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NO. 86049-1

SUPREME COURT OF THE STATE OF WASHINGTON

LOUIS ALEXANDER DIAZ and MONA DIAZ,

Petitioners,

v.

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

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

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ORIGINAL

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I. ISSUES PRESENTED

1. Under RCW 7.70.080's abrogation of the collateral source rule for medical malpractice cases, is evidence that plaintiff has already been compensated for the injury complained of from amounts paid by former co-defendants in settlement of plaintiff's claims admissible if offered by any remaining party at trial?

2. Did both the trial court and the Court of Appeals correctly conclude that ER 408 does not preclude the admission under RCW 7.70.080 of evidence of compensation paid by former co-defendants in settlement of plaintiff's claims, because the evidence is not being admitted to "prove liability for or invalidity of the claim or its amount," but is being admitted to avoid overcompensation of medical malpractice plaintiffs?

3. Does the fact that the trial court gave the jury Instruction No. 8, CP 301, defeat as a matter of law plaintiffs' claims of prejudice, which were that the settlement evidence might have "induced" the jury "to find no liability on the part of defendant regardless of the evidence, or might have led the jury "to deny the claim against Dr. Kini and MCL based on the perception that UWMC would not have paid . . . \$400,000 if it were not the party at fault," *App. Br. at 20*?

II. STATEMENT OF FACTS

This was a medical malpractice action against Dr. Kini and her employer, MCL. The trial court ruled before the start of the second trial¹ that it would admit, under RCW 7.70.080, evidence that the Diazes had settled claims against former co-defendants University of Washington and Dr. Neal Futran for \$400,000. *See* CP 307-09. The Diazes' counsel told the jury of the settlement in his opening statement. CP 309, 322.

During trial, the Diazes' counsel renewed a motion to exclude evidence of the settlement or to reserve a decision regarding the effect, if any, of the settlement on the jury verdict. CP 308. Because he had made reference to the settlement in opening statement, the Diazes counsel also asked the trial court to consider giving a curative instruction. CP 308.

The trial court ruled that the evidence was admissible, CP 308-09, but, after the close of evidence, instructed the jury that:

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 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

¹ In the first trial against Dr. Kini and MCL, which ended in a hung jury, the trial court excluded evidence of the compensation that former co-defendants, Dr. Neal Futran and the University of Washington, had paid in settlement with the Diazes.

instruction, the court does not mean to instruct you for which party your verdict should be rendered.

CP 301 (Court's Inst. No. 8).²

The jury, answering special interrogatories, unanimously answered "no" to the question of whether the defendants, Dr. Kini and MCL, had negligently caused injury to the Diazes, and thus did not reach the question of damages. CP 297.

The Diazes appealed, seeking a new trial on the ground that admission of the evidence of the \$400,000 settlement had prejudiced them by "la[y]ing the groundwork" for "induc[ing the jury] to find no liability on the part of the defendant regardless of the evidence", and by leading the jury "to deny the claim against Dr. Kini and MCL based on the perception that UWMC would not have paid the substantial sum of \$400,000 if it were not the party at fault." *App. Br. at 20*. The Diazes argued that admitting the settlement evidence was error (a) because Washington case law establishes that settlement evidence remains inadmissible under ER 408 despite the enactment of RCW 7.70.080, *App. Br. at 13-14*; (b) because the last sentence of RCW 7.70.080 means that only the University and Dr. Futran, but not Dr. Kini or MCL, were entitled to offer evidence of the settlement, *App. Br. at 16-17*; and/or (c) because interpreting the

² The Diazes did not assign error to that instruction, or any part of it, on appeal.

statute to allow admission of settlement evidence would discourage settlements, *App. Br. at 18-19*. The Diazes also argued, without citing any case authority, that settlement payments are not received from “collateral sources” and thus are not admissible under RCW 7.70.080. *App. Br. at 17*.

After the Court of Appeals issued its opinion affirming the trial court’s decision, the Diazes moved for reconsideration, renewing their argument that RCW 7.70.080 does not make settlements admissible because settlement payments are not “collateral sources,” and for the first time cited decisions, exclusively from other jurisdictions, in an effort to support that argument. In their motion for reconsideration, the Diazes also argued for the first time that RCW 7.70.080 unconstitutionally conflicts with ER 408 under separation-of-powers analysis.

The Court of Appeals denied the Diazes’ motion for reconsideration. The Diazes timely petitioned for review.

III. ARGUMENT

A. The Trial Court and the Court of Appeals Correctly Interpreted and Applied RCW 7.70.080.

1. RCW 7.70.080 abolished the collateral source rule to avoid overcompensation of plaintiffs in medical malpractice cases.

The 1975-76 Legislature made a number of modifications to the law governing actions for injury allegedly resulting from health care

provided after June 25, 1976. See RCW 7.70.010; *Branom v. State*, 94 Wn. App. 964, 968, 974 P.2d 335, rev. denied, 138 Wn.2d 1023 (1999) (“In enacting RCW 7.70, the Legislature modified the substantive aspects of all causes of action . . . for damages for ‘injury occurring as a result of health care’”). RCW 7.70.080 was one of the 1975-76 modifications. As further amended in 2006, RCW 7.70.080 provides:

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. [Emphases supplied.]

As this Court has recognized and explained, RCW 7.70.080 abolished the collateral source rule in medical malpractice cases. See *Mahler v. Szucs*, 135 Wn.2d 398, 412 n.4, 957 P.2d 632 (1998) (noting that, through the enactment of RCW 7.70.080, “[t]he Legislature has abolished the collateral source rule in the specific case of injuries occurring as a result of health care . . .”). As this Court explained 18 years

ago in *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 40, 864 P.2d 921 (1993):

The primary motivation in doing away with the collateral source rule is the rule allows plaintiffs to recover more than their total damages. Under the collateral source rule, a plaintiff could recover 100 percent of the damages from a liable defendant, even if the plaintiff had already recovered a portion of their [sic] damages from another source, such as insurance. Because the rule overcompensated plaintiffs, it came to be viewed as imposing unnecessary costs on society and causing higher insurance premiums. [Citation omitted].

Thus, the Legislature has allowed defendants in medical malpractice cases to show that plaintiffs have received payments from other sources.³

2. Contrary to the Diazes' assertions, *Byerly* and *Vasquez* do not hold or suggest that, despite the enactment of RCW 7.70.080, settlement evidence is inadmissible in medical malpractice cases.

In their Petition for Review at pages 9-10, and in their brief to the Court of Appeals, the Diazes cited *Byerly v. Madsen*, 41 Wn. App. 495, 704 P.2d 1236 (1985), *rev. denied*, 104 Wn.2d 1021 (1985), and *Vasquez v. Markin*, 46 Wn. App. 480, 731 P.2d 510 (1986), *rev. denied*, 108 Wn.2d

³ Since *Adcox* was decided in 1993, the Legislature has broadened RCW 7.70.080, to make evidence of more kinds of what otherwise would be "collateral sources" admissible in medical malpractice cases. From 1976 to 2006, the fact that medical malpractice plaintiffs had received compensation for their injuries from insurance purchased with their own funds was expressly excepted from the evidence of compensation admissible under RCW 7.70.080. A 2006 amendment eliminated that exception, and thus made medical malpractice plaintiffs' receipt of insurance benefits, even when the insurance was purchased with their own funds, admissible subject to the plaintiffs' right to show an obligation to repay such benefits. *Laws of 2006, ch. 8, § 315.*

1021 (1987), as authority for the proposition that, despite the enactment of RCW 7.70.080, settlement evidence remains inadmissible in medical malpractice cases. Neither case stands for such a proposition. Although *Byerly* and *Vasquez* are appellate decisions published after the enactment of RCW 7.70.080, neither decision addressed or mentioned that statute because neither decision concerned a trial court's ruling as to admissibility of evidence.

The issue in *Byerly* was whether it was an abuse of discretion for a trial court to grant a new trial because a juror had told fellow jurors that the plaintiff had settled with another health care provider. The Court of Appeals found no abuse of discretion and affirmed the grant of a new trial. In so doing, the Court of Appeals did not cite, much less address, either RCW 7.70.080 or ER 408. Nor does it appear that the parties in *Byerly* briefed or argued the admissibility of evidence of settlement under RCW 7.70.080, which is understandable because the issues concerning the disclosure of information about the settlement (and the possible effect of the disclosure) arose out a juror's injection of extraneous information into deliberations, not out of a trial court's evidentiary ruling.

The issue in *Vasquez* was whether the trial court abused its discretion in denying a plaintiff's motion for new trial based upon a claim that the bailiff had told jurors, during their deliberations, of the plaintiff's

settlement with other health care providers, something the trial court found had not happened. In affirming the denial of the new trial motion, the Court of Appeals did not mention or address either RCW 7.70.080 or ER 408, as the issue was not whether the trial court had made an erroneous evidentiary ruling, but rather whether the plaintiff was entitled to a new trial based on alleged misconduct of the bailiff that the trial court found had not occurred. Statements in *Vasquez* that “[e]vidence of settlements is inadmissible” and that “juror statements regarding settlements may warrant a new trial,” *Vasquez*, 46 Wn. App. at 484, are not only dicta because the Court of Appeals affirmed the denial of a new trial, but also, and more importantly, are unaccompanied by citation or reference to either ER 408, the common law collateral source rule, or RCW 7.70.080,⁴ and thus are not dispositive of the issue in this case.

The appellate courts in *Byerly* and *Vasquez* were not called upon to consider whether the collateral source rule generally applicable in tort cases was rendered inapplicable to medical malpractice cases by the enactment of RCW 7.70.080, as this Court has since recognized to be the case in *Adcox* and *Mahler*. Neither *Byerly* nor *Vasquez* cited, addressed,

⁴ The *Vasquez* court cited *Grigsby v. Seattle*, 12 Wn. App. 453, 529 P.2d 1167, *rev. denied*, 85 Wn.2d 1012 (1975), and *Byerly*, 41 Wn. App. at 500-01 for these propositions. Those cases also contain no reference to ER 408, the collateral source rule, or RCW 7.70.080.

or interpreted RCW 7.70.080 and, thus, neither *Byerly* nor *Vasquez* can be said to hold, or even imply, that RCW 7.70.080 does not allow trial courts to admit evidence of compensation paid in settlements in medical malpractice cases.

3. The courts below correctly rejected the Diazes' proposed interpretation of RCW 7.70.080's last sentence.

The trial court and the Court of Appeals properly rejected the Diazes' argument that the last sentence of RCW 7.70.080 allows only the University and Dr. Futran, and not Dr. Kini or MCL, to offer evidence of the \$400,000 that was paid in settlement. The last sentence of RCW 7.70.080 provides:

Notwithstanding this section, evidence of compensation by a defendant health care provider may be offered only by that provider.

The courts below were correct because, at trial, the University and Dr. Futran, having settled, were not "defendants," and thus were not in position to "offer" *any* kind of evidence. As is made clear by the first five words of RCW 7.70.080 ("[a]ny party may present evidence"), the statute concerns evidence that "[a]ny *party*" may offer, not what *nonparties* may offer. The last sentence of RCW 7.70.080 therefore would make no sense if it were construed to limit the right to "offer" settlement or other "collateral source" evidence to someone who is not a party (and thus not a "defendant") who can "offer" evidence of any kind at trial.

That is not to say that the last sentence of RCW 7.70.080 serves no purpose. It serves an important purpose: it makes clear (a) that a “defendant health care provider,” if the defendant so chooses at trial, may offer evidence that he, she, or it has already compensated the plaintiff to some extent (such as by providing follow-up care for free), but (b) that the plaintiff, or a co-defendant health care provider, may *not* offer such evidence against the defendant health care provider who furnished the compensation (because it may imply an admission of fault by that defendant health care provider). Thus, if *Dr. Kini*, who remained “a defendant health care provider” at trial, had compensated the Diazes, she alone would have had the right to offer evidence of *that* compensation; the Diazes could not have offered it. The point of the last sentence of RCW 7.70.080 is to make clear that, when a health care provider who is a defendant at trial has provided compensation to the plaintiff for the injury at issue, only that defendant health care provider may decide to allow the jury to hear about the provision of that compensation.

4. The courts below correctly concluded that ER 408 did not preclude admission of evidence concerning the settlement, because the evidence was not admitted “to prove liability for or invalidity of the [Diazes’] claim or its amount”.

As they did in the courts below, the Diazes asserted in their Petition for Review, pages 8-9, and 15-16, that ER 408 prevents the

admission of evidence of settlement despite RCW 7.70.080. The courts below correctly rejected that argument, because ER 408 is not a blanket prohibition against admitting settlement evidence. ER 408 requires exclusion of evidence of settlement only when the purpose for which it is offered is “to prove liability for or invalidity of the claim or its amount,” not when the evidence is offered for some other purpose.

The purpose of admitting evidence of amounts paid to a medical malpractice plaintiff in settlement with someone who is not now, or perhaps never was, a defendant under RCW 7.70.080 is not “to prove liability for or invalidity of the claim or its amount,” but rather to allow the jury to avoid overcompensating that plaintiff. As this Court held in *Adcox*, 123 Wn.2d at 41, the “primary goal in eliminating the collateral source rule [through RCW 7.70.080] has been to prevent overcompensating [medical malpractice] plaintiffs in light of the resulting costs to society.” Thus, the purpose of admitting settlement or other collateral source evidence in medical malpractice cases is not to prove “liability for or invalidity of the claim or its amount,” ER 408, but rather to avoid *over*compensation that puts upward pressure on the cost of health care.

ER 408 does not preclude admission of settlement evidence for that purpose.⁵

Any concern that admission into evidence of amounts paid by others who are not, or are no longer, parties to medical malpractice plaintiffs in settlements could induce a jury to infer that the settling persons were the ones truly at “fault,” or that a remaining defendant at trial either was not at fault or had minimal fault, can be – and in this case was – dealt with through an instruction to the jury *not* to draw such inferences.⁶ A jury is presumed to have heeded a trial court’s instruction. *Tincani v. Inland Empire Zoo. Soc.*, 124 Wn.2d 121, 136, 875 P.2d 621 (1994). Alternatively, any such concern about evidence of amounts paid by others in settlement being considered on liability issues could be dealt with by admitting into evidence only the amount of compensation the medical

⁵ This Court has striven, whenever possible, to avoid finding conflicts between statutes and court rules and instead seeks to harmonize them, and give effect to both, when they deal with the same subject matter. *Nearing v. Golden State Foods Corp.*, 114 Wn.2d 817, 821, 792 P.2d 500 (1990). The Court of Appeals’ decision shows how ER 408 and RCW 7.70.080 are properly and sensibly harmonized. The Diazes fail to acknowledge the preference our courts have for harmonizing court rules and statutes, much less explain why a limited rule of exclusion necessarily precludes admission of evidence for a purpose that is not one for which the rule was adopted.

⁶ The trial court went farther, and also instructed the jury not to consider the settlement evidence “[to] reduce the amount of any damages you find were caused by Dr. Kini or MCL.” If the defense had taken exception to inclusion of that language in the court’s limiting instruction, and if the jury had found Dr. Kini liable and awarded damages to the Diazes, inclusion of that language would have been reversible error. But the jury did not award damages, and the defense did not take exception to the court’s limiting instruction.

malpractice plaintiff has already received for his or her claimed injury, without disclosing to the jury that it was compensation paid in settlement by a nonparty or a former co-defendant.

5. Whether the Court of Appeals overstated the holding or reasoning of *Adcox* has no bearing on the correctness of that court's interpretation of RCW 7.70.080.

The Diazes may adopt an argument made in the Amicus Memorandum of the Washington State Association for Justice that the Court of Appeals overstated the holding or reasoning of *Adcox*. But, whether the Court of Appeals did or did not correctly characterize *Adcox*, or the types of collateral source evidence at issue in *Adcox*, is immaterial because the Court of Appeals' interpretation of RCW 7.70.080 is plainly correct. The statute makes clear that "compensation" means "*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." RCW 7.70.080 (emphases added). The statute just as plainly makes admissible compensation from "*any source* except the assets of the plaintiff, the plaintiff's representative, or the plaintiff's immediate family." *Id.* (emphasis added). Because the settlement by the University of Washington and Dr. Futran consisted of money paid to the plaintiffs and did not come from any of the three excepted sources, it was admissible

under the plain language of RCW 7.70.080, and irrespective of what collateral source evidence was or was not at issue in *Adcox*.

- B. None of the Decisions from Other Jurisdictions that the Diazes Cited in their Petition for Review Support Their Contention that Evidence of Compensation They Received Pursuant to Settlement with Former Co-Defendants Is Not Admissible under RCW 7.70.080.

The Diazes asserted in their Petition for Review at pages 11-12, and may continue to maintain based on citation to decisions from ten other jurisdictions, that settlement payments made by joint tortfeasors are not “collateral sources” and thus are not admissible under RCW 7.70.080. That argument ignores the breadth of the wording the Legislature chose to use in RCW 7.70.080, allowing presentation of evidence of compensation “*from any source,*” as well as this Court’s stated recognition that RCW 7.70.080 *abolished* the collateral source rule in medical malpractice cases, *Mahler*, 135 Wn.2d at 412 n.4, and did so to avoid overcompensation of plaintiffs in such cases, *Adcox*, 123 Wn.2d at 40.

Even if this Court were to consider the non-Washington decisions the Diazes cited in their Petition, however, none of which were brought to the attention of the Court of Appeals until the Diazes moved for reconsideration,⁷ none of those decisions are pertinent to the issue here.

⁷ This Court, in deciding whether to accept review, may and should ignore the non-Washington authorities the Diazes cite because the Diazes did not cite them to the Court of Appeals in their opening brief on appeal (the Diazes filed no reply

Nine of the ten decisions – all except *Kiss v. Jacob*, 650 A.2d 336 (N.J. 1994) – held that settlements are not “collateral sources” for purposes of offsets against judgments, that is, in the context of determining whether defendants were entitled to have settlements considered for purposes of offsets or credits against damages awards. None of the ten decisions holds that settlements are inadmissible despite statutes like RCW 7.70.080. Although *Kiss* did involve the issue of admissibility of settlement payments under a New Jersey statute, that statute is worded much more narrowly than RCW 7.70.080. The New Jersey statute makes evidence of “benefits” admissible, whereas RCW 7.70.080 makes admissible evidence of “compensation”, meaning “*payment of money* or other property *to* or on behalf of *the plaintiff*, rendering of services to plaintiff free of charge to the plaintiff, or indemnification of expenses incurred by or on behalf of the plaintiff.”

Thus, not one of the ten decisions from other jurisdictions that the Diazes cited in their Petition is on point, and nine of those decisions hold that settlement payments must be considered by the court in adjusting

brief) and first cited them in their motion for reconsideration. The Court of Appeals generally does not consider arguments first raised in motions for reconsideration, *e.g.*, *Housing Auth. of King Cy. v. Northeast Lake Wash. Sewer & Water Dist.*, 56 Wn. App. 589, 595 n. 5, 784 P.2d 1284, *rev. denied*, 115 Wn.2d 1004 (1990), and this Court has declined to consider an argument first raised in a motion seeking reconsideration of a Court of Appeals decision, 1515-

damages awards. In *Adcox*, 123 Wn.2d at 40-41, the Supreme Court held that RCW 7.70.080 makes it the job of juries, not trial judges, to avoid overcompensating medical malpractice plaintiffs, and that RCW 7.70.080 does that by allowing juries, in awarding damages, to consider amounts of money that medical malpractice plaintiffs have already received for their injuries, including amounts of money received from what would otherwise be “collateral” sources. Thus, the non-Washington decisions the Diazes cited in their Petition are inapposite not only because they did not involve application of a statute like RCW 7.70.080, but also because nine of them dealt with a mechanism for post-verdict adjustment of damages by trial judges that *Adcox* holds is the function of juries in Washington.

C. The Diazes’ Belatedly Raised Constitutional Argument Should Not Be Considered, Especially When the Diazes Have Not Shown and Cannot Show Actual Prejudice.

The Diazes argued at pages 14-15 of their Petition for Review, and may continue to maintain, that RCW 7.70.080 is unconstitutional under separation of powers analysis. That argument need not be considered because it presumes a conflict between RCW 7.70.080 and ER 408 that, as explained in Section A.4., *supra*, does not exist. Moreover, the constitutional argument is one the Diazes did not raise in the trial court

1519 Lakeview Blvd. Condo Ass'n v. Apt. Sales Corp., 146 Wn.2d 194, 203 n. 4, 43 P.3d 1233 (2002).

and did not raise in the Court of Appeals until their motion for reconsideration.

When a petitioner raises a constitutional issue for the first time on appeal, he or she must establish that the alleged constitutional error was manifest. RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *Fishburn v. Pierce Cy. Planning & Land Servs. Dept.*, 161 Wn. App. 452, 457 n.2, 250 P.3d 146, *rev. denied*, 172 Wn.2d 1012 (2011).⁸ That requirement applies even in a death-penalty case. *E.g.*, *State v. Gregory*, 158 Wn.2d 759, 837, 147 P.3d 1201 (2006). As the *McFarland* court explained:

[T]he asserted error must be “manifest”—*i.e.*, it must be “truly of constitutional magnitude”. [*State v.*] *Scott*, 110 Wn.2d [682] at 688 [757 P.2d 492 (1988)]. The defendant must identify a constitutional error *and show how, in the context of the trial, the alleged error actually affected the defendant’s rights*; it is this showing of actual prejudice that makes the error “manifest”, allowing appellate review. *Scott*, 110 Wn.2d at 688; *Lynn*, 67 Wn. App. at 346. [Emphasis added.]

McFarland, 127 Wn.2d at 333. Or, as the court explained in *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992), “a plausible showing by the defendant that the asserted error had practical and identifiable

⁸ *See also State v. Lynn*, 67 Wn. App. 339, 344, 835 P.2d 251 (1992) (“permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts” [italics by the court]).

consequences” at trial, in that it actually “affected” a constitutional right, is essential to determining whether the alleged error is manifest.

In their petition, the Diazes neither acknowledged RAP 2.5(a)(3) nor made any attempt to show actual prejudice in the form of “practical and identifiable consequences” to them, at trial, resulting from the admission of evidence of their settlement with the University and Dr. Futran. Nor *can* the Diazes show actual prejudice, because the trial court instructed the jury not to consider the evidence of settlement to “excuse any liability” it found on the part of Dr. Kini or MCL, and the jury is presumed to have heeded a trial court’s instruction. *Tincani*, 124 Wn.2d at 136. That presumption applies to limiting instructions not only in civil cases, *Gardner v. Spalt*, 86 Wash. 146, 149, 149 P. 647 (1915), but also in criminal cases, *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995), and even when the Supreme Court is reviewing a sentence of death, *State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1991).

Because the jury in this civil case is presumed to have heeded the trial court’s instructions and, thus, to have not considered the settlement evidence in deciding that Dr. Kini and MCL were not negligent, there is no basis for inferring or suspecting actual prejudice. The Diazes’ failure to address RAP 2.5(a)(3) should not be excused, and this Court should not consider their belatedly raised constitutional argument.

D. This Case Does Not Present Issues Under RCW 4.22.070(1).

If the Diazes adopt another argument made in the WSAJF's Amicus Memorandum, *i.e.*, that the Supreme Court should address in this case the question of how RCW 7.70.080 and RCW 4.22.070(1) interface, the Court should decline to do so for two reasons.

First, the Diazes never raised any such argument in the trial court or in the Court of Appeals, or even in their Petition for Review. Therefore, the issue is not properly preserved for review. RAP 2.5(a); *Madison v. State*, 161 Wn.2d 85, 104 n.10, 163 P.3d 757 (2007). ("This court does not consider issues raised first and only by amici.")

Second, the argument is not germane to this case. Dr. Kini and MCL never sought *both* to introduce settlement-compensation evidence under RCW 7.70.080 *and* to have fault apportioned to the settling former defendants under RCW 4.22.070(1). Although it may (or may not) come to pass someday that an appeal will present an issue of whether a medical malpractice defendant may both introduce settlement-compensation evidence under RCW 7.70.080 and ask a jury to apportion fault to (or "empty-chair") a settling former defendant, this is not that case, as the Court of Appeals recognized, *Diaz v. State of Washington*, 161 Wn. App. 500, 507 n.2, 251 P.3d 249 (2011) ("[t]he rule in RCW 7.70.080 might

play out differently under a case involving apportionment”). As this Court has previously made clear:

“Although courts in some states do render advisory opinions, we do not do so in this jurisdiction.” *Walker v. Munro*, 124 Wn.2d 402, 414, 879 P.2d 920 (1994) (citing *Washington Beauty College, Inc. v. Huse*, 195 Wash. 160, 164, 80 P.2d 403 (1938)). In other words, “this court will not render judgment on a hypothetical or speculative controversy.” *Walker*, 124 Wn.2d at 415.

Open Door Baptist Church v. Clark County, 140 Wn.2d 143, 157, 995 P.2d 33 (2000).

IV. CONCLUSION

For the reasons explained above, the Supreme Court should affirm the decision of the Court of Appeals upholding the trial court’s evidentiary ruling and affirming the entry of judgment on the jury’s finding against the Diazes on the issue of negligence.

RESPECTFULLY SUBMITTED this 7th day of October, 2011.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 7th day of October, 2011, I caused a true and correct copy of the foregoing document, "Supplemental Brief of Respondents," to be delivered to the following counsel of record in the manner indicated below:

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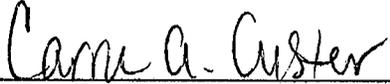
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