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Washington State Court of Appeals Division II No. 53006-6-II  
Kitsap County Superior Court 15-2-02556-4

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COURT OF APPEALS OF THE WASHINGTON STATE

DIVISION II

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JOSEPH SNOWDEN, et al.,

*Appellants,*

vs.

GILBERT ONDUSKO, M.D., et al.,

*Appellees.*

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BRIEF OF APPELLANTS

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## I. INTRODUCTION

Appellants, Joseph and Debra Snowden, were involved in a high-speed, head-on collision on December 30, 2011. Both sustained serious injuries and were transported to Harrison Medical Center in Bremerton, Washington (“Harrison”).

Joseph Snowden (“Joseph”), a 5’10” 283-pound 57-year-old African American was attended to in the emergency department by Gilbert N. Ondusko, M.D., (“Ondusko”) as well as other Harrison staff. Joseph reported multiple symptoms, including bilateral leg and foot pain. Joseph specifically identified his right foot as being injured and very painful. Despite his complaints of right foot pain, no x-rays were taken of his right foot.

Joseph presented at the Harrison emergency department four (4) additional times from January 3 through January 8, 2012, continuing to complain of right foot pain. No x-rays were taken at any of those visits. Convinced that something was seriously wrong with his right foot, Joseph went to PromptCare Medical Clinic in Bremerton, Washington, on January 11, 2012 where x-rays were taken disclosing a fracture of the right 2<sup>nd</sup> metatarsal, otherwise known as a Lisfrank fracture, a potentially devastating injury without a timely, accurate diagnosis and proper treatment.

Debra Snowden (“Debra”), a lithe 5’6” 120 pound 57 year old Caucasian, was also transported to Harrison for treatment. She was attended to by Scott T. Ekin, M.D. (“Ekin”) and other Harrison staff. Debra had four fractured ribs, a fractured sternum and a spleen injury as a result of the collision. She reported symptoms including moderate to severe chest pain, posterior neck pain, and back pain. Despite her injuries and symptoms, Debra was discharged by Ekin on December 30, 2011, *without* a diagnosis of fractured ribs, fractured sternum or spleen injury. Debra returned to Harrison on January 3, 2012, at which time she was diagnosed with a fractured sternum and a ruptured spleen. She returned to Harrison on January 4, 2012, at which time she was diagnosed with four (4) broken ribs.

Debra and Joseph Snowden filed suit against Ondusko, Ekin and Harrison on December 29, 2015. CP 2 (Complaint Arising out of Medical Negligence). Harrison answered the Complaint on April 14, 2016, denying liability. CP 8 (Defendant Harrison Medical Center’s Answer to Complaint).

Harrison was dismissed on Summary Judgment as to corporate liability and by further Order as to its vicarious liability. Ondusko and Ekin are the remaining defendants in this appeal.

Ondusko and Ekin sought Summary Judgment on August 16, 2016. CP 35. In their Motion, Ondusko and Ekin argued that the Snowden's claims were not sufficiently supported by expert medical opinion. That Motion was granted by Order dated October 18, 2016, which dismissed all claims against Ondusko and Ekin. CP 50.

On Plaintiff's motion for reconsideration the Court affirmed Ekin's dismissal and granted Plaintiff's motion as to Ondusko only. CP 52; CP 62. On January 25, 2019 Ondusko's claims were dismissed on his second Motion for Summary Judgment filed December 6, 2018. [CP not numbered but named Defendants Gilbert N. Ondusko, M.D. and Scott T. Ekin, M.D.'s Motion for Summary Judgement Dismissal]. The Snowden's timely filed their Notice of Appeal from that Order on February 22, 2019. CP not numbered.

Plaintiff's come before this Court seeking relief in the form of an Order reversing the trial court's dismissal of Ekin and Ondusko and remanding for trial.

## **II. ASSIGNMENTS OF ERROR**

1. The Superior Court erred in granting summary judgment in favor of Ondusko on the grounds that Joseph Snowden's claims were not sufficiently supported by expert medical opinion in that no specific injury was identified.

2. The Superior Court erred in granting summary judgment in favor of Ekin on the grounds that Debra Snowden's claims were not sufficiently supported by expert medical opinion.

#### IV. STATEMENT OF THE CASE

**A. The claims of Joseph Snowden were supported by the October 1, 2016, and January 10, 2019, Declarations of Andrea Fisk, M.D.**

Ondusko and Ekin argued that the Snowdens' claims were not sufficiently supported by expert medical opinion. The Snowdens opposed their Motion with, *inter alia*, the Declarations of Andrea Fisk, M.D., ("Fisk") dated October 1, 2016 and January 10, 2019. CP 43; CP ?

Fisk is a practicing physician, licensed in the State of Washington, board certified and specializing in Emergency Medicine. CP 43 at para. 2. Fisk reviewed all of the relevant medical records of Joseph and Debra Snowden. CP 43 at paras. 3-5. She then opined, in her first declaration, to a reasonable degree of medical certainty, as to Joseph Snowden, that "Dr. Gilbert N. Ondusko's treatment of [Joseph] Snowden fell below the standard of care and resulted in a delayed diagnosis of a fracture-dislocation of his right 2<sup>nd</sup> metatarsal joint." CP at para. 43, para. 7. More specifically, Fisk stated that Ondusko's care of Joseph Snowden deviated from the standard of care in that he failed to conduct even a cursory examination of Joseph's right foot and that, had he done so, the possibility

of a right foot fracture (which was then extant) would have been disclosed. CP 43 at para. 11.

Fisk further opines that, “[o]n a more probable than not basis, had the right foot fracture been diagnosed during his first visit, [Joseph] would have had proper care of this fracture. He would have been correctly told not to bear weight on his right foot and would have had closer follow up with an orthopedic surgeon/podiatrist for definitive management. CP 43 at para. 16. Fisk notes that Joseph underwent surgery on his right foot on February 29, 2012 (a “right mid foot fusion”). CP at para. 17. Fisk then notes:

“There is documentation by his PCP, podiatrist and physical therapist confirming that within a time period of several years, [Joseph] Snowden suffered from chronic right foot pain which prohibited him from working, leading to lost wages and financial difficulties. On a more probable than not basis, had Dr. Ondusko detected the fracture, [Joseph] Snowden would have been more promptly treated by the podiatrist and instructed not to bear weight on the right foot. This would have likely lead to less pain and suffering.” CP 43 at *id.*

In her Declaration of January 10, 2019, Dr. Fisk opined:

“Joseph Snowden received substandard treatment all the while he presented to Harrison Medical Center, including and specifically from Gilbert Ondusko, M.D. whose specific deviation from the standard of care was the failure to diagnose Joseph Snowden’s fractured right foot.” [CP, not numbered, but named Declaration of Andrea Fisk, M.D.

in Response to Defendant's Renewed Motion for Summary Judgment].

"If Dr. Ondusko had performed an adequate history, review of systems and examination of his right foot, with subsequent ordering of and XRay of his right foot, Joseph Snowden's fracture could have been diagnosed that visit and he could have received earlier treatment. Instead, he was not diagnosed until 13 days later and another facility. This significant delay in diagnosis and subsequent treatment led to unnecessary additional pain, restricted mobility, and probable further damage to the fractured foot." [CP, not numbered, but named Declaration of Andrea Fisk, M.D. in Response to Defendant's Renewed Motion for Summary Judgment].

"The undiagnosed fracture constituted further "injury" to Joseph Snowden. He had injured his left leg in this motor vehicle collision, and thus he was instructed by Dr. Ondusko to use crutches and bear all of his weight, all 283 pounds of weight, onto his fractured right foot. This more probably than not, caused him more pain over the next 13 days. Had Dr. Ondusko properly diagnosed him in his initial visit, he would likely have received proper fracture care treatment. This includes patient education about the specific fracture, emphasizing importance of elevation and avoidance of weight bearing to allow the fracture to heal and to minimize risk of displacement of the fractured bones." [CP, not numbered, but named Declaration of Andrea Fisk, M.D. in Response to Defendant's Renewed Motion for Summary Judgment].

"Joseph Snowden's missed foot fracture was a Lisfranc Joint fracture/dislocation. The Lisfranc Joint is located between the forefoot and midfoot and it is important in stabilizing the arch of the foot. This can be devastating injury

without a timely, accurate diagnosis and proper treatment. There is an increased risk of adverse outcome when the diagnosis is late. The underdiagnosed injury can lead to significant morbidity, progressive foot deformity, chronic pain and dysfunction.” [CP, not numbered, but named Declaration of Andrea Fisk, M.D. in Response to Defendant’s Renewed Motion for Summary Judgment].

“No one can say to a reasonable degree of medical certainty that the outcome of the fractured foot, at the conclusion of treatment and rehabilitation, would have been substantially different if the fractured foot was diagnosed on the initial visit rather than day 13. However it is worth noting, that bearing ones full weight on a fractured foot for 13 days impedes bone healing, aggravates pain and causes emotional distress to any patient. It is also well documented in the literature that missed or misdiagnosed Lisfranc injuries/fractures can lead to significant long term pain and disability.” [CP, not numbered, but named Declaration of Andrea Fisk, M.D. in Response to Defendant’s Renewed Motion for Summary Judgment].

“What I can say to a reasonable degree of medical certainty is that Dr. Ondusko failed to perform an adequate history, examination and failed to order the appropriate diagnostic test, an Xray This failure lead to a missed diagnosis of a debilitating foot fracture. This missed diagnosis certainly did not improve his chances of a better outcome. A fundamental principle of the practice of medicine is than earlier diagnosis increases a patient’s odds of a better outcome, both physically and emotionally. I would have taken a simple XRay to diagnose his fracture”. [CP, not numbered, but named Declaration of Andrea Fisk, M.D. in Response to Defendant’s Renewed Motion for Summary Judgment].

**B. The claims of Debra Snowden were supported by the October 1, 2016, Declaration of Andrea Fisk, M.D.**

In her October 1, 2016, Declaration, Dr. Fisk opined, to a reasonable degree of medical certainty that “Dr. Scott T. Ekin’s treatment of Debra Snowden fell below the standard of care and resulted in a delayed diagnosis of a sternal fracture, four rib fractures, and splenic injury that eventually ruptured which required an emergent splenectomy.”

CP 43 at para. 8. Dr. Fisk further opined:

Dr. Ekin’s care deviated from the standard of care in several respects”. CP 43.

She then identified the deviations:

“The mechanism of injury was not taken into consideration. Debra Snowden was in a high-speed collision with reports from the paramedics of significant intrusion. The paramedics were called to the scene, alerted the ER of their pending arrival, and she was placed on a back board and C collar. A modified trauma team was activated. We have two patients who were in the same high speed collision, presenting to the same hospital, yet one patient J. Snowden, had a full body CT (head, neck, chest, abdomen and pelvis) within 12 minutes of his arrival, yet [Debra] Snowden had only two studies performed: a X-ray of the cervical spine and X-ray of the chest. There is limited information about the accident in Dr. Ekin’s note: there is no mention about the speed of the vehicle, the damage to the vehicle, whether there was any airbag deployment or whether the patient was ambulatory on scene. These are key features that we must consider as emergency physicians when we assess the probability of a serious injury when it comes to a traumatic

injury secondary to a motor vehicle collision.” CP 43 at para. 19.

“Dr. Ekin did not take into consideration the paramedic’s report. The medical incident report from North Kitsap Fire and Rescue written by Chris Smith, paramedic, states that the patient was complaining of a, ‘neck, shoulder, sternum pn w/ difficulty breathing. pt states it feels like an 80 lb weight on chest. pn increases with insp. pt also states there is a “dent” in sternum that was not there prior to MVC.’ On examination he remarks that there is ‘swelling /redness to L clavicle and sternum, indent + pn to mid sternum.’ The paramedic did a more careful examination and more thorough history than Dr. Ekin did.” CP 43 at para. 20.

“There is a limited physical examination in Dr. Ekin’s dictated note. He notes diffuse tenderness over the sternum, however remarks, ‘chest wall: nontender.’ [Debra] Snowden had 4 lateral left sided rib fractures - it would be painful if he actually examined the area. A proper chest wall examination was not performed. There is also mention in his note that ‘she was treated with Vicodin with good relief of pain,’ however [Debra] Snowden had declined analgesics during her visit. Another contradiction.” CP 43 at para. 22.

“Dr. Ekin should have maintained a high index of suspicion: she was a modified trauma patient in a high speed MVC with diffuse tenderness over the sternum. She mentioned a ‘dent’ to the paramedics. It was imperative to rule out a sternal fracture which increases one’s risk of a myocardial injury, arrhythmia, and further rib cage fractures. It is in the scope of the ER physician’s knowledge base to know that Chest X-Rays do not detect all sternal fractures. When there is a high clinical suspicion, the next step is to order a CT of the chest which has a much greater

sensitivity in detecting sternal fractures.” CP 43 at para. 23.

“Let us now also compare Debra Snowden’s care to her husband’s J. Snowden. He was in the same high speed MVC and he had also presented with chest wall pain during his initial ER visit. Dr. Ondusko ordered a Chest CT and EKG which was the correct thing to do and which is what should have been ordered on [Debra] Snowden.” CP 43 at para. 24.

“On a more probable than not basis, had the Chest CT had been correctly ordered on [Debra] Snowden, the sternal fracture and the four left rib fractures would have likely been identified. She would have been likely admitted to the hospital and closely monitored. Left lower rib fractures also increases one’s risk of a splenic injury. This should raise a physician’s concern for a splenic injury thus placing more care on performing frequent and thorough abdominal examinations”.

“On a more probable than not basis, the delay in detection of the sternal fracture, 4 rib fractures and splenic injury, deprived [Debra] Snowden of an increased chance for a better outcome with earlier treatment.” CP 43 at para. 28.

“Had this splenic injury been detected earlier, she may have been spared a splenectomy, which causes a lifelong issue with immunosuppression. This increases her risk for severe infections with encapsulated bacteria which can cause bacterial meningitis, bacterial pneumonia and fulminant sepsis, to name a few. She would have been admitted to the hospital on her initial visit which would have allowed closer monitoring and further assessments of whether the splenic injury could have been salvaged, thus minimizing

the risk of rupture and then subsequent splenectomy.” CP 43 at para. 29.

“The consequences of these missed injuries were substantial. [Debra] Snowden suffered from chronic pain to her sternum, back and abdomen around her surgical scar.” CP 43 at para. 30.

“In my opinion, had the sternal fracture, 4 left rib fractures and splenic injury been detected on her initial visit on 12/30/2011 by Dr. Scott Ekin, she would have had a higher chance for a better outcome with earlier treatment.” CP 43 at para. 31.

## V. ARGUMENT

### A. Summary Judgment Standard

The purpose of summary judgment is to avoid useless trials on formal issues, which cannot be factually supported, or, if factually supported, could not, as a matter of law, lead to a result favorable to the non-moving party. *Burris v. General Ins. Co. of America*, 16 Wn. App. 73, 553 P.2d 125 (1976). In its inquiry, “the court must draw all reasonable inferences most favorable to the non-moving party.” *Burris v. General Ins. Co. of America* Supra, quoting *Wood v. Seattle*, 57 Wn.2d 469, 473, 358 P.2d 140 (1960).

In all cases, one who moves for summary judgment has the burden of proving that there is no genuine issue of material facts, irrespective of

whether he or his opponent would, at the trial, have the burden of proof on the issue concerned. *Preston v. Duncan*, 55 Wn. 2d 678,349 P.2d 605 (1960). *LaPlante v. State*, 85 Wn.2d 154,158,531 P.2d 299 (1975). The moving party bears the burden of showing the absence of an issue of material fact. *Safeco Ins. v. Butler*, 118 Wn.2d 383, 395,823 P.2d 499 (1992).

The trial Court's Orders are not always clear as to why it ruled the way it did. What follows is a summary of the opinions declared by Snowdens' qualified expert as to deviation from the standard of care; causation and damages (injury) in the context of the codified elements necessary to establish a case of medical negligence.

**B. Standard on Appeal.**

The standard of review on appeal is de novo.

**C. The Superior Court erred in granting summary judgment in favor of Ondusko on the grounds that Joseph Snowden's claims were not sufficiently supported by expert medical opinion.**

The elements necessary to establish a prima facie medical negligence case are codified in RCW 7.70.040:

**Necessary elements of proof that injury resulted from failure to follow accepted standard of care.**

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;

(2) Such failure was a proximate cause of the injury complained of.

True, Dr. Fisk's robust criticism of Drs. Ondusko and Ekin is not organized in a cogent fashion, making clear the deviations and what the deviations caused. Yet her declarations provide a prima facie case of deviations from the standard of care which were proximate causes of the injuries complained of by Joseph Snowden:

Ondusko's failures as an Emergency Room physician deviated from the standard of care. Found in Fisk's declarations where indicated are the following opinions stated on a more likely than not basis:

"Dr. Gilbert N. Ondusko's treatment of [Joseph] Snowden fell below the standard of care and resulted in a delayed diagnosis of a fracture-dislocation of his right 2<sup>nd</sup> metatarsal joint." CP at para. 43, para. 7.

"Ondusko's care of Joseph Snowden deviated from the standard of care in that he failed to conduct even a cursory examination of Joseph's right foot and that, had he done so, the possibility of a right foot fracture (which was then extant) would have been disclosed." CP 43 at para. 11.

“[o]n a more probable than not basis, had the right foot fracture been diagnosed during his first visit, [Joseph] would have had proper care of this fracture. He would have been correctly told not to bear weight on his right foot and would have had closer follow up with an orthopedic surgeon/podiatrist for definitive management. CP 43 at para. 16.

Fisk notes that Joseph underwent surgery on his right foot on February 29, 2012 (a “right mid foot fusion”). CP at para. 17. Fisk then notes:

“There is documentation by his PCP, podiatrist and physical therapist confirming that within a time period of several years, [Joseph] Snowden suffered from chronic right foot pain which prohibited him from working, leading to lost wages and financial difficulties. On a more probable than not basis, had Dr. Ondusko detected the fracture, [Joseph] Snowden would have been more promptly treated by the podiatrist and instructed not to bear weight on the right foot. This would have likely lead to less pain and suffering.” CP 43 at *id.*

In her Declaration of January 10, 2019, Fisk opined:

“Joseph Snowden received substandard treatment all the while he presented to Harrison Medical Center, including and specifically from Gilbert Ondusko, M.D. whose specific deviation from the standard of care was the failure to diagnose Joseph Snowden’s fractured right foot.” [CP, not numbered, but named Declaration of Andrea Fisk, M.D. in Response to Defendant’s Renewed Motion for Summary Judgment].

Ondusko’s deviations were a proximate cause of Joseph’s injuries:

“If Dr. Ondusko had performed an adequate history, review of systems and examination of his right foot, with subsequent ordering of and XRay of his right foot, Joseph Snowden’s fracture could have been diagnosed that visit and he could have received earlier treatment. Instead, he was not diagnosed until 13 days later and another facility. This significant delay in diagnosis and subsequent treatment led to unnecessary additional pain, restricted mobility, and probable further damage to the fractured foot.” [CP, not numbered, but named Declaration of Andrea Fisk, M.D. in Response to Defendant’s Renewed Motion for Summary Judgment].

“The undiagnosed fracture constituted further “injury” to Joseph Snowden. He had injured his left leg in this motor vehicle collision, and thus he was instructed by Dr. Ondusko to use crutches and bear all of his weight, all 283 pounds of weight, onto his fractured right foot. This more probably than not, caused him more pain over the next 13 days. Had Dr. Ondusko properly diagnosed him in his initial visit, he would likely have received proper fracture care treatment. This includes patient education about the specific fracture, emphasizing importance of elevation and avoidance of weight bearing to allow the fracture to heal and to minimize risk of displacement of the fractured bones.” [CP, not numbered, but named Declaration of Andrea Fisk, M.D. in Response to Defendant’s Renewed Motion for Summary Judgment].

“Joseph Snowden’s missed foot fracture was a Lisfranc Joint fracture/dislocation. The Lisfranc Joint is located between the forefoot and midfoot and it is important in stabilizing the arch of the foot. This can be devastating injury without a timely, accurate diagnosis and proper treatment. There is an increased risk of adverse outcome when the diagnosis is late. The underdiagnosed injury can lead to

significant morbidity, progressive foot deformity, chronic pain and dysfunction.” [CP, not numbered, but named Declaration of Andrea Fisk, M.D. in Response to Defendant’s Renewed Motion for Summary Judgment].

“No one can say to a reasonable degree of medical certainty that the outcome of the fractured foot, at the conclusion of treatment and rehabilitation, would have been substantially different if the fractured foot was diagnosed on the initial visit rather than day 13. However it is worth noting, that bearing ones full weight on a fractured foot for 13 days impedes bone healing, aggravates pain and causes emotional distress to any patient. It is also well documented in the literature that missed or misdiagnosed Lisfranc injuries/fractures can lead to significant long term pain and disability.” [CP, not numbered, but named Declaration of Andrea Fisk, M.D. in Response to Defendant’s Renewed Motion for Summary Judgment].

“What I can say to a reasonable degree of medical certainty is that Dr. Ondusko failed to perform an adequate history, examination and failed to order the appropriate diagnostic test, an Xray This failure lead to a missed diagnosis of a debilitating foot fracture. This missed diagnosis certainly did not improve his chances of a better outcome. A fundamental principle of the practice of medicine is than earlier diagnosis increases a patient’s odds of a better outcome, both physically and emotionally. I would have taken a simple XRay to diagnose his fracture.” [CP, not numbered, but named Declaration of Andrea Fisk, M.D. in Response to Defendant’s Renewed Motion for Summary Judgment].

**D. The Superior Court erred in granting summary judgment in favor of Ekin on the grounds that Debra Snowden’s claims were not sufficiently supported by expert medical opinion.**

Again, the elements necessary to establish a prima facie medical negligence case are codified in RCW 7.70.040, set forth above.

In her October 1, 2016, Declaration, Dr. Fisk opined, to a reasonable degree of medical certainty that “Dr. Scott T. Ekin’s treatment of Debra Snowden fell below the standard of care and resulted in a delayed diagnosis of a sternal fracture, four rib fractures, and splenic injury that eventually ruptured which required an emergent splenectomy.” CP 43 at para. 8. Dr. Fisk further opined that Dr. Ekin’s care deviated from the standard of care in several respects. CP 43. She then went on to identify them, opining on a more likely than not basis:

“The mechanism of injury was not taken into consideration. Debra Snowden was in a high-speed collision with reports from the paramedics of significant intrusion. The paramedics were called to the scene, alerted the ER of their pending arrival, and she was placed on a back board and C collar. A modified trauma team was activated. We have two patients who were in the same high speed collision, presenting to the same hospital, yet one patient J. Snowden, had a full body CT (head, neck, chest, abdomen and pelvis) within 12 minutes of his arrival, yet [Debra] Snowden had only two studies performed: a X-ray of the cervical spine and X-ray of the chest. There is limited information about the accident in Dr. Ekin’s note: there is no mention about the speed of the vehicle, the damage to the vehicle, whether there was any airbag deployment or whether the patient was ambulatory on scene. These are key features that we must consider as emergency physicians when we assess the

probability of a serious injury when it comes to a traumatic injury secondary to a motor vehicle collision.” CP 43 at para. 19.

“Dr. Ekin did not take into consideration the paramedic’s report. The medical incident report from North Kitsap Fire and Rescue written by Chris Smith, paramedic, states that the patient was complaining of a, ‘neck, shoulder, sternum pn w/ difficulty breathing. pt states it feels like an 80 lb weight on chest. pn increases with insp. pt also states there is a “dent” in sternum that was not there prior to MVC.’ On examination he remarks that there is ‘swelling /redness to L clavicle and sternum, indent + pn to mid sternum.’ The paramedic did a more careful examination and more thorough history than Dr. Ekin did.” CP 43 at para. 20.

“There is a limited physical examination in Dr. Ekin’s dictated note. He notes diffuse tenderness over the sternum, however remarks, ‘chest wall: nontender.’ [Debra] Snowden had 4 lateral left sided rib fractures - it would be painful if he actually examined the area. A proper chest wall examination was not performed. There is also mention in his note that ‘she was treated with Vicodin with good relief of pain,’ however [Debra] Snowden had declined analgesics during her visit. Another contradiction.” CP 43 at para. 22.

“Dr. Ekin should have maintained a high index of suspicion: she was a modified trauma patient in a high speed MVC with diffuse tenderness over the sternum. She mentioned a ‘dent’ to the paramedics. It was imperative to rule out a sternal fracture which increases one’s risk of a myocardial injury, arrhythmia, and further rib cage fractures. It is in the scope of the ER physician’s knowledge base to know that Chest X-Rays do not detect all sternal fractures. When there is a high clinical suspicion, the next step is to

order a CT of the chest which has a much greater sensitivity in detecting sternal fractures.” CP 43 at para. 23.

“Let us now also compare Debra Snowden’s care to her husband’s J. Snowden. He was in the same high speed MVC and he had also presented with chest wall pain during his initial ER visit. Dr. Ondusko ordered a Chest CT and EKG which was the correct thing to do and which is what should have been ordered on [Debra] Snowden.” CP 43 at para. 24.

Ekin’s deviations were a proximate cause of Debra’s injuries:

“On a more probable than not basis, had the Chest CT had been correctly ordered on [Debra] Snowden, the sternal fracture and the four left rib fractures would have likely been identified. She would have been likely admitted to the hospital and closely monitored. Left lower rib fractures also increases one’s risk of a splenic injury. This should raise a physician’s concern for a splenic injury thus placing more care on performing frequent and thorough abdominal examinations.” CP 43 at para. 27.

“On a more probable than not basis, the delay in detection of the sternal fracture, 4 rib fractures and splenic injury, deprived [Debra] Snowden of an increased chance for a better outcome with earlier treatment.” CP 43 at para. 28.

“Had this splenic injury been detected earlier, she may have been spared a splenectomy, which causes a lifelong issue with immunosuppression. This increases her risk for severe infections with encapsulated bacteria which can cause bacterial meningitis, bacterial pneumonia and fulminant sepsis, to name a few. She would have been admitted to the hospital on her initial visit which would have allowed

closer monitoring and further assessments of whether the splenic injury could have been salvaged, thus minimizing the risk of rupture and then subsequent splenectomy.” CP 43 at para. 29.

“The consequences of these missed injuries were substantial. [Debra] Snowden suffered from chronic pain to her sternum, back and abdomen around her surgical scar.” CP 43 at para. 30.

“In my opinion, had the sternal fracture, 4 left rib fractures and splenic injury been detected on her initial visit on 12/30/2011 by Dr. Scott Ekin, she would have had a higher chance for a better outcome with earlier treatment.” CP 43 at para. 31.

**E. The Superior Court erred by determining that Joseph Snowden did not identify an “injury” caused by Ondusko’s negligence sufficient to create a prima facie case against Ondusko.**

Ondusko argued that Joseph Snowden did not identify a specific injury that was caused by Ondusko’s negligence. [CP, not numbered but named Defendants Gilbert N. Ondusko, M.D. and Scott T. Ekin, M.D.’s Motion for Summary Judgment of Dismissal].

The corollary of the issue as stated and advanced by Defendant Ondusko is whether clear negligence which causes pain, discomfort, emotional distress and probable further compounding of an injury, and the likelihood of a reduced chance for a better outcome which defies

quantification is not compensable because a specific "injury" has no objective manifestation or label.

Fisk's opinions included:

"The undiagnosed fracture **constituted further "injury" to Joseph Snowden.** He had injured his left leg in this motor vehicle collision, and thus he was instructed by Dr. Ondusko to use crutches and bear all of his weight, all 283 pounds of weight, onto his fractured right foot. **This more probably than not, caused him more pain over the next 13 days.** Had Dr. Ondusko properly diagnosed him in his initial visit, he would likely have received proper fracture care treatment. This includes patient education about the specific fracture, emphasizing importance of elevation and avoidance of weight bearing to allow the fracture to heal and to minimize risk of displacement of the fractured bones." **Emphasis added.** [CP, not numbered, but named Declaration of Andrea Fisk, M.D. in Response to Defendant's Renewed Motion for Summary Judgment].

"No one can say to a reasonable degree of medical certainty that the outcome of the fractured foot, at the conclusion of treatment and rehabilitation, would have been substantially different if the fractured foot was diagnosed on the initial visit rather than day 13. However it is worth noting, that bearing ones full weight on a fractured foot for 13 days impedes bone healing, **aggravates pain and causes emotional distress to any patient.** It is also well documented in the literature that missed or misdiagnosed Lisfranc injuries/fractures can lead to significant long term pain and disability." **Emphasis added.** [CP, not numbered, but named Declaration of Andrea Fisk, M.D. in Response to Defendant's Renewed Motion for Summary Judgment].

## VI. CONCLUSION

The Snowdens received substandard care at Harrison. The care provided by their respective physicians, Ondusko and Ekin, deviated from the standard of care in many respects, specifically the failure to diagnose: a fractured foot; a fractured sternum; four fractured ribs; and an injured spleen . The deviations caused injury specifically identified by Fisk.

Based on the foregoing, Joseph and Debra Snowden respectfully ask that the Court reverse the Superior Court, grant them relief from judgment, and remand the matter back to Kitsap County Superior Court for further proceedings.

Respectfully submitted this 19th day of August, 2019.

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## CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I served the document to which this is annexed by email as follows:

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**August 19, 2019 - 4:07 PM**

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