SUPREME COURT NO.
COURT OF APPEALS NO.: 76593-1-I

96175-1

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/Respondent.

v.

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/Appellants.

RESPONDENTS' PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner, Grace Jung, DDS, a defendant in the trial court and a respondent at Division I of the Court of Appeals, asks the Court to accept review of the decision designated in Part II below.

II. CITATION TO COURT OF APPEALS DECISION

Dr. Jung petitions this Court to review the decision of the Court of Appeals, Division I, in the matter of *Perez v. Jung, et al.*, No. 76593-1-I, filed on July 9, 2018, which reversed the King County Superior Court's order dismissing on summary judgment Plaintiff's claims under RCW 7.70, *et seq.* A copy of the decision is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

Whether this Court should accept review pursuant to RAP 13.4(b) where the opinion of the Court of Appeals, Division I, is in conflict with a decision of this Court and involves an issue of substantial public interest?

IV. STATEMENT OF THE CASE

This dental malpractice case arose from treatment provided by Respondent-defendant, Grace Jung, DDS (hereinafter "Dr. Jung"), a pediatric dentist, to Juan Pablo Perez, a minor. *See* CP 1-4. Appellants' Complaint, filed June 19, 2015, alleged Juan Pablo suffered blindness in his right eye as a result of dental treatment. CP 2.

On September 16, 2015, Appellants provided a copy of an Outpatient Note by Avery Weiss, MD, dated November 25, 2013, in support of their claims. CP 119-22. Dr. Weiss' impression notes stated:

> 1. Acute visual loss, right eye. This child lost the vision in his right eye following an extensive dental procedure. The OCT shows particulate matter within the choroid and within the retina. **Whether or not there is a relationship between these particles within the choroid and all layers of the retina, and the dental injection is unclear.**

CP 121 (emphasis added).

Appellants ultimately disclosed two people as experts, treating provider Avery Weiss, MD, and hired expert Olivia Palmer, DMD as experts. CP 126-27.

A. Dr. Jung deposed Dr. Wiess and Dr. Palmer, then moved for summary judgment based on a lack of competent expert testimony on the issue of proximate cause.

On January 29, 2016, counsel deposed Dr. Weiss. CP 157. On April 25, 2016, counsel deposed Dr. Palmer. CP 140. After deposing the doctors, Dr. Jung moved for summary judgment, arguing their opinions on causation were based on speculation and conjecture. *Id.* CP 67-84.

In their opposition, Appellants relied upon excerpts from Dr. Weiss' deposition, a copy of a medical record from him dated July 25, 2016, and a declaration from Dr. Palmer. *See* CP 297, 320; CP 168-72.

1. Dr. Weiss' deposition testimony makes clear his opinions are based on speculation and conjecture.

Appellants presented 17 pages from Dr. Weiss' deposition to support their opposition to summary judgment. *See* CP 180-99. The excerpts reveal the speculative factual basis underlying Dr. Weiss' opinions; he stated:

> Q: And you say, 'Therefore, on the basis of these findings, we felt there was dissemination of microparticles possibly at the time of the injection or during the procedure, that followed by the way of retrograde transmission into the arterial circulation under high pressure'.
>
> A: Right.

CP 194 (Weiss Dep., p. 27:18-24).

> Q: So what are the particles?
>
> A: I have no idea. I just know I see particles.
>
> Q: What's the relationship to the particles and the blindness?
>
> A: When they do the injections, there *could* be particles in what they inject. I don't know.
>
> Q: What's the - -
>
> A: I don't know. I was, I wasn't involved with the injections. So I don't know what they injected. But I see particles that don't belong there. That's all I know.
>
> Q: What's the relationship between the particles and the blindness?

> A: The particles clogged up the perfusion to the nerve. They occlude the vessels. So now you can't perfuse the nerve.

CP 196 (Weiss Dep., p. 31:6-21).

Further, Dr. Weiss testified in his deposition that he never performed a dental injection, he does not know the anatomy of the mouth, he does not know where Dr. Jung injected the Appellant, and knows nothing about the procedure performed by her. CP 160-67. His declaration also does not indicate that he ever spoke with Dr. Jung, examined her record, or even reviewed her deposition, or that he reviewed any other heath care records of Appellant Perez. *See* CP 185-86, 297, 320.

2. Dr. Weiss' medical chart did not create an issue of fact because it was based on the same speculative knowledge as his deposition.

Despite these concessions, the Court of Appeals relied upon Dr. Weiss' July 25, 2016, medical chart when finding Appellants presented sufficient evidence of proximate cause. *See* App. A, p. 6; CP 320. The medical chart stated, in part:

> Juan is a 10-1/12 (sic) 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 to the retinal and choroidal circulation, probably by way of the central retinal artery.

CP 320.

In presenting this medical chart, Appellants provided only a short declaration from Dr. Weiss saying the chart reflects his opinions on a more probable than not basis. *See* CP 296-97. There was no information presented regarding the factual basis for his opinions. *See Id.*

3. Dr. Palmer's deposition testimony makes clear her opinions are based on speculation and conjecture.

During her deposition, Dr. Palmer acknowledge there is more than one way blindness can occur in a patient absent a violation of the standard of care. CP 140-55 (pp. 12:24-25; 13:1-14; 14:8-25; 15:1-10). Dr. Palmer also conceded she does not know if Dr. Jung injected anesthetic into Appellant's arterial circulation causing the blindness. CP 153-54. She testified:

> Q: And it is your opinion that she should have taken due care not to inject the local anesthetic into a blood vessel?
>
> A: She's using a 30-gauge needle that is almost impossible to aspirate. She says she aspirated only once. And the literature is pretty clear that about the only way you have this result is either diffusion or an intra-arterial injection.
>
> Q: And why couldn't this have been diffusion?
>
> A: It could have been. But this area where she was injecting is so vascular – you have got a pretty bit artery up there, it's not hard to hit it. That's why aspiration is so important.
>
> **Q: But you don't know if she hit it, do you?**

A: No, we don't know. And we'll never know.

Q: There is no way to know.

A: That's correct.

Id. (emphasis added).

Dr. Palmer further conceded her opinion Dr. Jung injected anesthetic into Appellant's artery is based on nothing more than assumption; she testified:

> Q: Okay. So other than what you just testified to, do you have any basis to conclude that she was in the artery?
>
> A: The type of injection she was giving.
>
> Q: Which is the block, as you described?
>
> A: Posterior superior alveolar block. If you read Malamed's book, one of the hazards is intra-arterial injection. You couple that with a 30-gauge needle, that you can't aspirate with, and a young, inexperienced dentist in a hurry to do a ton of dental work, I think it very reasonable to assume she was in the artery.
>
> **Q: But you still have to assume?**
>
> **A: Yes, you do.**

CP 155 (emphasis added).

B. The Court of Appeals incorrectly reversed the trial court.

On July 9, 2018, Division One of the Court of Appeals issued an unpublished opinion reversing the trial court's dismissal of the Appellant's claims and remanding the matter for further proceedings. Regarding the

issue of Dr. Weiss providing sufficient testimony on the issue of proximate cause, the Court of Appeals stated:

> 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 in chorioid (sic) and retina of the right eye." Taken in the light most favorable to Perez, this is competent medical testimony that the particles in Perez's eye resulted in his blindness.

Appx. A, p. 6.

The Court of Appeals addressed the notion that Dr. Weiss' testimony (through the medical record) was speculative and not admissible by saying:

> While it is true that Dr. Weiss did not testify to a reasonable degree of 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 noes accurately reflect his opinion that particulate matter was the "probable cause" of Perez's blindness, his declaration was admissible.

Appx. A, p. 11.

With respect to Dr. Palmer's testimony, the Court of Appeals stated the following with respect to her testimony regarding proximate cause:

> During her deposition, Dr. Palmer explained that local anesthetic for dental injections have preservatives in them to keep the anesthetic fresh and that these preservatives were "likely" the particles observed by Dr. Weiss.

Appx. A, p. 6. The Court of Appeals found her testimony sufficient to create an issue of fact, despite it lacking any foundation and being based on speculation. *Id.*

Respondents respectfully disagree with these decisions, as they are in conflict with other decisions of this Court. This Court should accept review to correct this error of law.

V. ARGUMENT

A. This Court should accept review pursuant to RAP 13.4(b)(4) because the Court of Appeals' decision involves an issue of substantial public interest.

A petition for review should be accepted when the decision of the Court of Appeals involves an issue of substantial public interest that should be decided by this Court. RAP 13.4(b)(4).

This case is appropriate for review because the question of what constitutes competent medical expert testimony in a health care malpractice action is an issue of substantial public interest, affecting both patients and health care providers alike. Indeed, the determination of what expert testimony is sufficient to survive summary judgment will have a wide-ranging impact on the potential liability exposure health care providers may face even for cases such as the present, that are based on speculative medical theories of causation. Establishing such a low bar, as the Court of Appeals did here, will force health care providers and their

insurers to incur the costs of having to defend at trial cases that should have been disposed of on summary judgment. This too will affect the general public significantly, as increased litigation costs to health care providers and their insurers will inevitably be passed along to patients by way of higher insurance premiums and health care costs, in direct contradiction to Washington State's declared public policy of reducing health care costs to the fullest extent possible. *See Putnam v. Wenatchee Valley Medical Center, P.S.,* 116 Wn.2d 974, 989, 216 P.3d 374 (2009) (Madsen, J., concurring, discussing "legislature's interest to curb malpractice insurance costs[.]")

In this case, the Court of Appeals' decision sets such a low bar for expert testimony that it will inevitably foster meritless and speculative litigations, unnecessarily consuming the court's time, and the resources of the parties. Such an outcome runs counter to the Legislature's stated goal of reducing malpractice insurance costs, and will cost members of the public money. This Court should accept review so as to correct this error.

B. This Court should accept review pursuant to RAP 13.4(b)(1) because the Court of Appeals' decision conflicts with this Court's decision in *Young v. Liddington.*

A petition for review should be accepted when the decision of the Court of Appeals is in conflict with a decision of this Court. RAP 13.4(b)(1).

1. The Court of Appeals incorrectly found Dr. Weiss provided admissible testimony as to the cause of Appellants' blindness.

The Court of Appeals decision is based in part on findings made by one of Appellants' treating providers, Avery Weiss, MD. Although Dr. Weiss did not provide a declaration stating his opinions, he provided one that referred to a medical record created on July 25, 2016, nearly three years after Respondent performed the dental surgery. CP 297, 320. The Court of Appeals erroneously found this evidence sufficient, stating:

> Here, Dr. Weiss' 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 (sic) and retina of the right eye." Taken in the light most favorable to Perez, this is competent medical testimony that the particles in Perez's eye resulted in his blindness.

Appendix A, p. 6.

However, such a holding conflicts with this Court's opinion in *Young v. Liddington*, 50 Wn.2d 78, 309 P.2d 761 (1957), under which Dr. Weiss' opinion qualifies as an opinion based on speculation an conjecture. In *Young*, the plaintiffs alleged the defendant doctor negligently and erroneously diagnosed, and failed to treat properly, a child's illness, and that such negligence proximately caused the plaintiff's injuries and damages (seizures). 50 Wn.2d at 79. Plaintiffs prevailed at trial, and the defendant appealed. *Id.*

On appeal, the defendant alleged the trial court errored by admitting into evidence certain hospital records as evidence. *Id.* at 80. The hospital record in question was a record that was made at a time when the plaintiff's mother had taken him to another hospital from the defendant for treatment of his epilepsy two years after to the alleged injury and after the malpractice action had already been commenced. *Id.* The record stated the child's seizures were the result of encephalitis following diphtheria. *Id.* The doctor based this causation opinion on an oral history provided by the child's mother at the time of his treatment, and his examination of the child that included studying the results of an electro-encephalogram (EEG). *Id.* at 81-83.

In finding that the trial court erred in admitting the hospital record as improper evidence of causation, this Court stated:

> [The hospital record[1]] contains accounts related by the mother to the doctor, which were considered by the doctor and from which, together with his examination of the patient and a study of the result of an electro-encephalogram, the doctor concluded that the child had "*Convulsive disorder secondary to residuals of encephalitis following diphtheria.*
>
> Here, the mother, after the malpractice suit had been commenced, sought the advice and skill of another physician to treat her child for epilepsy. Any opinions or conclusions that the doctor may have made from the history given by the mother and his examination of the patient

[1] The opinion refers to the hospital record as "Exhibit No. 6". *Young,* 50 Wn.2d at 80. For the sake of clarity, this brief will refer to it as "the hospital record."

> related only to his treatment of epilepsy, and could not be admitted as any proof that the epilepsy which he was then treating was the result of diphtheria. **Such a diagnosis or conclusion could only be based upon speculation or conjecture.**

Id. at 83-84 (emphasis added in bold; italics in original). Because the treating provider in *Young* relied only his review of an EEG and an oral history provided by the patient's parent, his causation opinions were not admissible because they were based upon speculation or conjecture; as the court stated, the mere fact that the doctor's opinions were contained in a medical chart did not insulate them from the standards for admissibility:

> "It was never intended that, under the guise of a business record, the exception to the hearsay rule would be extended so that the maker of a record could express, through the medium of the record itself, an opinion as to causation that he would not be permitted to express in open court, if he based his opinion solely upon the factual information shown in the report."

Id. at 84.

This Court went on to expand about the deficiencies with the doctor's opinions, and why they were inadmissible regardless of the fact they were contained in his chart:

> Illustrative of the reasonableness of such a rule is the fact that [the hospital record] does not indicate that the recording doctor considered exhibit No. 1, which was the hospital record of Kadlec hospital in Richland, or that he consulted with any of the doctors who made that record. Would the doctor have concluded as he did concerning *causation* had he made such inquiry or had he had the advantage of that report? Further, the exhibit does not

> indicate that the doctor was apprised of the fact that, subsequent to the original hospitalization in Kadlec hospital, the child suffered an attack of measles. Would the doctor's conclusions have been the same had he had this information? [The hospital record] indicates that the conclusion as to causation was a determination made without knowledge of all material and important facts. The doctor would not have been permitted to express an opinion as to causation, as an expert witness, if he based his opinion solely upon the matters shown in the report.

Id. at 84-85.

Despite the precedent established by *Young*, the Court of Appeals in the present case deemed proper, and relied upon, a record from treating provider, Dr. Weiss that is strikingly similar to the inadmissible exhibit in *Young*.

The statements in Dr. Weiss' declaration are exactly the type of statements that *Young* holds are insufficient. Dr. Weiss' record, like that of the doctor in *Young*, is based on facts relayed to him by the patient's parent after the litigation had already begun. Like the doctor in *Young*, Dr. Weiss' examination of the patient in the course of treating him was years after the alleged incident and both performed a diagnostic test, Dr. Weiss and OCT and in *Young* an EEG. Finally, just like the doctor in *Young*, Dr. Weiss offered a conclusion as to the cause of the Appellant's condition that was not actually observed, but rather is based merely on what was told to him by Appellant's father. There is no evidence presented that he

reviewed any other records, that he ever discussed his conclusions about the particles with other experts or providers, or that he even examined Dr. Jung's records. He also freely admits he does not know anything about the anesthetic used. Simply stated, his opinion is entirely speculative.

Cases law is clear that an expert witness must have a sufficient factual basis for his opinion, and it is the court's role to examine the factual basis underlying an opinion to ensure it is not sufficient. Here, the Court of Appeals accepted Dr. Weiss' opinion that the particles came from the dental procedure, but such acceptance was an error under *Young*, as Dr. Weiss has an insufficient basis for his testimony.

2. The Court of Appeals incorrectly found Dr. Palmer provided admissible testimony as to the cause of Appellants' blindness.

The Court of Appeals determined Dr. Palmer's declaration provided sufficient evidence Dr. Jung's actions caused the particles to enter Appellant's eye. Appx. A, p. 6. However, the court erred in doing so because Dr. Palmer's opinion as to how that occurred is based on speculation and assumption.

With respect to the issue of proximate cause, the Court of Appeals found the following selections of Dr. Palmer's testimony sufficient: (1) local anesthetics for dental injections have preservatives in them which were "likely" the particles observed by Dr. Weiss (Appx. A, p. 6); (2) the

"probable" cause of Appellant's blindness was injection into his arterial circulation (Appx. A, p. 7). However, neither of these statements were properly admissible.

a. Dr. Palmer's testimony that the anesthetic contained particles is speculative and inadmissible.

The Court of Appeals relied on CP 147-48 with respect to Dr. Palmer's testimony regarding the presence of particles in the anesthetic. Appx. A, p. 6. However, a review of that section of the clerk's papers reveals that Dr. Palmer does not actually testify that the actual anesthetic used in this case actually contained particles and merely speculates it did:

> Q: Okay. Let's go back to the particles issue. What do you mean that local anesthetic has particles in it?
>
> A: All local anesthetic for dental injection (sic) have preservatives in them, to keep the shelf life - - keep them fresh. I once had a patient that was allergic to the preservatives in the local anesthetic, so I couldn't use a traditional dental carpule and aspirating syringe with her. I had to go buy them without preservatives - -
>
> Q: Okay. Just - -
>
> Ms. Locher: Let her finish, please.
>
> By Mr. Versnel:
>
> Q: And that's fine. My question, though, is it your testimony, that local anesthetic has particles in it?
>
> A: The preservatives can - - the preservatives are the particles. In other words, not particles as in trash, no. But particles as in preservative. In other words, you can buy

> xylocaine with no preservatives. And dental anesthetic has preservative in it.
>
> Q: Okay. And it's your belief that what Dr. Weiss referred to as particles is the preservative from the anesthetic?
>
> A: Likely, yes.

CP 147-48.

As the full line of questioning reveals, Dr. Palmer's testimony regarding the particles is speculative, and incoherent. It is unclear whether by use of the word "particles" Dr. Palmer is referring to some sort of actual visible particle that could appear on an OCT, or some sort of atomic particle. She also does not state in her deposition, nor her multiple declarations, that she actually viewed the OCT in which Dr. Weiss allegedly observed the particles or discussed her opinion with him. Dr. Palmer also does not present any testimony, nor is there any from Dr. Weiss, that the particles he saw were consistent with Dr. Palmer's testimony about the preservatives being the particles. This is a particularly glaring omission, given that Dr. Weiss admits he does not know what the particles are. *See* CP 196. Having not done so, Dr. Palmer lacks a foundation to say that she and Dr. Weiss are using the word the same, and she can only assume that she and Dr. Weiss are using the term "particles" in the same way, making her statement that both she and Dr. Weiss are referring to the same thing is speculative.

Furthermore, while she testifies generally about some anesthetic having preservatives, she points to nothing in this case that the anesthetic actually used did. Instead she offers only speculation that it did. Such testimony is inadmissible, and the Court of Appeals erred in finding it created an issue of fact.

b. Dr. Palmer's testimony that intra-arterial injection caused the blindness is based on assumption.

The Court of Appeals relied on CP 170 with respect to Dr. Palmer's testimony regarding her theory Dr. Jung injected the anesthetic into Appellant's arterial circulation. Appx. A, p. 8. The Court of Appeals stated:

> 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[.]

CP 170.

However, as revealed by her deposition testimony, her theory is based on insufficient assumption and speculation. First, Dr. Palmer admitted during her deposition that she does not know if Dr. Jung actually injected into Appellant's artery, agreeing that there is "no way to know." CP 153-54. Second, she admits that the facts upon which she relies in forming her opinion are based on assumption:

> A: Posterior superior alveolar block. If you read Malamed's book, one of the hazards is intra-arterial injection. You couple that with a 30-gauge needle, that you can't aspirate with, and a young, inexperienced dentist in a hurry to do a ton of dental work, I think it very reasonable to assume she was in the artery.
>
> **Q: But you still have to assume?**
>
> **A: Yes, you do.**

CP 155 (emphasis added). Finally, Dr. Palmer opined Dr. Jung proximately caused Appellant's blindness by injecting the anesthetic too quickly, too forcefully, and into a blood vessel. CP 149-51, 155. However, she admitted she could not point to medical records or medical facts to support any of her assumptions regarding the rate, force, or exact locations of the injections, beyond the mere fact that Appellant went blind. *Id.* Because her causation opinions relied wholly on speculation, conjecture, and an unwarranted inference of negligent based on the ultimate injury, her testimony was insufficient to prevent summary judgment. *Young*, 50 Wn.2d at 84-85.

VI. CONCLUSION

For the foregoing reasons, this Court should accept review of this matter pursuant to RAP 13.4(b), and correct the error of law in this case and clarify the standards of acceptable medical expert testimony in the State of Washington.

Respectfully submitted this 8 day of August, 2018.

LEE SMART, P.S., INC.

By: _____
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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on August 8, 2018, I caused service of the foregoing pleading on each and every attorney of record herein:

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APPENDIX A

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

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[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

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[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

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[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

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[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

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[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.

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[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

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[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]

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[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:

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.

LEE SMART, P.S., INC.

August 08, 2018 - 11:26 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76593-1
Appellate Court Case Title:	Juan Pablo Rios Perez; Ricardo Rios Villa, et al., Apps. v. Grace Jung, D.D.S., et al., Res.
Superior Court Case Number:	15-2-15011-1

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