

08267-9

08267-9

08267-9

No. ~~682679-1~~

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

LEWIS and TALENA COLLEY

Plaintiffs/Appellants

v.

PEACEHEALTH d/b/a ST. JOSEPH HOSPITAL

Defendants/Respondents

APPELLANT'S REPLY BRIEF

Mark Leemon, WSBA #5005

Sidney Stillerman Royer, WSBA #14820

Leemon + Royer PLLC

2505 Second Avenue, Suite 610

Seattle, WA 98121

(206) 269-1100

Attorneys for Plaintiffs/Appellants

~~FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 FEB 28 PM 3:11~~

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents.....	2
Table of Authorities.....	3
I. INTRODUCTION.....	4
II. DEFENDANT'S EXPERT TESTIMONY WAS IRRELEVANT AND PREJUDICIAL.....	5
III. CERTIFICATE OF MERIT.....	8
IV. STEDMAN V. COOPER IS DIRECTLY ON POINT.....	9
V. EVIDENCE OF MR. COLLEY'S PRIOR DRINKING HABITS.....	12
VI. CONCLUSION.....	14

TABLE OF AUTHORITIES

WASHINGTON CASES

Stedman v. Cooper, ____ Wash.App. ____, 292 P.2d. 764 (2012)...9; 13

Larson v. Nelson, 110 Wash.App. 1002 (2002).....12

State v. Nysta, 168 Wash.App. 30, 275 P.3d. 1162 (2012).....12

Kramer v. J.I. Case Manufacturing Company, 62 Wash. App. 555, 815
P.2d. 798 (1991).....3; 13

Louis v. State, 96 Wash.App. 1046 (1999).....14

I. INTRODUCTION

The Defendant's description of the "facts" in this matter is breathtakingly disingenuous. Defendant is employing the same technique in this court as in the trial court – merely throwing (largely irrelevant) stuff at the wall to see what sticks. As in the trial court, Defendant repeats ad nauseum that Mr. Colley "had numerous medical problems and co morbid features." He "suffered problems" such as "memory loss" memory difficulties" and "severe sleep apnea App.Br. at 4. What Defendant fails to state is that none of Mr. Colley's past history relates in the slightest to the injury he suffered in St. Joseph's Hospital. As shown by two separate neuropsychological evaluations, one ordered by Defendant's own neurologist Mr. Colley suffered from a profound loss of short term memory after his hospitalization, which was completely unlike anything he had experienced in the past. RP. 388-396; 749-753. There is not one shred of evidence that any of Mr. Colley's previous medical problems has any relationship whatsoever to his condition after leaving Defendant's hospital.

Contrary to the implication made by Defendant (for even defense counsel apparently does not have the gall to come right out and say it) that Defendant's expert witnesses connect Mr. Colley's post-hospitalization

injury to anything in his past, the closest any of them comes is to say that Mr. Colley had the kind of conditions which are consistent on a chronic basis with some memory loss. However, none of them expresses an opinion on a more probably than not basis, or indeed to any degree of possibility that there is some other cause for Mr. Colley's abrupt and severe short-term memory loss.

Having laid the false foundation that Mr. Colley already was "damaged goods" before he entered Defendant's hospital, Defendant then proceeds to support its legal argument in an equally shaky fashion, with concurring opinions and unpublished opinions, in an unsuccessful attempt to distinguish the controlling authority cited by Plaintiff. The trial court allowed Defendants to parade before the jury irrelevant and prejudicial matters. This Court should not be similarly misled.

II. DEFENDANT'S EXPERT TESTIMONY WAS IRRELEVANT AND PREJUDICIAL

While Dr. Stimac did testify that a CT scan of Mr. Colley's brain showed a shrunken appearance compared with a normal person of his age, Dr. Stimac also testified that this radiographic appearance could not be correlated with any symptoms. Likewise, while he testified that there were not any abnormalities indicative of a respiratory problem, stroke or

asphyxia, he also testified that such injuries happened without any radiographic evidence. RP 825-6. Equally irrelevant was testimony that there was no change in the post-incident scan to suggest an insult to the brain. The only opinions Dr. Stimac gave related to the radiographic appearance of the brain. He clearly testified that nothing in this radiographic appearance either indicated or ruled out any symptoms. Accordingly, this testimony was virtually useless, except to allow a jury to speculate as to that to which Dr. Stimac would not testify: That Mr. Colley's obvious short-term memory injury was a result of a chronic process occurring before his hospitalization. There simply is no evidence from the imaging that would help the jury decide one way or another any question in this case. RP 827-8.

Dr. Ellsworth's testimony is even more irrelevant. He testifies about the normal dosages of morphine, the metabolism of morphine and even pretended to extrapolate the level of morphine remaining in Mr. Colley's blood in the early morning hours. However, he also testified that people's tolerance for narcotics varies by a factor of multiples of ten, recognizing that the "studies" he was relying on were completely dissimilar to Mr. Colley's situation. RP 930. More importantly, neither Dr. Ellsworth nor anybody else testified to any degree of medical certainty

that the morphine administered to Mr. Colley was not a cause of his respiratory arrest. On the contrary, that matter was undisputed. The issue of whether the morphine administered to Mr. Colley was in some abstract sense "too much" was never before the jury. Rather, the question was whether a person with sleep apnea, already susceptible to respiratory depression, should be monitored while be given medication known to further depress respiration. Dr. Ellsworth offered no opinions whatsoever as to that matter.

Dr. Pasqualy testified as indicated by Defendant that Mr. Colley "had multiple conditions that [in the abstract] affect memory such as sleep apnea, diabetes, depression, etc". However, Dr. Pascualy did not testify more probable than not, and in fact disavowed any opinion, that any of these other factors caused Mr. Colley's short-term memory loss. His statement that he would agree that memory complaints prior to this hospitalization would be consistent with Mr. Colley's previous conditions is made worthless by the fact that Mr. Colley never had any memory complaints prior to this hospitalization. The sole evidence on which Defendant bases this specious claim is the answer to a question directed at Mr. Colley in association with a sleep study to the effect that he has some memory problems, in a context where Mr. Colley was at the clinic because

of his excessive snoring and sleeplessness, and not anything to do with his memory. RP 80-82. There is literally no evidence whatsoever of Mr. Colley ever going to any doctor to complain about memory problems prior to the incident in question here.

III. CERTIFICATE OF MERIT

Defendant never addresses Plaintiff's argument in this regard. If it is a violation of the constitutional rights of a Plaintiff to require the procurement of a certificate of merit, because of the unfairness of requiring these kind of medical opinions before discovery is conducted, it follows ineluctably that the use against a Plaintiff of this unfairly required evidence must increase the constitutional unfairness. Defendant's argument against this position relies almost entirely on the concurring opinions of a minority of Supreme Court justices. That opinion is a concurrence, because the majority opinions held the requirement of a certificate of merit not only violated the separation of powers but violated the constitutional right of the Plaintiff to access to the courts. Defendant nowhere explains why this Court should follow an opinion held by a minority of the court over the holding of a majority of the court.

IV. STEDMAN v. COOPER IS DIRECTLY ON POINT

Stedman v. Cooper, _____ Wash.App. _____, 292 P.2d. 764 (2012) is directly in point in this matter in appellant's favor. In that case the trial court excluded the testimony of Alan Tencer, Ph.D. Dr. Tencer testified that the forces involved in a car accident were so small as to be unlikely to cause injury. However, he would not testify, as indeed he could not testify that the accident in fact was not the cause of the injury. This Court's opinion in that case did not turn on the question of whether Dr. Tencer (a full Professor at the University of Washington) was a bad expert, or whether he had been excluded before. Rather, the Court ruled that the only relevance to the biomechanical testimony of Dr. Tencer would be to show that this Plaintiff's injury was not caused by this accident. Without that kind of connection, the evidence was simply irrelevant. Dr. Tencer testified on a more probable than not basis that the forces involved in the accident were not such as would ordinarily cause injury. However, he offered no opinion on the only question to which his testimony was relevant, i.e. causation.

The testimony of Defendant's experts here suffer from the exact same deficiency. Thus Dr. Stimac testified about the appearance of Mr. Colley's brain. However, he neither testified that he could say anything

about Mr. Colley's condition from this appearance, nor did anything in the imaging he reviewed negate the possibility of an injury. It was thus irrelevant to the only issue for which it was offered.

The same is obviously true of Dr. Ellsworth. Thus, although he could give opinions on an a "more probable than not basis" about matters having nothing to do with this case, since it was undisputed that Mr. Colley's respiratory arrest was at least in part caused by the administration of morphine, there was absolutely no relevance to his testimony.

Finally, with regard to Dr. Pascualy, he not only testified in accordance with the argument made here that the imaging about which Dr. Stimac testified was completely irrelevant, he also testified that under certain circumstances certain conditions which appear to have been mentioned in Mr. Colley's medical records could lead to memory difficulties, although usually on a chronic rather than acute basis. RP941. Nonetheless, he too was unwilling to testify to any degree of certainty as to whether Mr. Colley's injury was caused by his respiratory arrest. RP 942.

In this regard, the court is reminded that the injury in question here is a neurologic injury. Plaintiff presented the testimony of a board certified neurologist who testified that the injury here was caused by the hypoxia

suffered by the Plaintiff, and that there was no other reasonable explanation for the injury. RP 698-699; 715. These opinions fulfill two of the three requirements for proof of causation, as conceded by Dr. Stimac. RP 826-7. (The third is temporal association, which was undisputed.) Although Defendants called experts from all sorts of fields to give irrelevant testimony, they significantly did not call a neurologist, as the Defendant hospital's own neurologist following a neuropsychological evaluation agreed that Mr. Colley suffered short-term memory loss as a result of oxygen deprivation, and in fact prescribed medication based on that opinion.

It is quite true that these matters relate to causation, rather than negligence. However, in light of the close question on the issue of negligence, with the Defendant doctor indicating she had ordered the appropriate bedside pulse oximeter to watch Mr. Colley's oxygenation, and the Defendant hospital's nurse indicating she never received such an order and did not carry it out, allowing Defendant to present this overwhelming cacophony of evidence essentially to prove that Mr. Colley was "damaged goods" without any reasonable foundation, infected the trial to such a degree that reversal and remand for a new trial is necessary.

Defendant's argument that somehow that all of this irrelevant evidence rebutted Plaintiff's causation evidence is apparently based on the unpublished decision in *Larson v. Nelson*, 110 Wash.App. 1002 (2002). Defendant nowhere explains why it is exempt from the mandate of GR14.1.

RULE 14.1. CITATION TO UNPUBLISHED OPINIONS

(a) Washington Court of Appeals. A party may not cite as an authority an unpublished opinion of the Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports.

See also *State v. Nysta*, 168 Wash.App. 30, 275 P.3d. 1162 (2012). Defendant apparently has no more respect for the law than the facts. Plaintiff will not respond to this inappropriately cited authority.

V. EVIDENCE OF MR. COLLEY'S PRIOR DRINKING

HABITS

As stated in Plaintiff's opening brief, Mr. Colley had been completely abstinent of alcohol for years prior to the trial. Evidence that he previously had been a heavy drinker is simply irrelevant to any issue in the case, as Mr. Colley never displayed the symptoms shown after his

hospitalization at the Defendant hospital at any time previously in his life. While Dr. Stimac testified that the "chronic shrinkage" of Mr. Colley's brain would occur on a chronic long-term basis, and that alcohol abuse is one thing of many that causes this appearance, Dr. Stimac did not offer any opinion whatsoever that the actual injury suffered by Mr. Colley and the symptoms that he was displaying were to any degree caused by alcoholism. His testimony was purely an invitation to the jury to speculate that this is the case and moreover was introduced solely for the purpose of prejudicing the jury against Mr. Colley. The testimony that long-term alcohol abuse can cause memory issues is no different whatsoever than Dr. Tencer's testimony in the *Stedman* case, *supra* that an accident producing a certain amount of force usually does not cause injury. Just as that testimony was completely unconnected to the question of causation in that case, so here nothing of any of Defendant's experts is directed towards showing any connection whatsoever of Mr. Colley's acute short-term memory loss with his previous drinking habits. In this regard, this testimony is precisely analogous to the testimony condemned by this court in *Kramer v. J.I. Case Manufacturing Company*, 62 Wash.App. 555, 815 P.2d. 798 (1991). As acknowledged by Defendant, this court found that the evidence of the Plaintiff's history of alcohol abuse and marijuana was not relevant on the issue of Plaintiff's earning capacity and work life

expectancy because nothing in the records indicated that the Plaintiff's drug and alcohol abuse affected his employment prior to the incident at issue in the lawsuit. Likewise, no evidence here indicates that Mr. Colley's previous drinking affected his memory in any way prior to the incident at issue in the lawsuit here.

Defendant's argument for the admissibility of this evidence is again based on an unpublished opinion, in disregard of GR14.1. *Louis v. State*, 96 Wash.App. 1046 (1999). Again, since it is inappropriate to cite this case, Plaintiff will not respond to it.

VI. CONCLUSION

The trial court in this matter allowed the Defendant to consume much of the defense case with evidence produced by "experts" which was entirely irrelevant to the only issue for which it was supposed to be admitted, causation. This evidence was largely directed at showing that Mr. Colley "was damaged goods" to begin with and inferentially unworthy of compensation for his injuries here.

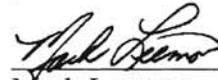
The Supreme Court has stated that it is a violation of a Plaintiff's constitutional rights to require the procurement of a certificate of merit as a precondition to filing a medical malpractice lawsuit. If it is unfair to

require a Plaintiff to obtain such a certificate, the actual use against the Plaintiff of this certificate certainly compounds the constitutional error. While Defendant's position to the contrary might be stronger if the concurring opinion it spends so long discussing were a majority, alas it is not.

This court should reverse the judgment herein and remand this matter to the trial court for a new trial.

Dated this 27th day of February, 2013.

LEEMON + ROYER



Mark Leemon
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I am an employee of LEEMON + ROYER PLLC, and am a person of such age and discretion as to be competent to serve papers, and that on today's date, I caused a true and correct copy of Plaintiffs/Appellants Opening Appeals Brief to be served via legal messenger and via electronic mail to the following:

Jeffrey D. Burnham, Esq., WSBA No. 22679
burnhamj@JGKMW.com
Johnson Graffe Keay Moniz & Wick
925 Fourth Avenue, Suite 2399
Seattle, WA 98104
(206) 223-4770
(206) 386-7344 (fax)
Attorneys for Defendant

Washington State Court of Appeals, Division 1
600 University Street
One Union Square
Seattle, WA 98101-1176

Dated this 27th day of February, 2013.



Nicole Scibelli