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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION TWO

THOMAS P. COLLINS
Appellant,

vs.

JUERGENS CHIROPRACTIC, PLLC;
CHRIS JUERGENS, D.C.
Respondents.

BRIEF OF APPELLANT

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NATURE OF THE CASE

Plaintiff Thomas Collins began receiving chiropractic care from Dr. Paul Randall in 2003. In 2013, Dr. Chris Juergens took over Dr. Randall's practice and Collins' care. Dr. Juergens subjected Collins to a new treatment involving forceful cervical manipulation. On January 28, 2014, following Collins' third treatment by Juergens, Collins suffered a stroke. The stroke resulted from a vertebral artery dissection caused by the cervical manipulation. Collins filed suit against Dr. Juergens based on negligence and failure to obtain informed consent. On Juergens' motion for summary judgment, the trial court dismissed Collins' claims. Collins appeals, contending that genuine issues of material fact precluded summary judgment.

ASSIGNMENTS OF ERROR

1. The trial court erred in ordering summary judgment in favor of Defendants dismissing Plaintiff's claims against them.
2. The trial court erred in denying Plaintiffs' motion for reconsideration.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Plaintiff present sufficient evidence to create a genuine issue of material fact whether his injury resulted from Defendants' failure to follow the accepted standard of care?

2. Did Plaintiff present sufficient evidence to create a genuine issue of material fact whether his injury resulted from care by the Defendants to which he did not consent?

STATEMENT OF THE CASE

The testimony and evidence, construed in the light most favorable to Mr. Collins, *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015), shows the following.

A. Factual History

In 2003, Collins sought chiropractic treatment from Dr. Paul Randall, D.C. (CP 282) Collins testified he was experiencing shoulder and arm pain. (CP 284) He continued treatment off and on as his symptoms returned.

At the first treatment in 2003, Dr. Randall performed an examination which included x-rays. (CP 282-84) That was the last examination Dr. Randall ever performed. (CP 187, 282)

At the first visit, Dr. Randall also had Collins sign a form entitled “Consent to Treatment, Release of Information and Insurance Needs.” (CP 252) The form represented chiropractic care as fully safe with only transient, minor side effects.

Symptomatic results of chiropractic treatment: I understand that chiropractic treatments are usually painless and that those treatments are what will be primarily used for care. I am also aware that it is possible for an occasional treatment to hurt momentarily and/or that a temporary increase in my symptom or symptoms may occur as a result of the adjustment. (Id.)

This was the only written disclosure Dr. Randall or Dr. Juergens ever presented to Collins. And, it is undisputed that during his entire course of treatment, neither Dr. Randall nor Dr. Juergens verbally supplemented this disclosure. (CP 284, 287) As a result, during his entire course of treatment, Collins was under the belief that chiropractic treatment presented no risk of injury. (CP 290-92)

Collins treated with Dr. Juergens three times after he took over Dr. Randall's practice in 2013: Twice in June, 2013, then once on January 28, 2014, when the incident underlying this action occurred. It is undisputed that, neither before or during any of those treatments, Dr. Juergens did not perform an examination, did not take x-rays, and did not inform Collins of any risks associated with chiropractic care. (CP 298, 308)

On the day of the injury Collins sought treatment for the reoccurrence of pain in his left arm and shoulder. (CP 147, 293) His symptoms did not involve his neck. (Id.) Dr. Juergens had Collins lie down on the table face up. Juergens took Collins' head in his hands and crunched it both to the right and to the left. (CP 305) Collins testified the adjustments "hurt some." Id. Important to this case, this treatment was different than what Dr. Randall had provided. Collins was in a different position. Dr. Juergens' maneuvers included elements of flexion, lateral movement, and rotation, and these were more forceful and vigorous than Dr. Randall's methods. Collins'

chiropractic expert, Dr. Alan Bragman, testified that Dr. Juergens' manipulations created a greater risk of injury than the techniques used by Dr. Randall. (CP 137, 188)

When treatment was done, Mr. Collins left and drove home. (CP 307-08) After arriving home, he got out of his vehicle, took a couple of steps to the side, stumbled a bit on his way into the house, and felt light headed. He sat down on his couch and woke up the next day feeling dizzy and nauseous. (CP 307-09)

Collins' symptoms continued over the next several days. On February 5, 2014, he went to his general practitioner, Dr. Gerald Faye. Dr. Faye diagnosed him with a likely stroke caused by dissection of the vertebral artery from the neck manipulation Collins received during chiropractic. (CP 275-76; 278-79). He believed the onset was twenty minutes after Dr. Juergens' manipulation. (CP 275)

Dr. Faye had Collins admitted to St. Peter Hospital. There, Collins was followed by board-certified neurologist Maria Ramneantu, M.D. (CP 218) Dr. Ramneantu confirmed Dr. Faye's diagnosis. (CP 218-19) She had treated two to four similar cases previously. (CP 217-18)

The diagnosis has also been confirmed by Dr. Bragman. (CP 138) He testified that, with a reasonable degree of medical certainty, the manual cervical manipulation Dr. Juergens performed on Collins on January 28,

2014, caused Mr. Collins to suffer a vertebral artery dissection and cerebellar infarct (stroke). (CP 138, 190) Dr. Bragman has studied and authored an article on stroke due to cervical manipulation. (CP 162) Over his career, he has personally been involved with more than 400 cases similar to Collins. (CP 164-65) He testified that the chiropractic profession has downplayed the risk of stroke from cervical manipulation. (CP 165)

The causal relationship was also confirmed by Collins' board-certified expert in neurology, Dr. James McDowell. Dr. McDowell opined that the cervical manipulation Collins underwent on January 28, 2014, was almost certainly, and within reasonable medical probability, the cause of the vertebral artery dissection that led to Mr. Collins' stroke. (CP 150-52) He testified that, because of the structure of the upper cervical spine, the vertebral artery is vulnerable to compromise and dissection if the head is forcefully rotated. (CP 151) He testified that Collins symptoms did not involve neck pain or cervical trauma. (CP 147-48) And, he testified that the risk of vascular injury including stroke from manual manipulation of the cervical spine was sufficient enough that "any provider who recommends such a procedure should inform a patient of this risk and less risky alternatives." (CP 151)

Dr. Juergens knew the risk. He testified that he learned in chiropractic school that stroke was "the most serious complication" of

chiropractic treatment. (CP 234).

Collins was asked in his deposition what he would have said if Dr.

Juergens had told him about a risk of stroke due to manual adjustment:

Q If Dr. Juergens would have told you on that first day that there's a risk of stroke due to a manual adjustment of the neck –

A Mm-hm.

Q -- having gone through 10 years of chiropractic treatment and received numerous neck adjustments, would you have still received a neck adjustment?

A At –

MR. WILSON: Object to the form.
You may answer.

A At that point, I would have to say, no, I wouldn't have, because like I said earlier, Dr. Randall had determined that my problem was coming from C6/C7.

(CP 290-91)

B. Procedural History

Collins filed suit against Dr. Juergens and his business entity in October, 2016 (collectively referred to as Dr. Juergens).

In June, 2016, Dr. Juergens filed a motion for summary judgment. (CP 12-28) On informed consent, he argued that Collins' claim failed because (1) his experts "did not provide a number regarding Plaintiff's likely risk of injury," (CP 20); (2) the risk was so small it was not material as a matter of law (CP 22-23); (3) because the risk was so small Collins would not have declined treatment. (CP 25) (RP 14-19) He argued that Collins' negligence claim failed because Collins could not establish that if Juergens

had performed an examination, Dr. Juergens would not have administered the treatment that caused his stroke. (CP 25-28; RP 8-13) Dr. Juergens did not submit any expert testimony of his own to support his arguments.

Collins submitted declarations and deposition testimony from Drs. Bragman and McDowell. He submitted deposition testimony of Drs. Faye and Ramneantu, Dr. Juergens and himself.

The trial court granted Dr. Juergens' motion and dismissed Collins' claims on August 3, 2018. (CP 382-84) Collins timely sought reconsideration on August 13, 2018. (CP 387-407) The court denied the motion on October 4, 2018. (CP 430) Collins timely appealed both orders. (CP 431-37)

ARGUMENT

There is no dispute that Collins presented sufficient evidence to create an issue of fact that Dr. Juergens chiropractic manipulation caused Collins' stroke. Thus, in his motion for summary judgment, Juergens argued two principle points. First, he argued he could not be found negligent because an examination that met the standard of care would not have revealed signs contra-indicating the treatment he gave Collins. Therefore, his breach could not be a proximate cause of Collins' injury. Second, he argued that he did not breach the duty to obtain informed consent because the risk of stroke was so statistically remote that he did not have a duty to inform Collins of it.

A. Standard of Review

Appellate courts review summary judgment de novo. *Highline Sch. Dist. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). Summary judgment is only appropriate when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” CR 56(c); *Hurley v. Port Blakely Tree Farms LP*, 182 Wn. App. 753, 761, 332 P.3d 469 (2014). A material fact is one upon which the outcome of the litigation depends. *In re Estate of Black*, 153 Wn.2d 152, 160, 102 P.3d 796 (2004).

“The initial burden is on the moving party to show there is no genuine issue of material fact.” *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 673, 292 P.3d 128 (2012) (citing *Vallindigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005)). All inferences are construed in the light most favorable to the nonmoving party. *In re Estate of Black*, 153 Wn.2d at 161. If the moving party makes this showing, “the burden shifts to the nonmoving party to establish specific facts which demonstrate the existence of a genuine issue for trial.” *Kendall v. Douglas, Grant, Lincoln, & Okanogan Counties Pub. Hosp. Dist. No. 6.*, 118 Wn.2d 1, 8-9, 820 P.2d 497 (1991). “When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party.” *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545,

552, 192 P.3d 886 (2008).

B. Collins presented sufficient evidence to create a genuine issue of material fact on the elements of a civil action based on health care.

RCW chapter 7.70 exclusively governs any action against health care providers for damages based on an injury resulting from health care. *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 34, 384 P.3d 232 (2016). Along with physicians, surgeons, nurses, dentists and other health care practitioners, RCW 7.70.020 defines “health care provider” to include chiropractors. RCW 7.70.020(1). Thus, chiropractors are held to the same standards that other health care practitioners are held to.

To recover damages for “injury occurring as the result of health care,” a plaintiff must establish at least one of three propositions:

- (1) That injury resulted from the failure of a health care provider to follow the accepted standard of care;
- (2) That a health care provider promised the patient or his or her representative that the injury suffered would not occur;
- (3) That injury resulted from health care to which the patient or his or her representative did not consent.

RCW 7.70.030 (emphasis added). In this case, Collins asserted propositions (1) and (3).

1. Juergens breached the standard of care by treating Collins without performing tests and examinations required before treatment. Collins established that the treatment was a proximate cause of his injuries.

For a damages claim based on a health care provider's failure to follow the accepted standard of care under RCW 7.70.030(1), a plaintiff must prove both that the health care provider "failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider" and that such failure was a proximate cause of the plaintiff's injuries. RCW 7.70.040(1). The applicable standard of care generally must be established by expert testimony. *Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 86, 419 P.3d 819 (2018). The expert testimony must establish what a reasonable medical provider would or would not have done under the circumstances, that the defendant failed to act in that manner, and that this failure caused the plaintiff's injuries. *Keck v. Collins*, 184 Wn.2d 358, 371, 357 P.3d 1080 (2015).

Here, by expert testimony, Collins established that the applicable standard of care required Dr. Juergens to perform a thorough pre-treatment examination, and that the treating provider should not provide treatment without such an examination. Dr. Bragman testified that the standard of care required D. Juergens to perform an initial examination before subjecting him to treatment. (CP 192) "The standard of care is that before you touch someone, you have to have a clinical basis for treating them." (CP 194)

By expert testimony, Collins also established that Dr. Juergens breached the applicable standard of care. Dr. Bragman testified that the

cervical manipulation Dr. Juergens performed fell below the standard of care because he had no clinical basis for performing it.

Q. And do you believe how he described how he does a cervical manipulation is falling below the standard of care?

A. Well, just to reiterate, yes, because he – he shouldn't be doing anything forceful to a patient that he has no clinical information about, he's failed to establish a basis for it. So, yes, anything that's forcefully done to this patient is totally inappropriate.

(CP 197-98) (See also CP 138: "He should not have performed the riskiest type of treatment on the patient's neck without having first met the standard of care in working up the patient to establish the basis to perform the treatment in the first place.")

Finally, it was not disputed for purposes of defendants' motion that Dr. Juergens' treatment was a proximate cause of Collins' injury. Two of Collins' treating doctors and two qualified experts testified that Collins' stroke was caused directly by Dr. Juergens treatment of him. (E.g., CP 138, 150, 217-19, 275-76, 278-79)

This case is analogous to *Gates v. Jensen*, 92 Wn.2d 246, 595 P.2d 919 (1979). In that case, the plaintiff sought treatment from the defendant ophthalmologist because she was experiencing difficulty in focusing, blurring, and gaps in her vision. Her symptoms suggested glaucoma, but two tests administered by the doctor ruled that out. However, the doctor had two

additional diagnostic tests for glaucoma which were simple, inexpensive, and risk free. The first was to use the standard drops for dilating the pupils to obtain a better view of the optic nerve discs. The second was to have the plaintiff take a visual field examination to determine whether she had suffered any loss in her field of vision. The doctor did not tell the plaintiff of the existence of these simple procedures, and he did not administer the tests. The court held that the plaintiff was entitled to have the issue of the doctor's negligence in failing administer the tests submitted to the jury.

The facts here are more compelling. In *Gates*, the professional standard of care for ophthalmologists did not require doctors to administer the two tests. To impose potential liability, the court applied a higher standard of care which included the tests. Here, expert testimony established that the chiropractic standard of care required Dr. Juergens to conduct a thorough pre-treatment examination, and that a chiropractor should not provide treatment without such an examination. The court does not need to apply a higher standard.

Collins presented sufficient evidence to create a genuine issue of fact that, simple, inexpensive, and risk free tests and examination processes existed which could have shown whether Collins was at increased risk of injury from aggressive spinal manipulation. He also presented sufficient evidence to create a genuine issue of fact that, under the circumstances of this

case, the standard of care required that Dr. Juergens perform those tests and examination processes, or refrain from treating Mr. Collins. Collins also showed that Dr. Juergens breached that standard. Collins was injured by Dr. Juergens' treatment. Summary judgment was, therefore, improper.

For purposes of his motion, Dr. Juergens did not dispute that he violated the standard of care and did not perform an appropriate pre-treatment examination. Instead, he argues that Collins failed to establish that his breach was a proximate cause of Collins' injury because Collins did not prove that an examination that met the standard of care would have shown that Juergens should not have treated Collins as he did. The argument has two fatal flaws.

First, the argument is based on the incorrect premise that Collins could only establish proximate cause in one way, by proving what would have happened if Juergens had met the standard of care by performing a pre-treatment examination. In fact, Collins had two ways of establishing proximate cause. One, obviously was, as Juergens claims: Proving what would have happened if Juergens had met the standard of care by performing a pre-treatment examination. The other, which Juergens ignores, was by proving what would have happened if Juergens met the standard of care by either refraining from caring for Collins without pre-treatment examinations or providing alternative, no-risk alternatives to the treatment he chose.

Collins did present sufficient evidence of the second way. “Proximate cause” means a cause which in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which the injury would not have happened. *Petersen v. State*, 100 Wn.2d 421, 435, 671 P.2d 230 (1983). Dr. Bragman testified that, in the absence of a pre-treatment examination, Dr. Juergens should have refrained from treating Collins, and should have referred Collins for or provided him with other types of treatment. (CP 138: “[U]ntil that workup had been done he should have recommended alternative forms of treatment”) According to Dr. Bragman, those alternatives presented “virtually no risk.” (CP 137) Dr. Juergens did not. Collins was injured by the treatment Dr. Juergens should not have given. Simply put, the breach (treating without a work-up) caused the injury. If Dr. Juergens had not breached the standard, but instead refrained from treating Collins, Collins’ injury would not have occurred.

The argument is flawed for another reason as well. If accepted it would allow Dr. Juergens’ to profit from his own negligence. Within his own evidence, Dr. Juergens submitted an informed consent form that stated: “The risk of cerebrovascular injury or stroke . . . can be even further reduced by screening.” (CP 97) The reason Collins does not know if the examination would have provided reasons for not using manual manipulation is because screening was not performed. (CP 184-85) During ten years of treatment,

neither Dr. Randall nor Dr. Juergens performed a physical examination or took x-rays to determine what Collins' physical condition was. His argument rewards this failure. That is wrong and bad policy.

To be sure, except for some evidence that Collins' physical condition did not warrant cervical manipulation at all (CP 147-48), Collins did not prove what an examination would have revealed because one was never performed. And, to be sure, if Collins had proved that an examination contra-indicated manual manipulation, he could have established proximate cause on that basis. But that was not his only option. It is beyond dispute that Collins established what would have happened if Dr. Juergens met the standard of care by not subjecting Collins to aggressive manual manipulation, instead referring him for or providing him with something else. That was all the law required.

2. Collins showed a genuine issue of material fact whether Dr. Juergens failed to obtain Collins' informed consent to treatment.

The informed consent statute prescribes four necessary elements of proof for a successful claim:

- (a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;
- (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;
- (c) That a reasonably prudent patient under similar

circumstances would not have consented to the treatment if informed of such material fact or facts;

(d) That the treatment in question proximately caused injury to the patient.

RCW 7.70.050(1).

The statute defines material facts as those “a reasonably prudent person in the position of the patient or his or her representative would attach significance to [in] deciding whether or not to submit to the proposed treatment.” RCW 7.70.050(2).

The determination of materiality is a 2-step process. Initially, the scientific nature of the risk must be ascertained, i.e., the nature of the harm which may result and the probability of its occurrence. See *Canterbury v. Spence*, supra at 787-88; *Waltz & Scheuneman*, supra at 641; Comment, *Informed Consent in Medical Malpractice*, 55 Cal.L.Rev. 1396, 1407 n. 68 (1967). The trier of fact must then decide whether that probability of that type of harm is a risk which a reasonable patient would consider in deciding on treatment.

Smith v. Shannon, 100 Wn.2d 26, 33, 666 P.2d 351 (1983). The first step requires expert testimony; the second does not. *Id.*

[E]xpert testimony is necessary to prove the existence of a risk, its likelihood of occurrence, and the type of harm in question. Once those facts are shown, expert testimony is unnecessary.

Id. at 34.

Here, Collins satisfied all three elements requiring expert testimony.

Dr. Juergens did not dispute the general risks associated with chiropractic

treatment. Among the evidence he submitted was an informed consent form that listed the risks: Pain, dizziness, nausea, flushing, fracture, disc herniation or prolapse, stroke, and burns from physiotherapy devices. (CP 96).

In effect, Dr. Juergens also did not dispute that stroke was a particular risk of chiropractic. Dr. Juergens himself submitted consent forms that actually listed stroke as a risk (CP 96, 97) These forms are not aberrations. In *Barton v. Sandifer*, No. 49516-3-II (Div. II, July 25, 2017)(unpublished opinion), the plaintiff also claimed to have suffered a stroke as a result of chiropractic manipulation. The consent form she signed specifically included stroke among the risks of treatment. These sources show that the chiropractic community recognizes the risk. That comports with Dr. Juergens' testimony that he was taught that stroke was "the most serious complication" of chiropractic treatment. (CP 234).

Collins also presented expert testimony on the risk of stroke . Dr. Bragman, Collins' expert in chiropractic, testified that the incidence of vascular injury such as strokes caused by chiropractic manipulation is well known. (CP 135) He testified that chiropractic manipulation of the cervical spine is a known potential cause of craniocervical arterial dissections. (CP 136) He testified the risk even had a name, "chiropractic stroke." (CP 178) He had authored an article on the subject. (CP 162) Dr. McDowell, Collins'

neurology and stroke expert, also testified that chiropractic manipulation of the cervical spine is a known potential cause of craniocervical arterial dissections. (CP 147, 150) He testified that the risk was greater with vigorous rotational style manipulation. (CP 150) And, he described the mechanism of injury through manipulation. (CP 151, 157) Dr. Faye testified that the risk was well-known in the medical community. (CP 263) With this evidence, Collins met his burden of establishing the existence of a risk and the type of harm.

Through expert testimony, Collins also established the likelihood of injury. Every one of Collin's testifying health care witnesses had experience with chiropractic stroke. Dr. Bragman testified that he alone has been involved in more than 500 cases involving cerebrovascular injury caused by chiropractic cervical manipulation. (CP 164, 168) He testified that, in his opinion, for a variety of reasons, the number of such injuries are grossly under reported, such that past scientific literature did not accurately represent the true risk. (CP 166, 168) He testified that current scientific literature establishes that the risk of stroke due to cervical manipulation is significant. (CP 167) As of 2011, vascular injury cases represented twelve percent of chiropractic malpractice claims. (CP 166-67) A 2014 study indicated that the risk of injury from forceful manipulation could be as low as 1 in 958. ((CP 171-72).

Dr. McDowell also testified that the risk of vascular arterial injury from chiropractic manipulation is under-reported. (CP 147). He described the mechanism of injury. (CP 150-51) He noted that extensive neurological literature had shown the causal connection between manipulation and stroke. (CP 150) He personally had seen several incidences of stroke from chiropractic manipulation. (Id.)

Collins treating physicians added to this evidence. Even in her limited practice, Dr. Ramneantu, Collins' treating neurologist, had encountered incidences of chiropractic stroke two to four times. (CP 217-18). Dr. Faye testified he was aware of a patient who died from manipulation on the chiropractor's table. (CP 262-63) He testified he believed the risk of injury was one percent, i.e., 1 in 100. (CP 264) When combined with evidence that others actually warn about the risk (CP 96, 97; *Barton v. Sandifer*, supra).

Put simply, the evidence Collins presented, expert and otherwise, showed that chiropractic manipulation of the type he received presented a risk of stroke and it showed the likelihood of that occurrence. Collins showed that the risk was significant enough that doctors should and do warn about it. Indeed, one may reasonably ask how many more would have to be hurt before the risk is considered significant? From there, "the trier of fact must then decide whether that probability of that type of harm is a risk which

a reasonable patient would consider in deciding on treatment.” *Smith v. Shannon*, 100 Wn.2d 26, 33, 666 P.2d 351 (1983).

Dr. Juergens claimed Collins evidence was insufficient for two reasons. First, he argued the evidence was insufficient because “it does not provide a number regarding Plaintiff’s likely risk of injury resulting from manipulation.” (CP 20) Relying on *Smith v. Shannon*, 100 Wn.2d 26, 666 P.2d 351 (1983), Dr. Juergens contended that testimony that the risk was “not low,” “significant,” or “higher” was “insufficient under *Smith’s* plain mandate.” (CP 322) In making this argument, he does not contend merely that the probability of injury is relevant to the determination of materiality, he contends that it is necessary as a matter of law or an informed consent claim fails. His argument fails.

First, even if a “number” is required, Collins provided it. Dr. Bragman testified that one study showed it could be as low as 1 in 958. ((CP 171-72). Dr. Faye testified the risk was greater, 1 in 100. (CP 264) While he also testified he considered the risk “low,” he added tellingly “1 percent means nothing when it’s you.” (CP 264) Though Dr. Juergens was critical of the testimony, his criticism went to the weight of the evidence, not its sufficiency to meet Collins’ burden on summary judgment.

Moreover, the *Smith* court did not hold that a number was necessary. Rather, it said that plaintiffs meet their burden by producing some evidence

of the magnitude of the risk.

Regarding the need for expert testimony, Ms. Smith was required to present some expert testimony to show the magnitude and other scientific characteristics of the risks described in the PDR. No further expert testimony was necessary.

100 Wn.2d at 34. In *Smith*, the plaintiff got her case to trial without statistical evidence, though the finder of fact (the judge in that case) ultimately decided against her.

Indeed, requiring statistical evidence of the risk of injury as a condition precedent to an informed consent claim imposes an unreasonably high bar that is both contrary to sound policy and unsupported by Washington's statutes. The requirements of RCW 7.70.050(1) expanded the duty to disclose from that fixed by prior law. *Flyte v. Summit View Clinic*, 183 Wn.App. 559, 573-74, 333 P.3d 566 (2014); accord 4 David W. Louisell, *Medical Malpractice* §22.04 (Mathew Bender & Co., 2018) (“In recent years, court decisions have significantly expanded the duty of physicians to disclose the risks of proposed treatments and alternatives. . . . The modern trend of informed consent have relied on the ascendancy of the value of autonomy over the value of beneficence.”) Under the law prior to its adoption, the duty to disclose extended only to “grave risks of injury.” *ZeBarth v. Swedish Hosp. Med. Ctr.*, 81 Wn.2d 12, 23, 499 P.2d 1 (1972). Dr. Juergens’ argument would return the law to a standard at least as restrictive as the

previous one, leaving the duty to inform dependent on the interests and resources of the scientific community to subject known risks to definitive scientific study.

Dr. Juergens' other argument was that the risk of injury was so exceedingly low that it was immaterial as a matter of law because no reasonable person would have declined care with the information. (CP 323-24) The argument, however, ignores the *Smith* Court's instruction: "The trier of fact must . . . decide whether that probability of that type of harm is a risk which a reasonable patient would consider in deciding on treatment." 100 Wn.2d at 33. Moreover, the argument ignores the very evidence Juergens submitted. The only two consent forms he presented with his motion specifically list stroke as a risk of treatment. (CP 96-97) These show that at least some chiropractors believe the risk is significant enough to disclose. Accord *Barton v. Sandifer*, supra (chiropractic consent form specifically included stroke among the risks of treatment). Dr. Faye testified he warns patients against such treatment because of the risk of injury. (CP 262: "And I try to get people to avoid that because I'm very concerned of potential injury.")

The argument also reflects poor reasoning. Typically, minor injuries are the most common injuries from medical procedures. These are also injuries that are least likely to influence a patient's decision whether to

undertake treatment. As the severity of injury increases, the risk of that injury typically decreases. Only in the most dire circumstances will health care professionals perform procedures where the most common risk is serious injury or death. Yet, those are the risks that are most likely to influence a patient deciding whether to undertake the treatment.¹ Dr. Juergens' reasoning results in not informing the patient of the most serious injuries simply because they are less likely to occur. That turns informed consent on its ear.

The cases Dr. Juergens cited for the argument do not support it. *Smith* has already been discussed. Dr. Juergens also relied on *Ruffer v. St. Frances Cabrini Hosp. of Seattle*, 56 Wn. App. 625, 784 P.2d 1288 (1990). In *Ruffer*, however, the plaintiff presented no expert testimony at all, instead relying on the defendant's statistical evidence that the risk of a perforated colon during sigmoidoscopy was 1 in 20,000 to 50,000. 56 Wn. App. 628-29. Wrongly relying on a decision made under the old informed consent standard, *Mason v. Ellsworth*, 3 Wn. App. 298, 474 P.2d 909 (1970), the

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This inclination is reflected in the consent forms Dr. Juergens submitted as evidence. (CP 96, 97) Both forms list a myriad of relatively minor injuries that may occur from chiropractic. But, when it comes to the risk of stroke, the forms fall over themselves to minimize the risk. This, undoubtedly, reflects the fact that the risk of serious injury is more likely to factor into a patient's decision. Minimizing that risk helps assure the risk won't actually influence a patient to decline treatment.

court decided this was too small a risk as a matter of law.

Because the record is devoid of any expert testimony from appellant concerning the risk of perforation, the trial court was clearly entitled to rely upon respondent's characterization of the risk, and following Mason, properly determined that the risk was not material and effectively not at issue in the case.

56 Wn. App. at 633.

Here, in contrast, Collins presented expert testimony, and a lot of it. In addition to establishing that the risk was significant, that it was encountered frequently, and was well known within the medical and chiropractic communities, even if a statistical probability was required, Collins provided it. As noted previously, Dr. Bragman testified that one study showed the risk could be as much as 1 in 958. ((CP 171-72). Dr. Faye testified the risk was greater, 1 in 100. (CP 264) If a legal threshold exists, Collins met it.

The court should also reject Dr. Juergens' argument that, because of Collins' extensive and successful previous treatment, no jury could find that a reasonably prudent person in his position would have declined treatment if he had been warned of the risks. The argument is disingenuous for at least two reasons. First, no one ever warned Collins about risks of chiropractic treatment. He consented to the previous treatment based on the false representation that the only risk of chiropractic was transient soreness. (CP

252) So, he never got to make an informed choice. Second, as importantly, Dr. Juergens did not inform him that the treatment he was employing was different than the treatment Dr. Randall provided, or that it increased the risk of injury. (CP 137, 188) Under these circumstances, nothing can be gleaned from the fact that Collins previously consented to treatment.

The question is not whether Collins would have foregone chiropractic care if the risk had been disclosed, but whether he would have opted for the different treatments modalities that presented “virtually no such risk” of injury” (CP 137) It simply cannot be said as a matter of law that a reasonably prudent patient in Collins’ position would not have opted for entirely risk free treatment modalities if he had been informed the modality being recommended carried a 1 in 100 or even 1 in 990 chance of producing a stroke.

In *Smith*, the court said the doctrine of informed consent is premised on the fundamental principle that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.” 100 Wn.2d at 29, quoting *Schloendorff v. Society of New York Hosp.*, 211 N.Y. 125, 129, 105 N.E. 92 (1914) (Cardozo, J.). A necessary corollary to this principle is that the individual be given sufficient information to make an intelligent decision. *Id.*

As Dr. McDowell testified, the very nature of forceful cervical

manipulation implies the risk of vertebral artery dissection. (CP 150-51, 157) Collins did not, however, rely only on that common sense observation. Through expert testimony, he presented evidence of each element *Smith* required: The scientific nature of the risk, including the nature of the harm which may result and the probability of its occurrence. As a result, the trial court erred in granting summary judgment to Dr. Juergens and dismissing Collins' claims.

CONCLUSION

For the foregoing reasons, Collins asks this court to reverse the trial court's order granting summary judgment and order denying reconsideration, reinstate Collins' claims, and remand the case for trial on the merits.

Dated this 8th day of April, 2019.

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