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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 326527

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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ESTATE OF LORRAINE P. HENSLEY by and through its Personal  
Representative, JESSICA WILSON and LORRAINE HENSLEY, by and  
through her Personal Representative,  
Appellants-Plaintiffs,

v.

COMMUNITY HEALTH ASSOCIATION OF SPOKANE (CHAS);  
PROVIDENCE HOLY FAMILY HOSPITAL; SPOKANE EAR, NOSE  
AND THROAT CLINIC, P.S., and MICHAEL CRUZ, M.D.,  
Respondents-Defendants

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BRIEF OF RESPONDENT COMMUNITY HEALTH ASSOCIATION  
OF SPOKANE (CHAS)

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## **I. INTRODUCTION**

The Respondent is Community Health Associates of Spokane (hereinafter, CHAS). The Appellants, the Estate of Lorraine P. Hensley, by and through its Personal representative, Jessica Wilson and Lorraine Hensley, by and through her Personal Representative (the Hensleys), seek reversal of the Trial Court's denial of their summary judgment against CHAS and the dismissal of their claim of lack of informed consent as well as the denial of a new trial due to alleged jury misconduct.

## **II. ASSIGNMENT OF ERRORS**

1. Whether the trial court erred in failing to grant the Hensleys summary judgment against CHAS on the elements of medical negligence liability and causation.

2. Whether the trial court erred in dismissing the Hensleys' claims of informed consent on a directed verdict.

3. Whether the trial court erred in denying the Hensleys' request for a new trial given jury misconduct.

## **III. COUNTERSTATEMENT OF THE CASE**

Lorraine Hensley was 51 years of age when she passed away in February of 2009. *CP 6-10*. She died as a result of a brain herniation due to cerebromeningitis, and infection in the brain. *Id.* On January 26, 2012 Jessica Wilson, on behalf of the Estate of Lorraine Hensley and her

statutory beneficiaries, filed the subject lawsuit in which she brought claims for medical negligence and wrongful death. *CP 3*. The Hensleys claimed that medical providers at CHAS, as well as other named Defendants, failed to meet the standard of care in their treatment of Lorraine Hensley and also failed to provide Ms. Hensley with informed consent. *CP 10-12*.

CHAS, along with the other Defendants, moved for summary judgment against the Hensleys on April 27, 2012. *CP 16-24*. The basis of the motions was that the Defendants claimed that the Hensleys lacked any testimony from a qualified medical expert who could establish the elements of any of the Hensleys' claims. *Id.* The Motions were scheduled to be heard on June 1, 2012. *CP 76*.

On May 22, 2012, the Hensleys responded by filing a countermotion for summary judgment, a response, and a motion to shorten time against CHAS and the other named Defendants, requesting entry of judgment on the issues of liability and causation and that the motion also be heard June 1, 2012. *CP 25-40*. Supporting the Hensleys' motion was a declaration from their otolaryngologist (ENT) expert Steven T. Kmucha, M.D. *CP 41-70*.

CHAS received the Hensleys' countermotion via mail after it was mailed on Monday, May 21, 2012. *CP 30*. On Thursday, May 24, 2012 CHAS sent a rebuttal memorandum to the Hensleys' motion for summary

judgment. *CP 112-117*. CHAS also filed a responsive declaration from their physician, Pavel Conovalciuc, MD, refuting the Hensleys' motion for summary judgment. *CP 123-127*. After all of these documents were filed, the judge assigned to the case at the time recused himself and a new judge was appointed to the case. *RP 3557*. As a result, the motions for summary judgment were re-noted for, and eventually heard, on June 22, 2012. *RP 3554-3557*.

In deciding on the motions, the trial Court took issue with Dr. Kmucha's declaration, *RP 3566-3570*, but allowed the Hensleys to obtain a supplemental declaration from Dr. Kmucha that would cure the deficiencies and defeat CHAS and the other Defendants' motions for summary judgment. *RP 3568-3569*. Thereafter, the trial court denied the Hensleys' motion for summary judgment against CHAS. *CP 176; RP 3595*.

Discovery continued thereafter and trial in this matter began on May 5, 2014, *RP 117*, and concluded on May 29, 2014, *RP 3553*. The Hensleys claimed at trial, in pertinent part, that (1) the primary care physicians at CHAS failed to appropriately treat a chronic sinusitis which led to a significant infection in her sinus, causing an erosion of the bone leading from her right frontal sinus into the right cranium, and (2) that this violated the standard of care. *RP 3405*.

It was CHAS's position at trial that the patient did not have a "chronic sinusitis", but rather that she had a recurrent sinusitis over the years, most likely contributed to by her allergies and smoking. *RP 3479-3480*. CHAS had the support of two board certified family physicians: Dr. Greg Ledgerwood from East Wenatchee, Washington, *RP 2552*, and Dr. Walter Balek, a family practitioner from Spokane, *RP 2293*. They were both supportive of the care provided by all of the providers at CHAS. *RP 2309, 2314, 2561*.

On May 31, 2014, after hearing all the evidence in this matter, a jury of twelve Spokane County residents entered a special verdict form in which the jury found that Defendant CHAS violated the standard of care in their treatment of Lorraine Hensley. *CP 907-909*. As to the violation of the standard of care by CHAS, however, the jury found that the violation was not a proximate cause of the injury to Lorraine Hensley. *CP 908*. The jury found by a vote of 10-2 that CHAS violated the Standard of Care and by a vote of 10-2 that the violation was not a proximate cause of injury or death to Lorraine Hensley. *Id.*

The jury thus returned a verdict in favor of CHAS and did not award damages to the Hensleys. *CP 908*. Following the delivery of the verdict by the jury foreman, the Court polled each juror as to their individual findings regarding the standard of care as to each

provider/defendant. *CP 951*. Each juror confirmed their respective votes and the collective will of the jury. *Id.* On June 23, 2014, the Hensleys filed a Motion for a New Trial pursuant to CR 59 on the basis of three alleged instances of juror misconduct and three alleged instances of error in law. *CP 910-934*. That Motion was denied. *CP 1015*. The Hensleys have now filed this appeal wherein they reassert some of those claims.

#### IV. ARGUMENT

##### A. Summary Judgment.

###### 1. Standard of Review.

Courts review an order regarding summary judgment de novo. *Seybold v. Neu*, 105 Wash.App. 666, 675, 19 P.3d 1068 (2001). However, whether an expert is qualified to testify is a determination within the discretion of the trial court and will not be reversed absent manifest abuse. *Harris v. Groth*, 99 Wash.2d 438, 450, 663 P.2d 113 (1983).

###### 2. Summary Judgment Standard.

Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301, 304 (1998). The moving party has the burden to demonstrate that there is no genuine dispute as to any material fact and reasonable inferences from the

evidence must be resolved against the moving party. *Id.* In other words, the evidence is viewed in the light most favorable to the non-moving party. *Cole v. Laverty*, 122 Wn. App. 180, 79 P.3d 924 (2002).

Summary judgment should only be granted if, from all the evidence, a reasonable person could reach only one conclusion. *Folsom*, 135 Wn.2d at 663. Conversely, when the court determines there is a dispute as to any material fact, summary judgment is improper. A material fact is one upon which the outcome of the litigation depends. *Doe v. Department of Transportation*, 85 Wn. App. 143, 147, 931 P.2d 196 (1999).

A court should not resolve any issue of credibility at a summary judgment hearing. *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1997). An issue of credibility is present if the party opposing the summary judgment motion comes forward with evidence which contradicts or impeaches the movant's evidence on a material issue. *Dunlap v. Wayne*, 105 Wn.2d 529, 536-37, 716 P.2d 842 (1986).

Because of the unique nature of medical negligence cases, plaintiffs are required to present expert testimony to establish a prima facie case of negligence. The testimony must be (1) that the defendant healthcare provider's treatment was below the standard of care **and** (2) that the standard of care violation proximately caused the plaintiff's injuries. RCW 7.70.040(1); *Harris*, 99 Wn.2d at 449.

3. **The Hensleys' Summary Judgment Motion should not be Reviewed as the Hensleys failed to Claim it as an Appealable Issue.**

Filing a timely notice of appeal is necessary to invoke Washington's appellate jurisdiction. *Buckner, Inc. v. Berkey Irrigation Supply*, 89 Wn. App. 906, 911, 951 P.2d 338 (1998). RAP 5.3(a) requires a notice of appeal to "designate the decision or part of decision which the party wants reviewed." Washington's appellate courts will not review an order that was not designated in a timely notice of appeal. RAP 2.4(a); *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 378, 46 P.3d 789 (2002).

The Hensleys filed a timely notice of appeal, but did not designate the order denying her pre-trial motion for summary judgment in that notice. *See CP 1017-33*. Ms. Hensley also filed an amended notice of appeal, but that amended notice also omitted the pre-trial summary judgment order. *CP 1034-46*.

The Hensleys bore the burden to designate all of the orders that they wanted reviewed. The Hensleys failed to designate the pre-trial summary judgment order, and there is no exception that can forestall the consequences of the Hensley's failure. The Court should, therefore, decline to review the pre-trial summary judgment order.

**4. Summary Judgment was Properly Denied because Dr. Conovalciuc's Declaration created a Genuine Issue of Material Fact.**

CHAS moved for summary judgment against the Hensleys on April 27, 2012. *CP 22-24*. On May 22, 2012, the Hensleys responded by filing a countermotion for summary judgment and motion to shorten time against CHAS and the other Defendants, requesting entry of judgment on the issues of liability and causation and that the Hensleys' motion also be heard June 1, 2012. *CP 25-40*. Supporting the Hensleys' motion was a declaration from their otolaryngologist (ENT) expert Steven T. Kmucha, M.D. *CP 41-70*. Therein, Dr. Kmucha stated that he was "familiar with the national standards of care of medical professional treatment for processes such as acute sinusitis, which is and was the condition at issue in the treatment of the deceased Lorraine Hensley." *CP 42*.

CHAS received the Hensleys' countermotion via mail after it was mailed on Monday, May 21, 2012. *CP 30*. As noted, the Hensleys' countermotion for summary judgment and motion to shorten time were to both be heard only nine days later on June 1, 2012. *CP 76*. Further, Monday, May 28 was a court holiday for Memorial Day. CHAS thus had until Friday, May 25, 2012 to draft and mail a response to the Hensleys' motion for summary judgment and motion to shorten time in order to allow three days for mailing so that the Court would receive it at least one

day before it would be heard on June 1, 2012. This is because CHAS could not be sure whether the Court would allow the Hensleys to proceed on shortened time and were forced to proceed as if the Court would.

While prejudiced by time, in that two day period CHAS was able to draft a rebuttal memorandum to the Hensleys' motion for summary judgment. *CP 112-117*. CHAS was also able to contact their physician client, Pavel Conovalciuc, MD, and quickly put together a responsive declaration refuting the Hensleys' motion for summary judgment. *CP 123-127*. Therein, Dr. Conovalciuc was simply able to discuss his qualifications, that he treated the patient, and testify that he and another CHAS PA-C met the standard of care in their treatment of Lorraine Hensley. *Id.* Because so little time was available, this declaration could only be filed with an affidavit pursuant to GR17 as no original could be secured in such short time. *Id.*

However, after all of these responsive documents were filed, the judge assigned to the case at the time recused himself and a new judge was appointed to the case. *RP 3557*. As a result, the motions for summary judgment were re-noted for, and eventually heard, on June 22, 2012, without the opportunity to supplement any of the responses. *RP 3554-3557*.

The Hensleys now take issue with the sufficiency of Dr. Conovalciuc's declaration and rest almost exclusively on the fact that the trial court held that it was "conclusory". *RP 3592-3593*. However, the Defendants also took issue with Dr. Kmucha's declaration and filed a motion to strike. *RP 3566-3570; CP 102*. The Court agreed and found that the declaration was flawed because Dr. Kmucha did not profess any knowledge or understanding of the standard of care in the State of Washington. *RP 3568-3569*. However, the Court allowed the Hensleys to get a supplemental declaration from Dr. Kmucha that would fix this error because if it was not fixed, CHAS and the other Defendants would have been entitled to summary judgment as a matter of law. *Id.* No such opportunity was afforded CHAS however because the Court deemed there was enough to state a genuine issue of material fact. *RP 3591: 17-20*. These motions occurred only a few months after filing of the law suit and the trial in this matter did not occur for another two years.

The trial court thus denied the Hensleys' motion for summary judgment against CHAS. *RP 3595: 5-9*. In denying the Hensleys' Motion, the court found a genuine issue of fact as to what specialty of doctor could testify regarding the standard of care of another specialty. The trial court stated that, "[s]o what that generates is issues of fact that may come up between the experts, and I am okay with that." *RP 3594: 10-16*.

The Hensleys now claim that CHAS failed to submit expert evidence rebutting Dr. Kmucha's evidence, and failed to establish the existence of any genuine issue of material fact for trial. They claim they were entitled to summary judgment against CHAS on both liability and causation.

While the Hensleys are correct that the Court was critical of Dr. Conovalciuc's declaration, the Court's decision had nothing to do with the Declaration of Dr. Conovalciuc. The court found that even if it was flawed "it does not make any difference." *RP 3592: 24-25*.

However, CHAS believes that on review the Court will find that the Declaration of Dr. Conovalciuc was sufficient to create a genuine issue of material fact as to CHAS' compliance with the standard of care. In Dr. Kmucha's declaration he states that he is an otolaryngologist, that he reviewed Lorraine Hensley's medical records, that the CHAS providers provided care below the standard of care and why. *CP 42*. The declaration of Dr. Conovalciuc, however contains similar details. Dr. Conovalciuc provides his expertise as a family practice physician, that he examined Lorraine Hensley and reviewed her records. The question is whether Dr. Conovalciuc was required to go through each instance of treatment and state why each instance complied with the standard of care. Surely he could do so given sufficient time. However, counsel for CHAS only had two days to consult with Dr. Conovalciuc and prepare a response. Lastly, it

seems readily apparent that if the Court felt that the denial of the Hensley's summary judgment motion actually hinged on this declaration, CHAS would have been afforded a chance to supplement the declaration, much the same way as the Hensley's response to the motion for summary judgment by CHAS hinged on a supplemental declaration of Dr. Kmucha and he was afforded the opportunity to so supplement.

**5. Summary Judgment was Properly Denied because the Hensleys Failed to Provide Sufficient Expert Testimony.**

Even assuming that the Declaration of Dr. Conovalciuc was insufficient to create a genuine issue of material fact, Dr. Kmucha was not qualified to opine on the standard of care of family practice providers.

The general rule is that a practitioner of one school of medicine is incompetent to testify as an expert in a malpractice action against a practitioner of another school. *Eng v. Klein*, 127 Wash. App. 171, 176, 110 P.3d 844, 847 (2005). While there are several well-established exceptions to this rule, *Id.*, those exceptions do not apply here. Those exceptions include circumstances where: (1) the methods of treatment in the defendant's school and the school of the witness are the same; (2) the method of treatment in the defendant's school and the school of the witness should be the same; or (3) the testimony of a witness is based on knowledge of the defendant's own school. *Id.* As will be shown, these

exceptions do not apply because Dr. Kmucha did not assert any of them in his declaration.

In *Miller v. Peterson*, 42 Wash.App. 822, 714 P.2d 695 (1986), the court created the first two exceptions holding, “that a practitioner of one school of medicine may testify against a practitioner of another school of medicine when the methods of treatment of the two schools are or should be the same.” *Id.* at 831. However, they did so after review of *Sandford v. Howard*, 161 Ga.App. 495, 288 S.E.2d 739 (1982). There orthopedic surgeons treated patients with the same ailment and were familiar with the procedure utilized by a defendant podiatrist. *Id.*

In *White v. Kent Med. Ctr.*, 61 Wash.App. 163, 810 P.2d 4 (1991), the court similarly considered only whether a specialist's testimony regarding the standard of care of a general practitioner could satisfy the plaintiff's summary judgment burden. There the court recognized that “a general practitioner cannot normally be held to the standard of care of a specialist.”

While in reversing the superior court's summary judgment order the court did find that, “So long as a physician with a medical degree has sufficient expertise to demonstrate familiarity with the procedure or medical problem at issue, ‘[o]rdinarily [he or she] will be considered qualified to express an opinion on any sort of medical question, including

questions in areas in which the physician is not a specialist”, the specific facts of that case caused the reversal. *Id.* at 173. There the court relied exclusively on the fact that:

**all of the doctors, defendant general practitioners as well as specialists, agreed** that [the plaintiff’s symptoms were] enough to establish the need for a vocal cord examination. This concurrence establishes that the alleged standard of care is more than mere personal opinion and is sufficient to establish, at least for summary judgment purposes, the...specialists' knowledge of the standard of care applicable to general practitioners.

*Id.* at 175 (**Emphasis Added**). Further, in *White* the Court simply found that the specialist’s opinion regarding the general practitioner’s actions created a genuine issue of material fact and that summary judgment was not proper. 61 Wash.App. 163. It did not grant summary judgment. *Id.*

This case, on the other hand, could not be any more different than both *Miller* and *White*. The Hensleys counter-motion for summary judgment relied exclusively on the declaration from their otolaryngologist (ENT) expert Steven T. Kmucha, M.D. *CP 41-70*. Therein, Dr. Kmucha stated that he was “familiar with the national standards of care of medical professional treatment for processes such as acute sinusitis, which is and was the condition at issue in the treatment of the deceased Lorraine Hensley.” *CP 42*. Dr. Kmucha did not, however, identify any training, experience, or education related to family practice medicine that would

qualify him to render opinions regarding the standard of care of a family practice physician. *CP 41-70*. Further, the Hensleys lack testimony from “all of the doctors” including CHAS experts, as was found in *White*, that the standard of care was breached.

While Dr. Kmucha may have expertise and appropriate qualifications as an ENT (otolaryngologist), he did not state in his declaration that he is familiar with the standard of care in the State of Washington as it pertains to a Physician Assistant Certified (PA-C) or family practice physician. *Id.* (While at CHAS, Lorraine Hensley was treated by PA-C Naomi Ward and family practice physician Dr. Pavel Conovalciuc, neither of whom are ENT’s. *CP 123-127*.) In *Miller*, the court applies the exception to the rule that a practitioner of one school of medicine is incompetent to testify as an expert in a malpractice action against a practitioner of another school because the plaintiff expert was familiar with the procedure utilized by the defendant. 42 Wash.App. 822. Dr. Kmucha, however, provided no such testimony in his declaration.

Dr. Kmucha did not identify any training, experience, or education related to family practice medicine that would qualify him to render opinions regarding the standard of care of a family practice physician. *CP 41-70*. Furthermore, although Dr. Kmucha stated that he is familiar with the “national standards of care of medical treatment for processes such as

acute sinusitis,” he did not state that he is familiar with the standard of care in the state of Washington or if the “national standard of care” is the same as the Washington State standard of care as it specifically relates to family practice physician Dr. Conovalciuc and PA-C Naomi Ward. *Id.* Furthermore, Dr. Kmucha’s declaration contained no statement that he had ever been in a situation similar to that which PA-C Ward or Dr. Conovalciuc was presented with. *Id.* Further, he failed to identify any experience, training, or education as it relates to family practice physicians and when they should refer patients with acute sinusitis. *Id.* Dr. Kmucha did not state how or why he would be qualified to render such an opinion against a family practice provider. *Id.*

While Dr. Kmucha may be a qualified and competent ENT practicing in California, he did not demonstrate, through his education, training, and experience that he is qualified to testify that PA-C Ward and Dr. Conovalciuc violated the standard of care of a board certified family practice physician or primary care provider in the state of Washington. *CP 41-70.*

Based on the foregoing, the trial court denied the Hensleys' motion for summary judgment against CHAS. *RP 3595: 5-9.* In denying the Hensleys’ Motion, the court specifically found an issue of fact as to this “ER/ER family practice/family practice” question. *RP 3594: 5-6.* The

court rhetorically asked whether this was “a situation that is so unique that really truly if you are not in the specialty you are going to miss this, you are not going to understand what the appropriate thing to do is.” *RP 3594: 6-10*. The trial court thus found that, “[s]o what that generates is issues of fact that may come up between the experts, and I am okay with that.” *RP 3594: 10-16*.

Essentially the question of fact that needed to be decided was whether the specific facts of this case were such that any doctor of any specialty had the expertise, just as a matter of being a doctor, to opine whether the family practice providers at CHAS met the standard of care-- i.e. whether the condition was so common--or whether the Hensleys were required to bring in a family practice expert to opine on whether the CHAS family practice physicians met the standard of care.

The summary judgment order specifically finds that an issue of fact existed regarding the foundation for Dr. Kmucha to render standard of care opinions against CHAS employees or ostensible agents. *RP 3594: 10-16*. The Court also orally denied the Hensleys’ counter-motion for summary judgment, as it had to, since the Kmucha Declaration was deficient. *RP 3595: 8-10*. The Hensleys were not able to satisfy their burden of proof to provide competent and qualified expert medical testimony that CHAS violated the standard of care and that such violation

proximately caused Lorraine Hensley's injuries. The Court thus properly found this to be a genuine issue of material fact precluding summary judgment. In the end, the Hensleys also apparently agreed and brought in a family practice physician expert to testify at trial. *RP 576*.

**6. Even if No Genuine Issue of Material Fact Existed, the Standard of Care was met.**

Dr. Kmucha's declaration in support of the Hensleys' summary judgment motion is clear that the standard of care required only a referral to ENT. *CP 44; para. 16*. He stated that had a referral been made to an ENT on February 1, 2009, Lorraine Hensley would have had a greater than 90% chance of survival. *CP 47, para. 28*. However, Lorraine Hensley actually was referred to an ENT on February 1, 2009 following her visit to the Holy Family Emergency Department, and she was treated by ENT Michael Cruz, MD on February 2, 2009. *CP 8, para 2.24; CP 121*. Assuming Dr. Kmucha's opinions are correct, he states that Lorraine Hensley would have had a greater than 90% chance of survival if CHAS had made a referral to an ENT up to February 1, 2009. *CP 47, para. 28*. Conceding for the purposes of this brief that CHAS made no such referral as of February 1, 2009, Lorraine Hensley still received the referral despite CHAS' alleged failure to do so. Therefore, there is no causal link between CHAS' alleged negligence and Lorraine Hensley's injuries. She received

that which allegedly should have been provided by CHAS (a referral), and received it at a time when her chance of survival was greater than 90%. Therefore, the Hensleys could not establish proximate cause on summary judgment and their motion failed on its own terms.

**B. The Hensleys' Informed Consent Claim was Properly Dismissed.**

**1. Standard of Review.**

In reviewing a trial court's decision on a motion for directed verdict, courts apply the same standard as the trial court. *Hizey v. Carpenter*, 119 Wash. 2d 251, 271-72, 830 P.2d 646, 657 (1992). A directed verdict is appropriate if, when viewing the material evidence most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party. *Id.* at 271-272.

**2. The Facts of this Case do not establish an Informed Consent Claim.**

Medical negligence claims are divided into two distinct categories: standard of care and informed consent. Courts have established that "allegations supporting one normally will not support the other." *Gustav v. Seattle Urological Assoc.*, 90 Wash.App. 785, 789, 954 P.2d 319 (1998). The division is significant. On the one hand, patients may blame healthcare providers for decisions or actions they deem imprudent (standard of care) and on the other hand, they may complain

that had they been better informed, they may have chosen a different course of treatment (informed consent).

However, they generally cannot combine the two concepts to claim that had the provider made the correct decision or action in the first instance, they should, or would have informed the patient of treatment options for the undiagnosed condition. *Gustav*, 90 Wash.App. 785. In this case, the Hensleys attempt to split their singular claim against CHAS to fit both of the mutually exclusive categories. However, evidence of a deviation from the alleged obligation of informed consent is not relevant in this case.

The trial Court herein affirmatively found that this fundamentally is not an informed consent case. *RP 3355*; 22-25. The requisite elements of informed consent claims illuminate the misapplication of the doctrine to the facts of this case. The gist of the Hensleys' Complaint is that Ms. Hensley's death was "preventable," but Ms. Hensley did not receive "proper medical treatment." *CP 12, para. 3.1 and 3.3*. As to the informed consent claim, the Hensleys state: "Lorraine Hensley's death resulted from health care to which she did not consent, **given the failure of diagnoses and interventions.**" *Id. at para. 3.5 (Emphasis Added)*. In sum, the Hensleys criticize the improper diagnoses and treatment plans of the Defendants, and state that had Ms. Hensley been informed of the

alleged standard of care violation (wrong diagnosis), she would have requested different treatment.

However, "a physician who misdiagnoses the patient's condition, and is therefore unaware of an appropriate category of treatments or treatment alternatives, may properly be subject to a negligence action where such misdiagnosis breaches the standard of care, but may not be subject to an action based on failure to secure informed consent." *Backlund v. Univ. of Washington*, 137 Wash. 2d 651, 661, 975 P.2d 950, 956 (1999); *See Also, Bays v. St. Luke's Hosp.*, 63 Wash. App. 876, 881-82, 825 P.2d 319, 322 (1992) ("A physician's failure to diagnose a condition is a matter of medical negligence, not a violation of the duty to inform the patient...Informed consent and medical negligence are alternate methods to impose liability").

In *Gustav*, supra, the trial court dismissed an informed consent claim based upon a physician's failure to diagnose prostate cancer. The court of appeals affirmed dismissal, noting that a failure to diagnose did not amount to a failure to inform. The plaintiffs' informed consent allegation was described by the court of appeals as follows:

...that Dr. Gottesman and Lilly 'failed to fully inform [plaintiff] of the appropriate frequency of diagnostic testing, the dangers involved in not testing more frequently, and the consequences of not completing the 1991 biopsy.' Nothing in these allegations relates to a

failure to warn of potential consequences of treating Gustav's cancer, a condition he could not have treated because he failed to diagnose it.

*Gustav*, 90 Wash.App. at 790. The Court emphasized that the duty of informed consent "does not arise until the physician becomes aware of the condition by diagnosing it." *Id.* Similarly here, the Defendants cannot be held liable under an informed consent theory for failing to inform Ms. Hensley of treatment options for conditions of which the Hensleys concede the Defendants did not diagnose.

In *Burnet v. Spokane Ambulance*, 54 Wash. App. 162, 168-69, 772 P.2d 1027, 1030 (1989) *review denied by*, 113 Wash.2d 1005 (1989), the plaintiff suffered a seizure and was hospitalized. The plaintiff alleged that the defendant neurologist should have ordered diagnostic tests, which they allege would have revealed a risk of brain herniation and subsequent injury. *Id.* at 169. The trial court dismissed the informed consent claim on the basis that the neurologist was not aware of the risks. *Id.* at 168-169. While a valid claim of medical negligence may have existed, "It [was] undisputed that Dr. Graham was unaware of [the plaintiff's] condition which implicated risk to her, so he had no duty to disclose." *Id.* at 169.

The Hensleys claim that *Gomez v. Sauerwein*, 180 Wash. 2d 610, 331 P.3d 19 (2014), affirmed their position as to why their case involved

both recovery theories. However, *Sauerwein* is on point with the claims of CHAS. There, the deceased plaintiff presented to providers with what was believed to be a urinary tract infection and blood was drawn. *Id.* at 614, 21. The results revealed a culture positive for yeast, but the culture had not grown to the point where the strain could be determined. *Id.* The family practitioner defendant decided to hold off on further treatment so long as the patient was not ill, on the mistaken belief that the presence of yeast was simply a contaminant. *Id.* The yeast was not a contaminant. *Id.* As it turned out, a rare fungal infection was growing. *Id.* at 615. The inaction delayed the administration of antifungal medication. *Id.* The infection spread to the decedent's internal organs, she developed fungal sepsis, and died. *Id.* The decedent's estate made an informed consent claim which was dismissed on a directed verdict because the cause of action was not applicable to the facts of the case. *Id.* at 615, 21-22. The court of appeals affirmed, as did the state Supreme Court. *Id.* at 616, 22. The Supreme Court's holding is clearly applicable to this case. They state that "a health care provider who believes the patient does not have a particular disease cannot be expected to inform the patient about the unknown disease or possible treatments for it." *Id.* at 618, 23.

Additionally, the Hensleys claim that this case is akin to the rare situation noted by the court in *Sauerwein* where a provider could be liable

for failure to inform without negligence. *Id.* at 631, 29. However, their claim simply does not hold merit. The rare example noted by that Court is where a provider knows about two alternative treatments but informs the patient of only one treatment, which is subsequently performed perfectly. *Id.* at 619, 23. This did not occur here. There was no testimony at trial that the Defendants knew of two alternative treatments and the Hensleys have thus not provided anything from the record to suggest otherwise. There was no evidence presented at trial that the Lorraine Hensley was suffering from an intracranial infection at any time she was being treated by the Defendants.

The Hensleys' reliance on *Gates v. Jensen* is also misplaced. While it is true that the Supreme Court in *Sauerwein* states that *Gates* is not overruled, the Hensleys fail to mention that the court considers the facts of that case an anomaly at best. *Sauerwein*, 180 Wash. 2d at 621, 331 P.3d at 24. The Court states that, "*Backlund* clarifies that *Gates* is the exception and not the rule with regard to the overlap between medical negligence and informed consent. Given the unique factual situation in *Gates*, it is unlikely we will ever see such a case again." *Id.* at 626, 27. This is not such a case.

The Hensleys cannot simultaneously argue that CHAS failed to appreciate Ms. Hensley's condition (standard of care), and likewise that

they failed to inform her of the possibilities of treatment for the alleged condition they did not know existed. As such, this is not an appropriate case to claim that CHAS failed to obtain informed consent. It is well established that in a medical malpractice case where the underlying primary claim is that the physician failed to appropriately diagnose a medical condition that a claim based on lack of informed consent is not possible. The reasoning behind this rule is that a physician cannot provide informed consent for a condition that they did not diagnose.

There was no evidence presented at trial that the decedent was suffering from an intracranial infection at any time she was being treated by Defendants. Because of the foregoing, the Trial Court specifically held that “this, fundamentally, is not an informed consent case, this is a medical negligence case.” *CP 3355*. The Hensleys failed to establish a prima facie case of failure to obtain informed consent and therefore it was proper that no instructions regarding informed consent were given to the jury. *Gustav*, 90 Wn. App. 785, 954 P.2d 319.

The sophistry in which the Hensleys engage to cast their case as involving both standard of care and informed consent demonstrates why, in this case, the claims/theories are mutually exclusive. Fundamentally, the Hensleys’ claim is that Defendants were negligent because they failed to diagnose the nature and extent of Lorraine Hensley’s infection. The

providers at CHAS believed they were dealing with one kind of infection. The Hensleys claim Defendants had an informed consent obligation to disclose to Ms. Hensley the "risk" that the condition they diagnosed and were treating was, in fact, something else. But, Washington case law, as previously cited, makes it abundantly clear that a healthcare provider does not have a duty to provide informed consent with respect to treatment alternatives for, and risks associated with, a condition not diagnosed or one that is not statistically significant to make it a "material fact".

**3. Even if an Informed Consent claim were Available, the Hensleys Failed to Make a Prima Facie Case.**

Both sides agree that the basis for an informed consent claim is that patients have the right to make decisions about their medical treatment. *Housel v. James*, 141 Wash.App. 748, 755-756, 172 P.3d 712 (2007). To prevail on an informed consent claim, a claimant must prove: (1) that she was not informed of a material fact relating to treatment, (2) she consented to the treatment without being aware or fully informed of such fact, (3) a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such fact, and (4) the treatment in question proximately caused the injury. *Id.*, citing, RCW 7.70.050(1). It is for the patient to evaluate the risks and decide

upon treatment, and the physician's role is to provide a basis for an informed decision. *Brown v. Dahl*, 41 Wash.App. 565, 570, 705 P.2d 781 (1985).

RCW 7.70.050 details the elements of proof required to maintain an action for breach of duty to secure informed consent. The plaintiff is required to prove:

- (a) **That the healthcare provider failed to inform the patient of a material fact or facts relating to treatment;**
- (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;
- (c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;
- (d) That the treatment in question proximately caused injury to the patient.

RCW 7.70.050(1) (**Emphasis added**).

A fact is considered material “if a reasonably prudent person in the position of the patient or his representative would attach significance to it deciding whether or not to submit to the proposed treatment.” RCW 7.70.050(2). The physician does not have a duty to explain all risks, only those of a material nature. *Gustav*, 90 Wn. App. 785, 954 P.2d 319. The patient must be given sufficient information to make an informed healthcare decision. *Backlund*, 137 Wn.2d 651, 975 P.2d 950.

Expert testimony is required to prove the existence, nature, potential consequences involved, and other scientific characteristics of the risk. *Smith v. Shannon*, 100 Wn.2d 26, 666 P.2d 351 (1983); *Adams v. Richland Clinic*, 37 Wn. App. 650, 681 P.2d 1305 (1984). The failure to provide expert testimony is a failure to plaintiff's claims based on informed consent. *Ruffer v. St. Cabrini Hosp.*, 56 Wn. App. 625, 784 P.2d 1288 (1990).

The rules were most succinctly stated in *Ruffer v. St. Frances Cabrini Hospital of Seattle*, 56 Wash. App. 625, 784 P. 2d 1288(1990).

There the court stated:

The *Miller* court established that it is within the province of the patient to evaluate the risks of treatment and the function of the health care provider to furnish the patient with information as to what those risks are. However, the doctrine does not impose an obligation upon the health care provider to disclose all possible risks, rather only those of a serious nature. *Smith v. Shannon*, 100 Wash.2d 26, 31, 666 P.2d 351 (1983); *Zebarth v. Swedish Hosp. Med. Ctr.*, 81 Wash.2d 12, 25, 499 P.2d 1 (1972); *Adams v. Richland Clinic*, 37 Wash.App. 650, 656, 681 P.2d 1305 (1984). The working rule for disclosure of a given risk is the test of materiality. *Shannon*, 100 Wash.2d at 31, 666 P.2d 351.

The determination of materiality is a two-step process. The first step is to ascertain the scientific nature of the risk and the likelihood of its occurrence. *Shannon*, at 33, 666 P.2d 351; *Adams*, 37 Wash.App. at 657–58, 681 P.2d 1305. This determination necessitates “some” expert testimony as such facts are generally not describable without medical training. *Adams*, at 658, 681 P.2d 1305. Only a physician or other qualified expert is capable of determining the existence of a given risk and the chance of it occurring. *Shannon*, 100 Wash.2d at

33, 666 P.2d 351. The court in *Shannon* observed that just as patients require disclosure of risks by their physicians to give informed consent, “a trier of fact requires description of risks by an expert to make an informed decision.” *Shannon*, at 33–34, 666 P.2d 351. The statute also enumerates those material facts which must be established by expert testimony. That list includes “[t]he recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.” RCW 7.70.050(3)(d).

The second step of the materiality test requires a determination of whether the probability of the type of harm described is a risk which a reasonable patient would consider in deciding on treatment. *Shannon*, at 33, 666 P.2d 351. See also RCW 7.70.050(2).

It is meaningful to note that the *Shannon* court adopted this test while considering a factual situation which involved, much like the instant case, a failure to disclose a known risk. There, the patient-plaintiff presented complaints indicating possible kidney complications and X-rays were ordered. The procedure involved administering an intravenous solution (Renographin–60) designed to enhance the X-ray image. The evidence at trial established that while the treating physician disclosed several risks of the procedure, including becoming flushed, nauseous, or unconscious, he did not inform the plaintiff of 10 additional risks which were mentioned in the Physician's Desk Reference (PDR), including inflammation of the vein, the complication which subsequently manifested itself in the plaintiff. **The trial court concluded that the plaintiff failed to prove that any of the risks referenced in the PDR were in fact medically significant risks, noting in particular that the plaintiff failed to provide sufficient expert testimony on the issue.** *Shannon*, at 28–29, 666 P.2d 351. The Supreme Court affirmed.

Having set the stage, the crucial issue confronting this court is whether the risk of colon perforation resulting from a sigmoidoscopy

with biopsy is material. As has been shown, unless the risk is serious—whether characterized as grave, medically significant, or reasonably foreseeable—and unless expert testimony can establish its existence, nature, and likelihood of occurrence, the presence of the risk, as a matter of law, is not material and no duty of disclosure manifests in the health care provider. The only expert testimony contained in the record concerning what risk exists and the likelihood of its occurrence and the only testimony upon which the trier of fact could make an informed decision was provided by the respondent in his answers to interrogatories and request for admissions.

Appellant contends that respondent's testimony alone is sufficient to preserve her right to trial and that additional expert testimony is not required. However, when the admissions of respondent are cast in the light of the controlling case law and the statute, the risk of colon perforation incident to a properly performed sigmoidoscopy is nonmaterial. The existence of a risk is not enough. Citing two separate medical sources (see footnote 1), respondent quantified the risk of perforation as 1 in 20,000 to 50,000. Such a risk, as a matter of law, is not foreseeable. The court in *Mason v. Ellsworth*, 3 Wash.App. 298, 474 P.2d 909 (1970), found that a .75 percent risk that perforation of the esophagus might occur during an esophagoscopy was so small that it was not reasonably foreseeable and did not require disclosure. When the numbers provided by respondent are characterized in percentages they read as .002 percent to .005 percent, a risk 150 to 375 times smaller than the risk found legally insufficient in *Mason*. Under *Mason*, the risk described in the instant case was not foreseeable and therefore not material.

Appellant further contends that respondent, by confusing foreseeability with materiality, improperly caused the trial court to decide a fact question and thereby obtained the improper dismissal of her claim. This contention is also without merit. Foreseeability and materiality are not mutually exclusive principles of law. In fact, within the context of informed consent, they are highly interrelated. As set forth above, foreseeability is an appropriate indicator of the

seriousness of a given risk. Only those risks of a serious nature are required to be disclosed. If a risk is not foreseeable, it almost certainly is not serious and, therefore, not material.

Appellant is correct that a court may not resolve fact issues in ruling on summary judgment. However, a court may find that no such issues are raised by the allegations of the pleadings if it so appears from uncontroverted facts in affidavits, depositions, and admissions on file. *Balise v. Underwood*, 62 Wash.2d 195, 381 P.2d 966 (1963). Because the record is devoid of any expert testimony from appellant concerning the risk of perforation, the trial court was clearly entitled to rely upon respondent's characterization of the risk, and following *Mason*, properly determined that the risk was not material and effectively not at issue in the case.

Finally, appellant contends that it was error for the trial court to accept respondent's testimony regarding the probability of risk. This contention is curiously contradictory. It is paralogistic to ask this court, on the one hand, to accept respondent's admission of the risk for purposes of satisfying the statutory and common law requirements of expert testimony and then ask, on the other hand, that this court reject respondent's quantification of the risk as too small.

Respondent admitted that the risk of perforation incident to a sigmoidoscopy was greater than the cited 1 in 20,000 to 50,000 when the procedure included biopsy. Respondent did not quantify how much greater the risk was, only that the risk increased. Appellant argues that without quantification of this greater risk, it was improper for the trial court to determine that the risk was small and thus immaterial. However, the established case law clearly places the burden on the appellant to submit affidavits affirmatively presenting the factual evidence upon which she relies. Appellant may not avoid respondent's motion for summary judgment by resting on mere allegations, but must set forth specific facts showing that there exists a genuine issue of material fact. *Plaisted v. Tangen*, 72 Wash.2d 259,

432 P.2d 647 (1967). Moreover, the doctrine of informed consent required the appellant to present expert testimony establishing the probability of sigmoidoscopy with biopsy. Appellant failed to meet her burden on all counts. The trial court reasonably proceeded with the information brought before it. The term “greater,” left unqualified by appellant, is nebulous. It was not for the trial court to give the unmeasured “greater” risk a value. Therefore, the trial court was correct in dismissing appellant's claim as a matter of law.

*Ruffer* at 630-634 (**Emphasis Added**).

a. **No Experts testified as to percentage of loss of chance**

*Ruffer* makes clear that when informed consent is sought, only “serious” risks need be disclosed. 56 Wash. App. at 630, 784 P.2d at 1291. The method for determining what risks are serious is the “test of materiality”, which is a two-part test that **requires expert testimony as to the scientific nature and likeliness of the occurrence** and whether the probability of the harm is a risk a reasonable person would consider in deciding on treatment. *Id.* at 631, 1292 (**Emphasis Added**).

Like *Ruffer*, in *Shannon*, the Supreme Court found that there was sufficient evidence to support the trial court’s findings that the undisclosed risks were not material. 100 Wash. 2d 26, 666 P.2d 351 (1983). The court looked at the fact that:

Of the five witnesses who testified about the likelihood of occurrence of the undisclosed risks, four characterized their occurrence as “remote”, “very rare”, or “occasional”. The fifth simply concluded that the undisclosed risks were not “material”. The only statistical evidence presented regarding the undisclosed

risks was (1) that the chance of death was about 8.6 in one million and (2) that one study showed an occurrence...in only .05 percent of over 21,000 cases. These small probabilities compare quite favorably with those in other cases where nondisclosure has been held justified. *See, e.g., Stottlemire v. Cawood*, 213 F.Supp. 897 (D.D.C.1963) (1/800,000 chance of aplastic anemia); *Yeates v. Harms*, 193 Kan. 320, 393 P.2d 982 (1964) (1.5 percent chance of loss of eye); *Starnes v. Taylor*, 272 N.C. 386, 158 S.E.2d 339 (1968) (1/250 to 1/500 chance of perforation of esophagus); *compare Bowers v. Talmage*, 159 So.2d 888 (Fla.App.1963) (3 percent chance of death, paralysis or other injury required disclosure); *Scott v. Wilson*, 396 S.W.2d 532 (Tex.Civ.App.1965), *aff'd*, 412 S.W.2d 299 (Tex.1967) (1 percent chance of loss of hearing required disclosure).

*Id.* at 36, 357.

The Hensleys claim that they plainly evidenced a "serious possible risk" to Lorraine Hensley from her medical condition per RCW 7.70.050(3)(d). They claim that if that serious risk was established, and that risk was merely "possible," then Lorraine Hensley was entitled to that knowledge pursuant to RCW 7.70.050(3)(d). The Hensleys rely almost exclusively on the Washington Statute and all but ignore the case law set forth above and the established test of materiality.

Here, after rejecting the idea that this was an informed consent case in the first place, the Court identified that even if it were an informed consent case, the Hensleys' experts did not meet their burden. *RP 3355-3356*. The Court correctly held that "there has to be a material risk... [a]nd that risk has to be identified in a way that talks about its probability." *RP*

3356. The Court found that the “issue is not only the potential negative outcome and how serious it is, but how probable that outcome is.” *Id.* The Court further acknowledges looking at seven cases regarding this issue and agreeing that “there has to be some evidence before the jury to deal with the materiality in terms of what’s the probability of this occurrence.” RP 3357. The Court states that the only evidence the jury has heard is that “everything is extremely rare.”

The Trial Court’s finding on this issue as outlined above is exactly on point with what was held in the case law. When informed consent is sought, only “serious” risks need be disclosed and the method for determining what risks are serious is the “test of materiality”. *Ruffer*, 56 Wash. App. at 630, 784 P.2d at 1291. This is a two-part test that requires expert testimony as to the scientific nature and likeliness of the occurrence and whether the probability of the harm is a risk a reasonable person would consider in deciding on treatment. *Id.* at 631, 1292.

Here, as the Court stated, the Hensleys’ experts never quantified the percentage of the risk of the development of a brain infection. However, several of the defense experts did quantify that percentage as an infinitesimally small number. *RP 3357: 23-25*. The Hensleys attempt to twist the Court’s findings to state that the trial court somehow “acknowledged that the Hensleys established the serious risk of death”,

but that is simply a misreading of the Court’s findings. In essence what the trial court said, and what Washington Appellate Courts have previously said is that if a serious risk like death is possible, but the chance of that happening is extremely small, it cannot be said that it is a material risk that would need to be expressed to the patient. Here, the Hensleys’ experts said death was “possible”, but did not quantify that possibility. As such, the Trial Court was correct in dismissing the Hensleys’ informed consent claims and that finding must be upheld.

**C. Juror Misconduct.**

**1. Standard of Review**

A trial court's denial of a motion for a new trial based on juror misconduct is reviewed for abuse of discretion. *McCoy v. Kent Nursery, Inc.*, 163 Wn.App. 744, 757-58, 260 P.3d 967 (2011), citing *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 158, 776 P.2d 676 (1989). The granting of a new trial on the ground of alleged misconduct of the jury is within the discretion of the trial court, and unless it clearly appears that its discretion has been abused, or that there was palpable error, it will not be disturbed on appeal. *Mathisen v. Norton*, 187 Wash. 240, 60 P.2d 1 (1936); *Kellerher v. Porter*, 29 Wash.2d 650, 189 P.2d 223 (1948). A new trial on the ground of misconduct or irregularities in a jury's deliberations should not be granted unless the incidents complained of raised a

reasonable doubt as to whether the complaining party received a fair trial and the mere possibility of prejudice is not sufficient. *Spratt v. Davidson*, 1 Wash.App. 523, 463 P.2d 179 (1969).

**2. The Court Properly Denied the Hensleys' Claims of Juror Misconduct.**

The Hensleys seek to override and disregard the jury's work based upon the discontent of a single juror. When determining whether misconduct occurred, the trial court must consider whether the alleged conduct "inheres in the verdict." If it does, the evidence cannot, as a matter of law, be considered by the trial court. *Turner v. Stime*, 153 Wash. App. 581, 589, 222 P.3d 1243, 1247 (2009). "A strong affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." *State v. Balisok*, 123 Wash.2d 114, 117-118, 866 P.2d 631 (1994).

**a. There was no Undisclosed Bias.**

While the failure of a juror to speak during voir dire regarding a material fact can amount to misconduct warranting a new trial, to obtain a new trial, a party must show the juror failed to answer honestly where a correct response would have provided a valid basis for a challenge for cause. *Kuhn v. Schnall*, 155 Wash.App. 560, 228 P.3d 828 (2010),

review denied 169 Wash.2d 1024, 238 P.3d 503; *McDonough Power Equipment v. Greenwood*, 104 S.Ct. 845, 464 U.S. 548, 78 L.Ed.2d 663 (1984). “Voir dire examination serves to protect the parties' rights to a fair trial by exposing possible biases, **both known and unknown**, on the part of potential jurors.” *Kuhn*, 155 Wash. App. at 574, 228 P.3d at 835 **(Emphasis Added)**.

In their brief, the Hensleys do not dispute this, but merely cite to law that they are entitled to an impartial panel of jurors. The Hensleys allege that certain jurors failed to disclose an alleged bias toward “lawsuits against doctors and litigating clients, and ‘big money’ lawyers suing underpaid doctors who help poor people”. *Appellants’ Brief*, p. 47.

The Hensleys rely on the declaration of Juror Phillips for this claim. *CP 936-941*. However, Juror Phillips did not say that any juror had a bias against suing doctors. *Id.* Rather, the juror allegedly stated that a doctor should not be sued for “trying to do his job,” or that a doctor should not be sued “if that doctor only sees a patient once.” *Id.* at 938. Those matters were not explored by counsel during voir dire. *RP 125-217*. Further, they are not matters of bias, but rather, appear to be individual juror conclusions based upon their view of the evidence presented over the course of four weeks of trial. Lastly, the jury found that CHAS violated the standard of care based upon the conduct of Dr. Conovalciuc, who only

saw Ms. Hensley on a single occasion, *RP 2240*, and Ginger Blake who did not see Ms. Hensley after September of 2008, *RP 2498*. Clearly, the jury was capable of finding fault on the part of medical providers and those that only saw the patient once for her problems or for that matter, not at all during the relevant period.

**b. No Impermissible Extrinsic Evidence was Introduced.**

CHAS acknowledges that it is misconduct for a juror to introduce extrinsic evidence into deliberations. *Kuhn*, 155 Wn. App. at 575, 228 P.3d at 836. Such misconduct will entitle a party to a new trial if there are reasonable grounds to believe the party has been prejudiced. *Id.* The court must make an objective inquiry into whether the extrinsic evidence could have affected the jury's determination, and not a subjective inquiry into the actual effect of the evidence on the jury. *Id.* Extrinsic evidence is "information that is outside all the evidence admitted at trial, either orally or by document." *Id.* at 575-576.

However, there are numerous instances in the case law where statements similar to those at issue here were not considered impermissible extrinsic evidence. In *Johnston v. Sound Transfer Co.*, 53 Wash.2d 630, 335 P.2d 598 (1959), an action based on negligence in causing plaintiff to be thrown from horse, the court found that the jurors' affidavits concerning conversations of jurors related in the jury room as to

their experience in horseback riding could not be used to impeach the verdict in favor of the defendant. Similarly, in *Nelson v. Placanica*, 33 Wash.2d 523, 206 P.2d 296 (1949), the court found that the likelihood of any effect upon the minds of the jurors from a statement by a juror during deliberations that the defendant was a big gambler was speculative and answered by the sound discretion of the trial court in denial of a new trial. There the Court further found that the remark of a juror as to how the defendant was dressed, adding, “They have lots of money,” was not misconduct warranting new trial. *Id.*

The Hensleys argue that two forms of improper extrinsic evidence were introduced during deliberations: (1) statements of a juror regarding his mother’s headaches and/or use of Dilaudid, and (2) the alleged remarks of a juror that the Hensley’s counsel, Ms. Schultz, is a “big money cases” lawyer and/or that another juror had some knowledge of Ms. Schultz that he refused to share.

#### **i. Statements Regarding Personal Experiences**

The first claim is directly on point with *Breckenridge v. Valley Gen. Hosp.*, 150 Wash. 2d 197, 75 P.3d 944 (2003). There the plaintiff moved for a new trial alleging juror misconduct claiming that one of the jurors committed misconduct when he related his experiences with his wife's migraines during jury deliberations, comparing her symptoms to

those of the plaintiff. *Id.* at 198. There the Court of Appeals found that the juror's statements pertained to his life experiences and therefore did not constitute misconduct and the Supreme Court affirmed finding that the juror's statements inhere in the verdict. *Id.* at 199. Further, the Court stated that the juror's use of his experience with his wife's migraine headaches to evaluate the evidence presented at trial “is what jurors are expected to do during deliberations.” *Id.* at 204.

Here, the Hensleys erroneously claim that “Juror Jay” injected extrinsic evidence of his mother displaying symptoms similar to those of Lorraine Hensley after receiving Dilaudid. However, based on *Breckenridge*, this argument that the juror’s statements were improperly introduced during deliberations has no backing. As in *Breckenridge*, these are simply life experiences, and not the basis upon which a new trial may be granted. In addition, the alleged “evidence” inheres in the verdict as described by *Breckenridge*.

Ultimately, even if the “extrinsic evidence” was not a “personal experience” as dictated by *Breckenridge*, and even if it did not inhere in the verdict, the Hensleys would still be required to demonstrate that reasonable grounds exist to conclude that the alleged misconduct deprived the plaintiff of a fair trial. See *Halverson v. Anderson*, 82 Wash.2d 746, 513 P.2d 827 (1973). “If misconduct is found, great deference is due the

trial court's determination that no prejudice occurred.” *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wash. App. 266, 271, 796 P.2d 737, 741 (1990), citing, *State v. Briggs*, 55 Wash.App. 44, 60, 776 P.2d 1347 (1989); *State v. Cummings*, 31 Wash.App. 427, 430, 642 P.2d 415 (1982). **“A strong, affirmative showing of juror misconduct is required to impeach a verdict.”** *Id.* The declaration supplied by the Hensleys simply did not meet this standard.

#### **ii. Statements Regarding Attorney Schultz.**

The second category is not “evidence” relating to this case at all. The record before this Court demonstrates no inference whatsoever that any juror was improperly biased against the Hensleys’ counsel. Ms. Phillips’ Declaration claims that some unidentified juror asserted that “It’s well known that she only does big money cases.” *CP 938*. It was also asserted that the foreman was curious whether Ms. Schultz pursued the Hensley family or vice versa. *Id.* Finally, some jurors appeared to believe that Ms. Schultz misrepresented, “twist[ed],” or “spun” the information received by the jury. *Id.* at 939.

None of the foregoing indicates any undisclosed “bias” on the part of any juror. To the contrary, as to the alleged pre-conceived bias (Ms. Schultz as a “big money” lawyer), the juror’s alleged statement was more likely complimentary; as in: Ms. Schultz is a good lawyer, or Ms. Schultz

represents worthy victims, or Ms. Schultz selects meritorious cases. There is no evidence whatsoever upon which to infer that any prejudice was borne from the alleged statement. Finally, “money” has no influence upon standard of care or causation. The jury never reached the issue of damages, and therefore, the value of Ms. Schultz’s prior cases would have no impact on jury deliberations or determinations on standard of care and causation issues.

The statement that another juror knew something about Ms. Schultz which he would not divulge is far too vague to warrant consideration. Even if true, it is unknown if the statement was a reference to something professional or private, positive or negative. It is simply not “evidence.”

As to the Hensleys’ allegation that jurors commented on Ms. Schultz “twist[ing],” or “spin[ning]” the evidence, those allegations seem more likely focused on their perceptions of Ms. Schultz during trial. There is no evidence to suggest that those statements were pre-conceived notions of Ms. Schultz. Moreover, they are not “evidence,” or “facts.” They are simply impressions of the jury or one of its members, and there is no suggestion of prejudice.

**c. Purported "Inability of Two Jurors to Perform Their Duty."**

The Hensleys further allege that two jurors refused to deliberate and failed to properly apply the instructions given by the Court. However, evidence that a juror decided upon their verdict prior to deliberating is inadmissible. See, *State v. Hatley*, 41 Wash.App. 789, 794-795, 706 P.2d 1083 (1985). Additionally, "a juror's failure to follow the court's instructions inheres in the verdict, and affidavits relating to such alleged misconduct may not be considered." *Ayers v. Johnson & Johnson Baby Products Co.*, 117 Wash.2d 747, 769, 818 P.2d 1337 (1992).

In the present case, the Hensleys allege that some jurors believed that causation had to be proven "direct" instead of on a more probable than not basis. This is the black-letter definition of information which "inheres in the verdict" as that term is defined by *Gardner v. Malone*, 60 Wash.2d 836, 376 P.2d 651 (1962). There the court found that "[The] verdict cannot be affected, either favorably or unfavorably, by the circumstances: that one or more jurors misunderstood the judge's instruction ... or were influenced by an illegal paper or by an improper remark of a fellow juror". *Id.* at 841, 654.

Finally, even if the voting procedure did not inhere in the verdict, polling the jury in open court validates the verdict. See, *Ayers*, 117

Wash.2d at 770. In this case, the Court polled the jury. *CP 951*. The jurors confirmed their votes as to the three defendants on issues of the standard of care and as to CHAS, causation. *Id.* The entirety of Ms. Phillips juror's sworn declaration "inheres in the verdict" and thus, should not be considered as a matter of law. Even if it were considered, its speculative contents fail to show any bias or misconduct warranting a new trial.

The declaration of the presiding juror, Mr. Mark Kinney also directly disputes much of Ms. Phillips declaration. The case law is clear that denial of a new trial for misconduct of jurors will not be disturbed where there were counter-affidavits as to the credibility of certain affiants. *Bundy v. Dickinson*, 108 Wash. 52, 182 P. 947 (1919). Here, Mr. Kinney directly disputes Ms. Phillips allegations and further confirms that the jurors were encouraged to speak their opinions and to review and use the instructions submitted to them by the court in coming to their decision. *CP 946-950*.

The jury selected in this case upheld its obligations and its heavily considered verdict should be respected. As can be seen in the declaration of the presiding juror, Mr. Mark Kinney, there is no basis to establish juror misconduct and the verdict must inhere on the verdict.

## V. CONCLUSION

The Hensleys' Appeal is nothing more than an attempt at obtaining a second bite at the apple. Summary Judgment was properly denied as to the Hensleys because the two competing declarations created an issue of fact as to compliance with the standard of care. Regardless of this finding, Dr. Kmucha was not qualified to testify on the relevant standard of care of a family practice physician. Furthermore, there was no error of law that occurred during the trial. The facts of this case do not support a claim of lack of informed consent and even if they did, the Hensleys' experts failed to specifically assert the materiality of the risk. Lastly, there is no evidence of any juror misconduct. The Hensleys' reliance on a hearsay laced declaration is not convincing. That declaration has been thoroughly vetted and deemed not credible by the declaration of the jury foreman.

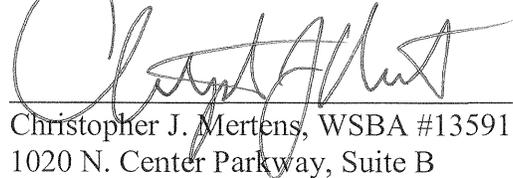
The Hensleys have already had their jury trial. To give them another opportunity to present their case would be fundamentally unfair to CHAS and highly prejudicial. Furthermore, it would be an abuse of discretion for the Court to overturn the trial court and send this case back to be re-tried.

Accordingly, CHAS respectfully requests that this Court deny the Hensley's appeal.

**DATED:** February 23<sup>rd</sup>, 2016

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 23<sup>rd</sup> day of February, 2016, I caused a true and correct copy of the foregoing document, "Brief of Respondent CHAS", to be sent via mail to the following counsel of record:

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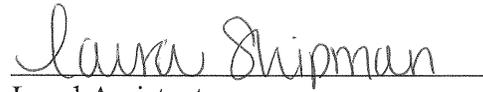
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DATED this 23<sup>rd</sup> day of February, 2016, at Kennewick, Washington.

  
Legal Assistant