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NO. 53006-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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JOSEPH SNOWDEN and DEBRA SNOWDEN,  
individually and as each other's spouse,

Appellants,

v.

GILBERT N. ONDUSKO, M.D.; SCOTT T. EKIN, M.D.; and  
HARRISON MEDICAL CENTER,

Respondents.

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BRIEF OF RESPONDENTS GILBERT N. ONDUSKO, M.D.  
AND SCOTT T. EKIN, M.D.

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TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. COUNTERSTATEMENT OF THE ISSUES PRESENTED ..... 2

III. COUNTERSTATEMENT OF THE CASE ..... 2

    A. Factual Background: Joseph Snowden. .... 3

        1. Mr. Snowden injured his left leg in a motor vehicle collision. .... 3

        2. Dr. Ondusko provided care and treatment to Mr. Snowden on December 30, 2011 at Harrison Medical Center for his left leg injury and complaint of some chest discomfort..... 4

        3. On January 3, 2012, Mr. Snowden returned to the Harrison emergency department, reporting swelling in both legs to Dr. Timothy Dahlgren. .... 4

        4. Mr. Snowden next visited Dr. Denis Ashley at the Harrison emergency department on January 6, 2012, complaining of increasing pain in his left leg and swelling in both legs. .... 5

        5. On January 7, 2012, Mr. Snowden returned to see Dr. Ashley, reporting worsening symptoms of leg swelling and redness. .... 6

        6. Mr. Snowden returned to the Harrison emergency department seeking a second “wound recheck” on January 8, 2012..... 7

        7. On January 11, 2012, Mr. Snowden complained of bilateral leg and foot pain and swelling to Dr. Roger Ludwig, who diagnosed a fracture in the right foot..... 7

8.	Several days later, on January 17, 2012, Mr. Snowden visited Dr. Blain Crandell at Virginia Mason Medical Center. ....	8
9.	On February 7, 2012, Mr. Snowden reported continuing symptoms to Dr. Crandell. ....	9
10.	On February 14, 2012, over one month after diagnosis of the fracture, Mr. Snowden visited a podiatrist, Dr. Alvin Ngan. ....	9
11.	On February 21, 2012, following additional testing, Dr. Ngan obtained Mr. Snowden’s “open-ended” consent to surgery. ....	10
12.	Dr. Ngan performed surgery on Mr. Snowden’s right foot on February 28, 2012 at Virginia Mason. ....	11
B.	Factual Background: Debra Snowden. ....	12
1.	At the Harrison emergency department following the December 30, 2011 car accident, Dr. Scott Ekin evaluated Debra Snowden, who reported chest and neck pain. ....	12
2.	On January 3, 2012, Ms. Snowden returned to the emergency department, complaining to Dr. Dahlgren of shortness of breath and increasing pain on her left side. ....	12
3.	Dr. Ty Chun performed an urgent splenectomy around midnight on January 3, 2012. ....	13
C.	Procedural History. ....	14
1.	The Snowdens’ complaint against Dr. Ondusko, Dr. Ekin, and Harrison Medical Center. ....	14
2.	Harrison’s initial motion for partial summary judgment. ....	14

3.	Harrison’s second motion for partial summary judgment and Drs. Ondusko and Ekin’s motion for summary judgment.....	16
4.	The Snowdens’ motion for reconsideration. ....	20
5.	The stipulated dismissal of all claims against Harrison.....	22
6.	Dr. Ondusko’s renewed motion for summary judgment.....	23
IV. STANDARD OF REVIEW.....		26
V. ARGUMENT.....		28
A.	The Trial Court Properly Dismissed the Snowdens’ Claims Against Dr. Ondusko.....	29
1.	Dr. Fisk was not qualified to opine as to whether any delay in diagnosis attributed to Dr. Ondusko caused any difference in the treatment or outcome of Mr. Snowden’s foot fracture. ....	29
2.	Dr. Fisk’s conclusory opinions and speculation did not raise a genuine issue of material fact for trial as to any causal link between Dr.Ondusko’s alleged negligence and any injury.....	32
3.	Dr. Fisk’s second declaration did not state a prima facie loss of chance claim.....	35
4.	Dr. Fisk’s declaration testimony contradicting her previous unequivocal deposition testimony cannot raise a genuine issue of material fact for trial.....	37
B.	The Trial Court Properly Dismissed the Snowdens’ Claims Against Dr. Ekin. ....	40
1.	Dr. Fisk was not qualified to opine as to whether any delay in diagnosis by Dr. Ekin caused any difference in the treatment or outcome of Ms. Snowden’s splenic injury. ....	40

2.	Dr. Fisk’s conclusory opinions and speculation did not raise a genuine issue of material fact for trial as to any causal link between Dr. Ekin’s alleged negligence and any injury.....	40
3.	Dr. Fisk’s declaration did not state a prima facie loss of chance claim. ....	41
C.	This Court Should Award Drs. Ondusko and Ekin Attorney Fees For Defending Against A Frivolous Appeal. ....	42
VI.	CONCLUSION.....	43

## TABLE OF AUTHORITIES

<b>STATE CASES</b>	<b>PAGE(S)</b>
<i>Christian v. Tohmeh</i> , 191 Wn. App. 709, 366 P.3d 16 (2015) .....	36, 42
<i>Colwell v. Holy Family Hosp.</i> , 104 Wn. App. 606, 15 P.3d 210 (2001) .....	27
<i>Davies v. Holy Family Hosp.</i> , 144 Wn. App. 483, 183 P.3d 283 (2008) .....	27, 29-30, 31, 32, 40, 41
<i>Dunnington v. Virginia Mason, Med. Ctr.</i> , 187 Wn.2d 629, 389 P.3d 498 (2017) .....	36
<i>Frausto v. Yakima HMA, LLC</i> , 188 Wn.2d 227, 393 P.3d 776 (2017) .....	26, 29
<i>Guile v. Ballard Cmty. Hosp.</i> , 70 Wn. App. 18, 851 P.2d 689 (1993) .....	27, 28, 32
<i>Harris v. Groth</i> , 99 Wn.2d 438, 663 P.2d 113 (1983) .....	27
<i>Herskovits v. Group Health</i> , 99 Wn.2d 609, 664 P.2d 474 (1983) .....	35, 36
<i>Johnson v. Mermis</i> , 91 Wn. App. 127, 955 P.2d 826 (1998) .....	42
<i>Keck v. Collins</i> , 181 Wn. App. 67, 325 P.3d 306 (2014) .....	28
<i>Klontz v. Puget Sound Power &amp; Light</i> , 90 Wn. App. 186, 951 P.2d 280 (1998) .....	39
<i>LaMon v. Butler</i> , 112 Wn.2d 193, 770 P.2d 1027, <i>cert. denied</i> , 493 U.S. 814 (1989).....	28
<i>Marshall v. AC&amp;S Inc.</i> , 56 Wn. App. 181, 782 P.2d 1107 (1989) .....	37, 38, 39

<i>Marthaller v. King County Hosp., Dist. 2,</i> 94 Wn. App. 911, 973 P.2d 1098 (1999) .....	38, 39
<i>Mohr v. Grantham,</i> 172 Wn.2d 844, 262 P.3d 490 (2011) .....	35-36
<i>O'Donoghue v. Riggs,</i> 73 Wn.2d 814, 440 P.2d 823 (1968) .....	32, 34
<i>Rash v. Providence Health &amp; Services,</i> 183 Wn. App. 612, 334 P.3d 1154 (2014) .....	35, 36, 42
<i>Reyes v. Yakima Health Dist.,</i> 191 Wn.2d 79, 419 P.3d 819 (2018) .....	32
<i>Taylor v. Bell,</i> 185 Wn. App. 270, 340 P.3d 951 (2014) .....	37, 38
<i>Wash. Fed. Sav. v. Klein,</i> 177 Wn. App. 22, 311 P.3d 53 (2013) .....	28
<i>Wilson v. Steinbach,</i> 98 Wn.2d 434, 656 P.2d 775 (1971) .....	26
<i>Young v. Key Pharm., Inc.,</i> 112 Wn.2d 216 & n.1, 770 P.2d 182 (1989) .....	26, 27

**FEDERAL CASES**

<i>Celotex Corp. v. Catrett,</i> 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1985) .....	26
<i>Van T. Junkins &amp; Assocs., Inc. v. U.S. Indus., Inc.,</i> 736 F.2d 656 (11th Cir. 1984) .....	37

**STATE STATUTES**

RCW 7.70.030 .....	27
RCW 7.70.040 .....	27
CR 56(e) .....	27, 32
ER 702.....	29
RAP 18.9(a).....	42, 43

**OTHER AUTHORITIES**

*Alice Ferot, The Theory of Loss of Chance: Between Reticence and  
Acceptance,*  
8 Fla. Int'l U. L. Rev. 591 (2013) ..... 35

## I. INTRODUCTION

In this medical negligence action, Joseph and Debra Snowden sued emergency physicians Dr. Gilbert Ondusko, Dr. Scott Ekin, and Harrison Medical Center, claiming that, in evaluating injuries after a car accident, Drs. Ondusko and Ekin failed to diagnose Mr. Snowden's right foot fracture and Ms. Snowden's spleen injury, causing them pain and suffering.

In response to motions for summary judgment based on a lack of expert medical testimony, the Snowdens produced a declaration from an emergency medicine physician, Dr. Andrea Fisk, who opined on both standard of care and causation. Harrison and Drs. Ondusko and Ekin challenged Dr. Fisk's qualifications to opine on causation and argued that her conclusory and speculative opinions did not support a prima facie case. After the trial court dismissed the Snowdens' claims against Dr. Ekin, and the Snowdens stipulated to dismissal of all claims against Harrison, Dr. Ondusko deposed Dr. Fisk. In response to Dr. Ondusko's renewed summary judgment motion, the Snowdens produced a second declaration by Dr. Fisk.

Because the trial court correctly concluded as a matter of law that Dr. Fisk's testimony could not raise a genuine issue of material fact as to the necessary issue of causation for any claim, this Court should affirm the summary judgment dismissal of the claims against Dr. Ondusko and Ekin.

## II. COUNTERSTATEMENT OF THE ISSUES PRESENTED

(1) Did the trial court properly grant summary judgment dismissing the Snowdens' claims against Dr. Ondusko where the only expert testimony concerning causation presented at summary judgment came from a witness who (a) was not qualified to express opinions on the treatment or outcome of the injury at issue; (b) provided only conclusory and speculative opinions as to causation; (c) did not identify a percentage or range of percentage of chance to support a loss of chance claim; and (d) presented a declaration contradicting previous unequivocal deposition testimony without explanation?

(2) Did the trial court properly grant summary judgment dismissing the Snowdens' claims against Dr. Ekin where the only expert testimony concerning causation presented at summary judgment came from a witness who (a) was not qualified to express opinions on the treatment or outcome of the injury at issue; (b) provided only conclusory and speculative opinions as to causation; and (c) did not identify a percentage or range of percentage of chance to support a loss of chance claim?

## III. COUNTERSTATEMENT OF THE CASE

On December 30, 2011, Joseph and Debra Snowden were injured in a motor vehicle collision and transported by ambulance to the emergency

department of Harrison Medical Center in Bremerton, where Mr. Snowden received medical care and treatment from Dr. Gilbert Ondusko and Ms. Snowden received medical care and treatment from Dr. Scott Ekin. CP 92, 104-05, 385. On December 29, 2015, the Snowdens sued Drs. Ondusko and Ekin and Harrison Medical Center, alleging medical negligence. CP 1-16. Ultimately, the trial court entered a series of orders resulting in the dismissal of all the Snowdens' claims against all parties. CP 246-66, 323-25, 487-89.

A. Factual Background: Joseph Snowden.

1. Mr. Snowden injured his left leg in a motor vehicle collision.

On December 30, 2011, Mr. Snowden, who had been driving an F150, was involved in what he described to emergency personnel a "head on collision" with a small car. CP 92, 329, 337, 385. Upon arriving at the scene, a medic noted that Snowden was "up and walking around" and had an injury to his "left anterior lower leg" with the "bone exposed." CP 92. Mr. Snowden denied losing consciousness during the collision and appeared "alert and oriented." CP 92, 385. The medic secured Mr. Snowden to a stretcher with a back board, applied a neck collar, provided wound care, and transported him to Harrison in an ambulance. CP 92, 385. The medic also reported that Mr. Snowden appeared to develop some confusion during the transport, asking repetitive questions. CP 222, 385.

2. Dr. Ondusko provided care and treatment to Mr. Snowden on December 30, 2011 at Harrison Medical Center for his left leg injury and complaint of some chest discomfort.

Upon arriving at Harrison, a trauma team including Dr. Ondusko provided medical care and treatment to Mr. Snowden. CP 92, 220, 222. Dr. Ondusko examined Mr. Snowden, noted his complaints of left leg pain, some chest discomfort, and some “mild rumination which evolved en route” in the ambulance, and ordered several tests, including CT scans of the head, neck, chest, abdomen, and pelvis, laboratory tests, an EKG, and an x-ray of the left leg. CP 96-97, 222. The test results were normal and the x-ray showed no fracture of the left leg; Dr. Ondusko applied multiple sutures to close the large, deep, “complex” laceration of Mr. Snowden’s left leg. CP 98, 222.

3. On January 3, 2012, Mr. Snowden returned to the Harrison emergency department, reporting swelling in both legs to Dr. Timothy Dahlgren.

Mr. Snowden returned to the Harrison emergency department on January 3, 2012, reporting for the first time to Dr. Timothy Dahlgren that he had developed swelling in both legs. CP 93-95, 220. Dr. Dahlgren noted that Mr. Snowden reported that his “knees and legs hit the dash” during the car accident, since which he had been “spending more time sitting and less time walking, less time elevating his legs, but some time elevating his legs.”

CP 93. Mr. Snowden told Dr. Dahlgren that his “discomfort” from the swelling was “minimal.” CP 94.

Dr. Dahlgren performed an examination, noting (1) the laceration on the left leg appeared to be healing well without evidence of infection; (2) there was tenderness “diffusely over the anterior aspect of each tibia and fibula”; (3) “ecchymosis” or bruising “over both legs”; (3) “edema” or swelling “in the feet”; (4) pulse could be measured in both feet by touch; and (5) Mr. Snowden was able to flex and extend his knees, ankles, and toes “bilaterally.” CP 93. Dr. Dahlgren diagnosed “[a]cute bilateral lower extremity contusions with resultant edema” and advised Mr. Snowden to “elevate his legs to try to reduce the swelling.” CP 94.

4. Mr. Snowden next visited Dr. Denis Ashley at the Harrison emergency department on January 6, 2012, complaining of increasing pain in his left leg and swelling in both legs.

On January 6, 2012, Mr. Snowden returned to the Harrison emergency department, complaining of “[b]ilateral leg swelling and pain” to Dr. Denis Ashley. CP 96. Mr. Snowden reported increased pain and swelling in his left leg “especially” “at the wound site,” and that “pain in his left leg seem[ed] to worsen with walking, but both legs” were “equally swollen,” as well as feeling chills and a subjective temperature. CP 96. As his differential diagnostic considerations included “cellulitis, abscess, deep venous thrombosis, CHF, pulmonary edema, acute renal failure, volume

depletion, acute renal insufficiency, [and] compartment syndrome,” Dr. Ashley ordered numerous tests, reviewed records and test results from Mr. Snowden’s initial December 30, 2011 visit, and performed an examination. CP 96-97.

Dr. Ashley decided not to remove the sutures from Mr. Snowden’s left leg out of concern for “increased scar formation and wound dehiscence” given the location and amount of swelling, but prescribed antibiotics and pain medication and advised him to follow up in the emergency department in 48 hours for wound reevaluation. CP 97. As the cause of the swelling that appeared “symmetric in both lower extremities” was “uncertain” based on the normal results of all the ordered tests, Dr. Ashley recommended further evaluation “if his symptoms persist.” CP 97.

5. On January 7, 2012, Mr. Snowden returned to see Dr. Ashley, reporting worsening symptoms of leg swelling and redness.

Mr. Snowden returned the next day, complaining that the “redness and swelling” of his legs was “increasing” and that his prescribed pain medication was “not working for him.” CP 98. Following his examination, Dr. Ashley decided that “more aggressive wound management was indicated” based on the “somewhat worsening” symptoms, removed the sutures, directed staff to irrigate the wound, and prescribed pain medication. CP 98-99.

6. Mr. Snowden returned to the Harrison emergency department seeking a second “wound recheck” on January 8, 2012.

Mr. Snowden returned to the emergency department the next morning, January 8, 2012. CP 100. Medical records indicate that he sought a second “wound recheck” of his left leg. CP 100.

7. On January 11, 2012, Mr. Snowden complained of bilateral leg and foot pain and swelling to Dr. Roger Ludwig, who diagnosed a fracture in the right foot.

On January 11, 2012, Mr. Snowden visited The Doctor’s Clinic Poulso Urgent Care, reporting to Dr. Roger Ludwig continuing “bilateral foot, ankle, leg and knee pain” and swelling. CP 193. Dr. Ludwig performed an examination, noting (1) localized swelling of both legs; (2) “[e]rythema” or redness of both legs; (3) tenderness of both legs on palpation and walking; (4) normal pulses; (5) swelling and tenderness in the right foot on palpation; and (6) a healing laceration on the left leg. CP 194. Dr. Ludwig ordered an x-ray of the right foot, which indicated “a mildly displaced fracture involving the base of the second metatarsal extending to the proximal articular surface.” CP 190, 194. Dr. Ludwig provided a fracture sandal, advised Mr. Snowden to avoid weight bearing, provided a refill prescription for pain medication, and arranged a consult “with orthopedics.” CP 194.

8. Several days later, on January 17, 2012, Mr. Snowden visited Dr. Blain Crandell at Virginia Mason Medical Center.

Rather than seeing an orthopedist, Mr. Snowden visited primary care physician Dr. Blain Crandell as a new patient at Virginia Mason Medical Center for follow up on all his symptoms on January 17, 2012. CP 500-01. Dr. Crandell noted in his medical record that Mr. Snowden reported that (1) he had been taking antibiotics for the infection in the wound on his left leg over the last week; (2) he had been “quite bothered” by persistent swelling in both lower legs; (3) he had been bothered by back and neck pain; and (4) he had been diagnosed with a right foot fracture. CP 500-01. Dr. Crandell observed that the wound appeared to be improving, that the leg swelling involved skin tension and tenderness but no unusual heat or redness, that an anterior chest wall contusion seemed to be healing satisfactorily, and that there was tenderness in the right foot but no “stepoffs or deformities, and no spinous process tenderness.” CP 500-01.

Dr. Crandell advised Mr. Snowden on wound care, discussed non-pharmaceutical approaches to reducing leg swelling and prescribed a medication for “short-term” help to reduce swelling, recommended massage for back and neck pain and use of a boot for the right foot fracture for four weeks, after which he should not have pain when walking. CP 500-01.

9. On February 7, 2012, Mr. Snowden reported continuing symptoms to Dr. Crandell.

On February 7, 2012, Mr. Snowden returned to see Dr. Crandell, reporting that (1) his right foot pain had not improved; (2) his left leg wound passed a “big blood clot,” “throbs,” and “looks nasty”; (3) he was experiencing headaches and neck pain despite massage and stretching; and (4) he was having stomachaches and nausea “all the time.” CP 503. Mr. Snowden requested medication for his right foot pain and a refill of diuretic medication for swelling. CP 503. In addition to prescribing medications as requested and offering advice and prescriptions for the other symptoms, Dr. Crandell ordered new x-rays of Mr. Snowden’s right foot and referred him to “ortho for continued management” of his right foot injury. CP 503-05.

10. On February 14, 2012, over one month after diagnosis of the fracture, Mr. Snowden visited a podiatrist, Dr. Alvin Ngan.

On February 14, 2012, more than one month after Dr. Ludwig diagnosed the fracture, Mr. Snowden visited Dr. Alvin Ngan, a podiatrist at Virginia Mason. CP 507-08. Dr. Ngan noted that Mr. Snowden walked in wearing a “postop shoe” and using a cane and admitted to driving. CP 507. Following his examination, Dr. Ngan believed that injury involved the Lisfranc joint, with a fracture or dislocation of the second metatarsal or ray, but could not determine conclusively whether the first and third metatarsals or rays had also been compromised. CP 508. Dr. Ngan explained to Mr.

Snowden the range of treatment options, including conservative treatment with a cast or surgery. CP 508. Dr. Ngan recommended surgery, but ordered a CT scan to determine how many rays or joints were involved and whether surgical solution would be possible. CP 508. In the meantime, he provided Mr. Snowden with an air cast, indicated that the air cast should not be worn while driving, and recommended that he minimize his activities. CP 508.

On February 16, 2012, Dr. Ngan called Mr. Snowden to discuss the results of the CT scan. CP 510. Dr. Ngan explained that, based on the scan results and his consultation with a radiologist, he believed that the fracture or dislocation was difficult to detect and still could not be conclusively determined because the bones could appear to be aligned when the foot was not bearing weight, but slip out of alignment when weight bearing. CP 510. Dr. Ngan believed the second ray of the Lisfranc joint might need to be fused, but recommended fluoroscopy stress testing to determine whether the first joint also needed intervention. CP 510.

11. On February 21, 2012, following additional testing, Dr. Ngan obtained Mr. Snowden's "open-ended" consent to surgery.

On February 21, 2012, Mr. Snowden returned to Virginia Mason for the recommended fluoroscopy stress testing. CP 512. Based on the results, Dr. Ngan believed that the second ray of the Lisfranc joint "was not

salvageable and would need to be fused,” but he still could not determine whether the first and third rays would also need to be fused or could be pinned. CP 512. Dr. Ngan requested Mr. Snowden’s “open-ended” consent to surgery, depending on his examination and findings as to the first and third rays during the procedure. CP 512. Dr. Ngan noted in his medical record that Mr. Snowden understood “risks of the procedure including long-term stiffness, possible numbness, scarring, delayed or non-healing of bone or soft tissue, [and] possibility for future surgery such as hardware removal.” CP 512. Dr. Ngan also advised him that recovery would require roughly six weeks of no weight bearing and no driving. CP 512.

12. Dr. Ngan performed surgery on Mr. Snowden’s right foot on February 28, 2012 at Virginia Mason.

On February 28, 2012, Dr. Ngan performed surgery on Mr. Snowden’s right foot at Virginia Mason. CP 425. Thereafter, Mr. Snowden continued to have pain in his right foot and eventually had two additional surgeries. CP 425-26. On March 25, 2015, during a telephone conversation regarding his ongoing treatment, Mr. Snowden asked Dr. Ngan about consulting on his “legal battle” with the “ER/hospital.” CP 514. Dr. Ngan “commented that he likely would have required surgery regardless, and [the] outcome would have been about the same.” CP 514.

B. Factual Background: Debra Snowden.

1. At the Harrison emergency department following the December 30, 2011 car accident, Dr. Scott Ekin evaluated Debra Snowden, who reported chest and neck pain.

Following the December 30, 2011 car accident, emergency personnel transported Ms. Snowden to the Harrison emergency department, where Dr. Scott Ekin evaluated her. CP 104-05. Dr. Ekin noted in his medical record that Ms. Snowden complained of “moderate to severe” chest and neck pain that was worse with movement. CP 104. Based on his examination, which revealed no tenderness in the abdomen, liver, or spleen, Dr. Ekin’s differential diagnosis included “spine fracture, ligamentous injury, sternal injury, [and] pneumothorax and aortic injuries.” CP 104-05. He ordered x-rays of the cervical spine and chest; the x-ray results, read by radiologist Dr. Tai Luong, showed no evidence of fracture. CP 105; CP 111. Dr. Ekin diagnosed acute cervical strain and chest contusion and released Ms. Snowden with pain medication that appeared to give “good relief of pain.” CP 105.

2. On January 3, 2012, Ms. Snowden returned to the emergency department, complaining to Dr. Dahlgren of shortness of breath and increasing pain on her left side.

Ms. Snowden returned to the Harrison emergency department on January 3, 2012 and reported shortness of breath and increasing pain on her left side. CP 114. Following his examination, Dr. Dahlgren ordered a chest

x-ray, which revealed what appeared to be a fracture to her sternum and suspected rib fractures. CP 112-13. Dr. Dahlgren ordered CT scans of the chest and abdomen. CP 113. As he repeatedly checked on Ms. Snowden, her condition seemed to worsen as she became more pale. CP 113. When the CT scan of the abdomen revealed a rupture of her spleen and active bleeding, Dr. Dahlgren admitted Ms. Snowden to the hospital in the care of Dr. Ty Chun, a surgeon, for immediate surgery. CP 113. In his medical record, Dr. Dahlgren noted that he suspected that Ms. Snowden had a “delayed bleed” that was causing “quite subtle” symptoms and became suddenly worse and more significant following his initial examination that same day. CP 113. He noted that he was “fairly unimpressed with her abdominal exam” when he first saw her and did not believe her symptoms at that point could have suggested a ruptured spleen in the differential diagnosis. CP 113.

3. Dr. Ty Chun performed an urgent splenectomy around midnight on January 3, 2012.

Dr. Chun performed surgery late on January 3, 2012. CP 122. In his operative report, he described finding a large amount of blood, including fresh bleeding from a laceration of the spleen that did not appear very deep, but seemed to have ongoing bleeding. CP 122. Given the late hour and the limited staffing available in the operating room, Dr. Chun decided “to do a

splenectomy rather than to attempt salvage.” CP 122. Ms. Snowden recovered from surgery in the intensive care unit, where she was alert and oriented the next day, January 4, 2012. CP 118-19.

C. Procedural History.

1. The Snowdens’ complaint against Dr. Ondusko, Dr. Ekin, and Harrison Medical Center.

On December 29, 2015, the Snowdens filed a medical negligence suit against Dr. Ondusko, Dr. Ekin, and Harrison Medical Center. CP 7-16. In their complaint, the Snowdens alleged that the failure to diagnose Mr. Snowden’s right foot fracture, by Dr. Ondusko initially, and by the other emergency room physicians who evaluated him on January 3, 6, 7, and 8 thereafter, violated the applicable standard of care, causing them injury. CP 10-11. They also alleged that Dr. Ekin violated the applicable standard of care by failing to diagnose Ms. Snowden’s fractured sternum and ribs, causing them injury. CP 11.

2. Harrison’s initial motion for partial summary judgment.

Harrison sought partial summary judgment dismissal of any claim by the Snowdens against it other than claims of vicarious liability for the care provided by Drs. Ondusko and Ekin. CP 22-28, 29-30, 42-80. Harrison pointed out that the Snowdens did not articulate any such claims in their complaint, they failed to timely respond to requests for admission

regarding such claims, and they failed to identify any expert medical testimony to support such claims. *Id.*

The Snowdens opposed the motion, arguing that their attorney's failure to timely respond to requests for admission should not be held against them, that medical records of the Snowdens' visits after December 30, 2011 raise material issues of fact as to whether other emergency department physicians and nurses were also negligent, and that Harrison's request for dismissal based on a lack of expert medical testimony was premature. CP 81-122.

In reply, Harrison pointed out that as four and one half years had passed since the care at issue and the case had been filed for nearly eight months, the Snowdens' failure, without any explanation, to obtain medical expert testimony was not excusable. CP 123-24. Harrison also challenged the Snowdens' attempts to have the trial court ignore the rules applicable to discovery and summary judgment motions without sufficient justification. CP 126-28; *see also* CP 131-35.

On August 19, 2016, the trial court denied Harrison's motion for partial summary judgment. CP 136-37.

3. Harrison's second motion for partial summary judgment and Drs. Ondusko and Ekin's motion for summary judgment.

A month later, Harrison filed a second motion for partial summary judgment dismissal of any claims against it independent of any vicarious liability claim based on alleged negligence by Drs. Ondusko and Ekin. CP 138-45; *see also* CP 146-200. Among other things, Harrison pointed out that the Snowdens had claimed that they would secure expert testimony within a month of the previous summary judgment hearing. CP 138-39. Harrison also pointed out that Mr. Snowden's allegation in the complaint that he complained of right foot pain when examined by emergency department physicians was not supported by any evidence and was actually contradicted by the medical records. CP 140-41.

Drs. Ondusko and Ekin also filed a summary judgment motion, seeking dismissal of all claims against them based on the Snowdens' failure to produce expert medical testimony. CP 201-14.

Rather than filing a brief in response to the motions, the Snowdens filed declarations from their counsel, Mr. Snowden, and Dr. Andrea Fisk. CP 215-32. Their counsel's declaration indicated that Dr. Andrea Fisk had been retained as an expert "opining as to standard of care and causation." CP 215. Mr. Snowden stated in his declaration that he repeatedly returned

to Harrison because he knew it was a hospital with medical equipment to test and examine patients. CP 217-18.

In her declaration, Dr. Fisk identified herself as a licensed and board certified Washington physician specializing in Emergency Medicine. CP 220. With regard to Mr. Snowden's care on December 30, 2011, Dr. Fisk opined that Dr. Ondusko "deviated from the standard of care" by (1) failing to mention right foot pain in his treatment note; and (2) by stating in his note, "RLE: moving ad lib," suggesting "a cursory examination of the right lower extremity." CP 223-24. Dr. Fisk criticized all the other physicians who evaluated Mr. Snowden in the emergency department on January 3, 6, 7, and 8, 2012 because (1) they did not note right foot pain in the medical record; (2) they did not address notes by nurses indicating right foot pain on January 3, 2012; (3) they did not document a physical examination of the right foot; and (4) they failed to give "attention" to "other clues" that Mr. Snowden was "having difficulties with his right foot," specifically that he was using a "walking stick" on January 3 and a wheelchair on January 6, 7, and 8. CP 223-24.

As to causation, Dr. Fisk opined that if Dr. Ondusko had diagnosed the fracture, Mr. Snowden would have (1) "had proper care"; (2) "been correctly told not to bear weight on his right foot"; (3) "had closer follow

up with an orthopedic surgeon/podiatrist for definitive management”; and (4) “been more promptly treated by the podiatrist.” CP 224-25.

Regarding Ms. Snowden’s care, Dr. Fisk criticized Dr. Ekin for (1) failing to consider the details surrounding the car accident as the “mechanism of injury”; (2) failing to consider the paramedic’s “more careful examination and more thorough history”; (3) entering contradictory notes regarding abdominal pain, his physical examination of the chest wall, and use of analgesics; (4) failing to “maintain a high index of suspicion” for sternal fractures when Dr. Luong made a “false initial reading” of the chest x-ray; and (5) failing to order a chest CT scan. CP 226-29. As to causation, Dr. Fisk opined that if Dr. Ekin had ordered a chest CT scan, the sternal and rib fractures would have been identified and Ms. Snowden would have been admitted to the hospital for close monitoring based on a risk of splenic injury, or the scan may have “possibl[y]” identified the splenic injury. CP 229. Either way, Dr. Fisk opined that the delay in diagnosis of the fractures and splenic injury “deprived [Ms.] Snowden of an increased chance of a better outcome with earlier treatment.” CP 229.

In reply, Harrison argued that (1) the Snowdens failed to produce any expert testimony to support any claims regarding nurse care or corporate negligence; (2) Dr. Fisk’s declaration did not establish her competence or qualifications to opine on the standard of care for a

radiologist or support a violation of that standard by Dr. Luong; (3) Dr. Fisk's declaration did not establish her competence or qualifications to opine on orthopedic/podiatric outcomes necessary to support the causation element of Mr. Snowden's claim; (4) Dr. Fisk's declaration did not establish her competence or qualifications to opine on splenic injuries or outcomes necessary to support the causation element of Ms. Snowden's claim; and (5) Dr. Fisk failed to identify a numerical value to measure the percentage or range of percentage of chance lost in this case, a necessary evidentiary threshold to prevent summary judgment dismissal of a loss of chance case. CP 233-42; *see also* CP 243-50.

In addition to joining Harrison's arguments, Drs. Ondusko and Ekin also filed a reply, arguing that Dr. Fisk's declaration could not prevent summary judgment because (1) her criticisms of Dr. Ondusko medical record notes were conclusory given the lack evidence that Mr. Snowden actually complained to Dr. Ondusko about right foot pain, the lack of medical facts to distinguish between a "cursory" physical examination and a "proper" one, and the lack of evidence that Dr. Ondusko knew of or could be responsible for the alleged standard of care violations of any other physician that saw Mr. Snowden later; (2) she did not claim expertise or competence or qualifications as a podiatrist or orthopedist and did not identify any medical facts suggesting Mr. Snowden would have had a

different outcome had the fracture been diagnosed earlier; (3) her conclusory opinion that “earlier” or “timely” diagnosis would have led to different treatment or a different outcome failed to establish “but for” causation given the evidence that the fracture was diagnosed within 13 days of the injury, surgery did not occur until 49 days after diagnosis, and Mr. Snowden’s treating providers initially recommended non-surgical management following the diagnosis; (4) her criticisms of Dr. Ekin’s care were conclusory and speculative; (5) she was not qualified to opine on causation as to Ms. Snowden’s splenectomy; and (6) she failed to identify the specific chance lost by a numeric percentage, as required by Washington law to support a loss of chance claim. CP 251-63.

The trial court granted summary judgment dismissal. CP 264-66.

4. The Snowdens’ motion for reconsideration.

The Snowdens sought reconsideration, arguing that (1) Dr. Fisk, as a specialist in emergency medicine, was qualified to opine on the standard of care for Drs. Ondusko and Ekin, also emergency physicians, regardless of the injury at issue, CP 270-79; and (2) Dr. Fisk’s declaration raised a genuine issue of fact as to causation by opining that delays in diagnosis “more probably than not” caused the Snowdens additional pain, CP 279-82. The trial court set a briefing schedule. CP 283-84.

In response, Harrison argued, among other things, that (1) Dr. Fisk's qualifications to opine on the standard of care for emergency room physicians was not in dispute; (2) Dr. Fisk did not claim the qualifications or scope of knowledge or experience required to offer criticisms of Dr. Luong's radiology care or to opine on causation of foot fracture outcomes or splenic injury outcomes; (3) Dr. Fisk's declaration did not raise an issue for trial as to whether Mr. Snowden's chronic right foot pain resulted from the delayed diagnosis rather than the underlying fracture itself; (4) Dr. Fisk's declaration did not raise an issue for trial as to whether Ms. Snowden's splenectomy was caused by the delayed diagnosis rather than the car accident; and (5) Dr. Fisk failed to identify a numerical chance as required for a loss of chance claim. CP 285-96.

Drs. Ondusko and Ekin joined Harrison's response and also pointed out, among other things, that (1) the Snowdens conceded at the summary judgment hearing that no evidence established that Mr. Snowden told Dr. Ondusko about any right foot pain he experienced on December 30; (2) Dr. Fisk's conclusory opinions regarding Mr. Snowden's condition after December 30 could not establish a violation of the standard of care by Dr. Ondusko on December 30; and (3) Dr. Fisk's description of the causal relationship between Dr. Ekin's failure to order a CT scan and Ms. Snowden's splenectomy was based entirely on a series of hypothetical

possibilities, such as the possibility that a scan or monitoring in the hospital would have shown a splenic injury that did not result in a rupture until 5 days later, or the possibility that the spleen could have been salvaged. CP 297-316.

In reply, the Snowdens claimed that a plaintiff need not present expert medical testimony quantifying a loss of chance or “put on its damages case” regarding causation to prevent summary judgment dismissal. CP 317-22.

On January 30, 2017, the trial court granted reconsideration only on the Snowdens’ claims against Dr. Ondusko.<sup>1</sup> CP 323-24.

5. The stipulated dismissal of all claims against Harrison.

In February 2018, Harrison again sought summary judgment dismissal, arguing that no evidence could establish its liability for Dr. Ondusko’s alleged negligence on an apparent agency theory. CP 326-393. The Snowdens opposed the motion, CP 394-62, and Harrison replied, CP 463-67. However, on April 4, 2018, the Snowdens stipulated to the dismissal of all claims against Harrison.<sup>2</sup> CP 469, 484, 487-89; *see also* CP

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<sup>1</sup> The Snowdens filed an appeal challenging the January 30, 2017 order, but this Court ultimately dismissed it as abandoned in August 2017. *See* CP \_\_\_ (sub #75, 76, 77, Supplemental Designation of Clerk’s Papers filed December 12, 2019).

<sup>2</sup> The Snowdens do not challenge the dismissal of all claims against Harrison. *See* Notice of Appeal, filed February 22, 2019.

\_\_\_ (sub #96.1, Supplemental Designation of Clerk's Papers filed December 12, 2019).

6. Dr. Ondusko's renewed motion for summary judgment.

Dr. Ondusko filed a motion for summary judgment dismissal of the only claim remaining before the trial court, that is, Mr. Snowden's medical negligence claim based solely on the care provided by Dr. Ondusko on December 30, 2011. CP 468-70. Dr. Ondusko argued that Mr. Snowden could not present a genuine issue of material fact for trial on the necessary element of causation because (1) Dr. Fisk failed to identify medical facts distinguishing any harm caused by his failure to diagnose the fracture from any harm caused by the other emergency physicians to whom she attributed violations of the standard of care; (2) Dr. Fisk's claim that Dr. Ondusko's failure to diagnose the fracture caused Mr. Snowden general "pain and suffering" was purely subjective, unmeasurable, and speculative, as well as nothing more than an assumption of her ultimate conclusion that was not supported by any medical facts in the record; (3) Dr. Fisk's conclusory statements that Mr. Snowden would have received "proper care," "closer follow up," and "definitive management" but for the delayed diagnosis was not supported by medical facts in the record; and (4) contrary to Dr. Fisk's speculation that a podiatrist or orthopedic surgeon would have directed Mr. Snowden not to bear weight on his right foot following diagnosis of the

fracture, the medical record established that Dr. Ngan did not make such a recommendation. CP 468-514.

In response, the Snowdens claimed that even if allegations of “pain, discomfort, emotional distress, and probable further compounding injury, and the likelihood of a reduced chance for a better outcome” “def[y] quantification,” they must be compensable despite the lack of a “specific injury” with an “objective manifestation or label.” CP 516-17. In support, the Snowdens produced the full transcript of Dr. Fisk’s deposition taken on January 3, 2019. CP \_\_\_ (sub #106, Supplemental Designation of Clerk’s Papers filed December 12, 2019). The Snowdens also produced a second declaration by Dr. Fisk, dated January 10, 2019. CP 523-27.

In reply, Dr. Ondusko argued that Dr. Fisk’s testimony did not raise a genuine issue for trial as to the necessary element of causation because, among other things, (1) her training, experience, and expertise did *not* include surgical care of foot fractures and testified at her deposition that she would defer to specialists regarding whether and when surgery is necessary as well as whether a patient should be restricted from weight bearing, CP 531-32, \_\_\_ (sub #106, Supplemental Designation of Clerk’s Papers filed December 12, 2019, at 6-8); (2) she could not distinguish between any injury proximately caused by Dr. Ondusko’s alleged negligence versus that of the other emergency physicians to whom she attributed violations of the

standard of care for which she admitted Dr. Ondusko could not be responsible, such that a jury would be required to rely on speculation to resolve questions of fact, CP 531-32, \_\_ (sub #106, Supplemental Designation of Clerk's Papers filed December 12, 2019, at 8, 16, 24, 27); (3) nothing in the record suggested that Dr. Ondusko advised Mr. Snowden to ignore pain in his right foot or to continue bearing weight on his right foot if he felt pain, CP 533; (4) nothing in the record suggested that Mr. Snowden chose to continue bearing weight on his right foot because Dr. Ondusko gave him crutches, CP 534; (5) any statements in Dr. Fisk's January 10, 2019 declaration that merely contradicted, without explanation, her January 3, 2019 deposition testimony could not raise a genuine issue of material fact for trial as a matter of law, CP 534-35; and (6) Dr. Fisk's references to general aphorisms like "sooner is better," rather than "real clinical findings" did not establish the kind of medical facts required to support expert testimony, CP 535-36, \_\_ (sub #106, Supplemental Designation of Clerk's Papers filed December 12, 2019, at 16, 18, 24).

After hearing oral argument,<sup>3</sup> the trial court granted Dr. Ondusko's motion for summary judgment dismissal. CP 538-39, \_\_ (sub #108, Supplemental Designation of Clerk's Papers filed December 12, 2019).

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<sup>3</sup> The Snowdens did not provide a transcript of the hearing to this Court.

Here, the Snowdens challenge the dismissal of their claims against Drs. Ondusko and Ekin. *See* Notice of Appeal, filed February 22, 2019.

#### IV. STANDARD OF REVIEW

Appellate courts review summary judgment decisions *de novo*, engaging in the same inquiry as the trial court, to determine if there is any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 775 (1971). The *de novo* standard applies when this Court reviews “all trial court rulings made in conjunction with a summary judgment motion.” *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 231, 393 P.3d 776 (2017) (quotations omitted).

Where the party opposing a motion for summary judgment will have the burden of proof on an issue at trial, the moving party can prevail by pointing out to the court that the opposing party’s case lacks evidentiary support. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 & n.1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1985)). To prevail on a claim of medical negligence, the plaintiff must prove that a 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,” and that “[s]uch failure was a proximate cause of the injury complained of.” RCW 7.70.040; RCW 7.70.030; *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 492, 183 P.3d 283 (2008). Expert medical testimony is generally required to establish the standard of care and to prove causation in a medical negligence action. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993) (citing *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983)). “If the plaintiff in a medical negligence suit lacks competent expert testimony, the defendant is entitled to summary judgment.” *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 611, 15 P.3d 210 (2001).

“[A] defendant may move for summary judgment on the ground the plaintiff lacks competent medical evidence to make out a prima facie case of medical malpractice.” *Young*, 112 Wn.2d at 226. To prevent summary judgment dismissal, the opposing party cannot rely on allegations made in pleadings, but must “set forth specific facts showing that there is a genuine issue for trial” in order to defeat the motion. *Id.* at 225-26 (citation omitted); CR 56(e). Although the court views the evidence and all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment, *Young*, 112 Wn.2d at 22, medical expert affidavits filed in opposition must set forth “specific facts establishing a cause of action,” not “conclusory statements without adequate factual support.”

*Keck v. Collins*, 181 Wn. App. 67, 91, 325 P.3d 306 (2014) (citing *Guile*, 70 Wn. App. at 25). The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value. *Wash. Fed. Sav. v. Klein*, 177 Wn. App. 22, 311 P.3d 53 (2013), *review denied*, 179 Wn.2d 1019 (2014).

An order granting summary judgment dismissal may be affirmed on any basis supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989).

#### V. ARGUMENT

While admitting that Dr. Fisk’s criticisms of the care provided by Drs. Ondusko and Ekin was “not organized in a cogent fashion” and did not make “clear” what their alleged “deviations caused,” the argument section of the Snowdens’ brief consists of little more than a recitation of Dr. Fisk’s declaration testimony and completely ignores Dr. Fisk’s January 3, 2019 deposition.<sup>4</sup> *App. Br.* at 13-21. However, the questions before the trial court included whether Dr. Fisk was qualified to provide *causation* opinions, whether she identified medical facts to support her *causation* opinions, and whether her testimony was sufficient to support a *prima facie* loss of chance

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<sup>4</sup> Despite the fact that the Snowdens produced the entire transcript of Dr. Fisk’s deposition before the trial court in opposition to Dr. Ondusko’s renewed summary judgment motion, *see* CP \_\_ (sub #106, Supplemental Designation of Clerk’s Papers filed December 12, 2019), they did not designate the deposition for this Court’s review, CP 540-45.

claim. *See supra* Sec. III. C. 3, 4, 6. The Snowdens' mere quotation of her declaration testimony does not elucidate their reasons for believing those questions should have been resolved in their favor or entitle them to a reversal of the trial court's proper summary judgment orders dismissing their claims against Drs. Ondusko and Ekin.

A. The Trial Court Properly Dismissed the Snowdens' Claims Against Dr. Ondusko.

1. Dr. Fisk was not qualified to opine as to whether any delay in diagnosis attributed to Dr. Ondusko caused any difference in the treatment or outcome of Mr. Snowden's foot fracture.

In their opening brief, *see App. Br.* at 13-21, the Snowdens did not address Dr. Ondusko's argument that Dr. Fisk was not qualified to testify about the necessary element of causation based on her training, experience, and scope of knowledge, which she acknowledged at her deposition. *Cf.*, CP 531-32, \_\_ (sub #106, Supplemental Designation of Clerk's Papers filed December 12, 2019, at 6-8).

Whether a particular medical professional is qualified to offer expert medical testimony as to causation in a particular case is properly analyzed under ER 702 and therefore depends on the "knowledge, skill, experience, training, or education" of the witness about the particular medical question at issue. *Frausto*, 188 Wn.2d at 239 (quoting ER 702); *see also Davies*, 144 Wn. App. at 494 (qualification of physician who is not a specialist depends

on whether witness “has sufficient expertise to demonstrate familiarity with the medical procedure or problem at issue in the action”).

Here, the medical question at issue in Dr. Ondusko’s summary judgment motion was whether there was a causal connection between a 4 to 13 day delay in diagnosis of a foot fracture and any subsequent treatment decision or outcome. Nowhere in their opening brief did the Snowdens deny that (1) such a causal link was essential to their claim against Dr. Ondusko; (2) they would bear the burden of proof on that causation question at trial; or (3) that expert medical testimony on that question would be required. *See App. Br.* at 1-22. Under these circumstances, Dr. Ondusko properly challenged Dr. Fisk’s qualifications to opine on that causation question before the trial court in his summary judgment motion. *See supra* Sec. III. C. 6.

The record establishes that Dr. Fisk was not qualified to opine as to such a causal link for several reasons. First, although Dr. Fisk stated in her first declaration that a copy of her curriculum vitae was attached, CP 220, it was never actually included in the record before the trial court, *see, e.g.*, CP 233, 289. Despite repeated challenges to her qualifications by Harrison and Drs. Ondusko and Ekin, the Snowdens never offered proof of her qualifications in the form of a curriculum vitae and never asked the trial

court to rule that she was qualified to opine on *causation* on that basis.<sup>5</sup> Second, Dr. Fisk claimed to be a specialist in emergency medicine only, CP 220, and explicitly denied any expertise in the “medical or surgical care of a foot fracture” after diagnosis at her deposition. CP \_\_\_ (sub #106, Supplemental Designation of Clerk’s Papers filed December 12, 2019, at 6-8). Third, Dr. Fisk testified that she would defer to a podiatrist or orthopedic surgeon as to whether surgery would be necessary for a particular fracture, what time frame would be appropriate, and whether a particular patient should be instructed not to bear weight on such a fracture. *Id.*

Because Dr. Fisk admitted that she did not possess the knowledge, skill, experience, training, or education to opine as to a causal link between any particular delay of diagnosis in this case and any difference in treatment or outcome, the trial court properly dismissed the case on summary judgment. *See, e.g., Davies*, 144 Wn. App. at 495-96 (where testimony does not provide a basis for claimed expertise, education, training, or experience, witness cannot be considered qualified to express an expert opinion).

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<sup>5</sup> Neither Harrison nor Drs. Ondusko and Ekin challenged Dr. Fisk’s qualifications to opine on standard of care for an emergency room physician. *See, e.g., CP 287, 297-98.*

2. Dr. Fisk’s conclusory opinions and speculation did not raise a genuine issue of material fact for trial as to any causal link between Dr. Ondusko’s alleged negligence and any injury.

Under CR 56(e), declarations of purported medical experts that are speculative or contain conclusory statements unsupported by medical facts are not sufficient to prevent summary judgment dismissal. *Davies*, 144 Wn. App. at 495-96; *Guile*, 70 Wn. App. at 25; *Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 87, 89, 419 P.3d 819 (2018) (“talismanic magic words” are not required or sufficient; expert testimony must amount to more than mere allegations and circular conclusions); *O’Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968) (if an expert who states that the facts are insufficient to permit an opinion is allowed to speculate, then “the jury must resort to speculation and conjecture in determining the causal relationship” “between the liability-producing situation and the claimed physical disability resulting therefrom”).

After testifying unequivocally at her deposition that she could not “speak to” what would have been different regarding treatment or outcome if Mr. Snowden’s foot fracture had been diagnosed on December 30, 2011, given her lack of expertise and her admitted deference to other specialists, Dr. Fisk’s declaration testimony was insufficient to raise a genuine issue of fact for trial as to causation. CP 531-34. For example, her claim that the delay “led to unnecessary additional pain, restricted mobility, and probable

further damage to his fractured foot,” CP 524, is speculative, conclusory, and not supported by medical facts. Dr. Fisk never identified any fact in any medical record to support a conclusion that Mr. Snowden caused “further damage” to his foot by putting weight on it before he received a diagnosis. She merely assumed her conclusion, claiming that a lack of diagnosis, rather than the act of deciding to put weight on a tender foot, caused “additional” pain. Similarly, she did not identify any medical fact to establish that the lack of diagnosis for some number of days “restricted” his “mobility” rather than the fracture itself.

Moreover, despite testifying unequivocally that she would “defer” to a specialist regarding limits on weight bearing appropriate for a “specific fracture,” and despite testifying unequivocally that she was not qualified to criticize Dr. Ngan’s care and treatment of Mr. Snowden’s right foot fracture, CP 531-34, Dr. Fisk did not defer to Dr. Ngan’s decision that conservative treatment, including use of an air cast and minimizing activities, rather than a prohibition on weight bearing and driving, was appropriate over a month after the initial diagnosis and prior to definitive testing and development of a surgical plan. *Compare CP 508 with CP 524-25.*

Dr. Fisk’s declarations contain several other conclusory and speculative statements. Despite identifying “clues” in the medical records indicating that Mr. Snowden was using a wheelchair on January 6, 7, and 8,

2012, (a circumstance Dr. Ondusko could not have known when he saw Mr. Snowden only on December 30, 2011), Dr. Fisk suggested that Mr. Snowden was “bearing [his] full weight on a fractured foot for 13 days” – and thereby impeding bone healing, aggravating pain and causing emotional distress – merely because Dr. Ondusko provided him with crutches after treating his significant left leg wound on December 30, 2011. CP 223-24, 523-24. Again, speculation about what Mr. Snowden could have done is no less speculative than Dr. Fisk’s reference to literature documenting that misdiagnosed Lisfranc injuries “can lead to significant long term pain and disability” when no medical facts exist to establish a causal link in this case.

Finally, having testified in her declaration that “[n]o 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,” CP 524-25, Dr. Fisk’s statements attempting to describe a causal link between the delayed diagnosis and any injury constitute nothing more than speculation that cannot be presented to a jury. *O’Donoghue*, 73 Wn.2d at 824.

3. Dr. Fisk's second declaration did not state a prima facie loss of chance claim.

Dr. Fisk's last ditch effort in her second declaration to identify the injury at issue as a loss of chance claim, CP 525 ("missed diagnosis certainly did not improve his chances of a better outcome"), must fail. A lost chance claim is "not a distinct cause of action, but an analysis within, a theory contained by, or a form of a medical malpractice cause of action" that is distinguished from and an alternative to a traditional malpractice claim. *Rash v. Providence Health & Services*, 183 Wn. App. 612, 629-30, 334 P.3d 1154 (2014), review denied, 182 Wn.2d 1028 (2015). In a traditional medical malpractice claim, the plaintiff has the burden of proving that negligence "caused the final outcome." *Id.* at 631. "In a loss of chance case, the plaintiff has the burden of proving that the negligence caused loss of chance, but not that the negligence caused the final outcome." Alice Ferot, *The Theory of Loss of Chance: Between Reticence and Acceptance*, 8 Fla. Int'l U. L. Rev. 591, 603 (2013).

Under current Washington law, the loss of chance theory only applies in medical malpractice cases when the plaintiff's chance of survival or of a better outcome was less than or equal to fifty percent absent any alleged negligence. *Herskovits v. Group Health*, 99 Wn.2d 609, 634, 664 P.2d 474 (1983) (Pearson, J., concurring); accord *Mohr v. Grantham*, 172

Wn.2d 844, 857, 262 P.3d 490 (2011) (adopting Justice Pearson's plurality opinion in *Herskovits*). The reduction or loss of that chance is the actionable injury, and “the defendant is liable, not for all damages arising from the” ultimate result, “but only for damages to the extent of the diminished or lost chance.” *Herskovits*, 99 Wn.2d at 632-34; *Mohr*, 172 Wn.2d at 857.

To establish a loss of chance claim, and, therefore, to prevent summary judgment dismissal, a plaintiff must present expert medical testimony quantifying the chance at issue with a numerical percentage. *Christian v. Tohmeh*, 191 Wn. App. 709, 722, 731, 366 P.3d 16 (2015), review denied 185 Wn.2d 1035 (2016) (40 percent chance of better outcome); *Rash*, 183 Wn. App. at 636; *Mohr*, 172 Wn.2d at 857-58; *Herskovits*, 99 Wn.2d at 611 (14 percent reduction in chance of survival); *Dunnington v. Virginia Mason, Med. Ctr.*, 187 Wn.2d 629, 636, 389 P.3d 498 (2017) (40 percent chance of better outcome).

Because Dr. Fisk failed to identify a percentage or range quantifying the chance of a better outcome at issue, the Snowdens cannot assert a loss of chance claim regarding the delayed diagnosis Mr. Snowden’s right foot fracture. *Rash*, 183 Wn. App. at 636; *Christian*, 191 Wn. App. at 731.

4. Dr. Fisk’s declaration testimony contradicting her previous unequivocal deposition testimony cannot raise a genuine issue of material fact for trial.

“A summary judgment motion will not be denied on the basis of an unreasonable inference.” *Marshall v. AC&S Inc.*, 56 Wn. App. 181, 184, 782 P.2d 1107 (1989). A self-serving declaration that contradicts prior unambiguous deposition testimony does not allow a *reasonable* inference as to the existence of a genuine issue of material fact. *Id.*

When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.

*Id.* at 185 (quoting *Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11<sup>th</sup> Cir. 1984)). The *Marshall* rule applies to the “traditional scenario” “in which a party – in an effort to create a genuine issue of material fact – introduces a self-serving affidavit that directly contradicts that party’s own unambiguous sworn testimony.” *Taylor v. Bell*, 185 Wn. App. 270, 294, 340 P.3d 951 (2014), *review denied*, 183 Wn.2d 1012, 352 P.3d 188 (2015).

In *Marshall*, a group of asbestos manufacturers moved for summary judgment dismissal of Marshall’s personal injury claim, under the statute of limitations, based on the following evidence: (1) Marshall’s unequivocal

deposition testimony that he learned of his asbestosis during his first visit to Harborview; (2) his admission that the first visit was in 1982 or 1983; (3) Harborview records of his first visit in July 1982; and (4) a workers' compensation form in which he listed "7-12-82" as the date he first learned of his disease. *Id.* at 183-85. In response to the summary judgment motion, Marshall filed an affidavit claiming he was first told he had an asbestos related disease in 1985. *Id.* at 183. In his appeal of the summary judgment order of dismissal, this Court held that it was "not reasonable" to "infer from his affidavit that there is a genuine issue of material fact concerning when he learned of his illness and its cause." *Id.* at 184. Because the "self-serving" "contradictory affidavit" did not raise a genuine issue of material fact, "the trial court did not err in granting summary judgment." *Id.* at 185. *Cf., Taylor*, 185 Wn. App. at 293-95 (*Marshall* rule did not apply where testimony was "neither unambiguous nor in direct contradiction to itself" and "a reasonable explanation for the potential inconsistencies" was given).

Similarly, in *Marthaller v. King County Hosp., Dist. 2*, 94 Wn. App. 911, 918, 973 P.2d 1098 (1999), the plaintiff's expert first testified at his deposition that he would not offer opinions on (1) the standard of care applicable to paramedics, or (2) whether the paramedics met that standard while performing an intubation. In opposition to a summary judgment motion, the plaintiff submitted the same expert's affidavit stating that he

was familiar with the applicable standard of care and that he was of the opinion that the intubation procedure failed to meet that standard. *Id.* at 918-19. This Court held that the affidavit failed to create a genuine issue of fact because it “effectively contradicts his deposition testimony regarding the applicable standard of care and whether the paramedics in this case breached that standard.” *Id.* at 919; *see also, Klontz v. Puget Sound Power & Light*, 90 Wn. App. 186, 191-92, 951 P.2d 280 (1998) (after plaintiff testified at deposition that he had not read the policy guide before his termination, his affidavit stating that he relied upon the policy guide contradicted his previous, unambiguous deposition testimony and could not raise genuine issue of material fact to prevent summary judgment).

Here, Dr. Fisk testified unequivocally that she could not identify any difference in treatment or outcome if Dr. Ondusko had diagnosed the fracture on December 30, 2011. CP 531-34. Her later contradictory statements of broad generalizations, without explanation, that the delay “led to unnecessary additional pain, restricted mobility, and probable further damages to his fractured foot,” that the instruction to use crutches “caused him more pain over the next 13 days,” and that he would have “received proper fracture care treatment” if diagnosed on December 30, could not raise a genuine issue of material fact for trial. *Marshall*, 56 Wn. App. at 184.

B. The Trial Court Properly Dismissed the Snowdens' Claims Against Dr. Ekin.

1. Dr. Fisk was not qualified to opine as to whether any delay in diagnosis by Dr. Ekin caused any difference in the treatment or outcome of Ms. Snowden's splenic injury.

Just as the Snowdens failed to establish Dr. Fisk's qualifications to opine on causation regarding Mr. Snowden's right foot fracture, *see supra* Sec. VI. A. 1, they failed to show her qualifications to opine about the treatment and outcomes of splenic injuries. In particular, the Snowdens never produced Dr. Fisk's curriculum vitae, CP 220, 233, 289; and never identified any evidence that Dr. Fisk had knowledge, skill, experience, training, or education in monitoring splenic injuries, performing spleen surgery, determining whether to attempt salvage of a spleen rather than a splenectomy, or evaluating the risk of splenic rupture, CP 228-30. Because Dr. Fisk's testimony did not provide a basis to conclude she was qualified to opine on any causal link between the alleged delay and any difference in Ms. Snowden's treatment or outcome, the trial court properly dismissed the case on summary judgment. *See, e.g., Davies*, 144 Wn. App. at 495-96.

2. Dr. Fisk's conclusory opinions and speculation did not raise a genuine issue of material fact for trial as to any causal link between Dr. Ekin's alleged negligence and any injury.

Dr. Fisk's conclusory opinions and speculation regarding a causal link between Dr. Ekin's alleged negligence and any injury to Ms. Snowden also fail. *See supra* Sec. V. A. 2. Despite admitting that Ms. Snowden's

spleen likely ruptured when she was being evaluated in the emergency department on January 3, 2012, Dr. Fisk failed to identify any medical facts suggesting that earlier monitoring would have prevented the rupture or allowed an earlier surgical intervention. CP 229. Instead, her references to closer monitoring and “suspicion” would likely have led to a different outcome must fail just like the insufficient causal connection described in *Davies*, 144 Wn. App at 496, involving a claim that appropriate suspicions would likely have led to “an appropriate work-up and diagnosis.” But, as in *Davies*, Dr. Fisk failed to link Dr. Ekin’s alleged negligence to the injury of the ruptured spleen or the splenectomy. Under these circumstances, the trial court properly granted summary judgment dismissal.

3. Dr. Fisk’s declaration did not state a prima facie loss of chance claim.

In her initial declaration, Dr. Fisk opined that Dr. Ekin’s failure to diagnose her sternal fracture, rib fractures, and splenic injury deprived Ms. Snowden “of an increased chance” and “a higher chance” “for a better outcome with earlier treatment.” CP 229, 231. But, Dr. Fisk did not identify any percentage of a chance that Ms. Snowden would have had for a better outcome if her injuries were diagnosed on December 30, 2011, or how much that chance was reduced because of the delay in diagnosis until January 3, 2012. Because a plaintiff must present expert testimony identifying a

percentage in order to prevent summary judgment dismissal of a loss of chance claim, the trial court properly dismissed the Snowdens' loss of chance claim against Dr. Ekin. *Rash*, 183 Wn. App. at 636; *Christian*, 191 Wn. App. at 731; *see also supra* Sec IV. A. 3.

C. This Court Should Award Drs. Ondusko and Ekin Attorney Fees For Defending Against A Frivolous Appeal.

This Court “may order a party ... who ... files a frivolous appeal ... to pay terms or compensatory damages to any other party who has been harmed[.]” RAP 18.9(a). “An appeal is frivolous if, considering the entire record, it has so little merit that there is no reasonable possibility of reversal and reasonable minds could not differ about the issues raised.” *Johnson v. Mermis*, 91 Wn. App. 127, 137, 955 P.2d 826 (1998).

Here, without accurately describing or acknowledging the evidence and arguments presented to the trial court, the Snowdens' opening brief consists of little more than a repetition of Dr. Fisk's two declarations. *See App. Br.* at 13-22. Given the lack of explanation or analysis, their omission of Dr. Fisk's contradictory deposition testimony also appears misleading. Under these circumstances, an award of attorney fees to Drs. Ondusko and Ekin for defending against a frivolous appeal is justified.

VI. CONCLUSION

For the foregoing reasons this Court should affirm the trial court's summary judgment orders dismissing the Snowdens' claims against Drs. Ondusko and Ekin and award them attorney fees under RAP 18.9(a).

RESPECTFULLY SUBMITTED this 23rd day of December, 2019.

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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 23rd day of December, 2019, I caused a true and correct copy of the foregoing document, “Brief of Respondents Gilbert N. Ondusko, M.D. and Scott T. Ekin, M.,” to be delivered in the manner indicated below to the following counsel of record:

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