

90563-1

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Sep 05, 2014, 2:28 pm
BY RONALD R. CARPENTER
CLERK

SUPREME COURT NO. 44388-1-II
COURT OF APPEALS NO.: 44388-1 II

E CRF
RECEIVED BY E-MAIL

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

KEVIN ANDERSON,

Appellant/Plaintiff.

v.

CHARLES HAMON, M.D.,

Defendants/Respondents.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

Craig McIvor, WSBA No. 12745
Of Attorneys for Respondent

LEE SMART, P.S., INC.
1800 One Convention Place
701 Pike Street, Suite 1800
Seattle, WA 98101-3929
(206) 624-7990

ORIGINAL

TABLE OF CONTENTS

| | Page |
|---|-------------|
| I. INTRODUCTION | 1 |
| II. STATEMENT OF THE CASE | 2 |
| A. Mr. Anderson was diagnosed with sinusitis in Hawaii, his symptoms continued and worsened, and he refused to seek further treatment for almost two months | 2 |
| B. Mr. Anderson sought treatment with Dr. Hamon, and an exam did not reveal any neurological abnormalities | 4 |
| C. Mr. Anderson’s condition deteriorated after leaving Dr. Hamon’s office, and 911 was called..... | 5 |
| D. Mr. Anderson was airlifted to Harborview, where a CT scan revealed a brain abscess..... | 5 |
| E. Mr. Anderson sued Dr. Hamon for medical negligence..... | 6 |
| F. Discovery revealed multiple indications of Mr. Anderson’s pre- and post-injury use of illegal drugs..... | 7 |
| G. Mr. Anderson unsuccessfully moved in limine to exclude all evidence of his prior drug use..... | 9 |
| H. Mr. Anderson repeatedly and unsuccessfully sought reconsideration of the trial court’s July 5, 2012 Order..... | 11 |
| I. During the November 2012 trial, all the admitted drug evidence was limited to the issues of causation, damages, and contributory negligence | 13 |
| J. The jury returned a verdict for Dr. Hamon, concluding that he met the standard of care | 13 |
| III. ARGUMENT..... | 13 |
| A. The Court of Appeals decision in this case does not conflict with any Supreme Court or Court of Appeals decision..... | 14 |
| 1. Standard for review of evidentiary rulings. | 14 |
| 2. The Court of Appeals decision affirming the trial court’s finding that evidence of Mr. Anderson’s drug use was relevant is consistent with current law | 15 |

| | | |
|-----|--|----|
| 3. | The Court of Appeals decision affirming the trial court's ruling that evidence of Mr. Anderson's drug use was not unduly prejudicial is consistent with procedural case law..... | 17 |
| B. | The Court of Appeals decision in this case does not implicate a significant question of Constitutional law | 19 |
| C. | The Court of Appeals decision in this case does not involve an issue of substantial public interest that should be decided by this Court | 19 |
| IV. | CONCLUSION..... | 20 |

TABLE OF CASES AND AUTHORITIES

| | Page(s) |
|--|-------------------|
| Federal Cases | |
| <i>Alpha v. Hooper</i> , 440 F.3d 670, 671-72 (5th Cir. 2006) | 18 |
| <i>Dillon v. Nissan Motor Co., Ltd.</i> , 986 F.2d 263, 270 (8th Cir. 1993) | 18 |
| <i>Larkins v. Farrell Lines, Inc.</i> , 806 F.2d 510, 515 (4th Cir. 1986)..... | 18 |
| <i>Phillips v. Hillcrest Med. Ctr.</i> , 244 F.3d 790, 800 (10th Cir. 2001) | 18 |
| Cases | |
| <i>Carson v. Fine</i> , 123 Wn.2d 206, 867 P.2d 610 (1994)..... | 17 |
| <i>Erickson v. Robert F. Ferr, M.D., P.S., Inc.</i> , 125 Wn.2d 183, 883 P.2d 313 (1994)..... | 17 |
| <i>Havens v. C & D Plastics, Inc.</i> , 124 Wn.2d 158, 876 P.2d 435 (1994) | 15 |
| <i>McCarson v. Foreman</i> , 692 P.2d 537, 542 (N.M. 1984)..... | 19 |
| <i>Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.</i> , 178 Wn. App. 702, 315 P.3d 1143 (2013), <i>review denied</i> , 180 Wn.2d 1011 (2014)..... | 14 |
| <i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664, 230 P.3d 583 (2010) | 15 |
| Statutes | |
| RCW 7.70.030(1) | 15 |
| RCW 7.70.030() | 15 |
| Rules | |
| RAP 13.4(b)..... | 1, 2, 13, 14, 20 |
| RAP 13.4(b)(3)..... | 19 |
| RAP 13.4(b)(4)..... | 20 |
| RAP 13.4(b)(1), (2) | 14, 19 |
| ER 401 | 13, 15 |
| ER 402 | 13, 15 |
| ER 403 | 8, 13, 17, 18, 19 |
| CR 59(a) | 9 |
| Other Authority | |
| <i>Wash. Appellate Prac. Deskbook</i> §27.11 (1998)..... | 20 |

I. INTRODUCTION

This medical malpractice case involves the care and treatment that Respondent Dr. Charles Hamon provided to Appellant Kevin Anderson. Mr. Anderson developed a sinus infection in March 2006. He then failed to follow medical advice, and as a result, his infection was incompletely treated and spread to his brain. He saw Dr. Hamon only once, on May 11, 2006, one day before his abscess was diagnosed and treated.

Mr. Anderson brought a medical-malpractice action in Kitsap County Superior Court, alleging that that Dr. Hamon should have diagnosed his brain abscess one day earlier or ordered emergent imaging testing. After a three-week trial, the jury found that Dr. Hamon met the standard of care. It did not address proximate cause or contributory fault.

Mr. Anderson appealed. The Court of Appeals affirmed in an unpublished decision. Mr. Anderson now seeks discretionary review, challenging the Court of Appeals decision affirming the trial court's discretionary ruling allowing limited evidence of Mr. Anderson's pre-injury cocaine and methamphetamine use. This case-specific issue does not satisfy RAP 13.4(b)'s criteria for granting discretionary review.

Evidence of Mr. Anderson's drug use was relevant to the proximate cause and damages elements of his claim and to Dr. Hamon's contributory-negligence defense. Defense expert Dr. Michael Kovar

testified that Mr. Anderson's nasal cocaine use contributed significantly to the spread of his sinus infection to his brain. Defense experts further testified that Mr. Anderson's drug use, coupled with his failure to heed instructions to seek further treatment, allowed a routine sinus infection to progress into a brain abscess causing him harm that could not be attributed to Dr. Hamon. Thus, evidence of Mr. Anderson's drug use was necessary to segregate injuries caused by the one-day delay in diagnosis and treatment from those that would have occurred in any event.

The trial court avoided unfair prejudice to Mr. Anderson by excluding all evidence of drug use it believed was irrelevant to causation, limiting the admission of the drug evidence to specific issues, and instructing the jury when appropriate. The trial court did not abuse its discretion, in admitting this evidence.

Mr. Anderson's Petition summarily reiterates the requirements for granting discretionary review under RAP 13.4(b) without identifying how his case meets any of the criteria for accepting discretionary review. Accordingly, the Petition for Review should be denied.

II. STATEMENT OF THE CASE

A. **Mr. Anderson refused to seek treatment for his sinusitis for almost two months after being diagnosed, despite continuing and worsening symptoms.**

In March 2006, Mr. Anderson sought treatment in Hawaii for a

severe headache, associated with fever, photophobia (intolerance to light), nausea, and vomiting. RP (November 7, 2012 Testimony of Jennifer Ray) at 85:4-86:11. Mr. Anderson was diagnosed with a sinus infection and given antibiotics and pain medication. *Id.* at 86:13-86:17.

On March 22, 2006, Mr. Anderson called his then-girlfriend, Jennifer Ray, and said that his symptoms had persisted and worsened. *Id.* at 88:4-88:9. Ms. Ray drove Mr. Anderson to the emergency room shortly thereafter. *Id.* at 88:13-89:13. A CT scan confirmed that his symptoms were caused by a sinus infection; the scan was otherwise negative. *Id.* at 89:21-91:20; RP (November 7, 2012 of Francis Riedo, M.D.) at 211:4-212:5. Mr. Anderson was given a set of written instructions. RP (November 8, 2012 Testimony of Jennifer Ray) at 299:20-299:23.

Mr. Anderson did not seek follow-up treatment despite persisting symptoms, despite instructions from the doctor, and despite multiple pleas from Ms. Ray to seek treatment. RP (November 7, 2012 Testimony of Jennifer Ray) at 95:10-95:23; RP (November 8, 2012 Testimony of Jennifer Ray) at 301:6-302:10.

Almost two months after his diagnosis, Mr. Anderson traveled by plane, first to Arizona, then to the Seattle area. RP (November 7, 2012 Testimony of Jennifer Ray) at 96:4-97:22; 104:19-106:16. His symptoms worsened during this trip, and he finally acceded to seeing a doctor prior

to the anticipated flight back to Hawaii. *Id.* at 113:5-113:18.

B. Mr. Anderson sought treatment with Dr. Hamon and an exam did not reveal any neurological abnormalities.

On May 11, 2006, Mr. Anderson, accompanied by Ms. Ray, visited Dr. Hamon in Bainbridge Island. *Id.* at 118:10-121:16. Mr. Anderson related his history, his earlier diagnosis and treatment in Hawaii, and the recent worsening of his symptoms. RP (November 13, 2012 Testimony of Charles Hamon, M.D.) at 619:15-621:3; RP (November 14, 2012 Testimony of Charles Hamon, M.D.) at 681:12-682:23.

Dr. Hamon's examination, including a neurologic examination, confirmed a sinus infection and no other abnormalities. RP (November 13, 2012 Testimony of Charles Hamon, M.D.) at 635:10-638:14; RP (November 14, 2012 Testimony of Richard Wohns, M.D.) at 757:23-757:25. Accordingly, Dr. Hamon diagnosed an acute sinus infection that had been incompletely treated and was becoming chronic. RP (November 7, 2012 Testimony of Jennifer Ray) at 134:9-134:19. He prescribed Mr. Anderson medication and instructed him to consult his primary care provider in Hawaii if he did not improve. *Id.* at 134:17-134:19; RP (November 8, 2012 Testimony of Jennifer Ray) at 329:8-329:11; RP (November 14, 2012 Testimony of Charles Hamon, M.D.) at 671:13-671:16, 675:12-675:18.

C. Mr. Anderson's condition deteriorated after leaving Dr. Hamon's office and he underwent treatment.

The day after visiting Dr. Hamon, Ms. Ray returned to her mother's home from a shopping trip at about 6:30 p.m. and found Mr. Anderson asleep. RP (November 7, 2012 Testimony of Jennifer Ray) at 149:15-151:7. After Ms. Ray was unable to wake Mr. Anderson, Ms. Ray's sister called 911. RP (November 7, 2012 Testimony of Jennifer Ray) at 151:13-151:19; 153:2-153:14. First responders arrived and airlifted Mr. Anderson to Harborview Medical Center. *Id.* at 154:3-154:20

A head CT scan revealed a 7-cm abscess in the frontal lobe, behind the frontal sinus; Ms. Ray was told that an infection had grown in Mr. Anderson's brain. *Id.* at 155:18-156:18; RP (November 7, 2012 Testimony of Francis Riedo, M.D.) at 169:14-170:3. He was taken to surgery just after midnight, a craniotomy was performed, and the abscess was drained. *Id.* at 169:16-170:21; RP (November 13, 2012 Testimony of Lynn Anderson) at 471:24-471:25. Mr. Anderson experienced permanent injuries as a result of the brain abscess, herniation, and craniotomies. RP (November 7, 2012 Testimony of Jennifer Ray) at 254:25-256:17.

D. Mr. Anderson sued Dr. Hamon for medical negligence.

On January 13, 2010, Mr. Anderson sued Dr. Hamon for medical negligence in Kitsap County Superior Court. CP 3-8. He alleged that Dr. Hamon was negligent for failing to order "proper imaging testing for

Mr. Anderson.” CP 6. In his answer to the complaint, Dr. Hamon specifically alleged the affirmative defense of contributory negligence. CP 357.

E. Discovery revealed multiple indications of Mr. Anderson’s pre- and post-injury use of illegal drugs.

The May 12, 2006 Harborview emergency room notes stated that Mr. Anderson had a history of pain pill abuse. CP 309.

A May 13, 2006 patient admission chart written by a nurse at Harborview stated in the “Substance abuse” category that Mr. Anderson had a history of marijuana and crystal meth, and that he quit using pain medications one year ago. CP 310. The same record noted that a “[f]riend called and stated patient has current daily cocaine habit.” *Id.*

A May 16, 2006 patient history chart dictated by one of Mr. Anderson’s physicians at Harborview stated, “Of note, friend contacted nursing staff yesterday and endorsed cocaine use by [patient], suggesting possible mechanism for spread of sinusitis.” CP 311.

A May 18, 2006 physical therapy progress note stated that the patient had a history of “daily cocaine and meth use.” CP 312.

A May 19, 2006 occupational therapy note stated that Mr. Anderson “uses tobacco, alcohol, [marijuana], crystal meth, cocaine (daily habit).” CP 313.

A June 2, 2006 Rehabilitation and Consultation note likewise stated under "Family & Social History" that Mr. Anderson had a history of marijuana, crystal meth, and cocaine. CP 314. A social work note produced at Harborview noted the same drug history. CP 315.

A September 28, 2006 letter from one care provider from Savannah Neurology, P.C. in Savannah, Georgia, to another stated that Mr. Anderson's father "informed me privately that his son has had abuse of narcotics in the past. In fact, Mr. Anderson has [been] asking for narcotics several times during our exam today." CP 353.

Ms. Ray, Mr. Anderson's then-girlfriend, testified at deposition that she knew of Mr. Anderson's prior cocaine use, and that she told doctors and nurses about it while he was at Harborview. CP 330. She also testified that Mr. Anderson admitted to her, "after everything happened," that he used cocaine while home in Statesboro, Georgia in 2005. CP 331. Ms. Ray also testified that Mr. Anderson admitted to her that he used methamphetamines while in Statesboro. *Id.*

F. Mr. Anderson unsuccessfully moved in limine to exclude all evidence of his prior drug use.

Before trial, Mr. Anderson filed Plaintiff's First Motions in Limine re: Drug Use and Limitation of Experts. CP 9-20. He argued that all the evidence of his drug use was irrelevant and prejudicial. CP 12-17.

Dr. Hamon opposed the motion, CP 38-53, and offered deposition testimony of family practitioner Dr. Michael Kovar, who testified that cocaine is a risk factor for a sinus infection to become chronic, and potentially lead to a brain abscess: "It's a direct causative risk factor and a major one." CP 41; *see* CP 71-85. Dr. Hamon also argued that the evidence of Mr. Anderson's drug use is directly relevant to (1) the cause of his brain abscess and (2) his contributory negligence in allowing a sinus infection progress into a brain abscess. CP 44-45. Dr. Hamon further argued that Mr. Anderson failed to meet the high threshold for excluding evidence under ER 403 because the evidence's probative value as to causation and contributory negligence outweighed the risk of unfair prejudice to Mr. Anderson. CP 46-48.

After extensive argument from both parties, Judge Sally F. Olsen granted Mr. Anderson's motion in part. *Id.* at 18. The trial court concluded that Dr. Kovar could not testify that Mr. Anderson's prior use of cocaine and meth explain why he did not seek earlier medical treatment. *Id.* However, the trial court found it was relevant to the cause of the brain abscess, and held that some of the drug evidence was admissible on that point. *Id.*

G. Mr. Anderson repeatedly and unsuccessfully sought reconsideration of the trial court's July 5, 2012 Order.

On July 11, 2012, Mr. Anderson moved for reconsideration, CP 207-17, arguing that the court should exclude all evidence of Mr. Anderson's prior drug use as to causation because Dr. Kovar lacked adequate foundation for his opinion, that the cause of the brain abscess was irrelevant, and that the evidence was unduly prejudicial. CP 212-15.

Dr. Hamon responded by arguing that Mr. Anderson had failed to identify upon which grounds under CR 59(a) he sought reconsideration and had merely repeated the same unsuccessful arguments. CP 278-83. Dr. Hamon argued that there was adequate foundation for the evidence of Mr. Anderson's drug use, multiple hearsay exceptions applied, and Dr. Kovar reasonably relied on the evidence under ER 703. CP 283-88. Dr. Hamon also argued that the evidence was relevant to causation, segregation of damages, and contributory negligence, and that the probative value of the evidence on those issues greatly outweighed any risk of prejudice to Mr. Anderson. CP 298-305.

On July 27, 2012, before the trial court's ruling on his Motion for Reconsideration, Mr. Anderson filed his Third Motions in Limine. CP 229-245. Mr. Anderson reiterated the same foundation, relevancy, and prejudice arguments made regarding the drug evidence. CP 231-35.

On July 31, 2012, the trial court denied Mr. Anderson's Motion for Reconsideration. CP 425-26.

On August 6, 2012, Dr. Hamon filed his Response to Plaintiff's Third Motions in Limine. CP 461-504. Dr. Hamon argued that the trial court's July 31, 2012 Order had confirmed that much of the drug evidence was relevant and admissible, that adequate foundation supported it, and that Dr. Kovar reasonably relied on it. CP 462-72.

On September 14, 2012, the trial court heard the parties' respective motions in limine. RP (September 14, 2012 Hearing) at 1-64. During the hearing, the trial court denied Mr. Anderson's motions to exclude: (1) evidence of drug use while Mr. Anderson was living in Maui; (2) evidence of cocaine use during the Christmas holiday in 2005; (3) the Harborview records memorializing the phone call about Mr. Anderson's daily cocaine use; and (4) evidence of drug use prior to Mr. Anderson's move to Maui in 2005. CP 231-35. The trial court reasoned that it had dealt with those issues in prior rulings. RP (September 14, 2012 Hearing) at 10.

However, the trial court excluded the urine test from 2008, concluding that although relevant, its prejudicial effect outweighed its probative value. RP (September 14, 2012 Hearing) at 12. As to Mr. Anderson's motion regarding marijuana, Dr. Hamon's counsel stated that he did not intend to bring up Mr. Anderson's marijuana use; the trial

court granted Mr. Anderson's motion on that issue. *Id.* at 13. The trial court reserved ruling on admissibility of the pain pill evidence, but ultimately issued an order excluding all evidence of Mr. Anderson's use of pain pills, holding his use of pain pills was of minimal relevance to the issues in the case, and is unduly prejudicial to the Plaintiff." CP 605.

The trial court's October 17, 2102, Order on Plaintiff's Third Motions in Limine and Defendant's First Motions in Limine, memorialized the above rulings. CP 607-12.

H. During the trial, all the admitted drug evidence was limited to the issues of causation, damages, and contributory negligence.

Mr. Anderson's counsel addressed the drugs issue in his opening statement. RP (November 6, 2012 Plaintiff's Opening Statement) at 35-37. He also conceded that as of May 11, 2006, Mr. Anderson had needed brain surgery regardless of Dr. Hamon's alleged negligence. *Id.* at 37.

Dr. Hamon's counsel also raised Mr. Anderson's drug use during opening statement, but confined his discussion of drug use to (1) the cause of Mr. Anderson's brain abscess and (2) Dr. Hamon's experts' opinions regarding Mr. Anderson's failure to seek earlier treatment to prevent the abscess from developing. RP (November 6, 2012 Defendant's Opening Statement) at 59-60.

On November 19, 2012, prior to the testimony of Dr. Kovar,

counsel for Mr. Anderson again objected to the mention of the prior drug use on hearsay grounds and asked that any mention of cocaine be limited to the record. RP (November 19, 2012 Argument re: Admission of Drug Evidence) at 1-9. The trial court heard argument and said that it would review its notes from the previous hearings and decide whether to allow testimony regarding daily cocaine use. *Id.* at 8-9. The trial court ruled later that day that it reviewed the motion in limine “extensively” and would not change its previous rulings. RP (November 19, 2012 Court’s Ruling re: Cocaine and Prior Rulings) at 2.

During trial, multiple witnesses testified to whether snorting cocaine or methamphetamine can worsen a sinus infection, or to their knowledge of Mr. Anderson’s usage of those drugs. *See, e.g.*, RP (November 7, 2012 Testimony of Francis Riedo, M.D.) at 229:2-231:13, RP (November 7, 2012 Testimony of Jennifer Ray) at 248:22-251:13; RP (November 8, 2012 Testimony of Jennifer Ray) at 302:11-312:11; 318:20-319:10; RP (November 9, 2012 Testimony of Terrence Davidson, M.D.) at 435:25-436:9); RP (November 13, 2013 Testimony of Lynn Anderson) at 569:8-573:8; RP (November 14, 2012 Testimony of Rebecca Anderson) at 840:12-840:17.

Counsel for both parties addressed the drug evidence in closing arguments. *See, e.g.*, RP (November 21, 2012 Plaintiff’s Closing

Argument) at 26:5-26:7; RP (November 21, 2012 Defense Closing Argument) at 21:22-24:20; RP (November 21, 2012 Plaintiff's Rebuttal Closing Argument) at 7:4-7:11.

I. The jury returned a verdict for Dr. Hamon, concluding that he met the standard of care.

On November 26, 2012, the jury returned a verdict in favor of Dr. Hamon, finding that he had met the standard of care and was not negligent. CP 636-37, 710.

J. The Court of Appeals affirmed the trial court's decision, holding that it did not abuse its discretion in admitting limited evidence of Mr. Anderson's drug use.

On June 24, 2014, Division II of the Court of Appeals affirmed the trial court's ruling admitting evidence of Mr. Anderson's past drug use under ER 401 and ER 403. The Court of Appeals held that evidence of Mr. Anderson's drug use was relevant to Dr. Hamon's contributory negligence defense under ER 401 and presumed admissible under ER 402. The Court of Appeals also held that the record did not support Mr. Anderson's claim that the probative value of evidence of his drug use was substantially outweighed by any unfair prejudice under ER 403.

III. ARGUMENT

RAP 13.4(b), which governs this Court's grant or denial of petitions for review, provides:

Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with the decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with the decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Because Mr. Anderson's Petition sets forth no grounds justifying review under RAP 13.4(b), the Court should deny his Petition.

A. The Court of Appeals decision in this case does not conflict with any Supreme Court or Court of Appeals decision.

Mr. Anderson alleges that "the Court of Appeals decision conflicts with long standing evidentiary law in both the Court of Appeals and the Supreme Court." Petition at 9. Yet, he does not specify **any** Court of Appeals or Supreme Court decision with which his case conflicts. Instead, Mr. Anderson reargues the validity of the trial court's discretionary ruling admitting evidence of his drug use at trial. Notably, nothing in the Court of Appeals decision affirming the trial court's ruling to admit evidence of Mr. Anderson's drug use conflicts with current evidentiary law. Accordingly, the Court should deny review under RAP 13.4(b)(1) and (2).

1. Standard for review of evidentiary rulings.

Appellate courts review a trial court's evidentiary rulings for an abuse of discretion. *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*,

178 Wn. App. 702, 728, 315 P.3d 1143 (2013), *review denied*, 180 Wn.2d 1011 (2014). A court will only overturn the trial court's ruling on the admissibility of evidence if its decision is "manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons." *Id.*

2. The Court of Appeals decision affirming the trial court's finding that evidence of Mr. Anderson's drug use was relevant is consistent with current law.

ER 401 defines "relevant evidence" very broadly as "evidence having any tendency to make the existence of any fact ... more probable or less probable." "Minimal" logical reliance is all that is required under ER 401. *See Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 670, 230 P.3d 583 (2010). Further, "[u]nder ER 402, all relevant evidence is admissible, unless otherwise excluded by the evidence rules." *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994).

Evidence of Mr. Anderson's drug use was directly relevant to the causation and damages elements of his negligence claim and to Dr. Hamon's contributory negligence defense. As part of his medical-malpractice claim, Mr. Anderson was required to demonstrate that Dr. Hamon's alleged negligence caused him injury and damages. *See* RCW 7.70.030(1); RCW 7.70.040(2). Moreover, in defending against Mr. Anderson's malpractice claim, Dr. Hamon alleged that Mr. Anderson was contributorily negligent by using drugs that may have caused his

sinusitis and the progression and exacerbation of sinusitis into a brain abscess. Thus, any evidence establishing that Mr. Anderson's injuries were caused by something other than Dr. Hamon's alleged negligence, including Mr. Anderson's own contributory negligence, was relevant.

Mr. Anderson conceded that while he experienced permanent injuries based on his brain abscess alone, at least some of his injuries were unavoidable and not attributed to Dr. Hamon's alleged negligence.

Additionally, Dr. Kovar testified at trial that cocaine use was a "big factor" in the perpetuation of the sinus infection, and Mr. Anderson's lack of response to antibiotics or his body's inability to fight the infection, or both. RP (November 19, 2012 Testimony of Michael Kovar, M.D.) at 53:16-53:23. He testified that he considered daily or frequent use of cocaine to be a "major factor" in sinus infections and in preventing the resolution of them. *Id.* at 52:16-52:18. Dr. Kovar testified that he believes Mr. Anderson's cocaine use was a plausible explanation for why he had a sinus infection that did not resolve "and, in fact, worsened to the point of a brain abscess." *Id.* at 57:16-57:20.

To the extent that Mr. Anderson's drug use caused his injuries, it was relevant in delineating which injuries Dr. Hamon proximately caused and which were caused by Mr. Anderson's own negligence. Because evidence of Mr. Anderson's drug use was clearly relevant, the Court of

Appeals decision affirming the trial court's ruling admitting that evidence does not conflict with any existing Supreme Court or Court of Appeals decision. Accordingly, Mr. Anderson's petition should be denied.

3. The Court of Appeals decision affirming the trial court's ruling that evidence of Mr. Anderson's drug use was not unduly prejudicial is consistent with precedential case law.

A trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Exclusion under ER 403 is an extraordinary remedy. *Carson v. Fine*, 123 Wn.2d 206, 224, 867 P.2d 610 (1994). Indeed, there is a presumption favoring admissibility under ER 403. *Erickson v. Robert F. Ferr, M.D., P.S., Inc.*, 125 Wn.2d 183, 190, 883 P.2d 313 (1994). The trial court has "considerable discretion" in administering ER 403 as a vehicle for excluding evidence. *Carson*, 123 Wn.2d at 226.

The Court of Appeals correctly affirmed the trial court because the trial court did not abuse its discretion in admitting evidence of Mr. Anderson's drug use. Mr. Anderson conceded that his brain abscess caused both physical injuries and the necessary surgeries to drain the abscess, which also caused physical injuries. The cause of the abscess was therefore highly probative to both causation and segregation of damages.

Moreover, the trial court minimized the risk of any unfair prejudice to Mr. Anderson by limiting evidence of Mr. Anderson's drug use to pre-

injury instances relevant to causation, CP 204-05, while excluding other evidence of drug use. RP (June 22, 2012 Hearing) at 18:4-18:15; CP 204-05; CP 204-05, 607-12; CP 605. The trial court did so after diligently weighing the relative probative value of evidence of Mr. Anderson's drug use against the risk of unfair prejudice to him. Because there was no evidence that the trial court abused its discretion by admitting this evidence after weighing its probative value under ER 403, the Court of Appeals properly affirmed the trial court.

Finally, contrary to Mr. Anderson's contention, past history of drug use is routinely and properly ruled admissible by trial courts under an ER 403 analysis. *See, e.g., Alpha v. Hooper*, 440 F.3d 670, 671-72 (5th Cir. 2006) (methamphetamine use of plaintiff relevant and not unduly prejudicial); *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 800 (10th Cir. 2001) (patient's use of street drugs relevant to evaluation of physical condition in medical malpractice case, and admission of evidence not unduly prejudicial); *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263, 270 (8th Cir. 1993) (plaintiff's cocaine and marijuana use relevant and not unduly prejudicial under ER 403 when relevant to claims of emotional injuries); *Larkins v. Farrell Lines, Inc.*, 806 F.2d 510, 515 (4th Cir. 1986) (not error to allow evidence of plaintiff's history of alcoholism under ER 403 analysis when it was relevant to causation and the complaints of

medical malpractice); *McCarson v. Foreman*, 692 P.2d 537, 542 (N.M. 1984) (cocaine charge indicated use of cocaine, which was relevant and admissible under ER 403 as to negligent entrustment claim). Given that courts routinely admit evidence of drug use at trial, Mr. Anderson cannot show the Court of Appeals decision affirming the trial court's ruling admitting such evidence conflicts with existing precedential case law.

The Court of Appeals properly affirmed the trial court's decision to admit evidence of Mr. Anderson's drug use — made after weighing its probative value against its prejudice. Thus, Mr. Anderson cannot show that the Court of Appeals decision conflicts with any precedential court decision such that review is warranted under RAP 13.4(b)(1) or (2). As such, the Court should deny Mr. Anderson's petition.

B. The Court of Appeals decision in this case does not implicate a significant question of Constitutional law.

Mr. Anderson does not allege that the Court of Appeals decision implicates a significant question of Constitutional law allowing review under RAP 13.4(b)(3). Therefore, no such review is warranted.

C. The Court of Appeals decision in this case does not involve an issue of substantial public interest that should be decided by this Court.

Mr. Anderson wants to correct a perceived error by the Court of Appeals, which is not an acceptable criterion for review.

RAP 13.4(b) says nothing in its criteria about correcting isolated instances of injustice. This is because the Supreme Court, in passing upon petitions for review, is not operating as a court of error. Rather, it is functioning as the highest policy-making judicial body of the state. ...

The Supreme Court's view in evaluating petitions is global in nature. Consequently, the primary focus of a petition for review should be on why there is a compelling need to have the issue or issues presented decided generally. The significance of the issues must be shown to transcend the particular application of the law in question.

Wash. Appellate Prac. Deskbook §27.11 (1998).


Mr. Anderson offers no argument or evidence supporting his contention that his case involves an issue of substantial public interest warranting review under RAP 13.4(b)(4). The reason for this omission is simple: Mr. Anderson's Petition does not involve any such issue. The only issue for which Mr. Anderson seeks review is from an unpublished Court of Appeals decision affirming the trial court's well-grounded, routine, discretionary ruling admitting limited evidence of his drug use at trial. This is an issue specific to Mr. Anderson's case, not an issue of broad public interest contemplated by RAP 13.4(b)(4). Accordingly, this Court should deny review of Mr. Anderson's petition.

IV. CONCLUSION

Mr. Anderson's Petition for Review does not present any issues that warrant review under RAP 13.4(b). The Petition should be denied.

Respectfully submitted this 5 day of September, 2014.

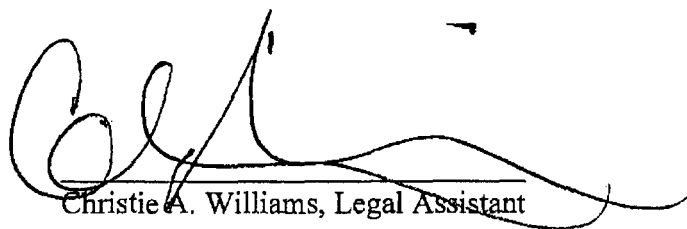
LEE SMART, P.S., INC.

By: 
Craig McIvor, WSBA No. 12745
Melinda R. Drogseth, WSBA No. 40711
Colin J. Troy, WSBA No. 46197
Of Attorneys for Respondent Charles
Hamon

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on September 5, 2014, I caused service of *Answer to Petition for Review* via electronic service and ABC Legal Messengers, Inc., to:

Mr. Raymond J. Dearie
Dearie Law Group, P.S.
2121 Fifth Avenue
Seattle, WA 98121



Christie A. Williams, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Christie A. Williams
Cc: rdearie@dearielawgroup.com; Craig L. Mclvor; Melinda R. Drogseth; Jennifer L. McConnell; aglassman@dearielawgroup.com
Subject: RE: Anderson v. Hamon (Supreme Cause No. 44388-1-II)

Received 9-5-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Christie A. Williams [mailto:cxw@leesmart.com]
Sent: Friday, September 05, 2014 2:09 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: rdearie@dearielawgroup.com; Craig L. Mclvor; Melinda R. Drogseth; Jennifer L. McConnell; aglassman@dearielawgroup.com
Subject: Anderson v. Hamon (Supreme Cause No. 44388-1-II)

Good Afternoon:

Please find attached our Answer to Petition for Discretionary Review for filing in the above-referenced matter.

If you have any problems opening the attachments, please do not hesitate to contact our office.

Christie A. Williams | [VCard](#) | [Email](#)
Legal Assistant to: Jeffrey P. Downer, David L. Sanders, Colin J. Troy

Lee Smart, P.S., Inc. | 1800 One Convention Place | 701 Pike St. | Seattle, WA 98101 | www.leesmart.com
Telephone 206.624.7990 | Toll-free 1.877.624.7990 | Fax 206.624.5944

CONFIDENTIALITY NOTICE: This email message may be protected by the attorney/client privilege, work product doctrine or other confidentiality protection. If you believe that it has been sent to you in error, do not read it. Please reply to the sender that you have received the message in error, then delete it. Thank you.