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Supreme Court No. 89837-5

Court of Appeals No. 68479-5-1

SUPREME COURT OF THE STATE OF WASHINGTON

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JEFFREY BEDE, as Personal Representative of the  
Estate of LINDA SKINNER, Deceased,

Plaintiff-Respondent,

v.

OVERLAKE HOSPITAL MEDICAL CENTER, a Washington  
corporation, and PUGET SOUND PHYSICIANS, PLLC,  
a Washington corporation,

Defendants-Appellants.

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. Beth Andrus)

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**RESPONDENT'S ANSWER TO APPELLANTS' PETITION  
FOR REVIEW**

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## I. INTRODUCTION

On January 26, 2010, Linda Skinner's son brought her to the emergency department at Overlake Hospital Medical Center ("Overlake") for the second time in two days. She felt feverish and had a severe headache, neck pain and stiffness, and a grossly elevated white blood cell count—all signs of meningitis. Dr. Laurie Anderton, the emergency medicine physician responsible for Ms. Skinner's care, was concerned that Ms. Skinner may have been suffering from a bacterial infection and ordered an MRI. Overlake's radiologist read the MRI as suggestive of meningitis and recommended that Ms. Skinner receive a lumbar puncture to rule it out. Rather than perform the recommended test or give Ms. Skinner antibiotics, Dr. Anderton sent Ms. Skinner home with pain medications. Sadly, Ms. Skinner in fact had meningitis, but her condition went untreated and she died the next day.

Jeffrey Bede, as the personal representative of his mother's estate, brought suit against Puget Sound Physicians ("PSP")—Dr. Anderton's employer—and Overlake—which is also responsible for Dr. Anderton's conduct. After a three-week trial and five days of deliberations, the jury found for plaintiff and awarded damages totaling \$3 million. Defendants then appealed. The Court of Appeals affirmed in a 62-page unpublished decision, and defendants now seek discretionary review. Notably,

defendants do not seek review of any significant *legal* ruling, nor do they seek review of any issue of substantial public interest. Rather, they challenge the trial court's *discretionary* ruling excluding on evidentiary grounds autopsy photos of Ms. Skinner's head, skull, and brain. Such a fact-bound and case-specific issue does not remotely satisfy any of the requirements for granting discretionary review under RAP 13.4(b).

Although defendants make much of the "pus" issue in their petition for review, the primary dispute at trial had nothing to do with pus. As the trial court noted, the real dispute concerned the *timing* of the migration of infectious agents from an old surgical site near Ms. Skinner's inner ear to her brain: plaintiff's experts and two of defendants' three experts believed that the migration occurred several days before Ms. Skinner's visit to Overlake, whereas one of defendants' experts claimed that it happened "catastrophically" while Ms. Skinner was in the emergency department on January 26. The autopsy photos do not resolve that issue, as the trial court also found. In addition, none of defendants' experts asked for—let alone considered—the photos while developing their opinions, and the photos are gruesome, duplicative of information found in the autopsy reports, and incomprehensible to lay people. The trial court did not err, let alone abuse its discretion, in excluding the photos. For all these reasons, and as set forth below, defendants' petition for review should be denied.

## II. STATEMENT OF THE CASE

### A. Relevant Factual Background.

Ms. Skinner first experienced symptoms of meningitis—fever, body aches, and neck pain—after flying from Washington, D.C. to Seattle on January 22, 2010. RP 414:25-415:17, 439:13-22, 444:1-445:1. A few days later, on January 25, 2010, Ms. Skinner’s son Chris brought her to Overlake’s emergency department, where PSP employee Dr. Marcus Trione evaluated her. RP 448:8-25. Dr. Trione concluded that Ms. Skinner was suffering from a flu-like illness and a cervical neck strain, and he discharged Ms. Skinner with a prescription for medication to treat her flu-like symptoms. RP 1344:11-14, 1527:6-8, 1539:7-14.

Ms. Skinner’s condition deteriorated overnight, so Chris brought her back to Overlake’s emergency department early in the morning on January 26, 2010. Ms. Skinner reported that she was nauseous and had neck and head pain that she described as the worst pain she had ever felt, rating the pain as a 10 on a 1- to 10-point pain scale. RP 1000:18-1001:11. Finally, Ms. Skinner added that her neck was not only painful, but also stiff. RP 1007:16-1008:5.

Knowing that Ms. Skinner’s symptoms were consistent with meningitis, the triage nurse asked Ms. Skinner whether she could touch her chin to her chest (something that someone suffering from meningitis either cannot do or can do only with difficulty). RP 1095:1-1096:8. Ms.

Skinner could not touch her chin to her chest. *Id.* The nurse also ordered a white blood cell test; the results came back grossly abnormal with a significant “left shift” of neutrophils, which is evidence of acute bacterial infection. RP 763:21-764:2, 1005:7-15; Plaintiff’s Trial Ex. 1, p. 33.

After Ms. Skinner was triaged, Dr. Anderton became responsible for her care. Dr. Anderton was aware of Ms. Skinner’s nausea, 10-rated neck and head pain, and blood test results, and she likewise knew that Ms. Skinner had failed the chin-to-chest test. RP 1000:22-1001:21, 1002:14-1003:25. In these circumstances, a doctor treating a patient with Ms. Skinner’s symptoms must either begin treatment for bacterial meningitis with antibiotics or rule out meningitis by doing a lumbar puncture (where spinal fluid is tested for evidence of infection). RP 777:19-780:6.

But even though Dr. Anderton recognized that Ms. Skinner’s symptoms could have been caused by bacterial meningitis (RP 1001:16-1002:1), she did not perform a lumbar puncture as she was trained to do. Instead, Dr. Anderton ordered (a) that Ms. Skinner be given powerful pain- and nausea-reducing medication and (b) that hospital personnel perform an MRI of Ms. Skinner’s neck. RP 1002:14-1003:22, 1009:2-24. Overlake’s radiologist subsequently read the MRI as abnormal and specifically concluded that there was “[p]rominent enhancement of the meninges in the posterior fossa and the cervical region” and that “[m]eningitis can give this appearance.” RP 937:4-13. Based on the MRI

*alone*, the radiologist recommended that Dr. Anderton perform a lumbar puncture to rule out meningitis. RP 941:24-942:20.

Despite all this information and specific advice, Dr. Anderton did not do a lumbar puncture. RP 1019:9-21. And even though Ms. Skinner's high white blood cell count "remained a mystery" to Dr. Anderton, she also did not prescribe antibiotics for Ms. Skinner. RP 1021:25-1022:6, 2087:7-2088:1, 1034:9-19. Instead, Dr. Anderton sent Ms. Skinner home with a diagnosis of "neck pain, vomiting and dehydration." RP 1032:23-1033:13. That, according to plaintiff's expert witnesses, was a violation of the standard of care. RP 789:25-790:24, 543:17-544:19.

Several hours after Dr. Anderton sent her home, Ms. Skinner became delirious, and Chris brought her back to Overlake. RP 467:10-469:18. Shortly after arrival, Ms. Skinner suffered a seizure and went into a coma. Plaintiff's Trial Ex. 1, p. 89. Another PSP physician recognized the signs and symptoms of meningitis and immediately prescribed antibiotics. *Id.*, pp. 54-56. Unfortunately, by that time the meningitis had progressed to the point where no treatment would be effective, and Ms. Skinner was pronounced brain dead. *Id.*, pp. 89-93. After being told by physicians at Overlake that there was no hope, her children removed life support and Ms. Skinner died. *Id.*, p. 93. The death certificate lists the cause of death as "bacterial meningitis." *Id.*, p. 95.

After her death, Ms. Skinner's children agreed—at Overlake's request—to an autopsy to be performed by pathologists at Overlake. *Id.*, p. 94. The autopsy report notes the presence of pus in an area where surgery had been performed on Ms. Skinner in 2006 to remove a benign tumor from her inner ear. *Id.*, p. 99. The Overlake pathologist listed the cause of Ms. Skinner's death as "acute bacterial meningitis." *Id.*, p. 96. Following the Overlake autopsy, Ms. Skinner's brain was sent to Johns Hopkins University Medical Center for a special autopsy by pathologists who specialize in the brain. *Id.*, pp. 101-05. The Johns Hopkins autopsy report likewise lists the cause of Ms. Skinner's death as "meningitis." *Id.*

**B. Relevant Procedural Background.**

Jeff Bede filed suit on July 2, 2010, alleging professional negligence. As is required by RCW chapter 7.70, *et seq.*, the parties retained medical experts. To assist his expert witnesses, and to prepare for trial, plaintiff requested and was provided by defendants hundreds of pages of medical records related to Ms. Skinner's care at Overlake, both informally before suit was filed and again after he requested all of Ms. Skinner's medical records in discovery. CP 900-01. Both times the medical records were provided to plaintiff they included the Overlake and Johns Hopkins autopsy reports. *Id.* But no autopsy photos were ever produced during discovery. *Id.*

Defendants did not so much as mention autopsy photos until Friday, December 16, 2011—just one business day before jury selection and opening statements were set to occur—when Overlake produced the photos to plaintiff by email, explaining that PSP’s attorney had asked for them the day before. CP 903. Plaintiff objected and argued that neither defendants nor their experts should be permitted to offer or discuss the autopsy photos at trial. RP 11:5-14:3. The trial court agreed and entered an order excluding the autopsy photos in accordance with its previous order granting *defendants’* motion *in limine* to exclude any evidence that had not been produced in discovery. RP 13:23-14:3.

This ruling began a saga in which defendants repeatedly asked the trial court to reconsider its ruling excluding the photos. CP 857-81, 904-09, 953-62, 1919-30; RP 976:9-978:20. In arguing one such motion, defendants specifically conceded that their causation expert—Dr. Francis Riedo—“absolutely” could give all of his opinions without relying on the photos and that they “were not necessary to his formation of his opinion.” RP 979:13-980:2. Although the trial court did not reconsider its ruling, it advised defendants that they “are free to use a diagram, free to use an illustration, in order to support your defense experts’ testimony.” RP 286:9-12. Defendants did so. Defendants’ Trial Exs. 130A-141A, 144.

Finally, defendants again raised the issue of the autopsy photos in a post-trial motion seeking a new trial under CR 59. CP 1045-60. The trial court again rejected defendants' arguments, explaining that:

The crux of the dispute between Plaintiff's and defense experts was not whether pus migrated from an old surgical site into Ms. Skinner's brain. The dispute was over the issue of *when* this infiltration of pus occurred and how rapidly it occurred. None of the expert declarations submitted by PSP demonstrates how any of the autopsy photographs definitively answers this question. Dr. Riedo, in the supplemental declaration submitted with the motion for new trial says the photos corroborate his opinion that there was a "large pocket" in Ms. Skinner's brain. But this fact was undisputed. All of the experts agreed that Ms. Skinner had a void left by the acoustic neuroma surgery. He also states that they show a "residual collection of pus in this site." Again, this was not disputed by any expert and was clearly disclosed in the autopsy report—a fact brought out by defense counsel during cross examination and closing argument.

CP 1366. Defendants' CR 59 motion also asserted, in a footnote, that the trial court had failed to consider the factors set forth in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), before excluding the autopsy photos. CP 1055 n.3. The court rejected that argument as well and entered a separate order that summarizes its previous consideration of the *Burnet* factors. CP 1370-73.

The Court of Appeals affirmed—*on several separate and independent grounds*—in a 62-page unpublished decision. Pet. App. A. Addressing relevance (ER 401) and needless presentation of cumulative evidence (ER 403), the Court of Appeals held: "We conclude that the autopsy photos were not only cumulative of other evidence but also

irrelevant as the trial court properly ruled.” *Id.* at 43. Turning to unfair prejudice (ER 403), the Court of Appeals likewise held that the trial court had not abused its discretion in excluding *all* of the autopsy photos because “[t]he color autopsy photographs of the area near Skinner’s brain are undeniably gruesome” and the other “photographs—regardless of which ones are selected—are no less gruesome and disturbing.” *Id.* at 47. The Court of Appeals further noted that “any of the other ER 403 grounds could also support [the trial court’s] ruling.” *Id.* at 47-48 n.34.

The Court of Appeals also rejected defendants’ argument that the trial court had failed to address the *Burnet* factors because “the trial court’s ruling to exclude the photographs under the circumstances here does not implicate the *Burnet* factors.” *Id.* at 44. That is so, the Court of Appeals explained, for two reasons: (1) because the *Burnet* framework does not apply to evidentiary rulings (as opposed to rulings imposing sanctions under CR 37(b)) and (b) because “[t]his case involved none of the harsher sanctions—dismissal, default, witness or testimony exclusion—discussed in *Burnet*...” *Id.* (citing additional cases). Lastly, the Court of Appeals added: “Even assuming error in excluding the photographs, any error was harmless and, thus, not a basis for reversal.” *Id.* at 48. Defendants then filed a motion for reconsideration, which the Court of Appeals denied, and they now seek discretionary review.

### III. APPELLANTS' PETITION FOR REVIEW SHOULD BE DENIED

**A. The Court Of Appeals' ER 401 Analysis Is Correct, And It Does Not Conflict With Any Decision Of This Court Or Raise Any Issue Of Substantial Importance That Should Be Determined By This Court.**

The first issue presented by defendants relates to the Court of Appeals' ER 401 analysis, which they claim "conflicts with this Court's liberal approach towards the admissibility of expert testimony" and also raises an issue of substantial importance that should be determined by this Court. Pet. 13, 15. As set forth below, both assertions are incorrect.

Defendants contend, at the outset, that the Court of Appeals' ER 401 analysis is "wrong" because "the trial court made no such a ruling." Pet. 11. That, too, is incorrect. The trial court noted that the "crux of the dispute" here was "not whether pus migrated from an old surgical site into Ms. Skinner's brain" but rather "*when* this infiltration of pus occurred and *how rapidly* it occurred." CP 1366 (emphasis added). The court then noted that "[n]one of the expert declarations submitted by PSP demonstrate how any of the autopsy photos definitively answers this question." *Id.* (emphasis added). While the trial court did not ultimately exclude the autopsy photos on ER 401 grounds, it nonetheless recognized—as the Court of Appeals correctly noted (Pet. App. A at 43)—that the photos did not make the "existence of any fact that is of consequence to the determination of the action more probable or less

probable.” ER 401 (emphasis added). The Court of Appeals could properly affirm on that basis. *See Otis Housing Ass’n v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009) (“We may affirm the trial court on any grounds established by the pleadings and supported by the record.” (internal quotation marks and citation omitted)).

The record amply supports the Court of Appeals’ ruling. Far from disputing the presence of pus in the area of Ms. Skinner’s old surgical site, plaintiff *agreed* that pus was present there, both by offering evidence confirming that point and through expert testimony. Plaintiff’s Trial Ex. 1, p. 99; RP 811:2-812:8 (plaintiff’s expert Dr. David Talan, answering “yes” when asked whether the old surgical site contained pus as well as bacteria); RP 1707:14-18, 1708:19-25 (plaintiff’s expert Dr. John Loeser, agreeing that the area of Ms. Skinner’s old surgical site from which her meningitis developed contained pus). The dispute, as noted above, centered on the testimony of Dr. Riedo, who unlike defendants’ other experts claimed that an “abscess” near Ms. Skinner’s ear burst while she was in the emergency department on the morning of January 26, 2010 and rapidly spewed pus and bacteria into her brain, causing “instant meningitis” and death, regardless of treatment. RP 1435:19-1437:19. As both the trial court and the Court of Appeals *correctly* concluded (and as common sense confirms), the autopsy photos have no probative value on that disputed *timing* issue. Pet. App. A at 40; CP 1366.

Defendants next claim that “[t]he Court of Appeals repeatedly emphasized that the autopsy photos were not ‘necessary’ to Dr. Riedo’s ability to testify to his theory of the case” (Pet. 12 n.18 (citing Pet. App. A at 26, 29, 47 n.33)), and they argue that this alleged “necessity test” “conflicts with this Court’s well-established liberal approach to relevance” (Pet. 12). This argument seriously misconstrues the Court of Appeals’ ruling. On each of the pages cited by defendants, the Court of Appeals either quoted or recounted *defendants’* representations in the trial court, including their representation that the autopsy photos “were not necessary” to Dr. Riedo’s testimony or opinion. Pet. App. A at 26, 29, 47 n.33. That was defendants’ word choice, not the Court of Appeals’.

Instead, the crux of the Court of Appeals’ ER 401 ruling is that “[t]he photographs depict nothing related to the crucial timing issue.” Pet. App. A at 40. That “test” is entirely consistent with the cases cited by defendants, which hold that “[f]acts tending to establish a party’s theory of the case will generally be found to be relevant” (*State v. Mak*, 105 Wn.2d 692, 703, 718 P.2d 407 (1986) (Pet. 12)) and that expert testimony, to be admissible, must be “helpful” (*Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 606, 260 P.3d 857 (2011) (Pet. 13)). Because the autopsy photos “depict nothing related to the crucial timing issue” (Pet. App. A at 40), they did not tend to establish defendants’ theory of the case and could not be helpful to Dr. Riedo or the jury.

In short, there is no conflict that could potentially warrant discretionary review under RAP 13.4(b)(1). And for similar reasons, the Court of Appeals' ER 401 analysis does not raise any issue of substantial importance that should be determined by this Court.

**B. The Court Of Appeals' ER 403 Analysis Is Also Correct, And It Also Does Not Raise Any Issue Of Substantial Importance That Should Be Determined By This Court.**

The second issue presented by defendants relates to the Court of Appeals' ER 403 analysis. The trial court concluded that the autopsy photos were inadmissible under ER 403. RP 285:18-286:8. Defendants claim that the Court of Appeals erroneously affirmed that ruling and that its alleged "mishandling of the application of ER 403 raises public interest concerns warranting review under RAP 13.4(b)(4)." Pet. 17.

Contrary to defendants' argument, the Court of Appeals' ER 403 analysis is correct and does not raise any issue of substantial importance that should be determined by this Court. The Court of Appeals appropriately began its analysis by citing several cases, including this Court's opinion in *Carson v. Fine*, 123 Wn.2d 206, 226, 867 P.2d 610 (1994), holding that trial courts have "considerable discretion in administering ER 403" and "reversible error occurs only in the exceptional circumstances of manifest abuse of discretion." Pet. App. A at 46. The Court of Appeals then turned to probative value and unfair prejudice and explained that while defendants claimed in the trial court that they would

offer only six of the 17 autopsy photos, their supporting expert witness's declaration "failed to identify which particular photographs those were, nor did he specifically explain how particular photographs aided the defense's theory of the case." *Id.* at 27. Defendants ignore these points, which seriously undermine their arguments.

But even putting these issues aside, the Court of Appeals correctly analyzed the ER 403 issue. Addressing probative value, the Court of Appeals concluded, as discussed above, that "the autopsy photograph evidence was not probative of the rupture causation theory in this case." *Id.* at 47. Turning then to unfair prejudice, the Court of Appeals concluded that the trial court had not abused its discretion in excluding *all* of the autopsy photos under ER 403 because "[t]he color autopsy photographs of the area near Skinner's brain are undeniably gruesome" and the other "photographs—regardless of which ones are selected—are no less gruesome and disturbing." *Id.* Far from "mishandling" this issue (Pet. 17), the Court of Appeals, like the trial court (RP 285:18-286:8), addressed all of the pertinent ER 403 considerations.

Also like the trial court's analysis, the Court of Appeals' decision is consistent with relevant case law. In *State v. Brett*, 126 Wn.2d 136, 160, 892 P.2d 29 (1995), for example, this Court recognized that autopsy photos "should not be admitted when the same information could be revealed in a nonprejudicial manner." The court similarly ruled in *State v.*

*Sargent*, 40 Wn. App. 340, 348-49, 698 P.2d 598 (1985). Consistent with this legal principle, the trial court invited defendants to use diagrams and illustrations to support their experts' testimony and defendants did so. RP 286:9-12; Defendants' Trial Exs. 130A-141A, 144.<sup>1</sup> These authorities amply support the Court of Appeals' analysis.

Defendants nevertheless assail the Court of Appeals for allegedly relying on "gruesomeness alone" to affirm the trial court's ruling. Pet. 16. But the Court of Appeals did not rely on gruesomeness alone. In addition to acknowledging the applicable standard of review (Pet. App. A at 46), the Court of Appeals recognized that the autopsy photos were "cumulative of other evidence" and "not probative of the rupture causation theory in this case" (*id.* at 43, 47)—both of which are pertinent ER 403 considerations. Equally important, the Court of Appeals recognized that ER 403 provides "many bases for exclusion of evidence other than unfair prejudice, including 'confusion of the issues,' 'misleading the jury,' or 'considerations of undue delay, waste of time, or needless presentation of cumulative evidence'" and expressly held that "any of these ER 403

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<sup>1</sup> In *State v. Lord*, 117 Wn.2d 829, 870, 822 P.2d 177 (1991), this Court further explained that autopsy "[p]hotographs have probative value where they are used to illustrate or explain the testimony of *the pathologist performing the autopsy*." (Emphasis added.) Here, in contrast, defendants never called as a witness either the Overlake pathologist who did the first autopsy or the neuropathologist at Johns Hopkins who did the special autopsy.

grounds could also support [the trial court's] ruling." *Id.* at 47-48 n.34. Defendants ignore this additional analysis.

For similar reasons, the cases cited by defendants are inapposite. The Washington Supreme Court opinions cited by defendants (Pet. 16 n.25) merely hold that a trial court does not abuse its discretion by admitting photographs that are *both* highly probative *and* gruesome.<sup>2</sup> Each of these cases involves a trial court's *case-specific* balancing under ER 403 of probative value and risk of unfair prejudice. Simply because the trial courts in those cases did not abuse their discretion in admitting gruesome photographs does not mean that the Court of Appeals erred when it held that the trial court in this case did not abuse its discretion by excluding gruesome, duplicative, and irrelevant photographs of Ms. Skinner's head, skull, and brain. The out-of-state cases cited by defendants (Pet. 16 n.26) are likewise distinguishable.

Nor is there any authority supporting defendants' misguided contention that plaintiff does not have standing to object to the photos on prejudice grounds. Pet. 17. Contrary to defendants' argument, plaintiff

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<sup>2</sup> See *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 285, 840 P.2d 860 (1992) ("Because the photographs are highly relevant to material issues ... their probative value is great."); *State v. Vidal*, 82 Wn.2d 74, 80, 508 P.2d 158 (1973) (trial court did not abuse discretion in admitting photographs of victim's body in murder prosecution); *Mason v. Bon Marche Corp.*, 64 Wn.2d 177, 178, 390 P.2d 997 (1964) (photographs admissible "if they have probative value"); *State v. Farley*, 48 Wn.2d 11, 19, 290 P.2d 987 (1955) (photographs "had a probative value upon the questions of the identity of the victim, the means by which she came to her death, and the existence of intent").

was not obligated to accept defendants' unsupported assertion that only they could possibly have suffered any adverse effect from the introduction of autopsy photos of Ms. Skinner's head, skull, and brain. Indeed, ER 403 confirms this point by focusing on "the *danger* of unfair prejudice." (Emphasis added.) So long as any such "danger" exists, as it would here by dehumanizing Ms. Skinner and/or causing the jury to begrudge plaintiff for filing suit, a plaintiff can properly object on ER 403 grounds.

*Davis v. Wooster Orthopaedics & Sports Medicine, Inc.*, 952 N.E.2d 1216 (Ohio Ct. App. 2011), cited by defendants on this point (Pet. 17), is not to the contrary. In *Davis*, the plaintiff offered an autopsy photograph of his wife because the photograph "was probative of the mental-anguish element of damages because he saw his wife just before she died, looking the way she is depicted in the photograph." *Id.* at 1222. Because the photograph was "probative of Mr. Davis's mental anguish," the appellate court held that the trial court had not abused its discretion under Rule 403 by admitting the photo. *Id.* at 1223. Here, in contrast, the autopsy photographs were not offered by plaintiff to prove an element of his professional negligence claim. Instead, they were offered by *defendants* despite the lack of any probative value. Just as the defendant had standing to object in *Davis*, plaintiff had standing to object here.

In sum, the Court of Appeals' ER 403 analysis is not only correct and consistent with *relevant* authority (including *Brett*, *Sargent*, and

*Lord*), it turns on the *specific facts and circumstances* presented in this case. The ER 403 analysis therefore does not raise any issue of substantial importance that should be determined by this Court.

**C. Defendants’ Remaining Arguments—Regarding The *Burnet* Factors And Harmless Error—Similarly Lack Merit.**

Defendants acknowledge, as they must, that “[b]ecause the Court of Appeals’ decision did not address the merits of the *Burnet* issue, [defendants] do not believe that issue is a proper basis for requesting review under RAP 13.4(b).” Pet. 10-11. They nevertheless attack the trial court’s *Burnet* analysis (Pet. 10) as well as the Court of Appeals’ harmless error analysis (Pet. 18), thereby necessitating the following brief response.

As the Court of Appeals *correctly* concluded, the trial court was not required to consider the *Burnet* factors because the *Burnet* framework does not apply to evidentiary rulings and this case does not involve one of the “harsher sanctions—dismissal, default, witness or testimony exclusion—discussed in *Burnet*” and its progeny. Pet. App. A at 44. Even if the trial court was required to consider the *Burnet* factors, it did so *multiple* times, both during trial (RP 11:5-14:3, 282:22-286:12) and afterwards (CP 1370-73). Defendants challenge the analysis during trial (Pet. 9 n.14), but they ignore this Court’s holding in *Jones v. Seattle*, No. 87343-7, 2013 Wash. LEXIS 955, at \*31 (Wash. Dec. 12, 2013), that trial courts can satisfy *Burnet* without “invok[ing] that case by name.” They

then challenge the post-trial analysis as improper “backfilling” under *Blair v. TA-Seattle East No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011) (Pet. 10), but *Blair* held only that the *reviewing court* cannot backfill – not that a trial court cannot summarize and *confirm* its analysis in a post-trial order.

Regardless, as to *all* of the above arguments (ER 401, ER 403, and *Burnet*), any trial court error was in any event “harmless and, thus, not a basis for reversal”—as the Court of Appeals also found. Pet. App. A at 48. Although they now claim that the photos were extremely relevant to their theory of the case, when defense counsel was specifically asked whether Dr. Riedo could testify and give his opinions without the benefit of the photos he responded “absolutely,” as they “were not necessary to his formation of his opinion.” RP 979:13-980:2. In addition, the trial court invited defendants to use diagrams and illustrations to support their experts’ testimony and defendants did so. RP 286:9-12; Defendants’ Trial Exs. 130A-141A, 144. The autopsy photos were cumulative of those exhibits and equally cumulative of the autopsy reports, which provide the same information in narrative form. Plaintiff’s Trial Ex. 1, pp. 99, 100. Any alleged error was therefore harmless.<sup>3</sup>

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<sup>3</sup> See *Saldivar v. Momah*, 145 Wn. App. 365, 396, 186 P.3d 1117 (2008) (exclusion of cumulative evidence is harmless) (citing 5 Karl B. Tegland, *Washington Practice: Evidence Law & Practice* § 404.14, at 513 (5th ed. 2007)); *Qwest Corp. v. Wash. Utils. & Transp. Comm’n*, 140 Wn. App. 255, 260, 166 P.3d 732 (2007) (“Error without prejudice is not grounds for reversal, and error is not prejudicial unless it affects the case outcome.”).

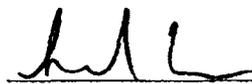
Although defendants recognize that harmless error review applies here, they suggest that the analysis should differ under *Magana v. Hyundai Motor America*, 123 Wn. App. 306, 94 P.3d 987 (2004), because the jury verdict was not unanimous. Pet. 18. The court in *Magana* did not so hold. Instead, it examined “the entire record” to determine prejudice and it did so only *after* concluding that the trial court had *erred* by refusing to instruct the jury that it should not consider stricken testimony. *Magana*, 123 Wn. App. at 315. Here, in contrast to *Magana*, the trial court did not fail to properly instruct the jury or otherwise err. Instead, it properly excluded autopsy photos that were gruesome, cumulative of other evidence, incomprehensible to lay people, and entirely irrelevant to the disputed *timing* issue in the case. *Magana*, like the other cases cited by defendants, does not support defendants’ petition for review.

#### IV. CONCLUSION

Defendants’ petition for review should be denied.

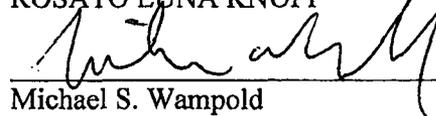
RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of February, 2014.

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