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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

LOUIS ALEXANDER DIAZ and MONA DIAZ,

Petitioners,

v.

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

Respondents.

RESPONDENTS' ANSWER TO WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION'S AMICUS BRIEF

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I. IDENTITY OF ANSWERING PARTIES

Respondents Jayanthi Kini, M.D. and Medical Center Laboratory, Inc., P.S. ("MCL") submit this answer to the Amicus Curiae Brief filed by the Washington State Association for Justice Foundation ("WSAJF").

II. ARGUMENT

RCW 7.70.080, the statute at issue, 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 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.

A. Contrary to WSAJF's Assertions, the Court of Appeals Correctly Interpreted RCW 7.70.080, Including the "Notwithstanding" Clause in the Statute's Last Sentence, in Accord with the Statute's Plain Meaning.

The Court of Appeals correctly held that RCW 7.70.080 is not ambiguous, *Diaz v. State*, 161 Wn. App. 500, 507, 251 P.3d 249 (2011), and neither WSAJF nor any party in this case contends otherwise.

Consistent with rules of statutory construction WSAJF cites, *WSAJF Br. at 7*, the Court of Appeals also correctly observed:

> Our purpose in interpreting a statute is to discern and implement the intent of the legislature. . . . If, when looking to the entire statute in which the provision is found and to related statutes, we determine that the meaning of the provision in question is plain, our inquiry ends. . . .

Diaz, 61 Wn. App. at 606. Although WSAJF recognizes these principles, as well as the principle of statutory construction that "'[p]lain 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,'" *WSAJF Amicus Br. at 7* (quoting *Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007), WSAJF advocates interpreting the last sentence of RCW 7.70.080 to mean something other than what it plainly means when parsed correctly and in context.

As respondents explained at page 9 of their supplemental brief:

> The courts below were correct because, at trial, the University and Dr. Futran, having settled, were not "defendants," and thus were not in position to "offer" *any* kind of evidence. ***As is made clear by the first five words of RCW 7.70.080 ("[a]ny party may present evidence"), the statute concerns evidence that "[a]ny party" may offer, not what nonparties may offer***. The last sentence of RCW 7.70.080 therefore would make no sense if it were construed to limit the right to "offer" settlement or other "collateral source" evidence to someone who is not a party

> (and thus not a "defendant") who can "offer" evidence of any kind at trial. [Emphasis added.]

The Court of Appeals reached the same conclusion:

> 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. [Emphases added.]

Diaz, 161 Wn. App. at 507.

WSAJF nevertheless asserts, *WSAJF Br. at 8*, that "[t]he plain meaning of 'defendant health care provider' does not require that the status of "defendant" be maintained up to the moment of trial." But, WSAJF cites no authority supporting an assertion that "defendant health care provider" plainly means that, once one has been a defendant health care provider, one always is a defendant health care provider. Moreover, WSAJF's assertion ignores not only the statutory context in which the words "defendant health care provider" are used, but also the fact that once a plaintiff settles with and releases a defendant, that defendant must be dismissed from the lawsuit and is no longer a party or a defendant.

RCW 7.70.080 concerns the introduction of evidence *at trial*. A former defendant who settled *cannot be* a party or a defendant *at trial*.

See Maguire v. Teuber, 120 Wn. App. 393, 399, 85 P.3d 939, *rev. denied,* 152 Wn.2d 1026 (2004) (where tort defendants' settlement with the plaintiff operated to release them, "they must be dismissed from the lawsuit"). As the Court of Appeals correctly concluded, the Legislature, by framing RCW 7.70.080 as a statute specifying what evidence *a party* may offer, necessarily was not trying to specify what evidence a *non party* – which would include someone who once was, but who no longer is, a party-defendant – may offer. Someone who at one time was a defendant and thus a party, but who has fully settled with the plaintiff, ceases to be a party defendant who can "offer" evidence. The Legislature had no reason to declare what evidence a nonparty may or may not "offer" at trial.[1]

In aid of its assertion that the Court of Appeals erred because "the plain meaning of the notwithstanding clause phrase 'defendant health care provider' includes those health care providers no longer in the case, *WSAJF Br. at 11*, WSAJF, confusingly and somewhat nonsensically argues, *WSAJF Br. at 8-12*, that the Court of Appeals interpreted RCW 7.70.080 "without regard for the special office of provisos, the rules of

[1] It should be noted that medical malpractice plaintiffs sometimes settle with one or more health care providers at the claims stage, before filing suit against them. WSAJF's proposed interpretation of the last sentence of RCW 7.70.080 would not affect the admissibility of evidence of compensation the plaintiff received in settlement with any health care providers whom plaintiff did not sue and who were never defendants or parties of any kind, but would create a distinction

construction that generally govern them and how provisos interface with the statutory language they modify." WSAJF's argument that the Legislature's use of the word "notwithstanding" as a "proviso" means that the words "defendant health care provider" necessarily includes health care providers who are no longer defendants is confusing, especially when contrasted with what the statute unambiguously says: (1) any *party* to a medical malpractice case (and thus either the plaintiff or the defendant or one of multiple plaintiffs or multiple defendants) may offer evidence of compensation that would otherwise be inadmissible as "collateral source" evidence; (2) notwithstanding that, when the compensation is compensation paid by a *defendant health care provider*, only *that defendant health care provider* – and thus not the plaintiff, and not another defendant, and not a non-party – may "offer" evidence of that compensation.

WSAJF's argument that the Court of Appeals' somehow failed to appropriately interpret the "notwithstanding" sentence as a "proviso" is nonsensical because: (1) although WSAJF cites various rules of statutory construction to the effect that "provisos" are not meant to broaden, but are meant to remove or except, things from the main body of the act, *WSAJF*

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between former defendants who settle and parties who were never defendants who settle that is entirely without basis in logic or the statute itself.

Br. at 9-10, it fails to show that there is anything in the Court of Appeals' interpretation of the "notwithstanding" last sentence of RCW 7.70.080 that broadened the meaning of language found in the main body of the act; (2) although WSAJF acknowledges that provisos are subject to the plain meaning rule and must be interpreted in the context of the statute, *WSAJF Br. At 10*, WSAJF then chastises the Court of Appeals for interpreting the "defendant health care provider" language of the "notwithstanding clause in the context of the greater statutory provision, *see WSAJF Br. at 10-11*, and (3) then suggests, *WSAJF Br. at 11-12*, that the rule that "provisos" can 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" is a rule that applies only where legislative intent must be discerned amidst conflicting statutes.[2]

In any event, nothing in WSAJF's foray into the rules of statutory construction of "provisos" supports its ultimate assertion, *WSAJF Br. at 11,* that "the plain meaning of the notwithstanding clause phrase

[2] WSAJF cites as support for this suggestion *State v. Wright,* 84 Wn.2d 645, 652, 529, 453 (1974), but that case sets forth the quoted rule of statutory construction regarding "provisos", but does not limit the rule's applicability to cases involving conflicting statutes. Notably, *State v. Wright* also states: "Provisos operate as limitations upon or exceptions to the general terms of the statute to which they are appended and as such, generally, should be strictly construed with any doubt to be resolved in favor of the general provisions, rather than the exceptions," a point WSAJF overlooks. *Id.* (citations omitted).

'defendant health care provider' includes those health care providers no longer in the case."

B. Contrary to WSAJF's Assertions, the Court of Appeals Decision Is Not Inconsistent with RCW 4.22.070.

WSAJF argues, *WSAJF Br. at 13*, that, under the Court of Appeals' reasoning, "a defendant health care provider found liable for damages would not be entitled to offset another defendant health care provider's settlement amount [because of RCW 4.22.070], but nonetheless would be entitled to offer that amount into evidence under RCW 7.70.080 . . ." As the Court of Appeals noted, however, *Diaz*, 161 Wn. App. at 507 n.2, *this case* presents no "offset" or other issue involving the interplay of RCW 7.70.080 and RCW 4.22.070 because the defendants/respondents did not seek to have the jury consider apportioning "fault" to the former, settled defendants.[3]

If a trial court were to enter judgment on a verdict apportioning fault to a nonparty by a jury that had been informed what a nonparty paid the plaintiff in compensation, the plaintiff in that case (depending upon how the jury was instructed) might have an argument that he or she was

[3] Although there is no reason for the Court to address the point because neither this case nor the Court of Appeals decision in this case present any issue involving RCW 4.22.070, it is not necessarily true that the "offset" to which a defendant would be entitled based on a jury's apportionment of fault to a non-party would equal "the amount" of settlement, whether or not the jury was informed of the settlement amount.

being undercompensated, and it might make sense for a court to decide whether, or with what instructions to the jury, a medical malpractice defendant who seeks to have "fault" apportioned to a non-party may also offer evidence under RCW 7.70.080 that the same non-party has paid money to the plaintiff in settlement.[4] But, again, that is simply not an issue this case presents. This Court rarely agrees to issue advisory opinions, *e.g., To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 416, 27 P.3d 1149 (2001), and addressing RCW 4.22.070 would neither affect the outcome of this case nor clarify anything that the Court of Appeals has held or said in its decision in this case.

III. CONCLUSION

For the foregoing reasons and those presented in the supplemental brief respondents filed in this Court and the brief respondents filed in the

[4] By adopting Civil Rule 12(i), the Court made apportionment of "fault" to a non-party something a defendant must affirmatively plead. Thus, apportionment of "fault" to a non-party is not something that occurs automatically. Depending on whether a future case were to present an issue of interplay between RCW 4.22.070 and RCW 7.70.080, a court might wish to consider whether the defendant must elect between having fault apportioned or offering settlement-amount evidence. On the other hand, it is not inconceivable that courts could, in some cases at least, construct special verdict forms, or otherwise instruct the jury in ways that would allow apportionment of fault to settling defendants under RCW 4.22.070 and admission of evidence of amounts the settling defendant(s) had paid, to avoid any perceived risk that a defendant found liable for damages did not receive a doubled reduction in the amount of his or her or its liability. Respondents submit, again, that considerations of sound jurisprudence weigh against addressing such issues in the abstract in an advisory opinion on review of the Court of Appeals decision in this case.

Court of Appeals, this Court should affirm the decision of Court of Appeals.

RESPECTFULLY SUBMITTED this 5th day of January, 2012.

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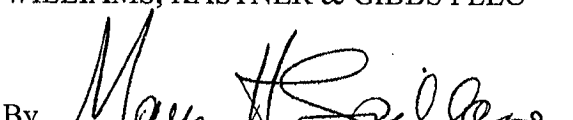
By 

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 5th day of January, 2012, I caused a true and correct copy of the foregoing document, "Respondents' Answer to Washington State Association for Justice Foundation's Amicus Brief," to be delivered to the following counsel of record in the manner indicated below:

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Attached for filing in .pdf format is Respondents' Answer to Washington State Association for Justice Foundation's Amicus Brief in *Diaz v. Kini, et al.*, Supreme Court Cause No. 86049-1. The attorneys filing this brief are Mary Spillane, WSBA No. 11981, (206) 628-6656, e-mail: mspillane@williamskastner.com and Dan Ferm, WSBA No. 11466, (206) 233-2908, e-mail: dferm@williamskastner.com.

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