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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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TERESA HARBOTTLE, individually and as  
Personal Representative of the Estate of  
JOHN F. HARBOTTLE, III, deceased,

Appellant,

v.

KEVIN E. BRAUN, M.D. and JANE DOE BRAUN,  
and their marital community,

Respondents.

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REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Dr. Kevin E. Braun (“Dr. Braun”) demonstrates in his responsive brief that the trial court erred, and a new trial should be granted in this case. He misrepresents the law in Washington on informed consent claims under RCW 7.70.050(1), while simultaneously admitting that controlling precedent should have allowed Teresa Harbottle and the Estate of John Harbottle III’s (“Estate”) informed consent claim to go forward.

Dr. Braun also shows that the trial court erred in excluding the fact that he was dishonest in his discovery responses relating to his departure from his former employer over investigations of his sexual misconduct. Dr. Braun chooses to focus on a hypothetical perjury defense, rather than the civil rules and rules of evidence, which deem his dishonest responses relevant and admissible to impeach his credibility.

These errors severely prejudiced the Estate. A new trial is warranted.

B. REPLY ON STATEMENT OF THE CASE

Dr. Braun makes several material misstatements of the facts and presents contested facts as verities in his brief. Perhaps most notably, Dr. Braun claims that Harbottle died of an “irregular heart rhythm” that was “likely genetic” and “untreatable.” Braun br. at 6-7. Dr. Braun cites his own trial brief as factual support for this assertion. *Id.* (citing CP 1077-

78).

In truth, Harbottle died of atherosclerotic heart disease, as evidenced by the official autopsy performed days after his untimely death. CP 398. The autopsy showed that he suffered from “severe atherosclerotic occlusion (blockage) of three major coronary arteries” as well as “mild aortic valve atherosclerosis” and an enlarged heart. CP 395-97. The Estate’s expert testified that these conditions occur over time and were almost certainly present when Dr. Braun first treated Harbottle for chest pains and other symptoms of heart disease 11 months before his death. CP 334.<sup>1</sup> Tragically, Dr. Braun treated Harbottle’s chest pains with heartburn medication, and never informed him of the seriousness of his symptoms or the risk he took in pursuing this treatment without seeing a cardiologist.

Dr. Braun’s other major misstatements of the facts are discussed in greater detail below.

### C. ARGUMENT

#### (1) The Trial Court Erred in Dismissing the Informed Consent Claim

The trial court erred in dismissing the informed consent claim where Dr. Braun was aware of coronary disease as an explanation for

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<sup>1</sup> The jury was not asked to make a finding regarding the cause of death. CP 1359-60. Thus, Dr. Braun’s assertion that he died of an irregular heart rhythm in direction contradiction to the autopsy results is merely an opinion statement of his expert who formed this opinion over four years after Harbottle’s death. CP 357-58.

Harbottle's symptoms and Dr. Braun was obligated to inform him of the material risks of the chosen treatment. Dr. Braun's attempts to justify the dismissal fail.

(a) Dismissal Was Inappropriate Where Harbottle's Heart Condition Was Known

Dr. Braun cites a list of cases for the proposition that an informed consent claim is properly dismissed when a physician fails to discuss treatment options for an "unknown disease." Braun br. at 19-25 (citing *e.g., Burnet v. Spokane Ambulance*, 54 Wn. App. 162, 169, 772 P.2d 1027, *review denied*, 113 Wn.2d 1005 (1989) (physician treating child for seizure disorder was unaware cerebral edema that had formed over the course of a few days while the patient was in the hospital); *Bays v. St. Lukes Hosp.*, 63 Wn. App. 876, 878, 825 P.2d 319, *review denied*, 119 Wn.2d 1008 (1992) (physician treating patient for broken back was unaware of sudden "full blown...pulmonary embolism" that rapidly developed while he was in the hospital). These authorities have no bearing on the case where Harbottle's heart problems were known to Dr. Braun.

Harbottle saw Dr. Braun in June 2011, after he experienced two months of chest pains and shortness of breath. CP 59, 263. Harbottle was over 50 years old, male, and had a history of elevated lipids in his blood,

all risk factors for heart disease. CP 291, 320. He underwent an EKG which showed a “partial or complete right bundle branch block and possibly some right heart, right ventricular hypertrophy.”<sup>2</sup> CP 323. Dr. Braun determined that he should have a stress test on a treadmill to further investigate his heart condition and referred him to a cardiologist. CP 264. When Harbottle did not complete the stress test, Dr. Braun never followed up or discussed the importance of getting that test, even when Harbottle continued to complain of shortness of breath upon exertion nine months later. CP 266-70, 74. An autopsy would later show that he suffered from “severe atherosclerotic occlusion (blockage) of three major coronary arteries.” CP 397. An expert testified that these occlusions were likely present at the time Harbottle first saw Dr. Braun in June 2011. CP 334.

This is not a case of an unknown condition. Dr. Braun determined that Harbottle needed to see a cardiologist, then dropped that course of treatment after Harbottle responded to heartburn medication without informing him of the risks involved. Even as his heart symptoms persisted just months before his death, Dr. Braun failed to inform Harbottle of the risks involved with not seeing a cardiologist and instead offered him asthma medicine. CP 331-32. Harbottle should have been informed of the

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<sup>2</sup> Hypertrophy means organ enlargement. As stated above, Harbottle’s autopsy showed he had an enlarged heart. CP 397. The Estate’s expert, Dr. Howard Miller, opined that the hypertrophy shown in the EKG was another reason why the stress test was so important. CP 323.

risks associated in pursuing these treatment plans, as opposed to following through with the cardiological assessments.<sup>3</sup>

This case is also distinguishable from the cases cited by Dr. Braun because his symptoms presented over the course of many months and were not some hidden or sudden event as was the case in *Burnet* and *Bays*, *supra*. Harbottle experienced two months of chest pains and shortness of breath before seeing Dr. Braun in June 2011. CP 59, 784. He complained of heart symptoms just two months before his death in May 2012. CP 790. His EKG displayed abnormalities which do not develop overnight. CP 323. He had a history of high lipids in his blood. CP 320. Over the course of treating him for these many ailments that pointed to a larger problem, Dr. Braun utterly failed to disclose the risks associated with his chosen treatment. Pursuant to controlling precedent, that failure should have precluded summary judgment on the Estate's informed consent claim.

(b) Dr. Braun Cannot Distinguish and *Gates* and *Flyte*

Dr. Braun fails to distinguish controlling precedent. He admits that *Gates v. Jensen*, 92 Wn.2d 246, 595 P.2d 919 (1979) has not been

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<sup>3</sup> To the extent there is any doubt about whether Dr. Braun knew of his heart condition, the Court should recall that all facts and inferences therefrom must be viewed in the light most favorable to the Estate, as the non-moving party to the summary judgment motion below. *Dowler v. Clover Park Sch. Dist. No. 409*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

overruled and stands for the following proposition:

[W]hen a physician is aware of '[t]he existence of an abnormal condition in [the patient's] body,' 'the presence of a high risk disease,' as well as 'the existence of alternative diagnostic procedures to conclusively determine the presence or absence of that disease,' the physician's duty of disclosure arises and the physician must inform the patient of those facts to allow the patient to 'make an informed decision on the course of which future medical care to take.'

Braun br. at 27-28 (quoting *Gates*, 92 Wn.2d at 251). That is exactly the case here – Dr. Braun's duty to disclose arose where the three preconditions to a claim, as outlined by our Supreme Court in the passage above, existed.

Frist, Dr. Braun was aware of the existence of an abnormal condition in Harbottle's body. Harbottle complained of chest pains and shortness of breath. He had elevated lipids in his blood. His EKG showed some abnormalities. He continued to complain of shortness of breath upon exertion well after Dr. Braun treated him for chest pains with heartburn medication. His awareness of Harbottle's heart condition is evident by the fact that he ordered a stress test and referred Harbottle to a cardiologist in the first place.

Second, a high-risk disease was present. It goes without saying that heart disease is a serious condition. Two well-respected experts, Drs. Howard Miller and Jerrold Glassman, testified that the disease is so

serious, Dr. Braun breached the standard of care by not ensuring Harbottle followed up with a cardiologist and performed a stress test, even if his risk for the disease might have been low on paper. CP 307, 322.

Third, there was an alternative diagnostic procedure to conclusively determine the presence or absence of heart disease – i.e., the very stress test for which Dr. Braun referred Harbottle, but never followed up on. Dr. Miller testified that the stress test would likely have shown heart issues; the autopsy revealed significant occlusions in Harbottle’s arteries that were likely present when Dr. Braun treated him for chest pains. CP 334.

According to Dr. Braun’s own reading of *Gates*, these facts supported a claim for liability based on a lack of informed consent. Indeed, the facts of this case closely resemble those of *Gates*. There, the patient saw, an ophthalmologist, with complaints of difficulty in focusing, blurring, and gaps in her vision. 92 Wn.2d at 247-48. The patient had some risk factors for glaucoma. *Id.* The ophthalmologist did some initial testing and determined that her symptoms might be caused by contact lens issues or the much more serious glaucoma. *Id.* Despite the availability of simple additional testing for glaucoma, he did not perform those tests because he did not suspect glaucoma, and he never counseled the patient regarding the importance of other tests to rule out much more severe

diseases. *Id.* at 249-50. Several years later, the patient was diagnosed with glaucoma and eventually became functionally blind. *Id.* at 248.

The fact pattern is nearly identical in this case, regardless of whether other courts have described *Gates* as “unique.” Braun br. at 26 (citing *Anaya Gomez v. Sauerwein*, 180 Wn.2d 610, 626, 331 P.3d 19 (2014)). The Supreme Court has not overruled *Gates*, despite multiple opportunities to do so, including, most recently, in *Anaya Gomez*.

*Anaya Gomez* does not control this case. There, a physician failed to diagnose a woman with a yeast infection that eventually entered her blood stream and killed her. *Id.* at 614-15. Importantly, the physician in that case performed *every test* that could have confirmed the infection but failed to diagnose it. *Id.* at 621-22. Thus, the Court distinguished it from *Gates* noting that the physician “had no additional tests available,” unlike the doctor in *Gates* who could have run further tests for glaucoma but chose to pursue a treatment plan for a less severe condition without informing the patient of the risks in doing so. *Id.* at 621. Importantly, the Court specifically cautioned that “*Gates* has not been overruled.” *Id.* at 623.

This Court also reaffirmed *Gates*’s holding *Flyte v. Summit View Clinic*, 183 Wn. App. 559, 562, 333 P.3d 566 (2014), a case which Dr. Braun cannot distinguish. There, this Court determined that *Gates* is still

good law, as is its holding that a physician “who has not conclusively diagnosed a particular illness” or has not “ruled out” a particular illness has a “duty to disclose information related to the treatment of that illness if the information is reasonably needed by the patient to make an informed decision about treatment.” *Id.* at 575.

Here, Braun never definitively ruled out heart disease as an explanation for Harbottle’s symptoms. Nothing in his records so states. *See, e.g.*, 784 (describing his impressions as “likely GERD”). Rather, he performed an EKG, chest x-ray, and determined that Harbottle still needed to meet with a cardiologist and perform a stress test. Thus, unlike *Anaya Gomez*, Dr. Braun recognized that he had more tests available in order to rule out heart disease. Dr. Braun treated Harbottle’s symptoms that could be linked to heart disease with heartburn medication and later with asthma medication. This diagnosis process, which lasted less than a year before Harbottle’s untimely death, was incomplete, could have included further tests, and never definitively ruled out heart disease as a cause of Harbottle’s symptoms.

Importantly, the question of whether a physician has ruled out a particular disease is a question of fact. *Flyte*, 183 Wn. App. at 579-80. In *Flyte* a question arose as to whether a doctor had “definitively ruled out” H1N1 virus by tentatively diagnosing the patient’s symptoms as an upper

respiratory tract infection. *Id.* at 579. This Court held that a jury instruction which “remove[d]” this “disputed issue of fact from the jury’s consideration” was reversible error. *Id.* at 580. Likewise, a summary judgment dismissal of the Estate’s informed consent claim, removed this disputed issue of fact from the jury’s consideration and should be reversed.<sup>4</sup>

*Gates* and *Flyte* are valid, controlling law on the set of facts presented in this case and should have precluded summary judgment dismissal of the Estate’s informed consent claim.

(c) The Estate Presented a *Prima Facie* Case for Informed Consent

As discussed above and in its opening brief, the Estate made a *prima facie* case for an informed consent claim, a claim which should have been submitted to a jury.<sup>5</sup> Estate br. at 7-22. Dr. Braun fails in his

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<sup>4</sup> As discussed in the Estate’s opening brief, regardless of whether this Court agrees with Justice González’s concurrence in *Anaya Gomez*, explaining “that a health care provider may be liable for both a negligence claim and an informed consent claim arising from the same set of facts,” *Anaya Gomez*, 180 Wn.2d at 627, the Estate should have been allowed to present both issues to the jury as alternative arguments. Estate br. at 22 n.7. This was the case in *Flyte*, for example, where the plaintiff argued both a negligence and informed consent claim to the jury.

<sup>5</sup> RCW 7.70.050(1) prescribes four necessary elements of proof for an informed consent claim: (a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment; (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts; (c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts; (d) That the treatment in question proximately caused injury to the patient.

attempts to argue otherwise.

(i) Dr. Braun Failed to Disclose Material Facts Regarding His Treatment of Harbottle's Chest Pains and Shortness of Breath

Inexplicably, Dr. Braun argues that the Estate “failed to raise a genuine issue of material fact as to any failure to disclose any ‘material fact relating to [Harbottle’s] treatment.” Braun br. at 35. This puzzling argument seems to ignore the plain fact that Dr. Braun treated Harbottle for heart disease symptoms including chest pains and shortness of breath. As part of that treatment he recommended heartburn medication and a stress test. When the heartburn medication seemed to initially help, he failed to disclose the risk in foregoing the stress test and not contacting the cardiologist to whom Braun referred Harbottle. Rather, he reassured Harbottle that heartburn medication, taken as needed, was the best course of treatment for his chest pains. He did not even raise the subject when Harbottle continued to complain of shortness of breath on exertion nine months later, further evidence of heart disease. He chose instead to give Harbottle asthma medication.

The Estate more than met its burden to show that Dr. Braun omitted material facts related to his treatment of Harbottle’s chest pain and shortness of breath. Additionally, to the extent there is any doubt, all facts and inferences therefrom must be viewed in the light most favorable to the

Estate, as the non-moving party in the court below. *Dowler*, 172 Wn.2d at 484. The Estate presented a genuine issue of material fact, and summary judgment was inappropriate.

(ii) The Estate Presented Sufficient Expert Testimony

Dr. Braun argues that the Estate failed to present sufficient expert testimony that Dr. Braun omitted a “material fact relating to the treatment” of Harbottle’s chest pains. Braun br. at 36-37. This is not supported by the record – the Estate presented ample expert testimony that Dr. Braun failed to disclose a material fact related to his treatment of Harbottle’s chest pains. Specifically, the Estate met its burden to show, via expert testimony, “the existence of a risk, the likeliness of occurrence, and the type of harm in question” as related the omitted material fact during the course of treatment. Dr. Braun br. at 36 (citing *Smith v. Shannon*, 100 Wn.2d 26, 34, 666 P.2d 351 (1983)).

The Estate’s medical experts, Dr. Miller and Dr. Glassman, testified that Dr. Braun’s failure to disclose the importance of following through on the stress test while treating Harbottle for chest pains was material. Dr. Miller testified that the risk of the type of harm in question – coronary artery disease – is so great, that it does not matter if a screening questionnaire shows a “5 percent chance or a 75 percent chance” for the

disease.<sup>6</sup> CP 322. Harbottle's demographics, EKG results, history of elevated lipids in his blood, and most importantly his symptoms presented a serious risk that should have been fully explained to Harbottle when discussing the chosen treatment. CP 291, 320. Dr. Miller testified that more likely than not, the stress test would have come back positive, due to the autopsy which revealed *severe* coronary occlusions as well as Harbottle's reported symptoms. CP 334. Dr. Glassman also testified that the stress test would have come back positive and would have led to medical or surgical intervention. CP 307. Dr. Miller opined that when a doctor orders a stress test in the course of treating a patient like Harbottle for chest pains, the doctor must advise the patient of the importance of completing that task because the type of harm is so great. CP 330-31. Likewise, Dr. Glassman opined that Dr. Braun's failure to recognize the danger of Harbottle's symptoms, even in an otherwise healthy patient, breached the standard of care. CP 306-07.

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<sup>6</sup> Braun repeatedly highlights Harbottle's low risk factors for heart disease, as determined by a risk questionnaire, to defend his failures in Harbottle's treatment. *See, e.g.*, Braun br. at 3. But testimony from the Estate's expert shows how misguided he was in the face of a disease as serious as coronary heart disease. Even when a patient has only a five percent risk on paper, a 53-year-old male complaining of chest pains and shortness of breath must be thoroughly evaluated. Harbottle consented to treating his chest pains with just heartburn medication because he was not advised of the risk of failing to pursue other treatment options. He and his wife were relieved to learn that it was "just heartburn," and not something more serious, and he relied on Braun's material omissions to the extent that he relaxed his exercise routine. CP 191. Informed consent actions are necessary to curtail the cavalier treatment Harbottle received, and to ensure that patients (even those who may seem healthy on paper) can "make an informed decision on the course of which future medical care to take." *Gates*, 92 Wn.2d at 251.

This testimony satisfied the Estate's burden to produce expert testimony regarding the existence of a risk, the likeliness of occurrence, and the type of harm in question. This is especially true considering it must be viewed in the light most favorable to the Estate. *Dowler, supra*. The trial court erred in refusing to submit this claim to a jury.

(iii) Causation Is a Question of Fact

Dr. Braun argues that summary judgment was appropriate as a matter of law because the Estate failed to make a *prima facie* case of causation. Braun br. at 35-36. This argument is meritless because causation is a *question of fact* and the Estate presented sufficient evidence to submit its claim to the jury.

Dr. Braun ignores the clear rule that proximate cause is classically a *question of fact* to be decided by the jury. *Martini v. Post*, 178 Wn. App. 153, 164, 313 P.3d 473 (2013) ("Cause in fact is usually a jury question and is generally not susceptible to summary judgment."); *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 611, 257 P.3d 532 (2011) (where the evidence is conflicting, cause in fact is to be resolved by the trier of fact). Again, because this claim was dismissed on summary judgment, all facts and inferences therefrom must be viewed in the light most favorable to the Estate.

Here, the Estate presented ample testimony that Dr. Braun's failure

to discuss the risks of the chosen treatment caused the Estate's injuries. Dr. Miller testified that the stress test would likely have shown heart issues and the autopsy revealed significant occlusions in Harbottle's arteries that were likely present when Dr. Braun first treated him for chest pains. Dr. Glassman, also testified that the stress test would have been positive and opened the door to life-saving treatment options, including heart surgery. CP 307. Harbottle relied on Dr. Braun's representations that heartburn medication was the only necessary course of treatment, even laxing his exercise habits as a result. CP 191. A jury could infer that had Dr. Braun fully disclosed the material facts related to his treatment of Harbottle's chest pains, he would have made the informed choice to follow through with potentially life-saving treatment with a cardiologist.

In sum, Harbottle's claim for informed consent should have been submitted to a jury. Reversal and remand for a new trial is appropriate on this issue.

(2) The Trial Court Erred in Refusing to Address Dr. Braun's Willful Nondisclosure in Discovery of Past Instances of Professional Misconduct

The trial court also erred in excluding evidence at trial on the negligence claim that Dr. Braun was dishonest in his discovery responses relating to his departure from MultiCare after a series of sexual misconduct investigations. Curiously, Dr. Braun spends much of his brief

arguing that he “could not be charged with perjury, let alone convicted” for his failure to disclose this history after being directly asked in interrogatories and at his deposition. Braun br. at 40. He, apparently, feels compelled to lay out the statutory elements of the crime, as well as case law commentating on the burden of proof for perjury. Braun br. at 39-40.

This exercise in challenging hypothetical criminal charges may be relevant in Dr. Braun’s mind, but it is not relevant to the case at hand. Rather, the issue is whether the trial court failed to properly apply the civil rules and rules of evidence related to witness credibility in allowing Dr. Braun to exclude all mention of his past discipline as well as the fact that he failed to disclose the misconduct when directly asked in discovery requests and at his deposition. There is no doubt the trial court erred on this material issue that bore directly on Dr. Braun’s credibility.

(a) The Trial Court Misapplied the Civil Rules<sup>7</sup>

The trial court misinterpreted the civil rules in excluding all testimony regarding the fact that Dr. Braun lied in his discovery responses and in his deposition. Pursuant to CR 32, “Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of

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<sup>7</sup> Interpretations of civil rules are questions of law reviewed *de novo*. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721, 723 (1997).

deponent as a witness.” Likewise, “Interrogatories may relate to any matters which can be inquired into under rule26(b), and the answers may be used [at trial] to the extent permitted by the Rules of Evidence.” CR 33. As noted in the Estate’s opening brief, these discovery provisions are essential to civil litigation and constitutionally mandated. *See* Estate br. at 24 (citing *Lowy v. Peacehealth*, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012)). To enforce this important policy, a party who fails to respond truthfully or who provides an “evasive or misleading answer” may be sanctioned by the court. CR 37.

Contrary to his sworn answers to interrogatories and his deposition testimony given under oath, Dr. Braun was the subject of complaints of sexual misconduct by at least three separate women during his time at MultiCare and he resigned from that facility in lieu of termination. CP 732-34. His failure to disclose these material facts was sanctionable.<sup>8</sup> Shockingly, despite having grounds to sanction Dr. Braun, the trial court rewarded his nondisclosure by excluding this material evidence in its

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<sup>8</sup> Dr. Braun’s argument that no sanction motion was filed in the Court below misses the point. Braun br. at 47-48. The point is that his conduct was sanctionable and clearly forbidden by the civil rules. The rules also permit discovery responses to be used for impeachment purposes, but that was disallowed in this case. Once the trial court issued its order excluding the evidence, in a hurried process that initially sprung from a motion to review records *in camera*, a motion for sanctions would be pointless. *See* RP (8/25/2017) at 4 (motion to exclude was initially brought before the court had reviewed MultiCare’s records of Braun’s misconduct). The fact that the Estate did not specifically seek sanctions in no way excuses Dr. Braun’s misconduct and lack of candor.

entirety. CP 956-57. The Estate could not fully examine him and was precluded from using his discovery materials for proper impeachment purposes pursuant to the civil rules. The court's decision to completely exclude any mention of his prior misconduct, even for impeachment, warrants reversal.

(b) The Trial Court Misapplied ER 608

“Washington case law allows cross-examination under ER 608(b) to specific instances that are relevant to veracity.” *State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754, *review denied*, 117 Wn.2d 1010 (1991). “Any fact which goes to the trustworthiness of the witness may be elicited if it is germane to the issue.” *State v. York*, 28 Wn. App. 33, 36, 621 P.2d 784 (1980).

Dr. Braun unsuccessfully tries to distinguish these clear rules regarding the admissibility of evidence that a witness is untruthful. He argues that questions regarding his veracity are a “collateral matter” and allowing the evidence in this case is a slippery slope toward “a system under which the trial court is constitutionally required to admit any instance of a key witness’s prior misconduct.” Braun br. at 43-45 (citing *State v. O’Connor*, 155 Wn.2d 335, 350, 119 P.2d 1337 (1979)). He is wrong.

Dr. Braun’s truthfulness is not a collateral matter where he lied in

discovery responses to defend himself *in this very action*. His slippery slope argument fails because the Estate is not reaching deep into his past to elicit “any instance” of his prior misconduct, however remote. He was untruthful defending himself in this case. He is a named defendant and one of two people in the room during the key events of this case. The other, Mr. Harbottle, is deceased. Therefore, his credibility – specifically his credibility as to his treatment of Harbottle – is a central issue in this case. And yet, the Estate was precluded from raising the fact that he was dishonest in discovery responses issued by *Harbottle’s own Estate in a civil action against Dr. Braun for Harbottle’s death*.

This is analogous to criminal cases where the Supreme Court has held, “the more essential the witness is to the prosecution’s case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters.” *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Dr. Braun is *the* essential living witness in this case, and his credibility is essential for the jury to consider. To hold otherwise would frustrate the purpose behind jury trials. *Stiley v. Block*, 130 Wn.2d 486, 502, 925 P.2d 194 (1996) (“[I]t is the function and province of the jury to weigh the evidence and *determine the credibility of the witnesses* and decide disputed questions of fact.”) (emphasis added) (quotation omitted). Dr. Braun’s credibility was a central issue and should

have been explored by the jury.

(c) Dr. Braun Cannot Escape His Untruthful Answers Given Under Oath and Is Not Unfairly Prejudiced by Their Admission

Dr. Braun continues to stretch the bounds of belief, arguing that he misunderstood the information sought in interrogatories and during his deposition and that he genuinely believed he was not leaving MultiCare as a result of his sexual misconduct investigations. Braun br. at 46. Indeed, Dr. Braun characterizes his untruthful discovery answers as “evidence of an unwillingness to admit to remembering” the allegations against him. Braun br. at 45. Plain and simple, he lied. As explained in the Estate’s brief – with excerpts of the clear questions asked and untruthful answers given – it is illogical to believe that Dr. Braun simply forgot or misunderstood that a request for any past investigations or complaints did not require him to disclose past sexual misconduct investigations based on complaints from three separate women. *See* Braun br. at 26-28. How a professional could truthfully omit these serious complaints when directly asked is beyond belief.

Similarly, under ER 403, Dr. Braun argues that the evidence and all reference to his untruthful discovery responses were properly excluded because it would be more prejudicial than probative, as the jury would be left to wonder about the substance of the “patient complaints that he did

not initially disclose.” Braun br. at 47. This ignores the fact that the trial court could have given a limiting instruction or otherwise carefully tailored the permissible testimony, which the Estate was willing to do. RP (9/8/2017) at 26.

Moreover, Dr. Braun ignores the fact that while the investigations may not be directly relevant, his deliberate omissions in discovery are. Pursuant to the civil rules cited *supra*, he opened the door to admitting his discovery omissions for impeachment purposes. Thus, whatever prejudicial effect his failure to truthfully respond may have is not “unfair” within the meaning of ER 403. *See, e.g., State v. Alexis*, 95 Wn.2d 15, 17, 621 P.2d 1269 (1980) (noting that unlike evidence of other crimes, evidence of past crimes “involving dishonesty or false statements must be admitted when offered” without balancing the probative value against the prejudicial effect); *State v. Posey*, 161 Wn.2d 638, 653-54, 167 P.3d 560 (2007) (“evidence is not inadmissible under ER 403 simply because it is detrimental or harmful to the interests of the party opposing its admission.”) (quotation omitted). Dr. Braun is solely responsible for his untruthful responses, and therefore cannot cry foul when they are used against him. The trial court erred.

(d) The Record is Sufficient to Permit Review

Contrary to Braun's last-ditch argument, the record is sufficient to review the trial court's pretrial exclusion of past misconduct testimony. *See* Braun br. at 49. It is true that the party seeking review of an issue "should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review." RAP 9.2(b). But when a trial court admits or excludes testimony prior to trial, the relevant record is "the record of the evidentiary hearing" itself. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999) (transcript of pretrial evidentiary hearing on motion to admit prior bad acts under ER 404(b) was not provided in record and therefore precluded review).

Here, the Estate provided all necessary portions of the record to permit review including the pleadings on the pretrial motion to exclude, the transcript of the evidentiary hearing, as well as the court's order (issued without oral ruling). CP 751-66, 820-28, 956-67; RP (9/8/17). The Estate was entirely precluded from raising the issue of Dr. Braun's misconduct before trial ever began. Therefore, a transcript of the entire trial itself would not only be excessively expensive, it would serve no purpose and would unnecessarily clog the record on appeal.

The error here was substantial, plain to see without the trial transcript, and not harmless, as Dr. Braun insinuates in his argument.

Courts have described harmless errors as “[t]rivial, or [f]ormal, or [m]erely academic, and...not prejudicial to the substantial rights of the party assigning it.” *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). Evidence of the named defendant’s untruthfulness during depositions and in response to interrogatories signed under oath is not “trivial” or “academic.” As discussed above, it is the substantial right of a plaintiff to examine witnesses and argue credibility to the jury, especially when it comes to *the defendant himself*.

Dr. Braun’s defense relied entirely on the credibility and reasonableness of his self-generated medical records and recollection of interactions with a deceased patient. Braun does not dispute this or the fact that his expert witnesses relied on them in making their conclusions. Braun br. at 41. The Estate was completely foreclosed from offering material evidence that he lied under oath in defending himself in this very action. Because this subject could not be broached in any way at trial, a transcript would not help this Court in reviewing this substantial error that prejudiced the Estate.

Additionally, a party need not always show that an error affected the outcome of a trial – some errors are so plain that they “presumptively affect[]” the outcome. *Brown v. Spokane Cty. Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983) (cited in Braun br. at 49); *see also*,

*e.g.*, *Longview Fibre Co. v. Weimer*, 95 Wn.2d 583, 588, 628 P.2d 456 (1981) (erroneous jury instruction on material element is presumed prejudicial); *State v. Murphy*, 44 Wn. App. 290, 296, 721 P.2d 30, *review denied*, 107 Wn.2d 1002 (1986) (juror misconduct is presumed prejudicial). The foreclosure of this key creditability evidence related to the named defendant where the credibility of his self-generated reports serves as the bulk of his defense, presumptively prejudiced the Estate. The entire trial transcript is not required to review this issue which severely prejudiced the Estate's ability to argue its case to the jury.<sup>9</sup> A new trial should be ordered.

#### D. CONCLUSION

The trial court erred in depriving the Estate of presenting an informed consent claim to the jury. The trial court also erred by preventing the Estate from using Dr. Braun's untruthful discovery

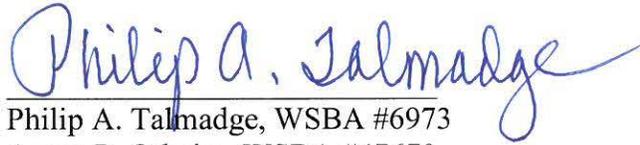
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<sup>9</sup> Alternatively, RAP 9.10 provides that, "[i]f a party has made a good faith effort to provide those portions of the record required by rule 9.2(b), the appellate court will not ordinarily dismiss a review proceeding or affirm, reverse, or modify a trial court decision." Rather, this Court may direct, on its own initiative or by motion of a party, the supplementation of the report of proceedings. *Id.* Here the Estate has made a good faith effort to provide the necessary portions of the record required to review the pretrial evidentiary decision, paying due attention to RAP 9.2 and the authorities cited *supra*. The pleadings, a transcription of the argument, and the court's ruling have all been provided. Should this Court also require the entire trial transcript to determine whether the Estate was prejudiced by the decision to prevent it from attacking the named defendant's credibility, the Estate respectfully requests that it order such supplementation. But, pursuant to *Wade, Brown, Weimer, Murphy*, RAP 9.2(b), *supra*, it is not necessary to decide this clear issue of error that cuts to the heart of the Estate's ability to present its case and adequately examine Dr. Braun whose credibility and judgment is a key issue in the case.

responses for impeachment purposes, in violation of clear case law and the civil rules. The Estate was prejudiced. The appropriate remedy is a new trial.

DATED this 20th day of August, 2018.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Reply Brief of Appellants* in Court of Appeals, Division II Cause No. 51427-3-II to the following parties:

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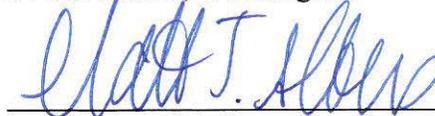
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 20, 2018 at Seattle, Washington.



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**TALMADGE/FITZPATRICK/TRIBE**

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