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NO. 62821-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SHARLA TAVARES, individually and as Guardian of the Estate of
MIRIAM TAVARES, a minor, and ERIK TAVARES,

Respondents/Cross-Appellants,

v.

EVERGREEN HOSPITAL MEDICAL CENTER, aka KING COUNTY
PUBLIC HOSPITAL DISTRICT #2,

Appellant/Cross-Respondent.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT IN REPLY

A. Because the Tavareses Failed to Prove Proximate Causation, the Trial Court Erred in Denying Evergreen's Motions for Judgment as a Matter of Law and JNOV.

It is well-established that a verdict “cannot be founded on mere theory or speculation.” *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 818, 733 P.2d 969 (1987). A plaintiff claiming medical negligence has the burden of proving that the defendant’s alleged breach of the applicable standard of care was, to a reasonable degree of medical certainty, a proximate cause of the plaintiff’s alleged injury. RCW 7.70.040(2); *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983); *McLaughlin v. Cooke*, 112 Wn.2d 829, 836-37, 774 P.2d 1171 (1989). To establish cause-in-fact, a plaintiff must establish that the “injury would not have occurred ‘but for’ the defendant’s negligence.” *Estate of Borden ex rel. Anderson v. Dep’t of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004). “Cause-in-fact does not exist if the connection between an act and the later injury is indirect and speculative.” *Id.*

Here, whether Evergreen’s claimed negligence was a proximate cause of Miriam’s injuries hinged on whether, had Dr. Keys been present in the hospital when Mrs. Tavares was admitted, or been notified sooner of Mrs. Tavares’ and the baby’s condition, a C-section delivery would have been accomplished in time to prevent Miriam’s brain damage. Because

the Tavareses failed to prove that Dr. Keys would have accomplished, or that a reasonably prudent OB/GYN would have been required to accomplish, a C-section delivery before the time that her experts say Miriam's brain damage more probably than not occurred, the evidence was insufficient to establish proximate cause and the jury could only speculate whether, "but for" Evergreen's alleged negligence, Miriam's brain damage would not have occurred.

The Tavareses implicitly admit that there was *no direct evidence* that Evergreen's alleged negligence was, to a reasonable degree of medical certainty, a proximate cause of Miriam's brain damage, when they argue, albeit erroneously, (1) that the jury could *reasonably infer* either that "the hospital proximately caused Miriam's anoxic brain injury by not having an obstetrician available to do a C-section at 9:02 and deliver Miriam by 9:06," *Resp. Br. at 17*, or (2) that "if Miriam had been C-sectioned [sic] at any time up to a few minutes before she was delivered at 9:25, she would not have been brain injured," *Resp. Br. at 19*.¹

¹ The Tavareses cite *Douglas v. Freeman*, 117 Wn.2d 242, 814 P.2d 1160 (1991), for the propositions that "a verdict does not rest on speculation or conjecture when founded upon reasonable inferences drawn from circumstantial facts," *id.* at 254-55, and that "[i]f, from the facts and circumstances and the medical testimony given, a reasonable person can infer that the causal connection exists, the evidence is sufficient," *id.* at 252. The problem for the Tavareses, however, is that, unlike the plaintiff in *Douglas*, they did not present sufficient circumstantial facts and medical testimony from which a reasonable jury could infer the necessary causal connection. *Douglas* concerned whether the absence of a dental assistant during plaintiff's wisdom tooth extraction caused Dr. Mark Freeman to perform the procedure in a manner that injured the patient. *Id.* at 254. As the

With regard to the Tavareses' first argument, to establish that the hospital's failure to have an obstetrician available to do a C-section at 9:02 and deliver Miriam by 9:06 proximately caused Miriam's brain damage, it is not enough, as the Tavareses' assert, *Resp. Br. at 15-17*, that Dr. Garite testified, 9/18 RP 115, that he would not have criticized Dr. Keys or said that it was below the standard of care if Dr. Keys would have started the C-section at 9:02 p.m., or that Dr. Keys testified, 9/30 RP 182, that, had she been at Mrs. Tavares's bedside at 8:45, she would have stayed and watched the fetal monitor tracing.² What the Tavareses failed to present was any evidence that the standard of care required Dr. Keys or any other reasonably prudent obstetrician to start the C-section at 9:02 p.m., or complete it by 9:06 p.m., the latest time any of the Tavareses' experts could say with reasonable medical certainty that a C-section delivery would have avoided Miriam's brain damage.

Douglas court noted, Dr. Freeman himself "provided the necessary evidence of causation" *id.* at 253, where he "insisted several times that the presence of a dental assistant was essential during a wisdom tooth extraction," *id.* at 250, and where expert testimony confirmed that an assistant's actions were necessary in certain steps of a wisdom tooth extraction, *id.* at 254. Here, neither Dr. Keys, nor any expert, provided the necessary evidence of causation.

² Nor is it sufficient that the Tavareses claim, *Resp. Br. at 17*, that it only took Dr. Keys three minutes to do the C-section. By the time Dr. Keys arrived at the hospital at 9:18 p.m., the team had already mobilized to the operating room, such that anesthesia was able to begin at 9:20 p.m., and Dr. Keys was able to accomplish the delivery by 9:24 p.m., six minutes after Dr. Keys' arrival. 9/30 RP 17-20, Ex. 4, Ex. 103 (p. 119) There was no expert testimony establishing that it takes only three minutes from decision to incision to complete a C-section delivery.

Dr. Keys testified that, even if she had been in the room at 8:45 p.m., when the decelerations began, she would have continued to watch the strip, but she would not have been operating on Mrs. Tavares at 9:02 or 9:03 p.m.; rather she would have made the decision to go for a C-section at 9:02 or 9:03 p.m., at which point it would take another 5-10 minutes to mobilize the necessary staff, get all the necessary supplies and equipment set up, and transfer the patient to the operating room, and then 4-5 minutes to do the C-section and get the baby out. 9/30 RP 163-66. Thus, by Dr. Keys' account, even if the nurses had made sure Dr. Keys was in Mrs. Tavares' room at 8:45 p.m., Miriam would not have been delivered until 9:11 p.m. at the earliest, or by 9:18 p.m. at the latest. The Tavareses presented no controverting expert testimony establishing that the time sequence described by Dr. Keys was unreasonable or that the standard of care would have required her to intervene any earlier than she says she would have intervened.

According to Dr. Keys' testimony, she would not have delivered Miriam by 9:06 p.m. even if she had been in Mrs. Tavares' room as of 8:45 p.m. Yet, the most the Tavareses' causation experts could say, to a reasonable degree of medical certainty, was that, if delivery had occurred by 9:06 p.m., Miriam would not have had brain damage. That was the most Dr. Nageotte could say. 9/8 RP 123. Dr. Taylor testified that

Miriam was already incurring damage by 9:05 p.m. 9/10 RP 83-84. Dr. Glass, using his “base excess” threshold of injury calculations, placed the period in which Miriam’s acidosis resulted in brain damage as between 9:02 p.m. and 9:06 p.m. 9/9 RP 198.

With regard to the Tavareses’ second argument that there was medical testimony and circumstantial evidence from which “the jury could reasonably infer that if Miriam had been C-sectioned [sic] at any time up to a few minutes before she was delivered at 9:25, she would not have been brain injured,” *Resp. Br. at 19*, the record simply does not bear that out. From the testimony of Dr. Nageotte that the Tavareses cite, but do not always quote or correctly paraphrase, *Resp. Br. at 17-18*, the jury could only speculate whether delivery any time after 9:06 p.m. would have made a difference in Miriam’s outcome. All that Dr. Nageotte could or did say, on a more likely than not basis, was that, had the delivery occurred by 9:06 p.m., Miriam would have not been brain damaged. 9/8 RP 123; *see also* 9/8 RP 140-41, 160-61.

Similarly, the testimony the Tavareses cite, but do not quote or correctly paraphrase from Dr. Garite, *Resp. Br. at 18*, concerning the critical need to get the baby out within 15 minutes in a case of uterine rupture (which Mrs. Tavares did not have), 9/18 RP 100, does not say anything from which a reasonable jury could draw a reasonable inference

that Miriam's brain damage, to a reasonable degree of medical certainty, would have been avoided if she had been delivered any time up to a few minutes before 9:25 p.m. The most Dr. Garite had to say on that score was his admission that he had testified in deposition that "more likely than not, there would not have been injury" if Miriam had been delivered by C-section at 9:06 p.m. 9/18 RP 132-33.

Moreover, neither the generalized testimony of Dr. Taylor about the "30-minute" rule for C-sections, cited by the Tavareses, *Resp. Br. at 18-19*, to the effect that "you don't have 30 minutes" to do a C-section in emergencies, like placental abruptions, cord prolapse, or uterine rupture, because you have "about 10 or 12 minutes" before the baby is damaged, 9/10 RP 90, nor the generalized testimony of Dr. Glass cited by the Tavareses, *Resp. Br. at 19*, about the range of time babies have before brain damage occurs with an evolving abruption, 9/9 RP 49-50, says anything from which a reasonable jury could infer that, in Miriam's case, delivery any time more than a few minutes before 9:25 p.m. would, more likely than not, have avoided her brain damage. Nor does that generalized testimony change the fact that Dr. Taylor testified that, by 9:05 or 9:06 p.m., Miriam was acidotic, 9/10 RP 185-86, and incurring damage, 9/10 RP 83-84, or the fact that Dr. Glass, using his "base excess" threshold of

injury calculations, placed the period in which Miriam's acidosis resulted in brain damage as between 9:02 and 9:06 p.m., 9/9 RP 198.

The Tavareses have presented no expert testimony based on reasonable medical certainty substantiating either their argument on appeal, *Resp. Br. at 19*, or their closing argument to the jury, 10/1 RP 21, that Miriam's brain damage would have been avoided had she been delivered after 9:06 p.m. and up to a few minutes before 9:25 p.m. Nor did they present any expert testimony establishing that Dr. Keys or any other reasonable prudent obstetrician, if present in the hospital when Mrs. Tavares was admitted, or if earlier notified of her condition, would have been required by the applicable standard of care to have delivered Miriam by C-section before 9:06 p.m., the only time by which the experts could say to a reasonable degree of medical certainty that Miriam's brain damage could have been avoided.

Without such evidence, the jury could only speculate whether, had the nurses made sure that Dr. Keys was present at some earlier time, Miriam's brain damage would not have occurred. But, a jury's verdict cannot be founded on mere speculation or conjecture. *Campbell*, 107 Wn.2d at 818. Because the Tavareses failed to present substantial evidence, as opposed to mere speculation and conjecture, that Miriam would have been delivered in sufficient time to avoid her injuries had

Evergreen made sure that Dr. Keys was present and fully informed the evening of Mrs. Tavares' admission, there was insufficient evidence to establish proximate cause and the Tavareses' claims of negligence should not have been submitted to the jury. The trial court erred in denying Evergreen's motions for judgment as a matter of law and JNOV.

B. The Trial Court Erred in Failing to Rule as a Matter of Law that WAC 246-320-365 Did Not Require the Presence of An Obstetrician 24/7, and in Allowing the Experts to Opine About, and the Jury to Decide, the WAC's Meaning.

The Tavareses' assertion, *Resp. Br. at 20-21*, that Evergreen somehow failed to preserve its claim of error as to the trial court's failure to rule on the meaning of the WAC as a matter of law is wholly without merit. Evergreen repeatedly raised and briefed the issue with the trial court, and the trial court was fully apprised of, but repeatedly rejected, Evergreen's position. *See* CP 147-48, 1610-12, 2083-85, 2092-98, 2214, 2235-39, 2314, 2624-28, 3361, 3366; 9/4 RP 165-66, 9/5 RP 233-34. *E.g., Falk v. Keene Corp.*, 53 Wn. App. 238, 242 n.3, 767 P.2d 576, *aff'd in part*, 113 Wn.2d 645, 782 P.2d 974 (1989) (that trial court was fully aware of the nature of appellant's exception is enough to preserve error for appellate review).

"It is the established and unquestioned rule that it is in the province of the court, and not the jury, to interpret a statute or ordinance and to

determine whether it applies to the conduct of a party.” *Ball v. Smith*, 87 Wn.2d 717, 722, 556 P.2d 936 (1976); *Wells v. City of Vancouver*, 77 Wn.2d 800, 804, 467 P.2d 292 (1970). Moreover, it is well-established that “[a] determination of the applicable law is within the province of the trial judge, not that of an expert witness.” *Hyatt v. Sellen Constr. Co.*, 40 Wn. App. 893, 899, 700 P.2d 1164 (1985). Thus, it was for the court, not the experts or the jury, to determine whether WAC 246-320-365 required the presence of an obstetrician in the hospital at all times. The trial court erred in not doing so, and allowing the experts to opine about, and the jury to decide, what the WAC required.

The WAC either does or does not require an obstetrician’s presence in the hospital 24/7. Allowing juries, on a case-by-case basis, to decide whether or not the WAC so requires would allow for inconsistent and absurd results, as the jury in this case would be free to decide that the WAC requires an obstetrician’s presence in the hospital 24/7, while a jury in another case would be free to decide exactly the opposite. It makes no sense to suggest that the same WAC could mean one thing in this case and the opposite in another. That is why it is the court’s, not an expert witness’s or a jury’s, province to determine what the WAC means.

The Tavareses, *Resp. Br. at 22*, cite *Douglas v. Freeman*, 117 Wn.2d 242, 248-49, 814 P.2d 1160 (1991), as standing for the proposition

that “the standard of care for hospitals [may be] defined by statute,” and *Morinaga v. Vue*, 85 Wn. App. 822, 833, 935 P.2d 637 (1997), *rev. denied*, 133 Wn.2d 1012 (1997), as standing for the proposition that “health care regulations like WAC 246-320-365 establish the standard of care.” But, the Tavareses’ assertions ignore the fact that, under RCW 5.40.050, “[a] breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence,” and beg the question of what the trial court should have ruled WAC 246-320-365 legally requires.

Unlike the federal regulation in *Morinaga*, which set forth a clear, 30-day waiting period from the date that a physician obtained the patient’s informed consent and the date that a sterilization was performed (that the physician admittedly violated), WAC 246-320-365 does not clearly mandate that an obstetrician be present within a hospital 24 hours a day, 7 days a week. And, in *Douglas*, while a question was raised as to whether a statutory duty to supervise a dental resident included a duty to provide an assistant, the *Douglas* court, implicitly recognizing that statutory interpretation was within its province, determined that it was not necessary to its decision to resolve that question: “We need not decide whether the statutory duty to supervise includes the duty to provide the necessary

professional assistance since [defendant] by his own testimony provided ample evidence of such a duty.” *Douglas*, 117 Wn.2d at 250.

Douglas does not hold that it is proper to allow experts to opine about, or a jury to decide, what a statute or regulation means or requires, or contradict the well-established rule that such determinations are the province of the court, not of experts or juries. That the court in *Douglas*, 117 Wn.2d at 255-59, determined that the trial court’s denial of the defendant’s motion in limine to exclude evidence of the dental resident’s nonlicensure, and its instructions to the jury on the licensing statute and the licensing exemption statute were proper, does not mean, or even suggest, that it was proper for the trial court in this case to refuse to decide the meaning of WAC 246-320-365, and instead let the experts discuss and the jury decide, its meaning. Contrary to the Tavareses’ assertions, *Resp. Br. at 22-25*, *Douglas* is not apposite.

The Tavareses also argue, *Resp. Br. at 25*, that any error in the trial court’s treatment of the WAC was harmless because their expert testified that both the WAC and Evergreen’s VBAC policy required 24/7 in-house obstetrician coverage. Nothing could be further from the truth. Indeed, the VBAC policy to which the Tavareses allude only requires obstetrician coverage for patients who are in active labor, *see* 9/18 RP 96-97; Ex. 87, and Mrs. Tavares was never in active labor. 9/17 RP 191.

The trial court's error in its treatment of the WAC was not harmless as the Tavareses' counsel had as much as acknowledged in arguing that testimony about the law offered by legally untrained and unqualified medical and nursing experts is "very likely to mislead and confuse the jury." CP 1425.

C. The Trial Court Abused Its Discretion in Allowing Argument And Evidence On Negligence Claims Dismissed On Summary Judgment and in Admitting Nurse Alati's Evaluation Statement.

The Tavareses argue, *Resp. Br. at 26-29*, that evidence that the hospital was negligent based on Nurse Short failure to attend a formal fetal monitoring course, Nurse Short's instruction to Mrs. Tavares to check her Foley catheter, and the nurses' correction of, or failure to correct, inaccuracies in the Tavareses' medical record entries, claims of negligence that were dismissed on summary judgment for want of evidence of proximate cause, were nevertheless relevant to their corporate negligence claim.³ Such evidence, however, was not relevant to their corporate negligence claim in the absence of evidence that such alleged negligence

³ Although the Tavareses make the same arguments about Nurse Alati's statement concerning "unsafe staffing" on her annual evaluation form, their claim of negligence by the hospital in allegedly failing to investigate or follow up on the statement was not one of the negligence claims dismissed on summary judgment. For the reasons discussed in the opening Brief of Appellant at 52-54, and because the statement by Nurse Alati about "unsafe staffing" in her February 2003 evaluation had no tendency to make the determination whether there was unsafe staffing on the evening of May 30 when Mrs. Tavares arrived at the hospital more probable or less probable than it would be without the evidence, the evidence was not relevant under ER 401; and, even if it had some marginal relevance, its probative value was substantially outweighed by the danger of unfair prejudice, such that it should have been excluded under ER 403.

proximately caused the Tavareses' claimed injuries. That is why the claims were dismissed. CP 3365-66; *see also*, RCW 4.24.290, RCW 7.70.040. Without a causal link, evidence of negligence is not of consequence to the determination of the action, and thus is not relevant under ER 401, and its admission served only to suggest "other wrongs" inadmissible under ER 404(b), and to prejudice and mislead the jury, ER 403.

The Tavareses also assert, *Resp. Br. at 28*, that the late entries and time changes in the medical records, and some inaccuracies in the Delivery Record were relevant to the nurses' memory and credibility. While evidence of changes made to or inaccuracies in the nurses' medical record documentation might be relevant to the nurses' memory or credibility, evidence that the nurses' documentation was "negligent" or "below the standard of care" does not have anything to do with the nurses' memory or credibility.⁴ There was no valid reason for the trial court to allow Nurse Mahlmeister or anyone else to so label the nurses'

⁴ The Tavareses cite *Erikson v. Kerr*, 69 Wn. App. 891, 851 P.2d 703 (1993), *aff'd in part and rev'd in part*, 125 Wn.2d 183 (1994), for the proposition that "ER 404(b) does not apply to issues involving the reliability of memory or credibility." *Erickson* is inapposite. Evidence that the nurses' documentation was *negligent* or *below the standard of care* has nothing to do with memory or credibility. It was the evidence and argument concerning *negligence*, for which there was no evidence of proximate cause, that the trial court erred in allowing.

documentation, especially when the claim of negligence had been dismissed on summary judgment for want of evidence of proximate cause.

The Tavareses argue, *Resp. Br. at 29*, that, under *Jordan v. Berkey*, 26 Wn. App. 242, 611 P.2d 1382 (1980), a summary judgment order is only “interlocutory in character and will be modified or abandoned according to the demands of justice.” In *Jordan*, an automobile accident case, the trial court, on plaintiff’s motion in limine to exclude evidence of plaintiff’s alcohol use, ruled that “if [evidence relating to alcohol use is] relevant it will come in, but now I don’t see how it gets to be relevant.” *Id.* at 244. Ultimately, use of alcohol did prove to be relevant to the plaintiff’s physical condition in relation to the determination of his damages and was admitted. *Id.* The appellate court held that the trial court did not err in allowing the evidence, noting that “the ‘order’ was not as definite as [plaintiff] asserts”. *Id.* at 245.

The Tavareses’ argument based on *Jordan* makes no sense. The trial court granted summary judgment dismissing certain negligence claims for want of evidence of proximate cause. It did not overturn its summary judgment order at trial or find that suddenly there was evidence of proximate cause. It simply and inexplicably, for no tenable ground or reason, allowed the Tavareses to present evidence and argument on claims of negligence that had been dismissed on summary judgment and for

which they had no evidence of proximate cause. That was an abuse of discretion and was not harmless.

D. The Trial Court Erred in Giving Instruction No. 22 on Burden Of Proof On Segregating Damages, in Giving Instruction No. 21 on Particular Susceptibility, and in Refusing to Give Evergreen's Proposed Instruction on Aggravation of Pre-Existing Condition.

As the Tavareses correctly note, *Resp. Br. at 30*, their experts opined that Miriam's brain injury occurred in the hospital, while the defense experts opined that her brain injury occurred before she arrived at the hospital. Contrary to their assertion, *Resp. Br. at 31*, the issue of whether her brain injury occurred before or after her mother's arrival at the hospital did not justify the giving of Court's Instruction No. 22 concerning segregation of injury/indivisible injury which erroneously placed the burden of segregating injury occurring to Miriam before and after Mrs. Tavares' arrival at the hospital on Evergreen and erroneously made Evergreen liable for the entire injury (even injury occurring before Mrs. Tavares' arrival at the hospital, if the jury found Miriam's injury indivisible.

Contrary to the Tavareses assertion, *Resp. Br. at 32-33*, neither *Cox v. Spangler*, 141 Wn.2d 431, 5 P.3d 1265 (2000), *Phennah v. Whalen*, 28 Wn. App. 19, 621 P.2d 1304 (1980), nor Restatement (Second) of Torts § 433B supports the trial court's giving of Instruction No. 22. This is not

a case involving two separate accidents, or negligence of two or more tortfeasors, combining to cause a single indivisible injury. In both *Cox* and *Phennah*, the plaintiffs had been involved in two separate accidents, and the courts held that, after the plaintiffs met their initial burden of demonstrating that each of the defendants had caused some damage, the burden to allocate that damage shifted to the defendants. *See Cox*, 141 Wn.2d 131 at 442-47. The Restatement section also focuses upon the conduct of two or more actors. The comment to the Restatement that the Tavareses quote, *Resp. Br. at 32*, is a comment concerning the second paragraph of § 433B, which states:

Where the tortious conduct of ***two or more actors has combined*** to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor. [Emphasis added.]

Cox, 141 Wn.2d at 443 (quoting Restatement (Second) of Torts, § 433B).

In this case, Evergreen was the only alleged tortfeasor, the Tavareses had the burden of proving what, if any, injuries or damages were proximately caused by Evergreen's alleged negligence, and Evergreen could not be held liable for pre-existing injuries that it did not cause. RCW 4.24.290; RCW 7.70.040; *Wagner v. Monteilh*, 43 Wn. App. 908, 910-12, 720 P.2d 847, *rev. denied*, 106 Wn.2d 1014 (1986) (jury

properly instructed that plaintiff had burden of proving defendant's negligence and that such negligence proximately caused him injury, and that defendant was not liable for damages caused by the initial hand injury for which plaintiff sought treatment from defendant). Instruction No. 22 impermissibly and prejudicially required the jury, if it thought Miriam's injury could not be divided, to hold Evergreen liable for injuries that occurred *before* the Tavareses arrived at the hospital and *before* any of Evergreen's alleged negligence occurred. "[A]n instruction's erroneous statement of the law is reversible error where it prejudices a party." *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67,92, 896 P.2d 682 (1995). The trial court's giving of Instruction No. 22 was prejudicial error.

The trial court's giving of Court's Instruction No. 21 on particular susceptibility (Instruction No. 21) and failure to give Evergreen's proposed instruction on aggravation of pre-existing condition were also prejudicial error. The Tavareses did not present substantial evidence establishing to a reasonable degree of medical certainty that Miriam's pre-existing condition made her more susceptible to the injuries they claim Evergreen's alleged negligence proximately caused. The Tavareses cite, *Resp. Br. at 36*, to testimony from Dr. Glass, 9/9 RP 81, that pre-existing chorioamnionitis, funisitis, meconium, and cord inflammation "*could have predisposed [Miriam] to a more severe injury.*" [Emphasis added.] But,

evidence as to whether a pre-existing “could have” predisposed, as opposed to evidence that “to a reasonable degree of medical certainty” or “more probably than not” it did predispose Miriam to a more severe injury is not sufficient to warrant the giving of the particular susceptibility instruction.

Even if there were substantial evidence supporting the giving of the particular susceptibility instruction, there was also evidence supporting the giving of WPI 30.17, the aggravation of pre-existing condition instruction that Evergreen proposed, but the trial court erroneously refused to give.⁵ There was ample evidence that Miriam had sustained disabling injury and brain damage before anyone at Evergreen became involved in her care. *App. Br. at 22-24*. This is not a case of a person’s “congenital weakness” as in *Reeder v. Sears, Roebuck & Co.*, 41 Wn.2d 550, 250 P.2d 518 (1952), cited by the Tavareses, *Resp. Br. at 36*, but rather disabling injury and brain damage occurring in a person who had not yet been born.

E. The Trial Court Erred In Giving Court’s Instruction No. 14 Regarding the JCAHO Standard.

Citing to *Douglas v. Freeman*, 117 Wn.2d at 249, and *Pedroza v. Bryant*, 101 Wn.2d 226, 233, 677 P.2d 166 (1984), the Tavareses argue

⁵ The Tavareses correctly note that, in the opening Brief of Appellant at p. 46, there is a mistake in the quotation from WPI 30.17. The aggravation of pre-existing condition instruction applies when the “plaintiff had a preexisting bodily condition which *was* causing pain or disability.”

that the JCAHO standard provides a standard of care to which hospitals must adhere. *Resp. Br. at 37-38*. But, the JCAHO standard was only *evidence* of the standard of care, and nothing more. *See App. Br. at 50-51* and cases cited therein. It was error for the trial court to instruct on the JCAHO standard as if it were the law, rather than evidence bearing on the question of negligence.

II. RESPONSE TO CROSS-APPEAL

The trial court did not err in denying the Tavareses' motion for JNOV and new trial on the parents' claims for damages.

A. Standard of Review.

In reviewing a trial court's denial of a motion for JNOV, the appellate court applies the same standard as the trial court. *Hizey v. Carpenter*, 119 Wn.2d 251, 271, 830 P.2d 646 (1992). A JNOV is proper only when the court can find, "as a matter of law, that there is neither evidence nor reasonable inference therefrom sufficient to sustain the verdict." *Goodman v. Goodman*, 128 Wn.2d 366, 371, 907 P.2d 290 (1995); *Hizey*, 119 Wn.2d at 271. "A motion for a JNOV admits the truth of the opponent's evidence and all inferences that can be reasonably drawn therefrom, and requires the evidence be interpreted most strongly against the moving party and in the light most favorable to the opponent." *Goodman*, 128 Wn.2d at 371.

B. The Tavareses Waived Any Claim of Inconsistent Verdict by Failing to Raise the Issue Before the Jury Was Excused.

The Tavareses did not raise any objection based on alleged inconsistency in the verdict awarding damages to Miriam, but not to her parents, at the time the jury was polled or before the jury was discharged. They therefore waived any claim of inconsistent verdict. *Minger v. Reinhard Distributing Co., Inc.*, 87 Wn. App. 941, 946, 943 P.2d 400 (1997); *Gjerde v. Fritzsche*, 55 Wn. App. 387, 393-94, 777 P.2d 1072 (1989).

Malarkey Asphalt Co. v. Wyborney, 62 Wn. App. 495, 814 P.2d 1219 (1991), relied upon by the Tavareses, *Resp. Br. at 49*, does not support a contrary conclusion. The court in *Malarkey*, 62 Wn. App. at 510-11, recognized the general rule that a party must raise a point of error at the time it occurs so that the trial court has an opportunity to correct the error and avoid the necessity of an appeal or a new trial. Waiver was not found in *Malarkey* because the issues presented questions of first impression and the jury verdict was inconsistent with clearly established legal principles. That is not the case here.

C. The Jury's Verdict Is Not Inconsistent.

The jury found that Evergreen proximately caused injury or damage to Miriam Tavares, but not to Sharla or Erik Tavares, and awarded Miriam over \$4.2 million in damages. CP 2322-23.

The loss of consortium claims of Sharla and Erik were separate, not derivative, claims for damages from the damage claim of Miriam. *Green v. A.P.C.*, 136 Wn.2d 87, 101, 960 P.2d 912 (1998); *Reichelt v. Johns-Mansville Corp.*, 107 Wn.2d 761, 776, 733 P.2d 530 (1987). Thus, legally, there was no reason why the jury could not find that Evergreen proximately caused injury to Miriam, but not to Erik and Sharla. As courts in other jurisdictions have made clear, a verdict is not inconsistent merely because the jury awards damages to one family member who sustained injury but denies recovery to another family member claiming loss of consortium. *See e.g., Streight v. Controy*, 279 Or. 289, 291-92, 566 P.2d 1198 (Or. 1977) (loss of consortium claim was a separate cause of action, plaintiff's husband had burden of proving his damages, and jury did not have to accept his evidence on loss of consortium at face value); *Waterfield v. Quimby*, 277 Ark. 472, 644 S.W.2d 241, 243 (Ark. 1982) (“With respect to the issue of whether the verdict is inconsistent because no loss of consortium recovery is awarded to the spouse of the injured party, we agree with the cases holding that the jury need not, as a matter of law, give a pecuniary award for loss of consortium where damages are awarded to the injured spouse.”).

In reviewing a special verdict form that is alleged to contain inconsistent answers, the court must reconcile the jury's answers when

possible. *Estate of Stalkup v. Vancouver Clinic, Inc.*, 145 Wn. App. 572, 586, 187 P.3d 291 (2008). Here, the jury's special verdict form answers can be reconciled as the answers are consistent with the evidence Evergreen presented that Miriam had sustained significant injury *before* Mrs. Tavares arrived at Evergreen. *See App. Brief at 22-24*. Based upon that evidence, the jury could have determined that Sharla and Erik Tavares were already going to be impacted by the difficulty of raising a significantly neurologically impaired child, and were already going to face the loss of services and consortium, mental anguish, and inconvenience that they were claiming in this case.

Palmer v. Jensen, 132 Wn.2d 193, 937 P.2d 597 (1997), relied upon by the Tavareses, *Resp. Br. at 47-48*, is inapposite. In *Palmer*, the jury awarded the motorist plaintiff the entirety of her requested *special* damages for medical bills incurred in treatment of her lower back problems, but failed to award plaintiff any *general* damages despite ample evidence of her pain and suffering up to two years post-accident. *Palmer*, 132 Wn.2d at 195-96. Here, the jury did not award any damages whatsoever to Erik or Sharla Tavares, and from the evidence presented at trial concerning Miriam's pre-existing injury, could properly have concluded that Sharla and Erik's claimed damages were not proximately caused by Evergreen's alleged negligence.

D. If This Court Concludes that the Verdict Is Inconsistent, Then a New Trial on All Issues Should Be Ordered.

If the Court finds the verdict inconsistent, it should remand for new trial on all issues, as there is no rational basis for parsing out which of the two verdicts should stand, and which should be retried. *See, e.g., Rhodes v. Winn-Dixie Greenville, Inc.*, 249 S.C. 526, 155 S.E.2d 308, 309-10 (S.C. 1967); *Coleman v. NYC Transit Auth.*, 28 Misc. 2d 694, 695, 208 N.Y.S.2d 186 (1960). In *Rhodes*, 155 S.E.2d at 309, where the jury returned a verdict in favor of the plaintiff wife for a fall in defendant's store, but against the plaintiff husband for loss of consortium and the trial court granted a new trial only on the husband's damages only, the appellate court reversed, stating:

The Court should not be required to speculate as to which verdict was valid and which was invalid. At best a determination by the judge as to which case should be tried over and which should be allowed to stand could only involve his appraisal of the evidence.

E. If This Court Concludes that the Verdict is Inconsistent, this Court Should Reinstate Evergreen's Affirmative Defense as to the Parent's Contributory Fault in Connection with the Parents' Claims.

If the court finds that the verdict as to Miriam is inconsistent with the verdict as to Sharla and Erik, then the Court must also reverse the trial court's determination that Sharla and Erik could not be held contributorially at fault for their claimed injuries when they rejected their

physicians' very strong recommendations that they not proceed with VBAC post-dates. 9/2 RP 95-97.

There was ample evidence presented that could have, and should have, been considered by the jury in terms of Sharla's and Eric's contributory negligence in insisting, against Mrs. Tavares' physicians' advice, a VBAC delivery post-dates. *E.g.*, CP 289-91, CP 313-14, CP 53; 9/17 RP 183-90; Ex. 104. The jury heard evidence that Erik and Sharla rejected two physicians' strong recommendations that they proceed with an elective C-section and not have a VBAC post-dates. CP 289-91, CP 313-14, CP 53; 9/17 RP 183-90; Ex. 104. By ruling as a matter of law that Sharla and Erik could not be held contributorily negligent in connection with their loss of consortium claims, the trial court usurped the jury's function to determine fault for their claimed injuries.

The issue of contributory negligence is generally one for the jury to determine from all the facts and circumstances of the particular case. The court should instruct the jury on the issue unless the evidence is such that all reasonable minds would agree that the plaintiff had exercised the care which a reasonably prudent man would have exercised for his own safety under the circumstances.

Rollins v. King Co. Metro Transit, 148 Wn. App. 370, 382, 199 P.3d 499 (2009).⁶

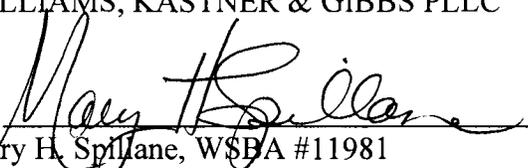
⁶ The Tavareses argued below, and may argue in their reply brief on their cross-appeal, that the Sharla and Erik Tavares could not be held contributorily at fault for their own injuries because of parental immunity. The trial court correctly rejected that argument.

III. CONCLUSION

Because the Tavareses failed to establish proximate cause, this Court should reverse the trial court's denials of Evergreen's motions for judgment as a matter of law and remand the case for entry of judgment in favor of Evergreen. Alternatively, because of the trial court's multiple other erroneous legal and evidentiary rulings adverse to Evergreen, this Court should remand the case for a new trial of the negligence claims against Evergreen brought on behalf of Miriam. This Court should affirm the trial court's entry of judgment on the jury verdict in favor of Evergreen on the parents' claims, but, if this Court finds the verdict inconsistent, it should remand for new trial of all claims, including Evergreen's claims of contributory fault by the parents on the parents' claims.

RESPECTFULLY SUBMITTED on September 25, 2009.

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RCW 4.22.070 contemplates that fault shall be apportioned to all at-fault persons, including those who may be immune from liability. That parents may be immune from liability to others for negligently failing to supervise their child has nothing to do with whether parents may be held contributorily at fault for their own claimed injuries. Nor does the inability to attribute fault of the parents to the child for purposes of the child's claims mean that fault of the parents cannot be attributed to the parents on their own claims.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 25th day of September, 2009, I caused a true and correct copy of the foregoing document, "Reply Brief of Appellant," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

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DATED this 25th of September, 2009, at Seattle, Washington.

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