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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 294382

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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ROBERT CHANEY

Appellant,

v.

PROVIDENCE HEALTH CARE d/b/a SACRED HEART MEDICAL  
CENTER & CHILDREN'S HOSPITAL

Respondent.

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REPLY BRIEF OF APPELLANT

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## I. STATEMENT OF THE CASE

### A. Regarding the Respondent's Statement of Facts

Mr. Chaney requests that the Court continue to consider his Statement of Facts during its review. The following inaccuracies contained in Sacred Heart's statement of facts must be addressed, however.

#### 1. No Donated PTO for the Trip to Hawaii

Sacred Heart states in its factual statement that "staff and supervisors at Sacred Heart donated their paid time off hours to Chaney so that he could care for his wife and take his family on a vacation to Hawaii during this difficult time." (Respondent's Brief, pg 5). Sacred Heart's citation to the record does not support this fact. Mr. Chaney's supervisors and co-workers did donate paid time off ("PTO") to assist Mr. Chaney in caring for his wife. (RP 78-79; RP 337; RP 442). This donated time was never utilized for a trip to Hawaii. (RP 442-44). Mr. Chaney had to receive special permission in writing by his supervisor to take such a vacation without PTO. (RP 444). Only after the fact did Mr. Chaney learn of a misperception held by his co-

workers that he had utilized donated PTO to take this trip. (RP 444-45).

Unfortunately, Sacred Heart seeks to continue this misperception in its Brief.

## **2. Medications and their Use**

Sacred Heart indicates that Mr. Chaney “continued taking various medications, including Methadone, generic Soma, generic Ambien, Imitrex, Wellbutrin, Lorazepam, generic Norco and Ondansetron. (Respondent’s Brief, pg 6, *citing* Ex. P33). The implication by Sacred Heart is that Chaney was taking all the medications, everyday. However, at least half of these medications were taken on an “as needed” basis. (Ex. P33). Dr. Jamison confirmed at trial that the medications were prescribed on an “as needed” basis and that the drug test screen for Mr. Chaney confirmed that he was abiding by such instructions. (RP 245-48).

## **3. Mr. Chaney’s appearance to Nurses on June 25, 2007**

Sacred Heart utilizes the “Supervisor’s Fitness for Duty Checklist” in establishing Mr. Chaney’s symptoms of “dilated or constricted pupils, glassy or reddened eyes, slurred speech, and a staggering or unsteady gate while walking.” (Respondent’s Brief, pg 8, *citing*, Ex. D126). Sacred Heart is reciting the symptoms under the column “specific” which are initialed, “RP”.

(See Ex. D126). Those initials are of Richard R. Polillo, a nurse who

signed the Checklist. (Id.). Mr. Polillo had been the subject of a previous complaint to Sacred Heart management filed by Mr. Chaney. (See P19).

The other signatory to the checklist, Konnie Dietz, who administered the drug testing process and sat with Mr. Chaney as he completed the three-dimensional spin assignment, did not make the same observations that Mr. Polillo had made. Ms. Dietz initialed “slurred speech” and “staggering or unsteady gate.” (Ex. D126). Ms. Dietz documented that Mr. Chaney’s slurred speech improved after he took “chew” out of his mouth. (Ex. D127).

There is no evidence that Mr. Chaney was describing the three dimensional spin of the brain when attempting to draw the diagram for Ms. Chessar and Ms. Benson. (See Respondent’s Brief, pg 8, *citing* RP 505-[06] and RP 463). Mr. Chaney was attempting to describe the new cancer procedures he had already been involved with that day with Dr. Lou. (RP 461). After his encounter with Ms. Benson and Ms. Chessar, Mr. Chaney proceeded to the procedure room and quickly completed the three-dimensional spin. That is when Ms. Dietz contacted him. (RP 464).

#### **4. Timing of Dr. Jamison’s call to Sacred Heart**

Sacred Heart states that the telephone call from Dr. Jamison to a female in human resources at Sacred Heart “occurred sometime around

September of 2007.” (Respondent’s Brief, pg 14, *citing* RP 256). The September time frame was suggested by Sacred Heart’s counsel during the cross examination of Dr. Jamison. After being asked whether he recalled the telephone call occurring in September, 2007, he responded: “I believe around that time.” (RP 256).

On redirect examination, Dr. Jamison testified that he believed the telephone conversation occurred while Mr. Chaney was still employed. (RP 273). In fact, the phone call occurred near the time that Dr. Jamison’s office completed the document informing Sacred Heart could safely perform his duties on July 5, 2007. (RP 274; Ex. P25).

**5. Dr. Jamison did not Testify of Concern that Chaney was Abusing Medication at the time of his Personal Accident**

Sacred Heart includes in its statement of facts that Dr. Jamison “had a suspicion that Chaney’s personal accidents and incidents at work may have been a result of potential abuse by pain medications.” (Respondent’s Brief, pg 15, *citing* RP 258-61). Sacred Heart twists the record to make this claim of the facts. A review of the record indicates that Dr. Jamison testified to his vigilance of monitoring patients taking narcotics to treat chronic pain. Such treatment through pain management always raises concern. Requesting refills of medications too soon raises a concern of the potential of abuse of pain

medication. (RP 259).

At one point, that concern did arise regarding Mr. Chaney. (RP 259). Dr. Jamison had Mr. Chaney sign a narcotics agreement. (RP 258). Such an agreement is typical for most people on chronic pain medication. (RP 258). On redirect, Dr. Jamison established the narcotics agreement as being signed in June, 2006. (RP 275). Dr. Jamison had no concerns of an overuse of medication by Mr. Chaney after June, 2006. (RP 275). When presented the question whether evidence of a personal accident at home was indicative of abuse of pain medications, Dr. Jamison responded, “No.” (RP 260).

## **II. REPLY ARGUMENT**

### **A. Involuntary Leave**

#### **1. Mr. Chaney Preserved Issue of Involuntary Leave for Review**

Mr. Chaney preserved the issue of involuntary leave for review upon his motion for a directed verdict. For his motion, Mr. Chaney’s counsel argued that Sacred Heart had violated the FMLA “by relying upon the opinion of a doctor of [its] choice while ignoring, and not even speaking to, the doctor who was treating the patient in this case, the employee.” (RP 521). Sacred Heart relied upon the opinion of Dr. Van Gerpen in placing Mr. Chaney on FMLA leave as explained in Ms. Morse’s letter:

Given that we have no other information, but the work release form that restricts you from working in your position, the Medical Center has concluded that your absence from work is due to a health condition. The Medical Center is designating the time off as provisional under FMLA and we are notifying you that FMLA benefits are being used, effective July 16, 2007.

(Ex. P36). Evidence that Sacred Heart considered the information from Dr. Van Gerpen, and not Mr. Chaney's doctor, in placing Mr. Chaney on FMLA leave is found in that July 31, 2007 letter. Ms. Morse directed Mr. Chaney to have Dr. Van Gerpen complete the FMLA certification. (Id.). Sacred Heart ignored the statement it had already received from Mr. Chaney's doctor's office. (See Ex. P25). That statement, dated July 5, 2007, stated that Mr. Chaney could "safely perform his duties . . . ." (Id.). Sacred Heart placed Mr. Chaney on FMLA although he had not requested it and his own doctor was indicating that he could work.

The trial judge did not take the opportunity to respond to this argument. She focused her concern on Mr. Chaney's proffered instruction concerning conflicting medical opinions. (RP 524-25).<sup>1</sup> The instruction was

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Sacred Heart's recitation of the record is not complete. Sacred Heart omits the trial court's discussion relevant to 29 U.S.C. § 2613 (c) and (d). See RP 524-25. Ultimately, the trial court denied the instruction concerning

denied by the court. (RP 525). While exposing her thought process, the trial judge did comment that the use of FMLA was at the behest of Sacred Heart. (RP 523). She recognized that Mr. Chaney had objected to the use of FMLA. (RP 524).

The motion for a directed verdict did adequately raise this issue. The trial court recognized that the FMLA was imposed upon Mr. Chaney against his will. The issue was preserved for review by this court.

**2. Mr. Chaney should not have been Forced on FMLA**

By placing Mr. Chaney on FMLA leave on the information from its retained physician, Sacred Heart violated the Act. See 29 C.F.R. § 825.208 (designation of leave as FMLA based only on information provided by employee). The termination of Chaney was then only a matter of time as the FMLA leave dwindled.

A cause of action for interference with FMLA rights exists when the employer forces an employee on FMLA leave. See Sista v. CDC Ixis N. Am. Inc., 445 F.3d 161, 175 (2<sup>nd</sup> Cir. 2006)(plaintiff may show employer interfered with FMLA rights and benefits by imposing leave); see also Wysong v. Dow Chemical Co., 503 F.3d 441, 449 (6<sup>th</sup> Cir. 2007)(claim may lie where forced

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competing medical opinions. See RP 525.

leave reduces time available for desired leave under Act).<sup>2</sup> Exhausting an employee's leave would have the effect of rendering the employee unprotected from discharge when the leave ran out. Such was the case for Mr. Chaney when he was discharged. Sacred Heart is liable for violating the FMLA by interfering with Mr. Chaney's FMLA rights upon placing him on leave against his will.

**B. Violation of the FMLA by not Restoring Mr. Chaney to Position**

**1. Pursuant to 29 C.F.R. § 825.310(c) (2007), Mr. Chaney should have been Restored to his Position**

Sacred Heart relies upon regulations which were not the applicable regulations at the time this matter arose. Sacred Heart cites 29 C.F.R. § 825.312 for allowing an employer to require a certification that the employee is able to resume work. Sacred Heart is citing the July 1, 2009 edition, or a later edition, of the Department of Labor's regulations. In 2007, § 825.312 pertained to circumstances where an employer could refuse to provide FMLA

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Appellant mistakenly indicated that the facts of Wysong involved a pregnant employee who was prevented from working by her employer who placed her on FMLA. (Brief of Appellant, pg 26). Those facts were contained in an earlier unpublished opinion which was cited by the Sixth Circuit in Wysong. See 503 F.3d at 449 (*citing Hicks v. Leroy's Jewelers, Inc.*, No. 986596, 2000 WL 1033029, slip op. at 3-4 (6th Cir. July 17, 2000) (unpublished), *cert. denied*, 531 U.S. 1146 (2001)).

leave or refuse to reinstate the employee. Sacred Heart utilizes this later edition of the regulations to argue that the employee has an explicit duty to cooperate with the employer. (See Respondent's Brief, pg 37). That language was not contained within the 2007 regulation.

The applicable regulation during July and August, 2007, provided:

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

(b) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment.

(c) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made.

29 C.F.R. § 825.310 (a)-(c) (2007).<sup>3</sup> If the employer applies such a uniform policy for all employees, it is entitled to a fitness-for-duty certification upon an employee's return to work from FMLA leave. That certification is satisfied by a "simple statement of an employee's ability to return to work." 29 C.F.R. § 825.310 (c) (2007).

The Sixth Circuit has commented regarding the lack of case law on what a "simple statement of an employee's ability to return to work" requires. Brumbalough v. Camelot Care Centers, Inc., 427 F.3d 996, 1003 (6<sup>th</sup> Cir. 2005). "However, a plain reading of this regulation indicates that the fitness-

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Section 825.310 is actually from the July 1, 2006, edition of Chapter V, of Title 29. The 2006 edition of Chapter V was reprinted in Title 29 of the Code of Federal Regulations, published on July 1, 2007.

for-duty certification need only state that the employee can return to work.” 427 F.3d at 1003; see also Jordan v. Beltway Rail Co. of Chicago, 2009 WL 537053, slip op. at 5 (N.D. Ill. March 4, 2009)(remarking that the Seventh Circuit has not clarified what’s required for a “simple statement of an employee’s ability to return to work” perhaps because the plain meaning of the phrase requires no explanation). Although the employer can seek clarification, it cannot delay reinstatement while it is obtaining further information for clarification. 427 F.3d at 1003-04. The Sixth Circuit compared the fitness for duty certification to the more stringent requirements involved with the initial certification for FMLA leave. See 427 F.3d at 1004 (*Comparing* 29 U.S.C. § 2613(b)<sup>4</sup> *with* 29 C.F.R. § 825.310(c)). The lack of such detailed information required by the Act for the certification for an employee’s return to work bolsters the view that the certification is just that—a simple statement that the employee can return. 427 F.3d at 1004; see also Cooper v. Olin Corp.,

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The Sixth Circuit referred to the required information for an initial medical certification under 29 U.S.C. § 2613 (b): “[S]tating that medical certification of a serious health problem will be ‘sufficient’ when it includes the date that the problems began, the probable duration of the ailment, all other appropriate medical facts regarding the condition, a statement that the employee is unable to perform work functions, as well as any requirements regarding “intermittent leave.” 427 F.3d at 1004.

246 F.3d 1083, 1090 (8<sup>th</sup> Cir. 2001)(recognizing the different requirements involved with the initial medical certification in comparison to fitness-for-duty certification).

In Brumbalough, the district court had granted the defendant summary judgment concluding that a doctor's note did not satisfy the requirements for a fitness-for-duty certification. 427 F.3d at 1003. The note stated that the plaintiff "may return to work on 8/13/01[.] She should only work a 40-45 hour work week and limit her out of town travel to 1 day per week." 427 F.3d at 1003. The Sixth Circuit held that the note was sufficient and "that once an employee submits a statement from her health care provider which indicates that she may return to work, the employer's duty to reinstate her has been triggered under the FMLA." 427 F.3d at 1004.<sup>5</sup>

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While considering what was sufficient for a fitness-for-duty certification, the Sixth Circuit considered two unpublished opinions and provided parenthetical explanations: "*Mathews v. Fairview Health Servs.*, No. 01-2151, 2003 WL 1842471, at \*1, 4 (D. Minn. 2003)(finding that a return-to-work slip by a doctor which stated only that the employee could return to work and should not work more than 40 hours in a two-week period, was a sufficient fitness-for-duty certification which required immediate reinstatement); *Underhill v. Willamina Lumber Co.*, No. 98-630-AS, 1999 WL 421596, at \*7 (D. Or. 1999)(finding that a letter from the employee's doctor stating that the employee can return to work is specific enough to constitute a fitness-for-duty certification and require reinstatement 'regardless of whether Defendant had concerns about plaintiff's ability to

It was Dr. Jamison's opinion that Mr. Chaney was "fit for duty." (RP 268). Dr. Jamison had opined on July 5, 2007, that Mr. Chaney could "safely perform his duties . . ." (Ex. P25). Though Sacred Heart questions this note's authenticity, the July 5, 2007, note was generated by Dr. Jamison's medical assistant under his direction. (RP 251, 264). A hard copy was printed, signed, and sent to Sacred Heart. (RP 251-52). Dr. Jamison's statement in his certification, signed August 10, 2007, is consistent with that July 5, 2007, note. In the certification, Dr. Jamison indicated that Mr. Chaney was fit for duty. (Ex. P45; RP 251).

Under the FMLA, upon receiving Dr. Jamison's statement indicating that Mr. Chaney was fit to return to work, Sacred Heart was required to restore Mr. Chaney to his position. Sacred Heart did not seek clarification of Dr. Jamison's note. Sacred Heart was not interested in clarification. Ms. Morse understood what Dr. Jamison's position was all along. (See Ex. P44).

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do his job').” Perhaps relevant to the case at bar which involves concern over the use of medication, in *Underhill*, the employer, a sawmill operator, was refusing to reinstate the employee because of its concerns with the plaintiff's use of medication to control seizures. The employer expressed concerns to the plaintiff's physician regarding the plaintiff's behavior: “[I]nstances of confusion, inability to concentrate, dramatic mood swings, severe headaches, lethargy and weakness . . .” while working “in an industrial setting involving sawmill processing equipment . . .” *Underhill*, slip. op. at 2.

**2. Sacred Heart never sought Clarification so its Claimed Lack-Of-Access to Medical Information is Irrelevant**

Sacred Heart skeptically comments that it would have been unable to seek clarification of Mr. Chaney's condition due to his obstructionist attitude regarding the sharing of his medical information. This skepticism is fomented from Mr. Chaney's unwillingness to sign a general release giving Sacred Heart access to all his medical records. Under the FMLA, a full release to information is not required. In fact, an employer's conduct in seeking a full release violates the FMLA.

The United States District Court for Illinois, Northern District, has considered the issue whether a general release for medical information violates the FMLA. In Jordan v. Beltway Rail Co. of Chicago, 2009 WL 537053 (N.D. Ill. March 4, 2009), the court considered the defendant's repeated requests for the plaintiff to sign a release for "any and all medical records and information relating to [the plaintiff's] care and treatment including treatment for pre-existing conditions". The district court determined that the release violated the FMLA and 29 C.F.R. 825.310 (c) because it would allow the employer to seek more information beyond the "serious health condition" for which the plaintiff had taken FMLA. Jordan, slip op. at 6.

Sacred Heart never sought clarification from Dr. Jamison. It

speculates that Mr. Chaney never would have given such consent. It bases this assumption on Mr. Chaney's objection to providing Sacred Heart a full release to his medical records and information. Under the FMLA, Mr. Chaney was not required to provide a full release. The issue of an employee refusing to consent to his employer's contact with his health care provider for purposes of clarification of a fitness-for-duty certification is not before this court.

**C. Directed Verdict**

In order to determine whether the trial court erred in denying a motion for a directed verdict, the Court of Appeals must determine, while viewing the evidence and reasonable inferences most favorably to the nonmoving party, whether "it is clear that the evidence and reasonable inferences are insufficient to support the jury's verdict." Industrial Indem. Co. of the Northwest, Inc. v. Kallevig, 114 Wn.2d 907, 916, 792 P.2d 520 (1990). When a matter involves multiple issues of factual dispute which require determination by a jury, the denial of a directed verdict will rarely be reversed. See Hizey v. Carpenter, 119 Wn.2d 251, 272 830 P.2d 646 (1992)(conflicting testimony concerning plaintiffs' awareness of attorney's representation of other parties and conflicting testimony on the proximate cause of damages in legal malpractice case); see also Mason v. Turner, 48 Wn.2d 145, 149, 291 P.2d 1023

(1956)(factual dispute from the testimony regarding whether decedent was within the scope of his employment at time of his death).

Despite Sacred Heart's claim to the contrary, the issue of whether Chaney presented a fitness-for-duty certification does not involve a factual dispute. Sacred Heart attempts to portray a factual dispute by arguing that the jury rejected Dr. Jamison's notations on the Certification of Health Care Provider as a valid "doctor's release." (Ex. P45). Sacred Heart relies on its policy manual concerning the FMLA. (See Ex. P2). That policy requires an employee who has been on FMLA due to his serious health condition must provide a "doctor's release" allowing him to return to his position. (Id., BS #102050). Sacred Heart argues that the jury rejected the notation by Dr. Jamison as a doctor's release. Sacred Heart claims that the trial judge made a "finding" that the notation by Dr. Jamison was "a bit ambiguous" during her comments while considering the plaintiff's motion for a directed verdict. (See RP 524). However in finishing the sentence with the referenced remarks, the trial judge continued "[Dr. Jamison] says [Mr. Chaney] is fit to go to work." (RP 524). The trial judge then observed the competing opinions:

So we have this situation where we have Dr. Van Gerpen saying one thing, Dr. Jameson saying another.

(RP 524). The trial judge clearly viewed Dr. Jamison's note as a fitness-for-

duty certification. It was a simple statement indicating that, medically, Mr. Chaney was able to return to work. It was up to Sacred Heart on whether it would comply with the FMLA and allow Mr. Chaney to return.

Sacred Heart could not draft its own unilateral requirements under the FMLA. It could not, as it now claims, require an employee to provide a “doctor’s release.” The personnel policy is not a collective bargaining agreement that would govern the return to work for an employee. See 29 U.S.C. § 2614 (a)(4).

The requirement for a fitness-for-duty certification is a “simple statement of an employee’s ability to return to work.” 29 C.F.R. § 825.310 (c) (2007). There is no issue of fact that Dr. Jamison provided such a statement. That statement was no surprise to Sacred Heart. Sacred Heart knew full well what Dr. Jamison’s opinion was. (See P44). Sacred Heart chose to ignore Dr. Jamison’s opinion and his statement. No evidence supports the proposition that Dr. Jamison’s note was not a simple statement providing his opinion that Mr. Chaney could return to work. Sacred Heart violated the FMLA by interfering with Mr. Chaney’s right to return to work and be restored to his position.

Sacred Heart may be arguing that it can be relieved of liability if it did

not recognize Dr. Jamison's notation as a fitness-for-duty certification. However, Sacred Heart's intent is irrelevant when considering whether it interfered with Mr. Chaney's FMLA rights. See Sanders v. City of Newport, \_\_\_ F.3d \_\_\_, 2011 WL 905998, slip op. at 5 (9<sup>th</sup> Cir. March 17, 2011)("In interference claims, the employer's intent is irrelevant to a determination of liability."); see also Bachelor v. America West Airlines, Inc., 259 F.3d 1112, 1130 (9<sup>th</sup> Cir. 2001)(employer liable for damages for interference with FMLA rights regardless of its intent). As a matter of law, Dr. Jamison's statement that Mr. Chaney was "OK to return to work" was a certification that Mr. Chaney was fit for duty. Mr. Chaney should have been restored to his position as an interventional radiologic technologist.

**D. Instructions**

**1. Methadone and Driving a Commercial Vehicle**

Mr. Chaney's proffered instruction, P3, did not involve a collateral matter as Sacred Heart contends. Dr. Van Gerpen attempted to mislead the jury for the basis of his opinion that Chaney could not return to work as an interventional radiologic technologist. Initially, during trial, he testified that Mr. Chaney was not functioning well due to multiple medications exposure based on a number of factors. (RP 400-02). Mr. Chaney's counsel confronted

Dr. Van Gerpen with his earlier testimony from his deposition for the actual basis of his opinion. The basis for his opinion was that Mr. Chaney could not work as an interventional radiologic technician while prescribed Methadone because, as Dr. Van Gerpen understood it, a commercial truck driver could not perform his job while prescribed Methadone. (RP 402-03). The legality of driving a commercial truck while prescribed Methadone became an issue in this case because Sacred Heart's doctor made it an issue.

Sacred Heart professed to its reliance upon Dr. Van Gerpen's opinion in its decision to not bring Mr. Chaney back to work. Naturally, the jury was interested in Dr. Van Gerpen's opinion on this crucial issue. Through the cross-examination of Dr. Van Gerpen, the basis of Dr. Van Gerpen's opinion was disclosed to the jury. The jury may have accepted Dr. Van Gerpen's opinion concerning the use of Methadone and the resulting prohibition of operating a commercial vehicle. This would add to the legitimacy of Sacred Heart's decision to not allow Mr. Chaney back to work.

Mr. Chaney was entitled to an accurate instruction on the law concerning the use of controlled substances such as Methadone and the ability to drive a commercial vehicle. Sacred Heart's witness made the subject an issue. The jury should have been instructed on the law.

## 2. Instruction regarding Health Care Information

Sacred Heart maintains that it was prevented from communicating with Dr. Van Gerpen without a full release executed by Mr. Chaney. It claims that the information derived from Dr. Van Gerpen's exam is confidential and that it did not have access. As support, Sacred Heart utilizes 29 C.F.R. § 1630.14 (c) and the C.F.R. Appendix.

29 C.F.R. § 1630.14(c) pertains to medical examinations authorized under the Americans with Disabilities Act (ADA). See 42 U.S.C. § 12112 (d). Such examinations must be job-related and consistent with business necessity. 29 C.F.R. § 1630.14(c). The information obtained from such examinations is required to be "collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record . . . ." Id. Disclosure of such information by the employer may be made to supervisors and managers concerning necessary restrictions and accommodations for the employee, first aid and safety personnel, and to government officials investigating compliance with the ADA. 29 C.F.R. § 1630.14 (c)(1). An employee may bring an action under the ADA for the disclosure of confidential medical information derived from a fitness-for-duty exam. Cossette v. Minnesota Power & Light, 188 F.3d 964, 968-70 (8<sup>th</sup> Cir. 1999).

The regulation supports Mr. Chaney's position concerning the law on the disclosure of health care information. The regulation indicates that the employer has access to the "medical condition or history" obtained through a fitness-for-duty examination. The information is to be kept confidential by the employer. In limited circumstances, the employer may disclose the information. See 29 C.F.R. § 1630.14(c)(1).

Plaintiff's Instruction No. P6 is a correct statement of the law on the confidentiality of health care information. Mr. Chaney should have had the ability to argue to the jury that Sacred Heart created the release to information issue in order to support its discharge of Mr. Chaney. In reality, there was no legal obstacle preventing Sacred Heart from consulting with Dr. Van Gerpen. Dr. Van Gerpen did not diagnose, treat, or maintain Mr. Chaney's physical or mental condition. See RCW 70.02.010 (5). Therefore, there was no prohibition against Sacred Heart discussing the matter with Dr. Van Gerpen.<sup>6</sup> The refusal to provide this instruction was an abuse discretion by the trial court.

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As discussed above, Sacred Heart is prevented from disclosing this confidential information except in limited circumstances. See 29 C.F.R. § 1630.14(c).

### III. CONCLUSION

The trial court erred in denying a directed verdict to Mr. Chaney. There is no factual dispute that Dr. Jamison provided a statement that Chaney could return to work. Sacred Heart violated the FMLA as a matter of law by not restoring Mr. Chaney to his position. Sacred Heart also violated the FMLA by relying on Dr. Van Gerpen's opinion when placing Mr. Chaney on involuntary leave. The cause should be remanded to the trial court for a trial on the damages.

If the Court determines that there was no error in denying the motion, the matter should be remanded for a new trial. Mr. Chaney's proffered jury instructions should have been provided.

Respectfully submitted this 8<sup>th</sup> day of July, 2011.

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