

NO. 294382



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION NO. III

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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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BRIEF OF RESPONDENT

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## **I. STATEMENT OF THE CASE**

### **A. Summary**

This case involves nothing more than an employer's right to terminate an employee on the basis that he failed to provide a valid and sufficient "doctor's release" before the exhaustion of his allotted Family Medical Leave Act ("FMLA") time on August 27, 2007. While the heart of Chaney's theory of the case (at least that which he presented to the trial court and jury) rests in allegations that Sacred Heart retaliated against him for taking FMLA time in the past to care for his ailing wife and young children, the record abounds with evidence to the contrary. This includes evidence that Chaney's supervisor, Mr. Francis, and the department head, Mr. Altermatt, as well as other staff at Sacred Heart, made donations for additional paid time off for Chaney out of their compassion for his situation. Moreover, Chaney's last performance evaluation, which was reviewed and signed by Mr. Francis and Mr. Altermatt, reflected overall that Chaney's performance met standards. Furthermore, Mr. Altermatt's testimony, corroborated by Sacred Heart's Employee Relations Manager, confirms that the only reason Chaney was terminated was because he was not released to return to his position as an Interventional Radiology Technician before the exhaustion of his FMLA leave time. Accordingly,

upon considering all of the evidence presented and assessing the credibility of the witnesses, the jury reasonably concluded that Sacred Heart was not liable for violation of the FMLA and not liable for wrongful discharge in violation of public policy.

Nonetheless, the heart of Chaney's present appeal rests on theories and technicalities that deviate from his underlying FMLA claim based on a theory of retaliation. Chaney first assigns error to the trial court's denial of his motion for directed verdict on his FMLA claim. In his appellate brief, Chaney presents two theories that Sacred Heart interfered with his rights under the FMLA *as a matter of law*, namely by 1) involuntary placing him on FMLA leave which resulted in the exhaustion of his allotted leave time ("FMLA involuntary leave claim") and 2) not reinstating him upon the expiration of his FMLA leave ("FMLA reinstatement claim"). Chaney did not move for a directed verdict with respect to his first theory, and therefore the trial court could not have erred in denying it. Nevertheless, there is substantial evidence in the record establishing that Chaney had a "serious health condition." Moreover, it is undisputed that Chaney never requested FMLA leave for which he was later denied. Given this set of facts, case law makes clear that Chaney has failed to allege, let alone establish as a matter of law, an FMLA

involuntary leave claim. Sacred Heart was well within its legal rights to require Chaney to submit to a fitness for duty examination and to unilaterally place Chaney on FMLA leave based upon the resulting medical opinion that he was not fit to perform the job duties of an Interventional Radiology Technician.

With respect to Chaney's second theory – the FMLA reinstatement claim – the record contains substantial evidence that Chaney failed to provide a sufficient and valid doctor's release prior to the expiration of his FMLA leave on August 27, 2007. Therefore, Chaney had no right to reinstatement and Sacred Heart was well within its rights to terminate Chaney on the basis that he failed to report to work with the required certification when his FMLA leave concluded. Ambiguities in the validity and sufficiency of the purported statement of release contained in the August 10, 2007 FMLA certification provided by Chaney's doctor, Dr. Jamison, precluded a directed verdict and also supported the jury's verdict in Sacred Heart's favor. Accordingly, the district court did not err in denying Chaney's motion for directed verdict on his FMLA claim.

Chaney's second and third assignments of error involve the trial court's refusal to respectively give two of his requested jury instructions – the first involving the federal Department of Transportation's regulations

governing the use of controlled substances by commercial drivers and the second involving the confidentiality of medical information pursuant to the Washington Health Care Disclosure Act (HCDA). Chaney's proposed instruction on a federal regulation governing commercial drivers is entirely inapplicable to this case involving an Interventional Radiology Technician. Chaney's proposed instruction on the HCDA reflects an erroneous interpretation of the law. Fundamentally, however, neither party alleges that either of these laws were violated, and thus it would have been prejudicial error for the district court to give such instructions that would have only served to invite speculation about collateral issues. The record reveals that Chaney was not precluded from arguing his theory of the case. This is further evidenced by the fact that Chaney does not assign error to any jury instruction regarding the FMLA, which governs his underlying claim in this matter. Accordingly, the trial court did not abuse its discretion in refusing to give these inapplicable and collateral instructions. For the reasons set forth further herein, this Court should uphold the jury's verdict in favor of Sacred Heart.

## **B. Facts**

Chaney was employed with Sacred Heart from April 9, 2001, to August 27, 2007. (RP 425). Chaney worked as an Interventional Radiology Technician in the Radiology Department. (*Id.*)

It is undisputed that during the course of Chaney's employment, Chaney was advised of his rights and obligations pursuant to the FMLA and further that he was never denied his right to take FMLA qualifying leave either on a continuous or intermittent basis. In 2005 and 2007, Chaney was allowed to exercise his right to take intermittent FMLA leave to care for his wife while she was suffering from a serious health condition and for the care or birth of his children. (RP 419; Ex. P3; Ex. P14). Chaney never faced disciplinary action for exercising his right to take FMLA leave. (RP 202). Indeed, 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. (RP 78-79; RP 337; RP 444).

Chaney also suffered from chronic back pain as a result of injuries he had sustained for which he had two back surgeries. (RP 431-432). Since 2002, Chaney undertook drug therapy for his chronic back pain which was managed by his physician, Dr. Jeffrey Jamison. (RP 432). In

the spring of 2006, Dr. Jamison started prescribing the narcotic Methadone for Chaney because he wanted to put Chaney on a “more long-acting type pain medication.” (RP 433-434). Chaney was concerned about the medications he needed for his back pain because he “didn’t want to be on the job and be highly medicated.” (RP 431). Nevertheless, Chaney continued taking various medications, including Methadone, generic Soma, generic Ambien, Imitrex, Wellbutrin, Lorazepam, generic Norco and Ondansetron. (Ex P33). Chaney testified to taking prescribed medications on the job. (RP 436).

From the period of January 2007 to the time Sacred Heart placed Chaney on FMLA leave in late June of 2007, Chaney described his condition as “really tired, pretty tired and beat up” and affirmed that at times he was “burning the candle at both ends.” (RP 458). Chaney testified that during this time he had several personal accidents that led to injuries and, at times, made him unfit to do his job. (RP 458). This included a time that he attempted to burn some debris in his back yard by using gasoline, which led to an explosion that threw him twenty feet and resulted in injuries to his head. (RP 459). In a second accident, Chaney cut his finger picking flowers with his daughter upon becoming distracted by something she said and was required to have stitches. (RP 460).

In addition, on numerous occasions during this period, Chaney had exhibited behavior while at work and on duty that raised reasonable suspicion as to whether he was unfit for duty. In January 2007, Chaney received first and second written warnings relating to incidents or concerns in the workplace. (Ex. P15; Ex. P16). The first written warning pertained to Chaney's alleged failure to show up for an on-call procedure on January 7, 2007. (Ex. P15). The second written warning was issued due to the perception of Chaney's supervisor, Mr. Francis, that Chaney was unfit for duty on January 9, 2007 based on his observation of Chaney nodding off while with a patient. (Ex. P12; Ex. P16). A condition for Chaney's return to work was that he must provide a medical release from his doctor. (Ex. P12, BS # 102056).

On January 12, 2007, Chaney's doctor, Dr. Jamison, provided the work release for Chaney's return effective January 19, 2007. (Ex. P13). This work release was in the form of a personal letter and was electronically signed by "Jeffrey Jamison D.O." as the author. (*Id.*) This work release unambiguously stated: "I believe that he will be completely fit for full-time duty in one week. He does not need to see me in a week to be cleared." (*Id.*) Moreover, Dr. Jamison explained that Sacred Heart

could contact him to discuss Chaney's care only "with a signed consent from [Mr. Chaney]" granting "his permission." (*Id.*)

On February 16, 2007, Dr. Jamison issued an Excuse Form for Chaney excusing him from work for 3-4 days due to illness. (Ex. P18). This form was electronically signed by Dr. Jamison as the author, and was also personally signed by him. (*Id.*).

On June 25, 2007, Chaney again exhibited behavior while at work and on duty that raised reasonable suspicion as to whether he was unfit for duty. (Ex. D126). On June 25, 2007, Chaney was observed by at least two registered nurses as demonstrating erratic behavior in general. (RP 504-505; D127). More specifically, Chaney was observed as having dilated or constricted pupils, glassy or reddened eyes, slurred speech, and a staggering or unsteady gate while walking. (Ex. D126). Ms. Judy Chessar, one of the nurses, testified that Chaney was incoherent and was having difficulty speaking as he attempted to describe the three dimensional spin procedure he was about to perform on a patient. (RP 505-56; RP 463). A phone call was made to Chaney's supervisor, Mr. Francis, concerning Chaney's behavior. (RP 86). Mr. Francis called to consult with the department's director, Mr. Altermatt, and it was decided that Chaney should be submitted to a drug test. (RP 61; RP 86-87; Ex.

D134). The hospital's house supervisor, Ms. Konnie Dietz, conducted the drug test. (RP 86-86). Pursuant to policy, Chaney was suspended from work and placed on administrative leave pending the results. (Ex. D134).

The results of Chaney's drug test came up positive for Methadone; however, the overall results were determined to be negative, as it was confirmed that Chaney had a legal prescription for Methadone. (RP 466; Ex. P28). It was recommended by the medical review officer, Dr. Paula Lantsberger, that Chaney may need a fitness-for-duty evaluation or visit to his doctor to fine tune his medication. (Ex. P28). Sacred Heart's Human Resources Department arranged for a fitness-for-duty examination. (RP 162).

Before submitting to the fitness-for-duty examination, Chaney visited his doctor, Dr. Jamison. On July 5, 2007, Dr. Jamison's office issued a correspondence indicating that Chaney "can safely perform his duties as an xray/special procedures technologist." (Ex. P25). Unlike the former personal release letter and excuse form officially signed by Dr. Jamison (Ex. P13; Ex. P19), this correspondence was "electronically signed by: Toni Huff" and it did not indicate who was the author. (Ex. P25). No other information was provided in the correspondence. Dr.

Jamison testified that Toni Huff was his medical assistant and that he was not there when the fax was placed. (RP 263-264).

On July 16, 2007, Chaney went for a fitness-for-duty appointment with Dr. Royce Van Gerpen, a health care provider who specializes in occupational medicine. (RP 469; Ex. P29). While the appointment was made by Sacred Heart's Human Resources Department, Dr. Van Gerpen was not employed by Sacred Heart. (RP 161-162). Before being seen by Dr. Van Gerpen, Chaney refused to sign a standard authorization form for releasing medical information to the employer that would allow Dr. Van Gerpen to release Chaney's medical records and/or allow Dr. Van Gerpen to discuss the contents of his medical records and examination with representatives of Sacred Heart. (RP 360-361; RP 469; Ex. P32). Chaney felt that his medical information was privileged and that the release went too far in allowing the hospital to have access to all of his medical records and history. (RP 470). Dr. Van Gerpen discussed the issue with Chaney and then modified the release to authorize his office only to "release a statement about whether [Chaney was] fit for duty." (Ex. P32; RP 360-361). Chaney agreed to be seen by Dr. Van Gerpen only after he signed this limited authorization. (RP 360-361; RP 471).

At the conclusion of the fitness-for-duty examination, Dr. Van Gerpen was of the medical opinion that Chaney could not be released back to work at Sacred Heart as an Interventional Radiology Technician because of concerns relating to the amount and number of prescribed medications Chaney was taking. (Ex. P33; Ex. P34; RP 400-403). Dr. Van Gerpen discussed with Chaney his concern that Chaney was on at least six medications at the time that “could adversely affect his ability to concentrate and make rapid and appropriate sequential decisions.” (Ex. P33, p. 2). This included eighty tablets of Hydrocodone a month, three tablets of Soma a month, and sixty milligrams of Methadone a day which, in Dr. Van Gerpen’s medical opinion, impacted Chaney’s functional ability. (Ex. P33; RP 405). In his progress notes, Dr. Van Gerpen stated that he discussed with Chaney that “an individual with this level of medication usage would not be allowed to operate a commercial motor vehicle” and that he “pointed out that [Chaney’s] position in an interventional radiology setting is more directly critical for an individual patient’s safety and thus must not be compromised.” (Ex. 33, p.2). At trial, Dr. Van Gerpen explained that it was his medical opinion that Chaney was not well-adjusted to the multiple medications he was taking: “this was a situation where an individual clearly had multiple medications exposure

that were contributing to not functioning well.” (RP 400). Dr. Van Gerpen testified that he based his medical opinion on the fact that Chaney’s employer had sent him in for the exam, Chaney had a history of chronic pain, and Chaney had experienced two personal accidents in the previous six months. (RP 401-02; Ex. P33, p. 2). On July 16, 2007, Dr. Van Gerpen provided a limited release for Chaney to return to work as a “general x-ray technician.” (Ex. P34).

After receiving Dr. Van Gerpen’s limited work release, Sacred Heart’s Human Resource Department attempted to work with Chaney to try and obtain additional information relating to the basis underlying Dr. Van Gerpen’s opinion. (Ex. P36). In order to seek additional information, Ms. Morse, Sacred Heart’s Employee Relations Manager, requested that Chaney sign a release for Sacred Heart to obtain additional medical information regarding his ability to do his job. (RP 169-71; Ex P36). The director of the Radiology Department, Mr. Altermatt, also requested Chaney to cooperate. (RP 322-324). Chaney refused to sign such a release on the basis of patient confidentiality. (RP 323; RP 474; Ex. P36). At that point, Sacred Heart made a determination that Chaney’s absence from work was due to a serious health condition. (Ex. P36). On July 31, 2007, Ms. Morse sent a letter to Chaney detailing the foregoing, and explaining

that “[g]iven 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.” (*Id.*) The letter explained that Chaney’s time off was being designated as provisional under FMLA and further notified him that benefits were being used effective July 16, 2007. (*Id.*) Chaney was further advised that his FMLA leave would expire on August 27, 2007, and that if he was not released to return to work as an Interventional Radiology Technician by that date, his position would not be held for him. (*Id.*) The letter directed Chaney to complete the FMLA paperwork and to have Dr. Van Gerpen complete the medical certification portion. (*Id.*)

On August 7, 2007, Dr. Van Gerpen sent a letter to Ms. Morse explaining he was not able to complete the FMLA paperwork of medical certification because he was not Chaney’s attending physician and he suggested that Chaney have his attending physician complete it. (Ex. P40).

On August 10, 2007, Dr. Jamison completed a Certification of Health Care Provider form for Chaney. (Ex. P45). This form expressly provides the definition of a serious health condition under the FMLA and requests the health care provider to check the categories that apply. Dr. Jamison did *not* check the box next to “Condition does not qualify as a

serious health condition under FMLA” thereby indicating that Chaney’s condition was a serious health condition. (*Id.* at p. 1). Dr. Jamison did check the box next to “Absence plus treatment”; however, he did not specify which of the treatment protocols were required. (*Id.*) In the Statement of Medical Facts section, Dr. Jamison wrote “multiple back surgeries” but provided no further information. (*Id.* at p. 2). In the Type of Leave Needed section, Dr. Jamison checked “Continuous” and next to number of weeks he wrote “2-4.” (*Id.*) In the Health Care Provider Recommendations section, the form specifically asks questions with respect to the work, if any, the employee is able to perform, to which Dr. Jamison wrote across the blanks provided: “is ok to work as soon as Employer allows.” (*Id.* at p. 3).

The record contains no work release form or further correspondence from Dr. Jamison to Sacred Heart prior to the expiration of Chaney’s FMLA leave on August 27, 2007. While Dr. Jamison testified that he telephoned Sacred Heart to provide more information about Chaney’s condition, he did not know the name of the woman he spoke to and recalled that the conversation occurred sometime around September of 2007. (RP 256). Ms. Morse testified that she could not recall ever speaking directly either in person or over the telephone with

Dr. Jamison before August 27, 2007 let alone in September of 2007, which would have been of no consequence as it relates to Chaney's leave and rights under the FMLA. (RP 174).

Dr. Jamison also testified that on numerous occasions he had spoken to Chaney about using more than the prescribed amount of medication and that he had a suspicion that Chaney's personal accidents and incidents at work may have been a result of potential abuse by pain medications. (RP 258-261).

On August 16, 2007, Chaney filled out a Request for FMLA leave form provided by Sacred Heart, in which he indicated that he could return to work immediately. (Ex. P46).

On August 23, 2007, Chaney returned for a follow up visit with Dr. Van Gerpen. (Ex. P47). Chaney acknowledged that he was still using about four to six Methadone tablets per day and he continued to express that Sacred Heart did not need to know his medical conditions. (*Id.*) Dr. Van Gerpen determined that there was no new basis to change his previous opinion. (*Id.*) He issued a work release form indicating that his "medical opinion of 7/16/07 is unchanged." (Ex. P48).

On August 27, 2007, Chaney was advised by Sacred Heart's Vice President of Human Resources, Patrick Clarry, that because he was not

released to return to his prior job and that no open positions for a general x-ray tech were available, he was being released as a result of the exhaustion of his FMLA leave and extended illness time allotments. (Ex. P49). Chaney was further advised that if he was released to return to work without restriction, he could apply for an open position in Interventional Radiology when a vacancy occurred or apply for other positions that he was qualified to perform. (*Id.*)

Chaney's last performance evaluation which was reviewed and signed by both his supervisor, Mr. Francis, and his department director, Mr. Altermatt, reflected overall that Chaney's performance met standards. (Ex. P20). While concerns were raised regarding Chaney's attendance (*id.* at BS # 101014), Mr. Francis empathized with Chaney's "tumultuous year due to family health issues and friction with coworkers as a result" and he committed himself to working with Chaney to help achieve his "goals of getting his personal life back on track and establishing better relations with his peers." (*Id.* at 101017; RP 57). Mr. Francis testified that he had no concern that Chaney was abusing his privilege to take FMLA leave or his schedule. (RP 88). Mr. Francis evidenced his support for Chaney not only by donating his own paid time off at a time he was

himself suffering from kidney failure and undergoing dialysis, but also by encouraging other employees to do so, which several of them did. (RP 79).

Similarly, Mr. Altermatt testified that he attempted to “go above and beyond, and be compassionate for Bob’s needs” in an effort to work with Chaney to get him released back to work. (RP 294; RP 336). Mr. Altermatt also made a cash donation to the effort to collect paid time off for Chaney. (RP 337).

Mr. Altermatt met with Ms. Morse in conjunction with making his determination to release Chaney, which he testified was on the sole basis that Chaney’s FMLA leave had been exhausted. (RP 338).

Ms. Morse confirmed that Mr. Altermatt had no other motive or reason to terminate Chaney. (RP 216).

Moreover, Mr. Daniel DeLong, the shop steward for the radiology technicians for the years 2005-2007, testified that he fielded “just a few” complaints from coworkers about Chaney utilizing FMLA time, to which he defended Chaney as being within his rights under the FMLA. (RP 94).

### **C. Procedural History**

Chaney originally asserted four separate claims against Sacred Heart. (CP 1-7). The first claim alleging that Sacred Heart discriminated

against Chaney because of an actual or perceived disability in violation of RCW 49.60.180 was dismissed on summary judgment by order of the trial court. (CP 27-35). The second claim alleged that Sacred Heart discriminated against Chaney by failing to accommodate his actual or perceived disability in violation of RCW 49.60.180. That particular claim was also dismissed on summary judgment by order of the trial court. (*Id.*)

The third and fourth claims alleging that Sacred Heart interfered with, restrained, or denied Chaney's exercise, or his attempt to exercise, his rights under the FMLA and that Sacred Heart wrongfully discharged Chaney in violation of Washington's Family Medical Leave Act, RCW 49.78 *et seq.*, were originally dismissed on summary judgment by order of the trial court, but were revived when the trial court granted, in part, Chaney's Motion for Reconsideration. (CP 36-39).

The matter proceeded to a jury trial on those remaining claims on September 13-16, 2010, which was limited to the issue of liability and not damages. At the close of evidence both parties moved for a directed verdict, both of which the trial court denied. (RP 521). The parties submitted proposed jury instructions and objections (CP 108-178), all of which the trial court judiciously considered and ruled upon – including Chaney's proposed instructions that are the subject of his appeal. (RP 541-

543). The trial court submitted the case to the jury and the jury returned a verdict in favor of Sacred Heart finding that Sacred Heart was not liable for violation of the FMLA and not liable for wrongful discharge in violation of public policy. (CP 269-70). Judgment for Sacred Heart was entered on September 29, 2010. (CP 271-75).

## II. ARGUMENT

### A. The Trial Court Properly Denied Chaney's Motion for Directed Verdict As There Is Sufficient Evidence to Support A Finding that Sacred Heart Did Not Violate the FMLA

#### 1. Standard of Review

In reviewing a ruling on a motion for a directed verdict, this Court engages in the same inquiry as the trial court. *Stiley v. Block*, 130 Wn.2d 486, 504, 925 P.2d 194 (1996). To be sure, a party moving for a directed verdict faces a tall burden, which “admits the truth of the opponent’s evidence and all inferences which can reasonably be drawn therefrom, and requires that the evidence be interpreted most strongly against the moving party and in a light most favorable to the opponent.” *Davis v. Early Const. Co.*, 63 Wn.2d 252, 254, 386 P.2d 958 (1963). In addition, “[t]he inquiry on appeal is limited to whether the evidence presented was sufficient to sustain the jury’s verdict.” *Stiley*, 130 Wn.2d at 505 (quoting *Hizey v. Carpenter*, 119 Wn.3d 251, 272, 830 P.2d 646 (1992)). Thus, to overturn

the trial court's denial of Chaney's motion for directed verdict, this Court must consider the evidence in the record in a light most favorable to Sacred Heart and nevertheless conclude "as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict" in Sacred Heart's favor. *Industrial Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 915-916, 792 P.2d 520 (1990); *see also Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-108, 864 P.2d 937 (1994) ("[o]verturning a jury verdict is only appropriate when the verdict is clearly unsupported by substantial evidence"). Moreover, this Court must "defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn.App. 672, 675, 935 P.2d 623 (1997).

**2. The Trial Court Did Not Err in Not Granting Chaney a Directed Verdict on his Purported FMLA Involuntary Leave Claim**

***a. Chaney Has Not Preserved His First Issue Pertaining to Assignment of Error No. 1 for Appeal***

Chaney's legal argument that Sacred Heart interfered with Chaney's rights under the FMLA by placing him on FMLA leave was not raised in Chaney's motion for directed verdict and was thus not preserved for appeal. RAP 2.5(a); *Elber v. Larson*, 142 Wn.App. 243, 250, 173 P.3d

990 (2007) (surgeon's argument that wife of deceased patient had no cause of action under wrongful death or special survival statutes was not preserved for appeal, where it was not raised below); *Bloor v. Fritz*, 143 Wn.App. 718, 739, 180 P.3d 805 (2008) (vendors' motion to dismiss negligent misrepresentation claim, in which they argued lack of a "special relationship," was insufficient to alert the trial court that vendors were also arguing the economic loss rule as a bar to the claim, and thus vendors waived that issue for appeal).

Chaney moved for directed verdict solely on the discrete issue of whether Sacred Heart violated the FMLA by not returning Chaney to work after the expiration of his FMLA leave. The legal argument presented by Chaney's counsel in its entirety is as follows:

Your Honor, the plaintiff would respectfully move for a directed verdict on the violation of the FMLA law on the basis that the defendant has not shown that the evidence is clear the defendant violated the FMLA by **not returning my client to work**, by not following the FMLA as it related to obtaining a third opinion associated with his **ability to return to work**, and by relying upon the opinion of a doctor of their choice while ignoring, and not even speaking to, the doctor who was treating the patient in this case, the employee. Under the FMLA, their obligation under the law is to do so. They chose not to do so, and to terminate my client otherwise. There is no evidence in this case that they made any attempt to do anything other than terminate the employee without compliance with those aspects of the FMLA, and therefore the FMLA has been violated as a matter of law.

(RP 521-522) (emphasis added). To this, the trial court responded by accurately reciting the facts and appropriately applying the law to these facts, as follows in pertinent part:

[F]irst of all we have the opinion of Dr. VanGerpen that Mr. Chaney is ... fit for duty as an X-ray technician ... but not as an intervening radiologist.... As a result of that, Mr. Chaney gets a certification from Dr. Jam[i]son, his personal physician, that he is fit to go back to work as soon as the employer will allow, is how he puts it. Which is a bit ambiguous, but be that as it may he says he is fit to go to work. So we have this situation where we have Dr. VanGerpen saying one thing, Dr. Jamison saying another. But the initial opinion of Dr. VanGerpen ... was not an FMLA opinion, it was an opinion based on ... a for-cause drug test and a fitness for duty issue. And the issue of FMLA only came up when it appeared that that was the only option available that Mr. Chaney could take advantage of and still potential[ly] remain employed by Sacred Heart Medical Center because all of his other leave was expended. My view is that this does not apply in our fact situation and so I am not going to ... grant a motion for direct verdict on this issue.

(RP 524-525). In direct response to the trial court's conclusions "on this issue" Chaney's counsel not only conceded to the facts as recited by the trial court, but also reiterated the discrete issue upon which the trial court held – namely, whether Sacred Heart violated the FMLA by not returning Chaney to work upon the expiration of his FMLA leave:

I accept the court's rendition of the facts as true for purposes of my comment right now. If what the court says is the case, then the only certification that the employer had following putting Mr. Chaney onto FMLA leave for his own condition was that of Dr. Jameson, and **under the FMLA they had an absolute obligation**

**to return him to work or seek an opposing FMLA opinion, which they did not do. And that is a violation of the FMLA.**

(RP 525 (emphasis added)). This confirms that the sole issue upon which Chaney moved for a directed verdict was with respect to his FMLA reinstatement claim – the subject of his Second Issue Pertaining to Assignment of Error No. 1 – which is separate and distinct from his purported FMLA involuntary leave claim.

In his appeal brief, Chaney again confirms this was indeed the sole issue upon which he moved for a directed verdict:

At the close of the evidence, Mr. Chaney moved for a directed verdict. (RP 521). **Mr. Chaney argued that Sacred Heart had violated the FMLA by not returning him to work** based on the opinion of its retained physician rather than adhering to the opinion of Mr. Chaney's doctor who had released him to work. (RP 521). The trial court denied the motion. (RP 523-25).

(Appellant's Br. at 22 (emphasis added)).

At the same time, however, with respect to Assignment of Error No. 1, Chaney identifies the First Issue as whether the trial court erred in denying his motion for a directed verdict on the basis of whether Sacred Heart interfered with his FMLA rights when initially placing him on FMLA leave. Chaney never made such a motion on his purported FMLA involuntary leave claim. Therefore, the trial court could not have erred in denying it. *Kelley v. Compton*, 145 Wn. 416, 260 P. 530 (1927), app

dismissed 376 U.S. 604, 72 L.Ed. 727, 48 S.Ct. 339 (holding that error cannot be assigned on failure of trial court to decide, as matter of law, and instruct, that jury return verdict for plaintiff, in absence of any request therefore). Chaney may not now raise this legal argument for the first time on appeal.

***b. There Is Sufficient Evidence to Support the Jury's Verdict that Sacred Heart Did Not Violate the FMLA By Placing Chaney on FMLA Leave***

Nevertheless, substantial evidence in the record supports the finding that Chaney was not improperly forced to take FMLA leave. Chaney asserts that Sacred Heart interfered with his FMLA rights by unilaterally placing him on FMLA leave “on the basis of Van Gerpen’s information” which exhausted his FMLA leave time and “exposed him to termination.” (Appellant’s Br. at 26-27). Courts that have contemplated a FMLA involuntary leave claim make clear that this, in and of itself, is insufficient to allege, let alone prevail, on such a claim.

In *Wysong v. Dow Chemical Co.*, 503 F.3d 441 (6th Cir. 2007), a case to which Chaney relies upon, the Sixth Circuit Court of Appeals explained in *dicta*:

**An employee may have a claim under [29 U.S.C.] § 2615(a)(1) when an employer forces an employee to take FMLA leave when the employee does not have a “serious health condition”**

that precludes her from working. However, the employee's claim ripens only **when and if the employee seeks FMLA leave at a later date**, and such leave is not available because the employee was wrongfully forced to use FMLA leave in the past.

503 F.3d at 449 (emphasis added) (internal citations omitted). In *Wysong*, the court rejected the plaintiff's claim under an "involuntary leave theory" as a matter of law by affirming the district court's grant of summary judgment in favor of the employer. *Id.* at 450.<sup>1</sup> Similarly, in *Sista v. CDC Ixis N. Am. Inc.*, 445 F.3d 161 (2nd Cir. 2006), another case to which Chaney cites, the Second Circuit Court of Appeals held that involuntary leave does not violate the FMLA unless shown to impinge upon some right provided under the FMLA. The court explained:

**The FMLA says nothing about an employer's ability to "force" an employee to take such leave, and such forced leave, by itself, does not violate any right provided by the FMLA. Cf. 29 U.S.C. §§ 2611 et seq. (establishing certain rights, including, inter alia, to take leave, to restoration of position, and to maintain a civil**

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<sup>1</sup> *Wysong* also asserted an FMLA interference claim under § 2615(a) on the theory that she was retaliated against and eventually terminated because she had voluntarily taken FMLA leave in the past. With respect to this claim, the court reversed the district court's grant of summary judgment in favor of the employer upon finding sufficient evidence in the record – namely an admission by the employer – that the employer considered her previous absences as a basis of her termination in violation of 29 C.F.R. § 825.220(c), which provides that "employers cannot use the taking of FMLA leave as a negative factor in employment actions." 503 F.3d at 448. Accordingly, the court remanded for further proceedings. *Id.* at 454. Here, however, Chaney relies upon *Wysong* solely for his purported FMLA involuntary leave claim and his appeal does not include an assignment of error with respect to any FMLA interference claim under § 2615(a) on the theory of retaliation. Nevertheless, there is substantial evidence in the record to support the jury's verdict that Sacred Heart did not consider Chaney's previous absences to take care of his wife as a basis for its decision to release Chaney; and rather, the decision to terminate him was solely based upon the fact his FMLA leave had expired. (RP 88; 337-338; 216).

action). The FMLA does not create a right to be free from suspension with or without pay, nor does the FMLA create a right against infliction of emotional distress, which is the crux of Sista's claim here. **If Sista were able to demonstrate that such a forced leave interfered with, restrained, or denied the exercise or attempted exercise of a right provided under the FMLA, a cause of action might lie.** 29 U.S.C. §§ 2615(a), 2617(a).

*Sista*, 445 F.3d at 175 (emphasis added). Just as in *Wysong*, the court in *Sista* rejected the plaintiff's FMLA involuntary leave claim as a matter of law by affirming the trial court's grant of summary judgment in favor of the employer. *Id.* Principally, what both the Second Circuit Court of Appeals and the Sixth Circuit Court of Appeals have stated in *dicta*, is that there *may* be an involuntary leave claim under the FMLA if an employee can establish: 1) that he did not have a serious health condition but was nonetheless required to take FMLA leave, and 2) that he subsequently requested FMLA leave but was refused because his leave had been exhausted as a result of the previously improper involuntary FMLA leave. That scenario does not fit the facts of this case. Here, the record provides sufficient evidence to lead to the reasonable inference that Chaney had a serious health condition. Moreover, it is undisputed that Chaney was never denied any request to take FMLA leave.

Indeed, Chaney's reliance on *dicta* in both *Sista* and *Wysong* disregards the principle of precedent and reflects an erroneous

presentation of the law. Even more, Chaney flatly misstates the facts of *Wysong*. The plaintiff in *Wysong* was not pregnant, but rather suffered from a chronic neck injury, among other things, for which she was prescribed and taking narcotic drugs. 503 F.3d at 444. The employer was concerned about safety risks associated with Wysong's prescription drug intake while working with machinery. As a result, the employer placed her on FMLA leave and informed her that she would need a release to work from both her physician and the employer's medical department prior to returning. *Id.* at 445. Wysong failed to obtain any medical releases and the employer terminated her based on its policy of terminating employees who are on medical leave of absence for a continuous period of six months. *Id.* It is of note that the district court granted the employer's motion for summary judgment based on its finding that Wysong was suffering from a "serious health condition", and thus concluded that the involuntary leave was not improper. *Id.* at 449 n. 3. While the court of appeals agreed with the district court's rejection of Wysong's involuntary leave argument, it did so for different reasons upon finding that the parties disputed whether a "serious health condition" existed. *Id.* Instead, the court explained that Wysong failed to allege that "she later requested FMLA leave but [was] refused, based on the fact that she had already used up her available

FMLA leave, ...and thus, as a matter of law, she cannot prevail on her FMLA claim based on this theory.” *Id.* at 449.

As in *Wysong*, here the parties presumably dispute whether Chaney had a serious health condition which, in and of itself, presents an issue of material fact so as to preclude a directed verdict. While Chaney may maintain that he did not have a serious health condition, Dr. Van Gerpen’s medical opinion as presented in his testimony and corresponding exhibits provides sufficient evidence that he did. (RP 400-403; Ex. P33, Ex. P34, Ex P47, Ex P48). Moreover, Dr. Jamison’s failure to check the box indicating that Chaney’s “condition does not qualify as a serious health condition” as defined by the FMLA in the August 10, 2007 Certification provides conclusive evidence that Chaney’s health condition was in fact serious. (Ex P45). Additionally, Dr. Jamison testified to his own suspicions that Chaney’s personal accidents and incidents at work may have been a result of potential abuse of his medications. (RP 258-61).

Based on this evidence, Sacred Heart was justified in believing that Chaney had a serious health condition, and therefore had the right to unilaterally place Chaney on FMLA leave. The law is clear that an employer may place an employee on FMLA leave, even involuntarily, if the reason for leave meets the FMLA’s definition of “serious health

conditions.” The FMLA regulation specifically states, in pertinent part, the following:

In all circumstances, it is the employer’s responsibility to designate leave, paid or unpaid, as FMLA – qualifying, and to give notice of the designation to the employee as provided in this section.

29 C.F.R. § 825.208(a). Accordingly, “[a]s a threshold matter, it is not contrary to the FMLA for an employee to be placed on involuntary FMLA leave.” *Willis v. Coca Cola Enterprises, Inc.*, 445 F.3d 413, 417 (5th Cir. 2006). Moreover, Sacred Heart was well within its rights as an employer to require Chaney to undergo a fitness-for-duty exam pursuant to the Americans with Disabilities Act (“ADA”).<sup>2</sup> Indeed, the Ninth Circuit Court of Appeals has held “that when health problems have had a substantial and injurious impact on an employee’s job performance, the employer can require the employee to undergo a physical examination designed to determine his or her ability to work, even if the examination might disclose whether the employee is disabled or the extent of any disability.” *Yin v. State of California*, 95 F.3d 864, 868 (9th Cir. 1996) (upheld lower court’s grant of summary judgment against employee’s

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<sup>2</sup> The FMLA regulations make clear that Congress intended the FMLA to work in congruence with the ADA: “FMLA’s legislative history explains that FMLA is ‘not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the American Disabilities Act of 1990, or the regulation issued under the Act.’” 29 C.F.R. § 825.702(a) (citing S. Rep. No. 3, 103 Cong., 1<sup>st</sup> Sess. 38 (1993)).

challenge of employer's requirement that employee submit to a medical examination of the employer's choosing). Accordingly, Sacred Heart had every right to make an employment decision to place Chaney on FMLA leave based upon Dr. Van Gerpen's medical opinion that Chaney had a serious health condition even if Chaney – or the courts – do not agree with the decision. *Domingo v. Boeing Employees' Credit Union*, 124 Wn.App. 71, n. 26, 98 P.2d 1222 (2004) (explaining that courts are not in the business of second guessing the wisdom of personnel decisions).

In addition, as in *Wysong*, it is undisputed that Chaney was never denied any request to take FMLA leave. Chaney did not later request FMLA leave. Chaney asserted that he was able to return to work. (Ex. P46). The eventual, and only, reasoning for Chaney's termination was the fact that he failed to obtain a sufficient and valid work release before his FMLA expired. Given this set of facts, Chaney cannot prevail on, let alone establish as a matter of law, his purported FMLA involuntary leave claim.<sup>3</sup>

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<sup>3</sup> Mr. Chaney erroneously cites to *Wysong* for the proposition that the “employer prevented pregnant employee from returning to work thus reducing time available after birth.” (Appellant's Br. at 26). Chaney was mistakenly referring to *Hicks v. Lero's Jewelers, Inc.*, No. 98-6596, 2000 WL 1033029 (6th Cir. July 17, 1000) (unpublished), an unpublished case referred to by the court in *Wysong*. In *Hicks* the court held that there was a genuine issue of material fact as to whether the plaintiff's kidney infection, which inflamed while she was pregnant, was a “serious health condition” that precluded her from working. *Wysong*, 503 F.3d at n. 4.

Chaney provides no legal support for his proposition that an employee may prevail on an involuntary leave claim under the FMLA as a matter of law. Rather, the cases to which he cites – *Sista*<sup>4</sup> and *Wysong* – have precluded such a claim *as a matter of law*. See also *Degraw v. Exide Technologies*, 744 F.Supp.2d 1199, 1215 (D. Kan 2010) (“because plaintiff does not claim that his right to take FMLA leave was interfered with by his involuntary placement on FMLA leave, the court shall grant summary judgment against this part of plaintiff’s interference claim.”). Here, Chaney was not terminated because he took FMLA leave. Chaney was terminated because he was not fit to return to work. Sacred Heart’s determination in this regard was clearly within the parameters of the law. Indeed, “forced leave, by itself, does not violate any right provided by the FMLA.” *Sista*, 445 F.3d at 175. Accordingly, the jury’s verdict with respect to this issue must not be disturbed.

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<sup>4</sup> The facts in *Sista* are also quite analogous to the present case. In *Sista*, the plaintiff had engaged in unsuitable behavior at work, including making a threat to management and yelling and swearing due to his “mounting agitation” in response to his demotion. 445 F.3d at 166. He was asked to take paid leave of absence because of his behavior outburst. The following day, the plaintiff’s wife informed management that he had attempted suicide the previous night. *Id.* The employer subsequently sent the plaintiff a letter with enclosed forms for FMLA leave and stated that in light of his behavior at work and his threat to another member of the company, he could not return to work until the employer received a letter from an appropriate medical professional indicating he was fit for work. *Id.* at 166-167. These facts are consistent with what occurred here. Chaney was deemed unfit to work, and his medical condition was directly attributable to his inappropriate behavior and condition at work.

### **3. The Trial Court Did Not Err In Denying Chaney's Motion for Directed Verdict on His FMLA Reinstatement Claim**

Questions of material fact exist as to whether the August 10, 2007 certification from Chaney's health care provider constituted a valid and sufficient release to return to work. Consequently, Sacred Heart did not violate the FMLA as a matter of law by not reinstating Chaney. The FMLA requires that an "employee be restored by the employer to the position of employment held by the employee when the [FMLA] leave commenced." 29 U.S.C. § 2614(a)(1)(A). However, the right to reinstatement under FMLA expires when FMLA leave expires. Consequently, an employee may maintain a right to reinstatement claim only if the employee reports to work with the required certification when his FMLA leave concludes. *Conoshenti v. Public Serv. Elec. & Gas Co.*, 364 F.3d 135, 148 (3d Cir. 2004) (holding employee is subject to discharge on the first day he is both absent from work and no longer protected by FMLA, affirming district court's grant of summary judgment in favor of employer); *see also Mondaine v. American Drug Stores, Inc.*, 408 F.Supp.2d 1169, 1206 (D. Kan. 2006) (employee is only protected under FMLA if he reports for work with the required work release certification indicating his ability to resume work when his FMLA leave concludes); *Hanson v. Sports Authority*, 256 F.Supp.2d 927, 936 (W.D.

Wis. 2003) (employee may be terminated if she does not have required doctor's work release certification indicating she is capable of performing her full-time duties at the time FMLA leave concludes). In accordance, Sacred Heart's personnel policy on the FMLA explicitly requires: "[a]n employee who has been off work due to his/her own serious health condition must submit a 'doctor's release' allowing the employee to return to his/her previous position and duties." (Ex. P2, BS # 102050).

Here, there is sufficient evidence in the record to lead a reasonable juror to conclude that Chaney did not have a valid or sufficient "doctor's release" to return to work on or before August 27, 2010, the date his FMLA leave and rights expired. The trial court expressly found that the August 10, 2007 FMLA certification from Dr. Jamison was "ambiguous" as to whether and/or when Chaney was fit for duty to return to work: "Mr. Chaney gets a certification from Dr. Jamison, his personal physician that he is fit to go back to work as soon as the employer will allow, is how he puts it. Which is a bit ambiguous." (RP 524). This finding alone precludes a directed verdict on Chaney's FMLA reinstatement claim.

Dr. Jamison completed the "Certification of Health Care Provider" form on August 10, 2007 indicating that Chaney's FMLA leave was justified. This certification form was not a "doctor's release" form; it was

certification for Chaney to take FMLA leave. Chaney concedes that “Dr. Jamison certified that Mr. Chaney had a serious health condition.” (Appellant’s Br. at. 27; citing Ex. P45). The certification form also indicated that the length of leave needed was “2-4 weeks.” (Ex. P45). Such prospective certification is an insufficient “doctor’s release”, as it was not clear whether Chaney was and/or would be fit for duty on August 27, 2007. Although the certification “itself need only be a simple statement of the employee’s ability to return to work,” according to 29 C.F.R. § 825.310(c), it must be relevant to the employee’s condition at the time FMLA leave is concluded. *See Barnes v. Ethan Allen, Inc.*, 356 F.Supp. 2d 1306, 1312 (S.D. Fla. 2005) *aff’d* by, 149 Fed.Appx. 845 (11th Cir. Aug. 26, 2005) (holding that a letter from the Plaintiff’s doctor stating that she may prospectively return to work in 4-6 weeks is insufficient certification for release under the FMLA). Indeed, the record contains no further correspondence from Dr. Jamison specifying when Chaney could return to work like he had provided in the past. For example, the valid “doctor’s release” letter his office provided on January 19, 2007 unequivocally specified that Chaney “will be *completely* fit for *full-time duty in one week*” and that “[h]e does not need to see me in a week to be

cleared.” (Ex. P13 (emphasis added)).<sup>5</sup> Conversely, Dr. Jamison’s statement on the FMLA certification form that Chaney could return to work “as soon as the employer allows” is, as the trial court concluded, ambiguous. Dr. Jamison did not specify what work or duties Chaney was able to perform, which was the actual question the form asked and was the precise issue of discrepancy – as Dr. Jamison knew Dr. Van Gerpen had provided a limited release for an x-ray technician but that Sacred Heart required a full release for an Interventional Radiology Technician. Moreover, Dr. Jamison’s statement is conditioned upon what the “employer allows”, indicating Dr. Jamison’s inconclusive opinion on the issue. These facts provide substantial evidence to justify the trial court’s denial of Chaney’s motion for directed verdict on his FMLA reinstatement claim. These facts also provide substantial evidence to support the jury’s finding that the August 10, 2007 FMLA Certification form was not a valid and sufficient “doctor’s release” for Chaney to return to work.

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<sup>5</sup> It is of note that the supposed release provided by Dr. Jamison’s office on July 5, 2007 (Ex. P25) is also insufficient for purposes of requiring Chaney’s reinstatement to his position under the FMLA. First and foremost, that release was electronically signed by Dr. Jamison’s assistant, which raises a genuine issue of material fact as to whether it was a valid *doctor’s* release. Moreover, it was provided prior to Chaney’s fitness-for-duty examination with Dr. Van Gerpen on July 16, 2007, which as explained *supra*, was entirely within Sacred Heart’s rights to require; and moreover, provided a warranted basis for Sacred Heart to place Chaney on FMLA leave effective July 16, 2007. Indeed, the record contains no valid and sufficient doctor’s release after July 16, 2007 to establish that Chaney was fit-for-duty as an Interventional Radiology Technician prior to the expiration of his FMLA leave on August 27, 2007.

Chaney relies upon *Albert v. Runyon*, 6 F.Supp. 2d 57 (D.Mass. 1998), wherein a district court held that the Postal Service may not conduct any type of investigation into a medical certification that an employee may return to duty, unless there are other reasons, apart from the fact that FMLA leave was taken. 6 F.Supp. 2d at 65. In *Albert*, an employee who provided a valid and timely certification to return to work was not reinstated until a medical examination was completed by the employer. The court determined that such a condition was not allowed under the FMLA. *Id.* at 66. Unlike in *Albert*, in the present case there is sufficient evidence in the record to lead a fact-finder to conclude that Chaney failed to submit a valid and timely doctor's release.

In *Jadwin v. County of Kern*, 610 F.Supp. 2d 1129 (E.D. Cal. 2009), the court similarly held that a genuine issue of material fact existed as a result of an ambiguous certification. At issue was whether the employer's placement of a physician on full-time leave, which he never requested, as opposed to part-time leave constituted a FMLA interference claim. The certification from plaintiff's doctor stated: "[t]his employee is unable to work full time and requires part-time or less to avoid worsening of his serious medical condition." 610 F.Supp.2d at 1169. To this, the court concluded: "Viewing the evidence in a light most favorable to

Defendants, this ‘or less’ statement calls into question whether a reduced leave schedule was the best accommodation for Plaintiff’s serious health condition.” *Id.* Similarly here, the ambiguities in the FMLA certification form from Dr. Jamison call into question whether Chaney was eligible to return to work prior to his expiration of FMLA leave and rights.

Chaney’s refusal to submit any further documentation and/or release the medical record from Dr. Van Gerpen further raise genuine issues of material fact as to Chaney’s condition and the timing of his eligibility to return to work. It is also of note that Sacred Heart was not required to seek clarification from Chaney’s health care provider; it is the employee that has a duty to cooperate with the employer. 29 C.F.R. § 825.312(a)-(b). Chaney’s argument in this regard is further undermined by the fact that Dr. Jamison had previously informed Sacred Heart that Sacred Heart may contact him to discuss Chaney’s medical records only with “a signed consent” from Chaney. (Ex. P13). Sacred Heart vehemently attempted to obtain an authorization from Chaney regarding the release of his medical records, and Chaney persistently refused. (RP 323; RP 474; Ex. P36). Chaney’s failure to cooperate with Sacred Heart prevented Sacred Heart from resolving any ambiguities in his favor. In addition, while Dr. Jamison testified that he contacted Sacred Heart to provide

clarification, the record contains no documentation of his contact. Dr. Jamison further testified to contacting Sacred Heart sometime in September 2007, which raises an issue of fact as to whether he provided any such clarification prior to the expiration of Chaney's FMLA leave, if at all. The record also reflects Sacred Heart's denial of any contact with Dr. Jamison either in person or over the telephone or via any type of electronic communication prior to the expiration of Chaney's FMLA leave. What the record does clearly reflect is that the only information that Sacred Heart had by August 27, 2007, was Dr. Van Gerpen's limited opinion that Chaney was not fit to return to his prior job.

Accordingly, considering all of the evidence in the light most favorable to Sacred Heart, there is certainly sufficient evidence and reasonable inferences to sustain the jury's verdict in favor of Sacred Heart – namely, that Sacred Heart did not violate the FMLA by releasing Chaney on August 27, 2007 on the basis that his FMLA right to reinstatement expired when his FMLA-authorized leave expired. The trial court did not err in denying Chaney's motion for directed verdict on this issue.

**B. The Trial Court Did Not Abuse Its Discretion in Refusing To Give Collateral and Misleading Jury Instructions**

**1. Standard of Review**

This Court reviews a trial court's refusal to give certain jury instructions for abuse of discretion. *Boeing Co. v. Harker-Lott*, 93 Wn.App. 181, 186, 968 P.2d 14 (1998). Refusal to give a particular instruction is an abuse of discretion only if the decision was "manifestly unreasonable, or [the trial court's] discretion was exercised on untenable grounds, or for untenable reasons." *Id.* Moreover, this Court may not reverse an error involving a jury instruction unless it is prejudicial, which requires that it affect the outcome of the trial. *Id.* "A harmless error is error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947).

As a whole, jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 210, 87 P.3d 757 (2004). Where the court meets all these conditions, "[i]t is not

error to refuse to give a cumulative instruction or one collateral to or repetitious of instructions already given.” *State v. Benn*, 120 Wn.2d 631, 655, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993). If a party's theory of the case can be argued under the instructions given as a whole, then a trial court's refusal to give a requested instruction is not reversible error. *Van Cleve v. Betts*, 16 Wn.App. 748, 756, 559 P.2d 1006 (1977).

**2. The Trial Court Did Not Abuse Its Discretion In Refusing To Give Chaney’s Proposed Jury Instruction Concerning a Department of Transportation Regulation Regarding the Use of Controlled Substances**

Chaney’s attempt to remedy his concern that “Dr. Van Gerpen’s opinion was in error....[h]is statement is not the law” (Appellant’s Br. at 35) through a jury instruction regarding a regulation governing the use of controlled substances by drivers of commercial vehicles is untenable and unwarranted. The trial court properly rejected Chaney’s instruction as collateral and inapplicable to this case which has nothing to do with drivers of commercial motor vehicles.

First and foremost, there is no specific federal regulation regarding the use of controlled substances in the context of working as an Interventional Radiology Technician, and the Department of

Transportation regulations indisputably do not apply to this case. Indeed, if the trial court had introduced this instruction it would have been prejudicial error, as neither party alleges that this regulation was violated, and thus it would have only served to invite speculation about a collateral issue. *Brown v. Cannon*, 6 Wn. App. 653, 655, 495 P.2d 705 (1972) (finding that an instruction was prejudicial and improper when, in an automobile accident case, the instruction related to a traffic rule that neither party alleged was broken).

Moreover, Chaney's accusation that "[w]ithout the instruction, Chaney's counsel was left without the ability to contradict Dr. Van Gerpen's misstatement" (Appellant's Br., p. 36) is itself a misstatement of the procedural facts. First, it was Chaney's counsel's own line of questioning during cross-examination that incited Dr. Van Gerpen's testimony regarding the law pertaining to driving a commercial vehicle while under the influence of Methadone, thereby opening the door for Dr. Van Gerpen to testify to his understanding of the law. (RP 402-405).

Second, Chaney's counsel was not precluded from contradicting Dr. Van Gerpen's understanding of the law in the presence of the jury. Several times throughout this line of questioning, Chaney's counsel

expressly pointed out that the law is contrary to Dr. Van Gerpen's understanding:

Q. Are you aware of any law which states just the opposite? In other words, that allows a worker to drive a commercial vehicle on a public street while being treated with Methadone so long as he has his prescribing physician's prescription – or so long ... as his prescribing physician deems such to be safe?

A. No, there is no such exclusion. That is absolutely contraindicated. You cannot – no matter what any physician says, if you are on Methadone, you cannot drive a commercial vehicle.

Q. So you're not only not aware of such a law, you deny that such a law exists; is that correct?

A. It's specifically in the federal regulations that mandate that Methadone is a clearcut exclusion from an approval for driving a commercial vehicle.

Q. And you would be very surprised to find out that the federal regulations don't say what you say they say; correct?

A. More than very surprised.

Q. All right.

(RP 404-405). Sacred Heart's counsel did not object to this line of questioning which, in essence, permitted Chaney to directly contradict Dr. Van Gerpen's understanding of the law.

Third, this line of questioning openly raised the issue of Dr. Van Gerpen's credibility in the jurors' minds, inasmuch as it called into question the basis of his medical opinion. It is of note that contrary to Chaney's assertion, Dr. Van Gerpen testified that his medical opinion was not based solely upon the fact Chaney was on Methadone. (Appellant's Br., p. 34). Dr. Van Gerpen explained that it was his medical opinion that

Chaney was not well-adjusted to the *multiple* medications he was taking: “this was a situation where an individual clearly had multiple medications exposure that were contributing to not functioning well.” (RP 400). Moreover, Dr. Van Gerpen testified that he based his medical opinion on the fact that Chaney’s employer had sent him in for the exam, Chaney had a history of chronic pain, and Chaney had experienced two personal accidents in the previous six months. (RP 401-402). In any case, the jury was left to consider the credibility of Dr. Van Gerpen and the persuasiveness of his medical opinion upon learning from Chaney’s counsel that his understanding of the law may not have been correct. Indeed, the credibility of witnesses is properly left for the jury and must be deferred to by this Court. *Hernandez*, 85 Wn.App. at 675 (appellate court must “defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence.”)

Ultimately, Chaney was in no way prejudiced by the trial court’s refusal to give a specific jury instruction on this issue. Any misstatement and/or misinterpretation of the law by Dr. Van Gerpen in the presence of the jury was Chaney’s counsel’s own doing. Consequently, Chaney’s counsel was provided full opportunity to contradict Dr. Van Gerpen’s testimony on this issue and present Chaney’s theory of the case.

Accordingly, the trial court did not abuse its discretion in rejecting as collateral and inapplicable Chaney's proposed jury instruction pertaining to a regulation governing the operation of commercial motor vehicles.

**3. The Trial Court Did Not Abuse Its Discretion In Refusing To Give Chaney's Proposed Jury Instruction Concerning Washington's Health Care Disclosure Act ("HCDA")**

Chaney's proposed instruction concerning the HCDA represents a manipulation of fact and misstatement of law. Consequently, the proposed instruction was properly rejected by the trial court.

With respect to the facts, it is undisputed that Chaney would not be seen by Dr. Van Gerpen until and unless Dr. Van Gerpen modified the standard release form to limit the authorization of his office only to "release a statement about whether [Chaney was] fit for duty." (Ex. P32; RP 360-61). It is thus undisputed that Dr. Van Gerpen did not have the authorization to release and/or discuss Chaney's medical records with Sacred Heart until or unless Chaney provided a full release. It is also undisputed that Chaney persistently refused to authorize a full release despite Sacred Heart's multiple requests. (RP 323; RP 474; Ex. P36).

With respect to the law, contrary to Chaney's assertion in the proposed instruction and briefing to this Court, Dr. Van Gerpen was prevented by law from sharing information he obtained in the course of his

fitness for duty examinations of Chaney. The EEOC Enforcement Guidance regarding fitness for duty examinations under the ADA expressly provides that such examinations are “medical examinations” for which the information obtained must be treated as a confidential medical record:

This provision [29 C.F.R. § 1630.14(c)] permits employers to make inquiries or require medical examinations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job....

....

**The information obtained in the course of such examination or inquiries is to be treated as a confidential medical record and may only be used in a manner not inconsistent with this part.**

29 C.F.R. Part 1630, App. §1630.14(c) (emphasis added).<sup>6</sup>

This EEOC Enforcement Guidance further makes clear that because fitness for duty examinations are medical examinations, they are as well governed by the HCDA, which prohibits the disclosure of a patient’s health care information without a patient’s written authorization. RCW 70.02 *et seq.* By its nature, a fitness for duty examination falls within the HCDA definition of “health care” as it is a medical examination

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<sup>6</sup> The EEOC's administrative interpretations of the ADA are not controlling authority but “do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986).

that involves a “service ...provided by a health care provider ... [t]o diagnose....” the employee’s “physical or mental condition” for purposes of assessing his ability to perform his essential job functions. RCW 70.02.010(5)(a). Dr. Van Gerpen’s progress notes further reveal that he conducted a physical “EXAM” of Chaney which included taking his blood pressure, pulse, height and weight; conducting a Romberg neurological exam; and scanning his body including spine and finger. (Ex. P33). This unquestionably involves “health care” services and procedures as defined by the HCDA. Indeed, Dr. Van Gerpen unequivocally fits HCDA’s definition of a “health care provider” as he is “a person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of business or practice of a profession.” RCW 70.02.010(9). Moreover, the HCDA broadly defines health care information as “*any* information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care.... The term includes any required accounting of disclosures of health care information.” RCW 70.02.010(7) (emphasis added). Thus, any and all such information Chaney provided to Dr. Van Gerpen that was associated with his identity and pertained to his mental or physical condition as it

related to his ability to perform his essential job function was protected information pursuant to the HCDA. This includes Dr. Van Gerpen's progress notes which provided the details of Chaney's fitness for duty examination and Dr. Van Gerpen's resulting medical opinion. (Ex. P33). As such, once directed by Chaney not to disclose his health care information to Sacred Heart, Dr. Van Gerpen was prohibited by the HCDA to do so without Chaney's further authorization.<sup>7</sup> Any attempt by Sacred Heart to discuss Chaney's medical records with Dr. Van Gerpen would have thus been futile.

The case to which Chaney cites, *Hines v. Todd Pacific Shipyards Corp.*, 127 Wn.App. 356, 112 P.3d 522 (2005), is plainly distinguishable. In *Hines*, the employer required the employee to undergo a drug test and follow up treatment based on that test. The employee was terminated and later began working for a subcontractor. The former employer disclosed to the subcontractor that the employee had failed a recent drug test. The employee sued alleging that his former employer violated the HCDA. The

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<sup>7</sup> It is also of note that HIPAA clearly requires a release prior to the disclosure of such health care information. See 45 C.F.R. §164.508(a)(1) (a covered entity may not use or disclose protected health information without a valid authorization). A "covered entity" includes health care providers that transmit any health information in electronic form. 45 C.F.R. §160.03. A health care provider is defined as a provider of services, a provider of medical or health services and any other person who furnishes, bills, or is paid for health care in the normal course of business. 45 C.F.R. §160.03.

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court held that the HCDA was not violated because plaintiff's former employer was not a health care provider under the statute. Furthermore, the court held that the drug screening test was not health care information, but a condition of employment agreed to in a collective bargaining agreement. *Hines* at 366-367. Unlike in *Hines*, this case involves a fitness for duty examination which is a medical examination governed by the ADA. Further, the medical examination was conducted by a licensed health care provider that was unaffiliated with the employer.

Contrary to Chaney's contention (Appellant's Br, p. 40), Sacred Heart in fact had its hands tied until and unless Chaney signed a consent form releasing his medical records. Sacred Heart's belief in the confidentiality of Chaney's records was not a "red herring", but a reality resulting from Chaney's refusal to cooperate with Sacred Heart as required by the FMLA. Chaney's attempt to twist the legalities involved for the disclosure of medical information held by Mr. Van Gerpen in order to fabricate a pretext for his discharge is disingenuous and was rightfully rejected by the trial court. Accordingly, the trial court did not abuse its discretion in refusing to give Chaney's proposed jury instruction concerning the HCDA.

Even if this Court were to determine that Chaney's interpretation of the HCDA is correct, it is of no consequence as neither party alleges that the HCDA was violated. Thus, the trial court properly refused Chaney's proposed instruction on this issue. *Brown*, 6 Wn. App. at 653. Moreover, Chaney was in no way prejudiced as his proposed instruction on the HCDA certainly would not have changed the outcome of this case involving the FMLA. *Harker-Lott*, 93 Wn.App. 181 at 186 (concluding that even if refusing to give the instruction had been error, there was no reason to believe that such error was prejudicial). Accordingly, the trial court did not abuse its discretion in refusing to give Chaney's proposed instruction reflecting an erroneous interpretation of the HCDA.

### **III. CONCLUSION**

The district court did not err in denying Chaney's motion for directed verdict on his FMLA claim with respect to either theory Chaney presents in this appeal. First, Chaney has failed to allege, let alone establish as a matter of law, an FMLA involuntary leave claim. Second, the record contains substantial evidence that Chaney failed to provide a sufficient and valid doctor's release prior to the expiration of his FMLA

leave on August 27, 2007. Therefore, Chaney had no right to reinstatement.

Moreover, the trial court did not abuse its discretion in refusing to give Chaney's requested instructions that respectively involve an inapplicable and collateral issue and reflect an erroneous interpretation of the law.

The record unequivocally reveals that Chaney was never denied his right to take FMLA qualifying leave; Chaney never faced disciplinary action for exercising his right to take FMLA leave; and ultimately, Chaney was not retaliated against for taking FMLA leave. Accordingly, the jury reasonably concluded that Sacred Heart was not liable for violation of the FMLA and not liable for wrongful discharge in violation of public policy.

For the foregoing reasons, this Court should affirm the jury's verdict in Sacred Heart's favor.

Respectfully submitted this 9<sup>th</sup> day of June, 2011.

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