SUPREME COURT, STATE OF COLORADO 2 East 14th Ave. Denver, CO 80203	FILED IN THE SUPREME COURT JAN 22 2013 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk
Colorado Court of Appeals Case No. 10CA0668, Division III Fox, Roy, and Webb, J.J. District Court of the City and County of Denver Case No. 06CV12898 Honorable Michael A. Martinez, Honorable Martin F. Egelhoff, Honorable Christina M. Habas	▲ COURT USE ONLY ▲
Petitioners: JASON L. KELLY, M.D. and MAURICIO L. WAINTRUB, M.D. v. **Respondent:** VASILIOS HARALAMPOPOULOS, by his guardian JOHN HARALAMPOPOULOS	Case Number: 11SC889
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BRIEF OF AMICI CURIAE AMERICAN MEDICAL ASSOCIATION, COLORADO MEDICAL SOCIETY, COLORADO CHAPTER OF THE AMERICAN COLLEGE OF EMERGENCY PHYSICIANS, COLORADO RADIOLOGICAL SOCIETY, COLORADO SOCIETY OF ANESTHESIOLOGISTS, AND REGENTS OF THE UNIVERSITY OF COLORADO

CERTIFICATION OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certify that the petition complies with C.A.R. 28(g) because it contains 3,680 words.

C.A.R. 28(k) applies to a "party" and a "responding party." As such, amicus curiae are not subject to Rule 28(a), (b), (c), or (k).

Dated this 22nd day of January, 2013.

MARTIN CONKLIN

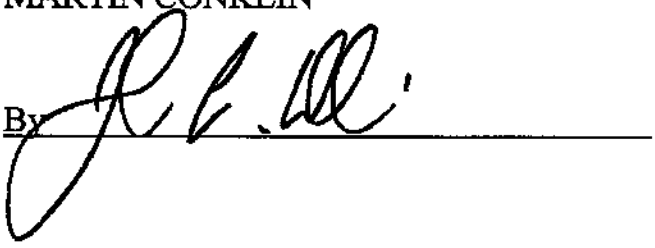
By: 

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Treatises

Constitutional Provisions

Dictionaries

Amici Curiae respectfully submit their brief in support of Petitioners Dr. Kelly and Dr. Waintrub. *Amici* believe, contrary to the court of appeals' opinion, that the trial court correctly determined that statements made to a physician about a patient's drug use, which likely explained the cause of the patient's condition, could be used to defend against claims of malpractice.

ISSUE PRESENTED

This Court framed the issue presented for review as follows: Whether the court of appeals erred in concluding that statements to a physician and other hearsay evidence regarding a patient's alleged cocaine use was inadmissible under the rules of evidence in a medical malpractice case in which the parties disputed the cause of the patient's complications following a medical procedure.

STATEMENT OF INTEREST

Health care providers routinely receive personal and sensitive information in attending patients. The law recognizes the value of sharing such information in improving medical diagnosis and treatment. As the Court considers whether plaintiffs bringing claims for medical malpractice may exclude from evidence information that impacts a patient's health condition, *Amici* request that the Court consider this brief discussing the impact of health information on the provision of medical care and the relevance of such information to the question of causation

in a medical malpractice lawsuit.

I. American Medical Association

The American Medical Association (AMA) is the largest professional association of physicians, residents and medical students in the United States. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policy making process. AMA members practice and reside in all states, including Colorado. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.

The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the AMA and State Medical Societies. The Litigation Center is a coalition of the AMA and the medical societies of every state and the District of Columbia whose purpose is to represent the viewpoint of organized medicine in the courts.

II. The Colorado Medical Society

The Colorado Medical Society is a nonprofit organization whose more than 7,000 members include the majority of physicians practicing in Colorado. As

Colorado's largest organization of physicians, residents, and medical students, the Society's mission is to promote the science and art of medicine, the betterment of public health, and the welfare of Colorado physicians and the patients they serve.

III. The Colorado Chapter of The American College of Emergency Physicians

The Colorado Chapter of the American College of Emergency Physicians (ACEP) is a medical specialty society formed in 1968 to improve emergency care by setting high standards for emergency medical education and practice. Colorado ACEP has more than 550 members working in Colorado to preserve the integrity of emergency medical practice and the ability of emergency medicine physicians to best care for their patients.

IV. The Colorado Radiological Society

The purpose of the Colorado Radiological Society is to advance the science of radiology, improve radiologic service to the patient, study the socioeconomic aspects of the practice of radiology, and encourage improved and continuing education for radiologists and allied professional fields. The Society is a not-for-profit organization representing approximately 500 Radiologists in the state.

V. The Colorado Society of Anesthesiologists

The Colorado Society of Anesthesiologists (CSA) is a Colorado nonprofit physician organization committed to patient safety, educational advancement, and providing the best anesthesia care to patients.

VI. The Regents of the University of Colorado

The Board of Regents of the University of Colorado governs the University of Colorado system. *Colo. Const. Article IX, §12.* The system consists of three campuses: University of Colorado at Boulder; University of Colorado at Denver and Health Sciences Center; and University of Colorado at Colorado Springs. More than 1,500 faculty in five schools, including nurses, dentists, pharmacists, physicians, and other allied health care professionals, contribute to the University's mission of providing education, research, clinical care, and community service.

DISCUSSION

These *Amici* ask this Court to reverse the majority opinion of the court of appeals for one fundamental reason: the underlying majority opinion construes the Colorado Rules of Evidence in a manner that is inconsistent with the practice of medicine and the diagnostic process and, consequently, threatens physicians' ability to defend against medical malpractice claims. Left unchecked, the underlying majority opinion is inconsistent with this Court's admonition that "our

rules of evidence must be construed to ensure that truth may be ascertained and proceedings justly determined." *People v. Huckleberry,* 768 P.2d 1234, 1244 (Colo. 1989).

I. Statement of Facts Underlying Amici Interest

Drs. Kelly and Waintrub provide an overview of the evidence, which obviates the need for *Amici* to include a lengthy recitation of the facts. The following facts, however, underlie the *Amici's* consideration of the issues:

- Mr. Haralampopoulos underwent a fine needle biopsy procedure to determine the nature of a cyst. During the procedure, Mr. Haralampopoulos suffered cardiac arrest and was resuscitated only after significant effort.

- After resuscitation, Mr. Haralampopoulos was determined to have an anoxic brain injury, but the reason for the difficulty in resuscitating him (leading to the injury) remained unknown.

- Ms. Hurd, a close friend/former girlfriend living with Mr. Haralampopoulos in the weeks before the biopsy, approached Dr. Kelly and inquired whether Mr. Haralampopoulos's cocaine use (the extent and timing of which is disputed) "could have interacted with the anesthesia or could it have set him into cardiac arrest . . . I was searching for some kind of answer or reason why this happened."

- Defense experts opined that cocaine use, whether recent or remote, explained why it was difficult to resuscitate Mr. Haralampopoulos after his cardiac arrest.

In denying a motion *in limine* to preclude evidence of Mr. Haralampopoulos's cocaine use, the trial judge observed that this evidence was "really the key to this case." A trial court's decision to admit or exclude evidence is not reversible unless its decision is "manifestly arbitrary, unreasonable, or unfair." *E-470 Public Highway Authority v. 455 Co.*, 3 P.3d 18, 23 (Colo. 2000).

At trial, Drs. Kelly and Waintrub not only offered evidence that they met the applicable standards of care, but, consistent with the trial court's evidentiary rulings, also offered evidence demonstrating that Plaintiff's cocaine use explained his sudden cardiac arrest and his delayed response to resuscitation efforts. Following a three-week trial, the jury returned verdicts in favor of Drs. Kelly and Waintrub, finding the physicians were not negligent and did not cause Plaintiff's claimed damages.

A divided panel of the court of appeals reversed and ordered a new trial, finding the trial court abused its discretion by admitting evidence of Plaintiff's cocaine use. In determining that statements to a physician regarding a patient's alleged cocaine use did not fall within the medical diagnosis exception to the hearsay rule because "the information had no diagnostic value" and otherwise excluding evidence of Plaintiff's cocaine use, the court of appeals failed to consider the use of such health information in the provision of medical care and

the relevance of such information to the question of causation in a medical malpractice lawsuit.

II. Causation in Medical Cases

The majority opinion of the court of appeals summarized its view of the evidence by stating, "[t]his case should have been about whether [Drs.] Waintrub and Kelly met their respective standards of care." This statement incorrectly describes the nature and extent of the relevant evidence in a medical malpractice trial.

As this Court has recognized, a plaintiff presenting a claim for medical negligence must show: (1) a legal duty on the defendant's part; (2) breach of that duty; (3) injury; and (4) causation, i.e., that defendant's breach caused plaintiff's injury. *Greenberg v. Perkins,* 845 P.2d 530, 533 (Colo. 1993); *HealthONE v. Rodriguez*, 50 P.3d 879, 888 (Colo. 2002). Independent of evidence about the standard of care, medical malpractice cases often turn on whether "the defendant's breach caused the plaintiff's injury." *See Estate of Ford v. Eicher*, 250 P.3d 262, 265 (Colo. 2011) (observing that there were competing theories of causation of an infant's brachial plexus injury and holding that the jury should hear both theories).

There can be no liability without causation attributable to the defendant, and it is generally within the province of juries to determine the cause of an injury.

Shultz v. Linden-Alimak, Inc., 734 P.2d 146, 149 (Colo. App. 1986); *Vento v. Colorado National Bank of Pueblo*, 907 P.2d 642 (Colo. App. 1995). Given the uncertainty about why Mr. Haralampopoulos's physicians could not immediately resuscitate him – i.e., causation – the case was about more than the standard of care.

III. Scope of C.R.E. 803(4) – Statements Made for Medical Diagnosis or Treatment

Although it is true that the Colorado Rules of Evidence exclude some hearsay statements, it is equally true that the rules allow trial courts to admit other hearsay statements. The distinction between the admissible and inadmissible hearsay lies in the fact that "under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness" sufficient to justify admission. *Advisory Comment to Fed. R. Evid. 803* (construing identical provision of federal law). C.R.E. 803(4) identifies an instance where a statement has guarantees of trustworthiness and the following type of statement is "not excluded by the hearsay rule, even though the declarant is available as a witness":

> Statements made for purposes of medical diagnosis or treatment and describing medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The reason statements made for medical diagnosis or treatment are admissible is common sense — "a patient's medical care depends on the accuracy of the information she provides, the patient has a selfish motive to be truthful; consequently a patient's statements to her physician are likely to be particularly reliable." *United States v. Pacheco*, 154 F.3d 1236, 1240 (10th Cir. 1998). Stated another way, "a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility." *White v. Illinois*, 502 U.S. 346, 356 (1992). Although many statements within the scope of Rule 803(4) come from patients, "statements by bystanders, family members, and others" routinely fall within the exception. *Federal Rules of Evidence Manual*, §803.02[5][d] (8th Ed. 2002), *Stephen A. Saltzburg et al.*

For example, Emergency Medicine physicians routinely rely on information from others to diagnose and treat patients. Commonly, when patients arrive in the emergency department, their condition prevents them from effectively communicating on their own behalf. When faced with such a critical health issue, family, friends, paramedics, bystanders, police, and others can be reliable historians and physicians routinely rely on information provided by them in diagnoses and treatment. Likewise, doctors who practice with older patient

populations, like those specializing in Hospice and Palliative Medicine or Geriatrics, care for patients who may present with conditions like dementia that cause cognitive impairment. These physicians must rely on others, such as family members, friends, co-workers, and caregivers, for necessary information that their patients are unable to provide. "Under Rule 803(4), the declarant's motive to promote treatment or diagnosis is the factor crucial to reliability." *Danaipour v. McLarey*, 386 F.3d 289, 298 (1st Cir. 2004). Consequently, the key inquiry is whether Ms. Hurd's statements were motivated by a desire to "promote treatment or diagnosis." Ms. Hurd's statements, quoted by the underlying majority opinion, demonstrate such motivation, even if the extent of Mr. Haralampopoulos's cocaine use is disputed:

> I said, "[he] used to do drugs in the past, he used to do a little cocaine, and, you know, could it have been in his system and could it have interacted with the anesthesia or could it have set him into cardiac arrest or" – you know, I was – I don't know if I was asking it right, but I was searching for some kind of answer or reason why this happened.

Transcript dated 2/1/2011 at p. 238: 9-15.

Asking a physician for "some kind of answer or reason why this happened" is the essence of "diagnosis," whether that term is used in legal, medical, or common parlance. *See Black's Law Dictionary* (6th Ed. 1990) (defining

"diagnosis" as including "the discovery of the source of the patient's illness . . ."); *Taber's Cyclopedic Medical Dictionary* (19th Ed. 2001) (defining "diagnosis" as including "the use of scientific or clinical methods to determine the cause and nature of a person's illness"); *Webster's Encyclopedic Unabridged Dictionary of the English Language* (1996) (defining "diagnosis" as including "a determining or analysis of the cause or nature of a problem or situation"). That Ms. Hurd's statements about Mr. Haralampopoulos's medical history concerned illegal activity–cocaine use–further buttresses the reliability of these statements. Even when patients can communicate for themselves, they may be reluctant to provide certain information, particularly information concerning illicit activity or substance abuse. Ms. Hurd's recounting of Mr. Haralampopoulos' history of cocaine abuse illustrates her motivation to provide accurate and truthful information, even though it concerned illegal activity, to understand "why this happened."

Determining the cause of a patient's condition, whether or not such cause impacts treatment, is central to medical diagnosis. *See Taber's, supra.* The process of diagnosis is ongoing, incorporating new information as it becomes available. Medical diagnosis is not limited to only situations in which a physician is attempting to prescribe future treatment. It also encompasses the determination of the cause of any medical condition, even if no treatment

is available at the time. The majority's overly narrow interpretation of Rule 803(4) is at odds with the diagnostic process and the practice of medicine.

IV. The Majority Opinion Misconstrues the Nature of Medical Practice in Interpreting Rules 403 and 803(4)

With this understanding of the principles of causation and Rule 803(4), these *Amici* believe the underlying majority opinion erred in three principal respects. Combined, these errors deny physicians the ability to present meaningful causation defenses in medical malpractice trials.

First, the majority repeatedly asserts that Rule 803(4) did not apply because Dr. Kelly did not "use" information about Mr. Haralampopoulos's cocaine use. But whether information is used by the receiving physician has never been the justification for information falling within the hearsay exception. When patients or their family and friends provide information to physicians for the purpose of diagnosis or treatment, there are "circumstantial guarantees of trustworthiness," regardless of whether the physicians actually use the information. *Advisory Comment to Fed. R. Evid. 803.* These "circumstantial guarantees of trustworthiness" are not lost merely because the physicians ultimately decide the information is not helpful or useful for future treatment.

For the medical diagnosis exception, the guarantee of trustworthiness is that the declarant understands that the quality of medical care may be impacted by providing truthful information. *Pacheco*, 154 F.3d at 1240; *White*, 502 U.S. at 356. If the declarant's motive is to provide potentially useful information to a medical provider, the reliability of that information is not undermined if the physician ultimately does not "use" it in treatment.

Indeed, this Court has not required a physician to use medical information to treat a patient to apply the exception in Rule 803(4). In *King v. People*, 785 P.2d 596 (Colo. 1990), a psychiatrist examined a patient more than a year after the events giving rise to the prosecution, and there was no assertion that the patient's statements were used for treatment. Nonetheless, this Court found the patient's statements admissible because they "were reasonably pertinent to the patient's diagnosis." *King*, 785 P.2d at 601.

This Court's recognition that use for treatment purposes is not determinative of whether a statement falls within the exception is consistent with the nature of medical practice. For example, consider an elderly patient with a fracture. The diagnosis is not complete merely because the examining physician determined that the patient has a fracture. Diagnosis requires the physician to determine what circumstances or condition caused the patient's fracture. In diagnosing the

patient's condition, the physician attempts to determine whether the patient fell, has osteoporosis, cancer, or is subject to abuse. Although such information may or may not change treatment of the patient's fracture, it is nonetheless important to health care providers and is part of the overall diagnostic and therapeutic processes.

The same situation exists here where experts were able to consider Ms. Hurd's statements to Dr. Kelly (in addition to other evidence, such as an echocardiogram demonstrating that Mr. Haralampopoulos had cardiac abnormalities) to explain why initial resuscitation efforts failed. The Colorado Rules of Evidence permit experts to base their opinions on otherwise inadmissible evidence, including evidence "received from others," provided such evidence is the type reasonably relied upon by experts in the field. C.R.E. 703; *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 203 (Colo. 1984). The information relied upon by physicians both as treating physicians and as medical experts in litigation often includes circumstantial evidence and third-party statements in certain situations, such as when an unconscious patient is brought to the Emergency Department, when a patient is impaired from providing information, or when illegal activity is involved like cocaine. This is particularly true when dealing with a patient with substance abuse issues, where the patient may be reluctant to self-disclose and

physicians may have to deduce substance use from a variety of external sources, including a patient's medical condition, test results, or behaviors and statements by family, friends and others.

In determining evidence of cocaine use was unreliable and inadmissible because there was no evidence a witness had "seen" or "observed" Mr. Haralampopoulos use cocaine since 1998, (*slip. op. at 15, 32*), the majority below impermissibly substituted its own judgment as to the type of evidence "reasonably relied upon by experts" in the medical field. The standard for admissibility of expert testimony under C.R.E. 702 is broad and liberal, focusing on relevance and reliability, not certainty. *People v. Ramirez*, 155 P.3d 371, 378 (Colo. 2007). The practice of medicine requires physicians to routinely rely on circumstantial evidence of patients' medical history, particularly when dealing with a patient with substance abuse issues. In eschewing the circumstantial evidence of substance abuse routinely relied on in the medical field and instead requiring more "certain" evidence that a witness had "seen" or "observed" Mr. Haralampopoulos use cocaine since 1998, the majority below overreaches and fails to consider the realities of the practice of medicine.

Second, the majority determined that the medical diagnosis exception did not apply because *Clark v. People,* 86 P.2d 257, 259 (Colo. 1939) bars statements

of fault. Irrespective of whether *Clark* remains good law after the adoption of the Colorado Rules of Evidence, the majority's reliance on *Clark* stems from its misconception that a medical malpractice trial should be solely about "whether [the physicians] met their respective standards of care." As described above, a claim for medical malpractice involves more; it involves a determination of "causation, i.e. that the defendant's breach caused the plaintiff's injury." *Greenberg,* 845 P.2d at 533; *HealthONE,* 50 P.3d at 888. In fact, Rule 803(4) explicitly allows trial courts to admit statements reasonably pertinent to the "cause or external source" of "past or present symptoms."

Instead of viewing diagnosis as an ongoing process that includes the cause of a patient's health condition, the majority conflates "cause" with "fault." Yet, the very nature of medical practice involves interpreting information from a variety of sources to form a clinical picture — before and after a primary diagnosis is made. The diagnostic process is complex and ever-evolving. The information physicians obtain from others when assessing a patient is a significant part of that process, regardless of whether it is used to assign a primary diagnosis or to determine the underlying cause of a patient's condition. If the statement was made for the purpose of determining the cause of the patient's condition, it is admissible,

regardless of whether it has some bearing on fault. As the dissent pointed out, "the majority mischaracterizes the hearsay at issue as a statement of blame and applies an overly narrow approach to the diagnostic process." *Slip op. at 54.*

Third, the majority determined that the evidence of Mr. Haralampopoulos's cocaine use violated Rule 403. But the majority could make this determination only because it misconstrued Rule 803(4)'s medical diagnosis exception, substituted its factual judgment for that of the trial court, and disregarded expert testimony presented by Defendants. Once it is understood that: (1) the medical diagnosis exception focused upon the declarant's statement of mind when making the statement; and (2) evidence of cocaine use is extremely probative on the issue of why Mr. Haralampopoulos could not be immediately resuscitated after his cardiac arrest, the trial court was correct when it described this evidence as "the key to the case." The majority could reach the conclusion that this evidence was substantially more prejudicial than probative only because it mislabeled powerful causation evidence as a hearsay statement relating to fault.

Importantly, information about substance abuse that may be viewed as inconsequential by a lay person may, in fact, be medically significant. Substance abuse can have life threatening implications to patients receiving medical care.

Absent an outright acknowledgment by a patient that they are a substance abuser, physicians may have to deduce substance abuse from a variety of external sources, including the patient's medical condition, test results, or reactions, and statements by the patient's family and friends. Despite the patient's unwillingness to disclose, it is nonetheless important for a physician to look to and rely on other sources because such information is critical to the processes of medical diagnosis and therapy.

The addictive nature of cocaine and evidence supporting both past and recent cocaine use left medical experts with the opinion that cocaine was a key factor in the inability to resuscitate the patient — which, in turn, is highly probative of a key element of Plaintiff's claim and the physicians' ability to defend.

CONCLUSION

The majority opinion of the court of appeals does not accurately reflect the reality of the medical diagnostic and therapeutic processes. Even if nothing could have been done to change Mr. Haralampopoulos's condition at the time of Ms. Hurd's statements, much could be done to explain his failure to respond to resuscitation. Testimony on this issue is within the realm of "diagnosis" and "the use of scientific or clinical methods to determine the cause and nature of a person's

illness." *Taber's, supra* Denying Dr. Kelly and Dr. Waintrub the ability to present a causation defense because the evidence of Mr. Haralampopoulos's cocaine use is prejudicial to his claim is inimical to C.R.E. 102's instruction that courts apply "the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

Physicians are entrusted with using appropriate judgment in considering information from others in attending patients and should not be precluded from submitting that very same information when called to account for their care. Medical care would be less effective and could be misguided without such information. An after-the-fact evaluation of that same care would be just as misguided and inaccurate were such information not included in the critique.

Respectfully submitted this 22nd day of January, 2013:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF AMICI CURIAE AMERICAN MEDICAL ASSOCIATION, COLORADO MEDICAL SOCIETY, COLORADO CHAPTER OF THE AMERICAN COLLEGE OF EMERGENCY PHYSICIANS, COLORADO RADIOLOGICAL SOCIETY, COLORADO SOCIETY OF ANESTHESIOLOGISTS, AND REGENTS OF THE UNIVERSITY OF COLORADO** was served by depositing a true copy thereof in the United States Mail, postage prepaid, addressed to the following on this 22nd day of January, 2013:

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