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Division II
State of Washington
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No. 506629

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DENISE REAGAN,

Appellant,

v.

ST. ELMO NEWTON III, M.D.,

Respondent,

RESPONSE BRIEF OF ST. ELMO NEWTON III, M.D.

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I. INTRODUCTION

This is a medical malpractice case arising from an injury that Denise Reagan sustained when she attended an Independent Medical Examination (IME) with Dr. Newton, an orthopedist. The exam occurred toward the end of her treatment relating to her worker's compensation injury. She subsequently sued Dr. Newton for medical malpractice, contending that during the IME he "manipulated plaintiff's hip in a manner that subsequently caused injury." Dr. Newton moved for summary judgment dismissal of this claim because she failed to secure expert testimony establishing that his manipulation and testing of her hip during the exam breached the standard of care, and that such breach proximately caused her injuries.

In response, Reagan, relying on RCW 7.70.030 (the medical malpractice statute), argued for the first time the unpled claims that: (1) Dr. Newton breached a promise not to injure her; and (2) she failed to consent to the IME. She also argued for the first time the unpled claim that Dr. Newton committed the intentional tort of medical battery. Finally, she argued that the medical malpractice statute did not apply because Dr. Newton was purportedly not providing "health care" at the time of her injury.

The trial court dismissed all claims. On appeal, Reagan abandons the “breach of a promise” and “informed consent” theories. Instead, she (1) focuses on her unpled claim for medical battery; and (2) also contends that—as a matter of law—Dr. Newton’s examination, diagnoses, and proposed treatment plan did not constitute “health care,” to trigger application of the medical malpractice statute.

Because Reagan failed to provide expert testimony that Dr. Newton breached the standard of care when he performed hip maneuvers during his examination, the trial court properly dismissed her claim. Dr. Newton was providing health care to Reagan because he was exercising that degree of care, skill, and learning expected of a reasonably prudent health care provider when he medically examined Reagan for the purpose of determining: (1) her medical restrictions in returning to work; (2) whether she needed further treatment, and if so, whether it was curative or rehabilitative; (3) her treatment goals; and (4) the length and prognosis of her treatment,

For these reasons Dr. Newton respectfully requests that the Court of Appeals affirm the trial court’s dismissal.

II. NO ASSIGNMENTS OF ERROR

The trial court did not err when it dismissed Denise Reagan's negligence/medical malpractice claim due to her failure to produce supportive expert testimony. Likewise, the trial court did not err when it dismissed her unpled claim for medical "battery."

On appeal, Reagan neither assigns error nor addresses the trial court's dismissal of her unpled informed consent and breach of promise claims. Accordingly, those claims are not subject to appellate review.

III. ISSUES

Should the Court affirm the trial court's dismissal of Denise Reagan's medical malpractice claim against Dr. Newton because she failed to provide any expert testimony establishing that: (1) Dr. Newton breached the standard of care in examining her; and (2) such breach proximately caused her alleged injuries?

Should the Court affirm the trial court's dismissal of Denise Reagan's unpled claim for medical "battery"?

IV. RESTATEMENT OF THE CASE

A. Denise Reagan Sustained an On-the-Job Injury.

On June 13, 2013, Denise Reagan was working as a cashier at Chuck's Foods when she sustained an on-the-job injury. Clerk's

Papers (CP) at 11. Reagan handed two watermelons to a customer over the cashier counter when she felt immediate back pain. *Id.* That same day she filed a worker's compensation claim and visited Dr. Knowles with Family Care and Urgent Medical Clinic. CP at 11. He diagnosed her with a thoracic sprain. *Id.* She subsequently participated in chiropractic treatment and physical therapy. CP at 16.

On November 7, 2013, her primary care physician, orthopedist Fred Bagares D.O., reviewed earlier CT and MRI imaging and opined that she had a "reactive stress fracture of the vertebral body." CP at 17. He prescribed a posture support brace and work-hardening physical therapy. *Id.* On February 21, 2014, Dr. Bagares related the stress fracture to the work incident with the watermelons. *Id.* On February 21, 2014, she was discharged from physical therapy because "maximum benefit [was] achieved." CP at 17.

Regan began light-duty work with Chuck's Foods. CP at 108 (47:17-19). At L&I's request, Reagan underwent an independent medical examination (IME) with two doctors: Dennis K.H. Chong, M.D., a physiatrist, and St. Elmo Newton III, M.D., an orthopedist,

on May 13, 2014. CP at 13. Dr. Chong interviewed Reagan about her medical concerns. CP at 97 (11:14-15); CP at 109 (50:17-23).

Reagan informed Dr. Chong that she had a previous work-related injury to her left hip, which resulted in surgery in 2008. CP at 109 (50:24-51:7). Previously, L&I determined that Ms. Reagan suffered a permanent hip injury and declared that she was 5% disabled in her left hip. CP at 27 (31:11-22).

B. Dr. Newton Conducted an Independent Medical Exam.

L&I required that Dr. Newton, as an orthopedist, hold a current board certification in his specialty. CP at 185. The L&I claims manager informed Dr. Newton that the stated purpose of the exam was to “determine the worker’s current work restrictions” including whether Reagan could return to her job as a cashier; to determine if the treatment was concluded; and if she had a permanent impairment as a result of her injury. CP at 161. The claims manager then made claim-specific requests, namely:

- What medical/physical restrictions, if any, prevent her from returning to work; which restrictions are related to her industrial claim versus non-industrial

conditions; and whether those medical restrictions are permanent or temporary (CP 162);

- What is her ability to physically perform the jobs designated on the job analyses, based on The Medical Examiner's Handbook (*Id.*);

What were Dr. Newton's treatment recommendations, including:

- Whether the medical treatment is considered curative or rehabilitative (*Id.*);
- Clearly stating the treatment goals (*Id.*);
- Estimating the length and prognosis of her medical condition (*Id.*); and
- Providing an impairment rating for the medical conditions of a thoracic sprain and cervical and thoracic nonallopathic lesion (*Id.*).

At the May 13, 2014 IME, Reagan reported pain in her mid-back, neck, left lateral pelvis, and lateral thigh, as well as her left foot. CP at 13. She was "asked at the time of the examination not to engage in any physical maneuvers beyond what she was able to tolerate or which she believed were beyond her limits or which could cause harm or injury." CP at 13; CP at 109 (51:24-52:5).

She told Dr. Newton about her prior 2008 hip injury. CP at 109 (52:15-22). When she arrived at the IME, she was experiencing moderate hip pain, CP at 109 (52:23-53:2), and completed a pain diagram indicating aching pain 7/10, on the left side of her back, hip, and thigh area. CP at 198.

Reagan was advised that her medical evaluation “could be stopped at any time and not to allow the evaluation to continue if it caused pain.” *Id.* Her sister-in-law was with her throughout the medical examination. CP at 18. During Dr. Newton’s medical examination, Reagan brought her leg up to 90 degrees of flexion at the hip. She reported discomfort during this maneuver, which was appropriately reflected in the IME report:

Left hip abduction with reported discomfort to the gluteus medius region. Abduction of 40 degrees, adduction of 30 degrees, hip flexion to 90 degrees with report of discomfort to the left groin.

FADIR stress was positive to the left hip.

CP at 19. Fortunately, Reagan “moved around the room fluently without evidence of distress. She departed the examination in a manner and condition as when she first arrived.” *Id.*

Dr. Newton conducted Reagan’s examination utilizing the skills which he had been taught in medical school, his training, and his practice. CP at 203-12. His examination included a FADIR test

(flexion, adduction, and internal rotation). CP at 104:12 to 105:1. Reagan contends that Dr. Newton's administration of the FADIR test negligently caused her injury.

C. Reagan Subsequently Had Ongoing Hip Pain.

Almost one month later, Reagan complained of back and left groin/hip pain when she met with her primary care physician, Dr. Bagares. CP at 36. An MRI in September 2014 revealed that she did not suffer from any traumatic injury, and instead had degenerative arthritis in her left hip. CP at 38.

On January 23, 2015, Bruce Blackstone, M.D., an orthopedic surgeon, conducted another IME for her June 13, 2013 L&I claim. CP at 121-30. Dr. Blackstone, dictating from an August 22, 2014 note by Dr. Colville, stated that "osteoarthritis of the left hip was secondary to her left hip injury back in 2008, which apparently was a work-related injury. He [Dr. Colville] felt that in terms of her Worker's Comp status at this time, her left hip problem was unrelated to her recent back injury and was related to her prior left hip injury and subsequent surgery. Degenerative arthritis in the hip was a frequent long-term consequence of an injury to the acetabular labrum." CP at 125.

Dr. Blackstone opined that he “agrees with the treating physicians, who have stated that her acute onset of left hip pain that occurred during the IME of May 13, 2014, was an aggravation of pre-existing arthritis, which is actually attributable to her work-related injury suffered back in 2008.” CP at 127-28. Notably, Dr. Blackstone did not opine that Dr. Newton’s hip manipulation breached the standard of care, and that such breach proximately caused her injuries.

Dr. Blackstone concluded that Reagan’s “underlying arthritis is casually related to the injury sustained in April 2008[.]” CP at 128. He also opined that he was “skeptical that this incidence during the IME [Dr. Newton’s], which aggravated her osteoarthritis, caused any structural worsening of her hip arthritis.” CP at 130.

Reagan’s L&I claim was eventually closed; she testified that she did not receive any type of settlement because L&I had “overpaid” her. CP at 31 (63:23-64:12). Reagan eventually requested to return to work full-time at Chuck’s Foods with weight restrictions, but was terminated for reasons unrelated to her physical limitations.

Since the late 1990s, Reagan has been a care provider to her mother and receives compensation through the State of

Washington. CP at 28 (36:15-37:10); CP at 32 (86:9-11). She currently works 110 hours a month providing care services to her mother. CP at 28 (36:15-37:10). This includes preparing meals, picking up medication, taking her mother to doctor appointments, and being a “stand-by assist” when her mother is taking a shower. CP at 29 (39:14-40:5). Ms. Reagan testified that she has continued assisting her mom as a care provider throughout the time of the subject L&I claim. CP at 30 (48:8-11).

On October 30, 2015, Reagan underwent a third IME by Anthony Woodward, M.D. CP at 40. Dr. Woodward determined that Reagan’s June 13, 2013 thoracic sprain had resolved (CP at 47-48), and that she currently suffers from osteoarthritis of her left hip, unrelated to work. CP at 47. He concluded that Reagan has some permanent partial impairment of the left hip due to osteoarthritis of the left hip. CP at 49. She had external rotation to 20 degrees, which placed her in the mild category with a 2% permanent partial impairment of the left lower extremity because of loss of range of motion attributed to osteoarthritis of the left hip. CP at 49.

D. Reagan Sued Dr. Newton for Medical Malpractice.

On December 17, 2015, Reagan sued Dr. Newton for medical malpractice, alleging that Dr. Newton manipulated her hip during his May 13, 2014, medical exam in a manner that subsequently caused injury. CP at 2:1-2. Over the course of litigation, Reagan provided no expert testimony to support the elements of her claim—namely that Dr. Newton breached the standard of care when he manipulated her hip, which proximately caused her injuries—therefore, Dr. Newton moved for summary judgment dismissal.

In response, Reagan—for the first time—asserted claims for “lack of consent” and “breach of promise not to injure under RCW 7.70.030(2).” CP at 78:11-12. Reagan then recast her lack of informed consent claim to one of “battery,” an intentional tort. CP at 79:16-25.

On June 30, 2017, the trial court dismissed Reagan’s claim(s), with prejudice. This appeal follows. In her opening brief, Reagan abandons the trial court’s dismissal of her unpled claims for (1) breach of a promise; and (2) lack of informed consent. Instead, she focuses on whether Dr. Newton’s medical examination and assessment of her conditions (physical restrictions on her

ability to return to work, whether she could perform the jobs described in the job analyses, and treatment recommendations (curative, rehabilitative, goals, length and prognosis) constitutes “health care,” which encompasses medical malpractice claims. She also argues that Dr. Newton’s manipulation of her hip during his examination was an intentional medical “battery.” App. Opening Br. at 10-25.

V. LEGAL ARGUMENT

A. The Court Applies De Novo Review to Summary Judgment Proceedings.

CR 56(b) enables a defendant to move for summary judgment dismissing an action or any part thereof. The summary judgment procedure dispenses with the time and cost of litigating meritless actions through trial. *W.G. Platts, Inc. v. Platts*, 73 Wn.2d 434, 442-43, 438 P.2d 867 (1968).

A defendant may move for summary judgment without supporting affidavits on the grounds that the plaintiff lacks competent evidence to support an essential element of her case. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 23-24, 851 P.2d 689 (1993) (citations omitted). In a medical malpractice case, expert testimony is usually required to establish standard of care and

causation. *Harris v. Groth*, 99 Wn.2d 438, 451, 663 P.2d 113 (1983). Expert testimony is also required to establish lack of informed consent. *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 634, 784 P.2d 1288 (1990).

Once Dr. Newton demonstrates that Reagan lacks admissible expert testimony, “the burden shifts to the plaintiff to produce an affidavit from a qualified expert witness that alleges specific facts establishing a cause of action. Affidavits containing conclusory statements without adequate factual support are insufficient to avoid summary judgment.” *Guile*, 70 Wn. App. at 25. Consequently—and as happened here—medical negligence and informed consent claims lacking supportive expert testimony cannot survive summary judgment.

A trial court’s order granting summary judgment is reviewed *de novo*. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). Dr. Newton was entitled to summary judgment because there is “no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* (quoting CR 56(c)). Here, Reagan did not present any genuine issues of material fact. Instead, she argues that the medical malpractice

statute does not apply as a matter of law because Dr. Newton was not providing health care, and that he committed a medical battery.

B. Reagan Abandoned and Waived Two Theories on Appeal.

In the trial court, Reagan argued in response to summary judgment and at oral argument that Dr. Newton: (1) breached a promise that an injury would not occur (RCW 7.70.030(2)); and (2) failed to provide informed consent (RCW 7.70.030(3)). CP at 78:15-79:14.

On appeal, she assigned no error to the trial court's dismissal on these two theories, nor did her opening brief address either theory. There are consequences for this decision. RAP 10.3(a)(6) requires an appellant's brief to include "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." When an appellant fails to argue an issue in her opening brief, she may not cure the defect in her reply brief. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (citing *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990)) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration."); RAP

10.3(c) (“A reply brief should be limited to a response to the issues in the brief to which the reply brief is directed.”); RAP 12.1 (“Except as provided in section (b), the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs.”) Based on the foregoing, Reagan waived two theories on appeal. Accordingly, Dr. Newton does not address those issues.

C. Chapter 7.70 RCW Exclusively Governs Actions Alleging Injury From Health Care.

RCW 7.70 exclusively governs all Washington civil actions based in tort, contract, or otherwise from damages arising from health care after June 25, 1976. RCW 7.70.010. “RCW 7.70 modifies procedural and substantive aspects of all civil actions for damages for injury occurring as a result of health care, regardless of how the action is characterized.” *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335 (1999); see also *Orwick v. Fox*, 65 Wn. App. 71, 86, 828 P.2d 12 (1992) (“By its terms, RCW 7.70 applies to all actions against health care providers, whether based on negligence or intentional tort.” (emphasis added)).

Health care is “the process in which [a health care provider] utilize[es] the skills which [he or she] has been taught in examining.

diagnosing, treating or caring for” the patient. *Branom*, 94 Wn. App. at 970-71 (citations omitted) (emphasis added).

Here, Dr. Newton utilized his learned medical skills in examining and diagnosing Reagan’s medical conditions. Reagan suffered an on-the-job injury and L&I specifically requested that an orthopedist examine her to determine her work restrictions; confirm whether her treatment was curative or rehabilitative, with clearly stated treatment goals; and estimate of the length and prognosis of her treatment. CP at 162. Dr. Newton also utilized his learned medical skills in examining and diagnosing Reagan’s medical conditions to determine what permanent impairment, if any, she had, resulting from her injury. *Id.* His examination included a FADIR test (flexion, adduction, and internal rotation) and Reagan contends that Dr. Newton’s administration of the FADIR test negligently caused her injury. Without exception, Washington courts have concluded that this type of conduct constitutes the administration of health care under RCW 7.70.

The Legislature has expressly limited medical malpractice actions against health care providers “to claims based on the failure to follow the accepted standard of care, the breach of an express promise by a health care provider, and the lack of consent.”

Sherman v. Kissinger, 146 Wn. App. 855, 866, 195 P.3d 539 (2008) (citing RCW 7.70.030).

The statutory definition of “health care provider” is expansive. It includes physicians, physician assistants, nurses, and any “entity” employing such persons, such as hospitals. It also includes employees or agents acting in the course and scope of employment for such an entity. See *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn.2d 136, 144, 341 P.3d 261 (2014) (citing RCW 7.70.020(1)).

It is undisputed that a claim of failure to follow the accepted standard of care does not require a physician-patient relationship.¹ RCW 7.70.030(1); *Eelbode v. Chec Med. Ctrs., Inc.*, 97 Wn. App. 462, 467, 984 P.2d 436 (1999) (holding that a physical therapist performing a preemployment physical examination had a duty to administer the test according to the accepted standards of care, notwithstanding the lack of a physician-patient relationship).

To survive summary judgment, Regan was required to establish a prima facie claim for medical negligence, namely, showing that (1) Dr. Newton breached the acceptable standard of

¹ Reagan utilizes a large portion of her opening brief explaining this undisputed concept. See Reagan’s Opening Br. at 10-14.

care during his medical exam and maneuvering of Reagan's hip (the FADIR test); and that (2) this breach was the proximate cause of her injuries. See RCW 7.70.040(1)-(2).

D. Dr. Newton Was Entitled to Summary Judgment Because Reagan Failed to Produce Competent Expert Testimony.

RCW 7.70.040 sets forth the necessary elements of proof for a medical negligence claim based on a breach in the standard of care:

- (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;
- (2) Such failure was a proximate cause of the injury complained of.

RCW 7.70.040.

As a threshold matter, to defeat a dispositive motion, Reagan needed to produce admissible expert testimony

establishing that: (1) Dr. Newton, as an orthopedist, breached the applicable standard of care during his medical examination of Reagan, namely his manipulation of her hip during the FADIR test; and (2) the breach proximately caused her injuries. *Harris*, 99 Wn.2d at 449 (“expert testimony will generally be necessary to establish the standard of care . . . and most aspects of causation”); *Shoberg v. Kelly*, 1 Wn. App. 673, 677, 463 P.2d 280 (1969) (affirming summary judgment dismissal of medical negligence claims on the grounds that “plaintiffs were under the necessity of showing at the minimum through a medical expert, or otherwise, that they had or would have medical expert testimony to prove the applicable standard of care and its violation. Without such expert medical testimony plaintiffs could not prove negligence and could not recover”).

1. Reagan Submitted No Medical Expert Testimony on the Standard of Care.

An injury, standing alone, is insufficient to create an inference of negligence. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 831 P.2d 744 (1992); *see also* WPI 105.07 (“A poor medical result is not, by itself, evidence of negligence”). A plaintiff’s expert evidence must rise to the level of a “reasonable medical

certainty,” *Pelton v. Tri-State Mem. Hosp., Inc.*, 66 Wn. App. 350, 355, 831 P.2d 1147 (1992); thus, a plaintiff’s expert cannot merely state his or her personal opinion that he or she would have chosen a different course of action than the defendant health care provider. *White v. Kent Med. Ctr.*, 61 Wn. App. 163, 172, 810 P.2d 4 (1991). Further, a medical expert cannot base his or her testimony on speculation or conjecture. *Seybold v. Neu*, 105 Wn. App. 666, 681, 19 P.3d 1068 (2001).

The medical expert witness generally must practice in the defendant’s relevant specialty. *Young v. Key Pharm.*, 112 Wn.2d 216, 229, 770 P.2d 182 (1989). In *Young*, the Supreme Court noted, “not even a medical degree bestows the right to testify on the technical standard of care; a physician must demonstrate that he or she has sufficient expertise in the relevant specialty.” *Id.* (holding that a pharmacist may not provide medical expert testimony against a physician). In Washington, the general rule “is that a practitioner of one school of medicine is not competent to testify as an expert in a malpractice action against a practitioner of another school of medicine.” *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 612, 15 P.3d 210 (2001) (citation omitted); see also *Harris*, 99 Wn.2d at 448.

Here, Reagan failed to provide testimony from a competent orthopedic expert witness in that, on a more probable than not basis, Dr. Newton's May 13, 2014 medical examination, namely the hip maneuver test, fell below the standard of care. Instead, she submitted excerpts from her own self-serving testimony—premised on hearsay—that Dr. Newton intentionally hurt her, adding her statement that Dr. Newton said “that was the reaction I was looking for.” CP at 110 (55:12-15); Opening Br. at 3. First, this offer of “proof” deftly sidesteps the statutory elements of establishing a prima facie case under RCW 7.70.040. Second, her testimony contains hearsay statements that do not fall within the exceptions of ER 801(d)(2). Nor is she authorized to speak on Dr. Newton's behalf.

Dr. Newton denied any negligent care, as stated in his Answer and Affirmative Defenses. CP at 3-5. To survive summary judgment, Reagan may not rely merely on allegations or self-serving statements, but must set forth specific facts showing that genuine issues of material fact exist. CR 56(c). The trial court's dismissal should be affirmed.

2. Reagan Submitted No Medical Expert Testimony on Causation.

In addition to standard of care testimony, competent medical expert testimony is also required to prove causation. *Berger v. Sonneland*, 144 Wn.2d 91, 111-12, 26 P.3d 257 (2001) (requiring expert medical evidence as to causation where causation is not observable by lay person); *Reese v. Stroh*, 128 Wn.2d 300, 308, 907 P.2d 282 (1995) (“the general rule in Washington is that expert testimony on the issue of proximate cause is required in medical malpractice cases”); *McLaughlin v. Cooke*, 112 Wn.2d 829, 837, 774 P.2d 1171 (1989) (“[a]s a general rule, expert medical testimony on the issue of proximate cause is also required in medical malpractice cases”). The medical testimony must establish that the event more likely than not caused the injury, and must reasonably exclude as a probability every other hypothesis. *O’Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968).

Thus, in the trial court, Reagan needed to provide competent medical expert testimony that, more probable than not, Dr. Newton’s alleged breach in the standard of care caused her hip injury. Here, another IME physician, Dr. Blackstone, opines on January 21, 2015, that “the aggravation of the pre-existing left hip

osteoarthritis appears to have accelerated the worsening of the symptoms” however, “I am skeptical that this incident during the IME [by Dr. Newton], which aggravated her osteoarthritis, caused any structural worsening of her hip arthritis.” CP at 130. On October 30, 2015, yet another IME doctor, Anthony Woodward, M.D., opined that she had 2 percent permanent partial impairment of the left lower extremity “because of loss of range of motion attributed to osteoarthritis of the left hip.” CP at 49.

When construing all material evidence and reasonable inferences therefrom in a light most favorably to the nonmoving party (Reagan), Dr. Newton’s hip maneuver test on May 13, 2014—according to Dr. Blackstone and Reagan’s treating physician—triggered her “acute onset of left hip pain” which “was an aggravation of pre-existing arthritis,” attributable to her 2008 work-related injury. CP at 127-28. Notably, no physician or expert, including Dr. Blackstone, opines that Dr. Newton’s hip manipulation/FADIR test was a breach of the standard of care and that *it was this breach of that standard that proximately caused her injuries.*

Summary judgment dismissal was appropriate, as a matter of law. The trial court's grant of summary judgment dismissal should be affirmed.

E. A Health Care Provider Who Assesses a Medical Condition Provides “Health Care,” Regardless of the Context.

Reagan circuitously suggests—without any relevant legal authority—that a health care provider who performs an independent medical examination is not providing “health care” because that provider is not providing “treatment.” See App. Opening Br. at 14-17. However, neither the statutes and regulations, nor cases applying those statutes and regulations support such a strained and narrow view. Cases interpreting RCW 70.70.040, define “health care” as a “process” in which that provider utilizes the skills that he has been taught in “examining, diagnosing, treating or caring for” the patient. *Branom*, 94 Wn. App. at 970-71. Here, Dr. Newton was clearly examining and diagnosing Reagan.

Similarly, the Uniform Health Care Information Act (UHCIA) defines “health care” broadly as “any care, service, or procedure provided by a health care provider: (a) to diagnose, treat, or maintain a patient’s physical or mental condition.” RCW 70.02.010(14). In *John Doe G. v. Department of Corrections*, 197

Wn. App. 609, 391 P.3d 496, *review granted in part*, 188 Wn.2d 1008 (2017), the Court considered BLACK'S LAW DICTIONARY'S definition of "diagnosis," which is "[t]he determination of a medical condition (such as disease) by physical examination or by study of its symptoms." *Id.* at 622 n.42 (quoting BLACK'S LAW DICTIONARY 548 (10th ed. 2014)). In light of that definition, the Court concluded that "to assess a medical condition is to diagnose it." *Id.* Division II considered the same issue on nearly identical facts and also held that the evaluations are protected by the UHCIA. *John Doe P. v. Thurston Cty.*, 199 Wn. App. 280, 399 P. 3d 1195 (2017).

Under the UHCIA and *John Doe G.*, Dr. Newton provided medical services to L&I and to Reagan, and conducted the physical examination to medically assess Reagan's medical conditions, namely to determine: (1) if there were any medical/physical restrictions that prevented her from returning to work; if so, what; and whether those restrictions were temporary or permanent (CP at 20); (2) her ability to physically perform the job(s) described on the job analysis (CP at 21); (3) whether Reagan needed further treatment, including whether the treatment was curative or rehabilitative; treatment goals; and estimated length and prognosis (*Id.*); and (4) her impairment rating for a "thoracic sprain and

cervical and thoracic non-allopathic lesion.” *Id.* While Dr. Newton certainly did not provide “treatment” *per se* and acknowledged that Reagan was not his “patient” for purposes of the IME, he nevertheless exercised that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances” to respond to all of L&I’s claim-related medical questions concerning Reagan. See RCW 7.70.040(1). That brings Reagan’s claim squarely within the ambit of RCW 7.70 *et seq.*

Reagan’s speculation about what health care providers can and cannot do in the context of an L&I claim is erroneous, and oddly hostile. For example, she speculates that “the interests of the worker and that of the examiners are often adversarial.” App. Opening Br. at 15-16. Not true. “The purpose of an IME is to gather information, not to conduct an adversarial proceeding.” CP at 192. “The purpose of the IME is to provide information to assist in the determination of the level of any permanent impairment not to conduct an adversarial procedure.” *Id.* Claims managers at L&I rely on IME doctors for their “unbiased, objective examinations and

ratings” to help them administer claims “effectively and fairly.” CP at 173.

Reagan contends that IME doctors “cannot make treatment recommendations.” App. Opening Br. at 16. This statement is belied by the claims adjuster’s letter requesting treatment recommendations for Reagan. CP at 162. These are not general recommendations, but specifically, whether further treatment is needed; whether the treatment is considered curative or rehabilitative; the treatment goals; and an estimate of the length and prognosis. CP at 162.

Reagan speculates that IME doctors “cannot provide diagnoses.” App. Opening Br. at 16. In Reagan’s case, L&I asked Dr. Newton to provide an impairment rating for her “thoracic sprain and cervical and thoracic nonallopathic lesion.” CP at 162. Dr. Newton overlaid a ratings system for impairments onto specific diagnoses. *In other cases*, however, the “key reason” for an IME is to “establish a diagnosis” because “prior diagnoses may be controversial or ill-defined.” CP at 176.

Reagan authoritatively declares that “[t]hey absolutely may not establish a physician-patient relationship.” App. Opening Br. at 16. Not so. According to the Medical Examiner’s Handbook, “[t]he

rules state you should not offer to provide ongoing treatment. However, if a worker voluntarily approaches an IME provider who has previously examined the worker and asks to be treated by that provider, the provider can treat the worker. The provider must document that the worker was aware of other treatment options.” CP at 194. This is because, with only a few exceptions, “the patient has free choice of a treating doctor.” *Id.*

In the L&I setting, WAC 296-20-01002 defines the scope of a consultation examination report as follows:

Consultation examination report: The following information must be included in this type of report. Additional information may be requested by the department as needed.

- (1) A detailed history to establish:
 - (a) The type and severity of the industrial injury or occupational disease.
 - (b) The patient's previous physical and mental health.
 - (c) Any social and emotional factors which may effect recovery.

- (2) A comparison history between history provided by attending doctor and injured worker, must be provided with exam.
- (3) A detailed physical examination concerning all systems affected by the industrial accident.
- (4) A general physical examination sufficient to demonstrate any preexisting impairments of function or concurrent condition.
- (5) A complete diagnosis of all pathological conditions including the current federally adopted ICD-CM codes found to be listed:
 - (a) Due solely to injury.
 - (b) Preexisting condition aggravated by the injury and the extent of aggravation.
 - (c) Other medical conditions neither related to nor aggravated by the injury but which may retard recovery.
 - (d) Coexisting disease (arthritis, congenital deformities, heart disease, etc.).
- (6) Conclusions must include:

- (a) Type of treatment recommended for each pathological condition and the probable duration of treatment.
 - (b) Expected degree of recovery from the industrial condition.
 - (c) Probability, if any, of permanent disability resulting from the industrial condition.
 - (d) Probability of returning to work.
- (7) Reports of necessary, reasonable X-ray and laboratory studies to establish or confirm the diagnosis when indicated.

WAC 296-20-01002. Similarly, WAC 296-20-200 provides the general medical information required for impairment ratings by consultants or independent medical examiners. For example, WAC 296-20-200(2) explains that system of rules and categories for impairment ratings “directs the provider's attention to the actual conditions found and establishes a uniform system for conducting rating examinations and reporting findings and conclusions in accord with broadly accepted medical principles.”

In *Eelbode v. Chec Med. Ctrs., Inc.*, 97 Wn. App. 462, 984 P.2d 436 (1999), the Court of Appeals considered whether an

examinee could bring a medical malpractice action against a physical therapist who allegedly injured him during a pre-employment physical. The court held that the action for breach in the standard of care under chapter 7.70 RCW was allowed, regardless of whether a physician-patient privilege existed. *Id.* at 468-69. Chapter 7.70 RCW “modifies . . . certain substantive and procedural aspect of all civil actions . . . for damages for injury occurring as a result of **health care.**” RCW 7.70.010 (emphasis added). In other words, *Eelbode* held that the plaintiff was receiving health care when he underwent his pre-employment physical exam. Where *Eelbode* held that the pre-employment examination constituted health care for the purposes of chapter 7.70 RCW, Dr. Newton’s examinations also constitute health care. Any other reading of the statutes renders an irreconcilable inconsistency and undermines the Court of Appeals’ holding in *Eelbode*.

The holding in *Eelbode* also exposes Dr. Newton to liability because he is obligated to comply with the standard of care set forth by chapter 7.70 RCW in performing his evaluations. See *Eelbode*, 97 Wn. App. at 468-69 (“no physician-patient relationship is needed to create liability for a claimed failure.”). Regardless of

whether he had a physician-patient privilege with Reagan, he owed her duty to comply with the standard of care and may be liable for his actions under chapter 7.70 RCW.

F. The Court Should Affirm the Dismissal of Reagan’s Unpled Claim for Medical Battery.

1. Reagan never pled an intentional tort.

Dr. Newton addressed Reagan’s unpled theory at oral argument. See Verbatim Report of Proceedings at 8:7-9:21; 27:10-28:2 (June 23, 2017). What follows are two additional legal arguments supporting the trial court’s dismissal of the unpled claim for battery. See *Bainbridge Citizens United v. Wash. State Dep’t of Natural Res.*, 147 Wn. App. 365, 371, 198 P.3d 1033 (2008) (if questions of law subject to de novo review are involved, the Court of Appeals is not confined to legal issues and theories argued by the parties, but may sustain the trial court’s ruling on any correct ground, even though the trial court did not consider it); see also *State v. Gimarelli*, 105 Wn. App. 370, 376 n.4, 20 P.3d 430 (2001) (stating that the Court of Appeals may affirm the trial court on any ground).

Reagan never pled a common law cause of action for medical “battery,” see CP at 1-2, and Dr. Newton does not assume that she implied a cause of action for medical battery because there

is no allegation of his “intent.” In *Kirby v. City of Tacoma*, 124 Wn. App. 454, 469, 98 P.3d 827 (2004), the Court laid the ground rules for “notice” pleading. The Court stated that “CR 8(a) requires that a complaint for relief ‘contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled.’” *Id.* (quoting CR 8(a)). Stated differently, “the complaint must ‘apprise the defendant of the nature of the plaintiff’s claims and the legal grounds upon which the claims rest.’” *Id.* at 469-70 (quoting *Molloy v. City of Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993)).

The *Kirby* Court affirmed that “a pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the grounds upon which it rests.” *Kirby*, 124 Wn. App. at 470 (quoting *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 23, 974 P.2d 847 (1999) (holding that Dewey failed to satisfy the liberal notice pleading standard because his complaint did not contain the words “First Amendment” or “free speech”). The *Dewey* Court stated that “although inexpert pleading is permitted, insufficient pleading is not.” *Id.*

Here, Reagan’s complaint was insufficient. Reagan’s sole cause of action states as follows: “During the course of the

examination, Defendant manipulated plaintiff's hip in a manner that subsequently caused injury." CP at 2, ¶ 6. The words "battery" and "intentional" appear nowhere, nor does the complaint "fairly imply such a theory" (quoting *Dewey*, 95 Wn. App. at 25). Because her complaint did not identify an intentional tort theory, nor "fairly imply such a theory," her unpled claim for battery was properly dismissed.

Instead, Reagan inserted her new theory in her response to Dr. Newton's motion for summary judgment. But "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 the case all along." *Kirby*, 124 Wn. App. at 472 (quoting *Dewey*, 95 Wn. App. at 26, and citing *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment.")). In *Kirby*, the Court affirmed the trial court's summary judgment dismissal of unpled claims. The case at bar compels the same result.

2. Reagan's intentional tort is barred by the statute of limitations.

Battery is an intentional tort; the tortfeasor must intend an offensive touching, and the plaintiff must show there was no

consent to the touching. *Bundrick v. Stewart*, 128 Wn. App. 11, 18, 114 P.3d 1204 (2005) (citing *Garratt v. Dailey*, 46 Wn.2d 197, 200-01, 279 P.2d 1091 (1955); Restatement (Second) of Torts § 13 cmt. d (1965)). Even if the Court re-characterized her unpled and abandoned claim of informed consent to an unpled claim of medical battery, the claim would be barred by the two-year statute of limitations. RCW 4.16.100(1), rather than RCW 4.16.350, applies to common law battery claims. And the tolling provision of RCW 4.16.350 does not apply.

Reagan contends that she was injured on May 13, 2014, but she first raised this unpled claim on June 12, 2017, when she responded to Dr. Newton's motion for summary judgment. CP at 71. Her unpled claim falls well outside the two-year statute of limitations.

If the Court declines to affirm dismissal of Reagan's medical battery claim because it was: (1) unpled; and/or (2) outside the statute of limitations, then Dr. Newton submits a short response. First, Reagan produced no evidence to the trial court to support her theory that Dr. Newton "intentionally" injured her, other than her own speculative, self-serving testimony. CP 12-13. Second, *Bundrick v. Stewart*, 128 Wn. App. 11, 114 P.3d 1204 (2005)

stands for the proposition that when a patient broadly provides informed consent for treatment, but seeks to limit the doctors authorized to participate in her care (here, a resident surgeon who participated in her surgery without her consent), “she must communicate the limitation of her consent.” *Id.* at 13. In *Bundrick*, the Court explained that “the plaintiff’s burden is to show that the defendant intended to and did cause harm or ‘offense,’ a burden that ordinarily requires the plaintiff to show that the defendant’s touching was not apparently consented to.” *Id.* at 18 (quoting Dan B. Dobbs, *The Law of Torts* § 29, at 57).

In the case at bar, Reagan submitted no admissible evidence that Dr. Newton “intended” to cause her harm.

VI. CONCLUSION

The plain language of RCW 7.70.040 and settled Washington precedent provide that medical negligence claims based on a breach in the standard of care cannot survive summary judgment absent competent medical expert testimony. Because Reagan failed to furnish such competent expert testimony, the Court should affirm dismissal of Reagan’s medical malpractice claim against Dr. Newton. The Court should also affirm dismissal of

her unpled battery claim because her complaint because it did not identify an intentional tort theory, nor “fairly imply such a theory.”

Respectfully submitted this 6th day of February, 2018.

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 6, 2018, I caused to be served via email and first class mail a true and correct copy of the foregoing Brief of Respondent to:

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VIA E-SERVICE,
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 VIA MESSENGER
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I declare under penalty of perjury that the foregoing is true and correct.

DATED at Seattle, Washington on 6th day of February, 2018.



Susan L. Klotz
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FLOYD PFLUEGER & RINGER PS

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