93128-3

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

REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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Dr. Howlett submits the following Reply to Driggs' response to Dr. Howlett's Petition for Review.

1. The Court of Appeals' determination that Dr. Graboff established an adequate foundation for Dr. Menendez' testimony on the Standard of Care.

Driggs asserts the "key holding" of the Court of Appeals was that an expert, under ER 703, can rely on the opinions of another expert when formulating opinions. That is certainly true, if the requirements of ER 703 are met. But ER 703 speaks to "facts or data" upon which an expert bases an opinion, not the issue of expert witness qualification. The rule also requires that the "facts or data" upon which the expert bases his/her opinion be those "perceived by or made known to the expert at or before the hearing." In the instant case, Dr. Graboff's testimony on a purported national standard of care was not perceived by or made known to Dr. Menendez at or before the hearing. And Dr. Menendez never testified that he relied on Dr. Graboff's testimony in any way, shape or form.

Driggs next endorses the Court of Appeals' reliance on *Hill v. Sacred Heart Medical Center,* 143 Wn. App. 438 (2008). There, in opposition to a summary judgment motion, the plaintiff submitted affidavits from two expert witnesses. One testified there was a national standard of care for the treatment at issue. The second physician was educated at the University of Washington

Medical School and testified that she knew the Washington standard of care paralleled the national standard. The *Hill* court did rely on the testimony of both physicians when reversing summary judgment. However, the standard of review there was different (de novo as opposed to abuse of discretion), and the Court never directly addressed whether, at trial, an expert witness must testify the standard of care in Washington and his personal familiarity with that standard.

2. Adequacy of Causation Testimony

Driggs contends *McLaughlin v. Cook*, 112 Wn.2d 826 (1989) does not require an expert to testify that his/her opinion is based on a reasonable degree of medical certainty. Instead, Driggs argues that "reasonable degree of medical certainty" is simply a test for the overall reliability of the expert's testimony. But Driggs offers no authority supporting that interpretation of *McLaughlin*. Essentially, Driggs proposes that "reasonable degree of medical certainty" be eliminated as a foundational requirement for expert testimony and that, instead, trial courts, presumably at the conclusion of the expert's testimony, look to the entirety of the expert's testimony to see if it passes muster. But this is a completely unworkable standard. In every case it would place the trial court in the position of having to weight the expert's testimony

to see if it was sufficient to withstand a CR 50 motion. That is clearly not what *McLaughlin* envisions.

Driggs also endorses the Court of Appeals' reliance on *White v. Kent Medical Center Inc.*, 621 Wn. App. 163 (1991). The Court of Appeals cited this case for the proposition that form should not prevail over substance. But *White* was a summary judgment case, where the Court of Appeals held that the affidavit testimony of two doctors that a vocal cord examination was required for a patient with a four to six week history of hoarseness was enough to defeat summary judgment even though neither physician testified that the Defendant violated the standard of care. Because of the summary judgment standard of review, where all reasonable inferences from the evidence are construed in favor of the non-moving party, this result is understandable. However, trial an expert witness is required to testify in terms of the standard of care. That is made plain by RCW 7.70.040.

3. Adequacy of Testimony of Materiality of Risk

Here, Driggs argues that statistics need not be part of an experts' testimony on causation. That may be true. However, again, *Smith v. Shannon* makes it very clear that, to make out a *prima face* case of informed consent, the Plaintiff produce expert testimony on both the nature of the risk and the likelihood of its occurrence. Dr. Howlett agrees that "likelihood of

occurrence" need not be expressed in terms of statistics. However, the jury must be provided with some meaningful testimony on the likelihood of the risks' occurrence see e.g. General statements about a particular risk being "bad" or "serious" do not satisfy *Smith. Seybold v. Neu*, 105 Wn. App. 666, 682, 19 P.3d 1068 (2001); *Mason v. Ellsworth*, 3 Wn. App. 398, 474 P.2d 909 (1970); *Ruffer v. St. Francis Cabrini Hospital of Seattle*, 56 Wn. App. 625, 784 P.2d 1288 (1990).

Driggs correctly points out that Dr. Howlett takes issue with the appellate court's reliance on ER 702 rather than *Smith v. Shannon,* 100 Wn.2d 26 (1983). What Driggs, and apparently the Court of Appeals would do is interpret the "likelihood of occurrence" requirement of *Smith* out of existence, substituting some amorphous standard under ER 702 of helpfulness to the trier of fact. But as emphasized by Dr. Howlett in his Petition, expert testimony that lacks foundation does not provide useful guidance to the jury, nor does it provide a factual foundation for the jury to evaluate the issue it must decide.

4. Harmless Error

Driggs asserts an examination of closing argument to define harmful error has been "approved" by the Supreme Court. (Response brief, page 11). The only support for this statement offered by Driggs is *Anfinson v. FedEx*

Ground Package Systems Inc., 174 Wn.2d 851, 281 P.3d 289 (2012). There, defense counsel, during closing argument, took advantage of an ambiguity in a jury instruction and, "actively encouraged the jury to apply an erroneous legal standard." *Anfinson, supra,* 174 Wn.2d at 876. That is a far cry from what happened here, where counsel for Dr. Howlett simply challenged the qualifications of one of Driggs' experts.

Driggs characterizes *Jones v. City of Seattle,* 179 Wn.2d 322 (2013) as "[a]n illuminating finding for harmless for cumulative evidence..." Response brief at page 11. In that case, the trial court excluded three defense witnesses because they were not disclosed until after trial had commenced. The Supreme Court held that the trial court erred by not conducting a *Burnet* analysis before excluding the witnesses. But in holding that the *Burnet* violation was harmless, the Court stated:

> The Burnet violations at issue in this case were harmless. First, much of the excluded testimony was irrelevant or unfairly prejudicial. As the trial judge stated, most of the testimony that Powell, Gordon, and Winquist would have provided related to Marks' alcohol consumption. The trial judge excluded testimony on that subject – without regard to its source – as irrelevant and unduly prejudicial. The City did not challenge that ruling in its appeal to this Court. Exclusion of the purely alcohol-related testimony offered by Powell, Gordon, or Winquist is thus necessarily harmless.
>
> To be sure, Powell's deposition and declarations by all three excluded witnesses also addressed subjects other than alcohol. As explained below, however, testimony on those other

> subjects was elicited from other witnesses at trial. Therefore, the non-alcohol-related evidence that the three excluded witnesses would have given was cumulative.

The court then went on to describe that the testimony the excluded witnesses would have provided related to the Plaintiff's physical capabilities and activities after the accident. The Court characterized this as cumulative, stating:

> The vast majority of this testimony was cumulative and largely undisputed. When Mark took the stand on September 29, he clearly stated that he did chores and carried equipment at his sisters (Tammy) house, went on outings with his young son, went hunting and fishing, and drove himself to Montana. On cross examination, Mark testified that when he drove, he did not 'have any trouble with the walking [that he exhibited in Court].' 12-ARP (September 29, 2009) at 134.

He also testified that since his accident, he had "had a lot of girl[friends]." *Id.* at 135. Essentially, the Plaintiff, during trial testimony, admitted that he engaged in the activities the excluded witnesses would have testified about. In the end, the Court stated:

> "An erroneous exclusion of evidence is harmless where that evidence is merely cumulative. *Holmes v. Raffo*, 60 Wash.2d 421, 424, 374 P.2d 536 (1962). Here, either Mark or Greg testified that Mark had performed virtually every specific activity cited by the excluded witnesses as evidence that Mark was exaggerating his disabilities. Thus, the jury was already well aware of Mark's ability to hunt, fish, camp, date, drive, do chores, send text messages, and go on outings with his son. For this reason, we hold that the portion of the erroneously excluded evidence that was not irrelevant was instead cumulative and its exclusion was therefore harmless."

179 Wn.2d at 360.

Here, Dr. Menendez's testimony was purely cumulative, and as was the case in *Jones* the evidence existed elsewhere in the record and was presented to the jury.

5. The Court of Appeals' Decision Conflicts With *Smith v. Shannon.*

Finally, Plaintiff argues that review should be denied because this case does not involve a matter of public importance. First, this matter is important, as the Court of Appeals' decision has confused the *Smith v. Shannon* standard for informed consent cases. Trial courts will undoubtedly be misled. Likewise, physicians will not have adequate guidance to determine when a patient must be informed of a risk. That is, when the risk is deemed "material." Obviously, it is not possible to inform a patient of *all* risks. *Smith* resolved this problem with the materiality standard.

Second, the absence of public interest alone is not dispositive. Rather, it is a factor this Court may consider in determining whether to exercise its authority to grant review.

Finally, another consideration, found under RAP 13.4(b)(1) is squarely in favor of granting review. That is: "If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court." In this case, as

set forth, *supra,* the Court of Appeals' decision conflicts with *Smith v. Shannon.*

DATED this 21st day of July, 2016.

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 21 day of July, 2016, the foregoing PETITION FOR REVIEW was delivered to the following persons in the manner indicated:

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Subject: Reply Brief in Support of Petition for Review

Clerk;

Please find attached the *Reply Brief in Support of Petition for Review* in the Driggs v. Howlett, et al. case # III-323811. If there are any questions please contact me, thank you for your attention to this matter.

Sincerely,

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