APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

COURT OF APPEALS, DIVISION III,
STATE OF WASHINGTON

No. 37545-5-III

[Filed August 17, 2023]

DAVID W. MURPHY, as Personal Representative for the Estate of KATHLEEN J. MURPHY,
Appellant,

v.

MEDICAL ONCOLOGY ASSOCIATES, P.S., a Washington corporation; ARVIND CHAUDHRY, M.D., Ph.D.; RAJEEV RAJENDRA, M.D.; BRUCE CUTTER, M.D.; PROVIDENCE HEALTH & SERVICES, a Washington corporation, d/b/a PROVIDENCE HOLY FAMILY HOSPITAL; HEATHER HOPPE, Pharm.D.; and ERIN WHITE, Pharm.D.,
Respondents.

ORDER CORRECTING OPINION AND OTHERWISE DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Appellant's motion for reconsideration and the record and file therein, and is of the opinion that corrections to the opinion filed June 29, 2023, should be made to statements on page 9, and that the motion should otherwise be denied.

The opinion shall be corrected as follows:

The first full paragraph on page 9 is corrected to read:

> During jury selection, and after prospective jurors had heard something about the case, the court asked them whether there was anything about the case that "would cause you to begin this trial with any feelings or concerns regarding your participation as a juror." RP at 81. Two individuals raised their hands, and the court questioned both. One of the prospective jurors, number 15, explained that he raised his hand because "Dr. Chaudhry treated my brother years ago during his cancer as an oncologist." RP at 81. Asked if he had ever met the doctor, number 15 responded that he had, over 10 years earlier, "At a very young age, around just 8, 9 years old." *Id.* A second juror, prospective juror 25, disclosed that Dr. Chaudhry was her mother's oncologist.

Therefore,

IT IS ORDERED, the opinion will be corrected on page 9 as indicated and the motion for reconsideration of this court's decision of June 29, 2021, is otherwise denied.

PANEL: Judges Siddoway, Fearing, Pennell

FOR THE COURT:

/s/ George B. Fearing
GEORGE B. FEARING
Chief Judge

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION THREE

No. 37545-5-III

[Filed June 29, 2023]

DAVID W. MURPHY, as Personal Representative for the Estate of KATHLEEN J. MURPHY,
Appellant,

v.

MEDICAL ONCOLOGY ASSOCIATES, P.S., a Washington corporation; ARVIND CHAUDHRY, M.D., Ph.D.; RAJEEV RAJENDRA, M.D.; BRUCE CUTTER, M.D.; PROVIDENCE HEALTH & SERVICES, a Washington corporation, d/b/a PROVIDENCE HOLY FAMILY HOSPITAL; HEATHER HOPPE, Pharm.D.; and ERIN WHITE, Pharm.D.,
Respondents.

UNPUBLISHED OPINION

SIDDOWAY, J. — In this medical malpractice action that resulted in a defense verdict below, David

Murphy, as the personal representative of the estate of his mother, sued some of the doctors who treated her in her final illness. He contends it was error for the trial court not to strike, sua sponte, at least two prospective jurors for cause and not to exclude, sua sponte, defense evidence that he contends violated the dead man's statute or evidence rules. He also appeals the denial of his motion for a new trial on an informed consent claim.

He fails to demonstrate actual bias on the part of any juror, and assuming without agreeing that defense witnesses provided inadmissible testimony, error was not preserved. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Medical treatment

In late May 2015, Kathleen Murphy was admitted to Holy Family Hospital in Spokane for a worsening of unwellness she had experienced since being hospitalized in the beginning of 2015 for exacerbation of chronic obstructive pulmonary disease (COPD). COPD is a "lung disease of the airways where there is a certain obstructive pattern on how people are able to exhale or inhale." Rep. of Proc. (RP) at 395. It is often caused by long term smoking. Kathleen's[1] treatment providers were aware she was a half-a-pack per day smoker.

---

[1] Given the common last name, and for clarity, we refer to David as "Mr. Murphy" but to other members of the family by their first names. We intend no disrespect.

Soon after her admission, a tissue biopsy revealed that Kathleen had Hodgkin's lymphoma. Hodgkin's lymphoma is a cancer that primarily affects the lymph nodes and other lymphoid tissue in the body.

On June 2, Kathleen established care with Dr. Arvind Chaudhry, an oncologist with Medical Oncology Associates, P.S. Dr. Chaudhry would later testify that Kathleen had an unusual presentation of Hodgkin's disease. For one thing, the disease is rare in someone who is 65 years old. In addition, Kathleen had nodules in her lungs and liver in addition to enlarged lymph nodes; if it *was* Hodgkin's disease, that meant it had progressed to other organs. Believing it might be a different type of lymphoma, Dr. Chaudhry deferred a treatment decision pending a report on the pathology. The pathology confirmed that Kathleen had Hodgkin's lymphoma.

On June 4, Kathleen met with Dr. Rajeev Rajendra, one of Dr. Chaudhry's colleagues, because Dr. Chaudhry was unavailable. Present during this meeting were Kathleen's son, Michael, and her daughter, Susan. According to medical records, the meeting lasted 35 to 40 minutes and included discussion of treatment objectives.

Dr. Rajendra ordered a pulmonary function test to measure lung health, information needed to determine whether Kathleen could take a drug called bleomycin. Bleomycin is one drug within a chemotherapy regimen called "ABVD." ABVD is named for its four drug components: adriamycin, bleomycin, velban, and dacarbazine. In Dr. Chaudhry's opinion, ABVD was the best available avenue for the treatment and cure of

Hodgkin's disease and gave Kathleen the best shot at curing her cancer. The standard treatment with the ABVD regimen is a cycle every four weeks, with drug infusions on day 1 and day 15 of each cycle. Chemotherapy is most efficacious if the patient is able to stay on schedule with the recommended dosage.

Dr. Chaudhry reviewed Dr. Rajendra's notes before seeing Kathleen the following day, June 5. The medical record of Dr. Chaudhry's visit with Kathleen that morning states, in part, "Dr[.] Raj has discussed chemo options." Ex. D102, at 226. It continues, "She would like to proceed, but focused on eating today. . . . Hope to start this weekend. Will need ABVD." *Id.* at 226-27. Dr. Chaudhry recognized that Kathleen "did not have too much time to wait for all the testing and results." RP at 404. Nevertheless, he wished to have received all of the informative pathology before beginning chemotherapy.

On the morning of June 6, Dr. Chaudhry met again with Kathleen. He recommended ABVD "in-house," meaning in the hospital. RP at 273. His note of the visit adds: "Discussed risks and benefits." Ex. D102 at 220. Kathleen also received printed information about chemotherapy guidelines and drugs. The first administration of ABVD occurred that day.

Kathleen's white blood cell count dropped following the first administration, a condition called "neutropenia." RP at 274. As a result, the second administration of ABVD was postponed, and Dr. Chaudhry decided to reduce the dosage of adriamycin. Kathleen was discharged from the hospital to a nursing facility on June 22.

Kathleen received her delayed second administration of ABVD at the doctors' clinic, on July 2. Medical records of her meeting with a nurse practitioner on that date state, "Discussed risks and side effects of therapy in detail with patient. Written materials provided. She wishes to proceed." Ex. D101, at 16. Consent paperwork signed by Kathleen at that time listed the chemotherapy drugs and their side effects.

Kathleen had an infection following this second chemotherapy and was readmitted to Holy Family Hospital on July 12. A CT[2] scan showed a mild pulmonary edema at her lung bases. She was discharged on July 15. She agreed to go forward with her third administration of ABVD and received it on July 16.

Sometime after, Kathleen was sent to Valley Hospital after showing low white blood cell counts once more. On July 30, Dr. Chaudhry decided to delay the next administration of ABVD and to reduce the dosage of adriamycin to prevent further episodes of neutropenia. At that point, Dr. Chaudhry had determined to cease providing care to Kathleen as soon as she could be seen by another physician.[3]

---

[2] Computed tomography.

[3] Apparently Susan had her own thoughts about how her mother's neutropenia should have been treated, which led to friction with Dr. Chaudhry and his notification that Kathleen should seek treatment from another oncologist. Before trial, the defendants sought an order in limine excluding evidence on this collateral issue. The trial judge agreed that the jury should hear only that

On August 13, Dr. Bruce Cutter, another oncologist with Medical Oncology Associates, assumed Kathleen's care and she received her fourth administration of ABVD. An entry in the medical record states that Dr. Cutter, Kathleen, and Susan "had a good talk and all wish to continue care here." Ex. D101, at 10. Dr. Cutter's notes "emphasized plan is to cure her" and recorded that "[w]e need to be aggressive to do so." *Id.* At a follow-up later that week, Kathleen reported feeling unwell and displayed some shortness of breath with exertion. Dr. Cutter conducted a physical exam and noted no baseline respiratory issues. He attributed her symptoms to her ongoing anemia. Before her next visit, Kathleen received a transfusion of two units of red blood cells.

At her next visit, on August 27, Kathleen presented with diffuse "crackles" in her lower lung bases. Lung crackles, or crepitations, are detectable by stethoscope and often sound like "Velcro opening up." RP at 450.[4] They can be an early indication of bleomycin toxicity, but may be caused by many ailments, including Hodgkin's lymphoma in the lungs. This was the first time Dr. Cutter heard lung crackles in Kathleen. Although Dr. Cutter had growing concerns about the dose delays and modifications affecting Kathleen's chemotherapy, he decided to hold off treatment until the next week, as a start, to do diagnostic testing. A

---

the care was transferred, unless Mr. Murphy could demonstrate that the particulars were important.

[4] The "popping sound" is made when the alveoli "try to open up." RP at 450-51.

few days later, Kathleen visited the emergency room where complaints of lightheadedness and dizziness were treated.

On September 10, the lung crackles were still present. Given a concern about bleomycin toxicity but the continued goal to aggressively pursue a cure, Kathleen received a fifth administration of chemotherapy consisting of only ADV. The next day, Dr. Cutter treated Kathleen with Neulasta, which causes bone marrow to produce more white blood cells.

On September 13, Kathleen went to the hospital by ambulance with significant shortness of breath. She was admitted to the intensive care unit (ICU) and placed on a ventilator. The treating physicians diagnosed Kathleen with acute respiratory distress syndrome (ARDS).

Kathleen died on September 24. Her treating physician in the ICU described the cause of death as ARDS, recording it in her medical record as acute cardiopulmonary failure secondary to pneumonia with underlying COPD and Hodgkin's disease.

Litigation

David Murphy thereafter brought suit against a number of medical providers and practices, but by the time of trial he had dismissed claims against all but Medical Oncology Associates, Dr. Chaudhry and Dr. Cutter. He asserted claims for medical malpractice under chapter 7.70 RCW and negligence, personal injury claims that survived Kathleen's death under RCW 4.20.060. On behalf of Kathleen's children, he

asserted a claim of wrongful death under RCW 4.20.010 and .020.

In pretrial motions in limine, Mr. Murphy asked the court to preclude Drs. Chaudhry and Cutter from testifying to transactions with and statements made by Kathleen, which he argued were inadmissible under Washington's dead man's statute, RCW 5.60.030.[5] He acknowledged that testimony by third parties is not excluded by the statute; only parties in interest are precluded from testifying on their own behalf.

The defendants responded that the dead man's statute applies only to actions brought on behalf of the decedent's estate, and because Mr. Murphy also asserted a wrongful death claim for the benefit of Kathleen's children, the statute, by its terms, did not apply.

After hearing argument, the court observed that the parties appeared to agree that the dead man's statute applied to Kathleen's claims that survived her death, but not to the wrongful death claim on behalf of the

---

[5] RCW 5.60.030 does not generally prevent an interested party from giving evidence by reason of his or her interest in the event of the action, but is subject to the key proviso,

> That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person . . . then a party in interest . . . shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person.

children. As to the latter claim, then, the evidence was not precluded by the statute. The court observed that testimony about communications between providers and Kathleen might still be inadmissible hearsay. Ultimately, the court offered a tentative, qualified ruling:

> [N]ot knowing what the testimony, what it's going to look like, I'm sort of guessing and putting some parameters on this. If there's—the deadman's statute doesn't apply. So if it's not hearsay, then it comes in. If you're not suggesting that it's hearsay, then it comes in.

RP at 361. Mr. Murphy's lawyer had conceded that case law recognizes medical records as an exception to the bar established by the dead man's statute, and the trial court ruled that medical records were "fair game." RP at 360.

During jury selection, and after prospective jurors had heard something about the case, the court asked them whether there was anything about the case that "would cause you to begin this trial with any feelings or concerns regarding your participation as a juror." RP at 81. Sixteen individuals raised their hands, and the court questioned each. One of the prospective jurors, number 15, explained that he raised his hand because "Dr. Chaudhry treated my brother years ago during his cancer as an oncologist." RP at 81. Asked if he had ever met the doctor, number 15 responded that he had, over 10 years earlier, "At a very young age, around just 8, 9 years old." *Id.* A second juror, prospective juror 25, disclosed that Dr. Chaudhry had been her mother's oncologist.

When questioning was turned over to the lawyers, Mr. Murphy's lawyer questioned number 15 briefly about his brother's treatment by Dr. Chaudhry. He did not engage in any individual questioning of number 25. When the court entertained challenges for cause at the conclusion of voir dire, Mr. Murphy had no for-cause challenges.

During the trial, jurors heard testimony from defendants Dr. Chaudhry and Dr. Cutter, and from four other treating providers: two hospitalists who had worked at Holy Family Hospital, Dr. Peter Weitzman and Dr. Jeremy Cope, and two physicians who had cared for Kathleen in the Holy Family ICU: Dr. Jeffrey Elmer and, by deposition, Dr. Donald Howard. They heard testimony from Mr. Murphy and briefly from Susan. They heard from two expert witnesses for Mr. Murphy: Dr. John Sweetenham, an oncologist, and Dr. Michael Fishbein, a pathologist specializing in pathology of the heart and lung. They also heard from two experts for the defense: Dr. Curtis Veal, an internist specializing in pulmonary disease and critical care and Dr. Craig Nichols, an oncologist.

In closing argument, Mr. Murphy's lawyers emphasized the testimony of their expert, Dr. Sweetenham, that while the ABVD regime is the gold standard for treating Hodgkin's lymphoma in younger people, the bleomycin component presents a risk of bleomycin toxicity, and death, in older individuals. Dr. Sweetenham opined that the four to five percent increase in a cure that is presented by including bleomycin is more than offset by the risk of the patient developing bleomycin toxicity. Mr. Murphy's lawyers

argued that Kathleen should have been informed of what they contended was a safer course of treatment for her: a regimen that excluded bleomycin.

Mr. Murphy's lawyers spent a considerable part of their argument talking about the informed consent claim, arguing that the lack of detail in the medical records about the risks and alternatives discussed was evidence that bleomycin toxicity and the alternative of omitting bleomycin had not been discussed. They also argued that the written documentation of informed consent obtained on July 2 proved that obtaining it was overlooked earlier. They reminded jurors of the testimony of their expert pathologist, Dr. Fishbein, that the diffuse alveolar damage to Kathleen's lungs that resulted in her death from ARDS was more probably than not the result of bleomycin toxicity.

Defense lawyers emphasized that all the experts agreed that the ABVD regime for treating Hodgkin's lymphoma had been the gold standard for 40 years. They argued that Drs. Chaudhry and Cutter would have breached the standard of care had they *not* recommended it. They pointed to entries in the contemporaneous medical records that Kathleen's treatment objective was cure, not palliative treatment, as reported not only by her but by her children. They pointed to four medical record entries that they argued reflected advice and consent about treatment and options before the first administration of ABVD. Addressing the July 2 documentation of informed consent, they contended it was obtained as a matter of routine because it was the first administration Kathleen had received at their clinic, since the first

administration took place at Holy Family Hospital. They reminded jurors that Dr. Nichols had extensive experience treating patients with bleomycin and expressed the opinion that ABVD was the best treatment option for Kathleen notwithstanding her age. They pointed out that while it was undesirable that Kathleen's neutropenia had caused delays in her doses, contemporaneous entries in the medical records supported a conclusion that the ABVD treatment had been working, and conflicted with plaintiff's theory that bleomycin toxicity caused the ARDS that was her cause of death. They reminded jurors that the experts agreed that ARDS could be the result of oxygen toxicity or pneumonia.

The jury returned a defense verdict on all claims. Mr. Murphy moved for a new trial on the issue of informed consent, which the court denied. Mr. Murphy appeals denial of his motion for a new trial and the judgment.

I. THE TRIAL COURT DID NOT ERR BY FAILING TO EXCLUDE JURORS SUA SPONTE

Mr. Murphy's first assignment of error is to the trial court's alleged error in failing, sua sponte, to strike certain prospective jurors for cause. For the first time on appeal, Mr. Murphy contends that prospective juror 15, who was seated as juror 8 (and who we generally refer to hereafter as juror 8), was actually biased.[6] He

[6] A threshold issue of whether Mr. Murphy allowed prospective juror 15 to be seated without exhausting his peremptory challenges, thereby precluding his ability to appeal on the basis that juror15 should have been excused, is not addressed by the

also contends for the first time on appeal that by failing to strike members of the venire whose close family members were or had been patients of the defending doctors, the court "gave the defendant doctors an unfair advantage in jury selection . . . result[ing] in a biased jury." Opening Br. of Appellant at 5.

Because neither objection was raised in the trial court, Mr. Murphy recognizes that RAP 2.5(a) requires him to demonstrate that "'(1) the error is manifest and (2) the error is truly of constitutional dimension.'" *State v. J.W.M.*, 1 Wn.3d 58, 90, 524 P.3d 596 (2023) (quoting *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). Proof that an alleged error is manifest requires a showing of actual prejudice; stated differently, it requires that the asserted error had practical and identifiable consequences at trial. *Id.* (citing *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). A manifest constitutional error remains subject to a harmless error analysis. *Id.*

Article I, section 21 of the Washington State Constitution provides that "the right of trial by jury shall remain inviolate." In civil proceedings, "'[t]he

---

parties. Appeal is unavailable in such a case, as recently clarified by our Supreme Court in *State v. Talbott*, 200 Wn.2d 731, 521 P.3d 948 (2022). *Talbott* also rejects Mr. Murphy's suggestion that if he was required to exercise a peremptory challenge to exclude prospective juror 25, that would be prejudicially unfair. Opening Br. of Appellant at 35 n.2; s*ee Talbott*, 200 Wn.2d at 739 (a party's rights are not violated "'simply because [they] had to use peremptory challenges to achieve an impartial jury'") (alteration in original) (quoting *State v. Fire*, 145 Wn.2d 152, 163, 34 P.3d 1218 (2001)).

right to trial by jury includes the right to an unbiased and unprejudiced jury, and a trial by a jury, one or more whose members is biased or prejudiced, is not a constitutional trial.'" *Henderson v. Thompson*, 200 Wn.2d 417, 434, 518 P.3d 1011 (2022) (internal quotation marks omitted) (quoting *Mathisen v. Norton*, 187 Wash. 240, 245, 60 P.2d 1 (1936)); *see also Allison v. Dep't of Lab. & Indus.*, 66 Wn.2d 263, 265, 401 P.2d 982 (1965).

The court has a duty to act on a prospective juror's apparent bias or prejudice. "Both RCW 2.36.110[7] and CrR 6.4(c)(1)[8] create a mandatory duty to dismiss an unfit juror even in the absence of a challenge." *State v. Lawler*, 194 Wn. App. 275, 284, 374 P.3d 278 (2016). Contrary to the doctors' position, a party able to demonstrate the actual bias of a juror may seek relief on appeal even after having been afforded an opportunity for a full and fair voir dire, and after failing to challenge the juror for cause.

A juror demonstrates actual bias when he or she exhibits "a state of mind . . . in reference to the action, or to either party, which satisfies the court that the

---

[7] "It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service."

[8] "If the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for cause."

challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). "Equivocal answers alone do not require that a juror be dismissed for cause." *Lawler*, 194 Wn. App. at 283. A juror who has preconceived ideas need not be excused if the juror credibly states that she or he can set those ideas aside and decide the case on the basis of the evidence presented and the law as instructed by the court. *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987). To excuse a juror based on actual bias, the trial court "must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially." RCW 4.44.190.

The party challenging a potential juror on the ground of actual bias has the burden of proving the facts necessary to the challenge by a preponderance of the evidence. *Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn. App. 747, 754, 812 P.2d 133 (1991). Because "'the trial court is in the best position to determine a juror's ability to be fair and impartial,'" we review a trial court's decision not to dismiss a juror for manifest abuse of discretion. *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 856, 456 P.3d 869 (2020) (quoting *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991)). A trial court's implicit decision not to dismiss a juror sua sponte is subject to the same review. The trial court's fact-finding discretion includes the power to weigh the credibility of the prospective juror. *Ottis*, 61 Wn. App. at 753-54.

Actual bias has been found in the case of a juror who made an unqualified representation in a questionnaire that she could not be fair to both sides. *Guevara Diaz*, 11 Wn. App. 2d at 846. It has been found in a case in which a juror responded, when asked if she might not be able to give both sides a fair trial, that she was "more inclined towards the prosecution I guess," and said, "I would like to say [the defendant's] guilty." *State v. Irby*, 187 Wn. App. 183, 190, 347 P.3d 1103 (2015). It has been found in a case in which a juror "unequivocally admitted a bias . . . in favor of police witnesses," "indicated the bias would likely affect her deliberations," and "candidly admitted she did not know if she could presume [the defendant] innocent in the face of officer testimony indicating guilt." *State v. Gonzales*, 111 Wn. App. 276, 281, 45 P.3d 205 (2002), *overruled on other grounds by State v. Talbot*, 200 Wn.2d 731, 521 P.3d 948 (2022).

In this case, members of the venire were asked early in voir dire to identify themselves and answer a handful of questions, one of which was, "Can you be fair?" RP at 86-87. Juror 8 answered that question, "I believe I can be fair." RP at 91. When the parties were given their opportunity to question the venire, Mr. Murphy's lawyer asked whether anyone had any feelings about medical malpractice, and juror 8 was one of the individuals who raised his hand. He and the lawyer engaged in the following exchange:

> [PROSPECTIVE] JUROR NO. 15: I mentioned earlier my slight experience with Dr. Chaudhry and you mentioning malpractice, I believe it was?

[PLAINTIFF'S COUNSEL]: Yes, negligence.

[PROSPECTIVE] JUROR NO. 15: I—I've had both good doctors and bad doctors in my experience. So I don't feel like I would have a bias I would express anyways or even have it internally. But I have been caught in the medical system, my family and myself, for generations literally. But I've seen both sides of it.

[PLAINTIFF'S COUNSEL]: And thank you again for sharing that. Maybe you could share a little more about your feelings here as far as being able to sit on this jury?

[PROSPECTIVE] JUROR NO. 15: I don't think I would have a problem, to answer you very generically. Personally, I don't know Dr. Chaudhry at all.

[PLAINTIFF'S COUNSEL]: Okay.

[PROSPECTIVE] JUROR NO. 15: But I know my brother's experience and what little bit I shared of that. And I know my mother was very close with Dr. Chaudhry during my brother's experience. However, like I say, that was years ago for me. But I would—I would have to take this case by case, just as I do everything else.

[PLAINTIFF'S COUNSEL]: Okay, that's good. Thank you.

> And I guess the thing—do I have or my client have anything to fear here that because of your experience with your brother, you might lean one way or the other?
>
> [PROSPECTIVE] JUROR NO. 15: I don't believe so, because I don't trust anybody's opinion, even my own sometimes, meaning that because my brother had a good experience with Dr. Chaudhry does not mean that I would or that his mother would have.
>
> [PLAINTIFF'S COUNSEL]: Okay, thank you very much for sharing that.

RP at 103-04.[9]

Juror 8's answers cannot be characterized as even equivocal statements of bias or prejudice. Mr. Murphy points to juror 8's statement that he was 8 or 9 years old at the time of his brother's cancer and speculates that he would have been "impressionable," and that in this "searing context," juror 8 would have perceived Dr. Chaudhry as having "*saved his brother's life*." Opening Br. of Appellant at 23, 26; Reply Br. of Appellant at 13. Mr. Murphy points to juror 8's statement that his mother was "very close" to Dr. Chaudhry during his brother's care and speculates that no such son "could

---

[9] Juror 8 later engaged in a more extensive exchange with defense counsel, after defense counsel asked the venire about any history of having a treatment relationship terminated by their doctor. *See* RP at 178-80. He talked about his relationships with three doctors; some favorable, some not. Mr. Murphy has nothing to say about these additional disclosures by juror 8, other than to dismiss them as "progressively less responsive." Opening Br. of Appellant at 24.

reasonably be considered free from actual bias." Opening Br. of Appellant at 26. But Mr. Murphy never obtained juror 8's agreement that he had been impressionable, or that he had such attitudes. Rather, juror 8 spoke of "what little bit [he] shared" of his brother's experience, and stated, "Personally, I don't know Dr. Chaudhry at all," and "like I say, that was years ago for me." RP at 104.

Ultimately, what Mr. Murphy is asking us to do is to *infer* bias from the "doctor-to-a-close-family member" relationship. But challenges for implied bias are governed by RCW 4.44.180, which identifies relationships for which a challenge for implied bias may be taken "and not otherwise." Being a close family member of a patient of a party is not identified as a basis for a challenge for implied bias. Accordingly, Mr. Murphy is required to demonstrate juror 8's actual bias, and he fails to do so.

Mr. Murphy's remaining argument is that once it was revealed that prospective juror 25's mother was a current patient of Dr. Chaudhry, the trial court should have excused all similarly-situated venire members sua sponte. This is despite the fact that in introducing herself and answering the question, "Can you be fair?" prospective juror 25 answered, "I can be fair." RP at 95. Mr. Murphy's lawyers did not use their allotted time in voir dire to ask her any questions. Mr. Murphy argues that this categorical disqualification was nevertheless required because the defense would otherwise have unfair access to information about how the jurors' family members had fared under the defendants' treatment.

Again, Mr. Murphy is required to demonstrate manifest constitutional error. He offers no legal authority or analysis supporting the proposition that a party has a constitutional right to disqualify a prospective juror if the party's adversary might have greater access to information about that juror. "'[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

II. THE TRIAL COURT DID NOT ERR BY FAILING TO INTERCEDE AND, SUA SPONTE, EXCLUDE UNOBJECTED-TO TESTIMONY

Mr. Murphy's next assignment of error is to testimony by Drs. Chaudhry, Cutter, and Nichols supportive of Kathleen's informed consent that he contends was speculative, unduly prejudicial, or violated the dead man's statute. The complained-of testimony was not objected to, but he advances two theories on which he claims to avoid the issue preservation problem. He also argues that because the dead man's statute would have applied to the estate's assertion of Kathleen's claims that survived her death, the trial court should have severed the wrongful death claim sua sponte.

A. The cumulative error doctrine does not apply

Mr. Murphy first seeks to avoid the issue preservation problem by invoking the cumulative error doctrine. The cumulative error doctrine applies "'when there have been several trial errors that standing alone

may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.'" *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 172, 288 P.3d 1140 (2012) (quoting *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)). Mr. Murphy acknowledges that this court has repeatedly held that cumulative error is not a method for obtaining appellate review of unpreserved issues. Opening Br. of Appellant at 37. Instead, cumulative error is "simply a recognition that the net impact of multiple small errors can still result in a prejudicial impact on the trial." *Rookstool v. Eaton*, 12 Wn. App. 2d 301, 311-12, 457 P.3d 1144 (2020). Nevertheless, Mr. Murphy points to our Supreme Court's statement in *State v. Clark*, 187 Wn.2d 641, 649, 389 P.3d 462 (2017), that "cumulative error present[s a] constitutional issue[ ] which we review de novo," and urges us to "follow the Supreme Court's reasoning" by reviewing his assigned error under "RAP 2.5(a)(3)'s manifest constitutional error doctrine." Opening Br. of Appellant at 38.

Cumulative error *does* present a constitutional issue, which *Rookstool* recognizes, analyzing it as implicating the fair trial right. *See* 12 Wn. App. 2d at 309-11. But a party must still present individually harmless *preserved* errors, or individually harmless manifest constitutional errors, before asking this court to consider whether, cumulatively, they operated to deprive the party of a fair trial. *Clark* does not hold otherwise. The cumulative evidence doctrine does not apply.

B. Mr. Murphy identifies only a narrow basis for a standing objection

Mr. Murphy's second argument is that his motions in limine created a standing objection sufficient to preserve his challenges on appeal. When a party has moved in limine in the trial court to exclude evidence, "giving the trial court opportunity to rule on relevant authority, and the court does so rule, it may not be necessary to object at the time of admission of the claimed erroneous evidence in order to preserve the issue for appeal." *State v. Sullivan*, 69 Wn. App. 167, 170, 847 P.2d 953 (1993). The party losing the motion in limine has a standing objection to the evidentiary issue decided. *Id.* at 170-71. The rule protects the losing party from being required to renew its objection in front of the jury "at the risk of making comments prejudicial to its cause, as well as incurring the annoyance of the trial judge." *Id.* at 171. The rule only applies "[w]hen the trial court has clearly and unequivocally ruled against the exclusion of evidence." *Id.*

Here, the rule afforded Mr. Murphy a standing objection to the trial court's ruling on the dead man's statute-related issue that he lost: its ruling that "the deadman's statute doesn't apply." RP at 361. Mr. Murphy baldly asserts that the standing objection created by his loss on that issue "should be construed to preserve a challenge to Dr. Chaudhry[']s and Dr. Cutter's speculative testimony," Opening Br. of Appellant at 47, but he provides no authority or reasoning in support. He had no standing objection to

speculative testimony. Any objection was required to be asserted during trial.

C. Mr. Murphy fails to demonstrate that the trial court breached a duty or abused its discretion when it did not bifurcate the wrongful death claim sua sponte

Mr. Murphy also argues that when the trial court ruled that the dead man's statute did not apply to the wrongful death claim asserted on behalf of the children, it was an abuse of discretion not to "sever—or at least to *consider* severing—the individual- and representative-capacity claims so that the representative claim would not be prejudiced by the loss of the deadman's statute's testimonial protections." Opening Br. of Appellant at 42. Implicit in this argument is an acknowledgment that because the statute did not apply to the wrongful death claim, the court could not exclude the evidence altogether.[10]

As the court's instructions explained to the jury, Mr. Murphy's survival claim on behalf of the estate was for the personal losses suffered by Kathleen, and the damages sought were her medical expenses and damages for personal injury, pain, suffering, and loss

---

[10] Although not addressed by the parties, a limiting instruction might have been an option, although it would doubtless have been difficult for the jury to apply. In *Dennick v. Scheiwer*, 381 Pa. 200, 113 A.2d 318, 319 (1955), the plaintiff sued under a death statute and brought a survival action, and the court held he was "a competent witness generally." The trial court had observed, "'To tell the jury to listen to the defendant in one claim and close its ear in the other might possibly be technically correct but practically senseless.'" *Id.*

of enjoyment of life until her death. His wrongful death claim was for the losses suffered by her children, as beneficiaries of the estate, and the damages sought were for the loss of Kathleen's love, care, companionship and guidance. As acknowledged by Mr. Murphy's counsel, the claims were joined by Mr. Murphy "as a matter of judicial economy." Opening Br. of Appellant at 42.

CR 42(b) provides that the court may order a separate trial of any claim or issue, in furtherance of convenience or to avoid prejudice. Mr. Murphy might have sought an order bifurcating the wrongful death claim, but he did not.

We review a trial court's decision whether to order separate trials for abuse of discretion, and will not reverse the court's decision if it rests on tenable bases. *Del Rosario v. Del Rosario*, 116 Wn. App. 886, 901, 68 P.3d 1130 (2003) (citing *Hawley v. Mellem*, 66 Wn.2d 765, 768, 405 P.2d 243 (1965)), *aff'd in part, rev'd in part on other grounds*, 152 Wn.2d 375, 97 P.3d 11 (2004). When a personal representative chooses to join survival and wrongful death claims in the same action, and to proceed with the claims as joined after the ramifications for the dead man's statute are identified, any reasonable judge would infer that the personal representative views a single trial as most convenient and least prejudicial. *And cf. Armstrong v. Marshall*, 146 S.W.2d 250, 252 (Tex. Ct. App. 1940) (since evidence was admissible as applied to the survival action, and no request was made to limit it to the other cause of action, appellants were in no position to complain of its admission).

Mr. Murphy identifies no legal authority that required the trial court to raise bifurcation under CR 42(b) sua sponte. We find no abuse of discretion.

D. Challenged testimony

Mr. Murphy identifies testimony by each of Drs. Chaudhry, Cutter and Nichols that he contends should have been cut off or struck by the trial court, sua sponte.

1. Testimony by Dr. Chaudhry about Kathleen's ability to understand his communications

Mr. Murphy points out that in questioning by Mr. Murphy's lawyer, Dr. Chaudhry testified he was not present for Dr. Rajendra's discussion with the family on June 5, so his understanding of what was said was limited to what the medical record reflected. Dr. Chaudhry also sometimes testified in response to questions that he did not recall a particular interaction with Kathleen, and would have to rely on the records. From this, Mr. Murphy argues that Dr. Chaudhry's answers to the following questions from Dr. Chaudhry's own lawyer were "speculation, which should not have been admitted," Opening Br. of Appellant at 46:

> Q. . . . Now, let's go back to your actual discussions with Ms. Murphy. Any concerns about her ability to understand what you were saying?
>
> A. Not at all.

> Q. Can you provide any more detail relating to the discussion and the back-and-forth that gave you that impression?
>
> A. So at multiple times, from 6/4 when she spoke to Dr. Raj, 6/5 and 6/6 with me, she was very clear she wanted to go for a cure. And I asked her multiple times. Even in the clinic, she was very clear she wanted to go for a full cure. So there was no doubt in my mind that she and the family had chosen the path of curative therapy.
>
> Q. Did she express to you understanding when you did—when you explained the risks and benefits of the drugs?
>
> A. Yes, she did.

RP at 1156-57. Mr. Murphy also contends that this testimony violated the dead man's statute.

No objection was made to these questions or answers in the trial court. Mr. Murphy had a standing objection to the trial court's ruling that the dead man's statute did not apply, but on appeal, he does not challenge that ruling on the merits—he merely argues that the trial court should have bifurcated the claims, sua sponte, which we reject in section II.C. Assuming without agreeing that the questions called for Dr. Chaudhry to speculate, error was not preserved.

2. Testimony by Dr. Cutter about his August 13 conversation with Kathleen and Susan

Mr. Murphy next points out that when Dr. Cutter was questioned by Mr. Murphy's lawyer, he testified that he could not recall speaking to Dr. Howard about Kathleen on September 15, but he likely did speak to him, based on a note in the medical records. Elsewhere, Dr. Cutter testified that Dr. Elmer was also involved in Kathleen's care "[b]ut I don't recall what discussions I had with who" and his only independent recollection of his conversation with the doctors was the medical records. RP at 642-43.

Based on that testimony, Mr. Murphy argues that almost four pages of transcribed testimony by Dr. Cutter about the August 13 note of his conversation with Kathleen and her daughter "could only be speculation, and . . . should not have been admitted." Opening Br. of Appellant at 46-47 (identifying testimony at RP 648-52). At no point in that testimony was any objection made. Assuming without agreeing that the questions called for Dr. Cutter to speculate, error was unpreserved.

3. Testimony by Dr. Nichols

Finally, Mr. Murphy contends the trial court should have cut off parts of defense counsel's examination of Dr. Nichols sua sponte. The first occasion was questioning by defense counsel about a note electronically signed by Dr. Rajendra on June 4. Much of what Dr. Nichols stated in response was quoting from the medical record, so we revise the formatting to

make Dr. Nichols's relatively limited testimony more easily discerned (the quoted testimony is italicized and set off as appropriate):

> Q. . . . [W]ill you read through that addendum and tell me if it is consistent or inconsistent with what you would expect for documenting informed consent?
>
> A. Okay. So it starts with
>
> "*I had an extensive d/w,*" [discussion with*]*, "*the family, daughter, and son Mike. I discussed the final pathology. I reiterated that I would discuss the pathology again with Dr. Corn to confirm. I next discussed staging;* [*workup*] *which would include CT* [*of the chest, abdomen, and pelvis*] *(done); Echo;* [*pulmonary function tests*]*; PICC/,*"
>
> which is the catheter that's put in under the (indicating) clavicle to administer chemotherapy;
>
> "*and a bone marrow biopsy. Port once they decide to proceed with chemotherapy. I discussed that if they decided to proceed with* chemo[therapy], *which they seem very keen on doing, I recommended 4 cycles of ABVD followed by* [*a*] *restaging PET/CT and then additional 2 cycles of ABVD, switching therapy*—v[ersus] *Switching therapy based on the results of PET/CT based on the Deauville Criteria.*"
>
> The Deauville criteria are a graded criteria about how metabolically active the PET scan is.

"*I discussed the chemotherapy agents used and their toxicities for each of these agents. I also discussed the prognosis for advanced stage* [*Hodgkin lymphoma*]. *Finally, they also were concerned about the patient's mentation* [*and*]*—and she feeling sluggish and lethargic, which is very unusual for their mother. I recommended checking for adrenal insufficiency, and if this—that's not the case, doing the LP for CSF,*"

which is cerebral spinal fluid, which is the fluid that surrounds the spinal cord,

"*or even an MRI brain. All of their questions were answered. I spent a total of 35-40 minutes discussing her patho*[logy,]*physiology/staging,* [*workup*]*, treatment options, and answering all their questions.*"

Q. Is that inconsistent or consistent with what you would expect in relation to informed consent regarding the administration of ABVD?

A. It's consistent with my practice and my understanding and experience with the practice in Washington.

Q. And spending 35 to 40 minutes with them in that discussion, is that also consistent with . . .

A. I would say that—I never say excessive, but it's more than is typically spent, yes.

RP at 797-98 (quoting Ex. D102 at 229) (format modified).

Defense counsel then questioned Dr. Nichols about a note Dr. Cutter entered in the medical records on the day he administered AVD, omitting bleomycin. Defense counsel asked Dr. Nichols to read through Dr. Cutter's assessment and "let me know when you're done there." RP at 803. This testimony followed:

> A. (Looking at a document.) I'm done.
>
> Q. And then under "Plan," do you see No. 2?
>
> A. I do.
>
> Q. Indicates the plan that Dr. Cutter had put into play, or intended to put in play?
>
> A. I do.
>
> Q. And then ultimately No. 5, what's that indicate to you?
>
> A. Number 5 says, "I went over the above in detail with both the patient and her doctor."
>
> Q. If Dr. Cutter testified not only consistent with the record there as well as indicated the assessment was discussed and that's what he meant by in No. 5 in relation to "Went over the above in detail," is that consistent with you with providing necessary information for informed consent?
>
> A. Yes.

RP at 803-04. Mr. Murphy contends that all of the foregoing testimony was speculative, unreliable and prejudicial, and should have been excluded. Assuming

without agreeing that the testimony was objectionable on any of those bases, error was not preserved.

Finally, Mr. Murphy complains about a line of questioning of Dr. Nichols that is reflected on a full five pages of the trial transcript. Defense counsel began by asking, "[I]f you were meeting with Ms. Murphy . . . what's the material information that you would have provided to her for what you consider to be informed consent?" and thereafter, "[T]ake us through what you would have said to Ms. Murphy." RP at 789-90. Representative of the nature of Dr. Nichols's response is the following snippet:

> "We are going to give four drugs: [o]ne has—is hard on your heart or can be hard on your heart, can be hard on your bone marrow; one can be hard on your lungs and cause lung stiffening and breathing problems; one can cause muscle aches, constipation, and be hard on your bone marrow; and the other can be hard on your bone marrow and blood and platelet counts. We'll check you carefully. We'll do what we can. But any or all of those drugs, alone or in combination, can rarely cause catastrophic outcomes and death."

RP at 792. At the conclusion of Dr. Nichols's articulation of what he would have said to Kathleen, defense counsel asked if Dr. Nichols would have noted the entire conversation on Kathleen's chart. The doctor answered, "No," explaining, "My chart note would be something like, 'I had a long discussion with Ms. Murphy . . . about her diagnosis, her prognosis, treatment option—general treatment options and

general discussion of toxicity and of risk and benefit from the—from ABVD.'" RP at 794. The unstated implication was that Dr. Chaudhry's similarly succinct chart note could summarize what had been a much lengthier discussion with Kathleen. At no point during the questioning did Mr. Murphy object.

Mr. Murphy argues that this testimony was "profoundly and overwhelmingly prejudicial," and the trial court had discretion to strike it sua sponte under *In re Estate of Hayes*, 185 Wn. App. 567, 591-92, 342 P.3d 1161 (2015). Opening Br. of Appellant at 51-52. *Hayes* merely holds that a trial court has *discretion* to strike evidence sua sponte, not that it can have a duty to do so. Not only does *Hayes* not recognize any duty, it holds that the court's discretion to strike testimony sua sponte is limited and can be abused, explaining, "'"[I]t is only when the evidence *is irrelevant, unreliable, misleading, or prejudicial, as well as inadmissible*, that the judge should exercise [the] discretion[ ] . . . to intervene."'" *Id.* at 592 (alteration in original) (quoting *Vachon v. Pugliese*, 931 P.2d 371, 381 (Alaska 1996) (quoting 1 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 55, at 225 (4th ed. 1992))).

Assuming without agreeing that this testimony by Dr. Nichols was excludable under ER 403, error was not preserved.

III. DENYING THE NEW TRIAL MOTION WAS NOT AN ABUSE OF DISCRETION

Finally, Mr. Murphy assigns error to the trial court's denial of his motion for a new trial. In moving for a new trial, Mr. Murphy had argued that because

Dr. Rajendra did not testify, Dr. Chaudhry was unaware whether Dr. Rajendra discussed with Kathleen the option of omitting bleomycin, and Dr. Chaudhry admitted that he, himself, did not speak with her about that alternative, the evidence was insufficient to support a defense verdict on the informed consent claim.

The jury was properly instructed that Mr. Murphy's informed consent claim required him to prove each of the following elements:

> First, that the Defendants failed to inform the patient of a material fact or facts relating to the treatment;
>
> Second, that the patient consented to the treatment without being aware or fully informed of such material fact or facts;
>
> Third, that a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts; and
>
> Fourth, that the treatment in question was a proximate cause of injury to the patient.

Clerk's Papers (CP) at 260 (Instr. 15); *see* RCW 7.70.050(1). The jury was further instructed, as to the meaning of "material facts," that

> [a] medical oncologist has a duty to inform a patient of all material facts, including risks and alternatives, that a reasonably prudent patient would need in order to make an informed

> decision on whether to consent to or reject a proposed course of treatment.
>
> A material fact is one to which a reasonably prudent person in the position of the patient would attach significance in deciding whether or not to submit to the proposed course of treatment.

CP at 259 (Instr. 14); *see* RCW 7.70.050(2).

The trial court's order identified three grounds on which to deny the new trial motion, with the following findings:

> 3. The jury heard testimony that the medical records demonstrated compliance with informed consent consistent with Washington law.
>
> 4. It is reasonable to infer that the jury believed that Ms. Murphy would have consented to the use of ABVD regardless of the risk.
>
> 5. Further, the jury heard testimony that allowed them to infer that Bleomycin was not the proximate cause of Ms. Murphy's death.

CP at 381.

CR 59 permits the trial court to order a new trial following a jury's verdict when "there is no evidence or reasonable inference from the evidence to justify the verdict." CR 59(a)(7). We review the denial of a motion for a new trial for abuse of discretion. *Conrad v.*

Alderwood Manor, 119 Wn. App. 275, 290, 78 P.3d 177 (2003). Where the proponent of a new trial argues the verdict was not based on the evidence, appellate courts will look to the record to determine whether there was sufficient evidence to support the verdict. *Coogan v. Borg-Warner Morse Tec Inc.*, 197 Wn.2d 790, 811-12, 490 P.3d 200 (2021) (citing *Palmer v. Jensen*, 132 Wn.2d 193, 197-98, 937 P.2d 597 (1997)). This analysis is akin to the inquiry courts make in considering a motion for judgment as a matter of law under CR 50, where the court is required to view the evidence and reasonable inferences in the light most favorable to the verdict, without regard to contrary evidence or inferences. *Id.* at 812. This substantial evidence review respects the jury's prerogative to evaluate and weigh the evidence. *Id.* (citing *Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 176-77, 422 P.2d 515 (1967)).

There was sufficient evidence to support a jury finding that a reasonably prudent patient under similar circumstances would have consented to Kathleen's course of treatment if informed of material facts. This is an independently sufficient basis for the jury's verdict. Drs. Chaudhry and Cutter testified that they informed Kathleen of material facts, both testified that the treatment provided best met Kathleen's objective of cure, and Dr. Nichols agreed that he would have pursued the same course of treatment. That testimony, if credited by jurors, supported this finding.

Mr. Murphy complains that the trial court's finding was that "[i]t is reasonable to infer that the jury believed that *Ms. Murphy* would have consented to the use of ABVD regardless of the risk," thereby

misanalyzing the essential element as subjective. CP at 381 (emphasis added). But the same evidence that supports the trial court's subjectively-framed finding supports our objectively-framed finding. In our review for abuse of discretion, we may affirm the trial court on any basis that the record supports. *Coogan*, 197 Wn.2d at 820 (citing *State v. Arndt*, 194 Wn.2d 784, 799, 453 P.3d 696 (2019)).

There was also sufficient evidence to support a jury finding that Mr. Murphy failed to prove that the treatment in question was a proximate cause of Kathleen's death. This, too, is an independently sufficient basis for the jury's verdict. While Drs. Sweetenham and Fishbein testified that the underlying lung injury was caused by bleomycin toxicity, aggravated by the Neulasta, Dr. Nichols testified that Kathleen's death was more likely caused by something else, and Dr. Howard testified he would attribute it to ARDS of undetermined etiology.

Since the trial court's decision can be affirmed on both these grounds, we need not reach its third alternative ground (that the medical records, as explained by the testimony, sufficiently demonstrated compliance with the requirement for informed consent).

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

/s/ Siddoway, J.
Siddoway, J.

WE CONCUR:

/s/ Fearing, J.
Fearing, C.J.

/s/ Pennell, J.
Pennell, J.

APPENDIX C

IN THE SUPERIOR COURT IN THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

Case No. 18-2-00260-0

[Filed March 20, 2020]

DAVID W. MURPHY, as Personal Representative for the Estate of KATHLEEN J. MURPHY Plaintiff, v. MEDICAL ONCOLOGY ASSOCIATES, P.S., a Washington corporation; ARVIND CHAUDHRY, M.D., Ph.D.; and BRUCE CUTTER, M.D., Defendants.	)

JUDGMENT FOR DEFENDANTS DR. ARVIND CHAUDHRY, M.D., Ph.D., DR. BRUCE CUTTER, M.D., and MEDICAL ONCOLOGY ASSOCIATES, P.S.

JUDGMENT SUMMARY

1. Judgment Creditors: DR. ARVIND CHAUDHRY, M.D., Ph.D., DR. BRUCE CUTTER, M.D., and MEDICAL ONCOLOGY ASSOCIATES, P.S.

2. Judgment Creditors' Attorneys:
   RONALD A. VAN WERT, WSBA #32050
   JEFFREY R. GALLOWAY, WSBA #44059
   ETTER, McMAHON, LAMBERSON,
   VAN WERT & ORESKOVICH, P.C.
   618 W. Riverside Ave., Suite #210
   Spokane, WA 99201

3. Judgment Debtor: DAVID W. MURPHY, as the Personal Representative for the Estate of KATHLEEN J. MURPHY

4. Amount of Judgment: $0.00

5. Amount of Interest Owed to Date of Judgment: $0.00.

6. Total of Taxable Costs and Attorney Fees: $242.28.

7. Relief Granted: All claims made by Plaintiff, DAVID W. MURPHY, as the Personal Representative for the Estate of KATHLEEN J. MURPHY, as against Defendants DR. ARVIND CHAUDHRY, M.D., Ph.D., DR. BRUCE CUTTER, M.D., and MEDICAL ONCOLOGY ASSOCIATES, P.S., are dismissed with prejudice. Defendants DR. ARVIND CHAUDHRY, M.D., Ph.D., DR. BRUCE CUTTER, M.D., and MEDICAL ONCOLOGY ASSOCIATES, P.S., are the prevailing parties under RCW 4.84.010 and awarded statutory attorney fees as provided in RCW 4.84.010(6), RCW 4.84.080(1), and RCW 4.84.090.

The above captioned matter was tried to a jury of twelve (12) from January 6, 2020 to January 15, 2020, before the Honorable Maryann C. Moreno, Judge of the Spokane County Superior Court. The Plaintiff, DAVID W. MURPHY, as the Personal Representative for the Estate of KATHLEEN J. MURPHY, was represented by Greg Casey and Brandon Casey of Casey Law Offices, P.S. Defendants DR. ARVIND CHAUDHRY, M.D., Ph.D., DR. BRUCE CUTTER, M.D., and MEDICAL ONCOLOGY ASSOCIATES, P.S. were represented by Ronald A. Van Wert and Jeffrey R. Galloway of Etter, McMahon, Lamberson, Van Wert & Oreskovich, P.C.

Each party presented evidence and testimony to the jury. On January 15, 2020, the jury returned a verdict in favor of Defendants DR. ARVIND CHAUDHRY, M.D., Ph.D., DR. BRUCE CUTTER, M.D., and MEDICAL ONCOLOGY ASSOCIATES, P.S., on all claims. A copy of the jury's verdict is attached hereto as **Exhibit A.**

Consistent with the jury's verdict in this action, the Court enters final judgment in this matter as follows:

1. All claims made by Plaintiff, DAVID W. MURPHY, as the Personal Representative for the Estate of KATHLEEN J. MURPHY, as against Defendants DR. ARVIND CHAUDHRY, M.D., Ph.D., DR. BRUCE CUTTER, M.D., and MEDICAL ONCOLOGY ASSOCIATES, P.S., are dismissed with prejudice; and

2. Defendants DR. ARVIND CHAUDHRY, M.D., Ph.D., DR. BRUCE CUTTER, M.D., and MEDICAL ONCOLOGY ASSOCIATES, P.S., as the prevailing parties, are awarded the following statutory costs pursuant to RCW 4.84 *et seq.*:

    a. Statutory attorneys' fees: $200.00

    b. Witness fee for Dr. Jeremy Cope, M.D.: $19.74

    c. Witness fee for Dr. Jeffrey Elmer, M.D.: $22.54

IT IS SO ADJUDGED.

DONE IN OPEN COURT this 20 day of Mar, 2020.

/s/ Maryann Moreno
Honorable Maryann C. Moreno

Presented by:

ETTER, McMAHON, LAMBERSON, VAN WERT & ORESKOVICH, P.C.

By: /s/ Jeffrey R. Galloway
Ronald A. Van Wert, WSBA #32050
Jeffrey R. Galloway, WSBA #44059
Attorneys for Defendants, Medical Oncology Associates, P.S., Arvind Chaudhry, M.D. and Bruce Cutter, M.D.

Approved as to form,
Notice of Presentment waived:

CASEY LAW OFFICES, P.S.

By: _____
BRANDON R. CASEY, WSBA #35050
Attorneys for Plaintiff

[*Certificate of Service Omitted in Printing of this Appendix.*]

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

No. 18-2-00260-0

David W. Murphy, As Personal Representative for the Estate of Kathleen J. Murphy, Plaintiff,	)
vs.	)
Medical Oncology Associates, P.S., a Washington corporation; Arvind Chaudhry, M.D., Ph.D.; Bruce Cutter, M.D., Defendant.	)

SPECIAL VERDICT FORM

We, the jury, answer the following questions submitted by the court:

QUESTION NO. 1: Was Dr. Arvind Chaudhry, M.D. negligent in administering Bleomycin?

ANSWER: Yes ____ No __X__

QUESTION NO. 2: Was Dr. Bruce Cutter, M.D. negligent in administering Bleomycin?

ANSWER: Yes ____ No __X__

QUESTION NO. 3: If you answered "Yes" to Question No. 1, was Dr. Arvind Chaudhry's negligence a proximate cause of injury to Ms. Kathleen Murphy?

ANSWER: Yes ____ No ____

QUESTION NO. 4: If you answered "Yes" to Question No. 2, was Dr. Bruce Cutter's negligence a proximate cause of injury to Ms. Kathleen Murphy?

ANSWER: Yes ____ No ____

(If you answered "No" to Question No. 3 and Question No. 4, proceed to Question 7)

QUESTION NO. 5: If you answered "Yes" to Question Nos. 1 and 3, or "Yes" to Questions Nos. 2 and 4, what do you find to be damages for the following?

ANSWER: Kathleen Murphy Estate:

Economic: $ _____

Non-economic:
$ _____

David Murphy
$ _____

Michael Murphy
$ _____

Susan Murphy
$ _____

QUESTION NO. 6: Assume that 100% represents the total combined negligence that proximately caused damages. What percentage of this 100% is attributable to the Defendants' negligence?

ANSWER: To Defendant Dr. Arvind Chaudhry, M.D. ___ %

To Defendant Dr. Bruce Cutter, M.D.
___%

TOTAL: (Must equal 100%)
___%

QUESTION NO. 7: Was there a failure to obtain informed consent prior to administration of Bleomycin?

ANSWER: Yes ____ No __X__

(If you answered "No" to Question No. 7, please date and sign the verdict form below.)

QUESTION NO. 8: If you answered "Yes" to Question No. 7, was the failure to obtain informed consent a proximate cause of injury to Ms. Kathleen Murphy?

ANSWER: Yes ____ No ____

(If you answered "No" to Question No. 8, please date and sign the verdict form below.)

QUESTION NO. 9: If you answered "Yes" to Question No. 7 and Question No. 8, what do you find to be damages for the following

ANSWER: Kathleen Murphy Estate:

Economic: $ _____

Non-economic:
$ _____

David Murphy
$ _____

Michael Murphy
$ _____

Susan Murphy
$ _____

QUESTION NO. 10: Assume that 100% represents the total combined damages proximately caused by the failure to obtain informed consent. What percentage of this 100% is attributable to the failure to obtain informed consent? Your total must equal 100%.

ANSWER: To Defendant Dr. Arvind Chaudhry, M.D. ___ %

To Defendant Dr. Bruce Cutter, M.D. ___%

TOTAL: (Must equal 100%) ___%

(If you answered all questions required to be answered, in accordance with the Court's Instructions and the directions included in this Special Verdict Form, the Presiding Juror must sign the Special Verdict Form and notify the bailiff so that your verdict can be announced in open Court.)

Dated: 1/15/2020

[signature]
Presiding Juror

APPENDIX D

THE SUPREME COURT OF WASHINGTON

No. 102393-6
Court of Appeals No. 37545-5-III

[Filed January 3, 2024]

DAVID W. MURPHY, et al., Petitioners,	)
v.	)
MEDICAL ONCOLOGY ASSOCIATES, P.S., et al., Respondents.	)

O R D E R

Department II of the Court, composed of Chief Justice González and Justices Madsen, Stephens, Yu, and Whitener, considered at its January 2, 2024, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 3rd day of January, 2024.

For the Court

/s/ González, C.J.
CHIEF JUSTICE

APPENDIX E

**IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE**

**COA No. 37545-5-III
Cause No. 18-2-00260-0**

[Dated January 6, 2020]

DAVID W. MURPHY, as Personal Representative for the Estate of KATHLEEN J. MURPHY,
Plaintiff,

vs.

MEDICAL ONCOLOGY ASSOCIATES, P.S., P.S., a Washington corporation; ARVIND CHAUDHRY, M.D., Ph.D; RAJEEV RAJENDRA, M.D.; BRUCE CUTTER, M.D.; PROVIDENCE HEALTH & SERVICES, a Washington corporation, d/b/a PROVIDENCE HOLY FAMILY HOSPITAL; HEATHER HOPPE, Pharm.D.; and ERIN WHITE, Pharm.D.,
Defendants.

VERBATIM REPORT OF PROCEEDINGS

PRETRIAL HEARING & JURY TRIAL
VOLUME I, Pages 1-500

12/20/2019; 1/6/2020; 1/7/2020; 1/8/2020, Part 1

Spokane County Courthouse
Spokane, Washington
Before the
HONORABLE MARYANN C. MORENO

Terri A. Cochran, CSR No. 3062
Official Court Reporter
1116 W. Broadway, Department No. 7
Spokane, Washington 99260
(509)477-4418

[p.2]

A P P E A R A N C E S

For the Plaintiff:

W. GREGORY CASEY
BRANDON CASEY
Casey Law Offices, P.S.
421 W. Riverside Avenue, Suite 308
Spokane, Washington 99201

For the Defendants:

RONALD A. VAN WERT
JEFFREY R. GALLOWAY
Etter, McMahon, Lamberson
Van Wert & Oreskovich, P.C.
618 W. Riverside Avenue, Suite 210
Spokane, Washington 99201

* * *

[p.80]

* * *

THE COURT: All right. You heard a little bit about what this case involves. Is there anyone here who has ever been diagnosed with cancer, Hodgkin's lymphoma, or had a -- has had a close relative or a friend been diagnosed with that and gone through some treatment?

[p.81]

(SOME HANDS ARE RAISED.)

THE COURT: Okay. I'm just going to take down the numbers: No. 2, No. 5, No. 6, No. 11, 19, 20, 23 . . .

JUROR NO. 29: Twenty-nine.

THE COURT: -- 29, 31, 41 . . .

JUROR NO. 17: Seventeen.

THE COURT: -- 17, 15, 27, 44.

And then, sir, are you 45?

JUROR NO. 45: Yes.

THE COURT: Okay. And then I missed you, 26. If I missed somebody, make sure I know. Anybody else who I did not see?

(NO RESPONSE.)

THE COURT: Is there anything about this particular case that would cause you to begin this trial

with any feelings or concerns regarding your participation as a juror in this case?

(SOME HANDS ARE RAISED.)

THE COURT: Fifteen?

JUROR NO. 15: Dr. Chaudhry treated my brother years ago during his cancer as an oncologist.

THE COURT: Uh-huh, okay. Have you ever met him?

JUROR NO. 15: At a very young age, around just 8, 9 years old.

THE COURT: Okay. So was -- did this happen a long

[p.82]

time ago?

JUROR NO. 15: Yes, ma'am.

THE COURT: Okay.

JUROR NO. 15: I'm -- I'm 24 now.

THE COURT: Okay.

JUROR NO. 15: Or 23, 24.

THE COURT: All right.

And then No. 25, did you have your hand up?

JUROR NO. 25: Yes. One of the physicians was my mom's oncologist.

THE COURT: Say that -- say that again?

JUROR NO. 25: One of the physicians here is my mom's oncologist.

THE COURT: Did I not ask if anybody knew?

JUROR NO. 25: No, I'm sorry.

THE COURT: Did I not ask -- did I miss that question, if anybody knew?

SEVERAL INDIVIDUALS SPEAKING IN UNISON: Yes, you asked, you asked.

THE COURT: Okay. But I'm glad you're bringing this up, because I may not have been very clear, which sometimes happens. So you -- your mother -- say it again.

JUROR NO. 25: My mother's physician is here --

THE COURT: And that would be --

JUROR NO. 25: -- Dr. Chaudhry.

[p.83]

THE COURT: -- Dr. Chaudhry?

JUROR NO. 25: Mm-hm.

THE COURT: Got it, thank you.

Anybody else? I must not have asked that -- a very good question today. So does anybody know the defendants, the plaintiffs, or anybody that's sitting up there at counsel table? And I can say their names again if I have to; it's Dr. Cutter, Dr. Chaudhry, Mr. Murphy.

(NO RESPONSE.)

THE COURT: Okay. We anticipate that this case will actually run about two weeks. We don't have trial on Fridays, but Monday, Tuesday, Wednesday, Thursday of this week, Monday, Tuesday, Wednesday, Thursday of next -- of next week. It could always be shorter, but that's the outside date. Now, knowing that, does anyone have any concerns or issues?

* * *

[p.86]

* * *

THE COURT: All right. We're going to turn on the board up here, the TV. There's a series of questions. We'll -- we'll get -- we'll tip that in a moment so that everyone can see. And there's a bunch of questions up there we're just going to go around the room and answer. You'll tell us your name; the area of town that you live in, whether it be North Side, West Plains, South Side, Cheney, just wherever you live, we don't need your exact address; if you are employed --

You can go ahead.

(THE CLERK APPROACHED THE JURY BOX WITH THE CORDLESS MIC.)

THE COURT: -- if you are employed, what you do for a living; if someone else lives in your home, what they do for a living; if you've ever been on jury duty before actually as a juror, been sworn in as a juror, let us know and just tell us what kind of case it was, civil or criminal. If you can't remember, that's okay. We just

want to know if a verdict was reached. Was the jury able to actually reach a final decision? We don't want to know what the verdict is necessarily. Can you

[p.87]

be fair? We have a lot of people in the courtroom, so just one thing you like to do when you have some free time.

So we'll start up at No. 1. And that microphone is not the best quality, so you really have to hold it up close to your mouth and -- and almost yell into it.

So No. 1?

* * *

[p.90]

* * *

THE COURT: Thanks.

Number 15?

JUROR NO. 15: My name's Kevin Roberts. Um, I have --

[p.91]

I live in the Deer Park area. I work at a manufacturing facility in Spokane here as a union laborer. My mother and father work at Riverside School District, and my wife is a chiropractor care front desk person. I have no prior jury experience. I believe I can be fair. And if I had any spare time, my hobby would be mechanic-ing.

THE COURT: Thank you.

Sixteen?

* * *

[p.95]

* * *

THE COURT: Thank you.

Twenty-five?

JUROR NO. 25: My name is Lisa Krein. I live on the North Side. I'm retired. My husband works for Spokane County. I have served on a jury before. We did reach a verdict. I can be fair. And I like to kayak.

THE COURT: And 24?

* * *

[p.99]

* * *

THE COURT: All right. Okay, that takes care of everybody. So now the attorneys have a chance to ask you a couple questions, and we will start with the plaintiff's side. Mr. Casey?

* * *

[p.103]

* * *

MR. GREG CASEY: And it looks like it's Juror -- I'm sorry, I better get my other glasses on.

JUROR NO. 15: Juror No. 15.

MR. GREG CASEY: Yes.

JUROR NO. 15: I mentioned earlier my slight experience with Dr. Chaudhry and you mentioning malpractice, I believe it was?

MR. GREG CASEY: Yes, negligence.

JUROR NO. 15: I -- I've had both good doctors and bad doctors in my experience. So I don't feel like I would have a bias I would express anyways or even have it internally. But I have been caught in the medical system, my family and myself, for generations literally. But I've seen both sides of it.

MR. GREG CASEY: And thank you again for sharing that. Maybe you could share a little more about your feelings here as

[p.104]

far as being able to sit on this jury?

JUROR NO. 15: I don't think I would have a problem, to answer you very generically. Personally, I don't know Dr. Chaudhry at all.

MR. GREG CASEY: Okay.

JUROR NO. 15: But I know my brother's experience and what little bit I shared of that. And I know my mother was very close with Dr. Chaudhry during my brother's experience. However, like I say, that was years ago for me. But I would -- I would have to take this case by case, just as I do everything else.

MR. GREG CASEY: Okay, that's good. Thank you.

And I guess the thing -- do I have or my client have anything to fear here that because of your experience with your brother, you might lean one way or the other?

JUROR NO. 15: I don't believe so, because I don't trust anybody's opinion, even my own sometimes, meaning that because my brother had a good experience with Dr. Chaudhry does not mean that I would or that his mother would have.

MR. GREG CASEY: Okay, thank you very much for sharing that.

Does that raise any information for anybody else that they may want to share?

* * *

[p.120]

* * *

THE COURT: That's okay, that's okay, just keep on going. I do intend to stop at noon, so . . .

All right, let's everybody take their seats and give Mr. Van Wert your full attention.

* * *

[p.142]

THE COURT: I'm only going to take agreed strikes right now.

MR. GREG CASEY: Okay.

THE COURT: So if there's not an agreement to any of these, I'm not going to -- going to do them.

MR. VAN WERT: Your Honor, I would say similarly for No. 18. And I guess Mr. Casey didn't say agreement --

THE COURT: All right.

MR. VAN WERT: -- and I -- I didn't mean to push on.

THE COURT: Okay.

MR. GREG CASEY: Not agree at this time, your Honor.

THE COURT: All right. So then let's just break at this point. So what'll happen is we'll -- we'll come back in, the lawyers will have a chance to finalize final questions, and then I know now that there will be some challenges, so we'll take them out into the hall, we'll take the rest our challenges and then go to peremptories. And then I thought the rest of the afternoon after that, if we have time left, would be the rest of the motions in limine.

MR. VAN WERT: I think that's -- that, I think, is a perfect idea, your Honor.

THE COURT: All right.

MR. BRANDON CASEY: Would -- I -- if we could get to openings, we were calling our first witness at 9:00. And -- and unfortunately, based on our trial schedule, I had -- he has

[p.143]

a flight out at 3:00 --

THE COURT: And that's fine --

MR. BRANDON CASEY: He's flying, so . . .

THE COURT: -- so maybe you'll need to not ask as many questions on voir dire. I mean, there's only so much time in a day --

MR. BRANDON CASEY: Absolutely.

THE COURT: -- so . . .

MR. VAN WERT: I just -- exactly, your Honor. I'm not sure how long each is going to take for -- for openings or with the --

THE COURT: Okay. I'm not sure that I asked --

MR. VAN WERT: -- the motions in limine.

THE COURT: I'm not sure that I asked you about time frames for opening. So how long do you need for your opening statement?

MR. BRANDON CASEY: Well, I was planning on an hour, but I think I'm going to have to cut it down if I'm going to get it in today, so . . .

* * *

[p.177]

* * *

MR. VAN WERT: Well, thank you. And I know this is all very personal. Thank you for sharing.

In relation to that kind of same questions, the flip side of that, has anybody here ever had a doctor that has said, "I can't treat you any longer, and I'm not going to treat you any longer," for whatever reason? Has anybody had that experience? So your doctor fired you, is sometimes what it's called.

Number 15, did that happen to you? If you can . . .

JUROR NO. 15: Ah, so I actually had both sides of that coin. I had digestive problems. I've been diagnosed with celiac disease. I was seeing a gastroenterologist that I did not like, because he wasn't getting anywhere and I felt like he was wasting my time. Also we didn't get along. But you can't

[p.178]

base your personal relationship on the doctor's profession. Your professional relationship is different. So I seeked a second opinion. That doctor helped me out, figured out that I had celiac disease, diagnosed me. Everything's been fine for a year and a half now. On that same note, I had a seizure a while back. That seizure, I ended up seeing three specialists. I ended up being diagnosed with multiple sclerosis. So my seizure specialist doctor, who's also a neurologist, said, "Hey I don't need to see you anymore, because you're seeing a neurologist now for your multiple sclerosis. He can do everything I can. There's no sense in paying two bills." They didn't really fire me. They were just killing two birds with one stone, so to speak, and it worked out well.

I -- I don't have a family care doctor. I see five specialists once a year. That's all I go to, so . . .

MR. VAN WERT: Anything about that experience that -- that -- I know you've asked this, I know I've asked you this question a number times, and I appreciate your patience. Anything about that experience, though, that -- that makes you concerned about sitting at a juror on a -- as a juror in this case?

JUROR NO. 15: This is a good way for me to put it. I -- my multiple sclerosis doctor misdiagnosed multiple sclerosis case his tenth year of practicing. Multiple sclerosis doctor, Dr. Steven Pugh, is fantastic. He made a

[p.179]

misdiagnosis of multiple sclerosis. He took a year off, because it kind of blew him back. Two years later -- I'm sorry, took two years off, two years later went back to practicing in his own private clinic, and he's now my current doctor. I love the guy, trust the guy, been nothing but helpful. I have referred everybody I can to him. He wanted to diagnose me. I seeked a second opinion. I had every reason to trust the guy, every reason to look at the facts and go, "Okay, this is probably what it is." I seeked a second opinion, because my insurance covered it. It was helpful. But even if they hadn't, I would have paid cash to get a second opinion before I started taking drugs, before I started undergoing treatment, just to hear more than one person say, "Hey, yeah, you should probably do that." So just because I liked the guy, I didn't believe him anyways. I wanted to hear another person say it.

MR. VAN WERT: I understand.

JUROR NO. 15: So I don't think that would cloud my judgment, if that's what you're getting at. And I don't think it's clouded anybody else either. I don't want to waste anybody else's time by rambling on here. But it's -- things are black and white. So he said I had it. Another doctor said I had it. I probably have it and I should probably treat it. Did they force me to treat it? No, I didn't have to. So I felt like to go -- felt like I needed to enough that I decided

[p.180]

to.

MR. VAN WERT: Thank you for that.

JUROR NO. 15: I'm sorry if I spoke too fast --

MR. VAN WERT: No --

JUROR NO. 15: -- by the way.

MR. VAN WERT: Oh.

THE COURT: Mr. Van Wert, you're almost done.

* * *

[p.183]

* * *

(VENIRE LEFT COURTROOM.)

THE COURT: Go ahead and have a seat. Let's head back to our for-cause challenges.

Mr. Casey, do you have any?

MR. GREG CASEY: I'm sorry, your Honor?

THE COURT: For-cause challenges, do you have any?

MR. GREG CASEY: We don't.

THE COURT: Okay. So let's go back to where we were. Number 17, right?

MR. VAN WERT: Um --

[p.184]

THE COURT: That's the one that you had asked to strike before lunch, right?

MR. VAN WERT: I did, your Honor. Would you like to go in -- in numerical order or go back to where we were?

THE COURT: Let me just say, is there any objection to 17?

MR. VAN WERT: Oh.

THE COURT: There was an objection earlier. There was -- we --

MR. GREG CASEY: I --

THE COURT: I discussed a rehabilitation, and I --

MR. GREG CASEY: Okay.

THE COURT: -- I didn't see it.

MR. GREG CASEY: Yeah, I didn't either, your Honor. I think on 17, he did indicate enough that -- and he's the only one, I believe, that indicated enough he may not be able to sit in this case.

THE COURT: So no, he was pretty clear that he couldn't be fair in this case, right?

MR. GREG CASEY: Right.

THE COURT: That's --

MR. GREG CASEY: Correct.

THE COURT: That's how I heard it. So I'm going to go ahead and strike for cause No. 17.

All right. Then, Mr. Van Wert, start at the top.

[p.185]

MR. VAN WERT: Yeah. Your Honor, we want to make a for-cause challenge in relation to Juror No. 7, Mr. Bunke. He had commented about his disgust of -- of the doctor in that particular case. When I asked him about his ability to be fair, my recall is him indicating that he felt that it would be difficult for him and he would not be looking at it through a clear lens and that it could or potentially would affect his judgment. I don't think that he was in any way properly rehabilitated from that. And based on his clear prejudices from what he was having his own difficulties trying to explain away, we'd ask that he be stricken for cause.

THE COURT: Okay. Mr. Casey?

MR. GREG CASEY: I think he said he -- it might. But on the other hand, there's many things that might, your Honor. And I don't believe that -- you know, I did ask him if he could be fair when I was asking the questions of him. He said he thought he could. So I don't think there was sufficient evidence that he could

not be fair in the case, even though everybody's judgment, including the nurses and so forth, are going to be somewhat clouded here, so . . .

THE COURT: Well, and I'm -- I'm sort of looking for the magic words here, and I don't -- I don't recall. I know before lunch he didn't say he couldn't be fair. He said he could be. He's got a lot of opinions, got a lot of feelings about this one doctor who didn't do X, Y, Z; but I do not

[p.186]

recall him saying that he couldn't be fair here. Did I just miss that? because I would have -- that would have been a red flag for me to write down.

MR. VAN WERT: In those express words, your Honor, when you're asking for the words themselves, I don't know that he said "I could not be fair" when I asked him, as I recall about whether or not --

(DISCUSSION HELD OFF THE RECORD.)

MR. VAN WERT: And yeah. And I asked him about his ability to fairly judge. He said his -- his thoughts would be shadowed or marred or dirtied, if you will, by the -- by his events that he realized and witnessed and was affected by. So although maybe not the exact words, certainly he said he'd have a difficult time to be fair without -- by looking through clear lenses and more of a shadowy lens based on his own experiences.

THE COURT: You're right, I do recall that now. And he had a lot to say, and he seems to have a lot of -- I'm not sure what the word is for it. He's convinced that his -- was it his mother or mother-in-law?

MR. VAN WERT: I think it was a mother-in-law, mother-in-law.

THE COURT: Mother-in-law. He's got --

MR. VAN WERT: Or was it mother?

THE COURT: First he said mother before lunch, and then later he said mother-in-law. I'm kind of confused, but it was

[p.187]

someone of that. He's just totally convinced that it was as simple as this happening, is what caused that. So I'm going to go ahead and strike No. 7 for cause.

What's your next one?

MR. VAN WERT: Number 8, your Honor. And I think No. 8 really did say the magic words, if I remember correctly, because she had really strong feelings regarding her husband passing away, believing that they -- she wanted to pursue a med mal suit; she was seeking justice; that she -- she would think about it frequently; just sitting here today kept bringing it to her mind; and it would be very difficult or would be hard on her to see this in anything other than a -- a bad way, if you will.

THE COURT: Okay.

Mr. Casey?

MR. GREG CASEY: I don't remember it being that way. I did indicate -- or heard her say that it may be difficult in some ways, but like I say, it will be for a lot

of people. I don't think she in any way said she could not be fair.

THE COURT: I don't believe she did either, and I'll deny the challenge for cause.

What's your next one, if you have one?

(DISCUSSION HELD OFF THE RECORD BETWEEN DEFENSE COUNSEL.)

MR. VAN WERT: That's it, your Honor. Thank you.

THE COURT: Okay. So just to recap, I've got 7, 17,

[p.188]

23, 43, and 44, right?

MR. GALLOWAY: Sorry, your Honor, could you repeat those?

THE COURT: Sure.

MR. GALLOWAY: My apologies.

THE COURT: 7, 17, 23, 43, and 44. Did I get those right?

MR. VAN WERT: Yes, your Honor.

MR. GALLOWAY: That's what we have, your Honor.

THE COURT: Okay. All right. So we'll have Erin bring them back in. If anybody needs a break, now would be the time to do it and I'm going to do that myself. But have Erin -- just tell Erin we're ready.

THE CLERK: We're ready, okay, your Honor.

(RECESS TAKEN.)

(VENIRE ENTERED COURTROOM.)

(PEREMPTORY CHALLENGE PROCESS BEING CONDUCTED.)

THE COURT: All right, I think we finally have our jury selected. I'll call some numbers from the box. And when you hear your number, just step down and move toward the back of the courtroom.

So from that top row, I need No. 5 and 7 to step down, and from the front row, No. 8, 10, and 11 to step down. And

[p.189]

No. 13, you'll step down as well.

All right. And up in the No. 5 seat is going to be No. 22. In the No. 7 chair is going to be No. 20. In the No. 8 seat down front in the front row will be No. 15. In the No. 10 seat is going to be No. 14. In the No. 11 seat is No. 16. And then we have some alternates, looks like No. 26 and No. 27, okay? So 26, 27, come on up.

All right. So let me make sure I've got who I need. I should have 1, 2, 3, 4, 22, 6, 20, 15, 9, 14, 16, 12, 26 and 27. Okay?

Everyone else, you're excused for the day.

* * *

APPENDIX F

No. 37545-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

[Filed May 13, 2022]

DAVID W. MURPHY, individually and as Personal Representative for the Estate of KATHLEEN J. MURPHY, Appellant,

v.

MEDICAL ONCOLOGY ASSOCIATES, P.S., a Washington corporation; ARVIND CHAUDRY, M.D., Ph.D.; and BRUCE CUTTER, M.D., Respondents.

OPENING BRIEF OF APPELLANT

Robert A. McGuire, III
WSBA #50649
Attorney for Appellants

ROBERT MCGUIRE LAW FIRM
113 Cherry Street PMB 86685
Seattle, WA 98104-2205
Telephone/Fax: (253) 267-8530
E-mail: ram@lawram.com

* * *

[p.18]

A. Reversal For A New Trial On All Claims Is Required Due To Constitutional Errors In Jury Selection

Murphy appeals two manifest constitutional errors that occurred during jury selection. These errors resulted in the seating of a biased jury and in the denial of procedural due process to Murphy. Each error independently requires reversal.

First, the trial court seated a biased juror when it failed to strike for cause venire panelist number 15. Panelist 15's brother was successfully treated for cancer by one of the defendant doctors, (RP 81, lines 20–21), and the panelist's mother was "very close" with the doctor at the time. (RP 104, line 8.) Despite these obvious grounds for presuming bias, the trial court failed *sua sponte* to perform its statutory duty to excuse panelist 15 from service under RCW 2.36.110.[1] This panelist [p.19] was thereafter seated as a juror, which tainted the impartiality of the jury and denied Murphy a fair trial.

Second, just as it failed to strike panelist 15, the trial court also failed to strike another panelist, number 25, whose mother was a (then-current) patient of the same defendant cancer doctor. (RP 82, lines 9–13.) Panelist 25 was not seated on the jury, but once

---

[1] RCW 2.36.110 provides in pertinent part that, "It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias [or] prejudice…."

it became clear that multiple relatives of a defendant's patients were on the venire panel, the trial court's failure to strike *all* relatives of current and former patients deprived Murphy of his due process right to a fundamentally fair jury-selection process. By not striking all such panelists, the trial court gave defendants the advantage of having asymmetrical, private knowledge about potential background sources of bias on the parts of multiple potential jurors. Murphy was forced to make his jury selection decisions without equal access to the same private information that the defendants had about how the relatives of affected panelists had fared (or were faring) in defendants' care. This disparity put Murphy at a [p.20] prejudicially unfair disadvantage. Such an uneven playing field was not harmless, since it produced a jury on which panelist 15 was seated. The trial court's failure to strike all relatives of the defendants' patients unconstitutionally denied Murphy his rights to both due process and an impartial jury.

Murphy did not preserve these two errors by objecting when they occurred. However, RAP 2.5(a)(3) allows civil appellants to raise manifest errors affecting constitutional rights for the first time on appeal. *See State v. WWJ Corp.*, 138 Wn.2d 595, 601–02, 980 P.2d 1257 (1999) (RAP 2.5(a) "makes no distinction between civil and criminal cases."). Murphy relies upon RAP 2.5(a)(3) in raising these manifest constitutional errors now.

* * *

[p.27]

b) The Error Was Constitutional And Manifest

RAP 2.5(a)(3) allows Murphy to raise the issue of jury bias for the first time on appeal because both *Kalebaugh* inquiries are satisfied. *Kalebaugh*, 183 Wn.2d at 583.

Addressing the first *Kalebaugh* inquiry, the issue of whether the trial court erred when it seated biased panelist 15 [p.28] on the jury is of constitutional magnitude because Murphy's claim of entitlement to an impartial civil jury implicates Washington's state constitutional right to due process.

Civil litigants pursuing claims in Washington's state courts are persons entitled to due process of law under the Washington constitution. *See* Wash. Const. art. I, § 3. "Washington's due process clause is coextensive with that of the Fourteenth Amendment." *State v. Morgan*, 163 Wn. App. 341, 352, 261 P.3d 167 (2011).

"The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (criminal context). Numerous federal circuit courts have recognized that the Fourteenth Amendment's due-process guarantee of a fair trial applies in the context of civil trials as well as criminal trials because "fairness in a jury trial, whether criminal or civil in nature, is a vital constitutional right." *Sides v. Cherry*, 609 F.3d 576, 581 (3d Cir. 2010) (collecting cases from 2d, 7th, 8th, and 9th Circuits).

[p.29]

Since the Due Process Clause of the U.S. Constitution's Fourteenth Amendment guarantees civil litigants the fundamental right to a fair trial, so too does Washington's due process clause. The due-process right to a fair trial in the civil context necessarily entails the same right to an impartial jury that is an "essential element of a fair trial" in the criminal context. *See State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009) ("Indeed, an essential element of a fair trial is an impartial trier of fact—a jury capable of deciding the case based on the evidence before it.").

The presence of even one biased juror will "taint the entire venire" and render a trial unfair. *Id.*; *see also State v. Berhe*, 193 Wn.2d 647, 658, 444 P.3d 1172 (2019) ("An 'impartial jury' means 'an unbiased and unprejudiced jury,' and allowing bias or prejudice by even one juror to be a factor in the verdict violates a defendant's constitutional rights and undermines the public's faith in the fairness of our judicial system.").

[p.30]

Applying these cases shows that RAP 2.5(a)(3) applies. As to the first *Kalebaugh* inquiry, the trial court's error in seating panelist 15 was of constitutional magnitude because the seating of a biased juror implicates constitutional due process.

As to the second *Kalebaugh* inquiry, the conclusion is mandatory that seating a biased juror is manifest error. "[I]f the record demonstrates the actual bias of a juror, seating the biased juror was by definition a manifest error." *State v. Irby*, 187 Wn. App. 183, 193,

347 P.3d 1103 (2015). The trial court could (and should) have corrected its error *sua sponte* by striking panelist 15 to assure Murphy's right to an impartial jury. "A trial judge has an independent obligation to protect that right, regardless of inaction by counsel…." *Id.* at 192–93; *see also* RCW 2.36.110. Since RAP 2.5(a)(3) applies, this Court may review the asserted manifest constitutional error of seating panelist 15, even though Murphy did not object at trial.

* * *

[p.31]

3. By Not *Sua Sponte* Striking Venire Panelists No. 15 and No. 25 For Cause, The Trial Court Gave Defendants A Fundamentally Unfair, Asymmetrical Advantage In Jury Selection (Issue #2)

The trial court's second manifest constitutional error was its failure to strike all close relatives of the defendants' current and former patients once it became clear that multiple relatives of Dr. Chaudhry's patients were on the venire panel.

[p.32]

In addition to revealing that panelist 15's brother had been a former cancer patient of Dr. Chaudhry, voir dire also revealed that panelist 25 knew Dr. Chaudhry because her mother was one of his *current* cancer patients. (RP 82, lines 8–25.) Despite this entangled existing relationship between the panelist and a defendant, the trial court inexplicably failed to perform its duty under RCW 2.36.110 to excuse panelist 25 for

cause. (RP 183–88; RP 188, lines 6–10.) This failure was an error not because panelist 25 was ultimately seated on the jury—she was not—but rather because leaving two different relatives of Dr. Chaudhry's patients in the venire panel deprived Murphy of a fundamentally fair jury-selection process.

Since panelists 15 and 25 were closely related to patients of Dr. Chaudhry, the defendants had the unfair advantage during jury selection of access to Dr. Chaudhry's exclusive knowledge about how his former and current patients—panelist 15 and 25's relatives—fared during the entire course of his care. Murphy not only lacked access to this information, but his [p.33] counsel could not realistically hope to learn enough through the abbreviated process of voir dire questioning to level the playing field. Since both panelists had a good chance of being seated on the jury due to their low seat numbers, and since panelist 15 actually was seated on the jury, the harm from this unfairness was real. Murphy was denied a fundamentally fair jury-selection process and the process resulted in the seating of am actually biased juror.

This error was not preserved by a contemporaneous objection, but RAP 2.5(a)(3) allows it to be raised for the first time now on appeal. First, the error implicates the Fourteenth Amendment due process right to a "fundamentally fair" civil proceeding. *Turner v. Rogers*, 564 U.S. 431, 444 (2011) (discussing "specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair."). Washington's constitutional guarantee of due process is at least as protective as the

Fourteenth Amendment's due process clause. *State v. Beaver*, 184 Wn.2d [p.34] 321, 332 n.9, 358 P.3d 385 (2015). The constitutional right of due process "requires a fair trial in a fair tribunal." *State v. Blizzard*, 195 Wn. App. 717, 722, 381 P.3d 1241 (2016). Murphy's due process right to a fundamentally fair proceeding was violated when he was placed at an unfair disadvantage in jury selection.

Second, this error is considered manifest for purposes of RAP 2.5(a)(3) because a procedural due process violation at trial is a manifest constitutional error if it results in actual prejudice. *See In re Adoption of K.M.T.*, 195 Wn. App. 548, 568, 381 P.3d 1210 (2016). Actual prejudice exists here both because "given what the trial court knew at that time, the court could have corrected the error" by striking panelists 15 and 25, *O'Hara*, 167 Wn.2d at 100, and because the improper jury-selection process actually produced a tainted jury on which [p.35] panelist 15 was seated.[2] Given the actual prejudice it produced, the error was not harmless.

* * *

---

[2] Although peremptory challenges were conducted off the record, (RP 188, line 19), it can be inferred that one of the parties—possibly the defendants—used a peremptory challenge to exclude panelist 25 from serving as the second alternate, since panelist 25 was not removed for cause, (RP 188, line 6), yet panelist 25 did not end up on the jury or as an alternate and two panelists with higher numbers than panelist 25 were seated as alternates. (RP 189, lines 2–10. The possibility that defendants may have used a peremptory challenge to excuse panelist 25 further emphasizes the prejudicial unfairness of the process to Murphy.

APPENDIX G

No. 37545-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

[Filed September 2, 2022]

DAVID W. MURPHY, individually and as Personal Representative for the Estate of KATHLEEN J. MURPHY, Appellant,

v.

MEDICAL ONCOLOGY ASSOCIATES, P.S., a Washington corporation; ARVIND CHAUDRY, M.D., Ph.D.; and BRUCE CUTTER, M.D., Respondents.

REPLY BRIEF OF APPELLANT

Robert A. McGuire, III
WSBA #50649
Attorney for Appellants

ROBERT MCGUIRE LAW FIRM
113 Cherry Street PMB 86685
Seattle, WA 98104-2205
Telephone/Fax: (253) 267-8530
E-mail: ram@lawram.com

* * *

[p.9]

2. The Errors In Jury Selection Satisfy RAP 2.5(a)(3)'s Requirements

In Section IV.G. of Respondents' Brief, the doctors deny that RAP 2.5(a)(3) applies. Their arguments are conclusory and contrary to the numerous authorities cited by Murphy in the Opening Brief.

a) Constitutional Magnitude

First, in Section IV.G.1., the doctors deny that seating panelist 15 after voir dire could give rise to a due process violation since voir dire itself is a process designed to produce an impartial jury, and that process was followed. (Resp. Br. at [p.10] 58.) The doctors also argue that panelist 15 cannot be deemed biased because he was "steadfast in his affirmations of fairness and impartiality." (Id.)

These arguments fail because the due-process interest implicated by the seating of panelist 15 on the jury flowed not from any failure to go through the procedural motions of voir dire, but instead arise from the seating of a biased juror—specifically, one whose close connection to one of the defendants objectively rendered the panelist unfit to serve on this jury.

Regardless of how "steadfast" panelist 15's professions of impartiality might have been and despite the fact that voir dire was permitted, it remains objectively true that no panelist whose brother had been saved from cancer by one of the defendants—and whose mother had been "very close" with that same defendant—could possibly be considered free from some

degree of actual bias. This is especially true where, as here, the panelist's assurances of his own impartiality were far more [p.11] half-hearted, and much less "steadfast," than the doctors portray them to be. (*See* Op. Br. at 24.) Indeed, it is virtually dispositive proof of actual bias that panelist 15 perceived *himself* to be partial, when the *panelist himself* brought up his personal connection to Dr. Chaudhry *on his own initiative* after the trial judge asked whether anything would cause any panelists to begin the trial with feelings or concerns about their own participation as a juror. (RP 81, lines 14–21.) Panelist 15 later downplayed this connection during questioning by defense counsel, but at the very outset of voir dire he himself volunteered it as a reason to mistrust his impartiality.[1]

By contrast, panelist 7, whom the trial court later *did* strike for actual bias, did not raise his hand when the court asked if any panelists had concerns about serving on the jury. [p.12] Panelist 7 was later maneuvered by doctors' counsel into, at worst, accepting counsel's statement that experiences with a different doctor "might shadow your lens in this case." (RP 124, lines 18–24.) On this frail basis alone did the doctors seek to strike panelist 7 for cause, despite him having no personal connection to the defendants in this case and despite his unequivocal professions of impartiality that were far stronger than those made by

---

[1] Significantly, the only other panelist who admitted to having concerns was panelist 25, whose mother was a *current patient* of Dr. Chaudhry. (RP 82.) She, too, perceived this personal connection as a concern for serving as a juror.

panelist 15. (RP 81–82; RP 160, line 24–RP 161, line 16.)[2]

The doctors' argument that merely conducting voir dire eliminates any constitutional due-process issue, even if it fails to prevent an actually biased juror from being seated, is simply wrong. No person can objectively be considered a suitable juror [p.13] for a trial of *the doctor who previously saved his brother's life*. As all the authorities cited in Sections IV.A.2.a. and IV.A.2.b. of the Opening Brief make clear, the requirement to avoid actual bias on the part of even a single juror plainly makes the trial court's assigned error of seating panelist 15 a matter of "constitutional magnitude" for purposes of authorizing appellate review under RAP 2.5(a)(3).

Although the doctors say little about the trial court's failure to strike panelist 25 from the venire, the fact that two panelists (15 and 25) were permitted to remain in the venire despite both having close family members who were current or former patients of Dr. Chaudhry raises a separate constitutional due-process issue. By leaving these two prospective jurors in the venire, the trial court gave the doctors the huge advantage of having exclusive knowledge about two panelists with low seat numbers. Permitting only one side to enjoy such an advantage during the jury

---

[2] Notably, the doctors do not argue that panelist 15 was unbiased. Instead, they argue only that voir dire occurred and Murphy's counsel never objected. The doctors fail to grapple with the obvious, objective unsuitability of panelist 15 to sit on this particular jury, given his answers—something the trial court had a statutory duty to recognize and remedy sua sponte.

selection portion of the trial is offensive to due process and is plainly of constitutional magnitude.

* * *

[p.16]

Third, the doctors say nothing at all in defense of the unlevel playing field that was created when Murphy was forced to conduct voir dire without benefit of the exclusive knowledge of panelists 15 and 25 that the doctors had with respect to those panelists' close family members. Choosing a jury is a strategic exercise; allowing one side to benefit from private knowledge of any panelists offends due process and, in this case, produced a jury tainted by the seating of panelist 15. The trial court erred in its conduct of jury selection, regardless of whether the harmless-error or an abuse-of-discretion standard is applied.

* * *