DIVISION II CAUSE NO. 44388-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KEVIN ANDERSON,

Plaintiff/Appellant,

v.

CHARLES HAMON, M.D.,

Defendants/Respondents,

2013 SEP 23 AM 11:23
STATE OF WASHINGTON
BY DEPUTY
COURT OF APPEALS
DIVISION II

REPLY BRIEF OF APPELLANT

Kevin Anderson, Appellant

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I. **INTRODUCTION**

The fundamental question before the jury was whether Defendant Hamon failed to diagnose Kevin Anderson's illness one day before he needed emergency brain surgery. Defendant has offered this Court a number of excuses as to why Kevin Anderson's past alleged drug use was admissible at trial. However, each of these excuses crumbles under its own weight when simple logic is applied.

Plaintiff's past drug use has absolutely no logical connection to contributory fault, or causation. First, there was not a single shred of evidence offered at trial that Kevin Anderson took any illicit drugs after Dr. Hamon examined him on May 11, 2006. Any evidence of drug use prior to being examined by Dr. Hamon is completely and utterly irrelevant in a failure to diagnose case. Second, as to causation, if Kevin Anderson used drugs in the days, weeks, months or years prior to meeting Defendant Hamon, it would have no bearing upon the issue of causation. Obviously, Plaintiff has never alleged that Dr. Hamon caused Kevin Anderson's brain abscess, but that he failed to recognize a medical emergency when Kevin Anderson presented himself under extreme medical duress.

Whether the brain abscess was caused by drugs, the common cold or some other unknown etiology is immaterial as to whether Dr. Hamon failed to diagnose Kevin Anderson properly. This is the fundamental flaw in the Defendant's appellate analysis, and the Court's erroneous decision to admit this extremely prejudicial information at trial.

Ultimately, "[t]here must be a logical nexus between the evidence and the fact to be established." State v. Cochran, 102 Wn. App. 480, 486, 8 P.3d 313, 316-17 (2000). Simply put, drug use had no logical nexus to any fact or issue that had to be established at trial – by Plaintiff or Defendant. Consequently, the trial court manifestly abused its discretion when it permitted the Defendant to introduce this inflammatory evidence. No reasonable person can conclude that portraying Kevin Anderson as a cocaine and methamphetamine addict did not adversely affect this case. Justice requires a new trial.

II. ARGUMENT

A. Alleged Cocaine & Methamphetamine Use Has Absolutely Nothing to Do with Dr. Hamon's Failure to Diagnose Kevin Anderson's Brain Abscess.

The foundation of this appeal is relevance. Both parties agree that there must be a "logical nexus" between the evidence and the fact to be established at trial. See State v. Burkins, 94 Wn. App. 677, 692, 973 P.2d 15, *review denied,* 138 Wn.2d 1014, 989 P.2d 1142 (1999); see also State v. Cochran, 102 Wn. App. 480, 486, 8 P.3d 313, 316-17 (2000). Nevertheless, Defendant argues that Plaintiff's alleged drug use was relevant to either contributory fault or causation. Even a cursory analysis of Defendant's arguments establishes that these arguments fail.

(1) Contributory Negligence

Defendant Hamon's assertion that drug usage is related to comparative fault is nonsensical. The only way that drug use could logically

be related to Plaintiff's claims for malpractice would be if there was evidence that Kevin Anderson used drugs AFTER he was examined by Dr. Hamon and before he lapsed into a coma. There is not a shred of evidence to support any drug use of this type. Both the medical records and Dr. Michael Kovar establish that Kevin Anderson did not test positive for the presence of drugs at Harborview Medical Center. See Trial Transcript of Michael Kovar at pp. 54-57, dated November 19, 2012.

The folly of Defendant's argument with respect to contributory negligence can be seen by analogy. For example, if Defendant's argument had merit than it would be proper for a defendant to argue that an obese person is contributorily negligent for overeating in a case where a surgeon botched a gastric bypass surgery. Another example would be to permit a defendant to introduce a plaintiff's sexual habits in the context of a case involving failure to diagnose an underlying medical condition in an AIDS patient. These two represent an almost inexhaustible supply of analogies to illustrate the sophistry in Defendant's arguments to support the notion that Plaintiff's past illicit drug use was somehow relevant at trial.

Overall, whether Kevin Anderson was negligent or reckless in contracting his own brain abscess is completely immaterial as to whether Dr. Hamon committed medical malpractice by failing to diagnose the condition. Logic mandates that Kevin Anderson's drug use was irrelevant and contributory negligence cannot provide Defendant with sanctuary for

the erroneous introduction of this extremely prejudicial testimony before the jury.

(2) Causation

Defendant also argues that Kevin Anderson's drug usage was relevant based upon causation. Defendant cites the testimony of Dr. Michael Kovar to support his argument.[1] Defendant either misapprehends his own argument or is attempting to confuse this Court. There is absolutely no relevance as to how the actual brain abscess was caused in connection with Dr. Hamon's failure to diagnose it.

Whether Kevin Anderson's brain abscess was caused by the common cold, a virus, a congenital condition, or drugs is completely irrelevant to Plaintiff's failure to diagnose claim or causation. The question for the jury is not how the brain abscess was formed but rather whether Dr. Hamon should have recognized the emergent nature of this medical problem.

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[1] In his appellate brief, Defendant goes to great lengths to leave this Court with the impression that there are numerous independent medical records of Kevin Anderson's "daily cocaine habit" and methamphetamine use. At trial, Dr. Michael Kovar (Defendant's expert) conceded that all of the references to Kevin Anderson's daily cocaine habit originated from one medical record. The original source of this medical record was an "anonymous friend." See Trial Testimony of Dr. Michael Kovar at Page 65, lines 7-17.

(3) Prejudice

No reasonable doubt exists that our society is prejudiced against illicit drug users; perhaps for good reason. Nevertheless, not only are illicit drug users criminals by definition, but society often associates many nefarious, insidious, and pejorative concepts with illicit drug use. There are few issues in our community and society today that provoke more negative emotional reactions than illicit drugs.

Evidence Rule 403 is designed exactly with this type of evidence in mind. As discussed earlier in this brief, the introduction of Kevin Anderson's purported use of drugs earlier in his life provided the Defendant with an irresistible opportunity to impugn his character. The problem, however, as analyzed above, is that Kevin Anderson's unspecified use of recreational drugs in his past had little, if any, bearing on the issues before the jury.

Even if the Court disagrees with Plaintiff's argument on the relevance of Kevin Anderson's past drug use, there can be no reasonable debate that this evidence was extremely prejudicial. At a minimum, ER 403 required the Court to exclude this evidence from being offered at trial. Whatever minimal probative value this Court might, or might not, ascribe to this evidence, it is literally swallowed up by the massive prejudice that this type of evidence evokes.

In Washington, appellate courts have repeatedly recognized the extreme danger of admitting evidence of drug use at trial: "In view of

society's deep concern today with drug usage and its consequent condemnation by many if not most, evidence of drug addiction is necessarily prejudicial in the minds of the average juror." State v. Renneberg, 83 Wn.2d 735, 737, 522 P.2d 835, 836 (1974). "Evidence of drug use on other occasions, or of drug addiction, is generally inadmissible on the ground that it is impermissibly prejudicial. State v. Tigano, 63 Wn. App. 336, 344-45, 818 P.2d 1369, 1374 (1991). "The drug evidence was also highly prejudicial. Evidence of drug use on other occasions ... is generally inadmissible on the ground that it is impermissibly prejudicial. The prejudice was particularly significant here because the evidence tended to negate an element of Stockton's defense. As such, it should have been excluded under ER 403." State v. Stockton, 91 Wn. App. 35, 42, 955 P.2d 805, 809 (1998).

Overall, introducing evidence of drug use is fraught with peril at trial. In this case, Kevin Anderson's past use of cocaine and methamphetamine was completely unrelated to his claims of medical malpractice. Because there was extremely little, if any, probative value offered by this evidence, the Court manifestly abused its discretion by permitting the defense to paint Kevin Anderson as a drug addict.

(4) Harmless Error

Defendant Hamon asserts that even if the trial court erred it was nothing more than mere harmless error. A harmless error is one "which is trivial, formal, or merely academic and which in no way affects the

outcome of the case." State v. Gonzales, 90 Wn. App. 852, 855, 954 P.2d 360 (1998); see also Crittenden v. Fibreboard Corp., 58 Wn. App. 649, 659, 794 P.2d 554 (1990).

Defendant fought long and hard to label Kevin Anderson a drug addict. Defendant was not satisfied with general references to Kevin Anderson's past use of cocaine and methamphetamine. Rather, defense counsel insisted that the jury hear that Kevin Anderson was a "daily user of cocaine." See Trial Excerpt of November 19, 2012 at pp. 5-6 (attached as Addendum A). Even though the source of this phrase was never identified, other than an "anonymous friend", the trial court permitted the jury to learn that Kevin Anderson purportedly had a daily cocaine habit. In other words, Kevin Anderson was an incorrigible drug addict. And of course, a liar as well, because he denied that he ever had a daily cocaine habit during his testimony. But, of course, Kevin Anderson could not confront his accuser at trial – because his accuser was his "anonymous friend."

No rational explanation exists that could ever reconcile the jury's learning of Kevin Anderson's disgusting and vile drug habits with the idea that this somehow did not affect the outcome of the case. Defendant, of course, insists that because this only relates to contributory fault or causation, the jury never used this evidence against Kevin Anderson because it did not find negligence on the part of Defendant Hamon. This argument defies common sense, logic and reality.

Ultimately, the Washington Supreme Court has held: "where there is a risk of prejudice and 'no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.'" Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 673, 230 P.3d 583, 587 (2010) (quoting Thomas v. French, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983). As previously argued, this case arguably represents a far more egregious set of facts than the Washington Supreme Court confronted in Salas. The extremely egregious prejudicial nature of this case is illustrated by Defendant when even after submitting fifty pages of appellate briefing, the only linkage offered by the Defendant to support the introduction of Kevin Anderson's methamphetamine use was that meth is supposedly delivered "through the nose." This represents the Defendant's entire basis for declaring Kevin Anderson as a meth addict in front of the jury. This implicit concession by the Defendant is emblematic of Defendant's ulterior motives in getting this revolting and extremely prejudicial testimony before the jury.

B. Colloquy Between the Trial Court and Counsel Seeking to Preclude Dr. Kovar from Testifying during Trial.

On the seventh day of trial, on May 19, 2012, the time came for Defendant to call his one and only witness to provide testimony that Defendant repeatedly represented to the trial court would tie Kevin Anderson's drug use to the facts of the case. Before doing so, however, Plaintiff's counsel made another attempt to persuade the Court that Kevin

Anderson's drug use was irrelevant, extremely prejudicial, and altogether inadmissible at trial. The colloquy between the trial court and counsel is quite revealing. Rather than simply excerpt the record here in this brief, Plaintiff attaches the colloquy as Addendum A this Reply Brief.[2]

III. CONCLUSION

Notwithstanding Defendant's fifty pages of zealous advocacy, this appeal is neither complex nor novel. Instead, this appeal is based upon rudimentary principles of logic, which form the foundation of the Washington Rules of Evidence. Kevin Anderson's prior recreational drug use has absolutely no relationship as to whether Defendant Hamon failed to diagnose Kevin Anderson's medical emergency. The Court manifestly erred by allowing the Defendant to paint a picture of Kevin Anderson as a drug addict. Excluding this type of inflammatory character evidence is essential to providing each citizen with the right to a fair trial and an impartial jury. This case must be remanded to ensure that Kevin Anderson's right to justice is not corrupted by inflammatory ad hominem attacks.

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[2] After receiving Defendant's appellate brief, Plaintiff's counsel realized that part of the November 19, 2012 argument had apparently not been transcribed by the Court Reporter, Andrea Ramirez. Counsel for Plaintiff's then immediately ordered the missing portions of the trial transcript, which is attached hereto as Addendum A.

RESPECTFULLY SUBMITTED this 23rd day of September 2013.

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing Reply Brief of Appellant postage prepaid on the date written below to the attorneys for Respondent Hamon at the address listed below:

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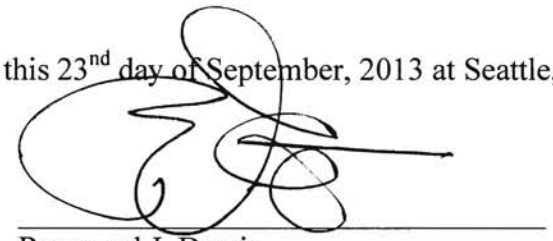
EXECUTED this 23nd day of September, 2013 at Seattle, Washington.



Raymond J. Dearie

2013 SEP 26 AM 11:28
STATE OF WASHINGTON
BY
DEPUTY

ADDENDUM A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KITSAP

KEVIN ANDERSON,	)	
Plaintiff,	)	
vs.	)	No. 10-2-00112-5
CHARLES HAMON, M.D.,	)	
Defendant.	)	

TRIAL - EXCERPT

Before the Honorable Sally F. Olsen

November 19, 2012
Port Orchard, Washington

APPEARANCES:

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Andrea Ramirez, RPR, CRR, CCR#2293
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1 P R O C E E D I N G S

2 * * *

3 MR. DEARIE: Next, I want to take this up before
4 we head down these roads. First of all, Plaintiff would
5 renew his continuing objection to the inclusion of
6 testimony about Kevin Anderson's drug habits. There's no
7 foundation for this. We know now, at this point, there's
8 an anonymous caller who says he's a daily user of cocaine.
9 That's hearsay. And even backing up from the hearsay
10 rules under ER 803, the fundamental question, is there an
11 indicia of reliability? Is there some substance to this
12 daily use cocaine habit? I'm not going to go into this
13 too long, because I know we've argued this a lot over the
14 past few months. But now the testimony is in. The only
15 evidence of daily cocaine use is from a hearsay statement
16 from an unknown witness, uncorroborated, no foundation.
17 So we don't think that their expert should be permitted to
18 talk about daily use of cocaine, part one.
19 Part two, if you were to provide and allow for
20 it, the testimony about cocaine needs to be confined to
21 that record, not speculation. So that's another part.
22 And we'll renew those objections as the Court inquires and
23 as we see appropriate.
24 The other thing I want to remind everyone here,
25 you have ruled that pills are out. And both of these

1 experts have testified, in their discovery deposition,
2 about pills. You have ruled in limine that's out. So I
3 think they need to -- their experts absolutely need to be
4 instructed on pills.
5 The other thing is marijuana. Marijuana is out.
6 However, as we know, Kevin Anderson, as I foresaw, blurted
7 out marijuana use, even though I instructed him on the
8 motions in limine. That happens in trial. Just blurting
9 out of marijuana, I didn't dwell on it. That does not
10 waive your motion in limine. That does not abrogate or
11 vitiate your order in limine preventing anyone from
12 talking about marijuana. It's irrelevant. Just as a lot
13 of times in trials insurance is blurted out, we don't then
14 say, Oh, now it's okay. We can talk about insurance.
15 That's not the way it's done. He blurted it out. We're
16 not going to emphasize it. We're not going to talk about
17 it. And therefore, their doctors need to be instructed
18 that, at the very least, pills are out. Marijuana is out.
19 And then I can get to this afternoon when
20 Dr. Kovar testifies. We'll have some more specifics. I
21 don't want to hold this up any more right now. But I
22 wanted to address those issues, as far as the drug issues
23 were concerned.
24 THE COURT: Response?
25 MR. McIVOR: Well, Your Honor, this issue was

1 argued extensively pretrial, and the Court has already
2 ruled, I thought, on the degree of admissibility of this.
3 All of the information put forth by Mr. Dearie this
4 morning was in the motions we argued earlier. Plaintiffs
5 moved no less than three times to have this evidence
6 excluded, and the Court made a specific ruling excluding
7 the marijuana and pain pill use but allowing the
8 remainder. And the documents we've prepared for trial
9 have -- we carefully redacted the pain pill and marijuana
10 use. I'm not interested in getting into marijuana because
11 of what Mr. Anderson may or may not have said on the stand
12 inadvertently.
13 THE COURT: Just so the record is clear, there
14 should be no mention or questioning of expert witnesses
15 about marijuana use or pills was the ruling.
16 MR. McIVOR: Right.
17 THE COURT: I am reviewing the Court's granting
18 regarding the drug use. Indicated the Defendant may,
19 however, present evidence of drug use as a cause of the
20 brain abscess. That was one of the motions.
21 I guess a question the Court has is,
22 Mr. Anderson got on the stand and admitted, according to
23 him, recreational use. So the only evidence of daily is
24 that anonymous phone call.
25 MR. McIVOR: That's true.

1 THE COURT: The Court also has some concerns --
2 I forgot the name of the witness. But Plaintiffs read one
3 of your witness' depositions, who indicated there was no
4 link -- I'm paraphrasing. But the issue of the drug use
5 came up. So I guess I need to know, do you intend to go,
6 with this witness and others -- I allowed use of the drug
7 use regarding the possible cause of the brain abscess.
8 But I'm a little concerned with the daily use.
9 Where do you intend to go with your witnesses
10 about cocaine use and the brain abscess?
11 MR. McIVOR: Well, Your Honor, this -- we laid
12 that out in the motion papers well before trial.
13 Dr. Kovar will testify, essentially, that daily cocaine
14 use would set up basically a continuing source of
15 inflammation, thereby, number one, setting up the
16 infection in the first place and, number two, hindering
17 its treatment and therefore allowing the infection to
18 continue, therefore allowing the infection to spread to
19 the brain.
20 THE COURT: And it's -- so from your
21 perspective, it's critical that it's the daily use, rather
22 than recreational use --
23 MR. McIVOR: Yes.
24 THE COURT: -- that Mr. Anderson has testified
25 to?

1 Do you have any other evidence to support the
2 fact that there was daily use, other than this anonymous
3 phone call?
4 MR. McIVOR: No.
5 THE COURT: Because as far as I can tell, that's
6 all there was.
7 MR. McIVOR: Well, there are several other
8 references in the Harborview records to it, yes. But the
9 direct evidence comes from this daily phone call. The
10 rest of it's in history. The source of the history is
11 unknown. One reference says the source of the history was
12 the girlfriend, which would be Jenny Ray.
13 THE COURT: I'll give you a chance to rebut.
14 MR. DEARIE: Yeah, I mean, this is our point. I
15 mean, ultimately, what is the basis, what is the
16 foundation for cocaine use of a daily nature? It's an
17 anonymous phone call. It's inherently unfair that this is
18 presented as the basis of these experts to come in and
19 testify he's basically a drug addict. This is basically
20 character assassination. So we say there's no foundation
21 to be able to assert that Kevin Anderson is a daily user
22 of cocaine when we can't cross examine the person who
23 supposedly provided that foundation, which is an anonymous
24 phone call. So its inherently unfair. And if they want
25 to say he has a history of cocaine, okay. But daily use,

1 that comes from pure hearsay. And I want to also add,
2 regardless of the Court's ruling on this, which we think
3 that now all the evidence has come in the Court can weigh
4 in on the admissibility anew. So that's part one.
5 Part two, the other thing is, I want all the
6 doctors -- I think they need to be instructed that they
7 can't testify, as was tried with Lynn Anderson, about this
8 hearsay conversation with a different, unknown doctor who
9 says, Yeah, I talked about, you know, with the parents
10 there might be a connection with cocaine and sinus
11 infections. There might be a connection. And then you've
12 sustained that objection on hearsay grounds several times.
13 So at a minimum they should be prevented from having these
14 experts come in and testify that, Oh, the parents talked
15 about it with this unknown doctor. That's another unknown
16 person that we can't cross examine. That, at a minimum,
17 as the Court has already ruled, should be excluded. And
18 these experts should not be permitted to come in here and
19 recite this hearsay conversation with an unknown doctor.
20 THE COURT: Well, hearsay is going to be
21 excluded, unless there's an exception to meet it. So I'm
22 going to have to wait, but you might want to just --
23 MR. McIVOR: I expect what Mr. Ray (sic) is
24 talking about is the parents' deposition testimony to this
25 conversation with the unknown doctor. I do not intend to

1 elicit any testimony regarding that.
2 THE COURT: As it relates to Dr. Kovar
3 testifying about the daily use, he's coming this
4 afternoon?
5 MR. McIVOR: Yes, he is, Your Honor. But can
6 I --
7 THE COURT: Are you planning to talk about daily
8 use through your witness this morning?
9 MR. McIVOR: No.
10 THE COURT: Okay. Because I just want to reread
11 my notes. But I have not changed my ruling previously on
12 motions in limine, and I'm not inclined to do so. But I
13 want to reread my rulings.
14 MR. McIVOR: I might point out, Your Honor, that
15 all of the arguments raised by Mr. Dearie, this was
16 briefed and argued extensively before trial. And we have
17 approached this trial relying on the Court's pretrial
18 rulings, which the Court never gave any indication that
19 they might be revisited and so -- wait a second. Can I
20 speak, please? And so we've approached this trial relying
21 on the Court's pretrial rulings on this issue, in terms of
22 our opening statement and particularly with respect to
23 Dr. Kovar.
24 THE COURT: And like I said, I have not -- it's
25 not my intention to. But I just want a little more time

1 to review the documents. It's highly unlikely I will
2 overrule a prior motion in limine ruling. But he
3 testifies this afternoon. Let me review my notes, and
4 I'll make a final decision at the break.
5 MR. DEARIE: Okay. Thank you, Your Honor.
6 (End of excerpt)
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2
3 C E R T I F I C A T E
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6 STATE OF WASHINGTON)
) ss.
7 COUNTY OF KITSAP)
8
9 I, Andrea Ramirez, an official court reporter
10 for Kitsap County Superior Court, do hereby certify that
11 the forgoing is a true and accurate transcript of the
12 proceedings, as taken by me on November 19, 2012, in the
13 matter of Kevin Anderson v. Charles Hamon.
14
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20 Andrea Ramirez, RPR, CRR, CCR #2293
Official Court Reporter
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