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

No. 35595-1

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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ROBIN VERA HANKEL,

Appellant/Plaintiff,

vs.

ROCKWOOD CLINIC, P.S. (MULTICARE HEALTH SYSTEMS),

Respondent/Defendant

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BRIEF OF RESPONDENT

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**I. COUNTERSTATEMENT OF THE CASE**

**A. General nature of case and identity of parties**

This is a medical malpractice case arising from treatment received by appellant Robin Hankel (“Hankel”) from respondent Rockwood Clinic. Hankel appeals from summary judgment in favor of Rockwood Clinic.

**B. Pertinent facts**

Hankel filed the underlying lawsuit on or about January 20, 2017, claiming that she sustained injuries and damages associated with the allegedly incorrect placement of a cast following right hand surgery which Hankel alleges occurred on or about January 24, 2014. *CP 1-5*. Records from Rockwood Clinic show Hankel was seen at Rockwood Clinic on February 11, 2013, by Dr. Randall Espinosa, a Rockwood Clinic hand surgeon for right thumb pain. *CP 37*. At that appointment, Dr. Espinosa diagnosed a complete insufficiency of the ulnar collateral ligament with subluxation of the right thumb metacarpal phalangeal joint and moderate metacarpal joint basilar thumb arthritis with subluxation. *CP 38*. Dr. Espinosa recommended surgery and gave the patient appropriate informed consent information. *Id.*

Dr. Espinosa then took Hankel to surgery on March 1, 2013 performing a right thumb ulnar collateral ligament reconstruction repair after finding a complete proximal detachment of her ulnar collateral

ligament and a complete subluxation and dislocatability of her thumb metacarpal phalangeal joint. *Id.*

Hankel returned to Rockwood on March 6, 2013, for a wound check. *Id.* At that time, because Hankel had water saturated post-operative dressings, a splint was put in place. *Id.*

Hankel then called Rockwood Clinic on March 12, 2013, indicating that the splint applied on March 6th had loosened. *Id.* She was asked to come in for a splint change. *Id.* Hankel was seen the same day by Dr. Espinosa and his staff and a fiberglass short arm thumb spica cast was put in place. *Id.*

Hankel returned to Rockwood on March 28, 2013. *Id.* She had no evidence of swelling, had minimal pain, was “doing fine” and “feeling better.” *Id.* She complained of cast loosening attributed to her “overdoing it” in the cast. *Id.* Dr. Espinosa examined Hankel and concluded that there was some attenuation of the ulnar collateral ligament and also noted a subluxation of the phalanx base consistent with the failure of her ulnar collateral ligament repair. *Id.* He recommended another week in the cast and then further follow up regarding additional potential surgical interventions. *Id.*

Hankel then returned to Rockwood on April 15, 2013. *CP 39.* She reported less instability and floppiness in the joint than before surgery. *Id.*

Dr. Espinosa on exam felt that she had a subluxation which was not as severe as before surgery and recommended a reconstruction. *Id.* On that same date, April 15, 2013, Dr. Espinosa recommended to the patient a revision surgery to address the failure that had evolved. *Id.*

Hankel was not seen again at the Rockwood Clinic. *Id.* The last clinical note for Hankel, was a telephone call from her on April 29, 2013, indicating she was going to wait until a later date to have her thumb operated again and wanted a pain medication refill which was denied. *Id.*

On May 10, 2017, Rockwood Clinic moved for summary judgment, arguing (1) there is no genuine issue of material fact demonstrating Rockwood Clinic deviated from the required standard of care, and (2) Hankel lacks expert testimony to establish any causal relationship between the alleged conduct of Rockwood Clinic and any injury or damage sustained by Hankel. *CP 37-43, 57-61.*

On July 21, 2017, the trial court issued its order granting summary judgment in favor of Rockwood Clinic. *CP 87-89.*

## II. ARGUMENT & AUTHORITIES

### A. Standard of Review

On appeal of summary judgment, the standard of review is de novo, with the appellate court performing the same inquiry as the trial court. *Lybbert v. Grant County*, 140 Wn.2d 29, 34, 1 P.3d 1124 (2000); *Nivens v. 7-11 Hoagies Corner*, 133 Wn.2d 192, 197-98, 943 P.2d 286 (1997). When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom, most favorably toward the non-moving party. *Weyerhouser Company v. AETNA Casualty and Surety Company*, 123 Wn.2d 891, 897, 874 P.2d 142 (1992). In reviewing a ruling on a motion for summary judgment, the appellate court will not consider materials that were not considered by the trial court. *Alexander v. Gonser*, 42 Wn. App. 234, 711 P.2d 347 (1985).

Rule of Appellate Procedure (RAP) 9.12 provides the following:

On review of an order granting or denying a motion for summary judgment ***the appellate court will consider only evidence and issues called to the attention of the trial court.*** The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel (emphasis added).

An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal. *Silverhawk, LLC v. KeyBank Nat. Ass'n*, 165 Wn. App. 258, 268 P.3d 958 (2011). It is the appellate court's task to review a ruling on a motion for summary judgment based solely on the record before the trial court. *Green v. Normandy Park*, 137 Wn. App. 665, 151 P.3d 1038 (2007).

**B. The trial court properly granted summary judgment in favor of Rockwood Clinic**

1. The trial court properly dismissed Hankel's standard of care claim for lack of supporting expert testimony

RCW 7.70.040 sets forth the necessary elements of proof in a medical negligence action where plaintiff claims the defendants failed to follow the accepted standard of care. The statute specifies these elements as follows:

(1) the health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider in the profession or class to which he belongs, in the State of Washington, acting in the same or similar circumstances; (2) such failure was the proximate cause of the injury complained of.

It is well settled in the State of Washington that expert testimony is essential in malpractice cases where the plaintiff alleges the defendant violated the standard of care. *Stone v. Sisters of Charity*, 2 Wn. App. 607,

469 P.2d 229 (1970). In the case of *Swanson v. Brigham*, 18 Wn. App. 647, 571 P.2d 217 (1977), at page 651, the Court stated:

Absent special exceptions, a plaintiff patient must establish the standard of professional practice at the time of the alleged injury and a violation of that standard through the testimony of the professional equals of the defendant physician. (Emphasis added).

From the above, it is clear that in a medical malpractice case the burden is on the plaintiff to come forward with a supporting affidavit of a medical practitioner establishing the necessary elements of a prima facie case. *Shoberg v. Kelly*, 1 Wn. App. 673, 463 P.2d 280 (1969).

Here, Hankel failed to come forward with an affidavit from a qualified medical expert stating a Rockwood Clinic provider violated the standard of care. *CP 37-43, 57-61*. Thus, Hankel's standard of care claim against Rockwood Clinic was properly dismissed. *CP 87-89*.

2. There is no medical record from Rockwood memorializing the care Hankel alleges failed to meet the standard of care

Hankel submits in her appellant brief that Rockwood Clinic's motion for summary judgment only succeeded in dismissing any claims she may have had for improper medical care in 2013 because Hankel's underlying claim was based on care Rockwood Clinic allegedly provided after a revision surgery on January 24, 2014.

No such record has been entered into the record indicating Hankel was seen at Rockwood Clinic after the January 24, 2014 revision surgery. The last record Rockwood Clinic possesses for care provided to Hankel was generated on April 29, 2013. *CP 8-36, 37.*

In Hankel's response in opposition to Rockwood Clinic's underlying summary judgment motion, she only provides an exhibit from Dr. Espinosa that cursorily mentions a January 24, 2014 revision surgery. *CP 47, 50.* Nothing in that record states or suggests Hankel was seen at Rockwood Clinic after the revision surgery.

Hankel also relies on the fact her Complaint alleged negligent medical care at Rockwood Clinic on January 24, 2014 as evidence that she actually received care at Rockwood Clinic on that date. *CP 1-5.* Hankel completely fails to explain or discuss the nonexistence of any medical record establishing she was seen by a Rockwood Clinic provider on January 24, 2014. Rockwood Clinic moved for summary judgment based on the available records detailing the care Hankel received. Hankel cannot rely on the allegations in her Complaint to create an issue of material fact. That is specifically prohibited during summary judgment proceedings, and the appellate court engages in the same inquiry into the evidence and issues called to the attention of the trial court.

Even if such record did exist, it does not matter because Hankel still failed to proffer expert testimony during summary judgment proceedings to support her standard of care claim against Rockwood Clinic. *CP 37-43, 57-61, 87-89*. That was her burden as the Plaintiff regardless of the date of the alleged care Hankel claims violated the standard of care. As previously discussed, a lack of expert testimony stating a provider violated the standard of care is fatal to a plaintiff during summary judgment.

3. The trial court's summary judgment dismissal of Hankel's claims against Rockwood Clinic applied to all of her claims against Rockwood Clinic, not just those arising from 2013

When granted, a motion for summary judgment results in a final judgment on the merits of the claim. If a motion is granted as to *all* claims or defenses, the case is normally at an end. *Seattle-First Nat. Bank v. Marshall*, 16 Wn. App. 503, 557 P.2d 352 (Div. 1 1976) (emphasis added).

Rockwood Clinic made clear when it moved for summary judgment dismissal of Hankel's claims that it was entitled to dismissal of *all claims*, not just some of the claims Hankel asserted. *CP 40*. Hankel contends that Rockwood Clinic was only successful in summary judgment dismissal of Hankel's claims arising from 2013 as opposed to 2014. However, the trial court's summary judgment dismissal of Hankel's claims meant dismissal was warranted for *all claims* Hankel brought against Rockwood Clinic, not just any claims arising in 2013 instead of 2014. *CP 40, 89*. Furthermore, as

discussed *supra*, Hankel possesses no competent evidence that she received care at Rockwood Clinic after April 29, 2013, the last date there is documentation establishing Rockwood Clinic rendered care to Hankel.

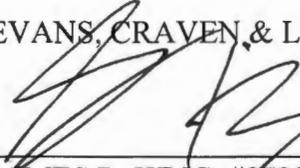
Hankel is attempting another bite of the apple by alleging Rockwood Clinic's underlying summary judgment motion only served to dismiss claims arising from care rendered in 2013. Nonetheless, summary judgment dismissal of Hankel's claims against Rockwood Clinic encompassed *all* claims she possibly could have brought against Rockwood Clinic.

### III. CONCLUSION

Based on the foregoing argument and authorities, Respondent Rockwood Clinic respectfully request that summary judgment in its favor be affirmed.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of October, 2018.

EVANS, CRAVEN & LACKIE, P.S.

  
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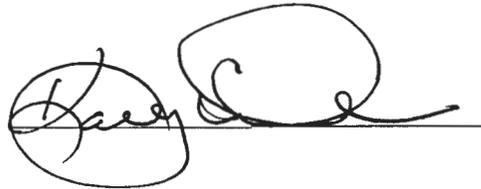
**CERTIFICATE OF SERVICE**

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 19 day of October, 2018, the foregoing was delivered to the following persons in the manner indicated:

Kenneth H. Kato  
1020 N. Washington St.  
Spokane, WA 99201

VIA REGULAR MAIL [ ]  
VIA CERTIFIED MAIL [ ]  
VIA FACSIMILE [ ]  
HAND DELIVERED []

10-19-18 / Spokane, WA  
(Date/Place)

A handwritten signature in black ink, appearing to read "Kenneth H. Kato", written over a horizontal line.