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STATE OF WASHINGTON

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DEPUTY

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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KENNETH FLYTE, as Personal Representative of THE ESTATE OF  
KATHRYN FLYTE, on behalf of their son JACOB FLYTE, and as  
personal representative of THE ESTATE OF ABIGAIL FLYTE,

Appellants,

v.

SUMMIT VIEW CLINIC, a Washington corporation,

Respondent.

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APPELLANTS' OPENING BRIEF

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**ORIGINAL**

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## I. INTRODUCTION

This is a medical malpractice lawsuit against a primary care clinic involving the preventable deaths of a young mother and daughter. After a full jury trial on the merits, the surviving family members, husband/father and son/brother, received a defense verdict led, as jury foreperson, by a management employee of a different hospital that they had already sued and settled with for \$3.5 million arising out of the same facts and related medical misconduct. The entire jury was informed of the \$3.5 million settlement with the settling hospital during multiple occasions throughout the trial. Several weeks after the trial, the Division I opinion that allowed for the admission of settlement evidence in medical malpractice lawsuits was reversed by the State Supreme Court. *See Diaz v. Medical Center Laboratory, Inc.*, 175 Wash. 2d 457, 285 P.3d 873 (September 20, 2012). Based upon these peculiar factual and procedural circumstances, and other errors of law such as misinforming the jury on the obligations of a doctor's obligations to provide full informed consent, on each error individually, and cumulatively together, the Appellant Flyte family requests a new trial pursuant to CR 59.

## Assignments of Error

**Assignment of Error 1: The trial court erred in not granting a new trial in accord with CR 59.**

**Issue 1: Should this Court should grant a new trial premised upon the fact that the Flyte family's case was judged by a jury which included a juror foreperson that worked in management for an entity that had settled with the Flyte family for \$3.5 million thereby causing harmful error to include providing a prejudicial jury instruction?**

**Assignment of Error 2: The trial court erred in considering juror declarations in relation to the motion for new trial.**

**Issue 2: Should this Court should grant a new trial premised upon the fact that the trial court improperly relied upon post-verdict juror-declarations when denying the motion for a new trial?**

**Assignment of Error 3: The trial court erred in the instructions to the jury pertaining to the informed consent claims.**

**Issue 3: Should this Court should grant a new trial premised upon the fact that the trial court improperly instructed the jury as the burden of proof for establishing a breach of informed consent?**

## II. STATEMENT OF THE CASE

This is a medical malpractice case involving the avoidable death of a 27 year-old pregnant woman, Kathryn Flyte, and the preventable death of her baby, Abbigail Flyte. Both Kathryn and Abbigail died as result of complications from the Swine Flu.<sup>1</sup> This young woman and child are survived by, Kenny Flyte, the husband and father, and Jacob Flyte, the

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<sup>1</sup> Verbatim Report of Proceedings: Kenneth Flyte Trial Transcript Generally

young brother and son.<sup>2</sup> Kenny and Jacob are both parties to this claim.<sup>3</sup> The history of this case is long, but the facts as relate to this appeal are straightforward.<sup>4</sup>

During June of 2009, Kathryn, then 7-months pregnant with Abbigail, manifested symptoms indicating she acquired the Swine Flu.<sup>5</sup> In that same time frame, and as early as April/May of 2009, the public health departments had been sending out alerts to all of Pierce County's primary care providers indicating the Swine Flu, a strain of influenza also referred to as H1N1, was a known health threat within the community.<sup>6</sup> One of the health alerts dated May 5, 2009 alerted health providers: "*Many probable cases of the swine-flu origin influenza A (H1N1) virus (S-OIV) have been reported in Washington State, suggesting transmission within communities.*"<sup>7</sup> Another health alert also dated May 5, 2009 alerted health care providers: "*Persons at high risk of complications from influenza who should be considered for antiviral therapy...Pregnant Woman.*"<sup>8</sup> The

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; Ex P-5

<sup>6</sup> Verbatim Report of Proceedings: Hal Zimmer, M.D. Trial Transcript, Pages 11-13;

Ex P-5

<sup>7</sup> Ex. P-6

<sup>8</sup> Ex. P-5

defendant, Summit View Clinic, received these health alerts.<sup>9</sup> In that same time period, the entire world was in fear of a Swine Flu pandemic.<sup>10</sup>

The health alerts, which were admittedly received by Summit View Clinic, specifically noted pregnant women were at the high risk for complications from influenza, the Swine Flu.<sup>11</sup> The health alerts indicated any pregnant women with symptoms suggestive of a risk of having acquired Swine Flu should immediately be offered a drug called Tamiflu to mitigate the severity of potential complications.<sup>12</sup> And because Tamiflu is most effective if given within the first 48 hours of symptom onset, the drug should be administered immediately, even in the absence of a formal influenza diagnosis.<sup>13</sup> Moreover, it is not disputed that there was no reliable test available for expeditiously confirming a clinical Swine Flu diagnosis: “*Note that a negative test does not rule out influenza.*”<sup>14</sup>

On June 26, 2009, Kathryn presented as a patient to the Summit View Clinic and reported suffering from a runny nose, congestion, cough, wheezing, chills and sweats as documented in the Clinic’s own records.<sup>15</sup> Kathryn also had a noted history of fever that had been fluctuating over a

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Verbatim Report of Proceedings: Hal Zimmer, M.D., Trial Transcript, Pages 9-10

<sup>12</sup> *Id.*; Ex P-5

<sup>13</sup> *Id.*; Ex P-6

<sup>14</sup> *Id.*

Verbatim Report of Proceedings: Howard Miller, M.D, Trial Transcript July 12, 2012

period of days.<sup>16</sup> At the Clinic, Kathryn was treated by Dr. Marsh.<sup>17</sup> Even though Kathryn met the criteria of being at-risk for the Swine Flu, Dr. Marsh did not inform Kathryn of the health alerts, and Dr. Marsh did not inform Kathryn of the option of taking Tamiflu.<sup>18</sup> Furthermore, the Summit View Clinic contends that Dr. Marsh did not formally diagnose the Swine Flu during the June 26, 2009 visit.

The following day, June 27 2009, Kathryn's symptoms had not gotten better, and she visited her obstetrical provider at St. Joe's Hospital.<sup>19</sup> During the visit to the obstetrical provider, Kathryn was again not offered Tamiflu despite being visibly ill with the same or similar symptoms with which she presented the previous day at the Summit View Clinic.<sup>20</sup> According to the St. Joe's medical record:

*She is 27 weeks pregnant and is here today clinic because she was seen by her primary care provider yesterday, and he sent her here for a follow up. She was seen by him yesterday complaining of flu symptoms...Her primary care provider said he thought that she had the flu and sent her on her way and that she had a virus and there was no medicine for it.<sup>21</sup>*

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Ex P-18; Verbatim Report of Proceedings: Kenneth Flyte, Trial Transcript

<sup>20</sup> *Id.*

<sup>21</sup> Ex. P-18

The attending medical provider at St. Joe's Hospital also failed to offer Kathryn the Tamiflu as was indicated by the health alerts.<sup>22</sup> It is understood that St. Joe's Hospital also received the health alerts and was on notice of the threat to pregnant women.<sup>23</sup>

Over the following 48-72 hours, Kathryn's condition only worsened. Kathryn's condition deteriorated so quickly that she was admitted at the emergency department at Good Samaritan Hospital and was placed into a medically induced coma.<sup>24</sup> Kathryn's husband, Kenny, was confronted with a decision to make: authorize an immediate C-Section of Kathryn to give birth to 7-month old baby Abbigail, or lose them both. The Good Samaritan Medical records indicate "*At this point, it appears like the best avenue that maximizes the chances for both mother and fetus is to deliver the child at this point.*"<sup>25</sup> Kenny elected to save Abbigail at the risk of losing Kathryn.<sup>26</sup>

Kathryn survived in the medically induced coma for approximately six additional weeks.<sup>27</sup> Kathryn never regained consciousness and she

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<sup>22</sup> Verbatim Report of Proceedings: Howard Miller, M.D, Trial Transcript July 12, 2012

<sup>23</sup> *Id.*; Ex. P-5 & 6

<sup>24</sup> Verbatim Report of Proceedings: Kenneth Flyte Trial Transcript Generally

<sup>25</sup> Ex. D-77

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*; Ex D-77

never consciously met her baby newborn, Abbigail.<sup>28</sup> After an extended stay in intensive care, Abbigail survived her mother by approximately by approximately 7-months.<sup>29</sup> Then, one unfortunate day in February of 2010, Kenny found Abbigail unresponsive in her crib.<sup>30</sup> After several more weeks in intensive care, Abbigail also passed away in the hospital, in Kenny's arms.<sup>31</sup>

The surviving Flyte family members, Kenny and Jacob, pursued the Summit View Clinic and St. Joe's Hospital in these medical malpractice proceedings. The leading claim against these health care providers was that they both failed to inform Kathryn of the known risks associated with her symptoms, as confirmed by the differential diagnosis, that they failed to inform her of the information disseminated in the health alerts, and that they failed to offer her the option of taking Tamiflu, which could have saved both lives. With respect to the medical issues in the case, a primary care provider and Flyte family expert, Howard Miller, M.D., opined as follows:

Q. Now doctor, as I understand your testimony you feel that the standard of care required Katie Flyte to be treated what you doctors call prophylactically with Tamiflu, correct?

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

A. Well, I'm not sure I would use that word "prophylactically" at this point if I felt she had influenza and I would treat with Tamiflu.

Now, in the beginning before you have the diagnosis you are going to treat what's called prophylactically. In other words, you're going to cover the base. You're going to treat the patient, and if – if necessary, you could stop the treatment. But you start the treatment. So that way I think I could use the word "prophylactically."

Q. So it's your opinion that Ms. Flyte should have been given Tamiflu prophylactically, correct?

A. Yes.<sup>32</sup>

Turning to procedural matters, prior to filing this lawsuit, in accordance with RCW Chapter 7.70, the Flyte family invited both the Summit View Clinic and St. Joe's Hospital to engage in a pre-filing settlement dialogue. St. Joe's Hospital accepted the invitation, but the Summit View Clinic declined the opportunity to resolve the case amicably. During a mediation that occurred on July 16, 2010, prior to the publication of case law published as *Diaz v. Medical Center Laboratory*, 160 Wash. App. 1023 (2011), the Flyte family settled with St. Joe's Hospital for \$3.5 million. The Flyte family filed the lawsuit against the Summit View Clinic on January 18, 2011. During the time that the Flyte family's claim against the Summit View Clinic was in the discovery phase of litigation, on May 7, 2011, Division I of the Court of Appeals published

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<sup>32</sup> Verbatim Report of Proceedings: Howard Miller, M.D, Trial Transcript July 12, 2012, Pages 70-72

*Diaz* providing for the introduction of settlement evidence with other health care providers, such as St. Joe's Hospital's \$3.5 million payment to the Flyte family. *Id.*

On July 9, 2012, the matter against the Summit View Clinic proceeded to trial. During the *voir dire*, the parties and the trial court were alerted that a management level employee of St. Joe's Hospital's network of providers<sup>33</sup> was on the panel, Christine Knight. Ms. Knight worked in management and was also trained as a nurse: "*I record all of the operations for all of the Franciscan Medical Group for that whole region. So I run all of the clinics. As a director, I have nine managers. I have about 50 physicians and over 100 staff.*"<sup>34</sup>

During *voir dire*, counsel for the Flyte family attempted to query Ms. Knight about potential bias as related to the \$3.5 million settlement with her employer.<sup>35</sup> But the trial court sustained the Summit View Clinic's objection, and the Flyte family's counsel was not permitted to query Ms. Knight as to whether the fact that her employer had already paid the Flyte family \$3.5 "might" impact her ability to be fair:

MR. BEAUREGARD: Can I ask you this? Do you feel like you'd be a in good position to be passing judgment,

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<sup>33</sup> St. Joe's Hospital is part of the Franciscan Health System network.

<sup>34</sup> Verbatim Report of Proceedings: Trial Transcript of Voir Dire on July 11, 2012, Pages 167-168

<sup>35</sup> Verbatim Report of Proceedings: Trial Transcript of Voir Dire on July 11, 2012, Pages 169-170

objective judgment on St. Joe's Hospital if they were on trial?

PROSPECTIVE JUROR NO. 19: I think as a nurse and working in healthcare, I think I can pass judgment on things that fall within my scope of understanding. So when you talk about something being done to a patient, I've been a nurse. I've given injections. I've given care. I run clinics. So I don't know exactly what you're asking me that I would – I may not know. I don't know enough to tell you what – I don't know what you're asking me.

MR. BEAUREGARD: Fair enough.

PROSPECTIVE JUROR NO. 19: When you say judgment on St Joe's Hospital, that's broad. If you ask me if an injection was given wrong, wrong site, wrong route, wrong dose, I'm a nurse. I'm going to understand that you're asking me to look at.

MR. BEAUREGARD: I'm going to tell you another fact that a lot of people have a strong reaction to, a lot of people have strong thoughts about, and that is this: That Katie Flyte – you're going to hear this evidence – that she was a patient at St. Joe's Hospital.

She was also a patient at the Summit View Clinic. She saw – she was seen at Summit View Clinic one day. She was seen at St. Joe's Hospital the next for OB/GYN care. That's some of the evidence that you are going to hear.

Well, Mr. Flyte actually already brought a claim against St. Joe's --

MR. MYERS: Your Honor, may I approach the bench?

THE COURT: Yeah, you may. Counsel.

[Whereupon a sidebar was held off the record.]

THE COURT: You may continue.

MR. BEAUREGARD: Thank you, Your Honor. We'll get back to that. Thank you, Juror No. 19. Thank you very much.

Couple of other thoughts. Anyone else have any real strong feelings about the subject matter they think they're going to hear about? Anybody else feel as though they can't be impartial?<sup>36</sup>

The trial court did not make a clear record of the reason for sustaining the defense's objection, and the Flyte family was denied the opportunity to develop a juror challenge for cause against Ms. Knight.<sup>37</sup> At sidebar, the trial court instructed the undersigned counsel that conducting *voir dire* about the \$3.5 million settlement was off limits.

Prior to opening statements, the Summit View Clinic moved affirmatively and argued for permission to inform the jury about the \$3.5 million settlement with Ms. Knight's employer during trial.<sup>38</sup> Over the Flyte family's strenuous objection, the trial court granted the Clinic's motion.<sup>39</sup> The trial court also ruled that every time the \$3.5 million settlement was mentioned that the Court would read the Summit View Clinic's following novel purported "limiting" instruction:

*You have heard evidence that St. Joseph Medical Center/Franciscan Medical Group entered into a settlement with plaintiff, agreeing to pay the plaintiff \$3,500,000.00. This evidence is admissible for the limited*

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<sup>36</sup> Verbatim Report of Proceedings of July 11, 2012, Pages 169-171

<sup>37</sup> *Id.*

<sup>38</sup> CP 7-13

<sup>39</sup> CP 22-51

*purpose of demonstrating that the plaintiff may have already been compensated for the injury complained of from another source. This evidence should not be used to assume that either the Summit View Clinic or St. Joseph Medical/Franciscan Medical Group acted negligently to cause damage to plaintiff.*<sup>40</sup>

Thereafter, the entire jury first learned Ms. Knight's employer had already paid the Flyte family \$3.5 million during opening statements.<sup>41</sup> There is no meaningful way for the undersigned counsel to recreate the shock in the jury and Ms. Knight's eyes when first told about this large payout by Ms. Knight's employer. At some point during opening statements, over the Flyte family's objection, the trial court also read the Clinic's purported "limiting" instruction noted above.<sup>42</sup> The theatrical process of reading the "limiting" instruction (and really just placing further emphasis upon the \$3.5 settlement) was repeated during the presentation of witness testimony and again during closing arguments.<sup>43</sup> Moreover, during the cross-examination of Kenny Flyte, the defense was permitted to ask about the \$3.5 million settlement with St. Joe's Hospital, but then counsel for the Flyte family was not permitted to inquire similarly on re-direct:

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<sup>40</sup> CP 146-76; Instruction No. 15

<sup>41</sup> Verbatim Report of Proceedings: July 12, 2012 (openings)

<sup>42</sup> CP 146-76; Instruction No. 15

<sup>43</sup> Verbatim Report of Proceedings: July 12, 2012 (openings); August 1, 2012 (closings)

CROSS EXAMINATION

\* \* \*

Q. I'd like to end and just – this is my last set of questions –on just one area, Mr. Flyte. You spoke, I think at the end of your testimony about some of your personal feelings about your wife's care.

And it is correct, is it not, sir, that you have received from the St. Joseph's Medical Center, Franciscan Medical Group a compensation that was paid in the amount of \$3.5 million, Is that true, sir?

A. That is true.

MS. LEEDOM: Your Honor, I believe that you had an instruction to the jury.

THE COURT: Ladies and gentlemen, you've just heard evidence that St. Joseph's Medical Center, Franciscan Medical Group entered into a settlement with the plaintiff agreeing to pay the plaintiff \$3.5 million.

This evidence is admissible for the limited purpose of demonstrating that the plaintiff may have already been compensated for the injury complained of from another source. This evidence should not be used to assume that either Summit View Clinic or St. Joseph's Hospital – Center, I should say, and Franciscan Medical Group acted negligently to cause the damages to the plaintiff.

Thank you.

MS. LEEDOM: Thank you, Your Honor. Thank you, Mr. Flyte. I appreciate you answering my questions.

THE COURT: Mr. Beauregard, any redirect.

REDIRECT EXAMINATION

BY MR. BEAUREGARD:

Q. Kenny, had you finished your answer to the question that Ms. Leedom had just asked?

A. No. I did receive a settlement. I didn't have to go to court. They were very compassionate. And they –

MS. LEEDOM: Excuse me, Your Honor.

THE COURT: Hang on a second. Is there an objection?

MS. LEEDOM: Yes, there is, Your Honor. It's beyond the purpose for which the evidence is offered.<sup>44</sup>

As a matter of substance, at trial, the Flyte family presented expert testimony to support the argument that the Summit View Clinic failed to provide Kathryn proper informed consent by failing to inform her of the option for taking Tamiflu. According to the Flyte's family's expert, Dr. Zimmer:

Q. Doctor, have you taken a look at the Summit View Clinic's care and come to any conclusions about whether or not the care provided was consistent with the expectations of informed consent in the context for which it was provided?

A. Well, as I've stated in defining informed consent, a patient needs to be advised of her options. And I think there was a significant deficit in the education of this patient towards the options that she would have for treating her illness as she presented to Dr. Marsh.

Q. What makes you say that, sir?

A. Well, from her indication and her explanation, my understanding is that she was quite ill and she was not offer the, in my understanding, the appropriate medications that might help treat her illness.

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<sup>44</sup> Verbatim Report of Proceedings: Kenneth Flyte Trial Transcript, Pages 121-23

Additionally, because she was at a critical time of pregnancy, the beginning of the third trimester, this would influence her pregnancy as well.

And so it's my feeling that the informed consent to not discuss the options of medication, specifically Tamiflu, which we were using to treat pregnant women at that time, was in violation of the standard of care in terms of informed consent.<sup>45</sup>

\* \* \*

Q. I want to ask you another question about informed consent, Doctor.

MR. BEAUREGARD: And I'd also like to publish and show to the jury Plaintiff's Exhibit 15.

THE COURT: You may publish.

MR. BEAUREGARD: Plaintiff's 5, excuse me.

[Whereupon, Exhibit No. 5 was published]

Q. (By Mr. Beauregard) Do you have a quick impression what this document is?

A. This is an advisory from the Tacoma Pierce County Health Department on swine flu or H1N1 novel influenza, which it was called technically, May 5<sup>th</sup>, I believe, of 2009. And it was both an advisory on the availability of medication and isolation techniques, namely masks, as well as information on the treatment of patients for the influenza pandemic that we were seeing begin at that time.

Specifically, I know that there has this – been this discussion about the timing of the administration of medication. And that statement here was that it would well be prescribed beyond the 48 hours that the package insert on Tamiflu showed. And so it would be incumbent on the

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<sup>45</sup> Verbatim Report of Proceedings: Hal Zimmer, M.D., Trial Transcript, Pages 9-10

physician to include that in their discussion with the patient.

You could certainly say, you know, the package insert, the FDA says that this might not be effective beyond 48 hours, because, again, that's the time during which the studies were done. But when you look at the clinical application of this drug many, many authorities – and we draw upon many authorities to help us make these kind of decisions – have stated it is effective beyond that stated timeframe.

Q. Doctor, would it have been part of participatory medicine for Dr. Marsh and Summit View Clinic to have told Katie Flyte that as of June 26<sup>th</sup>, 2009, they had received some 10, 11, 12 of these health advisories?

A. Well, I don't know so much that he would have had to of told her that he received the health advisories as to the fact of what the health advisories contained.

Saying we have this drug to treat influenza, which is a Category C, explain that means, and that the package insert by the sanctity of the Food an Drug Administration has said that it may not work beyond 48 hours. It appears, perhaps, that your symptoms have been ongoing on for more than 48 hours. But the harm, the risk is minimal, and the benefit could be substantial. And I would like you to consider that in whether you would like me to prescribe this drug or not.

Again, patient has to be participating. I wouldn't say this is the drug you need. You must take it. I would offer it, and if the patient chose, understanding the risks and benefits, then she could fill the prescription.<sup>46</sup>

To be clear, it was not, and never was, the Flyte family's theory of the case that Dr. Marsh or the Summit View Clinic failed to diagnosis the Swine Flu. Instead, the Flyte family claimed Kathryn's symptomology on

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<sup>46</sup> Hal Zimmer, M.D. Trial Transcript, Pages 11-13

June 26, 2009 coupled with the risk identified in the health alerts mandated letting her make her own decision about her medical course, particularly whether or not to take Tamiflu as a prophylactic to a worsening condition. On the first day of trial, before the jury was ever selected, counsel for the Flyte family made this objection and clarification of the theory of the case clear for the Court:

MR. BEAUREGARD: ...So with that, there's a second component of our argument, Your Honor, and that's – and we are going to be trying to make very to this jury through whole entire trial that under the health advisories and according to our experts, you don't have to diagnose influenza in order to offer Tamiflu. That was the point of the CDC's warnings; that was the point of the health alerts, is that pregnant women are at such risk, they are at such risk for complications that if a pregnant woman come in your office and you think she could just possibly have this, she's at risk of dying. Give her the medication and give it to her right away, and give it to her as close to the 48-hour window as you can, and you don't wait for and kind of confirmed test or anything along those lines for that precise reason. You can't screw around.<sup>47</sup>

Towards the end of trial, the parties proposed jury instructions. Despite the known fact the Flyte family was not making a failure-to-diagnose claim, over the Flyte family's objection, the trial court agreed to give the defense's novel jury instruction on exactly that topic, erroneously instructing the jury that:

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<sup>47</sup> Verbatim Report of Proceedings July 9, 2012, Pages 6-7

*A physician has no duty to disclose treatments for a condition that may indicate a risk to the patient's health until the physician diagnoses that condition.*<sup>48</sup>

Then, as a defense to the informed consent claim, in order to prevail at trial, Dr. Marsh simply had to deny that he ever diagnosed any form of influenza:

Q. Now, Doctor, you understand in this case that there is a claim that you, notwithstanding your note, actually diagnosed influenza of some variety, or flu of some variety, and that you did not obtain her informed consent by offering Ms. Flyte Tamiflu. You're aware of this allegation?

A. Yes.

Q. How do you respond, sir, to such an allegation?

A. Well, my diagnosis wasn't influenza, so prescribing Tamiflu would not be appropriate.<sup>49</sup>

As noted, the Flyte family's experts opined that Tamiflu should have been offered prophylactically, as a precautionary measure, even in the absence of a specific influenza or Swine Flu diagnosis.<sup>50</sup> The associated risk of failing to do so, offer the Tamiflu immediately, are illustrated by the tragedy that followed.

Needless to say, the defense's novel jury instruction is not supported by Washington law. Further, the instruction makes no sense

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<sup>48</sup> CP 146-76; Instruction No. 11

<sup>49</sup> Verbatim Report of Proceedings: William Marsh, M.D., Trial Transcript July 26 & 30, 2012, Page 104

<sup>50</sup> Verbatim Report of Proceedings: Howard Miller, M.D, Trial Transcript July 12, 2012, Pages 70-72

and provides bad medical practice and health policy. For example, Kathryn had a right to know that she was at risk of life threatening complications from a pandemic that was sweeping the world community, and that taking one simple drug, Tamiflu, as a prophylactic, could have prevented this tragedy.<sup>51</sup> Moreover, according to the health alerts time was of the essence given the 48 hour window of effectiveness, and a formal diagnosis of the Swine Flu was not a requisite to offering Tamiflu for prophylactic treatment.<sup>52</sup>

After a spirited presentation by the parties, the case was submitted to the jury. At the end of deliberations, the parties were summoned to the courtroom to hear the jury's verdict. The bailiff invited the jury foreperson to hand over the verdict form.<sup>53</sup> The jury foreperson, Ms. Knight, followed the bailiff's instructions: the jury had reached a defense verdict on all accounts including the informed consent claim.<sup>54</sup> Weeks later, in response to the Flyte's family's motion for a new trial, the defense ran out and obtained a juror-declaration from Ms. Knight which proclaims

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<sup>51</sup> Verbatim Report of Proceedings: Howard Miller, M.D, Trial Transcript July 12, 2012, Pages 70-72

<sup>52</sup> Verbatim Report of Proceedings: Hal Zimmer, M.D. Trial Transcript, Pages 11-13

<sup>53</sup> CP 177-179

<sup>54</sup> *Id.*

the \$3.5 settlement with her employer had nothing to do with the result of the trial.<sup>55</sup>

A little over one (1) month after Ms. Knight rendered the defense verdict, the Supreme Court reversed Division I and held that it was error to admit settlement evidence from another health care provider during trial. *Diaz v. Medical Center Laboratory, Inc.*, 175 Wash. 2d 457, 285 P.3d 873 (September 20, 2012). Unfortunately, for the Flyte family, the Supreme Court published this opinion correcting the law just a few weeks too late. According to the Supreme Court, the jury, including Ms. Knight, never should have been informed that St. Joe's Hospital had already paid the Flyte family \$3.5 million for the deaths of Kathryn and Abbigail. This appeal of the Flyte family's CR 59 based motion for new trial followed thereafter.

### III. ARGUMENT

**Issue 1: This Court should grant a new trial premised upon the fact that the Flyte family's case was judged by a jury which included a juror foreperson that worked in management for an entity that had settled with the Flyte family for \$3.5 million thereby causing harmful error to include providing a prejudicial jury instruction.**

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<sup>55</sup> During the motion for new trial, the Flyte family cited *Gardner v. Malone*, 60 Wash.2d 836, 840, 376 P.2d 651 (1962), which clearly holds that the Court cannot consider Ms. Knight's declaration as to what the jury was purportedly thinking or motivated by.

“The right to a trial by jury includes the right to an unbiased and unprejudiced jury, and a trial by a jury, one or more of whose members present is biased or prejudiced, is not a constitution[al] trial.” *Turner v. Stime*, 153 Wash. App. 581, 587, 222 P.3d 1243 (2009), citing, *Alexon v. Pierce County*, 186 Wash. 188, 193, 57 P.2d 318. In accord with this fundamental principle, the trial court erred in not granting a new trial pursuant to CR 59. The Flyte family did not receive a fair trial for a multitude of reasons related to the composition of the jury, unfair jury instructions, and the admission of highly prejudicial settlement evidence. For those reason, as in *Turner*, the Flyte family should be granted a new trial.

In *Diaz*, the Supreme Court ruled it was error, as a matter of law, to allow the introduction of settlement evidence at trial. *Id.* In that regard, with the law now having been fixed, in this instance, the question for this Court is whether or not the same error by trial court was harmless. *Id.* In this case, the jury foreperson, Ms. Knight, worked in management for the settling defendant, the Franciscan Health System: “*I record all of the operations for all of the Franciscan Medical Group for that whole region. So I run all of the clinics. As a director, I have nine managers. I have*

*about 50 physicians and over 100 staff.*<sup>56</sup> And Ms. Knight, although unable to be questioned during *voir dire* on the subject, was informed for the first time by way of opening statements, Kenny Flyte's testimony, and closing arguments, that her employer had already paid the Flyte family's \$3.5 million.

It must not be forgotten that settlement evidence is so readily recognized as inherently prejudicial, there is a specific evidentiary providing for the blanket prohibition of such evidence during trial. *See* ER 408. Moreover, according to RCW 2.36.110, the Flyte family was entitled to a jury free of "bias, prejudice, and indifference" to their claims which sought to vindicate the preventable deaths of a young woman and child. In *Diaz*, the Supreme Court recognized that in "examining evidentiary errors, we do not check our common sense at the door." *Id.* at 882. On similar issues, another court has held the improper admission of settlement evidence contrary to ER 408 warrants a new trial when such evidence may have "materially influenced" the jury's decision. *Weems v. Tyson Foods*, 665 F.3d 958 (2011). In this regard, pure "common sense" dictates the Flyte family did not get a fair trial in that the jury was undoubtedly "materially influenced" when learning of the fact Ms.

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<sup>56</sup> Verbatim Report of Proceedings: Trial Transcript of Voir Dire on July 11, 2012, Pages 167-168

Knight's employer had already made the remaining Flyte family members multi-millionaires. *Id.*

The Flyte family objected vigorously at every turn during the underlying proceedings to admission as evidence the \$3.5 million settlement with Ms. Knight's employer.<sup>57</sup> Beyond that, the "limiting" instruction *was not* the same instruction as was cited approvingly in *Diaz*, and, in this instance, amounted to an impermissible comment upon the evidence. *See Heithfeld v. Benevolent and Protective Order of Keglers*, 36 Wash.2d 685, 220 P.2d 655 (1950) (error for the trial court to comment on the evidence). Specifically, the "limiting" instruction actually informed the jury Ms. Knight's employer may have already paid the Flyte family enough money:

*You have heard evidence that St. Joseph Medical Center/Franciscan Medical Group entered into a settlement with plaintiff, agreeing to pay the plaintiff \$3,500,000.00. This evidence is admissible for the limited purpose of demonstrating that the plaintiff may have already been compensated for the injury complained of from another source. This evidence should not be used to assume that either the Summit View Clinic or St. Joseph Medical/Franciscan Medical Group acted negligently to cause damage to plaintiff.*<sup>58</sup>

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<sup>57</sup> CP 22-51

<sup>58</sup> CP 146-76; Instruction No. 15; The Summit View Clinic's argument that Instruction No. 15 only relates to damages, which the jury did not consider, should not be well taken. The Instruction is misleading as to liability also in that it suggests that "someone" else may have been at fault. The purported "limiting" instruction

The Clinic's proposition that this settlement evidence, and flawed "limiting" instruction, did not unfairly prejudice the jury's subconscious does not only defy "common sense", it is absurd.

Moreover, as noted in *Diaz*, issues of the proportionate fault of St. Joe's Hospital should have been properly addressed in accordance with RCW 4.22.070 and *Adcox v. Children's Hospital*, 123 Wash.2d 15, 864 P.2d 921 (1993), and not with a jury instruction which improperly commented on the evidence in that same regard. The Clinic's "limiting" instruction had the effect of instructing the jury over and over during the trial, including in the middle of Mr. Flyte's examination,<sup>59</sup> and in writing during deliberations that St. Joe's was the responsible culprit and that the Flyte family was already properly compensated. As in *Risley v. Moberg*, 69 Wash.2d 560, 419 P.2d 151 (1966), the trial court's "limiting" instruction had a "magnitude of importance" that proved prejudicial to the Flyte family's case and warrants reversal.

Just as importantly, the Flyte family was denied the opportunity to query Ms. Knight about her potential biases if informed about the \$3.5 million settlement, and the result was the Flyte's family case was ruled

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deals directly with issues of liability that are normally addressed via RCW 4.22.070 for proportionate fault related purposes.

<sup>59</sup> Verbatim Report of Proceedings: Kenneth Flyte Trial Transcript, Pages 121-23

upon by an inherently biased jury.<sup>60</sup> And all of the trial court's rulings in this respect were in reliance upon case law that has now been summarily reversed.<sup>61</sup> The Flyte family was not given a fair trial. For those reasons, the Flyte family respectfully requests that this Court grant a new trial in accordance with *Turner*, CR 59(a)(1),(8) and (9).

**Issue 2: This Court should grant a new trial premised upon the fact that the trial court improperly relied upon post-verdict juror-declarations when denying the motion for a new trial:**

In opposition to the Flyte family's motion for a new trial, the defense ran out and obtained declarations from Ms. Knight and other jurors purporting to explain how the jury purportedly deliberated and reached its verdict. Ms. Knight tried to claim that hearing that her employer had already paid the Flyte family \$3.5 million to settle did not impact her judgment at all. In the Reply briefing to the motion for new trial, footnote 3,<sup>62</sup> the Flyte family objected to the trial court considering these declaration as is expressly prohibited under clear and controlling precedent: *Gardner v. Malone*, 60 Wash.2d 836, 376 P.2d 651 (1962)

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<sup>60</sup> Verbatim Report of Proceedings of July 11, 2012, Pages 169-171. For clarity purposes, the Flyte family *is not* assigning error to the *voir dire* proceedings, or to Ms. Knight having been sat on the jury. By contrast, the Flyte family *is* asserting that Diaz was bad law, this bad law caused the settlement evidence to be admitted, and that the prejudicial impact was magnified by the fact that Ms. Knight was on the jury, as foreperson. To the extent that the Summit View Clinic anticipates submitting a response brief discussing issues surrounding *voir dire*, that is not the assignment of error of this appeal.

<sup>61</sup> CP 337-38

<sup>62</sup> CP 320

(“The mental process by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect of the evidence may have had upon the jurors or weight particular jurors may have given to particular evidence, or jurors’ intentions or beliefs...inhere in the verdict itself, and averments concerning them are inadmissible...”)

The fact that the Clinic was able to obtain a favorable and supportive declaration from Ms. Knight, a fellow healthcare provider, to try and uphold the verdict is further evidence of the problem with this particular trial result. To the extent that the trial court relied upon Ms. Knight or any other juror’s declaration in denying the motion for new trial, the trial court committed error and should be reversed in accord with CR 59(a)(1),(8), and (9).

**Issue 3: This Court should grant a new trial premised upon the fact that the trial court improperly instructed the jury as the burden of proof for establishing a breach of informed consent:**

Separate and apart from the issues pertaining to the settlement evidence related to St. Joe’s Hospital, a new trial should be granted premised upon the trial court having improperly instructed the jury on the issue of informed consent. Specifically, the offending jury instruction, which was proposed by the defense and objected to by the Flyte family, reads as follows:

*A physician has no duty to disclose treatments for a condition that may indicate a risk to the patient's health until the physician diagnoses that condition.*<sup>63</sup>

This instruction is not approved in the WPIs and does not accurately state Washington law. To the contrary, Washington Supreme Court precedent specifically provides the law is the *opposite*, and no formal diagnosis is required in order to trigger full informed consent obligations:

The basis of this duty is that the patient has a right to know the material facts concerning the condition of his or her own body, and any risks presented by that condition, so that an informed choice may be made regarding the course which the patient's care will take. **The patient's right to know is not confined to the choice of treatment once a disease is present and has been conclusively diagnosed.** Important decisions must frequently be made in many nontreatment situations in which medical care is given, including procedures leading to a diagnosis, as in this case. These decisions must all be taken with the full knowledge and participation of the patient. The physician's duty is to tell the patient what he or she needs to know in order to make them. The existence of an abnormal condition in one's body, the presence of a high risk disease, and the existence of alternative diagnostic procedures to conclusively determine the presence or absence of that disease are all facts which a patient must know in order to make an informed decision on the course which medical care will take.

*Gates v. Jensen*, 92 Wn.2d 246, 250-51, 595 P.2d 919 (1979).

In contrast to this Supreme Court authority, the Summit View Clinic has been unable to present authority truly supportive of the accuracy of the legal proposition proposed by the Summit View Clinic in

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<sup>63</sup> CP 146-76; Instruction No. 11

offending Instruction No. 15.<sup>64</sup> “Contrary to respondents’ contention, application of the doctrine of informed consent to the circumstances other than treatment of a diagnosed disease is nothing new.” *Gates*, 595 Wn.2d at 923. The offending jury instruction itself defies common sense and effectively, and impermissibly, retools the legal standard for medical malpractices cases as were already codified by the Legislature in RCW 7.70.050.<sup>65</sup>

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<sup>64</sup> The Summit View Clinic cited *Burnet v. Spokane Ambulance*, 54 Wn. App. 785, 954 P.2d 1027 (1989) and *Gustav v. Urological Association*, 90 Wn. App. 785, 954 P.2d 319 (1998). Neither *Burnet* nor *Gustav* are supportive of the dispute jury instruction. And even if *Burnet* or *Gustav* were supportive of the Summit View Clinic’s propose instruction, those opinions are inconsistent with the standard as codified by thLegislature under RCW 7.70.050.

<sup>65</sup> 7.70.050. Failure to secure informed consent--Necessary elements of proof--Emergency situations

(1) The following shall be necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his or her representatives against a health care provider:

- (a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;
- (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;
- (c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;
- (d) That the treatment in question proximately caused injury to the patient.

(2) Under the provisions of this section a fact is defined as or considered to be a material fact, if a reasonably prudent person in the position of the patient or his or her representative would attach significance to it deciding whether or not to submit to the proposed treatment.

Jury instructions must properly inform the jury as to the applicable law. *See Hue v. Farmboy Spray Co.*, 127 Wash.2d 67, 896 P.2d 682 (1995). When considering erroneous instructions, the appellate courts presume prejudice, and reversible error. *State v. Britton*, 27 Wash.2d 336, 178 P.2d 341 (1947). In this instance, in accord with the law, the trial court's error in giving the Summit View Clinic's instruction warrants granting a new trial. The Flyte's family's theory of the case *was not* that Dr. Marsh failed to diagnose Swine Flu.<sup>66</sup> Instead, the Flyte family's theory of the case *was* that in light of Kathryn's medical presentation on June 26, 2009, the Summit View Clinic was obligated to inform her of the option of taking Tamiflu.<sup>67</sup> But by the trial court embracing the Summit View's Clinic's erroneous jury instruction, the trial court misapplied the law and grafted an extra burden of proof upon the Flyte family with

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(3) Material facts under the provisions of this section which must be established by expert testimony shall be either:

- (a) The nature and character of the treatment proposed and administered;
- (b) The anticipated results of the treatment proposed and administered;
- (c) The recognized possible alternative forms of treatment; or
- (d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.

(4) If a recognized health care emergency exists and the patient is not legally competent to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, his or her consent to required treatment will be implied.

<sup>66</sup> Verbatim Report of Proceedings July 9, 2012, Pages 6-7

<sup>67</sup> Verbatim Report of Proceedings: Hal Zimmer, M.D., Trial Transcript, Pages 9-10

respect to the informed consent claim: that Dr. Marsh had to formally diagnose Kathryn with Swine Flu in order to offer the life-saving Tamiflu as prophylactic precautionary measure.

This is a case and an issue of particular public import because it deals with a woman's right to be fully informed about her health care in the most critical of circumstances. Existing Washington law, including the codified standards under RCW 7.70.040 and 050, are not consistent with the Clinic's legal proposition. The jury, led by Ms. Knight, was not properly instructed on the law, and the Flyte family did not prevail at trial as a result. The Summit View Clinic's proposed instruction, Instruction No. 11, effectively nullified the Flyte family's informed consent claim, which was the leading theory of the case.

Without also first making a finding of negligent diagnosis, which the Flyte family was not even asserting, the jury could *never* have ruled in the Flyte family's favor on the issue of informed consent. As is codified under Washington law, medical negligence (RCW 7.70.040) and informed consent (RCW 7.70.050) are two separate and distinct legal theories upon which a claimant can obtain a recovery under the law. "A provider may be liable to a patient for breaching this duty even if the treatment otherwise meets the standard of care." *Gomez v. Sauerwein*, 289 P.3d 755, 759 (2012). By accepting Instruction No. 11, and instructing the jury

in that regard, the trial court committed reversible error. For that reason alone, the Flyte family respectfully requests that this Court grant a new trial in accordance with CR 59(a)(1),(8), and (9).

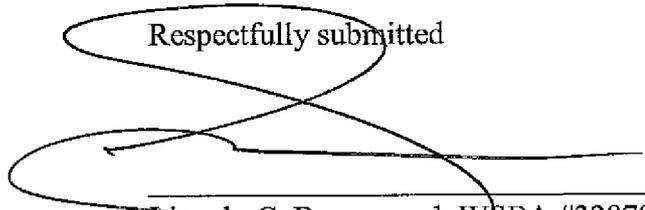
#### IV. CONCLUSION

The Flyte family did not receive a fair trial. There was strong evidence of medical negligence and a lack of informed consent, all of which was nullified by the jury having been led by a juror whose employer had recently paid the Flyte family \$3.5 million to settle related claims. The Flyte family was not provided a fair opportunity to *voir dire* Ms. Knight, and she ended up the foreperson on the jury. Thereafter, the trial court gave the jury an improper instruction on a fundamental issue of law, the informed consent standard, and allowed the entire case to be decided by an inherently bias juror. After the trial, the Supreme Court reversed Division I in *Diaz* thereby invalidating many of the corresponding rulings issued by the trial court. The Supreme Court also noted that in evaluating for “harmless error” that pure “common sense” is not checked at the door. *Diaz, supra*. All of the errors identified by the Flyte family in this appeal are those of law and are not matters that were within the discretion of the trial court and should therefore be reviewed *de novo*. *Jazbec v. Dobbs*, 55 Wash.2d 373, 347 P.2d 1054 (1960). Any of

these errors independently and/or cumulatively together warrant a new trial. *See In re Morris*, 288 P.3d 1140 (2012) (cumulative errors warrant new trial even when single error alone would not). In this case, in this rare instance, common sense dictates that the Court should order a new trial in accordance with CR 59(a)(1),(8), and (9). The trial court's denial of the underlying motion for a new trial should be reversed and a new trial should be granted.

DATED this 21<sup>st</sup> day of March, 2013.

Respectfully submitted



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NO. 43964-6-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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KENNETH FLYTE, as Personal Representative of THE ESTATE OF  
KATHRYN FLYTE, on behalf of their son JACOB FLYTE, and as  
personal representative of THE ESTATE OF ABIGAIL FLYTE,

Appellants,

v.

SUMMIT VIEW CLINIC, a Washington corporation,

Respondent.

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APPENDIX FOR APPELLANTS OPENING BRIEF

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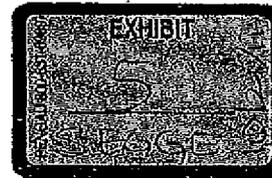
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**APPENDIX OF EXHIBIT P-5 (Admitted 7-12-12)**

Date: May 5, 2009

Information Contacts:  
 Public Health Information Officer

253 798-6500



## Addressing Shortages of Antivirals and PPE

Dear Provider,

### Antivirals

The Health Department has become aware that antivirals can now be difficult or impossible to find in retail pharmacies. The health department has a supply of Tamiflu (oseltamavir) and Relenza (zanamavir) supported by the Strategic National Stockpile to address the current Swine Origin Influenza Virus (H1N1) outbreak. Please contact 253 798-6500 and press 0 between 8 am and 4 pm with your requests for antivirals. We will determine availability and arrange for you to pick up a supply from the D Street building. This will be the procedure as we manage the flu outbreak at this level. If the severity of the outbreak changes and demand on the medical systems increase, distribution of antivirals may be moved to the system of Tier 1, 2 and 3 alternative care sites.

- Current guidelines for prescribing medications from the federally funded stockpile of medications (i.e., the Strategic National Stockpile), call for these medications to be used for the treatment of confirmed, probable, or suspected cases of swine influenza A (H1N1). They may not be used to treat those with seasonal flu, or for mild cases of H1N1 influenza for which providers would not normally use antiviral medications. Be advised that antiviral medications at best, shorten the duration and severity of illness, and thus initiation is not recommended past 48 hours of onset of symptoms.
- Please follow the attached "Interim guidelines for Outpatient Antiviral Drug Use for Influenza Infection".

### PPE

Tacoma-Pierce County Health Department has become aware that there is a shortage of surgical and N95 masks in retail outlets and from suppliers. As you use surgical and N95 masks when caring for patients, you may encounter a shortage. We have a supply of masks that are available to provider offices. If you are low on supplies and are unable to acquire them:

- Call Tacoma-Pierce County Health Department 253 798-6500 and press 0 between 8 am and 4 pm to request masks (indicate Small or Medium size for N95).
- You will be given instructions on times to pick up masks.
- Distribution will take place at the D street location, downstairs ground level.
- Instructions for patients on use of masks and how to take care of family members in the home may be found on [www.tpchd.org](http://www.tpchd.org).
- We will also give you a hard copy of these guidelines at the mask distribution for you to copy and give to your patients.

(P-5)

## Treatment

Influenza should be considered in persons with acute febrile respiratory illness with cough or sore throat. Treatment of hospitalized patients and outpatients at high risk for influenza complications should be prioritized. Mild uncomplicated illness should not be treated.

### Persons at high risk of complications from influenza who should be considered for antiviral therapy:

- Infants and children aged <5 years\*
- Persons with asthma or other chronic pulmonary diseases, such as cystic fibrosis in children or chronic obstructive pulmonary disease in adults
- Persons with hemodynamically significant cardiac disease
- Persons who have immunosuppressive disorders or are receiving immunosuppressive therapy
- HIV-infected persons
- Pregnant women\*\*
- Persons with sickle cell anemia and other hemoglobinopathies
- Persons with diseases that require long-term aspirin therapy, such as rheumatoid arthritis or Kawasaki disease
- Persons with chronic renal dysfunction
- Persons with cancer
- Persons with chronic metabolic disease, such as diabetes mellitus
- Persons with neuromuscular disorders, seizure disorders, or cognitive dysfunction that may compromise the handling of respiratory secretions
- Adults aged >65 years
- Residents of any age of nursing homes or other long-term care institutions

Antiviral treatment should be initiated as soon as possible after the onset of symptoms. Evidence indicates benefit from treatment in studies of seasonal influenza is strongest when treatment is started within 48 hours of illness onset. However, some studies of treatment of seasonal influenza have indicated benefit, including reductions in mortality or duration of hospitalization even for patients whose treatment was started more than 48 hours after illness onset. Therefore, treatment for high-risk patients who are seen >48 hours after illness onset and are not improving is permitted.

## Chemoprophylaxis

Routine prophylaxis with oseltamivir or zanamavir should be limited at this time to the following individuals who have contact with a confirmed or probable case:

- Household close contacts of a confirmed or probable case who are at high-risk for complications of influenza (e.g., persons with certain chronic medical conditions, persons 65 or older, children younger than 5 years old, and pregnant women).
- Health care workers who were not using appropriate personal protective equipment during close contact with an ill confirmed, probable, or suspect case of swine-origin influenza A (H1N1) virus infection during the case's infectious period.

(\*)Information from CDC on treatment of children under 1 year of age

- Children under one year of age are at high risk for complications from seasonal human influenza virus infections. The characteristics of human infections with swine-origin H1N1 viruses are still being studied, and it is not known whether infants are at higher risk for complications associated with swine-origin H1N1 infection compared to older children and adults. Limited safety data on the use of oseltamivir (or zanamivir) are available from children less than one year of age, and oseltamivir is not licensed for use in children less than 1 year of age. Available data come from use of oseltamivir for treatment of seasonal influenza. These data suggest that severe adverse events are rare, and the Infectious Diseases Society of America recently noted, with regard to use of oseltamivir in children younger than 1 year old with seasonal influenza, that "...limited retrospective data on the safety and efficacy of oseltamivir in this young age group have not demonstrated age-specific drug-attributable toxicities to date." (See IDSA guidelines for seasonal influenza.)
- Because infants typically have high rates of morbidity and mortality from influenza, infants with swine-origin influenza A (H1N1) infections may benefit from treatment using oseltamivir.

(\*\*)Information from CDC on treatment of pregnant women

- Oseltamivir and zanamivir are "Pregnancy Category C" medications, indicating that no clinical studies have been conducted to assess the safety of these medications for pregnant women. Because of the unknown effects of influenza antiviral drugs on pregnant women and their fetuses, oseltamivir or zanamivir should be used during pregnancy only if the potential benefit justifies the potential risk to the embryo or fetus; the manufacturers' package inserts should be consulted. However, no adverse effects have been reported among women who received oseltamivir or zanamivir during pregnancy or among infants born to women who have received oseltamivir or zanamivir. Pregnancy should not be considered a contraindication to oseltamivir or zanamivir use. Because of its systemic activity, oseltamivir is preferred for treatment of pregnant women. The drug of choice for prophylaxis is less clear. Zanamivir may be preferable because of its limited systemic absorption; however, respiratory complications that may be associated with zanamivir because of its inhaled route of administration need to be considered, especially in women at risk for respiratory problems.

For more information about antiviral drugs including dosing guidelines please see the CDC antiviral web page [www.cdc.gov/h1n1flu/recommendations.htm](http://www.cdc.gov/h1n1flu/recommendations.htm) and the Infectious Disease Society of America guidelines for seasonal influenza; [www.journals.uchicago.edu/doi/pdf/10.1086/5988513](http://www.journals.uchicago.edu/doi/pdf/10.1086/5988513)

Dosing guidelines for antiviral drugs (consult the manufacturer's package insert for complete information) Agent, Group	Treatment (5 days)	Prophylaxis (10 days)
<b>Oseltamavira</b>		
Adults	75 mg PO bld	75 mg PO qday
Children 15 kg or less	30 mg PO bld	30 mg PO qday
15-23 kg	45 mg PO bld	45 mg PO qday
24-40 kg	60 mg PO bld	60 mg PO qday
≥ 40 kg	75 mg PO bld	75 mg PO qday
<b>Zanamavira</b>		
Adults	Two 5mg Inhalations (10mg) bld	Two 5mg Inhalations qday
Children	Two 5mg Inhalations (10mg) bld (age ≥7 years)	Two 5mg Inhalations qday (age ≥5 years)

-- END --

Danette Gundy

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Sent: Tuesday, May 05, 2009 2:03 PM  
To: Danette Gundy  
Subject: Report for Control 111549  
Attachments: 111549.CSV

New feature as of April 20, 2003

Broadcast reports sent via e-mail now include an additional CSV format file.  
CSV (Comma Separated Values) may be read by a variety of programs including MS Excel.

The columns include:

Fax number  
E-mail address  
Date  
Time  
Last Name  
First Name  
Company  
Transmission status  
Call Duration (in seconds for fax)

Notes: Fax Numbers in the CSV files are now preceded with a = character.  
In some instances a transmission error occurs at the end of a fax call during the "tear-down" phase of the call. In many cases, the fax page(s) were successfully transmitted.  
Call durations are reported in actual seconds. These durations are not rounded up to 6 second increments until billing calculations are performed.

Additional information may be obtained via overnight reports.  
If you have any questions, please contact customer service at (310) 445-1000.

Broadcast Summary:

Group(s): @+0

609 Entries in Broadcast List  
65 Failed Transmissions

2535302129	5-May 13:38	St Anthony Hospital ER & Pharmacy	SENT@144	93	0 Sent
2535302856	5-May 13:47	St Anthony Hospital IC	SENT@144	88	0 Sent
2535308010	5-May 13:48	Multicare Urgent Care Gig Harbor	SENT@144	102	0 Sent
2535308099	5-May 13:58	Multicare Gig Harbor Primary Care	SENT@144	109	0 Sent
2535308126	5-May 13:48	Multicare Gig Harbor Women's Health	SENT@144	103	0 Sent
2535314228	5-May 13:48	King's Manor	SENT@144	124	0 Sent
2535314699	5-May 13:48	Cascade Christian Elementary Spanaw	SENT@144	113	0 Sent
2535333658	5-May 13:38		SENT@144	93	0 Sent
2535333822	5-May 13:38	Puget Sound Christian School	SENT@144	119	0 Sent
2535354155	5-May 13:38	Crossroads	SENT@144	92	0 Sent
2535355042	5-May 13:58	PLU Wellness Clinic	NO FAX TONE	6403	BT code not found in table
2535355684	5-May 13:38		SENT@144	108	0 Sent
2535357071	5-May 13:38	PLU Wellness Clinic	SENT@144	108	0 Sent
2535351255	5-May 13:38	Western Washington Alcohol and Drug	SENT@144	99	0 Sent
2535351612	5-May 13:38	All Family Medicine	SENT@144	103	0 Sent
2535361824	5-May 13:48	Summit View clinic	SENT@144	102	0 Sent
2535361906	5-May 13:38	Franklin Pierce School District	SENT@144	108	0 Sent
2535362956	5-May 13:38	Castelee Williams & Associates	SENT@144	102	0 Sent
2535363070	5-May 13:38	Spanaway Family Medical Clinic	SENT@144	89	0 Sent
2535363242	5-May 13:38	Pacific Pediatrics	SENT@144	94	0 Sent
2535365042	5-May 13:38	PLU Student Health Services	SENT@144	87	0 Sent
2535365327	5-May 13:48	Community Health Care Parkland Cln	SENT@144	91	0 Sent
2535365745	5-May 13:50	The Crossing	SENT@144	114	0 Sent
2535371705	5-May 13:38		SENT@144	103	0 Sent
2535375425	5-May 13:48	Spanaway General Medical Clinic	SENT@144	109	0 Sent
2535386408	5-May 13:38	Central Pierce Fire & Rescue	SENT@144	98	0 Sent
2535386408	5-May 13:26	Puyallup Fire and Rescue	NOT SENT DUPLICATE FAX	-1	BT code not found in table
2535399718	5-May 13:26		LOCKED Check Fax #	75	BT code not found in table
2535483049	5-May 13:38	Peter LoGerfo	SENT@144	103	0 Sent
2535521789	5-May 13:48	Multicare Maternal Fetal Medicine	SENT@144	110	0 Sent
2535522441	5-May 13:58	Community Health Care Soundview Cll	SENT@144	90	0 Sent
2535641629	5-May 13:49	University Place Fire Department	SENT@144	94	0 Sent
2535644813	5-May 13:38		SENT@144	103	0 Sent
2535643744	5-May 13:26	Northwest Foot and Ankle Clinic	LOCKED Check Fax #	75	BT code not found in table
2535646034	5-May 13:56	University Place Care Center	BUSY	6017	BT code not found in table
2535648344	5-May 13:38	Pediatrics Northwest James	SENT@144	100	0 Sent
2535649466	5-May 13:48	Bel Air Rehab	SENT@144	97	0 Sent
2535650684	5-May 13:48	Holistic Family Practice	SENT@144	99	0 Sent

**APPENDIX OF EXHIBIT P-6 (Admitted 7-12-12)**

Date: May 6, 2009

Information Contacts:

David Harrowe, MD, MPH

253 798-7388

[dharrowe@tpchd.org](mailto:dharrowe@tpchd.org)

## Update of Testing Recommendations Swine-Origin Influenza A (H1N1)

Many probable cases of the swine-origin influenza A (H1N1) virus (S-OIV) have been reported in Washington State, suggesting transmission within communities. In Pierce County to date, one individual has tested probable for this novel virus, while six others have tested negative. So far, influenza symptoms with S-OIV are similar to seasonal influenza.

Due to limited resources, the Washington State Public Health Lab is unable to test all persons in whom S-OIV is suspected and thus the decision has been made to test only a select group of patients for the novel H1N1 virus. These recommendations are summarized on the accompanying testing algorithm.

### Recommendations for Testing

- 1) Cases of unexplained severe respiratory illness resulting in death should be tested for S-OIV.
- 2) Persons hospitalized with severe respiratory illness (i.e., fever  $\geq 37.8^{\circ}\text{C}$  [ $100^{\circ}\text{F}$ ] plus shortness of breath, hypoxia, or radiographic evidence of pneumonia) should have a rapid test for influenza A.
  - If the rapid test is positive for influenza A, healthcare providers should notify their LHJ and obtain a second nasopharyngeal specimen for testing for S-OIV at PHL.
  - If the rapid test is negative, no samples should be forwarded to PHL. Note that a negative test does not rule out influenza. Consider additional tests for influenza (culture, IFA, PCR) if clinically appropriate.
- 3) Outpatients with influenza-like illness (i.e., fever  $\geq 37.8^{\circ}\text{C}$  [ $100^{\circ}\text{F}$ ] plus cough and/or sore throat) should be tested for influenza only if high priority (health care worker; pregnant; age  $< 1$  year; or a suspected outbreak where the test result will change public health actions).
- 4) Health Department staff have the option to request S-OIV testing at PHL in other circumstances.

Testing at the state lab must be approved by Tacoma-Pierce County Health Department. Call 253 798-6410, press "0" for an operator, and ask to speak to one of the epidemiology nurses or Dr. Harrowe. Laboratories must also call the Health Department to request authorization for testing.

Specimens should be shipped cold (not frozen) and must arrive at PHL within 72 hours of collection. A virology form should accompany the specimen:

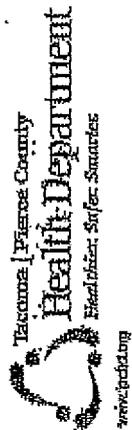
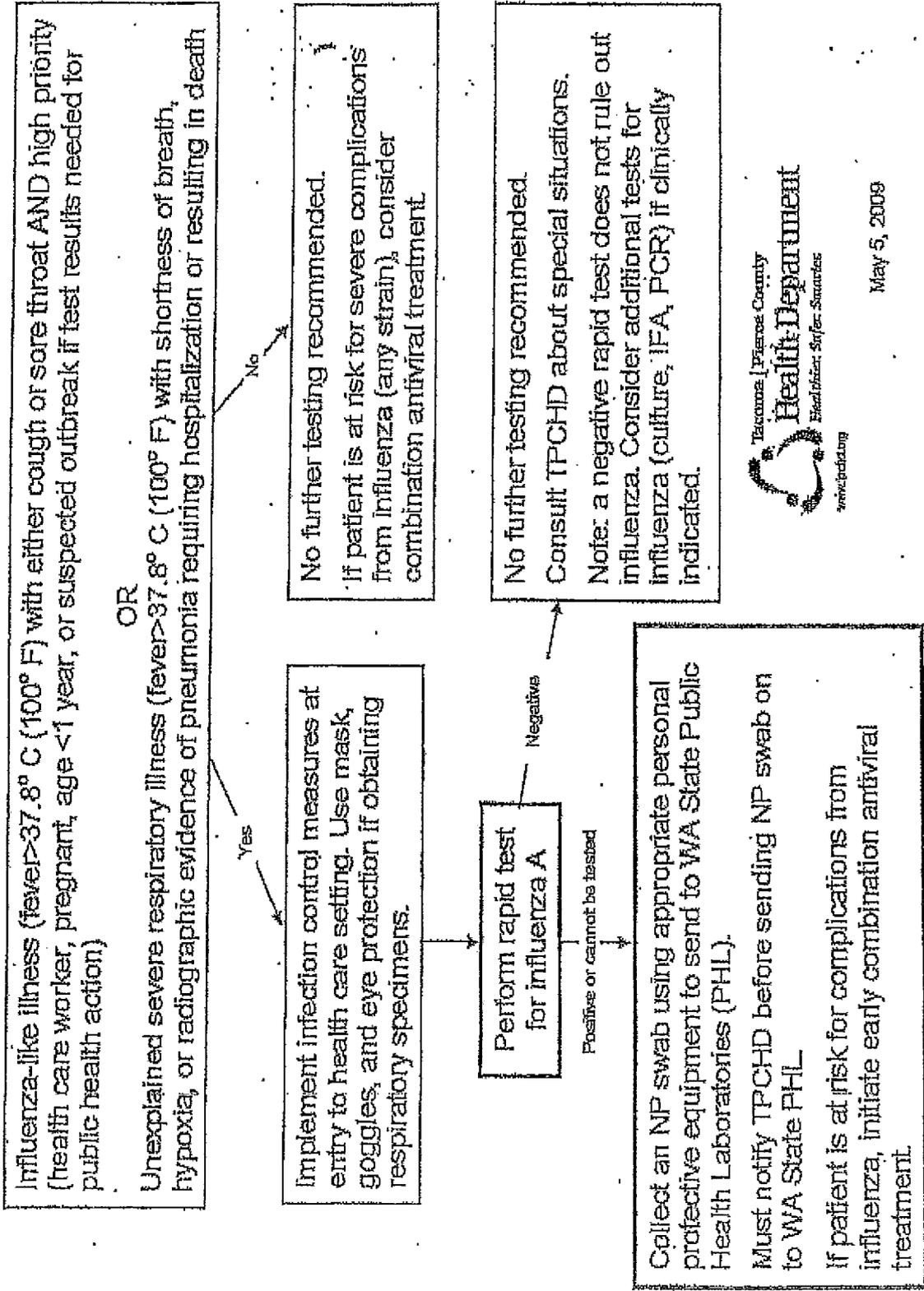
[www.doh.wa.gov/EHSPHL/PHL/Forms/SerVirHIV.pdf](http://www.doh.wa.gov/EHSPHL/PHL/Forms/SerVirHIV.pdf)

Ship specimens to:

Washington State Public Health Laboratories  
Attn: PHL Virology Laboratory  
1610 NE 150<sup>th</sup> Street  
Shoreline, WA 98155



# Testing Algorithm for Swine Origin Influenza Virus (S-OIV)



May 5, 2009

Danette Gundy

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From: service@thefaxcompany.com  
Sent: Tuesday, May 05, 2009 2:29 PM  
To: Danette Gundy  
Subject: APPROVAL NEEDED - Proof copy for Control # 111555  
Attachments: 111555.PDF

TO: Danette Gundy

NUMBER OF PAGES IN JOB DOCUMENT: 2

The following page(s) are a proof copy of a Broadcast Fax scheduled for transmission.

\*\*\*\*\*  
\* Your Fax Broadcast Job is Pending Approval \*  
\* To Approve & Submit this Job for Delivery \*  
\* Call 800-896-2318, then follow the prompts \*  
\* \*  
\* (You have up to 3 days to Approve this Job) \*  
\*\*\*\*\*

ACCOUNT #: 4784  
CONTROL #: 111555

\*NEW\* INCLUDED GROUPS: # Group Description

0 GROUP 0 Entire Database

\*NEW\* EXCLUDED GROUPS: # Group Description

There are 609 destinations on this broadcast list.

ICE Image Correction and Enhancement OFF

This broadcast was submitted at Tue May 05 14:28:26 2009 California time.

Broadcast scheduled for delivery on 05/05/2009 at 14:26:49

Fax Transmission Resolution: STANDARD

\*NEW\* Your database was last updated on Tue May 05 2009 @ 14:28:16

\*NEW\* Approximate transmission time (per copy) at 9600 Baud: 100 seconds

\*NEW\* Approximate transmission time (per copy) at 14400 Baud: 73 seconds  
(Total Bytes: 77165)

Customer Service (310) 445-1000  
24 Hour Customer service Pager (310) 587-7084

Danette Gundy

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From: service@thefaxcompany.com  
Sent: Tuesday, May 05, 2009 3:09 PM  
To: Danette Gundy  
Subject: Report for Control 111555  
Attachments: 111555.CSV

New feature as of April 20, 2003

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Fax number  
E-mail address  
Date  
Time  
Last Name  
First Name  
Company  
Transmission status  
Call Duration (in seconds for fax)

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Broadcast Summary:

Group(s): @+0

609 Entries in Broadcast List  
66 Failed Transmissions

2535381255	5-May 14:35	Western Washington Alcohol and Drug	SENT@144	73	0 Sent
2535381612	5-May 14:35	All Family Medicine	SENT@144	78	0 Sent
2535381824	5-May 14:35	Summit View clinic	SENT@144	66	0 Sent
2535381906	5-May 14:35	Franklin Pierce School District	SENT@144	81	0 Sent
2535382956	5-May 14:35	Castro Williams & Associates	SENT@144	78	0 Sent
2535383070	5-May 14:35	Spanaway Family Medical Clinic	SENT@144	72	0 Sent
2535383242	5-May 14:35	Pacific Pediatrics	SENT@144	73	0 Sent
2535385042	5-May 14:35	PLU Student Health Services	SENT@144	61	0 Sent
2535385327	5-May 14:35	Community Health Care Parkland Clin	SENT@144	71	0 Sent
2535385745	5-May 14:35	The Crossing	SENT@144	87	0 Sent
2535387105	5-May 14:36		SENT@144	74	0 Sent
25353876425	5-May 14:35	Spanaway General Medical Clinic	SENT@144	75	0 Sent
2535388408	5-May 14:35	Central Pierce Fire & Rescue	SENT@144	64	0 Sent
2535388408	5-May 14:26	Puyallup Fire and Rescue	NOT SENT DUPLICATE FAX		-1 BT code not found in table
2535389718	5-May 14:26		LOCKED Check Fax #		75 BT code not found in table
2535483049	5-May 14:35	Peter LoGerfo	SENT@144	74	0 Sent
2535521789	5-May 14:45	MultiCare Maternal Fetal Medicine	SENT@144	69	0 Sent
2535522441	5-May 14:56	Community Health Care Soundview Cl	SENT@144	62	0 Sent
2535541629	5-May 14:35	University Place Fire Department	SENT@144	67	0 Sent
2535644813	5-May 14:35		SENT@144	74	0 Sent
2535646744	5-May 14:26	Northwest Foot and Ankle Clinic	LOCKED Check Fax #		75 BT code not found in table
2535648034	5-May 14:35	University Place Care Center	SENT@144	78	0 Sent
2535648344	5-May 14:37	Pediatrics Northwest James	SENT@144	70	0 Sent
2535649456	5-May 14:35	Bel Air Rehab	SENT@144	70	0 Sent
2535650684	5-May 14:35	Holistic Family Practice	SENT@144	67	0 Sent
2535650684	5-May 14:26	Sound Healing Arts Center	NOT SENT DUPLICATE FAX		-1 BT code not found in table
2535654688	5-May 14:35	Fircrest Family Medicine	SENT@144	83	0 Sent
2535658777	5-May 14:35	Endocrine Consultants Northwest	SENT@144	73	0 Sent
2535658842	5-May 14:35	University Place Pediatrics	SENT@144	75	0 Sent
2535660210	5-May 14:35	Fir Creek Pediatrics	SENT@144	63	0 Sent
2535662252	5-May 14:35	Comprehensive Mental Health	SENT@144	60	0 Sent
2535665273	5-May 14:35	Tacoma Community College	SENT@144	71	0 Sent
2535665491	5-May 14:35	St. Charles Borromeo	SENT@144	74	0 Sent
2535665607	5-May 14:46	University Place School District	SENT@144	67	0 Sent
2535668850	5-May 14:36		SENT@144	97	0 Sent
2535711038	5-May 14:35	Tacoma Public School District	SENT@144	65	0 Sent
2535720424	5-May 14:35		SENT@144	74	0 Sent
2535721071	5-May 14:35	Center for Minimally Invasive Surge	SENT@144	64	0 Sent

111555.CSV

**APPENDIX OF EXHIBIT P-14 (Admitted 7-12-12)**

Patient Chart

*FLYTE, KATHRYN*

15179 Sex: F Age: 27 DOB: 04/17/1982  
Date Printed: 09/29/09

Progress Notes

06/26/09 : 11:13am  
URI:

: 303

Bp: 110/60, Left Arm, Pulse: 100  
Temperature: 98.8 F, Weight: 137 lbs

**SUBJECTIVE:**

This 27 yr old female presents with URI symptoms.

Current symptoms:

Duration: 3-5 days

Runny nose: yes

Congestion: yes

Mucopurulent nasal discharge: no

Fever: no

Cough: yes

Wheezing: yes

Sneezing: no

Ear Pain: no

Ear Drainage: no

Other: Body aches, chills and sweats

Tooth Pain: no

Sinus Pressure: no

Past History of Sinus Infection: no

Past History of Bronchitis: no

Smoking: non-smoker

**OBJECTIVE:**

Bp: 110/60, Left Arm, Pulse: 100

Temperature: 98.8 F, Weight: 137 lbs

General: Well appearing, well nourished in no distress. Oriented x 3, normal mood and affect.

Ears: EACs clear, TMs translucent & mobile, ossicles normal appearance, hearing intact

Nose: mucosa congested and inflamed

Sinus: Frontal and maxillary sinuses non-tender.

Pharynx: mucosa non-inflamed, no tonsillar hypertrophy or exudate

Lungs: clear to auscultation and percussion

Abdominal: pregnant enlarged FHT's >150 bpm

UA normal except protein present

**ASSESSMENT:**

URI: 465.9

**PLAN:**

Patient Education: Increase PO fluids



Printed using Practice Partner®

PLA 000061

(p-14)

Patient Chart

*FLYTE, KATHRYN*

Date Printed: 09/29/09  
L5179 Sex: F Age: 27 DOB: 04/17/1982

OV Level 4 Est Pt:99214

Return to clinic pm

Patient Education: Spilling some protein in the urine BP is OK FHT's OK.  
Chills and sweats not sure where coming from exam normal If gets worse to go to the ER  
Told to make appt with OB early next week because of the proteinuria

# SIGNED BY WILLIAM G MARSH MD (303) 06/26/2009 12:12PM

**APPENDIX OF EXHIBIT P-18 (Admitted 7-12-12)**

Elysium FINAL DICTATION RESULTS FROM ELYSIUM TRANSCRIPTION CHART COPY

Name: FLYTE, KATHRYN M Age: 27 MRN or ID: 13689525-1 [FMG]  
 Address: 12624 106TH AVE CT E Born: 17-Apr-1982 004272554819 [Elysium]  
 PUYALLUP, WA 98374 Sex: F  
 Home: (253) 770-3318 Work: (253) 250-9569

Action Requested of Stephanie Kizer by Rhonda J DiCostanzo on 24-Jul-2009 07:10 AM: Please document in OB chart

Annotation by Stephanie Kizer on 24-Jul-2009 07:31 AM: added to ob chart

Previous Annotations

Creator	Annotation	Date/Time
Rhonda J DiCostanzo	This is an unrevised dictated chart note. It is my usual and customary practice to edit chart notes after I can see my dictation.	24-Jul-2009 07:10 AM

Ordered Routine by RHONDA J DiCOSTANZO

Chart Note

Service/Procedure Date: 27-Jun-2009 12:00 AM

**SUBJECTIVE:** Mrs. Flyte is an established patient in this clinic. She is a patient of Peggy Dunlop. She is 27 weeks pregnant and is here today clinic because she was seen by her primary care provider yesterday, and he sent her here for a followup. She was seen by him yesterday complaining of flu symptoms, and when she was in his office, he noted that the baby's heart rate was in the 130s and that she had protein in her urine, and this concerned him, and so he sent her here. I explained to the patient that a heart rate of 130s and then 140s in the office at her primary's office was very normal. The range of the baby's heart rate can be between 110 and 160, which is what it was today, and it was 160 today, and all of those ranges are very normal. We discussed that the protein in her urine, while 1+ today also in the office today, is a little bit high. She has had trace protein in her urine for her entire pregnancy and, with a normotensive blood pressure reading, not concerning at this time, but we will keep an eye on it. The patient was upset that she had been sent here and that basically I was telling her that her baby's heart rate was okay and that the 1+ protein was nothing that we were going to do anything about at this time. Patient said that she has been feeling miserable. She has been taking Tylenol, as directed, every day. She is not feeling that much better. She has been feeling bad for about a week. Her primary care provider said he thought that she had the flu and sent her on her way and that she had a virus and there was no medicine for it. She said that he did listen to her lungs, and they were clear, and that she should follow up with her OB provider. She was asking about antibiotics, and I discussed the fact that it is true that, if there is a virus, there are no antibiotics for fighting the flu or for fighting a virus, but that we could check to see if she in fact did have a flu virus.

**OBSERVATION:**

**VS:** Patient is 27 weeks and 1 day pregnant. Her blood pressure today is 118/80. Her weight was 199 pounds.

She did have 1+ protein and no sugar in her urine. Her fundal height was 28. Fetal heart rate was 160.

**OTHER OBSERVATIONS:** Patient did feel warm to the touch, although I did not get her temperature. I did listen to her lungs, and she did have some crackling in her lower right lobe. I told her that, if her coughing or breathing got worse, she should follow up again with her primary provider, but it was a minor amount and, at this time, nothing we can do about it. I did do a culture for influenza and a long dip on her urine, and it again revealed 1+ protein and 1+ ketones.

**ASSESSMENT:** This lady probably has some kind of a viral infection, is miserable, and is 27 weeks pregnant.

**PLAN:** I did the culture. I will call her on Monday with those results, if they are in then, or, whenever they do come in, I will call her. I did get her phone number. I encouraged the patient to continue the Tylenol as directed on the bottle and to take some Benadryl to help her sleep and also to help her with her allergy symptoms, and to drink more fluid so that her urine is lighter and not so concentrated.

R&T: 07/10/2009 D: 06/27/2009



## Elysium FINAL DICTATION RESULTS FROM ELYSIUM TRANSCRIPTION CHART COPY

Name: FLYTE, KATHRYN M Age: 27 MRN or ID: 13689525-1 [FMG]  
 Address: 12624 106TH AVE CT E Bom: 17-Apr-1982 004272654819 [Elysium]  
 PUYALLUP, WA 98374 Sex: F  
 Home: (253) 770-3318 Work: (253) 250-9859  
 Ordered Routine by RHONDA J DICOSTANZO  
 Chart Note

Service/Procedure Date: 27-Jun-2009 12:00 AM

**SUBJECTIVE:** Mrs. Flyte is an established patient in this clinic. She is a patient of Peggy Dunlop. She is 27 weeks pregnant and is here today clinic because she was seen by her primary care provider yesterday, and he sent her here for a followup. She was seen by him yesterday, complaining of flu symptoms, and when she was in his office, he noted that the baby's heart rate was in the 130s and that she had protein in her urine, and this concerned him, and so he sent her here. I explained to the patient that a heart rate of 130s and then 140s in the office at her primary's office was very normal. The range of the baby's heart rate can be between 110 and 160, which is what it was today, and it was 160 today, and all of those ranges are very normal. We discussed that the protein in her urine, while 1+ today also in the office today, is a little bit high. She has had trace protein in her urine for her entire pregnancy and, with a normotensive blood pressure reading, not concerning at this time, but we will keep an eye on it. The patient was upset that she had been sent here and that basically I was telling her that her baby's heart rate was okay and that the 1+ protein was nothing that we were going to do anything about at this time. Patient said that she has been feeling miserable. She has been taking Tylenol, as directed, every day. She is not feeling that much better. She has been feeling bad for about a week. Her primary care provider said he thought that she had the flu and sent her on her way and that she had a virus and there was no medicine for it. She said that he did listen to her lungs, and they were clear, and that she should follow up with her OB provider. She was asking about antibiotics, and I discussed the fact that it is true that, if there is a virus, there are no antibiotics for fighting the flu or for fighting a virus, but that we could check to see if she in fact did have a flu virus.

**OBSERVATION:**

**VS:** Patient is 27 weeks and 1 day pregnant. Her blood pressure today is 118/60. Her weight was 199 pounds.

She did have 1+ protein and no sugar in her urine. Her fundal height was 28. Fetal heart rate was 160.

**OTHER OBSERVATIONS:** Patient did feel warm to the touch, although I did not get her temperature. I did listen to her lungs, and she did have some crackling in her lower right lobe. I told her that, if her coughing or breathing got worse, she should follow up again with her primary provider, but it was a minor amount and, at this time, nothing we can do about it. I did do a culture for influenza and a long dip on her urine, and it again revealed 1+ protein and 1+ ketones.

**ASSESSMENT:** This lady probably has some kind of a viral infection. Is miserable, and is 27 weeks pregnant.

**PLAN:** I did the culture. I will call her on Monday with those results if they are in then, or, whenever they do come in, I will call her. I did get her phone number. I encouraged the patient to continue the Tylenol as directed on the bottle and to take some Benadryl to help her sleep and also to help her with her allergy symptoms, and to drink more fluid so that her urine is lighter and not so concentrated.

R&T: 07/10/2009 D: 06/27/2009

ATMS-7TWKYK ATMS-7TWKYK.HL7 1  
 TMI Transcription

rd\_eab071009\_0  
 fnl:  
 HKCIEDIEHED

**APPENDIX OF EXHIBIT D-77 (Admitted 7-16-12)**

MULTICARE  
GOOD SAMARITAN HOSPITAL  
CONSULTATION  
\*\* Signed Report \*\*

Pulmonology Consultation

PATIENT NAME: FLYTE, KATHRYN M  
MRN: M621016  
DOB: 04/17/1982  
ENCOUNTER: V011546048  
DATE OF ADMIT: 06/29/2009  
DATE OF CONSULT: 06/30/2009

Ms. Flyte has progressive alveolar interstitial infiltrates with hypoxemia and tachycardia, resulting in intubation. She had foamy pulmonary edema fluid. Her echocardiogram showed an EF of 60%, very hyperdynamic. She clearly has fulminant ARDS. Dr. McEniry and I have talked. As whether influenza was present is unclear. She had a negative swab. It has been 5-7 days. Tamiflu will be started, but the efficacy of this late into a possible influenza episode is extremely questionable. Clindamycin has been added to her care. We are trying to balance the needs of the fetus and the needs of the patient. Apparently several fetal monitoring interrogations have been carried out, and there is some sluggish respiratory movement. She did get 50 of fentanyl soon after intubation because she was mildly hypotensive overbreathing the ventilator. I had talked with Dr. Pratt who said that Fentanyl was okay overall but for the issue of respiratory suppression. She has only gotten that 1 dose.

With increasing PEEP, she is having improvement in her oxygenation but she is extremely positional. Her blood pressure has come up with fluids.

I have talked with Dr. Wong, Dr. (on call perinatologist). At this point, it appears like the best avenue that maximizes the chances for both mother and fetus is to deliver the child at this point. The child would go to Tacoma General, and the mother would remain here. She likely needs to be rotated.

This represents greater than 2 hours of continuous critical care time from 7:10 to 11:24 a.m.

Dictated by:  
Thomas N Mann MD\*  
Pulmonology

D: 06/30/2009 11:24:51  
T: 06/30/2009 15:15:42  
Job#: 292638/EMR

Account Number: V011546048  
Patient Name: FLYTE, KATHRYN M Female  
Birth Date: 04/17/1982  
M.R. Number: M372096  
Report Number: 0630-0475  
Admit/Service Date: 06/29/09 Status: DIS IN

CONSULTATION

Chart Copy

Patient Name: FLYTE, KATHRYN M  
Date of Birth: 04/17/1982

<Electronically signed by THOMAS N MANN M.D.>

Electronic Authentication Status: Signed  
Sign Date/Time: 07/24/09 1618  
Dictating Dr: MANN, THOMAS M.D.

Account Number: V011546048  
Patient Name: FLYTE, KATHRYN M  
Birth Date: 04/17/1982  
M.R. Number: M372095  
Report Number: 0630-0475  
Admit/Service Date: 06/29/09 Status: DIS IN

Female

CONSULTATION

Chart Copy

Def 77-026

Def Ex 03-00026

MULTICARE  
GOOD SAMARITAN HOSPITAL  
OPERATIVE REPORT  
\*\* Signed Report \*\*

PATIENT NAME: FLYTE, KATHRYN M  
MRN: M621016  
DOB: 04/17/1982  
ACCOUNT: V011546048  
PROCEDURE DATE: 06/30/2009  
SURGEON: Carrie Wong MD\*

PREOPERATIVE DIAGNOSIS: IUP at 27 weeks 3 days, nonreassuring fetal status, maternal ARDS.

POSTOPERATIVE DIAGNOSIS: IUP at 27 weeks 3 days, nonreassuring fetal status, maternal ARDS.

OPERATIVE PROCEDURE: Repeat cesarean section via classical incision.

ASSISTANT: Dr. Sam Song.

TYPE OF ANESTHESIA: General endotracheal by Dr. Ost and Dr. Clark.

ESTIMATED BLOOD LOSS: 1000 mL.

URINE OUTPUT: Foley to gravity.

FINDINGS: Viable female infant, cephalic presentation, weight 1300 grams. Normal uterus, tubes, and ovaries bilaterally.

SPECIMENS: Placenta and placental cultures, maternal and fetal sides, and cord gases.

COMPLICATIONS: None.

INDICATIONS FOR PROCEDURE: The patient is a 27-year-old gravida 2, para 1 Caucasian female with an intrauterine pregnancy at 27 weeks and 3 days who was admitted yesterday for what was presumed to be bilateral pneumonia, which rapidly progressed to ARDS. She was intubated this morning at about 8:30 and at that time was found to have a nonreassuring fetal heart tone strip with tachycardia in the 180s to 190s and decreased variability, and no accelerations or decelerations. At this time, the perinatologist was consulted at Tacoma General, Dr. Buchbinder, who stated assessment with a biophysical profile, to assess fetal wellbeing, could be performed and if at that time it was 8/8 he would accept transfer. However, when the biophysical profile was 4/8, and subsequent repeat done 1 hour later secondary to concern for possible sedating effects on the baby there was no change, at that time we recommended cesarean section to the father in order for best maternal and fetal outcome with risk of hypo-oxygenation to both, and he agreed to proceed and consents were signed.

DESCRIPTION OF PROCEDURE: The patient was taken to the operating room where she was sterilely prepped and draped in the dorsal supine position with a leftward tilt. A Pfannenstiel skin incision was made through her previous scar and carried down through to the underlying layer of fascia. The fascia was nicked in the midline and the incision was extended laterally with Mayo scissors. The fascia was tented up superiorly and inferiorly, and the rectus muscles were

Account Number: V011546048  
Patient Name: FLYTE, KATHRYN M Female  
Birth Date: 04/17/1982  
M.R. Number: M621016  
Report Number: 0701-0106  
Admit/Service Date: 06/29/09 Status: DIS IN

OPERATIVE REPORT

Chart Copy

Patient Name: FLYTE, KATHRYN M

Date of Birth: 04/17/1982

dissected off bluntly. The rectus muscles were separated in the midline and the peritoneum was entered sharply. The incision was extended with good visualization of the bladder. The bladder blade was inserted and the vesicouterine peritoneum was tented up and entered sharply. The incision was extended laterally, and the bladder flap was created digitally. A vertical uterine incision was made starting in the lower uterine segment and extending the incision up into the active segment of the uterus with the bandage scissors.

The infant was delivered atraumatically. The cord was clamped and cut, and the infant was taken to the awaiting transport team who was also present in the operating room. At that time, the placenta was delivered with manual extraction and massage. The uterus was exteriorized and cleared of all clots and debris. The uterine incision was reapproximated in 3 layers, the first incorporated with #1 chromic in a running locked fashion to incorporate the lower into the myometrium. A second layer of #1 chromic was placed to reapproximate the upper layers of the myometrium. A third layer of 3-0 chromic was placed in a baseball stitch to reapproximate the serosa. One hemostatic stitch was placed just lateral to the lower uterine segment incision on the left for hemostasis with 3-0 chromic. The uterus was replaced back into the abdomen and the gutters were cleared of clots and debris. A sheet of Interceed was placed along the classical incision line to minimize future adhesions. The rectus muscles were reapproximated with #1 chromic in an interrupted fashion. The rectus fascia was reapproximated with #1 PDS in a running fashion. The skin was closed with staples. The patient tolerated the procedure well. Sponge, lap, and needle counts were correct x2. The patient was taken to the ICU.

Dictated by:  
Carrie Wong MD\*  
OB/GYN

D: 06/30/2009 14:21:30  
T: 07/01/2009 08:29:55  
Job#: 292840/NCS

cc: Sam Song MD

<Electronically signed by CARRIE C WONG M.D.>

Electronic Authentication Status: Signed

Account Number: V011546048  
Patient Name: FLYTE, KATHRYN M  
Birth Date: 04/17/1982  
M.R. Number: M621016  
Report Number: 0701-0106  
Admit/Service Date: 06/29/09 Status: DIS IN

Female

OPERATIVE REPORT

Chart Copy

Def 77-121

Def Ex 03-00121

Patient Name: FLYTE, KATHRYN M  
Date of Birth: 04/17/1982

Sign Date/Time: 07/19/09 1351  
Dictating Dr: WONG, CARRIE C M.D.

Account Number: V011546048  
Patient Name: FLYTE, KATHRYN M  
Birth Date: 04/17/1982  
M.R. Number: M621016  
Report Number: 0701-0106  
Admit/Service Date: 06/29/09 Status: DIS IN

Female

OPERATIVE REPORT

Chart Copy

Def 77-122

Def Ex 03-00122

MULTICARE  
GOOD SAMARITAN HOSPITAL  
CONSULTATION  
\*\* Signed Report \*\*

PATIENT NAME: FLYTE, KATHRYN M  
MRN: M621016  
DOB: 04/17/1982  
ENCOUNTER: V011546048  
DATE OF ADMIT: 06/29/2009

INFECTIOUS DISEASE CONSULTATION

DATE OF CONSULT: 06/30/2009

REFERRING PHYSICIAN: Thomas Mann, MD

REASON FOR CONSULTATION: Pneumonia.

CHIEF COMPLAINT: Shortness of breath.

HISTORY OF PRESENT ILLNESS: (The patient is unable to give any history. History is taken from discussion with Dr. Mann, review of the records and interview with the patient's husband.) This 27-year-old woman who is 27 weeks pregnant presented yesterday with shortness of breath. She had fever for a week. She also has had cough for several days. On presentation to the emergency room, she was found to have diffuse pulmonary infiltrates. She was hypoxemic and rapidly deteriorated. She has been transferred to the intensive care unit and is on a ventilator. Chest x-ray shows diffuse infiltrates.

She is to be transferred to Tacoma General for care of her respiratory failure and monitoring of her pregnancy.

PAST MEDICAL HISTORY: Her 2-year-old child reportedly had a 3-day illness with fever and sore throat, which was improving just as the patient became ill. No one else in the household has been ill. She has had no unusual animal exposures. No exposures to birds, rats or mice. There are 2 pet cats in the family, but they are outside cats. There is a history of possible adverse reactions to antibiotics. This includes a potential reaction to azithromycin, which reportedly is listed as itching. There is also a potential reaction to moxifloxacin. The husband states categorically that she cannot take penicillin. She has received ceftriaxone and has tolerated it so far.

PAST SURGICAL HISTORY: She has had a cesarean section for her first child because of the child being large for gestational age. C-section is her only surgical history.

SOCIAL HISTORY: She lives in Puyallup with her husband and child. There is no history of alcohol, tobacco, or drug use.

PHYSICAL EXAMINATION:

GENERAL: She is an ill woman on a ventilator. She is unresponsive.  
VITAL SIGNS: Temperature 36.9. Blood pressure 105/57, heart rate 130 and sinus tachycardia.  
HEENT: Sclerae and conjunctivae are clear. Orotracheal tube is in place.  
CHEST: Breath sounds are audible bilaterally.  
HEART: Regular rhythm without murmur or rub.

Account Number: V011546048  
Patient Name: FLYTE, KATHRYN M Female  
Birth Date: 04/17/1982  
M.R. Number: M372095  
Report Number: 0630-0331  
Admit/Service Date: 06/29/09 Status: DIS IN

Def 77-035

CONSULTATION

Chart Copy  
Def Ex 03-00035

Patient Name: FLYTE, KATHRYN M

Date of Birth: 04/17/1982

ABDOMEN: Soft. Gravid.

EXTREMITIES: Warm.

SKIN: Without rash.

GENITOURINARY: Foley catheter with clear urine.

DIAGNOSTIC DATA: Chest x-ray is reviewed and shows diffuse infiltrates. White count was 6.3 initially at presentation. White count 9.3, hemoglobin 13.5, hematocrit 36 yesterday and 13.8 and 38 today. Platelet count 116,000. Chemistry panel shows an AST of 149 and ALT normal at 56. The bilirubin is 1.0. Albumin 2.1.

ASSESSMENT:

1. Pneumonia. Given the current influenza pandemic, this is a strong consideration despite the negative nasopharyngeal swab, which is an insensitive test. The illness is compatible with influenza pneumonia, or with influenza complicated by bacterial pneumonia. Sputum Gram stain is pending. I doubt this is atypical pneumonia.
2. Possible macrolide allergy, possible quinolone allergy, documented penicillin allergy.
3. 27 week intrauterine pregnancy.

RECOMMENDATIONS:

1. Viral studies. I have discussed this with the Pierce County Health Department and they authorized sending samples to the state laboratory for PCR for novel H1N1 influenza. Will also do viral culture and viral DFA panel at the usual laboratory.
2. Gram stain. If Staphylococcus aureus appears to be likely based on the Gram stain, additional MRSA treatment may be indicated. She has initially received ceftriaxone. Will add clindamycin now for some Staphylococcus aureus coverage. Will add Linezolid if Staphylococcus aureus is indicated by the Gram stain.
3. Oseltamivir.
4. Droplet isolation.
5. Discussed with the microbiology laboratory, Dr. Mann, and the Pierce County Health Department.

Dictated by:  
David W McEniry MD\*  
Infectious Diseases

D: 06/30/2009 09:49:50  
T: 06/30/2009 12:45:09  
Job#: 292526/EMR

cc: Daniel W Wells MD  
Thomas N Mann MD\*

Account Number: V011546048  
Patient Name: FLYTE, KATHRYN M  
Birth Date: 04/17/1982  
M.R. Number: M372095  
Report Number: 0630-0331  
Admit/Service Date: 06/29/09 Status: DIS IN

Female

Def 77-036

CONSULTATION

Chart Copy  
Def Ex 03-00036

Patient Name: FLYTE, KATHRYN M  
Date of Birth: 04/17/1982

<Electronically signed by DAVID MCENIRY M.D.>

Electronic Authentication Status: Signed  
Sign Date/Time: 08/12/09 1223  
Dictating Dr: MCENIRY, DAVID M.D.

Account Number: V011548048  
Patient Name: FLYTE, KATHRYN M  
Birth Date: 04/17/1982  
M.R. Number: M372095  
Report Number: 0630-0331  
Admit/Service Date: 06/29/09 Status: DIS IN

Female

Def 77-037

CONSULTATION

Chart Copy

Def Ex 03-00037

MULTICARE  
GOOD SAMARITAN HOSPITAL  
Transfer of Care  
\*\* Signed Report \*\*

PATIENT NAME: FLYTE, KATHRYN M  
MRN: M621016  
DOB: 04/17/1982  
ENCOUNTER: V011546048  
DATE OF ADMIT: 06/29/2009  
DATE: 07/15/2009

TRANSFERRED TO: Harborview Medical Center intensive care unit.

FINAL DIAGNOSIS:

1. Severe ARDS.
2. H1N1 swine influenza.
3. Status post C-section 07/01/2009 with live birth.

DISPOSITION: Mrs. Flyte is being transported to Harborview Medical Center for ongoing care for her ARDS. She appears to be developing pulmonary hypertension as a secondary complication to her ARDS and continues to remain severely hypoxemic with need for high positive end-expiratory pressure. Her records and x-rays will accompany her.

HISTORY OF PRESENT ILLNESS: Mrs. Flyte is a 27-year-old who presented on 06/30/2009 with 5 days of fevers and nonproductive cough. She had bilateral lower lobe infiltrates on chest x-ray and was initially thought to have a community-acquired pneumonia. She rapidly deteriorated with bilateral diffuse infiltrates on chest x-ray consistent with ARDS and subsequently grew H1N1 swine influenzae from tracheal secretions. She required intubation and ventilatory support since 07/01/2009. She underwent emergent C-section 06/30/2009 with delivery of live infant who is now at Mary Bridge Children's Hospital. She initially had sepsis. Septic pattern with hypotension and responded to fluids and pressors. She underwent several days of proning with slight improvement in her oxygenation but has been unable to reduce either PEEP or FIO2 level below 85%. After the first week she was able to be stabilized such that diuresis was able to be accomplished and her chest x-ray has improved; however, she continues to have oxygenation problems with repeat echocardiogram suggesting elevated pulmonary artery pressures to the 47 mm range. She has maintained good left ventricular ejection fraction throughout at 55-60%. She has allergies to penicillin. She developed a rash when she had been on Rocephin and Tamiflu for 10 days and those were subsequently discontinued. She is currently on tigecycline vancomycin for empiric antibiotic therapy for fevers. She has not had focal source for fever. She had recent pelvic exam that did not suggest uterine infection. Her chest x-rays have primarily manifested interstitial changes of ARDS without focal infiltrates to suggest ventilator-associated pneumonia. She has had numerous blood cultures, all of which have been negative. Streptococcus pneumoniae antigen was negative on admission.

Her labs and cultures results will accompany patient. Her most recent white count today is 27.94 with hematocrit 26.5, platelets 640,000. Electrolytes have been normal, other than potassium today 6.0, which has been treated with glucose, insulin, and bicarbonate. Ionized calcium 1.19, magnesium 2.4, phosphorus 2.7, BUN 36, creatinine 1.1. Liver functions have been normal, albumin 1.7.

Account Number: V011546048  
Patient Name: FLYTE, KATHRYN M Female  
Birth Date: 04/17/1982  
M.R. Number: M372095  
Report Number: 0715-0274  
Admit/Service Date: 06/29/09 Status: DIS IN

*DIScharge  
Summary  
Transfer of Care*

Chart Copy

Patient Name: FLYTE, KATHRYN M  
Date of Birth: 04/17/1982

Dictated by:  
Vernon J Nesson MD\*  
Pulmonology

D: 07/15/2009 11:47:54  
T: 07/15/2009 12:33:56  
Job#: 305581/LFC

<Electronically signed by VERNON J NESSAN M.D.>

Electronic Authentication Status: Signed  
Sign Date/Time: 08/05/09 11:53  
Dictating Dr: NESSAN, VERNON J M.D.

Account Number: V011546048  
Patient Name: FLYTE, KATHRYN M  
Birth Date: 04/17/1982  
M.R. Number: M372095  
Report Number: 0715-0274  
Admit/Service Date: 06/29/09 Status: DIS IN

Female

Transfer of Care

Chart Copy

Def 77-009

Def Ex 03-00009

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

KENNETH FLYTE, P.R., *et al.*

Appellants,

v.

SUMMIT VIEW CLINIC, a Washington  
Corporation,

Respondent.

No. 43964-6-II

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington, that she is now, and at all times materials hereto, a citizen of the United States, a resident of the state of Washington, over the age of 18 years, not a party to, nor interested in the above entitled action, and competent to be a witness herein.

I caused to be served this date the following:

- Appellants' Opening Brief
- Appendix for Appellants Opening Brief

in the manner indicated to the parties listed below:

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Jennifer G. Crisera  
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DATED this 27<sup>th</sup> day of March, 2013.

  
\_\_\_\_\_  
Vickie Shirer  
Paralegal to Lincoln C. Beauregard