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Supreme Court No. 96175-1
Court of Appeals No: 76593-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JUAN PABLO RIOS PEREZ, a minor child by and through his parents,
RICARDO RIOS VILLA and MONICA PEREZ PEREZ, and individually,

Plaintiffs/Appellants

vs.

GRACE JUNG, D.D.S., individually and the marital community with JOHN
DOE JUNG, and CHUNG-LONG HWANG, DDS, PS dba CHILDREN'S
DENTAL CARE

Defendants/Respondents

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION.

This is a dental malpractice case in which experts for both sides agree Juan Pablo Rios-Perez, a 7 year old boy, was rendered blind in his right eye by a dental procedure. The Court of Appeals found competent expert medical testimony supported negligence and causation and remanded the case for trial.

II. IDENTITY OF RESPONDENTS.

Respondents to the Petition for Review are Juan Pablo Rios-Perez and his parents, Ricardo Rios Villa and Monica Perez Perez. They were plaintiffs in the Superior Court and appellants in the Court of Appeals.

III. COURT OF APPEALS DECISION.

The Court of Appeals decision for which Petitioners seek review is an unpublished decision that was filed July 9, 2018. It is found at Perez v. Jung, et al, No. 76593-1-I. A copy of the decision is attached as Appendix A.

IV. ISSUE.

Whether it was error for the Court of Appeals to find material issues of fact preclude summary judgment where competent experts submitted declarations establishing negligence and probable causation.

V. STATEMENT OF CASE

While under general anesthesia, 7 year old Juan Pablo Rios Perez underwent an extensive series of dental procedures performed by Petitioner Grace Jung, DDS. CP 208. Jung at the time was employed by Petitioner Chung-Long Hwang, DDS, PS, a corporation doing business under the name Children's Dental Care. CP 15, ¶5(c), 27, ¶5(c).

Although Juan Pablo was already under general anesthesia, Jung performed multiple injections of local anesthetic into highly vascularized areas during the subject dental procedures. For the injections she used a 30 gauge harpoon (needle). Jung injected some local anesthetic prior to aspirating. She aspirated only once per injection. CP 168-169, ¶7 and 8, 211, ln. 20-25.

The purpose of aspiration is to determine whether the harpoon is in the vascular circulation prior to injection of local anesthetic. If a return of blood is realized upon aspiration, the harpoon is in the vascular circulation and must be moved. CP 169, ¶6.

A 30 gauge harpoon's caliber is so small that it is extremely rare to get a return of blood on aspiration when the harpoon is in the vascular circulation. Studies have established one hundred percent (100%) positive aspirations are achieved from blood vessels using 25 gauge harpoons;

eighty-seven percent (87%) positive aspirations are achieved from blood vessels with 27 gauge harpoons; only two percent (2%) positive aspirations are achieved from blood vessels with 30 gauge harpoons. CP 168-169, ¶7¹.

Dental expert Dr. Olivia Palmer testified that the standard of care requires a dentist to take precautionary measures to avoid inadvertently injecting local anesthetic into a blood vessel. Specifically, she stated the standard of care required use of a larger caliber than 30 gauge harpoon where a child was already under general anesthesia, given the aspiration difficulties associated with a 30 gauge harpoon. Dr. Palmer further stated the standard of care required more than one aspiration in different planes to verify the harpoon was not in a blood vessel. Additionally, she stated that the standard of care required aspiration before injection of any local anesthetic to avoid accidental injection into a blood vessel. She stated Jung's actions with respect to the injection of the local anesthetic violated the required standard of care. CP 169-170, 212, 323-324.

Following the dental procedures, Juan Pablo's right eye began swelling. It was soon discovered he had lost vision in his right eye and

¹ The smaller the gauge, the larger the caliber of the harpoon.

had also lost ability to move it. Juan Pablo was taken to Children's Hospital in Seattle for evaluation. He was seen there by Dr. Avery Weiss.

Dr. Weiss is a pediatric ophthalmologist. He is chief of ophthalmology at Children's Hospital in Seattle. Dr. Weiss is also professor of ophthalmology at the University of Washington. He previously held faculty appointments in pediatrics and pediatric ophthalmology at the University of South Florida. He has been board certified in ophthalmology since 1981. CP 296. Dr. Weiss is Juan Pablo's treating pediatric ophthalmologist. CP 297.

Dr. Weiss first saw Juan Pablo three days after the dental procedure that blinded him and has treated him ever since. Dr. Weiss stated the cause of Juan Pablo's blindness and oculomotor issues was the injection of particulate matter into the arterial circulation during Juan Pablo's dental procedure. He based this on an optical coherence tomography (OCT) scan which he performed and interpreted. The scan revealed "too many particles to count" in the choroid and retina of Juan Pablo's right eye. He stated those particles had to arrive via the arterial circulation. He further stated the role of the particles in causing blindness was by occluding blood vessels, thereby eliminating perfusion to the relevant nerves. CP 189-193; 195-197; 221-222.

Dr. Weiss described his particular experience with respect to

injections and particles getting into the choroid of the eye at deposition.

He stated:

I have a unique experience because I see a lot of kids here with leukemia who get injections all the time in their cerebral spinal fluid, and I see all those particles in their choroids.

CP 194, ln. 9-12.

Dr. Weiss states that, based on his observation of the back of the eye as well as an OCT scan performed by him, that Juan Pablo had suffered an ischemic injury to his optic and oculomotor nerves. CP 296-7. He states that as a result of this ischemic injury Juan Pablo suffered right eye blindness and partial paresis of one of the oculomotor motor muscles of that same eye. CP 320-1.

Based on his knowledge, skill, training and examinations of Juan Pablo and with no alternate explanation for the particles he saw, Dr. Weiss opined the particles he saw must have been from the dental injections. CP 196-7, 320-1. Dr. Weiss states that in his opinion particles from the dental injections had blocked blood flow to the optic and ocular motor nerves, blinding Juan Pablo permanently and causing partial paralysis of one of the muscles responsible for moving the eyeball. CP 193-6.

Defense experts agree Juan Pablo's blindness was related to the dental procedure. CP 249, 339-40.

Dr. Olivia Palmer, a dental expert, explains that Juan Pablo's injections were made into highly vascularized areas. CP 170. She states the local anesthetic contained particles in the form of preservatives, as well as epinephrine, a vasoconstrictor. CP 145-6. She states the technique used by Respondent Jung in injection failed to meet the standard of care in that proper steps necessary to avoid the vascular circulation were not taken and that as a result local anesthetic was likely injected into the arterial circulation. All experts agree the local anesthetic should not be injected into the vascular circulation. CP 169-70.

Dr. Palmer described specific negligent acts by Jung that likely led to Juan Pablo's injury. She also opined the involved occurrence is of a type that does not ordinarily happen in the absence of negligence. CP 169-70, 322-5. Respondents offered no non negligent explanation for Juan Pablo's injuries.

VI. ARGUMENT

- A. Testimony by competent experts establishes violation of the required standard of care caused Juan Pablo's blindness.

Negligence suits founded on healthcare are governed by Chapter 7.70 RCW. RCW 7.70.030 states a plaintiff must establish one of three propositions by a preponderance of the evidence to recover an award of damages. RCW 7.70.030(1) is the proposition applicable to the case at

bar. It provides the plaintiff must establish by a preponderance of the evidence that the injury suffered resulted from the failure of the healthcare providers to follow the standard of care.

Juan Pablo has presented competent expert testimony establishing his injuries resulted from the failure of Defendant Jung to follow the standard of care. The expert testimony is provided by Dr. Olivia Palmer and treating physician Dr. Avery Weiss.

Dr. Olivia Palmer is an expert with respect to dentistry. She has been in practice for 34 years. Dr. Olivia Palmer received her Doctor of Dental Medicine degree in 1982 from the Medical University of South Carolina. CP 168. She completed a three month anesthesia residency in 1984. She is a Diplomate with the American Board of Oral Implantology/Implant Dentistry. She is an Honored Fellow in the American Academy of Implant Dentistry. She taught local anesthesia at the Medical University of South Carolina. A significant percentage of her private dental practice has been pediatric. She is familiar with the applicable standard of care. CP 168-9.

Dr. Palmer states that, as part of her education and training, she had to learn in great detail the anatomy, physiology, vascular circulation, and nervous systems of the head and neck. She states all curricula in dental schools teach about the locations of the veins and arteries, the

central and peripheral nervous system of the body, and the skeletal system of the entire body with a focus on the head and neck. She states a dentist cannot, and should not, inject local anesthesia in a patient's mouth without a complete understanding of the vascular circulation in the areas where she intends to inject. She also states dentists are taught about the adverse consequences of injecting lidocaine with epinephrine into an artery around the head and neck. CP 322-323.

Dr. Palmer states Juan Pablo's blindness was caused by the negligent injection of local anesthetic into his arterial circulation during the October 22, 2013 dental procedure performed by Defendant Jung. Dr. Palmer states Defendant Jung was injecting into highly vascularized areas of the mouth, including areas of arterial circulation. She states, given the blood circulation in the area and the right eye blindness as well as the local anesthetic involved, which was Lidocaine HCL with epinephrine, it was probable Defendant Jung injected local anesthetic into the arterial circulation, resulting in an ischemic event that cut off blood supply to certain vessels and nerves, resulting in right eye blindness. CP 170. Dr. Weiss agrees. CP 196.

Dr. Palmer stated the standard of care requires a dentist to take precautions to make sure local anesthetic is not inadvertently injected into the vascular circulation. To avoid vascular injection, the standard of care

requires that aspiration be performed at least two times in different planes following insertion of the harpoon to reassure the dentist that she is not in the vascular circulation. If either aspiration draws blood, the harpoon must be moved prior to the injection of anesthetic. The injection must be done slowly; local anesthetic injection into an artery that is injected rapidly and with force can cause retrograde flow of the anesthetic into the ophthalmic artery via the maxillary artery. Rapid and forceful injection is below the standard of care. CP 323-324.

Dr. Palmer pointed out that Defendant Jung was using a 30 gauge harpoon, stating the problem with a 30 gauge harpoon is that its caliber is so small that it is extremely difficult to get a return of blood on aspiration if the harpoon is in the vascular circulation. Since Juan Pablo was under general anesthesia prior to injection of the local anesthetic, there was no reason to use a 30 gauge harpoon, and there was no reason not to use a larger caliber harpoon (25 gauge or 27 gauge). Studies have established one hundred percent (100%) positive aspirations are achieved from blood vessels when a 25 gauge harpoon is used, eighty-seven percent (87%) positive aspiration from blood vessels are achieved with a 27 gauge harpoon, and only two percent (2%) positive aspirations from blood vessels are achieved with 30 gauge harpoons. Dr. Palmer also noted that Defendant Jung injected anesthesia before performing any aspiration and

that Defendant Jung aspirated only one time per injection. CP 169-170, 324.

Dr. Palmer stated the above violated the standard of care in at least 3 ways. She stated the standard of care required use of a larger caliber harpoon; she stated injecting local anesthetic prior to any aspiration violated the standard of care because it meant Defendant Jung was injecting local anesthetic before determining whether the harpoon was in the vascular circulation; she stated Defendant Jung's failure to aspirate in at least two different planes violated the required standard of care, particularly where a 30 gauge harpoon was used. CP 169-170, 324.

Dr. Palmer stated that, given the blood circulation in the involved area and right eye blindness as well as the local anesthetic involved, which was lidocaine HCL with epinephrine, it was probable Defendant Jung injected local anesthetic into the arterial circulation, rapidly and under pressure, resulting in an ischemic event that cut off blood supply to certain vessels and nerves, resulting in right eye blindness to Juan Pablo. CP 324-325.

Dr. Palmer stated there were two possible mechanisms of injury. The most probable was direct injection of local anesthetic into the arterial circulation. The other very unlikely, but possible, mechanism of injury

was diffusion. Regardless, both mechanisms of injury would be indicative of negligence. CP 170-171.

Lidocaine HCL with epinephrine does not diffuse easily. The local anesthetic more likely to be involved in a diffusion based injury is articaine, which was not used. Further, diffusion is prevented by slow injection and by making sure the local anesthetic is being deposited in the correct spot. If, in fact, Juan Pablo's injury was diffusion caused, it would support the probability that injection was made too rapidly in the incorrect spot, which would violate the required standard of care. CP 171.

However, Dr. Palmer opined injury by diffusion in this case was much less likely than injury by injection into the intra-arterial circulation. She states the probable cause of injury was intra-arterial injection, which also violates the required standard of care. CP 324-325.

Dr. Avery Weiss, Juan Pablo's treating ophthalmologist, also submitted a declaration. Dr. Weiss is a pediatric ophthalmologist at Seattle Children's Hospital. Dr. Weiss received his medical degree in 1974 from the University of Miami. He trained in internal medicine and did a research fellowship at Washington University in St. Louis. He then completed a Pediatric Ophthalmology Fellowship in 1981, at Children's Hospital National Medical Center in Washington, D.C. He has been board certified by the American Board of Ophthalmology since 1981. He held

faculty appointments at the University of South Florida in Pediatrics and Pediatric Ophthalmology between 1981 and 1991. He was an Associate Professor of Ophthalmology between 1991 and 2006 at the University of Washington. He has been Professor of Ophthalmology at the University of Washington since 2006. For more than 25 years, he has been Chief of Ophthalmology at Seattle Children's Hospital. CP 296-297.

Dr. Weiss stated his chart note of July 25, 2016 accurately reflects his findings and his opinion of the probable cause of Juan Pablo's right eye blindness and oculomotor issues. Dr. Weiss enclosed a true and correct copy of the referenced chart note with that declaration. CP 320-321. In the July 25, 2016 chart note Dr. Weiss stated:

Juan is a 10-1/2-year old child who developed ischemic optic neuropathy and right oculomotor paresis as a complication of a dental procedure during which the child was given multiple injections. We identified particulate matter within the choroid and retina of the right eye that resulted [in] the loss of vision in the right eye. Unfortunately, there was retrograde transmission into an arterial vessel which then circulating [sic] to the retinal and choroidal circulation, probably by way of the central retinal artery.

CP 320. In the same note under impression, Dr. Weiss stated:

Acute ischemic optic neuropathy, right eye, due to vascular occlusion, and right oculomotor paresis. This child's visual loss and oculomotor paresis resulted directly from

the injection into the vascular system of the head and neck.

CP 320. Dr. Weiss stated his note was based upon his knowledge, skill, training and examinations of Juan Pablo. CP 297. Dr. Weiss also states he is particularly experienced with respect to this type of causation because he sees a lot of kids with leukemia who get injections all the time in the cerebral spinal fluid, and he sees numerous particles in their choroids as a result. CP 194.

Dr. Palmer's testimony establishes Jung's negligence caused Juan Pablo's blindness. Dr. Weiss' testimony further establishes the blindness was the result of injection of local anesthetic into an arterial blood vessel. Both experts are competent to render those opinions.

Respondents argue Dr. Weiss lacks a foundation for his opinions and that he needed to have examined Juan Pablo's dental records to arrive at causation opinions. However, there is no question Juan Pablo had an extensive dental procedure involving multiple injections of local anesthetic into highly vascularized areas of the mouth. It is unclear what further information Dr. Weiss needed for his opinions as a pediatric ophthalmologist. He did rely on a history from the father, however, doctors always rely in part on histories in forming their opinions, and no one says the father's history was inaccurate. Dr. Weiss also stated he

relied on his own examination and treatment of the patient as well as his own knowledge and experience in forming his opinions. CP 296-7.

Dr. Weiss underlined that he does a lot of injections. CP 161. He also states he sees a lot of kids with leukemia who receive multiple injections resulting in particles in the choroid. CP 194.

Respondents cite a record by Dr. Weiss early in his treatment (December 6, 2013) as proof that he did not know causation. Respondents ignore later entries after further treatment where Dr. Weiss was able to formulate his opinions. For example, Dr. Weiss' chart note of July 25, 2016 states:

Acute ischemic optic neuropathy, right eye, due to vascular occlusion, and right oculomotor paresis. This child's visual loss and oculomotor paresis resulted directly from the injection into the vascular system of the head and neck. Unfortunately, when you give an injection there is a transient rise in the pressure at the head and the needle that exceeds 100 mmHg. This can in turn result in a dissemination of the fluid within the injection, or particulate matter. In this case, that then by retrograde transmission resulted in ischemic infarction of the optic nerve and the oculomotor nerve. As evidence, there were lots of particles in the choroid and retina. The child has irreversible vision loss in this eye that cannot be recovered. Therefore, he does need to wear his glasses at all times. The health of the left eye remains very normal.

CP 178, 221. Dr. Weiss specifically endorsed that chart note as reflecting his opinion on causation. CP 296-7.

Dental expert Dr. Palmer explained the local anesthetic involved had particles in the form of preservatives. CP 147. She further explained that the local anesthetic used also had epinephrine, which is a vasoconstrictor. CP 148, 207. Dr. Weiss and Dr. Palmer both pointed out that the involved injury was caused by particulate matter blocking perfusion to the optic nerve and certain oculomotor nerves, causing the blindness and oculomotor difficulty. They further point out that the source of the particles detected in the choroid of the artery had to be arterial. CP 191-2, 148-9, 207-8. Dr. Palmer explained, and no one disputes, it is below the standard of care to inject local anesthetic into the vascular circulation. Dr. Palmer testified that proper technique prevents injection or diffusion of local anesthetic into arterial circulation. CP 145-6, 204-5.

Dr. Palmer explains the particles in the local anesthetic. Dr. Weiss explains Juan Pablo has particles in his choroid that had to arrive via arterial circulation. Dr. Weiss states the particles clogged up perfusion to the nerve, which caused the blindness. CP 196-8. He made a well-reasoned causation opinion.

B. The Court of Appeals decision does not conflict with Washington Supreme Court precedent.

Petitioners argue the Court of Appeals decision conflicts with a 1957 Supreme Court case, Young v. Liddington, 50 Wn.2d 78, 309 P.2d

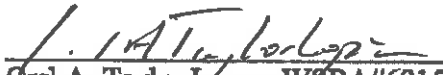
761 (1957). It does not. Liddington involved an attempt to use the business record exception to the hearsay rule to submit an opinion on causation through a bare medical record without testimony. In the case at bar Dr. Weiss was deposed and also submitted a declaration endorsing the opinions expressed in his medical records and gave a foundation for those opinions. Further, Dr. Weiss is a treating physician who saw Juan Pablo several times, including just 3 days after the negligent dental procedure.

VII. CONCLUSION


The Petition for Review should be denied. This cause should be remanded for trial.

Dated this 4 day of September 2018.

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APPENDIX A

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

JUAN PABLO RIOS PEREZ, a minor
child, by and through his parents,
RICARDO RIOS VILLA and MONICA
PEREZ, and individually,

Appellants,

v.

GRACE JUNG, DDS, individually and
the marital community with JOHN DOE
JUNG and CHUNG-LONG HWANG,
DDS, PS, d/b/a CHILDREN'S DENTAL
CARE,

Respondents.

No. 76593-1-I

UNPUBLISHED OPINION

FILED: July 9, 2018

VERELLEN, J. — Juan Pablo Rios Perez appeals the trial court's summary judgment dismissing his dental malpractice claim against Dr. Grace Jung and the other defendants. Perez contends his experts' testimony on causation was sufficient to withstand summary judgment. Viewing the evidence in the light most favorable to Perez, we agree that he presented competent evidence that Dr. Jung's breach of the standard of care caused his injuries and, therefore, reverse and remand for further proceedings.

FACTS

On October 22, 2013, Dr. Jung performed multiple dental procedures on seven-year-old Perez. Dr. Jung was employed by Dr. Chung-Long Hwang DDS, PS, a corporation doing business under the name of Children's Dental Care. While Perez was under a general anesthetic, Dr. Jung administered a local anesthetic by making at least four injections into different areas of Perez's mouth.

Later that evening, Perez went to the hospital because he experienced swelling in his right eye. Three days later, Perez complained of "severe vision loss" and "no light perception" to Dr. Avery Weiss, an ophthalmologist at Seattle Children's Hospital, who observed that "all the extraocular muscles were swollen."¹

When Perez returned to Seattle Children's Hospital on November 25, Dr. Weiss noted that his vision in his right eye was still poor. Dr. Weiss performed an optical coherence tomography (OCT) test and discovered "numerous particles within the choroid of the right eye."² Dr. Weiss determined that the particles in the "choroid and all layers of the retina" caused Perez to "irreversibly" lose the vision in his right eye.³

Perez and his parents sued Dr. Jung, alleging Perez "suffered blindness in his right eye as a result of his dental treatment."⁴ Perez alleged lack of informed consent, medical negligence under chapter 7.70 RCW, res ipsa loquitur, and

¹ Clerk's Papers (CP) at 120.

² CP at 121.

³ Id.

⁴ CP at 42.

common law negligence. Perez later added Chung-Long Hwang, DDS, PS, d/b/a Children's Dental Care, as a defendant.

Dr. Jung moved for summary judgment, arguing Perez's causation theory was not supported by competent expert testimony. In response, Perez filed a declaration of Dr. Olivia Palmer, an experienced pediatric dentist who has taught local anesthesia in medical school. Dr. Palmer opined that Dr. Jung's negligent administration of local anesthetic caused Perez's blindness. Perez's attorney also filed his declaration, attaching excerpts from Dr. Weiss's deposition testimony, as well as his chart notes. In reply to this evidence, Dr. Jung argued that the causation opinions of Dr. Palmer and Dr. Weiss were inadmissible and, therefore, insufficient to prevent summary judgment. The trial court denied Dr. Jung's motion for summary judgment except as to the informed consent claim, which it dismissed.

Dr. Jung then moved for reconsideration under CR 59(a)(7)-(9), arguing that the trial court erred as a matter of law by allowing a common law negligence claim to proceed in a case arising out of health care and by refusing to dismiss the dental malpractice claim in the absence of sufficient admissible expert testimony on the essential element of proximate cause. Specifically, Dr. Jung argued that Dr. Weiss's causation opinion was speculative because he did not testify to a reasonable degree of medical certainty that Dr. Jung's actions caused Perez's injuries and that his chart notes were inadmissible, unauthenticated, and hearsay. Additionally, Dr. Jung argued that Dr. Palmer's testimony on causation was insufficient because she lacked expertise in the area of ophthalmology.

Perez acknowledged that he did not intend to state a separate cause of action for common law negligence and submitted a first declaration from Dr. Weiss and a second declaration from Dr. Palmer. In her reply, Dr. Jung argued that the new declarations should be stricken because they were untimely and did not qualify as newly discovered evidence.

The trial court considered the new materials and granted Dr. Jung's motion for reconsideration, dismissing Perez's remaining claims with prejudice.⁵

Perez appeals.

ANALYSIS

Perez argues that the medical evidence from Dr. Palmer and Dr. Weiss was sufficient to survive summary judgment on his medical malpractice claim. We agree.

Summary judgment is proper when the pleadings, depositions, and admissions in the record, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.⁶ The purpose of summary judgment is to avoid an unnecessary trial where no genuine issue as to a material fact exists.⁷ A genuine issue of material fact exists if reasonable minds could differ about the facts controlling the outcome of the

⁵ The trial court previously approved the parties' agreement narrowing the claims against Dr. Hwang to vicarious liability. Therefore, the result of the order granting reconsideration and dismissal to Dr. Jung was to dismiss the only remaining claims against Dr. Hwang.

⁶ CR 56(c); Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

⁷ Id. at 225-26.

lawsuit.⁸ We review an order granting summary judgment de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party.⁹

In the medical malpractice setting, summary judgment is proper where the plaintiff does not present competent medical evidence to establish a prima facie case.¹⁰ The elements of a medical negligence claim are duty, breach, causation, and damages.¹¹

“Expert medical testimony is generally required to establish the standard of care and to prove causation in a medical negligence action.”¹² Competent medical expert testimony “must be based on facts in the case, not speculation or conjecture.”¹³ It also must be based on a reasonable degree of medical certainty, and sufficient to establish that the alleged injury-producing situation “probably” or “more likely than not” caused the subsequent condition.¹⁴ According to the Washington Supreme Court:

such [a] determination is deemed based on speculation and conjecture if the medical testimony does not go beyond the expression of an opinion that the physical disability “might have” or “possibly did” result

⁸ Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

⁹ Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).

¹⁰ Young, 112 Wn.2d at 225.

¹¹ Rounds v. Nellcor Puritan Bennett, Inc., 147 Wn. App. 155, 162, 194 P.3d 274 (2008) (quoting Colwell v. Holy Family Hosp., 104 Wn. App. 606, 611, 15 P.3d 210 (2001)).

¹² Davies v. Holy Family Hosp., 144 Wn. App. 483, 492, 183 P.3d 283 (2008).

¹³ Rounds, 147 Wn. App. at 163 (quoting Seybold v. Neu, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001)).

¹⁴ Id. (quoting Merriman v. Toothaker, 9 Wn. App. 810, 814, 515 P.2d 509 (1973)).

from the hypothesized cause. To remove the issue from the realm of speculation, the medical testimony must at least be sufficiently definite to establish that the act complained of "probably" or "more likely than not" caused the subsequent disability.^[15]

Here, Dr. Weiss's declaration states that the chart notes accurately reflect his "opinion with respect to the probable cause" of Perez's blindness, which according to those notes was "particulate matter within the chorioid and retina of the right eye."¹⁶ Taken in the light most favorable to Perez, this is competent medical testimony that the particles in Perez's eye resulted in his blindness.

The next question is whether there is a genuine issue of material fact that Dr. Jung's negligent actions caused those particles to enter Perez's eye. Viewing Dr. Palmer's declaration in the light most favorable to Perez, the answer is yes.

During her deposition, Dr. Palmer explained that local anesthetics for dental injections have preservatives in them to keep the anesthetic fresh and that these preservatives were "likely" the particles observed by Dr. Weiss.¹⁷ In her first declaration and her deposition, she also explained that, based on medical literature, there are two ways the particles can get into a patient's intra-arterial circulation: through direct injection of local anesthetic under pressure to the arterial circulation or through diffusion. She stated that the local anesthetic involved in diffusion based injuries is usually articaine because it has a much higher rate of diffusing through the bone than lidocaine does. But, in this case, the local anesthetic used was lidocaine

¹⁵ O'Donoghue v. Riggs, 73 Wn.2d 814, 824, 440 P.2d 823 (1968).

¹⁶ CP at 297, 320.

¹⁷ CP at 147-48.

HCL with epinephrine, which does not diffuse easily. For these reasons, she opined that "injury by diffusion in this case is much less likely than injury by injection into the intra-arterial circulation."¹⁸ As a result, she concluded that the "probable" cause of Perez's blindness was Dr. Jung's negligent injection of local anesthetic into his arterial circulation during the dental procedure.¹⁹

Dr. Palmer's declaration also explains the standard of care for administering local anesthetic in dental cases and how Dr. Jung's actions violated that standard. First, she explained that the standard of care requires that a dentist take precautions to ensure local anesthetic is not inadvertently injected into the vascular circulation. One such precaution required by the standard of care is to aspirate at least two times for each insertion of the needle to ensure that no blood is drawn and reassure the dentist that she is not in the vascular circulation. In order to get a return of blood on aspiration, the dentist must use a needle that is likely to achieve blood draw on aspiration. Citing authoritative literature, Dr. Palmer explained that 100 percent positive aspirations are achieved from blood vessels using 25 gauge needles, 87 percent positive aspirations are achieved from using smaller 27 gauge needles, and only 2 percent positive aspirations are achieved from using even smaller 30 gauge needles.

In this case, Dr. Jung used a 30 gauge needle to aspirate only once, and did so only after first injecting some anesthetic. According to Dr. Palmer, Dr. Jung

¹⁸ CP at 171.

¹⁹ CP at 170.

violated the standard of care in three ways. First, because Perez was under general anesthesia before the injections, there was no need to use a 30 gauge needle to inject the local anesthetic, and using a larger needle would have had a much higher chance of positive aspiration. Second, injecting the local anesthetic before aspiration meant that Dr. Jung injected it before determining whether or not the needle was in the vascular circulation. Third, failing to aspirate at least two times in different planes for each insertion created a circumstance where the needle could have been in the vascular circulation without Dr. Jung being aware of that fact. Based on the above analysis, Dr. Palmer concluded:

Given the blood circulation in the involved area and the right eye blindness as well as the local anesthetic involved, which was lidocaine HCL with epinephrine, it is *probable* Dr. Jung injected local anesthetic into the arterial circulation, resulting in an ischemic event that cut off blood supply to certain vessels and nerves, resulting in right eye blindness.^[20]

Dr. Palmer's testimony that it was probable that Dr. Jung's actions caused Perez's injuries satisfies the reasonable degree of medical certainty requirement,²¹ and summary judgment was not proper.

Dr. Jung argues that Dr. Palmer's conclusions are not based on a reasonable degree of medical certainty because she did not exclude all other potential sources of particles in the eye. But this is not the legal standard required. Dr. Palmer explained the likely source of the particles and, given that Perez's blindness occurred soon after the dental procedure, it was not improper or speculative reverse engineering to

²⁰ CP at 170 (emphasis added).

²¹ See Rounds, 147 Wn. App. at 163; O'Donoghue, 73 Wn.2d at 824.

analyze and evaluate any connection between the blindness and the dental procedure. Notably, none of the defense experts offered an alternative origin of the particles that caused the blindness.

Dr. Jung also argues that Dr. Palmer's testimony as to causation does not create a genuine issue of material fact because there was no evidence that she was qualified to opine on the cause of Perez's blindness. But Dr. Palmer relied on Dr. Weiss's diagnosis that particles in the choroid caused the blindness.²² Her expert testimony explained how such particles might enter the arterial circulation during a dental procedure. Given her extensive professional experience as a pediatric dentist, as evidenced by her curriculum vitae attached as an exhibit to her first declaration, Dr. Palmer's opinion is well within her field of expertise.

Dr. Hwang takes issue with Dr. Palmer's statements in her second declaration that it was probable Dr. Jung injected local anesthetic into the arterial circulation "rapidly and under pressure."²³ Although not included in her first declaration,²⁴ these statements, taken in the light most favorable to Perez, involved Dr. Palmer's determination that diffusion was less likely than injection into the arterial circulation. They do not appear to describe a direct connection between the force or speed of Dr.

²² See Driggs v. Howlett, 193 Wn. App. 875, 900, 371 P.3d 61 (2016) ("No rule precludes a party from relying on one expert witness for a portion of needed evidence and another expert witness for another segment of required testimony."), review denied, 186 Wn.2d 1007 (2016).

²³ CP at 324.

²⁴ Dr. Jung argues that the trial court did not consider Dr. Palmer's second declaration on reconsideration, but the court order granting reconsideration recites that it was reviewed by the court. CP at 347.

Jung's negligent injection and the resulting blindness. And even assuming that they do, the inclusion of more detail regarding her opinion on causation does not render obsolete her broader opinion on causation in the first declaration, especially where the second declaration did not materially alter the first and the two declarations are not inherently contradictory.²⁵ Dr. Hwang provides no legal authority that we must discard the initial declaration merely because the second contains more detail.²⁶ Therefore, because Dr. Palmer's opinion on causation in her first declaration was sufficient to withstand summary judgment, her inclusion of more detail in her second declaration does not require summary judgment dismissal of Perez's negligence claim.

Dr. Jung and Dr. Hwang also argue that Dr. Weiss's testimony as to causation was speculative and therefore not admissible. While it is true that Dr. Weiss did not testify to a reasonable medical certainty as to the specific procedures that Dr. Jung performed on Perez, his testimony as the treating ophthalmologist that the blindness was caused by particles in the choroid and retina was admissible. Because his declaration states that his chart notes accurately reflect his opinion that particulate

²⁵ See Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 175, 817 P.2d 861 (1991) (if a subsequent affidavit explains previously given testimony, whether the explanation is plausible is an issue to be determined by the trier of fact); Taylor v. Bell, 185 Wn. App. 270, 294, 340 P.3d 951 (2014) (the finder of fact should decide whether a witness's subsequent sworn testimony that explains a previous affidavit statement and is not contradictory to that statement is plausible).

²⁶ Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments that are not supported by any citation of authority need not be considered).

matter was the "probable" cause of Perez's blindness, his declaration was admissible.

Finally, Dr. Jung argues that Dr. Weiss' chart notes do not create an issue of fact because they lack a proper foundation and contain hearsay. But Dr. Weiss submitted a declaration on reconsideration that included both the chart notes and a statement that those notes accurately reflected his findings on examination.²⁷ As Dr. Jung acknowledged in her briefing, CR 59 does not prohibit new or additional materials on reconsideration, so this declaration was properly before the court. Furthermore, our conclusion that summary judgment was improper does not rely upon Dr. Weiss' opinion in the chart notes that Dr. Jung negligently administered the local anesthetic. Rather, the element of causation is met through Dr. Palmer's testimony explaining the source of the particles that Dr. Weiss opined caused the blindness.²⁸ For these reasons, Dr. Jung's argument is not persuasive.

Perez also argues, alternatively, that summary judgment was improper because the doctrine of *res ipsa loquitur* can establish causation. But given our conclusion that Dr. Palmer's expert opinion established a genuine issue of material fact as to causation, we need not address whether Perez's negligence claim could also survive under *res ipsa loquitur*.²⁹

²⁷ CP at 297.

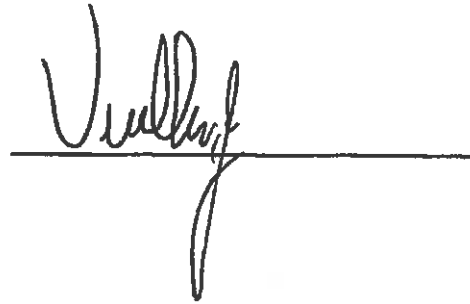
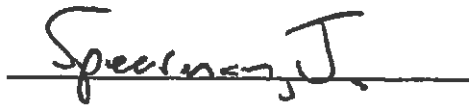
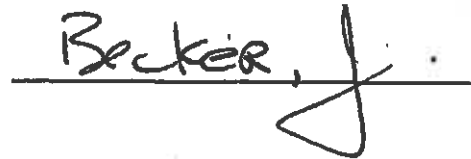
²⁸ See Driggs, 193 Wn. App. at 900 ("One expert may rely on the opinions of another expert when formulating opinions.").

²⁹ We note that the *res ipsa* inference of negligence requires evidence that the injury-causing event, here the presence of particles in the eye, does not ordinarily occur absent negligence. See Horner v. Northern Pac. Beneficial Ass'n Hosps., Inc., 62 Wn.2d 351, 360-61, 382 P.2d 518 (1963) (esoteric medical evidence leaves the

Viewing the evidence in a light most favorable to Perez, Dr. Palmer's declaration establishes an opinion to a reasonable degree of medical certainty that Dr. Jung's negligent injection of local anesthesia gave rise to particles in his eye. And, Dr. Weiss' declaration establishes that those particles caused Perez's subsequent blindness. The fact finder should be the one to weigh the strength of Dr. Palmer and Dr. Weiss's opinions and, therefore, summary judgment was not proper.

We reverse and remand for further proceedings.

WE CONCUR:

A handwritten signature in cursive script, appearing to be "V. ...", written above a horizontal line.A handwritten signature in cursive script, appearing to be "Speaker J.", written above a horizontal line.A handwritten signature in cursive script, appearing to be "Becker J.", written above a horizontal line.

inference of negligence where experts testified a paralyzed shoulder following hysterectomy surgery was of traumatic origin while under anesthesia, caused by positioning, movement, or pressure applied to patient). It appears that the testimony here, that blindness does not ordinarily occur following dental procedures and that properly administered local anesthesia does not ordinarily lead to blindness, is not esoteric medical evidence establishing that the injury-causing particles in the eye do not ordinarily occur absent negligence.

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SUPREME COURT
STATE OF WASHINGTON
9/6/2018 9:47 AM
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Supreme Court No. 96175-1
Court of Appeals No: 76593-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JUAN PABLO RIOS PEREZ, a minor child by and through his parents,
RICARDO RIOS VILLA and MONICA PEREZ PEREZ, and individually,

Plaintiffs/Appellants

vs.

GRACE JUNG, D.D.S., individually and the marital community with JOHN
DOE JUNG, and CHUNG-LONG HWANG, DDS, PS dba CHILDREN'S
DENTAL CARE

Defendants/Respondents

CERTIFICATE OF SERVICE OF
ANSWER TO PETITION FOR REVIEW

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I, Cynthia Ringo Palmer, declare and state as follows:

1. I am and at all times herein was a citizen of the United States, a resident of Snohomish County, Washington, and am over the age of 18 years.

2. On the 6 day of September, 2018, I caused to be served Answer to Petition for Review and Certificate of Service on counsel as follows:

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Lee Smart, P.S., Inc.
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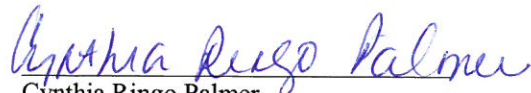
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I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated at Seattle, Washington, this 6 day of September, 2018.


Cynthia Ringo Palmer

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