovery cutoff had passed. *Id.* The discovery cutoff was August 26, 2013, twelve days after the defendants' initial request for the examination, which plaintiff's counsel ignored. CP 446-47.

The defendants then filed a motion to compel. CP 161-67. Ms. Anderson opposed the motion, complaining that Dr. Gilbert was not licensed to practice medicine in Washington and that the motion to compel was filed after the discovery cutoff. CP 385-97. The trial court denied the motion without explanation. CP 466-67.

Before trial, the defendants moved *in limine* to preclude plaintiff's counsel from impeaching Dr. Gilbert based on the lack of an examination. CP 2184-90. The trial court denied this motion. RP 11/5/13 at 32-33. It also granted Ms. Anderson's motion to preclude the defendants from explaining to the jury why the examination had not occurred. RP 11/15/13 at 32-33.

At trial, Mr. Choppa offered his Life Care Plan, with its presumption that Ms. Anderson would be ventilator-dependent for the rest of her life. RP 11/7/13 at 99-100, 143. Dr. Gilbert testified for the defense that Ms. Anderson was a candidate for a T-tube and that this procedure would free her from the ventilator almost immediately. RP 11/18/13 at 49-50, 57-59, 74-75. Plaintiff's counsel asked him, on cross examination, "you, as you sit there now, individually, without your team, without an assessment, cannot say whether it would be something you'd do and whether or not it would work; you have to do the assessment first, correct?" RP 11/18/13 at 108. Dr. Gilbert answered, "I think it would work for her, but I can't be certain about that." *Id.* The defense estimated that the use of the T-tube would reduce Ms. Anderson's care costs to a range from \$800,000 to \$4.7 million. RP 12/03/13 at 153-54.

3. Exclusion of Medicare payments

Ms. Anderson also moved *in limine* to exclude any reference to payments from collateral sources. CP 1126-32. Over Dr. Schatz and WAA's opposition, the trial court granted this motion. CP 2033-46; RP 10/17/13 at 23. Based on the trial court's ruling, the defendants were precluded from offering evidence that non-party Medicare had paid

Ms. Anderson's past medical expenses, in the amount of \$594,873.89. *See* CP 2804.

At trial, Ms. Anderson presented testimony that she had incurred \$2,655,461.19 in past medical expenses. RP 11/13/13 at 16. Plaintiff's counsel argued in closing that this was the total amount of Ms. Anderson's "past bills." RP 12/03/13 at 90.

4. Judgment and Post-Trial Procedure

On December 5, 2013, the jury returned its verdict. CP 2543. It found that: (1) Dr. Schatz, WAA, Dr. Paugh, WVMC, and non-party CWH were negligent and proximately caused Ms. Anderson's damages; (2) Medtronic was not negligent; and (3) Ms. Anderson's damages totaled \$18 million dollars. CP 2543-45. This included \$2.6 million for past economic damages and \$7.4 million for future economic damages. CP 2545.

The jury apportioned fault as follows: 5% to CWH; 42.5% to Dr. Paugh and WVMC; and 52.5% to Dr. Schatz and WAA. CP 2545. The trial court reduced the judgment by \$900,000, to account for the 5% fault assigned to CWH. CP 2540. It then entered judgment against Dr. Paugh, WVMC, Dr. Schatz, and WAA, jointly and severally, for the remaining \$17.1 million. CP 2540.

Dr. Schatz and WAA timely appealed. CP 3654. Dr. Paugh and WVMC filed a separate notice of appeal. CP 3642. Ms. Anderson also appealed the defense verdict that was awarded to Medtronic. This Court consolidated the defendants' appeals and linked Ms. Anderson's appeal.¹

D. SUMMARY OF ARGUMENT

The appellants did not receive a fair trial with respect to past economic damages because the trial court erroneously refused to apply RCW 7.70.080. This statute explicitly allows a defendant healthcare provider in a medical negligence action to present evidence of compensation by other sources. This denial was based on a misinterpretation of *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012), which related only to money received from settling defendants. It did not address the evidence offered here of payments by Medicare, which was never a party.

The result of this error was an over-inflation of Ms. Anderson's past economic expenses by roughly \$2 million. Ms. Anderson claimed her prior medical expenses totaled \$2.6 million. The defendants could not challenge this claim because the trial court excluded evidence that the providers accepted less than \$600,000 as full payment for their services.

¹ Ms. Anderson's appeal is Case No. 71411-2-I. The order on consolidation was issued on March 3, 2014.

The trial court thus prevented the defendants from arguing that the amount accepted, rather than the amount charged, was the reasonable value of these services.

The trial court also erred when it denied the defendants' request for a CR 35 examination. The defendants offered expert testimony from Dr. Gilbert that Ms. Anderson was a candidate for a T-tube insertion, which would have freed her from the ventilator. Dr. Gilbert stated, however, that he could not say for certain that this procedure would work for Ms. Anderson without examining her.

The trial court not only prohibited the defendants from obtaining the necessary examination; it also allowed plaintiff's counsel to attack Dr. Gilbert based on the fact that he had not examined Ms. Anderson. It also ordered *in limine* that the defendants could not explain to the jury why no such examination had occurred. As a result, the jury accepted Ms. Anderson's position that she would be ventilator-dependent for the rest of her life, which increased her future damages award by millions of dollars. This judgment must be reversed.

E. ARGUMENT

1. The trial court erred in excluding evidence of Ms. Anderson's actual past medical expenses.

By granting Ms. Anderson's motion *in limine* to exclude all collateral source evidence, the trial court erroneously prevented the defendants from rebutting Ms. Anderson's contentions as to her past economic damages. The defendants could not offer evidence that Medicare paid Ms. Anderson's medical expenses and that the amount paid was \$594,873.89. CP 2804. The trial court's collateral source ruling, however, allowed Ms. Anderson to present un-rebutted evidence that she had incurred \$2.6 million in past medical expenses. RP 11/13/13 at 16. The trial court should have permitted the defendants to introduce the Medicare payments as evidence that the reasonable value of Ms. Anderson's past medical care was significantly less than the \$2.6 million she claimed. Because the defendants were denied this opportunity, the jury awarded the full \$2.6 million in past economic damages—a windfall of \$2 million. *See* CP 2545.

- a. The trial court was statutorily required to admit evidence of the Medicare payments.

By statute, Dr. Schatz and WAA were entitled to present evidence that Medicare paid these medical expenses. *See* RCW 7.70.080. In an action for injuries resulting from health care, "[a]ny party may present

evidence to the trier of fact that the plaintiff has already been compensated for the injury complained of from any source except the assets of the plaintiff, the plaintiff's representative, or the plaintiff's immediate family." *Id.* "Compensation" includes "indemnification of expenses incurred by or on behalf of the plaintiff." *Id.*

The trial court declined to apply RCW 7.70.080, based on *Diaz v. State*, 175 Wn.2d 457 at 470-71. RP 11/17/13 at 23. In *Diaz*, our Supreme Court held that the trial court erred in admitting evidence of a health care provider's settlement with the plaintiff. The *Diaz* decision, however, is distinguishable on its facts and does not impact the validity of RCW 7.70.080 in this case.

First, *Diaz* turned on a proviso found in the statute's plain language. After declaring that compensation "from any source" is admissible, the statute states that "evidence of compensation **by a defendant health care provider** may be offered **only by that provider.**" RCW 7.70.080 (emphasis added). The purpose of this exception is to preserve a health care provider's right to settle confidentially. *Diaz*, 175 Wn.2d at 463. The Supreme Court determined that this proviso applied to the plaintiff's settlement with a hospital defendant. *Id.* at 464. The court

explained that “a ‘defendant health care provider’ includes a health care provider that was previously a defendant and later settled.” *Id.*

This analysis has no application here. It would likely bar evidence, for example, of Ms. Anderson’s settlement with former defendant Central Washington Hospital. But Medicare was never a defendant in this action and therefore cannot be considered a “defendant health care provider.” RCW 7.70.080. Thus, the proviso at the heart of the *Diaz* decision is inapposite to the Medicare payments.

Second, in *obiter dicta*, the *Diaz* court held that RCW 7.70.080 conflicts with two later statutes (RCW 4.22.060, .070), which establish procedures by which the courts account for prior settlements. While RCW 7.70.080 would allow the jury to reduce a plaintiff’s damages by the amounts of prior settlements, RCW 4.22.060 requires the trial judge to apply offsets for prior settlements after trial, and RCW 4.22.070 requires the trial judge to reduce damages after trial based on allocations of fault. *Diaz*, 175 Wn.2d at 469. Application of all three statutes would result in a double reduction. *Id.* The court concluded that the latter two statutes control because they deal “specially with the effect of *prior releases and settlements* on the determination of an injured person’s damages.” *Id.* at 470 (emphasis added).

Again, this portion of the analysis might come into play with respect to the Central Washington Hospital settlement. But it has no application to the Medicare payments, which are not “prior releases and settlements” and are thus not affected by RCW 4.22.060 and .070. Indeed, the trial court applied these latter two statutes when it reduced the award by \$900,000 to account for the 5% fault assigned to the Hospital. There was no corresponding reduction based on the Medicare payments. As such, evidence of this compensation, per RCW 7.70.080, would not result in a double reduction or otherwise conflict with RCW 4.22.060 and .070.

Finally, in further *dicta*, the *Diaz* court noted that its decision avoided a conflict between RCW 7.70.080 and Evidence Rule 408. The court explained that “ER 408 bars the admission of *settlement evidence* to prove liability for or invalidity of a claim or its amount” *Diaz*, 175 Wn.2d at 470 (emphasis added). Noting that a conflicting statute must yield to the Evidence Rules on procedural questions of admissibility, the court stated that ER 408 should have controlled with respect to the admissibility of settlement evidence. *Diaz*, 175 Wn.2d at 470.

Once again, the analysis is inapposite here because the Medicare payments were not settlements. The rule pertains to consideration offered or furnished “in compromising or attempting to compromise a claim

which was disputed as to either validity or amount” ER 408. It is “intended to encourage settlements and promote free communication in compromise negotiations.” *Diaz*, 175 Wn.2d at 471 (citing 5A KARL B. TEGLAND, WASH. PRAC., EVIDENCE LAW AND PRACTICE § 408.1 (5th ed.)). It does not pertain to the Medicare payments because there is no evidence that the arrangement between Ms. Anderson and Medicare involved any dispute as to the validity or the amount. Because RCW 7.70.080 and ER 408 do not conflict when applied to the Medicare payments here, the separation of powers concerns identified in *Diaz* do not arise.

In short, *Diaz* involved an as-applied analysis which turned on the fact that the trial court admitted evidence of a settlement by a former defendant. None of the grounds on which the *Diaz* court determined that application of RCW 7.70.080 was erroneous is present here. As such, the trial court erred when it found that *Diaz* prohibited application of RCW 7.70.080 with respect to the Medicare payments.

b. The Legislature has the power to abrogate the collateral source rule.

In response to the defendants’ motions for a new trial, Ms. Anderson argued that RCW 7.70.080 violates separation of powers because it conflicts with the common law collateral source rule. CP 2827. For this proposition, she relied on the *Diaz* ER 408 analysis, as well as two

cases in which statutes conflicted with the Civil Rules: *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010) and *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009). These cases do not support Ms. Anderson's position.

At the outset, in *Diaz* our Supreme Court expressly acknowledged the conflict between RCW 7.70.080 and the common law collateral source rule, but never suggested that this violated separation of powers. The court observed that "RCW 7.70.080 supersedes the common law collateral source rule" and that "RCW 7.70.080 replaces the collateral source rule in medical malpractice cases." *Diaz*, 175 Wn.2d at 465. Later, the court identified a separation powers problem inherent in the conflict between RCW 7.70.080 and ER 408. *Diaz*, 175 Wn.2d at 470-72. But nowhere in the opinion did the court even hint at any violation created by the statutory preemption of the common law collateral source rule.

The Supreme Court's failure to take issue with this action should not be surprising. The legislative preemption of a common law doctrine is well within the Legislature's long-established powers. This result derives from the collateral source rule's dual identity as both a substantive and an evidentiary doctrine.

Commentators observe that the collateral source rule is “part of the substantive law of damages,” which “dictates that compensation received from a source wholly independent from the tortfeasor will not be deducted from the plaintiff’s recovery from the tortfeasor.” Richard C. Witzel Jr., *The Collateral Source Rule and State-Provided Special Education and Therapy*, 75 Wash. U. L.Q. 697, 700 (1997) (internal footnotes omitted). The rule “also incorporates an evidentiary component,” which merely furthers this substantive objective by precluding evidence offered to show that the plaintiff’s damages should be less because of benefits received from a collateral source. *Id.*

The Washington Supreme Court recognizes the substantive nature of the collateral source rule. *See Mazon v. Krafchick*, 158 Wn.2d 440, 452, 144 P.3d 1168 (2006). “The rule comes from tort principles as a means of ensuring that a fact finder will not reduce a defendant’s liability because the claimant received money from other sources, such as insurance carriers.” *Id.* The rule is thus “generally considered part of the law of torts, not evidence.” KARL B. TEGLAND, 5A WASH. PRAC., EVIDENCE LAW AND PRACTICE § 409.4 (citing *Mazon*, 158 Wn.2d at 452).

The cases on which Ms. Anderson relies recognize that a statute will control over a court rule on substantive matters. *See Waples*, 169

Wn.2d at 161 (“If a statute and a court rule cannot be harmonized, the court rule will generally prevail in procedural matters and the statute in substantive matters.”). “Substantive law ‘creates, defines, and regulates primary rights,’ while procedures involve the ‘operations of the courts by which substantive law, rights, and remedies are effectuated.’” *Putman*, 166 Wn.2d at 984 (quoting *Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2005)). There can be no question that the Legislature was well within its rights, as a matter of substantive law, to provide that a defendant in a medical malpractice action may be entitled to offsets for collateral source payments. *See Diaz*, 175 Wn.2d at 465.

The rule’s evidentiary component is merely derivative of the substantive law. When the Legislature abrogated the substantive law, the collateral source payments became relevant. This rendered the evidentiary rule prohibiting their admission obsolete.

Moreover, our Supreme Court has acknowledged that the Legislature can supersede common law evidentiary rules. *See, e.g., Carson v. Fine*, 123 Wn.2d 206, 213, 867 P.2d 610 (1994) (noting that the Legislature enacted the physician-patient privilege in derogation of common law). All three of the cases on which Ms. Anderson relied involved conflicts with *published* rules. *See Diaz*, 175 Wn.2d at 465

(conflict between RCW 7.70.080 and ER 408); *Waples*, 169 Wn.2d at 161 (conflict between RCW 7.70.100(1) and CR 3(a)); *Putman*, 166 Wn.2d at 982-83 (conflict between RCW 7.70.150 and CR 8, 11). *See also State v. Gresham*, 173 Wn.2d 405, 429, 269 P.3d 207 (2012) (conflict between RCW 10.58.090 and ER 404(b)).

The physician-patient privilege illustrates the Legislature's power to supersede *common law* evidence principles. *See Carson*, 123 Wn.2d at 213. At common law, a physician was "bound" to reveal a patient's secrets if the information was requested in court. *Phipps v. Sasser*, 74 Wn.2d 439, 445 n. 8, 445 P.2d 624 (1968) (quoting *Duchess of Kingston*, All E.R. (1775-1802) 623, 625, 168 Eng.Rep. 175 (1776)). Now, however, by legislative enactment, communications between a physician and a patient are privileged. *See RCW 5.60.060(4)*.

In acknowledging the Legislature's right to abrogate a common law evidence doctrine, the Supreme Court stressed that the courts must show deference to such decisions:

The rule of privilege embodied in RCW 5.60.060(4) reflects the considered judgment of one branch of our tripartite-structured government, traditionally regarded as constitutionally separate, independent and equal. ***Such legislative judgments merit, even require, the exercise of judicial self-restraint of a very high***

order. It is our duty when confronted with a valid act such as this to give effect to the legislative intent embodied therein, refraining from substituting our judgment in the matter, whatever that may be, for that of the legislature.

Phipps, 74 Wn.2d at 444 (emphasis added; internal footnote omitted).

Here, the “exercise of judicial self-restraint of a very high order” would have required the trial court to admit evidence of the Medicare payments, as mandated by RCW 7.70.080.

- c. Admission of the Medicare payments evidence, to show the actual amount of medical expenses, does not conflict with the collateral source rule.

Finally, it is unnecessary to consider whether RCW 7.70.080 and the collateral source rule conflict, because even under the collateral source rule, the Medicare payments were admissible. Again, the defendants sought to introduce these payments as evidence of the actual amount of medical expenses incurred by Ms. Anderson and thus to impeach the testimony that these costs were \$2 million higher than they really were.

The policy behind the collateral source rule is “that the wrongdoer should not benefit from collateral payments made to the person he has wronged.” *Ciminski v. SCI Corp.*, 90 Wn.2d 802, 805, 585 P.2d 1182 (1978) (citing *Thoreson v. Milwaukee & Suburban Transp. Corp.*, 56 Wis.2d 231, 201 N.W.2d 745 (1972)). It is a substantive rule dictating

“that compensation received from a source wholly independent from the tortfeasor will not be deducted from the plaintiff’s recovery from the tortfeasor.” Witzel, *supra*, at 700 (footnotes omitted). It is a means to ensure “that a fact finder will not reduce a defendant’s liability because the claimant received money from other sources” *Mazon v. Krafchick*, 158 Wn.2d at 452. But it does not bar the admission of evidence for other purposes. *See Alston v. Blythe*, 88 Wn. App. 26, 40, 943 P.2d 692 (1997).

Here, the defendants sought to admit the Medicare payments as evidence of the reasonable value of Ms. Anderson’s medical care. In her claim for past medical expenses, Ms. Anderson bore the burden of proving the “reasonable value of necessary medical care, treatment, and services received to the present time.” WPI 30.07.01. The “amount actually billed or paid is not itself determinative. The question is whether the sums requested for medical services are reasonable.” *Hayes v. Wieber Enterprises, Inc.*, 105 Wn. App. 611, 616, 20 P.3d 496 (2001).

In *Hayes*, Division 3 of this Court held that the trial court had not abused its discretion by applying the collateral source rule to exclude evidence of the amounts actually paid for medical services. But the Court based this decision on its opinion that the defendant had not presented evidence that the amounts charged were unreasonable. *Id.* at 616. The

Court argued that the fact the physician accepted the insurance carrier's limits did not tend to prove that his charge for the services was unreasonable. *Id.*

With all due respect to Division 3, the court appears to have overlooked basic human nature. Any rational juror could have found that the physician would not have accepted an amount that was unreasonable and that this therefore proved the amount received was the reasonable amount.

The *Hayes* decision was also influenced by the fact that the verdict form did not segregate past and future medical bills. There was thus "no way for [the court] to determine how much the jury awarded [the plaintiff] for her past medical bills." *Id.* Here, in contrast, the verdict form includes \$2.6 million for past medical expenses. Had the jury known that Ms. Anderson's providers accepted less than \$600,000 as full payment for the underlying treatment, it could have reasonably concluded that the reasonable value of this treatment was less than \$2.6 million. The trial court prejudiced the defendants' ability to present their defense when it excluded this relevant and admissible evidence.

2. The order denying the defendants' request for a CR 35 examination deprived the defendants of a fair trial on damages.

The trial court abused its discretion, and materially prejudiced the defendants' ability to defend against Ms. Anderson's damages claim, when it denied the defendants' request for a CR 35 examination. This ruling prevented the defendants' expert otolaryngologist, Dr. Gilbert, from fully evaluating Ms. Anderson's claims that she would be dependent on a ventilator for the rest of her life. After opposing the defendants' request to allow Dr. Gilbert to examine Ms. Anderson, plaintiff's counsel attacked Dr. Gilbert's opinions at trial by emphasizing that Dr. Gilbert had never examined her. The trial court erred both in prohibiting the examination and in allowing Ms. Anderson to capitalize unfairly on the ruling.

- a. The trial court erred in prohibiting the CR 35 examination.

When a party's medical condition is "in controversy," the trial court may order a physical examination upon a showing of "good cause." CR 35(a). Good cause can be established by the pleadings alone. *Matter of Welfare of Green*, 14 Wn. App. 939, 943, 546 P.2d 1230 (1976). The concepts of "in controversy" and "good cause" are intertwined, and "when a party affirmatively places his or her condition in controversy, the court will have little trouble in finding good cause for an examination."

15A WASH. PRAC., HANDBOOK CIV. PRO. § 51.5 (2013-14 ed.). *See also Schlagenhauf v. Holder*, 379 U.S. 104, 119, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964) (“A plaintiff in a negligence action who asserts mental or physical injury . . . places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury.”). Here, there can be no dispute that Ms. Anderson’s allegations placed her physical condition in controversy.

The defendants established good cause for a physical examination because Ms. Anderson’s damages experts had superior access to the information on which both sides were forced to base their opinions. “Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.” *Bushman v. New Holland Div. of Sperry Rand Corp.*, 83 Wn.2d 429, 434, 518 P.2d 1078 (1974) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947)). Without the examination, Ms. Anderson and her experts were able to monopolize critical trial testimony. Indeed, Dr. Gilbert specifically stated that he needed to examine Ms. Anderson before he could say for certain whether a T-tube would work for her. CP 254, 256-58.

Ms. Anderson's arguments in response to the defendants' multiple requests for a CR 35 examination failed to overcome this showing of good cause. Ms. Anderson made little effort to refute the defendants' need for the examination. Instead, she focused on procedural details such as the timing of the defendants' request and the fact that Dr. Gilbert is not licensed to practice medicine in Washington. CP 171, 385-97.

Dr. Gilbert's lack of a Washington license could not have been an impediment to the examination. The defendants proposed that Dr. Gilbert would simply observe one of Ms. Anderson's routine bronchoscopies. CP 451-453. Ms. Anderson offered no authority for the proposition that observing a procedure constitutes the practice of medicine.

As for the timing of the request, first, the defendants requested the examination weeks before the discovery cutoff and within two days after Dr. Gilbert's deposition. CP 446-47. And second, if the trial court's intention was to preclude the examination as a sanction, it needed to state this reason on the record. *See Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). It is "an abuse of discretion for the trial court to impose the severe sanction of limiting discovery and excluding expert witness testimony . . . without first having at least considered, on the record, a less severe sanction that could have advanced the purposes of

discovery and yet compensated [the other party] for the effects of the [sanctioned party]'s discovery failings. *Id.* at 497 (citing *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993)). Here, the trial court did not give any explanation for the decision, much less a consideration on the record of the appropriateness and necessity of sanctions. CP 466-67. Thus, the order limiting discovery cannot be sustained on the theory that it was some sort of punishment for a perceived lack of timeliness.

- b. The prohibition of the CR 35 examination, in combination with subsequent erroneous orders, prejudiced the defense.

The inability to examine Ms. Anderson prejudiced the defendants. This prejudice was compounded when the trial court denied the defense motion *in limine* to prohibit Ms. Anderson from challenging Dr. Gilbert's opinions based on the lack of an examination. Ms. Anderson subsequently attacked Dr. Gilbert's credibility at trial by cross-examining him on the fact that he had not examined her. The prejudice from this tactic was further exacerbated by the trial court's order *in limine* which prohibited the defendants from explaining why Dr. Gilbert had not conducted such an examination.

Dr. Gilbert's opinions were a crucial component of the damages defense in this case. A substantial majority of the future costs detailed in Mr. Choppa's Life Care Plan assumed that Ms. Anderson would be ventilator-dependent for the rest of her life. RP 11/7/13 at 99-100, 143. The defendants presented evidence, however, that if the T-tube placement was successful, Ms. Anderson could leave the ventilator immediately. CP 255-59. This would greatly improve her quality of life and dramatically decrease the cost of care. It is clear from the jury's assessment of \$7.4 million in future economic damages—nearly \$3 million higher than the highest estimate associated with the T-tube—that it rejected the notion that Ms. Anderson would undergo this procedure. *See* CP 2545; RP 12/03/13 at 153-54.

F. CONCLUSION

Substantial justice was not done in this case. The erroneous exclusion of the relevant, statutorily required Medicare payments evidence deprived the defendants of a fair trial on Ms. Anderson's past economic damages. The various rulings with respect to the CR 35 examination prejudiced the defense with respect to future economic damages. As such, the judgment against these defendants must be reversed.

RESPECTFULLY SUBMITTED this 21st day of May, 2014.

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DECLARATION OF SERVICE

I hereby declare that I sent a copy of the document on
which this declaration appears via fax/mail/messenger/email
service to All Counties of Record

I declare under penalty of perjury of the laws of the
State of Washington that the foregoing is true and correct.

Executed at Seattle, WA on MAY 21/14
Signed by: 