SUPREME COURT

OF THE STATE OF WASHINGTON

COA NO. III- 323811

JOSHUA DRIGGS,

Plaintiff/Respondent

v.

ANDREW T.G. HOWLETT, M.D. and JANE DOE HOWLETT, and their marital community; PROVIDENCE PHYSICIAN SERVICES CO. aka Providence Orthopedic Specialties, a Washington Corporation,

Defendants/Petitioners

RESPONSE TO DEFENDANT'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

The petitioners are Andrew Howlett, M.D., and Providence Physician Services Company, *aka* Providence Orthopedic Specialties, which will be referred to as "Dr. Howlett". This is an reply by Mr. Driggs to the Dr. Howlett's petition for review.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner Dr. Howlett seeks discretionary review of The Court of Appeals Decision unpublished March 8, 2016 decision. Mr. Driggs motion for publication was granted on May 5, 2016. Copies of these have already been provided, and are referenced back to in order to save trees.

III. ISSUES PRESENTED REVIEW

Mr. Driggs adds no new issues for review. Mr. Driggs disagrees with how Dr. Howlett framed the issues in motion for discretionary review, and contends the Court of Appeals better framed the issues.

IV. STATEMENT OF THE CASE

1. General Nature of the Case and Claims

This is a reply to Dr. Howlett's motion for discretionary review.

V. ARGUMENT AND AUTHORITIES

Dr. Howlett's brief does a very cursory review of the requirements of RAP 13.4(d), and then goes forward to reargue their appeal case without actually explaining how the elements of RAP 13.4(d) are met. *Howlett Brief p. 2.* Dr. Howlett's brief only names two reasons for granting their requested review, (1) claims that the *Driggs* appellate court conflicted with the Supreme Court's rulings, and (2) this is an important public interest. The crux of Dr. Howlett's brief is basically a re-argument of the case as they did to the court of appeals. Neither basis for review is correct, and based on the *Driggs* appellate court's agreement with the Supreme Court, as shown below, Mr. Driggs requests review be denied.

1) The decision of the Court of Appeals is not in conflict with a decision of the Supreme Court.

This opinion is consistent with prior Supreme Court decisions. The appellate court held that the three trial court rulings were errors of law. Each of these errors of law (a) expert testimony to the standard of care, (b) causation testimony and (c) testimony on the materiality of the risk do not conflict with Supreme Court decisions. The Driggs appellate court found (d) harmful error was committed in these errors of law. As shown beneath, all of this comports with previous rulings by the Supreme Court.

a. Standard for expert testimony in Washington

The key holding by the appellate court here is that an expert can rely on the opinions of another expert when formulating opinions. Op. p. 26. ER 703, and other cases cited by the appellate court approve of one expert relying on another expert. *State v. Russell*, 125 Wn.2d 24, 69 (1994)(Experts rely on data collected by others in crime reports); *Deep Water Brewing LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 271

(2009)(Appraisal expert relies on the work of another appraiser); *Volk v. Demeerleer*, 184 Wn. App. 389, 430-431(Expert psychologist relies on contacting a state psychologist for standard of care in Washington.). Dr. Howlett produces no Supreme Court authority that the Court of Appeals conflicts with in this matter, but instead relies on a conflict with Mr. Tegland's treatise in the *Washington Practice: Evidence Law and Practice*. Howlett's Brief p. 9 fn. 2.

The appellate court decision actually analyzes three appellate court decisions, *Hill v. Sacred Heart Medical Center*, 143 Wn. App. 438 (2008), *Winkler v. Giddings*, 146 Wn. App. 387 (2008) and *Ebler v. Larson*, 142 Wn. App. 243 (2007) that looked at the very same issue. The appellate court found this matter as most similar to *Hill*, and distinguished *Winkler*, in particular because another physician testified that Washington followed the national standard of care and no evidence contradicted that. Op. p. 28. In contrast, Dr. Howlett's main arguments are in regards to *Winkler*, an appellate court decision that the Driggs appellate court distinguished. There is no showing of any grounds for review under RAP 13.4(d)(1) of a conflict with the Supreme Court.

The only possible conflict with the Supreme Court was in the underlying brief to the appellate court Dr. Howlett brought up the holding of *McKee v. American Home Products Corp*, 113 Wn.2d 701, 706-07

(1989) as holding that a physician cannot rely on another expert to establish that Washington follows the national standard of care. Op. p.25 The appellate court distinguished that case as being factually different than this one. The *McKee* court stated that a physician from Arizona did not establish the standard of care of a pharmacist in Washington. Key to note is that the *McKee* court relied on the requirement that an expert from that field must establish the standard of care, not an expert in another the field. Since in this matter it was a physician testifying that Washington followed the national standard of care in that field, another physician was allowed to testify to the national standard of care. This did not conflict with *McKee*, but instead is well within ER 703 as laid out by the Supreme Court's rule making authority.

b. Causation testimony should look at the entire record

The appellate court's decision is that expert testimony must be based on a reasonable degree of medical certainty, but much like causation testimony, there is no requirement the exert utter certain talismanic words. Op. 31. This is in line with *Reese v. Stroh*, 128 Wn.2d 300, 305-306, 309 (1995), which stated that statistics were not required in causation

testimony, only the requirements of ER 702 and reasonable medical certainty.

The appellate court rightly notes it is safer to get a "yes" to the words on medical certainty, but the trial court must look to the whole substance of testimony rather than the form. The appellate court notes that the substance of Dr. Menendez's testimony is based on his medical expertise, education and experience rather than speculation or conjecture. The appellate court relied on *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163 (1991) to hold that function prevails over form when evaluating the testimony of a witness. Op. p. 32. Mr. Driggs believes that the Supreme Courts rules and opinions prefer substance to form and talismanic words.

Dr. Howlett's brief on this at best argues a conflict with the case *McLaughlin v. Cooke*, 112 Wn.2d 826, 836 (1989). However, *McLaughlin* does not require magical words of causation. *McLaughlin* says that for standard of care testimony, it must be based on a reasonable degree of medical certainty. *Id.* The appellate court did not disagree with this, but rather looked at *White's* ruling that the proof of a reasonable degree of medical certainty comes from viewing the testimony as a whole and not magical words.

Key here is that the *McLaughlin* Court was looking at the sufficiency of evidence to support a jury verdict and jury instructions. The *McLaughlin* court encouraged a holistic view of the evidence rather than a narrow view as can be seen by its statement:

> "It is not always necessary to prove every element of causation by medical testimony. If, from the facts and circumstances and the medical testimony given, a reasonable person can infer that the causal connection exists, the evidence is sufficient." *Id.* at 837.

The Supreme Court in *Reese* and *McLaughlin* favored the substance of testimony, to some kind of magical words or statistics. This supports the appellate court's ruling in *White* that no magical words were required for standard of care testimony, but rather the trial court must look at the substance of the testimony. Here the *Driggs* appellate court has followed this arc of our law by requiring the trial court to look at the substance of Dr. Menendez's testimony in order to rule on whether or not the testimony was based on a reasonable degree of medical certainty. This does not conflict with the Supreme Court.

c. Testimony on materiality of the risk

Dr. Menendez was stopped from testifying to the materiality of the risk because he did not provide statistics or probability. The Supreme

Court decision in *Reese* is very clear that statistics are not necessary for causation testimony, but rather the standards of ER 702. *Reese*, 128 Wn.2d at 309. There is no reason that should not apply to materiality of the risk testimony as well.

The appellate court looked deeper at this matter, noting that the purpose of expert testimony is to equip the jury to place themselves in the position of a patient and decide whether, under the circumstances the patient should have been told of the risk. Op. p. 36. The *Driggs* appellate court found that the trial court did not give its basis for striking Dr. Menendez on this matter, but under ER 702 Dr. Menendez was clearly qualified and would have provided helpful information for the jury. Based on the purpose of expert testimony stated in *Smith v. Shannon*, 100 Wn.2d 26, 32 (1983) and ER 702 this well comports with the Supreme Court's rulings and enacted evidence rules.

Dr. Howlett's brief takes issue with the fact that the appellate court looked at ER 702 as its standard rather than *Smith v. Shannon*, 100 Wn.2d 26 (1983). What Dr. Howlett fails to appreciate, is that the evidence rules have been laid out by the Supreme Court and Dr. Howlett's testimony had to be evaluated under ER 702. The only basis for striking an expert under another rule, would be to strike the entire claim under CR 50 or CR 56, both of which were not followed in this matter. In a CR 50 or a CR 56

motion, the sufficiency of evidence under *Smith* would be appropriate to review, under ER 703 it is the qualifications of the expert and whether or not the evidence is helpful to the jury like the appellate court did here.

Dr. Howlett's brief incorrectly brings forward *O'Donahue v. Riggs*, 73 Wn.2d 814 (1968), as the conflict with the Supreme Court for testimony on material risk. *O'Donahue* looks at an expert who is asked to testify to medical causation after only one medical visit. In that case the expert states that he did not do enough testing to give a sound opinion, and the *O'Donahue* court concludes that this means he should not be able to give an opinion. *Id.* at 821. This corresponds with the ER 702 analysis that admits expert testimony if it will be helpful to the jury in understanding matters outside the competence of a layperson, but keeps it out if it is not helpful because it is inaccurate. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600-601(2011).

The appellate court looked at the testimony of Dr. Menendez and found it showed a sufficient basis to be expert testimony. In particular the *Driggs* appellate court found the trial court's reason for excluding Dr. Menendez was based on an error of law that Dr. Menenedez should provide a percentage to the risk in order to help the jury. Op. p.44. The *Driggs* appellate court found the language "more likely" to be helpful to a jury, and it was an error of law to require a statistic or calculated

probability. *Id.* This coincides with the Supreme Court in *Reese* rather than posing the conflict Dr. Howlett alleges.

d. The appellate court did not conflict with the Supreme Court on finding this to be harmful error

"A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." *Anfison v. FedEx Ground Package System, Inc.*, 159 Wn. App 35, 44, 244 P.3d 32 (2010), affirmed 174 Wn.2d 851 (2012). This is the standard the *Driggs* appellate court used to assess whether or not the striking of Dr. Menendez was harmless. Op. p 30. The Drigg's appellate court noted that cumulative evidence is often harmless, but found the following reasons for the striking of Dr. Menendez to be harmful here:

i. The excluded opinions of Dr. Menendez probed the central issues in this case;

ii. The jury garnered the misimpression that Dr. Menendez lacked key opinions on these key issues;

iii. Dr. Howlett attacked the credentials of the other expert Dr. Graboff, which Dr. Menendez's credentials would not have been subject too. Op. p. 31.

The appellate court noted that none of the reported decisions concerned these three factors, and the appellate court found them to meet the standard of affecting the outcome of the case. Op. p. 32. This meets with the Supreme Court's view that striking of a witness is so harmful to a case that it is considered an extreme sanction. *Blair v. Ta-Seattle East No.* 176, 171 Wn.2d 342, 348, 254 P.3d 797 (2011).

An illuminating finding for harmless for cumulative evidence is in *Jones v. City of Seattle*, 179 Wn.2d 322, where the cumulative testimony was either not relevant or it was "cumulative and largely undisputed." Here we have an expert struck based on an abuse of discretion, and testimony that is heavily disputed and goes to the heart of the case. This clearly shows harmful error in line with our Supreme Court holdings. Dr. Howlett, however, incorrectly argues that the appellate court was wrong to look at its closing argument to find harmful error. Howlett brief p. 17-18.

Looking at the closing arguments to find harmful error is actually approved by the Supreme Court's previous holdings. In the Supreme Court's holding of *Anfinson*, the Supreme Court looked solely to the closing arguments of counsel to find a misstated jury instruction was harmful error. *Anfinson v. FedEx Ground Package Systems, Inc.*, 174 Wn.2d 851, 876, 281 P.3d 289 (2012). The *Anfinson* court noted that the closing argument took a latent defect of the jury instruction, and turned it

into harmful error. While Dr. Howllett "unaware of any authority supporting the proposition that an appellate court can dissect counsel's closing argument to determine whether error in excluding evidence is harmless,"[1] it is clear in *Anfison* that such appellate court actions are approved by the Supreme Court. The appellate decision of *Anfison* was the *Drigg's* appellate court's basis standard of harmless error, and a review of the Supreme Court's upholding of *Anfison* shows that looking at the closing argument is not only allowed but encouraged.

Dr. Howllett raises a second issue, that Mr. Driggs did not object during the closing argument to the harmful arguments. This violates the Supreme Court's statements in *Anfison* that the objection is required when the error occurs, and not when it becomes harmful. *Id.* at 876. It is also not a cure to harmful error created in a closing statement to argue the other side could have argued the opposite. *Id.*

As noted by the Supreme Court in *Anfinson*, what could be a harmless error becomes harmful when one party actively argues the error in a closing statement. *Id.* The appellate court here aligned with the Supreme Court in this matter as can be seen by the Supreme Court's holding in *Anfinson.*

[1] Howllet's brief p. 17-18

2. Dr. Howllett provides no argument on how this opinion involves issues of substantial public interest

Dr. Howllett has shown no basis for the appellate court here overturning "established standards." Dr. Howllett also fails to do anything but a conclusory statement of this affecting the public interest. Because of this Mr. Driggs has no response, because arguing conclusory statements only wastes this Court's time.

Conclusion

Because the appellate court produced a well-reasoned and correct result that does not warrant review by the Supreme Court under RAP 13.4(b) we ask that review be denied.

Dated this 6 day of July, 2016

Marshall Casey, WSBA# 42552
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Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 6th day of July, 2016, I cause a true and correct copy of the foregoing document to be delivered in the manner indicated below to the following counsels of record:

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Dated this on 6th of July, 2016.

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