

FILED

COA No. 326527

JUN 24 2016

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

Plaintiffs/Appellants/Cross-Appellees,

v.

**COMMUNITY HEALTH ASSOCIATION OF SPOKANE;
PROVIDENCE HOLY FAMILY HOSPITAL; SPOKANE EAR, NOSE
AND THROAT CLINIC, P.S., and MICHAEL CRUZ, M.D.,**

Defendants/Appellees/Cross-Appellants

PROVIDENCE HOLY FAMILY HOSPITAL'S REPLY BRIEF

**BRIAN T. REKOFKE, WSBA # 13260
MATTHEW W. DALEY, WSBA # 36711
STEVEN J. DIXSON, WSBA # 38101
WITHERSPOON · KELLEY, P.S.
422 West Riverside Avenue, Suite 1100
Spokane, Washington 99201-0300
Phone: (509) 624-5265**

**Counsel for Providence Holy Family
Hospital**

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION & RELIEF REQUESTED	1
II. REPLY ARGUMENT.....	1
A. Ms. Hensley Acknowledged That She Presented No Evidence of Agency, and the Trial Court Erred By Not Holding Ms. Hensley to Her Burden.....	1
B. Nothing that Occurred During the Trial Court Proceedings Alleviated Ms. Hensley's Burden to Prove Agency.....	2
1. <i>Holy Family's Summary Judgment Arguments Did Not Concede Agency</i>	3
2. <i>The Pre-trial Management Report Did Not Alleviate Ms. Hensley's Evidentiary Burden</i>	4
3. <i>None of Holy Family's Trial Court Pleadings Conceded Agency</i>	5
C. Ms. Hensley Does Not Dispute That She Failed to Offer Expert Opinions To a Reasonable Degree of Medical Certainty	7
III. CONCLUSION.....	10

TABLE OF AUTHORITY

CASES

<i>Adamski v. Tacoma General Hosp.</i> , 20 Wn. App. 98 (1978)	3
<i>Anderson v. Akzo Nobel Coatings, Inc.</i> , 172 Wn.2d 593 (2011)	9
<i>Barrett v. Lucky Seven Saloon, Inc.</i> , 152 Wn.2d 259 (2004).....	6
<i>City of Bellevue v. Kravik</i> , 69 Wn. App. 735 (1993)	7
<i>Davis v. Early Const. Co.</i> , 63 Wn.2d 252 (1963)	3
<i>Frye v. United States</i> , 293 F. 1013 (1923).....	9
<i>Graves v. P.J. Taggares Co.</i> , 94 Wn.2d 298 (1980).....	2, 4
<i>Lybbert v. Grant County</i> , 141 Wn.2d 29 (2000).....	5
<i>McLaughlin v. Cook</i> , 112 Wn.2d 829 (1989)	8
<i>Reese v. Stroh</i> , 128 Wn.2d 300 (1995)	8

RULES

CR 16	5
ER 702	9

I. INTRODUCTION & RELIEF REQUESTED

The Plaintiffs' (hereinafter collectively, "Ms. Hensley") responsive brief does not meet the challenges posed by Providence Holy Family Hospital's (hereinafter "Holy Family") cross appeal. Ms. Hensley failed to demonstrate that she presented *prima facie* evidence in support of her agency allegations. And Ms. Hensley failed to demonstrate that she offered admissible expert opinions to support her medical negligence allegations. In short, Ms. Hensley failed to demonstrate sufficient support for the trial court's denial of Holy Family's mid-trial/post-trial motions for a directed verdict. Holy Family, therefore, respectfully asks the Court to reverse the trial court's denial of those motions.

II. REPLY ARGUMENT

A. **MS. HENSLEY ACKNOWLEDGED THAT SHE PRESENTED NO EVIDENCE OF AGENCY, AND THE TRIAL COURT ERRED BY NOT HOLDING MS. HENSLEY TO HER BURDEN.**

There is no dispute that Ms. Hensley failed to present evidence of agency at trial. VRP 1863-64. Ms. Hensley did not challenge that issue on appeal. *See* Appellant's Consolidated Reply and Response Brief, pp. 30-35. It is, therefore, undisputed that the only evidence that was relevant to the issue militated against a finding of agency:

- Neither PA-C Hunter nor Dr. Tullis were Holy Family employees. *See* CP 90-2; VRP 1869, 3572, 3581.

- Neither provider was an express agent for Holy Family. *Id.*
- On each of her visits to Holy Family, Ms. Hensley signed a form acknowledging that she would be treated by physicians who were **not employed** by the hospital and for whose conduct the hospital would **not assume liability**. VRP 1860-61; CP 904 (citing Exhibits 105 and 106).

In light of those facts, it was error for the trial court to deny Holy Family's motion for a directed verdict. It was an even more grievous error for the trial court to direct a verdict in Ms. Hensley's favor on agency. *See* CP 887 (Instruction No. 6); VRP 3392-93. Holy Family respectfully asks the Court of Appeals to remedy that error.

B. NOTHING THAT OCCURRED DURING THE TRIAL COURT PROCEEDINGS ALLEVIATED MS. HENSLEY'S BURDEN TO PROVE AGENCY.

Both before the trial court and on appeal, Ms. Hensley argued that Holy Family somehow conceded that it was vicariously liable for the conduct of PA-C Hunter and Dr. Tullis. *See* Appellant's Consolidated Reply and Response Brief, pp. 30-35. However, Ms. Hensley's argument misses the most foundational aspect of the analysis: agency was part of Ms. Hensley's *prima facie* burden, and Holy Family (as a defendant) was under no obligation to remind Ms. Hensley to meet her evidentiary burden. *See Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302-03 (1980)

("Whether a relationship is one of agency or independent contractor can only be decided as a matter of law where there are no facts in dispute and where the facts are susceptible to only one interpretation."); *Davis v. Early Const. Co.*, 63 Wn.2d 252, 256-57 (1963); *Adamski v. Tacoma General Hosp.*, 20 Wn. App. 98, 111-16 (1978).

1. Holy Family's Summary Judgment Arguments Did Not Concede Agency.

As anticipated in Holy Family's Primary Brief, Ms. Hensley attempted to excuse her failure to prove agency, based upon comments made during a pre-trial motion for partial summary judgment. VRP 1863-64; 3556-97. As noted in its Primary Brief, Holy Family acknowledged, in the context of that pre-trial motion for partial summary judgment, that it would be vicariously liable for Dr. Tullis' and Mr. Hunter's conduct. *Id.* However, there is no indication of a stipulation of other concession to Ms. Hensley's claim. *See id.* Tellingly, there was no order entered following the hearing, holding that agency questions had been resolved.

Ms. Hensley merely references that summary judgment argument and asserts that it constitutes a stipulation that bound Holy Family. Ms. Hensley did not offer any argument or authority to demonstrate that Holy Family's comments had effects beyond the summary judgment motion, in the context of which the comments were made.

Washington's State Supreme Court has held that "whether a defendant was vicariously liable for the actions of [another] is a critical issue." *Graves*, 94 Wn.2d at 305. As a result of the issue's importance, it can only be surrendered or stipulated in a knowing and informed manner. *Id.* at 303-05. Nothing in the summary judgment hearing constituted a knowing and intelligent stipulation to Ms. Hensley's agency allegations. *See* VRP 1863-64; 3556-97.

Nothing in the summary judgment hearing alleviated Ms. Hensley's burden of proving her agency allegations. *See id.* Holy Family's comments during the summary judgment hearing simply recognized that agency was not part of that motion. *See id.* And the trial court's comments during the same hearing acknowledge that Holy Family's comments were limited to the summary judgment proceedings in which they were made. *See id.*

2. *The Pre-trial Management Report Did Not Alleviate Ms. Hensley's Evidentiary Burden.*

Holy Family also correctly anticipated that Ms. Hensley would argue that the parties' pre-trial management report alleviated her burden to prove agency. *See* Appellant's Consolidated Reply and Response Brief, pp. 31-2. However, Ms. Hensley did not make any argument that was not

already discredited by Holy Family's Primary Brief. Holy Family, therefore, takes this opportunity to summarize the applicable authority.

There is no principle of law that elevates a trial management report over the fundamental allocation of burdens or over due process. Though a defendant's failure to disclose an affirmative defense can constitute a waiver, there is no authority for the rather extraordinary proposition that a defendant's failure to remind a plaintiff to satisfy her *prima facie* burden can somehow alleviate the plaintiff of that burden. *See Lybbert v. Grant County*, 141 Wn.2d 29, 38 (2000). Ms. Hensley does not cite any authority to the contrary.

Only a pre-trial order, entered pursuant to CR 16, could have alleviated Ms. Hensley's burden of proving agency. However, no such order was sought by Ms. Hensley, and no such order was entered by the trial court. Thus, Ms. Hensley bore the burden of producing evidence to establish each element of her vicarious medical negligence claim against Holy Family. She failed to do so, and the trial court erred by not imposing the consequences of that failure on Ms. Hensley.

3. *None of Holy Family's Trial Court Pleadings Conceded Agency.*

In a final attempt to stave off dismissal, Ms. Hensley asserts that Holy Family's failure to address agency in its trial brief and Holy Family's

failure to proffer an instruction to support her theory of the case both constituted a stipulation to her claim. *See* Appellant's Consolidated Reply and Response Brief, pp. 32-4. Neither of Ms. Hensley's assertions withstand even modest scrutiny.

No rule in Washington State or Spokane County requires a party's trial brief to address all theories or issues in the case. Ms. Hensley cites no authority for her assertion to the contrary. The Court should reject Ms. Hensley's assertion that Holy Family's trial brief's failure to remind her of her evidentiary obligations resulted in a stipulation to her claims.

Ms. Hensley's argument regarding Holy Family's proposed jury instruction is equally unavailing. Holy Family did not propose any instruction on agency, until after the trial court denied Holy Family's motion for a directed verdict and directed a verdict in Ms. Hensley's favor on agency. *See* VRP 3392, 3394-5. However, that does not constitute a stipulation to Ms. Hensley's allegations.

Holy Family did not submit an instruction on agency, in the first instance, because no instruction on agency should have been given. A party is only entitled to an instruction that is supported by evidence. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266-67 (2004). No instruction on agency was appropriate because Ms. Hensley failed to produce evidence in support of her agency allegations. *See* VRP 1863-64.

Holy Family, therefore, had no cause or warrant to propose an instruction on an issue of law that was not applicable in the trial. However, once the trial court directed a verdict in Ms. Hensley's favor, Holy Family was obliged to proffer an instruction that properly stated Washington State law on apparent agency. *City of Bellevue v. Kravik*, 69 Wn. App. 735, 740 (1993), *see also* CP 660. No instruction that Holy Family proposed or failed to propose freed Ms. Hensley of her burden to offer proof to support her allegations.

There was no stipulation and there was no pre-trial order filed that declared agency undisputed. Ms. Hensley argues that a handful of pre-trial and intra-trial processes removed her burden of proof. However, she offers no authority to support her argument. The simple fact remains: Ms. Hensley failed to prove her agency allegations at trial. The trial court erred by not holding Ms. Hensley to her burden, and Holy Family respectfully asks the Court of Appeals to remedy that error.

C. MS. HENSLEY DOES NOT DISPUTE THAT SHE FAILED TO OFFER EXPERT OPINIONS TO A REASONABLE DEGREE OF MEDICAL CERTAINTY.

Holy Family's primary brief pointed out that medical opinions are inadmissible unless they are rendered to "a reasonable degree of medical certainty" or on "a more probable than not" basis; Holy Family also pointed out that Ms. Hensley did not elicit opinions to that standard at

trial. *McLaughlin v. Cook*, 112 Wn.2d 829, 836-37 (1989). Holy Family anticipated that Ms. Hensley would parse the record in an attempt to stack implication on assumption in order to demonstrate that her experts' opinions were expressed to the necessary standard. Instead, Ms. Hensley's response flatly rejected the "reasonable degree of medical certainty" or "more probable than not" standard. *See* Appellant's Consolidated Reply and Response Brief, pp. 35-6. Ms. Hensley argues that once a witness is qualified as an expert, any opinion that he or she offers is (by definition) admissible. *See id.* Ms. Hensley's assertion is simply unsupportable.

Washington law is settled and clear – a medical negligence plaintiff must present expert testimony to prove that particular conduct is not reasonably prudent under the applicable standard of care. *McLaughlin*, 112 Wn.2d at 836-37. It is also settled law that expert opinions regarding the applicable standard of care must be expressed to "a reasonable degree of medical certainty" or on "a more probable than not" basis. *Id.* That standard is a substantive requirement used to ensure that expert medical opinions rise above speculation, conjecture, or mere possibility. *Reese v. Stroh*, 128 Wn.2d 300, 305-6, 309 (1995).

Ms. Hensley's characterization of the "more probable than not" or "reasonable degree of medical certainty" standard as a *Frye*¹ or ER 702 issue is directly contradicted by the very case that she relies upon. See Appellant's Consolidated Reply and Response Brief, pp. 36 (*citing Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 606-07 (2011)). The State Supreme Court in *Anderson v. Akzo Nobel Coatings, Inc.* specifically noted that the probability standard for medical expert testimony is separate and apart from the *Frye* analysis:

In our courts, scientific evidence must satisfy the *Frye* requirement that the theory and technique or methodology relied upon are generally accepted in the relevant scientific community. Having satisfied *Frye*, the **evidence must still meet the other significant standards of admissibility . . .** Expert medical testimony must meet the standard of reasonable certainty or reasonable medical probability.

Id. at 606-07 (citations omitted & emphasis added).

The requirement that medical opinions be expressed beyond speculation and conjecture is captured in the reasonable probability or reasonable medical certainty standard, and that standard is a well-established element of Washington State law. Ms. Hensley provided no basis for the Court to depart from that settled rule.

¹ *Frye v. United States*, 293 F. 1013 (1923).

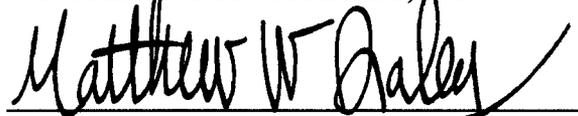
Ms. Hensley acknowledges, by her acquiescence, that she did not offer medical opinions to a reasonable degree of medical certainty or on a more probable than not basis. That is absolutely fatal to her claim. The trial court, therefore, erred in denying Holy Family's motions for judgment as a matter of law. Holy Family respectfully asks the Court to reverse that trial court decision and to dismiss Ms. Hensley's claims with prejudice.

III. CONCLUSION

The trial court erred in denying Holy Family's motions to dismiss. Ms. Hensley bore the burden of presenting *prima facie* evidence in support of her claim for vicarious liability. The record is clear – Ms. Hensley did not present any evidence in support of her claim. Ms. Hensley also bore the burden of presenting medical opinions to a reasonable degree of medical certainty – she failed to do so. The Court of Appeals should, therefore, reverse the trial court's decision denying Holy Family's motions for judgment as a matter of law.

RESPECTFULLY SUBMITTED, this 24th day of June, 2016.

WITHERSPOON· KELLEY, P.S.



BRIAN T. REKOFKE, WSBA # 132160
MATTHEW W. DALEY, WSBA # 36711
STEVEN J. DIXSON, WSBA # 38101
Counsel for Providence Holy Family
Hospital

DECLARATION OF SERVICE

I declare that I sent a true and correct copy of the foregoing brief by the method indicated below and addressed to the following:

<p>Mary E. Schultz Attorney at Law 2111 East Red Barn Lane Spangle, Washington 99031 Email: mary@mschultz.com</p> <p>Counsel for the Plaintiffs</p>	<p><input type="checkbox"/> Hand delivery <input type="checkbox"/> U.S. mail <input checked="" type="checkbox"/> Overnight mail <input checked="" type="checkbox"/> Email <input type="checkbox"/> Fax</p>
<p>Christopher J. Mertens Miller, Mertens & Comfort PLLC 1020 North Center Parkway, Suite B Kennewick, Washington 99336 Email: cmertens@mmclegal.net</p> <p>Counsel for CHAS</p>	<p><input type="checkbox"/> Hand delivery <input checked="" type="checkbox"/> U.S. mail <input type="checkbox"/> Overnight mail <input checked="" type="checkbox"/> Email <input type="checkbox"/> Fax</p>
<p>James B. King Evans, Craven & Lackie 818 West Riverside, Suite 250 Spokane, Washington 99201 Email: jking@ecl-law.com</p> <p>Counsel for Dr. Cruz</p>	<p><input checked="" type="checkbox"/> Hand delivery <input type="checkbox"/> U.S. mail <input type="checkbox"/> Overnight mail <input type="checkbox"/> Email <input type="checkbox"/> Fax</p>

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED, this 24th day of June, 2016.



 LAURI PECK, legal assistant