NO. 94887-9

SUPREME COURT OF THE STATE OF WASHINGTON

MILTON LONG, individually, and as Personal Representative of the ESTATE OF DONALD RODENBECK,

Petitioner,

v.

PEACEHEALTH dba PEACEHEALTH ST. JOSEPH MEDICAL CENTER, a Washington Non-Profit Corporation,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTY

Respondent PeaceHealth d/b/a PeaceHealth St. Joseph Medical Center submits this Answer to Petition for Review.

II. COURT OF APPEALS DECISION

In its May 15, 2017 unpublished decision, Division I reversed Whatcom County District Court Judge Matthew Elich's grant of a new trial based on findings that the trial judge, Whatcom County Superior Court Judge Deborra Garrett, commented on the evidence in questioning one of PeaceHealth's experts, Dr. Terence Quigley. In reversing Judge Elich's grant of a new trial, Division I recognized, among other things, that (1) "[w]hether a trial judge's utterances constitute an improper comment is a constitutional question that we review de novo," *Slip Op. at 5*;[1] (2) "[t]here is nothing irregular about a trial judge asking questions of a witness," *id.*; (3) "[t]o rise to the level of an unconstitutional comment, the judge's opinion or attitude [towards the merits of the cause] must be 'reasonably inferable from the nature or manner of the questions asked and things said,'" *id.*; and (4) nothing in the trial judge's utterances in this case, including the trial judge's use of the word "Okay" at the end of her questioning of Dr. Quigley, contained any reasonably inferable indication of the judge's opinion or attitude as to the merits of the case, *id. at 7-9.*

[1] The slip opinion is attached as Appendix A-1 through A-13 to the Petition for Review.

III. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals properly reverse Judge Elich's grant of a new trial, finding that Judge Garrett's utterances in questioning Dr. Quigley were not constitutionally prohibited comments on the evidence?

IV. COUNTERSTATEMENT OF THE CASE

In his Petition for Review, Mr. Long presents a one-sided view of the case most favorable to him, omits contradictory evidence the jury was free to credit, includes material that has no bearing on the limited issue on appeal,[2] and at times misleadingly portrays what occurred at trial.[3] Space does not allow for PeaceHealth to clarify, correct, or point out all of the inaccuracies and irrelevancies contained in Mr. Long's petition, and so

[2] The sole issue on this appeal is whether Judge Elich erred in finding that Judge Garrett prejudicially commented on the evidence in her questioning of Dr. Quigley and in granting a new trial on that basis. Yet, Mr. Long in his petition continues to focus on and complain about a host of other issues that were not before Judge Elich or encompassed in his order granting a new trial, the only order from which the appeal was taken. Among the other issues Mr. Long raises extraneous to this appeal are: (1) a nursing assistant's incorrect chart note, *Pet. at 4*; (2) whether PeaceHealth properly complied with RCW 68.50.010-.030 concerning coroner notification, *see Pet. at 5 (n. 2), 18*; (3) PeaceHealth's sentinel event reporting concerning Mr. Rodenbeck, *Pet. at 5-6*; (4) changes made on Mr. Rodenbeck's death certificate, *Pet. at 6*; (5) Mr. Long's not being provided with copies of informal notes Dr. Zastrow made in preparation for her testimony, *Pet. at 7-8*; (4) rulings on Mr. Long's claim of spoliation relating to PeaceHealth's cleaning up of the blood on the floor, *Pet. at 8*; (6) Judge Garrett's foundational questioning of Nurse McInnis outside the presence of the jury, *Pet. at 10*; (7) how often PeaceHealth providers entered Mr. Rodenbeck's medical records after his death, *Pet. at 12-13*.

[3] By way of example, Mr. Long states, *Pet. at 7*, "Judge Garrett did not allow Dr. Owings to testify at trial." Yet, he fails to mention that he did not attempt to call Dr. Owings (the pathologist who performed Mr. Rodenbeck's autopsy) in his case-in-chief, but only in rebuttal, and that, after Judge Garrett initially ruled that Dr. Owings' testimony was not proper rebuttal, she was willing to hear additional argument with specifics as to what Dr. Owings' rebuttal testimony would be, RP 1976-77; *see also* RP 1974-75, but, after a break, Mr. Long's counsel told the court that "during the break, I did have a chance to talk with my co-counsel and we don't see a need to call Dr. Owings and so the Court doesn't need to grapple further with my arguments on that issue." RP 1985.

PeaceHealth provides this counterstatement focusing on facts and procedure relevant to the issue presented for review.

A. Factual Background.

Donald Rodenbeck underwent aortofemoral bypass surgery performed by vascular surgeon Dr. Connie Zastrow at PeaceHealth to treat his significant atherosclerotic vascular disease. RP 1238-49. The surgery was technically challenging, with significant, but not unexpected, blood loss. RP 1247, 1263-64, 1268. After recovering from anesthesia, he was transferred to the intensive care unit (ICU) for monitoring. RP 1264. He was awake, alert and oriented when he arrived in the ICU, RP 916, and except for a little disorientation as to time, but not name or place, when first awakened the next morning, RP 914-15, he was alert, oriented, and without cognitive dysfunction when assessed, *see* RP 916, 927, 929-30.

After two days of observing and monitoring Mr. Rodenbeck's vital signs, hemoglobin and hematocrit in the ICU, Dr. Zastrow felt his condition was stable and approved his transfer to a regular hospital floor. RP 932-33, 1264, 1274-76, 1329. The nurses caring for Mr. Rodenbeck after his transfer to the surgical floor had no concerns about his cognitive status, as when not asleep, he was alert, conversant, and joking, but not wanting to get out of bed until physical therapy was to come the next morning. RP 1007, 1012-13, 1021, 1038, 1730, 1734-35. The nurses made sure he

knew how to use his call light and instructed him to use it to get help. RP 1021-23, 2432-33, 2435-36, 2447. As one of the nurses explained, technically all patients on the surgical floor are fall risks, so she goes over with each of them how the call light works and reminds them they are fall risks and not supposed to get up without assistance.[4] RP 1021-23.

After the late evening shift change on the evening Mr. Rodenbeck was transferred to the surgical floor, a nursing assistant entered his room, found him lying face up on the floor with a pool of blood (variously described as small, "smaller than a piece of paper," moderately-sized, and 50 to 100 cubic centimeters, *see* RP 888, 1286, 1594-95, 1658, 1743, 1761, 1782) by his head, and yelled for help. RP 1594. The charge nurse, who was walking by, responded, checked Mr. Rodenbeck's pulse, found none, and began chest compressions. RP 1594, 2421-22. Other nurses also responded, as did the code team which took over resuscitation efforts. RP 887-88, 1742-44, 1814-15. Unfortunately, Mr. Rodenbeck could not be revived and was pronounced dead. RP 1285.

Hospital staff notified Mr. Rodenbeck's registered domestic partner, Mr. Milton Long, and moved Mr. Rodenbeck's body to the bed

[4] Notwithstanding this testimony, Mr. Long misleadingly states, *Pet. at 3*, "PeaceHealth caregivers taking over Rodenbeck's care were not aware nor advised he was a fall risk." In any event, whether or not PeaceHealth properly documented or communicated to all of its caregivers Mr. Rodenbeck's fall risk, *see Pet. at 16*, was an issue that was properly left for the jury to resolve in deciding whether PeaceHealth was negligent and has nothing to do with the issue presented in this appeal.

and cleaned the floor in preparation for Mr. Long's arrival. RP 292-93, 1285. Hospital staff had previously called Dr. Zastrow to tell her that Mr. Rodenbeck had been found on the floor in a pool of blood and that the code team was trying to resuscitate him. RP 1284-85. Dr. Zastrow was told that when Mr. Rodenbeck was found on the floor, his IVs, epidural catheter, and Foley catheter were disconnected, and the stopcock on the central IV catheter in his neck was open, which would explain the blood on the floor around his head. RP 1286. By the time Dr. Zastrow arrived, resuscitation efforts had been stopped, Mr. Rodenbeck's body had been placed back in bed, and the floor had been cleaned. RP 1285. Dr. Zastrow examined the body for signs of bleeding, laceration, or other injury from a fall, but found no evidence of trauma. RP 1285, 1756-57.

The hospital's house manager called the Medical Examiner's office about Mr. Rodenbeck's unwitnessed fall, RP 2455-56, 2458, 2459, but the medical examiner, Dr. Goldfogel, convinced that bleeding from the central catheter, not trauma, provided the best explanation for the amount of blood on the floor, declined jurisdiction. RP 2455, 2460, 2470-71, 2473. Dr. Zastrow then obtained Mr. Long's consent to an autopsy. RP 1289-90. Dr. Owings performed the autopsy and found evidence of severe coronary artery disease and fibrosis in the heart putting Mr. Rodenbeck at risk for sudden dysrhythmia, RP 1944-45, but no evidence of external

trauma, RP 1947, and only 450 cubic centimeters of internal bleeding, well within the range Dr. Zastrow would expect given the nature of Mr. Rodenbeck's surgery. RP 1339-40. Given no evidence of injury from a fall or other competing causes, Dr. Owings concluded that dysrhythmia was the probable cause of death. RP 1946-49; *see also* RP 1336-40.

B. Procedural Background.

Mr. Long, individually and on behalf of Mr. Rodenbeck's estate, sued PeaceHealth alleging medical negligence. CP 4-9. The case was tried to a jury before Judge Deborra Garrett. *See* CP 26-46.

Mr. Long's theory of negligence was that PeaceHealth was negligent in failing to follow its policies and procedures, transferring Mr. Rodenbeck from ICU to the surgical floor, failing to properly assess and monitor his condition after transfer, and failing to communicate pertinent medical information between caregivers. *See* CP 60. He presented expert testimony in support of that theory from physician/attorney Dr. Kenneth Coleman and two nursing experts. *See* RP 302-03, 312, 317-19, 379-92, 398-99, 405-06, 408-12, 422-25, 434-35, 441-42, 446-48, 456-57, 581-82, 626-31, 640, 646-48, 714. His theory of causation, supported by Dr. Coleman's testimony, was that Mr. Rodenbeck bled to death on the floor after getting out of bed, fainting, and disconnecting his central IV catheter. RP 292, 305, 307, 309, 348. According to Dr. Coleman, Mr. Rodenbeck

had continued undetected and untreated internal bleeding after the surgery, and that he died not from a fatal arrhythmia, RP 305, but instead bled to death externally, after getting out of bed, fainting, falling to the floor, and disconnecting his central IV line. RP 292, 305, 307, 309, 348. Although the fact that Mr. Rodenbeck was found in a pool of blood was important to Dr. Coleman's opinion concerning cause of death, RP 289, 291-92, 305, the size of the pool of blood was not, RP 348-49, 357-58.

PeaceHealth's theory, supported by standard of care expert testimony from Dr. Terence Quigley and two nursing experts, was that Dr. Zastrow appropriately monitored Mr. Rodenbeck's recovery, and that the nursing personnel provided attentive and appropriate postoperative care. *See* RP 1111, 1114-19, 1121-28, 1131-33, 1137, 1144, 1151-52, 1155-60, 1484-91, 1495, 1502-04, 1534-35, 1540, 1544, 1609, 1612, 1622-24, 1628-29, 1631-33, 1859. PeaceHealth's theory of causation, supported by testimony from Dr. Zastrow and defense experts Dr. Quigley and Dr. Matthew Lacy and deposition testimony from the medical examiner, was that Mr. Rodenbeck died not from exsanguination after fainting, falling to the floor, and disconnecting his central IV, but unexpectedly from a fatal heart dysrhythmia. *See* RP 1285-88, 1339-41, 1345, 1622-26, 1635-36, 1646-47, 1666, 1936-41, 1946-49, 2236-37, 2257-60, 2359-90, 2470-71. Drs. Zastrow, Quigley, Lacy, and Goldfogel all disagreed with Dr.

Coleman's theory that Mr. Rodenbeck's death was caused by external blood loss and opined that the amount of blood on the floor based on the eyewitness accounts was too small for external bleeding to have been the cause of death, RP 1345-46, 1635-36, 1653, 1656, 1936-41, 2470-71.

Mr. Long's counsel, challenging the accuracy of and variations in the eyewitnesses' accounts of the amount of blood on the floor, repeatedly questioned defense causation witnesses about the sources of their information about it, and they all made clear that they were relying on eyewitness accounts, RP 1345-46, 1358-60, 1372, 1375-76, 1450-51, 1651-53, 1658-59, 1936-38, 1956-59, 2470-71.

After PeaceHealth finished its direct examination of Dr. Quigley, in which he had testified that he had reviewed Mr. Rodenbeck's medical records and numerous depositions, RP 1606-07, and saw some deposition about the amount of blood seen when Mr. Rodenbeck was found on the floor of his room, RP 1635-36, and that the amount of blood described, which also had IV fluids mixed with it,[5] was not sufficient to cause death, RP 1636, Judge Garrett sought to clarify Dr. Quigley's sources of information concerning the amount of blood on the floor as follows:

[5] Mr. Long asserts, *Pet. at 9*, Dr. Quigley "made up, out of whole cloth, that the blood on the floor included IV fluids." He ignores, however, the testimony of Nurse Starkovich, who characterized the blood she saw as a moderately sized pool of blood, light red, *mixed with IV fluids*, pretty liquid, and not coagulated. RP 1743, 1761, 1782; *see also* RP 1658.

> MR. FOX: Thank you. Those are all my questions.
>
> THE COURT: I have one question, Doctor, and that is, I don't know the technical jargon, you indicated that you're understanding, you indicated that amount of blood that was noted at the scene was not extensive in your view.
>
> DR. QUIGLEY: Yes.
>
> THE COURT: What's your understanding, obviously you weren't there so you're relying on information from other sources on what the amount of blood was, and what I want to know is what's your information about what the amount of blood was?
>
> DR. QUIGLEY: Well, someone described, I forget, I really apologize, two inches around the head, which is frankly a trivial amount of blood and fluid. And someone else said it was less than a can of soda, which would be less than two of these put together and that's not enough blood to cause death, it just isn't.
>
> THE COURT: Uh-huh, okay. So the information that you've got comes from your reading of the chart notes?
>
> DR. QUIGLEY: Depositions.
>
> THE COURT: And from the depositions.
>
> DR. QUIGLEY: Actually from the depositions. I don't remember reading anything in the chart that said anything about blood loss. These were from eye-witnesses who were there and saw the patient and the amount of blood around his head.
>
> THE COURT: Okay.

RP 1639-40. Mr. Long's counsel did not object to Judge Garrett's questioning of Dr. Quigley at the time, *see id.*, at the ensuing break to deal with an objection to one of PeaceHealth's follow-up questions, *see* RP 1642-44, or at any time prior to the filing of Mr. Long's reply on motion for new trial. After PeaceHealth completed its follow-up questions, Mr. Long's counsel, as he did with other witnesses, *see* 1358-60, 1372, 1375-

76, 1450-51, 1956-59, 2470-71, cross-examined Dr. Quigley, questioning the accuracy of, and pointing out the variations in, the eyewitness accounts of the amount of blood on the floor, RP 1651-53, 1658-59.

Having heard the testimony of more than twenty witnesses over ten trial days, *see* CP 26-46, the jury returned a special verdict in favor of PeaceHealth, answering "Yes" to the question whether PeaceHealth was negligent, but "No" to the question whether such negligence was a proximate cause of Mr. Rodenbeck's death. CP 46, 71-73.

Mr. Long moved for a new trial, alleging errors in jury selection, jury instructions, exclusion of rebuttal evidence, and admission of expert testimony, lack of substantial evidence supporting the verdict, and "repeated comments on the evidence." CP 148. For his alleged comments on the evidence, he cited only a transcript excerpt where he tried to cross-examine a defense nursing expert about Exhibit 69, an article on medication reconciliation she had written. CP 148, 152, 184-89, 262. When PeaceHealth objected to the attempt to cross-examine about Exhibit 69, Judge Garrett, noting that the article "seem[s] to be about medication," asked about its relevance and whether there was a concern in the case about medication given to Mr. Rodenbeck. CP 187-88. Ex. 69 was not admitted into evidence. CP 2258. It was not until his reply on motion for new trial that Mr. Long first asserted that Judge Garrett's questioning of

Dr. Quigley was a comment on the evidence.[6] *See* CP 295-96.

At the hearing on the motion for new trial, Judge Garrett responded to Mr. Long's comment on the evidence claims, indicating that the allegations "surprised" her, the alleged comments "don't sound like comments on the evidence to me," and she did not "recall having any opinion to comment on, much less commenting on the evidence." 8/21/15 RP 7. Judge Garrett denied the motion for new trial, *id*. at 14; CP 299-300, 301-02,[7] but, at Mr. Long's insistence that she recuse on the alleged comments on the evidence, referred those claimed incidents to the presiding judge on "existing briefing only," 8/21/15 RP 14-16; CP 298, 302.

Whatcom County District Court Judge Matthew Elich, serving pro tem in the superior court, ultimately heard argument on the alleged comments on the evidence. CP 303; 9/9/15 RP 4-84. At the end of the hearing, Judge Elich indicated that he would get a transcript of the day's hearing, invited the parties to submit supplemental briefing, which they did, *see* CP 326-45, 346-55, and stated that, after reviewing those

[6] It was not until the hearing on the motion for new trial before Judge Garrett that Mr. Long added a third alleged comment on the evidence based on Judge Garrett's response to his objection to a reference Dr. Quigley made to "guessing" in which she stated that she thought Dr. Quigley was using "vernacular." 8/21/15 RP 7-8, *see* RP 1635-36. Although he had cited the "guessing" excerpt from Dr. Quigley's testimony in his reply on motion for new trial, he did so to claim that a new trial should be granted because of admission of speculative expert testimony, not because it involved any alleged comment on the evidence. *See* CP 293-94.

[7] Although Mr. Long initially filed an appeal from Judge Garrett's order denying his motion for new trial, Mr. Long subsequently voluntarily withdrew that appeal. *See Long v. PeaceHealth*, Court of Appeals No. 74033-9-I.

materials, he would decide whether or not he needed to review the entire trial transcript. 9/9/15 RP 80-81. Without obtaining or reviewing the entire transcript, Judge Elich subsequently filed his memorandum opinion granting a new trial, CP 572-79, and later entered a supplemental order incorporating the memorandum into findings of fact and conclusions of law, CP 562-71. His grant of a new trial was based only Judge Garrett's questioning of Dr. Quigley which he concluded was a prejudicial comment on the evidence. CP 572-79, 562-71.[8]

PeaceHealth timely appealed Judge Elich's order granting a new trial. CP 580. Division I reversed, concluding that Judge Garrett did not comment on the evidence in questioning Dr. Quigley. Slip Op. at 12.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

Under RAP 13.4(b), a petition for review will be accepted only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

[8] Mr. Long erroneously claims, *Pet. at 12, 16-17*, Judge Elich found that Judge Garrett commented on the evidence not only in her questioning of Dr. Quigley, but also in asking Mr. Long's counsel about the relevance of his attempt to question Nurse Hobson about Ex. 69, but that Judge Elich made no finding regarding prejudice with respect to the latter. Yet, with regard to Ex. 69, although Judge Elich found that "[a]s there was no ruling to explain, the statements at issue are, and were, comments on the evidence," CP 587 (Finding of Fact 1.16), he went on to find that "[t]here is not sufficient information contained in the record before this court to determine that the statements made by the trial court either directly or implicitly conveyed to the jury the trial court's personal opinion regarding the credibility, weight or sufficen[cy] of Exhibit 69 or the line of testimony surrounding it," CP 587 (Finding of Fact 1.17) and concluded that "[p]laintiff did not meet his burden to prove that the trial court's comments on Exhibit #69 made before the jury conveyed the trial court's personal opinion about that evidence," CP 590 (Conclusion of Law 2.4).

> (2) If the decision of the Court of Appeals is in conflict with a published decision 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.

Here, Mr. Long cites only RAP 13.4(b)(1) and (3) as his purported grounds for seeking review. Because the Court of Appeals decision is not in conflict with any decision of this Court so as to warrant review under RAP 13.4(b)(1), and because no significant question of law under either the state or federal constitution is involved so as to warrant review under RAP 13.4(b)(3), this Court should deny Mr. Long's petition for review.

A. The Court of Appeals Decision Is Not in Conflict with Any Decision of This Court.

Mr. Long asserts, *Pet. at 13*, the Court of Appeals decision "is in direct conflict with existing Supreme Court decisions," but never explains how it conflicts with any particular Supreme Court decision. The mere assertion of a conflict does not make it so.

Here, consistent with decisions of this Court, the Court of Appeals appropriately recognized, among other things, that (1) whether a trial judge's utterances constitute an improper comment on the evidence is a constitutional question subject to de novo review, Slip Op. at 5 (citing *State v. Woods*, 143 Wn.2d 561, 590-91, 23 P.3d 1046 (2001)); (2) there is

nothing irregular about a trial judge questioning a witness or posing clarifying questions to a witness, Slip Op. at 5-6 (citing *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 140, 606 P.2d 1214 (1980); *Dennis v. McArthur*, 23 Wn.2d 33, 37-38, 158 P.2d 644 (1945), *overruled on other grounds by State v. Davis*, 41 Wn.2d 535, 537, 250 P.2d 548 (1952); *State v. Brown*, 31 Wn.2d 475, 487, 197 P.2d 590, 202 P.2d 461 (1948)); (3) the constitutional prohibition of comments on the evidence is violated when the judge's utterances "imply to the jury an expression of the judge's opinion concerning disputed evidence, or the court's attitude towards the merits of the cause," Slip Op. at 5 (citing *Hansen v. Wightman*, 14 Wn. App. 78, 85, 538 P.2d 1238 (1975) (citing *State v. Carothers*, 84 Wn.2d 256, 267, 525 P.2d 731 (1974); *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970); *Risley v. Moberg*, 69 Wn.2d 560, 565, 419 P.2d 151 (1966), *overruled on other grounds by Bowman v. Two*, 104 Wn.2d 181, 186, 704 P.2d 140 (1985)); and (4) to rise to the level of a constitutionally prohibited comment on the evidence, "the judge's opinion or attitude must be 'reasonably inferable from the nature or manner of the questions asked and things said,"' Slip Op. at 5 (citing *Dennis*, 23 Wn.2d at 38). The Court of Appeals then applied those principles in reviewing de novo Judge Garret's utterances in her questioning of Dr. Quigley, Slip Op. at 7-9, and properly found that she did not comment on the evidence as "[n]o reason-

able juror would be believe that these utterances revealed any judicial opinion of or attitude toward [Dr. Quigley's] testimony," Slip Op. at 12.

None of this Court's "comment on the evidence" cases Mr. Long cites are in conflict with the Court of Appeals' decision in this case. For example, Mr. Long, *Pet. at 16*, cites *Case v. Peterson*, 17 Wn.2d 523, 531, 136 P.2d 192 (1943), for the non-controversial proposition that "Washington State's constitution prohibits the trial judge from commenting on disputed facts." The Court of Appeals did not hold otherwise. It merely determined that Judge Garrett's utterances in questioning Dr. Quigley did not reveal her personal opinion or attitude toward any evidence or the credibility of any witness, and thus did not constitute a comment on the evidence. That Mr. Long disputed the accuracy of eyewitness accounts as to the amount of blood on the floor does not render Judge Garrett's questioning of Dr. Quigley a judicial comment on disputed facts.

As an additional example, Mr. Long cites *Risley*, 69 Wn.2d at 565, for the equally non-controversial proposition that "[w]hen a judge's questions appear to assume the existence of evidence which is disputed, or appear 'personally to corroborate and seemingly to indorse the credibility' of a party or its expert witness, the judge improperly comments on the evidence." Again, the Court of Appeals did not hold otherwise. Rather it carefully considered and distinguished *Risley*, and concluded that Judge

Garrett's questioning of him did not assume the existence of disputed evidence, "did no more than clarify testimony already given," and did not reveal "her attitudes or opinions of the testimony or of the legitimacy of either party's case." Slip Op. at 10-12.

Mr. Long citations to this Court's "comment on the evidence" pronouncements in *State v. Becker*, 132 W.2d 54, 64, 935 P.2d 1321 (1997), *Pet. at 14*; *State v. Levy*, 156 Wn.2d 709, 721, 723, 132 P.3d 1076 (2006), *Pet. at 14, 16*; *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988), *Pet. at 14*; or *State v. Bogner*, 62 Wn.2d 247, 252, 382 P.2d 254 (1963), *Pet. at 17*, are equally unavailing and do not establish the existence of any conflict between those decisions and the Court of Appeals decision in this case. The Court of Appeals did not contradict any of those pronouncements. It hewed to them and found that Judge Garrett's utterances did not convey her personal attitudes toward the merits of the case, or allow the jury to infer from what she said or didn't say that she personally believed or disbelieved the testimony in question.

The Court of Appeals decision is simply not in conflict with any decision of this Court so as to warrant review under RAP 13.4(b)(1).

B. No Significant Question of Constitutional Law is Involved.

Mr. Long also asserts, *Pet. at 13*, the Court of Appeals decision "presents a question of first impression whether a trial court's questions of

a witness, and words in response to those questions in front of a jury can be 'meaningless[']expression(s), and not fall within the constitutional prohibition on judicial comments on the evidence." Yet, the Court of Appeals did not say that Judge Garrett's clarifying questions of Dr. Quigley were "meaningless." It found that nothing in those questions contained any reasonably inferable indication of Judge Garrett's opinion or attitude as to the merits of the case or the credibility of any witness so as to constitute a constitutionally prohibited comment on the evidence. Slip Op. at 7-9. The only utterance the Court of Appeals found meaningless was Judge Garrett's use of the word "Okay" when she had finished questioning Dr. Quigley, a filler word[9] the Court of Appeals found she had used no less than 21 times in front of the jury that day, Slip Op. at 9, and a filler word Judge Garrett, PeaceHealth's counsel, and Mr. Long's counsel together had used more than 200 times that day. *See* RP 1554-1835.

Citing inapposite cases concerning the need to give words their ordinary meaning or dictionary definitions in interpreting statutes or contracts, *Pet. at 15* (citing *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002); *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009); *Boeing Co. v. Aetna*

[9] "A *filler word* is an apparently meaningless word, phrase, or sound that marks a pause or hesitation in speech. Also known as a *pause filler* or *hesitation form*." https://www.thoughtco.com/what-is-a-filler-word-1690859.

Casualty & Sur. Co., 113 Wn.2d 869, 877, 784 P.2d 507 (1990)), Mr. Long asserts that the Court of Appeals was required to give Judge Garret's use of the word "Okay" at the end of her questioning of Dr. Quigley its dictionary definition of expression of approval or agreement.[10] But, beside the fact that the Court of Appeals was not interpreting a statute or contract, Mr. Long's assertion ignores the fact that "Okay" is commonly used in spoken English as a filler word when pausing, hesitating, or transitioning from one topic to another.[11] Indeed, if use of the word "Okay" in questioning a witness must be construed only as an expression of agreement or approval with what the witness said, then Mr. Long's counsel and PeaceHealth's counsel on innumerable occasions in this trial were guilty of expressing their approval of witnesses' answers on both direct and cross-examination, given the many numbers of times they said "Okay" after a witness finished his or her answer and before they asked their next question.

Mr. Long asserts, *Pet. at 15*, that the Court of Appeals' determination that Judge Garrett's use of the word "Okay" at the end of her ques-

[10] Mr. Long, without citation to supporting authority also asserts, *Pet at 15*, that "[t]he law assumes jurors also give the words used in the courtroom the proper meaning" and "look to the dictionary" to determine the meaning of a word. But, jurors are not encouraged to look to the dictionary to determine the meaning of words, and in some cases, may commit prejudicial misconduct warranting a new trial if they do so. *See, e.g.*, *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d128, 137-38, 750 P.2d 1257 (1988).
[11] *See* footnote 9, *supra*.

tioning of Dr. Quigley was a "meaningless expression" has somehow "carried the law in Washington to where it has never been before and should never go." Setting aside his dramatic hyperbole, Mr. Long's assertion ignores that in *State v. Hansen*, 46 Wn. App. 292, 301, 730 P.2d 706 (1986), in a different context, the Court of Appeals described another judge's remark as "ambiguous and for that reason quite meaningless."

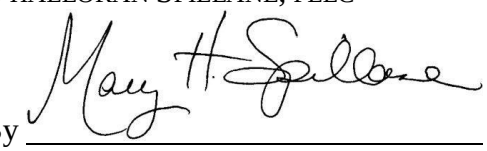
The Court of Appeals' determination that Judge Garret's use of the word "Okay" was a "meaningless expression" was not erroneous and does not alter existing Washington law. Nor does it present a question of law, much less a significant one, under the state or federal constitution so as to warrant review under RAP 13.4(b)(3).

VI. CONCLUSION

For all these reasons, the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 28th day of August, 2017.

FAIN ANDERSON VANDERHOEF ROSENDAHL
O'HALLORAN SPILLANE, PLLC

By 

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 28th day of August, 2017, I caused a true and correct copy of the foregoing document, "Answer to Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 28th day of August, 2017, at Seattle, Washington.

Carrie A. Custer

Carrie A. Custer, Legal Assistant

FAVROS LAW

August 28, 2017 - 2:38 PM

Transmittal Information

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Appellate Court Case Number:	94887-9
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Superior Court Case Number:	14-2-01483-6

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