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SUPREME COURT
OF THE STATE OF WASHINGTON

LOUIS ALEXANDER DIAZ and MONA DIAZ,

Petitioners,

v.

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

Respondents.

FILED
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STATE OF WASHINGTON

PETITIONERS' ANSWER TO AMICUS BRIEF OF
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

Joseph A. Grube, WSBA #26476
Ricci Grube Breneman, PLLC
Attorneys for Appellant
1200 Fifth Avenue, Suite 625
(206) 770-7606

ORIGINAL

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I. ANSWER TO AMICUS

Petitioners adopt and agree with the arguments and reasoning of the Washington State Association for Justice Foundation as set forth in the Brief of Amicus Curiae, except as set forth below. The plain language of RCW 7.70.080 clearly precludes evidence of compensation paid by any health care provider if that health care provider has ever had the status of defendant, unless offered by that defendant health care provider.

Settlements with co-defendants are not “collateral sources.”

Footnote 9 in the Amicus brief states that compensation paid by a defendant health care provider would be “collateral” to another defendant health care provider. To the extent the footnote is referring to settlement payments (as opposed to the other types of compensation contemplated in RCW 5.65.010 (“medical, hospital or similar expenses”), Petitioners disagree.

Assuming *arguendo* that the legislature constitutionally modified the collateral source rule when enacting RCW 7.70.080, settlement payments from co-defendants are still not “collateral sources.”¹ As set forth in the Petitioners’ Petition for Review at pp. 11-12, the great majority of jurisdictions distinguish between co-defendant settlement payments and payments from other sources:

Typically, the [collateral source] doctrine applies to such independent sources as insurance policies

¹ As discussed in Petitioners’ Petition for Review at p. 1, the basis for the claimed exclusion of the settlement evidence was pursuant to ER 408. It was *not* the collateral source rule.

maintained by plaintiff or an innocent third party, employment wages and benefits, gratuities, social security benefits, and welfare payments...**Importantly, however, this rule does not apply to "payments made by another who is or believes he is subject to the same tort liability.**

North Atlantic Fishing, Inc. v. Geremia, 153 B.R. 607, 611 (D.R.I. 1993) (citations omitted, emphasis added)(quoting RESTATEMENT (SECOND) TORTS § 920A(1)). See also RESTATEMENT (SECOND) TORTS § 920A comment c:

The rule that collateral benefits are not subtracted from the plaintiff's recovery applies to the following types of benefits: (1) Insurance policies... (2) Employment benefits...(3) Gratuities...(4) Social legislation benefits.

See e.g. *Villarini-Garcia v. Hospital Del Maestro*, 112 F.3d 5, 5 (1st Cir. 1997)(payments by prospective codefendants are of a different character than payments from insurance (i.e. they are not collateral sources)); *In re Lake States Commodities, Inc.*, 230 B.R. 602, 605 (N.D.Ill. 1999)(payments in settlement by other tortfeasors not subject to the collateral source rule); *Chenega Corp. v. Exxon Corp.*, 991 P.2d 769, 790 (Ak. 1999)(settlement from codefendant not collateral source); *Smith v. Zufelt*, 880 P.2d 1178, 1184 (Co. 1994)(sums paid to avoid liability at trial are not traditional collateral sources); *Simon v. Coppola*, 876 P.2d 10, 19, 21 (Col. App. 1993)(concurrence); *Kiss v. Jacob*, 138 N.J. 278, 282 (N.J. 1994); *Acordia of Virginia Ins. Inc. v. Genito Glenn, L.P.* 560 S.E.2d 246, 252, 263 (Va. 2002); *Dziwura v. Broda*, 297 Ga.App. 1 (2009) *Kassman v. American University*, 546 F.2d 1029 (C.A.D.C. 1976); *F.D.I.C. v. United Pacific Ins. Co.*, 20 F.3d 1070 (10th Cir. 1994).

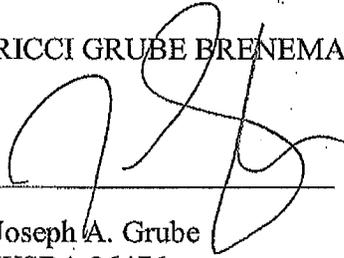
As RCW was intended to modify the collateral source rule (and not ER 408), its application to override ER 408 in the medical negligence context is inappropriate and should be rejected.

II. CONCLUSION

The decision of the Court of Appeals should be reversed, the judgment of the trial court should be vacated, and this matter should be remanded for a new trial absent any evidence of a settlement with defendant health care provider University of Washington and Dr. Neil Futran.

RESPECTFULLY SUBMITTED this 5th day of January, 2012

RICCI GRUBE BRENNEMAN, PLLC

A handwritten signature in black ink, appearing to read 'J. Grube', is written over a horizontal line.

Joseph A. Grube
WSBA 26476
Attorney for Appellants

CERTIFICATE OF SERVICE

I, Joseph A. Grube, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein. My business address is that of Ricci Grube Breneman PLLC, 1200 Fifth Avenue, Suite 625, Seattle, Washington 98101. On January 5 2012, I caused a copy of the foregoing Petition for Review to be served on the following parties:

Via U.S. Mail and electronic mail:

Jeffrey Street
1620 SW Taylor, Suite 350
Portland, OR 97205
jrs@hs-legal.com

Brian P. Harnetiaux
517 E. 17th Avenue
Spokane, WA 99203
amicuswsahf@wsahf.org

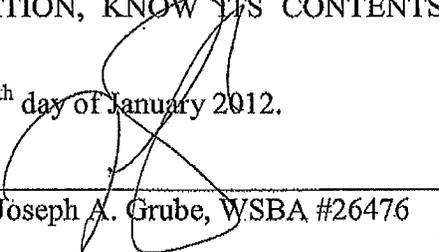
Mary H. Spillane
Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, WA 98101
mspillane@williamskastner.com

David P. Gardner
1900 Bank of American Fin. Ctr.
601 W. Riverside Ave.
Spokane, WA 99201
dgardner@winstoncashatt.com

George M. Ahrend
100 E. Broadway Ave.
Moses Lake, WA 98837
gharend@ahrendlaw.com
amicuswsajf@wsajf.org

I DECLARE UNDER PENALTY OF PERJURY UNDER WASHINGTON LAW THAT I HAVE READ THIS DECLARATION, KNOW ITS CONTENTS, AND I BELIEVE THE DECLARATION IS TRUE.

DATED at Seattle, Washington this 5th day of January 2012.



Joseph A. Grube, WSBA #26476

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To: Sarah Giese
Cc: jrs@hs-legal.com; amicuswsahf@wsahf.org; mspillane@williamskastner.com; dgardner@winstoncashatt.com; amicuswsajf@wsajf.org; Joseph Grube
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Cc: jrs@hs-legal.com; amicuswsahf@wsahf.org; mspillane@williamskastner.com; dgardner@winstoncashatt.com; amicuswsajf@wsajf.org; Joseph Grube
Subject: Diaz v. Kini, et al. (S.C. #86049-1)

Please find attached the Petitioners' Answer to Amicus Brief of Washington State Association for Justice Foundation to be filed with the court.

Thank you very much,

Sarah Giese

Ricci Grube Breneman, PLLC
1200 Fifth Avenue, Suite 625
Seattle, WA 98101
Tel: 206.770.7606
Fax: 206.770.7607
www.rgbcounsel.com

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