

No. 48278-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Respondents/Cross-Appellants,

v.

SUMMIT VIEW CLINIC,

Appellant/Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE RONALD E. CULPEPPER

BRIEF OF APPELLANT

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I. INTRODUCTION

Kathryn Flyte passed away in July 2009 from complications of H1N1 swine flu. Respondent Kenneth Flyte originally brought this action for medical negligence, wrongful death, and failure to obtain informed consent against appellant Summit View Clinic (“the Clinic”) as personal representative of the estates of his wife Kathryn and daughter Abbigail Flyte, as well as on behalf of himself and the Flytes’ son Jacob. During the first trial in July 2012, the jury returned a defense verdict, finding that the Clinic was not negligent and had not failed to obtain informed consent. This Court reversed, holding that the trial court erred in instructing the jury on informed consent and in admitting evidence of Mr. Flyte’s settlement with another healthcare provider.

Prior to the second trial, Mr. Flyte dismissed all claims of medical negligence and any claim arising out of his daughter’s death; the case went to trial only on Mr. Flyte’s informed consent claim. Early in that second trial, the jurors were exposed to a poster in the jury room that listed the differences in symptoms between H1N1 swine flu, seasonal influenza, and a cold. Even though whether the Clinic had a duty to inform Ms. Flyte of treatment options based on her symptoms was a hotly contested issue at trial, the trial court

denied the Clinic's motion for mistrial or to excuse jurors who had admitted to reading the poster.

Despite dismissing all claims for medical negligence and limiting his claim to noneconomic damages arising from his wife's death, Mr. Flyte's counsel in violation of orders in limine repeatedly introduced evidence of the Clinic's alleged negligence and of his daughter Abbigail's death, and over repeated defense objections and trial court admonishments argued to the jury that the Clinic had been "way negligent" in its treatment of Ms. Flyte. He then asked the jury to award damages to hold the Clinic "accountable," claiming Mr. Flyte sought only "a dollar" for his loss. The jury responded to counsel's appeal to passion and prejudice by awarding \$5 million to the Estate of Kathryn Flyte, \$5 million to Mr. Flyte, and \$6.7 million to Jacob. This Court should reverse this punitive verdict, and remand for a new trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering judgment on the jury's verdict against Summit View Clinic. (CP 414-16)
2. The trial court erred in entering its Order Denying Defendant's Motion for New Trial. (CP 679-80)

3. The trial court erred in denying defendant's motion for a mistrial and its motion in the alternative to excuse Jurors 4 and 8. (RP 799, 802)

III. STATEMENT OF ISSUES

1. A new trial is warranted if there is objective proof that a jury has been exposed to extrinsic evidence and there is any reasonable doubt a party could have been prejudiced by the information. Did the trial court err in refusing to declare a mistrial when it was undisputed that the jury was exposed to extrinsic evidence that bore directly on the ultimate fact in issue?

2. Did plaintiff's repeated introduction of inadmissible evidence of claims not at issue, violations of orders in limine, and pleas that the jury award damages to hold defendant "accountable" cross the line from aggressive advocacy to prejudicial misconduct that prevented the defendant from having a fair trial?

3. Was the jury's award of damages driven by passion and prejudice and so excessive that it violated the defendant's due process rights?

IV. STATEMENT OF FACTS

A. This case arises from the tragic death of plaintiff's wife in the early stages of the 2009 H1N1 swine flu pandemic.

The swine flu pandemic arose from a novel strain of the H1N1 virus that originated in Mexico in April 2009. (RP 1112) Because it was a new strain of H1N1, there was no effective vaccine available. (RP 1115) With the limited information available at the time, in spring 2009 the Center for Disease Control ("CDC") and local and state health departments began sending out health advisories to healthcare providers on how to diagnose, treat, and prevent H1N1, especially as compared to the seasonal flu. (See RP 1121-23) Appellant Summit View Clinic ("the Clinic") began receiving these health alerts in April 2009. (See RP 618-19) The Clinic circulated the alerts to their providers and discussed them at staff meetings. (See RP 593, 595, 618)

By May 2009, the first probable cases of H1N1 had appeared in several Washington counties, including Pierce County. (RP 831) The information in the health alerts evolved with the CDC's understanding of the virus. In one of the earlier health alerts, dated May 7, 2009, the CDC informed healthcare providers that "currently based on clinical details and confirmed cases, 2009 H1N1 influenza

virus causes mild illness similar to seasonal influenza.” (RP 1185-86) The CDC’s advice and recommendations changed as it became evident that H1N1 was more severe than seasonal influenza, with a higher mortality rate especially among young people. (See RP 1183, 1186-87) For instance, the CDC originally believed the incubation period for H1N1 to be two to seven days, with a rapid onset of symptoms. But it later became known that the incubation period could be as long as ten days. (See RP 1605)

Kathryn Flyte, age 27, was seven months pregnant when she began feeling ill on the evening of Tuesday, June 23, 2009. (RP 533, 639-40, 748, 750) She told her husband, Kenneth Flyte, that she felt “energy-less” on June 24. (RP 681-82) Because Ms. Flyte did not have a primary care physician, she visited the Clinic on the morning of Friday, June 26 and saw Dr. William Marsh. (RP 689, 733) Dr. Marsh was the CEO of the Clinic at the time, as well as the on-call doctor on the day of Ms. Flyte’s appointment. (RP 810, 815, 882) Dr. Marsh’s medical assistant, Andrea Brady, took Ms. Flyte’s temperature, which was recorded normal at 98.8 degrees. (RP 741, 863-64) Ms. Flyte presented with wheezing, cough, aches, chills, and sweats. (RP 748) She was tired and fatigued, but otherwise “well-appearing.” (RP 749) In his clinical diagnosis, Dr. Marsh ruled out

influenza because Ms. Flyte did not have all of the symptoms – most importantly, she did not have a fever of 100 degrees.¹ (RP 873, 902) He diagnosed her instead with an upper respiratory infection (“URI”), which plaintiff’s own expert conceded was a reasonable working diagnosis. (RP 962)

Because a vaccine for H1N1 was not created until late 2009, the CDC recommended treating high-risk individuals, such as pregnant women, with the antivirals Relenza and Tamiflu. (See RP 1115, 1127, 1188) Tamiflu, the more commonly administered antiviral, was proven by the FDA to be effective in reducing symptoms of H1N1 only if taken within 48 hours of the onset of symptoms. (RP 1628-29, 1623, 1769) After that point, its efficacy was unknown. (See RP 1665-66) Patients who had been exposed to H1N1 could also be given Tamiflu prophylactically. (RP 875) However, during the early stages of the 2009 pandemic, the Pierce County Health Department limited prophylactic use to high-risk individuals who had a household close contact of a confirmed or probable case of H1N1. (RP 998-99, 1539, 1560-61, 1738) Tamiflu is

¹ As defined by the CDC in 2009, a documented fever of over 100 degrees was the “hallmark” symptom required to make a diagnosis of H1N1. (See RP 873, 881, 1324, 1565, 1621-22, 1676, 1174) Now, however, the CDC has determined that some patients with H1N1 can present without a fever. (See 1495-97)

not a medicine used to treat a URI, and Ms. Flyte indisputably did not meet the criteria at the time for prophylactic use of Tamiflu. (RP 1048-49, 1738)

The next day, Saturday, June 27, Ms. Flyte went to St. Joseph Medical Center for an OB/GYN appointment. (RP 694) She left the appointment without any medications and was told to go to the emergency room if her illness got worse. (RP 694)

During the five-day period from June 23-27 when Ms. Flyte had been sick, there was no change in her physical condition. (RP 695-96) In the middle of the night on Sunday, June 28, however, Ms. Flyte worsened and said she needed to go to the emergency room. (RP 696-97) Because she was too tired to go that evening, Mr. Flyte took her to Good Samaritan Hospital the next morning, Monday, June 29. (RP 650, 698)

Unfortunately, Ms. Flyte's condition continued to deteriorate. She was placed in a medically induced coma. *Flyte v. Summit View Clinic*, 183 Wn. App. 559, 570, ¶4, 333 P.3d 566 (2014) (CP 21-40) The Flytes' daughter Abbigail was delivered by caesarean section on Tuesday, June 30. (CP 22) Ms. Flyte was diagnosed with H1N1 swine flu on Thursday, July 2, and given Tamiflu that same day. (RP 703-

04) Having never regained consciousness, Ms. Flyte died on August 11, 2009. (CP 4, 10, 22) Abbigail died on February 21, 2010. (CP 22)

B. At the first trial, the jury returned a defense verdict finding that the Clinic had provided informed consent and had not been negligent.

In 2011, Kenneth Flyte sued the Clinic personally, as representative of the estates of Kathryn and Abbigail, and as guardian of the Flytes' son Jacob. (CP 1-12) He alleged medical negligence against the Clinic and its agents and employees for failing to test for H1N1 or administer Tamiflu prophylactically, as well as breach of the duty of informed consent for failing to inform Ms. Flyte about the pandemic and the available treatment. (CP 5, 11) Mr. Flyte also sued for the wrongful deaths of Ms. Flyte and Abbigail, including their pain and suffering and loss of companionship. (CP 5, 11)

During discovery, the Clinic learned that Mr. Flyte had settled with St. Joseph, where Ms. Flyte had been seen the day after her only visit to the Clinic, for \$3.5 million. *Flyte v. Summit View Clinic*, 183 Wn. App. 559, 563, ¶5, 333 P.3d 566 (2014). The trial court admitted evidence of this settlement, instructing the jury that it could be used in considering only whether Mr. Flyte had been fully compensated for his injuries. 183 Wn. App. at 563, ¶5. The court instructed the jury that 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," and gave a limiting instruction concerning plaintiff's settlement with St. Joseph. 183 Wn. App. at 564, ¶8. The jury found by special verdict that the Clinic was not negligent and had not failed to provide informed consent. 183 Wn. App. at 564, ¶8.

This Court reversed and remanded for a new trial, holding that the trial court erred in admitting evidence of and instructing the jury about the prior settlement under *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012), which had been decided after the first trial. 183 Wn. App. at 566-67, ¶¶14-15. This Court also held that the trial court's informed consent instruction misstated the law because the "duty to disclose is not confined to the period after a conclusive diagnosis has been made." 183 Wn. App. at 580, ¶43.

On remand, Mr. Flyte voluntarily dismissed with prejudice any medical negligence claims against the Clinic and its agents and employees, all claims arising from Abbigail's death, and any and all claims for economic loss. (CP 193, 195-96) The second trial went ahead only on the noneconomic damages caused by the alleged failure of Dr. Marsh to obtain Ms. Flyte's informed consent pursuant to RCW 7.70.030(3) and RCW 7.70.050. (CP 194, 196) After plaintiff limited his claims, Pierce County Superior Court Judge Ronald

Culpepper (“the trial court”) granted a motion in limine precluding any mention of the Clinic’s alleged breach of the standard of care because medical negligence was “out of the case.” (RP 49-50)

C. Although only informed consent was at issue in the second trial, plaintiff over sustained objections repeatedly introduced evidence of negligence and argued to the jury that the Clinic had been “way negligent.”

Despite limiting his claim to informed consent, and in violation of the order in limine, Mr. Flyte repeatedly introduced evidence and argued that the Clinic had failed to meet the standard of care and was negligent for not taking health advisories seriously, for not implementing a triage protocol during the pandemic, and for the large number of patients the Clinic’s doctors saw on a daily basis. (See, e.g., RP 1385-86, 1655-56, 2002, 2007-09, 2013-14) Over objection, Mr. Flyte’s counsel asked one expert if he thought the Clinic had been diligent in response to the information received about the swine flu pandemic (RP 1655-56), asked another expert whether he had any “criticism of what Summit View Clinic *claims they did*” (RP 1077-78: court in sustaining objection “couldn’t help but notice the quotation marks”) (emphasis added), and argued that Dr. Marsh had been negligent in failing to test for and diagnose Ms. Flyte with H1N1. (See RP 971, 1251, 1950-51)

The trial court agreed with the defense that “[w]e need to be clear on the claims,” and reminded the jury that negligence was “not one of the claims at issue here.” (RP 971) Plaintiff’s counsel nonetheless implied that Dr. Marsh “would just ignore a patient’s recent medical history” (RP 1062), before questioning an expert witness whether Dr. Marsh’s care to Ms. Flyte would have been different had he “*taken the time* to learn about the Tylenol” that Ms. Flyte had taken prior to her appointment with Dr. Marsh. (RP 1072) (emphasis added)

Because plaintiff persisted in violating the order in limine, the trial court was repeatedly forced to remind the jury throughout trial that the only claim at issue was for informed consent. (See RP 971, 1386, 1656, 1953)

During closing argument, plaintiff’s counsel again argued that the Clinic had been negligent:

- “[T]his was not a facility that was doing what their responsibilities were to make sure people were safe.” (RP 2008)
- “If a facility is truly being diligent, they don’t just lose critical health alerts.” (RP 2008)
- “These particular systemic failures . . . ha[d] an overall lack of preparedness and a breakdown in the safety net These are systemic failures that caused the issues here. These are systemic failures that could have been prevented.” (RP 2008-09)

- “[N]obody ever caught the fact that Jacob was sick the week before with a temperature of 104 plus If Summit View wasn’t treating so many patients, maybe they would have caught that.” (RP 2012)
- “This is a clinic that is treating too many people too quickly and missing critical information.” (RP 2013)
- “The Summit View was way negligent, way negligent in this case.” (RP 2109)
- “[I]f there’s a representation that we don’t think they were way negligent, *that’s not right.*” (RP 2109) (emphasis added)

Defense counsel was again forced to repeatedly object. Yet plaintiff’s counsel persisted in arguing negligence even after the defense objections were sustained. (RP 2013, 2014, 2109, 2110)

In the post-trial hearing on the defense motion for a new trial, the trial court agreed that plaintiff had improperly argued a negligence claim to the jury. (12/1 RP 33-34)

D. Despite voluntarily dismissing the claim, and in violation of an order in limine, plaintiff argued and elicited prejudicial testimony regarding his daughter’s death.

Because the plaintiff had dismissed any claims based on Abbigail Flyte’s death prior to the second trial (RP 12; CP 195-96), the defense moved in limine to exclude evidence of plaintiff’s devastation about Abbigail’s death. (RP 39) In response, plaintiff threatened to reinstate Abbigail’s wrongful death claim, only to “drop

it at the end.” (RP 39) The Clinic argued it would be fraud on the court to put on prejudicial evidence that is not probative of anything related to the real issues in the case, and that it would “require a very strong curative instruction” at the end of the trial informing the jury that the plaintiff had dropped the claim. (RP 40-41)

The trial court limited evidence of Abbigail’s death to telling the jury that “Abbigail was born prematurely and then died in February of 2010.” (RP 41) The trial court held that plaintiff could not testify to “a whole lot” regarding Abbigail’s death, but he could “testify to what happened and where he was and how it occurred.” (RP 41) The defense sought to clarify that only a limited amount of evidence concerning Abbigail’s death would be appropriate, and the trial court agreed, saying it would “allow a bit but not too much.” (RP 42)

In opening statements, plaintiff’s counsel nevertheless told the jury that Abbigail “held on for a number of months, but she never really seemed to the level of health as other children.” (RP 459) On the defense’s objection, the trial court acknowledged that this was “somewhat beyond the scope” of the claims and cautioned counsel to “limit this.” (RP 460) Ignoring both the court’s admonition and the absence of any evidence that the Clinic was in any way responsible, plaintiff’s counsel told the jury that “Abbigail Flyte deserved to live.”

(RP 472) The trial court again sustained the Clinic's objection, instructing the jury to disregard the statement because "[i]t's not a claim in this case." (RP 472) Plaintiff's counsel sought to justify his subsequent attempt to elicit testimony that Abbigail remained in the hospital until the day her mother passed by arguing it was relevant to "loss of consortium," which also was not a claim at issue. (RP 652-53) The trial court again sustained the Clinic's objection. (RP 653)

E. The jury was exposed to extrinsic evidence of a major issue at trial: the difference between symptoms of a cold, seasonal flu, and H1N1.

On the third day of trial, a juror told the bailiff that a chart entitled "Differences Between Cold, Seasonal Flu & H1N1 Symptoms" was posted in a bookcase in the jury room. (RP 776; CP 161) The chart had been posted several years earlier, likely in 2009. (RP 776-77)² The chart has three columns, differentiating the symptoms of a cold, seasonal flu, and H1N1. (CP 161) The symptoms addressed in the chart included fever, which was "**rare** with a cold," but "**Fever is usually present** with H1N1 in up to 80% of all flue [sic] cases. A

² The poster is undated, but based on the information it contained, it likely dates from late 2009, after Ms. Flyte's illness and death. The defense had moved in limine to preclude literature and information about H1N1 after June 26, 2009, when Ms. Flyte was seen at the Clinic, and plaintiff conceded that such information would not be relevant to the remaining informed consent claim. (RP 67-68)

temperature of 101°.” (CP 161) (emphasis in original) According to the poster, “[c]hills are **uncommon** with a cold,” “**mild to moderate** with the seasonal flu,” but “60% of people who have H1N1 experience **chills**.” (CP 161) (emphasis in original)

The trial court recognized that “[c]ertainly the difference in these symptoms is *a major issue*.” (RP 801) (emphasis added) The record was replete with evidence and testimony from a multitude of witnesses regarding whether or not Dr. Marsh should have known Ms. Flyte had a fever – the hallmark symptom of H1N1 – because she was suffering from “chills and sweats,” in addition to whether or not patients with H1N1 always presented with a fever. (*See, e.g.*, RP 465, 467, 609, 738-40, 773, 865, 873, 965-66, 1060, 1073, 1085, 1174-75, 1178, 1180, 1315, 1321, 1323, 1339, 1401, 1408-10, 1414-15, 1444, 1508, 1549-51, 1916, 1951, 2022, 2024-26, 2061)

The poster was displayed in a bookcase at the end of the jury table, in close proximity to three juror chairs. (RP 924; CP 179) Any juror sitting in those chairs would be able to clearly see the poster. (RP 924) Any juror using the women’s restroom would have to walk by the bookcase where the poster was displayed. (RP 924)

A copy of the jury room poster (CP 161) is reproduced as the next page of this brief.

JURY ROOM POSTER

DIFFERENCES BETWEEN COLD, SEASONAL FLU & H1N1 SYMPTOMS			
SYMPTOM	COLD	SEASONAL FLU	H1N1
FEVER	Fever is rare with a cold.	Fever is common with the seasonal flu.	Fever is usually present with H1N1 in up to 80% of all flu cases. A temperature of 101°
COUGHING	A hacking, productive (mucus-producing) cough is often present with a cold.	A dry and hacking cough is often present with the seasonal flu.	A non-productive (non-mucus producing) cough is usually present with H1N1 (sometimes referred to as dry cough).
ACHES	Slight body aches and pains can be part of a cold.	Moderate body aches are common with the seasonal flu.	Severe aches and pains are common with H1N1.
STUFFY NOSE	Stuffy nose is commonly present with a cold and typically resolves spontaneously within a week.	A runny nose is commonly present with the seasonal flu.	Stuffy nose is not commonly present with H1N1.
CHILLS	Chills are uncommon with a cold.	Chills are mild to moderate with the seasonal flu.	60% of people who have H1N1 experience chills.
TIREDFNESS	Tiredness is fairly mild with a cold.	Tiredness is moderate and more likely referred to as a lack of energy with the seasonal flu.	Tiredness is moderate to severe with H1N1.
SNEEZING	Sneezing is commonly present with a cold	Sneezing is common present with the seasonal flu.	Sneezing is not common with H1N1.
SUDDEN SYMPTOMS	Cold symptoms tend to develop over a few days.	Symptoms tend to develop over a few days and include flushed face, loss of appetite, dizziness and/or vomiting/nausea. Symptoms usually last 4-7 days, depending on the individual. Diarrhea is common.	H1N1 has a rapid onset within 3-6 hours. H1N1 hits hard and includes sudden symptoms like high fever, aches and pains. Symptoms usually last 4-7 days, depending on the individual. Diarrhea is common.
HEADACHE	A headache is fairly uncommon with a cold.	A headache is fairly common with the seasonal flu.	A headache is very common with H1N1 and present in 80% of cases.
SORE THROAT	Sore throat is commonly present with a cold.	Sore throat is commonly present with the seasonal flu.	Sore throat is not commonly present with H1N1.
CHEST DISCOMFORT	Chest discomfort is mild to moderate with a cold.	Chest discomfort is moderate with the seasonal flu. <i>If it turns severe seek medical attention immediately!</i>	Chest discomfort is often severe with H1N1.

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(CP 161)

The trial court was made aware of the jury room poster by Juror 8, who had noticed it when she was looking at a Jenga game on the bookshelf. (RP 776, 789) Thinking it “odd” that the poster was displayed there, Juror 8 pointed it out to Juror 4, who also thought “that’s probably not a very good thing to be in here.” (RP 777, 793) Juror 4 looked at the poster as well, admitting that she “read like the three – I think there’s three columns.” (RP 793) Juror 8 then reported the poster to the judicial assistant. (RP 784)

Juror 8 told the court and counsel that she did not review the jury room poster. (RP 789) However, it initially appeared to the judicial assistant that Juror 8 had reviewed the poster, as she “reiterated the chills and H1N1.” (RP 784) Juror 8 herself said that she saw “H1N1” and “chills,” and “thought [she] should probably report this.” (RP 791) Juror 8 noted that she was “told to disregard anything outside of the courtroom, *although this kind of is in the courtroom.*” (RP 791) (emphasis added)

Once informed that the jurors had been exposed to this extrinsic information on a key issue in dispute, the Clinic immediately moved for a mistrial. (RP 780) Despite “kind of shar[ing]” the defense’s “concern that this might be deemed as somehow authoritative or objective because it was posted by the Court in the jury

room” (RP 802), the trial court denied the Clinic’s motion. (RP 799) The trial court also denied the defense motion to excuse Jurors 8 and 4, because “it appears to [the court] that the jurors, in fact, did not absorb this information.” (RP 802) Despite acknowledging that “had [the poster] been reviewed by the jurors, . . . we would have a problem” (RP 805-06), and that “a sharp-eyed juror who really wanted to read it might have noted something” (RP 925), it was the court’s “understanding it wasn’t” actually read. (RP 806)

During argument of the Clinic’s motion for a new trial, the trial court noted that it had “difficulty calling this misconduct, which implies some kind of wrongdoing.” (12/1 RP 32) The trial court again stated that it did not “think the jurors that did see it . . . really paid that much attention to [the poster].” (12/1 RP 33)

F. After plaintiff introduced evidence of nonexistent claims and argued for punitive damages, the jury returned a verdict of \$16.7 million.

In addition to introducing evidence of claims that had been dismissed, plaintiff’s counsel argued that the jury should award damages not as compensation, but to punish and hold the Clinic accountable. During closing argument, plaintiff’s counsel told the jury: “[Mr. Flyte] told me to recommend that the jury award him a dollar. Because he doesn’t care about the money; he cares about

accountability. He cares about proving the point that Summit View Clinic is responsible.” (RP 2041) Over objection that plaintiff was seeking exemplary damages, counsel again argued: “Kenny Flyte told me to ask you for a dollar. What he cares about is accountability . . . [W]hat Kenny cares about is that dollar.” (RP 2041-42)

Plaintiff’s counsel again forced defense counsel to repeatedly object during closing argument. He attempted to introduce a CBS News article that the trial court had previously refused to admit into evidence (RP 655), telling the jury that CBS had taken an interest “in what happened there at the Summit View Clinic” because it was “not what was supposed to have happened.” (RP 2033) Counsel displayed to the jury illustrative exhibits of “Kenny Flyte loving his family” that had not been previously admitted (RP 2034-35), and assured the jury that Jacob Flyte could not “touch” any award “until he’s way into adulthood.” (RP 2040-41)

Although claiming Mr. Flyte only wanted the jury to award him one dollar, during closing argument plaintiff’s counsel asked for \$1 to \$5 million for Mr. Flyte, \$1 to \$2.5 million for Ms. Flyte, and \$1 to \$5 million for Jacob, recommending \$3 million. (RP 2040-42) The jury returned a verdict of \$16.7 million: \$5 million for the Estate

of Kathryn Flyte, \$5 million for Kenneth Flyte, and \$6.7 million for Jacob Flyte. (CP 628)

During the hearing on the Clinic's motion for a new trial, the trial court recognized that "[t]here wasn't much evidence about [Ms. Flyte's] pain and suffering;" plaintiff's counsel claimed that the verdict rested on "an inference" he had argued. (12/1 RP 22-23) Plaintiff's counsel revealed that asking for one dollar for Mr. Flyte was a ploy; because Mr. Flyte wanted "to make sure that the clinic is held accountable, a synonym for responsibility," "the less money that we ask[ed] for, the more likely [he was] to get accountability." (12/1 RP 20)

The trial court entered judgment on the jury's verdict and denied the Clinic's CR 59 motion for a new trial. (CP 414-16, 679-80) Summit View appeals. (CP 411)

V. ARGUMENT

A. **The trial court erred in denying the Clinic's motion for a mistrial or to discharge two jurors after the jury was indisputably exposed to extrinsic evidence.**

1. **Introduction and Standard of Review.**

"The jury may be discharged by the court on account of . . . accident or calamity requiring their discharge." RCW 4.44.330 ("Discharge of jury without verdict"). If jurors are exposed to extrinsic

evidence outside trial, “the trial court must grant a new trial if, in its discretion, it has *any reasonable doubt* that the information prejudicially affected the verdict.” *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 137, 750 P.2d 1257, 756 P.2d 142 (1988) (emphasis added). Whenever a trial court declares a mistrial and the jury is discharged during the progress of the trial, “by reason of accident or other cause,” “the action shall thereafter be for trial anew.” RCW 4.44.340 (“Effect of discharge of jury”). “If after the formation of the jury, and before verdict, a juror becomes unable to perform his or her duty, the court may discharge the juror,” and thereafter has only three alternatives: 1) replace the discharged juror with an alternate, 2) swear a new juror and begin trial anew, or 3) discharge the entire jury and form a new jury. RCW 4.44.290 (“Replacement juror procedure”).

The trial court has a duty to “excuse from further jury service any juror, who . . . has manifested unfitness as a juror . . . by reason of conduct or practices incompatible with proper and efficient jury service.” RCW 2.36.110. The trial court also has a duty to excuse any juror who “has manifested unfitness as a juror by reason of . . . conduct or practices incompatible with proper and efficient jury service.” RCW 2.36.110 (“Judge must excuse unfit person”). In determining whether a juror is “unfit” for purposes of RCW 2.36.110, “[t]he test is whether

the record establishes that the juror engaged in misconduct.” *State v. Jordan*, 103 Wn. App. 221, 229, 11 P.3d 866 (2000), *rev. denied*, 143 Wn.2d 1015 (2001).

A trial court’s denial of a motion for a mistrial is reviewed for abuse of discretion. *State v. Escalona*, 49 Wn. App. 251, 255, 742 P.2d 190 (1987). A much stronger showing of an abuse of discretion is required to set aside an order granting a new trial than one denying it. *O’Brien v. City of Seattle*, 52 Wn.2d 543, 545, 327 P.2d 433 (1958) (citation omitted). This Court likewise reviews a trial court’s decision to not excuse a juror for abuse of discretion. *See State v. Jordan*, 103 Wn. App. at 226. The trial court necessarily abuses its discretion when it applies the wrong legal standard. *Reese v. Stroh*, 128 Wn.2d 300, 310, 907 P.2d 282 (1995).

The trial court necessarily abused its discretion in this case by relying on the wrong legal standard in refusing to declare a mistrial after the jury was indisputably exposed to extrinsic evidence affecting a central issue in dispute. The trial court recognized that the jurors objectively *could* have been affected by the extrinsic evidence the actual legal standard. It then applied an incorrect standard, erroneously denying the Clinic’s motion for a mistrial and its alternative motion to excuse two jurors based on the court’s

subjective belief that the jurors had not actually absorbed the extrinsic evidence to which they were exposed. In denying the defense motion for a new trial, the trial court again improperly assessed individual jurors' thought processes, and took the erroneous view that juror "misconduct" requires ill will or bad intention on the part of the jurors, again contrary to the proper standard. The trial court's legal error was an abuse of its discretion.

2. The trial court erred in relying on its subjective view of the effect of the extrinsic evidence on the jurors' thought processes.

It is misconduct for the jury to consider evidence that is "novel or extrinsic." *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 681, 82 P.3d 1199, *rev. denied*, 152 Wn.2d 1023 (2004). Novel or extrinsic evidence is that which is "wholly outside the evidence received at trial," whether oral or documentary. *Loeffelholz*, 119 Wn. App. at 681; *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004). Extrinsic evidence is improper because it is "not subject to objection, cross-examination, explanation or rebuttal" by either party. *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973). If the jury is exposed to extrinsic evidence "during the progress of the trial," the trial court should declare a mistrial and discharge the jury

“by reason of accident or other cause,” and order a new trial. RCW 4.44.340.

Facts alleged that “are linked to the juror’s motive, intent, or belief, or describe their effect upon him” inhere in the verdict and may not be considered by the trial court on a motion alleging juror misconduct. *Gardner v. Malone*, 60 Wn.2d 836, 841, 379 P.2d 918 (1963). The trial court may not consider “facts touching on the mental processes by which individual jurors arrived at the verdict, the effect the evidence may have had on the jurors, and the weight particular jurors may have given to particular evidence.” *Long v. Brusco Tug & Barge, Inc.*, 185 Wn.2d 127, 131-32, 135, ¶¶7, 16, ___ P.3d (2016) (statements made by a persuasive juror during deliberations regarding maritime laws and his familiarity with boats “were expressions of personal belief based on life experiences,” and thus inhere in the verdict).

In considering allegations of misconduct or irregularities, however, the court *must* consider facts or circumstances that do not inhere in the verdict but establish misconduct of the jury. *Gardner*, 60 Wn.2d at 842. When “it is undisputed that the jury received evidence that it should not have seen, the critical question that remains is whether the jury’s receipt of this evidence prejudiced [a

party].” *State v. Pete*, 152 Wn.2d at 554. In determining whether the evidence prejudiced the jury against a party, the court must make “an *objective* inquiry into whether the extraneous evidence *could* have affected the jury’s determinations and *not* a subjective inquiry into the actual effect of the evidence on the jury because the actual effect of the evidence inheres in the verdict.” *State v. Briggs*, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989) (emphasis added); *see also Gardner*, 60 Wn.2d at 841 (if the facts alleged do not inhere in the verdict, “it then becomes a matter of law for the trial court to decide the effect the proved misconduct *could* have had upon the jury”) (emphasis added).

If “the information supplied to the jury can be ascertained without probing the jurors’ mental processes, the trial court must grant a new trial if, in its discretion, it had *any reasonable doubt* that the information prejudicially affected the verdict.” *Adkins*, 110 Wn.2d at 137 (emphasis added). In *Halverson*, for instance, a juror told the jury average incomes of the minor victim’s desired future careers during deliberations, despite there being no evidence introduced regarding an alleged impairment of the victim’s earning capacity. Several jurors submitted affidavits stating that \$18,000 of the \$20,000 award was their projected estimate of future lost wages. *Halverson*, 82 Wn.2d at 747. The Supreme Court remanded for a new trial on the issue of

damages, holding that “[i]f the trial court has *any doubt* that the misconduct affected the verdict, it was obliged to resolve that doubt in favor of granting a new trial.” *Halverson*, 82 Wn.2d at 752. *See also Gardner*, 60 Wn.2d at 846-47 (reversing denial of new trial after jurors engaged in misconduct by making an unauthorized visit to the scene of the accident because if “there is *reasonable doubt* as to [the misconduct’s] effect, that doubt must be resolved against the verdict.”) (emphasis in original) (quoted case omitted).

Here, the extrinsic evidence did not inhere in the verdict because there was objective proof that the jury was indisputably exposed to a poster with highly relevant information about H1N1 that was not subject to objection, cross-examination, explanation, or rebuttal. Thus, the critical question the trial court had to address was whether the jury room poster *could have* affected the jury. *State v. Briggs*, 55 Wn. App. at 55. Instead, the court made a *subjective* inquiry into the *actual* effect the evidence had on the jurors. (See RP 782: “Well, do we *know* that they read this chart?”; RP 786: “Well, we don’t have any foundation that anybody *actually* read this, although my impression . . . is that Juror No. 8 did read through the chart.”; RP 787: “Do we *know* that anybody other than Juror 8 looked at this?”) (emphasis added) The trial court’s inquiry improperly

probed the jurors' subjective mental processes, which inhere in the jury's verdict – *precisely* what the court is forbidden from doing. *Gardner*, 60 Wn.2d at 841; *Adkins*, 110 Wn.2d at 137.

The jurors' exposure to the jury room poster was clearly prejudicial by any objective standard. The trial court itself noted that “[c]ertainly the difference in these symptoms is *a major issue*” in the case. (RP 801) (emphasis added) Indeed, the issue of whether Dr. Marsh should have discussed Tamiflu with Ms. Flyte almost exclusively turned on whether or not a fever always accompanies H1N1, and whether “chills and sweats equal fever.” (See RP 465, 467, 609, 738-40, 773, 865, 873, 965-66, 1060, 1073, 1085, 1174-75, 1178, 1180, 1315, 1321, 1323, 1339, 1401, 1408-10, 1414-15, 1444, 1508, 1549-51, 1916, 1951, 2022, 2024-26, 2061)

The trial court clearly had a reasonable doubt that the extrinsic evidence could influence the verdict, noting “had [the chart] been reviewed by the jurors, . . . we would have a problem.” (RP 805-06) And the jurors gave the court and the judicial assistant conflicting answers as to the extent to which they had reviewed the jury room poster. The trial court's own impression was that “Juror No. 8 did read through the chart.” (RP 786) Although Juror 8 told the court that she had not read the poster, she admitted that she had

seen “H1N1” and “chills.” (RP 789) The “chills” row is halfway down in the middle of the poster; clearly, Juror 8 had read the poster enough to recognize its purpose and realize that it should not be in the jury room given its pertinence to a highly contested issue. (See CP 161; RP 791) In addition, Juror 4 looked at the poster and *admitted* she had read the three columns. (RP 793)

The trial court also recognized the highly prejudicial nature of the jury room poster, admitting that it “kind of share[d], to some extent, [the defense’s] concern that this might be deemed as somehow authoritative or objective because it was posted by the Court in the jury room.” (RP 801-02) Juror 8 acknowledged the authoritative quality of the chart, stating that she had “been told to disregard anything outside of the courtroom, *although this kind of is in the courtroom.*” (RP 791) (emphasis added)

Despite recognizing that the jury room poster could be considered authoritative, and that it went to a major issue of the case, the trial court denied the defense motion for a mistrial or to excuse the jurors based *purely* on the court’s “understanding [that] it wasn’t” actually read by the jurors (RP 806), the court did not “think the jurors that did see it really paid *that much attention to it*” (12/1 RP 33), and “it appear[ed] to [the court] that the jurors, in fact, did

not *absorb* this information.” (RP 802) (emphasis added) By assessing the actual effect of the extrinsic evidence upon the jurors, including the weight that they might have given to the chart, the trial court very clearly based its decision on mental processes that inhered in the verdict.

The chart had been posted in the jury room during the entirety of voir dire and for two days of testimony from four witnesses on the very topics of Ms. Flyte’s symptoms and health advisories to the Clinic. (See RP 569, 593, 692, 738-40) During that time, any number of other jurors could have seen the poster. Two jurors *admitted* to having looked at the chart – directly contrary to the trial court’s conclusion that the jurors hadn’t read the poster. Considering the extent to which jurors actually absorbed the information on the poster was not only irrelevant, but legal error. The test that the trial court was required to apply is whether or not the jury *could* have been prejudiced by it – that is, whether there was any reasonable doubt that the verdict could be affected. The trial court instead based its ruling on its subjective understanding that the extrinsic evidence might not have an *actual* effect on those jurors – matters that inhere in the verdict. The trial court applied the wrong legal standard and thus abused its discretion.

3. The trial court erred in concluding that there was no misconduct because the jurors had been inadvertently exposed to extrinsic evidence.

The trial court also improperly relied on the fact that the jurors had not intentionally been exposed to the jury room poster, reasoning that it had “difficulty calling that misconduct, which implies some kind of wrongdoing.” (12/1 RP 32) This assessment of the jurors’ intent was also legal error, because even a juror’s inadvertent exposure to information from an extrinsic source constitutes “misconduct” that may warrant a mistrial. *See Fritsch v. J.J. Newberry’s, Inc.*, 43 Wn. App. 904, 907, 720 P.2d 845 (it is “the injection of evidence outside the record during jury deliberations affecting a material issue in the case [that] constitutes misconduct”), *rev. denied*, 107 Wn.2d 1006 (1986); RCW 2.36.110 (no requirement of deliberate or intentional actions or misconduct in order for a court to dismiss an “unfit” juror). Whether or not that evidence comes from the jurors themselves or an outside source, and whether or not it is intentional or inadvertent, is irrelevant.

In *State v. Rinkes*, 70 Wn.2d 854, 859-60, 425 P.2d 658 (1967), a newspaper editorial and cartoon criticizing supposedly lenient court decisions in criminal actions was published the morning after the jury was empaneled. The defendants moved for a

change in venue or in the alternative a continuance, arguing that jurors “who might have had access to the newspaper in question, would be prejudiced by reading this material.” *Rinkes*, 70 Wn.2d at 862. The editorial and cartoon were marked as an exhibit and offered to the court solely for purposes of the motion outside of the jury’s presence. *Rinkes*, 70 Wn.2d at 862. However, “[t]hrough *inadvertence*, this material went into the jury room.” *Rinkes*, 70 Wn.2d at 862 (emphasis added). Our Supreme Court held that “the consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.” *Rinkes*, 70 Wn.2d at 862. The Court thus reversed and remanded “for a new trial free from potential taint, by the extraneous material *inadvertently* before the jury.” *Rinkes*, 70 Wn.2d at 863 (emphasis added).

Rinkes makes clear that any injection of prejudicial extraneous evidence to the jury, even that which occurs inadvertently and through no fault of the jurors, is sufficient “misconduct” to warrant a new trial. *Rinkes* is in accord with the statutory scheme authorizing the trial court to grant a mistrial: the trial court may discharge the jury for “accident or calamity,” RCW 4.44.330, and

order a new trial where the jury was “discharged or prevented from giving a verdict, *by reason of accident* or other cause.” RCW 4.44.340 (emphasis added). Contrary to the trial court’s reasoning, the court is not required to find that a juror or third party intentionally exposed the jury to extrinsic evidence in order to find misconduct warranting a new trial or the dismissal of the exposed jurors.

Here, the entire jury was indisputably exposed to extraneous information. The jury room poster highlighting the differences in symptoms between a cold, the seasonal flu, and H1N1 was posted in the jury room where any juror could see it. Two jurors specifically admitted to seeing it and looking at it. (See RP 789-90, 793) Regardless of whether the poster was intentionally placed in the jury room during this trial, or whether either juror deliberately sought out the poster or the information on it, the fact remains that Jurors 4 and 8 saw the outside information. In addition, Juror 8 did engage in misconduct – although she did not mean to – by informing Juror 4 of the chart. (RP 790, 793) Juror 8 admitted that she realized soon after that she should not have told a fellow juror about it. (See RP 790)

After denying the Clinic's motion for a mistrial based on its subjective assessment of the effect the jury room poster may have had on the jurors' thought processes, the trial court again abused its discretion by denying the defendant's alternative motion to dismiss Jurors 4 and 8, both of whom admitted to viewing the poster. A trial court has a duty to dismiss a juror for misconduct under RCW 2.36.110. *See also State v. Jorden*, 103 Wn. App. at 229. Because juror misconduct occurs when a juror is exposed to extrinsic evidence, and because it is undisputed that both Juror 8 and 4 saw the chart and were exposed to it, the trial court abused its discretion by not declaring a mistrial or, at a minimum, dismissing the two jurors who admitted to reading the H1N1 poster.

B. Misconduct of plaintiff's counsel prevented the Clinic from having a fair trial, and the \$16.7 million verdict, untethered to any economic damages, was arbitrary and punitive.

1. Introduction and Standard of Review.

While the juror misconduct by any objective standard mandates a new trial, the trial was also tainted by the persistent misconduct of Mr. Flyte's counsel. The court should grant a new trial if the "misconduct of the prevailing party materially affects the substantial rights of the losing party." *Teter v. Deck*, 174 Wn.2d 207, 222, ¶28, 274 P.3d 336 (2012). The denial of a new trial is subject to greater

scrutiny than the grant of new trial. *Teter*, 174 Wn.2d at 215, ¶14. Whether an award of punitive or exemplary damages is excessive and violates due process is subject to de novo review. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001); *Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal. 4th 1159, 1172, 113 P.3d 63, 29 Cal. Rptr. 3d 379 (2005).

2. Plaintiff's repeated violation of orders in limine and reliance on inadmissible and irrelevant evidence of claims not before the jury severely prejudiced the Clinic's defense.

Because the court has a duty “to keep inadmissible evidence from the jury,” it is misconduct for counsel to “elicit testimony regarding subjects that the court had ruled inadmissible or irrelevant.” *Teter*, 174 Wn.2d at 223, ¶¶30, 32. *See also State v. Evans*, 96 Wn.2d 119, 123-24, 634 P.2d 845 (1981), *as amended by* 649 P.2d 633 (1982) (“purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation”). “Persistently asking knowingly objectionable questions is misconduct,” because it “places opposing counsel in the position of having to make constant objections.” *Teter*, 174 Wn.2d at 223, ¶30 (citations omitted). Such misconduct is prejudicial because “[t]hese repeated objections, even if sustained, leave the jury with the

impression that the objecting party is hiding something important.” *Teter*, 174 Wn.2d at 223, ¶30 (citations omitted). “Misconduct that continues after warnings can give rise to a conclusive implication of prejudice.” *Teter*, 174 Wn.2d at 223, ¶30 (citations omitted).

In *Teter*, the Supreme Court held that the cumulative effect of repeatedly exposing the jury to inadmissible evidence materially affected the right of the losing party to have a fair trial. 174 Wn.2d at 223-25, ¶¶30, 32-34. The Supreme Court in *Teter* cited with approval *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967), which reversed and remanded for a new trial because opposing counsel argued inadmissible evidence to the jury, depriving the losing party of a fair trial.

The defendant in *Warren* counterclaimed for damages arising from a rear-end collision, and introduced inadmissible testimony of the fact that she did not receive a citation at the accident scene. 71 Wn.2d at 513-14. During closing argument, defense counsel urged the jury to base its verdict on the fact that the defendant had not been cited. *Warren*, 71 Wn.2d at 516-17. Because “[w]hat the police officer did or did not do with respect to issuing a citation to either party when he arrived at the scene was *utterly immaterial* to the issues submitted to the jury,” “such flagrant misconduct that no

instruction . . . could have cured” deprived the plaintiff of a fair trial. *Warren*, 71 Wn.2d at 518-19 (emphasis added).

Similarly, the *Warren* Court made clear that the “intentional injection of collateral matter of a prejudicial nature will be reversible error.” 71 Wn.2d at 515, citing *Miller v. Staton*, 64 Wn.2d 837, 840, 394 P.2d 799 (1964). In *Miller*, the plaintiff sought damages for injuries sustained during a tavern fight between other patrons. During cross-examination, defense counsel engaged in misconduct by asking the plaintiff about her relationship with a man 30 years prior, “[f]ollowing a thread of relevancy, which somehow escap[ed] th[e] court.” *Miller*, 64 Wn.2d at 839. Defense counsel offered “no excuse for such a line of questioning, apparently relying upon his withdrawal of the question upon the objection of plaintiff’s counsel and the instruction by the trial court that the jury was to disregard it.” *Miller*, 64 Wn.2d at 839.

The Court noted that despite the trial court’s curative instruction, “the incident must still be considered as a major element in the over-all decision as to whether the plaintiff received a fair trial before an impartial and unprejudiced jury.” *Miller*, 64 Wn.2d at 840. This misconduct, along with defense counsel’s improper reference to his client’s lack of liability insurance and the trial court’s erroneous

contributory negligence instruction, prevented the plaintiff from having a fair trial. *Miller*, 64 Wn.2d at 840-41.

Here, in direct contravention of pre-trial rulings, plaintiff repeatedly introduced evidence and injected improper commentary regarding the Clinic's alleged negligence and the death of Abigail Flyte, neither of which were claims at issue in this trial, forcing the defense to repeatedly object and prejudice itself against the jury. (See, e.g., RP 459, 472, 651-52, 653, 656, 971, 1072, 1077-78, 1251, 1385-86, 1655-56, 1755, 1953, 2009, 2012-13, 2109-11) The introduction of collateral matters further prevented the Clinic from having a fair trial by forcing it to attempt to defend against claims that had been dismissed, as well as by confusing the jury as to the claims it was to decide.

- a. **Plaintiff repeatedly introduced evidence of claimed negligence and argued that the jury should award damages because the Clinic was "way negligent."**

Plaintiff's counsel engaged in flagrant misconduct by eliciting testimony of the Clinic's alleged negligence in violation of an order in limine, and by explicitly arguing that the Clinic was "way negligent" in his closing argument. (RP 2109) In addition to asking "knowingly objectionable questions," placing defense counsel in the position of being required to repeatedly object to this improper testimony left

the jury with the impression that the defense was “hiding something important.” *Teter*, 174 Wn.2d at 223, ¶30.

Mr. Flyte had dismissed with prejudice any and all claims of negligence before trial. As a consequence, the Clinic did not call any standard of care expert witnesses and obtained an order in limine preventing evidence concerning a breach of the standard of care. (RP 49-50) Nonetheless, throughout trial plaintiff elicited testimony from both lay and expert witnesses that Summit View Clinic, Dr. Marsh, and Andrea Brady had breached the standard of care. (*See, e.g.*, RP 656, 971, 1072, 1077-78, 1385-86, 1655-56, 1953) Plaintiff cross-examined defense experts with questions regarding whether the Clinic had been negligent in its response to the H1N1 pandemic by not taking the health advisories seriously and not implementing any triage protocol. (*See, e.g.*, RP 1385-86, 1655-56) Plaintiff additionally attempted to introduce testimony through his informed consent and causation experts that Dr. Marsh had been negligent in his diagnosis and treatment of Ms. Flyte. (*See* RP 971, 1251, 1953) Plaintiff’s counsel persisted in eliciting this irrelevant evidence even after the court sustained the Clinic’s objections. (RP 970-71, 1072, 1077-78, 1656, 1953, 2009, 2012-13, 2014, 2109, 2110-11)

In violation of the court's order in limine, plaintiff's counsel engaged in misconduct by injecting the collateral matter of negligence that was "utterly immaterial" to the informed consent claim, *Warren*, 71 Wn.2d at 518-19, confusing the jury as to the actual claims it had to decide, and, as in *Teter*, requiring defense counsel to repeatedly seek the court's intervention. *See also Carabba v. Anacortes Sch. Dist.*, 72 Wn.2d 939, 947-48, 954, 435 P.2d 936 (1967) (misconduct for counsel to continue questioning witness, after sustained objection, about a "totally inadmissible" letter she had written expressing her opinion on the accident resulting in her son's injuries, thereby "inject[ing] a matter for the jury that doesn't belong there").

In closing argument, plaintiff's counsel repeatedly flouted the trial court's specific directive "not to argue negligence." (RP 1839) Over multiple, sustained, defense objections, plaintiff's counsel over and over argued that the Clinic had been negligent because of its "systemic failures." (RP 2007-14) Here, as in *Warren* and *Miller*, intentionally arguing a collateral matter of a prejudicial nature is "such flagrant misconduct that no instruction . . . could have cured," and is reversible error. *Warren*, 71 Wn.2d at 518, *see also Miller*, 64 Wn.2d at 840. The fact that plaintiff's counsel persisted in the most

inflammatory of his statements at the end of his rebuttal closing argument further increased the prejudicial effect of his improper remarks, taking advantage of the “last heard longest remembered principle.” *See Adkins*, 110 Wn.2d at 141 (counsel’s improper golden rule argument more prejudicial when made at the very end of his closing argument, right before a recess).

Rather than curing the prejudice caused by plaintiff’s misconduct, the trial court’s ineffective admonitions only exacerbated it. When the Clinic tried to rebut the plaintiff’s improper arguments during closing by telling the jury that “[t]here is no claim that Dr. Marsh or Andrea Brady should have gotten that history of fever or that they were negligent in any way,” the trial court sustained *plaintiff’s* objection, admonishing the Clinic’s counsel to “avoid standard of care arguments.” (RP 2052-53) The Clinic was thus unable to refute plaintiff’s attempt to inflame the jury by arguing an irrelevant negligence claim that plaintiff had voluntarily dismissed with prejudice. In his rebuttal, plaintiff’s counsel then explicitly told the jury that “Summit View was way negligent, *way negligent* in this case,” and that “if there’s a representation that we don’t think they were negligent, *that’s not right.*” (RP 2109) (emphasis added)

In presenting evidence and argument of negligence, a claim which plaintiff had voluntarily dismissed, plaintiff prevented the Clinic from having a fair trial by an unbiased jury. This Court should reverse and grant a new trial.

b. Plaintiff made repeated references to his daughter's death, inflaming the passion and prejudice of the jury.

In addition to impermissibly arguing negligence, plaintiff further inflamed the jury's passion and prejudice by repeatedly referring to Abbigail Flyte's death – claims that the plaintiff had also voluntarily dismissed with prejudice before trial. (RP 12; CP 195-96) When plaintiff's counsel stated his intent to “reinstate” Abbigail's wrongful death claim only to “drop it at the end” so that he could introduce evidence about plaintiff's devastation in losing his daughter (RP 39), the trial court in its ruling in limine limited the admissible evidence to telling the jury that “Abbigail was born prematurely and then died in February of 2010.” (RP 41) Undaunted by the trial court's admonition, plaintiff did exactly what he had threatened – introducing nonprobative evidence of irrelevant claims merely to incite the prejudice of the jury.

Rather than merely tell the jury “what happened and where he was and how it occurred” (RP 41), plaintiff's counsel in opening

statement sought to place responsibility for his daughter's death on the Clinic, telling the jury that "Abbigail Flyte deserved to live." (RP 459, 472) Counsel attempted to justify Mr. Flyte's testimony of his distress relating to Abbigail's hospitalization as relevant to "loss of consortium" – another claim that was no longer at issue because plaintiff had voluntarily dismissed it. (RP 652-53) Counsel had "no excuse for such a line of questioning." *Miller*, 64 Wn.2d at 839. Plaintiff's intentional violation of the order in limine was prejudicial misconduct calculated solely to engender the sympathy of the jury and turn them against the Clinic. Introducing such inflammatory inadmissible evidence prevented the Clinic from "receiv[ing] a fair trial before an impartial and unprejudiced jury," and compels reversal. *Miller*, 64 Wn.2d at 840.

3. Plaintiff impermissibly asked the jury for exemplary damages not as compensation, but to hold the Clinic "accountable for its actions."

Plaintiff's counsel engaged in further misconduct by asking the jury to award damages in order to hold the Clinic "accountable" for its actions. Jury verdicts in tort cases "must be compensatory only. After full compensation has been reached, no further award should be made." *Walters v. Spokane Int'l Ry. Co.*, 58 Wash. 293, 301, 108 P. 593 (1910). Washington law prohibits punitive damages – that is,

exemplary damages intended to deter or punish the defendant. *Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 575, 919 P.2d 589 (1996); see *Brown v. MHIN Government Services, Inc.*, 178 Wn.2d 258, 271, ¶24, 306 P.3d 948 (2013); *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 78, ¶18, 272 P.3d 827, cert. denied, 133 S. Ct. 199 (2012) (purpose of punitive or exemplary damages “is to punish the defendant and deter similar conduct.”); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S. Ct. 1513, 1519, 155 L. Ed. 2d 585 (2003) (punitive damages are aimed at deterrence and retribution).

In closing argument, plaintiff’s counsel told the jury that while he believed an appropriate range of damages for Mr. Flyte would be \$1 to \$5 million, Mr. Flyte had told his counsel “to recommend that the jury award him a dollar,” and that Mr. Flyte sought a dollar not as compensation for his loss, but “[b]ecause he doesn’t care about the money; he cares about accountability.” (RP 2041) Counsel told the jury that Mr. Flyte requested a nominal award solely because “[h]e cares about proving the point that the Summit View Clinic is responsible;” all that “he cares about is accountability.” (RP 2041)

Plaintiff’s counsel knew that the less money he asked for as compensation, the “more likely [he was] to get accountability.” (12/1 RP 20) By telling the jury not to award damages for compensation

based on the evidence, but to hold the defendant accountable and “*prou[e] the point*” that the defendant was responsible, plaintiff improperly sought an award of punitive, not compensatory damages. (RP 2041) (emphasis added) *See Wuth ex rel. Kessler v. Lab. Corp. of Am.*, 189 Wn. App. 660, 709, ¶105, 359 P.3d 841 (2015) (error to permit counsel to argue that “deterrence is important as a reminder that we can never elevate the business of medicine over the practice of medicine”), *rev. denied*, 185 Wn.2d 1007 (2016); *Broyles v. Thurston Cnty.*, 147 Wn. App. 409, 445, 195 P.3d 985, 1003 (2008) (argument that damages should be awarded “so that what . . . happen[ed] to these [plaintiffs] will never happen again” was an improper request for punitive damages).

Plaintiff’s ploy worked just as designed the jury did not award one dollar, but damages far in excess of the maximum amount suggested by plaintiff’s counsel. The misconduct of plaintiff’s counsel in closing argument compels a new trial. *Warren*, 71 Wn.2d at 518-19 (reversing for counsel’s misconduct during closing argument in urging the jury to base their verdict on evidence immaterial to the claims it had to decide); *Adkins*, 110 Wn.2d at 141 (reversal required for counsel’s improper golden rule argument during closing and trial court’s failure to give curative instruction).

4. The punitive verdict itself demonstrates the effect of plaintiff's misconduct and the jury's passion and prejudice.

While the jury's role in determining damages is essential, both the trial court and this Court have the power to order a new trial where a jury's verdict is tainted by passion or prejudice, or is excessive and not supported by substantial evidence. *Steinman v. City of Seattle*, 16 Wn. App. 853, 855-57, 560 P.2d 357 (1977); *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645-46, 771 P.2d 711, 780 P.2d 260 (1989). The jury's award "must be in proportion to the injury suffered," "supported by competent evidence," and not "flagrantly outrageous and extravagant." *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 140, 856 P.2d 746 (1993) (citations omitted). Jury verdicts must be compensatory of a pecuniary loss, and no further award can be made after full compensation. *Walters*, 58 Wash. at 301.

While "[d]amages need not be proved with mathematical certainty" – and because general damages cannot be – courts routinely use economic awards to assess the reasonableness of the jury's award of noneconomic damages and ensure that the damages are proportional to the injury sustained. *See, e.g., Hill*, 71 Wn. App. at 140 (\$410,000 award for noneconomic damages in a sex

discrimination case “clearly indicates passion or prejudice, or an attempt to award punitive damages” in light of “the meager evidence and the jury’s award of excessive economic damages” in the amount of \$40,000); *Bunch v. King Cnty. Dep’t of Youth Servs.*, 155 Wn.2d 165, 181, ¶29, 116 P.3d 381 (2005) (\$260,000 award of noneconomic damages in racial employment discrimination case not excessive where it was roughly three-quarters of the “uncontested” economic damages award of \$340,000); *Hoskins v. Reich*, 142 Wn. App. 557, 571-72, ¶¶33-34, 36, 174 P.3d 1250 (“paltry” noneconomic damages award of \$15,000 within the range of evidence and not the result of prejudice where jury awarded plaintiff \$25,095, “almost the exact amount requested,” in past economic damages), *rev. denied*, 164 Wn.2d 1014 (2008).

Where, as here, there is no claim for special damages, courts must review multi-million dollar verdicts for purely noneconomic damages with special scrutiny particularly where the record is replete with prejudicial misconduct and devoid of substantial evidence to support the award. In such circumstances, the court must ensure that the jury did not abuse its province by awarding general damages to punish the defendant. *See Joseph H. King, Jr., Pain and Suffering, Noneconomic Damages, and the Goals of Tort*

Law, 57 SMU L. Rev. 163, 176 (2004) (“Pain and suffering damages may reflect efforts to replace sums once received under the rubric of punitive damages by now seeking to utilize pain and suffering damages as the vehicle for venting a jury’s urge to punish a defendant.”). Such an award is not only impermissible under Washington law, but violates a defendant’s due process rights.

Federal law is instructive of the due process implications of excessive verdicts intended to punish a defendant. The Due Process Clause of the Fourteenth Amendment “prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” *State Farm*, 538 U.S. at 416, 123 S. Ct. at 1519-20. Even in states that authorize punitive damages, “[t]o the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.” *State Farm*, 538 U.S. at 417, 123 S. Ct. at 1520; *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432, 114 S. Ct. 2331, 2340, 129 L. Ed. 2d 336 (1994) (“Punitive damages pose an acute danger of arbitrary deprivation of property.”). Because of “the stark of unpredictability of punitive awards,” such exemplary damages must bear some relation to the compensatory damages awarded. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497-503, 128 S. Ct. 2605, 2624-27, 171 L. Ed. 2d 570 (2008); *see also State Farm*,

538 U.S. at 426, 123 S. Ct. at 1524-25 (where plaintiff suffered only minor economic injuries, \$1 million award was complete compensation; compensatory damages for the injury suffered were likely based on a component which was duplicated in excessive punitive award of \$145 million).

Further, exemplary damages must have substantial evidentiary basis and bear some relation to the actual harm suffered by the plaintiff in order to pass constitutional muster in jurisdictions where a jury may award damages to punish the defendant. The U.S. Supreme Court has held that a single-digit maximum ratio of punitive to compensatory awards “is appropriate in all but the most exceptional of cases,” *Exxon*, 554 U.S. at 514-15, 128 S. Ct. at 2634 (citing *State Farm*, 538 U.S. at 425, 123 S. Ct. at 1513), with “an award of more than four times the amount of compensatory damages . . . close to the line of constitutional impropriety.” *State Farm*, 538 U.S. at 425, 123 S. Ct. at 1524.

The jury’s \$16.7 million award in this case was punitive, not compensatory. By engaging in prejudicial misconduct, introducing irrelevant and inadmissible evidence of negligence and wrongful death claims not before the jury, and asking the jury not for compensation but to “hold the defendant accountable,” plaintiff

inflamed the jury's prejudice against the defendant, convincing the jury to award a verdict based on passion and unsupported by the evidence.

The trial court itself acknowledged the absence of evidence that Ms. Flyte suffered any pain while in a medically induced coma. (12/1 RP 22-23) Yet the jury awarded her estate \$5 million based only on "an inference," not evidence. Plaintiff's counsel argued in support of the verdict that the Clinic had the burden of proving that Ms. Flyte had not suffered pain. (12/1 RP 22-23) Similarly, there was scant evidence regarding Jacob Flyte at trial, yet the jury returned a \$6.7 million award to him after plaintiff's counsel assured them that Jacob would not be able to touch the award until he is "way into adulthood." (RP 2040-41) Finally, despite being asked for one dollar for the sole claimed purpose of ensuring "accountability" rather than compensation – the jury returned a verdict of \$5 million for Mr. Flyte. The jury's award of \$16.7 million to hold the Clinic "accountable" for alleged negligence, as plaintiff's counsel requested, was a punitive award and unsupported by substantial evidence at trial.

The "stark unpredictability of punitive awards" is apparent in this excessive \$16.7 million verdict, which was admittedly not

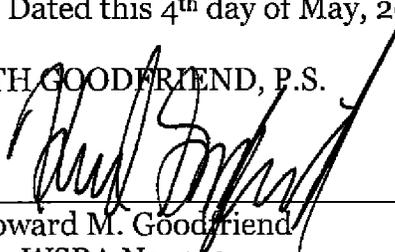
intended to compensate plaintiff for his loss. Even if punitive damages were allowed under Washington law, this verdict would far exceed any single-digit ratio, as plaintiff did not put on any evidence of his compensatory damages and instead argued general damages of pain and suffering based on “an inference” not grounded by evidence. (12/1 RP 22-23) The trial court’s decision to uphold this verdict on this record arbitrarily deprived the Clinic of its due process rights.

VI. CONCLUSION

Summit View Clinic did not receive a fair trial. This Court should reverse and remand for a new trial.

Dated this 4th day of May, 2016.

SMITH GOODFRIEND, P.S.

By:  _____

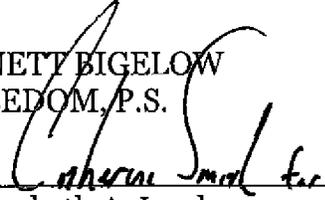
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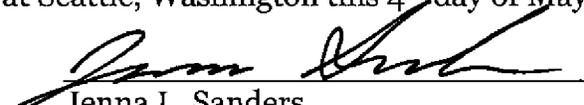
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The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 4, 2016, I arranged for service of the foregoing Brief of Appellants, to the court and to the parties to this action as follows:

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Jenna L. Sanders

SMITH GOODFRIEND

May 04, 2016 - 2:32 PM

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