NO. 44655-3-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

LONNITA HASKINS, Appellant

vs.

MULTICARE HEALTH SYSTEM, a Washington Corporation d/b/a TACOMA GENERAL HOSPITAL, Respondent

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APPELLANT'S REPLY BRIEF AND RESPONSE BRIEF TO CROSS APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Other Cases

Statutes

Rules and Regulations

Other Authorities

I. ARGUMENT IN REPLY

A. The Trial Court Should Have Instructed the Jury on Res Ipsa Loquitur, Plaintiff's Proposed Jury Instruction #17

Lonnita Haskins was injured because her stents slipped 14 inches out of her body, as described in the opening brief. That fact is known. But no one testified that they saw it happen. There is thus no direct evidence as to how it happened.

Res ipsa loquitur is tailor made for this situation. That doctrine says that if the particular injury in this case likely or ordinarily would not have occurred absent negligence, then the jury may draw an inference that negligence occurred. The jury is not required to draw the inference; plaintiff's proposed instruction, which is based on the pattern instruction, would have instructed the jury to that effect.[1] But they must be told that that they are permitted to draw the inference where the standard for res ipsa loquitur is met, as here.

Res ipsa loquitur applies if "the accident or occurrence that caused the plaintiff's injury would not ***ordinarily*** happen in the absence of negligence."[2] *Curtis v. Lein*, 169 Wn.2d 884, 891, 239 P.3d 1078 (2010) (emphasis added) quoting *Pacheco v. Ames,* 149 Wn.2d 431, 438-39, 69

[1]After quoting the three elements, the proposed instruction states: "Then, in the absence of satisfactory explanation, you may infer, but you are not required to infer, that the defendant was negligent." Plaintiff's Proposed Instruction 17.

P.3d 324 (2003). "[T]he plaintiff is not required to "'eliminate with certainty all other possible causes or inferences'" in order for res ipsa loquitur to apply." *Pacheco v. Ames*, 149 Wn.2d at 440-441, quoting *Douglas v. Bussabarger,* 73 Wn.2d 486, 438 P.2d 829 (1968). Testimony that "[t]hese things more likely than not do not occur unless someone is negligent" meets the standard for a res ipsa loquitur instruction. *Brown v. Dahl*, 41 Wn. App. 565, 582 n. 12, 705 P.2d 781 (1985). *See* Appellant's Opening Brief at 24-25 for discussion of *Brown.*

The hospital cannot defeat res ipsa loquitur under this standard. In its brief, therefore, the hospital essentially rewrites and revises the clear language of the Supreme Court's test. It argues the issue as though the Washington Supreme Court's test stated that "the accident or occurrence that caused the plaintiff's injury would ***never*** happen in the absence of negligence," or that "the accident or occurrence that caused the plaintiff's injury would not ***theoretically*** happen in the absence of negligence."

Thus, although the hospital does not dispute that Dr. Dorigo testified that the stents would not have slipped 14 inches without negligence, the hospital instead focuses on his testimony that "theoretically" stents can slip. Dr. Dorigo immediately followed up this

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[2]The hospital challenges only the first element of res ipsa loquitur.

testimony with the opinion, backed by analysis of the facts, that slippage without negligence did not occur in this case. RP (1/22/13) at 40-43.

The "theoretical" possibility that the event could have occurred without negligence does not defeat res ipsa loquitur under Washington law. Nor is a plaintiff required to prove that the defendant's negligence is the only inference that can be drawn from the facts. In *Ripley v. Lanzer*, 152 Wn. App. 296, 322, 215 P.2d 1020 (2009), the Court of Appeals specifically contrasted Washington law on this point with the res ipsa loquitur law in other states, specifically West Virginia:

> In discussing the application of res ipsa loquitur, the [West Virginia] court noted that the doctrine could only be invoked in cases where the defendant's negligence is the only inference that can reasonably be drawn from the circumstances. But res ipsa loquitur applies more broadly under Washington law.[3]

The hospital also focuses on its ***own*** evidence that res ipsa loquitur is not applicable as though the question of res ipsa loquitur turns on the trial court's weighing of evidence presented by the parties. Respondent's brief at 13-16. The law is otherwise.

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[3] The hospital makes repeated reference in this regard to the testimony of Dr. Bahman Saffari in support of its position. Respondent's brief at 11, 23. Dr. Saffari, who was Ms. Haskin's surgeon, is a member of the local medical community enjoying privileges at Tacoma General Hospital. Dr. Saffari testified that he could not rule out the possibility that the uretal stents were dislodged by other than negligent mechanisms. Supp RP (1/16/13) at 54. It should be clear by now that the inability to rule out a non-negligent cause does not invalidate a res ipsa loquitur theory. *See* also discussion of *Pacheco v. Ames, infra.*

> The fact that the defendant may offer reasons other than negligence for the accident or occurrence merely presents to the jury alternatives that negate the strength of the inference of negligence res ipsa loquitur provides.

Curtis v. Lein, 169 Wn.2d 884, 895, 239 P.3d 1078 (2010). "Even where the defendant offers weighty, competent and exculpatory evidence in defense, the doctrine may apply." *Pacheco v. Ames*, 149 Wn.2d at 440-441. The rule which the hospital offers in its brief is in fact a throwback to the rule definitively rejected by the Supreme Court in *Pacheco v. Ames*:

> We have held that a jury instruction invoking the doctrine of res ipsa loquitur is inapplicable where there is evidence that is *completely* explanatory of how an accident occurred and no other inference is possible that the injury occurred another way. [citations omitted] That rule, which we reaffirm, is narrower than that enunciated by the Court of Appeals because it only defeats res ipsa loquitur where an inference is not possible, and thus there is nothing upon which the doctrine can operate. [citation omitted] The Court of Appeals' decision here, on the other hand, is broader in that it would defeat the doctrine of res ipsa loquitur in cases where the defendant offers *some* evidence explaining the injury.

149 Wn.2d at 440 (emphasis in original).

The hospital could have relied on the evidence from its own witnesses to support its claim that res ipsa loquitur should not apply. But this evidence was a question for the jury under appropriate instructions. It was not for the trial court to take away from the jury.

Further, the hospital defines the event or occurrence as "stent slipping." But that definition omits a significant fact or circumstance on

which Plaintiff's experts relied. The event or occurrence which caused "the plaintiff's injury" here is a stent slipping ***14 inches***. And plaintiff's evidence is clear that that event does not occur ordinarily without negligence.

B. The Trial Court Erred in Admitting Evidence of Collateral Source Payments Pursuant to RCW 7.70.080, an Unconstitutional Statute under Separation of Powers

Plaintiff did not invite error in challenging the constitutionality of RCW 7.70.080. Plaintiff moved in limine to exclude all evidence of collateral source payments because the statute was unconstitutional. CP 571-72. Alternatively, Plaintiff also moved in limine to exclude evidence of future collateral source payments, an argument addressing the construction of the statute assuming its constitutionality. CP 570-571. She invited no error. She did not ask the court to admit any evidence based upon an unconstitutional statute. Rather, she asked the court to exclude evidence.

Plaintiff specifically made the motion regarding the construction of the statute subject to the argument that the statute as a whole was unconstitutional. "This argument [that RCW 7.70.080 is limited to past collateral source payments] is made subject to the argument in 18B that

RCW 7.70.080 is unconstitutional because it violates the separation of powers." CP 570 footnote 1.[4]

The statute itself is clearly limited to past collateral sources. Nevertheless, the hospital made a lengthy and vociferous argument in the trial court that RCW 7.70.080 allowed admission into evidence of future collateral source payments. CP 584-592; RP (1/15/13) at 7-12. Defense counsel specifically sought to place before the jury evidence that Medicare and other government benefits would cover dialysis treatments in the future. Plaintiff brought the motion in the alternative because if the trial court found the statute constitutional, which it did, Plaintiff at least had to establish that the collateral source rule barred evidence of future collateral source payments.

The seriousness of this question and its effect on the jury is reflected in defense counsel's actions after the trial court granted the motion in limine precluding evidence of future collateral source payments. Notwithstanding the order, defense counsel proceeded to place before the

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[4] In Reply, Plaintiff stated:

> Defendant misunderstands the constitutional argument. RCW 7.70.080 is unquestionably limited to past benefits. Plaintiff is arguing that RCW 7.70.080 is unconstitutional even with regard to past benefits, for the reasons set out in the motion. Because of the unconstitutionality of RCW 7.70.080, Plaintiff is asking the Court to bar any evidence of collateral source payments sought to be admitted pursuant to the statute, whether past benefits or future benefits.

CP 603.

before the jury during jury selection the question whether dialysis patients did have to pay for their dialysis treatment. RP (1/15/13) at 62-63. Although the trial court foreclosed this line of questioning, the idea was placed before the jury.[5]

On the merits, the hospital makes no attempt to address in any meaningful sense the separation of powers analysis raised in Appellant's Brief. The hospital simply cites cases applying the statute in which the parties did not challenge the constitutionality of RCW 7.70.080. Plaintiff is making that challenge.

The hospital argues that RCW 7.70.080 is constitutional because the Court in *Diaz v. State*, 175 Wn.2d 457, 465 (2012) stated that RCW 7.70.080 supersedes the common law collateral source rule. Plaintiff agrees that the legislature intended for RCW 7.70.080 to supersede the common law rule. That is why the statute is unconstitutional. The legislature may not constitutionally enact an evidentiary statute which conflicts with the court's evidentiary rules. In some instances, there is a question as to whether the statute conflicts with evidentiary rules, and a court has an obligation to harmonize statutes and rules if possible.

[5] Notably, although the hospital has brought a cross-appeal on two issues, it did not renew the wholly unsupported argument it insisted in making in the trial court that RCW 7.70.080 applies to future collateral source payments. As a legal issue, this argument has no traction. On the other hand, as a jury issue, the

Putman v. Wenatchee Valley Medical Center, P.S., 166 Wn.2d 974, 981, 216 P.3d 374 (2009). But no such analysis is necessary here. A statute which supersedes a rule of evidence unquestionably conflicts with that rule.

Contrary to the hospital's brief at 28, *Diaz* did question the constitutionality of RCW 7.70.080. It held:

> 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 *in* admissible under 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). Under our separation of powers jurisprudence, when a statute appears to conflict with one of our evidence rules and they cannot be harmonized, the statute must yield to the rule on a procedural issue such as the admissibility of evidence. *Id.* 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.

Diaz v. State, 175 Wn.2d at 471. The hospital's brief, however, never address the constitutional separation of powers issues raised by *Putman* and *Diaz.*

Diaz did not address the express issue raised by this case, whether RCW 7.70.080 is an unconstitutional violation of the separation of powers

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suggestion of collateral source payments has undoubted prejudicial effect on the jury's consideration both as to liability and damages.

doctrine. But the reasoning of *Diaz* forms the foundation for the ineluctable conclusion that RCW 7.70.080 is unconstitutional for reasons spelled out in Appellant's Opening Brief.

The hospital makes a one sentence argument that the error here is harmless because the jury found for the defendant on liability. Respondent's Brief at 28-29. However, the courts, and specifically Washington courts, have ruled that the collateral source rule has as one of its purposes the prevention of prejudice on liability. Ultimately, compensation of the victim for the damages he or she has suffered is one of the fundamental purposes of tort law. *Shoemake ex rel. Guardian v. Ferrer,* 168 Wn.2d 193, 203, 225 P.3d 990 (2010). If the jury has evidence before it that the victim is or has been taken care of financially, that evidence detrimentally impacts the jury's need to find liability.

The Utah Supreme Court recently canvassed the case law explaining why the admission of collateral source payments was prejudicial on the issue of liability.

> It has long been recognized that evidence of collateral source benefits "involves a substantial likelihood of prejudicial impact." *See Eichel v. N.Y. Cent. R.R. Co.,* 375 U.S. 253, 255, 84 S.Ct. 316, 11 L.Ed.2d 307 (1963) (per curiam); *see also Robinson v. All–Star Delivery, Inc.,* 1999 UT 109, ¶ 23, 992 P.2d 969 (noting that evidence of "disability benefits is potentially very prejudicial" to a plaintiff). This prejudicial impact is two-fold. First, the evidence suggests to the jury that the plaintiff is already receiving the care that he needs. Thus, the jury believes that

> "the outcome of the trial is immaterial to the party benefitting from the collateral source." *Cates,* 361 S.E.2d at 740. Second, because most jurors do not understand the concept of subrogation rights, they will erroneously conclude that the plaintiff is seeking a windfall. This is highly prejudicial because the jury will believe that the plaintiff has already been "fully compensated and [is] trying to obtain a double recovery." Id. (internal quotation marks omitted); *see also Green,* 59 F.3d at 1033–34 ("[T]he jury may feel that awarding damages would overcompensate the plaintiff for his injury...." (internal quotation marks omitted)); *Williams v. Asplundh Tree Expert Co.,* No. 3:05–cv–479–J–33MCR, 2006 WL 2942796, at *2 (M.D.Fla. Oct. 9, 2006) ("There is substantial danger of unfair prejudice in this [collateral source] evidence. The jury may believe that [the plaintiff] is trying to receive a double recovery for a single harm").

Wilson v. IHC Hospitals, Inc., 289 P.3d 369, 384 (Utah 2012).

Washington has followed the *Eichel* line of cases in assessing the prejudicial effect of collateral source evidence. In *Johnson v. Weyerhaeuser*, 134 Wn.2d 795, 802, 953 P.2d 800 (1998), the Court held that the collateral source rule bars evidence of collateral source benefits in workers' compensation proceedings, because of the prejudicial effect.

> "Similarly, *we must recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact." Eichel,* 375 U.S. at 255, 84 S.Ct. at 317 (emphasis added) (footnotes omitted). We find the reasoning of *Eichel* persuasive.

Johnson, 134 Wn.2d at 802 (emphasis in original). The Court further explained the purpose of the rule and the nature of the prejudice:

> The very essence of the collateral source rule requires exclusion of evidence of other money received by the

> claimant so the factfinder will not infer the claimant is receiving a windfall and nullify the defendant's responsibility. If evidence of collateral benefits is admitted, the message received by the factfinder is that the claimant already has enough money and, therefore, is not disabled.

Id. at 803. *See also Ciminski v. SCI Corp.*, 90 Wn.2d 802, 806, 585 P.2d 1182 (1978). The hospital's harmless error analysis fails. The link between admission of collateral source benefits and liability is simply too strong, as the cases above indicate.

Plaintiff did not invite error on this issue. Plaintiff, however, is inviting a published ruling on this issue. The Supreme Court's recent decisions in *Putman*, *Waples*[6] and *Diaz* have brought this issue to the forefront. How can the collateral source statute on medical malpractice cases stand in the face of the Supreme Court's separation of powers analysis found in these cases? It cannot, but until the appellate courts issue a definitive published ruling on the issue, Washington trial courts are likely to continue to issue conflicting rulings.[7]

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[6] *Waples v. Yi*, 169 Wn.2d 152, 161, 234 P.3d 187 (2010).

[7] The undersigned lawyers are raising the unconstitutionality of the statute in every case where it may be applicable. Plaintiff lost in the court below; but Plaintiff recently won in another case. *See e.g.*, *Anderson v. Paugh*, et al., King County Superior Court No. 12-2-1798-0, Dkt.564A (Order and Transcript Ruling of Hon. Michael Trickey) (Appendix A). Until the appellate courts definitively address the issue in a published opinion, the trial courts are likely to continue to issue conflicting rulings. This case presents the opportunity for appellate consideration of the issue.

C. The Supreme Court's Statement in 2011 that Preponderance of the Evidence Means More than 50% is Washington Law, not Obiter Dictum, and It is Error to Prohibit a Party from Arguing that Preponderance of the Evidence is More than 50%.

Two years ago, the Washington Supreme Court quantified the preponderance of the evidence standard as follows:

> In order to establish a causal connection in most civil matters, the standard of confidence required is a "preponderance," or more likely than not, ***or more than 50 percent.*** *See* Lloyd L. Wiehl, *Our Burden of Burdens,* 41 WASH. L. REV. 109, 110 & n. 4 ("The Washington court has reduced the burden to the probability factor."). By contrast, "[f]or a scientific finding to be accepted, it is customary to require a 95 percent probability that it is not due to chance alone."

Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 608, 260 P.3d 857 (2011). The hospital, however, asks this Court to simply disregard this language, uttered only two years ago, as a species of obiter dictum.

This Court has most recently defined "obiter dictum" as follows:

> Statements made in the course of a court's reasoning that go beyond the facts before the court and are "wholly incidental" to the basic decision constitute obiter dictum and do not bind us.

Hudson v. UPS, 153 Wn. App. 254, 267 n. 6, 256 P.3d 287 (2011).

The greater than 50 percent language was an integral part of the Court's holding in *Akzo*. As the above quotation from *Akzo* indicates, the Court expressly compared the quantification of the probability standard, greater than 50%, with the scientific standard, 95% or greater. The Court

then used the comparison to explain why an expert opinion as to causation which did not meet the statistical probability under the scientific standard nevertheless was sufficient to meet the probability standard imposed by the law. *Akzo*, 172 Wn.2d at 609. If the Court's statement in *Akzo* is statement is obiter dictum, then in every case, every bit of reasoning utilized by a Court in reaching a specific holding is obiter dictum, other than the bare holding itself.

The Supreme Court's language in *Akzo* is hardly an outlier. Division III recently made the same point in addressing the issue of the proof needed to recover on a "loss of chance" claim.

> Because a plaintiff must prove proximate cause by a "'probably' or 'more likely than not' "standard, traditional tort principles would require the plaintiff to prove loss of chance greater than 50 percent.

Estate of Dormaier v .Columbia Basin Anesthesia, __ Wn. App __, 2013 WL 6037098 ¶19 (Nov. 14, 2013). Indeed, the history of the development of loss of chance claims discussed in *Dormaier* makes sense only if the standard for preponderance can be quantified as being more than 50%. The question in these cases is what damages, if any, can be recovered if the loss of a chance of survival is 50% or less, *i.e.*, less than the preponderance standard. *See e.g., Mohr v. Grantham,* 172 Wn.2d 844,

850, 856–57, 859, 262 P.3d 490 (2011); *Herskovits v. Group Health*, 99 Wn.2d 609, 614, 664 P.2d 474 (1983); *Dormaier, supra.*[8]

Plaintiff in the present case is not raising this question as a jury instruction issue. Counsel was well aware that the Court would instruct the jury based upon WPI 21.01, an instruction which does not address preponderance of the evidence in terms of percentages.[9] But the Court's remarks precluded counsel from addressing the jury's concerns and erroneous assumptions regarding how the law quantifies the preponderance of the evidence. *See* Appellant's Opening Brief at 33. This was error and grounds for reversal.

II. ARGUMENT ON CROSS-APPEAL

A. The Trial Court did not Abuse Its Discretion in Excluding a Witness, Nurse's Aide Ashley Barker, from the Courtroom.

It has long been Washington law, predating the promulgation of ER 615, that the exclusion of witnesses is a matter within the trial court's discretion, and that the trial court's decision will not be disturbed except for a manifest abuse of discretion. *State v. Weaver*, 60 Wn.2d 87, 90, 371

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[8] *Herskovits* was a plurality opinion by Justice Pearson. *Mohr v. Grantham* adopted Justice Pearson's plurality opinion as the opinion of the Court. *See Dormaier, supra*, ¶¶17-18.

[9] Counsel's acknowledgement, noted by Defendant, that the Court was "correct," that the final instruction would not mention percentages was no more than an acknowledgement that the instruction would not contain a percentage. It was not an acknowledgement that the law did not allow the jury to consider

P.2d 1006 (1962). The purpose of allowing a designated representative to remain in the courtroom is to assist counsel in the trial of the case. This was the purpose even prior to the promulgation of ER 615, when it was "customary to exempt one witness to confer with prosecutor during the trial." *State v. Weaver*, 60 Wn.2d at 90.

The hospital designated CNA Ashley Barker to attend trial as the hospital representative, and asked that she be exempted from the order excluding testifying witnesses from the courtroom. As is clear from the facts, however, the hospital did not designate CNA Barker as its representative because of her superior ability to assist counsel with the case. First, she was performing a job which was not one of her ordinary tasks. She was substituting for a co-worker who was ill. Second, even though she was providing care to Ms. Haskins, she did not know how the stent slipped. She was not like the employee who could tell the attorneys what happened in an automobile accident in which she was the driver. She couldn't because she didn't know how it happened.

On the other hand, there was evidence from experts regarding all of the possibilities and speculations regarding how the stents slipped. If CNA Barker had remained in the courtroom, there was the clear risk that her testimony could have been colored by what she heard from other

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preponderance in terms of the percentages, or that 51% satisfied the burden of

witnesses, or from counsel during opening statement, information that she did not know at the time of the incident, but that could easily color her testimony, consciously or otherwise.

The purpose of sequestration is to prevent witnesses from tailoring their testimony to that of prior witnesses and to aid in detection of dishonesty. *Geders v. United States,* 425 U.S. 80, 87, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976). The trial court's ruling was driven by this concern:

> You can designate a corporate representative who is -- can be the representative for the corporation, but this witness is a factual witness. She wasn't sued directly. She's just another witness in the case. And I've never had a factual witness of a company be the corporate representative. It's usually someone in management or is designated by the company to be a corporate representative, but this witness is not going to sit through the entire case and then testify as a factual witness. So if risk management wants to take her seat, the CEO, or someone designated by that person to represent the corporation, that's fine, but not a nurse who's going to be testifying as to factually what happened during the trial. I want her testimony to be uninfluenced by anything she hears in this courtroom.

RP (1/14/13) at 6-7.

ER 615 does not give a corporation an absolute right to designate any employee it wants as corporate representative. The trial court should not be precluded from excluding fact witnesses whose paramount importance is giving truthful testimony rather than assisting counsel.

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proof. The law allows it; 51% satisfies the burden of proof.

The hospital has not shown in any way that it was prejudiced because of the presence of corporate representatives with superior knowledge of the operations and procedures of the hospital, rather than CNA Barker. The trial court did not abuse its discretion in excluding her from the courtroom.

B. The Trial Court Properly Denied Defendant's Proposed Instruction 10, Regarding the Tax Consequences of the Judgment, an Instruction not Authorized by and Contrary to Washington Law.

The hospital failed to preserve this instruction for appeal. Although the hospital excepted to the failure to give the instruction, the hospital failed to provide any "grounds for objection" to the failure to give the instruction. At the exceptions conference, counsel stated:

> The other proposed instruction that is not subsumed by what the plaintiff has prepared is defendant's proposed instruction No. 10. This deals with the non-taxability of a personal injury award. I'm not going to take up a lot of the Court's time with argument on this. This is an instruction we routinely propose, and we defer to the Court's discretion.

(RP 1/29/13) at 184:5-11. Neither in the exceptions conference nor elsewhere did the hospital provide the trial court with the grounds for requesting this instruction, and it certainly did not set out the reasons now argued on cross-appeal.

CR 52(f) requires the party "to make objections to the giving of an instruction ***and to the refusal to give a requested instruction.***" (emphasis

added). It further requires that the "objector shall state distinctly the matter to which he objects ***and the grounds of his objection...***" (emphasis added). The purpose of this requirement is to "sufficiently apprise the trial court of any alleged error in order to afford it the opportunity to correct the matter if necessary". *Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 63, 882 P.2d 703 (1994). The failure to give the instruction is not preserved for appeal where the party has failed to clearly apprise the trial court of the grounds for the objection. *Davis v. Globe Mach. Mfg. Co., Inc.*, 102 Wn.2d 68, 75, 684 P.2d 692 (1994).

In any event, Washington law does not authorize the proposed instruction on taxes. There is no WPI on this issue. The hospital cites two federal cases, one from 1975 and one from 1979 in support of the instruction. Washington has not adopted either case. To the contrary, Washington courts have specifically rejected the United States Supreme Court case on which those cases were based, *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755 (1980). In *Janson v. North Valley Hosp.*, 93 Wn. App. 892, 971 P.2d 67 (1999), the Court agreed with the dissent in *Liepelt* regarding the consideration of the tax consequences of an award, noting that the federal rule was a minority rule:

> If this case were tried under federal law, *Liepelt* would apply and the jury would be instructed as requested by Ms. Janson. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486-87, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981).

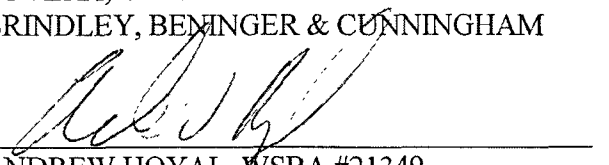
> Nevertheless, only a minority of states have adopted *Liepelt. Rego Co. v. McKown-Katy,* 801 P.2d 536, 539 (Colo.1990). We decline to follow *Liepelt* because it assumes that jurors will disregard their duty and instructions by inflating or deflating damage awards based on wrongful speculation about tax consequences. Rather, we agree with the rationale stated in Justice Blackmun's dissenting opinion:
>
> > It also is "entirely possible" that the jury "may" increase its damages award in the belief that the defendant is insured, or that the plaintiff will be obligated for substantial attorney's fees, or that the award is subject to state (as well as federal) income tax, or on the basis of any number of other extraneous factors. Charging the jury about every conceivable matter as to which it should not misbehave or miscalculate would be burdensome and could be confusing.
>
> *Liepelt*, 444 U.S. at 503, 100 S.Ct. 755 (Blackmun, J., dissenting). Accordingly, we decline to make the issue of damage awards more complicated by injecting income tax consequences.

Janson v. North Valley Hosp. 93 Wn. App. at 906. In *Bingaman v. Grays Harbor Community Hosp.*, 37 Wn. App. 825, 829, 685 P.2d 1090 (1984), *rev'd on other grounds*, 103 Wn.2d 831, 699 P.2d 1230 (1985), the Court refused to hold that the failure to give a tax consequence instruction was reversible error.

The trial court did not error in declining to give the proposed instruction.

DATED this 9th of December 2013.

LUVERA, BARNETT
BRINDLEY, BENINGER & CUNNINGHAM



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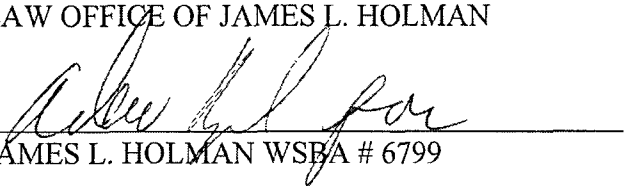
LAW OFFICE OF JAMES L. HOLMAN



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Counsel for Appellant

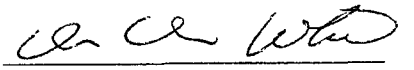
CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that she caused delivery of the foregoing Appellant's Reply Brief to be served on Monday, December 9, 2013, on the below counsel of record in the following manner:

Rebecca S. Ringer — *via email delivery*
Floyd, Pflueger & Ringer
200 West Thomas Street, Suite 500
Seattle, WA 98119-4296

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 9th of December, 2013, at Seattle, Washington.



Dee Dee White
Paralegal

Appendix A

HON. MICHAEL TRICKEY
Noted for Hearing: October 14, 2013

FILED
KING COUNTY, WASHINGTON
OCT 22 2013
SUPERIOR COURT CLERK
BY NICHOLAS REYNOLDS
DEPUTY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

BECKY S. ANDERSON, a single person, Plaintiff, vs. DONALD R. PAUGH; WENATCHEE VALLEY MEDICAL CENTER, P.S.; LINDA K. SCHATZ; WENATCHEE ANESTHESIA ASSOCIATES; MEDTRONIC, INC.; MEDTRONIC XOMED, INC. Defendants.	NO. 12-2-17928-0 SEA ORDER RE: PLAINTIFF'S MOTION RE COLLATERAL SOURCE RULE ~~[PROPOSED~~]

These matters having come upon Plaintiff's Motion regarding the unconstitutionality of RCW 7.70.080 and to exclude any evidence or testimony of compensation from collateral sources, and following briefing and argument; the Court finds the statute is unconstitutional and that the common law collateral source rule bars evidence of such payments, IT IS ORDERED THAT:

1. Plaintiff's motion to exclude all collateral source payments is GRANTED.

2. _____

_____.

Dated this 21st day of October, 2013.

JUDGE MICHAEL TRICKEY

ORIGINAL

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MS. DELISA: Correct.

THE COURT: I got to keep track of everybody here. So they're still in the case, so they're a party. But let me ask you, doesn't the agreement itself say it shouldn't come into evidence? I mean that's --

MS. DELISA: I think our position on that would be, your Honor --

THE COURT: The fact of the payment can come in but not the agreement; is that what you're saying?

MS. DELISA: That and also if plaintiff goes in their argument or in their presentation in the case making arguments on or that we failed to do the right thing, we're not accepting responsibility, I think they've opened the door with respect to this and we should be able to put it in.

THE COURT: Okay. All right.

MR. HOYAL: I think the agreement says what it says and they agreed to it.

THE COURT: All right. So then we got to keep moving. We got a lot of motions to go through today and tomorrow. So here's my ruling. I think that Diaz holds RCW 7.70.080 to violate the

separation of powers. So to me that means they've said the statute is unconstitutional, even though they didn't then go and address whether or not the common law collateral source rule was reinstated. Absent a statute, it has to be in effect, and so I'm going to grant the motion because I think that it's now the law, and I think under the case law cited by plaintiff, I think that's where the Supreme Court is headed anyway, so if they didn't do it explicitly in Diaz, they're going to do it in this case. So I think I have to make my interpretation of what the law is, and that's my interpretation.

With regard to the other one, I think the terms of the agreement prohibit it. So the $25,000 payment is excluded. If the defense thinks that plaintiffs opened the door, then we'll take it up out of the presence of the jury.

MR. HOYAL: Thank you, your Honor.

MS. DELISA: Thank you, your Honor.

THE COURT: All right. So I guess we're back to Dr. Paugh's motions.

MR. LEEDOM: Yes, your Honor. We are on number 8.

THE COURT: All right. I have it.