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WASHINGTON STATE COURT OF APPEALS, DIVISION III

CHERYL AND COLTON BEHR,

Appellants,

v.

NORTHWEST ORTHOPEDIC SPECIALISTS and
DEACONESS HOSPITAL ,

Respondents.

ON APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
12-2-04734-5

**DISMISSED-DEFENDANT
TIMOTHY W. POWERS, M.D.'S
BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. THE TRIAL COURT DID NOT ERR	10
A. There are No Meritorious Assignments of Error.	10
B. Counter-Statement of Issues.	10
III. COUNTER-STATEMENT OF THE CASE	10
A. Background on Medical Events.	10
B. Background on Events that Lead to Dr. Powers Filing a Motion for Summary Judgment.	12
1. Allegations Against Dr. Powers.	12
2. Disclosure of Standard of Care Expert.	13
3. Deposition of Dr. Collier Regarding His Standard of Care Opinions.	13
4. Declarations of Dr. Collier.	14
5. Trial Court's Oral Ruling of April 10, 2010.	15
C. Subsequent Motions Regarding the April 2014 Dismissals of Drs. Powers and Lynch.	17
1. 2014 Court of Appeals.	17
2. 2015 Motion to Reinstate Drs. Lynch and Powers, Motion for Reconsideration.	18
3. 2018 Motions to Reinstate Dr. Lynch and Dr. Powers.	19
4. May 2018 Trial.	20

	<u>Page</u>
5. 2018 Post-Trial Motions.....	21
IV. ARGUMENT.....	22
A. Standards of review.....	22
B. Summary Judgment of Dismissal of Drs. Lynch and Powers Proper.....	23
1. Standard of care.....	23
2. Proximate Causation.....	27
C. Subsequent Motions to Reinstate Drs. Lynch and Powers and Motions for Reconsideration Were Properly Denied and Should be Affirmed.....	28
V. CONCLUSION.....	30

TABLE OF AUTHORITIES

	Page
Washington Cases	
<i>Adams v. Western Host, Inc.</i> , 55 Wn.App. 601, 779 P.2d 281 (1989).....	29
<i>Adcox v. Children’s Orthopedic Hosp. & Med. Ctr.</i> 123 Wn.2d 15, 864 P.2d 921 (1993).....	29
<i>Alwood v. Harper</i> , 94 Wn.App. 396, 973 P.2d 12 (1999).....	29
<i>Berry v. Crown & Cork Seal Co., Inc.</i> , 103 Wn.App. 312, 14 P.3d 789 (2000).....	25
<i>Chaffee v. Keller Rohrback, LLP</i> , 200 Wn.App. 66, 401 P.3d 418 (2017).....	28
<i>Chen v. State</i> , 86 Wn.App. 183, 937 P.2d 612 (1997) <i>review denied</i> , 133 Wn.2d 1020, 948 P.2d 387 (1997).....	23
<i>Grove v. PeaceHealth St. Joseph Hosp.</i> , 182 Wn.2d 136, 241 P.3d 261 (2014).....	18
<i>Guile v. Ballard Cmty. Hosp.</i> , 70 Wn.App. 18, 851 P.2d 689 (1993).....	24
<i>Harris v. Groth</i> , 99 Wn.2d 438, 663 P.2d 1113 (1983).....	24
<i>Keck v. Collins</i> , 181 Wn.App. 67, 325 P.3d 306 (2014) <i>aff’d</i> , 184 Wn.2d 358, 357 P.3d 1080 (2015).....	22
<i>Lybbert v. Grant County</i> , 141 Wn.2d 29, 1 P.3d 1124 (2000).....	22

<i>Marshall v. AC&S, Inc.</i> , 56 Wn.App. 181, 782 P.2d 1107 (1989).....	25
<i>Marthaller v. King County Hosp. Dist. No. 2</i> 94 Wn.App. 911, 973 P.2d 1098 (1999).....	24-25
<i>McCormick v. Lake Wash. School Dist.</i> , 99 Wn.App. 107, 992 P.2d 511 (1999).....	25
<i>Meridian Minerals Co. v. King County</i> , 61 Wn.App. 195, 810 P.2d 31 (1991) review denied, 117 Wn.2d 1017 (1991).....	30
<i>Meyer v. Univ. of Wash.</i> , 105 Wn2d 847, 719 P.2d 98 (1986).....	23
<i>Mountain Park Homeowners Ass'n v. Tydings</i> , 125 Wn.2d 337, 883 P.2d 1383 (1994).....	23
<i>O'Donoghue v. Riggs</i> , 73 Wn.2d 814, 440 P.2d 823 (1968).....	27, 28
<i>Orcutt v. Spokane County</i> , 58 Wn.2d 846, 364 P.2d 1102 (1961).....	28
<i>Perry v. Hamilton</i> , 51 Wn.App. 936, 756 P.2d 150 (1988).....	29
<i>Ramos v. Arnold</i> , 141 Wn.App. 11, 169 P.3d 482 (2007).....	25
<i>Republic of Kazakhstan v. Does 1-100</i> , 192 Wn.App. 773, 368 P.3d 524 (2016).....	23
<i>Safeco Insurance Co. of America v. McGrath</i> , 63 Wn.App. 170, 817 P.2d 861 (1991).....	26
<i>Seybold v. Neu</i> , 105 Wn.App. 666, 19 P.3d 1068 (2001).....	24

<i>Sluman v. State</i> , 3 Wn.App.2d 656, 418 P.3d 125 (2018) review denied, 192 Wn.2d 1005, 430 P.3d 254 (2018).....	25
<i>State v. Carroll</i> , 81 Wn.2d 95, 500 P.2d 115 (1972).....	27
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997) cert. denied, 523 U.S. 1008, 118 S.Ct. 1193 (1998).....	29
<i>Taylor v. Bell</i> , 185 Wn.App. 270, 340 P.3d 951 (2014).....	26
<i>Truck Ins. Exchange v. VanPort Homes, Inc.</i> , 147 Wn.2d 751, 58 P.3d 276 (2002).....	27
<i>Wagner Dev., Inc. v. Fid. & Deposit Co.</i> , 95 Wn.App. 896, 977 P.2d 639 (1999).....	29
<i>Young v. Key Pharmaceuticals</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	24

Washington Statutes and Court Rules

CR 56(c).....	23
CR 56(e).....	23, 24
RCW 7.70.040.....	24, 27

I. INTRODUCTION

The April 2014 dismissals of Timothy W. Powers, M.D. and Patrick S. Lynch, M.D., through summary judgment proceedings, occurred in a methodical and comprehensive way, with the Trial Court considering 59 documents (*see* listed documents in the 4/23/2014 Order Granting Motions for Summary Judgment, CP 800 – 801), arguments of counsel for all parties with the 4/4/14 hearing consisting of 65 pages of transcribed colloquy (CP 818 – 884), Honorable Maryann C. Moreno’s oral ruling on 4/10/14 (CP 885 – 898), and the subsequent Order Granting dismissal of Drs. Powers and Lynch filed on 4/23/14. The dismissal of Dr. Powers and Dr. Lynch in 2014 was done deliberately and thoroughly. It was the right ruling.

The dismissals of Drs. Lynch and Powers were an issue persistently raised from 2014 through the 2018 trial, and even into post-trial motions. The rulings of the subsequent judicial officers, who heard the 2015 and 2018 motions to reinstatement Drs. Lynch and Powers, the associated motions for reconsideration, and the other motions and arguments that related to the 2014 summary judgment dismissals of Dr. Powers and Dr. Lynch, were also the right rulings.

All of the trial courts’ rulings relative to the dismissals of Dr. Powers and Dr. Lynch should be affirmed.

Dr. Powers and Dr. Lynch were correctly dismissed from this lawsuit in 2014. In 2014, the Behrs did not produce, in response to the Motions for Summary Judgment filed by Dr. Powers and Dr. Lynch, evidence that would raise a genuine issue of material fact as to a specific and particularized act or omission of Dr. Powers or Dr. Lynch such that a medical expert witness opined that there was a breach of the standard of care. The Behrs, in the 2014 summary judgment proceedings, attempted to attribute fault to Dr. Powers and Dr. Lynch through a concept that Drs. Powers and Lynch were at one point involved in Mr. Behr's care, and were therefore subject to liability through a theory of collective responsibility of Northwest Orthopedic Specialists. Such a standard is inconsistent with the law of the State of Washington. Such a standard was addressed by Judge Moreno when she made her April 2014 ruling that dismissed Dr. Powers and Dr. Lynch. Although there was a discussion on the theory proffered by the Behrs, the trial court emphasized that the basis for the dismissals of Drs. Powers and Lynch was because there was no genuine issue of material fact and Drs. Powers and Lynch were not negligent.

In April of 2014, with the finding of the trial court that Dr. Lynch and Dr. Powers were not negligent, Drs. Powers and Lynch were entitled to summary judgment of dismissal as a matter of law. If there is no finding of a breach of the standard of care, then you do not get to the question of

causation. In bringing their Motions for Summary Judgment, Dr. Lynch and Dr. Powers did argue that Plaintiffs did not have medical expert testimony to support an allegation that Drs. Lynch or Powers violated the standard care, or that there was medical expert testimony on proximate causation.

The lack of a medical expert opinion against Drs. Lynch or Powers to support a *prima facie* case of a breach of the standard of care or proximate causation has persisted from December 7, 2012, when the Complaint was filed, through the grant of summary judgment of dismissal, and through the numerous reiterations of motions to reinstate Dr. Lynch and Dr. Powers. Facts pertinent to the involvement of Drs. Lynch and Powers in the care of Colton Behr were testified to by witnesses at the time of trial. At no point, did Plaintiffs produce medical expert testimony that would support a finding that Dr. Lynch or Dr. Powers violated the standard of care or that such an alleged breach of duty was a proximate cause of any claimed injury.

A maxim in healthcare is that a doctor cannot diagnose what is not clinically present at the time of his care of a patient. In this case, the medical liability claimed by the Behrs is the failure to diagnose compartment syndrome. In looking at the chronology of what occurred, the timing of the events, in and of themselves, do not implicate liability against Dr. Powers or Dr. Lynch relative to the care they provided. Briefly, the timeline is:

- On Wednesday, 12/8/2010, Mr. Behr hurt himself in a basketball game in northern Idaho. He drove himself to Deaconess in Spokane. Dr. Lynch met Mr. Behr through the Emergency Room admission with Dr. Lynch diagnosing a tibial plateau fracture. Dr. Lynch was not able to take Mr. Behr to surgery in the immediate timeframe, and offered that one of his partners, Dr. Powers, was available to do the surgery.
- Dr. Powers performed an open reduction and internal fixation procedure on Thursday, 12/9/10, to repair the left lateral tibial plateau fracture and meniscal tear.
- On Friday, 12/10/10, a physician's assistant, Mark Buescher, rounded on Mr. Behr, finding Mr. Behr was neurovascularly intact, able to wiggle his toes, his pain was under control, he was afebrile with stable vital signs, and had normal hemoglobin and hematocrit.
- On Saturday, 12/11/10, physician's assistant, Leann Bach, rounded on Mr. Behr. PA Bach examined Mr. Behr's knee, including the four compartments of the lower leg, and determined them to be soft and tentable. Mr. Behr was able to engage in passive range of motion without marked increase in pain. There was some swelling around the knee. PA Bach attempted knee aspiration two times after discussing this was supervising orthopedic surgeon, Christopher G. Anderson, M.D. The aspiration attempts were unsuccessful.
- Also on Saturday, 12/11/10, Dr. Anderson rounded on Mr. Behr. Dr. Anderson took a full history and conducted an examination. Dr. Anderson determined that Mr. Behr was neurovascularly intact and there were no signs or symptoms of compartment syndrome.
- On Sunday, 12/12/10, Dr. Anderson rounded on Mr. Behr and found markedly different signs and symptoms. Mr. Behr had tense anterior swelling that was not present the previous day, and pain with planar flexion and extension. Pedal pulses were intact, but Mr. Behr had decreased sensation to pinprick, and was no longer neurologically intact. He also had reduced motor function. Dr. Anderson performed a needle pressure test with the results showing elevated compartment pressure in the lateral

compartment. Dr. Anderson then took Mr. Behr to surgery for a fasciotomy to release compartment pressure.

- On Monday, 12/13/10, Dr. Powers communicated with Dr. Anderson regarding Mr. Behr's hospital course, with Dr. Powers then coordinated care for Mr. Behr with an orthopedic surgeon in his home state of Montana, with Mr. Behr being discharged from Deaconess.

Dr. Lynch's involvement in the care of Mr. Behr on Wednesday, 12/8/10 was to diagnosis Mr. Behr's injury. Dr. Powers' involvement with Mr. Behr was on Thursday, 12/9/10, when he performed surgery to repair Mr. Behr's injury. Dr. Powers was not thereafter involved in Mr. Behr's care until the date of discharge, which was on Monday, 12/13/10. Chronologically, neither Dr. Lynch or Dr. Powers were in positions that would subject them to the Behr's theory of liability that medical negligence occurred as a result of a failure to diagnose compartment syndrome. Neither Dr. Lynch nor Dr. Powers were present at times in which an alleged failure to diagnose compartment syndrome could have been made.

Specific to Dr. Powers, there is no factual allegation in the Complaint for Medical Negligence that Dr. Powers violated the standard of care in his performance of the surgical repair of Colton Behr's tibial plateau fracture. The Behrs' standard of care medical expert, Andrew J. Collier, Jr., M.D., was deposed on 1/29/14. Dr. Collier testified that he had no standard of care criticisms of Dr. Powers. Specific to the surgery performed by Dr. Powers, Dr. Collier's testimony was that Dr. Powers' performance in

completing the 12/9/10 surgery met the standard of care in all respects. At trial, the Behrs repeatedly told the jury that Dr. Powers' surgery on 12/9/10 was "perfectly done" and "excellent".

After Dr. Collier testified at his deposition in January of 2014, Drs. Lynch and Powers both moved for summary judgment of dismissal on the basis that the Behrs lacked the requisite medical expert testimony to support a *prima facie* case against them. (Northwest Orthopedic Specialists and PA Leann Bach also moved for summary judgment, with the trial court denying those motions.)

After the motions for summary judgment were filed, the Behrs filed a declaration of Dr. Collier in which he criticized Drs. Lynch and Powers, not for anything they did, but asserting that all healthcare providers associated with Northwest Orthopedic Specialists had a shared responsibility to monitor Mr. Behr post-operatively, and, therefore, the entire practice, including Dr. Lynch and Dr. Powers, failed to meet the standard of care. The Behrs referenced in their assertion of collective responsibility that a phone message to Northwest Orthopedics was made by physical therapist Ruth Benage on Friday, 12/10/10 that was not received by Dr. Lynch. The Behrs ignored that Dr. Collier had this information available to him when he formed his opinions and when he testified to his opinions at his deposition in January of 2014. In granting the summary

judgment dismissals of Drs. Powers and Lynch, Judge Moreno considered that Dr. Collier knew this information when he was deposed and he still testified that he had no standard of care opinions against either Dr. Lynch or Dr. Powers.

Dr. Lynch moved to strike Dr. Collier's post-deposition declaration testimony as being in violation of the "*Marshall* rule". Dr. Powers joined this motion. Additional declarations of Dr. Collier were submitted prior to the 4/4/14 summary judgment motion hearing, with those declarations being responded to by Drs. Lynch and Powers. Oral arguments were heard on 4/4/14. The trial court made its oral ruling on 4/10/14. The Order granting summary judgment dismissal of Drs. Lynch and Powers was filed on 4/23/14.

What must be emphasized, underlined, and highlighted is that at no time have the Behrs presented medical expert testimony that criticizes the particular care provided by Dr. Lynch or Dr. Powers, i.e., there is no medical expert opinion that has been proffered by the Behrs that Dr. Lynch violated the standard of care in his diagnosis of Mr. Behr's injury. Similarly, there has been no medical expert opinion proffered by the Behrs that Dr. Powers violated the standard of care in his performance of the surgical repair of Mr. Behr's injury.

Functionally, the 2014 summary judgment dismissals of Drs. Lynch and Powers, and the subsequent recapitulations of motions to reinstate Dr. Lynch and Dr. Powers, and motions for reconsideration, are exercises in argument that do not make a difference. Chronological, the facts show why the Behr's theory of this case, that there was a failure to diagnose compartment syndrome, do not implicate the care provided by Dr. Lynch or Dr. Powers.

Moreover, as articulated by Court of Appeals Commissioner Monica Wasson in 2014 when the Behrs filed a Motion for Discretionary Review with the Court of Appeals, the remaining defendants in the litigation permitted the Behrs the opportunity to succeed in their claims and be fully compensated for their claimed damages, if their claims were proven at the time of trial. The persistence of the Behrs in re-hashing the dismissals of Drs. Lynch and Powers enduring as arguments that do not make a difference, is because at trial, the jury was asked to determine if Dr. Christopher Anderson's medical judgment on the afternoon of Saturday, 12/11/10, was negligence. Trial occurred in May of 2018. The jury deliberated on whether Dr. Anderson was negligent in his care and treatment of Mr. Behr on Saturday, 12/11/10, such that Northwest Orthopedics would be subject to vicarious liability. (Dr. Anderson was voluntarily non-suited, as well as PA Leann Bach, on the first day of trial in

May of 2018. The Behrs proceeded to trial against the entity Northwest Orthopedics on a theory of vicarious liability for acts or omissions of PA Bach or Dr. Anderson, with the Court determining at the close of Plaintiffs' case-in-chief that no fault could be attributed to PA Bach because there was no evidence presented at trial of a causal connection between PA Bach's care and any claimed injury.) There was no prejudice to any party at the time of trial as the result of the 2014 dismissals of Dr. Lynch and Dr. Powers from this litigation. The jury in May of 2018 determined Dr. Anderson was not negligent, which means the jury's findings supported that Dr. Anderson's medical judgment was reasonable and appropriate on Saturday, 12/11/10 that Mr. Behr did not have signs and symptoms of compartment syndrome.

As a matter of law, Drs. Lynch and Powers were dismissed from the lawsuit with no fault to be apportioned to them. That decision of the trial court should be affirmed. The Behrs subsequent perseverations on the 2014 dismissals of Drs. Lynch and Powers are misguided and misplaced. The subsequent decisions of judicial officers in not reinstating Drs. Lynch and Powers and not permitting fault to be attributed to them at the time of trial should be affirmed.

II. THE TRIAL COURT DID NOT ERR

A. There are No Meritorious Assignments of Error.

The Behrs Opening Brief identifies 11 errors with each persistently being invaded by arguments that go back to the complaint that Drs. Powers and Lynch should not have been dismissed in 2014 from this case. The summary judgment of dismissals of Drs. Powers and Lynch in 2014 were consistent with the law. None of the assignments of error are meritorious.

B. Counter-Statement of Issues.

1. Should the 2014 summary judgment dismissals of Dr. Powers and Dr. Lynch be affirmed? Yes.

2. Should the subsequent decisions of the judicial officers maintaining the law of the case as established in April of 2014 of the dismissals of Drs. Powers and Lynch from this lawsuit be affirmed? Yes.

III. COUNTER-STATEMENT OF THE CASE

A. Background on Medical Events.

On Wednesday, December 8, 2010, Mr. Behr injured his left leg in a basketball game in Priest Lake, Idaho. CP 80-82; 85-86. He was admitted to Deaconess Medical Center through the Emergency

Department with a diagnosis made by Dr. Patrick Lynch of a comminuted left lateral tibial plateau fracture. *Id.*

On Thursday, December 9, 2010, Mr. Behr was taken to the Operating Room by Dr. Timothy Powers for repair of a left lateral tibial plateau fracture and meniscal tear. CP 91-92. The surgical procedure was an open reduction and internal fixation of fracture and sutures for a lateral meniscal tear. *Id.*

On Friday, December 10, 2010, PA Mark Buescher rounded on Mr. Behr. CP 88.

On Saturday, December 11, 2010, PA Leann Bach saw Mr. Behr in his hospital room. CP 89-90. After a discussion with Dr. Christopher Anderson, PA Bach performed knee aspiration procedures. *Id.* Dr. Anderson saw Mr. Behr later that day, and determined Mr. Behr had no symptoms of compartment syndrome, and the plan was to continue to monitor Mr. Behr. CP 90.

On Sunday, December 12, 2010, Dr. Anderson saw Mr. Behr and diagnosed compartment syndrome. CP 93-94. Mr. Behr was taken to the Operating Room, with the performed procedure being a left anterior and lateral fasciotomy. *Id.*

On Monday, December 13, 2010, Dr. Powers saw Mr. Behr and facilitated the referral of Mr. Behr to the care of Dr. Blasingame of

Kalispell, Montana, where Mr. Behr lived, and discharged Mr. Behr from Deaconess Hospital. CP 83-84.

B. Background on Events that Lead to Dr. Powers Filing a Motion for Summary Judgment

1. Allegations Against Dr. Powers.

In the Complaint for Medical Negligence, Paragraph 3.3, it was alleged that “[t]here were no signs of a compartment syndrome forming after the fracture.” CP 5. It was further alleged, Paragraph 3.5, that “Mr. Behr was sent to surgery of his tibial plateau fracture at 3:30 p.m. on 12/9/10 and he was in recovery and conscious by 9:10 p.m. on that same date.” *Id.* There were no allegations in the Complaint that Dr. Powers violated the standard of care in the performance of the repair of the tibial plateau fracture on December 9, 2010. CP 3-11.

The surgical repair of Mr. Behr’s injury at Deaconess Hospital on December 9, 2010 was the primary role Dr. Powers had in the care of Colton Behr, except for his role in discharging Mr. Behr from Deaconess Hospital and transferring Mr. Behr’s care to an orthopedic surgeon in Montana where Mr. Behr lived. CP 91-92; 83-84.

Through sworn Declaration testimony, Dr. Powers affirmed that the following:

I performed surgery on Colton Behr on Thursday, December 9, 2010. I saw him post-operatively in the post-anesthesia care unit (PACU) that same day. Thereafter, I was not subsequently aware

of any information that indicated a need to implement additional activity beyond having him seen once daily by an orthopedic surgeon or physician's assistant (PA). I was out of town in Northern Idaho from early Friday morning, December 10, 2010, through the afternoon of Sunday, December 12, 2010. The next contact I had concerning Colton Behr occurred on the evening of Sunday, December 12, 2010, when Dr. Christopher Anderson contacted me regarding the fasciotomy that had already been performed.

CP 518.

2. Disclosure of Standard of Care Expert.

In December of 2013, the Behrs disclosed experts, with Dr. Andrew Collier identified as the only orthopedic surgery expert who would offer standard of care testimony against the defendant-doctors. CP 51.

3. Deposition of Dr. Collier Regarding His Standard of Care Opinions.

Dr. Collier's deposition was taken on January 29, 2014. CP 51. In this deposition, Dr. Collier testified that Dr. Powers met the standard of care in his performance of the December 9, 2010 surgery in all respects. CP 135-140.

Q. And in terms of Dr. Power's [sic] department of the surgery and the indications for those surgeries, as far as you're concerned, did he comply with the national standard of care?

A. Yes, sir. **I think he did a good job in repairing it.** It was a fracture that needed an open reduction. **He did that properly.**

CP 140 (emphasis added).

Q. Did Dr. Powers have appropriate indications for the surgical procedures that he undertook?

A. Yes, sir.

Q. **And did he perform the surgical procedure in compliance with the national standard of care?**

A. **Yes, sir.**

Q. Did he write appropriate postoperative orders for management of the patient?

A. Yes, sir.

CP 140 (emphasis added).

Q. **My question is, do you have any criticism at all of Dr. Powers in connection with his surgical management of this patient on 12/9 of 2010?**

A. Okay. I'm sorry. I thought you said 12/9. **Of 12/9, no, sir.**

CP 140 (emphasis added).

Q. Before I ask you what your opinions are, **do you have any opinions of Dr. Powers that anything he did or didn't do violated the standard of care?**

A. **No. He did appropriate treatment and care for the tibial plateau fracture.** He, I assume, was off for the weekend. So he did not follow the patient or see him.

CP 141 (emphasis added).

4. Declarations of Dr. Collier.

In response to the motions for summary judgment filed, the Behrs produced Declarations of Dr. Collier that were filed on 2/24/14 (CP 323-332) and 3/21/14 (CP 521-523). Maintained through those Declarations was that Dr. Collier, the Behrs' only standard of care expert, was that he "did not have specific criticisms of Dr. Powers or Dr. Lynch regarding the individual pieces of care they did provide." CP 325.

5. Trial Court's Oral Ruling of April 10, 2010.

Judge Moreno's oral ruling of 4/10/14 underscores why the 2014 dismissals of Drs. Lynch and Powers should be affirmed. With regard to the presentation of evidence against Dr. Powers, the trial court articulated:

At the time of his deposition, Dr. Collier testified that he had completely reviewed the medical records and he was aware that Dr. Powers had actually been the surgeon who performed the surgery on Mr. Behr. My understanding, at least from Dr. Collier's testimony out of the medical records, was that Dr. Powers was addressing a left lateral tibial plateau fracture and meniscal tear. After the surgery was performed, Dr. Powers had no further contact with Mr. Behr, I believe until about four days later when Mr. Behr was discharged.

In response to specific questions posed to Dr. Collier, he -- he testified that Dr. Powers did nothing that violated the standard of care; he did a good job on the surgery; and that likewise there was nothing that he failed to do which violated the standard of care.

CP 889. With regard to Dr. Lynch, the trial court articulated:

In that same deposition Dr. Collier acknowledged that he understood that Dr. Lynch was the provider who actually recommended the -- that he have the surgery. Dr. Lynch would up handing off Mr. Behr to Dr. Powers. Dr. Collier reviewed the entire medical record; and he knew that there was a chart note, I believe, by one of the hospital PT's that -- in which he or she indicated that they would be placing a call to Dr. Lynch. Again, upon very specific questioning, Dr. Collier testified that Dr. Lynch did nothing that violated the standard of care and that likewise there was nothing that he failed to do that violated the relevant standard of care.

CP 889-890. The trial court then analyzed the Declarations of Dr. Collier filed after the motions for summary judgment were filed.

Dr. Collier, in response to the summary judgment motions, filed a supplemental affidavit and attempted to correct his deposition testimony. Basically, he's now changed his opinion and he's concluding now that both Dr. Powers and Dr. Lynch have violated the

standard of care because they -- their group, Northwest Orthopedic group, failed to monitor the other members of the group; they failed to monitor -- monitor Mr. Behr; and they failed to ensure that their group properly monitored Mr. Behr. He claims that Dr. Powers' failure to monitor Mr. Behr post-surgically violated the standard of care. He testified that -- stated in his declaration that Dr. Lynch failed to see that Mr. Behr was monitored; he failed to follow up after receiving a call from the hospital. I should note that Dr. Lynch denies that he ever received that call or that he was made aware of that call. Again, the notation with regard to the PT indicating he or she was going to call Dr. Lynch was a fact known to Dr. Collier at the time of his deposition.

So the defendants ask that I exclude this new evidence or this new opinion that Dr. Collier's now giving, and they cite the -- the *Marshall* rule. And, of course, the *Marshall* rule prohibits the court from considering an affidavit or a declaration that is filed to create a material issue of fact which contradicts prior sworn testimony and documentary evidence. Clearly Dr. Collier's new testimony contradicts his prior deposition statements. He's completely reversed course, and I didn't get any indication that he was now relying on some new evidence or something that he didn't know at the time of the deposition.

He justifies his change of -- change of opinion by indicating that the manner in which he was questioned by Mr. -- Mr. King was confusing, it was kind of odd, he had little experience with depositions. I understood that Mr. Mason was present at the time. I didn't -- I didn't see, I didn't read, I didn't hear, any objections voiced by him. There was no attempt by Mr. Mason to rehabilitate Dr. Collier or to expand or to ask questions or object in any way.

Again, Dr. Collier was asked specifically: Is there anything that Dr. Powers or Dr. Lynch failed to do that violated the standard of care for orthopedic surgeons? To me that -- that would have given Dr. Collier leeway to basically say, "Yeah, now that you ask, now that I have time to state my opinions," et cetera, et cetera. But he didn't. He -- he continued to answer in the negative that there's nothing that they failed to do that violated the standard of care.

So the affidavits with regard to -- or the declaration of Dr. Collier with regard to Drs. Powers and Lynch are excluded; thus, there's no material issue of fact, and I will grant the summary judgment with regard to those two individuals. I would say that even for the sake of argument if I did consider Dr. Collier's "failed to monitor" comments, to me that's a fairly illusive comment which really doesn't -- isn't

backed up or supported by any facts. And *Grove v. Peace Health Hospital* basically stands for the proposition that you've got to prove a violation of the standard of care by a specific member of the group. Northwest Orthopedic Specialists as a group is not a healthcare provider. And under 7.70.040, the plaintiff has to prove that a specific healthcare provider "... failed to exercise that degree of care, skill, and learning expected of a reasonably prudent healthcare provider at that time in the profession or class to which he or she belongs, in the State of Washington, acting in the same or similar circumstances." So again, there's no -- even if I were to consider the declaration of Dr. Collier, there are no facts to support any violation of the standard of care.

CP 890-893.

Dr. Lynch and Dr. Powers were dismissed in April of 2014 because Plaintiffs had no medical expert witness who criticized the care of Dr. Lynch or Dr. Powers under RCW 7.70.030, et seq. CP 800 – 801. This was the correct ruling and should be affirmed.

C. Subsequent Motions Regarding the April 2014 Dismissals of Drs. Powers and Lynch.

1. 2014 Court of Appeals

The Behrs filed a Notice of Discretionary Review to the Court of Appeals, Division III, relative to the April 2014 ruling, which was heard under Case No. 32513-0-III. On September 18, 2014, Commissioner Monica Wasson issued her Commissioner's Ruling. Part of that ruling was that "[a]n appeal after trial may not be necessary if the Behrs succeed in their claims against the remaining defendants and are fully compensated for their damages, as proven at trial. Thus, further proceedings are not

useless, nor is the status quo substantially altered.” The Certificate of Finality was issued on 10/29/14.

2. 2015 Motion to Reinstate Drs. Lynch and Powers, Motion for Reconsideration.

On 3/2/15, the Behrs filed motion to reinstate Drs. Powers and Lynch. This motion was heard on 3/13/2015 by the Honorable John O. Cooney. CP 1908-1925. The Behrs argued that *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn.2d 136, 241 P.3d 261 (2014) talked about team liability. In his ruling, Judge Cooney articulated that

The plaintiff then talks about Grove. And I just got done reading Judge Moreno’s findings. I guess before I switch to Grove, turning to the order on summary judgment. Judge Moreno’s order indicated she granted defendant Timothy W. Powers, M.D., and defendant Patrick S. Lynch, M.D.’s motion to strike the declaration of Andrew J. Collier, M.D., under the Marshall Rule where granted as inconsistent with Dr. Collier’s uncorrected deposition testimony. There’s no genuine issue of material fact as to defendant Timothy W. Powers, M.D. or defendant Patrick S. Lynch, M.D. Plaintiffs have not show sufficient evidence that there was a violation of the standard of care as to defendant Dr. Powers or to defendant Dr. Lynch.

Her decision was made under the Marshall Rule, not under Grove. After Judge Moreno indicated she was going to grant summary judgment, she continued with her application of Grove. I don’t think that her application of Grove had any bearing at all on her decision to dismiss those two defendants because they were dismissed prior to her even discussing Grove.

CP 1922-1923. The Order Denying Plaintiffs’ Motion to Reinstate Dr. Powers and Dr. Lynch was filed 4/2/15. CP 1927.

On 4/8/15, the Behrs filed a Motion for Reconsideration, with the Court setting a briefing schedule. CP 1937-1942; CP 1952. On 5/5/15,

Judge Cooney issued his letter opinion (CP 2009-2010) denying the motion for reconsideration, with the ruling:

This Court is denying the motion for reconsideration as the Plaintiffs' [sic] have not made a showing that there is no evidence or a reasonable inference from the evidence to justify the prior decisions, or that the prior decisions are contrary to law.

CP 2010. These decisions of the trial court were the subject of a Notice of Discretionary Review that was taken to the Washington Supreme Court, with the Supreme Court, on 6/1/16, issuing an Order denying motion to modify commissioner's ruling.

3. 2018 Motions to Reinstate Dr. Lynch and Dr. Powers

On 4/5/18, the Behrs again moved to reinstate Dr. Powers. CP 4418-4434. This motion relative to Dr. Powers, was filed after the Behrs had moved to reinstate Dr. Lynch through a motion filed on 3/16/18, claiming compartment syndrome was present by noon on 12/10/10 and Dr. Lynch ignored a communication provided to Northwest Orthopedic Specialists. CP 3685-3696. On 3/30/18, the Honorable Julie M. McKay heard argument on the motion to reinstate Dr. Lynch and issued her oral ruling. CP 5838-5862. Judge McKay's ruling:

I was able to review the information that is before the court. I am aware of the facts. I am aware of what happened with Judge Moreno, Judge Cooney, the Court of Appeals, the Supreme Court. And the requests to add Dr. Lynch, and although not before me now Dr. Powers, back in, based upon this newly discovered information.

I'm not sure that it changes anything because Dr. Lynch is still saying, "I didn't take the calls." That is an issue for trial. Dr. Lynch

can still be a trail witness. I think he's on a witness list, if I'm not mistaken. I don't know that for sure. But under the circumstances, I do not think this rises to level, based upon what is coming through and being discovered, as a basis for reinstating Dr. Lynch. I am not going to be reinstating him as a defendant."

CP 5861. The Order Denying Plaintiffs' Motion to Reinstatement Dr. Lynch was filed on 4/27/18. CP 5442-5446.

The hearing on the Behrs' Motion to Reinstatement Dr. Powers was heard on 4/19/18, with the trial court denying that motion for reasons stated in the denial of the motion to reinstate Dr. Lynch. CP 5761.

4. May 2018 Trial

At trial, in opening statement, counsel for the Behrs told the jury, "as we told you in voir dire, the surgery was great. Perfectly done. There is absolutely no complaint at all about the surgery done by Dr. Timothy Powers at Northwest Orthopedic Specialists." RP 290, lines 18-21 (emphasis added). Dr. Powers was called as a witness in the Behrs' case-in-chief. The initial line of questioning included the following commentary from the Behr's counsel: "before we start, we just want to make clear what we said in the voir dire, that Mr. Behr is very pleased with your surgery, thinks it was excellent." RP 461, line 15-17 (emphasis added). Dr. Powers was asked about his involvement in the care of Colton Behr in both the Plaintiffs' and Defendants' cases-in-chief. RP 460-489; 577-597; 613-632.

Dr. Lynch also testified at trial relative to his involvement in the care and treatment of Colton Behr. RP 562-566. With both Dr. Lynch and Dr. Powers, the Behrs' counsel asked questions about the relative care provided by these physicians, as well as what happened on 12/10/10 when these doctors were not involved in Mr. Behr's care. No party was prejudiced in presenting their cases at trial as a result of the 2014 dismissals of Drs. Powers and Lynch.

5. 2018 Post-Trial Motions

After a jury returned a defense verdict in May of 2018, determining Northwest Orthopedic Specialists was not negligent, counsel for Plaintiffs filed several post-verdict motions. One of the post-verdict motions, was Plaintiffs' Motion and Memo for a New Trial. CP 6612-6649. At oral argument for this (and other) motions, counsel for Northwest Orthopedic Specialists argued the following, which gives further context to the pending appeal and further validation that Dr. Lynch and Dr. Powers were properly dismissed from this lawsuit in 2014.

So Mr. Mason had his day in Court on a failure to diagnose compartment syndrome, failure to intervene in compartment syndrome, and the jury found that he failed to meet his burden of proof and that Anderson complied with the standard of care. However, that finding that there's no negligence on Sunday [Saturday] totally wipes out, cancels, nullifies, any claim that compartment syndrome was present on Friday and should have been diagnosed on Friday.

And I know we've litigated this Lynch and Powers thing fairly well, but there's an additional reason beyond the fact that the prior

rulings, both from the superior court and the court of appeals that Lynch and Powers don't belong in this case, and that is the jury finding that there's no compartment syndrome on Sunday [Saturday], as a matter of law, it intervenes and supercedes any claim that there was compartment syndrome diagnosable on Friday. So Lynch and -- excuse me, there was compartment syndrome present on Friday. Obviously the jury concluded it wasn't there on Saturday, that Anderson hadn't violated the standard of care by not diagnosing it on Saturday. So as a matter of law, there could be no standard of care violation for not diagnosing something on Friday that wasn't there on Saturday.

RP at 1844, lines 6 - 1845, line 5.

IV. ARGUMENT

A. Standards of review.

Summary judgment is reviewed *de novo*, with the appellate court performing the same inquiry as the trial court. *See Keck v. Collins*, 181 Wn.App. 67, 78, 325 P.3d 306 (2014), *aff'd*, 184 Wn.2d 358, 357 P.3d 1080 (2015); *and see, Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id.* If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id.*

The standard of review for the various motions to reinstate Drs. Lynch and Powers that occurred between 2015 and 2018 (through and after trial), the associated motions of reconsideration, the related motions

and arguments ruled on by the trial court that regard the 2014 dismissals of Dr. Lynch and Dr. Powers are subject to an abuse of discretion standard. “A court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or reasons.” *Republic of Kazakhstan v. Does 1-100*, 192 Wn.App. 773, 781, 368 P.3d 524 (2016); *and see, Chen v. State*, 86 Wn.App. 183, 192, 937 P.2d 612, *review denied*, 133 Wn.2d 1020, 948 P.2d 387 (1997).

B. Summary Judgment of Dismissal of Drs. Lynch and Powers Proper

1. Standard of care

Summary judgment of dismissal is proper when there is no genuine issue about any material fact, and the moving party is entitled to a judgment as a matter of law. *See*, CR 56(c). In a summary judgment proceeding, all facts and reasonable inferences will be held in the light most favorable to the nonmoving party. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). A nonmoving party “may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on affidavits considered at face value.” *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986); *see also* CR 56(e). Affidavits consisting of conclusory statements without sufficient factual support will not defeat

a summary judgment motion. *See*, CR 56(e); *and see*, *Guile v. Ballard Cmty. Hosp.*, 70 Wn.App. 18, 25, 851 P.2d 689 (1993) .

In a medical liability case, the plaintiff must prove through expert medical testimony that the defendant-health care provider failed to meet the standard of care. *See*, RCW 7.70.040, *and see*, *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 770 P.2d 182 (1989); *and see*, *Harris v. Groth*, 99 Wn.2d 438, 663 P.2d 1113 (1983). “Summary judgment in favor of the defendant is proper if the plaintiff fails to make a *prima facie* case concerning an essential element of his or her claim.” *Seybold v. Neu*, 105 Wn.App. 666, 676, 19 P.3d 1068 (2001).

At the trial court level, the Behrs did not show that an action or inaction of Dr. Powers or Dr. Lynch violated the standard of care of a reasonable and prudent orthopedic surgeon in their care and treatment. Dr. Collier’s testimony was that he had no criticisms of the care provided by Dr. Powers or Dr. Lynch. Without a demonstration of a violation of the standard of care, the Behr’s cause of action against Dr. Powers and Dr. Lynch failed.

A declaration submitted in relation to a summary judgment motion cannot create the existence of an issue of material fact where the party has previously given answers in a deposition that “negate the existence of any genuine issue of material fact.” *Marthaller v. King County Hosp. Dist. No*

2, 94 Wn.App. 911, 918, 973 P.2d 1098 (1999); *see also*, *Ramos v. Arnold*, 141 Wn.App. 11, 19, 169 P.3d 482 (2007) (a party cannot create an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony); *see also*, *McCormick v. Lake Wash. School Dist.*, 99 Wn.App. 107, 111, 992 P.2d 511 (1999) (self-serving affidavits contradicting prior sworn deposition testimony cannot be used to create a material issue of fact); *see also*, *Marshall v. AC&S Inc.*, 56 Wn.App. 181, 185, 782 P.2d 1107 (1989) (an affidavit that contradicts answers to unambiguous deposition questions cannot be used to create a material issue of fact).

The *Marshall* rule disallows a party from creating an issue of material fact by submitting a self-serving declaration directly contradicting “unambiguous sworn testimony” the same party made previously. *Sluman v. State*, 3 Wn.App.2d 656, 697, 418 P.3d 125 (2018), *review denied*, 192 Wn.2d 1005, 430 P.3d 254 (2018). “When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.” *Marshall*, 56 Wn.App. at 185 (citations omitted). The *Marshall* rule applies whether the declarant is a party or a witness. *See*, *Berry v. Crown & Cork Seal Co., Inc.*, 103

Wn.App. 312, 14 P.3d 789 (2000). The *Marshall* rule is narrowly construed. See, *Taylor v. Bell*, 185 Wn.App. 270, 294, 340 P.3d 951 (2014). If a party gives an explanation in his/her affidavit explaining the discrepancy, the court may consider the explanation's plausibility. See, *Safeco Insurance Co. of America v. McGrath*, 63 Wn.App. 170, 175, 817 P.2d 861 (1991).

Dr. Collier testified under oath at this deposition that Dr. Powers and Dr. Lynch did not violate the standard of care. In responding to motions for summary judgment, the Behrs cobbled together an orchestrated "collective liability" theory with Dr. Collier saying that although he testified at his deposition that there was no standard of care violation, and did not have any criticism of the care directly provided by either Dr. Lynch or Dr. Powers, all providers of Northwest Orthopedic Specialists had a collective responsibility to follow-up, post-surgery, with the care of Colton Behr. CP 325. The alleged purpose of Dr. Collier's declaration was purportedly to clarify that even though he did not have specific criticism of Dr. Powers or Dr. Lynch regarding their care, omissions of follow-up care implicated all providers of Northwest Orthopedic Specialists. *Id.*

Judge Moreno weighed all of this in her analysis. Under the *Marshall* rule, the trial court properly gave no consideration Dr. Collier's later inconsistent statement.

The trial court did not err in granting summary judgment of dismissal to Dr. Powers and Dr. Lynch.

2. Proximate Causation

Although the question of proximate causation was not reached by the trial court relative to the dismissals of Drs. Powers and Lynch, this is another basis for why the summary judgment dismissals of these doctors was appropriate.

Appellate courts have a duty to affirm if the judgment can be sustained on any ground, even on granting a petition for review. *See, State v. Carroll*, 81 Wn.2d 95, 101, 500 P.2d 115 (1972); *and see, Truck Ins. Exchange v. VanPort Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

RCW 7.70.040 requires a plaintiff to prove that the alleged deviation from the standard of care was a proximate cause of the injury complained of. In Washington, medical testimony must be proffered to establish the causal relationship between the liability-producing event and the claimed injury resulting from the event. *See, O'Donoghue v. Riggs*, 73 Wn.2d 814, 440 P.2d 823 (1968). Medical testimony necessary to establish the requisite

causal relationship must be definite enough to establish that the act complained of probably or more likely than not caused the subsequent injury or disability. *See, Orcutt v. Spokane County*, 58 Wn.2d 846, 364 P.2d 1102 (1961); *and see, O'Donoghue*, 73 Wn.2d at 824.

In April of 2014, the finding of the trial court when ruling on Motions for Summary Judgment of Dismissal was that Dr. Lynch and Dr. Powers were not negligent. CP 805-806. If there is no finding of a breach of the standard of care, then you do not even get to the question of causation. In bringing their Motions for Summary Judgment, both Dr. Lynch and Dr. Powers argued that in addition to Plaintiffs not having medical expert testimony to support an allegation that Dr. Lynch or Dr. Powers violated the standard care, Plaintiffs also did not have medical expert testimony on proximate causation. CP 69-70; CP 55. In this case, there is no proximate cause evidence that has been produced by the Behrs, which is another reason for the dismissals of Drs. Powers and Lynch to be affirmed.

C. Subsequent Motions to Reinstate Drs. Lynch and Powers and Motions for Reconsideration Were Properly Denied and Should be Affirmed

Trial courts may revisit previous orders but are not required to. *See, Chaffee v. Keller Rohrback LLP*, 200 Wn.App. 66, 76, 401 P.3d 418 (2017) (a trial court is permitted to correct any mistakes prior to entry of final

judgment) (quoting *Alwood v. Harper*, 94 Wn.App. 396, 400-01, 973 P.2d 12 (1999). “A judge may reverse or modify a pretrial ruling at any time prior to the entry of final judgment.” *Adcox v. Children’s Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 37, 864 P.2d 921 (1993).

Motions for reconsideration are addressed to the sound discretion of the trial court; a reviewing court will not reverse a trial court’s ruling absent a showing of manifest abuse of that discretion. *See, Perry v. Hamilton*, 51 Wn.App. 936, 938, 756 P.2d 150 (1988). A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons. *See, State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998).

In this case, the summary judgment process afforded the parties the appropriate opportunity to present evidence. If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence. *See, Wagner Dev., Inc. v. Fid. & Deposit Co.*, 95 Wn.App. 896, 907, 977 P.2d 639 (1999); *and see, Adams v. Western Host, Inc.*, 55 Wn.App. 601, 608, 779 P.2d 281 (1989) (“The realization that [the] first declaration was insufficient does not qualify the second declaration as newly discovered evidence.”) “Unless discovered after the opportunity passes, the parties should

generally not be given another chance to submit additional evidence.”

Meridian Minerals Co. v. King County, 61 Wn.App. 195, 203-204, 810 P.2d 31 (1991), *review denied*, 117 Wn.2d 1017 (1991).

The trial court in ruling on the motions to reinstate and motions for reconsideration did not abuse its discretion because those decisions were not manifestly unreasonable and were not exercised on untenable grounds. In bringing their various motions, the Behrs did not point to any mistake made by the trial court or by the parties. Instead, the Behrs insist on a theory of liability that is inapplicable to either Dr. Powers or Dr. Lynch.

All rules of the trial court on motions to reinstate Drs. Powers and Lynch, motions for reconsideration, and all other motions and rulings made by the trial court that related to the 2014 dismissals of Drs. Powers and Lynch should be affirmed.

V. CONCLUSION

Dismissed-Defendant Dr. Powers respectfully request the Court of Appeals affirm all rulings of the Trial Court related to the 2014 dismissal of Drs. Powers.

Respectfully submitted this 1st day of June, 2020.

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CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing Dismissed Defendant Timothy W. Powers, M.D.'s Brief of Respondent on the 1st day of June, 2020 as follows:

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