

NO. 90563-1

SUPREME COURT  
OF THE STATE OF WASHINGTON

COURT OF APPEALS CAUSE NO. 44388-1-II

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KEVIN ANDERSON,

Plaintiff/Petitioner,

v.

CHARLES HAMON, M.D.,

Defendants/Respondents,

**FILED**  
JUL 30 2014  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

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**PETITION FOR REVIEW OF PLAINTIFF/PETITIONER  
KEVIN ANDERSON**

**SENT ON JULY 24, 2014 VIA FAX FOR FILING IN  
COURT OF APPEALS, DIVISION II**

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**I. IDENTITY OF PETITIONER**

Petitioner Plaintiff Kevin Anderson asks this Court to accept review of the decision terminating review designated in Part II.

**II. CITATION TO COURT OF APPEALS DECISION**

Petitioner seeks review of the Court of Appeals' unpublished decision, Kevin Anderson v. Charles Hamon, M.D. (No. 44388-1-II), filed on June 24, 2014. The copy of the decision is in the Appendix at pages 1 through 7.

**III. ISSUES PRESENTED FOR REVIEW**

1. Whether the trial court abused its discretion by admitting evidence from an "anonymous friend" that Plaintiff Kevin Anderson was a "daily user of cocaine" even though this evidence offered little or no probative value, and was overwhelmingly prejudicial.
2. Whether the trial court abused its discretion by permitting the Defendant to introduce evidence of Plaintiff Kevin Anderson's previous use of crystal meth even though this information was 100% irrelevant and catastrophically prejudicial.

**IV. 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 and 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 22<sup>nd</sup>, 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, M.D.

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.

## V. ARGUMENT

### A. Introduction

The Supreme Court should accept review under RAP 13.4(b)(1) and RAP 13.4(b)(2) because the Court of Appeals decision conflicts with long standing evidentiary law in both the Court of Appeals and the Supreme Court. In addition, the Supreme Court should also accept review under RAP 13.4(b)(4) because this case involves an issue of substantial public interest that should be determined by the Supreme Court.

The trial court grossly erred when it permitted the Defendant to taint the entire trial by admitting irrelevant and inflammatory innuendo regarding Kevin Anderson's purported drug use. None of the purported drug use was ever tied to the time of the alleged malpractice. Simply put, 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.

**B. 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).

**C. 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.

**D. 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 12<sup>th</sup> 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.

**E. Contributory Negligence**

In its decision, the Court of Appeals stated that Plaintiff's drug use was relevant to contributory negligence. The Court of Appeals analysis on this issue is erroneous and illogical. See Anderson Opinion at p. 5. In its Opinion, the Court fails to articulate the relevancy of Plaintiff's (purported) drug use in regards to comparative fault. Instead, the Court of Appeals simply states its decision in conclusory fashion.

Plaintiff's claim for malpractice was based upon Dr. Hamon's **failure to diagnose Kevin Anderson's brain abscess.** **Plaintiff Kevin Anderson never alleged that Defendant Hamon actually caused the brain abscess. Who, what, or why the brain abscess evolved is irrelevant in regards to whether Dr. Hamon breached the standard of care in failing to diagnose Plaintiff Anderson with a brain abscess.** See Arnold v. Laird, 94 Wash. 2d 867, 870, 621 P.2d 138, 140 (1980) ("it is irrelevant [in regards to contributory negligence] how a dog becomes abnormally dangerous, i. e., whether it happens intentionally, through negligence, or merely through a dog's heredity."); see also Jackson v. City of Seattle, 15 Wash. 2d 505, 512, 131 P.2d 172, 176 (1942) (contributory

negligence should not have been submitted to jury without substantial evidentiary support).

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

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

Overall, whether Kevin Anderson was negligent or reckless in contracting his own brain abscess is completely immaterial (a/k/a irrelevant) as to whether Dr. Hamon committed medical malpractice by failing to diagnose the condition. Logic mandates that Kevin Anderson's drug use was irrelevant and contributory negligence cannot provide Defendant with sanctuary for the erroneous introduction of this extremely prejudicial testimony before the jury.

F. **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.

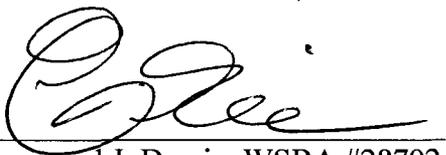
This case is more egregious than Salas. In contrast to Salas, Defendant’s introduction of cocaine usage was completely irrelevant. By the end of the trial, Defendant’s true motive in introducing drugs into this trial was revealed when Defendant did not even attempt to link Kevin Anderson’s purported 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.

## VI. 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. The Supreme Court should accept review to provide Kevin Anderson with a legitimate trial on the merits.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of July 2014.

DEARIE LAW GROUP, P.S.

By:   
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CERTIFICATE OF SERVICE

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

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EXECUTED this 24<sup>nd</sup> day of July, 2014 at Seattle, Washington.



Ann Glassman

FILED  
COURT OF APPEALS  
DIVISION II

2014 JUN 24 AM 9:05

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION II**

KEVIN ANDERSON,

Appellant,

v.

CHARLES HAMON, M.D.,

Respondent.

No. 44388-1-II

UNPUBLISHED OPINION

LEE, J. — Kevin Anderson appeals the jury's verdict finding Dr. Charles Hamon was not negligent in Anderson's care. Anderson argues that the trial court erred in admitting evidence of his past drug use for the purposes of proving contributory negligence. We hold that the trial court did not abuse its discretion by admitting the evidence under ER 401 and ER 403. We affirm.

**FACTS**

**I. BACKGROUND**

Anderson began dating Jennifer Ray in September 2005, while they both lived in Hawaii. In February 2006, Anderson moved in with Ray. Shortly after, Anderson began complaining about being sick. On March 21, 2006, Anderson went to urgent care with a headache and congestion. The urgent care center diagnosed Anderson with a sinus infection and prescribed antibiotics. On March 22, Anderson began suffering from a severe headache, nausea, vomiting,

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and photophobia. Anderson went to the emergency room. The emergency room performed a CT scan, determined that he had a severe sinus infection, and sent him home to continue his antibiotics.

Over the next several weeks, Anderson's congestion improved, but his headache never fully resolved. On May 4,, Anderson and Ray flew from Hawaii to Arizona to visit friends. During the trip to Arizona, Anderson's condition declined. He was tired and had a severe headache, photophobia, anorexia (loss of appetite), nausea, and vomiting. After a few days in Arizona, Ray and Anderson flew to Seattle to visit Ray's family on Bainbridge Island. Anderson's condition continued to worsen. During the first two days on Bainbridge Island, Anderson stayed in bed the entire time, did not eat, and continued to experience a severe headache and photophobia.

On the morning of May 11, Ray convinced Anderson to see a doctor. Ray drove Anderson to see Dr. Hamon. Hamon performed a physical examination, took a medical history, and performed a neurological exam. Anderson presented with a severe headache, photophobia, malaise, anorexia, nausea, fever, and chills. Hamon diagnosed Anderson with a chronic sinus infection and gave him another course of antibiotics, a decongestant, and pain medication. Ray brought Anderson home, and he returned to bed. The next morning, Ray spoke with Anderson at approximately 9:30 before leaving the house to spend the day with her mother and sister. Ray returned home at 6:30 PM and checked on Anderson. Ray heard Anderson snoring and decided to let him stay asleep. At 7:30 PM Ray attempted to wake Anderson, but he did not wake up; Ray thought he was "knocked out" from the pain medication. At approximately 8 PM, Ray attempted

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to wake Anderson, but he was unresponsive. Ray's sister called 911, and the responding medical personnel airlifted Anderson to Harborview Medical Center.

At Harborview, Anderson was diagnosed with a brain abscess. The CT scan revealed a 7 cm abscess (roughly the size and volume of a baseball). Anderson had an initial craniotomy to drain the abscess, a sinus surgery, and a subsequent craniotomy. Eventually, Anderson regained consciousness and began physical therapy. Anderson was discharged from Harborview on July 4, 2006. Anderson has permanent injuries resulting from his brain surgeries, including loss of use of his right hand, blindness, and cognitive impairments.

## II. PROCEDURE

On January 13, 2010, Anderson filed a medical malpractice claim against Hamon, alleging that Hamon breached the standard of care by failing to refer Anderson to a specialist or an emergency room for further treatment. Hamon denied the allegation and pled contributory negligence as an affirmative defense. Prior to trial, Anderson filed a motion in limine to exclude any evidence related to Anderson's history of drug use. Hamon argued that Anderson's drug use, particularly cocaine and methamphetamine, were relevant to a defense of contributory negligence.<sup>1</sup> The trial court allowed Hamon to introduce evidence of Anderson's cocaine and methamphetamine use as it relates to the cause of Anderson's brain abscess. During the trial, Anderson continued to raise his objection to the admissibility of any evidence of his drug use.

At trial, Ray testified that Anderson told her he had used drugs including cocaine, but that Anderson did not use drugs while they were together. Dr. Michael Kovar, one of Hamon's

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<sup>1</sup> In an action based on fault seeking to recover damages for injury or death to a person, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. RCW 4.22.005.

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experts, testified that Anderson's charts from Harborview noted cocaine use and that use of cocaine and methamphetamine can contribute to the development of a sinus infection and brain abscess.

Anderson presented expert testimony from several doctors who testified that Hamon breached the standard of care by failing to refer Anderson to a specialist, to the emergency room, or for a CT scan. Hamon, on the other hand, presented expert testimony of several doctors who testified that Hamon did not breach the standard of care.<sup>2</sup>

The trial court specifically instructed the jury as to Hamon's affirmative defense of contributory negligence:

In addition, [Hamon] claims as an affirmative defense that the plaintiff was contributorily negligent in one or more of the following respects:

- By drugs that ultimately caused the sinusitis that escalated into a large brain abscess over the course of several months, causing substantial injuries.

Clerk's Papers (CP) at 619. The jury was given a special verdict form that asked: "Was defendant Charles Hamon, M.D. negligent in his care of plaintiff Kevin Anderson?" CP at 636. The jury answered "[N]o." CP at 636. The jury did not reach the additional questions regarding proximate cause, Anderson's damages, and Anderson's contributory negligence. Anderson appeals.

#### ANALYSIS

Anderson argues that the trial court erred by admitting the evidence of his past drug use because it was irrelevant under ER 401 and unfairly prejudicial under ER 403. The evidence of

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<sup>2</sup> It appears that Anderson and Hamon each called four doctors but the record before us on appeal does not include all of the trial testimony from each doctor.

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Anderson's drug use was relevant to support Hamon's theory of contributory negligence; therefore, the evidence was properly admitted under ER 401. In addition, the probative value of the evidence was not substantially outweighed by any prejudice resulting from the admission of the evidence under ER 403.

We 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). "Therefore, we will overturn the trial court's ruling on the admissibility of evidence only if its decision [is] manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons." *Mut. of Enumclaw*, 178 Wn. App. at 728. Only relevant evidence is admissible. ER 402. "Relevant evidence has any tendency to make a fact of consequence more likely or less likely; this definition sets a low threshold." *Gorman v. Pierce County*, 176 Wn. App. 63, 84, 307 P.3d 795 (2013) (citing ER 401), *review denied*, 179 Wn.2d 1010 (2014). The trial court may exclude relevant evidence if the probative value of the evidence is outweighed by the risk of unfair prejudice. ER 403.

Here, evidence of Anderson's drug use was relevant to Hamon's contributory negligence defense. Specifically, the evidence regarding Anderson's use of drugs ingested through nasal passages was relevant to whether Anderson's drug use caused or contributed to his sinusitis or the development of his brain abscess. Therefore, we hold that evidence of Anderson's drug use meets the standard for relevant evidence in ER 401 and is presumed admissible under ER 402.

But, Anderson argues that the evidence of his drug use was so prejudicial that it should have been excluded under ER 403. We disagree.

In certain circumstances, improperly admitted evidence can result in enduring prejudice that requires reversal. For example, in *Bertsch v. Brewer*, the trial court erroneously admitted the plaintiff's unfavorable psychological profile. 97 Wn.2d. 83, 85-87, 640 P.2d 711 (1982). Although the evidence was admitted for the purposes of damages, an issue the jury never reached, the appellate court stated:

The derogatory description of [the plaintiff] undoubtedly prejudiced the jurors as to [the plaintiff's] credibility, which reflected directly on many crucial issues, including informed consent, the causal relationship between [the defendant's] treatment and [the plaintiff's] recurring symptoms, and contributory negligence.

*Bertsch*, 97 Wn.2d at 88. Because the improper evidence was so damaging to the plaintiff's credibility, the court held that its improper admission was reversible error. But here, Anderson's credibility was never an issue.<sup>3</sup> Furthermore, the limited evidence that was admitted did not present a particularly derogatory description of Anderson. Rather, the evidence simply established that in December 2005, Anderson had used drugs while staying with his parents and there was a note in his Harborview medical file stating that someone had reported Anderson was a daily drug user. Therefore, any prejudicial effect of the evidence related to Anderson's past drug use cannot be said to be so enduring that reversal is required.

Thus, while there is always a risk that evidence will result in some prejudice to one party or the other, the record does not support Anderson's claim that any probative value of the evidence as to the cause of Anderson's sinusitis or brain abscess was substantially outweighed by the unfair prejudice resulting from the limited evidence regarding his drug use. Accordingly, we

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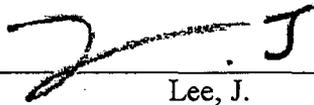
<sup>3</sup> Anderson testified that he could not remember anything from the time he and Ray left Maui until he was in physical therapy three to four weeks after being admitted to Harborview.

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hold that the trial court did not abuse its discretion in admitting the limited evidence regarding Anderson's drug use.

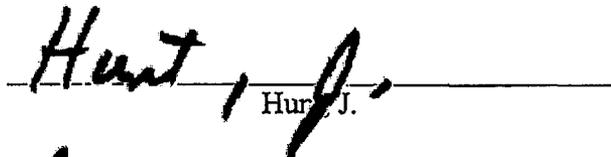
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.60.040, it is so ordered.

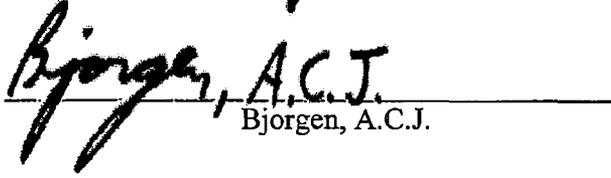


Lee, J.

We concur:



Hunt, J.



Bjorgen, A.C.J.