NO. 97642-2

SUPREME COURT OF THE STATE OF WASHINGTON

TERESA HARBOTTLE, individually and as Personal Representative of the Estate of JOHN F. HARBOTTLE, III, deceased,

Petitioner,

v.

KEVIN E. BRAUN, M.D. and JANE DOE BRAUN, and their marital community,

Respondents.

ANSWER TO PETITION FOR REVIEW

Mary H. Spillane, WSBA #11981
Jennifer D. Koh, WSBA #25464
Attorneys for Respondents
FAIN ANDERSON VANDERHOEF ROSENDAHL O'HALLORAN SPILLANE, PLLC
701 Fifth Avenue, Suite 4750
Seattle, WA 98104
(206) 749-0094

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES **Page(s)**

RULES

I. IDENTITY OF RESPONDING PARTIES

Respondents Kevin E. Braun, M.D., Jane Doe Braun, and their marital community submit this Answer to Petition for Review.

II. COURT OF APPEALS DECISION

In this wrongful death action arising out of Dr. Braun's failure to diagnose coronary artery disease as the cause of John Harbottle's symptoms, Division II in a published decision issued August 27, 2019, affirmed the trial court's summary judgment dismissal of the Estate's informed consent claim and its exclusion from trial of the Estate's medical negligence claim evidence of Dr. Braun's discovery responses regarding unrelated patient complaints. As to dismissal of the informed consent claim, Division II, consistent with *Anaya Gomez v. Sauerwein*, 180 Wn.2d 610, 331 P.3d 19 (2014) and *Backlund v. Univ. of Wash.*, 137 Wn.2d 651, 975 P.2d 950 (1990), concluded that the facts supported only a medical negligence claim and not an informed consent claim. As to the evidentiary ruling, it concluded that the trial court did not abuse its discretion as the evidence had relevance only to impeach Dr. Braun's credibility on a collateral matter.

III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court properly dismiss the informed consent claim because Dr. Braun's failure to diagnose coronary artery disease, a condition he believed was an unlikely cause of Mr. Harbottle's symptoms

based on the facts and circumstances surrounding his condition and his positive response to treatment for gastroesophageal reflux disease, gave rise only to a medical negligence claim, not an informed consent claim?

2. Did the trial court properly exercise its discretion in excluding as irrelevant to the standard of care, medical causation, and damages at issue on the trial of the Estate's medical negligence claim evidence of Dr. Braun's discovery responses regarding unrelated, unsubstantiated, remote-in-time complaints other patients had made?

IV. COUNTERSTATEMENT OF THE CASE

In its petition for review, *Pet.* at 1-4, the Estate complains that the Court of Appeals "glosse[d] over critical factual points," improperly "adopting" Dr. Braun's view of the facts as to his "treatment of John Harbottle's coronary disease." These characterizations, as well as other statements in its factual recitation, *id*., are inaccurate and/or misleading, particularly in light of the fact that Dr. Braun *did not treat* Mr. Harbottle for "coronary disease," because, as the Court of Appeals recognized, *Slip Op.* at 3, Dr. Braun *believed* that Mr. Harbottle's reported symptoms did not have a cardiac cause.[1] CP 266, 269-70. Because evidence or inference that Dr. Braun's belief was unreasonable was relevant only to the medical

[1] *See Anaya Gomez*, 180 Wn.2d at 618 ("a health care provider who *believes* the patient does not have a particular disease cannot be expected to inform the patient about" that disease or its possible treatments) (italics added).

negligence claim, Dr. Braun focuses on the facts and procedure relevant to evaluating the summary judgment and evidentiary issues for which the Estate seeks review rather than identifying each of its inaccurate statements.

A. Factual Background.

In June 2011, Mr. Harbottle, who had seen Dr. Braun only once before,[2] saw Dr. Braun for complaints of "burning" in his chest. CP 45, 258, 262-63. Based on "an in-depth history" and "thorough physical examination," Dr. Braun believed that Mr. Harbottle's clinical condition indicated gastroesophageal reflux disease (GERD) as the likely cause of his symptoms, and recommended Prilosec treatment to see if it relieved them. CP 45, 263-65. Although Dr. Braun believed Mr. Harbottle was at low risk of heart disease because he was not overweight, did not smoke, and did not have diabetes, high blood pressure, or a family history of heart disease, Dr. Braun also offered additional testing, including lab testing (incorporating Mr. Harbottle's request for testosterone level testing), a chest x-ray, an electrocardiogram (ECG), and a stress test to "help diagnose potential causes … of his symptoms," to which Mr. Harbottle agreed. *Id.* Dr. Braun

[2] The Estate's repeated claim that Dr. Braun, as Mr. Harbottle's "primary care physician," was "fully aware" of the condition of his heart, *see, e.g.*, *Pet.* at 1-5, ignores the fact that Mr. Harbottle had seen Dr. Braun only once prior to the June 2011 visit, returned for only three more visits, and consistently denied symptoms potentially related to cardiac problems other than chest burning in June 2011 that appeared related to GERD, and shortness of breath with exercise in March 2012 that appeared related to a cold, seasonal allergies, and potentially asthma. CP 45, 48-50, 256, 258-59, 262-70.

ordered the labs, provided a cardiology referral for a stress test, and reviewed the ECG his nurse performed, finding it "unremarkable."[3] CP 264-66. Mr. Harbottle scheduled the stress test with a cardiologist, but later cancelled it without consulting Dr. Braun. CP 266-67.

When Mr. Harbottle saw Dr. Braun again on July 27, 2011, he denied any chest pain and reported that Prilosec had resolved his symptoms. CP 48, 266. Given Mr. Harbottle's clinical condition, Dr. Braun believed a cardiac issue that "had been a very unlikely potential cause of his symptoms was even less likely." CP 266. On August 22, 2011, Mr. Harbottle told Dr. Braun that "acid foods seemed to cause" symptoms of "heartburn" that were well treated with Prilosec. CP 49-50, 258, 267-69. Dr. Braun conducted a full physical exam and found no abnormalities. *Id*.

Mr. Harbottle returned on March 14, 2012, reporting "dyspnea on exertion" (shortness of breath with exercise), cold symptoms, and seasonal allergies. CP 51, 269-70. Dr. Braun performed a physical examination and, based on Mr. Harbottle's clinical condition and history suggesting bronchial reactive airway disease, gave Mr. Harbottle samples of Symbicort, an asthma medication. *Id.* Mr. Harbottle agreed to return to report whether Symbicort resolved his symptoms, but did not see Dr. Braun again, and

[3] The Estate's experts' disagreement as to what the electrocardiogram showed, *see Pet.* at 2, 4; CP 323, were relevant only to her medical negligence claim.

instead saw his allergist, Dr. Andrade, in May 2012. CP 62-65, 270.

On May 24, 2012, during a massage appointment in California, Mr. Harbottle was found unresponsive and not breathing, could not be revived, and was pronounced dead at a nearby hospital. CP 67-69. After a limited autopsy that did not include microscopic review of relevant tissue samples, the coroner attributed the death to coronary artery disease.[4] CP 71.

B. Procedural Background.

Mrs. Harbottle individually and as personal representative of her husband's estate (the Estate), sued Dr. Braun for medical negligence, claiming misdiagnosis of GERD and bronchial airway reactive disease and failure to diagnose "significant coronary artery occlusion" causing death, and for lack of informed consent, claiming that, if informed "of the true nature of his condition" and the alternative of "a cardiology consult," Mr. Harbottle would not have consented to treatment for GERD and reactive airway disease. CP 3-5.

1. Summary judgment dismissal of informed consent claim

Dr. Braun moved for summary judgment dismissal of the informed consent claim, arguing that an alleged failure to inform of the risks

[4] At trial of the medical negligence claim, the cause of death was disputed based on another pathologist's later microscopic review of the tissue blocks retained from the autopsy that led that pathologist to conclude that Mr. Harbottle did not have clinically significant coronary artery disease, but died as a result of asymptomatic hypertrophic cardiomyopathy, an untreatable, likely genetic, condition. CP 1077-78.

associated with a condition based on a misdiagnosis or failure to diagnose gives rise to a medical negligence, not an informed consent, claim. CP 19-22. Relying on *Anaya Gomez*, *Backlund*, and other cases, Dr. Braun argued that, because he had not diagnosed coronary artery disease, he was not required to obtain Mr. Harbottle's informed consent to risks of, or alternative treatments for, that condition, and that, if the jury ultimately believed Mr. Harbottle died from coronary artery disease and that Dr. Braun violated the standard of care by not diagnosing that condition, Dr. Braun could be liable only for medical negligence. CP 21-22.

The Estate responded by trying to distinguish *Backlund* and *Anaya Gomez*, and claiming that *Gates v. Jensen*, 92 Wn.2d 246, 595 P.2d 919 (1979) and *Flyte v. Summit View Clinic*, 183 Wn. App. 559, 333 P.3d 566 (2014) supported an informed consent claim for failure to inform about a diagnostic test available to rule out a cardiac condition. CP 194-200.

In reply, Dr. Braun pointed out that (1) *Backlund* and *Anaya Gomez* clarified that *Gates* involved a limited exception rather than the rule as to the overlap between the distinct causes of action of medical negligence and informed consent; and (2) *Flyte* involved only an informed consent claim, not a medical negligence claim based on failure to diagnose. CP 508-16.

The trial court dismissed the informed consent claim. CP 526-27.

2. Discovery orders

Dissatisfied with Dr. Braun's answers to interrogatories and deposition questions regarding his employment history, other claims or medical board disciplinary proceedings, the Estate issued a subpoena to MultiCare, where Dr. Braun had been employed some five years before he began to treat Mr. Harbottle. CP 590-92. Dr. Braun moved to quash the subpoena and moved for a protective order, and the trial court, as requested by the Estate, ordered MultiCare to produce its nonprivileged records[5] and to submit its privileged records for *in camera* review. CP 528-38, 674-76, 880-81, 1373-78. At no time did the Estate did ask the trial court for discovery sanctions against Dr. Braun. Nor has the Estate appealed from any discovery order. CP 1363-66.

3. Exclusion of evidence as to Dr. Braun's discovery responses about remote, unrelated and unsubstantiated complaints.

Before trial, Dr. Braun moved to exclude evidence of allegations made against him unrelated to his care of Mr. Harbottle as irrelevant and inadmissible under ER 401, 402, 403, and 608(b). CP 751-62, 767-819. He argued that: (1) unsubstantiated complaints of other patients were irrelevant

[5] The records MultiCare produced included a letter to Dr. Braun indicating three female patients had made grievances alleging flirtation and untoward touching. CP 732. Other documents the Department of Health produced showed that the Medical Quality Assurance Commission investigated those three complaints and closed the file based on insufficient evidence, and investigated another complaint regarding refusal to provide a narcotic prescription and closed the file without disciplinary action because the "[c]are rendered was within standard of care." CP 739, 846-47, 857, 859-60.

to whether his diagnosis and treatment of Mr. Harbottle complied with the applicable standard of care and would cause confusion and waste time on collateral issues; (2) the sexual nature of some of the allegations posed the risk of undue prejudice far outweighing any probative value; and (3) his discovery responses did not suggest a lack of credibility or an attempt to conceal relevant evidence. CP 757-62.

In response, the Estate characterized the unsubstantiated complaints as "prior acts of professional misconduct"[6] and Dr. Braun's discovery responses as "perjury" admissible under ER 608(b), citing *State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754 (1991) and *State v. York*, 28 Wn. App. 33, 621 P.2d 784 (1980), and claimed that Dr. Braun's credibility and his memory were "paramount" to the case. CP 822-27.

In reply, Dr. Braun distinguished *Wilson* and *York* and pointed out that Dr. Braun's admission that he had no independent recollection of conversations with Mr. Harbottle undermined any notion that his memory was central to the case. CP 863-67.

The trial court granted Dr. Braun's motion to exclude. CP 956-57. At trial of the medical negligence, the jury returned a verdict in favor of Dr. Braun, finding no negligence. CP 1359-60.

---

[6] After investigation, the Medical Quality Assurance Commission found all allegations against Dr. Braun to be unsubstantiated and did not initiate any charges. *See* note 5, *supra*.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Estate cites RAP 13.4(b)(1) and (2) in seeking review of the affirmance of the dismissal of the informed consent claim, and RAP 13.4(b)(1), (2), and (4) in seeking review of the affirmance of the evidentiary ruling. *See Pet.* at 5, 13, 20. Because Division II's decision is not in conflict with any decision of this Court or of the Court of Appeals so as to warrant review under RAP 13.4(b)(1) or (2), and does not involve any issue of substantial public interest so as to warrant review under RAP 13.4(b)(4), the Estate's petition for review should be denied.

A. The Court of Appeals' Affirmance of the Dismissal of the Estate's Informed Consent Claim Is Not in Conflict with Any Decision of this Court or of the Court of Appeals.

The Estate argues, *Pet.* at 8-13, that Division II's affirmance of the dismissal of its informed consent claim is in conflict with "*Gates/Backlund/ Anaya Gomez/Flyte*." It incorrectly claims that those decisions prohibit negligent misdiagnosis and informed consent claims based on the same set of facts only when a physician is "entirely unaware" of the patient's condition or has "definitively" "ruled out" "a potentially fatal disease," and that here Dr. Braun was "aware" of Mr. Harbottle's risk of coronary artery disease and did not "definitively rule out" heart disease.

First, Division II's decision is not in conflict with, but rather is based upon, *Backlund* and *Anaya Gomez*. *See Slip. Op.* at 8-17. As this Court

ruled in *Backlund*, 137 Wn.2d at 661:

> A physician who misdiagnoses the patient's condition, and is therefore unaware of an appropriate category of treatments or treatment alternatives, may properly be subject to a negligence action where such misdiagnosis breaches the standard of care, but may not be subject to an action based on failure to secure informed consent.

"In misdiagnosis cases, this rule is necessary to avoid imposing double liability on the provider for the same alleged misconduct." *Anaya Gomez*, 180 Wn.2d at 618 (citing *Backlund*, 137 Wn.2d at 661-62 n.2)

> Simply put, a health care provider who believes the patient does not have a particular disease cannot be expected to inform the patient about the unknown disease or possible treatments for it. In such situations, a negligence claim for medical malpractice will provide the patient compensation if the provider failed to adhere to the standard of care in misdiagnosing or failing to diagnose the patient's condition.

Anaya Gomez, 180 Wn.2d at 618.

Here, because Dr. Braun was unaware of any actual abnormality in Mr. Harbottle's heart, and based on Mr. Harbottle's clinical condition, believed that a cardiac cause of his symptoms was highly unlikely, the rule in *Anaya Gomez* and *Backlund* against double liability on the same set of facts applies, as the courts below correctly concluded.

Second, Division II's decision is not in conflict with *Gates*. Indeed, the Estate's reliance on *Gates* is misplaced, because, as Division II properly recognized, *Slip Op*. at 9-12, this Court in *Anaya Gomez* and *Backlund* clarified the *Gates* holding and *Gates* is distinguishable on its facts. On the

unique facts in *Gates*, this Court recognized that a duty to inform may arise "during the process of diagnosis" in a misdiagnosis case if there is "an informed decision for the patient to make about" a "treatment choice." *Anaya Gomez*, 180 Wn.2d at 623. In *Gates*, based on the patient's "consistently high eye pressure readings" pointing to "higher risk for glaucoma over a *two year* period" and a "borderline test result," and the availability of two "simple, inexpensive, and risk free" "diagnostic tests for glaucoma," the ophthalmologist had a choice to put to the patient whether to do additional testing. *Id.* at 621 (citing *Gates*, 92 Wn.2d at 248).

In contrast, even though the patient in *Anaya Gomez* was at risk for infections and had an initial test result indicating a yeast blood infection, the physician, based on the patient's physical condition and symptoms that "indicated that she did *not* have a blood infection," ruled out a diagnosis of yeast and determined that there was nothing further to diagnose. *Anaya Gomez*, 180 Wn.2d at 622. Concluding that those facts did not give rise to an informed consent duty, this Court rejected the plaintiff's claim that the question turned on the physician's "*knowledge* about the "positive blood test,'" *id.* at 621 (italics added), noting a difference between "suspecting" a patient has some kind of infection and "knowing" that a patient has a particular infection, *id.* at 621 n.5, and recognizing that "the medical realities surrounding the circumstances of the case" cannot be ignored, *id.*

at 622. Given the physician's *belief* based on the patient's complete clinical presentation that the test result was "likely erroneous," the physician had "nothing to put to the patient in the way of an intelligent and informed choice" about treatment for a blood infection. *Id.* at 622.

As Division II properly recognized, *Slip Op.* at 15-16, this case is factually similar to *Anaya Gomez* and easily distinguished from *Gates*. Based on his observations of Mr. Harbottle's complete clinical condition in June 2011, and confirmed by Mr. Harbottle's clinical presentation in July and August 2011, Dr. Braun *believed* that Mr. Harbottle "suffered from GERD and not coronary disease" and thus "did not follow up" on further diagnostic testing such that he never "knew" the actual condition of Mr. Harbottle's heart.[7] *Slip Op.* at 16. Unlike the kind of circumstances relating to glaucoma presented in *Gates*, here Mr. Harbottle lacked many major risk factors for coronary artery disease, lived a healthy lifestyle, and his clinical

[7] The Estate has never identified any evidence to contradict Dr. Braun's testimony as to his belief about the cause of Mr. Harbottle's symptoms; it only identified evidence to support its claim that Dr. Braun's belief was unreasonable or unfounded. For example, the Estate emphasizes evidence such as (1) its expert's opinion that the EKG showed a "right bundle branch block" that should have been investigated, *Pet*. at 2; CP 323; (2) the autopsy finding of atherosclerotic heart disease, *Pet.* at 2; CP 397; and (3) its experts' opinions that a stress test in 2011 or 2012 would have been positive for coronary artery disease, *Pet.* at 2-3; CP 307, 334. Contrary to the Estate's claim, *Pet*. at 2, 4, such evidence does not create a fact question as to Dr. Braun's belief that Mr. Harbottle's symptoms did not have a cardiac cause or allow an inference that "Dr. Braun was fully aware of the existence of [Mr. Harbottle's] possible coronary disease." Instead, such evidence raises an issue of fact only as to whether Dr. Braun's belief was reasonable or whether he should have believed that Mr. Harbottle's symptoms had a cardiac cause – a question that is only relevant to a medical negligence claim for misdiagnosis or failure to diagnose.

condition over time, which improved with treatment for GERD, was *inconsistent* with coronary disease, and the coronary testing that Dr. Braun had already completed – which admittedly did not include a stress test – did not raise any concerns. *Slip Op.* at 15-16.

Division II correctly concluded that, just as the actual infection in the patient's blood was "unknown" to the physician in *Anaya Gomez*, the actual condition of Mr. Harbottle's heart was "unknown" to Dr. Braun, despite Dr. Braun's initial inclusion in his differential diagnosis of what he believed to be an unlikely cardiac cause of Mr. Harbottle's symptoms. *Slip Op*. at 16; *Anaya Gomez,* 180 Wn.2d at 621-23. Consistent with this Court's opinions in *Anaya Gomez* and *Backlund*, Division II therefore correctly concluded that the general rule against double liability in misdiagnosis or failure to diagnose cases, rather than the limited exception of *Gates* applies here. *Slip Op.* at 15-16; *see Anaya Gomez,* 180 Wn.2d at 621-23.

Third, Division II's decision is also not in conflict with *Flyte*. As Division II correctly recognized, *Slip Op*. at 16-17, *Flyte* does not support the Estate's claim. Although the court in *Flyte* recognized that the informed consent duty examined in *Gates* and *Anaya Gomez* "is not confined to the period after a conclusive diagnosis has been made," *Flyte,* 183 Wn. App. at 580, it did not hold or suggest that a conclusive diagnosis was a condition precedent to application of the rule against double liability.

In *Flyte*, because the plaintiff did not allege both medical negligence and lack of informed consent based on the same facts, the rule against double liability described in *Anaya Gomez* and *Backlund* did not apply. *Flyte*, 183 Wn. App. at 576. In fact, the plaintiff in *Flyte* "never argued" that the defendant violated the standard of care by misdiagnosing or failing to diagnose the patient's actual condition, but claimed that it breached the standard of care by failing to consider the possibility of a specific strain of influenza and offer an available prophylactic treatment – a treatment that, by definition, did not depend on or require a prior definitive diagnosis. *Id*. The informed consent claim was based on facts separate from a failure to diagnose – that is, the failure to inform the patient that public health alerts described the influenza strain as a global pandemic and recommended use of the prophylactic treatment that was actually available. *Id*.

To the extent there was a factual dispute in *Flyte* over whether the physician "conclusively" ruled out a diagnosis, that dispute arose because (1) the physician admitted that he had no independent memory of the visit and testified inconsistently with his own chart notes, and (2) the trial court had erroneously instructed the jury to consider the plaintiff's informed consent claim only if it found that the physician "had conclusively diagnosed influenza," a fact that the plaintiff "had never alleged." *Id*. at 580.

Finally, nothing in *Anaya Gomez*, *Backlund*, *Gates*, or *Flyte*

supports the Estate's claim, *Pet*. at 9-11, that a health care provider must "definitively rule out" a particular condition in order for the rule against double liability to apply. As Division II correctly observed, requiring a physician to "obtain informed consent *not* to treat any condition that is not definitively 'ruled out' would 'require health care providers and patients to spend hours going through useless information that will not assist in treating the patient.'" *Slip Op*. at 17 (quoting *Anaya Gomez*, 180 Wn.2d at 623).

Here, like the physician in *Anaya Gomez* who, based on the patient's clinical condition, believed that it was unlikely the patient had a yeast blood infection notwithstanding a positive blood test, Dr. Braun, based on Mr. Harbottle's lack of risk factors, his clinical condition, and his positive response to treatment for GERD, believed that it highly unlikely that Mr. Harbottle's symptoms were due to a cardiac cause. To the extent that conclusion was wrong, the plaintiff had a medical negligence claim for misdiagnosis or a failure to diagnose, but not a duty to obtain informed consent based on the same facts. *Anaya Gomez*, 180 Wn.2d at 613. In *Anaya Gomez*, this Court described the physician's action alternatively as "rul[ing] out," "conclud[ing]," and "believ[ing]," but it cannot be said that the physician conclusively or definitively ruled out the possibility of yeast blood infection, and this Court did not hold or suggest that the rule against double liability for failing to obtain informed consent with regard to a

misdiagnosis or failure to diagnose was dependent upon whether the condition at issue had been *definitively* or *conclusively* ruled out. *See e.g.*, *Anaya Gomez*, 180 Wn.2d at 613, 614, 618.

Ultimately, as the Court of Appeals properly recognized, *Slip Op. at* 7, "the facts of this case do not support an informed consent claim."

B. The Court of Appeals' Affirmance of the Exclusion of Evidence of Dr. Braun's Discovery Responses as to Other Patient Complaints Is Not in Conflict with Any Washington Appellate Decision and Does Not Involve an Issue of Substantial Public Interest.

The Estate incorrectly contends, *Pet.* at 13, that contrary to precedent, by finding no abuse its discretion in excluding the evidence under ER 608(b), Division II has "condoned" the deprivation of its "right to impeach Dr. Braun's testimony"[8] and set "unsound public policy."

First, the Estate ignores the standard of review. As Division II properly recognized, *Slip Op. at* 18-19, the trial court has *broad* discretion to exclude "*nonconviction* evidence" of specific instances of conduct offered under ER 608(b) to impeach a witness's credibility. *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 708, 82 P.3d 1199 (2004). A trial court's

[8] Contrary to the Estate's claim, *Pet.* at 13, the record does not show that the trial court's decision to exclude the challenged evidence under ER 608(b) deprived it of the right to impeach Dr. Braun's testimony. Dr. Braun admitted in deposition that he had no "independent recollection," generally or specifically, of conversations with Mr. Harbottle, but had to rely on medical records, chart notes, and habit and practice. CP 255, 864-85. Nothing in the trial court's ruling precluded the Estate from establishing that at trial. As the Estate has not furnished a transcript of Dr. Braun's trial testimony or the parties' closing arguments, the sufficiency of the Estate's ability to challenge Dr. Braun's credibility or memory cannot be reviewed.

decision to exclude such evidence will be reversed "only if no reasonable person would have decided the matter as the trial court did." *State v. Lile*, 188 Wn.2d 766, 783, 398 P.3d 1052 (2017) (quoting *State v. O'Connor*, 155 Wn.2d 335, 351, 119 P.3d 806 (2005)). The trial court, when exercising its discretion, "may consider" whether the specific instances of conduct offered are "relevant to the witness' veracity on the stand and … germane or relevant to the issues presented at trial." *Lile*, 188 Wn.2d at 783 (quoting *O'Connor*, 155 Wn.2d at 349). On review, the court assesses whether the trial court's decision was reasonable, but it does not make its "own relevancy determination." *Lile*, 188 Wn.2d at 784.

Second, Division II's decision is not "contrary to" the precedent the Estate cites, *Pet.* at 16-18, such as *York*; *O'Connor*; and *Wilson*. Indeed, Division II cited and relied upon, and/or distinguished, that precedent and more. *See Slip Op.* at 18-22. As Division II properly recognized, *Slip Op.* at 19, *York* does not support the Estate's claim that the trial court erred in granting Dr. Braun's motion to exclude evidence of his discovery responses about unrelated patient complaints. In *York*, the court acknowledged that the normal standard for reversal of a trial court's decision under ER 608(b) is that no reasonable person would have "taken the action pursued by the trial court." *York*, 28 Wn. App. at 36. But, given the "fundamental constitutional right" of a *criminal defendant* to cross-examine witnesses and the

"extra latitude" allowed criminal defendants to challenge the motive or credibility of a prosecution witness "essential to the State's case," the *York* court observed that the *denial or diminution* of that right "calls into question the integrity of the fact-finding process and requires the competing interests be closely examined." *Id*. at 36-37 (citations omitted). Because the *York* trial court allowed the State to "heavily" stress its only eyewitness's "apparent unsullied background" and prevented the defendant from challenging his credibility with evidence of his "only negative characteristics," the *York* court concluded that a new trial was required "as a matter of fundamental fairness." *Id*. at 35-38.

This Court, in *O'Connor*, 155 Wn.2d at 350, however, explicitly stated that the result in *York* cannot be read as a rule that "a trial court is constitutionally *required* to admit *any* instance of a key witness's prior misconduct," as such a rule would be contrary to the clear policy choice embodied in ER 608 "grant[ing] trial courts discretion to make such determinations." *O'Connor*, 155 Wn.2d at 350. Thus, as Division II properly recognized, *Slip Op*. at 22, *York* does not guarantee the Estate the same extra latitude in cross-examination as that afforded to a criminal defendant. Nor do any of the other cases cited by the Estate.

And, as *O'Connor*, 155 Wn.2d at 350; *Wilson*, 60 Wn. App. at 893; and *York*, 28 Wn. App. at 36, all recognize, there are limits to admissibility

under ER 608(b), including ER 403 considerations and whether the evidence is probative of truthfulness, is not remote in time, and is relevant and germane to the issue at hand or would just be impeachment on a collateral matter. Recognizing such limits on admissibility under ER 608(b), the Court of Appeals properly concluded, *Slip Op.* at 22, that, because Dr. Braun's misstatements in discovery had to do with matters collateral and unrelated to the litigation, the trial court did not abuse its discretion in excluding evidence of them.

Third, Division II's decision does not conflict with public policy. Although the Estate insists upon demonizing Dr. Braun as a "liar" guilty of "sexual misconduct," *Pet.* at 13-20, the evidence does not support its claims. Dr. Braun filed supplemental discovery responses explaining that his original answers were based on a misunderstanding of the scope of the questions and that the Medical Quality Assurance Commission found all of the unrelated, remote-in-time patient complaints alleged against him to be unsubstantiated. *See* CP 852-54. Dr. Braun has never been found in any forum to have lied or committed misconduct. Under such circumstances, the trial court was not required to treat the Estate's accusations against Dr. Braun differently than any other litigant's characterization of an opposing party. The central public policy embodied in ER 608(b) is that the trial court is in the best position to determine whether the evidence offered in each

particular case should be admitted or excluded. *O'Connor*, 155 Wn.2d at 350. Division II, *Slip Op.* at 22, correctly so recognized.

Finally, although the Estate stresses the "constitutional dimension" of *discovery* in civil litigation, *Pet.* at 14, this case does not involve discovery orders or sanctions. The Estate did not seek discovery sanctions and has not appealed from any discovery order. Thus, this case does not present any issue regarding discovery that warrants this Court's review.

VI. CONCLUSION

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

RESPECTFULLY SUBMITTED this 11th day of October, 2019.

FAIN ANDERSON VANDERHOEF ROSENDAHL
O'HALLORAN SPILLANE, PLLC

s/Mary H. Spillane
Mary H. Spillane, WSBA #11981
Jennifer D. Koh, WSBA #25464
Attorneys for Respondents
701 Fifth Avenue, Suite 4750
Seattle, WA 98104
Ph: 206.749.0094
Email: mary@favros.com
jennifer@favros.com

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 11th day of October, 2019, 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:

Counsel for Petitioner:
Philip A. Talmadge, WSBA #06973
TALMADGE FITZPATRICK TRIBE
2775 Harbor Ave SW
Third Floor, Suite C
Seattle WA 98126-2138
Ph: (206) 574-6661
Email: phil@tal-fitzlaw.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☑ E-file / E-mail

Counsel for Petitioner:
John R. Connelly, JR, WSBA #12183
Nathan P. Roberts, WSBA #40457
CONNELLY LAW OFFICES
2301 N 30th St
Tacoma WA 98403-3322
Ph: (253) 593-8363
Email: jconnelly@connelly-law.com
nroberts@connelly-law.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☑ E-file / E-mail

Co-counsel for Respondents:
Scott M. O'Halloran, WSBA #25236
Barret J. Schulze, WSBA #45332
FAIN ANDERSON VANDERHOEF, ROSENDAHL O'HALLORAN SPILLANE, PLLC
1301 A. Street, Suite 900
Tacoma, WA 98402
Ph: (253) 328-7800
Email: scott@favros.com
barrett@favros.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☑ E-file / E-mail

DATED this 11th day of October, 2019, at Seattle, Washington.

s/Carrie A. Custer
Carrie A. Custer, Legal Assistant

FAVROS LAW

October 11, 2019 - 3:00 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97642-2
Appellate Court Case Title:	Teresa Harbottle v. Kevin E. Braun, M.D., et ux.
Superior Court Case Number:	15-2-05013-9

The following documents have been uploaded:

- 976422_Answer_Reply_20191011145504SC130703_3180.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to Petition for Review.PDF

A copy of the uploaded files will be sent to:

- barret@favros.com
- bmarvin@connelly-law.com
- cindy@favros.com
- jconnelly@connelly-law.com
- jennifer@favros.com
- matt@tal-fitzlaw.com
- nroberts@connelly-law.com
- phil@tal-fitzlaw.com
- scott@favros.com

Comments:

Sender Name: Carrie Custer - Email: carrie@favros.com
Filing on Behalf of: Mary H. Spillane - Email: mary@favros.com (Alternate Email: carrie@favros.com)

Address:
701 Fifth Ave
Suite 4750
SEATTLE, WA, 98104
Phone: (206) 749-0094

Note: The Filing Id is 20191011145504SC130703