SUPREME COURT NO. 97874-3

NO. 78343-2-I

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

TANESSA DESRANLEAU, individually and as the Personal Representative of the ESTATE of JAY'BREON DESRANLEAU;

Plaintiff-Respondents,

v.

HYLAND'S, INC., STANDARD HOMEPATHIC LABORATORIES, INC., and STANDARD HOMEPATHIC COMPANY, and MICHELLE REID,
Defendants-Petitioner.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

The Petitioners are Hyland's Inc., Standard Homeopathic Laboratories Inc., and Standard Homeopathic Company, Respondents in the Court of Appeals, and Defendants in King County Superior Court. Petitioners are referred to collectively hereafter as "Hyland's."

II. COURT OF APPEALS' DECISION

The Court of Appeals issued its published opinion on October 21, 2019 . *See* Appendix 1-13. In its published opinion, the Court of Appeals reversed the trial court's order dismissing plaintiff Tanessa Desranleau's (hereafter, "Plaintiff") product liability claim against Hyland's. In so doing, the Court of Appeals reversed the trial court's conclusion that Plaintiff failed to offer admissible evidence that decedent Jay'Breon Desranleau (hereafter, "Jay'Breon") was exposed to Hyland's Baby Tiny Cold Tablets (the specific Hyland's product that Plaintiff bases her claims in this lawsuit). Further, the Court of Appeals determined that Plaintiff's medical expert's declaration submitted in opposition to summary judgment, that of Dr. Marvin Pietruszka, contained admissible expert testimony regarding causation, such that medical causation should be presented to a jury for consideration.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals' published opinion conflicts with this Court's precedent and involves an issue of substantial public interest warranting review under RAP 13.4(b)(1) and (4) because it contradicts this State's precedent requiring expert opinions to have an adequate foundation in order to be admissible, and when the Court of Appeals abdicated the court's gatekeeping function to the jury such that the jury would be permitted to reach a verdict predicated on speculation.

2. Whether the Court of Appeals' published opinion conflicts with this Court's precedent and involves an issue of substantial public interest warranting review under RAP 13.4(b)(1) and (4) because the Court of Appeals' published opinion acknowledges that police investigative reports are inadmissible hearsay (citing *State v. Hines*, 87 Wn. App. 98, 941 P.2d 9 (1997)), but then concludes that information within said report creates a question of fact regarding exposure.

IV. STATEMENT OF THE CASE

1. Background and Summary Judgment.

Plaintiff's child, Jay'Breon, was found unresponsive in his crib with blankets covering his head on January 19, 2014. CP 399. Sadly, Jay'Breon was just thirteen (13) months old when he was found unresponsive and subsequently pronounced dead. Ms. Desranleau herself was not present for these events; she had not been Jay'Breon's caretaker

since an arrest in July of 2013. CP 415. Following his investigation of Jay'Breon's death, the Chief Medical Examiner did not attribute Jay'Breon's death to medications and did not express any concern regarding medications that Jay'Breon had purportedly been administered[1]. CP 420-421. Jay'Breon's toxicology screen was unremarkable. CP 421.

This lawsuit followed, however, with Plaintiff alleging that Jay'Breon's unfortunate passing was the result of ingesting one of Hyland's homeopathic cold medicines. CP 367- 376. Specifically, Plaintiff's lawsuit alleges that Jay'Breon's death was caused by Hyland's Baby Tiny Cold Tablets. *Id*. Plaintiff's working theory is that Gelsemium Sempervirens, an ingredient included in Hyland's Baby Tiny Cold Tablets in truly minuscule amounts, was mistakenly included in the Hyland's Baby Tiny Cold Tablets in lethal amounts and that it caused Jay'Breon's untimely death. *Id*. Plaintiff's theory, without any evidence regarding the actual levels of Gelsemium Sempervirens in the Hyland's tablets

[1] The Court of Appeals, reiterating an argument advanced by Plaintiff, states that King County's Chief Medical Examiner did not consider Hyland's Baby Tiny Cold Tablets as a potential cause of death because he did not have the same information that Plaintiff's expert had. Appendix at p. 10. There is no support in the record for this contention, which further suggests a result-oriented approach taken by the Court of Appeals. This contention assumes that Dr. Harruff did not review the police investigative materials and was unaware of any medications that were recovered from the scene. Not only is this contention pure supposition, but it is disparaging of Dr. Harruff to contend that he would not have considered medications that were purportedly administered to Jay'Breon leading up to his death, and it assumes what Dr. Harruff would have, or would not have, known or considered regarding any such medications.

Jay'Breon purportedly consumed or that the levels differed from the labeled miniscule amount, is nothing more than a farfetched theory lacking any factual support.

On summary judgment, Ms. Desranleau could not establish with admissible evidence that Jay'Breon took Hyland's homeopathic medicine that is the subject of Plaintiff's lawsuit, Hyland's Baby Tiny Cold Tablets, much less that they were the proximate cause of his death. CP 1296-1298. The trial court correctly rejected the hearsay-within-hearsay Plaintiff relied upon to argue an exposure , *i.e.*, an out-of-court statement made by the father's girlfriend (Ms. Reid[2]) to another third party (the police), and then put into the police's investigative report. *Id.* As such, the trial court determined that there was no admissible evidence that Jay'Breon even consumed a Hyland's product. Further, the medical opinion regarding causation that Plaintiff relied on at summary judgment was purely speculative without an adequate foundation. Plaintiff submitted the declaration of Dr. Marvin Pietruszka in opposition to summary judgment, and he opined that Hyland's Baby Tiny Cold Tablets caused Jay'Breon's death. CP 681-789. Yet, Dr. Pietruszka's declaration testimony is conclusory, speculative and lacks any factual foundation. *See generally,*

[2] Ms. Reid is a named defendant to this lawsuit, but she never appeared or participated in any way in this litigation. Jay'Breon's biological father is not a party to this litigation, and he too has not participated in the litigation in any way.

id. The speculative and inadmissible nature of Dr. Pietruszka's declaration testimony was highlighted on summary judgment *see* CP 339-342, 345-350, 855-856, 924-1261, 505-676, 1262-1290. In the end, the trial court granted summary judgment, dismissing all claims against Hyland's. CP 1296-1298.

2. The Court of Appeals' Reversal And Remand of Plaintiff's Product Liability Claim.

On appeal, the Court of Appeals reversed the dismissal of Plaintiff's product liability claims[3]. Appendix 1-13. In so doing, the Court of Appeals determined that there was admissible evidence from which Jay'Breon's exposure to Hyland's Baby Tiny Cold Tablets could be inferred. *Id*. The Court of Appeals also determined that Plaintiff's medical expert's declaration on summary judgment contained admissible expert testimony, creating a question of fact regarding causation. *Id*.

On both issues (*i.e*., admissible evidence of exposure and the admissibility of Dr. Pietruszka's opinions as contained in his declaration), the Court of Appeals' determinations are deeply flawed. First, the Court of Appeals correctly observed that all of Ms. Reid's statements regarding what medications she administered to Jay'Breon were inadmissible hearsay, **and the Court of Appeals observed that the police**

[3] The Court of Appeals affirmed the dismissal of both Plaintiff's CPA claim and her request for punitive damages through the application of California law. Appendix 1-13.

investigative report which contained Ms. Reid's out of court statements was also inadmissible hearsay. Appendix at p. 6-8 (citing, *inter alia, State v. Hines*, 87 Wn. App. 98, 941 P.2d 9 (1997). Inexplicably, the Court of Appeals nonetheless determined that other information contained within the same inadmissible police investigative report—beyond Ms. Reid's inadmissible statements—provided sufficient circumstantial evidence from which an exposure to a Hyland's product could be inferred. *Id*. at p. 8-9. To be clear, the Court of Appeals reasoned that the **inadmissible** investigative report contained sufficient **admissible** evidence to defeat Hyland's motion for summary judgment on the issue of an exposure. *Id*. The Court of Appeals' conclusion in this regard is in direct contrast with established precedent, precedent which the Court of Appeals' recognized and cited to no less.

Next, the Court of Appeals' treatment of Plaintiff's proffered medical expert's declaration was also perplexing and in conflict with this Court's established precedent requiring expert testimony to have a sufficient factual foundation in order to be admissible. Plaintiff's expert, Dr. Pietruszka, does not set forth any medical, toxicological, or scientific facts that form the basis of his case specific opinions. CP 681-789. It is inaccurate to even characterize Dr. Pietruszka's declaration testimony as

"junk science"; it simply does not involve science. The following omissions from Dr. Pietruszka's declaration are undisputed:

- Dr. Pietruszka does not identify any peer-reviewed studies concerning Gelsemium Sempervirens and its effects that he relies upon;

- Dr. Pietruszka does not state whether he had any knowledge of Gelsemium Sempervirens prior to this lawsuit, and whether he has any knowledge regarding it from sources other than Wikipedia and drugs.com;

- Dr. Pietruszka does not identify any peer-reviewed literature that he relies upon for his opinions regarding Gelsemium Sempervirens;

- Dr. Pietruszka does not identify a single medical or toxicological fact pertaining to Jay'Breon in his declaration that, according to him, supports a conclusion that Gelsemium Sempervirens caused Jay'Breon's death;

- Dr. Pietruszka does not discuss or identify any toxicological facts with regard to the level at which Gelsemium Sempervirens is known to be lethal;

- Dr. Pietruszka does not state whether he is familiar with any deaths reported as a result of Gelsemium Sempervirens;

- Dr. Pietruszka does not state whether the level of Gelsemium Sempervirens indicated on the label for Hyland's Baby Tiny Cold Tablets is a lethal amount (he suggests that said amount would be safe);

- Dr. Pietruszka does not state what amount of Gelsemium Sempervirens he believes actually ended up in any Hyland's Baby Tiny Cold Tablets;

- In contravention of CR 56(e), Dr. Pietruszka does not attach copies of any medical records or toxicological records that he is relying upon in this case;

- Dr. Pietruszka did not state why it is more likely that a Hyland's product caused Jay'Breon's death as opposed to an illness, Children's Tylenol, suffocation, an undiagnosed congenital heart defect, or any other potential cause of death.

CP 681-789.

Yet, the Court of Appeals reasoned that Dr. Pietruszka's lack of foundation were "factual contentions" for a jury to consider. Appendix at p. 9-10. Accordingly, the Court of Appeals determined that Dr. Pietruszka's declaration contained admissible expert testimony that created a question of fact for the jury. *Id*. In so doing, the Court of Appeals adopted a "let it all in approach" and positioned that a lack of any foundation is merely a credibility issue. Hyland's did not have contentions regarding the factual foundation for Dr. Pietruszka's declaration; Hyland's pointed out that the declaration lacked any factual foundation. This distinction is critical.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals' published opinion necessitated casting aside well-established and well-reasoned legal precedent, which presents issues of substantial public interest that should be resolved by this Court, as well as legal conclusions that are in conflict with this Court's precedent regarding hearsay and the foundational requirements for expert testimony.

1. The Court of Appeals' Ruling On Expert Testimony Conflicts With This Court's Precedent and It Involves An Issue of Substantial Importance.

It has long been the law in Washington that, "[i]t is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted." *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991); *see also, Simmons v. City of Othello*, 199 Wn. App. 384, 399 P.3d 546 (2017) (an opinion must be supported by sufficient foundational facts. "Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.") (internal citation omitted). Ignoring the aforementioned legal requirements that Washington recognizes, the Court of Appeals states the following:

> But Hyland's bases its argument on fact based questions—such as whether Dr. Pietruszka relied on improper information in reaching his conclusion, and whether he adhered to the proper scientific method. This indicates that material questions of fact remain as to whether Dr. Pietruszka's opinions properly conclude that Hyland's products caused Jay'Breon's death.

App. at p. 9.

The Court of Appeals' reasoning is troubling for several reasons. First, the Court of Appeals expressly delegates its gatekeeping function to the jury (*e.g.*, "whether he adhered to the proper scientific method," and whether Dr. Pietruszka "relied on improper [inadmissible?] information in

reaching his conclusion" are for a jury). This State's jurisprudence is clear that these determinations are reserved for the judge, not for a jury to speculate about. The Court of Appeals' "let it all in" approach contradicts this State's evidentiary rules and jurisprudence under *Frye*, determinations of admissibility, and foundation. Indeed, this Court has explicitly confirmed that questions regarding whether an expert has an adequate foundation is within the province of the court, not the jury. *See Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 357, 333 P.3d 388 (2014) (Before allowing an expert to render an opinion, the trial court must find that there is an adequate foundation so that an opinion is not mere speculation, conjecture, or misleading. It is the proper function of the trial court to scrutinize the expert's underlying information and determine whether it is sufficient to form an opinion on the relevant issue); *see also* ER 102 and 104(a).

Dr. Pietruszka flatly does not present any information, documentation, or support for his opinions specific to this case and Jay'Breon's cause of death. CP 681-789. Dr. Pietruszka's declaration represents a total dearth of any factual foundation for his case specific opinions, and the Court of Appeals is mistaken in its characterization that these are "fact based questions" or credibility issues for a jury. This is not

a disagreement over facts, it is pointing out the absence of facts and a foundation.

In *McGrath*, the issue was the admissibility of expert testimony concerning the effects of alcohol on individuals, and as to the individual at issue in the litigation. *McGrath,* 63 Wn. App. 170. The court in *McGrath* recognized that the effects of alcohol on individuals' ability to operate motor vehicles, and the science involved in this assessment, has been the subject of extensive scientific research, which provides experts with an adequate foundation to opine on how a given number of measured alcoholic drinks over a given amount of time affects a drivers' ability to operate a motor vehicle. *Id*. at 178. The court notes that without such a scientific basis, there would be an inadequate foundation for an expert to offer an opinion on the issue (effects of alcohol on one's ability to operate a motor vehicle). *Id*. However, even with the aforementioned extensive scientific research on the effects of alcohol on one's ability to operate a motor vehicle, this research did not provide a foundation for the expert's opinion that McGrath's consumption of alcohol rendered him unable to form the intent to commit a crime. *Id*. at 178-179. As the court pointed out, the expert's opinion in this regard (unable to form intent) would need a separate foundation than studies pertaining to alcohol's effect on one's ability to operate a motor vehicle. And because the expert did not have a

foundation to support that conclusion (that McGrath was unable to form intent), it was an abuse of discretion to admit the expert's testimony on that issue. *Id* at 179. *See also Anderson v. Akzo Nobel Coatings, Inc*., 172 Wn.2d 593, 603, 260 P.3d 857(2011) (plaintiff's expert could properly rely on an extensive study on the effects of organic solvents on pregnancy to opine that the plaintiff's child's injuries were attributable to exposure to solvents).

Here, there are no studies, toxicological findings or medical findings relied upon by Dr. Pietruszka to support his opinions in this case. This is undisputed, and the Court of Appeals mistook the lack of any foundation for credibility questions. In a case dealing with issues of toxicity, Dr. Pietruszka's declaration does not contain a single reference to toxicity levels, nor does he rely on any identified medical findings in this case[4]. Under Washington's aforementioned precedent, it would be reversible error to present this case to a jury based on Dr. Pietruszka's

[4] Dr. Pietruszka raises a concern in his declaration regarding the use of Gelsemium Sempervirens in young children due to renal development. CP 687. Yet, Dr. Pietruszka does not address the fact that Jay'Breon's adrenal, thyroid and pituitary glands were examined during the autopsy and nothing was identified as being remarkable. *Id*.; CP 468. Indeed, Dr. Pietruszka does not discuss any findings from the autopsy or toxicology screen performed in this case that are relevant to his opinions; he only states that no such investigation could disprove his speculative theory of causation. CP 687. Such a contention should dictate that a proper foundation is even more crucial here; it should not dispense with the foundational requirement.

testimony, and this Court should accept review of the issue prior to a jury getting to speculate on Dr. Pietruszka's baseless opinions.

Dr. Pietruszka's opinions in this case rest on Plaintiff's *theory* that unintended levels of Gelsemium Sempervirens could somehow get into Hyland's Baby Tiny Cold Tablets, which he bases on correspondence from the FDA concerning another Hyland's product. This is a fine working theory for Plaintiff to argue that a Hyland's product *could* have included higher than intended levels of an ingredient. But what evidence does Plaintiff or her expert present in this case that this **did** occur here? None. Juries do not get to speculate about baseless theories. *Sanchez v. Haddix*, 95 Wn.2d 593, 599, 627 P.2d 1312 (1981). For instance, Dr. Pietruszka does not state that the tablets are marketed as containing "X" amount of Gelsemium Sempervirens, but based on his analysis/study — or the analysis/study of someone else — they actually contain "Y" amount of Gelsemium Sempervirens. Dr. Pietruszka's declaration testimony is nothing more than a repackaging of Plaintiff's litigation theory, unsupported by actual facts, science, or medicine. Dr. Pietruszka does not even state whether Gelsemium Sempervirens is present in finished Hyland's Baby Tiny Cold Tablets at levels capable of detection.

Dr. Pietruszka claims that an email containing a "Risk Calculation for Gelsemium Sempervirens" from a Wilfried Stock, Ph.D. is

"confirmatory" to his conclusions in this case. CP 687, 700-701. Put differently, the email does not even serve as the basis for Dr. Pietruszka's opinions, it just solidifies them, according to Dr. Pietruszka. But a review of the email demonstrates that it could not serve as the foundation for a medical/toxicological opinion that a homeopathic cold remedy caused a specific death, which is a highly unusual claim to be sure. The excerpt from the "risk calculation" upon which Dr. Pietruszka places reliance is the statement that, "Since Gelsemium is not a typical drug for small children it should only be applied under the control of a homeopathic physician or a naturopath." CP 687, 701. Based on this statement, an "expert" could state that any time—whether or not this statement is true—a medication is not a "typical" drug for a child and the child subsequently dies after consuming it, the consumed drug is most likely the cause of a specific death. Such a conclusion is without regard to other possible causes of death, and no science or medical training is required to reach said conclusion. The kind of reasoning deployed by Dr. Pietruszka does not reflect the slightest notion of medical training, expertise or a factual foundation supporting his case specific causation testimony. Notably, the "risk calculation" does present a discussion of Gelsemium Sempervirens at various doses. CP 701. Dr. Pietruszka, however, does not even

mention or address any of these doses, nor does he discuss Gelsemium Sempervirens or its effects relative to dose in any regard. CP 681-789.

Next, based on a link to drugs.com, Dr. Pietruszka notes that the website states that Gelsemium is no longer considered safe and that it can cause death. CP 687. Accordingly, the basis for Dr. Pietruszka's opinion that Hyland's Baby Tiny Cold Tablets caused Jay'Breon's death appears to be a statement from drugs.com that one of the ingredients at issue in this case is no longer considered safe, and that the ingredient can cause death. Again, putting aside the veracity of said statement, Dr. Pietruszka's reliance on this kind of general information—pulled straight from drugs.com—does not reflect science or medical training, and is certainly not evidence of specific causation in this case. Again, at what dose is Gelsemium Sempervirens lethal? At what levels is it contained in Hyland's Baby Tiny Cold Tablets? Dr. Pietruszka does not even contemplate these very basic — foundational — questions in this case. Submitting Dr. Pietruszka's opinion testimony to a jury would be a total relinquishment of the requirement that a medical expert must possess a sufficient foundation to take their opinions above the realm of speculation. Any lay person can peddle generalized statements from drugs.com. Prior to the Court of Appeals' published opinion, this kind of effort would never pass judicial muster.

Table salt can kill you with a sufficient dose. On the other hand, cyanide is not harmful, let alone lethal, in sufficiently small amounts. All that can be surmised from Dr. Pietruszka's declaration testimony is that he believes — without any support — that Gelsemium Sempervirens is lethal at any dose. According to this reasoning, if Gelsemium Sempervirens is distilled down to a single molecular structure and breathed in through the air, it will kill you. To be clear, this means that, according to Dr. Pietruszka, Gelsemium Sempervirens is the deadliest known chemical compound on the planet earth, because its lethalness is entirely independent of its dose. The Court of Appeals' determination that Dr. Pietruszka's opinions as contained in his declaration have a sufficient foundation to go to a jury is troubling and cannot be reconciled with this State's precedent regarding the foundational requirements for expert testimony. The Court of Appeals' published opinion on this issue will have profound impacts on civil litigation in Washington if not addressed by this Court.

2. The Court of Appeals' Ruling Hearsay Conflicts with This Court's Precedent and It Involves An Issue of Substantial Importance.

As noted above, the only statements that Jay'Breon was administered Hyland's Baby Tiny Cold Tablets came from the out-of-court statements of Ms. Reid. Because of this, and because no hearsay

exceptions were applicable to Ms. Reid's statements, the trial court properly granted summary judgment of Plaintiff's claims because there was no admissible evidence of an exposure to Hyland's product. CP 1296-1299. The Court of Appeals also confirmed that Ms. Reid's statements were inadmissible hearsay, and it recognized that the police investigative report containing Ms. Reid's inadmissible statements was also inadmissible hearsay. Appendix at p. 6-8 (confirming that Ms. Reid's statements are inadmissible hearsay, and citing *State v. Hines*, 87 Wn. App. 98, 102, 941 P.2d 9 (1997) in recognition that police investigative reports are inadmissible hearsay).

The Court of Appeals, however, then goes on to state that other information contained within the inadmissible investigative report constitutes admissible evidence that, when viewed in the light most favorable to Plaintiff, created material questions of fact regarding whether Jay'Breon ingested "Hyland's cold medicine." The Court of Appeals' conclusion in this regard cannot be reconciled with its own ruling, much less with established precedent (which it cites to in its opinion). On summary judgment, evidence – circumstantial or otherwise—must be admissible in order to create a question of fact. *Lynn v. Labor Ready, Inc*., 136 Wn. App. 295, 309, 151 P.3d 201 (2006), *as amended* (Jan. 17, 2007), *as amended* (Feb. 6, 2007) (internal citation omitted); see also *State v.*

Edwards, 131 Wn. App. 611, 613, 128 P.3d 631 (2006) (hearsay evidence is inadmissible to prove the truth of the matter asserted).

In reversing the trial court on the issue of whether there was admissible evidence of an exposure, the Court of Appeals stated the following:

> But even though the trial court correctly identified Reid's statements as hearsay, the trial court did not provide Desranleau with the benefit of all reasonable inferences.
>
> ***
>
> There was also evidence that the police recovered Hyland's infant cold medicine from the scene: Officer Rego reported that he recovered cold medications from the scene and booked them into evidence, and the police report contains an evidence description of cold medications with the brands "Tylenol & Hyla." This evidence was retained by the police and later transferred to Hyland's counsel. Further, Officer Mickelsen reported that while photographing the kitchen and dining room, he located numerous medications on the counter that were prescribed to the other residents of the house.
>
> ***
>
> Second, an open bottle of Hyland's cold medicine—specifically designed for infants who were experiencing a cold—was recovered from the scene. Third, the police found this medicine in a separate location from the other household occupant's medications, indicating that it was not their medication. And fourth, the police recovered this medication as evidence from where Jay'Breon was found.

Appendix at p. 8-9. All of this information, however, comes from the inadmissible police investigative report[5]. CP 389-421.

[5] To the extent the Court of Appeals concluded that the death certificate established that Jay'Breon had a cold and that the certificate is admissible evidence, all that is established from this is that Jay'Breon had a cold.

Hyland's had noted throughout the litigation that the investigative report was discussed only because it presented the only known information available regarding the circumstances surrounding Jay'Breon's care-taking and death, but not for the purpose of proving the truth of any matters asserted therein, and objected that the police investigative report constituted inadmissible hearsay. *See e.g.*, CP 1394 (Motion for Protective Order, at fn. 1), CP 854. It was argued to the Court of Appeals that the police investigative reports are inadmissible hearsay, which the Court of Appeals recognized. *See* Appendix at p. 6. Information concerning what medications police detectives found, where it was found in relation to other medications, and whether any said medications were "opened," all comes from the inadmissible police investigative reports. The police investigative report is inadmissible hearsay, and for good reasons.

As *Hines* notes, investigative reports containing officer observations and summaries of investigations should be subject to examination so that accuracy can be evaluated. *Id*. at 101-102. This is critical here where the product identified in the police investigative reports, which the Court of Appeals places reliance, are to "Hyla" and never to the **specific** Hyland's product at issue in this case: Hyland's Baby Tiny Cold Tablets. There is no reference to the specific product at issue in

this case within the police investigative report, and no police officers offered any testimony in this case on that issue. Further, there was no evidence in the record that Hyland's manufactures only one tablet-form product for the use of treating cold symptoms in babies, nor that all such product lines contain Gelsemium Sempervirens. The reality is that Hyland's manufactures multiple tablet-form products for the use of treating cold symptoms in babies, and not all contain Gelsemium Sempervirens.

VI. CONCLUSION

Defendants-Petitioner respectfully requests that the Court grant review of the Court of Appeals' decision as to its reversal and remand of Plaintiff's product liability claim.

RESPECTFULLY SUBMITTED this 20th day of November, 2019.

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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 20th day of November, 2019, I caused a true and correct copy of the foregoing document, "PETITION FOR DISCRETIONARY REVIEW**,"** to be delivered in the manner indicated below to the following:

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Signed at Seattle, Washington this 20th day of November, 2019.

s/Catherine Berry

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Appendix

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TANESSA DESRANLEAU, individually and as the Personal Representative of the ESTATE of JAY'BREON DESRANLEAU, Appellant, v. HYLAND'S, INC., STANDARD HOMEPATHIC LABORATORIES, INC., and STANDARD HOMEPATHIC COMPANY, and MICHELLE REID, Respondents.	No. 78343-2-I DIVISION ONE PUBLISHED OPINION FILED: October 21, 2019

MANN, A.C.J. — Tanassa Desranleau appeals the trial court's decision on summary judgment dismissing her claims against Hyland's, Inc., and its parent companies Standard Homepathic Laboratories, Inc., and Standard Homepathic Company (collectively, Hyland's) alleging that it caused the death of Desranleau's infant son Jay'Breon. Desranleau argued that Hyland's manufacturing process is flawed resulting in individual tablets containing toxic levels of chemical components and that Jay'Breon's ingestion of such a toxic tablet caused his death.

The trial court dismissed Desranleau's claims after it determined that there was no admissible evidence that Jay'Breon actually ingested Hyland's cold medicine or that the cold medicine was the probable cause of his death. Because when viewed in the light most favorable to Desranleau there are material questions of fact, we reverse the dismissal of Desranleau's claims under the Washington Products Liability Act (WPLA), ch. 7.72 RCW. We affirm dismissal of Desranleau's claims under the Consumer Protection Act (CPA), ch. 19.86 RCW and her request for punitive damages under California law.

I

On January 18, 2014, 13-month-old Jay'Breon was found dead in his crib. Prior to his death, Jay'Breon had been suffering from a cold, so his caregiver Michelle Reid—Jay'Breon's father's girlfriend—gave him cold medicine earlier that morning. At about 6 a.m. on January 18th, Reid awoke to hear that Jay'Breon's chest was still congested. She gave him a dose of children's Tylenol and a banana before going back to sleep. Reid and Jimi Williams, Jay'Breon's father, awoke at 9:15 a.m. and saw that Jay'Breon was still asleep. Reid did not specifically check on him to avoid waking him up. Reid and Williams were in the living room for about 30 minutes when Reid went back into the bedroom to get ready for work. Reid found Jay'Breon face down in his crib, with his head covered by a blanket. Reid immediately noticed Jay'Breon was blueish in color and not breathing. Reid, her roommate Nageisha Tramble, and a neighbor, attempted to do CPR on Jay'Breon until the ambulance arrived. By this time, Williams had left the scene. The fire department attempted CPR on Jay'Breon but determined that he was deceased. Reid told police officers that "she was giving

[Jay'Breon] Highlands (sic) tablets, children's cold medicine, for the same amount of time that he'd been having symptoms of a cold . . . she had been giving him about 8 tablets per day and that the last time she gave him 2 tablets was the night prior at [9 p.m.]" Reid fully cooperated with police and consented to a taped interview.

The King County Medical Examiner investigated Jay'Breon's death. After an autopsy, the medical examiner concluded that Jay'Breon's body was normally developed, but waited to determine an official cause of death until his toxicology screening was finished. The toxicology report for Jay'Breon came back unremarkable, so the medical examiner concluded that Jay'Breon's official cause of death was sudden unexpected infant death.

Three years later, Desranleau sued Hyland's and Reid. Desranleau alleged that Hyland's knowingly sold toxic and dangerous homeopathic medicines for children, the ingestion of which caused Jay'Breon's death. This, Desranleau alleged, was a violation of the WPLA and the CPA. Desranleau requested punitive damages under California law.

Hyland's manufacturers various types of homeopathic medicines, using the same general manufacturing process. Hyland's dilutes various products using a dry-dilution process, where a quantity of an ingredient is mixed with a "diluent" over and over again until the desired concentration is achieved.

In 2012, the United States Food and Drug Administration (FDA) informed Hyland's that it was concerned with Hyland's dilution process related to a separate product. The FDA wrote that Hyland's dilution process may lead to batch stratification—where some tablets within a single batch have significantly higher concentrations of an

ingredient than others. The FDA recommended a liquid dilution process rather than a dry dilution process. These concerns remained in 2017, when the FDA again informed Hyland's that it was concerned with their manufacturing process. The FDA wrote:

> You manufacture drug products . . . from ingredients that pose potentially toxic effects. Specifically, Hyland's Baby Teething Tablets and Hyland's Baby Nighttime Teething Tablets contain belladonna[1] and are marketed for vulnerable patient populations, including infants and children. . . .
>
> FDA's analysis of samples of your [products] . . . found that the alkaloid content far exceeded the claim on your label . . . . The testing found inconsistency in levels of belladonna, a toxic substance, and reveals that your manufacturing process is poorly controlled and may pose unnecessary risk to infants and children.

Though the FDA's concerns were specifically related to stratification of belladonna in Hyland's teething products, and belladonna is not contained in Hyland's cold medicines, Hyland's admitted that its manufacturing process is substantially similar in all of its products. Therefore, Desranleau alleges that stratification of the alkaloid *gelsemium sempervirens*, which can be toxic in high doses and is found in Hyland's cold medicines, likely also occurs. The possibility of stratification coupled with the potential for *gelsemium sempervirens* to be toxic in high doses is what Desranleau alleges caused Jay'Breon's death.

Hyland's moved for summary judgment arguing primarily that Desranleau was unable to provide any admissible evidence that Hyland's medicines caused Jay'Breon's death. Hyland's also argued that Desranleau could not recover punitive damages under either California or Washington law, and that she could not recover under the CPA.

The trial court heard argument on Hyland's motion on April 13, 2018. The court began the hearing by warning "the most serious issue here is that we don't have

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[1] Belladonna is an alkaloid substance that can be harmful in large doses.

admissible evidence . . . that this child even consumed the [Hyland's] cold pills." Consistent with its warning, the court ruled in Hyland's favor upon finding that Desranleau had not produced any admissible evidence that "Reid actually provided the Hyland's Tiny Cold tablets to Jay'Breon."[2]

Desranleau appeals.

II.

We review summary judgment orders de novo, engaging in the same inquiry as the trial court. Summary judgment is warranted only when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The facts and all reasonable inferences are viewed in the light most favorable to the nonmoving party. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989).

The moving party for summary judgment bears the initial burden of showing the absence of an issue of material fact. Young, 112 Wn.2d at 225. "If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff." Id. If the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the trial court should grant the motion. Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)). Only admissible evidence can be considered in reviewing a motion for summary judgment. See Lynn v. Labor Ready, Inc., 136 Wn. App. 295, 306, 151 P.3d 201 (2006).

[2] Reid did not participate below and is not a party to this appeal.

III.

To bring a claim under the WPLA, the plaintiff must establish that his or her harm was proximately caused by the condition of the manufacturer's product. See RCW 7.72.030(1) ("a product manufacturer is subject to liability . . . if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonable safe as designed."). "Proximate cause is ordinarily a question for the jury, [but] when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion [] it may be a question of law for the court." Fabrique v. Choice Hotels Intern., Inc., 144 Wn. App. 675, 683, 183 P.3d 1118 (2008).

To establish causation, Desranleau relied on two propositions. First, Desranleau relied on Reid's statements to the police that she had given Jay'Breon Hyland's cold medicine to prove that Jay'Breon ingested Hyland's cold medicine prior to his death. Second, Desranleau relied upon Dr. Pietruszka's expert opinion to prove that Hyland's cold medicine was the cause of Jay'Breon's death.

A.

The trial court determined that Reid's statements to the police officers were inadmissible hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801. Hearsay is inadmissible unless covered by a recognized exception. ER 802. Since Desranleau was attempting to rely on Reid's statements for the truth of the matter asserted—that Reid administered Jay'Breon Hyland's cold medicine—Reid's statements were hearsay. See State v. Hines, 87 Wn. App. 98, 941 P.2d 9 (1997)

(holding that the admission of a police officer's investigation report was error because it was hearsay not covered by an applicable exception).

Desranleau argues that Reid's statements are not hearsay because they are admissions by a party-opponent. ER 801(d)(2) provides that a statement is not hearsay if it is "offered against a party and is (i) the party's own statements . . . or (ii) a statement of which the party has manifested an adoption or belief in its truth." Desranleau contends that because Reid is a codefendant ER 801(d)(2) applies to her statements.

But Desranleau ignores that even though Reid is a codefendant in this suit, under ER 801(d)(2), Reid's statements could only be used against her; they could not be used against Hylands. See ER 801(d)(2) (a statement is not hearsay if "offered against a party and is . . . the party's own statements.") (Emphasis added). See also Feldmiller v. Olson, 75 Wn.2d 322, 324, 450 P.2d 816 (1969) ("statements made by Mr. Olson may or may not be admissions on his part against him. They are admissible as evidence only against him (Olson) and they would not be evidence against the other defendant Leonard.") (alteration in original). Therefore, Reid's statements are not admissible against Hyland's under ER 801(d)(2).

Desranleau also incorrectly argues that because Dr. Pietruszka relied on Reid's statements when forming his opinion, those statements became admissible evidence under ER 703. ER 703 allows an expert witness to base their opinion on facts or data regardless of their admissibility, and ER 705 provides that an expert may be required to disclose the underlying facts or data upon which their opinion is based, but neither provides that inadmissible statements become substantively admissible simply because an expert relied upon them in forming their conclusions. See State v. Anderson, 44 Wn.

App. 644, 652, 723 P.2d 464 (1986) (ER 705 is not "a mechanism for admitting otherwise inadmissible evidence as an explanation of the expert's opinion.").[3]

But even though the trial court correctly identified Reid's statements as hearsay,[4] the trial court did not provide Desranleau with the benefit of all reasonable inferences. When viewing the evidence and all reasonable inferences therefrom in the light most favorable to Desranleau, there are material questions of fact as to whether Jay'Breon ingested Hyland's cold medicine. Young, 112 Wn.2d at 226.

It was undisputed that Jay'Breon had a cold for the few days prior to his death. Hyland's admits as such in its briefing to this court, and the medical examiner's report described Jay'Breon's lungs at the time of his death as congested.

There was also evidence that the police recovered Hyland's infant cold medicine from the scene: Officer Rego reported that he recovered cold medications from the scene and booked them into evidence, and the police report contains an evidence description of cold medications with the brands "Tylenol & Hyla." This evidence was retained by the police and later transferred to Hyland's counsel.[5] Further, Officer Mickelsen reported that while photographing the kitchen and dining room, he located numerous medications on the counter that were prescribed to the other residents of the house.

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[3] See also State v. Lui, 153 Wn. App. 304, 321, 221 P.3d 948 (2009) ("ER 705 gives the trial court discretion to permit an expert to relate hearsay or otherwise inadmissible evidence to the jury for the limited purpose of explaining the reasons for his or her opinion"); In re Detention of Coe, 175 Wn.2d 482, 504, 286 P.3d 29 (2012) (holding that because the trial court admitted hearsay evidence for substantive purposes, the Court of Appeals erred when it reasoned the under ER 703 the hearsay evidence was admissible).

[4] Though, of course, this evidence may still be admissible at trial through the testimony of Reid or through an otherwise recognized exception to the hearsay rule not addressed herein. See, e.g., ER 803.

[5] Though whether the trial court was aware of the fact that Hyland's counsel had the medications recovered from the scene during summary judgment is unclear.

Even without Reid's statements, it would be reasonable for a jury to infer that Jay'Breon ingested Hyland's cold medicine from the chain of circumstantial evidence. First, Jay'Breon had a cold leading up to his death. Second, an open bottle of Hyland's cold medicine—specifically designed for infants who were experiencing a cold—was recovered from the scene. Third, the police found this medicine in a separate location from the other household occupant's medications, indicating that it was not their medication. And fourth, the police recovered this medication as evidence from where Jay'Breon was found. There was enough circumstantial evidence in the record, when viewed in the light most favorable to Desranleau, for a jury to find that Jay'Breon ingested Hyland's cold medicine.

B.

Desranleau also offered Dr. Pietruszka's expert opinion to establish that Hyland's products contained potentially lethal doses of alkaloids and therefore were likely the cause of Jay'Breon's death. Hyland's argues on appeal that we should disregard Dr. Pietruszka's opinion and that because Dr. Pietruszka's opinion should be excluded, Desranleau cannot establish legal causation.

But Hyland's bases its argument on fact based questions—such as whether Dr. Pietruszka relied on improper information in reaching his conclusion, and whether he adhered to the proper scientific method. This indicates that material questions of fact remain as to whether Dr. Pietruszka's opinions properly conclude that Hyland's products caused Jay'Breon's death.

Further, Hyland's asks this court to rule on the credibility of Dr. Pietruszka. The trial court did not rule on the admissibility of Dr. Pietruszka's opinions. See Volk v.

DeMeerleer, 187 Wn.2d 241, 277, 386 P.3d 254 (2016) ("[a]dmission [of an expert witness] is proper provided the expert is qualified and his or her testimony is helpful [to the trier of fact.]").

The medical examiner ruled out numerous causes of death including asphyxiation, hyperthermia, and other natural causes of death other than sudden infant death syndrome. But the medical examiner did not have the benefit of the information about Hyland's cold medicine available to him when he conducted his investigation; Dr. Pietruszka did. As this is a review of a summary judgment order, where we view all of the evidence and reasonable inferences from the record in the light most favorable to Desranleau, we cannot conclude, as a matter of law, that Dr. Pietruszka's expert opinions should be disregarded.

"Proximate cause is ordinarily a question for the jury." Fabrique, 144 Wn. App. at 683. Since here "the facts are []disputed and the inferences therefrom are [not] plain and incapable of reasonable doubt or difference of opinion,"[6] we reverse. Desranleau rebutted Hyland's motion for summary judgment with sufficient evidence to reach the trier of fact on the questions of whether Jay'Breon consumed Hyland's cold medicine before his death and whether that medicine was the cause of his death.

III.

Desranleau requested punitive damages under California law because Hyland's is a California company and manufacturers all of its products in California. See Singh v. Edwards Lifesciences Corp., 151 Wn. App. 137, 140, 210 P.3d 337 (2009) ("where, as here, an entity headquartered in California, committed the conduct in California that

[6] Fabrique, 144 Wn. App. at 683.

resulted in the plaintiff's damages, California had the greater interest in deterring such . . . activities."). But even if we assume California law applies, Desranleau's claim is barred by California's two-year statute of limitations. Cal. Civ. Proc. Code § 335.1.

Jay'Breon died on January 18, 2014, therefore any claims he or his estate had related to his death accrued on that date. See Atchison v. Great Western Malting Co., 161 Wn.2d 372, 374-75, 166 P.2d 662 (2007) (statute of limitations for wrongful death action began to run upon the decedent's death). Desranleau did not file her complaint until January 3, 2017; nearly three years later. Therefore, the California statute of limitations bars Desranleau's claim for punitive damages.

Desranleau tries to avoid this result by arguing that the discovery rule should apply to her claim and toll the statute of limitations until 2016 when she first met with her attorney and discovered that Hyland's could potentially be liable for Jay'Breon's death. But our Supreme Court has already rejected that argument. See Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 772, 733 P.2d 530 (1987) ("Mr. Reichelt would have us adopt a rule that would in effect toll the statute of limitations until a party walks into a lawyer's office and is specifically advised that he or she has a legal cause of action; that is not the law.").[7]

Desranleau knew of the damages that she and Jay'Breon suffered in 2014. While she may not have known that she had a potential cause of action against Hyland's until after meeting with her legal counsel, that cannot save her claim. "A party

[7] And Desranleau waived this argument by only mentioning it in a footnote of her opening brief and not substantively arguing her point until her reply brief. See State v. Johnson, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993) ("placing an argument . . . in a footnote is, at best, ambiguous or equivocal as to whether the issue is truly intended to be part of the appeal.") and Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

must exercise reasonable diligence in pursuing a legal claim. If such diligence is not exercised in a timely manner, the cause of action will be barred by the statute of limitations." Reichelt, 107 Wn.2d at 772.

IV.

To establish a CPA violation, a private plaintiff must prove "(1) an unfair or deceptive act or practice; (2) which occurs in trade or commerce; (3) that impacts the public interest; (4) which causes injury to the plaintiff in his or her business or property; and (5) which injury is causally linked to the unfair or deceptive act." Washington St. Physicians Ins. Exchange and Ass'n v. Fisons Corp., 122 Wn.2d 299, 312, 858 P.2d 1054 (1993). "The causation requirement is met where the defendant induced the plaintiff to act or refrain from acting." Robinson v. Avis Rent a Car System, 106 Wn. App. 104, 113, 22 P.3d 818 (2001).

Desranleau's CPA claim fails as a matter of law because she cannot establish that Hyland's induced her to do anything. Desranleau admitted below that she never purchased any Hyland's product or even heard of Hyland's before this suit. Therefore, Desranleau cannot establish that Hyland's induced her to act or refrain from acting, and as such she cannot establish a prima facie case for a violation of the CPA.

We reverse and remand the trial court's grant of summary judgment on Desranleau's WPLA claim, but affirm the trial court's grant of summary judgment on Desranleau's punitive damages and CPA claims.

Mann, ACJ.

WE CONCUR:

WILLIAMS KASTNER

November 20, 2019 - 1:03 PM

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