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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LOUIS ALEXANDER DIAZ and MONA DIAZ,

Plaintiffs/Petitioners,

v.

JAYANTHI KINI, M.D. and MEDICAL CENTER LABORATORY, INC.,
P.S.,

Defendants/Respondents.

WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION
AMICUS CURIAE MEMORANDUM IN SUPPORT OF REVIEW

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On Behalf of
Washington State Association for Justice Foundation

I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. Both WSTLA and WSTLA Foundation name changes were effective January 1, 2009. WSAJ Foundation has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the rights of plaintiffs pursuing medical negligence claims against health care providers.

II. BACKGROUND

The petition for review in this case provides this Court with its first opportunity for determining whether RCW 7.70.080, setting forth exceptions to the collateral source rule in the medical negligence context, permits a defendant to submit evidence to the trier of fact of the plaintiff's settlement with a former co-defendant.¹

This review arises out of a medical negligence action commenced by Louis Diaz and his wife (Diaz) against Dr. Neal Futran and his employer, the University of Washington (collectively UW), Yakima Valley Memorial Hospital Association (Hospital Association), and Dr. Jayanthi

¹ The current version of RCW 7.70.080 is reproduced in the Appendix to this memorandum.

Kini and her employer, Medical Center Laboratory, Inc. (collectively MCL). The tort claim is based on Ch. 7.70 RCW, governing malpractice actions against health care providers. The underlying facts are drawn from the published Court of Appeals opinion, and the briefing of the parties. See Diaz v. State, University of Washington, ___ Wn.App. ___, 251 P.3d 249 (2011), *review pending*; Diaz Pet. for Rev. at 1-8; MCL Ans. to Pet. for Rev. at 3-5; Diaz Br. at 1-11; MCL Br. at 1-5. For purposes of this amicus curiae memorandum, the following facts are relevant:

Diaz alleged that the health care providers misdiagnosed cancer of the larynx, resulting in unnecessary removal of Louis Diaz's larynx. Diaz settled with UW prior to trial for \$400,000. The case proceeded to a jury trial against MCL.²

At trial, Diaz unsuccessfully moved to exclude evidence of the UW settlement from the jury. As a consequence, Diaz made reference to the settlement in the opening statement to the jury. Diaz renewed the motion to exclude mid-trial and asked the court to consider a curative instruction regarding the settlement reference. This motion was also denied. The trial court's Instruction No. 8 advised the jury regarding the settlement and its effect:

You have heard evidence that the University of Washington and Dr. Neal Futran were once parties to this litigation and later entered into a settlement with the plaintiffs, paying the plaintiffs \$400,000. This evidence should not be used to either (a) assume the University of Washington or Dr. Futran acted negligently to cause damage to the plaintiffs, (b) excuse

² The Hospital Association was voluntarily dismissed from the case. See Diaz, 251 P.3d at 250.

any liability you find on the part of Dr. Kini or MCL, or (c) reduce the amount of any damages you find were caused by Dr. Kini or MCL. By giving you this instruction, the court does not mean to instruct you for which party your verdict should be rendered.

MCL Br. at 3 (quoting CP 301); see also Diaz, 251 P.3d at 250.³ The jury returned a verdict for MCL, concluding it had not negligently caused injury to Diaz. The trial court denied Diaz' motion for a new trial.

Diaz appealed both the judgment and denial of the motion for new trial, and the Court of Appeals, Division I, affirmed. In so doing, the court finds RCW 7.70.080 unambiguous in allowing a defendant to present evidence of a settlement by former co-defendants. Diaz, 251 P.3d at 252.

The court's interpretation of the statute concludes:

The language of RCW 7.70.080 is broad and applies to compensation "from any source" except from the plaintiff and the plaintiff's family. This compensation would include settlements from other tortfeasors.

Id. The court does not specifically discuss in any detail the last sentence of RCW 7.70.080, which provides: "[n]otwithstanding this section, evidence of compensation by a defendant health care provider may be offered only by that provider," except to say that the phrase "defendant health care provider" is limited to parties remaining after other parties have settled with the plaintiff. See Diaz at 252.

The Court of Appeals also rejected Diaz' argument that an interpretation of the statute allowing evidence of a settlement by former

³ While MCL argued below that the trial court erred in instructing the jury it could not take the settlement into account as a basis for reducing damages against it, MCL does not seek cross-review on this issue. See Diaz, 251 P.3d at 253 & n.4; MCL Ans. to Pet. for Rev. at 13 n.7.

co-defendants conflicts with ER 408, which precludes evidence of settlement as a basis for proving liability or the invalidity of a claim or its amount.⁴ See Diaz at 252-53.

Lastly, the Court of Appeals denied Diaz' motion for reconsideration based on the argument that the court's reading of RCW 7.70.080 renders it unconstitutional under the separation of powers doctrine. See MCL Ans. to Pet. for Rev. at 16-17; see also Diaz Pet. for Rev. at 14-16 & n.10.

Diaz now seeks review before this Court.

III. ISSUES PRESENTED

Diaz's petition for review raises the following issues:

- 1) Does RCW 7.70.080 permit a defendant in a medical negligence action to introduce evidence at trial of a settlement between plaintiff and a former co-defendant?
- 2) If RCW 7.70.080 permits introduction of such evidence, is the statute unconstitutional under the separation of powers doctrine because it conflicts with ER 408, governing the admissibility of evidence regarding settlements and offers of settlement?

See Pet. for Rev. at 1.

IV. ARGUMENT IN SUPPORT OF REVIEW

This Court should grant review under RAP 13.4(b)(4) because the issue of proper interpretation and application of RCW 7.70.080 is a question of "substantial public interest" that will profoundly impact trial of medical negligence actions, and the Court of Appeals analysis of this statute is both incomplete and flawed. Three aspects of the court's analysis

⁴ The current version of ER 408 is reproduced in the Appendix to this memorandum.

are discussed below, each of which supports a grant of review and deserves more comprehensive treatment on the merits than the 10-page limitation or the nature of this submission allows.⁵ See RAP 13.4(h).

A.) The Court Of Appeals Failed To Fully Address Diaz' Argument That The Last Sentence Of RCW 7.70.080 Prohibits A Defendant From Presenting Evidence Of A Former Defendant's Settlement.

The last sentence of RCW 7.70.080 provides: "Notwithstanding this section, evidence of compensation by a defendant health care provider may be offered only by that provider." Diaz argued below that this sentence was "clear and unambiguous" and would only permit UW — not MCL — to offer evidence of compensation paid by UW. See Diaz Br. at 16-17; see also MCL Ans. to Pet. for Rev. at 4 (acknowledging this argument made at Court of Appeals). This argument merits serious consideration, and yet nowhere in the Court of Appeals opinion does the court focus specifically on the meaning and intent of this notwithstanding clause. See Diaz, 251 P.3d at 252. This provision is subject to a reasonable interpretation that a non-settling defendant may not present evidence to the jury of compensation paid by former defendants who have settled with plaintiff. This aspect of the statute is at least worthy of discussion, if not determinative. The failure of the Court of Appeals to explicitly address this issue renders its analysis incomplete, and could lead to uncertainty as to the scope of the court's holding.

⁵ If review is granted, WSAJ Foundation stands ready to submit a brief on the merits, urging that the Court of Appeals' interpretation of RCW 7.70.080 is wrong.

B.) The Court Of Appeals Misinterpreted This Court's Opinion In *Adcox* As Supportive Of Its Interpretation Of RCW 7.70.080.

The only occasion this Court has had to discuss RCW 7.70.080 is its opinion in *Adcox v. Children's Orthopedic Hosp.*, 123 Wn.2d 15, 864 P.2d 921 (1993). In that case, the Court concluded the trial court erred in not allowing the defendant hospital to present evidence to the jury about collateral source payments that may be received by plaintiffs. See id., 123 Wn.2d at 39-41. However, the Court concluded this error was harmless. See id.

In passing on this issue the Court "strongly encourage[d] trial courts to fully follow the statute in the future," but did not engage in any analysis suggesting the statute contemplated that a defendant could submit evidence at trial of a former co-defendant's settlement with plaintiff. See id. at 41. In fact, the Court identified with particularity what collateral sources the defendant hospital sought to place into evidence:

The Hospital offered to prove some of the following collateral sources might be available as mitigating the plaintiffs' damages: school districts; state medical care; state respite care; state payments of foster care expenses; state insurance pool for the uninsurable; and charitable organizations providing services.

Id. at 40 n.11.

Notwithstanding the limited nature of this Court's discussion in *Adcox*, the Court of Appeals below turned to a *different part* of the *Adcox* opinion and concluded:

But, a close reading of the opinion suggests that the main purpose of the offset procedure was to account for the

previous settlements. *Id.* at 22, 864 P.2d 921. The footnote cited by the Diazes merely identifies other potential collateral sources the Hospital offered to prove. *Id.* at 40 n.11, 864 P.2d 921.

Diaz, 251 P.3d at 252.

The Court of Appeals' factual statement that "the main purpose of the offset procedure [in Adcox] was to account for the previous settlements" is incorrect. There is no indication in the text of the Adcox opinion that the defendant hospital offered evidence of the settlements with other defendants.⁶

Moreover, the portion of Adcox relied on by the Court of Appeals to support its view of RCW 7.70.080 — Adcox, 123 Wn.2d at 22 — does not relate to this statute. Instead, the cited portion of Adcox involves the proper interpretation and application of RCW 4.22.070.⁷ At the time of trial in Adcox there was an unresolved question about RCW 4.22.070, and how it applied in a multi-defendant context when one or more of the defendants settle prior to trial. See Adcox at 22-29 (describing different theories of how RCW 4.22.070 should apply, e.g. allocation of fault to settling defendants with proportionate liability of remaining defendant, or full liability for remaining defendant with offset of settlement amounts). Adcox did not resolve this issue because the Court found it was not

⁶ MCL agrees that the defendant hospital in Adcox did not offer evidence of settlements with other defendants. See MCL Br. at 25 (stating "Adcox did not address the admissibility of a settlement under RCW 7.70.080 because the defendant hospital did not seek to offer evidence of a settlement").

⁷ A former version of RCW 4.22.070 was in effect at that time. See Adcox, 123 Wn.2d at 24-25 n.2 (setting forth the relevant parts of the former statute). The current version of RCW 4.22.070 is reproduced in the Appendix to this memorandum.

properly preserved by the defendant hospital.⁸ See id. at 25. Nowhere in the analysis of this allocation/offset issue is there any reference to RCW 7.70.080.

Thus, the Court of Appeals' conclusion that "*Adcox* establishes that a trial court must allow a party in a medical malpractice case to present collateral source evidence, including settlements" is a misreading of this Court's opinion. Diaz at 252 (footnote omitted). The Court of Appeals' ultimate view of RCW 7.70.080 may well have been infected by its flawed analysis of Adcox.

C.) The Court Of Appeals Failed To Consider The Impact Of RCW 4.22.070, As Interpreted By This Court In *Washburn*, In Construing RCW 7.70.080.

The Court of Appeals analysis in Diaz does not discuss RCW 7.70.080 in the larger context of a fault allocation system based principally on proportionate liability, with RCW 4.22.070 as its centerpiece. See generally Washburn, 120 Wn.2d at 290-99; see also Kottler v. State, 136 Wn.2d 437, 448-49, 963 P.2d 834 (1998).⁹ In Washburn, this Court

⁸ After the trial in Adcox, this Court resolved the controversy over proper interpretation of RCW 4.22.070 in Washburn v. Beatt Equipment Co., 120 Wn.2d 246, 840 P.2d 860 (1992), discussed in §C., infra. Washburn predates the opinion in Adcox.

⁹ Neither party in Diaz offered any meaningful analysis of the relevance of the fault allocation system in RCW 4.22.070 to interpretation and application of RCW 7.70.080. There is only one reference to RCW 4.22.070 in the briefing. See MCL Br. at 25 n.12. MCL agrees that there should be no offset for settlements with other defendants under RCW 4.22.070, but does not address how this lack of offset relates to its view of RCW 7.70.080 as allowing for reduction of MCL's liability. See MCL Ans. to Pet. for Rev. at 13 n.7. The Diaz opinion contains a passing reference to apportionment of liability, with a baffling citation to RCW 7.70.060, which has nothing to do with the subject. See 251 P.3d at 252, n.2. Although these references should be sufficient to preserve the issue of the impact of RCW 4.22.070 for review, in any event the Court is not confined to the issues framed or theories advanced by the parties if the parties ignore or overlook an applicable statute. See Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 623, 465 P.2d 657 (1970); see also Harris v. Department of Labor & Indus., 120 Wn.2d 461,

clarified that a former defendant's settlement amount has no bearing on the liability of remaining defendants because RCW 4.22.070 imposes proportionate liability, with rare exceptions. See 120 Wn.2d at 296-97; see also Kottler, 136 Wn.2d at 448-49. There is no offset for settlements by former defendants when proportionate liability applies to a non-settling defendant. See id.

That RCW 7.70.080 is plain and unambiguous should not foreclose consideration of how RCW 4.22.070 should impact interpretation of the statute. A statute is not ambiguous merely because the parties disagree as to its meaning. See Burton v. Lehman, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005) (stating "a statute is not ambiguous merely because different interpretations are conceivable"). The question must be asked why the last sentence of RCW 7.70.080 should be interpreted to permit evidence of a settlement by former co-defendants, essentially providing the remaining defendant with the basis for an offset, when no such offset is permitted in determining ultimate liability under RCW 4.22.070, regardless of whether the plaintiff is at fault. See Washburn at 296. The Court of Appeals' analysis of RCW 7.70.080 is incomplete in the absence of consideration of how this statute and RCW 4.22.070 interface. Review should be granted so that this question can be fully briefed and answered.¹⁰

467-68, 843 P.2d 1056 (1993) (addressing issue raised only by amicus curiae where necessary to reach a proper decision).

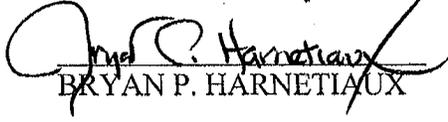
¹⁰ MCL argued below that any error in instructing the jury on RCW 7.70.080 is harmless. See MCL Br. at 8-10. The Court of Appeals did not address this issue, instead issuing a published, precedential opinion on the meaning of RCW 7.70.080 that is binding on all lower courts. See Diaz at 251-53.

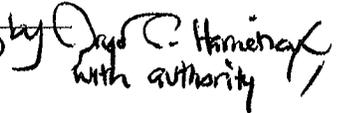
Of course, if RCW 7.70.080 does not permit a defendant to submit evidence that plaintiff settled with former co-defendants then the second issue raised by Diaz on review would be moot, as the statute and ER 408 would be in harmony.

V. CONCLUSION

The petition for review should be granted.

DATED this 22nd day of July, 2011.


BRYAN P. HARNETIAUX

 by 
GEORGE M. AHREND
with authority

On behalf of WSAJ Foundation

Appendix

RCW 4.22.070. Percentage of fault--Determination--Exception--

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

[1993 c 496 § 1; 1986 c 305 § 401.]

RCW 7.70.080. Evidence of compensation from other source

Any party may present evidence to the trier of fact that the plaintiff has already been compensated for the injury complained of from any source except the assets of the plaintiff, the plaintiff's representative, or the plaintiff's immediate family. In the event such evidence is admitted, the plaintiff may present evidence of an obligation to repay such compensation and evidence of any amount paid by the plaintiff, or his or her representative or immediate family, to secure the right to the compensation. Compensation as used in this section shall mean payment of money or other property to or on behalf of the plaintiff, rendering of services to the plaintiff free of charge to the plaintiff, or indemnification of expenses incurred by or on behalf of the plaintiff. Notwithstanding this section, evidence of compensation by a defendant health care provider may be offered only by that provider.

[2006 c 8 § 315, eff. June 7, 2006; 1975-'76 2nd ex.s. c 56 § 13.]

ER 408. COMPROMISE AND OFFERS TO COMPROMISE

In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Amended effective September 1, 2008.

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Subject: RE: Diaz v. Kini, et al. (S.C. #86049-1) - Request for Amicus Curiae Status and Filing of Accompanying Proposed Amicus Curiae Memorandum

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Respectfully submitted,

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