Lafferty v. Stevens Mem. Hosp.

Court of Appeals of Washington, Division One

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No. 56313-1-I Consolidated w/No. 56382-3-I

Reporter
2006 Wash . App. LEXIS 2825 *

TAMI LAFFERTY, *individually and as parent of* BENJAMIN LAFFERTY, *a minor*, and DIANE MITCHELL, *guardian ad litem for* BENJAMIN LAFFERTY, *a minor, Respondents*, v. STEVENS MEMORIAL HOSPITAL, *Public Hospital District No. 2, Appellant*. And EDMONDS FAMILY MEDICINE CLINIC, P.S., *a Washington corporation*; JAE SIM, M.D., MYRA HORIUCHI, M.D. *Defendants*.

Notice: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *Lafferty v. Stevens Mem. Hosp., 136 Wn. App. 1027, 2006 Wash. App. LEXIS 3053 (2006)*

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Judges: Schindler, A.C.T. WE CONCUR: Becker, J., Coleman, J.

Opinion by: SCHINDLER

Opinion

SCHINDLER, A.C.J. -- Benjamin Lafferty was born with extensive brain damage and severe disabilities. His mother, Tami

Lafferty, and the guardian ad litem for Benjamin sued several physicians who provided prenatal care, the Edmonds Family Medicine Clinic, P.S., Sound Imaging Associates, P. C., and Stevens Memorial Hospital. Following a six-week trial, the jury concluded that the two Edmonds Clinic physicians and Stevens Hospital were negligent. The jury attributed 80% of the fault to Stevens Hospital. The court entered judgment on the verdict for approximately $17 million. The court denied the Hospital's motion to offset the verdict by the amount of the Laffertys' settlement with Sound Imaging. [1]

[*2] On appeal, Stevens Hospital contends it was denied a fair trial and asks this court to vacate the judgment on the verdict and remand for a new trial. The Hospital's primary argument is that the trial court abused its discretion in denying several motions for a mistrial based on the conduct of the Laffertys' attorney. The Hospital also argues the trial court abused its discretion in ruling on the admissibility of personnel records and excluding evidence of future benefits, and the court erred in giving a spoliation jury instruction and refusing to offset the Sound Imaging settlement amount against the verdict.

We conclude the trial court did not abuse its discretion in denying the motions for a mistrial or in ruling on the admissibility of evidence, and the court did not err in giving a spoliation jury instruction or refusing to the offset the Sound Imaging settlement amount against the verdict. We affirm the judgment on the verdict.

FACTS

This case involves the prenatal care received by Tami Lafferty and delivery of her son, Benjamin Lafferty. [2] Tami's pregnancy was uneventful until late November 1998. In late November, when Tami was about 36 weeks pregnant, a fetal **[*3]** maternal hemorrhage occurred over the course of several days. The fetal maternal hemorrhage resulted in Benjamin losing most of his blood volume through a lesion in the placenta. The lack of blood volume deprived Benjamin of oxygen. Benjamin eventually suffered cardiac arrest, causing extensive brain damage.

During the weekend of November 22-23, Tami noticed a "marked decrease in [the baby's] activity level." On Monday, November 23, she telephoned the practice providing her prenatal care, Edmonds Family Medical Clinic (Clinic), about the baby's decreased movement. Tami was told to come in the following day for her regularly scheduled appointment. On Tuesday, November 24, Tami saw her doctor, Dr. Jennifer Peterson. Dr. Peterson is a family practice doctor who works in the obstetric practice at the Clinic. [3] Tami told Dr. Peterson about the decreased fetal movement. Dr. Peterson **[*4]** administered a non-stress test to measure the baby's heart

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[1] Sound Imaging (previously known as Stevens Radiology) employed the radiologists working at Stevens Hospital.

[2] For the sake of clarity, we will refer to the parties by their first names in this opinion. We intend no disrespect in doing so.

[3] The Edmonds Family Medical Clinic staffs its obstetric practice with family practice doctors.

rate in response to the baby's movements. Generally, the heart rate of a healthy baby increases when the baby moves. Nonstress test results are reactive (normal) if there are two or more fetal heart rate increases in the testing period (usually 20 minutes), or nonreactive (not normal) if there is no change in the baby's heart rate when the baby moves. Tami's non-stress test result was normal. But for the first time in her pregancy, Tami exhibited signs of pregnancy-induced hypertension. [4]

Dr. Peterson placed Tami on bed rest and instructed her to perform "kick counts" to keep track of the baby's movements." Because Dr. Peterson was leaving town, she scheduled a follow-up appointment with her colleague, Dr. Myra Horiuchi, for the day after Thanksgiving, Friday, **[*5]** November 27. Dr. Peterson also scheduled an ultrasound for Tami at Stevens Memorial Hospital for Saturday, November 28.

The next day, on Wednesday, November 25, Tami called the Clinic to report that the baby was not moving. The Clinic scheduled an appointment for that afternoon with Dr. Jae Sim. At the appointment that afternoon, Tami still manifested symptoms of hypertension. Tami told Dr. Sim she did not feel the baby moving. Dr. Sim performed another non-stress test. Because the results were nonreactive, Dr. Sim ordered a biophysical profile (BPP) for Tami at Stevens Hospital. [5] A BPP is a type of ultrasound that measures baby's well-being and assesses the baby's movements, tone, and breathing. Dr. Sims ordered the BPP on a "stat" basis -- given priority over other patients. The first available appointment at Stevens Hospital was at 10:00 p.m. that night. Dr. Sim told Tami that if the BPP test was normal, she should return for her appointment as scheduled on Friday, November 27.

[*6] When Tami went to Stevens Hospital for the ultrasound, the sonographer working that night, Anita Dirini, could not locate the paperwork for test. Dirini had been a sonographer at Stevens Hospital for about four months. There is no dispute that Stevens Hospital was responsible for supervising and scheduling Dirini for the night shift.

Instead of performing a BPP, Dirini did an obstetric ultrasound. An obstetric ultrasound is very different from a BPP. An obstetric ultrasound measures organ size and abnormalities. During the obstetric ultrasound, Tami asked Dirini whether the lack of fetal movement was unusual, especially given how hard Dirini was pushing on her abdomen. In response, Dirini told Tami "I'm just the tech." Dr. Sim testified that she called the Hospital that night and spoke to Dirini, who told her the result of the BPP was "10 out of 10." [6] Dr. Sim said that she also spoke to Tami. Tami testified that neither she nor Dirini spoke to anyone on the telephone while she was there. Nothing in the hospital chart

[4] Tami's blood pressure was slightly elevated and her urine tested positive for protein.

[5] The plaintiffs' experts agreed with Dr. Sims' interpretation of the test. The defense presented expert testimony that the test result was actually normal.

[6] Ten out of ten is not the correct score for a BPP. The highest score for a BPP is an eight.

corroborates the telephone call.

[*7] The next day, November 26, was Thanksgiving. Tami still did not feel any fetal movement and remained on bed rest Thanksgiving Day. Because no one from the Clinic contacted Tami about the test results from the night before, she assumed the results were normal.

On Friday, November 27, Tami went to the Clinic for her 11:00 a.m. appointment with Dr. Horiuchi. Before Tami's appointment, Dr. Horiuchi tried unsuccessfully to get the results of the BPP from Stevens Hospital. Dr. Horiuchi testified that Tami told her the result of the BPP was a perfect "8 out of 8." Tami denies reporting any test results to Dr. Horiuchi. Dr. Horiuchi administered another non-stress test. Because the results were nonreactive, Dr. Horiuchi sent Tami to the Hospital for a contraction stress test. During the contraction stress test, the nurse was unable to stimulate any fetal movement. At 1:26 p.m., Benjamin's heart rate dropped dramatically. The nurse called a "code blue" emergency code. Tami was taken directly to the operating room and the on-call obstetrician performed an emergency Caesarean section.

Benjamin was delivered about 20 minutes after his heart rate dropped. Benjamin had suffered cardiac arrest **[*8]** and was born without a pulse. He was resuscitated 16 minutes after delivery and transferred directly to Children's Hospital. The oxygen deprivation caused extensive brain damage. Benjamin is profoundly and severely mentally and physically disabled.

Tami Lafferty and the guardian ad litem for Benjamin (the Laffertys) sued Edmonds Family Medicine Clinic, its physicians, Dr. Peterson, Dr. Sim, Dr. Horiuchi, Stevens Hospital, and Sound Imagining. [7] At trial, the Laffertys' experts testified that Dr. Sim breached the standard of care by failing to call an obstetrician for a consultation, failing to instruct Tami that she should call the on-call doctor on Thanksgiving if there was no fetal movement, and failing to follow up on the BPP test. The Laffertys argued that Dr. Horiuchi breached the standard of care by failing to immediately consult an obstetrician and failing to treat the case as an emergency. The Laffertys asserted Stevens Hospital was negligent in failing to perform the BPP ultrasound test ordered by Dr. Sim and in failing to supervise Dirini. The Laffertys also alleged that Dirini, who was working alone and unsupervised on the night of November 25, had an extensive history **[*9]** of not properly performing physician-ordered tests.

The Laffertys' experts testified that Benjamin was suffering from a chronic fetal maternal hemorrhage beginning on Wednesday, November 25, and if the BPP test was done, the score would have been a 0 (or 2) out of 8. If this score were reported, Tami would have been admitted to the Hospital and an obstetrician would have been consulted to determine whether to deliver the baby. The Laffertys' experts also testified that Benjamin's brain damage was caused by the cardiac arrest and resulting loss of oxygen, and to a reasonable degree

[7] The Laffertys settled their claims against Dr. Peterson and Sound Imaging before trial.

of medical certainty, if Benjamin had been delivered before he went into cardiac arrest, he would not have suffered brain damage.

Following a six-week trial, the jury found Stevens Hospital and Dr. Sim and Dr. Horiuchi negligent and returned a verdict of approximately $17 million in favor of the Laffertys. The jury attributed 80% fault to the **[*10]** Hospital, 15% to Dr. Sim, and 5% to Dr. Horiuchi. The trial court denied the Hospital's motion to offset the verdict by the Laffertys' $450,000 settlement with Sound Imaging.

After filing a notice of appeal, the Clinic, Dr. Sim and Dr. Horiuchi settled with the Laffertys. According to the settlement agreement, the Laffertys received $3 million, with the right to an additional $2 million if they were to receive "no recovery whatsoever" from Stevens Hospital. The trial court approved the settlement and determined $3 million was reasonable. The Hospital appeals. [8]

[*11] ***ANALYSIS***

Motions for Mistrial

Stevens Memorial Hospital (the Hospital) contends the trial court abused its discretion in denying a number of motions for mistrial based on the improper and prejudicial conduct of the Laffertys' attorney. This court reviews a trial court's denial of a motion for mistrial for abuse of discretion. *Kimball v. Otis Elevator Co., 89 Wn. App. 169, 178, 947 P.2d 1275 (1997)*; *State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994)*. "Trial courts have broad discretionary powers in conducting a trial and dealing with irregularities that arise." *Kimball, 89 Wn. App. at 178*. The criteria for abuse of discretion in denying a motion for mistrial based on misconduct of counsel is whether a litigant is prevented from having a fair trial. *Moore v. Smith, 89 Wn.2d 932, 942, 578 P.2d 26 (1978)*. The trial court's decision to deny a motion for mistrial will be overturned only "when nothing the court can say or do would remedy the harm caused by the irregularity[,] or . . . when the harmed party has been so prejudiced that only a new trial can remedy the error." *Kimball, 89 Wn. App. at 178*. **[*12]** In considering a motion for a mistrial based on the misconduct of counsel, the moving party must establish that the conduct "complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record." *Aluminum Co. of America v. Aetna Casualty & Surety Co., 140 Wn.2d 517, 540, 998 P.2d 856 (2000)* (quoting with approval, 12 James Wm. Moore, *Moore's Federal Practice, §59.13, 3d. ed.* (1999)).

Voir Dire

The Hospital contends the trial court abused its discretion in denying the motion for a mistrial after the Laffertys' attorney told the

[8] The Laffertys filed a motion in response to the Hospital's motion to file an overlength reply brief, requesting that the court disregard certain arguments contained in the Hospital's reply brief that were not raised in the opening brief, were set forth only in footnotes, or were not supported by the record. We grant the Hospital's motion to strike the Laffertys' response to the extent that it contains an impermissible substantive reply to the Hospital's reply brief. ***RAP 10.1(b)***.

jury during voir dire that he obtained a $13 million dollar verdict in a negligence case against the City of Seattle.

The Laffertys' attorney questioned jurors during voir dire about "the medical negligence system, where people ask for compensation" and their attitude about large verdicts. The attorney began by stating, "[l]et me ask you this one. A few years ago, I tried a lawsuit that returned a verdict of $13 million against the City of Seattle." The defense objected as "inappropriate voir dire. **[*13]** " The court allowed the Laffertys' lawyer to complete the question. The attorney then continued, "[i]t was against the City of Seattle. That was a case in which there were written complaints of problems with an intersection. There were internal meetings where they knew there were problems with that intersection. My client was injured at that intersection." At this point, the court interrupted and sustained the defense objection. Without objection, the Laffertys' lawyer then engaged the jurors in a discussion about their views on large jury verdicts in medical malpractice cases, including asking the jurors, "[i]f you sat on a jury that came back with an award of $13 million or $15 million or $20 million dollars what kind of reaction would you get at work?"

At the end of the day, the defense made a motion for a mistrial based on the lawyer's remarks about the $13 million verdict. The trial court concluded that although the subject matter was an appropriate topic for voir dire, the interjection of the lawyer's personal experience was not. The court granted the defense motion to exclude any further references to personal experiences, but denied the motion for mistrial. The court ruled **[*14]** that the lawyer's comment about his personal experience did not rise to the level of "tainting" the jury so that it could not be "fair and impartial."

On appeal, the Hospital argues the trial court abused its discretion. The Hospital contends that the reference to the $13 million verdict was incurably prejudicial because the Laffertys' attorney impermissibly invited the jury to return a large verdict. [9]

The primary purpose of voir dire is to give litigants the opportunity to explore potential juror attitudes for juror challenges. *Lopez-Stayer v. Pitts, 122 Wn. App. 45, 51, 93 P.3d 904 (2004)*. Because of the nuances and subtleties **[*15]** presented by voir dire, the trial judge is vested with considerable latitude in ruling on the limits and extent of voir dire. *State v. Davis, 141 Wn.2d 798, 825-26, 10 P.3d 977 (2000)*; *Murray v. Mossman, 52 Wn.2d 885, 887, 329 P.2d 1089 (1958)*; *State v. Frederiksen, 40 Wn. App. 749, 753, 700 P.2d 369 (1985)*.

The Hospital cites *State v. Brady, 116 Wn. App. 143, 64 P.3d 1258 (2003)*, in support of its argument. In *Brady*, the trial court initially told counsel they would have two opportunities to question potential jurors. In reliance on that format, defense counsel saved certain topics to explore in the second

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[9] In its reply brief, the Hospital also asserts that given the similarity of its theory against the Hospital to the case counsel described, it was an improper attempt to "try the case" in voir dire. We will not address arguments raised for the first time in a reply brief. ***Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)***.

session. But after the first session, the trial court decided to eliminate the second session. Because certain overarching issues were not discussed due to counsel's reliance on a second opportunity to question the jury panel, the appellate court concluded the trial court's ruling prejudiced the defendant and was an abuse of discretion. *Brady, 116 Wn. App. at 149*. The Hospital cites two other cases, but both involve the scope of questioning. And, in both cases the appellate court held the trial **[*16]** court did not abuse its discretion. *See Davis, 141 Wn.2d at 798* (no abuse of discretion in a case involving interracial murder where trial court did not sua sponte question potential jurors about race after defense counsel did not do so); *Frederiksen, 40 Wn. App. at 751-53* (no abuse of discretion where trial court refused to allow questions about potential jurors views about the right to self defense). None of the cases cited by the Hospital are analogous or lead to the conclusion that the trial court abused its discretion by denying the motion for mistrial.

While the lawyer's reference to the $13 million verdict and his description of the case were improper, the focus of the discussion was not about the previous case or the justification for a request for a high damage award in this case. After the trial court properly sustained the objection, the lawyer immediately moved on to discuss the relevant topic of juror views on verdicts in malpractice cases. The trial court was in the best position to assess the prejudice of the comment and concluded it did not compromise the impartiality of the jury. We conclude the court did not abuse its discretion **[*17]** in denying the motion for mistrial based on counsel's improper but isolated comment in voir dire.

Speaking Objections

The Hospital argues the trial court abused its discretion in denying its motion for mistrial based on numerous improper "speaking objections" made by the Laffertys' attorney during the trial.

A speaking objection occurs when an attorney goes beyond stating the legal ground for an objection. Speaking objections are not allowed or prohibited in the Evidence Rules. But under *ER 611*, the trial court is vested with broad discretion to control courtroom proceedings and rule on evidentiary objections. Even though the Evidence Rules do not specifically prohibit speaking objections, they are generally disfavored. *See* 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice*, §103.8 (4th ed. Supp. 2006) ("most trial judges believe speaking objections should be used sparingly, if at all.") No Washington case has specifically defined or discussed speaking objections. The Hospital cites a Florida case, *Michaels v. State, 773 So. 2d 1230, (Fla. Dist. Ct. App. 2000)*. [10]

[*18] Below, the Hospital argued that it

[10] But *Michaels v. State*, did not involve a motion for a mistrial based on speaking objections. In that case, the appellate court was asked to review the trial court's imposition of contempt sanctions against an attorney based on the attorney's "tirade" and "personal assault on the integrity of the trial court." *Michaels v. State, 773 So. 2d at 1231 (2000)*.

was prejudiced when in the context of making several objections Laffterys' counsel said the Hospital had "broke its promise" that it would call sonographer Dirini as a witness. [11] The Hospital sought to introduce Dirini's deposition testimony through one of its expert witnesses, Dr. Mary D'Alton. The Hospital's attorney asked Dr. D'Alton about whether Dirini did an informal BPP, and whether when Dirini performed an ultrasound Dirini would look for signs of fetal well-being. The trial court sustained Laffertys' counsel's objections to these questions. In objecting, Laffertys' counsel stated that the defense "promised" it would call Dirini as a witness. The Hospital objected and asked the court to strike the comment, stating "[Counsel] could have called the witness." In response, the Laffertys' attorney said the defense "promised to call her." The Hospital's attorney started to respond again, but the court interjected, and granted the Hospital's motion to strike the comment.

[*19] The following day, the defense moved for a mistrial. In the alternative, the Hospital asked the court to give a curative instruction. The Hospital argued that contrary to the attorney's improper assertion, the Hospital did not say in opening statement that the Hospital would call Dirini to testify during trial. The trial court denied the Hospital's motion for a mistrial. During opening statements, the Hospital's attorney talked about Dirini and expressly told the jury that Dirini "will be here to talk to you." The court agreed with Laffertys' attorney that the only way to interpret the statements the Hospital's attorney made in opening was that the Hospital intended to call Dirini to testify at trial. The court ruled that although the Laffertys' lawyer's comment about the promise to call Dirini was inappropriate as an evidentiary objection, it was clearly an appropriate point to make in closing argument. The court concluded that because "the jury would have been advised of that anyway in argument, the fact that they heard it early does not mean that the defendant hospital cannot get a fair trial." The court also observed that while both parties made improper comments when making **[*20]** evidentiary objections, the comments were adequately "dealt with at the time" and "none of it impacts the hospital's right to a fair trial." [12]

Although the Hospital broadens its argument on appeal and asserts that a mistrial should have been granted based on the number of speaking objections, the Hospital does not explain specifically how it was prejudiced by any speaking objection other than the "promise" to call Dirini comment. [13] While it was improper for counsel to comment on the Hospital's failure to present Dirini's testimony in the context of an evidentiary objection, it is highly unlikely the remark prejudiced the Hospital. The court granted the Hospital's motion to strike and instructed the jury to not make any assumptions or draw any conclusions

[11] The Hospital did not assert that it was prejudiced because of any other speaking objections.

[12] The record reveals that over the course of the trial, numerous speaking objections were made, by attorneys for both sides.

[13] And, as the trial court observed, over the course of the trial, attorneys for both sides made numerous speaking objections.

based on a lawyer's evidentiary objection or an argument not based on the evidence. [14] And in closing, both sides presented argument **[*21]** to the jury about Dirini's failure to testify at trial. Laffertys' attorney argued that the Hospital promised, but failed to call Dirini to testify. The Hospital's attorney told the jury that the Laffertys had the same opportunity and obligation to call Dirini as a witness. On this record, the trial court did not abuse its discretion in concluding the Laffertys' lawyer's speaking objections did not deprive the Hospital of a fair trial and in denying the motion for a mistrial.

Closing Arguments

The Hospital contends Laffertys' attorney improperly stated his personal opinion and tried to appeal to passion and prejudice during closing argument and the court abused its discretion in denying the Hospital's motion for a mistrial. The Hospital did not object at the time to the allegedly improper arguments. **[*22]** Instead, the Hospital moved for a mistrial the following day. [15]

A party must object contemporaneously to an improper or inaccurate comment during closing argument. The failure to make a contemporaneous objection waives any error unless the argument was "so flagrant and prejudicial as not to be subject to a curative instruction." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 333-34, 858 P.2d 1054 (1993)* ("failure to make contemporaneous objections usually waives any error"). Only a contemporaneous objection allows the trial court a reasonable opportunity to correct the problem. *In re Welfare of Young, 24 Wn. App. 392, 397, 600 P.2d 1312 (1979)* ("general rule requires that the alleged error first be brought to the trial court's attention at a time that will afford that court an opportunity to correct it"). [16]

[*23] The first allegedly improper argument occurred while Laffertys' attorney was discussing the BPP test. Laffertys' lawyer told the jury that in determining negligence, they had to decide whether a BPP test was ordered. The lawyer argued that while Dr. Sim intended to order a BPP ultrasound on November 25, the evidence showed a BPP was not done. Based on the evidence, the lawyer talked about whether it was likely that Dr. Sim ordered the wrong test or whether the Hospital failed to perform the test ordered by Dr. Sim. The lawyer then said "I really don't have a dog in this fight, this is between the clinic and the hospital, but I think if you look at the evidence, I think that it points to the hospital." The lawyer said "when you look at who dropped the ball there, I think it's the hospital." The Hospital contends this

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[14] *Washington Pattern Jury Instructions Civil* 1.02 (2d ed 1994).

[15] In the alternative, the Hospital asked the court to give a curative instruction.

[16] *See also, Butler Mfg. Co. v. Hughes, 292 Ark. 198, 729 S.W.2d 142, 144 (Ark. 1987)* (by waiting until after closing arguments, the attorney did not give the trial court the opportunity to correct any error committed during the argument). *Jones v. Lincoln Elec. Co., 188 F.3d 709, 727 (7th Cir. 1999), cert. denied, **529 U.S. 1067, 120 S. Ct. 1673, 146 L. Ed. 2d 482, (2000)*** (objection to evidence must be timely raised).

argument is an improper assertion of the attorney's personal opinion.

It is not misconduct to argue inferences from the evidence including why the jury should believe one witness over another. An argument is improper only if counsel clearly states a personal opinion rather than arguing inferences based on the evidence. *State v. Copeland, 130 Wn.2d 244, 290-291, 922 P.2d 1304 (1996).* **[*24]**

Although Laffertys' lawyer phrased the argument in terms of "I think," viewed in context, the lawyer was referring to the evidence and arguing that the logical conclusion from the evidence was that the Hospital bore responsibility for failing to do the test ordered by Dr. Sim. [17] Counsel pointed out that while Dr. Sim's chart notes documented an order for a BPP, the Hospital could not support its theory that Dr. Sim ordered an OB ultrasound because it lost the schedule. In context, counsel was arguing why the jury should believe Dr. Sim instead of the Hospital based on the evidence. [18]

The second allegedly improper argument occurred when Laffertys' attorney argued that the Hospital was negligent because it knew Dirini was prone **[*25]** to making mistakes, either by not performing the correct test or not performing tests properly. Based on the evidence that ultrasound testing is frequently critical and time-sensitive, counsel asserted that the Hospital was negligent in scheduling Dirini to work unsupervised at night and this decision posed a threat to the "community." The lawyer also argued that - "they admit in their own documents that they are not having any success making this an employee that they can trust with patient safety, yet that's exactly what they did to this community." And, "their response, despite knowing she has all these problems, are to put her back on at nights unsupervised and impact patient safety. It's the worst possible thing a hospital could do to a community."

The Hospital claims the comments referring to the "community" were intended to inflame the jury and encourage the jury to base its verdict on fear because of the likelihood that some of the jurors had received services at Stevens Hospital. In its reply brief, the Hospital cites *Pederson v. Dumouchel, 72 Wn.2d 73 83-84, 431 P.2d 973 (1967)* in support of its argument that the comments referring to the "community" were **[*26]** improper.

In *Pederson*, after concluding that the verdict should be reversed on other grounds, the court stated it was inappropriate for counsel in closing to make arguments calculated to prejudice the jury against out-of-town parties. But the arguments in *Pederson* were far more extensive than the three references to "the community" in this case. Here, in arguing that the Hospital's decision to staff its ultrasound department with an employee with demonstrated problems, which created a risk and caused injury, counsel was essentially summarizing

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[17] The Hospital's counsel made similar "I think" arguments.

[18] We also agree with the trial court's conclusion that even if the lawyer expressed a personal opinion, it was not so flagrant or prejudicial that it could not be contemporaneously addressed by a curative instruction.

the testimony of at least three expert witnesses who testified that the Hospital's staffing decision was negligent, and that it fell below the standard of care, and placed "patients at risk." Counsel did not urge the jury to base its decision on fear or retaliation, or any factor other than the evidence presented. The references to the "community" during closing argument in this case were also neither as extensive nor as prejudicial as the arguments courts have found to be reversible misconduct in criminal cases. *See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988)* (remarks made by the prosecutor in closing **[*27]** argument that the defendant was "strong in" the American Indian Movement, whose members were "a deadly group of madmen" and "butchers that kill indiscriminately" were highly prejudicial and had a substantial likelihood of affecting the verdict; *State v. Reed, 102 Wn.2d 140, 147-48, 684 P.2d 699 (1984)* (argument that appealed to the hometown instincts of the jury by emphasizing that defendant's counsel and expert witnesses were outsiders and that they drove expensive cars resulted in prejudice to the defendant and denied him a fair trial); *State v. Bautista-Caldera, 56 Wn. App. 186, 194-95, 783 P.2d 116 (1990)* (remarks urging the jury to send a message to society that sexual abuse of children will be punished, were improper).

In context, neither the argument that the Hospital was negligent nor the references to the community were improper. [19] **[*28]** We conclude the trial court did not abuse its discretion in denying the Hospital's motion for a mistrial based on allegedly improper arguments. [20]

Shadow Jury

The Hospital claims the trial court abused its discretion in denying its motion for a mistrial based on an interaction between a member of a "shadow jury" and a real juror. In this case, the Laffertys retained a jury consultant who hired three "shadow jurors" to listen to the evidence during the trial. [21] The jury consultant did not tell the shadow jurors which party retained them.

[*29] About a week and a half into the trial, defense counsel observed the shadow jurors enter the jury lounge during the lunch hour and have contact with a juror on the Lafferty case. The defense moved for a mistrial.

The court separately questioned the three shadow jurors and the jury consultant about what had occurred. This inquiry revealed that all three of the shadow jurors went to the jury lounge that day for the first time to eat their lunch. One of the shadow jurors asked a juror who was on the Lafferty case about parking validation. The occurrence

[19] By failing to object, the Hospital also cannot show the remarks were so flagrant and prejudicial that a contemporaneous objection and curative instruction could not have addressed any potential prejudice.

[20] For the first time in its reply brief, the Hospital claims the lawyer's arguments were also an improper golden rule argument. We will not address arguments raised for the first time in a reply belief. ***Cowiche Canyon, 118 Wn.2d at 809***

[21] Shadow jurors are mock jurors paid to observe trial and report their reactions to a jury consultant hired by one of the litigants. Shadow jurors are generally matched as closely as possible to the real jurors. *See* *Mercado v. Warner-Lambert Co., 106 S.W. 3d 393 (2003)* (citing BLACK'S LAW DICTIONARY, 861 (7TH ed. 1999).

and substance of the communication was corroborated by one of the other shadow jurors. Neither of the other two shadow jurors had any conversation with jurors on the Lafferty case. The jury consultant also confirmed that the three shadow jurors were not told which litigant retained them and had been instructed not to discuss the case with each other or with anyone else. But the jury consultant said he had not instructed the shadow juror not to enter the jury lounge, because it was not on the same floor as the courtroom and he did not know it existed. The court instructed the shadow jurors they were not to enter the jury lounge and reiterated **[*30]** that they were not to have any communication with the jurors.

The defense asked the court to question each member of the Lafferty jury panel about any interaction with the shadow jurors. The defense also wanted the court to identify the shadow jurors and the consultant to the jury and tell the panel that the shadow jurors had no affiliation with the defense. The court denied the motion for the mistrial and the defense request to question the jury panel members and tell the jury about the shadow jurors. The court concluded that the brief interaction about parking validation did not cause prejudice to any party and did not warrant a mistrial.

On appeal, the Hospital argues the trial court abused its discretion because it did not interview the jury panel members individually and was, therefore, unable to evaluate prejudice or the effect of the interaction between the shadow juror and the jurors. The Hospital relies on a Texas appellate court case, *Mercado v. Warner-Lambert Co., 106 S.W.3d 393 (Tex. Civ. App. 2003)*.

In *Mercado*, the appellate court affirmed the trial court's denial of a motion for a new trial based on an interaction between a shadow juror and juror. **[*31]** The trial court in *Mercado* held an evidentiary hearing about the juror's interaction with a shadow juror. The juror testified that during a break, a man, who the attorneys confirmed was a shadow juror, approached the juror and asked for a cigarette and a quarter. The juror testified that "[h]e did not know the man had been hired by one of the law firms," but knew he attended the trial almost every day and would stand with other jurors on "smoke breaks." *Mercado, 106 S.W.3d at 395*. The juror thought the man might be associated with the plaintiff's family. The juror said they did not discuss the case. The appellate court determined that based on the evidentiary hearing, the trial court was able to evaluate the severity of the alleged misconduct and concluded the court did not abuse its discretion in denying the motion for a new trial.

The Hospital claims a different result should follow here. The Hospital contends that the reason the *Mercado* court declined to presume prejudice is because the trial court heard testimony from the juror and was able to ascertain the juror did not know the shadow juror was affiliated with a litigant. [22] But the Texas appellate **[*32]** court in *Mercado* does not state, nor imply, that the

[22] In *Mercado*, the appellant also urged the court to presume prejudice because there was an "exchange of favors" between the juror and shadow juror.

result hinges on the fact that the court heard testimony from a juror, rather than from a shadow juror. Instead, the court focused on the fact that the trial court conducted an evidentiary hearing and was able to evaluate whether the impropriety resulted in any harm.

Here, as in *Mercado*, the trial court conducted an evidentiary hearing. And, like *Mercado*, there was evidence of a limited interaction between a juror and a shadow juror that was unrelated to the case. There was also no evidence that the shadow jurors knew who retained them, making it extremely unlikely that the juror knew who the shadow juror was affiliated with and in any way compromise the impartiality of the jury. [23] We conclude the trial court conducted an appropriate inquiry and its decision to deny the defense motion for a **[*33]** mistrial was not an abuse of discretion.

Evidence of Dirini's Suspension

The Hospital argues the trial court should have granted its motion for mistrial after the jury heard excluded evidence about Dirini's suspension during the videotaped deposition testimony of the Hospital's administrator, Don Hanna.

In their complaint, the Laffertys alleged that the Hospital and Sound Imaging negligently supervised Dirini and were responsible for Dirini's failure to perform the requested BPP on November 25. Before trial, Sound Imaging voluntarily produced Dirini's personnel file. Dirini's personnel file documented a number of performance problems, including her failure to perform physician-ordered tests. During pretrial motions, the court ruled that the evidence concerning any post-November 25 disciplinary action against Dirini must relate **[*34]** to the documented pre-November 25 problems. The court reserved ruling on the admissibility of post-November 25 documents and whether they were relevant to the Hospital's contention that Sound Imaging was also responsible for supervising Dirini. In advance of trial, both sides designated certain parts of Don Hanna's videotaped deposition. The parties agreed they would play the entire videotaped deposition during the Laffertys' case. At the beginning of trial, the Hospital informed the court that it had decided not to pursue its contention that Sound Imaging was also responsible for supervising. The trial court then ruled that the fact that Dirini was suspended and fired after November 25 was not admissible, but the evidence in Dirini's personnel file, regarding performance problems and incidents prior to November 25, was admissible and relevant to the Laffertys' negligence claim.

At trial, when Laffertys' counsel played Hanna's videotaped deposition, it still included the previously designated portions concerning Sound Imaging and the post-November 25 discipline of Dirini. In the deposition played to the jury, Laffertys' counsel asks Hanna whether Dirini was suspended as of November **[*35]** 30 and

[23] The jury consultant testified that the jurors did not know which party retained them. The court declined to ask the shadow jurors directly whether they knew who retained them.

whether the suspension was more serious disciplinary action than the warning given to Dirini on October 13. At this point, Laffertys' lawyer stopped the videotape.

Before the jury watched the rest of the videotaped testimony, the parties reviewed the videotape to make sure there were no other references to Dirini's discipline, but still missed another reference to Dirini's suspension. When the videotape was played the second time, Laffertys' counsel asks Hanna about an employee evaluation of Dirini and whether it was filled out after the meeting on November 7 following a written warning to her and "before the November 24th meeting that preceded her suspension."

The Hospital moved for a mistrial, claiming that Hanna's videotape testimony about Dirini's discipline was incurably prejudicial. The trial court denied the motion for a mistrial. The court ruled that the failure to delete the designated portions violated the court's in limine order, but in context, the failure to do so was inadvertent. [24] To overcome any potential prejudice, the court gave a curative instruction telling the jury to disregard questions and answers in Hanna's deposition testimony about any post-November **[*36]** 25 information. Both sides proposed a number of curative instructions for the court. With some modification, the court used the Hospital's proposed instruction. [25] **[*37]** The court instructed the jury that:

> [I]n deciding any issue related to Ms. Dirini's job performance, you must only consider information available to Stevens Hospital prior to November 25 [sic], 1998. Questions asked of Mr. Hanna about matters after November 25, [sic] 1998 may have inaccurately summarized the events and may have misled the witness. These questions and answers should be disregarded and not considered by you for any purpose. [26]

The Hospital argues the trial court's denial of its motion for a mistrial was an abuse of discretion. The Hospital also contends the court should have given the curative instruction it proposed which informed the jury that "plaintiff's counsel violated an order of the court" and that there was "no evidence" that Dirini was subjected to disciplinary action.

Although Lafferty's counsel was responsible for editing the Hanna's videotaped deposition testimony to comply with the court's in limine order, the trial court acted within its discretion in ruling that the admission of the evidence was inadvertent and its curative instruction properly addressed any potential prejudice. A jury is presumed to follow the court's instructions. *Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 136, 875 P.2d 621 (1994)*.

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[24] According to the court, some of the designations made by both sides violated the court's in limine order.

[25] The Hospital's proposed curative instruction states:

> Plaintiffs' counsel violated an order of this court resulting in some of the delay today. You are now instructed as follows: In deciding this case you must only consider information available to Stevens Hospital prior to November 25, 1998 regarding Ms. Dirini's performance. Questions were asked of Mr. Hanna which were inaccurate and may have misled the witness. These questions and answers should be disregarded and not considered.

[26] The trial court also instructed the jury not to consider statements relating to Dirini's employment contract which had been excluded in limine on the plaintiffs' motion.

Although the Hospital asserts that the court's instruction was ineffective, the instruction given **[*38]** by the court was not significantly different from the Hospital's curative instruction. [27] Both the court's and the Hospital's proposed instructions clearly directed the jury to disregard and not consider the testimony.

And, although the Hospital argues that the only possible interpretation of the testimony was that Dirini was disciplined because of her conduct on November 25, we conclude that inference is not inescapable. Because the suspension was put in the context of earlier warnings and meetings in October and November, the evidence also suggested that Dirini's suspension was precipitated by events prior to November 25. In any event, because the jury was properly instructed to disregard the evidence, we conclude the trial court did not abuse its discretion in denying the Hospital's **[*39]** motion for a mistrial.

Admissibility of Personnel File

The Hospital contends the trial court abused its discretion in ruling that the documents contained in Dirini's personnel file were discoverable. The Hospital argues that some of the documents contained in Dirini's personnel file were actually "quality assurance" (QA) records that were privileged and not subject to discovery under *RCW 70.41.200(3)*. [28]

The Quality Improvement Statute, *RCW 70.41.200*, requires hospitals to establish a quality improvement program to improve patient care and prevent malpractice. *Subsection (3)* of the statute protects documents that are "created specifically **[*40]** for, and collected, and maintained by a quality improvement committee" from discovery and admission at trial. *RCW 70.41.200(3)* has not been addressed by Washington courts. However, the court in interpreting a similar statute, *RCW 4.24.250*, which grants immunity to records created by "regularly constituted" review committees that "review and evaluate the quality of patient care," has concluded that the statute is contrary to the general policy favoring discovery and must be strictly construed and limited to its purpose. *Coburn v. Seda, 101 Wn.2d 270, 276, 677 P.2d 173 (1984)*; *Anderson v. Breda, 103 Wn.2d 901, 905, 700 P.2d 737 (1985)*. The burden of proving the statute's applicability rests with the party seeking its application. *See Anderson, 103 Wn.2d at 905*.

The Hospital initially refused to produce Dirini's personnel file, asserting that some of the documents contained in the file were privileged quality assurance documents. After reviewing the alleged privileged documents, and reviewing the testimony of individuals involved in the Hospital's administration and risk management, **[*41]** the trial court concluded that the documents in the personnel file "were not created specifically for and collected and

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[27] Here, unlike in ***Magana v. Hyundai Motor Am., 123 Wn. App. 306, 94 P.3d 987 (2004)***, the court also timely instructed the jury to disregard the evidence inadvertently included in the videotaped deposition.

[28] The Hospital does not claim documents in Dirini's file were protected under *RCW 4.24.250*, nor does it challenge the voluntary production of Dirini's personnel file maintained by Sound Imaging. It is undisputed that *RCW 70.41.200* applies only to hospitals.

maintained by a quality improvement committee," and were therefore, not privileged under *RCW 70.41.200(3)*.

The Hospital contends that it met its burden of proving the documents in Dirini's personnel file were "created for, and collected and maintained by" a quality improvement committee. [29] The Hospital relies on the declaration of Douglas Jaquez, the Director of Healthcare Review, to support its contention. In his declaration, Jaquez states that the Hospital established quality assurance committees in accordance with the statute and those committees operated at the departmental level. Jaquez said the individuals involved in quality assurance activities for radiology included Hanna, Dr. Fletcher of Sound Imaging and lead sonographer, Nancy Bailey. Jaquez states that the Hospital maintains its quality assurance files in the risk management department and the quality assurance records are separate from an employee's personnel file. Having reviewed Dirini's personnel file, Jaquez asserts: "it appears that certain quality assurance documents **[*42]** were mistakenly placed in Ms. Dirini's personnel file." In a subsequent declaration, Jaquez claims that the documents from Dirini's personnel file withheld by the Hospital were "created specifically for, collected, and maintained by and for the quality assurance program and systems at the Hospital."

The Hospital also cites the testimony of Lorie Kelly, who was in charge of risk management. Kelly's testimony similarly discusses the fact that the Hospital had quality assurance/peer review committees operating at the departmental level. But Kelly does not testify that any documents in Dirini's file were created for or maintained by a quality assurance committee. In fact, she said that to her knowledge, the Hospital did not have a quality assurance committee that oversaw health care provided by non-physician **[*43]** employees.

Hanna testified that if a quality assurance issue arose pertaining to staff in radiology, specific "quality assurance memos" would be generated that would be sent to risk management. Hanna said this memo was distinct from employee evaluations which were not part of quality assurance.

Because there is no evidence supporting the conclusory statement in Jaquez's declaration that information contained in Dirini's personnel file was "created specifically for and collected and maintained by a quality improvement committee," we conclude the trial court did not abuse its discretion in ruling that the documents in the personnel file were not privileged under *RCW 70.41.200(3)*. [30]

[*44] ***Spoliation Instruction***

[29] Neither party identifies the specific documents that the Hospital claims were privileged. It appears from the transcript that the challenged documents were evaluations and memos regarding Dirini's performance.

[30] The Hospital also asserts the court abused its discretion in ordering production of Sound Imaging's personnel record for Dirini because many of the records were irrelevant and related to events after November 25. But Sound Imaging voluntarily produced Dirini's personnel file and the trial court did not rule that documents related to events after November 25 were admissible. In addition, information in the personnel file related to Dirini improperly performing tests was relevant to the Laffertys' claim of negligent supervision against the Hospital.

The Hospital argues the trial court erred by giving a spoliation instruction to the jury based on the Hospital's failure to produce the radiology schedule for November 25. Jury Instruction No. 9 stated:

> When a party fails to produce relevant documentary evidence within its control, without satisfactory explanation, the inference is that such evidence would be unfavorable to the non-producing party.

A "spoliation instruction" is appropriate under narrow circumstances in which a party cannot offer a "satisfactory explanation" for the loss of information under its control. *Pier 67, Inc., v. King County, 89 Wn.2d 379, 573 P.2d 2 (1977).* In deciding whether to give the jury a spoliation instruction, the court must take into consideration "(1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party." *Henderson v. Tyrrell, 80 Wn. App. 592, 607, 910 P.2d 522 (1996).*

The Hospital stipulated that it had a radiology schedule listing the procedures performed on November 25, and could not explain why the November 25 radiology schedule was destroyed. **[*45]** But the Hospital argues that the instruction was unwarranted because it produced the "radiology log" which contained the same information as the radiology schedule. In its reply brief, the Hospital also points to the testimony of sonographer Nancy Bailiey, to contend that Tami Lafferty's test would not have appeared on the schedule because it was ordered on the same day it was performed.

We reject the Hospital's arguments. First, there is no dispute that the November 25 radiology schedule was relevant and that the Hospital could not explain why it was destroyed. Second, the radiology log only recorded the tests that were performed, which are not necessarily the same as the tests that were ordered. And, although Bailey testified that "add-on" tests would not appear on the schedule, Bailey's testimony contradicted the testimony of a Hospital employee directly responsible for scheduling, who said that add-ons were written on a piece of paper and then stapled to the schedule. Bailey also admitted that she actually did not know how last-minute appointments were added to the original schedule, because sonographers worked off a copy of the schedule that was made the night before, and sonogrophers **[*46]** would not see the original after the copy was made. [31]

We conclude that the jury instruction was supported by the evidence and the trial court did not err in giving a spoliation instruction.

Evidence of Future Benefits

A few years after Benjamin was born, the family relocated to New Jersey so Benjamin could attend a publicly-funded special school for children with cerebral palsy. Pre-trial, the defense made a motion to introduce evidence regarding the services,

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[31] The Hospital essentially admitted that the original schedule kept by the clerical office would have shown what test was scheduled for Tami. The Hospital argued in closing that Dirini, as a sonographer, had no responsibility for adding tests to the schedule - that was the job of the clerical staff who "either wrote the patient's name on [the schedule] as an add-on, they wrote it on a piece of paper and stapled it to the scheduling."

such as physical therapy and speech therapy that Benjamin received and will continue to receive at **[*47]** the school until age twenty-one.

The trial court ruled that evidence regarding benefits Benjamin has received through his school was admissible under former *RCW 7.70.080*, but excluded evidence of future benefits as not authorized by the statute. The trial court's ruling allowed the Hospital to explore the nature of the services currently provided by the school and the services provided in the past, but excluded evidence about what services would be provided by the school in the future.

RCW 7.70.080 replaces the common law collateral source rule in medical malpractice cases. *Adcox v. Children's Orthopedic Hosp., 123 Wn.2d 15, 40 864 P.2d 921 (1993)*. Former *RCW 7.70.080* allowed a party to "present evidence to the trier of fact that the patient has already been compensated for the injury complained of from any source except the assets of the patient, his representative, or his immediate family, or insurance purchased with such assets . . . ." [32]

[*48] The Hospital does not challenge the trial court's interpretation of former *RCW 7.70.080*. Instead, the Hospital argues that evidence as to future services that Benjamin would receive at his school was admissible because the Laffertys presented evidence about the legal requirement that the school provide services until age twenty-one and played a "day in the life" video, which showed Benjamin receiving therapy at the school.

The evidence presented by the Laffertys about the services currently provided by the school and past services was within the scope of the court's ruling and did not open the door to evidence about what services the school would provide in the future. To the extent the evidence went beyond the parameters of the trial court's ruling, the door was not opened by the Laffertys, but by the Clinic during cross-examination of Lafferty's expert witness, Dr. Forrest Bennett. Over the objection of the Laffertys, the Clinic asked Dr. Bennett whether Benjamin was entitled to receive services until he reached the age of twenty-one. [33] **[*49]** We conclude the Laffertys did not impermissibly open the door to evidence of future benefits. [34]

Offset for Sound Imaging Settlement

A few weeks before the trial, the Laffertys filed notice of a $450,000 settlement with Sound Imaging. Following a hearing, the court approved the settlement. After the trial, the Hospital filed a motion to "Reconsider and Amend or Vacate" entry of the judgment on the verdict by offsetting the Sound Imaging settlement amount from the

[32] *RCW 7.70.080* was amended in 2006. The amendments do not affect the analysis.

[33] The later testimony of Dr. Steven Glass, another expert witness for the Laffertys about assumptions for calculating the life plan addressed schooling until age twenty-one but not services.

[34] At oral argument, the Hospital cited to footnote 11 of the *Adcox* opinion to support its position that it was entitled to present evidence of future benefits. The Hospital's reliance on *Adcox* is misplaced. While footnote 11 describes services that the Hospital in that case sought to prove such as "school districts; state medical care," it did not address whether future benefits were admissible under *RCW 7.70.080*. ***Adcox, 123 Wn.2d at 40***.

amount awarded to the Laffertys.

The Hospital claims the trial court erred in denying its motion. The Hospital argues that because there was an agency relationship between Sound Imaging and the Hospital, joint and several liability **[*50]** applies and the Hospital was entitled to an offset.

Under the Tort Reform Act of 1986, several liability rather than joint liability is the general rule in Washington. Joint and several liability exists only if one of three statutory exceptions apply. *Koste v. Chambers, 78 Wn. App. 691, 899 P.2d 814 (1995)*. Under one of the statutory exceptions, joint and several liability applies when a person acts as an agent of another party. *RCW 4.22.070(1)(a)*. Here, the Hospital argues Sound Imaging was acting as its agent and the Hospital was entitled to offset the judgment by the amount of the settlement under *RCW 4.22.060(2)*. *RCW 4.22.060(2)* requires that the judgment against a nonsettling party be reduced by the amount received in settlement if the nonsettling party acts as an agent. *See Waite v. Morisette, 68 Wn. App. 521, 525, 843 P.2d 1121 (1993)*. The premise of the Hospital's argument was not established by the evidence.

The Laffertys alleged in their complaint that Sound Imaging was an agent of Hospital. The allegation was denied by the Hospital in its answer. At trial, **[*51]** there was no evidence presented regarding an agency relationship between Sound Imaging and the Hospital and the fact of agency was not proved at trial or found by the jury. Because no evidence established joint and several liability, the trial court did not err in denying the Hospital's request for an offset.

Reasonableness of Settlement Agreement

After the trial, and after the Hospital, the Clinic, and Dr. Sim and Dr. Horiuchi each filed a notice of appeal, the Laffertys entered into a settlement with the Clinic and the doctors. The settlement agreement provides that the Laffertys will receive $3 million and if the Hospital prevailed on appeal and the Laffertys recovered nothing from the Hospital on retrial they would receive an additional $2 million. Additionally, the settlement agreement gives the Laffertys the option of foregoing the additional $2 million in exchange for receiving an additional $414,394.

Following a reasonableness hearing, the trial court approved the settlement agreement. The court entered findings addressing the reasonableness factors under *Glover v. Tacoma General Hospital, 98 Wn.2d 708, 658 P.2d 1230 (1983)*.

On appeal, the **[*52]** Hospital challenges the court's approval of the $3 million settlement as reasonable. The Hospital argues that the trial court ignored the "high" elements of the settlement, the $2 million contingency, and that an additional $414,394 could be recovered.

Because the order was entered after the Hospital filed its Notice of Appeal and the Notice of Appeal was not amended, the Laffertys contend the Hospital may not challenge the trial court's decision because the Hospital did not appeal the order approving the settlement. The Hospital

counters that the appeal from the final judgment is sufficient for review, analogizing to an order awarding attorney fees entered after the final judgment, where the appeal from the decision on the merits brings up for review the order awarding attorney fees. *See RAP 2.4(g).*

We need not decide whether the trial court's order approving the settlement and its findings on reasonableness are part of the appeal from the judgment on the verdict. Even assuming the Hospital properly appealed the trial court's decision, it conceded below that $3 million was reasonable, as long as the court's order specifically provided that if the additional **[*53]** $414,394 was paid, the total amount actually paid would be offset against any judgment paid by the Hospital. In light of its concession, we conclude the Hospital waived its challenge to the court's determination that $3 million was a reasonable settlement with the Clinic and the two doctors.

We affirm the judgment on the verdict.

Schindler, A.C.T.

WE CONCUR:

Becker, J.

Coleman, J.