Washington State Supreme Court No.: 89778-6
Court of Appeals, Division I No.: 68272-5-I

IN THE WASHINGTON STATE COURT SUPREME COURT

BERNARDO FIGUEROA and ROSA FIGUEROA, husband and wife,

Plaintiff/Respondent,

vs.

THOMAS RYAN, M.D.,

Defendant/Appellant.

Appeal from the Superior Court of King County
King County Superior Court No.: 08-2-43576-8 KNT

ANSWER TO PETITION FOR REVIEW

By:

Tyler K. Firkins, WSBA 20964
Neal R. Kingsley, WSBA 42461
VAN SICLEN, STOCKS & FIRKINS
Attorneys for Respondent
721 45th Street NE
Auburn, WA 98002
(253) 859-8899

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. IDENTITY OF RESPONDENTS

Bernardo Figueroa and Rosa Figueroa, husband and wife, are the Respondents in this matter and hereby ask this Court to deny further review of the Court of Appeals decision that is designated in Section II of this Answer

II. COURT OF APPEALS DECISION

Division One of the Court of Appeals affirmed the trial court's actions jury verdict finding for the Figueroas in the amount of $122,000 in an unpublished Opinion at Docket No. 68272-5-I on October 14, 2013. A copy of the Opinion is attached to Defendant's Petition for Review at Appendix A.

III. COUNTERSTATEMENT OF ISSUES ON REVIEW

1. Did the Court of Appeals properly affirm the trial court's exclusion the cumulative and unduly prejudicial evidence of Plaintiff signing different names when the purported purpose for that evidence was admitted by Plaintiff during cross examination?
2. Did the Court of Appeals properly affirm the trial court's exclusion of Plaintiff's signature when that evidence had no bearing on whether Defendant breached the standard of care for a doctor?

3. Can the Court of Appeals affirm the trial court's rulings on any grounds supported by the record regardless of whether it chooses to specifically address each argument?
4. Did the Court of Appeals properly affirm the trial court's grant of Plaintiff's motion in limine to exclude Dr. Ryan's testimony regarding habit and routine when such testimony lacked sufficient probative value and would only have confused the jury?

IV. COUNTERSTATEMENT OF THE CASE

Mr. Figueroa was first seen in the ER at 3:00 p.m. VRP 276; CP 442. The Defendant, Dr. Thomas Ryan, examined Mr. Figueroa. VRP 278. Mr. Figueroa was complaining of nausea and burning in his abdomen, so Dr. Ryan sent Mr. Figueroa for a CT scan with contrast to rule out certain conditions, such as an inflamed or burst appendix. VRP 445. An IV was placed in his right hand for an initial saline injection. VRP 277. Mr. Figueroa complained several times to the nurse that his hand hurt, but nothing was done. *Id.*

Mr. Figueroa was delivered to the radiologist at around 3:40 p.m. An IV was prepared and connected to his hand. VRP 447. During the injection of dye contrast, Mr. Figueroa felt that something "blew up" in his hand. *Id.* He began screaming as his hand and arm increasingly swelled

until the staff finally took notice. VRP 448. After considerable effort, the nurse and radiologist were able to disconnect the IV. *Id.*

Mr. Figueroa had suffered an extravasation, which occurs when contrast fluid from an IV leaks from the vein. VRP 326. The leaked fluid can damage surrounding tissue. VRP 300. In some rare instances, the body will develop what is known as compartment syndrome. VRP 304. When this occurs, the swelling builds up pressure in body "compartments" composed of thick connective tissue known as fascia where there is no room for expansion. *Id.* This eventually results in the collapse of the surrounding veins and the cessation of blood flow into and out of the compartment. VRP 305. The treatment for compartment syndrome is a fasciotomy, a surgery in which the fascia is cut until the pressure decreases and the vessels can reexpand. VRP 307. Unless surgery occurs, the problems compound until that part of the body dies. VRP 306-07. It is generally accepted that surgery should occur within six hours to prevent serious injury. VRP 350.

Compartment syndrome was not properly tested for or diagnosed at the time, despite the "red flag" of pain. VRP 319. Mr. Figueroa's fingers became impossible to move without significant pain. VRP 451. There was also significant swelling and pain associated with the swelling. *Id.* Ice was applied. *Id.* Dr. Ryan then had Mr. Figueroa injected with

large dose of the painkiller Demorol, after which Mr. Figueroa unsurprisingly reported feeling less pain. VRP 453, 333. The nurse reported that the swelling appeared to decrease upon application of ice, but this was not something she could accurately observe. VRP 430. Mr. Figueroa also reported being better able to move his fingers, which is consistent with the effects of pain medication because pain was the primary inhibitor of movement. VRP 346-47.

Mr. Figueroa was discharged at 5:18 p.m. CP 461. Dr. Ryan never physically examined Mr. Figueroa's hand or forearm. VRP 458-59. He never requested that a nurse perform any tests. *Id.* All he did was look at Mr. Figueroa's hand, and then order ice and an injection of Demorol. *Id.* There were no written discharge instructions regarding the potential for compartment syndrome, nor any mention of the extravasation injury. The only reference to Mr. Figueroa's arm in the discharge instructions was for him to keep the arm elevated and not work the next day. VRP 339. He was instructed to return within 24 hours if his symptoms did not improve. VRP 359.

Dr. Ryan admits that he has no independent memory of Mr. Figueroa. VRP 808. The only evidence of what occurred that day is the testimony of Mr. Figueroa, his wife Rosa, and the medical records.

After returning home, Mr. Figueroa's pain became so significant that he and Rosa returned to the emergency room. VRP 464. According to Highline records, Mr. Figueroa returned to triage at 9:40 p.m. and was seen by a physician at 9:46 p.m. *Id.* Doctors immediately saw that there was a serious problem and Mr. Figueroa was transferred to the Burien hospital campus for surgery. CP 459. The Diagnosis of the problem was "compartment syndrome." *Id.*

Dr. Mouenke, a surgeon, performed an emergency fasciotomy surgery to resolve the compartment syndrome at approximately 11:40 p.m., approximately eight hours after the extravasation. CP 471. The surgery came too late and Mr. Figueroa has suffered significant permanent injuries to his right arm. VRP 471. Now both of Mr. Figueroa's arms have been severely compromised.

During post-surgery treatment by Dr. Mouenke, Mr. Figueroa related that he was still having serious problems with his arm. VRP 872. Dr. Mouenke sent Mr. Figueroa to Dr. Clark for a second opinion. VRP 872. Dr. Clark noted that Dr. Mouenke made a valiant effort to resolve the compartment syndrome, but he was too late. *Id.*

Mr. Figueroa had persistent problems after the surgery, including "decreased motion, significant stiffness, and continued pain as well as paresthesia in the median nerve distribution..." and "Unfortunately [Mr.

Figueroa] has residuals of stiffness and weakness" because of the delay. VRP 872, 906.

At trial the Defendant sought to offer documents which indicated that that Mr. Figueroa used an alias, Seku Montana-Linares when he checked into Highline Hospital. The Plaintiff moved to exclude these documents on the basis that such evidence was unfairly prejudicial and of minimal probative value. CP 21. Defendant objected, arguing that such evidence was crucial and went to the character of Mr. Figueroa. CP 68. The trial court granted Plaintiffs' motion and had the signatures redacted from the documents, properly ruling that under an ER 403 balancing, the potential for unfair prejudice was likely to distract the jury from dealing with the actual issues at hand of medical negligence. VRP 6. When the issue was again raised during the testimony of Mrs. Figueroa, the court noted that the Defendant had already been able to elicit the testimony that the signatures supposedly proved: that Mr. Figueroa's signature looked the same on his intake and discharge forms. VRP 681.

The trial court also properly excluded testimony regarding Dr. Ryan's habit and routine. VRP 829. The court reasoned that, under *Physicians Ins. Exchange v. Fisons Corp.*, 122 Wn.2d 299, 326, n. 39, 858 P.2d 1054 (1993), any testimony by Dr. Ryan regarding a habit or routine instructions regarding a potential compartment syndrome, or even an

extravasation injury, were quite different from the permitted testimony described in that case. VRP 829. The court further noted that such testimony was not admissible in light of the fact that Dr. Ryan admittedly had no memory of what he may or may not have said to Mr. Figueroa, and that Dr. Ryan testified that he has never seen another compartment syndrome before or since. *Id.*

V. ARGUMENT ON WHY REVIEW SHOULD BE DENIED

Review will be accepted by this Court only if one or more of the factors in RAP 13(b) are met. Defendant asks this Court to accept review under RAP 13.4(b)(1), (2), and (3), but fails to establish a basis for review under these factors. The Supreme Court is not, and has never been, a forum for review by parties who are simply dissatisfied with the rulings of a trial court or the Court of Appeals. Nonetheless, Defendant here attempts to rehash the same flawed arguments rejected below. There is no conflict between the Court of Appeals' Opinion and any precedent in this state, nor are any issues of public importance raised in the unpublished opinion. This Court should deny review of this case because the Court of Appeals correctly upheld the trial court's rulings.

a. There is no conflict between the Court of Appeals opinion and any other decision regarding ER 406.

The Court of Appeals correctly upheld the trial court's

discretionary decision to exclude Dr. Ryan's testimony regarding any habit or routine for an admittedly rare occurrence that Dr. Ryan has not seen before or since. As an initial matter, an appellate court may affirm the trial court on any grounds supported by the record. *In re Marriage of Rideout*, 150 Wash.2d 337, 358, 77 P.3d 1174 (2003). It is long-standing in Washington that a trial court's decision to admit or exclude evidence will be overturned only for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The facts of this case are clear that there was no such abuse.

As noted by both the Court of Appeals and the trial court, because "determination of admissibility of habit evidence is within the trial court's discretion," and "[s]ince habit is 'semi-automatic, almost involuntary and invariably specific response to fairly specific stimuli,'" Dr. Ryan cannot reasonably testify that he treats or discharges every patient condition in the same semi-automatic manner. *Physicians Ins. Exchange v. Fisons Corp.*, 122 Wn.2d 299, 326, n. 39, 858 P.2d 1054 (1993). Dr. Ryan testified at trial that he has not seen a compartment syndrome from an extravasation before or since. VRP 808. It is therefore absurd to argue that he would have developed a routine to deal with such an occurrence. Further, no competent physician would give the exact same injury-specific instructions to every person discharged from the hospital.

Dr. Ryan admitted he has no memory of treating Mr. Figueroa, yet was nonetheless permitted to testify that he gave oral discharge instructions to Mr. Figueroa regarding his arm, despite the fact that the only written notes state, "no work and elevate arm." VRP 753, 803. Defendant now asserts that Dr. Ryan should have been permitted to further speculate about what he would have said or done. It is not the intent of ER 406 to permit a doctor to testify that proper specific instructions were given regardless of any memory or corroborating evidence. Such a reading would actively discourage the keeping of written records because doctors could later immunize themselves by simply claiming that they always gave proper discharge instructions. The Court of Appeals Opinion is thus consistent with precedent and the laws of this state. Accordingly, this Court should decline review.

b. There is no conflict between the Court of Appeals opinion and any other decision regarding ER 403.

The Court of Appeals properly also affirmed the trial court's exclusion of evidence of Mr. Figueroa's use of an alias when he checked into Highline Hospital. Under ER 403, otherwise "relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..." An appellate court will overturn a trial court's balancing of the danger of prejudice against the probative value of

the evidence "only if no reasonable person could take the view adopted by the trial court." *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

Defendant continues to argue that the trial court relied on *Salas v. High Tech Erectors,* 168 Wn.2d 664, 670, 230 P.3d 583 (2010) to support the exclusion of the identity evidence despite the fact that the trial court specifically noted that *Salas* was not directly applicable to the case at bar, and did not base its ruling on that case. VRP 4; 680. The trial court examined *Salas* only for the proposition that it is the invitation to arouse prejudice, suspicion, and anger that caused the Court to disallow the minimally probative evidence. *Id.* at 668 (citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). The Court of Appeals similarly examined *Salas* for the principal that "When evidence is likely to stimulate an emotional response rather than a rational decision, the danger for unfair prejudice exists." *Salas,* 168 Wn.2d at 671. Thus under an ER 403 balancing test, whatever probative value the signatures may have was overwhelmed by the potential for prejudice and was likely to district the jury from dealing with the claim at hand: medical malpractice. VRP 6; 682.

The trial court properly ruled that evidence of an unrelated alleged wrongdoing on behalf of Mr. Figueroa was of minimal relevance for determining whether Dr. Ryan had committed medical malpractice,

especially in light of the associated potential for prejudice. Further, Defendant was able to elicit testimony from both Plaintiffs that Mr. Figueroa's signatures at entry and discharge were identical. As affirmed by the Court of Appeals, admission of the signatures had a substantial likelihood to cause prejudice, while the duplicative evidence provided by viewing the admittedly similar signatures had only incremental probative value. Nothing essential to Dr. Ryan's defense was excluded by the ruling.

Defendant argues that the Court of Appeals Opinion is in conflict with existing cases, but fails to examine a number of important facts. Defendant first cites to cases that stand for the generally accepted proposition that evidence crucially relative to a defense should not be excluded and that the trial court must balance the probative value against potential prejudice. For example, the court in *Carson v. Fine,* 123 Wn.2d 206, 867 P.2d 610 (1994) upheld a trial court's admission of challenged testimony by a treating physician. *Id.* at 224. The *Carson* court further noted that "Because of the trial court's considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion." *Id.* at 226, citing *State v. Gould*, 58 Wn.App. 175, 180, 791 P.2d 569 (1990); *State v. Gatalski*, 40 Wn.App. 601, 610, 699 P.2d 804, *review denied*, 104 Wn.2d 1019 (1985). The *Carson* court's holding thus stands for the simple proposition that

adverse testimony by a treating physician is evaluated the same as any other evidence challenged under ER 403. *Id.* at 226. Such testimony is not even the type of evidence excluded in the present case.

Similarly, the court in *State v. Brown,* 48 Wn.App. 654, 739 P.2d 1199 (1987) dealt with the exclusion of evidence that a rape victim had been heavily drinking and had ingested LSD prior to the rape. A central defense of in case was whether the victim had actually resisted sexual contact or had the ability to accurately perceive events at all. *Id.* at 660. There are no similar concerns in the present case, wherein the excluded signature was duplicative of testimony and is in no way probative of whether Dr. Ryan gave adequate instructions.

Nor does the Court of Appeals Opinion conflict with *Erikson v. Kerr,* 125 Wn.2d 183, 883 P.2d 313 (1994). At trial, the treating physician in *Erikson* repeatedly testified as to what he " 'would have' done or is 'sure' he or [the Plaintiff] said in certain situations when the records are silent on those points." *Id.* at 191. The trial court excluded under ER 403 evidence that the physician could not remember when he spoke with the Plaintiff or even that his patient had died. This Court found that the excluded evidence was not cumulative, but instead was the only evidence probative of the treating physician's forgetfulness, and reversed. *Id.* This is wholly distinguishable from the present case, wherein there was already

testimony at trial that the signatures are substantially similar. It is not even proper impeachment evidence of Mr. Figueroa, as the record shows that Mr. Figueroa had no fraudulent intent but instead accurately included his contact information, lack of insurance, and later informed the hospital of his use of an alias. The excluded signatures are unduly prejudicial and are not crucial to Dr. Ryan's ability to present a defense, as Mr. Figueroa's use of an alias is at best minimally probative of whether Dr. Ryan met his standard of care.

The Court of Appeals Opinion accurately reflects the law of this state when a trial court must balance evidence under ER 403. There is no conflict with prior decisions, nor does the trial court's extremely limited and fact-specific ruling does not extend the breadth of ER 403, as argued by Defendant, beyond existing precedent. This Court should decline review.

c. *Nothing in this Opinion calls the integrity of the Court into question.*

Finally, Defendant seeks review by improperly attempting to raise an issue of judicial integrity, arguing that the trial court's rulings in this case prevented Defendant from fully litigating their theories of Plaintiff's "dishonesty." The extent of Mr. Figueroa's injury was heavily litigated at trial, including whether or not Mr. Figueroa "lied" about any aspects of his

injury. What Defendant fails to mention, however, is that he was permitted extensive opportunity to impeach Mr. Figueroa on his veracity.

During the cross examination of Mr. Figueroa, Defendant introduced as impeachment evidence an unauthenticated, unpublished, and previously undisclosed video clip that showed Mr. Figueroa performing physical activities. VRP 501. Despite Plaintiffs' extensive objections, the trial court admitted the video for the purpose of impeachment and it was shown to the jury. VRP 521. Additionally, the Defendant was able to elicit testimony from both Mr. and Mrs. Figueroa that Mr. Figueroa's signature was the same at discharge as it was at entry. VRP 681. All of this evidence was before the jury, who was able to make a determination of Mr. Figueroa's credibility. A reading of the record as a whole thus fails to demonstrate that the integrity of the court is called into question by either the trial court's rulings or the Court of Appeals' affirmation of those rulings.

///

///

///

///

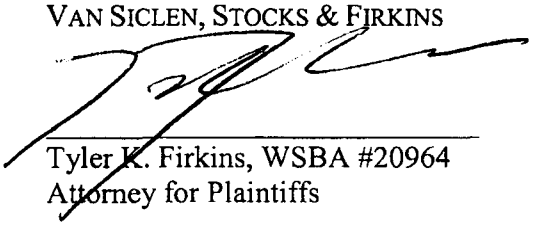
///

VI. CONCLUSION

The decision of the Court of Appeals is consistent with established precedent and raises no issues of substantial public interest. Accordingly, the Petition fails to establish a basis for review under RAP 13.4. Plaintiff Figueroa respectfully request that this Court deny Defendant's Petition for Review.

DATED this 3rd Day of February, 2014.

VAN SICLEN, STOCKS & FIRKINS



Tyler K. Firkins, WSBA #20964
Attorney for Plaintiffs

Certificate of Transmittal

I hereby certify that the foregoing Answer to Petition for Review was electronically filed with the Washington State Supreme Court and sent via ECR and ABC Legal Messenger to the following counsel:

Bertha Fitzer
Fitzer Leighton & Fitzer
1145 Broadway, Ste. 610
Tacoma, WA 98402
bertha@flfps.com

DATED this 3rd day of February, 2014 at Auburn, Washington.

Diana Butler
Diana M. Butler

OFFICE RECEPTIONIST, CLERK

To: Diana Butler
Subject: RE: Figueroa v. Ryan - Answer to Petition for Review (COA Div I - Case No.: 68272-5-I)

Received.

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Diana Butler [mailto:diana@VanSiclen.com]
Sent: Monday, February 03, 2014 3:41 PM
To: 'Dawne Shotsman'; OFFICE RECEPTIONIST, CLERK
Cc: Bertha Fitzer (Bertha@flfps.com); Tyler Firkins; Neal Kingsley
Subject: RE: Figueroa v. Ryan - Answer to Petition for Review (COA Div I - Case No.: 68272-5-I)

Attached please find the Respondent's Answer to Petition for Review.

Diana M. Butler, Paralegal to Tyler K. Firkins
& Zachary Jarvis

VSF Van Siclen Stocks Firkins
ATTORNEYS AT LAW
721 45th St. NE
Auburn, WA 98002-1381
(253) 859-8899
(866) 947-4646
diana@vansiclen.com