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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

LOUIS ALEXANDER DIAZ and MONA DIAZ,

Plaintiffs/Petitioners,

vs.

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

Defendants/Respondents.

**FILED**  
DEC 19 2011  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
*[Signature]*

BRIEF OF AMICUS CURIAE  
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ORIGINAL

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## **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. 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.

WSAJ Foundation filed an amicus curiae memorandum in support of review in this case.<sup>1</sup>

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

This appeal provides the Court with its first opportunity to determine whether RCW 7.70.080, modifying the common law "collateral source rule" in the medical negligence context, permits one defendant health care provider to submit evidence at trial of compensation paid by another defendant health care provider that was dismissed from the case prior to trial. This is a medical negligence action commenced by Louis Diaz and his wife (Diaz) against Dr. Neal Futran and his employer,

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<sup>1</sup> See "Washington State Association for Justice Foundation Amicus Curiae Memorandum in Support of Review" (WSAJ Fdn. ACM), dated July 22, 2011. The amicus curiae memorandum focused on whether the issues before the Court warranted review under RAP 13.4(b).

University of Washington (collectively UW), Yakima Valley Memorial Hospital Association (Hospital Association), and Dr. Jayanthi Kini and her employer, Medical Center Laboratory, Inc. (collectively MCL). The tort claims are based on Ch. 7.70 RCW, governing medical negligence actions against health care providers.

The underlying facts are drawn from the Court of Appeals opinion, and the briefing of the parties. See Diaz v. State, 161 Wn.App. 500, 251 P.3d 249, *review granted*, 172 Wn.2d 1010 (2011); Diaz Br. at 1-11; MCL Br. at 1-5; Diaz Pet. for Rev. at 1-8; MCL Ans. to Pet. for Rev. at 3-5; MCL Supp. Br. at 2-4.

For purposes of this amicus curiae brief, the following facts are relevant. Diaz voluntarily dismissed the claims against Hospital Association and settled with UW prior to trial. UW was dismissed from the lawsuit and the case proceeded to a jury trial against MCL. Diaz unsuccessfully moved to prevent the jury from hearing evidence about the settlement with UW. As a consequence, the jury was told of the settlement, and the amount of compensation paid by UW.<sup>2</sup> The jury returned a verdict for MCL and the superior court denied Diaz's motion for a new trial.

Diaz appealed and challenged the superior court's refusal to exclude evidence of the settlement with UW. The Court of Appeals, Division I, affirmed, holding:

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<sup>2</sup> For additional details regarding how this collateral source issue was handled at trial, see WSAJ Fdn. ACM at 2-4.

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.

Diaz, 161 Wn.App. at 508.

The Court of Appeals did not address in 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.” (Emphasis added) Nor did the court address how this sentence relates to the language that precedes it in the statute. However, in concluding the statute plainly and unambiguously allows evidence of the settlement between Diaz and UW, the court read the phrase “defendant health care provider” as follows:

The plain meaning of the phrase “defendant health care provider,” in the context of the greater statutory provision, contemplates only those defendants who participate in trial. The provision limits its application to “any party.” RCW 7.70.080. Former health care provider defendants who have settled with the plaintiff and paid damages have contributed to compensation of the plaintiff and are no longer defendants in the surviving action. Any remaining party may present evidence of that compensation.

Id. at 507.

This Court granted Diaz’s petition for review challenging the Court of Appeals’ interpretation of RCW 7.70.080.

### III. ISSUE PRESENTED

Does RCW 7.70.080 permit one defendant health care provider in a medical negligence action governed by Ch. 7.70 RCW to introduce evidence at trial of compensation paid to plaintiff by another defendant health care provider who is no longer a party in the case?

See Diaz Pet. for Rev. at 1.<sup>3</sup>

#### IV. SUMMARY OF ARGUMENT

While RCW 7.70.080 modifies the common law “collateral source rule” for medical negligence cases, the plain language of the proviso in the statute prohibits one defendant health care provider from offering evidence at trial of compensation paid by another defendant health care provider. This limitation applies even when the defendant health care provider paying compensation is dismissed from the case before trial.

This reading of RCW 7.70.080 is in harmony with the operation of RCW 4.22.070 in these circumstances, which does not permit a nonsettling defendant an offset for monies paid by a settling defendant.

#### V. ARGUMENT

##### A. **Background Regarding The Common Law Collateral Source Rule, And RCW 7.70.080’s Modification Of The Rule For Medical Negligence Cases.**

Under Washington common law, evidence of payments received by a tort victim from a collateral source is not admissible as a basis for reducing damages recoverable from a defendant tortfeasor. See Heath v. Seattle Taxicabs Co., 73 Wash. 177, 185-87, 131 Pac. 843 (1913) (applying collateral source principle as to plaintiff’s pension fund benefits); Stone v. Seattle, 64 Wn.2d 166, 172, 391 P.2d 179 (1974)

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<sup>3</sup> Diaz also preserves for review the question of whether the Court of Appeals’ interpretation of RCW 7.70.080 renders the statute unconstitutional (under the separation of powers doctrine) because it conflicts with ER 408, concerning admissibility of compromises or offers to compromise. See Diaz Pet. for Rev. at 1, 14-16. This issue need not be reached if RCW 7.70.080 is interpreted as prohibiting a defendant health care provider from introducing evidence of compensation paid by another defendant health care provider.

(extending collateral source concept to payment from Social Security or veterans pensions); Ciminski v. SCI Corporation, 90 Wn.2d 802, 804-07, 585 P.2d 1182 (1978) (recognizing “collateral source rule” and that it covers all collateral payments, not just ones purchased by plaintiff); Mazon v. Krafchick, 158 Wn.2d 440, 452, 144 P.3d 1168 (2006) (same). Although the collateral source rule is viewed as an evidentiary principle, it is grounded in tort law and serves as a means of assuring that a fact finder will not reduce a defendant’s liability because the plaintiff received money from other sources. See 5A Karl B. Tegland, Wash. Prac., Evidence Law & Practice, §409.4 (5<sup>th</sup> ed. 2007); 16 David K. DeWolf et al., Wash. Prac., Tort Law & Practice, §§5.42-43 (3<sup>rd</sup> ed. 2006).

In 1976, the Legislature modified the collateral source rule for medical negligence claims governed by Ch. 7.70 RCW. See 1975-76 Laws, 2<sup>nd</sup> Ex. Sess., Ch. 56 §13 (codified as RCW 7.70.080). This modification of the collateral source rule was amended in 2006 as part of a comprehensive act addressing health care liability reform. See 2006 Laws Ch. 8, §315 (revising RCW 7.70.080).<sup>4</sup>

As amended, RCW 7.70.080 now provides:

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

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<sup>4</sup> The amendment occurred before the settlement in this case between Diaz and UW. See Diaz Br. at 9-10.

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.

This Court has had little occasion to discuss this statute. See Adcox v. Children's Orthopedic Hosp., 123 Wn.2d 15, 864 P.2d 921 (1993); Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998). In Adcox, this Court criticized the superior court's decision to address the impact of RCW 7.70.080 posttrial as a matter of offset, rather than allowing the jury to hear and evaluate certain collateral source evidence. See 123 Wn.2d at 40. While Adcox explains that the modification to the collateral source rule in RCW 7.70.080 is intended "to prevent overcompensating plaintiffs in light of the resulting cost to society" in this health care provider litigation context, the Court does not attempt to explicate the statute. 123 Wn.2d at 41.<sup>5</sup> In Mahler, the statute is only mentioned in passing. See 135 Wn.2d at 412, n.4.

To date the Court has not addressed the issue presented here, namely whether one defendant health care provider may present evidence of compensation paid by another defendant health care provider who has settled and is no longer in the case. This issue is addressed below.

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<sup>5</sup> The Court of Appeals below interpreted Adcox as suggesting the main purpose of RCW 7.70.080 is to account for prior settlements. See Diaz, 161 Wn.App. at 506-07 & n.3. WSAJ Foundation addressed why this interpretation is incorrect in its amicus curiae memorandum. See WSAJ Fdn. ACM at 6-8 (tracing Court of Appeals misinterpretation of Adcox); see also MCL Ans. to WSAJ Fdn. ACM at 4 (arguing that "[e]ven if the Court of Appeals overstated the holding or stated reasoning of Adcox" its interpretation of the statute is correct).

**B. The Plain Language Of RCW 7.70.080 Does Not Allow One Defendant Health Care Provider To Present Evidence Of Compensation Paid By *Another* Defendant Health Care Provider, Regardless Of Whether The Other Health Care Provider Has Been Dismissed From The Case.**

*The Plain Language of RCW 7.70.080*

Properly construed, the last sentence of RCW 7.70.080 – hereafter the “notwithstanding clause” – does not entitle MCL to present evidence of payment of compensation by UW. The goal of statutory interpretation is to effectuate the intent of the Legislature. Burns v. City of Seattle, 161 Wn.2d 129, 140, 164 P.3d 475 (2007). If the meaning of a statute is plain, enforcing it as written effectuates the legislative intent. See id. As further explained in Burns:

Plain meaning is discerned from viewing the words of a particular provision in the context of the statute in which they are found, together with related statutory provisions, and the statutory scheme as a whole.

Id. (citation omitted).

The notwithstanding clause, which is not discussed with any particularity in the Court of Appeals opinion, provides: “[n]otwithstanding this section, evidence of compensation by a defendant health care provider may be offered only by that provider.” Under this language only UW would be entitled to offer evidence of compensation it paid to Diaz. The fact that UW could not offer such evidence because it was no longer a party at the time of trial is irrelevant.

The notwithstanding clause addresses a particular source of compensation. It is unequivocal in stating that only the defendant health

care provider who is the source of the compensation may offer evidence regarding the compensation paid. In this case, UW paid compensation to Diaz as a “defendant health care provider” under the notwithstanding clause. A “defendant” is a “person sued in a civil proceeding...”. Black’s Law Dictionary, s.v. “defendant” (9<sup>th</sup> ed. 2009)<sup>6</sup>; Merriam-Webster Online, s.v. “defendant” (“a person required to make answer in a legal action or suit”) (available at [www.m-w.com](http://www.m-w.com); viewed 12/19/11); see also RCW 4.22.070.<sup>7</sup>

The plain meaning of “defendant health care provider” does not require that the status of “defendant” be maintained up to the moment of trial. The notwithstanding clause does not modify “defendant” in this regard. The Legislature was undoubtedly aware of the fact that a defendant health care provider could pay compensation to a plaintiff and either remain in the litigation or be dismissed before trial. For example, a health care provider may cover medical, hospital or similar expenses occasioned by an injury, and this fact would not be admissible in evidence against it. See RCW 5.64.010.<sup>8</sup> On the other hand, a defendant health care provider may compensate the plaintiff in exchange for being dismissed as a defendant, as occurred here. The Legislature did not

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<sup>6</sup> See Lauer v. Pierce County, 2011 WL 6225263, at \*9 (Wash. Sup. Ct., Dec. 15, 2011) (relying on Black’s Law Dictionary for plain meaning of undefined term in statute).

<sup>7</sup> The pertinent language of RCW 4.22.070(1) provides: “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...” (Emphasis added) The antecedent of “those” in this passage is “defendant.” Also, the usage of “defendant” in RCW 4.22.070(2) involves defendants who have settled. The full text of the current version of RCW 4.22.070 is reproduced in the Appendix.

<sup>8</sup> The current version of this statute is reproduced in the Appendix to this brief.

distinguish between these two circumstances. There is no basis under the last sentence of RCW 7.70.080 for allowing MCL to present evidence of the payment of compensation by UW.<sup>9</sup>

***The Flawed Court of Appeals' Analysis***

The Court of Appeals' "plain meaning" analysis of RCW 7.70.080 is incorrect. Diaz, 161 Wn.App. at 507. The problem with its analysis is that it interprets RCW 7.70.080 without regard for the special office of provisos, the rules of construction that generally govern them and how provisos interface with the statutory language they modify.

The notwithstanding clause in RCW 7.70.080 is in the nature of a proviso. See City of Seattle v. Ballsmidler, 71 Wn.App. 159, 162-63 & n.3, 856 P.2d 1113 (1993) (involving notwithstanding provision in one statute that modified the scope of a related statute). As this Court notes in Bartlett v. Lanphier, 94 Wash. 354, 357-58, 162 Pac. 532 (1917), "the purpose of a proviso is not to broaden the meaning of language found in the main body of the act, but rather to limit the meaning of such language or except from its operation some specified objects or things." As further explained in Tyler Pipe Indus. v. Dep't of Revenue, 96 Wn.2d 785, 788, 638 P.2d 1213 (1982):

It is a well established principle of statutory construction that provisos and exceptions remove something from the enacting

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<sup>9</sup> In essence, the notwithstanding clause is a partial codification of the common law collateral source rule because, as to a defendant health care provider who paid compensation, the source would not be "collateral," although evidence of such compensation would be admissible to prevent a double recovery against that provider. See Lange v. Raef, 34 Wn.App. 701, 704, 664 P.2d 1274 (1983). However, as to another defendant health care provider, that source would remain collateral and evidence of such compensation would therefore remain inadmissible.

clause that would otherwise be contained therein. This proposition was well stated by this court in *McKenzie v. Mukilteo Water Dist.*, 4 Wn.2d 103, 114, 102 P.2d 251 (1940) as follows:

It has not been an unfrequent mode of legislation to frame an act with general language in the enacting clause, and to restrict its operation by a proviso.... Provisos and exceptions are similar; intended to restrain the enacting clause; to except something which would otherwise be within it, or in some manner to modify it.... The exception of a particular thing from the operation of the general words of a statute shows that in the opinion of the law-maker the thing excepted would be within the general words had not the exception been made.

See also Ballsmidler, 71 Wn.App. at 162 (stating “[t]he definition of ‘notwithstanding’ is ‘in spite of’, which in turn is defined as ‘in defiance of, *regardless of ...*’ (Emphasis added.) Webster’s New World Dictionary 974, 1374 (2d ed. 1976”).

This rule of construction governing provisos is wholly consistent with the plain meaning rule of statutory construction, discussed above. See Burns, 161 Wn.2d at 140 (requiring a particular provision of the statute to be interpreted in context). As with the plain meaning rule, a court will not read into a proviso words that are not there, even if the court conceives the Legislature may have left them out unintentionally. See Jepson v. Dep’t of Labor & Indus., 89 Wn.2d 394, 403, 573 P.2d 10 (1977).

The Court of Appeals considered the text of RCW 7.70.080 as a whole, and overlooked the special rules of construction governing

provisos. In doing so, it failed to recognize that the notwithstanding clause excepts a particular “thing” from the rest of the text (the enacting clause) – compensation paid by defendant health care providers. The court interpreted the phrase “defendant health care provider” in the notwithstanding clause “in the context of the greater statutory provision,” and concluded that the phrase could only refer to defendants paying compensation who participate in trial as a “party.” Diaz, 161 Wn.App. at 507.

As indicated above, this was error because the plain meaning of the notwithstanding clause phrase “defendant health care provider” includes those health care providers no longer in the case. See supra at 8.<sup>10</sup> But it was also error because the Court of Appeals allowed the enacting clause to influence its perception of the meaning of “defendant health care provider” without examining the notwithstanding clause in its own right. See Diaz at 507. The court then drew upon the “any party” language of the enacting clause as the basis for allowing MCL to present “any source” evidence about the UW settlement. See id.

Nor is the Court of Appeals’ analysis justified under the rule of construction that applies when there are conflicting statutes that create

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<sup>10</sup> While it is true that provisos and exceptions to enacting clauses are narrowly construed, this rule of construction does not apply when the word or phrase at issue is unambiguous. See Ballsmider, 71 Wn.App. at 163 n.3.

The question whether the statute has a latent ambiguity with regard to claims governed by Ch. 7.70 RCW that are settled by a patient and health care provider before litigation by the patient against another health care provider is not presented in this case. See Sprint Int’l v. Dep’t of Revenue, 154 Wn.App. 926, 939 n.9, 226 P.3d 253 (stating “[a] latent ambiguity is apparent only when a statute’s language is applied to particular facts and is not apparent on the face of the statute”), *review denied*, 169 Wn.2d 1023 (2010).

uncertainty as to the meaning of a proviso. On occasion this Court has invoked the rule regarding construction of provisos that allows a proviso to be construed “in the light of the body of the statute, and in such a manner as to carry out the legislature’s intent as manifested by the entire act and laws in pari materia therewith.” State v. Wright, 84 Wn.2d 645, 652, 529 P.2d 453 (1974). However, this rule of construction is properly confined to situations where a court is required to discern the Legislature’s “overall intent” amidst related statutes that are conflicting. See id. (interpreting statutory proviso to uphold right of state commission to temporarily close ocean beaches to vehicles in light of commission’s regulatory authority, notwithstanding other statutes providing beaches be maintained as highways “forever”).

The Court of Appeals analysis should be rejected, and this Court should hold that under the plain meaning of RCW 7.70.080 MCL should not have been allowed to present evidence that UW paid compensation to Diaz.

**C. Interpreting RCW 7.70.080 As Prohibiting One Defendant Health Care Provider From Presenting Evidence Of Settlement By Another Defendant Health Care Provider Is Consistent With The Liability Scheme Established In RCW 4.22.070.**

Under the plain meaning rule of statutory construction, it is also appropriate for the Court to view the words of the particular statutory provision “together with related statutory provisions.” Burns, 161 Wn.2d at 140. With this in mind, it is important to note that, as the sole

remaining defendant in this case, under RCW 4.22.070(1)(b)<sup>11</sup> MCL would not be entitled to offset any damage award against it by the amount of the settlement paid by UW. See Washburn v. Beatt Equipment Co., 120 Wn.2d 246, 290-96, 840 P.2d 860 (1992) (interpreting former version of RCW 4.22.070); Waite v. Morisette, 68 Wn.App. 521, 526-27, 843 P.2d 1121, 851 P.2d 1241 (same), *review denied*, 122 Wn.2d 1006 (1993).<sup>12</sup>

The interpretation proposed in this brief renders the proviso to RCW 7.70.080 consistent with RCW 4.22.070, as applied in Washburn and Waite. On the other hand, the Court of Appeals' reading of RCW 7.70.080 leads to an anomaly. Under RCW 4.22.070 a defendant health care provider found liable for damages would not be entitled to offset another defendant health care provider's settlement amount, but nonetheless would be entitled to offer that amount into evidence under RCW 7.70.080 for the purpose of arguing against "overcompensating" the plaintiff. See Adcox, 123 Wn.2d at 41.<sup>13</sup> This result carries the real risk of undercompensating a plaintiff by an offset imposed by the jury that the liable defendant health care provider would not otherwise be entitled to receive.

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<sup>11</sup> MCL contends that the Court should not consider RCW 4.22.070 in interpreting RCW 7.70.080 because this argument was not considered below. See MCL Supp. Br. at 19. As previously noted, this Court is not bound by the arguments of the parties that overlook or ignore a relevant statute. See WSAJ Fdn. ACM at 8 n.9.

<sup>12</sup> Subsequent revisions to RCW 4.22.070 have not altered the holdings in Washburn and Waite. See 1993 Laws, Ch. 496 §1.

<sup>13</sup> MCL agrees that the purpose of RCW 7.70.080 is to avoid overcompensation, and that the trial court erred in suggesting otherwise in its Instruction No. 8 to the jury. See Diaz, 161 Wn.App. at 508 & n.4; MCL Supp. Br. at 1, 11-12 & n.6; WSAJ Fdn. ACM at 3 & n.3.

Properly interpreted, RCW 7.70.080 is consistent with the proportionate liability scheme of RCW 4.22.070 in only allowing a defendant health care provider to present evidence of compensation *it* paid to the plaintiff.

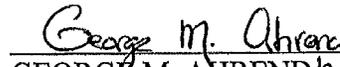
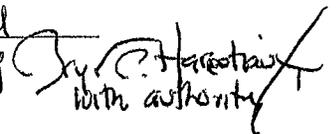
## VI. CONCLUSION

The Court should adopt the analysis set forth in this brief, and resolve this appeal accordingly.

DATED this 19th day of December, 2011.

  
BRYAN P. HARNETIAUX

  
DAVID P. GARDNER

  
GEORGE M. AHREND by   
with authority

On behalf of WSAJ Foundation

# Appendix

#### **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.]

#### **4.22.070. Percentage of fault--Determination--Exception--Limitations**

(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.]

**5.64.010. Civil actions against health care providers--Admissibility of evidence of furnishing or offering to pay medical expenses--Admissibility of expressions of apology, sympathy, fault, etc.**

(1) In any civil action against a health care provider for personal injuries which is based upon alleged professional negligence, or in any arbitration or mediation proceeding related to such civil action, evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible.

(2)(a) In a civil action against a health care provider for personal injuries that is based upon alleged professional negligence, or in any arbitration or mediation proceeding related to such civil action, a statement, affirmation, gesture, or conduct identified in (b) of this subsection is not admissible as evidence if:

(i) It was conveyed by a health care provider to the injured person, or to a person specified in RCW 7.70.065 (1)(a) or (2)(a) within thirty days of the act or omission that is the basis for the allegation of professional negligence or within thirty days of the time the health care provider discovered the act or omission that is the basis for the allegation of professional negligence, whichever period expires later; and

(ii) It relates to the discomfort, pain, suffering, injury, or death of the injured person as the result of the alleged professional negligence.

(b) (a) of this subsection applies to:

(i) Any statement, affirmation, gesture, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence; or

(ii) Any statement or affirmation regarding remedial actions that may be taken to address the act or omission that is the basis for the allegation of negligence.

[2006 c 8 § 101, eff. June 7, 2006; 1975-'76 2nd ex.s. c 56 § 3.]

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Rec'd 12/19/11

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**Subject:** Diaz v. Kini, et al. (S.C. #86049-1)

Dear Mr. Carpenter,

Attached please find our brief in the above matter. Arrangements for electronic service are reflected in our letter request to the Court.

Respectfully submitted,

Bryan Harnetiaux, WSBA #5169  
on behalf of WSAJ Foundation