No. 1023936

SUPREME COURT
OF THE STATE OF WASHINGTON

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DAVID W. MURPHY, as Personal Representative for the Estate of KATHLEEN J. MURPHY,

Petitioner,

v.

MEDICAL ONCOLOGY ASSOCIATES, P.S., a Washington corporation; ARVIND CHAUDHRY, M.D., Ph.D., BRUCE CUTTER, M.D.,

Respondents.

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# RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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## I. INTRODUCTION

In this medical malpractice and wrongful death trial, the jury rendered a unanimous defense verdict. The Court of Appeals correctly affirmed the discretionary rulings underlying the defense verdict. The Court of Appeals held that (1) the trial court did not abuse its discretion by failing to exclude jurors, *sua sponte*, who demonstrated neither bias nor prejudice; (2) the trial court did not abuse its discretion by failing to intercede and, *sua sponte*, exclude unobjected-to testimony; (3) the cumulative error doctrine does not apply; (4) Mr. Murphy had no standing objection to speculative testimony; (5) the trial court did not abuse its discretion when it declined to bifurcate the wrongful death from the medical malpractice claim, *sua sponte*; (6) Mr. Murphy failed to preserve error with respect to challenged testimony; and (7) the trial court did not abuse its discretion in denying Murphy's request for a new trial.

In sum, Murphy's case was adjudicated in a fair trial and justice was served. The Court of Appeals properly affirmed the verdict. The Court should deny discretionary review because none of the alleged errors meet the criteria of RAP 13.4(b)(1)-(4).

## II. RESTATEMENT OF ISSUES

Rather than providing this Court a "concise statement of the issues presented for review," RAP 13.4(c)(5), Murphy offers a hyperbolic and misguided critique of the *trial court's rulings* instead of the Court of Appeals' decision. Properly stated, the issues are:

Did the Court of Appeals correctly hold that the trial court did not abuse its discretion when (1) it failed to exclude jurors, *sua sponte*, who demonstrated neither bias nor prejudice; (2) failed to intercede and, *sua sponte*, exclude unobjected-to testimony; (3) the cumulative error doctrine does not apply; (4) Mr. Murphy had no standing objection to speculative testimony; (5) it did not bifurcate

the wrongful death claim, *sua sponte*, from the medical malpractice claim; (6) Mr. Murphy failed to preserve error with respect to challenged testimony; and (7) denied Mr. Murphy's request for a new trial.

## III. RESTATEMENT OF THE CASE

This case arises out of medical care and treatment that Respondents Drs. Cutter and Chaudhry provided to decedent Kathleen Murphy from late May to September 2015 for advanced Stage IV-B Hodgkin's lymphoma. *See generally* CP 6-11. After a six-day trial, the jury unanimously rendered a defense verdict, finding that neither doctor was negligent in administering Bleomycin (one component of a chemotherapy regimen that includes Adriamycin, Bleomycin, Velban, and Dacarbazine, known as "ABVD") to her during their care and treatment of her Hodgkin's lymphoma. CP 267. The jury also found that there was no failure to obtain the decedent's informed consent prior to the administration of Bleomycin. CP 268.

The Court of Appeals affirmed the defense verdict and held that the trial court did not abuse its discretion in its rulings.

For the purpose of brevity, Respondents rely on the statement of facts and procedural background set forth in the Court of Appeals unpublished decision attached to Murphy's petition for review at 2-12.

## IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

### A. The Court of Appeals correctly held that there was no error by failing to exclude jurors *sua sponte* because there was no demonstrated bias or prejudice.

Mr. Murphy contends that prospective juror 15 (seated as 8) was actually biased. Pet. 26. He did not object in the trial court, thus defaults to the RAP 2.5(a) requirements that "'(1) the error is manifest and (2) the error is truly of constitutional dimension.'" *State v. J.W.M.*, 1 Wn.3d 58, 90, 524 P.3d 596 (2023) (quoting *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)).[1]

[1] The Court of Appeals relied on both cases in its unpublished decision. *Murphy v. Med. Oncology Assocs*., 2023 Wash. App. LEXIS 1230 *14 (June 29, 2023).

Mr. Murphy must demonstrate actual prejudice, with clear "practical and identifiable consequences at trial." *Murphy v. Med. Oncology Assocs*., 2023 Wash. App. LEXIS 1230 (June 29, 2023) (citing *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). "The court has a duty to act on a prospective juror's apparent bias or prejudice." *Murphy*, 2023 Wash. App. LEXIS 1230 *14. In the civil context, RCW 2.36.110 "creates a mandatory duty to dismiss an unfit juror even in the absence of a challenge." *Id*. (quoting *State v. Lawler*, 194 Wn. App. 275, 284, 374 P.3d 278 (2016)).

"A juror demonstrates actual bias when he or she exhibits 'a state of mind . . . in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." *Murphy*, 2023 Wash. App. LEXIS 1230, *14 (quoting RCW 4.44.170(2)). Accordingly, a juror "who has preconceived

ideas need not be excused if the jury credibly states that she or he can set those ideas aside and decide the case on the basis of the evidence presented and the law as instructed by the court." *Id*. (citing *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987)). "To excuse a juror based on actual bias, the trial court 'must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the case impartially.'" *Murphy*, 2023 Wash. App. LEXIS 1230, *14 (quoting RCW 4.44.190).

A trial court decision to not dismiss a juror (*sua sponte* or otherwise) is reviewed under the manifest abuse of discretion standard. S*tate v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991). Here, members of the venire were directly asked "Can you be fair?" RP at 86-87. Juror 8 responded "I believe I can be fair." RP at 91. Mr. Murphy's counsel and prospective juror 15 (seated as 8) engaged in the following colloquy:

[PROSPECTIVE] JUROR NO. 15: I mentioned earlier my slight experience with Dr. Chaudhry and you mentioning malpractice, I believe it was?

[PLAINTIFF'S COUNSEL]: Yes, negligence.

[PROSPECTIVE] JUROR NO. 15: I—I've had both good doctors and bad doctors in my experience. So I don't feel like I would have a bias I would express anyways or even have it internally. But I have been caught in the medical system, my family and myself, for generations literally. But I've seen both sides of it.

[PLAINTIFF'S COUNSEL]: And thank you again for sharing that. Maybe you could share a little more about your feelings here as far as being able to sit on this jury?

[PROSPECTIVE] JUROR NO. 15: I don't think I would have a problem, to answer you very generically. Personally, I don't know Dr. Chaudhry at all.

[PLAINTIFF'S COUNSEL]: Okay.

[PROSPECTIVE] JUROR NO. 15: But I know my brother's experience and what little bit I shared of that. And I know my mother was very close with Dr. Chaudhry during my brother's experience. However, like I say, that was years ago for me. But I would—I would have to take this case by case, just as I do everything else.

[PLAINTIFF'S COUNSEL]: Okay, that's good. Thank you.

And I guess the thing—do I have or my client have anything to fear here that because of your experience with your brother, you might lean one way or the other?

[PROSPECTIVE] JUROR NO. 15: I don't believe so, because I don't trust anybody's opinion, even my own sometimes, meaning that because my brother had a good experience with Dr. Chaudhry does not mean that I would or that his mother would have.

[PLAINTIFF'S COUNSEL]: Okay, thank you very much for sharing that.

RP at 103-04. The foregoing answers "cannot be characterized as even equivocal statements of bias or prejudice." *Murphy*, 2023 Wash. App. LEXIS *19. Here, the Court of Appeals committed no errors in its analysis of the trial court's rulings (*sue sponte* or otherwise) nor does Mr. Murphy credibly show actual bias.

Mr. Murphy also argues that because proposed juror 25 revealed that his mother was a current patient of respondent Dr. Chaudhry, the trial court should have excused all similarly-situated venire members *sua sponte*. However, she, too, expressly stated "I can be fair." RP at 95.

Here, the Court of Appeals correctly held that Mr. Murphy failed to demonstrate manifest constitutional error

because "he offers no legal authority or analysis supporting the proposition that a party has a constitutional right to disqualify a prospective juror if the party's adversary might have greater access to information about that juror." *Murphy*, 2023 Wash. App. LEXIS at *19.

### B. The Court of Appeals correctly held that the cumulative error doctrine did not apply.

Mr. Murphy complains that certain testimony by Respondents Chaudry and Cutter, and defense expert Nichols regarding the informed consent claim was speculative, unduly prejudicial or violated the dead man's statute. However, Mr. Murphy failed to object, thus did not preserve alleged error on appeal. The Court of Appeals correctly held that the doctrine is '"simply a recognition that the net impact of multiple small errors can still result in a prejudicial impact on the trial."' *Murphy*, 2023 Wash. App. LEXIS *22 (quoting *Rookstool v. Eaton*, 12 Wn. App. 2d 301, 311-12, 457 P.3d 1144 (2020)). Here, Mr. Murphy contends—and the Court of Appeals agrees—that

cumulative error is a constitutional issue, as stated in *Rookstool*, however, "a party must still present individually harmless *preserved* errors, or individually harmless manifest constitutional errors before asking this court to consider whether, cumulative, they operated to deprive the party of a fair trial." *Murphy*, 2023 Wash. App. LEXIS at *22 (emphasis in original) (citing *State v. Clark*, 187 Wn.2d 641, 649, 389 P.3d 462 (2017)). Accordingly, Court of Appeals correctly held that the cumulative error doctrine does not apply.

### C. The Court of Appeals correctly held that there was no error in failing to *sua sponte* exclude unobjected-to testimony.

The Court of Appeals correctly held that Mr. Murphy's standing objection with respect to the trial court's ruling on the deadman's statute does not inexplicably extend to a "standing objection" on an entirely different issue, *i.e*., preserving a challenge to respondents' purportedly speculative testimony. In sum, Mr. Murphy had no

standing objection on speculative testimony. *Murphy*, 2023 Wash. App. LEXIS at *22.

### D. The Court of Appeals correctly held that the trial court did not abuse its discretion in declining to bifurcate the wrongful death claim, *sua sponte*.

Mr. Murphy next contends that the trial court (not the Court of Appeals' decision affirming the trial court) abused its discretion by not severing or consider severing the individual- and representative-capacity claims such that the representative claim would not be allegedly prejudiced by the loss of the statute's testimonial protections.

In the Court of Appeals, Mr. Murphy admitted that the claims were joined by Mr. Murphy "as a matter of judicial economy." *Id*. at *25. Accordingly, when "a personal representative chooses to join survival and wrongful death claims in the same action, and to proceed with the claims as joined after the ramifications for the dead man's statute are identified, any reasonable judge would infer that the personal representative views a single trial as most

convenient and least prejudicial. *Id*. (citing *Armstrong v. Marshall*, 146 S.W.2d 250, 252 (Tex. Ct. App. 1940)) (holding that because evidence was admissible as applied to the survival action, and no request was made to limit it to the other cause of action, appellants were in no position to complain of its admission). Likewise, Mr. Murphy submits no legal authority for the proposition that a trial court is *required to raise, sua sponte*, the question of bifurcation under CR 42(b).

### E. The Court of Appeals correctly held that the trial court did not abuse its discretion in denying Mr. Murphy's request for a new trial.

Mr. Murphy moved for a new trial under CR 59(a)(7), which by its express language, requires the moving party to prove that there is "no evidence or reasonable inference from the evidence to justify the verdict." Specifically, he moved for a new trial on *only one element* of informed consent, among four.

The trial court was required '"to admit the truth of the nonmoving party's evidence"' (Drs. Chaudhry and Cutter) '"and all reasonable inferences drawn therefrom."' *Lewis v. Doll*, 53 Wn. App. 203, 207, 765 P.2d 1341, *review denied*, 112 Wn.2d 1027 (1989) (quoting *Levy v. N. Am. Co. for Life & Health Ins*., 90 Wn.2d 846, 586 P.2d 845 (1978)). '"If there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury."' *Id*. (quoting *Levy*, 90 Wn.2d at 586).

Here, the trial court found that the defense verdict was based on substantial evidence and denied Mr. Murphy's motion. CP 389. The decision to deny a motion for a new trial under CR 59 will not be reversed absent a strong showing of abuse of discretion. *Fritsch v. J.J. Newberry's, Inc.*, 43 Wn. App. 904, 905, 720 P.2d 845 (1986).

The trial court did not abuse its discretion in denying Mr. Murphy's request for a new trial, and the Court of Appeals correctly affirmed the ruling.

## V. CONCLUSION

Mr. Murphy received a fair trial before an objective, impartial jury. His constitutional due process rights were not violated. The jury heard competing expert opinions, among other evidence, before rendering a unanimous defense verdict. The trial court did not abuse its discretion in denying his motion for a new trial or in its evidentiary rulings. The Court of Appeals correctly affirmed those discretionary rulings. Respondents respectfully request that the Court deny discretionary review because the Court of Appeals decision conflicts with no decision of the Supreme Court; the decision conflicts with no published decision of the Court of Appeals; there is no significant question of law under the state or United States

Constitution; and the petition involves no issue of substantial public interest.

**Certificate of Compliance**: The number of words contained in this document (exclusive of words referenced in RAP 18.17(b)), based on the word count calculation of Microsoft is 2,293.

Respectfully submitted this 18th day of October, 2023.

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## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the date noted below, a true and correct copy of the foregoing Brief of Respondents was delivered and/or transmitted in the manners noted below:

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DATED at Seattle, Washington on October 18, 2023.

/s/ Susan L. Klotz
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## FLOYD PFLUEGER & RINGER PS

## October 18, 2023 - 2:11 PM

## Transmittal Information

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