

Consolidated Nos. 71315-9-1 and 71316-7-1

**COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION I**

BECKY S. ANDERSON,

Respondent,

v.

DONALD R. PAUGH; WENATCHEE VALLEY MEDICAL CENTER,
P.S.; LINDA K. SCHATZ; WENATCHEE ANESTHESIA
ASSOCIATES,

Appellants

BRIEF OF APPELLANTS DONALD R. PAUGH, M.D. AND
WENTACHEE VALLEY MEDICAL CENTER

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FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 APR 21 PM 4:36

ORIGINAL

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I. INTRODUCTION

This is an appeal from a \$17.1 million judgment in a medical negligence case, which came after a co-defendant had settled for \$12 million. Defendant/appellants Dr. Donald Paugh and his medical group, Wenatchee Valley Medical Center (“WVMC”), appeal from the verdict and resulting judgment on several grounds related to allocation of fault and damages. Their appeal presents three sets of issues involving: (1) whether the jury should have been allowed to determine whether one of the defendants against whom judgment was entered (Dr. Linda Schatz) was the agent of a settling defendant (Central Washington Hospital), thereby creating joint and several liability between those entities, which would have required that the hospital’s \$12 million settlement be credited against the judgment under RCW 4.22.060; (2) whether *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012) rendered RCW 7.22.080 (the statutorily modified collateral source rule for medical negligence cases) unconstitutional as applied to evidence of past payments by Medicare; and (3) whether the superior court’s handling of appellants’ request for a CR 35 exam of plaintiff/respondent was prejudicially erroneous.

II. ASSIGNMENTS OF ERROR

A. The superior court erred by refusing to instruct the jury on a settling defendant's vicarious liability for the acts of its alleged agent,¹ and by declining to hold a hearing on the reasonableness of the hospital's settlement.²

B. The superior court erred in declaring RCW 7.70.080 unconstitutional and thereby excluding evidence of public benefits paid to the plaintiff.³

C. The superior court erred by refusing to permit a CR 35 exam of the plaintiff⁴ and, after refusing, by allowing plaintiff's counsel to impeach appellants' expert based on the lack of an exam,⁵ and by preventing the witness from explaining why no exam occurred.⁶

III. ISSUES

A. In a case where there was evidence sufficient to support a finding that the defendant anesthesiologist was the agent of the co-defendant hospital, which had settled prior to trial, was it error to refuse to instruct the jury on apparent agency, thereby precluding a determination of

¹ CP 1548 and RP 12/3/13 AM at 7:8-12.

² CP 1398-1399.

³ CP 1126-1133; 2019-2022; 2027-2031; 2042-2043 and RP 10/17/13 AM at 23:6-20.

⁴ CP 466-467 and 1400-1402.

⁵ CP 2184-2190; RP 11/15/13 at 32:8-33:1

⁶ CP 2184-2190 and RP 11/15/13 at 32:8-33:1.

whether the anesthesiologist's fault was attributable to the hospital under RCW 4.22.070(a)?

B. Under the circumstances, were appellants entitled to a determination of the reasonableness of the hospital's settlement under RCW 4.22.060?

C. Does *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012) preclude application of RCW 7.70.080, insofar as that statute allows introduction of evidence that plaintiff's past medical expenses were paid by Medicare?

D. Where the plaintiff's physical condition was genuinely in controversy and the requested CR 35 exam was highly likely to resolve an important question concerning future damages, did the trial court sufficiently consider alternatives before refusing to allow it?

E. Assuming that denial of a CR 35 exam was not an abuse of discretion, did the superior court nevertheless commit prejudicial error by allowing cross of examination of appellants' medical expert, which suggested that appellants had intentionally forgone an exam because they knew its results would be unfavorable, and by preventing appellants' from showing that the suggestion was untrue?

IV. STATEMENT OF THE CASE

In January 2012, plaintiff/respondent Becky Anderson consulted Dr. Donald Paugh, an otolaryngologist, concerning a raspy throat. Dr.

Paugh, an employee of appellant Wenatchee Valley Medical Center (“WVMC”), diagnosed a benign vocal cord polyp and recommended laser surgery to remove it. Ms. Anderson, then 53 years old, agreed with the recommendation and was admitted to Central Washington Hospital (“the hospital”) for surgery by Dr. Paugh on February 3, 2012. Dr. Linda Schatz, an employee of Wenatchee Anesthesia Associates (“WAA”), served as her anesthesiologist.⁷

During the procedure, an airway fire occurred, which resulted in damage to Ms. Anderson’s trachea and lungs. The fire caused her to spend several weeks in intensive care and to be ventilator-dependent at the time of trial in fall 2013.⁸ Ms. Anderson sued Dr. Paugh and WVMC, Dr. Schatz and WAA, the hospital, and Medtronic, Inc., manufacturer of the endotracheal tube used during the procedure.

A. Facts

Ms. Anderson’s evidence was that the cause of the fire was the combined negligence of Dr. Schatz, Dr. Paugh, and Medtronic. More specifically, in order to safely use a laser for vocal cord surgery, there must be a barrier between the surgical field and flammable gases used to anesthetize and ventilate the patient. This barrier is provided by an

⁷ RP 10/25/13 AM Session at 30-32.

⁸ RP 10/25/13 AM Session at 29-30.

inflatable cuff surrounding the endotracheal tube, which prevents flammable gas from reaching the surgical field.⁹

Ms. Anderson's theory of the case was that the fire occurred because the physicians went forward with the procedure despite the fact that the hospital supplied them with a single-cuff endotracheal tube, as opposed to the double-cuffed tube they were accustomed to using in such cases.¹⁰ Her evidence also was that Dr. Paugh failed to adequately protect the cuff against perforation by the laser because he did not properly place wet cotton pads—called “pledgetts”—over the cuff's surface.¹¹

Ms. Anderson's theory was that the failure to properly place pledgetts allowed the laser to perforate the cuff, which in turn permitted the 100% oxygen being administered during the critical portion of the operation to leak past the perforated cuff, causing the plastic cuff itself to ignite.¹² She further claimed that the physicians did not respond properly once the fire occurred, thereby making her injuries worse.¹³ Finally, Ms.

⁹ RP 10/25/13 AM Session at 31-32.

¹⁰ *Id.*

¹¹ *Id.* at 33.

¹² *Id.* at 37-39.

¹³ *Id.*

Anderson's evidence was that Medtronic negligently designed the single-cuff tube.¹⁴

Dr. Paugh and WVMC contested Ms. Anderson's claims against them, and also sought to allocate fault to the hospital, which had settled prior to trial. Appellants' evidence against the hospital was that it was negligent for not furnishing the double-cuffed tube that the physicians had specifically requested the hospital to provide, and in telling the physicians the double-cuffed tube was not available when, in fact, it was.¹⁵ Dr. Paugh and WVMC also sought to show that Dr. Schatz, the anesthesiologist, was the agent of the hospital.¹⁶

B. Procedure

Prior to trial, plaintiff obtained a summary judgment ruling that Dr. Schatz was negligent as a matter of law for administering 100% oxygen at the point during the operation when the laser was being used.¹⁷ On plaintiff's claim that Dr. Schatz was the agent of the hospital, the superior court found there was an issue of fact for trial.¹⁸ Shortly after these rulings, the hospital settled with Ms. Anderson for \$12 million and was

¹⁴ RP 10/25/13 AM Session at 47-49.

¹⁵ RP 10/25/2013 AM Session at 94-95.

¹⁶ See pp. 8-11, *infra*.

¹⁷ Supp. CP ___. [Sub-number 145 supplemental designation of clerk's papers] – R5

¹⁸ CP 440-443.

dismissed from the case.¹⁹ Appellants sought, but were denied, a reasonableness hearing under RCW 4.22.060 concerning this settlement.²⁰

The case against the remaining defendants was tried over the course of approximately eight weeks. The jury determined that Ms. Anderson's total damages amounted to \$18 million dollars, and allocated fault 52.5% of the fault to Dr. Schatz/WAA, 42.5% to Dr. Paugh/WVMC, and 5% to the hospital. It found no fault on the part of Medtronic.²¹ The jury was not allowed to determine if Dr. Schatz was the hospital's agent, thereby precluding allocation of her fault to the hospital.²² Accordingly, judgment was entered against Dr. Schatz/WAA and Dr. Paugh/WVMC, jointly and severally, for a total of \$17.1 million.²³

Appellants timely renewed their motion for judgment as a matter of law and moved for new trial.²⁴ Following denial of those motions,²⁵ appellants timely appealed.²⁶

¹⁹ CP 3088-3099.

²⁰ CP 1398-1399.

²¹ CP 2545.

²² See pp. 8-11, *infra*.

²³ CP 2539-41.

²⁴ CP 2634.

²⁵ CP 3100.

²⁶ CP 3642-3651.

V. ARGUMENT

A. Refusal to Instruct the Jury on the Hospital's Liability for the Acts of the Anesthesiologist was Error.

In her complaint, plaintiff sought to attribute responsibility for Dr. Schatz's acts and omissions to the hospital, alleging that she was its "actual or apparent agent."²⁷ Shortly before trial, plaintiff moved for summary judgment on this claim.²⁸ She argued that the hospital was liable based on actual and ostensible agency theories under *Adamski v. Tacoma Gen'l Hospital*, 20 Wn. App. 98, 579 P.2d 970 (1978), as well as a theory of non-delegable duty.²⁹ The hospital opposed and filed a cross-motion, seeking dismissal of agency claim.³⁰ The superior court denied the plaintiff's motion, granted the hospital's motion as to actual agency, but stated, "The issue regarding ostensible agency remains a question of fact."³¹ A few days later, the hospital settled with Ms. Anderson for \$12 million. In return, Ms. Anderson dismissed all claims against the hospital with prejudice and fully released all of her claims against it, including her "claims of 'agency' or vicarious liability."³²

²⁷ CP 5.

²⁸ CP 23-39.

²⁹ *Id.*

³⁰ CP 74-96.

³¹ CP 440-443.

³² CP 749-754, Supp. CP - (Sub. No. 550W, supplemental designation submitted).

After learning of the hospital's settlement, Dr. Paugh and WVMC moved for a reasonableness determination under RCW 4.22.060. Ms. Anderson objected, and the superior court refused to make a determination.³³ Dr. Paugh and WVMC then obtained leave to file an amended answer, by which they sought an allocation of fault to the hospital pursuant to RCW 4.22.070 based on, among other things, its responsibility for Dr. Schatz's conduct.³⁴

At trial, without objection, evidence was elicited to show that Dr. Schatz was the hospital's apparent agent under the criteria set forth in *Adamski* and Wash. Pattern Jury Instruction Civil 105.02.03.³⁵ Ms.

³³ CP 732-746; 941-957; 1398.

³⁴ CP 975-976; 1403-1404; 1577-1578

³⁵ WPIC 105.02.03 states:

A hospital is liable for the conduct of a physician who is not a hospital employee if the physician was the apparent agent of the hospital. This is established if you find that the hospital, through its own acts or failures to act, has caused the patient to reasonably believe the treatment is being provided by a hospital employee. In determining whether the relationship between the hospital, physician, and patient was such that the physician was the apparent agent of the hospital, you may consider, among others, the following factors:

- 1 Whether the patient sought treatment primarily from the hospital or from the physician;
- 2 Whether it was the hospital who designated the physician to perform the services in question;
- 3 Whether the type of care provided was an integral part of the hospital's operation;
- 4 Whether the hospital handled the billing for the services of the physician;
- 5 Whether the hospital provided drugs and supplies utilized by the physician;
- 6 The nature and duration of any hospital-physician agreements; and

Anderson's sister-in-law, Stacy Daniels, accompanied her to the surgery.³⁶ She testified that, to her knowledge, Ms. Anderson was not given a choice of who her anesthesiologist would be, was not provided with any information about Dr. Schatz's relationship with CWH, and stated that Ms. Anderson relied on CWH to provide an anesthesiologist for her surgery.³⁷ Ms. Daniels testified she assumed Dr. Schatz was an employee of CWH.³⁸ Also, Ms. Anderson testified by declaration, which was read to the jury, that she had no involvement in choosing which anesthesiologist would be involved in her care at CWH.³⁹

Dr. Schatz testified that anesthesia services were integral to the hospital's functioning and the hospital contracted with her group, WAA, to provide those services.⁴⁰ She also testified her identification badge bore the hospital's logo, and did not indicate she was a member of WAA.⁴¹ Further, the hospital provided all of her equipment and supplies.⁴² Dr.

7 Whether the hospital made any representations to the patient, verbally or in writing, regarding their relationship with the physician.

The above factors, no one of which is controlling, should be considered by you along with any other evidence bearing on the question.

³⁶ RP 11/07/13 AM at 51:19-21.

³⁷ *Id.* at 73:7-74:7.

³⁸ *Id.* at 74:8-10.

³⁹ *Id.* at 64:4-9.

⁴⁰ *Id.* at 209:14-20.

⁴¹ RP 11/14/13 at 207:3-14.

⁴² *Id.* at 209:14-17.

Schatz did not advise Ms. Anderson she was not an employee of CWH.⁴³ Additionally, prior to surgery, Ms. Anderson and Dr. Schatz executed a written consent for anesthesia services form, which also did not disclose Dr. Schatz's status as an independent contractor.⁴⁴ To the contrary, it was undisputed that Ms. Anderson and her family were unaware of Dr. Schatz's actual status.⁴⁵

Based on this evidence, appellants requested the standard jury instruction on the apparent agency (WPIC 105.02.03), modified to fit the circumstances relevant to the relationship between the hospital and Dr. Schatz, and a special interrogatory to the jury, asking whether Dr. Schatz was the hospital's apparent agent.⁴⁶ Ms. Anderson opposed these requests.⁴⁷ The superior court sided with her and refused to instruct on apparent agency.⁴⁸ Dr. Paugh and WVMC excepted to these failures,⁴⁹ and also raised the issue in their motion for new trial.⁵⁰

⁴³ RP 10/28/13 at 183:7-12.

⁴⁴ RP 10/28/13 at 164:12-21; 11/13/13 at 60:11-61:9.

⁴⁵ RP 11/07/13 AM at 73:19-74:10.

⁴⁶ CP 1548, 1568.

⁴⁷ CP 2416-2423.

⁴⁸ RP 12/03/13 AM at 7:5-8.

⁴⁹ CP 2534.

⁵⁰ RP 01/10/14 12:17-32:19 and CP 2638-2640; 3100-3101.

1. The jury should have been allowed to determine if Dr. Schatz's fault was attributable to the hospital.

Under RCW 4.22.070(1), in actions involving the 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." All other things unchanged, if Ms. Anderson had not settled with the hospital and the jury was persuaded that Dr. Schatz was its agent, Dr. Schatz's share of fault (52.5%) would have been attributed to the hospital. Together with its independent fault (5%), the hospital and Dr. Schatz would have been jointly and severally responsible for a total of 57.5% (\$10.35 million) of the total damages (\$18 million), leaving Dr. Paugh and WVMC liable for the rest (\$7.65 million).

Under RCW 4.22.070(1), when a plaintiff settles with one defendant in a multi-defendant case, the remaining defendants have the right to step into the shoes of the plaintiff and attempt to attribute fault to entities "released by the claimant." See *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn. 2d 15, 25, 864 P.2d 921 (1993) (non-settling defendant has "right to allocation"). Where, as in this case, the non-settling defendant produces sufficient evidence to support attribution of fault to a settling defendant, the issue is for the jury. *Id.* at 23.

All other things remaining unchanged, the result of a jury finding that Dr. Schatz was the hospital's agent would have allowed the hospital's \$12 million settlement, or such other amount as the court determined to be reasonable, to be offset against verdict amount under RCW 4.22.060(2).⁵¹ An offset would be appropriate under RCW 4.22.070(1)(a) because the hospital would be a party responsible for the fault of its agent, Dr. Schatz, and therefore, jointly and severally liable with her. In that circumstance, RCW 4.22.060(2) mandates an offset.

This outcome would have been very similar to what happened in *Adcox v. Children's Orth. Hosp.*, where the defendant doctor settled and the case went to trial against the defendant hospital. The trial court precluded the hospital from seeking to allocate fault to the settling doctor, but it did reduce the verdict against the hospital by the amount of the doctor's settlement. 123 Wn.2d at 927. On appeal, Adcox justified the offset on the theory that the undisputed facts showed that the doctor and the hospital were "acting in concert" and, therefore, fell under RCW

⁵¹ RCW 4.22.060(2) provides:

A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount paid pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement in which case the claim shall be reduced by an amount determined by the court to be reasonable.

4.22.070(1)(a) provision for joint and several liability.⁵² The Supreme Court affirmed.⁵³

Although the Adcox-plaintiffs' reading of the "in concert" language in RCW 4.22.070(1)(a) has been rejected by later cases,⁵⁴ their fundamental interpretation of the statute was correct; *i.e.*, "If any settling defendants were jointly and severally liable, then RCW 4.22.070(2) would have been applicable." *Washburn v. Beatt Equip. Co.*, 120 Wn. 2d 246, 296, 840 P.2d 860 (1992). Under RCW 4.22.070(2), "if a defendant is jointly and severally liable ... the effect of settlement by such defendant shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060."

In this case, RCW 4.22.060 is the operative provision, and it provides for an offset of the hospital's settlement in the event the jury determined that Dr. Schatz was its agent. The Court should reverse and remand, with instructions that the verdict be reduced by the amount paid by the hospital, or such other amount as the superior court determines to be reasonable under RCW 4.22.060, and judgment entered accordingly.

⁵² See Brief of Respondent in *Adcox v. Children's Orthopedic Hosp.*, No. 5896-1, pp. 39-42 (copy appended to this brief).

⁵³ See *Diaz*, 175 Wn.2d at 468 (stating with respect to *Adcox*, "we affirmed the trial court's decision to offset the settlements under RCW 4.22.060.").

⁵⁴ See *Kottler v. State*, 136 Wash. 2d 437, 448-49, 963 P.2d 834, 841 (1998), citing *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 75 Wn. App. 480, 486, 878 P.2d 1246, (1994) rev'd on other grounds, 128 Wn. 2d 745, 912 P.2d 472 (1996) ("acting in concert" means "consciously act[ing] together in an unlawful manner").

2. The reasons advanced by plaintiff for refusing to allow the jury to determine if Dr. Schatz's fault should be attributed to the hospital were erroneous.

Why then were Dr. Paugh and WVMC precluded from putting on the plaintiff's full case against the hospital? Although the trial court never explained its reasoning,⁵⁵ it cannot be that it refused to instruct based on the absence of evidence to support a finding of agency; it had already found there were genuine issues of material fact with respect to agency,⁵⁶ and the evidence elicited at trial was more than adequate to support a jury finding.⁵⁷ Instead, the trial court presumably accepted one or both of two legal arguments put forth by the plaintiff. As demonstrated below, both arguments were wrong and the trial court erred in refusing to instruct on apparent agency. This Court's review is *de novo*.⁵⁸

First, plaintiff argued that attribution of fault to the hospital based on vicarious liability for the acts of Dr. Schatz would necessarily result in the sum of fault attributable to all entities exceeding 100 percent.⁵⁹ This argument assumes that Schatz's fault would be counted twice. But there would be no double-counting because, the hospital would be "responsible"

⁵⁵ RP 12/03/13 AM at 7-18; RP 1/10/14 at 31-32.

⁵⁶ CP 440-443.

⁵⁷ See pp. 9-11, *ante*.

⁵⁸ *State v. Walker*, 136 Wn. 2d 767, 772, 996 P.2d 883 (1998) (refusal to give an instruction based upon a ruling of law is reviewed *de novo*).

⁵⁹ CP 2822-2826.

for Schatz's share of fault under RCW 4.22.070(1)(a).⁶⁰ Combining Schatz's percentage of fault with the hospital's independent fault percentage would be fully consistent with the statutory requirement that, "the sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent."

Plaintiffs' response to this point was to argue that the hospital could not be responsible for Dr. Schatz's share of fault because, under RCW 4.22.070(1)(a), only a "party" can be held responsible on the basis of agency and "party" in this context means a defendant in the case when judgment is entered.⁶¹ This argument was based entirely on a paragraph taken out of context from Chief Justice Madsen's solo concurring and dissenting opinion in *Barton v. State*, 178 Wn.2d 193, 220, 308 P.2d 597 (2013). In *Barton*, a young woman operating her parents' car was involved in an intersection collision with a fault-free motorcyclist, causing catastrophic injuries. The motorcyclist sued the driver for negligence, her parents under the family car doctrine, and the State for negligent roadway design and maintenance. *Id.* at 197-98. The family had \$100,000 in liability insurance.

⁶⁰ RCW 4.22.070(1)(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."

⁶¹ CP 2420; 2824.

Prior to trial, the family entered into an agreement with Barton to advance \$20,000 to pay his medical expenses, in return for his covenant not to execute on a judgment in excess of insurance limits. *Id.* at 198. On appeal to the Supreme Court, the principal issue was whether this covenant not to enforce the judgment constituted a “release” of claims for purposes of RCW 4.22.070(1), which would eliminate joint and several liability between the State and the family and prevent the State from seeking contribution from them. *Id.* at 200-01. The Supreme Court held, 7-1, that the agreement was not a release, did not eliminate joint and several liability, and therefore, the ability of the State to seek contribution from the family was preserved. *Id.* at 216.

The Chief Justice, writing only for herself, dissented from the majority’s rationale. She argued that covenants not to enforce judgments are “releases” for purposes of RCW 4.22.070, but that the agreement in question was not such a covenant. *Id.* at 222. She reasoned that because the agreement in question was solely between the plaintiffs and the parents, and did not limit the plaintiff’s ability to execute against their daughter—the causing driver—it was not similar to a release. *Id.* at 220. She rejected the State’s claim that the agreement eliminated its contribution rights, stating, “Because Korrine’s [the driver’s] fault was still before the jury, and because any contribution rights against the Linvogs

[her parents] based on vicarious liability were not affected by the agreement, it was not an agreement that extinguished contribution rights.” *Id.* at 221 (emphasis supplied). Thus, in the Chief Justice’s view, the State was free to assert a claim for contribution against the parents, based solely on vicarious liability for their daughter’s negligence.

The rub, according to plaintiff,⁶² is that the Chief Justice’s comment that RCW 4.22.070(1)(a)’s reference to a “party responsible for the fault of another,” means a party who remains in the suit at the time judgment is entered. *Id.* at 218-19. In this regard, the Chief Justice’s comment is inconsistent with at least two unanimous Supreme Court decisions. In *Kottler v. State*, 136 Wn. 2d 437, 447, 963 P.2d 834 (1998), the court explained the scope of potential contribution claims under RCW 4.22.070(1)(a) thusly:

Parties settling before trial will be jointly and severally liable only if the case falls under an exception which does not require a judgment to be entered, such as RCW 4.22.070(1)(a) (actors in concert, master/servant, principal/agent)....”

Kottler cited *Kirk v. Moe*, 114 Wn.2d 550, 789 P.2d 84 (1990), as an example of how this provision operates. *Id.* n.10. In *Moe*, a principal settled with the injured plaintiff for the full liability incurred by its agent.

⁶² CP 2420.

The Supreme Court allowed the principal who had settled to seek contribution from the non-party agent, “because under RCW 4.22.070(1)(a) a principal/agent relationship automatically gives rise to joint and several liability without the need for judgment to be entered.” *Id.* In short, under these precedents, there is no requirement that that principal to whom its agent’s fault is attributable remain in the case through judgment in order for joint and several liability to exist.

Plaintiff’s second argument was that an entity liable on a vicarious basis is not “at fault” for purposes of RCW 4.22.070(1).⁶³ Therefore, she argued, the statute does not permit the jury to attribute fault to a settling entity whose only responsibility is vicarious. This argument has many flaws. To begin with, it flouts the statute, which commands that the “trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant’s damages....” Corporations act only through agents, and for this reason, fault of an agent, such as Dr. Schatz, is “attributable” to the hospital, which under RCW 4.22.070(1)(a) would become “responsible” for her fault. Plaintiff’s second argument also contradicts her own prior position, when she sought a ruling attributing Dr. Schatz’s fault to the hospital as a matter of law,

⁶³ CP 2417-18.

even though she still intended to pursue her claims against Dr. Schatz individually.⁶⁴

Ms. Anderson attempted to divert attention from these flaws by arguing that *Mailloux v. State Farm*, 76 Wn. App. 507, 887 P.2d 449 (1995), stands for the proposition that “defendants did not have standing” to attribute fault to the hospital.⁶⁵ *Mailloux* was an underinsured motorist (“UIM”) case where the UIM insurer sought to reduce an arbitration award by the full amount of the liability insurance limits of a motorist who the plaintiff did not sue, but who the UIM insurer asserted was a non-party entity at fault. The arbitration panel found the non-party motorist was ten percent at fault, and reduced the plaintiff’s award by that percentage. Not satisfied, the UIM carrier sought to offset the non-party motorist’s full liability limits.

Division 2 held that the UIM carrier was not entitled to any further reduction of the award, stating:

Only the plaintiff, however, can assert that another person is liable to the plaintiff. If no one proves fault, the other person is neither at fault nor liable to the plaintiff. *Adcox*, 123 Wn.2d at 25-26, 864 P.2d 921. If the plaintiff proves fault that is a proximate cause of the plaintiff’s damages, the person at fault is also liable to the plaintiff, and

⁶⁴ Plaintiff asserted, “[T]he evidence permits no other reasonable inference than that Dr. Schatz was the hospital’s ostensible agent at the time of Becky Anderson’s surgery, and that CWH is vicariously liable for her negligence.” CP 36.

⁶⁵ CP 2418.

judgment is entered as set forth in the statute. If a party other than the plaintiff proves fault that is a proximate cause of the plaintiff's damages, the person at fault is not liable to the plaintiff-the plaintiff has made no claim against him or her-but his or her fault nevertheless operates to reduce the "proportionate share" of damages that the plaintiff can recover from those against whom the plaintiff has claimed.

Id. at 511-12 (emphasis supplied). As the highlighted language and outcome of the case make clear, attribution of "fault" is not limited by the plaintiff's choice of defendants. Nor is the ability of a non-settling party to reduce its liability by attribution of fault to a party with whom the plaintiff has settled.⁶⁶

In the same vein, plaintiff asserted that *Gass v. MacPherson's Inc. Realtors*, 79 Wn. App. 65, 899 P.2d 1325 (1995), establishes that a principal cannot be "at fault" for the acts of an agent. This assertion ignores the context in which *Gass* was decided. In that case, a real estate agent who was on the losing end of a client's negligence suit brought a contribution action against his listing broker, claiming that he was acting as the broker's agent. *Id.* at 67. The broker was not a party to the original suit. *Id.* This Court affirmed dismissal of the contribution action on the basis that such an action can be maintained only between parties who are

⁶⁶ Further, as Judge Lasnik commented in *Khan Air, LLC v. U.S. Aircraft Ins. Grp.*, C05-0420L, 2005 WL 3466546 (W.D. Wash. Dec. 19, 2005), "The validity of the *Mailloux* analysis outside the underinsured motorist context is unclear."

jointly and severally liable. *Id.* at 70. It first held that RCW 4.22.070(1)(a)'s provision making "A party ... responsible for the fault of another person ... when a person is acting as agent or servant of the party," means "a party to the original action," and only when "the principal is a 'party' (to the original action) does the principal become responsible for the fault of the agent." *Id.* The Court did not say, however, the principal has to remain a party through entry of judgment in the underlying case in order to maintain a contribution action. Such a statement would be contrary to the Supreme Court's decisions in *Kottler* and *Moe*.

Gass also offered a second rationale for dismissal, which the plaintiff seized upon as support for her argument that Schatz's fault cannot be attributed to the hospital:

If the injured party in the original action obtains a judgment against a vicariously liable principal, any fault attributed to the principal is in reality the fault of the agent. As between the principal and agent, the comparative fault of the agent is 100 percent. The comparative fault of the agent may in such a case provide the principal with a basis for seeking contribution from the agent. But if the injured party recovers first from the negligent agent, the agent has no basis to seek contribution from the principal. The comparative fault of the principal is 0 percent.

Id. at 71 (emphasis supplied).

This language and holding necessarily applies only to contribution actions where the at-fault agent seeks contribution from a fault-free principal. It cannot be applied to tort actions because to do so would override the statutory command that the trier of fact “shall determine the percentage of total fault which is attributable to every entity which caused the claimant’s damages,” including non-party entities. In the tort context, the phrase “[w]hich is attributable” means more than just the active fault of an entity: it has to include liability brought about by the acts of others for which the entity is legally responsible.⁶⁷ Otherwise, the statute would simply say, “the trier of fact shall determine the percentage of total fault of every entity which caused the claimant’s damages.”

Moreover, if fault cannot be attributed to a non-party entity based on acts of its agents, co-defendants would be precluded from seeking an allocation of fault to the settling defendants whenever a hospital or clinic and its employed physicians, named as defendants based solely on the negligence of the employed physicians, settled with the plaintiff.

⁶⁷ See *Candyce Martin 1999 Irrevocable Trust v. United States*, 739 F.3d 1204, 1211-12 (9th Cir. 2014) (“attributable to” means ‘due to, caused by, or generated by.’ ”); also see *Lynn v. Washington State Dep’t of Soc. & Health Servs.*, 170 Wash. App. 535, 547, 285 P.3d 178, 184 (2012) (“attribute” means “to explain as caused or brought about by: regard as occurring in consequence of or on account of.”).

B. The Statutorily Modified Collateral Source Rule is not Unconstitutional as Applied to this Case.

RCW 7.70.080⁶⁸ replaces the common law collateral source rule in medical negligence cases; as held in *Adcox v. Children's*, it serves to prevent over-compensation of plaintiffs.⁶⁹ At the time of trial, Medicare and Medicaid had paid approximately \$700,000 towards Ms. Anderson's medical expenses.⁷⁰ She moved *in limine* to preclude defendants from offering evidence of these payments.⁷¹ Defendants opposed.⁷²

In her motion, Ms. Anderson conceded the statute required admission of evidence of past Medicare/Medicaid payments, but argued that *Diaz v. State*, 175 Wn.2d 974, 285 P.3d 873 (2012) rendered it

⁶⁸ The statute 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.

⁶⁹ *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn. 2d at 40.

⁷⁰ CP 1127.

⁷¹ CP 1126.

⁷² CP 1183, 2019, 2042,

unconstitutional.⁷³ The superior court agreed, indicating, “if they didn't do it explicitly in *Diaz*, they're going to do it in this case.”⁷⁴ This reading of *Diaz* is erroneous. *Diaz* provides no reason to conclude that RCW 7.70.080 is unconstitutional as applied to this case, and Ms. Anderson has not carried her heavy burden of showing unconstitutionality.⁷⁵

Diaz involved a situation where two defendants in a multi-defendant medical negligence case settled before trial. The remaining defendants were allowed to introduce evidence of the settlements.⁷⁶ The Supreme Court held, as a matter of statutory interpretation, that RCW 7.70.080 does not allow a non-settling defendant to offer evidence of settlements by other defendants. This holding was based on the statute's concluding sentence.⁷⁷

As “[a]n alternative ground” supporting its statutory interpretation holding, the court explained that allowing evidence of pre-trial settlements, “conflicts with later-enacted and more specific statutes dealing with the effect of settlement on the claims of an injured party

⁷³ CP 1130, 1128.

⁷⁴ RP 10/17/13 at 23.

⁷⁵ See *League of Educ. Voters v. State*, 176 Wn. 2d 808, 820, 295 P.3d 743 (2013) (“The party challenging a statute's constitutionality “must prove that the statute is unconstitutional beyond a reasonable doubt”); appellate review of such questions is *de novo*. *Am Legion Post #149 v. Washington State Dep't of Health*, 164 Wn 2d 570, 615, 192 P.3d 306 (2008).

⁷⁶ 175 Wn.2d at 461-62.

⁷⁷ 175 Wn.2d at 463-64.

against the defendants remaining in a case.”⁷⁸ It noted that, insofar as RCW 7.70.080 provides a means for the jury to determine if the plaintiff was already compensated and to reduce the verdict by the amount of compensation already paid, that purpose is independently served—in cases of joint and several liability—by RCW 4.22.060(1), which provides for reduction of the verdict amount by the reasonable value of prior settlements.⁷⁹ In cases where there is no joint and several liability, the court noted that RCW 4.22.070 allows the jury to determine the fault attributable to settling parties, thereby reducing the liability of the defendants against whom judgment is entered.⁸⁰ For these reasons, the Court said, even if the last sentence of RCW 7.70.080 was absent, it would deem these later-enacted and more specific statutes to be controlling.⁸¹

Neither the holding nor the alternative ground in *Diaz* has any application to this case, because appellants did not seek to introduce evidence of another party’s settlement. Instead, the superior court based its ruling on the following statement in *Diaz*:

If settlement evidence were admissible under RCW 7.70.080, as the trial court ruled, there would be yet another conflict because settlement evidence is *inadmissible* under

⁷⁸ *Id.* at 465.

⁷⁹ *Id.* at 466.

⁸⁰ *Id.* at 467-70.

⁸¹ *Id.*

ER 408 and applying the statute and applying the evidence rule would produce contrary results, raising separation of powers concerns. *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009). ... Given the conflict between ER 408 and the trial court's interpretation of RCW 7.70.080, the statute should have yielded to the evidence rule. Thus, the trial court erred by admitting the evidence.^[82]

If this statement represents a holding by the *Diaz* court, the superior court erred by analogizing the common law collateral source rule to a rule of judicial procedure to which the separation of powers doctrine applies. As applied by our Supreme Court, the separation of powers doctrine comes into play where a statute irreconcilably conflicts with a court rule.⁸³ *Putman*⁸⁴ involved a conflict between the certificate of merit required by former RCW 7.70.150 and CRs 8 and 11; *Waples*⁸⁵ a conflict between former RCW 7.70.100(1)'s pre-suit notice requirement and CR 43(a); *Diaz* a potential conflict between RCW 7.70.080 and ER 408; *Gresham*⁸⁶ a conflict between RCW 10.58.090 and ER 404(b).

⁸² *Id.* at 471 (footnote omitted).

⁸³ See *City of Fircrest v. Jensen*, 158 Wn. 2d 384, 394, 143 P.3d 776 (2006) (“Whenever there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court's inherent power, the court rule will prevail.”)

⁸⁴ *Putman v. Wenatchee Valley Med. Ctr., PS*, 166 Wn.2d 974, 216 P.3d 374 (2009).

⁸⁵ *Waples v. Yi*, 169 Wn. 2d 152, 234 P.3d 187 (2010)

⁸⁶ *State v. Gresham*, 173 Wn. 2d 405, 269 P.3d 207 (2012).

The collateral source rule is a common law principle of damages.⁸⁷ It is not embodied in any court rule, nor is it based on principles of evidentiary relevance.⁸⁸ Rather, the common law rule reflects a judicial view as to what is “equitable.”⁸⁹ As such, it is freely subject to legislative modification.⁹⁰

To hold otherwise would turn the separation of powers doctrine from its intended purpose of preventing usurpation of judicial prerogatives,⁹¹ into a sword to be used to strike down all manner of legislation bearing on liability matters. If this path is followed, courts themselves will be at risk of violating the separation of powers, by

⁸⁷ See *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn. 2d at 40 (describing the collateral source rule as “a common law doctrine”); *Johnson v. Weyerhaeuser Co.*, 134 Wn. 2d 795, 798, 953 P.2d 800 (1998) (“common law collateral source rule”).

⁸⁸ Even if the collateral source rule is viewed as reflecting application of relevancy principles, where the line between substantive and procedural rules is not clear, the Legislature is not without authority to overrule judicial decisions governing admissibility of evidence. See *City of Fircrest v. Jensen*, 158 Wn. 2d 384, 397, 143 P.3d 776 (2006) (upholding statute overruling prior decision regarding admissibility of alcohol breath test results).

⁸⁹ *Ciminski v. SCI Corp.*, 90 Wn. 2d 802, 803, 585 P.2d 1182, 1183 (1978).

⁹⁰ See *Spokane Methodist Homes, Inc. v. Dep't of Labor & Indus.*, 81 Wn. 2d 283, 288, 501 P.2d 589, 592 (1972) (“The legislature may change the common law. However, it is not the prerogative of the courts to amend the acts of the legislature.”).

⁹¹ The separation of powers doctrine is violated only when “the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Carrick v. Locke*, 125 Wn. 2d 129, 135, 882 P.2d 173 (1994), quoting *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975).

denying the Legislature its traditional prerogative to modify the common law, particularly in areas of economic legislation.⁹²

C. The Superior Court’s Handling of the Appellants’ Request for a CR 35 Exam of Plaintiff Constituted Prejudicial Error.

The major issue concerning plaintiff’s damages was whether she must remain on a ventilator for the rest of her life.⁹³ If she must, her quality of life will be severely diminished and she will require around-the-clock care. The dollar impact of this issue in terms of reduced future care costs and future non-economic damages amounts to millions of dollars.⁹⁴

Appellants’ physician-witnesses stated that Ms. Anderson could be freed from her ventilator by placement of a stent or tube in her trachea, but that an examination was required in order to conclusively determine if she was a suitable candidate for such a procedure.⁹⁵ On August 14, 2013,⁹⁶ appellants asked Ms. Anderson’s counsel if they would agree to a CR 35 examination by one of their experts, Dr. Gilbert. After not responding for

⁹² See *Matter of Salary of Juvenile Dir.*, 87 Wn. 2d 232, 252, 552 P.2d 163 (1976) (court order to increase salary of juvenile court administrator “imposed an improper check on the function of the legislative branch of government”).

⁹³ RP 10/25/13 at 69-70.

⁹⁴ *E.g.*, Plaintiff argued for \$7.15 million in future care costs, based on the assumption she would be ventilator dependant for the rest of her life. RP 12/03/13 PM at 91:8-92:3.

⁹⁵ CP 451-453; 636-638.

⁹⁶ CP 171. This request was made within the discovery cut-off and at the earliest point following the event when, from a medical standpoint, the exam results would be meaningful. RP 10/22/13 PM at 170:7-12; RP 10/25/11 at 74-75.

several weeks, Ms. Anderson's lawyers refused on the basis that her medical condition was not in controversy.⁹⁷

Appellants asked the court to order an exam.⁹⁸ Ms. Anderson opposed, arguing that the exam should not be permitted because the defense expert, Dr. Gilbert, was not licensed in Washington, and because the exam would require a bronchoscopy—insertion of a flexible tube into her airway—which they claimed would be unduly invasive and risky. Ms. Anderson also asserted a stent procedure in a patient such as she was experimental in nature and that the CR 35 motion was untimely, having been made after the discovery cut-off provided for by local rule.⁹⁹

The trial court entered an order declining to allow an exam by Dr. Gilbert.¹⁰⁰ Based on this indication, appellants moved for reconsideration, supported by the declaration of Douglas Wood, M.D. Dr. Wood is Chief of Cardiothoracic Surgery at the University of Washington and an acknowledged expert in airway surgery.¹⁰¹ Dr. Wood stated he was willing to conduct or supervise the exam, that Ms. Anderson had undergone a number of bronchoscopies without incident, that these low-

⁹⁷ CP 171.

⁹⁸ CP 161-167.

⁹⁹ CP 385-397.

¹⁰⁰ CP 466-467 (the court added to plaintiff's proposed order the specification that it was denying an exam "by Dr. Ralph Gilbert").

¹⁰¹ CP 636-638.

risk exams are routinely conducted on patients like Ms. Anderson, and that a stent procedure was a realistic option for someone in her condition.¹⁰² Alternatively, appellants proposed that Dr. Gilbert or Dr. Wood would observe one of the routine bronchoscopy exams conducted by Ms. Anderson's own physician. In response to the argument that the stent procedure itself was experimental, appellants submitted evidence that a stent procedure had been performed on another client of Ms. Anderson's lawyers, who suffered a similar injury.¹⁰³ The court declined to reconsider, however.¹⁰⁴

Knowing that Ms. Anderson would try to discredit Dr. Gilbert based on the absence of an examination, appellants moved *in limine* to preclude her from doing so.¹⁰⁵ Appellants argued that cross examination on the absence of an examination would be unfairly prejudicial and likely to confuse the jury, when the reason no exam occurred was because of plaintiff's objection. The superior court denied appellants motion, however.¹⁰⁶

¹⁰² *Id.*

¹⁰³ CP 454-456.

¹⁰⁴ CP 1400-1401.

¹⁰⁵ CP 2184-2190.

¹⁰⁶ RP 11/15/13 at 32-33.

Accordingly, after Dr. Gilbert testified that it was probable that a stent procedure would free Ms. Anderson from her ventilator immediately,¹⁰⁷ Ms. Anderson's counsel impeached him as follows:

Q: So let me see if I've got this straight. Isn't it true that you do not know, as you sit here now, whether the T-tube or any other tube device would work successfully for her because you and your team haven't examined her?

A: Correct.

Q: You cannot say whether a qualified specialist and team would or would not recommend this procedure unless there was first an examination and assessment?

A: Always the case.

Q Without an assessment, again I believe more probably than not that Mrs. Anderson is a candidate for T-tube. I just can't be completely certain at this time that it would work because we don't treat anybody without an assessment. All of which means, does it not, doctor, that you, as you sit there now, individually, without your team, without an assessment, cannot say whether it would be something you'd do and whether or not it would work; you have to do the assessment first, correct?

A If the patient was in front of me, we would have to do the assessment. I was asked whether I thought it would work for her, and my opinion, based on my experience, is that on a more probable than not basis, based on our experience, that it would. So for me it's really a question of semantics. I think it

¹⁰⁷ RP 11/18/13 AM at 49-50, 57-59, 74-75.

would work for her, but I can't be certain about that.^{108]}

The superior court also refused to allow appellants to question their expert about why he had not examined Ms. Anderson; *i.e.*, because of her attorneys' objection.¹⁰⁹ Then, during closing argument, Ms. Anderson's counsel skillfully exploited the absence of an exam to suggest that the jury should disregard Dr. Gilbert's testimony.¹¹⁰ The jury awarded future damages in an amount (\$13.4 million),¹¹¹ indicating it believed that Ms. Anderson would be on a ventilator for the rest of her life.

1. Refusal of a CR 35 exam was erroneous.

CR 35(a) provides:

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

¹⁰⁸ RP 11/18/13 AM at 101:5-15, 107:5-22.

¹⁰⁹ RP 11/15/13 at 32:22-33:1.

¹¹⁰ RP 12/03.13 AM at 87:13-88:18.

¹¹¹ CP 2545.

Although the “in controversy” and “good cause” requirements of the rule are analytically separate and not “mere formalities,”¹¹² in cases like this both requirements are easily met. *See Schlagenhauf v. Holder*, 379 U.S. 104, 119, 85 S. Ct. 234, 243 (1964) (“A plaintiff in a negligence action who asserts mental or physical injury, ... places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury.”).

The good cause requirement is not onerous. It is met where the record shows, as it does here, “that the examination could adduce specific facts relevant to the cause of action and necessary to the defendant's case.”¹¹³ Here, the record established that Ms. Anderson’s physical condition—specifically her suitability for a stent procedure—was genuinely in controversy. Further, the record indicates that a bronchoscopy exam would have allowed Dr. Gilbert to state definitively whether Ms. Anderson was a suitable candidate for successful stenting. Allowing a CR 35 exam in these circumstances unquestionably would have served the purpose of the rule, which is to “level the playing field” in

¹¹²*Matter of Welfare of Green*, 14 Wn. App. 939, 943, 546 P.2d 1230 (1976).

¹¹³*Ragge v. MCA/Universal Studios*, 165 F.R.D. 605, 609 (C.D.Cal.1995).

cases where one party's physical or mental condition is at issue.¹¹⁴ Further, it would have been of great assistance to the jury in determining the extent of Ms. Anderson's damages to know the results of the requested exam.

Plaintiff's objections to an examination focused on three elements: (1) Dr. Gilbert's lack of a Washington license; (2) the supposedly risky nature of the exam; and (3) the timing of appellants' request, which came late in the discovery period and after Dr. Gilbert's deposition.¹¹⁵ Each objection was without merit. Appellants were willing to rely on a video recording of a routine bronchoscopy performed by Ms. Anderson's regular physician, or to have the exam performed at the University of Washington.¹¹⁶ As a part of her routine care, Ms. Anderson had undergone this procedure on a number of occasions without incident, and no medical professional stated there was undue risk associated with another one.¹¹⁷

¹¹⁴ *Id.* at 608; *Sauer v. Burlington N. R. Co.*, 169 F.R.D. 120, 124 (D. Minn. 1996). In this regard, it is notable that Ms. Anderson's treating physician agreed that stenting was an option, although not one that he recommended based on his impression of the condition of her trachea. RP 11/06/13 PM at 188-189. The treating physician conceded on cross-exam that he had never consulted an airway reconstruction specialist such as Dr. Gilbert or Dr. Wood. *Id.* at 199-200.

¹¹⁵ CP 385-386.

¹¹⁶ CP 451-453; 636-638.

¹¹⁷ *Id.*

Plaintiff's timing objection was one of her own creation; appellants' request was made within the discovery period, but her attorneys avoided a response until after discovery had closed.¹¹⁸ And, if timing was the basis for its ruling, the superior court should have engaged in the analysis required by *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

Burnet holds it is an abuse of discretion to limit discovery and exclude expert testimony as a sanction for violation of the scheduling order without on-the-record consideration of the efficacy of lesser measures.¹¹⁹ With two months to go before trial, the court could and should have allowed the development of this critical evidence. Doing so would have resulted in no prejudice to plaintiff, except possibly the need to re-depose Dr. Gilbert, with respect to which it could have ordered appellants to bear the costs. Delay of the trial would not have been required.

2. Allowing plaintiff to impeach based on lack of exam without allowing an explanation compounded the error.

Refusal of a CR 35 exam deprived appellants of the opportunity to present important evidence. Then, when they tried to present the best

¹¹⁸ CP 170-172.

¹¹⁹ *Burnet v. Spokane Ambulance* applies whenever trial courts employ sanctions for violation of discovery orders, including scheduling orders, "that affect a party's ability to present its case." *Mayer v. Sto Indus., Inc.*, 156 Wn. 2d 677, 690, 132 P.3d 115 (2006).

case they could without that evidence, the trial court allowed plaintiff to suggest Dr. Gilbert's opinion was not credible because he had not conducted an exam. Then, it refused to allow appellants to correct the misimpression by showing lack of an exam was not Dr. Gilbert's fault. The confluence of circumstances was a further abuse of discretion in that it unfairly allowed Ms. Anderson's lawyers to suggest the absence of an exam was a strategic move by appellants, because they suspected the results would be unfavorable. Rather than compounding the error resulting from refusal of a CR 35 exam, the trial court should have disallowed any questioning about the absence of an exam, or allowed Dr. Gilbert to explain that he had asked for and been denied permission to conduct an exam.

3. These errors were prejudicial.

Errors in pretrial discovery rulings are subject to the same harmless error standard as applies to evidentiary rulings; *i.e.*, "An error is prejudicial if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected."¹²⁰ Here, the jury's verdict reflects a probability that it determined damages based on

¹²⁰ *In re Det. of W.*, 171 Wn. 2d 383, 410, 256 P.3d 302, 315 (2011) citing *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (citation omitted) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)); also see *Jones v. City of Seattle*, 179 Wn. 2d 322, 360, 314 P.3d 380 (2013), as corrected (Feb. 5, 2014), where the court held that a *Burnet* violation was harmless where the excluded evidence was "merely cumulative."

the belief that Ms. Anderson will require a ventilator and associated care for the rest of her life. The record also reflects a reasonable probability the outcome of the requested exam would have been to confirm she was an appropriate candidate for a stent procedure, which would have freed her from the ventilator immediately. Had appellants been allowed to develop and present this highly probative evidence, plaintiff's damages probably would have been reduced materially. Allowing Ms. Anderson to discredit appellants' expert, and prohibiting his rehabilitation, concerning the absence of an exam only heightened the prejudice resulting from the erroneous denial of a CR 35 exam.

VI. CONCLUSION

For the reasons stated, the Court should reverse the challenged rulings, vacate the judgment and remand for a new trial on the issues of apparent agency and damages, with instructions to (a) determine the reasonableness of the hospital settlement and (b) order a CR 35 exam of Ms. Anderson.

Respectfully submitted this 21st day of May 2014

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Wenatchee Valley Medical Center

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and at all times material hereto, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein. I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

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2014 JUN 21 AM 4:36

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Dated this 21st day of May, 2014, at Seattle, Washington.


Gerri Downs
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APPENDIX

No. 58986-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KERI J. ADCOX, individually, and
DEGEL GUARDIANSHIP AND TRUST SERVICES,
as guardian of the person and of the estate of
BRANDON W. BRIGGS, a minor and incompetent,

Respondents,

v.

CHILDREN'S ORTHOPEDIC HOSPITAL
AND MEDICAL CENTER,

Appellant.

BRIEF OF RESPONDENT DEGEL GUARDIANSHIP AND
TRUST SERVICES, as guardian of the person and
of the estate of BRANDON W. BRIGGS, a minor
and incompetent.

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not meet the language or spirit of ER 103.

Did the negligence of Dr. Herndon make a difference in Brandon's outcome, where the hospital's nurse violated his order for oxygen, disconnected Brandon's electronic monitor, and failed to call a physician despite Brandon's documented deterioration over a two-hour period? This Court cannot know because the hospital neglected or chose not to produce evidence. Without such evidence, the hospital should not now be heard to argue that Dr. Herndon's "fault" should have been apportioned.

4. The Hospital Nursing Staff and Dr. Herndon Were Acting "In Concert" In Providing Medical Care To Brandon, and the Hospital is Therefore Jointly and Severally Liable For Any Fault That Might Have Been Apportioned to Dr. Herndon.

RCW 4.22.070(1)(a) states in part:

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

The term "in concert" is not defined in the 1986 Tort Reform Act. See, Harris, Washington's 1986 Tort Reform Act: Partial Tort Settlements After The Demise of Joint and Several Liability, 22 Gonz. L. Rev., n. 50 at 77 (1986/87). "Where a statute

fails to define a term there is a presumption the Legislature intended the term to mean what it meant at common law." In re Marriage of Gimlett, 95 Wn.2d 699, 701, 629 P.2d 450 (1981). No legislative history has been found regarding the Legislature's intent in preserving joint and several liability as to defendants acting "in concert," and so there is no apparent reason to interpret the term "in concert" as having a meaning different from its common law usage.

Washington courts have followed California precedent in defining the term "in concert." As stated in Elliot v. Barnes, 32 Wn.App. 88, 91, 645 P.2d 1136 (1982):

Under the California formula, which has been recognized by our courts, the following three elements must all exist: (1) A concert of action; (2) a unity of purpose or design; (3) two or more defendants working separately but to a common purpose and each acting with the knowledge and consent of the others.

Each of these requirements is satisfied with respect to the working relationship between Dr. Herndon and the hospital's nursing staff: (1) the physician and nurses were working together and assisting one another, with the physician writing

orders for the nurses to follow and the nurses following those orders (or at least being required to follow those orders) and providing general nursing care in furtherance of (2) the unified purpose of providing medical care to Brandon, where (3) the physician and nurses, though working separately, were working with the knowledge and consent of one another.

Because Dr. Herndon and the hospital nursing staff were acting "in concert," the hospital is jointly and severally liable for any fault attributable to Dr. Herndon. The hospital cannot argue that apportionment would have had any effect on its liability, because the plaintiffs were entitled to full compensation from the hospital and were precluded by their settlement with Dr. Herndon from collecting any additional amount from his insurer. Any apportionment argument to the jury would have been theoretical and without legal or practical significance.

This argument, that Dr. Herndon and the hospital's nursing staff were acting "in concert" and that the apportionment statute, by its own specific exception, does not apply, was not presented to the trial court. An appellate court,

however, "may sustain a trial court on any correct ground, even though that ground was not considered by the trial court." Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

5. The Apportionment Statute Can and Should Be Interpreted In A Manner That Preserves and Promotes Partial Settlements.

If the defendant hospital had no obligation to produce sufficient evidence upon which apportionment could be rationally determined, and had no obligation to make an offer of proof demonstrating its ability or willingness to produce such proof, and if the hospital and Dr. Herndon were not acting "in concert" within the meaning of the statute, then this Court must decide how the apportionment statute is to be applied with respect to dismissed defendants whose settlements have previously been determined "reasonable" in accordance with a statutorily mandated reasonableness hearing.

Washburn v. Beatt Equipment Co., No. 57736-6 (Nov. 25, 1992), explains how judgments are to be calculated where both partial settlements and apportionment of liability as to settled defendants has occurred. Washburn did not address, nor was the argument made to the Court, whether the