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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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

Appellant,

v.

SUMMIT VIEW CLINIC, a Washington corporation,

Respondent.

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BRIEF OF RESPONDENT

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pm 5/20/13

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## I. INTRODUCTION

Just as the Washington Supreme Court held in *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012), with respect to the evidence of settlement that was admitted in that case, any error in the admission of evidence of plaintiff's \$3.5 million settlement with St. Joseph Hospital in this case was harmless. The trial court gave a limiting instruction that told the jury the settlement evidence was "admissible for the limited purpose of demonstrating that the plaintiff may have been compensated for the injury complained of from another source" and "should not be used to assume that either Summit View Clinic or St. Joseph Medical Center/Franciscan Medical Group acted negligently to cause damage to plaintiff." As in *Diaz*, the jury never reached the issue of damages because it found against the plaintiff on liability. And, as in *Diaz*, 175 Wn.2d at 474, the jury is firmly presumed to have obeyed the court's instruction and not to have considered the settlement in making its findings of no liability. Thus, as in *Diaz*, any error in apprising the jury of the settlement was harmless.

It was not error for the trial court to consider the juror declarations defendants submitted in opposition to plaintiff's motion for new trial, and even if there were any such error, it too was harmless. In his motion for new trial, plaintiff insinuated that the case must have been the topic of conversations between Jurors Knight and Ichiyama in the courthouse

hallway during trial. It therefore was appropriate for the trial court to consider declaration testimony from those jurors in which they denied any such misconduct. If and to the extent that the court also considered Juror Knight's declaration testimony that plaintiff's settlement with St. Joseph Hospital did not influence her or the jury's deliberations, any error was harmless. The trial court was not obliged to affirmatively disbelieve such testimony. And, it had no basis for finding either that Jurors Ichiyama and Knight did in fact discuss the case in the hallway during trial or that any juror disobeyed its instruction limiting the purpose for which the St. Joseph Hospital settlement could be considered.

The trial court also did not err in giving Court's Instruction 11, CP 159. It correctly stated Washington informed consent law. Even if the instruction had been in error, however, plaintiff is not entitled to retry his informed consent claim because his informed consent theory was really a malpractice theory, such that he was not entitled to any informed consent instructions at all.

## II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was any error in admitting evidence of plaintiff's \$3.5 million settlement with St. Joseph Hospital, based upon the then-controlling Court of Appeals decision in *Diaz v. State*, 161 Wn. App. 500, 251 P.3d 249 (2011), harmless, where the trial court gave a limiting

instruction, which the jury is firmly presumed to have followed, that the evidence was admissible for the limited purpose of demonstrating that the plaintiff may have already been compensated for the injury complained of from another source,” and where the jury, having found no liability on the part of Summit View Clinic, never reached the issue of damages?

2. Was there any error in the trial court’s consideration of the two juror declarations defendant submitted in opposition to plaintiff’s motion for new trial, much less any such error that requires a new trial?

3. Did the trial court properly give Court’s Instruction No. 11, which told the jury that “[a] physician has no duty to disclose treatments for a condition that may indicate a risk to the patient’s health until the physician diagnoses that condition”?

### III. COUNTERSTATEMENT OF THE CASE

Following a horribly sad outcome to the most difficult of dilemmas that confront next of kin in a health care setting – whether to try to save one patient’s life at the very possible expense of another’s – Kenneth Flyte settled for \$3.5 million with St. Joseph Hospital, CP 18, where his wife, Kathryn, had died on August 11, 2009, six weeks after she gave birth by emergency C-section to their daughter Abbigail, who then died suddenly on February 21, 2010.<sup>1</sup>

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<sup>1</sup> CP 87, 96; 7/12 RP (Openings) 24, 26, 59.

After settling with St. Joseph Hospital, *see* CP 23 (lines 5-6), *App. Br. at* 8, Mr. Flyte, individually, as personal representative of Kathryn's estate, and as guardian of his minor son Jacob, sued Summit View Clinic, where Dr. William Marsh had seen Kathryn on June 26, 2009 and diagnosed her with an upper respiratory viral illness. CP 1-5. Mr. Flyte asserted claims of malpractice and failure to obtain Kathryn's informed consent for treatment. CP 1-5. He contended that Dr. Marsh failed to inform Kathryn that Tamiflu could be administered in case she had flu,<sup>2</sup> which Dr. Marsh did not believe Kathryn had because Kathryn had no fever, did not appear in distress, and did not even meet criteria for being tested for flu.<sup>3</sup> The case was tried to a jury starting on July 10, 2012, and concluded with a defense verdict on August 2, 2012.<sup>4</sup> CP 177-79.

At the outset of trial, adhering, as it was obliged to do, to the Court of Appeals' 2011 published decision in *Diaz v. State*, 161 Wn. App. 500,

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<sup>2</sup> CP 2 (¶2.1), CP 5 (¶3.2), 7/12 RP (Openings) 29-31.

<sup>3</sup> 7/26 RP (Dr. Marsh) 54-58, 66-67, 85-86, 89-93, 100.

<sup>4</sup> Mr. Flyte makes no claim, nor could he, that there was insufficient evidence to support the jury's verdict. The Clinic presented expert testimony that Dr. Marsh complied with the applicable standard of care in his evaluation, diagnosis and treatment of Mrs. Flyte, and that neither the standard of care nor the obligation to obtain informed consent required him to offer her Tamiflu. *See* 7/23 RP (Dr. Ruiz) 16-18, 21-48. Indeed, Mr. Flyte's own expert, Dr. Miller, who testified on direct that, based on what was contained in the Summit View Clinic chart, he would have diagnosed Kathryn as having influenza and that, in his opinion, Dr. Marsh's diagnosis of an upper respiratory infection and failure to prescribe Tamiflu were inconsistent with the standard of care, 7/12 RP (Dr. Miller) 36-37, conceded on cross-examination that Dr. Marsh's working diagnosis of upper respiratory infection was reasonable, that Tamiflu was not a medicine that was indicated for upper respiratory infection, and that he would not talk to a patient about a medication that he did not think was indicated. 7/12 RP (Dr. Miller) 67-70.

251 P.3d 249 (2011), the trial court ruled that, under RCW 7.70.080, the defense could present evidence of the plaintiff's \$3.5 million settlement with St. Joseph Hospital, but that it would give a limiting instruction. 7/9 RP (Motions in Limine) 27-36, 45-47. Plaintiff's counsel chose to apprise the jury of the settlement in his opening statement, stating:

One of the other elements of the case that you're going to hear about and the defense is going to tell you about is that – and I mentioned earlier that there were all these sorts of things – the Summit View Clinic is going to introduce evidence that St. Joe's Hospital was previously subject to a claim from Kenny Flyte, and that they already paid \$3 and a half million dollars to resolve their claims.

You're going to be instructed by the judge that any evidence regarding that settlement does not suggest or presume in any way that St. Joe's Hospital or anybody else was at fault in this case. And you need to follow that instruction. And Summit View Clinic gets its own trial.

7/12 RP (Openings) 32-33.<sup>5</sup> When defense counsel elicited testimony confirming the settlement and its amount from Mr. Flyte during his cross-examination,<sup>6</sup> 7/18 RP (K. Flyte cross-examination) 121-22, and prior to closing arguments, as part of the Court's Instructions to the Jury, CP 146-76, the trial court instructed the jury, CP 163 (Instruction No. 15), that:

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<sup>5</sup> Contrary to Mr. Flyte's assertion without any supporting citation to the record, *App. Br. at 12*, the trial court did not read any limiting instruction during opening statements. See 7/12 RP (Opening Statements) 1-69.

<sup>6</sup> Mr. Flyte was asked: "And it is correct, is it not, sir, that you have received from the St. Joseph's Medical Center, Franciscan Medical Group a compensation that was paid in the amount of 3.5 million. Is that true, sir?", to which he responded: "That is true." 7/18 RP K. Flyte cross-examination) 121 (lines 17-21).

You have heard evidence that St. Joseph Medical Center/Franciscan Medical Group entered into a settlement with the plaintiff, agreeing to pay the plaintiff \$3,500,000. This evidence is admissible for the limited purpose of demonstrating that the plaintiff may have already been compensated for the injury complained of from another source. This evidence should not be used to assume that either Summit View Clinic or St. Joseph Medical Center/Franciscan Medical Group acted negligently to cause damage to plaintiff.<sup>7</sup>

Mr. Flyte does not claim, nor does the record indicate,<sup>8</sup> that anyone ever argued to the jury that the evidence of St. Joseph Hospital's settlement could be considered for purposes of determining liability, or for any purpose other than the limited purpose set forth in Instruction No. 15. Indeed, even when his counsel and defense counsel each made reference to the settlement in closing argument, both reminded the jury that it had to follow the court's instruction. 8/1 RP (Closing Arguments) 8, 74-75. To the extent Mr. Flyte complains, *App. Br. at 12*, about the instruction being given both during Mr. Flyte's testimony and at the end of the case, Mr. Flyte fails to apprise the court that his counsel told the trial court that the

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<sup>7</sup> This was the limiting instruction that the Clinic proposed. CP 21. Mr. Flyte proposed that the trial court give a "mirror image" of the instruction given by the trial court in *Diaz*, see CP 26, which the Clinic argued would have precluded the jury from using the evidence to reduce the amount of any damages, even though the only point in admitting the evidence under RCW 7.70.080 (and the Court of Appeals decision in *Diaz*) was to show that plaintiff had already been compensated for his claimed injuries, 7/9 RP 28-29.

<sup>8</sup> See 7/18 (K. Flyte cross-examination) 121-22, where the Clinic's counsel made inquiry of Mr. Flyte concerning the settlement, 8/1 RP (Closing Arguments) 8, where Mr. Flyte's counsel briefly mentioned the settlement in closing argument, and 8/1 RP (Closing Arguments) 74-75, where the Clinic's counsel briefly referenced the settlement in closing argument.

instruction should be given at both of those points – when the evidence came in and when the “hard set” of instructions was given to the jury. 7/9 RP (Motions in Limine) 36.<sup>9</sup>

The trial court also instructed the jury that, if the Clinic was negligent and proximately caused injury, it was not a defense that an entity not a party to the case may also have caused the injury, CP 61 (Instruction No. 14), and that, if the jury returned verdicts for the plaintiff on liability, it had to award medical bill damages of at least \$892,200.72<sup>10</sup> and had to consider awarding other types of economic and noneconomic damages.

The jury answered “no” to the question on the verdict form as to whether the Clinic failed to “provide ‘informed consent’ to Kathryn Flyte,” CP 177, and also answered “no” to the question as to whether the Clinic was negligent, CP 178. Having answered “no” to both those questions, the jury never reached the questions on the verdict form concerning proximate cause or damages.

On August 30, 2012, Mr. Flyte moved for a new trial under CR 59(a) without specifying the subparagraph(s) of the rule upon which he relied. CP 180-92. He argued that Juror 19 should have been “removed

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<sup>9</sup> Mr. Flyte’s characterization, *App. Br. at 12*, of the process of reading Instruction No. 15 as “theatrical” is not borne out by anything in the record.

<sup>10</sup> CP 220 (Instruction No. 18); CP 226 (Instruction No. 21).

for cause,” CP 185;<sup>11</sup> that reversal by the Supreme Court of the Court of Appeals decision in *Diaz* was imminent, CP 186; that he should have been allowed to tell the jury that the reason he had settled with Franciscan Health System was that FHS had treated him with compassion, CP 187; that the court’s limiting instruction, No. 15, CP 163, had been a comment on the evidence, CP 187-88; and that Instruction No. 11, CP 159, had misstated informed consent law, CP 188-91. The trial court denied the motion for new trial on September 14, 2012. CP 337-38.

Six days later, on September 20, 2012, the Supreme Court issued its decision in *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012), holding that RCW 7.70.080 did not authorize disclosure to the jury of the fact or amount of settlements with other defendants in that case, but that the error in apprising the *Diaz* jury of the plaintiff’s settlement with former defendants was harmless as a matter of law because the trial court had given a limiting instruction and the jury had found for the defense on liability and had not reached the issue of damages. Thus the Supreme Court did not overturn the defense verdict or order a new trial in *Diaz*. *Id.* at 474-75.

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<sup>11</sup> In his motion for new trial, Mr. Flyte also asserted that his counsel had “observed Juror 19 having private conversations with another health care experiences juror in the hallway during the course of trial.” CP 182 (lines 15-16). He did not offer evidence that Juror 19 had, during trial, any private conversation with any other juror that related to the trial. Nor did he or could he cite any standing order prohibiting jurors from conversing with each other even if their conversations had nothing to do with the trial.

After the Supreme Court issued its decision in *Diaz*, Mr. Flyte did not ask the trial court to reconsider its order denying his motion for new trial or seek any further relief in the trial court. Even though he has not designated his notice of appeal for inclusion in the clerk's papers, *see* RAP 9.6(b)(1)(A), he did timely file his notice of appeal from the trial court's denial of his motion for new trial.

#### IV. STANDARD OF REVIEW

Orders denying motions for new trial are reviewed for abuse of discretion. *Alcoa v. Aetna Cas. & Surety Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

Under an abuse of discretion standard, the reviewing court will find error only when the trial court's decision (1) adopts a view that no reasonable person would take and is thus "manifestly unreasonable," (2) rests on facts unsupported in the record and is thus based on "untenable grounds," or (3) was reached by applying the wrong legal standard and is thus made "for untenable reasons." [*State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)] (quoting *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)).

*State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012).

With respect to challenges to jury instructions:

Jury instructions are reviewed de novo for errors of law. *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005). "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). If

any of these elements are absent, the instruction is erroneous. *See Joyce*, 155 Wn.2d at 323-25. An erroneous instruction is reversible error only if it prejudices a party. *Id.* at 323. Prejudice is presumed if the instruction contains a clear misstatement of law; prejudice must be demonstrated if the instruction is merely misleading. *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002).

*Anfinson v. Fedex Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012).

A trial court ruling may be affirmed on any ground supported by the record, whether or not the ground is one the trial court considered. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

## V. ARGUMENT

A. Mr. Flyte's Complaints about *Voir Dire* and Ms. Knight Being Seated on the Jury Are Beside the Point Because He Disavows Any Related Claim of Error and, in Any Event, Waived Any Such Claim Below.

Mr. Flyte complains, *App. Br. at 1, 2, 29, 31*, that a foreperson employed by the hospital that settled with him for \$3,500,000 "led" the jury, and that the trial court prevented his counsel from developing a for-cause challenge to that juror based on bias, *App. Br. at 9-11, 21, 24, 31*. But, Mr. Flyte expressly disavows, *App. Br. at 24 n.60*, any claim of error as to anything that occurred in "the *voir dire* proceedings" or to Ms.

Knight “having been sat on” on the jury,<sup>12</sup> and indicates that there is no reason for the Clinic to discuss any “issues surrounding *voir dire*” in its brief.

Accordingly, the Clinic will not discuss any issues “surrounding” *voir dire* or Juror Knight’s participation as a juror except to note four things. First, without even citing to the record the trial court made concerning the sidebar conference, *see* 7/11 RP (Voir Dire, Vol. II) 197-98,<sup>13</sup> Mr. Flyte blames the trial court for failing to make a clear record of a sidebar conference, *App. Br. at 10-11*, but does not show or assert that his counsel *asked* the trial court to put anything more about the sidebar on the

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<sup>12</sup> Mr. Flyte made no record of any for-cause challenge to Ms. Knight either during *voir dire* or after the jury was apprised of his settlement with St. Joseph Hospital, and he obviously did not exercise a peremptory challenge to keep her from serving as a juror. In his reply in support of his motion for new trial, he asserted that his counsel recalled “offering a challenge for cause as to Juror No. 19” and was “working with the court reporter to identify the proper portion of the transcript.” CP 320 n. 2. Given the lack of any assignment of error to any ruling denying a challenge for cause as to Ms. Knight – either before or after the \$3.5 million settlement was disclosed to the jury – one may infer that the court reporter’s notes did not bear out counsel’s professed recollection. The record before this court is certainly devoid of any reference to any exercise of a challenge to Ms. Knight, whether for cause or peremptorily.

<sup>13</sup> As the trial court explained, 7/11 RP (Voir Dire, Vol. II) 197-78:

We had a little matter that we handled on the sidebar here. The questions that Mr. Beauregard was asking had gotten into the settlement with St. Joe’s. And it had started to raise my eyebrows, and about that time there was an objection.

The reason that I was concerned about it is a little different, I think than Mr. Myers. It was getting down the road to advocacy a little further than I would permit. Getting down to too many details.

\* \* \*

Although, a lot of it did happen in this *voir dire*, and it’s a fine line, but at some point you have kind of crossed over it, and that was a concern I had and I asked you not continue it.

record, or sought to supplement the record with a summary of what occurred during the sidebar, or made an offer concerning what he would have asked, but was not permitted to ask, Ms. Knight during *voir dire*. Thus, no claim of error can be predicated on the sidebar not being of record. *State v. Nguyen*, 134 Wn. App. 863, 871-72, 142 P.3d 1117 (2006), *rev. denied*, 163 Wn.2d 1053 (2008), *cert. denied*, 555 U.S. 1055, 129 S.Ct. 644, 172 L.Ed.2d 626 (2008).

Second, Mr. Flyte's assertion, *App. Br. at 11*, that, during the sidebar, the trial court simply instructed plaintiff's counsel "that conducting *voir dire* about the \$3.5 million settlement was off limits," is not consistent with what the trial court put on the record concerning the sidebar. *See footnote 13, supra*. Nor is it a substitute for a properly made record. It should therefore be disregarded.

Third, it also is inaccurate for Mr. Flyte to assert that the jury and Ms. Knight learned that her "employer" had settled with the plaintiff. As Ms. Knight's juror questionnaire (CP 196) disclosed, she was employed by Franciscan Health System. CP 181, 317. The jury was informed that plaintiff had settled with St. Joseph Hospital, not Franciscan Health System. Although Franciscan Health owns St. Joseph Hospital, Ms. Knight was not involved with, and had no responsibility for, St. Joseph Hospital. 7/11 RP (Voir Dire, Vol. II) 167-68.

Fourth, Mr. Flyte's disavowal, *App. Br. at 24, n. 60*, of any claim of error in *voir dire* should render the matter moot but, in case it does not, his counsel's statement, *App. Br. at 12*, that "[t]here is no meaningful way for the undersigned counsel to recreate the shock in the jury and Ms. Knight's eyes when first told about this large payout by Ms. Knight's employer," is inadmissible unsworn testimony by counsel, which the court should disregard.

B. In Light of the Jury's Findings of No Liability and the Unrebutted Presumption that It Obeyed Instruction No. 15, Disclosure of Mr. Flyte's \$3.5 Million Settlement with St. Joseph Hospital As a Matter of Law Was Not Prejudicial.

1. Instruction 15 was a limiting instruction that the jury is firmly presumed to have obeyed.

Without assigning error to the instruction or its specific wording, Mr. Flyte complains about the limiting instruction that the trial court gave when Mr. Flyte testified as to the settlement with St. Joseph Hospital and its amount during cross-examination, RP 7/19 at 121-22 (K. Flyte cross-examination),<sup>14</sup> and when the trial court gave its instructions to the jury at the end of trial, CP 163 (Court's Instruction No. 15). He complains, *App. Br. at 23*, that Instruction No. 15 was not worded identically to the

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<sup>14</sup> Plaintiff's counsel paraphrased the limiting instruction prospectively, after disclosing to the jury in his opening statement that there had been the \$3.5 million settlement with St. Joseph Hospital. 7/12 RP (Openings) 32-33.

limiting instruction that the trial court gave in *Diaz* and contends that it was “an impermissible comment upon the evidence.”

*Diaz* does not hold that it is reversible error to give a limiting instruction worded even slightly differently from the one the trial court gave in that case. Trial courts have “considerable discretion in deciding how [jury] instructions will be worded.” *Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 617, 707 P.2d 685 (1985).

Although Instruction No. 15 here was not identical to the limiting instruction given in *Diaz*, it had the same limiting purpose, *i.e.*, to tell the jury that the settlement could be considered for “*the limited purpose* [singular] of demonstrating that the plaintiff may have already been compensated for the injury complained of from another source [italics supplied].” CP 163. There is no basis for thinking the jury believed it could, or that the jury did, consider the settlement when weighing the conflicting medical expert testimony in order to answer the verdict form’s initial liability questions, which, because it answered them “no,” were the only questions it answered. Indeed, there is no evidence, and Mr. Flyte does not claim, that the Clinic ever argued that the jury could consider the evidence of settlement for purposes of determining liability or for any purpose other than the limited purpose set forth in Instruction No. 15.

Even if Instruction No. 15 is considered bereft of any context supplied by other instructions the court gave, there is, under Washington law, a firm presumption that the jury obeyed Instruction No. 15. *Diaz*, 175 Wn.2d at 474. Mr. Flyte has not offered anything of record to rebut that presumption or to suggest that the settlement evidence tainted the jury's findings of no negligence and no failure to obtain informed consent, CP 177-78.

But Instruction No. 15 did not stand alone; the court also gave WPI (Civ.) 105.04 as its Instruction No. 14, telling the jury that:

There may be more than one proximate cause of the same injury. If you find that the defendant was negligent and that such negligence was a proximate cause of injury or damage to the plaintiff, it is not a defense that the act of some other person who is not a party to this lawsuit may also have been a proximate cause.

CP 162. That instruction informed the jury that, for purposes of evaluating the Clinic's liability, it did not matter whether St. Joseph Hospital had caused the same injury. Mr. Flyte fails to explain why Instruction No. 14 did not cure any possibility of prejudice that he believes Instruction No. 15 did not protect him from.

Court's Instruction Nos. 18 and 21 further instructed the jury that, if it returned a verdict for Abbigail Flyte's estate, it had to award medical-bill economic damages of \$321,034.66, and that, if it returned a verdict for

Kathryn Flyte's estate, it had to award medical-bill economic damages of \$571,166.06. CP 166 and 172. Court's Instructions Nos. 18-22, CP 166-74, listed additional items of economic and/or noneconomic damages the jury had to consider if it returned verdicts for Kenneth Flyte, Jacob Flyte, and the two estates. Thus, the court instructed the jury that, if it found liability, it had to award at least \$892,000 for actual economic damages and had to consider awarding various types of noneconomic damages, all *notwithstanding* that the Flytes had already been paid \$3.5 million by St. Joseph Hospital. Mr. Flyte's arguments based on *Diaz* fail to account for any of the trial court's causation or damages instructions, which confirmed that the Clinic could be found liable if Dr. Marsh negligently caused injury for which St. Joseph Hospital had already paid compensation.

As a matter of law, settlement evidence cannot have been prejudicial if a jury, instructed to consider settlement evidence only on the issue of damages, returns a defense verdict based on a finding of no negligence and does not reach the issue of proximate causation much less the issue of damages. *Diaz*, 175 Wn.2d at 474. On appeal, a jury is presumed to have obeyed the trial court's instructions. *Id.* That is what occurred here. Any error in admitting evidence of plaintiff's settlement with St. Joseph Hospital was harmless and does not warrant a new trial.

2. Court's Instruction No. 15 was not a "comment on the evidence".

Contrary to what Mr. Flyte argues, *App. Br. at 23*, Instruction No. 15 also was not a "comment on the evidence." Const. art. IV, §16 provides that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose of that constitutional provision "is to prevent a jury from being influenced by knowledge conveyed to it by the trial judge as to the trial judge's opinion of the evidence submitted." *State v. Swan*, 114 Wn.2d 613, 657, 790 P.3d 610 (1990).

"An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question." *Id.* The rule is the same for civil cases. *See, e.g., Egede-Nissen v. Crystal Mt.*, 93 Wn.2d 127, 139, 606 P.2d 1214 (1980) (for a jury instruction to be an impermissible comment on the evidence, "the jury must be able to infer from what the court said or did not say that he personally believed or disbelieved the testimony in question"), and *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988) ("An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the

case or allows the jury to infer from what the judge said or did not say that the judge personally believed or disbelieved the particular testimony in question,” but “an instruction which does no more than accurately state the law pertaining to an issue does not constitute an impermissible comment on the evidence....”).

Mr. Flyte does not explain how Instruction No. 15 amounted to a comment on the evidence under these standards, nor was it a comment on the evidence.<sup>15</sup> Instruction No. 15 accurately stated the controlling law at the time this case was tried. Even though it was given to limit the purposes for which the jury could consider evidence that the Supreme Court later held inadmissible in *Diaz*, the instruction was not a comment on the evidence because it did not signal the trial judge’s personal opinion about the probativeness of any evidence.

C. Mr. Flyte Fails to Explain What the Post-Trial Juror Declarations Have to Do with the Fairness of the Trial.

Mr. Flyte did not designate any juror declarations as clerk’s papers or quote any in his opening brief, yet he complains that “the defense ran

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<sup>15</sup> Appellant cites *Heitfeld v. Benev. & Prot. Order of Keglers*, 36 Wn.2d 685, 220 P.2d 655 (1950), for the proposition that it is “error for the trial court to comment on the evidence.” *App. Br. at 23*. That proposition begs the question of what a comment on the evidence *is*, and why appellant selected *Heitfeld* as support for his assertion is unclear, because the court there observed, after an extensive review of “comment on the evidence” decisions, that there was an “apparent hopeless conflict of the authorities,” and that “each case must be determined on its own peculiar facts and circumstances,” and held that the comments there at issue had not constituted prejudicial error. *Heitfeld*, 36 Wn.2d at 706.

out and obtained” two juror declarations that it filed in connection with its opposition to his motion for new trial. *App. Br. at 25*. It is not incumbent on a respondent to designate the clerk’s papers essential for consideration of an appellant’s appeal, but the Clinic has designated the two declarations that Mr. Flyte refers to in his opening brief. CP 351-52 (Juror Ichiyama), 344-50 (Juror Knight).

Appellant relies on case law standing for the proposition that a trial court may not find juror misconduct for purposes of a CR 59(a)(2) new-trial motion based on juror testimony as to how the jury arrived at its verdict. Juror Ichiyama’s declaration makes a single point that has nothing to do with the jury’s deliberative process. In his motion for new trial, Mr. Flyte asserted that Mr. Ichiyama (Juror No. 1) and Ms. Knight (Juror No. 7) were seen talking to each other in the hallway during trial. CP 183 (footnote 2). In his declaration, Mr. Ichiyama averred that he “never discussed this case outside of deliberations with any other juror, including Juror No. 7 (formerly Juror No. 19), Christine Knight.” CP 351 (¶2). Ms. Knight similarly declared that she “never discussed this case outside of deliberations with any other juror, including Juror Number 1, Randall Ichiyama.” CP 345 (second of two paragraphs numbered 6). The trial court properly could consider both jurors’ denials of Mr. Flyte’s insinuations of improper conduct. Even if the trial court somehow should

have ignored such juror denials of misconduct during trial, the absence of Ichiyama's and Knight's denials still would have left a record that did not permit – much less require – it to find that Jurors Ichiyama and Knight committed misconduct, much less misconduct warranting a new trial.

Juror Knight also asserted in her declaration that the settlement evidence had not influenced her or figured in the jury's deliberations. CP 345 (¶¶ 4-6). Even if the court should have entered an order specifically stating that it had not considered the fourth, fifth, and (and first of two) sixth paragraphs, any error in failing to do so was harmless. As previously noted, the jury is presumed to have obeyed Court's Instruction No. 15, which limited the purpose for which the jury could consider the St. Joseph Hospital settlement, *Diaz*, 175 Wn.2d at 474, and plaintiff has presented nothing of record to rebut that presumption or from which the court could have found juror misconduct. Thus, *with or without* the Ichiyama and Knight declarations, no basis existed for granting plaintiff a new trial. The trial court's consideration of the two jurors' declarations, even if error, does not warrant the grant of a new trial.

D. Court's Instruction No. 11 Did Not Misstate Informed Consent Law.

Appellant, relying on *Gates v. Jensen*, 92 Wn.2d 246, 250-51, 595 P.2d 919 (1979), *App. Br. at 27*, argues that Court's Instruction No. 11, CP

159, misstated Washington informed consent law. Informed consent law in Washington is codified in RCW 7.70.050, as part of a set of medical malpractice statutes enacted in 1976 that apply to claims based on injury occurring as the result of health care provided after June 25, 1976.<sup>16</sup> *Gates* arose out of health care provided before 1974 and was based entirely on, and addressed and applied, pre-statutory “informed consent” law. Thus, *Gates* is not a reliable source of authority for purposes of an RCW 7.70.050 informed consent claim, which was at issue here, as the trial court’s unexcepted-to use of WPI (Civ.) 105.04 and 105.05, CP 158, 160, reflected.

Instruction No. 11 told the jury that “[a] physician has no duty to disclose treatments for a condition that may indicate a risk to the patient’s health until the physician diagnoses that condition.” That instruction was correct. Under case law applying RCW 7.70.050, “[t]he duty to disclose [a course of treatment] does not arise until the physician becomes aware of the condition [to be treated] by diagnosing it.” *Gustav v. Seattle Urological Assocs.*, 90 Wn. App. 785, 790, 954 P.2d 319, *rev. denied*, 136 Wn.2d 1023 (1998).

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<sup>16</sup> See RCW 7.70.010, providing that “The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care which is provided after June 25, 1976.”

As a recent decision of Division III of the Court of Appeals explains:

*Gates* has either been abrogated or limited to its facts ... or has been overruled sub silentio in light of the Supreme Court's decision in *Backlund*<sup>17</sup> and its denial of review of *Wilfac*, *Burnet*, and *Bays*.<sup>18</sup> A later holding overrules a prior holding sub silentio when it directly contradicts the earlier rule of law. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009). And see *Gustav v. Seattle Urological Associates*, 90 Wn. App. 785, 790, 954 P.2d 319, *review denied*, 136 Wn.2d 1023 (1998), in which a two-member majority – over a dissent on this issue – held that “a physician’s failure to diagnose a condition is a matter of medical negligence, not a violation of the duty to inform,” and “[t]he duty to disclose does not arise until the physician becomes aware of the condition by

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<sup>17</sup> *Backlund v. Univ. of Wash.*, 137 Wn.2d 651, 661, 975 P.2d 950 (1999) (explaining, in *dicta*, that “[a] physician who misdiagnoses the patient's condition, and is therefore unaware of an appropriate category of treatments or treatment alternatives, may properly be subject to a negligence action where such misdiagnosis breaches the standard of care, but may not be subject to an action based on failure to secure informed consent”), and *id.* at 661 n. 2 (further stating, also in *dicta*, that “[w]here a physician arguably misdiagnoses the patient's condition and recommends a course of treatment for the patient based on that misdiagnosis, the physician is properly liable in negligence for the misdiagnosis if such diagnosis breaches the standard of care. But the physician should not be additionally liable under RCW 7.70.050 for a condition unknown to the physician. For example, a physician who misdiagnosed a headache as a transitory problem and failed to detect a brain tumor may be guilty of negligence for the misdiagnosis, but it seems anomalous to hold the physician culpable under RCW 7.70.050 for failing to secure the patient's informed consent for the undetected tumor”).

<sup>18</sup> *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 261, 828 P.2d 597, *rev. denied*, 119 Wn.2d 1020 (1992) (“failing to diagnose a condition is a matter of medical negligence, not a violation of the duty to inform a patient”); *Burnet v. Spokane Ambulance*, 54 Wn. App. 162, 169, 772 P.2d 1027, *rev. denied*, 113 Wn.2d 1005 (1989) (quoted approvingly in *Backlund*, 137 Wn.2d at 661, for the proposition that, where the defendant physician was unaware of the patient’s condition “the issues presented were confined to negligence and misdiagnosis rather than a violation of the informed consent law,” because of the doctor’s lack of awareness, “he had no duty to disclose”); *Bays v. St. Luke’s Hosp.*, 63 Wn. App. 876, 883, 825 P.2d 319, *rev. denied*, 119 Wn.2d 1008 (1992) (declining “to create a second or alternate cause of action on informed nonconsent to a diagnostic procedure predicated on the same facts necessary to establish a claim of medical negligence”).

diagnosing it.” Once again, the Supreme Court denied review in *Gustav*.

*Gomez v. Sauerwein*, 172 Wn. App. 370, 385, 289 P.3d 755 (2012).

*Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 828 P.2d 597, *rev. denied*, 119 Wn.2d 1020 (1992), is aptly cited in the excerpt from *Gomez* quoted above because it is factually similar to this case. In that case the plaintiff, Thomas, suffered breathing problems after exposure to Malathion but the defendant physician, having decided asthma, not Malathion poisoning, was causing Thomas’ complaints, treated her for asthma and did not explain Malathion poisoning or antidote treatment to her. Thomas claimed the defendant physician had thereby breached his legal duty to secure her informed consent for the asthma treatment he provided. *Thomas*, 65 Wn. App. at 258-59. The Court of Appeals held that the physician had no duty to inform Thomas of the timeframe for administering a Malathion poisoning antidote or of future risk she might face if the antidote was not administered, because “[f]ailure to diagnose a condition is a matter of medical negligence, not a violation of the duty to inform a patient.” *Thomas*, 65 Wn. App. at 261. In other words, a malpractice claim based on an alleged misdiagnosis cannot be restated as a claim of failure to obtain the patient’s informed consent for the treatment offered or given for the condition actually diagnosed.

This case is not meaningfully distinguishable, factually, from *Thomas*. Mr. Flyte’s “informed consent” claim here was that, even though the Clinic’s physician, Dr. Marsh, did not think his wife had flu because she did not have a fever, he should have informed her, but failed to inform her, of the option of Tamiflu treatment as a precaution in case he was wrong and her symptoms were early signs of flu.

It is noteworthy that the expert medical testimony – testimony by Dr. Zimmer – that Mr. Flyte offered at trial to support his informed consent claim and upon which he relies on appeal, *App. Br. at 15-16*, was framed in terms of a standard of care:

[I]t’s my feeling that the informed consent to not discuss the options of medication, specifically Tamiflu, which we were using to treat pregnant women at that time, was a violation of the standard of care in terms of informed consent.

7/19 RP (Zimmer) 10. Although defense counsel did not move to strike that testimony, such a motion would have been well taken, because a standard of care has no relevance to informed consent analysis and for that reason is not among the elements of an informed consent claim listed in RCW 7.70.050(1) and WPI (Civ.) 105.05.<sup>19</sup>

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<sup>19</sup>Under RCW 7.70.050, the elements of an informed consent claim are:

- (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;

In an informed consent case, a defendant “doctor’s liability is founded, *not on violation of a standard of care among the medical community*, but on failure to disclose material information to a patient.” *Crawford v. Wojnas*, 51 Wn. App. 781, 783, 754 P.2d 1302, *rev. denied*, 111 Wn.2d 1027 (1988) (emphasis added). Indeed, while medical expert testimony is proper – indeed, required – to prove the existence of a particular risk for purposes of an informed consent claim, it is inappropriate to allow “standard of care” opinion testimony to intrude, in an informed consent case, on the separate question of whether a reasonably prudent patient would have considered the risk material. As explained in *Smith v. Shannon*, 100 Wn.2d 26, 30, 666 P.2d 351 (1983) (emphasis added):

Once it has been established by expert medical testimony that a risk existed, then the existence of the risk is the patient’s business; and *it is not for the medical profession to establish a criteria [sic] for the dissemination of information to the patient based upon what doctors feel the patient should be told.*

*Miller [v. Kennedy]*, 11 Wn. App. 272, 522 P.2d 852 (1974), *aff’d per curiam*, 85 Wn.2d 151, 152, 530 P.2d 334 (1975)].] at 285-86. [Footnote omitted.] To allow physicians, rather than patients, to determine what

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(c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;

(d) That the treatment in question proximately caused injury to the patient.

information should be disclosed would be in direct conflict with the underlying principle of patient sovereignty.

Mr. Flyte's reliance on older law that used to be different from current informed consent law is misplaced. As the court explained in *Smith v. Shannon*, 100 Wn. 2d at 32 (emphases added):

We have concededly shifted to an extent on the issue of an expert testimony requirement. In *ZeBarth v. Swedish Hosp. Med. Ctr.*, [81 Wn.2d 12, 499 P.2d 1 (1972)], we noted that "in most instances, and as a general rule, the duty to inform the patient must be established by expert medical testimony or reasonable inferences to be drawn from it." *ZeBarth*, at 24. In *ZeBarth*, however, we enunciated a test for materiality based on the standard of disclosure in the medical profession. See *ZeBarth*, at 26-27. ***That test has since been replaced by the "reasonable patient" test*** enunciated in *Miller* ..., as we recognized in *Keogan v. Holy Family Hosp.*, 95 Wn.2d 306, 318, 622 P.2d 1246 (1980). Where the focus of the materiality test is on the patient rather than the profession, expert testimony is of secondary importance.

The jury is capable of deciding whether the doctor did not tell the patient about something that should have been revealed. The jury does not need testimony from physicians about the norm of disclosure in the community. ***The usual conduct of doctors in this matter is not relevant*** to the establishment of the liability which is imposed by law. The jury, as lay people, are equipped to place themselves in the position of a patient and decide whether, under the circumstances, the patient should have been told.

*Miller*, at 288-89. See also *Keogan*, at 318.

By framing his medical expert opinion testimony on informed consent in terms of a standard of practice or care, Mr. Flyte was styling a negligent failure to diagnose claim – a RCW 7.70.040 *malpractice* claim – as a separate “informed consent” claim, which the decisions discussed above hold is not proper under RCW 7.70.050.

Thus, the trial court properly could have refused to give *any* “informed consent” instructions because such a claim was redundant with Mr. Flyte’s wrong diagnosis claim.<sup>20</sup> Because the trial court’s decision to enter judgment on the defense verdict may be affirmed on any ground supported by the record, *Nast*, 107 Wn.2d at 308, the court’s denial of Mr. Flyte’s motion for new trial on the “informed consent” claim may be affirmed because that claim was redundant with his malpractice claim.

## VI. CONCLUSION

For the foregoing reasons, Mr. Flyte has not shown any error that, singly or in combination, deprived him of a fair trial on either of his causes of action against Summit View Clinic. The judgment entered on

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<sup>20</sup> Although Mr. Flyte categorically asserts, *App. Br. at 16*, that “it was not, and never was, the Flyte family’s theory of the case that Dr. Marsh or the Summit View Clinic failed to diagnosis [sic] the Swine Flu,” the fact remains that he did present expert testimony from Dr. Miller that, based upon the entire Summit View Clinic chart note for the visit in question, Dr. Miller determined that Mrs. Flyte had influenza, and that Dr. Marsh’s diagnosis of an upper respiratory infection was not consistent with the standard of care, and his failure to prescribe Tamiflu was a violation of the standard of care. 7/12 RP (Dr. Miller) 36-37.

the jury's verdict finding no liability and the trial court's order denying plaintiff's motion for a new trial should be affirmed.

RESPECTFULLY SUBMITTED this 20th day of May, 2013.

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By

  
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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 20th day of May, 2013, I caused a true and correct copy of the foregoing document, "Brief of Respondent," to be delivered in the manner indicated below to the following counsel of record:

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COURT OF APPEALS  
DIVISION II

DATED this 20th day of May, 2013, at Seattle, Washington.

  
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Paula Polet, Legal Assistant