No. 95131-4

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 75532-3-I

IN THE COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

BRIAN HOLLINS,

Petitioner,

v.

RICHARD ZBARASCHUK AND ALEXIA ZBARASCHUK,

Respondents.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. INTRODUCTION

The Zbaraschuks were denied justice and a fair trial given the two million dollar jury verdict was based on incomplete and misleading damages testimony that the motor vehicle accident at issue and Mr. Hollins' related subjective neck pain and soft-tissue injury, were the *only* factors impacting his life, activities, and career. Because the trial court did not abuse its discretion in determining it had erred in excluding relevant evidence bearing on credibility and damages including Mr. Hollins' multiple and significant other unrelated injuries and surgeries resulting in ongoing pain and permanent impairments, Division I of the Court of Appeals properly affirmed the trial court's discretionary decision to grant the Zbaraschuks' motion for new trial pursuant to CR 59(a)(1).

No reason exists for this Court to grant discretionary review.

To obtain this Court's review, Mr. Hollins must show that the Court of Appeals decision conflicts with a decision of this Court or with another Court of Appeals decision, or that he is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b). Although Mr. Hollins claims Division I's decision conflicts with opinions from this Court and other published Court of Appeals opinions, he is wrong. The cases relied upon all support the proper method for

review of a trial court's decision granting a motion for new trial pursuant to CR 59(a)(1) is for abuse of discretion. Nor does this case present an issue of substantial public interest. Because Mr. Hollins cannot show review is warranted under any of the criteria of RAP 13.4(b), his Petition for Review must be denied.

II. COUNTER STATEMENT OF ISSUES

A. Should this Court deny Mr. Hollins' Petition for Review where Division I of the Court of Appeals correctly reviewed for abuse of discretion the trial court's grant of the Zbaraschuks' motion for new trial under CR 59(a)(1) consistent with appellate precedent; thus review is not warranted under RAP 13.4(b)(1) or RAP 13.4(b)(2)?

B. Should this Court deny Mr. Hollins' Petition for Review where preserving a jury verdict of two million dollars in his favor following an unfair trial based on misleading and incomplete damages testimony and evidence does not involve an issue of substantial public interest as contemplated by RAP 13.4(b)(4)?

III. COUNTER STATEMENT OF THE CASE

The Zbaraschuks admitted liability in the September 23, 2011, motor vehicle accident at issue and accepted $33,124.18 in past medical treatment. CP 91, CP 1168, CP 437. The sole issue for trial was the

nature and extent of Mr. Hollins' claimed soft tissue neck injury and damages. CP 180.

During trial, the Zbaraschuks asked the trial court to address a previous judge's motion in limine ruling regarding exclusion of Mr. Hollins' significant other unrelated injuries, surgeries and impairments both pre and post-accident. The Zbaraschuks argued several grounds upon which to admit the evidence, including the fact that Mr. Hollins had opened the door regarding alleged treatment for his neck during 2013 to present, and also by offering testimony regarding his perception of his "disability." RP 277-299; 337-339. Although ultimately finding it was a "really close call," the trial judge denied the Zbaraschuks' multiple requests for relief from the order in limine. RP 289, 339, 449-450.

As such, Mr. Hollins was allowed to present a severely truncated and misleading case to the jury to the great prejudice of the Zbaraschuks.

Mr. Hollins presented a case keenly focused on isolated testimony of his employment trajectory with limited focus on personal life to present an illusion of one accident, one injury as ruining his life, rather than offering complete information bearing on damages. Mr. Hollins testified to one brief statement about his personal life and then jumped to work experience; within minutes, he was testifying to an anterior cervical procedure that he never had and was never going to have. RP 206-208.

The complete information the jury should have been allowed to consider in assessing damages included: Mr. Hollins' four knee arthroscopic surgeries, two hip surgeries, an elbow surgery, wrist arthritis, all with resulting pain and permanent impairments and limitations. CP 482-524. Mr. Hollins would have admitted as of April 2016, he was still having "limitations with all the injuries, with my elbows, my neck, my hip, and my knee." CP 492.

Dr. Brzusek testified Mr. Hollins had no motor problems, that his examination of Mr. Hollins on the one and only time he saw him (almost five (5) years after the accident) was essentially normal, he had good strength, good motor abilities, and reasonably good range of motion. RP 475, 509-510. Dr. Brzusek further testified that Mr. Hollins had made "significant improvement" by September 2012. RP 511, 527-528.

Despite the fairly normal examination and minimal vocational impairment,[1] Dr. Brzusek testified that Mr. Hollins could not do the job of an "Epic Consultant" because it was a "…high stress job involving a fair amount of computer work, some physical work as well. .. It's more of a high stress job, lots of hours…" RP 482-483. Dr. Brzusek admitted, however, that the only basis for this opinion was Mr. Hollins' "self-

[1] Dr. Brzusek explained that a neck injury can only lead to a maximum of 12% vocational impairment and he estimated that Mr. Hollins was between 5% and 8% impaired. RP 543. Importantly, he did not equate this to a disability. RP 564.

report." RP 550-552. As Dr. Brzusek testified: "[Mr. Hollins] self-reports. Is he a valid historian, does he seem to tell the truth. That's what you have to go on sometimes." RP 551.

The jury had no choice than to simply believe Mr. Hollins' subjective reports of neck pain and limitations, just like Dr. Brzusek. Mr. Hollins was allowed to present himself at trial as an extremely injured and disabled man. The jury was prejudicially led to believe that all of Mr. Hollins' problems were caused by one soft-tissue neck injury and a related impairment that truly pales in comparison to his other unrelated impairments.[2]

The trial court correctly recognized there was significant additional relevant evidence that the jury should have heard before charged with the responsibility of evaluating Mr. Hollins' claimed damages and granted a new trial under CR 59(a)(1). Because Division I correctly reviewed this decision for abuse of discretion consistent with clear appellate precedent, Mr. Hollins' Petition for Review must be denied.

[2] Mr. Hollins implies a couple of times in his Petition that given his $5.2 million request, the Zbaraschuks had "misjudged" the "gravity" of his "substantial" claims for damages and such was the reason they wanted a "do-over." Petition at 5 and 14. To be clear, the multiple requests for the trial court to admit relevance evidence bearing on damages was absolutely sparked by the audacity of Mr. Hollins' request based only on a non-surgical 5-8% impairment of his cervical spine where he also has a 24% permanent impairment for left knee following four surgeries, 25% permanent impairment for right hip following two surgeries, and permanent elbow impairment following elbow surgery which he intended to hide from the jury. CP 482-584.

IV. ARGUMENT

This Court will grant discretionary review of a decision terminating review only under the following

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

RAP 13.4(b).

Here, Mr. Hollins argues the Court of Appeals' decision is in conflict with decisions by this Court and published decisions by the Court of Appeals. *See* Petition For Review at 8-13. He also argues that his Petition involves an issue of substantial public interest. *Id.* at 13-18. Mr. Hollins has not supported either assertion. His Petition should be denied.

A. The Court Should Deny Mr. Hollins' Petition for Review Where Mr. Hollins Fails to Demonstrate Any Actual Conflict Between Division I's Decision And Clear Appellate Court Precedent Which Requires a Strong Showing of Abuse of Discretion to Overturn a Trial Court's Grant of Motion for New Trial Under CR 59(a)(1).

This Court has stated many times that the granting or denying of a motion for new trial is discretionary with the trial court and the Supreme

Court will not interfere with the trial court's ruling on such a motion unless it can be said that there was an abuse of discretion. *Riley v. Dep't of Labor & Indus.*, 51 Wn.2d 438, 444, 319 P.2d 549, 553–54 (1957) citing *Rettinger v. Bresnahan*, 42 Wn.2d 631, 257 P.2d 633 (1953). It is also beyond dispute that a much stronger showing of an abuse of discretion will ordinarily be required in a case where a new trial is granted than where it is denied. *Id.* citing *Bystrom v. Purkey*, 2 Wn.2d 67, 97 P.2d 158 (1939). The Court will also review for abuse of discretion a trial court's evidentiary rulings. *Hoskins v. Reich*, 142 Wn. App 557, 566, 174 P.3d 1250 (2008).

Mr. Hollins does not challenge Division I's finding that he failed in his burden to show that the trial judge abused her discretion by granting the Zbaraschuks' motion for new trial. Rather, Mr. Hollins claims, and relies on Justice Dwyer's dissent, that Division I used the wrong standard of review. No authority is cited for the proposition that "[a] posttrial [sic] ruling as to whether a trial court abused its discretion by excluding evidence presents a legal question, not a discretionary one." App. 21.

Justice Dwyer completely ignores the procedural posture of the case and Mr. Hollins urges this Court to do so as well, i.e. he asks this Court to remove the trial court's own finding that it abused discretion in failing to admit evidence in conjunction with a motion for new trial.

Justice Dwyer ignores that a motion under CR 59(a)(1) was brought and the trial court ruled on the motion. If Judge Dwyer is correct, under what circumstances could a trial court ever grant a motion for new trial under CR 59(a)(1) given an "abuse of discretion?" Judge Dwyer would argue that no trial court could look back at pre-trial or mid-trial rulings and consider whether the exercise of discretion in regard to evidentiary rulings, for example, was appropriate. Judge Dwyer would have a trial judge, post-trial, ignore the basis for a CR 59 motion and look back at discretionary rulings as a matter of law. This exercise is not supported by any legal authority.

In contrast, as the Majority appropriately recognized when looking at the trial court's conduct: "the authorities uniformly hold, this is a classic discretionary decision." APP 05. This is not a case where the Court is asked to analyze pre-trial or mid-trial rulings. The Majority got it right; and its decision is consistent with clear appellate precedent.

Indeed, the main case upon which Mr. Hollins heavily relies is consistent with Division I's decision. Mr. Hollins quotes at length from *Detrick v. Garretson Packing Co.,* 73 Wn.2d 804, 812, 440 P.2d 834 (1968), but completely misses the point. Petition at 9. More importantly,

Mr. Hollins fails to articulate exactly how Division I's decision in this case is "directly contrary" to *Detrick*.[3] *Id.* at 10.

Mr. Hollins fails in his argument that the trial court's decision was based on an error of law.[4] Mr. Hollins focuses on the language "such as involving the admissibility of evidence." However, the fact that the trial judge found she abused discretion in excluding evidence does not equate to an "error of law" "involving the admissibility of evidence." There is no authority offered to support this leap. Curiously, Mr. Hollins fails to even cite to the Division I case upon which the Majority relies on this important distinction.

In *Clark v. Teng*, 195 Wn. App. 482, 380 P.3d 73 (2016), Division I clearly outlined the applicable standard of review:

> We review a trial court's grant of a new trial for abuse of discretion unless that grant is based on an error or law. Dr.

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[3] This case outlines the undisputed proposition that the Court will review a trial court's grant of a new trial for abuse of discretion, unless that grant is based on an error of law. *Id.* Also, there is no dispute that a much stronger showing of abuse of discretion is needed to set aside an order granting a new trial than one denying a new trial. *Id.; see also Teter v. Deck*, 174 Wn.2d 207, 215, 274 P.3d 336, 340 (2012).

[4] Again, Justice Dwyer merely argues that a post-trial ruling as to whether a trial court abused its discretion by excluding evidence presents a legal question with no authority to support this statement. It is confusing, to say the least, to understand this argument in the context of a CR59(a)(1) motion for new trial. First, it is beyond dispute that the trial judge had the discretion to revisit the motion judge's pre-trial rulings in the context of the entire trial. *See State v. Austin*, 34 Wn. App. 625, 627-28, 662 P.2d 872 (1983). Nor does Justice Dwyer articulate why the trial judge could not look back at her mid-trial rulings and find she abused her discretion in making such rulings. Again, Justice Dwyer ignores the procedural posture of this case; i.e., that a motion for new trial was granted. He instead focuses on pre-trial and mid-trial rulings. But the propriety of those rulings is not at issue in this case. The review is properly focused on the trial court's grant of a motion for new trial. In other words, why would the Court of Appeals even be in the position to review de novo the pre and post-trial motion rulings if there was no motion for new trial? How can the Court of Appeals than completely ignore the motion for new trial and the grounds upon which it was granted? This makes no sense.

> Teng argues we should review the new trial order de novo because the trial court based its decision on an "error of law," namely, the admissibility of evidence**. But the evidentiary rulings underlying the order in limine**, including arguably drawing a line between evidence of nonparty fault and causation, **all involve discretionary rulings.** The trial court exercised its discretion in granting a new trial based upon defense counsel's conduct during trial. **Abuse of discretion standard applies.**

Id. at 492 quoting *Teter,* 174 Wn.2d at 215 (emphasis supplied).

Mr. Hollins ignores *Clark* and coincidentally, his quotation of *Detrick,* also stops just short of the pertinent part of the opinion:

> In the instant case, therefore, **our inquiry should be whether the reason given by the trial court in granting the new trial involved the exercise of discretion** or whether the reason was predicated on a question of law.

Id. at 839 (emphasis supplied).

In *Detrick,* the trial court granted a new trial to plaintiff following a defense verdict. In granting the new trial, the trial court ruled that as a matter of law plaintiff did not voluntarily expose himself to a known danger. Essentially the Court took away one of the affirmative defenses. "The granting of a new trial on the ground that the trial court erred in submitting the defense of Volenti non fit injuria to the jury," therefore, formed the basis for the first assignment of error. *Id.* at 836.

As *Detrick* recognized:

> **In the instant case, the trial court's determination that, as a matter of law, plaintiff had no reasonable**

> **alternative did not involve an exercise of discretion.** Thus, in determining whether the trial court properly granted a new trial, we must simply determine whether the trial court's reason is supported by the applicable legal principles and decisions. We have concluded that there was sufficient evidence to submit the question of 'volenti' to the jury (i.e., that reasonable minds could differ as to whether plaintiff had a reasonable alternative). **Thus, we must reverse the trial court's order granting a new trial, not because he abused his discretion, but because his conclusion of law, on which that order was based, was in error.**

Id. at 813–14 (emphasis supplied).

Here, the reason given by the trial court in granting the new trial under CR 59(a)(1) is that she abused her discretion in excluding evidence. This was not predicated on a question of law. There is no conflict with this case and *Detrick*. The underlying situation is completely different. The trial court in *Detrick* found it committed an error of law in instructing the jury. *Id.*

Furthermore, there is no conflict here with *Johnson v. Howard*, 45 Wn.2d 433, 275 P.2d 736 (1954), a case upon which *Detrick* relies.

In *Johnson*, the following three reasons were considered by the Court in conjunction with the motion for new trial:

1. The verdict was so grossly excessive as to unmistakably indicate that it was the result of passion or prejudice;

2. Misconduct of the plaintiffs' counsel; and

3. Substantial justice has not been done.

Id. at 436, 442, 444.

Upon review of these bases supporting the motion for new trial for abuse of discretion, the Court concluded:

> "[C]onsidered separately or together, the reasons set out in the order do not warrant the granting of a new trial. It was therefore an abuse of discretion to grant a new trial on the grounds indicated."

Id. at 447.

This case did not involve review of an order under CR 59(a)(1), but all of the bases that the Court did review were still for abuse of discretion. *Id.*

Mr. Hollins does not offer any case that supports a different standard of review under these facts. In fact, Mr. Hollins cites one additional case which again clearly supports Division I's decision.

In *M.R.B. v. Puyallup Sch. Dist*., 169 Wn. App. 837, 848, 282 P.3d 1124, 1130 (2012), the Court outlined the standard of review as follows:

> We review a trial court's denial of a motion for a new trial under CR 59(a)(1), CR 59(a)(2), and CR 59(a)(9) to determine whether " 'such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent [the] litigant from having a fair trial.' But when an error of law is cited as grounds for a new trial under CR 59(a)(8), we review the alleged error of law de novo.

Id. (citations omitted).

First, *M.R.B.* involves review of a trial court's denial of a motion for new trial and clearly sets out the standard for review of such under CR59(a)(1) as being abuse of discretion.[5] Second, it clearly outlines *a different* standard of review for an error of law under CR 59(a)(8) as being review de novo. *Id.* citing *Detrick*, 73 Wn. 2d at 812..

Here, the trial court granted the Zbarachuks' motion pursuant to CR 59(a)(1). Division I properly reviewed this decision for abuse of discretion just like the court in *M.R.B.* Mr. Hollins ignores the actual grounds upon which the trial court granted the motion for new trial (CR 59(a)(1)) and instead attempts to mislead this Court to impose a de novo standard of review based upon an error of law under CR 59(a)(8). This was not a basis under which the trial court granted the motion. As such, de novo review has no application to the facts of this case and no case law has been offered to support a contrary determination. Division I's decision is clearly in line with all of the case law Mr. Hollins cites in addition to the one case he conspicuously omits, *Clark v. Teng.*

[5] *M.R.B.* cites *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co*., 140 Wn.2d 517, 537, 998 P.2d 856, 869 (2000), which states: "Abuse of discretion is the standard of review for an order denying a motion for a new trial: 'An order denying a new trial will not be reversed except for abuse of discretion. The criterion for testing abuse of discretion is: '[H]as such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial?' " quoting *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978)(citations omitted).

The other cases upon which Mr. Hollins relies (and as cited by Justice Dwyer in dissent APP 21, fn. 2) are irrelevant to the Court's determination in this case as they did not involve a trial court's grant of a motion for new trial.[6] They all stand quite simply for the undisputed proposition that a trial court's ruling on admission of evidence is reviewed for abuse of discretion. This is not the issue here.

Mr. Hollins notes that the "Panel Majority distinguishes *McCoy* as well as several other cases relied upon by Mr. Hollins (App. 6-7), but it did so largely on factual grounds that are not material here. Mr. Hollins relied on these cases for discrete legal principles, as set forth in this Petition." Petition at 10, fn 1. But "the discrete legal principles" upon which Mr. Hollins relies, i.e. that de novo review is appropriate where the grounds for a trial court's decision on a motion for new trial are based on an error of law, are not in dispute. Mr. Hollins failed to convince Division I and has not provided any contrary authority here, that the trial court's decision was based on an "error of law."

McCoy is clearly distinguishable because the court found the trial court abused its discretion in ordering a new trial under CR 59(a)(9). *McCoy v. Kent Nursery, Inc.*, 163 Wn. App 744, 757, 260 P.3d 967(2011). Again, the trial court here relied on CR 59(a)(1).

[6] *See e.g., In re Det. Of Post*, 170 Wn.2d 302, 241 P.3d 1234 (2010); *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008); *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995).

Similarly, Division I appropriately recognized that the two additional cases upon which Mr. Hollins relied[7] did nothing to address the issue in this case. App 06-07. *Bunnell* and *Thompson* involved the Court of Appeals review of the evidence and the trial court's grant of a new trial based on the jury's verdict. *Id.* This was not the case here.

Here, the trial court granted a motion for new trial under CR 59(a)(1) because the trial court found that it had wrongfully denied the Zbaraschuks the opportunity to present evidence to their detriment. This case did not require the appellate court's review of the verdict. This was not a case where the trial court disagreed with or even questioned the jury's ruling. In fact, just the opposite occurred.[8] Division I appropriately reviewed the trial court's grant of a motion for new trial under CR 59(a)(1) for abuse of discretion consistent with appellate precedent. Mr. Hollins' Petition should be denied.

[7] *Bunnell v. Barr*, 68 Wn.2d 771, 775, 415 P.2d 640, 643–44 (1966) and *Thompson v. Grays Harbor Community Hosp.*, 36 Wn. App. 300, 307–08, 675 P.2d 239, 243–44 (1983).

[8] The trial court stated: "I'm not saying that [the jury's] decision was in error or they considered things incorrectly or anything of that nature. I'm obviously not in a position to say that. But I do believe that it was an abuse of discretion for me to exclude that information and to prevent the defendants from being able to raise those issues as factoring into how Mr. Hollins' current condition was affected by the motor vehicle accident… " RP 35-36.

B. The Court Should Deny Mr. Hollins' Petition for Review Where Mr. Hollins' Self-Interest in Preserving a Two Million Dollar Jury Verdict Based on Incomplete and Misleading Evidence Fails to Present An Issue of Substantial Public Interest.

Mr. Hollins argues that "granting a new trial here undermines [his] right to a jury trial" and that it is "manifestly unfair to Mr. Hollins to discard the jury verdict and require him (and his trial lawyers) to start all over again." Petition at 14 and 17. Mr. Hollins fails to explain how this presents an issue of substantial public interest. He further ignores the trial court's finding that it was the Zbaraschuks' who were prevented from having a fair trial given the omission of relevant evidence to permit the jury to adequately fulfill its constitutional function.

As an initial matter, in many instances where this Court has granted review under RAP 13.4(b)(4), the case was moot, yet the Court concluded that a question presented by the case should nevertheless be decided because it had substantial ramifications on the public interest. As such, it appears that in most cases, RAP 13.4(b)(4) functions as an exception to the mootness doctrine.[9]

[9] See, e.g., *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 699 n.1, 257 P.3rd 570 (2011) ("[T]he question of whether or not a child has the right to counsel at an initial truancy hearing is an issue of significant public interest affecting many parties and will likely be raised in the future. Because we decide cases of substantial public interest likely to recur even though the issues may be moot, we reach the issues presented."); *Satomi Owners Ass 'n v. Satomi, LLC*, 167 Wn.2d 781, 796, 225 P.3d 213 (2009) ("Notwithstanding the fact that the case is moot, we choose to review the preemption question. We do so because it is one of 'continuing and substantial public interest.") (citation omitted);

As this Court outlined in *State v. Cruz*, 404 P.3d 70, 75–76 (Wash. 2017):

> There is an exception: we may retain and decide a moot case "when it can be said that matters of continuing and substantial public interest are involved." We consider three factors in determining whether a case satisfies this exception: ' [(1)] the public or private nature of the question presented, [(2)] the desirability of an authoritative determination for the future guidance of public officers, and [(3)] the likelihood of future recurrence of the question.'

Id. (citations omitted).

Here, the present appeal is not moot. Mr. Hollins has not cited a single case that supports that review under RAP 13.4(b)(4) is appropriate in this circumstance. Certainly preserving Mr. Hollins' two million dollar verdict does not present an issue of "substantial public interest." Mr. Hollins does not even reference factors pertinent to consider whether something is of substantial public import, let alone explain how this situation meets any such factors.[10]

Cathcart–Maltby–Clearview Cmty. Council v. Snohomish County, 96 Wn.2d 201, 208, 634 P.2d 853 (1981) ("A moot case will be reviewed if its issue is a matter of continuing and substantial interest, it presents a question of a public nature which is likely to recur, and it is desirable to provide an authoritative determination for the future guidance of public officials.").

[10] In addition to the concept of mootness, the phrase "substantial public interest" has been considered in the context of standing as well. Similarly, even traditional standing to bring a lawsuit is not an absolute bar to a court's review where an important issue is at stake. *See Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419 (2004) (holding that when an issue "is of substantial public importance, immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture," we will "take a 'less rigid and more liberal' approach to standing." (*quoting Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969))).

Even assuming RAP 13.4(b)(4) applies outside the mootness realm, "substantial public interest" entails some degree of importance to the citizens of Washington beyond the insular desire to sustain an individual verdict related to a motor vehicle accident.

Lastly, it is unknown why Mr. Hollins references the "open the door" concept and a 2017 case in the section of his brief related to review under RAP 13.4(b)(4). It appears he challenges the trial court and appellate court findings that Mr. Hollins opened the door to evidence of his significant pre and post-accident injuries, surgeries and permanent impairments; however, such does not form the basis for this Court to accept his Petition for Review.

In any event, Division I correctly analyzed the "open door" rule and recognized that Mr. Hollins testified he has a permanent disability and that he had been in treatment "for the last five years." App 09. "The evidence is neither speculative nor unduly prejudicial."[11] *Id.* at 13. Division I also appropriately recognized that the trial court's limiting

[11] Neither is the evidence "confusing." Petition at 16, fn. 3. Mr. Hollins again criticizes the Majority for distinguishing the line of cases he offered in support of exclusion of previous unrelated conditions and argues regarding "the complex medical issues raised by Mr. Hollins' unrelated injuries." *Id.* Again, this criticism does not form a basis for this Court to accept the Petition. In any event, the Majority appropriately distinguished the issues and recognized the critical difference between evidence going toward damages and evidence being used to attack or support causation. APP 13-16. . Again, our issue was not whether there was an aggravation or a superseding cause for Mr. Hollins' neck injury. As such, there was no justification for a blanket exclusion of other relevant testimony bearing on damages, but that would not confuse the jury in regard to causation, nor require the jury to speculate.

instruction which only concerned the cost of medical treatment "did nothing to address other damages, which included past and future economic and non-economic damages. Thus, it did not cure prejudice, as argued." APP 18.

Mr. Hollins testified as to his present physical condition, his perception of his "disability," his self-imposed work limitations, his need to stand up at various times during trial and testimony solely because of his neck, the degree of impairment that he allegedly suffered in regard to his neck, and his aversion to cervical surgery. In so doing, he placed his credibility at issue and opened the door to rebuttal evidence showing that he may not have been injured to the extent he claimed, he was not adverse to surgery and/or was not having the surgery because he truly did not need it unlike his several other surgeries, and that other injuries and limitations affected his overall picture of health, well-being, ability to work and damages. The Zbaraschuks did not need expert medical testimony in this regard.[12] Mr. Hollins would have provided the only support needed with his own testimony of ongoing pain, permanent impairment and limitations and Dr. Brzusek could have been asked about the same. The jury would not be asked to speculate given Mr. Hollins' own testimony.

[12] *Colley v. Peacehealth*, 177 Wn. App. 717, 728-29, 312 P.3d 989 (2013) (citing *Miller v. Stanton*, 58 Wn.2d 879, 885-86, 365 P.2d 333 (1961)).

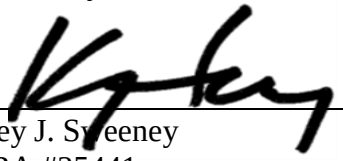
V. CONCLUSION

Discretionary review is reserved for those few cases that meet one or more of the criteria of RAP 13.4(b). This is not one of them.

The trial court granted the Zbaraschuks' motion for new trial under CR 59(a)(1) finding that "the Court abused its discretion by prohibiting evidence on the issue of [Mr. Hollins'] physical condition, including other injuries, surgeries, and medical treatments that were not caused by the underlying motor vehicle accident, for the purposes of establishing credibility and defending against [Hollins'] claimed damages." CP 627-630. Division I correctly reviewed the trial court's decision for abuse of discretion consistent with appellate precedent. Because Mr. Hollins cannot establish any conflict with Division I's decision and cases of this Court or the Court of Appeals, nor that this case is of substantial public interest, his Petition for Review should be denied.

Dated this 8th day of December, 2017.

Respectfully submitted,



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DECLARATION OF SERVICE

On said date below, I served/filed a true and accurate copy of the Answer to Petition for Review to the following by the manner described:

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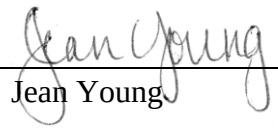
I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

SIGNED: December 8, 2017 at Seattle, Washington.



Jean Young

SWEENEY & DIETZLER

December 08, 2017 - 9:25 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95131-4
Appellate Court Case Title:	Brian Hollins v. Richard Zbaraschuk and Alexia Zbaraschuk
Superior Court Case Number:	14-2-26708-8

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