

No. 48070-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

KEISHA BAUMGARTNER, as Personal Representative of
the Estate of Angela Baumgartner, deceased,

Appellant,

v.

THE VANCOUVER CLINIC, INC., P.S.; JASON ANAST,
M.D., ERIC KLINE, MD; COLUMBIA ANESTHESIA
GROUP, P.S., MARK A. MOREHART, M.D.; LEGACY
SALMON CREEK HOSPITAL, a health care entity;
CHRISTOPHER FRALEY, M.D.; SPECIALTY CARE,
INC. ; and MICHELLE L. HENDRIX. and JOHN DOE
ENTITY NO.1 THROUGH NO. 12,

Respondents.

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

BRIEF OF RESPONDENTS COLUMBIA ANESTHESIA
GROUP, P.S. AND MARK A. MOREHART, M.D.

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I. INTRODUCTION

The details of this case are discussed below in the "Counter Statement of the Case" portion of this brief. However, the following is a brief introduction to the issues before this court.

Ms. Baumgartner was a patient who underwent a laparoscopic partial nephrectomy to remove a small tumor on her kidney. Ms. Baumgartner was also a Jehovah's Witness who, pursuant to her religious beliefs, refused to accept her own blood once it had left her body and also refused to accept blood transfusions and all blood products. A portion of the Jehovah's Witness community will allow the use of a Cell Salvage device during surgery. Ms. Baumgartner did agree to the use of a Cell Salvage device. A Cell Saver device consists of a suction wand on one end which suctions blood into a container for processing and then circulates the blood into an IV line back into the patient. This technique is acceptable because some Jehovah's Witnesses believe that it creates a closed circuit and that, therefore, their blood remain in circulation and does not technically leave their body.

The Cell Saver was used during the surgery, but its suction was limited and noted by the surgeons to be insufficient. Unfortunately, Ms. Baumgartner experienced significant bleeding during the surgery. Because the Cell Saver suction was not sufficient to clear the surgical field

of blood so that the source of the bleed could be identified, the surgeons converted the procedure to an open procedure. In the process of converting to an open procedure the suction wand for the Cell Saver device fell outside of the surgical field. For reasons that are discussed in more detail below, this rendered the Cell Saver device inoperable for a period of time both due to contamination/sterility issues and because the Jehovah's Witness circuit was no longer closed and therefore did not comply with Ms. Baumgartner's religious beliefs. The surgeons cleared the operative field with wall suction, lap pads and surgical sponges, identified the source of the bleeding and where able to stop it. The surgery was completed, however, Ms. Baumgartner unfortunately later passed away due to shock and profound anemia.

Prior to the surgery Ms. Baumgartner was informed numerous times that her refusal to accept blood transfusion and blood products increased her risk of death during surgery. Ms. Baumgartner acknowledged this risk prior to surgery.

These defendants filed a motion for summary judgment on the grounds that plaintiff could not present admissible evidence that these defendants violated the standard of care and also on the grounds that plaintiff could not provide admissible evidence to prove the causation portion of its claim. After reviewing extensive briefing, including a new

declaration from plaintiff's expert Dr. Spiess, and after hearing oral argument, the trial court granted these defendants' motion for summary judgment.

II. COUNTER STATEMENT OF THE CASE

A. General Nature Of The Case, Identity Of Parties And Claims.

This is a wrongful death case. The Appellant and plaintiff is Keisha Baumgartner, Personal Representative of the Estate of decedent Angela Baumgartner. The Respondents and defendants are Columbia Anesthesia Group, P.S. (CAG), Mark A. Morehart, M.D. Legacy Salmon Creek Hospital, Specialty Care, Inc. and Michelle L. Hendrix were respondents and defendants, however, each recently reached settlement agreements with plaintiff. The Vancouver Clinic, Jason Anast, M.D. and Eric Kline, M.D. were defendants but reached settlement agreements with plaintiff while the case was at the trial level.

This case arises from a surgical procedure performed on Ms. Baumgartner on July 26, 2011 to remove a malignant kidney tumor. The procedure was performed at Legacy Salmon Creek Hospital by surgeons Jason Anast, M.D. and Eric Kline, M.D. of The Vancouver Clinic. Mark Morehart, M.D. of Columbia Anesthesia Group was the anesthesiologist during the surgery. Michelle Hendrix of Specialty Care, Inc. was responsible for the operation of the Cell Saver device which is a piece of

surgical equipment used during the surgery in question. This is explained in more detail below.

The patient, Ms. Baumgartner, was a practicing member of the Jehovah Witness religion. Due to her religious beliefs, Ms. Baumgartner refused to receive any blood or blood products. CP 133. Ms. Baumgartner did, however, give her consent to the use of a Cell Saver machine during her surgery so long as its use maintained a closed circuit to comply with her religious beliefs. CP 325, 327-328. While maintaining a closed circuit, a Cell Saver machine suctions blood from a patient during surgery and processes the blood so that it can be reinfused back into the patient.

B. Background About Jehovah's Witnesses And Blood.

Jehovah's Witnesses believe that it is a violation of God's law to receive any blood from another or to permit any blood that has left their body to be returned to their body. If a Jehovah's Witness receives blood contrary to their church beliefs they will de facto no longer be a Jehovah's Witness. They will have essentially opted themselves out of the belief system and the church. CP 1342, CP 1832. If they accept blood contrary to their church beliefs they will no longer go to their afterlife/heaven. CP 1342, CP 1832. If they accept blood contrary to their church beliefs they will be excommunicated from the community. CP 1342, CP 1832.

Physicians have been charged with assault for violating Jehovah's Witness beliefs regarding blood products. CP 1342, CP 1832.

Though their faith prohibits the use of stored blood or the return of blood to the body after the blood has left the body, some Jehovah's Witnesses will permit techniques such as cell salvage during surgery, so long as the person's own blood remains continuously part of the person's circulatory system during the procedure. Under those circumstances, the blood is seen as never leaving the body because it remains in circulation. CP 2203.

In 2009 Ms. Baumgartner executed an Advanced Health Care Directive stating her refusal to allow blood products or blood transfusions and her acceptance of the use of a Cell Salvage device. CP 1108.

C. Ms. Baumgartner Understood The Risks That Refusing Blood Created.

Ms. Baumgartner understood that undergoing surgery to remove a portion of her kidney would expose her to a risk of blood loss during the procedure which could lead to her own death if she refused to allow her doctors to give her blood products. Ms. Baumgartner had multiple conversations with multiple doctors about the risks of the treatment she had chosen. On June 26, 2011 Ms. Baumgartner was seen by the surgeon,

Dr. Anast, for follow-up relating to her kidney tumor. At that visit, the risks associated with performing a robot assisted partial nephrectomy were thoroughly discussed. Dr. Anast's chart note reads in part:

"We discussed risks of the procedure including possible loss of the entire kidney, possible benign disease, injury to nearby organs, blood loss, infection. She is a Jehovah's Witness and will refuse blood transfusion. I explained that a (sic) comfortable doing her surgery with this restriction, however she does run the risk of anemia and/or death, and her risk of needing the entire kidney removed will increase due to this. She understands and wishes to proceed." CP 102-103 (emphasis added).

The day before the surgery Ms. Baumgartner created a document entitled "Durable Power of Attorney for Health Care" pursuant to which she confirmed her understanding that refusing blood products/transfusions increased her risk of death during the surgery. Pursuant to that document Ms. Baumgartner stated:

"I am one of Jehovah's Witnesses, and I direct that NO TRANSFUSIONS of whole blood, red cells, white cells, platelets, or plasma be given me under any circumstances, even if health care providers believe that such are necessary to preserve my life. I refuse to predonate and store any blood for later infusion." CP 135 (emphasis in original).

The surgery was scheduled for the next day, July 26, 2011. Ms. Baumgartner met again with her surgeon Dr. Anast on the day of the surgery, before the procedure was performed. The risks of the procedure and of refusing blood transfusions were again discussed by Ms.

Baumgartner and Dr. Anast. Dr. Anast's chart note reads in part:

"Discussed the risk of surgery including bleeding, infection, need to remove entire kidney . . . She is a Jehovah's witness, does not accept blood products, understands that this is a surgery that rarely will have significant bleeding, and that refusing blood in that situation could lead to significant morbidity or even death. The patient understands the risks, and all questions were answered to the patient's satisfaction." CP 120 (emphasis added).

Dr. Anast's operative report confirmed his discussion with Ms.

Baumgartner about the risk of blood loss during the surgery. CP 743.

Prior to the surgery, Ms. Baumgartner signed an informed consent document acknowledging her awareness of the material risks of the procedure, including possible bleeding and death. CP 133. She affirmed that the risks had been explained to her and that all of her questions about the procedure and its risks had been answered to her satisfaction. *Id.* She also acknowledged that she had not been given any guarantees as to the results of the procedure. *Id.* And she specifically confirmed the following statement:

"I refuse to receive blood or blood products even if it results in my death or serious disability." *Id.*

Ms. Baumgartner also confirmed that she understood the risk of bleeding that could be associated with the anesthesia services being provided by Dr. Morehart. CP 134. Ms. Baumgartner and her medical

providers thoroughly discussed the risks associated with surgery. CP 133.

Ms. Baumgartner understood that undergoing surgery posed a risk that severe bleeding could occur and that if severe bleeding occurred her direction that she not be given blood greatly increased her chances of dying. It appears to be undisputed that but for Ms. Baumgartner's refusal to allow the transfusion of blood, she would have survived her surgery. CP 822-823, 840-841.

D. Dr. Morehart's Involvement in the Surgery.

Dr. Morehart was the anesthesiologist during the surgery in question. He did not operate the suction tubing or the Cell Saver device. The Cell Saver device was provided by Legacy Hospital and operated by Michelle Hendrix a technician employed by defendant SpecialtyCare, Inc. CP 1018:18-1019:1. The suction portion of the Cell Saver device was operated by the assistant surgeon Dr. Kline. CP 1300.

E. The Surgery in Question.

The surgery was initially performed laparoscopically (through small incisions called ports) via a robot controlled by the primary surgeon, Dr. Anast. CP 1296. Dr. Anast was able to see via cameras on the instruments that transmitted a 3-D displays to the surgeon. The assistant surgeon, Dr. Kline had access to the patient through the laparoscopic ports to assist the surgeon with tasks such as suctioning blood. For this surgery

the suction device was connected to the Cell Saver and controlled by the assistant surgeon, Dr. Kline. CP 1300.

The surgery began at approximately 2:15 pm. CP 1314. The surgeon began removing the kidney tumor shortly after 4:28 pm.¹ At about 4:45 pm heavy arterial bleeding began to occur. CP 1296, 1360-1361. The bleeding was so severe that it obstructed the surgeons' view. CP 1296. The surgeons tried to suction the blood to clear their view but the Cell Saver suction was not sufficient to clear their view. CP 1296. (This fact is also discussed in Appellant's brief, pg 15 and 16.) Without the ability to see, the surgeons could not locate and stop the bleeding. CP 1296. The surgeons decided to convert to an open procedure in order to be able to find the source of the bleeding. CP 1296. Additional personnel arrived in the operating room to assist with undocking the robot and converting to an open procedure at about 4:49 pm. CP 1316.

When Ms. Baumgartner's abdomen was opened, the surgeons found a large amount of blood. CP 1296. In fact, there was so much blood that Ms. Baumgartner's entire kidney and most other structures in her abdomen were submerged in blood. CP 540. Ms. Baumgartner continued to bleed profusely. The surgical team needed to immediately

¹ Kidney dissection began after clamping the renal artery. The operative report notes that Mannitol was given just prior to clamping the renal artery. CP 844. The medical records indicate that Mannitol was administered at 4:28 PM. CP 1319.

clear the surgical field of blood so that they could identify the source of the bleeding and stop it. CP 1389, 1397. The surgeons used surgical sponges, lap pads and standard "wall suction" (type of suction used for most surgeries, usually connected to a vacuum port in the wall) to clear the blood so that they could locate the source of the bleeding and stop it. CP 1405.

During the process of converting to an open procedure it was noticed that the suction wand for the Cell Saver had dropped below the sterile field. CP 1386. The Cell Saver technician, Ms. Hendrix, testified that she saw the Cell Saver suction line on the floor with the suction still sucking. Ms. Hendrix notified the surgical team of her observation.

"A: . . . And as I was watching this happen in front of me I realized that the suction line from the field had been dropped onto the floor. And I notified them of what had just occurred, that the suction line was on the floor contaminated. The suction was still on.

Q: You saw this with your own eyes, saw the suction line –

A: Yes, sir.

Q: -- on the floor?

A: Yes.

Q: Okay.

A: Which in turn contaminates the suction line, the reservoir that's attached to it. And it is then my job to remove the contamination." CP 148 (emphasis added).

Dr. Anast directed Ms. Hendrix to replace the contaminated tubing so that the Cell Saver device could continue to be used for suctioning, however, Ms. Hendrix informed Dr. Anast that because the device had been contaminated, and because the Jehovah's Witness circuit had been broken, she would need to reset the machine from scratch. CP 1395-1396.

Ms. Hendrix testified as follows on these two issues.

"A: So by the suction line falling on the floor, I cannot continue -- I cannot hand that back to them. It's contaminated. I cannot hand that back to them on the sterile field. They cannot use it. I cannot take the blood that has been collected in that reservoir and then wash it in hopes that there's not a contaminant in there. I don't know what has been sucked up, what contaminants have happened." CP 1555 (emphasis added).

"A: What happened was they felt that it would be an easy fix if they opened another suction line and replaced the dirty one. The problem being is it's not just the suction line that's been contaminated because it has a vacuum suction attached to it. It has contaminated everything it's touching and what the vacuum is connected to. So the whole reservoir was contaminated also." CP 581 (emphasis added).

"A: The problem being with this patient, a Jehovah's Witness. Once you start collecting and a cut has been made, if anything breaks that circuit in between the surgery at no matter what point and has been disconnected, it is no longer a complete circuit. So had I re-set it up, it was no longer Jehovah Witness protocol." CP 266-267 (emphasis added).

Appellant argues that at some point during this process "Dr. Morehart announced his agreement with Ms. Hendrix's statements."

Appellant's brief, page 2. Dr. Morehart agrees that he did engage in a conversation about the Cell Saver device, however, the conversation he participated in did not occur until much later in the surgery, after the bleeding had been controlled. However, the timing and content of the conversation was not an issue which affected the summary judgment argument at the trial court level nor is it an issue at the appellate level. Even if plaintiff's version of Dr. Morehart's involvement is taken as correct, plaintiff's claim still fails for all of the reasons expressed in Respondent's Motion for Summary Judgment and now this Respondent's brief.

The surgeon, Dr. Anast, ultimately ordered Ms. Hendrix to reset the Cell Saver device. CP 1396, 1397. However, this was going to take time. Once the procedure was converted to open Ms. Baumgartner continued to bleed profusely and the surgeons needed to act quickly. While operational, the suction from the Cell Saver was not sufficient. CP 1296. At the time that the procedure was converted to open, no suction from the Cell Saver was available because the suction line had fallen out of the sterile field. According to plaintiff, it would have taken two minutes to replace just the suction tubing and twelve minutes to replace all of the contaminated components of the Cell Saver. App Brief, pg 17. The surgeons needed to clear the field. They could not wait for the Cell Saver

device to be reset or the suction tubing to be replaced. The surgeons ordered Ms. Hendrix to get the Cell Saver working while they cleared the field and stopped the bleeding. Dr. Anast testified:

“A: So back to our previous discussion, when she had told me that it was contaminated and we could not use it anymore, I said -- I told her to open a new tubing. I said what -- what can we do to salvage this at this point? And she said the only thing we can do is reset the machine from start -- from scratch and essentially new tubing and then whatever she had to do to reset the machine. I'm not -- I don't know the technical aspects of that, so -- so we did that. And then while we were waiting for her to --

Q: When we did that, you mean when she opened a new suction line?

A: Yes.

Q: Okay.

A: But it was not immediately available for use. I don't know what she had to do, but there was some resetting of the machine.

Q: M-hm.

A: So while she was doing that, we opened up a standard suction device to help with the procedure 'cause we couldn't wait, there was active bleeding going at that time.” CP 545-546 (emphasis added).

The surgeons were able to clear the blood and stop the severe bleeding. CP 370, 844. Because the Cell Saver was not available, no blood was collected by the Cell Saver during this time. Some bleeding continued after the kidney was removed, however, that bleeding was minimal and immediately controlled with pressure. CP 1296, 1393.

Despite the surgeon's order to reset the Cell Saver device, Ms. Hendrix apparently believed that she had been released. CP 1311. She left the operating room but was called back by the surgeon to restart the Cell Saver device. CP 1313. Pursuant to the surgeon's order the Cell Saver device was restarted at 5:15 pm, however the bleeding was fully controlled by that time and very little blood was salvaged for reuse. CP 1400, 1398. The procedure was completed at 6:59 PM. CP 1316.

Ms. Baumgartner lost a large amount of blood during the procedure and ultimately was not able to recover from her blood loss. Because she would not allow a blood transfusion, her physicians could not provide her with the replacement blood she needed. Ms. Baumgartner died early on the morning of July 27, 2011 due to shock and profound anemia. CP 98.

III. ARGUMENT AND AUTHORITIES

A. The Trial Court Correctly Granted Summary Judgment In Favor Of Dr. Morehart And CAG.

Plaintiff argues that the trial court erred in granting summary judgment to Dr. Morehart and CAG because plaintiff asserts that there were genuine issues of material fact that precluded summary judgment as to the following allegations:

(1) Standby Setup Allegation: Failing to “advise the surgical team that setting up the Cell Saver and connecting it to the patient before surgery was not required by Jehovah’s Witness beliefs” and “directing that it not be deployed as standby.” App Brief, p 31.

(2) Contaminated Tubing Allegation: Failing to “direct Technician Hendrix or other members of the surgical team to employ new tubing with a larger bore suction tip to immediately suction blood into the Cell Saver for processing when Technician Hendrix announced that the Cell Saver had been contaminated and could not be used.” App Brief, p 31-32.

At the trial court level plaintiff asserted a number of other theories of negligence against these defendants. These defendants specifically moved against each of these theories individually. (Example: The patient was not sufficiently paralyzed and anesthetized when she arrived at the ICU.) CP 1432-1462. Plaintiff’s summary judgment response only contained argument which addressed the issues now before this court. (See contentions 1 and 2 listed above.) CP 1608-1634. In response to these Defendant’s Motion for Summary Judgment plaintiff did not attempt to provide a response to the Motion for Summary Judgment seeking to dismiss all of the other allegations of negligence. CP 2166. Appellant’s appeal does not include dismissal of the other negligence specifications.

1. The Trial Court Correctly Directed Summary Judgment On Plaintiff's "Standby Setup" Allegation.

Plaintiff's "standby setup" allegation was asserted for the first time in response to Dr. Morehart's motion for summary judgment. The allegation was never pled in the complaint or disclosed in response to any interrogatory request despite specific interrogatory requests asking plaintiff to state "with specific detail and particularity each and every way in which" plaintiff contended that Dr. Morehart was negligent. CP 11-17, 330, 324-326. Plaintiff's anesthesiology expert, Dr. Spiess, did not identify the allegation during his deposition despite being plainly and clearly asked to identify all of the reasons he believed Dr. Morehart failed to meet the standard of care. CP 1737- 1916. CP 1834-1837. No witness was ever questioned by plaintiff's counsel as to why the Cell Saver device was set up for use during the procedure rather than reserved in a standby setup.

Plaintiff's "standby setup" theory of recovery was properly dismissed because no facts support liability against Dr. Morehart for the alleged failure to use the device in a standby setup and because plaintiff cannot create an issue of fact by asserting a new theory of recover that contradicts prior sworn testimony.

a) Plaintiff Cannot Create An Issue Of Fact By Asserting A New Theory Of Recovery.

A Plaintiff cannot defeat a motion for summary judgment by attempting to create a new genuine issue of fact as to a theory of recovery that the plaintiff had not previously identified or alleged. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 472, 98 P.3d 827, 837 (2004).

Kirby involved a harassment and discrimination action. *Kirby*, 124 Wn. App. at 462. In response to the Defendant's Motion for Summary Judgment, the *Kirby* plaintiff argued, for the first time, that the City was liable for violating his First Amendment rights and public policy. *Id.* at 470-471. The Court rejected the *Kirby* plaintiff's argument, holding that the plaintiff had not pled the newly asserted theory and that raising a new theory in response to a motion for summary judgment was not permitted. *Id.* at 472; *see also Camp Fin., LLC v. Brazington*, 133 Wn. App. 156, 162, 135 P.3d 946, 949 (2006) ("a complaint cannot be amended through arguments in a response brief to a motion for summary judgment"); *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847, 852 (1999) ("A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along").

In this case, like in *Kirby*, plaintiff attempted to assert a new theory

of recovery, for the first time, in response to Dr. Morehart's motion for summary judgment. Such tactics are not permitted. Plaintiff cannot create a genuine issue of material fact based on a theory of recovery that was never pled, disclosed or explored during discovery. On this basis alone, the trial court did not err in granting summary judgment as to plaintiff's previously undisclosed "standby setup" theory of recovery.

b) Plaintiff Cannot Create An Issue Of Fact By Offering Testimony from its Own Expert which Contradicts that Experts Prior Testimony.

A plaintiff cannot create an issue of fact in response to a summary judgment motion by submitting sworn testimony that contradicts prior sworn testimony. *Marthaller v. King Cnty. Hosp. Dist. No. 2*, 94 Wash. App. 911, 919, 973 P.2d 1098, 1102 (1999); *Klontz v. Puget Sound Power & Light Co.*, 90 Wn.App. 186, 192, 951 P.2d 280, 283 (1998). A contradiction exists when an expert attempts to testify about a new theory of negligence that the expert had not disclosed when asked during the expert's deposition. *Id.*

In *Marthaller*, an expert testified during his deposition that he would not be offering the opinion that paramedics violated the standard of care during an intubation procedure. *Id.* at 918. In response to the defendant's Motion for Summary Judgment, however, the expert opined in a declaration that the paramedic's intubation failed to meet the standard of

care. *Id.* The court held the expert's declaration testimony to be contradictory to his deposition testimony and, therefore, insufficient to create an issue of fact and defeat the motion for summary judgment. *Id.*

In this case, Dr. Spiess was asked to provide all of his standard of care opinions during his deposition. Counsel for Dr. Morehart asked Dr. Spiess:

“List for me all the criticisms that you have of Dr. Morehart, the anesthesiologist in this case. When I say criticisms, I mean where you believe his care fell below the standard of care.” CP 1834.

Dr. Spiess then discussed his standard of care opinions without stating any criticism of Dr. Morehart relating to the fact that the Cell Saver device was set up for use during the procedure rather than being reserved in “standby” without being actually set up. Near the end of his deposition, Dr. Spiess again confirmed that all of his opinions had been discussed. CP 1897.

Despite being directly asked multiple times to state all of his standard of care opinions, Dr. Spiess never testified that the standard of care required that the Cell Saver device be reserved only for emergency “standby” use, and he never testified that Dr. Morehart breached the standard of care by not being aware of that possibility or voicing a belief that the surgeon could or should reserve the Cell Saver device for standby

use instead of having it set up and in use during the procedure. CP 1737-1914. Instead, this new theory showed up for the first time in response to these defendants' motion for summary judgment. In fact, as discussed in the next section of this brief, Dr. Spiess did discuss this issue (for the first time) in a declaration submitted with Plaintiff's Summary Judgment Response, however, Dr. Spiess never actually stated the standard of care required that a Cell Saver be set up in "stand by" mode at the beginning of surgery.

If this court determines that Dr. Spiess did testify in his declaration submitted in response to these defendants Motion for Summary Judgment that Dr. Morehart breached the standard of care by not being aware of the possibility of reserving the Cell Saver for "standby" use, then such testimony directly contradicts his deposition testimony and, it cannot be used to create an issue of fact in response to Dr. Morehart's motion. The trial court did not err in granting summary judgment as to plaintiff's contradictory "standby setup" theory of recovery.

c) Plaintiff Did Not Present Evidence That The Standard Of Care Required That The Cell Saver Device Be Used In "Standby Setup" During The Surgery.

Plaintiff's expert, Dr. Spiess, never asserted that the standard of care required that the Cell Saver device only be reserved in a "standby

setup” or that a decision to have the Cell Saver setup and in use from the beginning of the procedure was negligent in any way. CP 1636-1647, 1650-1661, 1737-1916. In his July 2, 2015 declaration Dr. Spiess states only that the standard of care required that anesthesiologists be *aware* that a standby setup is “*acceptable*” to Jehovah’s Witnesses. CP 1640. Dr. Spiess never testified in any declaration, including his declaration in response to the Respondent’s Motion for Summary Judgment, or in his deposition that the standard of care required that the Cell Saver device always be reserved in a “standby” setup.²

The only evidence presented in the trial court as to the permissible setup of the Cell Saver device was that the device could either be set up for use during the procedure or it could be held in reserve at bedside, ready be hooked up (i.e. in “standby”), at the discretion of the *surgeon*. CP 2194-2195, 2196-2197. Dr. David R. Rosencrantz is the founder and medical director of Legacy Health System’s bloodless surgery program. He testified that Cell Saver devices could be either used during surgery or reserved in standby:

“A: Jehovah’s Witness is different. You would have the option, depending upon what you want, either to have the

² Appellant’s brief also cites a few times to SpecialtyCare’s expert Dr. Waters. However, a reading of those passages cited by plaintiff indicates that Dr. Waters’ testified about how some Jehovah’s Witnesses may proceed with procedures and what may be acceptable to some Jehovah’s Witnesses. Dr. Waters did not offer testimony regarding an accepted standard of care on the “stand by” issue.

Cell Saver hooked up, or have it at the bedside --

Q: All right.

A: -- ready to hook up." CP 2194:14-2195:5.

As discussed above, plaintiff's own expert has not offered testimony that the standard of care required that the anesthesiologist (or anyone) direct that the Cell Saver only be set up in standby mode. Because there is no evidence supporting plaintiff's assertion that the standard of care *required* that the Cell Saver device be reserved in a "standby setup," the trial court properly granted summary judgment as to plaintiff's new and unsupported "standby setup" theory of recovery.

d) Plaintiff Did Not Present Evidence That Dr. Morehart Was Involved In Any Way In the Decision About How To Set Up The Cell Saver Device.

Though Dr. Spiess testified that the anesthesiologist should be "aware" that a "standby setup" is acceptable to Jehovah's Witnesses, plaintiff presented no evidence that Dr. Morehart (or any of the medical team) actually lacked such awareness. Plaintiff also did not present any evidence that Dr. Morehart had any involvement in the decision not to employ a standby setup. In fact, the evidence in the record established that the decision about how to set up the Cell Saver is a decision made by the surgeon, not the anesthesiologist. As Dr. Rosencrantz explained,

"Q: Okay. What would -- what purpose would be served

in having the suction irrigator hooked up directly to the Cell Saver during an RALPN?

...

A: A surgeon's discretion.

Q: Okay. And on what basis would his discretion lead him to employing a setup with the suction irrigator directly to the Cell Saver?

...

THE WITNESS: Comfort.

Q: (By Mr. Nelson) Whose?

A: The surgeon's." CP 2196:12-2197:16 (emphasis added) (objections omitted).

The decision as to how to set up and/or employ the Cell Saver device was a surgical decision made at the discretion of the surgeons based on their comfort level. *Id.* The suction wand coming from the Cell Saver was a surgical tool, operated and controlled by the surgeon. How and when to use it was up to the surgeons. As discussed above, plaintiff did not present any evidence that the standard of care required that the Cell Saver be setup in "standby mode." Plaintiff has also presented no evidence supporting any assertion that Dr. Morehart, the anesthesiologist, was responsible for this decision.

2. The Trial Court Correctly Directed Summary Judgment On Plaintiff's Contaminated Tubing Allegation.

Plaintiff's "contaminated tubing" allegation is premised on the

unsupported assertion that the Cell Saver could not be used after the suction line fell to the floor *solely* because it no longer complied with Ms. Baumgartner's direction that a closed circuit be maintained. Plaintiff chooses to ignore the fact that the suction line being outside of the sterile field also contaminated (infected) the Cell Saver device. Plaintiff then argues that the suction line is irrelevant to the Jehovah's Witnesses requirement of a closed circuit and that Dr. Morehart was negligent for not knowing that. As discussed below, plaintiff's claim fails because she chooses to ignore the contamination issue and is unable to offer any admissible evidence to support her circuit argument.

a) Contamination/Sterility of the Cell Saver System.

With regard to the contamination/sterility issue, the evidence established that one of the reasons the Cell Saver device could not continue to be used when the suction wand fell out of the sterile field was because the entire device was understood to have been contaminated when it fell onto the floor and continued suctioning while on the floor. CP 148. Plaintiff ignores this fact even though all persons present during the surgery agreed that the device was no longer sterile and could not be immediately returned to use in an unsterile condition. In fact, because Ms. Hendrix witnessed the suction operating while the device was on the floor, it would not have been possible to replace *only* the suction tubing as

plaintiff seems to suggest should have been done. Rather, all exposed components of the device had to be replaced including the blood canisters and the operational parts of the machine. CP 148.

Dr. Morehart could not see the suction tubing from his position in the operating room and was not in a position to second-guess Ms. Hendrix's observation that the entire system had become contaminated. CP 347. Plaintiff's entire "contaminated tubing" theory of recovery is, in a very real sense, a red herring.

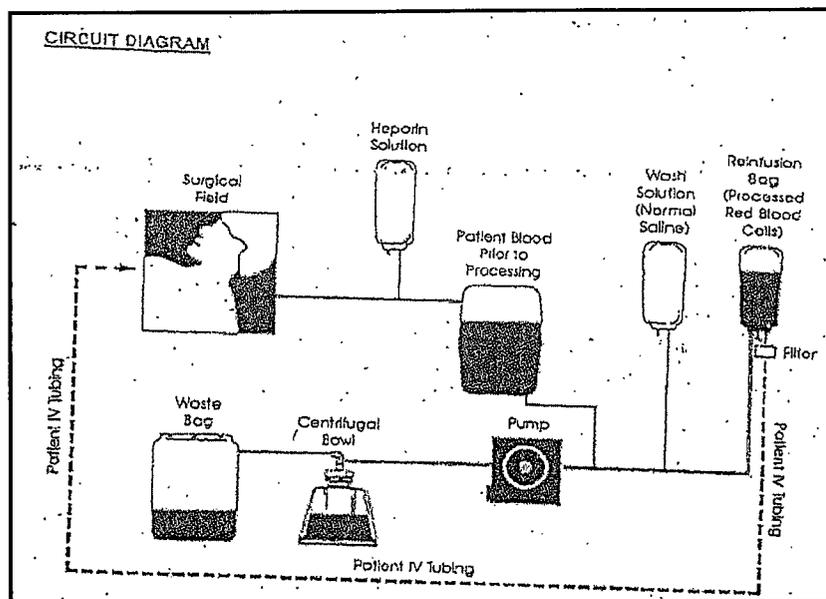
Plaintiff ignores the actual contamination issue and instead focuses only on the issue of whether use of the device still complied with Ms. Baumgartner's religious requirement that the device be used only if a closed circuit was maintained. As discussed below, plaintiff relies on one physician from Pennsylvania to speak for all Jehovah's Witnesses and define what definition of a "circuit" complies with Jehovah's Witnesses beliefs. Plaintiff's misdirection, however, is improper and incorrect because, as discussed below, Dr. Spiess is not qualified to establish a medical standard of care on the issue of whether a suction wand dropping outside of the surgical sterile field does or does not break the required Jehovah's Witness circuit.

b) Plaintiff's expert cannot offer admissible testimony which establishes a standard of care that applies to this case.

Ms. Baumgartner made a decision to allow cell salvage. She informed her physicians that she would only permit cell salvage so long as a "closed circuit" was maintained. CP 324-326. As discussed above, complying with a Jehovah's Witness request for a closed circuit is not something to be taken lightly. When Ms. Hendrix announced that the Jehovah's Witness closed circuit had been broken when the suction wand fell outside of the surgical field, no one in the operating room had reason to question this. Dr. Spiess may have his own opinions on this issue. However, as discussed below Dr. Spiess' opinions are not supported by any medical literature and not supported by any discussions Dr. Spiess may have had with any Jehovah's Witnesses or physicians about whether a Jehovah's Witness circuit is broken when the front end of the circuit, the suction line, falls outside of the sterile field.

The "circuit" issue in this case centers around whether the Jehovah's Witness "circuit" was broken when the surgical suction wand fell outside of the surgical field/and or on the floor of the surgical room. The diagram below came from the Legacy Salmon Creek Autologous Blood Salvage and Post-Operative Blood Salvage Protocols. It is a diagram of the "Continuous ATS (Autologous) Circuit." It shows that the

“circuit” consists of a continuous loop which begins with the line within the surgical field (suction end) and ends with a line in the surgical field (I.V. end). CP 1408.



This diagram is consistent with the testimony of Dr. David Rosencrantz who, as noted in plaintiff's brief, is the founder of and one of the medical directors for the Legacy Bloodless Surgery Program. CP 1014:20-1015:24.

“Q: Is that essentially telling us the same thing with regard to the use of the Cell Saver and a Jehovah's Witness patient?”

A: Yes. It is a continuous circuit, as you can see, it goes from the patient through the various things that are all connected, and back to the patient.

Q: Do you think that is what is meant by the closed circuit—circuit? Is that's a connection from the patient to the Cell Saver, and then back to the patient?”

A: Yes. It is continuity – it's in continuity.” CP 2193.

Because this loop or continuous circuit was broken when the suction wand fell outside of the surgical field, the Cell Saver technician, Ms. Hendrix, based on her training provided by SpecialtyCare, declared that the Jehovah's Witness circuit had been broken and that the Cell Saver set up could no longer be used. CP 1554-1555. Ms. Hendrix's supervisor, Mr. Kluth, confirmed that Ms. Hendrix's understanding of this issue was consistent with the training provided by their employer, Specialty Care. CP 1122. Plaintiff contends that when the suction wand fell outside of the sterile field the Jehovah's Witness circuit was not broken, and that the standard of care required everyone in the room, including Dr. Morehart, to recognize that the circuit was allegedly not broken. Plaintiff argues that the surgical team would not have violated Ms. Baumgartner's religious beliefs by reinserting the surgical wand back into the sterile field (and thereby reclosing the loop). In support of this argument plaintiff offer's the testimony of its expert Dr. Spiess. However, for all of the reasons discussed below, Dr. Spiess cannot offer competent admissible testimony that his way of thinking about the circuit (closed loop not required) is the standard of care.

Generally, in a medical malpractice action, the breach of the standard of care, must be established by expert medical testimony.

Putman v. Wenatchee Valley, Med. Ctr., 166 Wn 2d 974, 988, 216 P3d

374 (2009). Where plaintiff fails to present competent expert testimony in a medical negligence case, the defendant is entitled to summary judgment dismissal. *McKee v. American Home Prods. Corp.*, 113 Wn 2d 701, 706-07, 782 P2d 1045 (1989). A plaintiff's expert evidence must arise to the level of a "reasonable medical certainty." *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn App, 155, 163, 194 P.3d 274 (2008). The expert testimony may not be based on speculation or conjecture. *Rounds v. Nellcor Puritan Bennett, Inc. Supra*. Testimony reflecting only a personal opinion or the testimony of experts that they would have followed a different course of treatment than that of the defendant is insufficient to establish a standard of care against which a jury must measure a defendant's performance. *Adams v. Richland Clinic*, 37 Wn. App. 650, 655, 681 P2d 1305 (1984).

Dr. Spiess is critical of Dr. Morehart (and the co-defendant surgeons and the co-defendant Cell Saver technician) for the alleged belief that the Jehovah's Witness circuit was dependent on having the suction wand in the sterile field and for failing to "take control" of the Cell Saver when the Cell Saver technician announced that the Jehovah's Witness circuit had been broken once the suction wand fell outside of the sterile field. CP 1342, CP 1343.

However, Dr. Spiess cannot offer Admissible evidence to support

this criticism. By his own testimony the definition of what is and is not a Jehovah's Witness circuit varies and there is no written authority which supports his definition.³

"A: It is not a requirement for Jehovah's Witnesses that the thing sits on a surgical field all the time.

Q: And what do you base that understanding on?

A: Talking to my Jehovah's Witnesses and doing cases with Jehovah's Witnesses all the time.

Q: Can you direct me to any writing of any kind that supports that definition you just gave us of what is and is not a circuit?

A: In terms of Jehovah's Witnesses?

Q: Yes.

A: I don't know that anybody can give you writing one way or the other. It is very highly individually dependent."
CP 1322-1323.

As noted this prior quote, Dr. Spiess claims that his expertise regarding what constitutes a Jehovah's Witness circuit is based on his discussions with Jehovah's Witnesses. However, on the specific issue in this case regarding whether the Jehovah's Witness circuit is broken when the suction end of the cell saver device falls out of the sterile field, Dr. Spiess testified as follows:

"Q: How often do you find yourself discussing the suction end of the cell saver with your Jehovah's Witness patients?"

³ Plaintiff attempts to cite to a two page document from the server of the website www.betheltours.org. Bethel Tours is apparently a travel company that sets up tours of the World Headquarters of Jehovah's Witnesses. CP 166, 167. This document's author and origin are unknown. It is not admissible evidence. ER 403, 901, 803(18).

A Rarely, if ever. I will discuss with a Jehovah's Witness [sic] are they willing to take cell saver. And my comment to them has in the past been 'I will connect the cell saver to your body by saline. Are you ok with that?' and they have said yes. I have never once had anyone of them say, 'Well, make sure the wand never leaves my body.' I have never had anybody even bring that up." CP 1325 (emphasis added).

Dr. Spiess later in his deposition again directly contradicted his contention that his standard of care opinions for this case was based on discussions with Jehovah's Witness patients by testifying as follows:

"Q: Okay. As a result of this case, have you discussed with any Jehovah's Witnesses their thoughts about where the circuit is and whether or not – I think you call it a front end of a circuit – whether or not a front – end disassociation or elimination, where that front end isn't available anymore or is contaminated, impedes your ability to give them blood products from the cell saver?

A: No, I have not. Not as a result of this case. No.

Q: Have you done that ever?

A: I have never heard anybody discuss the front – end connection/disconnection as being of anything to do with Jehovah's Witnesses until this case. And all of the Jehovah's Witnesses I have ever done, we have only had interest and thoughts about making sure the cell saver machine is connected with their body, if you will, on the back end through saline. And so it never even came as a consideration until it started becoming a continuous issue in this case." CP 1361-1362.

By his own testimony, Dr. Spiess' claimed expertise on the issue at hand is based on his discussion with Jehovah's Witnesses. However, again by his own testimony, he has never discussed the issue specific to

this case with “anybody.”

In support of his opinions at deposition, Dr. Spiess produced approximately 20 medical journal articles. Notably however, none of these articles supported or even addressed Dr. Spiess’ position regarding what is and what is not a Jehovah’s Witness circuit.

“Q: OK. During the course of doing this literature search – and by the way, we have got roughly 20 articles here; more than that if you count just the abstracts. Did you actually attempt to locate literature that discussed what is and is not a circuit for purposes of Jehovah’s Witness cases in which a cell saver was used?

A: I don’t believe I did that.

Q: Have you ever tried that exercise?

A: I don’t believe I have.” CP 1356.

Later during his deposition he was again given an opportunity to support his opinion with any kind of written materials.

“Q: Do you think you have anything in writing, whether you have handed it out or used it in a PowerPoint, any way you have used it in a presentation, that specifically identifies and defines what is a Jehovah’s Witness circuit for purpose of the use of a cell saver?

A: No.

Q: And to your knowledge you have never seen any such thing in a writing, right, presented by anybody else?

A: No.” CP 1341.

Dr. Spiess is offering criticisms of the treating physicians in this case for their alleged failure to accurately understand what constitutes a

Jehovah's Witness circuit. However, by Dr. Spiess' own testimony his definition of what constitutes a Jehovah's Witness circuit is not "rational".

"Q: So there isn't truly a continuous circuit even included with the circuit that you are saying constitutes the Jehovah's Witness circuit; correct:

A: Well, I think we are arguing over something that isn't rational. In other words, if you took a Jehovah's Witness to an engineering center and said, 'let me show you how many breaks there are in here. Are you OK with this or not?' but they have to deal with [sic] as best reality as they can and they've, for the most part, said 'I'm ok with cell saver'.

Q: So the irrational part that includes the stop gaps within the circuit, as you have described it, that is still required for the continuous circuit. But the irrational part of the wand staying within contact of the body or within the surgical field, that's not required for the circuit. That's your understanding?

A: It is not when I deal with Jehovah's witnesses in my practice here." CP 1324.

Dr. Spiess testified that though the wishes of all Jehovah's Witnesses are different, they generally require that their blood remain within their circulatory system. He testified:

"A: When we do Jehovah's Witnesses, they generally -- and everybody's different. They generally would like to have the blood that is harvested out of their body kept in continuity with their circulation in some manner." CP 1766 (*emphasis added*).

Dr. Spiess testified that, at his institution in Pennsylvania, he tries to comply with the requirement that the Jehovah's Witness patient's blood remain part of their circulatory system by connecting the blood that had

been “harvested out of” their body to the patient with saline. This is the so called “back-end reinfusion line.” Dr. Spiess continued:

“And that usually means that the Cell Saver machine has a return system that is flushed with saline and has a connection directly to some IV in their body. So that’s the way we deal with it here . . .” CP 1767 (*emphasis added*).

Dr. Spiess never testified that the way they “deal with” Jehovah’s Witness patients at his institution in Pennsylvania is a general professional standard that must be followed at hospitals in the State of Washington. As discussed above, there cannot be any single professional standard for how Cell Savers are used with Jehovah’s Witness patients because each patient is “very highly individually dependent.”

As plaintiff points out, Dr. Spiess did testify that set up of the Cell Saver is the same at all institutions around the county. App Brief, pg 30; CP 1766-1767. This is not in dispute. The setup of the Cell Saver in this case appears to be the same as the setup Dr. Spiess is talking about. The issue in this case is not how the device is set up, but rather what parts of the setup (i.e. suction line vs reinfusion line) are relevant to the continuous circuit beliefs of Jehovah’s Witnesses.

Dr. Spiess’ opinions are conclusory, unsupported by the facts and reflect nothing more than his own personal opinion. Such expert opinions are to be ignored and cannot create an issue of fact on summary judgment.

Rothweiler v. Clark County, 108 Wn.App. 91, 100-01, 29 P.3d 758 (2001). The trial court did not err in dismissing plaintiff's claim that Dr. Morehart was negligent for failing to direct Ms. Hendrix to continue using the Cell Saver device after the circuit was broken and the tubing was contaminated.

3. The Trial Court Correctly Directed Summary Judgment on All Claims Because Plaintiff Did Not Prove Causation.

Causation must be affirmatively proven by the plaintiff based on non-speculative evidence. A plaintiff cannot meet his or her burden of proof simply by showing that an alleged breach of a duty *might* have caused the alleged injury or that in the absence of the alleged breach the injury *might not* have occurred. *Miller v. Likins*, 109 Wn. App. 140, 145, 34 P.3d 835, 837 (2001).

When a plaintiff attempts to meet his or her burden of proving causation through expert testimony, the expert's testimony must be based on established facts. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689, 693 (1993).

In *Miller v. Likins, Supra*, a boy who was riding his skateboard at a curve in the road was struck by a car. *Miller*, 109 Wn. App. at 143. There was conflicting witness testimony about where the boy was at the time of the accident. *Id.* The plaintiff in *Miller* alleged that if the City had taken

additional precautions, such as installing raised pavement markings, the driver would have been likely to be more alerted to the possible presence of pedestrians, and would have avoided the collision. *Id.* at 147. The plaintiff submitted expert testimony supporting its allegations on a “more probable than not basis.” *Id.* The trial court struck the expert’s testimony and granted the city summary judgment dismissal.

The court explained that there was no direct or circumstantial evidence showing that the driver was in fact confused or misled by the condition of the roadway. *Id.* at 147. Rather, the most that the plaintiff was able to show was that the accident might not have happened had the City installed additional safeguards. *Id.* The court held that the expert’s conclusion could only be characterized as “speculation or conjecture.” *Id.* (*Emphasis added.*) Accordingly, summary judgment was proper because plaintiff failed to satisfy her burden of producing evidence showing that the City’s negligence proximately caused the alleged injuries. *Id.* See also *Moore v. Hagge*, 158 Wn. App. 137, 151, 241 P.3d 787, 794 (2010) (causation too speculative when facts of how and why accident occurred cannot be established).

In this case, plaintiff failed to present non-speculative evidence that Dr. Morehart’s actions (or any of the defendants’ actions) in fact caused Ms. Baumgartner’s death.

a) Even if Operational the Cell Saver Would Not Have Been Able To Collect Sufficient Blood.

(1) Suction Not Sufficient.

Both of the surgeons testified that when the Cell Saver was in operation, it did not provide enough suction to effectively remove the blood necessary to clear the surgical field. CP 552, 1390. The operative report stated:

“We were unable to remove the blood quickly enough to see the base of the tumor. We were somewhat limited in our ability to suck due to the lower suction required on the Cell Saver device.” CP 844 (emphasis added).

Dr. Spiess confirmed that during instances of heavy bleeding, like the bleeding that occurred in this case, it would take multiple Cell Saver devices to suction enough blood to clear the surgical field. CP 1813.

“It appears in this case that there was a disconnect, a vascular disconnect at the aorta. I will put it to you that I don't care what you have sucking, you can't keep up with that. If you open your aorta, you can have the best suction in the world, you are not going to keep up with it. There's going to be a large amount of blood that you just have to get control over.” CP 1813 (emphasis added).

In his second declaration, Dr. Spiess contradicts this testimony, suggesting that because the surgeons were in fact able to clear the blood with wall suction, lap pads and sponges, the source of the bleeding must have been from some source other than the aorta. CP 1644. He then speculates that if the aorta was not the source of the bleeding then the Cell

Saver would have been able to clear the surgical field. *Id.*

Dr. Spiess' opinion is speculative at best and relies on the unfounded assumption that, if operational, the Cell Saver, by itself, would have been able to, suction, process and reinfuse "most of" the entire amount of blood lost during the operation quickly enough for the surgeon to prevent Ms. Baumgartner from bleeding out on the table. This assumption is not based on any actual facts of the case and directly contradicts Dr. Spiess' own prior sworn testimony regarding the source of the bleed and the testimony of the other witness's in the case. It also contradicts the operative report of the vascular surgeon, Dr. Huang, who was called in to assist with the massive bleed which states in part:

"During the course of the procedure there was significant hemorrhage from the aorta near the left renal artery which led to "open conversion."

CP 388.

(2) Cell Saver Not Available During the Bleed.

Dr. Spiess' opinion also ignores the undisputed fact that Ms. Hendrix testified that the entire Cell Saver device was contaminated because she saw the suction wand sucking while it was on the ground. CP 148. Dr. Morehart was at the patient's head, behind drapes and could not see the suction wand. At the time that the wand was discovered outside of the sterile field, Dr. Morehart was occupied with monitoring the patient's

declining vitals and doing his best to stabilize the rapidly deteriorating patient. Why plaintiff believes that Dr. Morehart should have ignored Ms. Hendrix declaration that the entire circuit was contaminated is unclear.

Dr. Spiess ignores the timing of events and the fact that the Cell Saver device could not be used for a period of time because it was contaminated. Assuming for a moment that the surgical team chose to ignore Ms. Baumgartner's closed circuit directive, it still would have taken up to twelve minutes to replace the contaminated suction tube and the other contaminated components of the Cell Saver device. There is nothing in the record to support, and it is ridiculous to speculate that when the suction tube was seen outside of the sterile field the surgeons would have done nothing and allowed the bleeding to continue while they waited for the suction tube to be replaced and/or the Cell Saver to be reset. Rather, the testimony in the case is that the surgeon directed the Cell Saver technician to get the machine operable but had to use other means to clear the blood while that was occurring. The surgeons testified that they needed to clear the blood *immediately* and did not have time to wait for the machine to be made sterile or the circuit reset. CP 141-142. They did not have time to wait 2 minutes or 12 minutes. That is why they used wall suction, lap pads and sponges to clear the blood.

Even if the Cell Saver had been available, there is no way to know

that Ms. Baumgartner would have survived. Dr. Spiess does not account for the amount of blood removed by the wall suction, lap pads and sponges. Dr. Spiess' opinions are not based on the facts of the case but rather rely on unsupported speculation about the amount of blood loss, the timing of the blood loss, the origin of the blood loss and speculation about how much blood could have been suctioned, processed and reinfused if the Cell Saver could have been put back in service after only replacing the suction hose or after being reset up entirely. Stating multiple unsupported inferences is not sufficient to raise issues of fact. *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 314, 323 (1940) ("Presumptions may not be pyramided upon presumptions, nor inference upon inference"); *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 314, 323 (1940) ("the opinions of expert witnesses are of no weight unless founded upon facts in the case"). The trial court did not err in granting Dr. Morehart's Motion for Summary Judgment.

b) Direction By Dr. Morehart To Continue Using The Cell Saver Despite The Contamination And Circuit Breach Would Not Have Changed The Outcome Because Such Direction Was Already Given By The Surgeon.

Dr. Spiess' assertion that Ms. Baumgartner might have survived if Dr. Morehart had directed the Cell Saver technician to employ new

suction tubing and continue using the Cell Saver is speculative, at best. According to the surgeon, Dr. Anast, the Cell Saver technician was in fact directed by him to replace the suction tubing and continue using the Cell Saver device, but she refused to do so out of concern for using contaminated equipment and violating Ms. Baumgartner's religious beliefs. Dr. Anast testified:

“And at that point the Cell Saver technician came back into the room and I requested that we continue to use the suction, and she determined that the circuit had been broken and would not allow me to continue to use the suction device.” CP 140.

Dr. Spiess relied on that testimony as part of the basis for his opinions in the case. CP 1655. In fact Dr. Spiess testified that Ms. Hendrix had a duty to abide by the direction of the surgeon and in fact failed to comply with the surgeon's directions. CP 1655. Plaintiff's claim against Dr. Morehart relies on the speculative suggestion that if Dr. Morehart had “directed” that the Cell Saver be restarted after replacing only the suction tubing, somehow that would have altered the outcome.

Plaintiff's argument is highly speculative because there is no reason to believe that a duplicative direction by Dr. Morehart would have altered the outcome in anyway, given the undisputed fact that Ms. Hendrix was directed by Dr. Anast to do exactly the same thing.

B. The Trial Court Correctly Denied Plaintiff's Motion For Summary Judgment.

1. Assumption Of Risk Does Apply to this Case.

To establish express or implied primary assumption of risk⁴, there must be evidence that (1) the plaintiff had a subjective understanding of the presence and nature of the specific risk, and (2) voluntarily chose to encounter the risk. *Kirk v. Washington State Univ.*, 109 Wn. 2d 448, 453, 746 P.2d 285, 288 (1987). Express assumption of risk and implied assumption of risk require the same elements of proof. *Id.* The only difference between the two doctrines is the additional ceremonial weight that exists with an express agreement. *Id.* In *Boyce v. West*, 71 Wn. App. 657, 666-667, 862 P.2d 592 (1999), the court explained that both express and implied assumption of risk act as a form of release of liability. The court explained:

“Identical in result to a release of liability which exculpates for ordinary negligence if it occurs, express and primary implied assumption of risk exculpate by shifting the duty of care from the defendant to the plaintiff, thus preventing negligence from occurring. Express assumption of risk bars a claim resulting from risks actually assumed by the plaintiff; implied primary assumption of risk bars a claim resulting from specific known and appreciated risks.”

⁴ Implied reasonable and unreasonable secondary assumption of risk are treated as alternative names for comparative negligence. *Kirk v. Washington State Univ.*, 109 Wn. 2d 448, 454, 746 P.2d 285, 289 (1987); *Scott By & Through Scott v. Pac. W. Mountain Resort*, 119 Wn. 2d 484, 497, 834 P.2d 6, 13 (1992).

When the plaintiff has knowledge of a risk,⁵ understands its nature, and voluntarily chooses to encounter the risk, the plaintiff's consent to the known risk negates any duty the defendant "would otherwise have owed to the plaintiff." *Home v. N. Kitsap Sch. Dist.*, 92 Wn. App. 709, 719, 965 P.2d 1112, 1118 (1998). A patient who refuses reasonable medical treatment assumes the risk of injury caused by the refusal. *Shorter v. Drury*, 103 Wn. 2d 645, 658, 695 P.2d 116, 123 (1985). The facts of the *Shorter* case are nearly identical to the facts in this case and the *Shorter* case is controlling.

a. Shorter v. Drury.

Shorter v. Drury, 103 Wn.2d 645, 695 P.2d 116 (1985) was a wrongful death medical malpractice action. In *Shorter*, a patient, for religious reasons, expressly refused to permit any blood transfusions

⁵ The knowledge requirement of an assumption of risk defense is knowledge of the particular hazard, not knowledge of every variable that might affect the likelihood of harm. See *Hvolboll v. Wolff Co.*, 347 P.3d 476 (Wash.Ct.App. Feb. 12, 2015) (describing the *Shorter* case as "holding that the risk of dying from bleeding if a blood transfusion is refused was the specific risk that was voluntarily assumed, not any more particularized assessment of the impending medical procedure"). Thus, in this case, like *Shorter*, an assumption of risk defense only requires proof that Ms. Baumgartner had knowledge of the risk that she could bleed during the surgery and die if she refused a blood transfusion. Defendants do not need to prove that Ms. Baumgartner had knowledge of every possible specific event that could occur during surgery that could lead to the need for blood transfusions.

during or after a planned surgical procedure. *Shorter*, 103 Wn.2d at 647. The surgical procedure carried a risk of bleeding and the patient understood that if she bled during the surgery, and continued to refuse blood transfusions, she could die. *Id.* at 651. During the procedure, the surgeon negligently caused profuse bleeding. *Id.* at 648. It was undisputed that if the patient had not refused blood transfusions, the surgeon's mistake would have been correctable and would not have resulted in the patient's death. *Id.* at 648. Because the patient refused blood transfusions, she died. When the patient's husband sued the surgeon for wrongful death, the surgeon asserted the defense of assumption of risk. The jury found that the surgeon was 25% at fault and that the patient assumed 75% of the risk of her own death. *Id.* at 649.

On appeal, the Washington Supreme Court confirmed that assumption of risk survives independent of the comparative negligence statute⁶ and affirmed the jury's conclusion that the patient assumed the risk of her death. *Id.* at 659. The *Shorter* Court ruled that, though the patient did not assume the risk of the surgeon's negligence, she did "voluntarily assume the risks relating to the refusal of transfusions of blood or blood products." *Id.* at 654. The court went on to explain:

⁶ The comparative negligence statute applicable in *Shorter* was the pre-1981 version. However the changes made to the comparative negligence state in 1981 do not affect the *Shorter* court's analysis of the assumption of risk doctrine.

“The risk of death from a failure to receive a transfusion to which the Shorters exposed themselves was created by, and must be allocated to, the Shorters themselves.” *Id.* at 658.

In this case, like in the *Shorter* case, there is evidence that Ms. Baumgartner expressly or, at the very least, impliedly assumed the risk that she could die from blood loss during her surgery if she refused to allow blood transfusions. Ms. Baumgartner refused to allow blood transfusions “under any circumstances,” even if her health care providers believed that blood transfusions were necessary to save her life. CP 873-874. There is evidence that Ms. Baumgartner understood that even with the use of the Cell Saver device, she still faced that risk that she could bleed during the surgery, and that if she experienced enough bleeding she could die if her doctors were not permitted to use all reasonably accepted medical techniques. CP 812-813, 815, 821, 824-825, 826, 827. And there is evidence that Ms. Baumgartner voluntarily encountered that risk by making the fully informed and voluntary choice to refuse to allow her doctors to use certain medical techniques that could have saved her life. *Id.*

The evidence indicates that Ms. Baumgartner had a subjective understanding of the presence and nature of the specific risk that she could die due to blood loss if she refused reasonable medical care and that she voluntarily chose to encounter that risk and died as a result of her choice.

The record contains significant support for Respondent's argument that Ms. Baumgartner expressly or impliedly assumed the risk that she could die during the surgery due to blood loss if she refused to permit blood transfusions and, therefore, her estate is not entitled to recover monetary damages from these defendants for losses caused by risks that Ms. Baumgartner knowingly assumed liability for.

2. There Were Issues Of Fact As To Ms. Baumgartner's Contributory Fault Because She Voluntarily Refused Reasonable Medical Care.

Contributory fault occurs when a plaintiff's failure to use ordinary care contributes to the plaintiff's alleged injury. *Honegger v. Yoke's Washington Foods, Inc.*, 83 Wn. App. 293, 296, 297, 921 P.2d 1080, 1082 (1996) (shoplifter contributorily negligent for injury received when trying to evade store security); WPI 10.01; WPI 10.02. Every plaintiff is required to use ordinary care for his or her own protection. *Id.* A plaintiff who voluntarily engages in behavior that increases the risk of injury, can be held to be predominantly liable for their injury even if the plaintiff's behavior was not the direct cause of the injury. *Id.*; *See also Geschwind v. Flanagan*, 121 Wn. 2d 833, 839, 854 P.2d 1061, 1064 (1993) (vehicle passenger found to be 70% at fault for choosing to ride with an intoxicated driver, even though driver directly caused the accident); RCW 4.22.015 (defining fault as including "failure to avoid an injury or mitigate

damages”).

Whether a plaintiff used ordinary care for her protection is judged objectively. *Ramey v. Knorr*, 130 Wn.App 672, 676, 124 P.3d 314 (2005); *Ridge v. Kladnick*, 42 Wn.App 785, 788, 713 P.2d 1131 (1986). That is, a person’s internal mental state or beliefs are not determinative of whether ordinary care was exercised. *Id.* Ordinary care is that care which an objectively reasonable person would exercise for their own protection.

A plaintiff’s subjective religious beliefs cannot act to absolve the plaintiff of the duty to use ordinary care to protect herself or shield the plaintiff from responsibility for voluntary choices that increase the plaintiff’s risk of injury. A plaintiff who chooses not to use ordinary care in protecting herself, even if the choice is based on a personal religious or philosophical belief, cannot recover from others those damages caused by her own voluntary choice not to protect herself.

In this case, the record supports the affirmative defense that a patient using ordinary care would allow her physicians to provide any reasonable medically accepted treatment, when such treatment is needed during surgery to save the patient’s life. The record also supports the affirmative defense that Ms. Baumgartner is liable for voluntarily engaging in behavior (i.e. limiting available medical treatments that her physicians could use) that increased her risk of death and ultimately

directly caused her own death. Thus, Ms. Baumgartner contributed to her own death through her refusal to allow all available medical techniques. To the extent the jury finds that Ms. Baumgartner's own choices caused or contributed to her death, any damages to the estate should be reduced accordingly. RCW 4.22.020.

Based on the record before this court, a jury could clearly find that Ms. Baumgartner contributed to her own death or injury and that some or all of the damages of her estate should be allocated to the estate. The trial court did not err in denying plaintiff's motion for summary judgment as to defendant's comparative fault defense.

3. Comparative Fault And Assumption Of Risk Apply To Ms. Baumgartner's Heirs.

A defendant in a wrongful death action is entitled to the benefit of all defenses that would have been available against the decedent, had the decedent lived. *Johnson v. Ottomeier*, 45 Wn.2d 419, 420, 275 P.2d 723 (1954); *See also Deggs v. Asbestos Corp. Ltd.*, 188 Wn. App. 495 (2015) ("it has been held that the action for wrongful death is extinguished by an effective release executed by the deceased in his lifetime") (quoting *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 580-81, 44 P.2d 193 (1935)). Thus, to the extent that assumption of risk would have been a viable defense to claims by Ms. Baumgartner had she suffered some injury short

of death, assumption of risk is also available as a defense against the claims brought by Ms. Baumgartner's beneficiaries in this wrongful death case. *Johnson*, 45 Wn.2d at 420.

This principle was applied in *Boyce v. West*, 71 Wn. App. 657, 667, 862, P.2d 592 (1993). In *Boyce* a decedent died during a scuba diving class and the student's beneficiaries brought a wrongful death action. *Id.* at 659. The defendants asserted the defense of assumption of risk based on a release that the student had signed before the class. *Id.* Pursuant to the release, the decedent acknowledged the possibility of death from scuba diving and assumed "all risks in connection with [the scuba diving] course ... whether foreseen or unforeseen..." *Id.* at 667. On appeal, the Court of Appeals upheld the trial court's grant of summary judgment and specifically held that the decedent's assumption of the risk which caused his death barred the wrongful death lawsuit that had been brought by the decedent's beneficiaries. *Id.*

The correct results reached by courts in *Shorter*, *Boyce* and other cases stem from the nature of the defense of assumption of risk and the nature of wrongful death actions. RCW 4.20.010 authorizes wrongful death actions only when the person's death is caused by a "wrongful act" of another. *See also Johnson v. Ottomeier*, 45 Wn.2d 419, 421, 275 P.2d 723 (1954) ("If the tort-feasor breached no duty owing to decedent, or if

decedent proximately contributed, through consent, negligence, or unlawful acts, to his own injury, it is reasonable to say that his death was not wrongful in the contemplation of the statute”). Assumption of risk operates like a release from liability binding the decedent and the decedent’s beneficiaries. *Boyce*, 71 Wn. App., at 666-667.

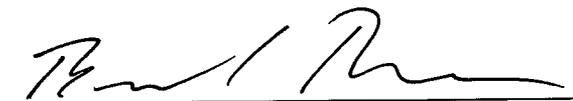
The beneficiaries in a wrongful death action are subject to any defenses that would have been applicable to direct claims by the decedent. In this case, to the extent that the jury finds that Ms. Baumgartner contributed to her own death and/or assumed the risk that she could die during her surgery due to her refusal to accept blood transfusions then these affirmative defenses apply to Ms. Baumgartner’s beneficiaries.

IV. CONCLUSION

Dr. Morehart and CAG respectfully submit that all of the trial court’s ruling as to Dr. Morehart were appropriate. The trial court’s ruling on those issues should be affirmed.

DATED this 10th day of MAY, 2016.

HODGKINSON STREET MEPHAM, LLC



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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 2016, I served the foregoing BRIEF OF RESPONDENTS COLUMBIA ANESTHESIA GROUP, P.S. AND MARK A. MOREHART, MD on the following:

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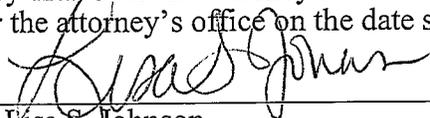
by the following indicated method(s):

by **mailing** a full, true and correct copy thereof in a sealed first-class postage prepaid envelope, addressed to the foregoing attorney at the last known office address of the attorney, and deposited with the United States Post Office at Portland, Oregon on the date set forth above.

by causing a full, true and correct copy thereof to be **hand delivered** to attorney William Nelson at the last known address listed above on the date set forth above.

by sending a full, true and correct copy thereof via **overnight mail** in a sealed, prepaid envelope, addressed to attorney William Nelson/Laurence Wagner as shown above on the date set forth above.

by **faxing** a full, true and correct copy thereof to the attorney at the fax number shown above, which is the last-known fax number for the attorney's office on the date set forth above.



Lisa S. Johnson