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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION TWO

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THOMAS P. COLLINS  
Appellant,

vs.

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

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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

Table of Authorities ..... ii

**REPLY ARGUMENT** ..... 1

**1. Collins established a genuine issue of material fact that as to whether Dr. Juergens violated the standard of care and was a proximate cause of his injuries. The trial court should not have dismissed his claim on summary judgment.** ..... 1

**2. Collins established a genuine issue of material fact as to whether Dr. Juergens failed to get his informed consent. The trial court should not have dismissed his claim on summary judgment.** ..... 5

**CONCLUSION** ..... 9

## Table of Authorities

### Cases

<i>Christen v. Lee</i> , 113 Wn.2d 479, 780 P.2d 1307 (1989) .....	8
<i>Douglas v. Bussabarger</i> , 73 Wn.2d 476, 438 P.2d 829 (1968) .....	1-2
<i>Flyte v. Summit View Clinic</i> , 183 Wn.App. 559, 333 P.3d 566 (2014) .....	7
<i>Gates v. Jensen</i> , 92 Wn.2d 246, 595 P.2d 919 (1979). . . . .	2, 4-5
<i>Holt v. Nelson</i> , 11 Wn. App. 230, 523 P.2d 211 (1974) .....	9
<i>McKown v. Simon Property Group, Inc.</i> , 182 Wn.2d 752, 344 P.3d 661 (2015) .....	8
<i>Schooley v. Pinch's Deli Market, Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998) .....	8
<i>Smith v. Shannon</i> , 100 Wn.2d 26, 666 P.2d 351 (1983) .....	6-7

### Other Authorities

J. Steincipher, Survey of Medical Professional Liability in Washington, 39 <b>Wash.L.Rev.</b> 704 (1964) .....	3
---	---

## REPLY ARGUMENT

**1. Collins established a genuine issue of material fact as to whether Dr. Juergens violated the standard of care and was a proximate cause of his injuries. The trial court should not have dismissed his claim on summary judgment.**

Collins presented unrebutted testimony that Dr. Juergens violated the standard of care in two ways: 1. He failed to conduct a pre-treatment examination to determine whether treatment was necessary and, if so, the modalities that should be used; 2. He treated Mr. Collins without performing an exam. Only one needed to be a proximate cause of Collins' injuries. Juergens focuses exclusively on the first, ignoring the second. The evidence was undisputed, however, that if Juergens had met the second standard of care, he would not have injured Collins.

Juergens also fails to acknowledge two possible outcomes of a thorough examination. He contends the examination would have to have shown that the treatment was contraindicated for liability to attach. But another alternative exists: The examination could have revealed that treatment was unnecessary. To this day, Dr. Juergens cannot testify that his treatment was needed for Collin's condition, or that it provided any benefit to Collins, because he simply never looked.

*Douglas v. Bussabarger*, 73 Wn.2d 476, 438 P.2d 829 (1968), does not provide an apt analogy. In *Douglas* the intervening act of an

independent provider caused the drug to be administered. 73 Wn.2d at 478. Here, no one intervened between Dr. Juergens' failure and his decision to treat Collins. He breached the standard of care and he alone decided to treat Mr. Collins despite the breach.

Juergens reliance on *Gates v. Jensen*, 92 Wn.2d 246, 595 P.2d 919 (1979), is misplaced. Juergens focuses on the fact that the tests administered would have shown whether the Plaintiff had Glaucoma. Response Brief at 22. That misses the point. The importance of *Gates* is that the Court imposed a duty to test as part of the standard of care. 92 Wn.2d at 253. That is the same duty Collins is arguing exists here.

Dr. Juergens places his response to Collin's primary argument in a footnote, concluding with the unsupported statement: "This cannot be the law." See Brief of Respondent at 24, n.3. To get to that conclusion he creates an inapt hypothetical based on *Bussabarger, supra*. Response Brief at 22. However, the scenario Juergens describes was not raised in *Bussabarger*. As a result, the court did not address it, and Juergens cannot predict the outcome as if it had been raised.

Juergens characterizes Collins' argument as "untenable." Response Brief at 24, n.3. In fact, it is Juergens' position that is untenable. As the *Bussabarger* Court noted, "no single group occupies a more favorable position at law than members of the medical profession."

73 Wn. App. at 478 (quoting J. Steincipher, Survey of Medical Professional Liability in Washington, 39 **Wash.L.Rev.** 704, 710 (1964)). Juergens' proposal would extend that favored position by encouraging deliberate ignorance. Collins and his experts did not know Collins' pre-treatment condition because neither Dr. Juergens nor Dr. Randall performed an examination in the ten years after they began caring for him. Juergens takes advantage of the absence of information he caused. Under such circumstances, even shifting the burden to the offending doctors to establish that an examination would not have revealed contraindicating factors to treatment is a better solution than letting them off scot free.

Dr. Juergens' reduction of Collins' argument to what he describes as circular logic (Response Brief at 23) is false reasoning itself. Collins' evidence did not establish merely that Juergens was required to refrain from negligence or refrain from using a faulty technique. Collins provided expert testimony that the chiropractic standard of care required a thorough pre-treatment examination, and that the standard of care prohibited treatment without it. Whether Juergens breached those standards, and whether his treatment was either negligent or faulty were then questions for the jury to decide. That is not circular reasoning.

Nor is Collins asking the court to abandon proximate cause. Collins established proximate cause by showing that but for Dr. Juergens'

breach of the standard of care, he would not have been injured.

It is, rather, Dr. Juergens who is attempting to limit proximate cause. He asks the court to hold that proof of proximate cause must include not only but-for causation, but evidence of what the outcome would have been if the defendant's negligence had not occurred. In other words, in a common tort situation, he would require victims of car accidents to show not only that they were injured in the accident, but that they would not have been injured if the accident had not occurred. While such proof may be readily available under some circumstances, it is not required to establish proximate cause.

What's more, the rule he proposes is illogical. Suppose Dr. Juergens had conducted an examination of Mr. Collins and in doing so discovered not that Collins was at risk of VAD, but rather had calcification that made his bones brittle and subject to fracture from chiropractic manipulation. And suppose further that knowledge of that condition would have caused Collins to forego treatment. Without that knowledge, Juergens treated Collins who suffered VAD. Under Juergens' theory he would not be liable because the examination would not have contraindicated the procedure he performed, even though it deprived Collins of the ability to choose whether to undergo treatment.

That is where *Gates* comes in. In *Gates*, the court held that a

physician has a duty to investigate or examine the patient sufficient to advise the patient of the risks of treatment and treatment alternatives. Failure to do so can be a violation of the standard of care. 92 Wn.2d at 253.

Collins does not ask the court to apply new or novel rules of proximate cause, or even to apply existing rules in a new or novel way. He asks the court to apply the rules just as it does to other health care professionals subject to standards of care. Chiropractors have successfully demanded their place among those professionals. They have to live up to the standard. Collins established that the professional standard of care requires chiropractors to conduct a pre-treatment examination and refrain from treatment until they do. Juergens violated both standards, and as a result of his treatment Collins was injured. That was what the law required. Therefore summary judgment was improper.

**2. Collins established a genuine issue of material fact as to whether Dr. Juergens failed to get his informed consent. The trial court should not have dismissed his claim on summary judgment.**

With regard to informed consent, Dr. Juergens' argument is essentially that Collins did a lot, but not enough. His experts and treating doctors' testimony that the risk of VAD was known, material, substantial, common, and even taught in chiropractic school, that the risk was under-

reported, and that each of his treating doctors had encountered the injury, was not enough. According to Dr. Juergens, Collins needed statistical probabilities; only numbers could provide a basis for determining materiality. And, though Collins presented numbers showing probabilities of injury as high as 1 in 100, his numbers were not “pure” enough, meaning they did not factor out injuries from negligence or improper patient screening, or did not account for patients in Collins’ particular condition, or other matters. But, in the end, Dr. Juergens’ arguments are not supportable.

Juergens reliance on *Smith v. Shannon*, 100 Wn.2d 26, 666 P.2d 351 (1983), remains misplaced. The decision supports Dr. Juergens only by interpreting its words in the most burdensome and restrictive way possible. However, nothing in the decision suggests that when the Court used terms like magnitude, nature of the risk, likelihood of occurrence, and probability of occurrence, it was imposing mathematical probability as the only sufficient evidence. The decision as a whole indicates the court was merely recognizing that the trier of fact needed some expert description of the risk in order to make an informed decision on whether consent was needed. As the court said:

Just as patients require disclosure of risks by their physicians to give an informed consent, a trier of fact requires description of risks by an expert to make an

informed decision.

Some expert testimony is thus necessary to prove materiality. Specifically, expert 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.

*Smith v. Shannon*, 100 Wn.2d at 33-34. This does not imply the mathematical purity for which Dr. Juergens advocates. Moreover, his mathematically pure standard runs contrary to the policy of Washington law to expand the duty to disclose. *Flyte v. Summit View Clinic*, 183 Wn. App. 559, 573-74, 333 P.3d 566 (2014).

Dr. Juergens' other arguments go to the weight of the evidence, not its sufficiency to resist summary judgment. He argues for example that Dr. Bragman's statistics were flawed because they might have included negligently caused VAD, or they might reflect poor patient screening. While these present arguments that may impeach Collins' experts' testimony, they do not preclude summary judgment, where the facts are interpreted in the light most favorable to the non-moving party. All these "facts" merely challenge Collins' assertion about the probability of harm. The *Smith* Court made clear that decision is for the jury. 100 Wn.2d at 33 ("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.")

The simple fact remains, Collins presented all the evidence he needed to survive summary judgment. He provided statistical probability of harm. He provided the knowledge of the relevant health care community. He provided scientific studies. He provided knowledge derived from education. He showed the practices of others in the chiropractic community to warn of VAD. And, he provided the medical communities' clinical experience. If that was not sufficient to get his claim to a jury, then patient control over their care and the doctrine of informed consent are hollow concepts.

The facts undermine Juergens' argument that the risk of VAD was unforeseeable. Foreseeability is normally an issue for the trier of fact and will be decided as a matter of law only where reasonable minds cannot differ. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 477, 951 P.2d 749 (1998). In order to establish foreseeability "the harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant." *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 763, 344 P.3d 661 (2015)(quoting *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989)) A jury hearing evidence that the risk of VAD was taught in chiropractic school, that other chiropractors include the risk in their informed consent disclosures, and the prevalence of the injury could reasonably conclude

that the risk was sufficiently foreseeable that Dr. Juergens should have disclosed it.

Finally, Dr. Juergens' contention that no jury could find that Collins would have foregone treatment if he had known of the risk misstates the issue and asks the court to substitute its judgment for the jury's. The question is not whether Collins would have foregone chiropractic treatment altogether if the risk had been disclosed, but whether he would have opted for different treatment modalities to avoid the risk or no treatment at all. To get that issue to the jury, Collins only had to present evidence from which the jury could infer that his choice would have been different. *Holt v. Nelson*, 11 Wn. App. 230, 236, 523 P.2d 211 (1974). And, Collins was competent to testify to his own intent. *Id.*

Here Collins testified that his choice would have been different. (CP 290-91) Moreover, a jury could reasonably conclude that a patient of Mr. Collin's age who is presented with a treatment that risks stroke and an alternative treatment that carries no risk, even one that may produce less satisfactory results, reasonably would opt for the less risky alternative. The issue is one for the jury.

### **CONCLUSION**

For the foregoing reasons, Collins again 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 22nd day of July, 2019.

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