No. 95022-9

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SUPREME COURT
OF THE STATE OF WASHINGTON

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KENNETH FLYTE, as personal representative of THE ESTATE OF KATHRYN FLYTE, on behalf of their son JACOB FLYTE, and as personal representative of THE ESTATE OF ABIGAIL FLYTE,

Respondents,

v.

SUMMIT VIEW CLINIC, a Washington corporation,

Petitioner.

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# ANSWER TO PETITION FOR REVIEW

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## A. INTRODUCTION

Hoping to divert this Court's attention from its egregious misconduct in failing to secure Kathryn Flyte's informed consent to her treatment for flu-like symptoms, including informing her about the readily available drug Tamiflu, that resulted in Kathryn's death and that of her baby, Abbigail, Summit View Clinic ("Summit") raises three weak procedural arguments to support its assertion that review of the Court of Appeals' unpublished opinion is merited. It attacks the trial counsel of Kenneth Flyte, the grieving father, when both the trial court and Division II discerned no prejudice in trial counsel's examination of witnesses and closing argument, it complains about the Court of Appeals' alleged "blurring" of the distinction between informed consent and medical negligence under RCW 7.70 when it never raised such an issue before in this case, and it offers a half-hearted complaint about the Court of Appeals' proper application of several liability principles.

Summit's petition is a "Hail Mary" effort, and nothing more. The central issue, counsel misconduct, is one reviewed for an abuse of discretion, and Division II correctly concluded that the trial court did not abuse its discretion. On the distinction between informed consent and medical negligence, Summit failed to even properly raise the issue below; it never assigned error to the trial court's instructions on informed consent

or the jury verdict form, for example. On the offset issue, Division II correctly applied several liability principles enacted by the 1986 Legislature in RCW 4.22.070.

In all, this case does not meet the criteria of RAP 13.4(b) for this Court's review. This Court should decline to review Division II's thoughtful, unpublished opinion that fully honors this Court's law on counsel misconduct, informed consent, and several liability.

B. STATEMENT OF THE CASE

This is the second appeal involving these parties. In its opinion in the first appeal, Division II set forth the facts of Summit's egregious misconduct in failing to properly disclose the risks the treatment of a pregnant woman like Kathryn for flu-like symptoms. *Flyte v. Summit View Clinic*, 183 Wn. App. 559, 333 P.3d 566 (2014).

In 2009, a seven-month pregnant Kathryn experienced flu-like symptoms. Summit treated her, but failed to discuss treatments with her such as the readily available drug Tamiflu, during the then-prevalent swine flu pandemic. Kathryn's health deteriorated and she died, lingering in the hospital for two months, often in a medically-induced coma. Abbigail was born by caesarian section and she died six months after her birth. Op. at 23.

In the second appeal, Division II's discussion of the facts and procedure in this case in its unpublished opinion is thorough. Op. at 2-6.[1] Moreover, in the body of its opinion, Division II addressed the specific facts pertinent to the various legal issues raised by the parties. Flyte concurs in the Court's factual recitation and offers only the following additional factual/procedural points.

First, Summit has not claimed any error by the trial court on any of its specific evidentiary rulings. Br. of Appellant at 2-3; Pet. at 1.

Second, Summit has not claimed any instructional error by the trial court. Br. of Appellant at 2-3; Pet at 1.

Third, the trial court properly instructed the jury on damages, as Summit has not claimed any instructional error with respect to damages, br. of appellant at 2-3, pet. at 1.[2] Critically, given the present procedural posture of the case, by abandoning its Golden Rule argument, Summit has

[1] Summit did not move to publish Division II's opinion, conceding it could not meet the criteria of RAP 12.3(e). Plainly, Summit did not believe that Division II's opinion determined an unsettled or new question of law, modified, clarified, or reversed an established principle of law, was one involving general public interest or importance, or that the decision conflicted with a prior opinion of the Court of Appeals. *Id.* Moreover, Division II believed that Summit's present arguments which were also the subject of its motion for reconsideration in that court so lacked merit that it did not call for an answer and denied Summit's meritless motion on August 22, 2017.

[2] Summit's motion for a new trial in the trial court focused exclusively on juror and counsel misconduct. CP 417-49. It did not assert any specific trial court evidentiary ruling was erroneous, nor did it contend the trial court erred in any way in its liability or damages instructions to the jury. *Id.*

abandoned any issues on the amount of the jury damages award, apart from the legal issue of any offset for Flyte's settlement with the Franciscan Health Systems ("Franciscan"). Any arguments it raises to this Court on counsel misconduct go to liability. The jury's verdict assessing $16.7 million in damages must stand.

Finally, Summit moved for a mistrial on alleged juror misconduct, but did not do so with regard to alleged misconduct of counsel at any time during trial or in the course of closing argument. Summit made a tactical decision not to seek a curative instruction regarding counsel's statements, betting on the outcome of the jury's decisionmaking.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED

In addressing Summit's petition, it is important for this Court to note the issues Summit has now abandoned on review, and the standard of review pertinent to the issues it now chooses to present to this Court. Consistent with its last ditch effort to overturn the jury's verdict against it, for example, Summit spent considerable time making a spurious juror misconduct argument that Division II properly rejected. Op. at 6-11. Similarly, it argued that the jury's verdict was excessive, another argument Division II readily rejected. Op. at 21-24. Neither argument is raised in Summit's petition and they are therefore not before this Court. RAP 13.7(b); *Xieng v. Peoples Nat'l Bank of Wash.*, 120 Wn.2d 512, 518, 844 P.2d 389 (1993)

("Issues not raised in a petition for review are not considered."). As for the standard of review, that will be discussed in connection with each issue *infra*.

(1) Summit's Argument on Counsel Misconduct Was Properly Rejected by Division II and It Fails to Present Any Reasons for this Court to Review that Decision

In its effort to overturn the jury's verdict, Summit repeats its attack on Flyte's trial counsel, an argument it did not properly preserve and that is meritless in any event. Pet. at 9-14. There was no "misconduct" here by Flyte's trial counsel, who were aggressive in their advocacy, as was Summit's defense team. In response to specific objections in the course of a long, hard-fought trial, the trial court made evidentiary rulings about which Summit has not specifically assigned error. Moreover, the trial court, who is closest to the jury's deliberations, saw no basis to conclude that the jury was in any way prejudiced by the conduct of Flyte's counsel when it denied Summit's post-trial motion for a new trial. RP (12/1/15):33-34; CP 679-80. Moreover, Division II discerned no abuse of discretion in the trial court's decision, carefully applying this Court's authorities on counsel

misconduct. Op. at 11-20.[3] In honoring those authorities, Division II's unpublished opinion does not merit review. RAP 13.4(b).[4]

As will be discussed in greater detail *infra*, the gravamen of Summit's claim of counsel misconduct is that Flyte's trial counsel sought to introduce evidence and make argument more relevant to a claim of medical negligence than one of lack of informed consent. For the reasons discussed *infra*, the line between the evidence relevant to these claims is not necessarily precise. The trial court, however, was vigilant in policing the distinction, sustaining evidentiary objections where appropriate. Op. at 12-16. Sustaining objections, however, does not equate to misconduct of counsel sufficient to compel a new trial.

In one instance, Flyte's counsel mentioned Summit's "negligence" in rebuttal in closing, but that was in response to *Summit's counsel having improperly surfaced the issue* by stating: "Don't you think that if there were claims of negligence, they would have been brought to you for consideration[?]." RP 2052; Op. at 17. Flyte was entitled to respond to

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[3] A trial court has broad discretion in connection with motions for a new trial. *Teter v. Deck*, 174 Wn.2d 207, 215, 274 P.3d 336 (2012). *See also, Hollins v. Zbaraschuk,* __ Wn. App. __, __ P.3d __, 2017 WL 4273989 (2017) (rejecting contention that *de novo* review governed granting of new trial).

[4] Summit has limited its argument on putative counsel misconduct to the alleged attempt to bring negligence evidence or argument to the jury. Below, it asserted that counsel made a "Golden Rule" argument to effectively seek punitive damages from the jury. Division II rejected that argument. Op. at 20-21. Summit does not raise that argument in its petition, abandoning it. RAP 13.7(b).

Summit's own raising of the negligence issue. *Taylor v. Intuitive Surgical, Inc.*, 187 Wn.2d 743, 766, 389 P.3d 517 (2017) (when party opens the door to an issue, the opposing party is entitled to respond).

In any event, even if Flyte's counsel was too aggressive in presenting the evidence here (and that is not so), the trial court did not abuse its discretion in denying a motion for a new trial. Division II applied well-established principles established by this Court to measure if counsel misconduct requires a new trial. *Aluminum Co. of Am. v. Aetna Cas. & Surety Co.*, 140 Wn.2d 517, 998 P.2d 856 (2000); *Teter, supra*. Those cases require a party to demonstrate that there was a substantial likelihood that any alleged misconduct prejudiced the jury's verdict. *Alcoa,* 140 Wn.2d at 539. Moreover, to preserve any alleged error as to counsel misconduct, a party must expeditiously object to any alleged misconduct, file a motion for a mistrial,[5] or seek a curative instruction to the jury. As the *Alcoa* court noted at 539: "the trial court's issuance of a curative instruction may obviate the need for a new trial, even if there is misconduct. *Teter,* 174 Wn.2d at 226. While Summit objected to the isolated possible references

[5] As this Court observed in *Teter*, a motion for a mistrial is ordinarily necessary to preserve a claim of counsel misconduct unless the misconduct is so flagrant that no curative instruction can cure it. 174 Wn.2d at 225-26. The isolated references in the examination of witnesses or closing here did not constitute misconduct, let alone flagrant misconduct, that could not have been cured by an instruction to the jury.

to facts that might support a negligence argument, it did not file a mistrial motion nor did it seek a curative instruction at any time during the closing arguments to the jury despite the repeated, often baseless, objections by Summit's counsel during Flyte's counsel's closing arguments. RP 2000-2117. Division II properly reviewed the trial court's determination that Summit was not deprived of a fair trial for an abuse of discretion. Op. at 11. Division II appropriately considered both the isolated references at trial to matters that might bear on negligence, as well as counsel's closing argument. Op. at 12-18. With regard to these events, they were plainly isolated events over the course of nearly a month-long trial. In each instance, the trial court appropriately addressed the objections.

The jury is presumed to understand and follow trial court rulings. *Diaz v. State*, 175 Wn.2d 457, 474, 285 P.3d 873 (2012) ("Washington courts have, for years, firmly presumed that jurors follow the court's instructions."). In *Diaz,* this Court held that the jury must be presumed to have heeded a trial court curative instruction to disregard certain evidence.[6] The jury here was therefore presumed not to have considered any facts more relevant to a negligence, rather than an informed consent, argument.

[6] The Court also noted in rejecting an argument for a new trial involving a "minor feature of a fairly lengthy trial" (175 Wn.2d at 460) that had been previously tried *twice* before, that it did not "check our common sense at the door" in rejecting a bid for a new trial. *Id.* at 474.

Moreover, as for any possible prejudice to Summit's right to a fair trial, the case was tried before the Honorable Ronald Culpepper, a seasoned Pierce County trial judge. The trial court discerned no prejudice to Summit's interest in denying its motion for a new trial.[7] In analyzing the existence of any prejudice, our courts defer to trial courts' assessment of the existence of any prejudice because they are "close to the action," having seen the witnesses, the conduct of counsel, and juror reactions "up close and personal." *Teter,* 174 Wn.2d at 223; *see also, Taylor v. Cessna Aircraft Co., Inc.*, 39 Wn. App. 828, 832, 696 P.2d 28, *review denied,* 103 Wn.2d 1040 (1985); *Levea v. G. A. Gray Corp.*, 17 Wn. App. 214, 226, 562 P.2d 1276, *review denied*, 89 Wn.2d 1010 (1977). Appellate courts do not "substitute

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[7] The trial court stated:

> The misconduct by Mr. Beauregard that's alleged by the defense, he did say some things that could have been thought of as arguing negligence. I kind of agree with that. The phrase about "they were way negligent," however, was in rebuttal to Ms. Leedom in her closing saying that negligence isn't an issue, something like that, so he was rebutting that.
>
> The complaints about system failures and the failure to have proper protocol in a sense were negligence arguments, but again, the jury was told this is an informed consent case. They were given instructions on informed consent. That's all they were instructed on. They were told to follow the instructions. I don't have any reason to think they didn't follow the instructions.
>
> So if there was misconduct by Mr. Beauregard, if, I don't see that it really affected the jury's verdict. I assume they followed their instructions and disregarded improper argument.

RP (12/1/15):33-34.

our own judgment for the trial court's judgment in evaluating the scope and effect of [any alleged] misconduct." *Teter,* 174 Wn.2d at 226. Review is not merited on this issue. RAP 13.4(b).[8]

(2) Summit's Argument Regarding Informed Consent and Medical Negligence Is Baseless and Was Not Raised

Summit concocts an entirely new theory in seeking review by this Court, contending that Division II's opinion allegedly "blurs" the distinction between informed consent and medical negligence in RCW 7.70. Pet. at 14-19. This argument is not only baseless, as will be noted *infra*, it was never raised below. It is nothing but a backdoor attempt to raise an argument belied by the facts and procedure below; the jury was properly instructed on informed consent in any event, as Summit *conceded* by not assigning error below to the instructions on informed consent. Br. of Appellant at 2-3.

First, the jury was properly instructed on informed consent in three separate instructions. Instructions 8 and 10 set forth the law on informed consent. *See* Appendix. As noted *supra,* Summit *concedes* that the jury was properly instructed on the law as it never assigned error to those instructions. The jury was not instructed on medical negligence. CP 197-

[8] This Court recently denied review in *Clark v. Teng*, 195 Wn. App. 482, 380 P.3d 173 (2016), *review denied*, 187 Wn.2d 1018 (2017), another case in which an argument of counsel allegedly violated an order on a motion in limine.

216. In fact, it was specifically instructed by Instruction 11 on the difference between a negligent misdiagnosis and informed consent.[9] Summit did not assign error to it. Thus, the "blurring" Summit claims never occurred anywhere in the presentation of the law by the trial court to the jury.

Second, Summit never made this argument to Division II. *Nowhere* in its opening or reply brief is the issue addressed. Tellingly, Division II's lengthy and thorough, unpublished opinion never addresses the issue at all, further reinforcing the fact that Summit raised the issue for the first time in its petition. That is too late. RAP 2.5(a); *Carrera v. Olmstead*, __ Wn.2d __, 401 P.3d 304, 307 n.3 (2017).

Finally, the putative issue is meritless in any event. Division II's opinion faithfully preserves the proper distinction between informed consent and medical negligence claims under RCW 7.70. Summit

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[9] Instruction 11 stated:

> A physician who has not conclusively diagnosed a particular illness may have a duty to disclose information related to the treatment of that illness if the information is reasonably needed by the patient to make an informed decision about treatment. '
>
> When a physician rules out a particular diagnosis based on the circumstances surrounding a patient's condition, there is no duty to inform the patient on treatment options pertaining to a ruled out diagnosis.

CP 210.

incorrectly presumes that the evidence pertinent to medical negligence and informed consent can be artificially sealed from another in any event.

Breach of the standard of care and failure to secure informed consent are alternative methods for establishing the liability of a medical professional to a patient. *Backlund v. Univ. of Wash.*, 137 Wn.2d 651, 659-60, 975 P.2d 950 (1999). To establish a claim of failure to secure informed consent against a medical professional, RCW 7.70.050(1) sets for the elements of an informed consent claim:

> (a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;
>
> (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;
>
> (c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed or such material fact or facts;
>
> (d) That the treatment in question proximately caused injury to the patient.

RCW 7.70.050 (2) indicates what facts are "material" to a patient:

> (a) The nature and character of the treatment proposed and administered;
>
> (b) The anticipated results of the treatment proposed and administered;
>
> (c) The recognized possible alternative forms of treatment; or

> (d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.

As can be seen from these statutory elements of an informed consent claim, the evidence necessary to prove these elements and the elements of a medical negligence claim will often be the same. This Court has recognized that although these claims are distinct, the evidence to prove them may "overlap." *Gomez v. Sauerwein*, 180 Wn.2d 610, 617, 331 P.3d 19 (2014). Inherent in the nature of these alternative methods of proving medical professional liability, particularly in discussing material facts to which the patient is entitled in determining if informed consent was secured, causation, and harm, there will be some cross-over in the evidence necessary to prove the elements. From a practical standpoint, evidence at trial on a misdiagnosis, for example, necessary to prove a breach of the standard of care, will often be necessary in an informed consent case to document the materiality of the risk to the patient, a necessary element of informed consent. There may be instances in which a duty to inform arises from the professional's diagnostic activities, even though the failure to properly diagnose a condition and to secure informed consent are discrete. *Gomez*, 180 Wn.2d at 623; *Gates v. Jensen*, 92 Wn.2d 246, 248, 595 P.2d 919 (1979); *Flyte*, 183 Wn. App. at 574-77 (Summit had a duty to disclose

swine flu pandemic and the treatment option of prescribing Tamiflu). There was no "misconduct" by trial counsel in presenting evidence relevant to Flyte's informed consent claim here, particularly where the trial court was vigilant in policing the evidence.

Division II recounted the instances in which evidence pertinent to a medical negligence claim was allegedly referenced in the examination of witnesses and in closing. Op. at 12-18. These isolated instances in a lengthy trial were appropriately addressed by the trial court upon objection. The lines between "medical negligence" and "informed consent" were not blurred by Division II's opinion, as Summit contends. They were carefully maintained. The experienced trial judge here properly instructed the jury on this "overlap" between negligence and informed consent in Instruction 11, to which Summit never objected. The court also handled the evidence properly, being attentive to distinctions between evidence on informed consent and negligence, upholding objections where necessary. No "blurring" of the claims occurred, despite Summit's belated contrary assertion.

Review is not merited on this issue both because it is not properly before the Court, and because it is meritless. RAP 13.4(b).

(3) The Court of Appeals Correctly Applied Several Liability Principles under RCW 4.22.070 in Addressing Any Offset

Summit offers exactly one paragraph in its petition to address Division II's opinion on several liability and the offset to which was not entitled for the Flytes' settlement with Franciscan that operated St. Joseph Medical Center where Kathryn and Abbigail were treated. Pet. at 19-20. Summit fails to document how Division II incorrectly applied several liability principles, nor can it. It does not claim anywhere in its petition that joint and several liability applied here. Pet. at 19-20. Review of this issue is not merited. RAP 13.4(b).

Summit seemingly has no substantive answer to Division II's analysis, op. at 24-26, and it fails to even address the fact that the 1986 Legislature largely abandoned the common law regime of joint and several liability in favor of several liability principles. RCW 4.22.070. *See generally*, Cornelius J. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 Wash. L. Rev. 233 (1987); Philip A. Talmadge, *Product Liability Act of 1981: Ten Years Later*, 27 Gonz. L. Rev. 153, 166 (1991/92) ("The 1986 Act abrogated the doctrine of joint and several liability where a claimant is in any degree responsible for his or her own injury and adopts the doctrine of several liability."). This Court applied RCW 4.22.070 and its several liability principles in *Washburn v. Beatt Equip. Co.,* 120 Wn.2d 246, 840 P.2d 860 (1992) and *Kottler v. State*, 136 Wn.2d 437, 445-46, 963 P.2d 834

(1998).[10] In *Washburn*, this Court held that the defendant was not entitled to any credit for settlements entered into with other defendants because none of those settling defendants was jointly and severally liable to the plaintiff; the 1986 Legislature's several liability regime set forth in RCW 4.22.070 controlled. *Id.* at 294 ("… it is clear that several liability is now intended to be the general rule.").

Summit pleaded that Kathryn was also at fault for her death. CP 16 ("Any alleged injuries and damages were proximately caused by Decedent's own comparative negligence."). It also asserted that others were at fault. *Id*. But it chose to forego arguing that fault. Instead, it sought an offset for the Franciscan settlement. CP 41-49. Moreover, as Division II noted in its opinion at 26-27, Summit did not seek an instruction as to Franciscan's "empty chair" fault nor an allocation of fault to it. *Id.* In fact, it *stipulated* prior to trial that it would not seek to claim non-party fault as to Franciscan or to allocate fault to it. CP 301-08. Summit did not assign error to the trial court's jury verdict form below. Br. of Appellant at 2-3. Consequently, the jury properly determined Summit's fault, and any request at this late date to require the jury to apportion fault, in light of Summit's

[10] *See also, Waite v. Morrisette*, 68 Wn. App. 521, 525-26, 843 P.2d 1121, *review denied*, 122 Wn.2d 1006 (1993) (in several liability jurisdiction like Washington offsets or credits for settlement are unnecessary where each defendant only bears its proportional share of the overall fault for the plaintiff's damages).

actions below, would be inappropriate. Summit itself *invited* any alleged error it now raises. Op. at 26 n.10.

Division II's unpublished opinion properly addressed this Court's application of legislatively-mandated several liability principles in *Washburn* and *Kottler*. Review is not merited. RAP 13.4(b).

D. CONCLUSION

Summit failed to secure informed consent from Kathryn Flyte regarding all of her pertinent treatment options including the readily available and safe drug Tamiflu that would have prevented her unnecessary death. Summit had a fair trial before a jury properly instructed on the law based on evidence that was properly before the jury. Both the trial court and Division II discerned no misconduct or prejudice to Summit in isolated remarks by Kenneth Flyte's trial counsel. In its careful unpublished opinion, Division II properly applied the law, honoring this Court's precedents on counsel misconduct and several liability. Review is not merited. RAP 13.4(b).

This Court should deny review and affirm the judgment on the jury's verdict. Costs on appeal should be awarded to Flyte.

DATED this 29th day of September, 2017.

Respectfully submitted,

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# APPENDIX

Instruction 8:

In connection with the plaintiffs' claim of injury as a result of the failure to obtain the patient's informed consent to the treatment undertaken, the plaintiffs have the burden of proving each of the following propositions:

First, that the defendant failed to inform the patient of a material fact or facts relating to the treatment;

Second, that the patient consented to the treatment without being aware of or fully informed of such material fact or facts;

Third, that a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts; and

Fourth, that the treatment in question was a proximate cause of injury to the patient.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for the plaintiffs. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

CP 207.

Instruction 10:

A physician has a duty to inform a patient of all material facts, including risks and alternatives that a reasonably prudent patient would need in order to make an informed decision on whether to consent to or reject a proposed course of treatment.

The question of whether or not a physician obtained a patient's informed consent is to be determined by reference to what material facts were know or should have been known at the time of the care and treatment provided.

A material fact is one to which a reasonably prudent person in the position of the patient would attach significance in deciding whether or not to submit to the proposed course of treatment.

CP 209.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Answer to Petition for Review*** in Supreme Court Cause No. 95022-9 to the following parties:

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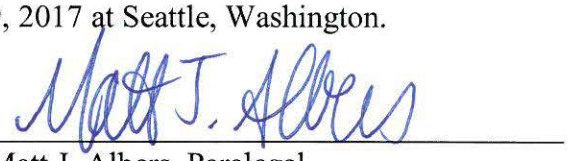
Original E-filed with:
Washington Supreme Court
Clerk's Office

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

DATED: September 29, 2017 at Seattle, Washington.



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