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NO. 64363-1-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LOUIS ALEXANDER DIAZ and MONA DIAZ,

Appellants,

v.

JAYANTHI KINI, M.D., and MEDICAL CENTER
LABORATORY, INC., P.S.,

Respondents.

BRIEF OF RESPONDENTS

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I. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court properly conclude that, under RCW 7.70.080's abrogation of the collateral source rule in medical malpractice cases, evidence of compensation paid by former co-defendants in settlement of plaintiffs' claims against them was admissible?

2. Given that juries are presumed to follow the court's instructions, does the fact that the trial court instructed the jury not to use the evidence it heard concerning the plaintiffs' settlement with former co-defendants either to "assume [the former co-defendants] acted negligently to cause damage to the plaintiffs" or to "excuse any liability you find on the part of Dr. Kini or MCL [her employer]", CP 301 (Court's Instruction No. 8), defeat, as a matter of law, plaintiffs' claim, *App. Br. at 19-20*, that they were prejudiced because the settlement evidence might have "induced" the jury "to find no liability on the part of defendant regardless of the evidence", or might have led the jury "to deny the claim against Dr. Kini and MCL based on the perception that [the former co-defendants] would not have paid . . . \$400,000 if [they] were not the part[ies] at fault"?

II. COUNTERSTATEMENT OF THE CASE

A. Nature of the Case.

In this medical malpractice action, Louis Diaz and his wife sued two sets of health care providers: (1) Dr. Neal Futran and his employer,

the University of Washington (“UW”); and (2) Dr. Jayanthi Kini and her employer, Medical Center Laboratory, Inc., P.S. (“MCL”). CP 3-9, 129-35. The Diazes alleged that Dr. Kini, a pathologist, negligently failed to communicate her uncertainty in diagnosing invasive laryngeal cancer from a biopsy specimen, *see* CP 6, 78, 95, and that Dr. Futran, a surgeon, negligently operated to remove Mr. Diaz’s larynx without obtaining a second and more definitive pathology opinion, *see* CP 5-7 and 132-33. The Diazes claimed that both Dr. Kini and Dr. Futran should have diagnosed the lesion in Mr. Diaz’s neck as non-cancerous. *See* CP 6-7, 306. The Diazes alleged that MCL was vicariously liable for Dr. Kini’s acts and omissions and that the UW was vicariously liable for Dr. Futran’s acts and omissions. CP 4, 129-30, 301 (Court’s Instruction No. 7).

Shortly before the first trial, in May 2008, Dr. Futran and the UW settled with the Diazes for \$400,000, CP 314, and were dismissed from the lawsuit, CP 209-12. Evidence of Dr. Futran’s and the UW’s settlement with the Diazes was not admitted at the ensuing trial against Dr. Kini and MCL, which ended with a deadlocked jury. CP 307.

The Diazes’ malpractice claims against Dr. Kini and MCL were re-tried before a second jury in July 2009. CP 286-97. Dr. Kini’s and MCL’s defense, supported by ample expert testimony, was that Dr. Kini had not been negligent and that Mr. Diaz did have cancer. *See* CP 155,

306, 323-25, 333-35, 342-44, 349, 352-53.

Before the second trial, the trial court, the Honorable Suzanne Barnett, ruled that evidence of the Diazes' settlement with Dr. Futran and the UW, and the amount of the settlement, was admissible under RCW 7.70.080. *See* CP 307-09.¹ In opening statement, plaintiffs' counsel told the jury of the settlement. *See* CP 309, 322. Defendants did not present any evidence of the settlement. CP 322.

At the conclusion of trial, the trial court gave Court's Instruction No. 8, which told the jury:

You have heard evidence that the University of Washington and Dr. Neal Futran were once parties to this litigation and later entered into a settlement with the plaintiffs, paying the plaintiffs \$400,000. This evidence should not be used to either (a) assume the University of Washington or Dr. Futran acted negligently to cause damage to the plaintiffs, (b) excuse any liability you find on the part of Dr. Kini or MCL, or (c) reduce the amount of any damages you find were caused by Dr. Kini or MCL. By giving you this instruction, the court does not mean to instruct you for which party your verdict should be rendered.

CP 301. The Diazes have not assigned error to the giving of Court's Instruction No. 8. Their opening brief does not say what, if any, exception their counsel took to Court's Instruction No. 8. According to the partial verbatim report of proceedings, all the Diazes' counsel said by way of

¹ Evidently, the "Ruling on Evidentiary Issues" of which CP 307-09 is a part was entered after trial to confirm and explain two evidentiary rulings made before trial.

exception to that instruction was that:

Formally I object to Instruction No. 8 for all the reasons that have been briefed and argued with respect to the admission of any discussion of settlement and the fact that the University of Washington was a party and the amount of the settlement.

7/23 RP 19.

The jury reached a unanimous verdict in favor of Dr. Kini and MCL on July 23, 2009, answering “No” to the question: “Were defendants negligent in one or more of the ways alleged by plaintiffs and, if so, was defendants’ negligence a proximate cause of injury to plaintiffs, Louis and Ramona Diaz?”. CP 296, 297. The jury did not reach the question of damages. CP 297.

The trial court entered judgment on the verdict on August 27, 2009. CP 310-12. The Diazes moved for a new trial, arguing that the verdict was against the weight of the evidence and was tainted by the disclosure of their \$400,000 settlement with Dr. Futran and the UW. CP 313-20. The trial court denied the motion for new trial by order signed on September 22, 2009, and entered on September 23, 2009. CP 354.

The Diazes appealed. CP 356-67. On appeal, the Diazes have not asserted that the verdict was somehow against the weight of the evidence.²

² Nor could they. Although, in their opening brief, the Diazes have devoted some eight pages to a self-serving account of their theories of the case against Dr. Kini and MCL, they failed to include in that account, or in the partial verbatim report of proceedings, any

Nor have they assigned error to the giving of Court's Instruction No. 8, to the judgment on the jury's verdict entered on August 27, 2009, or to the order denying their motion for new trial entered on September 23, 2009.

III. STANDARD OF REVIEW

The interpretation of statutes and evidence rules are questions of law subject to *de novo* review. *Lawson v. City of Pasco*, 168 Wn.2d 675, 678, 230 P.3d 1038 (2010) (statute); *State v. Foxhoven*, 161 Wn.2d 168, 174, P.3d 786 (2007) (evidence rule). A trial court's decision to admit or exclude evidence under a correctly interpreted statute or rule is reviewed for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); *Foxhoven*, 161 Wn.2d at 174. Without prejudice, however, any error or abuse of discretion in the admission or exclusion of evidence is not grounds for reversal. *See State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 688 P.2d 571 (1983).

IV. SUMMARY OF ARGUMENT

On this appeal, the Diazes argue that the disclosure to the jury of the compensation they received in their settlement with Dr. Futran and the UW prejudiced them by “la[y]ing the groundwork” for “induc[ing] the

of the evidence that the defense presented to counter the Diazes' theories. Nonetheless, it is apparent from the clerk's papers, that the defense presented ample evidence to defeat the Diazes' claims and to show that Dr. Kini was not negligent and that Mr. Diaz in fact had cancer. *See* CP 155, 306, 323-25, 333-35, 342-44, 349, 352-53.

jury] to find no liability on the part of the defendant regardless of the evidence”, *App. Br. at 19-20*, and by leading the jury “to deny the claim against Dr. Kini and MCL based on the perception that UWMC would not have paid the substantial sum of \$400,000 if it were not the party at fault,” *App. Br. at 20*. That argument ignores the fact that the trial court specifically instructed the jury, CP 301 (Court’s Instruction No. 8), that it was not to use the evidence concerning the settlement either to “assume the University of Washington or Dr. Futran acted negligently to cause damage to the plaintiffs” or to “excuse any liability you find on the part of Dr. Kini or MCL”.

In light of the presumption that juries are presumed to follow the court’s instructions, plaintiffs’ claim of prejudice from the admission of evidence of the settlement does not withstand scrutiny. Even if the trial court had erred in ruling that the evidence was admissible, which it did not, error without prejudice does not warrant reversal. Because the Diazes’ prejudice argument fails, and error without prejudice does not warrant reversal, this court may affirm the judgment on the jury’s verdict and the order denying the Diazes’ motion for new trial without reaching or addressing the Diazes’ arguments that the trial court erred in allowing the settlement with Dr. Futran and the UW to be disclosed to the jury.

Even if this Court chooses to reach the Diazes' arguments concerning admissibility, evidence of the settlement was admissible under RCW 7.70.080, which abrogated the common law collateral source rule in medical malpractice actions, and which provides in pertinent part that: "Any party may present evidence to the trier of fact that the plaintiff has already been compensated for the injury complained of from *any source* except the assets of the plaintiff, the plaintiff's representative, or the plaintiff's immediate family." [Emphasis added.] The trial court correctly concluded that, under RCW 7.70.080, evidence that the plaintiffs had received compensation from their settlement with Dr. Futran and the UW for the injuries for which they sought damages from Dr. Kini and MCL was admissible. The cases relied upon the Diazes are not to the contrary. And, the evidence concerning the settlement was not admitted for any purpose proscribed by ER 408.

Because the trial court's admissibility ruling was correct, and/or because the Diazes' claim of prejudice fails given the trial court's limiting instruction which the jury is presumed to have followed, the judgment on the jury verdict and the order denying the Diazes' motion for new trial should be affirmed.

V. ARGUMENT

A. Because the Trial Court Instructed the Jury Not to Use the Evidence of the Settlement in the Ways the Diazes Claim Such Evidence Would Be Prejudicial, and Because the Jury Is Presumed to Have Followed the Court's Instructions, the Diazes' Claim of Prejudice Fails as a Matter of Law.

The Diazes devote most of their opening brief to a self-serving description of the evidence they presented on liability and to arguments that it was error for the trial court to let the jury learn about their settlement with Dr. Futran and the UW. They devote less than two full pages of their brief to an argument that disclosure of the settlement was prejudicial to their case. *See App. Br. at 19-20*. All they argue in that regard is that disclosure of the settlement prejudiced them by “la[ying] the groundwork” for “induc[ing the jury] to find no liability on the part of the defendant regardless of the evidence,” *App. Br. at 19-20*, and by leading the jury “to deny the claim against Dr. Kini and MCL based on the perception that UWMC would not have paid the substantial sum of \$400,000 if it were not the party at fault.” *App. Br. at 20*.³

³ The Diazes also quote *Northington v. Sivo*, 102 Wn. App. 545, 550, 8 P.3d 1067 (2000), for the proposition that admission of settlement evidence “can have a ‘corrosive’ effect on the jury.” *App. Br. at 19*. They do not suggest that the corrosive effect the admission of settlement evidence had in this case consisted of the jury doing anything other than drawing the inferences they specify, *i.e.*, that Dr. Futran and the UW must be at fault and that Dr. Kini must not be at fault, because Dr. Futran and the UW paid the Diazes so much money. Nor do the Diazes acknowledge that, even in *Northington*, which was not a medical malpractice case governed by RCW 7.70.080’s abrogation of the collateral source rule, notwithstanding the court’s determination that the admission of evidence of a

The Diazes' prejudice argument ignores the fact that the trial court instructed the jury that the settlement evidence should not be used to "assume the University of Washington or Dr. Futran acted negligently to cause damage to the plaintiffs," or to "excuse any liability you find on the part of Dr. Kini or MCL." CP 301 (Court's Instruction No. 8).⁴ There is no evidence that the jury disregarded those instructions, nor do the Diazes argue that the jury did. Indeed, the jury is presumed to have followed the court's instructions. *Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 152, 210 P.3d 337 (2009); *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 318, 189 P.3d 178 (2008); *A.C. ex rel. Cooper v. Bellingham Sch. Dist.*, 125 Wn. App. 511, 521-22, 105 P.3d 400 (2004).

Applying the presumption that the jury followed Court's Instruction No. 8, it follows that the Diazes are wrong: the jury *was not* "induced to find no liability" on the part of Dr. Kini and MCL, and the jury *did not* "deny the [Diazes'] claim against Dr. Kini and MCL based on the perception that UWMC would not have paid . . . \$400,000 if it were not the party at fault." Thus, as a matter of law, the only prejudice that the

nonparty's settlement with a plaintiff to prove bias was error, the court concluded that the admission of evidence of settlement had been harmless error.

⁴ Indeed, although the Diazes, in their opening brief, cite CP 301 for the proposition that "the court instructed the jury as to the amount of the settlement and the fact that the UWMC and Dr. Futran had been defendants", *App. Br. at 11*, they inexplicably neither quote Court's Instruction No. 8, nor acknowledge the limitations that that instruction placed on the jury's use of the evidence concerning settlement.

Diazes claim resulted from the trial court's ruling allowing evidence of the settlement with Dr. Futran and the UW to be disclosed to the jury did not occur.

Error without prejudice is not grounds for reversal. *See Bourgeois*, 133 Wn.2d at 403; *Brown*, 100 Wn.2d at 196. Because the Diazes fail to demonstrate prejudice, this Court need not reach the Diazes' arguments that the trial court erred by allowing disclosure of the settlement to the jury under RCW 7.70.080. If, however, the Court does reach those arguments, it should reject them for reasons set forth below.

B. The Trial Court Did Not Err in Admitting Evidence of the Settlement Under RCW 7.70.080.

1. RCW 7.70.080 makes evidence that a medical malpractice plaintiff has received compensation for the complained of injury from any source, except the assets of the patient, the patient's representative, or the patient's immediate family, admissible.

In enacting RCW ch. 7.70, the 1975-76 Legislature made a number of substantive modifications to the law governing medical malpractice actions for health care provided after June 25, 1976. *See* RCW 7.70.010; *Branom v. State*, 94 Wn. App. 964, 968, 974 P.2d 335 (1999) ("In enacting RCW 7.70.010, the Legislature "modified the substantive aspects of all causes of action . . . for damages for 'injury occurring as a result of health care'"). The enactment of RCW 7.70.080 was one of the 1975-76 modifications the Legislature made to the law governing medical

malpractice actions. As further amended in 2006, RCW 7.70.080 provides:

Any party may present evidence to the trier of fact that the plaintiff has already been compensated for the injury complained of from *any source* except the assets of the plaintiff, the plaintiff's representative, or the plaintiff's immediate family. In the event such evidence is admitted, the plaintiff may present evidence of an obligation to repay such compensation and evidence of any amount paid by the plaintiff, or his or her representative or immediate family, to secure the right to the compensation. ***Compensation as used in this section shall mean payment of money*** or other property to or on behalf of the plaintiff, rendering of services to the plaintiff free of charge to the plaintiff, or indemnification of expenses incurred by or on behalf of the plaintiff. Notwithstanding this section, evidence of compensation by a defendant health care provider may be offered only by that provider. [Emphases supplied.]

In enacting RCW 7.70.080, the Legislature abolished the collateral source rule in medical malpractice cases for the purpose of preventing double recoveries in such cases. See *Mahler v. Szucs*, 135 Wn.2d 398, 412 n.4, 957 P.2d 632 (1998) (noting that, through the enactment of RCW 7.70.080, “[t]he Legislature has abolished the collateral source rule in the specific case of injuries occurring as a result of health care . . .”).⁵ As the

⁵ Generally, under the collateral source rule, a tortfeasor may not make known to the jury, in order to get a reduction in damages, the fact that the plaintiff has received, from a collateral source, compensation for the injury allegedly inflicted by the tortfeasor. See *Mazon v. Krafchick*, 158 Wn.2d 440, 452, 144 P.3d 1168 (2006) (“The collateral source rule is an evidentiary principle that enables an injured party to recover compensatory damages from a tortfeasor without regard to payments the injured party received from a source independent of a tortfeasor The rule [is] a means of ensuring that a fact finder will not reduce a defendant’s liability because the claimant received money from other sources, such as insurance carriers”).

court explained in *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 40-41, 864 P.2d 921 (1993):

The primary motivation in doing away with the collateral source rule is [that] the rule allows plaintiffs to recover more than their total damages. Under the collateral source rule, a plaintiff could recover 100 percent of the damages from a liable defendant, even if the plaintiff had already recovered a portion of their [sic] damages from another source, such as insurance. Because the rule over-compensated plaintiffs, it came to be viewed as imposing unnecessary costs on society and causing higher insurance premiums. [Citation omitted].

Thus, by abolishing the collateral source rule for medical malpractice cases, the Legislature has allowed defendants in such cases to show that plaintiffs have received payments for their injuries from other sources.

Since *Adcox* was decided, the Legislature has broadened RCW 7.70.080, to make evidence of more kinds of what otherwise would be "collateral sources" admissible in medical malpractice cases. From 1976 to 2006, the fact that medical malpractice plaintiffs had received compensation for their injuries from insurance purchased with their own funds was expressly excepted from the evidence of compensation admissible under RCW 7.70.080. A 2006 amendment eliminated that exception, and thus made the plaintiff's receipt of insurance benefits admissible, subject to the plaintiff's right to show that he or she has an obligation to repay the insurer. *Laws of 2006, ch. 8, § 315.*

2. Under the plain terms of RCW 7.70.080, evidence of the settlement with Dr. Futran and the UW was admissible.

Dr. Futran and the UW paid the Diazes \$400,000 for the injuries for which they sought to recover damages in this lawsuit. CP 301, 314. Payment of money constitutes “compensation” within the meaning of RCW 7.70.080:

Compensation as used in this section shall mean payment of money . . . to or on behalf of the plaintiff, rendering of services to the plaintiff free of charge to the plaintiff, or indemnification of expenses incurred by or on behalf of the plaintiff.

Under the plain terms of RCW 7.70.080: (1) “Any party”; (2) “may present evidence to the trier of fact that the plaintiff has already been compensated for the injury complained of”; (3) “from any source except the assets of the plaintiff, the plaintiff’s representative, or the plaintiff’s immediate family.” All of these statutory prongs were met. First, Dr. Kini, MCL, and the Diazes were parties at trial. Second, the evidence at issue was evidence that, by way of the compensation Dr. Futran and the UW paid the Diazes in settlement, the Diazes had already been compensated for injuries that they were claiming in their lawsuit against Dr. Kini and MCL.⁶ And third, the compensation that Dr. Futran and the UW paid the Diazes in settlement did not come from assets of the Diazes,

⁶ The Diazes did not claim in the trial court, and have not claimed on appeal, that the compensation they received from Dr. Futran and the UW was compensation for something other than injuries complained of in this lawsuit.

their representatives, or their immediate family.

Thus, because the compensation at issue compensated the Diazes for injuries they were claiming in this lawsuit, and did not come from the assets of the Diazes, their representatives, or their immediate family, the statutory prerequisites were satisfied, no exception applied and, under RCW 7.70.080, “any party,” including Dr. Kini and MCL, was entitled to present evidence that the Diazes had “already been compensated for the injury complained of” in their settlement with Dr. Futran and the UW.

3. The last sentence of RCW 7.70.080, that “evidence of compensation by a defendant health care provider may be offered only by that provider”, does not preclude evidence of a settlement by a health care provider who is no longer a defendant in the case.

The Diazes argue that the “plain language” of the last sentence of RCW 7.70.080 (which states that “evidence of compensation by a defendant health care provider may be offered only by that provider”) “contemplates the ‘compensation by a health care provider’ refers to health care providers who are defendants at the time the agreement to pay compensation is made,” such that only Dr. Futran or the UW, who were no longer parties to the case by the time of trial, were entitled to offer evidence of the settlement compensation they paid to plaintiffs. *See App. Br. at 16-17.* The Diazes “plain language” argument fails for any number of reasons.

First, it makes no sense to read the last sentence of RCW 7.70.080 as authorizing only a nonparty to “offer” evidence that he or she settled with the plaintiff. At the time the evidence was offered, Dr. Futran and the UW were not parties to the action; they had been dismissed by reason of their settlement. Someone who is a nondefendant by reason of a settlement is not in a position, at trial, to “offer” evidence. Evidence is “offered” by parties, including nonsettling defendants, but is not “offered” by nonparties.

Second, the Diazes’ proposed interpretation of the last sentence of RCW 7.70.080 is textually incorrect. The first sentence of RCW 7.70.080 makes clear that its subject is what a *party* may offer in evidence, when it provides that: “**Any party** may present evidence to the trier of fact that the plaintiff has already been compensated for the injury complained of” [Emphasis added.] The statute speaks to what *any party* may offer in evidence, not to what nonparties might “offer” if nonparties could ever “offer” evidence. The *parties* to this case at trial, and at the time the evidence was being offered, were the Diazes and Dr. Kini and MCL, not Dr. Futran or the UW.

Third, the key word in the last sentence of RCW 7.70.080 is the word “*defendant*”. That last sentence speaks to who is able to present evidence of compensation paid to the plaintiff by “a *defendant* health care

provider” (emphasis added), and thus does not limit who can offer evidence of compensation paid to the plaintiff by a health care provider who is *not a defendant*. The term “defendant” in the last sentence necessarily refers to a defendant at the time of trial, not a former defendant who has settled and is no longer a defendant. By the time of trial, and when the evidence was offered, in this case, Dr. Futran and the UW were not defendants. Thus, the last sentence of RCW 7.70.080 has nothing to do with, and does not restrict who was entitled to offer, evidence of compensation the Diazes had received from Dr. Futran and the UW.

Contrary to what the Diazes would have this Court hold, what Dr. Futran paid the Diazes in settlement is not something that, because of the final sentence of RCW 7.70.080, Dr. Futran and the UW alone could offer as evidence at trial of the Diazes’ claim against Dr. Kini and MCL. Moreover, because the context established in the statute’s first sentence is what “any party” may do (or not do), the statute never purports to authorize or limit the “offering” of evidence at trial by a nonparty. As the trial court correctly concluded:

Under the statute [RCW 7.70.080], “any party” may present evidence of compensation for the plaintiff’s injury. The only caveat to admission of this evidence is that compensation by a “defendant health care provider” can be introduced only by that provider. Former health care provider defendants who have settled with the plaintiff and paid damages have contributed to compensation of the

plaintiff and are no longer defendants in the surviving action. Any remaining party may present evidence of that compensation.

CP 308.

That is not to say that the statute's last sentence serves no purpose; it does. What the last sentence does is make it clear that, if *Dr. Kini*, who remained "a defendant health care provider" at trial, had compensated the Diazes, she alone would have had the right to offer evidence of *that* compensation; the Diazes could not have offered it. For example, in a situation where a nonsettling defendant health care provider, following an unsuccessful operation, provided corrective treatment without charge to the patient, or paid the patient's medical bills, that nonsettling defendant health care provider has the option, at trial, of disclosing to the jury the fact that he or she did so. The language that "evidence of compensation by a defendant health care provider may be offered only by that defendant" means that the plaintiff does *not* have the option of disclosing that the nonsettling defendant healthcare provider has provided compensation.⁷ The point of the last sentence is to make clear that when a health care provider who is a defendant at trial has provided compensation

⁷ As noted in 5A Karl B. Tegland, *Wash. Practice, Evidence Law and Practice* § 408.5, at p. 64 (5th ed. 2007), an "unusual twist" of Washington law is that ER 408 makes settlement offers inadmissible only when offered in evidence by the *offeree* (citing *Bulaich v. AT&T Information Sys.*, 113 Wn.2d 254, 264, 778 P.2d 1031 (1989)). Thus, the interpretation of the last sentence of RCW 7.70.080 advanced here is consistent with more general Washington law.

to the plaintiff for the injury at issue, only that defendant healthcare provider may decide to allow the jury to hear that he, she, or it provided that compensation to the plaintiff.

4. Contrary to the Diazes' assertions, the fact and terms of the settlement were not inadmissible under ER 408.

In the trial court, the Diazes asserted a perfunctory objection to the evidence of the Futran/UW settlement based on ER 408, stating that “statements made during the course of settlement negotiations are inadmissible. ER 408: (‘Evidence of . . . accepting . . . consideration in compromising or attempting to compromise a claim which was disputed . . . is not admissible to prove . . . invalidity of the claim or its amount.’).” CP 24. In their opening brief, they augment their ER 408 argument only by citing *Northington v. Sivo*, 102 Wn. App. 545, 550, 8 P.3d 1067 (2000),⁸ for the proposition that admission of settlement evidence “can have a ‘corrosive’ effect on the jury.” *App. Br. at 19*. As noted earlier in this brief, *see fn. 3, supra*, the specific corrosive effects that the Diazes claim the Futran/UW settlement evidence had on the jury are ones that Court’s Instruction No. 8, CP 301, guarded against.

The Diazes’ ER 408 argument is rather facile. Even if one engages in actual analysis under that rule, it was not error for the trial court to

⁸ *Northington* was neither a medical malpractice case, nor one that concerned admissibility of evidence of settlements under RCW 7.70.080.

admit the evidence of settlement in this medical malpractice case under RCW 7.70.080.

ER 408 provides that:

In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Nothing in ER 408 creates a blanket prohibition against admitting evidence of settlement. It makes settlement evidence inadmissible “to prove liability for, or invalidity of, the claim or its amount,” and allows admission of settlement evidence “for another purpose,” giving as examples “proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”

Here, the trial court did not admit the Futran/UW settlement evidence to prove liability of Dr. Futran or the UW, or to prove invalidity of the Diazes’ malpractice claim against Dr. Kini and MCL. Indeed, the

trial court specifically instructed the jury *not* to use the evidence for such purposes. CP 301 (Court’s Instruction No. 8). Nor did the trial court admit the evidence “to prove . . . invalidity of the claim[’s] amount.” Providing the jury evidence from which it could reduce its award of damages to account for compensation the Diazes had already received for the same injury from Dr. Futran and the UW is not the same thing as allowing the jury to find “invalid” the total amount necessary to fully compensate the Diazes.⁹ The trial court admitted evidence of the Futran/UW settlement pursuant to RCW 7.70.080, the purpose of which, according to *Adcox*, 123 Wn.2d at 40-41, is to prevent overcompensation of medical malpractice plaintiffs. Thus, the trial court admitted the evidence for “another purpose,” which ER 408 allows.

5. The cases the Diazes cite do not support their argument that settlement evidence remains inadmissible in medical malpractice cases even after the enactment of RCW 7.70.080.

In support of their argument that the trial court erred in ruling that evidence of the Futran/UW settlement was admissible under RCW

⁹ It was appropriate for the trial court to have instructed the jury not to use the Futran/UW settlement either to infer negligence on Dr. Futran’s or the UW’s part or to “excuse” Dr. Kini and MCL from liability. CP 301 (Court’s Instruction No. 8, parts (a) and (b)). However, by also instructing the jury not to use the settlement evidence to reduce the amount of damages it found Dr. Kini and MCL had caused, CP 301 (Court’s Instruction No. 8, part (c)), the trial court erred, but to the prejudice of Dr. Kini, not to the prejudice of the Diazes, because the purpose of RCW 7.70.080 is to prevent overcompensation, *Adcox*, 123 Wn.2d at 40-41, and thus to allow the jury to determine the amount of damages a defendant has caused, but also to reduce its *award* of damages to account for compensatory payments the plaintiff has already received from collateral sources.

7.70.080, the Diazes cite *Grigsby v. City of Seattle*, 12 Wn. App. 453, 529 P.2d 1167, *rev. denied*, 85 Wn.2d 1012 (1975); *Byerly v. Madsen*, 41 Wn. App. 495, 501, 704 P.2d 1236, *rev. denied*, 104 Wn.2d 1021 (1985); *Vasquez v. Markin*, 46 Wn. App. 480, 484, 731 P.2d 510, *rev. denied*, 108 Wn.2d 1021 (1987); *Bowman v. Whitelock*, 43 Wn. App. 353, 357, 717 P.2d 303 (1986); and *Adcox*, 123 Wn.2d at 39, 40 n.11. None of those cases is apposite. The Diazes' reliance upon them for their argument that settlement evidence remains inadmissible in medical malpractice cases, under either ER 408 or the common law collateral source rule, notwithstanding the enactment of RCW 7.70.080, is misplaced.

Grigsby, an automobile accident case which the Diazes quote for its holding that it "was error for the trial court to reveal to the jury that Grigsby settled a claim against his driver", *App. Br. at 13*, is inapposite not only because it was decided before the enactment of RCW 7.70.080, but also because it is not a medical malpractice case to which RCW 7.70.080 could have applied.

The Diazes' reliance on *Byerly*, *App. Br. at 14, 17, 19-20*, which at least was a medical malpractice case that was decided after the enactment of RCW 7.70.080, is still misplaced. *Byerly* was a case involving the trial court's grant of a new trial based on misconduct of a juror in telling fellow jurors that the plaintiff had settled with another health care provider. The

Byerly decision did not address RCW 7.70.080 at all. It does not appear that the parties in *Byerly* briefed or argued the admissibility of evidence of settlement under RCW 7.70.080, which is understandable because the issues concerning the disclosure of information about the settlement and the possible effects of the disclosure, arose out a juror's injection of extraneous information about the settlement into the deliberations, rather than as the result of an evidentiary ruling by the court. *Byerly* hardly provides support for the Diazes' argument that settlement evidence is inadmissible under ER 408, even after the enactment of RCW 7.70.080, when the *Byerly* court's discussion concerning inadmissibility of settlements, *Byerly*, 41 Wn. App. at 501, did not mention either ER 408 or RCW 7.70.080.

For similar reasons, *Vasquez*, which the Diazes cite, *App. Br. at 15, 17*, is also inapposite and does not support the Diazes' argument that settlement evidence is inadmissible under ER 408 even after the enactment of RCW 7.70.080. Like *Byerly*, *Vasquez* was an appeal from a discretionary ruling on a new trial motion. Like *Byerly*, *Vasquez* understandably did not mention ER 408 or acknowledge or address RCW 7.70.080, perhaps because it also was not an appeal from an evidentiary ruling, but rather involved a losing plaintiff's claim that jurors had learned of his settlement with other health care providers from the bailiff during

deliberations, which the trial court found did not happen. The statements in *Vasquez* that “[e]vidence of settlements is inadmissible” and that “juror statements regarding settlements may warrant a new trial,” *Vasquez*, 46 Wn. App. at 484, are unaccompanied by citation or reference to either ER 408, the common law collateral source rule, or RCW 7.70.080.¹⁰

Thus, *Grigsby*, *Byerly* and *Vasquez* all fail to support the Diazes’ argument that, under ER 408 and/or the collateral source rule, evidence of compensation a medical malpractice plaintiff received from a settlement with a health care provider who was not, or who is no longer, a party to the litigation is inadmissible notwithstanding RCW 7.70.080’s abrogation of the collateral source rule in medical malpractice cases.

Nor do *Bowman* or *Adcox* support such an argument. The Diazes cite *Bowman* in support of their argument that settlement proceeds are not collateral sources within the meaning of RCW 7.70.080. *App. Br. at 17*. Yet, once again, *Bowman*, an airplane crash case, was not a medical malpractice case and had nothing to do with, and nothing to say about, RCW 7.70.080 or what does or does not constitute “compensation for the injury complained of” within the meaning of RCW 7.70.080.

¹⁰ The *Vasquez* court did cite both *Grigsby* and *Byerly*, but neither of those decisions referred to ER 408, the collateral source rule, or RCW 7.70.080.

Quoting from *Bowman*, 43 Wn. App. at 357, the Diazes argue that collateral source evidence relates to “benefits received by the plaintiff from sources wholly independent of and collateral to the wrongdoer.” They then baldly assert, without any explanation, that “[a] medical negligence settlement with a settling co-defendant cannot be viewed as ‘wholly independent and collateral to the wrongdoer,’ and therefore is not collateral source evidence as contemplated by RCW 7.70.080. Their assertion makes no sense. Their settlement with Dr. Futran and the UW most certainly was “wholly independent and collateral” to Dr. Kini and MCL. Dr. Kini and MCL had nothing to do with that settlement and their alleged wrongdoing was separate and distinct from Dr. Futran’s and the UW’s alleged wrongdoing.

Adcox also does not support the Diazes’ claim that settlement proceeds are not collateral sources within the meaning of RCW 7.70.080. The Diazes attempt to suggest, *App. Br. at 18*, that because *Adcox* (the only appellate decision thus far that has addressed RCW 7.70.080) discusses the admissibility of certain types of collateral sources that the defendant hospital offered to prove might be available to mitigate the plaintiffs’ damages,¹¹ but “has no discussion about the admissibility of

¹¹ As the court noted in *Adcox*, 123 Wn.2d at 40 n.11:

The Hospital offered to prove some of the following collateral resources might be available as mitigating the plaintiff’s damages:

settlements with other parties to the litigation”, that somehow must mean that settlements are not the types of collateral sources admissible under RCW 7.70.080.¹² *Adcox* stands for no such proposition.

Adcox did not address the admissibility of a settlement under RCW 7.70.080 because the defendant hospital did not seek to offer evidence of a settlement and neither the trial court nor the appellate court was asked to make, and thus did not make, any ruling with respect to the admissibility of a settlement under RCW 7.70.080. *See fn. 12, supra.*

What *Adcox* did address concerning admissibility of collateral sources under RCW 7.70.080 is what matters here:

For medical malpractice cases, RCW 7.70.080 replaces the common law’s collateral source rule. . . . The primary motivation in doing away with the collateral source rule is

school districts; state medical care; state respite care; state payments of foster care expenses; state insurance pool for the uninsurable; and charitable organizations providing services.

¹² *Adcox* was a medical malpractice case in which the plaintiff had settled with two of three original defendant health care providers for less than \$700,000. The jury awarded damages of more than \$9 million at trial against the third (hospital) defendant. The trial court offset the settlements against the jury’s award; whether it should have done so was not an issue on appeal as such. (*Washburn v. Beatt Equip. Corp.*, 120 Wn.2d 246, 296, 840 P.2d 860 (1992), makes clear that there should have been no offsets for the settlements). The hospital argued on appeal in *Adcox* that it was entitled to have “fault” apportioned by the jury among itself and the settling defendants under RCW 4.22.070(1). The Supreme Court held that, because the hospital had not presented evidence of, and had not offered to prove, negligence on the settling defendants’ parts, it was too late for it to argue for apportionment of “fault” under RCW 4.22.070(1). While the hospital argued on appeal, and the *Adcox* court agreed, that that the trial court had erred in refusing to permit the hospital to present to the jury, under RCW 7.70.080, evidence that certain resources might be available to mitigate the plaintiffs’ damages, the hospital did not argue on appeal, presumably because it had not so argued in the trial court, that plaintiffs’ settlements with the former health care provider defendants should have been admitted into evidence under RCW 7.70.080.

the rule allows plaintiffs to recover more than their total damages. Under the collateral source rule, a plaintiff could recover 100 percent of the damages from a liable defendant, even if the plaintiff had already recovered a portion of their damages from another source, such as insurance. Because the rule overcompensated plaintiffs, it came to be viewed as imposing unnecessary costs on society and causing higher insurance premiums.

Adcox, 123 Wn.2d at 40 (citations omitted).

Evidence of “compensation” that a plaintiff has already received for the injury complained of from “any source” except the plaintiff’s own assets, representatives, or family is admissible in medical malpractice cases. RCW 7.70.080. Because what Dr. Futran and the UW paid the Diazes in settlement qualifies as “compensation” under RCW 7.70.080 and compensated the Diazes for their complained of injuries, and because the source of that compensation was not the Diazes’ assets or the assets of their representative or immediate family, the settlement payment is admissible for the same reason that the collateral source evidence that happened to be at issue in *Adcox* was admissible. The evidence of the settlement was evidence that the defendants, Dr. Kini and MCL, were entitled to present to the jury under RCW 7.70.080.¹³

¹³ *Adcox* makes it clear that evidence made admissible by RCW 7.70.080 is for the finder of fact, not just the trial judge, to consider in medical malpractice cases. In *Adcox*, the trial court decided to consider appropriate damages offsets itself, after verdict, for the collateral sources the defendant hospital sought to introduce into evidence, instead of allowing the jury to hear and consider that collateral source evidence. The *Adcox* court held that the trial court had erred by doing so, but found the error harmless because the goal of RCW 7.70.080, “to prevent overcompensating [health care injury] plaintiffs in

6. The Diazes “chilling effect” argument is one more properly addressed to the Legislature.

The Diazes assert, *App. Br. at 18-19*, that making evidence of settlements with other health care providers admissible at trial in medical malpractice cases will have a chilling effect on settlement of such cases. The Diazes offer no free-speech or other constitutional argument context in which the prospect of a “chilling effect” might resonate. Nor do they cite any authority for the proposition that a court may consider a statute’s “chilling effect” when engaging in statutory interpretation. *See State v. D.H.*, 102 Wn. App. 620, 629-30, 9 P.3d 253 (2000), *rev. denied*, 42 Wn.2d 1045 (2001) (declining to modify unambiguous terms of a statute on policy grounds “in the guise of statutory interpretation”). The public policy choices of encouraging settlements, and preventing double recovery in medical malpractice cases are policy choices for the Legislature, not the court. *See, e.g., Ruiz v. State*, 154 Wn. App. 454, 461, 225 P.3d 458 (2010) (“While this argument has some attraction, particularly on the facts here that underscore a collision between the important policy of public safety and that of environmental protection, these public policy choices, however, are for the legislature not this court”).

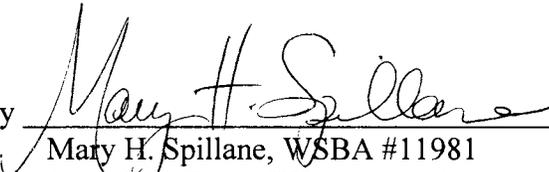
light of the resulting costs to society,” had been met in that case, and because it did not want to force retrial of a lawsuit that had taken five weeks to try the first time. *Adcox*, 123 Wn.2d at 24 and 41. The court cautioned, however, that “we strongly encourage trial courts to fully follow the statute in the future.” *Id.*

VI. CONCLUSION

The Diazes were not prejudiced by the disclosure to the jury of their settlement with Dr. Futran and the UW because the adverse inferences they contend the jury could have drawn were ones the trial court specifically instructed the jury *not* to draw, and juries are presumed to have followed their instructions. *Singh*, 151 Wn. App. at 152. In any event, notwithstanding either ER 408 or the collateral source rule, Dr. Kini and MCL were entitled, by reason of RCW 7.70.080, to inform the finder of fact that the Diazes had received, in a settlement with Dr. Futran and the UW, \$400,000 in compensation for the injuries for which they sought to hold Dr. Kini and MCL liable at trial. Thus, because the trial court did not err in ruling that evidence was admissible under RCW 7.70.080, and/or because the Diazes claim of prejudice with respect to the admission of evidence of the settlement is belied by the trial court's instructions to the jury, which the jury is presumed to have followed, this Court should affirm the trial court's judgment on the jury's verdict in favor of Dr. Kini and MCL and the order denying the Diazes' motion for new trial.

RESPECTFULLY SUBMITTED this 30th day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 30th day of June, 2010, I caused a true and correct copy of the foregoing document, "Brief of Respondents," to be delivered in the manner indicated below to the following counsel of record:

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