

FILED  
Court of Appeals  
Division II  
State of Washington  
6/7/2019 2:15 PM  
NO. 52552-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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THOMAS P. COLLINS,

Appellant,

v.

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

Respondents.

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BRIEF OF RESPONDENTS

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## I. INTRODUCTION

Thomas Collins filed suit against Chris Juergens, D.C., and Juergens Chiropractic, PLLC (collectively “Dr. Juergens”), alleging that he suffered a vertebral artery dissection (VAD) and stroke as a result of chiropractic treatment. Mr. Collins made claims for violation of the standard of care and failure to obtain informed consent. With respect to his standard-of-care claim, Mr. Collins alleged that Dr. Juergens failed to take an adequate medical history, failed to perform a proper pretreatment evaluation, and failed to take x-rays prior to manipulating his cervical spine. With respect to his informed consent claim, Mr. Collins alleged that Dr. Juergens failed to disclose the risk of vascular injury or stroke associated with cervical manipulation.

Dr. Juergens moved for summary judgment on two grounds: First, he argued that Mr. Collins failed to present a *prima facie* standard-of-care claim by establishing, through expert medical testimony, that he would have avoided his injuries had Dr. Juergens complied with the standard of care. Accordingly, he argued that Mr. Collins did not establish that his injuries were proximately caused by Dr. Juergens’ alleged negligence. Second, Dr. Juergens argued that Mr. Collins failed to present a *prima facie* informed consent claim because he had not produced expert medical testimony establishing his risk of VAD from cervical manipulation, including medical

facts tending to show that the risk was “material.” Dr. Juergens further argued that, even if he had disclosed the statistically improbable risk of VAD, Mr. Collins would not have declined treatment on the incident date. After hearing oral argument, the superior court granted Dr. Juergens’ motion for summary judgment. It subsequently denied Mr. Collins’ motion for reconsideration. Mr. Collins now appeals.

The superior court correctly dismissed Mr. Collins’ standard-of-care claim based on his failure to present expert testimony establishing the element of proximate cause. The superior court correctly dismissed Mr. Collins’ informed consent claim because he failed to establish the scientific nature of his risk of injury, including its probability and materiality, and because a reasonable person in Mr. Collins’ situation would not have declined treatment if advised of the marginal risk of vascular injury. This Court should affirm summary judgment dismissal of Mr. Collins’ claims.

## II. COUNTERSTATEMENT OF THE CASE

### A. Factual Background

1. Mr. Collins begins chiropractic treatment by Dr. Randall in 2003.

On July 7, 2003, Mr. Collins presented to Paul Randall, D.C., for chiropractic treatment, complaining of pain in his left arm/shoulder. CP 58-59; CP 284. Dr. Randall performed an initial exam and took x-rays. CP 283-84. He did not advise Mr. Collins of any specific risks of chiropractic

treatment. CP 284. He did not inform Mr. Collins that vertebral artery dissection or stroke was a risk of cervical or neck manipulation. CP 287. During his ten years of treatment with Dr. Randall, Mr. Collins never learned of any risks of chiropractic treatment. CP 291-92.

Mr. Collins had previously seen a chiropractor a few times when he was very young. CP 285. He was introduced to chiropractic treatment by his mother, and he used to attend treatments with her. CP 285-86. This involved watching her receive treatment, including neck adjustments. CP 285. Mr. Collins said his knowledge of his mother's chiropractic treatment "made it a comfortable thing for [him] to try" with Dr. Randall. CP 285-86. Mr. Collins also knew of friends and family who had gone to see chiropractors and received a benefit from chiropractors. CP 62. Neither he nor any of his family had ever had a negative experience with chiropractors, and he had never heard of any injuries resulting from chiropractic treatment. CP 62.

When Mr. Collins presented to Dr. Randall in 2003, he was seeking an alternative treatment to back surgery, which he said was "not a viable option" due to his work. CP 60. He called treatment with Dr. Randall a "pretty easy decision" compared to "going under the knife." CP 62. Mr. ultimately started receiving "maintenance" treatment from Dr. Randall as part of a "wellness program." CP 61. The program allowed Mr. Collins to

purchase multiple treatments together at a reduced cost. CP 61. Mr. Collins testified that Dr. Randall's treatment had been helpful in treating his pain at his cervical spine. CP 296.

Mr. Collins continued treating with Dr. Randall until 2013, when Dr. Randall retired. CP 60. From 2003 to 2013, Mr. Collins visited Dr. Randal 194 times for chiropractic treatment. CP 60. Mr. Collins testified that approximately 20 to 25 percent of his treatments with Dr. Randall involved manual adjustments to his cervical spine, amounting to 40 to 50 such neck adjustments total. CP 63.

2. Mr. Collins transfers care to Dr. Juergens in 2013.

In 2013, Mr. Collins transferred care to Dr. Juergens after Dr. Randall retired and sold his practice. Mr. Collins presented to Dr. Juergens two times in June 2013, receiving manipulations to his lumbar spine. CP 99-100. Mr. Collins testified that Dr. Juergens did not perform an examination of him at any time or advise him of any risks of chiropractic treatment. CP 298.

Six months later, in January 2014, Mr. Collins presented to Dr. Juergens with pain at his cervical and thoracic spine. CP 101. Mr. Collins testified he had "exactly" the same symptoms that Dr. Randall had previously, and successfully, treated numerous times in the past. CP 65-66; CP 293. He alleges that Dr. Juergens first treated him on his stomach with

the Activator device, CP 299, and then on his back when he “aggressively twisted [his] neck up and to the left and up and to the right.” CP 43; CP 305-06. Mr. Collins claims that he heard “crunching during these maneuvers and felt some pain.” CP 43.

Importantly, Mr. Collins does not allege that he presented to Dr. Juergens on the incident date with a VAD. CP 51, 42. He denies having any symptoms indicating VAD or stroke on the incident date. CP 42. Mr. Collins alleges his VAD and stroke are wholly attributable to Dr. Juergens’ neck adjustment on the incident date. *See* CP 51, 42.

B. Procedural Background

1. Mr. Collins sues Dr. Juergens, alleging violation of the standard of care and failure to obtain informed consent.

Mr. Collins sued Dr. Juergens on September 30, 2016, alleging that Dr. Juergens failed to perform an adequate workup of Mr. Collins on the incident date and that he failed to properly advise him of risks of chiropractic treatment. CP 33-34. He alleged serious and permanent injuries including neurological deficits. CP 34.

Dr. Juergens issued discovery to clarify Mr. Collins’ allegations. Specifically, Dr. Juergens sought to determine if Mr. Collins alleged he presented to Dr. Juergens without arterial injury and, therefore, Dr. Juergens caused his vertebral artery dissection, or if he alleged he presented with an existing vascular injury that Dr. Juergens failed to diagnose. CP 51-52, 42-

45. Mr. Collins responded he was alleging the former. He said he presented to Dr. Juergens “without any vertebral artery dissection.” CP 51. Likewise, he said he presented “without symptoms indicating a risk of stroke.” CP 51.

2. Mr. Collins’ chiropractic expert Alan Bragman, D.C., is deposed.

Mr. Collins’ chiropractic expert Alan Bragman, D.C., was deposed on August 17, 2017. CP 57. Dr. Bragman offered opinions on standard of care, informed consent, and proximate cause. Asked to identify all criticisms of Dr. Juergens, Dr. Bragman testified that Dr. Juergens (1) did not obtain a main complaint history from Mr. Collins, (2) did not perform a comprehensive physical examination, (3) did not perform any x-rays, and (4) did not obtain informed consent by discussing the risks of cervical neck manipulation and alternative treatments. CP 348.

Despite his myriad criticisms, Dr. Bragman did not link any purported violations of the standard of care to Mr. Collins’ injuries. Asked how things would have been different if Dr. Juergens performed the screening tests he says were required, he replied as follows:

So I don’t know. I mean, he may have gone through, and there may have been other symptoms on that date. He may have done a thorough exam at some point and realized there were other issues, but I -- because they didn’t do anything, I can’t really answer that.

CP 77. Likewise, Dr. Bragman could not say how obtaining x-rays would have made any difference in Mr. Collins’ outcome. CP 354.

Dr. Bragman was specifically asked if he saw any evidence in Mr. Collins' records that a neck manipulation was contraindicated.<sup>1</sup> CP 78. He responded that "the only contraindication" was that Dr. Juergens had not "done anything to establish a clinical basis" for treatment. CP 78 ("[Y]ou don't touch him if you haven't done anything."). He said this principle applied to treatment with a device called the Activator as well:

Well, even though -- an activator is safer than manual adjusting. There are still risks with it, particularly to have carotid vessels because they're more superficial. So, no, any -- any forceful manipulation done with his total failure to establish a basis is inappropriate, even an activator.

CP 351.

Importantly, Dr. Bragman did not testify that the manner in which Dr. Juergens manipulated Mr. Collins' neck violated the standard of care. CP 80 ("[T]he manipulation . . . may have been okay."). While Dr. Bragman testified that Dr. Juergens used a "different" and "more forceful" technique than Dr. Randall, he did not opine that Dr. Juergens' manipulation was improper or that Mr. Collins would have avoided his injuries had he received a neck adjustment using Dr. Randall's technique. CP 348. He

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1. "Contraindication" is a term of art, meaning "a specific situation in which a drug, procedure, or surgery should not be used because it may be harmful to the person." *Contraindication*, U.S. National Library of Medicine <https://medlineplus.gov/ency/article/002314.htm> (last accessed June 4, 2019). *See also* CP 320.

testified only that Dr. Randall's technique was "less likely" to result in VAD. CP 348.

Dr. Bragman was also critical of Dr. Juergens' informed consent process, testifying that Dr. Juergens failed to inform Mr. Collins of the risk of "vascular injury, dissection, [or] stroke." CP 81. But, when asked to identify Mr. Collins' risk of VAD/stroke from cervical manipulation on the incident date, Dr. Bragman testified he could **not** provide a number. CP 69. He said the risk "[is] extremely variable" and ranges "anywhere from 1 in 1,000 to 1 in millions." CP 69. He referenced an article stating that "[t]he magnitude of risk [of neurological injury from chiropractic manipulation] has been estimated as high in 1 in 958 manipulations, to as low as 1 in 5.85 million manipulations." CP 70.

To quantify the risk, Dr. Bragman said you have to consider the quality of the clinician and the method of delivery. CP 69. For someone who is a "very prudent and a good clinician," and who uses low force techniques, he said the "risk is quite low." CP 69. For people who are not "prudent" or "good clinician[s]," however, the "number can be quite high." *See* CP 69. Pressed further on the risk of VAD, Dr. Bragman repeated that he could not provide a number and the risk depended on the quality of the clinician and the type of adjustment:

As I told you, I do not have a number. I said -- as I said earlier, I think it's dependent on the quality of the clinician. I think people that are like this guy who don't do anything to establish a basis, use forceful manipulation, I think they're in a pretty high risk category.

Someone who follows the standards of care, who does gentle manipulation on someone that's an appropriate candidate, I think they're -- they have a very low risk of this happening.

CP 83.

At the conclusion of his deposition, Dr. Bragman was asked whether any of his patients had declined a cervical neck adjustment after being made aware of the risk of stroke. CP 94. He testified that a very small percentage of patients had done so—likely only fifteen or twenty out of thousands over his thirty-plus years of providing chiropractic treatment. CP 94. When asked if any of the patients who declined treatment had received a cervical adjustment before, he could not say. CP 95. Thus, Dr. Bragman did not identify a single individual who had declined cervical manipulation due to the risk of stroke when the patient had previously received cervical manipulation. CP 95.

3. Dr. Juergens moves for summary judgment.

Dr. Juergens moved for summary judgment, arguing that Mr. Collins' informed consent claim should be dismissed because (1) his expert failed to offer expert medical testimony regarding the statistical likelihood or probability of Mr. Collins' risk of injury, (2) Mr. Collins' VAD was not

reasonably foreseeable as a matter of law, and (3) using an objective standard that accounted for Mr. Collins’ “medical condition, age, [and] ]risk factors,” he would not have declined chiropractic treatment even if he had been informed of the marginal risk of vascular injury.

Dr. Juergens further argued that Mr. Collins’ claim for breach of the standard of care should be dismissed because there was no expert testimony linking Dr. Juergens’ purported standard-of-care violations to Mr. Collins’ outcome. Dr. Juergens pointed out that, even if he obtained the history, physical examination, and x-rays that Dr. Bragman said were required, there was no medical evidence that he would have discovered a contraindication to neck manipulation. Dr. Juergens argued that, even under that scenario, Mr. Collins still would have received a neck adjustment and still would have suffered the exact same result. As a result, he lacked sufficient expert medical testimony on the issue of proximate cause—that is, he failed to present testimony establishing that, if the standard of care had been met, then he would not have sustained a VAD.

4. Mr. Collins opposes Dr. Juergens’ motion and submits a new declaration from Dr. Bragman.

Mr. Collins opposed Dr. Juergens’ motion by submitting a declaration from his retained chiropractic expert Dr. Bragman, a declaration from his retained neurology expert James McDowell, excerpts of deposition

testimony from two treating physicians, and excerpts from the depositions of Mr. Collins and Dr. Juergens. CP 102-03.

With respect to his informed consent claim, Mr. Collins argued he created an issue of fact regarding materiality through testimony from Dr. Bragman and Dr. McDowell that the risk of vascular injury from manual manipulation was “significant,” “serious,” and “material.” CP 123-24. Defending Dr. Bragman’s inability to narrow the range of risk of stroke, Mr. Collins claimed the literature was inherently unreliable due to underreporting. CP 123. He also argued statistical testimony from a medical expert should not be an indispensable requirement of an informed consent claim in Washington, citing to a New Jersey case as persuasive authority. CP 124 (citing *Frost v. Benner*, 300 N.J. Super. 394, 693 A.2d 149 (App. Div. 1997)).

Mr. Collins further argued there was a question of fact as to whether a reasonably prudent patient would submit to chiropractic treatment having been advised of “the risk of vascular injury from vigorous, forceful manipulation of his or her neck under these circumstances.” CP 125. According to Mr. Collins, “these circumstances” included that he had not been advised that Dr. Juergens had not obtained an adequate history and had not performed an adequate examination, that he had not been advised of less

risky forms of treatment such as the Activator only, and that he had not been advised of the risk of vascular injury. CP 125.

With respect to his standard-of-care claim, Mr. Collins argued that he had stated a *prima facie* case via the testimony of Dr. Bragman and Dr. McDowell. He alleged that “[t]he examination, test and x-rays” identified by Dr. Bragman “could have revealed contraindications to manual manipulation” if they had been performed and that “[r]epeat x-rays could have shown progressive degenerative changes . . . which are red flags for vascular injury.” CP 118. “In short,” he argued, “Dr. Juergens should not have provided the cervical manipulation treatment until he had determined it was reasonably safe to do so.” CP 118.

Critically, Mr. Collins did not submit any expert medical testimony that a complete history, more robust physical examination, or repeat x-rays “would” have revealed a contraindication to neck manipulation. In fact, Mr. Collins admitted it was “unknown what specific contraindications may have been found” and it was “impossible for Dr. Bragman to know what would have occurred” had Dr. Juergens performed additional screening tests. CP 119.

In addition, Dr. Bragman’s new declaration said Dr. Juergens “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.” CP 138. Directly contradicting prior testimony, Dr. Bragman testified that Dr. Juergens should have recommended some other form of treatment, such as the Activator, if he was not going to perform a proper workup. *Compare* CP 136-38 (“[U]ntil that workup had been done, he should have recommended alternative forms of treatment [such as the activator]”), *with* CP 351 (“[A]ny forceful manipulation done with his total failure to establish a basis is inappropriate, even an activator.”).

5. Dr. Juergens replies that Mr. Collins has not met his burden of proof and summary judgment is appropriate.

Dr. Juergens responded by moving to strike Dr. Bragman’s new contradictory opinions. He also argued that summary judgment was appropriate even if the superior court considered them. Dr. Juergens observed that Dr. Bragman’s opinion that a neck adjustment was contraindicated because Dr. Juergens had not performed a proper workup was circular, conclusory, and not based on medical facts. CP 319. He noted there was no medical testimony that Mr. Collins would have avoided his stroke had Dr. Juergens performed additional screening procedures or a different treatment modality, CP 321-22, and that Dr. Bragman said it was “impossible” to state otherwise. CP 320, 322. Dr. Juergens further pointed

out that there was no evidence in the record that Mr. Collins was an inappropriate candidate for neck manipulation. CP 321.

In addition, Dr. Juergens argued that Mr. Collins had not met his burden under *Smith v. Shannon* of establishing the probability or likelihood of stroke arising from manual manipulation, 100 Wn.2d 26, 666 P.2d 351 (1983), and that the statements of Dr. Bragman and Dr. Holmes that the risk was “not low,” “significant”, or “higher” were legal conclusions, not scientific evidence regarding the probability or likelihood of VAD/stroke. CP 322. Dr. Juergens reiterated that Dr. Bragman’s opinion that the risk of stroke is “high” in certain circumstances was flawed because it included circumstances in which the provider violated the standard of care and the patient is an inappropriate candidate for neck manipulation. CP 323. Furthermore, he argued that Dr. Bragman’s range of risk was too broad, and there were no medical facts to suggest that Mr. Collins was toward the “risky” end of this spectrum. CP 323-24. Finally, Dr. Juergens pointed out that, other than hindsight bias, Mr. Collins offered no factual basis to suggest an objective person in his situation would have declined a neck manipulation on the incident date even if he had been advised of a marginal risk of stroke. CP 324.

6. The superior court grants Dr. Juergens' motion for summary judgment.

Thurston County Superior Court Judge John Skinder heard oral argument on August 3, 2018. After reviewing and considering all materials submitted by Dr. Juergens and Mr. Collins, Judge Skinder denied Dr. Juergens' motion to strike but granted his motion for summary judgment. CP 384. Judge Skinder did not specify the basis for his ruling. CP 384.

7. The superior court denies Mr. Collins' motion for reconsideration without oral argument.

Mr. Collins moved for reconsideration of the trial court's order granting summary judgment. CP 388. With respect to informed consent, Mr. Collins argued that Dr. Juergens "incorrectly framed the materiality issue . . . by asserting that Mr. Collins had to prove the 'probability' or statistical likelihood of the risk of vascular injury." CP 389. Mr. Collins argued that neither Washington law nor *Smith*, in particular, required him to present expert medical testimony regarding the statistical probability of risk. He argued that Dr. Juergens overemphasized *Smith's* references to "probability" and "influenced the Court to apply an incorrect legal standard for materiality." CP 401. He further argued that the statistics cited by Dr. Bragman in his deposition and declaration, along with his testimony that the risk of vascular injury was "material, significant, and underreported," were

sufficient to meet his burden of proof with respect to informed consent. CP 402.

As to his standard-of-care claim, Mr. Collins again argued that Dr. Juergens improperly “framed the issue” by claiming Mr. Collins’ injury still would have occurred even if Dr. Juergens had complied with the standard of care. CP 405. Mr. Collins cited to Dr. Bragman’s opinion that cervical neck manipulation was contraindicated because a “proper workup” had not been done. CP at 406 (citing CP 138). He argued that Dr. Juergens had not provided affirmative evidence that he would have performed the same manipulation. CP 406. He also argued that Dr. Juergens violated the standard of care by performing “a maneuver which presented the most risk and danger, with the greatest consequence of serious injury or death” without a proper workup. CP 406. Finally, Mr. Collins argued his case was like *Gates v. Jensen*, 92 Wn.2d 246, 595 P.2d 919 (1979), in that Dr. Juergens failed to use diagnostic tools that were available to him, making it impossible for Mr. Collins to understand his condition for treatment purposes.

Dr. Juergens opposed reconsideration. He pointed out that Mr. Collins could not establish proximate cause because his experts admitted they could not show what a “proper workup would have yielded in Mr. Collins’s case.” CP 416. Dr. Juergens observed that a cervical neck

adjustment was indicated by the January 28, 2014 encounter note, which identified right cervical pain and diagnosed Mr. Collins with a restricted joint at his cervical spine, CP 416; CP 101, and that it was Mr. Collins' burden to produce expert testimony supported by medical facts demonstrating why cervical manipulation was contraindicated. CP 416. Dr. Juergens further explained that *Gates* was inapposite to Mr. Collins' case because the plaintiff in *Gates* would have been conclusively diagnosed with glaucoma had the ophthalmologist performed the additional tests she alleged were required. In contrast, Mr. Collins' experts testified it was "impossible" to know what a proper workup would have yielded had Dr. Juergens performed a more thorough workup. CP 416.

As to informed consent, Dr. Juergens argued that Mr. Collins was conflating the two-step inquiry under *Smith* by asserting that his medical experts could establish the scientific nature of the risk by testifying the risk was "material" or "significant." CP 417-18. Dr. Juergens noted that "material" and "significant" are legal conclusions to be determined by the factfinder *based on scientific testimony presented by experts*. CP at 418. Because Dr. Bragman admitted he was not testifying to Mr. Collins' probability or likelihood of stroke, there was insufficient scientific testimony from which a jury could conclude his risk was reasonably foreseeable or material. CP 418.

Judge Skinder denied Mr. Collins' motion for reconsideration without oral argument. CP 430. Mr. Collins appeals. CP 431.

### III. STANDARD OF REVIEW

An order granting or denying summary judgment is reviewed de novo. *E.g., Kave v. McIntosh Ridge Primary Rd. Ass'n*, 198 Wn. App. 812, 819, 394 P.3d 446 (2017). The appellate court engages in the same inquiry as the trial court, viewing the evidence in the light most favorable to the nonmoving party. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004); *Kave*, 198 Wn. App. at 819. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* (citing CR 56(c)). An appellate court may affirm a lower court on any alternative basis supported by the record and the pleadings even if the trial court did not consider that alternative. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

### IV. ARGUMENT

Mr. Collins failed to establish essential elements of his claims for violation of the standard of care and failure to obtain informed consent. His standard-of-care claim was properly dismissed because he failed to establish, through expert medical testimony, how his outcome would have been different had Dr. Juergens performed any additional screening

procedures. As a result, Mr. Collins failed to establish the essential element of proximate cause—that is, that he would have avoided his injuries had Dr. Juergens complied with the standard of care.

Likewise, Mr. Collins’ informed consent claim was properly dismissed because (1) he failed to identify the scientific nature of his risk of injury; (2) his risk of VAD/stroke was not reasonably foreseeable or material as a matter of law; and (3), having been advised of the marginal risk of stroke associated with chiropractic treatment, a reasonable patient in Mr. Collins’ shoes would not have declined treatment on the incident date.

A. The lower court properly dismissed Mr. Collins’ standard-of-care claim because he failed to create an issue of fact as to proximate cause.

1. There is no medical testimony that a more detailed history, more thorough examination, or x-rays would have revealed a contraindication to neck manipulation.

The lower court properly dismissed Mr. Collins’ standard-of-care claim because he failed to establish, through expert medical testimony, that his injuries were proximately caused by a negligent act of Dr. Juergens. Although Mr. Collins’ chiropractic expert Dr. Bragman identified several purported standard-of-care violations (*e.g.*, inadequate medical history, improper examination, no x-rays), he never established that Mr. Collins’ outcome would have been different if Dr. Juergens had undertaken these efforts.

The plaintiff in a medical negligence action bears the burden of proving the statutory elements, including breach and causation. RCW 7.70.040; *Berger v. Sonneland*, 144 Wn.2d 91, 111, 26 P.3d 257 (2001). There are two elements of proximate cause: cause in fact and legal causation. “Cause in fact refers to the ‘but for’ consequences of an act—the physical connection between an act and an injury.” *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985) (citing *King v. City of Seattle*, 84 Wn.2d 239, 249, 525 P.2d 228 (1974)). In other words, cause in fact refers to the actual connection between an act and an injury—whether, but for the act, the injury would not have occurred. *See Dunnington v. Virginia Mason Med. Ctr.*, 187 Wn.2d 629, 636, 389 P.3d 498 (2017). “To establish the cause in fact, the plaintiff must show that he or she would not have been injured but for the health care provider’s failure to use reasonable care.” *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 448, 177 P.3d 1152 (2008).

Here, Mr. Collins never demonstrated that he would not have been injured but for the alleged failure of Dr. Juergens to use reasonable care. Asked how a more detailed history, more robust examination, or x-rays would have changed Mr. Collins’ outcome, Dr. Bragman testified he could not say what these things would have revealed. CP 76-77 (“I don’t know. I mean, he may have gone through, and there may have been other symptoms

on that date. . . . I can't really answer that.”<sup>2</sup>). Dr. Bragman said it was “impossible” to know what Mr. Collins’ clinical picture would have been had Dr. Juergens done a proper workup. CP 138. On appeal, Mr. Collins concedes he “did not prove” “what an examination would have revealed.” App. Br. at 15. Accordingly, it is undisputed that Mr. Collins did not establish any contraindications to treatment or other medical facts that would have been revealed by a more thorough workup.

Mr. Collins’ failure to produce medical testimony that he would have avoided his injuries if Dr. Juergens had performed a proper workup is fatal to his standard-of-care claim. In *Douglas v. Bussabarger*, the plaintiff alleged that the defendant drug manufacturer failed to label an anesthesia medication with adequate warnings. 73 Wn.2d 476, 477-78, 438 P.2d 829 (1968). The anesthesiologist who administered the drug, however, testified

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2. Dr. Bragman’s testimony that “there **may** have been other symptoms” had Dr. Juergens complied with the standard of care is insufficient to create an issue of fact on summary judgment. CP 76-77 (emphasis added). Witnesses offering an opinion on medical causation must speak in terms of probability, not mere possibility. *Miller v. Staton*, 58 Wn.2d 879, 885-86, 365 P.2d 333 (1961). “The testimony must be sufficient to establish that the injury-producing situation ‘probably’ or ‘more likely than not’ caused the subsequent condition, rather than the accident or injury ‘might have,’ ‘could have,’ or ‘possibly did’ cause the subsequent condition.” *E.g., Merriman v. Toothaker*, 9 Wn. App. 810, 814, 515 P.2d 509 (1973). Dr. Bragman’s suggestion that other symptoms “may” have been revealed is speculation, not medical causation testimony offered on a more probable than not basis.

that he relied on his own knowledge of the drug and, in fact, did not read the labeling on the container. *Id.* at 478. Accordingly, the court held that “even if we assume such labeling should have taken place,” “this negligence was not a proximate cause of [the] plaintiff’s disability.” *Id.* *Douglas* underscores that allegations of negligence do not exist in a vacuum and must be causally connected to the injuries claimed. When the plaintiff’s injuries would have occurred even if the defendant complied with the duty of care, there is no cause in fact and therefore no proximate cause. *Id.*

This case is like *Douglas* in that there is no link between Dr. Juergens’ alleged negligence and Mr. Collins’ injuries. There is no testimony that a more thorough workup or x-rays would have revealed a contraindication to neck manipulation, and there are no facts to suggest that anything would have been different had Dr. Juergens complied with the purported standard of care. As such, there is no basis to conclude that Dr. Juergens proximately caused Mr. Collins’ injuries. Under well-established Washington law, Mr. Collins has failed to establish a *prima facie* standard-of-care claim. The lower court was correct in dismissing it.

2. Mr. Collins mistakenly analogizes to *Gates v. Jensen*, where unlike him, the plaintiff provided expert medical testimony on the issue of proximate cause.

As he did at the lower court, Mr. Collins mistakenly claims that his case is analogous to *Gates v. Jensen*, 92 Wn.2d 246, 595 P.2d 919 (1979).

It is not. In *Gates*, the plaintiff alleged that the defendant ophthalmologist was negligent by failing to administer two simple, inexpensive, and risk free diagnostic tests for glaucoma after two prior tests proved to be inconclusive. *Id.* at 249, 253. Moreover, unlike Mr. Collins, the plaintiff's expert in *Gates* testified that, if the tests had been administered, they would have conclusively established a diagnosis of glaucoma, *id.* at 253, and her "condition could have been stabilized and a great part of her vision saved." *Id.* at 250.

Mr. Collins has no such testimony. His expert testified that he had no idea what would have happened had Dr. Juergens performed the history, examination, and x-rays that he says were required by the standard of care. This is in direct contrast to *Gates*, where the plaintiff alleged that she would have been conclusively diagnosed with glaucoma had the defendant ophthalmologist performed the diagnostic tests she claims were required.

In light of *Gates*, Mr. Collins' proximate cause deficiency is glaring. He has no expert testimony providing that a more thorough workup would have revealed a contraindication to neck manipulation. He has no expert testimony that his injuries would have been avoided had Dr. Juergens complied with the standard of care. Without this testimony, his standard-of-care claim was properly dismissed.

3. Mr. Collins' remaining arguments are based on circular logic and misapplication of Washington law, not medical facts.

Recognizing he has no causation testimony linking his improper workup allegations to his injuries, Mr. Collins next asserts that he can establish proximate cause by proving what would have happened if Dr. Juergens “met the standard of care” by “either refraining from caring for [Mr.] Collins” or by providing “no-risk alternatives.” App. Br. at 13-14.<sup>3</sup> Essentially, he argues that, in the absence of a proper workup, Dr. Juergens

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3. Mr. Collins' claim that he has “two ways” of proving proximate cause is wrong and unsupported by authority. It would also lead to absurd results. Were the Court to accept his reasoning, there is essentially no allegation of negligence, medical or otherwise, to which this reasoning could not apply. For example, the plaintiff in *Douglas* could have alternatively argued that, without proper warnings, the drug manufacturer should not have released the drug at all, in which case she would not have suffered the adverse effects. 73 Wn.2d 476, 477-78, 438 P.2d 829 (1968).

It is also helpful to analogize to another medical context to appreciate the untenable nature of Mr. Collins' argument. Assume as follows: Patient A presents to his plastic surgeon for liposuction. The plastic surgeon has access to an inexpensive, risk-free blood screening test that identifies individuals at risk for infection. If the test is administered to Patient A, it would return negative results indicating he is not at risk for infection. However, the plastic surgeon performs liposuction on Patient A without administering the blood test. The plastic surgeon meets the standard of care during the procedure, but the patient develops an infection. Under this set of facts, Mr. Collins would say the plastic surgeon should be liable for Patient A's infection because she performed liposuction without first administering the blood test. This is despite the fact that the procedure met the standard of care and the blood test would have yielded negative results. This cannot be the law.

should not have treated him at all. He relies on circular reasoning and a misunderstanding of his burden under Washington law.

To establish the standard of care in a medical negligence action, the medical expert must “state specific facts showing what the applicable standard of care was and how the defendant violated it.” *Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 89, 419 P.3d 819 (2018). “[T]he expert must link his or her conclusions to a factual basis.” *Id.* at 87. Conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993). Likewise, the circular conclusion that a reasonable doctor would not have acted negligently is insufficient to establish a material fact as to the requisite standard of care. *Reyes*, 191 Wn.2d at 89.

Here, Dr. Bragman claims that, in the absence of a proper workup, the standard of care required Dr. Juergens to refrain from manipulating his neck or to offer a “less risky” alternative form of treatment. This is based on Dr. Bragman’s assertion that any treatment was contraindicated until Dr. Juergens performed a proper workup (*i.e.*, a workup that met the standard of care) and established a clinical basis. CP 347 (explaining “the only contraindication is you haven’t done anything”); CP 138. But, as Dr. Juergens observed at the lower court, CP 319 n.2, the statement that he

should not manipulate Mr. Collins' neck until he performs a proper workup is just another way of saying he should not treat Mr. Collins unless he meets the standard of care. This type of circular reasoning is insufficient to establish the requisite standard of care under Washington law. *Reyes*, 191 Wn.2d at 89 (recognizing as insufficient the "allegation that a reasonable doctor would not have acted negligently"); *Keck v. Collins*, 184 Wn.2d 358, 373, 357 P.3d 1080, 1087 (2015) ("To say that a reasonable doctor would not use a faulty technique essentially states that a reasonable doctor would not act negligently.").

To sufficiently allege that Dr. Juergens should not have manipulated his neck, Mr. Collins has the burden of establishing, through medical testimony and medical facts, that cervical manipulation was contraindicated. Dr. Bragman offers no medical facts establishing that Mr. Collins was an inappropriate candidate for neck manipulation or what contraindications would have been revealed by additional screening procedures. Without expert testimony and medical facts evidencing that neck manipulation was contraindicated, the factfinder has no basis to conclude otherwise. *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). And because Dr. Bragman did not criticize the manner in which Dr. Juergens performed the neck manipulation that allegedly caused his injuries, CP 80; CP 351, there is no other standard-of-care allegation

through which Mr. Collins can claim Dr. Juergens caused his VAD. Dr. Bragman's circular opinion that a reasonable chiropractor would have treated the patient by complying with the standard of care is insufficient to cure this deficit as a matter of Washington law. *Reyes*, 191 Wn.2d at 89; *Guile*, 70 Wn. App. at 26.

4. Mr. Collins should not be relieved of his burden of establishing proximate cause.

Acknowledging that he failed to prove what a more robust workup would have revealed and how it would have changed his outcome, Mr. Collins essentially asks this Court to relieve him of the burden because, otherwise, it would "allow Dr. Juergens' [sic] to profit from his own negligence." App. Br. 14. In doing so, Mr. Collins asks this Court to set aside decades of jurisprudence requiring a tort plaintiff to establish that his injuries were proximately caused by the negligence of the defendant, without resorting to speculation and conjecture. *E.g.*, *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 282, 78 P.3d 177, 181 (2003). Moreover, he asks the Court to ignore this state's statutory scheme and associated case law pertaining to medical negligence, including the threshold requirement that medical facts be established by medical experts within a reasonable degree of medical certainty. RCW 7.70 *et seq.*; *Merriman v. Toothaker*, 9 Wn. App. 810, 814, 515 P.2d 509 (1973).

Summary judgment and the rules pertaining to medical negligence exist to protect healthcare providers from unfettered speculation and guesswork by the factfinder on issues of medical fact and proximate cause. While Mr. Collins' situation is unenviable, his failure to produce evidence to support a *prima facie* showing of proximate cause is indicative of the conclusion that additional screening measures would have been fruitless and his injuries were unforeseeable. His case is an unworthy basis to abandon foundational principles of our tort system. This Court should affirm dismissal of his standard-of-care claim.

B. The lower court properly dismissed Mr. Collins' informed consent claim because he failed to create an issue of fact that his injuries resulted from a material risk of treatment.

The lower court correctly dismissed Mr. Collins' informed consent claim because he failed to create an issue of fact that his injuries resulted from a material risk of treatment. The informed consent issues are multifold: (1) Mr. Collins failed to establish the scientific nature of the risk of vertebral injury as required by *Smith*; (2) the scientific testimony he did produce is legally insufficient and improperly inflated; (3) there are no medical facts demonstrating his risk of arterial injury was reasonably foreseeable; and (4) using an objective standard, he would not have deferred treatment even if he was advised of the marginal risk of arterial injury associated with chiropractic neck manipulation.

1. Mr. Collins failed to establish his likelihood or probability of injury as required by *Smith v. Shannon*.

Dismissal of Mr. Collins’ informed consent claim was proper because he failed to establish through expert medical testimony the scientific nature of his risk of vertebral arterial injury as required by *Smith v. Shannon*, 100 Wn.2d 26, 666 P.2d 351 (1983). Rather than establishing the probability or likelihood of his injury, Mr. Collins’ experts testified that the risk was “material” and “significant.” This testimony is insufficient to establish the scientific nature of the risk and conflates the role of the expert with the factfinder under *Smith*.

A claim for failure to obtain informed consent requires the claimant to prove that the defendant health care provider failed to inform the patient of a “material” fact relating to treatment. RCW 7.70.050(1). A “material” fact is one which a reasonable patient would consider in deciding on treatment. *Smith*, 100 Wn.2d at 33-34. In *Smith*, the Washington State Supreme Court held that the determination of materiality is a two-step process. 100 Wn.2d at 33. The first step is to determine the scientific nature of the risk and the likelihood of its occurrence. *Id.* The second step is to determine whether the probability of the type of harm found to exist is a risk that a reasonable patient would consider in deciding on treatment. *Id.* “While the second step of this determination of materiality clearly does not

require expert testimony, the first step almost as clearly does.” *Id.* at 33. “[E]xpert testimony is necessary to prove the existence of a risk, its likelihood of occurrence, and the type of harm in question.” *Id.* at 34. “Once those facts are shown, expert testimony is unnecessary.”

In light of *Smith*, Mr. Collins had a threshold obligation to establish the scientific nature of his risk of injury through expert testimony, including its probability or likelihood of occurrence. “Probability” means “the chance that a given event will occur.”<sup>4</sup> “Likelihood” means “probability.”<sup>5</sup> As a result, Mr. Collins was required to establish through expert testimony the chance that vascular dissection would occur as a result of cervical manipulation. He failed to do so.

When asked to provide the risk of stroke resulting from cervical manipulation, Dr. Bragman testified the risk was “extremely variable,” ranging from “1 in 1,000 to 1 in millions.” CP 336. To quantify that number, he said “you have to look at the quality of the clinician” and the “method of delivery.” Pressed further on the risk of VAD resulting from cervical manipulation, Dr. Bragman admitted he could not quantify the risk, but that it could range from “pretty high” to “very low”:

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4. *Probability*, <https://www.merriam-webster.com/dictionary/probability> (last visited June 4, 2019).

5. *Likelihood*, <https://www.merriam-webster.com/dictionary/likelihood> (last visited June 4, 2019).

As I told you, I do not have a number. I said -- as I said earlier, I think it's dependent on the quality of the clinician. I think people that are like this guy who don't do anything to establish a basis, use forceful manipulation, I think they're in a pretty high risk category.

Someone who follows the standards of care, who does gentle manipulation on someone that's an appropriate candidate, I think they're -- they have a very low risk of this happening.

CP 357. Via declaration, Dr. Bragman testified that the risk of stroke from cervical adjustment was "material, "significant, and "not low," CP 136-37, but he did not provide testimony quantifying the probability or chance of Mr. Collins' injuries within a reasonable degree of medical certainty.

The testimony of Mr. Collins' other experts fares no better. Expert neurologist Dr. Holmes opined that the risk of "vascular injury . . . is significant enough" that Dr. Juergens should have informed Mr. Collins of the risk and less risky alternatives, but he did not quantify the risk. CP 151. Mr. Collins primary care provider Dr. Fay did not quantify the risk other than to say, "[i]t's very small" and "clearly less than 1 percent."<sup>6</sup> CP 264 (emphasis added). Mr. Collins' treating neurologist Dr. Ramneatu testified she had seen patients claim to have suffered stroke from neck manipulation,

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6. Dr. Fay did not testify that the risk of injury from chiropractic treatment was "one percent" or "1 in 100," as claimed by Mr. Collins. App. Br. at 19.

but she did not testify to the probability or likelihood of the risk.<sup>7</sup> CP 217-18.

Having failed to establish the probability or likelihood of his risk of stroke, Mr. Collins claims he can meet his burden under *Smith* by presenting expert testimony that his risk of stroke was “material” or “significant.” These are legal conclusions, not scientific testimony establishing the likelihood of risk. Allowing legal conclusions to serve as scientific testimony would conflate the role of the expert with the role of the factfinder under *Smith*’s two-part test for materiality. Under *Smith*, the expert is charged with presenting scientific testimony regarding the risk, including its likelihood or probability of occurrence; the factfinder is charged with determining whether the risk is “material” or “significant” enough to warrant disclosure based on the scientific testimony. Mr. Collins cannot circumvent this process and establish materiality by having his experts testify to legal conclusions.

Mr. Collins argues that *Smith* does not require statistical evidence because the plaintiff “got her case to trial” without it. But the case does not say that, and there is no indication that the defendant moved for summary

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7. Mr. Collins’ representation that Dr. Ramneatu had encountered chiropractic stroke two to four times is also incorrect. App. Br. at 19. She testified to one instance of chiropractic stroke and two to three instances of stroke resulting from self-manipulation or self-massage. CP 217-18.

judgment based on the absence of statistical evidence. 100 Wn.2d at 36. Even if it did, the trial judge did not have the benefit of *Smith*'s references to "probability" and "likelihood," of course, because the decision had not been authored yet.

Mr. Collins next suggests that the *Smith* Court implied statistical evidence was not required when it stated, "Ms. Smith was required to present some expert testimony to show the magnitude and other scientific characteristics of the risks . . . ." *Id.* "Magnitude," however, means "quantity, number."<sup>8</sup> It is difficult to understand how the use of "magnitude" as a synonym for "probability" and "likelihood"—in the context of "scientific testimony," no less—suggests that anything short of some statistical or numerical data is required. Moreover, Mr. Collins ignores case law interpreting *Smith* which suggests exactly that. *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 631, 784 P.2d 1288 (1990) ("Only a physician or other qualified expert is capable of determining the existence of a given risk and the **chance** of it occurring.") (emphasis added).

Finally, Mr. Collins cites to informed consent forms submitted by Dr. Juergens as evidence of risk. App. Br. at 17. But the existence of a risk alone is not enough to require disclosure; the risk must be material. *Ruffer*,

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8. *Magnitude*, <https://www.merriam-webster.com/dictionary/magnitude> (last visited June 5, 2019).

56 Wn. App. at 630. The forms cited by Dr. Juergens illustrate the risk is exceedingly rare and not material. CP 96-97.

2. Dr. Bragman's testimony regarding materiality is legally insufficient because he includes the risks of undiagnosed medical conditions and chiropractor negligence.

Leaving aside that Mr. Collins failed to produce scientific medical testimony establishing the likelihood or probability of his injuries, Dr. Bragman's testimony that Mr. Collins' risk of stroke was "significant," "higher," or "not low" is legally insufficient because he includes the risks of chiropractor negligence and undiagnosed conditions.

The law of informed consent requires the provider to disclose material risks of treatment—risks that a reasonable patient would consider in deciding on treatment. *Smith*, 100 Wn.2d at 33-34. It has long been the case, in this jurisdiction and others, that risks of negligence need not be disclosed as a matter of informed consent. *Holt v. Nelson*, 11 Wn. App. 230, 241, 523 P.2d 211 (1974) (no duty to disclose the risk of "improper performance of a procedure"); *Hall v. Frankel*, 190 P.3d 852, 865 (Colo. App. 2008) (no duty to disclose the risk of negligence in the performance of a procedure); *Sood v. Smeigh*, 578 S.E.2d 158, 162 (Ga. App. 2003) (risk of negligence not a matter of informed consent); *Gilmartin v. Weinreb*, 735 A.2d 620, 625 (N.J. Super. Ct. App. Div. 1999) (same).

Likewise, it is well established, in this jurisdiction and others, that the law of informed consent does not require a provider to disclose the risk of undiagnosed conditions. *Backlund v. Univ. of Wash.*, 137 Wn.2d 651, 661, 975 P.2d 950 (1999) (misdiagnosis gives rise to negligence, not informed consent claim); *Hall*, 190 P.3d at 865 (Colorado court of appeals holding same); *Roukounakis v. Messer*, 826 N.E.2d 777, 780-82 (Mass. App. Ct. 2005) (failure to order ultrasound based on misdiagnosis constitutes negligence, not informed consent); *Pratt v. Univ. of Minn. Affiliated Hosps. & Clinics*, 414 N.W.2d 399, 401-02 (Minn. 1987) (no duty to inform patient that diagnosis may not be correct).

In testifying that Mr. Collins' risk of stroke was "material" and "significant,"<sup>9</sup> Dr. Bragman ignores these rules and improperly inflates the risk by including situations in which the provider does not "follow[] the standard of care" and uses forceful manipulation on someone who is not an "appropriate candidate." CP 357; CP 137 ("A reasonable person would also want to know about the increased risk of stroke in the context of not having been worked up correctly.") Dr. Bragman goes so far as to conclude Mr.

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9. Notably, during his deposition, Dr. Bragman contradicted his own testimony that the risk of vascular injury was "significant" and "not low," by referring to the risk of "vascular insult" as "small" and a "rare event," though he maintained it should be mentioned as a matter of informed consent. CP 367.

Collins was in a “high risk category” because Dr. Juergens was not a quality clinician. CP 357 (“[I]t’s dependent on the quality of the clinician. . . . [P]eople that are like this guy . . . [are] in a pretty high risk category.”). This is wildly inappropriate and inconsistent with the law of informed consent. Whether Dr. Juergens needed to disclose the risk of vascular injury does not turn on whether he follows the standard of care, whether he is a “quality” clinician, or whether Mr. Collins has undiagnosed conditions, such as a propensity for stroke. These are not risks of treatment as a matter of law. Testimony that includes them is fundamentally flawed and cannot form the basis for an informed consent claim. *Backlund*, 137 Wn.2d at 661; *Holt*, 11 Wn. App. at 241.

Despite Dr. Juergens raising the issue several times at the lower court, Mr. Collins never addresses that Dr. Bragman relies almost exclusively on inappropriate information to conclude Mr. Collins’ risk of stroke was “material.” This is because there is no counterargument. Dr. Juergens’ obligation was to disclose “serious” risks and complications of treatment inherent to treatment, not the risk of negligence or undiagnosed injuries. RCW 7.70.050(2). Accounting for a properly performed procedure and an appropriate candidate, Dr. Bragman concedes that the risk of injury rising from cervical manipulation is “very low.” CP 357; CP 336 (“I think

it does remain safe in the correct, circumstance, yes.”). This was Mr. Collins’ risk of stroke: very low.

3. Mr. Collins’ risk of stroke was not reasonably foreseeable and, therefore, not material as a matter of law.

Dr. Juergens was also entitled to summary judgment because Mr. Collins’ risk of vertebral artery dissection was not reasonably foreseeable or material as a matter of law. A healthcare provider’s duty to disclose risks of treatment extends only to risks that are reasonably foreseeable. *Mason v. Ellsworth*, 3 Wn. App. 298, 314, 474 P.2d 909 (1970). “[F]oreseeability is an appropriate indicator of the seriousness of a given risk.” *Ruffer*, 56 Wn. App. at 633. “If a risk is not foreseeable, it almost certainly is not serious and, therefore, not material.” *Id.*

The Washington cases that have evaluated materiality hold that risks amounting to a fraction of a percentile are generally unforeseeable as a matter of law. In *Mason v. Ellsworth* the risk of esophageal perforation during an esophagoscopy was deemed to be not reasonably foreseeable and immaterial when the evidence showed that it only occurred in 0.25% to 0.75% of cases. 3 Wn. App. 298, 301, 474 P.2d 909 (1970). Likewise, in *Ruffer v. St. Cabrini Hospital*, the risk of bowel perforation was deemed to be immaterial when the evidence showed it only occurred in 1 in 20,000 to 1 in 50,000 sigmoidoscopy procedures. 56 Wn. App. at 632. The court

reasoned that an injury occurring “0.002% to 0.005%” of the time was “legally insufficient” to be “material” as a matter of law. *Id.* at 632-33.

The undisputed evidence in this case shows that Mr. Collins’ risk of VAD was a fraction of a percentile. He did not present with any signs or symptoms concerning for stroke or arterial injury. CP 51. He had no history of cerebrovascular symptoms and no prior neurologic problems. CP 151, CP 346. He had undergone cervical manipulation dozens of times without incident. CP 63-64. He was presenting to Dr. Juergens with a complaint that had been successfully treated in the past. CP 65-66. And his only “risk factor” was a prior history of smoking, though he had quit thirty years earlier. CP 346. The record is simply devoid of medical facts indicating that Mr. Collins’ risk of stroke was anything but exceedingly low.

On appeal, Mr. Collins emphasizes that Dr. Bragman referenced a study showing the risk of neurological injury was estimated to be as low as 1 in 958. App. Br. at 18. But neither Dr. Bragman nor anyone else testified this was Mr. Collins’ risk of VAD or stroke. Rather, Dr. Bragman categorically refused to quantify the risk, and he did not say the 1 in 958 number applied to Mr. Collins. CP 357 (“I do not have a number.”). He testified the risk was “extremely variable,” ranging from roughly 1 in 1000 to 1 in several million. CP 336. Yet he cited to no medical facts that would place Mr. Collins near the risky end of this range. He also attributes the

major “risks” of cervical adjustment to violating the standard of care and performing aggressive manipulation on inappropriate candidates, which are invalid data points. CP 336; 357.

While Mr. Collins is entitled to reasonable inferences on summary judgment, he is not entitled to inferences that his expert refused to endorse and which violate the law. Accounting for a correctly performed procedure and an appropriate candidate, Dr. Bragman admits the risk of VAD is “quite low” and “safe.” CP 357; CP 336. Risks that are “quite low” and amount to a mere fraction of a percentile—as Mr. Collins’ risk did—are not reasonably foreseeable as a matter of law.

4. Using an objective standard, Mr. Collins would not have deferred treatment had he been advised of the marginal risk of injury associated with chiropractic treatment.

The lower court also properly dismissed Mr. Collins’ informed consent claim because, using an objective standard, no jury would conclude that Mr. Collins would have deferred treatment on the incident date had he been advised of a marginal risk of vascular injury. The test for evaluating an informed consent claim in Washington is objective, not subjective. *Backlund*, 137 Wn.2d at 665-66; *Degel v. Buty*, 108 Wn. App. 126, 132, 29 P.3d 768 (2001). The principal issue is whether a reasonably prudent patient in the plaintiff’s position would have chosen a different course of treatment if fully informed of the risk of injury.

An objective standard means a plaintiff may not survive summary judgment merely by testifying he would have chosen a different course of treatment. *Backlund*, 137 Wn.2d at 665-66. There must be a genuine issue of fact as to whether a reasonable person in his position would have chosen an alternative course of treatment having been informed of the risk at issue. In making this determination, the factfinder looks to the situation of the plaintiff at the time of the treatment, including his or her “medical condition, age, risk factors, etc.” *Id.* at 667. In adopting an objective test, the Washington State Supreme Court sought to avoid the issue of hindsight bias—that is, the *post hoc* claim by the plaintiff that he would not have consented to treatment had he been properly advised of the risk. *Id.* at 665 n.4.

Taking Mr. Collins’ condition, age, and risk factors into account, there is no reason to believe a reasonable person stepping into his shoes would have declined a neck adjustment on the incident date. Prior to the incident date, Mr. Collins had received chiropractic treatment nearly 200 times over eleven years—40 or 50 of which involved cervical manipulations, and none of which involved complications. His personal history with chiropractic treatment went back to when he was very young and he attended treatments with his mother. During that time, he never heard of anyone getting injured as a result of chiropractic treatment, and he had

never been harmed himself. He was seeking treatment for pain that he had been successfully treated in the past, and he believed chiropractic treatment was helping him. He had no history of neurological or cerebrovascular issues. He had no risk factors for stroke. He also had no contraindications for neck manipulation, nor would any have been revealed with additional workup. He had never heard of anyone being harmed by chiropractic treatment. Last, he had already received chiropractic treatment from Dr. Juergens on two prior occasions.

Consequently, even assuming that Dr. Juergens told Mr. Collins the risk of vascular injury as a result of cervical manipulation was 1 in 1000—which would have grossly overinflated his risk—this is still a fraction of a percentile. There is no reason to believe a reasonable person in Mr. Collins’ position—that is, someone with the same history as him—would have deferred treatment on the incident date having been so advised, having undergone cervical manipulation dozens of times in the past, and having presented to Dr. Juergens specifically for chiropractic treatment.<sup>10</sup> In fact,

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10. This is even more obvious considering that Dr. Juergens treated Mr. Collins before the incident two times in June 2013. Dr. Bragman’s testimony is that the informed consent process should have occurred at the outset of their treatment relationship, which means Mr. Collins likely would have been consented for the risk of vascular injury in June 2013. This provides even less reason to believe that Dr. Juergens would have declined treatment on the incident date, which was in January 2014.

despite treating thousands of patients over thirty years, Dr. Bragman could not identify one individual who declined a cervical adjustment due to the risk of stroke *if* the individual had previously received a cervical adjustment. Mr. Collins wants the Court to believe he would have been the first.

The only reason to believe Mr. Collins would have declined treatment is hindsight bias, which is an insufficient basis to overcome summary judgment. Because there is no reason to believe that a reasonable person in Mr. Collins' position would have declined chiropractic treatment under these circumstances, the lower court correctly dismissed Mr. Collins' informed consent claim.

#### V. CONCLUSION

For the foregoing reasons this Court should affirm summary judgment dismissal of Mr. Collins' standard-of-care and informed consent claims.

RESPECTFULLY SUBMITTED this 7th day of June, 2019.

FAIN ANDERSON VANDERHOEF,  
ROSENDAHL O'HALLORAN SPILLANE,  
PLLC

*s/Mark B. Melter*

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 7th day of June, 2019, I caused a true and correct copy of the foregoing document, "Brief of Respondent," to be delivered in the manner indicated below to the following counsel of record:

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June 07, 2019 - 2:15 PM

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**Appellate Court Case Number:** 52552-6  
**Appellate Court Case Title:** Thomas P. Collins, Appellant v. Juergens Chiropractic, PLLC, et al, Respondents  
**Superior Court Case Number:** 16-2-03958-5

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