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SUPREME COURT
OF THE STATE OF WASHINGTON
NO. _____

TANYA GREGOIRE, Guardian for the person and estate of
BRIANNA ALEXANDRIA GREGOIRE, a minor, and as
Personal Representative for
EDWARD ALBERT GREGOIRE, deceased,

Appellant,

v.

CITY OF OAK HARBOR,

Respondent.

**RESPONDENTS' ANSWER TO PETITION FOR
DISCRETIONARY REVIEW**

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ORIGINAL

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INTRODUCTION

Respondent City of Oak Harbor submits this Answer to plaintiff Gregoire's petition for review and requests that the Supreme Court deny review.

COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Without any record of the evidence that was actually presented to the jury that decided this case, and in light of well-established Washington law on the issues tried below, does this petition present an issue of substantial public interest regarding whether the trial court properly instructed the jury with respect to contributory fault, assumption of the risk, and proximate cause in this jail suicide case?

B. Has the Supreme Court established the evidentiary standard for juror misconduct and juror bias?

C. What is the appropriate standard of review of a courts decision with respect to allegations of juror bias and/or misconduct?

COUNTERSTATEMENT OF THE CASE

A. Substantive Facts

Plaintiff has not included any trial testimony as part of her record on appeal. Rather, for her factual background, she relies completely upon testimony from the Coroner's Inquest conducted shortly after Mr. Gregoire's suicide. This was information provided to the trial court on

summary judgment, but not at trial. On appeal, plaintiff may only rely on this testimony in her challenge to the summary judgment order, which has been abandoned in her petition for review, not in support of her argument regarding jury instructions, as this inquest testimony was never presented to the jury. The trial court necessarily relied solely the actual trial testimony of the witnesses in determining appropriate jury instructions. As a counterstatement of facts, respondent submits the factual background that was presented to the trial court on summary judgment, included in respondent's summary judgment motion. (CP 2122-2136)

B. Procedural Background

Plaintiff filed their original action in the U.S. District Court for the Western District of Washington, asserting three civil rights claims under 42 U.S.C. § 1983, as well as a state law claim of wrongful death, against the City of Oak Harbor and various individual defendants. (CP 2089-2104)

In his order of October 5, 2001, Judge Lasnik dismissed all of the plaintiff's federal claims under 42 U.S.C. § 1983, but declined to dismiss the remaining state law claims, holding that the parties had not substantively addressed the issue of the exercise of supplemental jurisdiction. (CP 601-613) The Court subsequently declined to exercise supplemental jurisdiction over the state law claim in its order of May 6,

2002, in which the Court reiterated the dismissal with prejudice of all § 1983 claims, dismissed with prejudice the negligence claims against two Washington State troopers also named as defendants, and dismissed the negligence claims against the remaining defendants without prejudice, so as to allow them to be heard in state court. (CP 597-600)

Plaintiff filed her Complaint in the instant case on May 30, 2002, asserting claims of negligence, denial of rights under the Washington State Constitution, and reasserting (in the face of Judge Lasnik's prior order) Civil Rights violations. (CP 1528-1536) On April 10, 2003, Judge Alan Hancock dismissed on summary judgment all of plaintiff's federal and state civil rights claims. (CP 614-615) On June 12, 2003, Judge Hancock issued a letter decision denying respondent's motion for summary judgment with respect to plaintiff's negligence claims against the City of Oak Harbor. (CP 590-596)

This matter was tried to a jury in Island County Superior Court before Judge Hancock between May 16 and May 31, 2006 on plaintiff's one remaining claim of negligence on the part of the City of Oak Harbor. The jury returned a special verdict, finding respondent negligent (Question 1), but finding that this negligence was not a proximate cause of Mr. Gregoire's death (Question 2). (CP 21-23)

ARGUMENT

A. USE OF THE RECORD ON APPEAL

Notably, plaintiff has not included any trial testimony as part of her record on appeal. Thus, there is no record of what evidence was presented to the jury and upon which the trial court relied in determining appropriate jury instructions. Accordingly, plaintiff cannot argue that the trial testimony established some evidentiary background that would take factual questions out of the province of the jury in assigning error. Without this foundation, plaintiff's arguments regarding jury instructions lack not only legal support for Supreme Court review, but lack substance upon which to premise her arguments as well.

Plaintiff does include in the record information provided to the trial court on summary judgment, not at trial, and cannot rely on these facts in support of her arguments regarding jury instructions. As the Court of Appeals noted on page 10: "This court is not in a position to second guess the trial court's interpretation of facts, especially where the evidence presented at trial is not part of the record."

B. PLAINTIFF'S STATED ISSUES DO NOT WARRANT REVIEW

RAP 13.4 governs the filing of a Petition for Discretionary Review from a Court of Appeals decision terminating review. Of the four

considerations governing acceptance of review set forth in RAP 13.4(b) plaintiff's petition relies only upon the fourth one – “[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court.”

However, the issues presented in this case have been long determined by the Supreme Court, and are well-established law in Washington. Instead of articulating adequate grounds for review by the Supreme Court, petitioner simply rehashes the same arguments that were soundly rejected by the Court of Appeals. Framed in any light, especially the light of RAP 13.4, this case does not warrant review.

1. The Court Properly Instructed the Jury on Comparative Fault and Assumption of the Risk.

Jury instructions are sufficient if “they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.” *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92 (1995). The court reviews a challenged jury instruction *de novo*, within the context of the jury instructions as a whole. *State v. Jackman*, 156 Wn.2d 736, 743 (2006). Where the record shows that the party challenging the instructions was not prejudiced, no error has occurred. *Id* at 745.

Plaintiff argues that it was error on the part of the trial court to give

instructions on comparative fault and assumption of the risk on the theory that these defenses are not available when a custodial “special relationship” exists.¹ However, plaintiff’s argument completely ignores the well-established law holding that principles of comparative fault, assumption of risk and other defenses apply and must be considered by a jury when a “special relationship” exists.²

When a “special relationship” exists, defenses such as contributory fault, assumption of the risk and intervening cause are available to reduce or eliminate liability for harm suffered by one who is in the custody of another.³ That is so both with harms inflicted by a third party as well as self-inflicted harm (such as suicide). The issue turns on the question of foreseeability, an issue that is squarely in the province of the jury. In *Hunt v. King County*⁴, a case in which a mental hospital patient jumped from a fifth story window, the court stated:

¹ Given the absence of any record of testimony presented to the jury, plaintiff does not even have an evidentiary basis for calling this a case that involves a “special relationship.”

² Plaintiff places mistaken reliance on *Christensen v. Royal School District*, 156 Wn.2d 62 (2005). *Christensen*, discussed *infra*, held that in the narrow and circumscribed facts of that case plaintiff could not be assigned contributory fault as a matter of law. Judge Hancock properly concluded that the holding had no application to the very different facts of this case.

³ Washington courts have repeatedly apportioned damages based on the contributory fault of plaintiffs in protective special relationships with defendants. See *Yurkovich v. Rose*, 68 Wash.App. 643, (1993) (13-year-old girl assessed with contributory fault in an action against a school district alleging negligence by a bus driver); *Pearce v. Motel 6, Inc.*, 28 Wash.App. 474, 480, (1981) (finding that a jury could have considered evidence of the care and attention exercised by a motel guest for her own safety in a negligence action against the motel).

⁴ 4 Wash.App. 14 (Div. 1, 1971).

Defendant pleaded and assumed the burden of proving that the plaintiff's son was guilty of contributory negligence, including volitional action. It is true that contributory negligence may consist of the 'failure to discover or appreciate a risk which would be apparent to a reasonable man, or an inadvertent mistake in dealing with it ***' It is also true that contributory negligence may be 'an intentional exposure to a danger of which the plaintiff is aware.' W. Prosser, Torts, § 64, at 434 (3rd Ed. 1964).

To the extent that contributory negligence may be said to be a defense, it is prerequisite to a defense of contributory negligence in a hospital-patient case that the patient be capable of exercising the care of a reasonable man, i.e., able to appreciate the risk of harm and able to act reasonably on the basis thereof. (Citations omitted.) Under the evidence here, the issue of foreseeability of self-inflicted harm which defines the scope of the duty (citation omitted) and the issue of the patient's capacity to exercise reasonable care, i.e., capacity to be contributorily negligent, were questions for the jury. (Citation omitted.)

Id., at 25-26.⁵

Plaintiff's reliance on *Christensen v. Royal School Dist.*⁶ is misplaced. There, a middle school student and her parents asserted liability against a school district arising from a teacher's sexual relationship with the student. The U.S. District Court for the Eastern District of Washington certified the following question to the Washington Supreme Court: "May a 13-year old victim of sexual abuse by her teacher on school premises, who brings a negligence action against the School District and her principal for

⁵ The Washington State Supreme Court recognized in *Niece v. Elmview Group Home*, 131 Wn.2d 39 (1997), that the foreseeability of the harm to a plaintiff in a special relationship is a question of fact for the jury. *Id.*, at 51, fn. 10.

⁶ 156 Wn.2d 62 (2005).

failure to supervise or for negligent hiring of the teacher, have contributory fault assessed against her under the Washington Tort Reform Act for her participation in the relationship?" *Id.*, at 64. The court, treating this as an issue of first impression, held as follows:

We answer "no" to the question, concluding that, as a matter of law, a child under the age of 16 may not have contributory fault assessed against her for her participation in a relationship such as that posed in the question. This is because she lacks the capacity to consent and is under no legal duty to protect herself from the sexual abuse.

Id., at 64-65.

The Supreme Court focused on the strong policy considerations behind the criminal laws prohibiting sexual relations with children and on the School District's enhanced duty to protect minors in its care. The court's holding that contributory fault may not be assessed in that case was limited to the specific facts and policy considerations identified in the opinion, none of which are present here. *Id.*, at 71-72. There is a significant distinction between a heightened duty to protect a minor from intentional sexual abuse that constitutes strict criminal liability, on the one hand, and on the other hand allowing a jury to determine the scope of a jail's duty based upon foreseeability of a prisoner's likelihood of self-harm.

Plaintiff's reliance on *Sauders v. County of Steuben*, 693 N.E. 2d 16

(Ind. 1998), is equally misplaced. First, an Indiana case obviously has no precedential value. Second, the holding in *Sauders* is premised on the fact that Indiana is a comparative fault state and allowing a jury to assign *any* fault to a decedent's act of suicide would completely bar a plaintiff's claim for wrongful death of an inmate. *Id.*, at 17. The case *sub judice* would not subject plaintiff to such a harsh result, the jury being able to apportion liability to the plaintiff without it constituting a bar to recovery. (CP 21-23) *Steubens* acknowledges that state courts have treated this issue differently based upon the application of comparative as opposed to contributory fault. *Id.*, at 19. In light of the well-defined body of existing Washington law guiding these issues, is not persuasive to suggest Washington look for guidance from a jurisdiction that has determined the issue under a different legal framework.

Judge Hancock considered a motion brought by plaintiff specifically on the issue of whether contributory fault should be considered in light of the *Christensen* decision. (CP 1-8) The court also considered significant argument on this issue, specifically with respect to jury instructions. (RP 289-295) Thus, it was only after giving thorough consideration to the plaintiff's position that the trial court determined what jury instructions were appropriate. The court's instructions properly stated the law in Washington.

Likewise, the court properly instructed the jury with respect to assumption of risk. WPI 13.03, instructing on implied primary assumption of risk, applies to those situations in which a person, by voluntarily choosing to encounter a known peril, impliedly consents to relieve the defendant of the duty to reasonably protect against that peril. (Comment to WPI 13.03, 6 Washington Practice at 160, 5th ed. 2005)(referencing Prosser and Keeton on Torts, Sec. 68 (5th ed. 1984)). *Egan v. Cauble*⁷, cited by plaintiff, supports the application of an instruction on assumption of risk. *Egan* states that the factors of knowledge and voluntariness, which apply to assumption of risk, are questions of fact for the jury, except when reasonable minds could not differ. *Id.*, at 378. Plaintiff never raised the issue concerning assumption of risk on summary judgment. As no trial testimony has been made a part of the record by plaintiff, there is no evidence in the record to even review, let alone support a contention that reasonable minds could not differ on those facts in this case and that Judge Hancock erred in giving WPI 13.03.

The trial court relied on the comments to WPI 13.03, as well as the definition of fault under RCW 4.22.015 in reaching the correct conclusion that an instruction on assumption of the risk should be given. (RP 304:2-305:21) The definition of fault under RCW 4.22.015 includes

⁷ 92 Wn.App. 372 (Div. II, 1998).

“unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages.” RCW 4.22.015. The statute goes on to state that “legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.” *Id.*

To accept plaintiff’s arguments, a duty arising in the context of a “special relationship” would become one of strict liability, making a jail a guarantor of prisoners’ safety. Neither Washington case law nor the Legislature has seen fit to take this step. The instructions to the jury were correct statements of the law. Also, there was no finding by the jury on assumption of risk or contributory negligence; rather, they found there was no proximate cause. As such, any error in giving these instructions was harmless.

2. *The Trial Court’s Instructions on Proximate Cause Were Appropriate.*

Plaintiff contends that it was not proper to give a proximate cause instruction “that negates the special relationship duty.” This is an erroneous statement of the law. The special relationship duty cases still require proof of proximate cause. Otherwise, it would involve imposition of strict liability. The instruction on proximate cause does not negate the duty. Rather, proximate cause is a separate element of a cause of action based on negligence.

Where a defendant cannot reasonably foresee the injured party's conduct causing self-inflicted injury, then that conduct has legal effect either because the injured party has a duty to take reasonable care to protect himself from injury, or because that conduct is the proximate cause of those injuries. *Hunt*, at 23. Plaintiff contends that the court should have included WPI 15.02, applying the "substantial factor" test to proximate cause. Instead, the trial court gave WPI 15.01, the standard proximate cause instruction, and subsequently WPI 15.01.01, when the jury asked for a clearer definition of "proximate cause." (RP 329-334) Plaintiff's proposed jury instructions included both WPI 15.01.01 as well as 15.02. (RP 330:20-24) The Court rejected WPI 15.02 under the circumstances of this case. *Id.*

WPI 15.02, the instruction applying the "substantial factor test," is limited to use in the narrow class of cases in which the "but for" test of WPI 15.01 is inapplicable. 6 Washington Practice at 187, 5th Ed. (2005). The "substantial factor test" may be appropriate in three types of cases:

First, the test is used where either one of two causes would have produced the identical harm, thus making it impossible for plaintiff to prove the "but for" test. Second, the test is used where a similar, but not identical, result would have followed without the defendant's act. Third, the test is used where one defendant has made a clearly proven but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire.

Id. (citing *Daugert v. Pappas*, 104 Wn.2d 254, 262 (1985)). There is no record presented here suggesting that this case falls into any of these categories.

Applying the “substantial factor” test to determine cause in fact is normally justified only when a plaintiff is unable to show that one event alone was the cause of the injury. *Daugert* at 262. In *Daugert*, the Washington Supreme Court limited the application of the test to cases “only where the defendant's negligence caused a ‘separate and distinguishable harm.’ *Id.* at 261.⁸ WPI 15.02 is not applicable to this case, where there is one injury, Mr. Gregoire’s death, resulting from one cause, asphyxiation by hanging.

Rather, WPI 15.01 is appropriate, even where there are multiple potential proximate causes as alleged in this case. WPI 15.01 includes the optional final paragraph “there may be more than one proximate cause of an injury/event,” this language being included in Jury Instruction No. 17. (CP 43) The jury was further instructed regarding each alternative theory of proximate cause asserted by the plaintiff and the respondent with Jury

⁸ The comment to WPI 15.02 goes on to indicate that the substantial factor test has been adopted by Washington courts in cases such as those involving discrimination or unfair employment practices, to determine the status of “seller” under the Securities Act of Washington, in multi-supplier asbestos-injury cases where it is not possible to determine which of many exposures caused injury, and in *Herskovitz v. Group Health Coop*, 99 Wn.2d 609 (1983), where the lead opinion of two justices apply the substantial factor test in a medical malpractice case in which it was claimed that a misdiagnosis reduced the decedent’s chance of survival from 39% to 25% but the plurality opinion of four concurring justices applied the traditional “but for” test. *Id.*, at 187-189.

Instruction No. 6. (CP 32) Finally, the question on the verdict form pertaining to proximate cause spoke in terms of whether “the City of Oak Harbor’s negligence [was] a proximate cause of the death of Edward Gregoire.” (CP 21-23, emphasis added.)

Nothing in these instructions prevented plaintiff from arguing her specific theories to the jury or prevented the jury from determining that the respondent was negligent or that such negligence was a proximate cause of the decedent’s death. Indeed, with Jury Instruction No. 6, plaintiff argued that there were multiple ways in which the City was negligent. While some of them related to screening and incarcerating, the fifth one absolutely did not. That related to the failure to initiate CPR. While the jail can be deemed to have a non-delegable duty to provide medical care for inmates, whether or not that was done in a method that met the standard of care was an issue of fact for this jury.

At page 7 of her petition, plaintiff makes the statement “the jury found the City of Oak Harbor violated its duties” Again, it is impossible to tell from the jury’s answer to the verdict form which of plaintiff’s multiple theories of liability it found to have been violated. In other words, the jury did not specify the manner in which the City was negligent. However, while none of the relevant record has been made part of the appeal, plaintiff was sufficiently convincing that the jury agreed the

City was negligent under one or more of the theories argued at trial. But the jury was also convinced the City's negligence, in whatever manner it was found, was not a proximate cause of Mr. Gregoire's death.

In the instant case, plaintiff contented that there was more than one proximate cause of Mr. Gregoire's death; in particular, despite the fact that Mr. Gregoire hanged himself, respondent's negligence caused or contributed to his death. However, among these alleged multiple causes, the jury could distinguish and determine what they believed proximately caused Mr. Gregoire's damages. To this end, the jury was given Instruction No. 7 regarding reduced or lost chance of survival resulting from the alleged negligence on the part of respondent for failing to initiate CPR. (CP 33)

A party is not entitled to any particular phraseology or "to put his argument into the court's instructions." *Shea v. Spokane*, 17 Wn.App. 236, 245 (Div. 3, 1977) (citations omitted). All that is required is that the instructions adequately and correctly state the law and are sufficient to allow a party to argue its specific theories to the jury. *Id.*, at 246 (citations omitted). Here, plaintiff was able to make her arguments, and the jury certainly could have found that respondent's negligence was a proximate cause of Mr. Gregoire's death and apportion some percentage of fault against the City. Contrary to plaintiff's contention, simply because the

jury found no proximate cause does not mean they could not have found otherwise given the instructions. It was entirely within the function and ability of the jury to determine what, if any, damages would have resulted had Mr. Gregoire not initiated the hanging, and conversely, whether respondent's alleged negligence was a proximate cause of Mr. Gregoire's damages. It is entirely conceivable that the jury found the City's negligence had nothing to do with plaintiff's theories about screening or otherwise preventing Mr. Gregoire from hanging himself, but rather was negligent in delaying the initiation of CPR. It could then have found, consistent with the evidence presented through the defense experts (none of which is in this record) that this alleged delay was not a proximate cause of Mr. Gregoire's death. There is simply no way of knowing what theory of liability formed the basis for the jury's decisions and plaintiff cannot make any assumption in that regard in the context of this petition.

Judge Hancock's instructions on this issue were proper statements of law, coming directly from the WPI. Further, the language in the instruction gave plaintiff all she needed to argue her theories of liability. There was no error in the proximate cause instructions given to the jury. The jury instructions, when read in their entirety, not only reflect a proper statement of applicable law, but also allowed the jury to find that respondent's negligence was a proximate cause of injury and apportion

damages accordingly. Thus, not only were the instruction appropriate, but plaintiff was in no way prejudiced by the jury instructions as given.

3. ***Contrary to Plaintiff's Argument, The Evidentiary Standard for Jury Bias and Misconduct is Well-Established and The Standard of Review is For Abuse of Discretion***

The plaintiff frames the issue regarding juror bias or misconduct without reference to any of the grounds for accepting discretionary review. In other words, she does not argue that it is a matter of public interest that the court addresses this issue. Rather, she frames the issue as whether the court should grant review “to determine the evidentiary standard for review of a trial court’s failure to question or dismiss deliberating jurors ...” Plaintiff’s argument is a complete red herring because the evidentiary standard is already well-established. In fact, plaintiff’s petition, at page 19, clearly articulates the precise evidentiary standard under the circumstances at issue here, citing, among other cases, *In re Pers. Restraint of Lord*, 123 Wn.2d 296 (1994); and *State v. Cho*, 108 Wn.App. 315 (Div. 1, 2001). There is no reason for this court to accept review of this case in order to simply restate what is already defined.

Plaintiff’s reliance on *State v. Elmore*, 155 Wn.2d 758 (2005), for the argument that the Court needs to determine the proper evidentiary standard “when the trial court is presented with uncontrovertible [sic]

evidence of bias by a seated deliberating juror” is misplaced and unpersuasive. This is not a case of first impression for which an evidentiary standard needs to be defined. It is simply plaintiff’s self-serving opinion that their “evidence” shows bias of Juror No. 5. As the Court of Appeals found at p. 7: “Even if the juror had disclosed the information contained in his blog during voir dire, it would not have entitled Gregoire to a challenge for cause because the information did not indicate bias.”

“In cases that involve a juror’s alleged concealment of bias, the test is whether the movant can demonstrate that information a juror failed to disclose in voir dire was material, and also that a truthful disclosure would have provided a basis for a challenge for cause.” *Dalton v. State*, 115 Wn.App. 703, 713 (Div. 3, 2003). (Citation omitted.)

Plaintiff’s suggestion that this matter be reviewed *de novo* is also an incorrect statement of the law. Once the evidentiary standard is established, the judge’s actions and decisions are reviewed for an abuse of discretion. As the Supreme Court states in *Elmore*:

Washington courts, as well as the great majority of other courts reviewing juror dismissal, have applied an abuse of discretion standard and found that so long as the trial court has applied the proper legal standard of proof to the evidence, the trial court’s decision deserves deference.

Id at 768-9.

Further defining the test for bias, Division One has said:

“The right to trial by a jury assumes the right to an unbiased and unprejudiced jury. . . . If one or more members of the jury panel are biased or prejudiced, the constitutional right to trial by jury is denied. . . . But a [party] assigning error to the court’s denial of a challenge for cause must show more than the mere possibility that the juror was prejudiced. . . . And therefore, unless it is very clear, the court’s denial of a challenge for cause must be sustained.”

State v. Stackhouse, 90 Wn.App. 344, 350 (Div. 3, 1998) (citations omitted)

With respect to Juror No. 5, Judge Hancock took a careful approach in determining that no juror misconduct occurred and that dismissal or further inquiry was unnecessary.

Plaintiff has not previously challenge the evidentiary standard the trial court applied in reviewing the alleged impropriety of Juror No. 5 and should be precluded from doing so now as a way to obtain review through the back door. After review of plaintiff’s “evidence,” Judge Hancock determined that there was no apparent bias or impropriety on the part of Juror No. 5. (RP 342:6-347:7) His determination went so far as to find that there was nothing in the information provided to indicate that Juror No. 5 was untruthful in answering the jury questionnaire or otherwise inappropriately discussed the case in some manner contrary to the court’s instructions in his “blog.” Judge Hancock also found that his earlier

“blog” entries, which indicated some prior experience with suicide and/or death, did not demonstrate evidence of bias or prejudice. *Id.* The trial court also noted that both parties had every opportunity to question Juror No. 5 relating to suicide during voir dire. *Id.* Clearly, the trial court’s decisions regarding this subject were based on tenable grounds. There are no reasonable grounds for the Supreme Court to review this decision.

CONCLUSION

Petitioner fails to establish any grounds justifying review of the decision below by the Supreme Court. Further, there is simply no record of any testimony presented to the jury, precluding this court from assessing the basis for Judge Hancock’s decisions regarding what instructions to give.

Judge Hancock properly instructed the jury with respect to contributory fault, assumption of the risk, and proximate cause, utilizing standard WPI instructions. The instructions were proper statements of the law, allowed the parties to make their respective arguments, and did not prejudice plaintiff.

The trial court applied the appropriate evidentiary standard in its review of allegations of juror bias and misconduct, and review of Judge Hancock’s decision is for abuse of discretion.

For these reasons, petitioner’s petition for review should be denied.

Respectfully submitted this 28 day of January, 2008.

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