

DIVISION II CAUSE NO. 44388-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KEVIN ANDERSON,

Plaintiff/Appellant,

v.

CHARLES HAMON, M.D.,

Defendants/Respondents,

BRIEF OF APPELLANT

Kevin Anderson, Appellant

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I. INTRODUCTION

Appellant Kevin Anderson (Plaintiff) is entitled to a new trial because the trial court erroneously permitted Defendant to introduce inflammatory, irrelevant and unfairly prejudicial testimony about Mr. Anderson's purported drug use. Kevin Anderson's unsubstantiated prior drug use had nothing to do with this trial. Nevertheless, Defendant introduced Kevin Anderson's past drug use for one reason: to convince the jury that Kevin was a bad person.

While the standard of review is appropriately high with respect to evidentiary rulings, the trial court abused its discretion by permitting Defendant to introduce Kevin Anderson's purported use of cocaine and methamphetamine -- even though it had absolutely no bearing as to whether Defendant Charles Hamon committed medical malpractice. Not only was this evidence extremely prejudicial, but this evidence was completely irrelevant to the issues before the jury. In other words, this evidence lacked probative value. This case must be remanded back for a trial on the merits.

II. ASSIGNMENT OF ERROR

A. Assignments of Error No. 1

Did the trial court abused its discretion by allowing the Defendant to introduce Kevin Anderson's purported cocaine and

methamphetamine use, which was completely irrelevant as to whether Defendant committed medical malpractice?

B. Issue Pertaining to Assignment of Error No. 1

Whether the trial court abused its discretion by permitting the Defendant to introduce evidence of Plaintiff Kevin Anderson's purported cocaine and methamphetamine use even though this evidence was extremely prejudicial and altogether irrelevant as to whether Defendant Hamon was liable for medical malpractice?

III. STATEMENT OF THE CASE

A. Underlying Facts

Plaintiff Kevin Anderson was born and raised in Statesboro, Georgia. In June 2005, Kevin decided to move to Hawaii. While residing in Hawaii, Kevin Anderson began dating Jennifer Ray in September 2005. See Trial Testimony of Jennifer Ray at 10. As their relationship continued blossomed, Kevin and Jennifer planned to marry.

In March 2006, Kevin Anderson began exhibiting symptoms of a sinus infection. See Trial Testimony of Jennifer Ray at 15-16. On March 21, 2006, Kevin Anderson sought medical care in Hawaii, and was diagnosed with a sinus infection by an urgent care physician. Id. at 16-18. The very next day, March 22nd, Kevin Anderson experienced an exacerbation of his symptoms, including vomiting and a severe headache. Id. at 18-19. Jennifer Ray advised Kevin Anderson that he

should go to the hospital. Id. On the same day, Jennifer Ray drove Kevin Anderson to the Emergency Room at Maui Memorial Hospital. Id. In the course of diagnosing Kevin's illness, Dr. Jeffrey Trager scheduled Kevin Anderson for a CT scan to rule out more serious medical problems. Id. at 20-21. The CT report confirmed the presence of a sinus infection but nothing more severe. Id. Dr. Trager advised Kevin Anderson to complete his antibiotic course, which he did over the next two weeks. Id. During this period of time, Kevin Anderson's symptoms improved. Id. at 22.

On May 5, 2006, Kevin Anderson and Jennifer Ray travelled together to Phoenix, Arizona for a pre-arranged vacation to visit college friends. Id. at 22-25. During this trip, Kevin Anderson's previous symptoms began to reappear. Id. As the trip wore on, Kevin Anderson's headache returned with a vengeance. Id. at 28-31. After spending four days in Arizona, Jennifer and Kevin planned to visit Jennifer Ray's mother who lived in Bainbridge Island. Id. at 36-37. Shortly after arriving in Washington on May 9th, Kevin Anderson's symptoms deteriorated further. Id. After being picked up by Jennifer's mother, all three drove north to Seattle where they decided to eat dinner at Ivar's Restaurant. Id. at 38-39. Kevin Anderson stayed in the family vehicle the entire time because he was too ill to join Jennifer and her mother for dinner. Id.

Once they arrived at Lynn Ray's home on Bainbridge Island, Kevin Anderson stayed in Jennifer Ray's room virtually the entire time. See Trial Testimony of Jennifer Ray at 40-41. During this period, Kevin became extremely sensitive to light, and was suffering from a condition known as photophobia. Id. at 42. The Ray family tried to seal the windows in Jennifer's room in the hopes of alleviating Kevin's photophobia and debilitating headache. Id.

On May 11th, Kevin and Jennifer decided that Kevin needed to be seen by a physician. Id. at 43. Jennifer Ray then began searching for a local physician and telephoned the Medical Office of Gregory Keyes, M.D. Id. at 44. Jennifer explained to medical staff that she was originally from Bainbridge Island, and that she and her boyfriend were temporarily visiting family in the area while otherwise living in Hawaii. Id. at 45. Jennifer further explained that Kevin needed to see a physician because of a severe headache, vomiting, and other symptoms of an acute illness. Id. The medical staff person instructed Jennifer to bring Kevin to the office as soon as possible. Id.

At approximately 11:30 a.m. on May 11, 2006, Jennifer Ray and Kevin Anderson arrived at the doctor's office. Id. at 49. Because Kevin was so weak, Jennifer Ray assisted Kevin with walking into the facility. Kevin immediately sat down in the reception area, and was only able to sit with his head tilted back and his hands shielding his eyes from the

light. Id. at 50-51. Jennifer Ray filled out all the medical intake forms because Kevin was “so out of it.” Id. at 52-54.

After the medical forms were completed, Kevin Anderson was escorted back to the medical room by a nurse. Id. at 54. Jennifer Ray accompanied Kevin back to the room to help Kevin navigate. Id. Jennifer stayed during the entire examination because Kevin had shown little ability or inclination to communicate. Id.

After arriving at the examination room, the nurse agreed to turn off the overhead lights to relieve Kevin’s pain and discomfort. Id. at 56-57. Jennifer Ray described the lighting in the room as dark and virtually off. Id. at 58. There were no windows in the examination room.

After the nurse left Kevin and Jennifer in the examination room, Defendant Charles Hamon, M.D., entered the room. Id. at 59. Dr. Hamon was temporarily filling in for Dr. Gregory Keyes as a locum tenens physician. Dr. Keyes was on vacation at the time.

After entering the room, Dr. Hamon was greeted by Jennifer Ray, and not Kevin Anderson. Id. Ms. Ray explained that Kevin was her boyfriend, who had previously been diagnosed with a sinus infection in Hawaii several weeks prior. Id. at 60. She further explained that Kevin’s symptoms had recently returned and had deteriorated rapidly over the past several days. Id. at 60-62. Ms. Ray further explained that Kevin had been complaining most significantly of an excruciating 10/10

headache, vomiting, dry heaving, intolerance to light, and other symptoms. Id. at 60-64.

Throughout the examination, Kevin Anderson never had a conversation with Dr. Hamon. Id. at 64. Throughout the examination, Dr. Hamon never turned on the overhead lights. Id. at 66. Throughout the examination, Dr. Hamon never even made Kevin Anderson get out of his chair. Id. at 67.

Instead, Dr. Hamon performed a cursory examination that lasted as little as 10 minutes. Id. at 65. Most of this time was used to obtain a medical history from Jennifer Ray, and not Kevin Anderson. During the entirety of the examination, Dr. Hamon never raised the issue of any drug use by Kevin Anderson.

After the examination, Dr. Hamon concluded that Kevin Anderson simply had a reoccurrence of his sinus infection. Id. at 64. Instead of ordering an MRI as had occurred in Hawaii, Dr. Hamon simply prescribed antibiotics and pain medications. Id. at 65. Finally, Dr. Hamon instructed Ms. Ray to have Kevin Anderson return to his doctor upon arrival back in Hawaii. Id.

Feeling relieved that Kevin was only suffering a sinus infection, Jennifer Ray drove Kevin Anderson back to her mother's home. Id. at 69. After learning of Dr. Hamon's diagnosis, Jennifer Ray was

surprised that Kevin seemed so ill and delicate, given that he was only suffering from a sinus infection. Id.

Arriving back home at approximately 12:30 p.m., Kevin Anderson went straight back to bed. Id. at 72-74. The next morning on May 12th, Kevin and Jennifer had a 30 minute conversation before Jennifer and her mother left to attend a family baby shower. Id. at 79-80. When they returned home at approximately 6:30 p.m., Jennifer went to check on Kevin, who appeared to be snoring. Id. at 81. Jennifer was happy that Kevin was finally resting soundly, and did not attempt to wake him. Id. at 82-83.

At approximately 8:00 p.m., Jennifer attempted to rouse Kevin, but he was unresponsive. Id. Jennifer Ray's sister then dialed 911. Id. at 84. Medics arrived shortly thereafter and Kevin was immediately airlifted to Harborview Medical Center in Seattle. Id. Kevin Anderson was in a full coma at this time. A short time thereafter, Kevin Anderson was diagnosed with a large brain abscess in his frontal lobe following an MRI. Emergency brain surgery was then immediately performed. Id. at 86-88. Kevin Anderson's brain abscess was the size of a major league baseball. See trial testimony of Francis Riedo.

Kevin Anderson remained at Harborview for 54 days following his initial brain surgery. Kevin is now blind and partially paralyzed, and will continue to live with chronic, debilitating pain for the rest of his life.

Kevin cannot live independently or hold down a job. Instead, Kevin lives in Statesboro, Georgia with his father, Lynn Anderson, who is the Sheriff of Bulloch County, Georgia, and his mother, who works at a local bank. See trial testimony of Lynn Anderson.

At trial, Plaintiff presented expert testimony from Dr. Richard Wohns, who practices neurosurgery in the Seattle area. See trial testimony of Richard Wohns, M.D. Dr. Wohns and three other Washington physicians all opined that Defendant Charles Hamon, M.D., breached the standard of care by failing to order an MRI for Kevin Anderson at the conclusion of his examination on May 11, 2007. See trial testimony of Francis Riedo, M.D., Howard Miller, M.D., and Terrence Davidson, M.D. According to Dr. Wohns, if Dr. Hamon had simply followed the appropriate standard of care and referred Kevin Anderson for an MRI, then Kevin Anderson's catastrophic brain damage would not have occurred. See Trial Testimony of Richard Wohns. Kevin Anderson was 27 years old at the time of the incident.

B. Purported Drug Use

After being transported to Harborview Medical Center, Kevin Anderson had his blood tested for the presence of drugs or alcohol. See Trial Testimony of Dr. Michael Kovar at 88. This is a routine medical procedure at Harborview. Kevin Anderson did not test positive for the presence of cocaine, methamphetamine, alcohol, or any illicit drug. Id.

After Kevin Anderson was airlifted to Harborview Medical Center, Jennifer Ray and her mother arrived later via automobile. While at Harborview, medical personnel asked Jennifer Ray many questions about Kevin Anderson's medical history, including drug usage. In response to one set of questions, Jennifer Ray told medical personnel that she was aware that Kevin Anderson had used cocaine and methamphetamine in the past. See Trial Testimony of Jennifer Ray at 94. Jennifer Ray insisted that Kevin Anderson had never used cocaine or methamphetamine in her presence. Id. at 95. And it is undisputed that Kevin Anderson has no criminal record of any kind.

Jennifer Ray's comments about Kevin Anderson's use of drugs were memorialized in Harborview's medical records. In one other medical record, there is a reference to Kevin Anderson being a "daily user of cocaine." See Trial Testimony of Michael Kovar at 56-57. The purported source of this information is an "anonymous friend." Id. Although the identity of the person who reported Kevin Anderson as a "daily user of cocaine" was never discovered, this particular reference to Kevin Anderson's purported drug use was repeated throughout many of the Harborview Medical Records. Id.

C. Procedural Background

On May 12, 2012, Plaintiff filed Plaintiff's First Motions *In Limine* RE: Drug Use and Limitations Experts. CP 9-20. Within this motion,

Plaintiff asked the trial court to exclude references of “prior drug use, including cocaine and methamphetamines.” CP sub 74. Defendant Hamon opposed the motion arguing that Dr. Michael Kovar would testify that it is “well accepted” that snorting methamphetamine and cocaine can “increase the risk for sinus infection...” CP at p. 3.

On June 22nd, the trial court held oral argument with respect to Plaintiff’s motion to exclude Kevin Anderson’s prior drug use at trial. On July 5, 2012, the trial court denied, in part, Plaintiff’s motion by ruling: “The defendant may, however, present evidence of drug use as a cause of the brain abscess.” CP 205.

On July 10, 2012, Plaintiff filed a motion for reconsideration in regards to the denial of Plaintiff’s motion to exclude Kevin Anderson’s prior drug usage. CP 205-217. On July 31, 2012, the trial court denied Plaintiff’s motion for reconsideration. CP 425-27.

On July 27, 2012, Plaintiff filed Plaintiff’s Third Motions in Limine. CP 229-246. Within these motions, Plaintiff asked the trial court to exclude any reference to Kevin Anderson’s prior drug use because it was based upon hearsay, speculation and conjecture, among other evidentiary deficiencies. CP 231-32. On October 17, 2012, the Court denied Plaintiff’s motions as follows:

- (2) Plaintiff’s motion that there be no mention of cocaine use during the Christmas holiday in 2005 is denied.

- (3) Plaintiff's motion that there be no mention of the Harborview notes referencing daily cocaine use is denied.
- (4) Plaintiff's motion that there be no mention of meth use prior to Mr. Anderson's move to Maui in the summer of 2005 is denied.

See CP 607-608.

On November 5, 2012, the jury trial commenced. Based upon the Court's pre-trial rulings, counsel for the Plaintiff referenced Kevin Anderson's prior use of cocaine and methamphetamine in his opening statement to the jury. Defendant similarly referenced Kevin Anderson's prior drug use in his opening statement.

Plaintiff's past use of cocaine was also referenced in the testimony of several witnesses, including Jennifer Ray, Dr. Eric Peterson, Lynn Anderson, Kevin Anderson, Dr. Charles Hamon, and Dr. Michael Kovar. In all of the testimony about Kevin Anderson's prior use of cocaine and methamphetamine, none of the witnesses had knowledge of Kevin Anderson using any drugs after December 2005.

At trial, Defendant called Dr. Michael Kovar ostensibly to establish a connection between Kevin Anderson's cocaine use and his sinus infection. See Kovar Trial Testimony 1-92. During his testimony, Dr. Kovar admitted that he had no evidence linking Kevin Anderson's sinus infection to any illicit drug use. Id. at p. 88. Dr. Kovar's entire testimony about illicit drug use was based upon speculation and innuendo. Id.

In his closing argument, Defendant argued that cocaine use was a possible explanation for Kevin Anderson's brain abscess. Although Defendant raised Kevin Anderson's use of methamphetamine during trial, Defendant did not attempt to link methamphetamine use with the brain abscess in closing argument.

IV. ARGUMENT

A. Standard of Review

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. City of Auburn v. Hedlund, 165 Wn.2d 645, 654, 201 P.3d 315 (2009). A trial court abuses its discretion if the "exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

B. Kevin Anderson's Purported Past Use of Cocaine and Methamphetamine was Completely Irrelevant & Inadmissible.

"It is a fundamental rule of evidence that 'evidence which is not relevant is not admissible.'" In re Det. of Post, 170 Wn.2d 302, 311, 241 P.3d 1234 (2010) (quoting ER 402). Evidence is relevant and thus probative if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "There must be a logical nexus between the evidence and the fact to be established." State v. Cochran, 102 Wn. App. 480, 486, 8 P.3d 313, 316-17 (2000) (citing State v.

Burkins, 94 Wn. App. 677, 692, 973 P.2d 15, review denied, 138 Wn.2d 1014, 989 P.2d 1142 (1999).

In this case, there was no evidence suggesting that Kevin Anderson's purported drug use was relevant to any of the issues before the jury. There was no testimony about any causal relationship between purported drug use and Kevin Anderson's brain abscess. Thus, Kevin Anderson's purported drug use was completely and utterly irrelevant.

C. Even if Kevin Anderson's Purported Drug Use Was Relevant, It was Extravagantly Prejudicial and thus Inadmissible.

Even relevant evidence must be excluded if it is unfairly prejudicial. See ER 403. As the Washington Supreme Court recently stated: "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 671, 230 P.3d 583, 586 (2010) (citing State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995)). Unfair prejudice has been described as "prejudice caused by evidence of 'scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.'" United States v. Roark, 753 F.2d 991, 994 (quoting United States v. McRae, 593 F.2d 700, 707 (5th Cir.), cert. denied, 444 U.S. 862 (1979)). "Another authority states that evidence may be unfairly prejudicial under rule 403 if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or 'triggers other mainsprings of human action.'" Carson v. Fine,

123 Wn.2d 206, 223, 867 P.2d 610, 620 (1994) (quoting 1 J. Weinstein & M. Berger, *Evidence* § 403[03], at 403–36 (1985)). “‘Evidence of prior drug use and addiction certainly presents a danger of unfair prejudice’ because a jury could decide a case based on its judgment that a party is a bad person rather than on the merits of the case.” Jones v. Bowie Industries, 282 P.3d 316 (Alaska Sup. Ct. 2012) (quoting Liimatta v. Vest, 45 P.3d 310 (Alaska Sup. Ct. 2002)).

In this case, Kevin Anderson’s purported use of cocaine was only introduced to provoke a negative emotional response from members of the jury. This can be shown by analyzing several key facts. First, Kevin Anderson’s blood test on May 12th was negative for the presence of cocaine or methamphetamine. See Kovar Trial Testimony at pp. 54-56. Second, Defendant had no evidence tying Kevin Anderson to drug use after December 2005. Id. Third, even Defendant’s purported expert on the relationship between cocaine use and a brain abscess, Dr. Michael Kovar, admitted on cross-examination that he had no evidence whatsoever tying Kevin Anderson to the use of any illegal drugs. See Kovar Trial Testimony at p. 88. And finally, Dr. Kovar also admitted that he had no scientific proof of a relationship between cocaine use and a brain abscess. Id. at 66-67. And finally, even though the Defendants fought long and hard to introduce

evidence of methamphetamine use, the record shows that Kevin Anderson had not used methamphetamine in several years prior to his brain abscess.

The only rational inference gleaned from this record is that Defendant sought to introduce Kevin Anderson's purported drug use simply to disparage. By attacking his character, the Defendant calculated that the jury would most likely reject Kevin Anderson's request for justice on an emotional level. In short, Defendant's emphasis upon Kevin Anderson's purported drug use was analogous to advocating for jury nullification.

D. Testimony about Kevin Anderson's Purported Drug Usage Tainted the Entire Trial.

An error in admitting evidence will not result in a reversal unless prejudice results. Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). “[E]rror is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). An error is prejudicial to a party if it affects the trial outcome. See Brown, 100 Wn.2d at 196. A harmless error is one “which is trivial, formal, or merely academic and which in no way affects the outcome of the case.” State v. Gonzales, 90 Wn. App. 852, 855, 954 P.2d 360 (1998); see also Crittenden v. Fibreboard Corp., 58 Wn. App. 649, 659, 794 P.2d 554 (1990).

In this case, the trial court's decision to permit the Defendant to introduce evidence regarding Kevin Anderson's purported drug usage was neither trivial nor harmless. Essentially, Defendant was arguing to the jury that Kevin Anderson did not deserve justice because he was a druggie. Because there was no substantive basis to introduce drug usage in this medical malpractice case, the only reasonable inference is that Defendant intentionally interjected this inflammatory evidence in a concerted effort to provoke the jurors' prejudices against Kevin Anderson.

In Adkins v. Aluminum Co. of America, the Washington Supreme Court was asked to determine whether making an improper "golden rule" argument was so prejudicial as to require reversal. Adkins v. Aluminum Co. of Am., 110 Wash. 2d 128, 141-43, 750 P.2d 1257, 1265-66 (1988) clarified on denial of reconsideration, 756 P.2d 142 (Wash. 1988). In analyzing the issue, the Adkins Court candidly stated: "The effect of a 'golden rule' argument on the jury is difficult to ascertain." Id. However, the Court reasoned, "It is the nature of the argument itself which establishes its impropriety: the jury is invited to decide the outcome of the case based on sympathy, prejudice or bias, rather than on the evidence and the law." Id. Ultimately, the Court held that "the improper argument presumptively affected the outcome of the trial and requires reversal."

Similarly, in Salas, the Washington Supreme Court was tasked with determining whether the trial court erred in admitting evidence that was

unfairly prejudicial when the Defendant introduced evidence of Plaintiff's illegal immigration status. Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 673, 230 P.3d 583, 587 (2010). In analyzing this issue, the critical question was actual prejudice had been established by the appellant. Id. Ultimately, the Supreme Court held that **“where there is a risk of prejudice and ‘no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.’”** Id. (quoting Thomas v. French, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983) (emphasis added)). The Court concluded that “the risk of prejudice inherent in admitting immigration status to be great, and we cannot say it had no effect on the jury.” Salas, 168 Wn.2d at 673. Ultimately, the Supreme Court determined that while the plaintiff's immigration status was actually relevant to damages, the prejudicial effect required a new trial. Id.

This case is more egregious than Salas. In contrast to Salas, Defendant's introduction of cocaine usage was completely irrelevant. By the end of the trial, Defendant's true motive in introducing drugs into this trial was revealed when Defendant did not even attempt to link Kevin Anderson's purported use of methamphetamine to the development of Kevin's brain abscess. The introduction of drugs into this trial was nothing more than a transparent tactical strategy designed to persuade the jury to align themselves with a highly educated medical doctor over an

undeserving drug user. There can be no reasonable doubt that drugs affected the outcome of this trial.

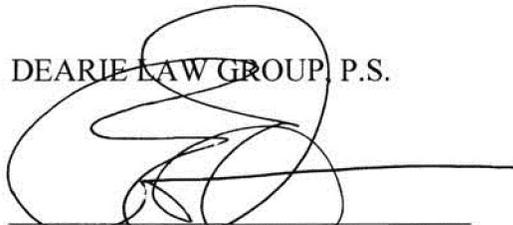
V. CONCLUSION

Defendant Charles Hamon's failure to properly diagnose Kevin Anderson resulted in catastrophic brain damage. Instead of trying this case on its merits, Defendant focused his trial strategy upon impugning Kevin Anderson's character. Kevin Anderson's purported use of cocaine and methamphetamine was completely unrelated as to whether Defendant committed medical malpractice. The trial court erred by permitting the Defendant to taint the entire trial by introducing inflammatory and unsubstantiated accounts of drug usage. This Court must order a new trial to provide Kevin Anderson with a legitimate trial on the merits.

RESPECTFULLY SUBMITTED this 22nd day of July 2013.

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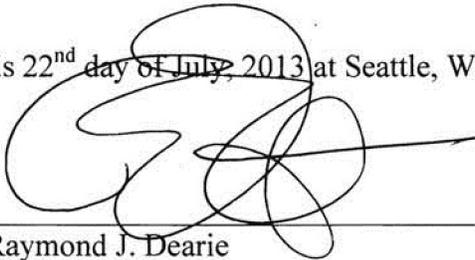
CERTIFICATE OF SERVICE

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

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EXECUTED this 22nd day of July, 2013 at Seattle, Washington.



Raymond J. Dearie

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