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King County Superior Court

No. 08-2-43576-8KNT

COA No. 68272-5-I

In the Court of Appeals for
the State of Washington
Division I

BERNARDO FIGUEROA and ROSA FIGUEROA,
husband and wife

Respondents,

vs.

THOMAS RYAN, M.D.

Appellant.

APPELLANT'S AMENDED REPLY BRIEF

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I. INTRODUCTION

At trial, Plaintiffs' counsel told the jury he was "confident that when you look through everything, you will understand that the whole picture is here." **VRP 911, lines 5-6.** He wondered "who is taking responsibility for those errors now? The guy who didn't do anything wrong, showed up at the hospital with abdominal pain and walks out with two arm surgeries?[1]" **VRP 911, lines 15-19.**

In their submission to this court, plaintiffs return to the dramatic, emotional appeals used at trial. Plaintiffs argue "by around 10:00 PM that night, Mr. Figueroa had nearly lost the use of his left arm, and had come dangerously close to death.[2]" **Resp. Brief at 1.** They later portray the image of a tragically injured, struggling immigrant family living on "only

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[1] These arguments ignore the fact the Plaintiff would have had fasciotomy, hospitalization, and scarring and perhaps skin graft in any event because of the extravasation injury sustained in the radiology department, not because of the care of Dr. Ryan. **VRP 416-17; CP 147-49.** In fact, Plaintiffs originally sued Highline Medical Center, the entity responsible for the extravasation injury, but did not oppose their motion for summary judgment. **Supp. Clerk's Papers at 587-88.**

[2] The arm involved in this incident was plaintiff's right arm, not his left. [See **Resp. Brief 6;10; CP 148**] The two surgeries were the direct result of an extravasation injury attributable to care by the Hospital, not Dr. Ryan. **CP 147-49.** Mr. Figueroa left the operating room after his surgery for recovery in "good condition." **CP 472.**

a tiny portion of his prior income by way of a Labor and Industries pension."[3]

Having eloquently argued the case for personal responsibility and fairness, counsel cannot now shirk from its application to his client. The jury was entitled to the "whole picture" of what occurred the night Dr. Ryan treated Mr. Figueroa. Dr. Ryan was entitled to an "even handed[4]" application of the evidentiary rules.

Plaintiffs attempt to justify the exclusion of highly probative evidence by characterizing it as "minimally relevant" and "cumulative." It is neither. Bernardo Figueroa's credibility was at the "heart" of his medical malpractice case.[5] Unfortunately, Mr. Figueroa lied the night he sought medical treatment under a false name.[6] He lied under oath at his deposition about his criminal record.[7] And, finally, he lied at trial about the nature and extent of his injuries.[8]

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[3] **Resp. Brief at 6**. The citation to the record here is inaccurate. The cited testimony only established that he received a pension. **VRP 498**. The remainder of the sentence regarding the "tiny portion" is simply fabricated out of thin air.
[4] ***Carson v. Fine,*** 123 Wn.2d 206, 225, 867 P.2d 610 (1994).
[5] **See Part II, A (2), infra.**
[6] **CP 59-61**.
[7] Compare **CP 137** (Never been convicted of a crime) with Appendix A (Page 7, Plaintiffs' Motions in Limine, criminal convictions for Patronizing Prostitute; Assault 4; Criminal Trespass; Driving While Suspended; 2 DUI's, Second Supp. Clerk's Papers at _____.)
[8] See Opening Brief at pp. 18-19 and **VRP 487-493. , Ex. 22**.

This Reply Brief will address the exclusion of the un-redacted medical records and three other errors:[9] 1) the inequitable application of **ER 406**; 2) the admission of evidence of breach of a standard of care that did not relate causally to the plaintiff's injury; and 3) the lack of factual foundation for Dr. Zafren's causation testimony. Plaintiffs' justifications for these errors are not supported by the record or by a correct understanding of applicable law. Appellant therefore respectfully requests that this Court reverse the learned trial judge and remand the matter for a new trial.

II. ARGUMENT

A. Plaintiffs' Claim that the Medical Records and False Statements on the Night of Treatment Is of Minimal Relevance Misstates the Facts of This Case and Conflicts with Applicable Law.

1. Plaintiffs' Concession that ER 403 Does Not Apply to Evidence Essential to the Defense of the Case Simply Reflects the Clear Rule Established in Washington About the Balancing Required by ER 403.

Plaintiffs concede that **ER 403** exclusions do not "generally extend to evidence crucial to a defense." **Resp. Brief at 25.** Citing ***State v. Young,*** 48 Wn. App. 406, 413, 739 P.2d 1170 (1987), plaintiffs acknowledge that "at that point, the evidence's probative value exceeds its

[9] Dr. Ryan rests on the original arguments contained in his opening brief for the remainder of the issues raised therein.

potential for prejudice." **Resp. Brief at 25-26**. This concession is appropriate because the foundation for this legal proposition is well established. In ***Carson v. Fine***, 123 Wn.2d 206, 224, 867 P.2d 610 (1994), the Supreme Court observed that "the ability of the danger or unfair prejudice to substantially outweigh the probative force of evidence is 'quite slim' where the evidence is undeniably probative of a central issue in the case." ***Carson***, 123 Wn.2d at 224, citing ***United States v. 0.161 Acres of Land,*** 837 F. 2d 1036, 1041 (11th Cir. 1988). ***See also, State v. Brown***, 48 Wn.2d 654, 660, 739 P.2d 1199(1987). "**ER 403** does not extend to the exclusion of crucial evidence relative to the central contention of a valid defense." ***United States v. Wasman, 641 F.2d 326 (5th Cir. 1981)).***" ***State v. Young***, 48 Wn. App. 406, 413, 739 P.2d 1170(1987).

2. ER 403 Does Not Apply to Evidence Relating to Credibility When, as Here, a Party's Credibility is Crucial to the Determination of Whether Medical Malpractice Occurred.

Erickson v. Kerr, 125 Wn.2d 183, 190, 883 P.2d 313 (1994) establishes the importance of credibility evidence in certain[10] medical malpractice cases. In ***Erickson***, the plaintiff was not allowed to cross-examine the defendant doctor about a specific incident of forgetfulness.

[10] There are obviously cases where credibility is not an issue, such as the retention of a foreign body, a surgical mishap or a clear medical error. Here, however, the question of whether malpractice occurred cannot be separated from the credibility issue.

Dr. Kerr had been treating Mrs. Erickson for depression. Following her suicide, Dr. Kerr apparently forgot that she had committed suicide and asked Mr. Erickson about his wife's health. The Court of Appeals held Dr. Kerr's credibility "went to the heart of the malpractice issue." ***Erickson v. Kerr***, 69 Wn. App. 891, 902, 851 P.2d 703 (1993). The Supreme Court agreed, ruling that prejudicial impact of the testimony "cannot be reasonably found to substantially outweigh its relevance." ***Erickson***, 125 Wn.2d at 191. The court held the trial court abused its discretion and concluded the evidence was not cumulative because there was little, if any, evidence probative of Dr. Kerr's forgetfulness. ***Id.*** Citing ***Carson, supra,*** and ***State v. Crenshaw***, 98 Wn.2d 789, 806, 659 P.2d 488(1983), the Supreme Court observed that "courts readily admit such prejudicial evidence under similar circumstances." ***Id.***

Here, Mr. Figueroa's credibility also went to the "heart" of plaintiffs' medical malpractice case. Plaintiff's complaint of pain the evening he sought treatment formed the basis of Dr. Kenneth Zafren's conclusion that Mr. Figueroa had a compartment syndrome at the time of discharge. Dr. Zafren testified:

> Mr. Figueroa had something that people with extravasation injuries shouldn't have, which is severe pain. That is a red flag for something other than a pure extravasation injury, in fact, that indicates that the possibility of a compartment syndrome.

VRP 319, lines 17-25. That conclusion is based Mr. Figueroa's reports of pain that evening as established in the medical records. **VRP 322**. Evidence Mr. Figueroa engaged in deceptive conduct at the time he was making these complaints of pain is highly relevant to the issue of whether he was also lying about other things, including the level of his pain.

Second, Mr. Figueroa's credibility is at the "heart" of his expert's opinions regarding proximate cause. Dr. Zafren's testimony is the only testimony establishing the link between the allegedly delayed surgery and "permanent" injuries.[11] Dr. Zafren based his findings on Mr. Figueroa's deposition testimony. **VRP 408; 417**. But again, Mr. Figueroa was [12] lying during that deposition.

Third, Mr. Figueroa's credibility is central to the issue of whether Dr. Ryan appropriately tested for compartment syndrome before he discharged Mr. Figueroa.[13] Both Dr. Zafren and defense expert, Dr. Ronald Dobson, described assessments that included taking pulses, testing for tenseness of the compartment and looking at capillary refill by pressing the fingernails. **VRP 311; 340; 622**. Mr. Figueroa heard this

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[11] Plaintiffs attempt to cure this defect by citing to a letter by Dr. Clark. That argument will be addressed in **Part II, C**.
[12] See note 4 for documentation of false denial of prior crimes.
[13] Here, Dr. Ryan's testimony was substantially limited by the court's inequitable application of **ER 406.** See discussion at **Part II, B**.

testimony and then denied Dr. Ryan did those tests.[14] He told the jury that Dr. Ryan did not touch his fingernails or touch the top of his hand and push. **VRP 457, lines 20-25, 458, line 1.**

Fourth, Mr. Figueroa's credibility went to the issue of whether Dr. Ryan breached the standard of care required for giving discharge instructions. Mr. Figueroa denied that Dr. Ryan gave him any instructions. **VRP 460, lines 18-21.**

Finally, whether or not Mr. Figueroa told the truth directly impacted the ability of the jury to assess his testimony regarding damages. At trial, Mr. Figueroa claimed that he had no strength, that he had difficulty moving the handle to open a door, that he has a tough time writing and that he was "very limited." **VRP 480-81**. As demonstrated by the surveillance video, these claims turned out to be untrue. **See VRP 504-05; Ex. 22.** After having three hours to ponder the impeachment evidence contained in that video, plaintiffs offered "explanations."[15] But to evaluate the validity of the plaintiff's "explanations" the jury needed to

[14] Even the cross-examination of the defense expert, rested in part on Mr. Figueroa's credibility. Thus plaintiffs' counsel faulted the defense expert for not having read the depositions of his clients. **VRP 618, lines 16-21**. In his closing, counsel argued that Dr. Dobson's opinion should be discounted because he did not have the sworn deposition testimony of Rosa and Bernardo Figueroa at the time he formed his opinion. **VRP 858; lines 2-6**.

[15] Resp. Brief at 15.

know that the exaggerated statements at trial were not the first time plaintiff had been untruthful.

Without the evidence of prior deceptions, the jury could not assess the truth of these outrageous claims Mr. Figueroa made asserting Dr. Ryan ignored his pleas for assistance the night in question:

> I was there with my arm very swollen. I asked the doctor if he was going to observe me and leave me in observation for a while. He said it wasn't necessary, that the swelling would go down in two or three hours. And I asked him again, "but, look, my arm is very swollen. Doesn't this require some observation?" He repeated, "no, everything will be fine," he said. That is what I recall. "In two or three hours, the swelling will go down and you will be fine."

VRP 454, lines 15-25. In short, it is impossible to separate Mr. Figueroa's credibility from the questions of whether the standard of care was met, whether the alleged negligence proximately caused him injury and/or the amount of his damages. Pursuant to ***Erickson v. Kerr***, it was error to exclude evidence of the plaintiffs' credibility.

Plaintiffs try to diminish the role of credibility in this case by attacking counsel. They argue Appellant "deceptively relies on the case of ***Goehle v. Fred Hutchinson Cancer Research Ctr.***, 100 Wn. App. 609, 621-22, 1 P.3d 579, 586 (2000) claiming the case stands for the proposition that putting down false information on a job application is *per se* admissible." **Resp. Brief at 27**. The brief then goes on to argue that

the case deals with "after acquired evidence"[16] and concludes: "As such, it is not relevant to the case at bar when the issue is the unfairly prejudicial effect of minimally useful evidence." **Resp. Brief at 28.**

This argument is without merit. Appellant cited the case for the proposition that a misrepresentation goes to the credibility of a party. App. Opening Brief at 34. This proposition is taken directly from ***Goehle, supra.***[17]

In sum, neither the law, nor the facts support plaintiffs' contention that his credibility was of "minimum relevance." The trial judge thus abused his discretion by protecting Mr. Figueroa from the consequences of his own dishonest acts at the time of treatment.

3. ER 403 Does Not Apply to the Un-redacted Medical Records with the Fake Signatures Because It Constituted the Only Objective Evidence of the Condition of the Plaintiff's Hand and was Thus Crucial to Dr. Ryan's Defense.

The un-redacted medical records showed two virtually identical signatures establishing, contrary to Mr. Figueroa's testimony, that his hand was fully functional at the time of discharge. **Compare CP 59 with CP 61**. Dr. Ryan needed this evidence to establish his defense that the

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[16] The brief also contains the statement: "I need another sentence or two here to understand your point here. ***Id*** at 621-622." Resp. Brief at 28. It appears that this sentence is an errant editorial comment that had not been removed from the final brief.

[17] "The after-discovered evidence of misconduct in this case involved a misrepresentation and was thus relevant to Goehle's credibility." ***Goehle***, 100 Wn. App. at 622.

compartment syndrome developed only after the plaintiff left the emergency room. **VRP 601, lines 11-24**.

Nonetheless, Plaintiffs assert that the records were cumulative of the Figueroa's testimony and therefore any error was harmless. **Resp. Brief at 26**. This argument is unsound.

First, exclusion of the evidence denied Dr. Ryan the opportunity to corroborate his theory of the case regarding when the injury occurred. Had the court allowed the evidence, the defense could have shown the documents to the defense expert Dr. Ronald Dobson and asked him whether or not the later signature was consistent with someone with compartment syndrome. Instead, defense was forced to ask a hypothetical question about swollen stiff fingers, which drew the objection that the questions was speculative. **VRP 604.** With the exhibit, Dr. Dobson could have directly evaluated the functionality of the plaintiff's hand and rebutted the claim the plaintiff's theory that he had a compartment syndrome at the time of discharge.

Second, the argument ignores the impact of the language barriers asserted by the plaintiffs. Throughout the trial, plaintiffs' counsel highlighted these communication issues to draw sympathy for his clients. See, e.g. **VRP 269-70**; **905, lines 20-24.**

Third, the argument ignores the negative impact the exclusion of documents used during the cross-examination had on the defense lawyer's credibility. Plaintiffs respond to this argument with another personal attack. They argue, "defendant also attempts to deceive the Court by claiming that the jury's request to see "all the medical records" somehow means that the jury was specifically requesting the unredacted (sic) documents described by the Defendant." **Resp. Brief at 28.**

The claim of an attempt at "deception" is unfounded.[18] Plaintiffs' counsel is well aware that appellate counsel was not trial counsel and did not handle the exhibits.[19]

Consistent with this counsel's obligation to present a complete and accurate record to the Court in order for it to reach an informed decision, the writer has searched the record to determine whether factual support exists for the plaintiffs' argument. That search revealed that there were actually two jury questions sent out regarding the completeness of medical records. The first question asked for the deposition of all "Docs", the "Hospital Admin. Records" and "All medical records." **CP 219.** The court

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[18] Given the failure to support their assertion about what happened with a citation to the record, the simplest answer to this ill-spirited attack is to rely on **RAP 10.3(a) (5)** and point out that the argument lacks factual support.

[19] Counsel did attend portions of the trial as an observer to assist in brief writing and research but did not participate in trial and was not there for the entire proceeding. **VRP 15-18.** The jury questions occurred during deliberations, the day following the conclusion of testimony and the closings. It is extremely unlikely Counsel was present that day.

answered this jury question at 10:55 am, with a note stating: "No, you have all of the exhibits admitted into evidence." **CP 220**.

Twenty minutes later the jury sent out a second note stating: "Were the 15-21 articles admitted into evidence? Also, there does not appear to have the medical note of pg 12 is not in our evidence book either. Should it have been there?" **CP 221**. Apparently at this point the parties discovered that exhibits 6 & 7 had been omitted from the exhibit book. The court responded to that jury note: "1) Ex's 15-21 were not admitted. 2) Ex 6 & 7 were admitted, but you did not have them until now due to a mistake, which includes page 12." **CP 222**.

The existence of this second exchange regarding medical records does not support the inference plaintiffs draw, which is that the jury were not looking for the documents[20] used during the cross-examination. The jury's repeated request for medical records instead demonstrates the importance they placed on having complete medical records. When the jury received additional records after the second request, the clear inference was that there were no more records.

At that point, the trial court's ruling substantially impaired the defense lawyer's credibility. Instead of being a prepared advocate who

[20] The plaintiffs also argue that the jury received the medical records, just in a "redacted form." **Resp. Brief at 29**. This argument is disingenuous. The redactions eliminated the entire signature block showing a blank where plaintiff had signed the false name. Compare **Ex. 6** with **CP 59** and **61**.

knew the medical records and used them effectively, defense counsel looked like a bully, an uncaring individual who used inadmissible documents to beat up on two poor immigrants who needed interpreters to tell their story to the jury.

These conclusions echo plaintiffs' trial themes in closing. He argued: "The oldest trick in the defense book is to—rather than put what the judge's instructions are on trial, we will put Bernardo Figueroa on trial. We are going to make him the bad guy." ***VRP 850, lines 12-16.*** He emphasized the language barrier: "It could be that Mr. Figueroa, who is speaking to you in the manner you heard him speak, and understanding you in the manner that you heard him understand, may not be understanding you." **VRP 866, lines 8-12.** In rebuttal, he returned to the bully theme. "Well, like I told you, the issue of Mr. Figueroa is a bad guy, I predicted with certainly (sic) that that was going to be the presentation by the defendant. Indeed, that's the beginning and the middle of that presentation. Mr. Figueroa is a bad guy." **VRP 905, lines 20-24**

He asked the jury to "go through the records very carefully and told them that it was "very easy to pull out records that say almost anything." **VRP 909, lines 20-22**. He argued Dr. Ryan wrote down everything he did, and that the lack of records means "that he didn't do it." "It is not there. Everything else is." **VRP 909, lines 18-19.** Counsel

emphasized the completeness of the records arguing "I am confident when you look through everything, you will understand that the whole picture that is here." **VRP 911, lines 5-7.**

Unfortunately, the jury did not have "everything." They were missing the most important piece of evidence, the un-redacted medical records which illustrated plaintiff's ability to use his hand at the time of discharge. This evidence directly contradicted Mr. Figueroa's claim his hand "was so swollen that my fingers were stuck together. . . ." **VRP 537.**

The exclusion of this evidence wrongly placed the burden of the plaintiff's illegal act, using a fake driver's license and identity,[21] on Dr. Ryan, rather than on the Plaintiff, where it belonged. Because this evidence was crucial to the issues of credibility and Dr. Ryan's defense the trial judge abused his discretion.

B. Plaintiffs Do Not Address the Waiver Argument, Misstate the Law and the Facts Relating to Habit and Routine Evidence, and Ignore the Language of ER 406.

Initially, it should be noted that Plaintiffs have failed to address the argument that they waived the right to exclude the allegedly improper

[21] Plaintiff also argues that there is no evidence that Mr. Figueroa used a false identity for some illegal or fraudulent purpose. **Resp. Brief at 28**. The entire paragraph that follows is based on factual contentions that are not supported by citations to the record. Moreover, Mr. Figueroa not only used the name of another, he also obtained a driver's license and used it to obtain treatment under the name of another. **CP 60; CP 55**.

habit and routine evidence by themselves introducing Dr. Ryan's routines into the case.[22] Instead, plaintiffs argue that the exclusion of Dr. Ryan's testimony regarding habit and routine was proper because he did not have any supporting evidence and he did not remember the patient. **Resp. Brief at 30**. This argument ignores the express language of **ER 406.**

> **Rule 406. Habit; Routine Practice**
>
> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(Emphasis added.) This rule abrogated pre-rule cases where the proof of habit or routine required corroboration. **K. Tegland, 5A Wash. Prac. §406.6, p. 36 (2007)**.

Plaintiffs next argue that Dr. Ryan could not have a habit or routine regarding extravasation injuries because they are rare. They assert "It is therefore inconceivable that when confronted with an extremely rare occurrence that he had never seen, Dr. Ryan would develop a routine." **Resp. Brief at 31**.

This argument is unsound. The testimony at trial was that the specific mechanism which produced the plaintiff's compartment syndrome, the extravasation injury, was an extremely rare occurrence.

[22] See Appellant's Brief at 37-38.

VRP 436; 586; 588. Compartment syndromes, on the other hand, are not rare. **VRP 756, line 19**. They can occur from traumatic injury or even sleeping on an arm all night. **VRP 757, 1-3. *See al*so, VRP 818**, Dr. Ryan "absolutely" knew one when he saw one.[23] **VRP 756, line 22**.

Plaintiffs next assert "Dr. Ryan was permitted by the trial court to testify that he gave oral instructions to Mr. Figueroa. **Resp. Brief at 32.** Plaintiffs support this claim with a citation to **VRP 803**, plaintiffs' cross-examination of Dr. Ryan. Rather than establishing that the trial court permitted Dr. Ryan to present his case, the passage illustrates the court's one sided application of **ER 406**. Plaintiffs were permitted to use Dr. Ryan's habit and routine offensively to prove the violation of the standard of care. **VRP 173; 364**. Dr. Ryan, on the other hand, was denied the right to use his routines to establish support his care. **See sustained objections at VRP 765; 768; 772; 787; 813 and argument at VRP 833-34.**

The excluded testimony was not limited to Dr. Ryan's routines regarding oral instructions. Dr. Ryan would have testified about his oral instructions and the routines he used to care for his emergency room

[23] All emergency room doctors develop routines because of the large case loads. **VRP 610-11**. Dr. Ryan would have testified to his specific, engrained professional response that he would do on all occasions. **VRP 830, lines 20-25**.

patients.[24] Dr. Ryan had routines for assessing compartment syndrome which he was not allowed to discuss. **VRP 765**. He could not testify regarding his routines for checking on patients. **VRP 768**. He could not testify regarding how he makes patients understand the need to come back to the hospital. **VRP 772**. He could not refute the plaintiff's statement that he told him "don't worry this will go away in two or three hours." **VRP 787**. These were all areas where Dr. Ryan had routines that did not vary from patient to patient. These were "engrained professional responses that the doctor will do on all occasions." **VRP 830, lines 20-25**. These are the automatic responses engrained in a professional, like the insurance adjuster who always advised claimants in double claim situations that she represented the adverse party,[25] or the notary public who always asked for identification.[26]

Plaintiffs rely on ***Physicians' Ins. Exchange v. Fisons***, 122 Wn.2d 299, 326, 858 P.2d 1054(1993). Counsel argues "no competent physician would give the exact same injury-specific instructions to every person discharged from the hospital." **Resp. Brief at 32**.

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[24] The issue of admissibility of habit and routines in medical malpractice actions is of particular importance in emergency room cases. ER doctors see thousands of patients a year. **VRP 610**. This volume forces doctors to develop routines. ***Id.***
[25] ***Heigis v. Cepeda***, 71 Wn. App. 626, 862 P.2d 129 (1993).
[26] ***Meyers v. Meyers***, 5 Wn. App. 829, 491 P.2d 253 (1971), aff'd 81 Wn.2d 533, 503 P.2d 59 (1972).

Fisons does not support this argument and misconstrues the proposed testimony. ***Fisons*** involved the exclusion of habit evidence from a drug representative. The drug representative would have testified that it was his "habit" to discuss the dangers of a particular drug when he visited physicians and therefore he must have discussed the specific risks in dispute. He told the court that his "presentations would go virtually the same way with every physician and that it was "highly unlikely" that he did not do so with the doctor in question. ***Fisons,*** 122 Wn.2d at 325.

The routine "sales pitch" of a drug representative is not the engrained response of a trained medical professional who is taught to react in specific ways to "fairly specific" stimuli.

Plaintiffs finally argue that "it would be poor policy to permit doctors to testify what they would have said under an **ER 406** exception, regardless of any written record or corroborating evidence." **Resp. Brief at 32**. The "fact that testimony is self-serving or that it is not corroborated goes only to the weight of the testimony, not admissibility." K. Tegland, 5A Wash. Prac. §406.6, p. 37 (2007) citing ***Meyer v. U.S.,*** 638 F.2d 155 (10th Cir. 1980). [Emphasis added.]

Meyer v. U.S., supra is directly on point and supports Dr. Ryan's position. In that case, the dentist was allowed to testify that he routinely advised patients of the potential risks of molar extractions and that he

acted in conformity with that long established habit and custom when dealing with the plaintiffs. ***Meyer***, 638 F. 2d at 155. Here, Dr. Ryan would have testified as to his long established routines in the emergency room. **VRP 830-31**. Because the trial judge allowed the plaintiff to use such evidence offensively, but denied Dr. Ryan the right to respond in kind with a full discussion of his routines, the trial court abused his discretion.

C. Dr. Clark's 2006 Opinion Letter Does Not Cure the Foundational Defect in Plaintiff's Causation Testimony.

Plaintiffs argue that the trial court was within his discretion to admit Dr. Zafren's causation testimony, that Dr. Zafren had the required expertise and that other evidence of causation exists. **Resp. Brief at 3**5. All of these arguments fail.

The issue is not Dr. Zafren's competency to offer opinion evidence regarding the standard of care for an emergency room physician. Instead, the issue is whether Dr. Zafren had the factual foundation to render opinions regarding the existence of permanent injuries and the proximate cause of those injuries. Dr. Zafren was not qualified to offer testimony regarding the plaintiff's current condition. **VRP 434**. He never examined the plaintiff. He had not reviewed the treating physician's complete treatment records. **VRP 434; 407; 417-18, 436**. He did not review the

post-surgical office visits nor did he speak with the treating physician. **VRP 415, lines 11-22**. Yet Dr. Zafren was allowed to testify that "there is harm and there wouldn't have been, had the fasciotomy had (sic) been performed in a timely fashion, functional disability." **VRP 418, lines 4-8**. Without the necessary factual foundation, admission of this testimony was error.

Plaintiffs cite ***Weber v. Budget Truck Rental, LLC***, 162 Wn. App. 5, 15, n. 26, 254 P. 3d 196(2011). **Resp. Brief at 35-36**. ***Weber*** actually supports the opposite conclusion. ***Weber*** involved an over serving case that was dismissed on summary judgment. The plaintiff's expert testified that based on the amount of drugs found in the driver's system at the time of arrest, it was probable that he exhibited the characteristic effects of methamphetamine intoxication. Division One held that the expert's testimony was insufficient to create a question of fact because the law required direct observational evidence at the time of over service. "Under this rule, jurors are not permitted to make an inferential leap of the 'driver's [blood alcohol content] was X, so he *must* have appeared drunk type." ***Weber***, 162 W. App. at 11. The court noted that the expert's testimony is of exactly this type and thus insufficient. ***Id.***

Here, Dr. Zafren made a similar inferential leap—that the existence of the plaintiffs' suit meant there had to have been harm. He

didn't "think there would be a case, if he didn't have impairment. **VRP 408, lines 7-14.** The only evidence he relied upon was the deposition testimony of the plaintiffs taken in 2009. **VRP 408, lines 15-25**. He opined "the type of impairment they talk about in their depositions does not get better over time, but, again, **that is not my area**." **VRP 409, lines 1-3**. Deposition testimony is not medical information that a surgeon would use to offer an opinion. **VRP 417, lines 24-25; 418, lines 1-3.** Moreover, as previously argued, the plaintiff was not being truthful during his deposition.

Plaintiffs' final argument in favor of admissibility and the jury's finding that Dr. Ryan caused plaintiff permanent injury is that a letter authored by a consulting physician, Dr. Clark, established the necessary causal link. **Resp. Brief at 38**. Here the brief blatantly misrepresents what is contained in the transcript and records. The brief states:

> Dr. Clark said,
>
> > Despite [Dr. Mouneke's] best efforts to treat this emergency, it appears that it was probably six hours before [Dr. Mouneke] was able to get him to the operating room simply because he went home and there was a delay before he actually came back.
>
> VRP 907. As a result of the delay, "[Mr. Figueroa] has residuals of stiffness and weakness." VRP 906.

Resp. Brief at 38. The transcript does not contain the introductory phrase "**As a result of the delay**. . . ." Instead, the passage reads: "Intravenous contrast material appropriately treated with emergency fasciotomies. Unfortunately he has residuals of stiffness and weakness." **VRP 906, lines 23-25**.

The indented quoted in the plaintiffs' brief leaves out the qualifiers Dr. Clark placed on his opinion. The letter counsel read into the record states: "Recommendations. My first thought is that he may have had some mild ischemia and subsequent scarring." **VRP 907, lines 1-3**. [Emphasis added.] These phrases were obviously left out because "may have" does not reach the required threshold for causation testimony. It is well settled law that a plaintiff must prove proximate cause on a more probable than not basis. Generally, plaintiffs only meet this burden through expert testimony establishing causation on a more probable than not basis. ***McLaughlin v. Cooke***, 112 Wn.2d 829, 837, 774 P.2d 1171 (1989). Because Dr. Zafren lacked the factual foundation for his opinion and because Dr. Clark's opinion letter does not meet the required threshold, substantial evidence does not support the verdict. The trial court erred in allowing Dr. Zafren to testify and in entering the jury verdict based on that testimony.

D. Plaintiffs Misrepresent the Testimony and Ignore the Lack of Causation Between Dr. Ryan's Admittedly Deficient Documentation and the Plaintiffs' Injury.

Again Plaintiffs advance arguments without factual support in the record. Here, plaintiffs argue that Dr. Dobson agreed with the premise that "the defendant's written discharge instructions, together with the insufficient oral instructions, caused the plaintiff's injuries." **Resp. Brief at 39**. This statement is incorrect. Dr. Dobson specifically rejected the notion that the lack of documentation had anything to do with the outcome in this case. He testified: "Again, I am making a distinction between documentation and care. But that said, the documentation in no way would have changed the outcome. So it really was a moot point in the sense, yes, it should have been done. Would it have changed things? No." **VRP 662, lines 1-6**.

Dr. Dobson's testimony could not have been clearer on this point. The plaintiffs' unfounded suggestion to the contrary should be rejected. Because there was not, and could not be, a causal link between the lack of documentation and the injury, the trial court abused his discretion by letting the jury consider this evidence.

III. CONCLUSION

Mr. Figueroa accepted the benefits of citizenship in the United States. With that came the duty to follow its laws and to tell the truth in legal proceedings. Plaintiff did neither. The trial court's rulings deprived Dr. Ryan of his right to use evidence that directly impacted Mr. Figueroa's credibility and illustrated issues crucial to his defense. Appellant respectfully requests the jury's verdict be reversed and the matter remanded for either dismissal or a new trial.

Dated this 30th day of January 2013.

By: 

Bertha B. Fitzer, WSB #12184
Attorney for Appellant
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DECLARATION OF SERVICE

I, Bertha B. Fitzer, state and declare under penalty of perjury under the laws of the state of Washington that I caused to be served in the manner noted below a copy of this document, entitled "APPELLANT'S AMENDED REPLY BRIEF" on the attorney of record as follows:

Attorney for Respondent:

Tyler Firkins
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[x] Electronically and via USPS

DATED at Tacoma, Washington this 30th day of January, 2013.

Bertha B. Fitzer

Appendix A

4. **Mr. Figueroa's criminal convictions are irrelevant and inadmissible**

Mr. Figueroa has several misdemeanor convictions. Those convictions are as follows:

ADULT MISDEMEANOR CONVICTIONS

Cause No./Jurisdiction/Charge	Offense Dt/Dispo Dt	Disposition	Source
Tukwila Municipal 85191 Patronizing a Prostitute	6/2/1993 10/27/93	Guilty	WATCH
Southwest District Y10182905 Assault – 4°	6/6/2001 3/1/2002	Guilty	WATCH
Aukeen District K00176782 DUI Driving While License Suspended – 3°	7/27/93 11/16/93	Guilty	JIS
Kent Municipal K00047276 Criminal Trespass – 2°	10/30/2004 9/23/05	Guilty	JIS
Seattle Muni 146109 Driving While License Suspended – 2°	2/27/93 5/18/93	Guilty	Seattle.gov
Seattle Muni 140102 Negligent Driving – 1°	1/5/93 5/13/93	Guilty	Seattle.gov
Seattle Muni 139527 DUI	1/6/93 5/13/93	Guilty	Seattle.gov

1. None of these crimes are either recent or involve dishonesty as required by ER 609. Even assuming that the fact of these crimes was relevant, the prejudicial impact of these convictions far outweighs any probative value. Quite simply, this evidence is inadmissible.

5. **The Court should strictly limit references to any alleged medical malpractice crisis and/or tort reform to the *Voir Dire* process**

The Court should prohibit at trial any testimony, evidence, or reference to the subject of the potential medical malpractice tort "reform" or the alleged medical malpractice insurance "crisis," except during the *voir dire* process. The primary purpose of *voir dire* is to give litigants and opportunity to explore the potential jurors' attitudes in determining whether a juror should be challenged. *Lopez-Stayler v. Pitts,* 122 Wn. App. 45, 51, 93 P.2d 904 (2004); *State v. Davis,* 141 Wn. 2d 798, 825-26, 10 P.3d 977 (2000); *State v. Fredericksen,* 40 Wn. App. 749, 752, 700 P.2d 369 (1985). *Voir Dire* is an appropriate forum in which to ask jurors about their

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