

86049-1

COURT OF APPEALS NO. 64363-1-I

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.

PETITION FOR REVIEW

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

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I. IDENTITY OF PETITIONERS

Louis Alexander Diaz and Mona Diaz, plaintiffs in the trial court and appellants in the Court of Appeals, ask this Court to accept review of the Court of Appeals published decision filed on March 7, 2011 and the Court of Appeals Order Denying Reconsideration filed on April 27, 2011. The Court of Appeals decision is published at ____ Wn.App. ____, ____, P.3d ____, 2011 WL 1886539. A copy of the slip opinion is in the Appendix at pages A-2 through A-13.

II. ISSUES PRESENTED FOR REVIEW

- A. Does RCW 7.70.080 permit the introduction of evidence of settlements with codefendants in a medical negligence action?
- B. Does RCW 7.70.080 unconstitutionally conflict with ER 408 by authorizing the admission of evidence that is barred by that rule?

III. STATEMENT OF THE CASE

This is a medical malpractice case brought by Louis and Mona Diaz against Medical Center Laboratory, Inc. ("MCL") and Jayanthi Kini, M.D. for catastrophic and disfiguring injuries caused to the Mr. Diaz in the fall of 2004. Dr. Kini, a clinical pathologist, misdiagnosed Mr. Diaz with invasive laryngeal cancer. This misdiagnosis caused Mr. Diaz to undergo an unnecessary total laryngectomy, leaving him without natural voice or the ability to taste or smell, and with a permanent hole (stoma) in this throat.

On October 22, 2004, Louis Diaz presented to Yakima Valley Memorial Hospital complaining of pain in his throat and difficulty swallowing. He was referred to Yakima Otolaryngologist James Abbenhaus. On October 27, 2008 Dr. Abbenhaus examined Mr. Diaz. Using a laryngoscope, Dr. Abbenhaus noted an “exophytic mass” on the right side of the pyriform sinus.¹ Dr. Abbenhaus suspected that the mass was a type of cancer called squamous cell carcinoma. In his chart note (Ex. 19) he wrote: “I will await the definitive diagnosis after I biopsy the lesion.”

The next day, Dr. Abbenhaus performed a biopsy of the mass under general anesthesia. The biopsies were sent to the pathology laboratory at Yakima Valley Memorial Hospital. The laboratory is run under contract by defendant MCL. Dr. Kini was one of the pathologists at the lab.

Dr. Kini preliminarily diagnosed Louis Diaz as having “Ulcerated Squamous Cell Carcinoma” (cancer). (Ex. 1). When she looked at the biopsy specimen, she found it “extremely difficult” to interpret. (Ex. 6). She failed to consult with any colleagues, and failed to inform the surgeon about her difficulty. On November 1, Dr. Kini made a further diagnosis of “ulcerated invasive squamous cell carcinoma with reactive changes.” (cancer).

The general practice in cancer treatment is that a definitive treatment for a cancer is not rendered without having a definitive pathology diagnosis. RP (7/14/2009) p. 61. Following the “definitive” diagnosis of Dr. Kini, Mr. Diaz presented to the University of Washington Medical Center (“UWMC”) for

¹ The pyriform sinus is a recess on both sides of the larynx.

treatment. He met with otolaryngologist Neil Futran, M.D. Based on the presentation of the mass *and* the definitive diagnosis of cancer by Dr. Kini, University of Washington surgeon (Neal Futran) recommended that Mr. Diaz undergo a total laryngectomy and right neck dissection. RP (7/16/09) p. 33. 2

At trial, Dr. Futran testified that he would never have recommended a total laryngectomy without a definitive diagnosis of invasive squamous cell carcinoma. RP (7/16/09) p. 34. Specifically, he testified that had Dr. Kini provided him the information contained in the handwritten note prior to surgery, he would not have performed or recommended the laryngectomy:

Q: I want you to assume for these questions that Mr. Diaz had come to you, the same as he did, with the exact same symptoms, the exact same history, the same imaging, and everything you could see when you looked, the same clinical presentation, but with a pathology report that contained the language ...[w]ith the pathology report contained in Exhibit 1, which is Dr. Kini's report....[b]ut also with an attached note, which is Exhibit 6. Without any further information, would you have offered or performed surgery for Mr. Diaz?

A. No.

Q. Why not?

A. Because there is a question about the diagnosis based on the note, not based on the pathology report. And whenever there is a question about something, you have other people and yourself help answer it before you move with definitive therapy.

2 A "neck dissection is a surgical procedure intended to remove lymph nodes and surrounding tissue from one side of the neck into which cancer cells may have migrated.

RP (7/16/09) at 33-34. Dr. Futran went on to give the same answer with respect to every other diagnosis offered by the other defense pathologists who testified. RP (7/16/09) p. 34-37.

Mr. Diaz, after consultation with his family, made the choice to have his larynx removed. On November 29, 2004, Dr. Futran removed Louis Diaz's larynx. Ex. 10. The surgery resulted in a tracheostomy stoma (a permanent hole) in Mr. Diaz's throat, through which he breathes and attempts to speak. *Id.*

As a matter of course, the material removed from Mr. Diaz was sent to the UWMC pathology laboratory for analysis. When the UWMC pathologists reviewed the material, they found no cancer anywhere. (Ex. 2)

After finding no cancer in the larynx, the UWMC pathologists, concerned they were "missing cancer", then requested the original biopsy slides from MCL and Dr. Ex. 4). When transmitting the slides to the UWMC, Dr. Kini handwrote a note to Dr. Futran. The note reads:

Dear Dr. Futran:

Enclosed are slides from Diaz Louis. The biopsy was extremely difficult to interpret, mostly ulcerated with atypical reactive changes. The squamous epithelial changes were more than what I would like to see in reactive conditions. Please give me a call to see what your pathologist's interpretation is.

Thanks, J. Kini, MD.

(Ex. 6)(emphasis added).

The slides were received by the UWMC on December 15. Six UWMC pathologists reviewed the slides (the same slides Dr. Kini had based her diagnosis on) and found no cancer. (Ex. 3). At that point, the UWMC pathology department

requested the original biopsy material (paraffin blocks).³ The UW pathologists made their own slides of the paraffin material (known as “recuts”) and performed immunostaining. The immunostaining demonstrated that there was no “invasive” component to the cells. (Ex. 3 p. 2). This was again confirmed by six UW pathologists. *Id.* In addition, other experts (including pathologist Stephen Sarewitz, M.D.) determined that none of the slides showed invasive cancer:

Q. In your opinion, the biopsy slides demonstrate any level of invasive cancer?

A. No they do not.

RP (7/14/2009) p. 27. He further determined that Dr. Kini did not meet the standard of care in making the diagnosis. RP (7/14/2009) p. 28.

At trial, Dr. Futran testified that he did not believe that Mr. Diaz ever had cancer:

Q. Based on everything you know, do you think Mr. Diaz ever had cancer of the larynx?

A. In my opinion, he never had laryngeal cancer.

Q. Why do you think that?

A. For two reasons. Number one, based on the totality of the information, and again what we are relying on most specifically is the final pathology report. Review of the entire specimen revealed by the UW Medical Center pathologists revealed no cancer cells within the specimen, and on their ultimate review of at least the information they have...the report I received, revealed no evidence of cancer. And ultimately the fact that Mr. Diaz is still here without evidence of any recurring cancer, without any additional treatment.

³ Biopsy material is generally preserved in paraffin blocks so that later testing may be performed on it, if necessary.

Q. By that you mean without any radiation that he was supposed to have?

A. Yes.

RP (7/16/09) p. 36-37. Expert witness (and pathologist) Steven Sarewitz testified that there "was no cancer of any type in those slides." RP 7/14/2009 at p. 49.

Plaintiffs commenced this lawsuit against the State of Washington (UWMC), Dr. Futran, Yakima Valley Memorial Hospital Association, MCL, and Dr. Kini.⁴ The plaintiff alleged against Dr. Kini, in part:

[Dr. Kini was] negligent in interpreting pathology slides performed upon biopsy of the plaintiff's lesion and failing to properly identify it as a non-cancerous entity....in failing to request a second biopsy of the lesion in question....[and] failing to get a second pathological opinion on the biopsy specimens before reporting a diagnosis.

CP 132. The plaintiff alleged against Dr. Futran and UWMC, in part:

[They] were negligent in failing to perform an independent biopsy with pathological examination of the lesion in the plaintiff's throat prior to performing the laryngectomy....[and] failing to obtain a review of the pathology slides prepared at Yakima Valley Memorial Hospital...prior to performing surgery....

CP 132-133.

In response, neither MCL nor Kini alleged that Dr. Futran or UWMC had been negligent in their treatment of Mr. Diaz. Neither MCL nor Kini produced any evidence or expert testimony that Dr. Futran and/or UWMC had been

⁴ Yakima Valley Hospital Association was voluntarily dismissed. MCL was added in April 2007.

negligent in their treatment of Mr. Diaz. In discovery responses, Dr. Kini and MCL stated:

Dr. Kini and Medical Center Labs do not specifically contend that any person is responsible for or has contributed in any way to plaintiff's injuries or damages.

CP 184.

At the end of a second mediation, the plaintiffs settled all of their claims against UWMC and Dr. Futran, weeks before the first trial. The amount of the confidential settlement was for \$400,000. CP 301. 5

Once UWMC and Dr. Futran had settled, MCL and Dr. Kini moved the trial court to compel production of the settlement agreement and also moved the court to:

admit evidence of compensation in the amount of \$_____ received on plaintiffs' behalf from another source...

CP 108. They moved the trial court to admit the First Amended Complaint. CP 117. Three days before trial, Dr. Kini and MCL for the first time tried to argue that Dr. Futran and UWMC were an "intervening cause." CP 122, CP 186.

During the first trial, the trial court did not compel production of the settlement agreement or permit evidence regarding the fact or amount of the settlement agreement. During deliberations, the jury for the first trial hung, and a mistrial was ultimately declared. CP 213.

Between the first trial and the second trial (approximately 14 months), the trial court changed its ruling on production and admissibility of the settlement

5 Because the Court ultimately ordered disclosure of the settlement amount and agreement, and no party has appealed, the settlement amount is no longer confidential.

agreement. CP 358. The trial court issued a written opinion describing its reasoning. CP 358-362.

Prior to opening statements, the court ruled that “evidence of plaintiffs’ settlement with Dr. Futran and UWMC, and of the amount of the settlement was admissible.” CP 361. Based on this pretrial ruling (and based only this ruling), plaintiffs’ counsel discussed this fact during opening statements. CP 361.

At the end of the evidence, the court instructed the jury as to the amount of the settlement and the fact that the UWMC and Dr. Futran had been defendants. CP 301.

The jury deliberated and returned a verdict for the defendants. CP 362. Plaintiffs timely brought a motion for new trial, which was denied . CP 363.

IV. ARGUMENT IN SUPPORT OF REVIEW

A. The Trial and Appellate Courts Ignored ER 408 and Washington decisional law precluding introduction of settlement evidence.

This Court should accept review because the trial judge’s ruling, admitting evidence of the settlement with the former codefendants, was in error and contrary to established Washington decisional law and statutes, because the Court of Appeals continued that error by its decision and because the Court of Appeals ruling sets a dangerous precedent by permitting the introduction of settlement evidence in medical malpractice actions.

- 1. The fact and terms of the settlement with other co-defendants is inadmissible under ER 408.**

ER 408 specifically precludes the admission of settlement ER 408 provides, in part, that evidence of “accepting...consideration in compromising or attempting to compromise a claim which was disputed....is not admissible to prove....invalidity of the claim or its amount.” “ER 408 was enacted to protect parties and witnesses from the potentially corrosive effect settlement evidence may have on a jury.” *Northington v. Sivo*, 102 Wn.App. 545, 550 (Div. 1 2000).

In *Grigsby v. City of Seattle*, 12 Wn.App. 453 (1975) a passenger involved in an automobile accident brought an action against the driver and the City of Seattle for negligence. Prior to trial, the passenger and the driver settled their claims. At trial, the court permitted the City to present evidence about the prior claims and the settlement. The Court of Appeals reversed, holding that it “was error for the trial court to reveal to the jury that Grigsby settled a claim against his driver.” *Id.* at 458.

2. Subsequent to the enactment of RCW 7.70.080, Washington Courts have repeatedly held that settlements with codefendants in medical malpractice actions are inadmissible.

In *Byerly v. Madsen*, 41 Wn.App. 495 (1985), a patient brought a medical malpractice action against physicians and a hospital. Prior to trial, the patient settled with the physicians for \$100,000. Both before and during juror deliberations, one juror told the others that the physician group had been a defendant and had settled for \$100,000. As a result, the trial court granted a new trial. On appeal, the Court of Appeals affirmed that ruling. Rejecting the hospital’s argument that knowledge of a settlement could only affect a jury’s determination of ‘proximate cause’ and not liability. The court responded:

This argument does not withstand scrutiny. The fact of settlement has no more bearing on the issue of proximate cause than it does on the issue of negligence. Such settlements are inadmissible. We believe an additional reason supporting the inadmissibility of settlements is a justifiable fear that a juror with such knowledge may conclude the plaintiff has already received sufficient satisfaction for his or her injuries and further compensation from a remaining defendant is unwarranted

Id. at 501 (emphasis added).

The Court of Appeals reaffirmed the inadmissibility of pretrial settlements in *Vasquez v. Markin*, 46 Wn.App. 480 (1986). *Vasquez* was a medical malpractice case against several physicians and Valley Memorial Hospital. Prior to trial, *Vasquez* settled with two physicians and the hospital. During deliberations, the bailiff inadvertently informed the jury of the prior case name (which included a settling physician). *Id.* at 483. The jury found in favor of the remaining defendants and the plaintiff appealed. The Court of Appeals unequivocally stated that “[E]vidence of settlements is inadmissible....and juror statements regarding settlements may warrant a new trial.” *Id.* at 484 (citations omitted). Because there was no evidence that the jurors had *actually* been informed of the settlement, the *Vasquez* court did not reverse the verdict. *Id.* at 485. In this case the jury was told about the other defendants, the settlement, and the amount. *See also SVEA Fire & Life Ins. Co. v. Spokane, Portland & Seattle Ry.*, 175 Wn. 622 (1933)(compromises are favored in law and parties should not be penalized by having their efforts used against them).

The Court of Appeals published Opinion disregards the clear language of both *Byerly* and *Vasquez* with little analysis or discussion.

3. **RCW 7.70.080 does not modify ER 408, because settlements with co-defendants are not “collateral sources.”**

The Opinion acknowledges that the provisions of RCW 7.70.080 modify the common law collateral source rule. Op. at p. 4. The Opinion then determines that payments from settling codefendants are collateral sources because the “payment” is made independent of the remaining defendant – disregarding any joint fault. Op. at 7. Assuming *arguendo* that the legislature’s intent to modify the collateral source rule is constitutional, the Opinion’s holding that settlement payments are collateral sources is without precedent and in fact contrary to the great majority of (if not all) jurisdictions.

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

The great majority of jurisdictions make a distinction between settlement payments from co-defendants (or joint tortfeasors) and other sources. *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)(settlements made to avoid tort liability are not collateral source payments); *Kiss v. Jacob*, 138 N.J. 278, 282 (N.J. 1994) (“benefits” in collateral source statute does not include proceeds of settlement with codefendant); *Acordia of Virginia Ins. Inc. v. Genito Glenn, L.P.* 560 S.E.2d 246, 252, 263 (Va. 2002) (“the collateral source rule traditionally does not apply to settlement proceeds.”); *Dziwura v. Broda*, 297 Ga.App. 1 (2009)(settlement with codefendant not a collateral source); *Kassman v. American University*, 546 F.2d 1029 (C.A.D.C. 1976)(“...we have held that the collateral source rule...does not apply to the proceeds of settlements of litigation...”); *F.D.I.C. v. United Pacific Ins. Co.*, 20 F.3d 1070 (10th Cir. 1994)(settlement not subject to collateral source rule).

Because settlements are not collateral sources, RCW 7.70.080 should not be read to permit the introduction of settlements in medical negligence cases.

4. The Court of Appeals wrongly read *Adcox v. Children's Orthopedic Hosp & Med. Ctr.* as mandating the introduction of codefendant settlement evidence.

The Opinion holds that *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15 (1993) “establishes that a trial court must allow a party in a medical malpractice case to present... [evidence of] settlements.” Op. at p. 6.

This is incorrect. *Adcox* did not involve the trial court's exclusion (or admission) of evidence of settlement with codefendants. Rather, the issue regarding the settlement was whether or not the defendants were entitled to *allocation* versus *offset*. *Adcox*, 123 Wn.2d 15, 24 (1993) ("Issue One-Allocation Versus Offset"). What the plaintiffs sought in *Adcox* was the exclusion of evidence of "fault" of the settling physicians. *Id.* at 22-23.⁶ The Hospital didn't offer any proof of fault until after the trial. *Id.* at 28-29.⁷ If the Hospital had proven fault of the physicians at trial, it would have been entitled to allocation pursuant to (former) RCW 4.22.070(1). The defendant Hospital failed to present evidence of fault of the other physicians and was therefore not entitled to allocation. *Id.* at 28.

The trial court offset amounts paid by other settling codefendants.⁸ The offset of the settlement amount in *Adcox* was presumably pursuant to RCW 4.22.060(2) which provides that a release of claims against non-releasing defendants "is reduced by the amount paid pursuant to the agreement..." The

6 As ER 408 makes clear, settlements are not admissible evidence of fault.

7 "Thus, the Hospital deliberately chose, as a matter of its own trial strategy, not to pursue the fault of Dr. Herndon and Dr. Lush at trial; not to make an offer of proof at the critical time when the trial judge was deciding whether to exclude the relevant evidence; not to take any clear position about allocation of fault during the pretrial rulings; not to try to present any such evidence at trial; not to propose a jury verdict form addressing the issue; not to create a record from which an appellate court might remand for allocation. Then, following 5 weeks of trial and an adverse jury verdict, the Hospital attempts to create an issue for appeal by making an offer of proof as to the doctors' negligence and arguing apportionment of fault was required under Washington's statutes."

8 There is no discussion of "offsets" anywhere within the plain language of RCW 7.70.080 – which again supports the proposition that the statute is merely procedural rather than substantive.

parties had already engaged in a reasonableness hearing, which is provided for under RCW 4.22.060.9

The discussion of RCW 7.70.080 in *Adcox* is contained entirely within “Issue Six – Collateral Source Evidence” of the opinion. *Adcox* at 39. Nowhere in that discussion does the court discuss the settlement with the physicians. The opinion clearly identifies the types of collateral source evidence the Hospital offered, and it does NOT include the settlement. Rather, identifies as collateral sources the exact types of benefits identified in the Restatement (Second) of Torts § 920A comment c.

B. RCW 7.70.080 unconstitutionally usurps the Court’s authority to promulgate rules of evidence.

Additionally, this Court should accept review because, to the extent RCW 7.70.080 purports to modify ER 408, it is unconstitutional.

1. RCW 7.70.080 is an evidentiary statute and is therefore procedural.

The Opinion recognizes that a statute conflicting with a court rule must yield to the court rule on procedural matters. Op. at p. 7. *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 980 (2009); RCW 2.04.200. Washington’s courts have the inherent “power to prescribe rules for procedure and practice.” *State v. Smith*, 84 Wn.2d 498, 501 (1974). Additionally, RCW 2.04.190 provides:

The supreme court shall have the power to prescribe, from time to time, the forms of writs and all other process....; *of taking and obtaining evidence*; and

⁹ See also RESTATEMENT (SECOND) OF TORTS § 885(3) (“A payment made by any person made in compensation of a claim for a harm for which others are liable as tortfeasors diminishes the claim against the tortfeasors...”)

generally to regulate and prescribe by rule the kind and character of the entire...*procedure to be used in all suits actions, appeals and proceedings of whatever nature by* the supreme court, *superior courts*, and justices of the peace of the state.

RCW 2.04.190 (emphasis added).

RCW 7.70.080 specifically discusses and authorizes the “present[ation] of evidence” in medical malpractice actions. The plain language of the statute is not ambiguous, and does not address the effect or meaning of that evidence on the issues of liability, causation, or damages. When interpreting a statute, the court’s inquiry “ends” if the plain language is subject to only one interpretation. *HomeStreet, Inc. v. State, Dept. of Revenue*, 166 Wn.2d 444, 451 (2009). The plain language of the statute indicates it is solely evidentiary (i.e. procedural) in nature. Therefore, to the extent RCW 7.70.080 conflicts with a court rule the court rule should prevail.

2. RCW 7.70.080 directly conflicts with ER 408 by authorizing the admission of evidence that has repeatedly been excluded under ER 408.

This Court’s Opinion interprets RCW 7.70.080 to unambiguously permit the admission of settlement evidence in medical malpractice actions. Op. at p. 8. This is in direct conflict with ER 408, which specifically precludes the admission of settlement evidence for the purpose of proving the “invalidity of the claim or its amount.” ER 408. The only purpose for which the settlement evidence was offered in this case was to prove that the plaintiffs had already been compensated by the

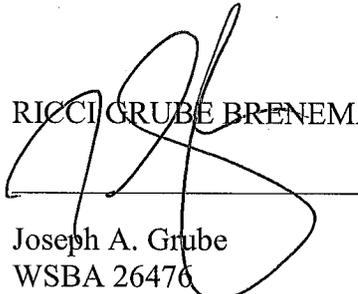
settlement with the UWMC.¹⁰ In other words, the Respondents conceded that the purpose was to prove the invalidity of the “amount” being claimed against the remaining defendants. This is not “another purpose” provided for under ER 408.¹¹

Because (according to the Opinion) RCW 7.70.080 permits the admission of settlement evidence to prove a reduction in the amount of the claim, it impermissibly conflicts with ER 408 and is unconstitutional. *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 980 (2009).

V. CONCLUSION

The Court should accept review, reverse the decision of the Court of Appeals, vacate the judgment in the trial court, and remand for a new trial.

RESPECTFULLY SUBMITTED this 27th day of May, 2011


RICCI GRUBE BRENNEMAN, PLLC

Joseph A. Grube
WSBA 26476
Attorney for Appellants

¹⁰ Respondents admit the purpose of the evidence was to “reduce the award.” Op. at 8. No other purpose for offering this evidence has been suggested. The Opinion’s discussion of the legislative purpose of RCW 7.70.080 also acknowledges that the evidence was being offered for the jury to consider in reducing the amount to award to plaintiff – in direct contravention of ER 408.

¹¹ Because RCW 7.70.080 is a procedural statute, it is analyzed for *conflict* with ER 408, not as part of it. Permitting RCW 7.70.080 (or any statute directly contradicting ER 408) to qualify as “another purpose” constitutes an abandonment of the judiciary’s primacy as the supreme rule maker regarding evidence.

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 May 27 2011, I caused a copy of the foregoing Petition for Review to be served on the following parties:

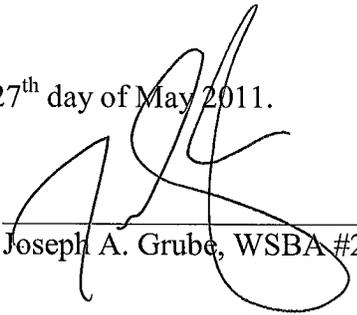
Via U.S. Mail:

Jeffrey Street
1620 SW Taylor, Suite 350
Portland, OR 97205

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

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 27th day of May 2011.



Joseph A. Grube, WSBA #26476

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LOUIS ALEXANDER DIAZ and MONA DIAZ,)	
)	No. 64363-1-I
Appellants,)	
)	DIVISION ONE
v.)	RE PUBLISHED OPINION
)	
STATE OF WASHINGTON, UNIVERSITY OF WASHINGTON; NEAL D. FUTRAN, DMD, M.D.; and YAKIMA VALLEY MEMORIAL HOSPITAL ASSOCIATION, a Washington nonprofit corporation,)	
)	
Defendants,)	
)	
MEDICAL CENTER LABORATORY INC., PS, a Washington professional services corporation; and JAYANTHI KINI, M.D.,)	
)	
Respondents.)	FILED: March 7, 2011
)	

APPELWICK, J. — The Diazes filed this medical malpractice action alleging misdiagnosis of cancer of the larynx resulting in the unnecessary removal Mr. Diaz's larynx. The question presented is whether RCW 7.70.080 permits the introduction of evidence of, and instruction of the jury on, a settlement between the plaintiff and a codefendant who is no longer a party. We conclude it does. We affirm.

FACTS

Louis Diaz and his wife sued several health care providers, alleging malpractice relating to the diagnosis of Mr. Diaz's cancer of the larynx. The

Diazes named Dr. Neal Futran, the otolaryngologist and oral surgeon who performed the related surgery, and his employer, the University of Washington Medical Center (UW), in the lawsuit. The Diazes also named Dr. Jayanthi Kini, the pathologist who reviewed Mr. Diaz's biopsy specimen and diagnosed cancer, and her employer, Medical Center Laboratory, Inc., PS (MCL).¹ Prior to trial, the Diazes reached a settlement with Futran and UW for \$400,000. The case proceeded against Kini and MCL. In the first trial, the evidence of settlement was not admitted. The jury deadlocked and could not render a verdict. Before the second trial, the trial court ruled that the evidence of the Diazes' settlement with Futran and UW, including the amount, was admissible under RCW 7.70.080. The Diazes' counsel informed the jury of the settlement in opening argument.

Mid-trial, the Diazes renewed the motion to exclude evidence of the settlement or to reserve a decision regarding the effect, if any, of the settlement on the jury verdict. Because counsel had made reference to the settlement in opening statements, the Diazes counsel also asked that the court consider a curative instruction. The trial court ruled that the evidence was admissible.

The trial court then gave the following instruction:

You have heard evidence that the University of Washington and Dr. Neal Futran were once parties to this litigation and later entered into a settlement with the plaintiffs, paying the plaintiffs \$400,000. This evidence should not be used to either (a) assume the University of Washington or Dr. Futran acted negligently to cause damage to the plaintiffs, (b) excuse any liability you find on the part

¹ An additional defendant, Yakima Valley Memorial Hospital Association, was voluntarily dismissed.

of Dr. Kini or MCL, or (c) reduce the amount of any damages you find were caused by Dr. Kini or MCL. By giving you this instruction, the court does not mean to instruct you for which party your verdict should be rendered.

The jury found in favor of Kini and her employer. The trial court denied the Diazes' motion for a new trial. The Diazes appeal both the judgment and the denial of the motion for a new trial.

DISCUSSION

The Diazes contend that the trial court erred in admitting evidence of the settlement between the Diazes and defendants Futran and UW. The trial court found that RCW 7.70.080 permitted admission of the settlement. This court reviews a trial court's interpretation of a statute de novo. Nevers v. Fireside, Inc., 133 Wn.2d 804, 809, 947 P.2d 721 (1997).

RCW 7.70.080 states:

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

The Washington Legislature added RCW 7.70.080 in 1976, when it modified common law with respect to medical malpractice actions for health care. See LAWS OF 1975-76, 2nd Ex. Sess., ch. 56, § 13; RCW 7.70.010; Branom v. State,

94 Wn. App. 964, 968, 974 P.2d 335 (1999). The purpose of the legislation was to address rising health care costs resulting from the high cost of malpractice liability:

The medical malpractice issue is national in scope, and represents a wide range of factors which combine to create the overall problem. The most commonly cited examples of symptoms [sic] of the problem include: insurance carriers' [sic] dropping or restricting their coverages or refusing to cover certain providers, large increases in malpractice insurance rates which add to already rising medical care costs, providers limiting or changing their patterns of practice in order to reduce the cost of coverage; and, in some cases, providers' shutdown and strikes.

1976 FINAL LEGISLATIVE REPORT, 44th Wash. Leg., 2nd Ex. Sess., at 22.

RCW 7.70.080 replaced the common law collateral source rule in actions for injuries resulting from health care. Mahler v. Szucs, 135 Wn.2d 398, 412 n.4, 957 P.2d 632, 966 P.2d 305 (1998); Adcox v. Children's Orthopedic Hosp. & Med. Ctr., 123 Wn.2d 15, 40, 864 P.2d 921 (1993). The collateral source rule is an evidentiary principle that enables an injured party to recover compensatory damages from a tortfeasor without regard to payments the injured party received from a source independent of a tortfeasor. Mazon v. Krafchick, 158 Wn.2d 440, 452, 144 P.3d 1168 (2006). The rule comes from tort principles as a means of ensuring that a fact finder will not reduce a defendant's liability because the claimant received money from other sources, such as insurance carriers. Id.; see also Mahler, 135 Wn.2d at 412 n.4. RCW 7.70.080 restricted the collateral source rule in medical malpractice cases to permit introduction of evidence that a plaintiff has already received compensation from sources other than the

defendant. See 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW & PRACTICE § 5.43, at 224-25, § 15.3, at 458-59 (3d ed. 2006); 5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE ER 409, at 273-74 (2010-11 ed.).

Our purpose in interpreting a statute is to discern and implement the intent of the legislature. Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., 168 Wn.2d 421, 432, 228 P.3d 1260 (2010). If, when looking to the entire statute in which the provision is found and to related statutes, we determine that the meaning of the provision in question is plain, our inquiry ends. Id. at 433. But, if the statute is susceptible to more than one reasonable interpretation, it is ambiguous and we may resort to statutory construction, legislative history, and relevant case law. Id.

Both parties, here, argue that the plain language of the statute is clear. Kini argues that, because the statute refers to “any party,” only a defendant who is still a party at the time of trial can constitute a “defendant health care provider.” The Diazes argue the statute refers to any health care provider who is a defendant at the time the agreement to pay compensation is made.

The only case addressing the meaning of RCW 7.70.080 is Adcox. In that medical malpractice case, our Supreme Court held that the trial court had committed error when it determined appropriate offsets rather than allowing the

jury to hear collateral source evidence offered by the defendant.² 123 Wn.2d at

40. In doing so, the court discussed the history and purpose of this statute:

This statute reserves for the finder of fact—in this case, the jury—the task of examining the extent to which the plaintiff has already been compensated by third parties for the injuries incurred by the defendant and the additional task of offsetting these recoveries from the damages being assessed against the defendant.

Id. The Supreme Court nevertheless found the error harmless, but cautioned:

“[W]e do not condone the trial court’s failure to follow RCW 7.70.080 in its entirety, and we strongly encourage trial courts to fully follow the statute in the future.” Id. at 40-41. Adcox establishes that a trial court must allow a party in a medical malpractice case to present collateral source evidence, including settlements.³

We hold that the statute is unambiguous. The plain meaning of the phrase “defendant health care provider,” in the context of the greater statutory provision, contemplates only those defendants who participate in trial. The

² We note that neither this case nor Adcox involved apportionment of liability under RCW 7.70.060. The rule in RCW 7.70.080 might play out differently under a case involving apportionment.

³ The Diazes contend that Adcox related only to other types of collateral sources, not settlements. They extrapolate that settlement proceeds are not the type of collateral sources contemplated by RCW 7.70.080. They rely on the court’s footnote in Adcox where it clarified that “certain collateral source evidence being proffered by the Hospital” included certain public benefits and services provided by charitable organizations, without mentioning the settlement proceeds. 123 Wn.2d at 40. But, a close reading of the opinion suggests that the main purpose of the offset procedure was to account for the previous settlements. Id. at 22. The footnote cited by the Diazes merely identifies other potential collateral sources the hospital offered to prove. Id. at 40 n.11.

provision limits its application to "any party." RCW 7.70.080. Former health care provider defendants who have settled with the plaintiff and paid damages have contributed to compensation of the plaintiff and are no longer defendants in the surviving action. Any remaining party may present evidence of that compensation.

The Diazes also argue that the settlement is not collateral source evidence as contemplated by RCW 7.70.080. The Diazes contend that a former codefendant is not a source independent and collateral to the wrongdoer because the codefendant also contributed to the injury. But, payments need only to have been received by the injured party from a source independent from the tortfeasor. Lange v. Raef, 34 Wn. App. 701, 704, 664 P.2d 1274 (1983). The Diazes cite no authority requiring the third party source to be fault-free. The language of RCW 7.70.080 is broad and applies to compensation "from any source" except from the plaintiff and the plaintiff's family. This compensation would include settlements from other tortfeasors.

The Diazes next contend that ER 408 prevents the admission of the settlement. Generally, if a statute appears to conflict with a court rule, we will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters. Putman v. Wenatchee Valley Med. Ctr., 166 Wn.2d 974, 980, 216 P.3d 374 (2009). This court reviews the trial court's

interpretation of evidentiary rules de novo. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

ER 408 provides that evidence of settlement "is not admissible to prove liability for or invalidity of the claim or its amount." It further states, however, that "This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." ER 408. Kini argues that the settlement evidence here was not admitted for any purpose proscribed by ER 408. Instead, she contends that the purpose of the admission of the evidence, as instructed by RCW 7.70.080, is to allow the jury to reduce the award to prevent overcompensation of medical malpractice plaintiffs.⁴ We agree and hold that ER 408 does not prohibit the admission of settlement evidence under RCW 7.70.080.

Northington is not to the contrary. The reason for admission under ER 408 in that case, witness bias, is not at issue here. 102 Wn. App. at 548. Although Northington recognizes that evidence of settlement is "potentially corrosive," id. at 550, it does not prevent the admission of settlement evidence for the purposes prescribed by RCW 7.70.080.

⁴ Kini additionally argues that the trial court actually erred in instructing the jury that the settlement evidence should not be used "to reduce the amount of damages it found Dr. Kini and MCL had caused." Kini contends that the purpose of RCW 7.70.080 is to reduce the award of damages to account for compensatory payments the plaintiff has already received from collateral sources.

Additional case law cited by the Diazes provides no further guidance in interpreting the statute or ER 408. Grigsby v. City of Seattle, 12 Wn. App. 453, 529 P.2d 1167 (1975) was not a medical malpractice case and was decided before both RCW 7.70.080 was enacted and ER 408 was adopted.⁵ Byerly v. Madsen, 41 Wn. App. 495, 704 P.2d 1236 (1985), and Vasquez v. Markin, 46 Wn. App. 480, 731 P.2d 510 (1986), both involved medical malpractice claims but neither invoked nor referenced RCW 7.70.080. Those cases applied the general rule regarding inadmissibility of evidence of a settlement without explanation. Byerly, 41 Wn. App. at 501; Vasquez, 46 Wn. App. at 484. Also, both cases involved inadvertently informing the jury of the settlement, not an evidentiary ruling by the trial court. Byerly, 41 Wn. App. at 498; Vasquez, 46 Wn. App. at 484. Neither are helpful or controlling here.

The Diazes argue that permitting the introduction of evidence of settlements with defendants will have a chilling effect on out-of-court settlements of healthcare disputes. The Diazes theorize that no health care provider will want to be the first to settle for fear of paying a higher proportion of damages. This is a consideration to be weighed by the legislature.

⁵ ER 408 was adopted in 1979. 5A KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 408.1, at 59-60 (5th ed. 2007).

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Finding no error, we need not reach the Diazes' arguments regarding prejudice. We affirm the judgment on the jury verdict and order denying the Diazes' motion for new trial.

WE CONCUR:

Appelwhite, J.

Leach, A.C.J.

Scheibler, J.