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COA No. 362221

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

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CHERYL and COLTON BEHR, Appellants,

v.

DR. CHRISTOPHER G. ANDERSON, LEANN G. BACH, PA-C,  
NORTHWEST ORTHOPEDIC SPECIALISTS, and DEACONESS  
HOSPITAL, Respondents.

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DEACONESS HOSPITAL'S RESPONSE BRIEF

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## **I. INTRODUCTION & RELIEF REQUESTED**

This is a medical negligence case. Colton Behr suffered a significant long-bone fracture. He underwent surgical treatment at Spokane's Deaconess Hospital ("Deaconess"). During post-operative recovery, Mr. Behr developed compartment syndrome – a known complication of the surgery.

Mr. Behr and his wife, Cheryl, brought suit in 2012.<sup>1</sup> Mr. Behr named three orthopedic surgeons (Drs. Anderson, Lynch, and Powers), an orthopedic physician assistant (PA-C Bach), the orthopedic group for whom the surgeons and the physician assistant worked (Northwest Orthopedic Specialists), and Deaconess as defendants in this suit. Mr. Behr contends that there was a delay in the diagnosis of his compartment syndrome and that the alleged delay in diagnosis proximately caused lasting damage.

Mr. Behr's opening brief attempts to complicate the issues before the Court. However, as it relates to Deaconess, this case is quite narrow.

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<sup>1</sup> Though both Mr. and Mrs. Behr are the Plaintiffs, for ease of reference, Deaconess will refer to the Plaintiffs collectively as "Mr. Behr."

The sole claim against Deaconess asserts that the nursing care between December 9 and December 11, 2010, fell below the standard of care.<sup>2</sup>

Deaconess acknowledges that Mr. Behr presented expert testimony with respect to the standard of care expected of Deaconess' nurses. However, Mr. Behr completely failed to present expert testimony to demonstrate that any alleged violation of the nursing standard of care was a proximate cause of any claimed injury.

Mr. Behr (through his nursing expert Linda Newman) acknowledges that nurses cannot diagnose compartment syndrome. VRP 871, 905-07. The diagnosis can only be made by a physician or a physician assistant. *Id.*

Mr. Behr acknowledges that nurses cannot do a compartment pressure test. *Id.* The test can only be performed by a physician or a physician assistant. *Id.*

And Mr. Behr acknowledges that the appropriate intervention for compartment syndrome is a fasciotomy. VRP 709-10. Of course, a nurse cannot perform surgery.

Mr. Behr also acknowledges that a physician and a physician assistant evaluated him multiple times between December 9 and

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<sup>2</sup> Mr. Behr's nursing expert, Linda Newman, testified that she had no criticisms of the nursing care after Dr. Anderson's diagnosis of compartment syndrome. VRP 936.

December 11, 2010. *See generally*, Mr. Behr's Opening Brief, *see also* MR 25-29.<sup>3</sup> Most critically, Mr. Behr acknowledges that prior to December 12, 2010, the physician and physician assistant had repeatedly concluded that Mr. Behr did **not** have compartment syndrome. *See id.*

Critically, Mr. Behr acknowledges that Dr. Anderson specifically ruled compartment syndrome out at approximately 3:30 p.m. on December 11, 2010. MR 28. Prior to making that decision, Dr. Anderson examined Mr. Behr, spoke with Mr. Behr, reviewed Mr. Behr's medical record, and spoke with the Deaconess nurses regarding Mr. Behr's condition. VRP 1391-1402. Dr. Anderson was fully informed, yet his professional judgment was to rule compartment syndrome out.<sup>4</sup> Equally critical, Mr. Behr's expert testified that muscle damage had already occurred by the time of Dr. Anderson's December 11, 2010 examination. VRP 1254-55. Thus, had Dr. Anderson diagnosed compartment syndrome on December 11, 2010, Mr. Behr may have had a marginally better outcome, but some damage had already occurred. *Id.*

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<sup>3</sup> In the interest of consistency, Deaconess adopts Mr. Behr's use of the citation format "MR pg#" to refer to trial exhibit D-101. *See* Mr. Behr's Opening Brief, p.6.

<sup>4</sup> It warrants note that a jury found that Dr. Anderson's treatment complied with the standard of care. CP 6601-02.

Though Mr. Behr acknowledges the undisputed facts, he fails to acknowledge the unavoidable consequences of those facts. With Dr. Anderson having ruled compartment syndrome out at approximately 3:30 p.m. on December 11, 2010, anything that the nurses did or did not do prior to that could possibly have changed Mr. Behr's outcome. Likewise, with damage having already been suffered by 3:30 p.m. on December 11, 2010, nothing that the nurses did or did not do after that could have changed the outcome either. Dr. Anderson's independent medical judgment severed any possible causal chain involving the Deaconess nursing care.

The Trial Court was, therefore, correct to dismiss Mr. Behr's claim against Deaconess. The evidence that Mr. Behr offered just did not establish that Deaconess' actions or omissions proximately caused any harm. Deaconess respectfully asks the Court to affirm the Trial Court's decision.

## **II. RESTATEMENT OF THE ISSUE PRESENTED**

A. A medical negligence plaintiff bears the burden of presenting expert testimony establishing that the defendant's actions or omissions proximately caused the claimed injury. Mr. Behr failed to offer expert testimony to demonstrate that any action or omission by the Deaconess

nurses caused any injury, loss, or damage. Was the Trial Court, therefore, correct to dismiss Mr. Behr's claim against Deaconess?

B. Washington law requires an expert witness to be medically competent with respect to the relevant condition's diagnosis and treatment, in order to testify regarding causation. Was the Trial Court, therefore, correct to preclude Nurse Linda Newman from offering causation opinions where Nurse Newman acknowledged that nurses are not medically competent to diagnose compartment syndrome?

C. A plaintiff cannot appeal the denial of a pre-trial motion for summary judgment after the trial has concluded. Should the Court, therefore, deny Mr. Behr's attempt to re-litigate the denial of his 2014 motion for partial summary judgment?

### III. STATEMENT OF FACTS

**A. COLTON BEHR BROKE HIS LEG, AND DR. POWERS PERFORMED A SURGICAL REPAIR.**

On December 8, 2010, Colton Behr suffered a broken leg (a tibial plateau fracture, in the medical vernacular). MR 22-23. He drove himself from Priest River, Idaho, to Deaconess Hospital in Spokane, Washington. *Id.* Mr. Behr was admitted to Deaconess at approximately 10:00 p.m. on December 8, 2010. MR 13.

Following x-rays and examinations, Mr. Behr signed a surgical consent, and Dr. Timothy Powers (of Northwest Orthopedic Specialists) performed a surgical repair of Mr. Behr's leg. MR 63-65. Mr. Behr's surgery was completed at approximately 9:00 p.m. on December 9, 2010. MR 66.

Mr. Behr remained at Deaconess until December 13, 2010. MR 20-21. Over the course of his hospitalization, Mr. Behr was regularly monitored by Deaconess' nursing staff. *See generally*, MR. In addition, Mr. Behr was repeatedly evaluated by Dr. Chris Anderson (of Northwest Orthopedic Specialists) and by PA-C Mark Beuscher and PA-C Leann Bach (also of Northwest Orthopedic Specialists). MR 25-29.

The relevant medical records demonstrate that the Deaconess nurses were regularly checking on Mr. Behr, managing his pain, and documenting his symptoms. *See generally*, MR. However, nurses are not capable of diagnosing compartment syndrome. VRP 905-07. The nurses' role was limited to observing and reporting signs and symptoms to Mr. Behr's orthopedist. *See* VRP 908, 932. Dr. Anderson's and PA-C Bach's evaluations were, therefore, the opportunities for diagnosis that are relevant to this suit.

**B. FIRST EVALUATION: OVERNIGHT/EARLY MORNING OF DECEMBER 10, 2010.**

PA-C Beuscher (from Northwest Orthopedic Specialists) examined Mr. Behr sometime between midnight and 9:30 a.m. on December 10, 2010. MR 25. PA-C Beuscher also noted that Mr. Behr was able to wiggle his toes, which he noted as demonstrating that Mr. Behr was neurovascularly intact. *Id.* Nothing in PA-C Beuscher's examination was indicative of compartment syndrome. *Id.*

Deaconess' Physical Therapist, Ruth Benage, evaluated Mr. Behr at approximately noon on December 10, 2010. MR 101; VRP 502-07. Though Ms. Benage's chart note did not reference compartment syndrome or any signs/symptoms thereof, Ms. Benage expressed some concern regarding Mr. Behr's post-surgical course. *Id.* Ms. Benage, therefore, discussed the situation with the Deaconess nursing staff, and together the decision was made to call Dr. Lynch to report the concerns. VRP 507. Specifically, Ms. Benage found that Mr. Behr had decreased active movement and decreased sensation in Mr. Behr's left foot. MR 101, 502-07.

Mr. Behr makes much and more of Dr. Lynch's, Dr. Powers', and Northwest Orthopedic Specialists' conduct following the calls from Deaconess. *See generally*, Mr. Behr's Opening Brief. That issue may

have some bearing on the claims against the other Defendants; however, as it pertains to Deaconess, the only relevant fact is that Ms. Benage and the nursing staff reached out to Mr. Behr's attending physicians. *See* VRP 507.

**C. SECOND EVALUATION: 10:45 A.M. ON DECEMBER 11, 2010.**

Leann Bach, a NWOS physician assistant, examined and evaluated Mr. Behr at approximately 10:45 a.m. on December 11, 2010. MR 27-8, VRP 644. PA-C Bach noted swelling around Mr. Behr's knee. MR 27-8, VRP 468.

Dr. Anderson was the on-call physician for NWOS on Saturday, December 11, 2010. VRP 1382-83. PA-C Bach called Dr. Anderson to advise him of Mr. Behr's status and symptoms. MR 27; VRP 648, 1382. After discussing the situation with Dr. Anderson, Ms. Bach attempted a procedure to alleviate swelling from Mr. Behr's leg. MR 27-8; VRP 648. That procedure was, unfortunately, unsuccessful. *Id.*

During the morning hours of December 11, 2010, the Deaconess nurses encountered some interpersonal challenges with Mr. Behr. *See* MR 151; VRP 1091-92, 1385. Mr. Behr demanded that a physician come examine him. *Id.* A Deaconess nurse called Dr. Anderson to report on those interpersonal difficulties and to report that Mr. Behr was asking to see a physician. *Id.*

**D. THIRD EVALUATION: APPROXIMATELY 3:00 P.M. ON DECEMBER 11, 2010.**

Dr. Anderson arrived at Mr. Behr's bedside around 3:00 p.m. on December 11, 2010 and evaluated Mr. Behr. MR 28; VRP 1092. Dr. Anderson reviewed the available x-rays, reviewed Mr. Behr's chart, and spoke with both the nurses who had been treating Mr. Behr. VRP 1386. Dr. Anderson took a medical history from Mr. Behr and conducted a physical examination. VRP 1391-92. Dr. Anderson removed the bandages around Mr. Behr's leg to visualize the entire leg. VRP 1393. Dr. Anderson palpated the compartments in Mr. Behr's leg. VRP 1392-97, 1412. Dr. Anderson also manipulated Mr. Behr's leg to test the various compartments in the leg. VRP 1397-1400. Dr. Anderson also tested the circulation in Mr. Behr's leg. VRP 1400-01. After conducting that thorough examination, Dr. Anderson concluded that Mr. Behr exhibited no signs of compartment syndrome. VRP 1401-02.

As it pertains to Deaconess, Dr. Anderson's late afternoon examination on December 11, 2010, is the most important fact of the case. As against the other Defendants, Mr. Behr may criticize the manner, means, or conclusion of Dr. Anderson's examination. For the claim against Deaconess, the key fact is that Dr. Anderson's December 11, 2010

examination resulted in an unambiguous medical determination that Mr. Behr did not have compartment syndrome at that time.<sup>5</sup>

Deaconess nurses called Dr. Anderson at least two additional times between Saturday evening (December 11, 2010) and Sunday morning (December 12, 2010). MR 45, 155, 210, 215, *see also* VRP 933-34, 1413-14. Deaconess nurses called Dr. Anderson at approximately 11:00 p.m. on December 11, 2010, and at 6:30 a.m. on December 12, 2010. *Id.* With each call, Dr. Anderson was given an update on Mr. Behr's condition, and Dr. Anderson gave the Deaconess nurses direction with respect to Mr. Behr's treatment. *Id.*

**E. FOURTH EVALUATION: DIAGNOSIS OF COMPARTMENT SYNDROME & SURGICAL INTERVENTION – DECEMBER 12, 2010.**

Dr. Anderson arrived at Mr. Behr's bedside at approximately 11:00 a.m. on December 12, 2010. MR 29, *see also* VRP 1461-19. Dr. Anderson reviewed Mr. Behr's records and conducted a physical examination. *Id.* Dr. Anderson noted changes in Mr. Behr's condition and decided to conduct a compartment pressure test. *Id.* Thereafter, Dr. Anderson diagnosed compartment syndrome and promptly took Mr. Behr to surgery. *Id.*

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<sup>5</sup> Mr. Behr's experts testified that muscle damage had already occurred by the time of Dr. Anderson's December 11, 2010 examination. VRP 1252-55.

Dr. Anderson was able to surgically relieve the pressure in Mr. Behr's compartment. MR 80-82. Following the surgery, Mr. Behr experienced significant pain relief. MR 152.

Mr. Behr was discharged from Deaconess on December 13, 2010. MR 29. Mr. Behr underwent further procedures near his home in Whitefish, Montana. VRP 447-48. That surgery revealed the scope of Mr. Behr's damage. *Id.*

#### **IV. STATEMENT OF CASE**

This case was filed on December 7, 2012. CP 1. The case was tried to a jury about five and a half years later – in May 2018. *See generally* VRP.

The Parties offered opening statements on May 8, 2018. VRP 289-344. From May 8 to May 17, 2018, Mr. Behr presented his case. *See generally* VRP. Mr. Behr presented testimony from 15 witnesses over a period of 10 days and then rested his case. *Id.*, *see specifically* VRP 1327.

Once Mr. Behr rested, Deaconess brought a motion for judgment as a matter of law. VRP 1328-39; CP 5742-55. Deaconess pointed out that Mr. Behr failed to demonstrate a causal nexus between the purported violations of the nursing standard of care and Mr. Behr's claimed injuries. *Id.*

The Court orally granted Deaconess' motion on May 17, 2018. VRP 1354. On May 25, 2018, the Court entered a written Order dismissing Mr. Behr's claims against Deaconess. CP 5876-79. Mr. Behr filed a timely Notice of Appeal on July 20, 2018. CP 6857-60.

## V. ARGUMENT

### A. REVIEWING THIS MATTER DE NOVO, THE COURT SHOULD AFFIRM THE TRIAL COURT'S DISMISSAL ORDER.

A trial court's entry of a directed verdict is reviewed de novo. *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 848 (2015); *Winkler v. Giddings*, 146 Wn.App. 387, 394 (2008). In reviewing the case, the Court of Appeals, therefore, engages in the same inquiry as the Trial Court. *University of Washington v. Government Employment Insurance Co.*, 200 Wn.App. 455, 569 (2017).

A defendant is entitled to relief under CR 50 where the plaintiff failed to present "substantial evidence or reasonable inference to sustain a verdict." *Wilcox v. Basehore*, 187 Wn.2d 772, 782 (2017); *see also Chaney v. Providence health Care*, 176 Wn.2d 727, 732 (2013).

"Substantial evidence exists if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise." *Wilcox*, 187 Wn.2d at 782. In analyzing a CR 50 motion, the Court must view all of the evidence in a light most favorable to the nonmoving party. *University of*

*Washington v. Government Employment Ins. Co.*, 200 Wn. App. at 569 (citing *Queen City Farms, Inc. v. Central National Ins. Co. of Omaha*, 126 Wn.2d 50, 98 (1994)).

Accepting all evidence and all reasonable inferences, Mr. Behr failed to present sufficient evidence to establish a prima facie case against Deaconess. Specifically, Mr. Behr cannot establish that any of the alleged violations of the nursing standard of care bear any causal connection to the damages that he seeks.<sup>6</sup>

**B. MR. BEHR FAILED TO PRESENT EXPERT TESTIMONY ESTABLISHING PROXIMATE CAUSE.**

To earn the right to present his claim to the jury, Mr. Behr (as a medical negligence plaintiff) had the obligation to present competent expert testimony establishing both (i) a violation of the standard of care and (ii) proximate cause. *Keogan v. Holy Family Hospital*, 22 Wn.App. 366, 372 (1979). For purposes of this appeal, Deaconess does not dispute that Mr. Behr presented expert testimony asserting that the Deaconess nurses failed to comply with the standard of care. The deficiency in Mr. Behr's case was his failure to offer competent expert testimony to causally

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<sup>6</sup> The *de novo* standard applies to the Court's dismissal of Mr. Behr's claims against Deaconess. However, the Court's decision refusing to permit Nurse Linda Newman to offer causation opinions is reviewable for abuse of discretion. See § C.1., below.

connect the alleged violations of the standard of care to the injuries that he asserted. That was a fatal deficiency.

In order to demonstrate proximate cause in medical negligence cases, the plaintiff must present expert testimony to establish that the alleged negligence was a "but for" cause of the damages sought.

*Dunnington v. Virginia Mason Med. Ctr.*, 187 Wn.2d. 629 (2017); *see also, Rash v. Providence Health & Servs.*, 183 Wn.App. 612, 636 (2014).

A proximate cause is one that in natural and continuous sequence, unbroken by an independent cause, produces the injury complained of and without which the ultimate injury would not have occurred. *Attwood v. Albertson's Food Centers, Inc.*, 92 Wn. App. 326, 330 (1998). Expert testimony on causation must go beyond "speculation and conjecture." *Young v. Group Health Cooperative*, 85 Wn.2d 332, 340 (1975). The testimony must establish that "the resulting condition probably would not have occurred but for the defendants' conduct." *Id.* Further, expert testimony must be more than a witness' personal opinion. *Adams v. Richland Clinic, Inc., P.S.*, 37 Wn.App. 650, 655 (1984).

By arguing around the issue, Mr. Behr seems to acknowledge that he did not offer expert testimony regarding causation. Mr. Behr argues that the expert testimony that was offered was sufficient to allow a lay jury to fill the "causal gaps." Mr. Behr's Opening Brief, pp. 53-54. He also

argues that the Trial Court erred in refusing to permit Nurse Newman to present causation opinions. Mr. Behr's Opening Brief, p. 52. Neither of Mr. Behr's arguments can take the place of the missing causation testimony. Neither of Mr. Behr's arguments are supported by Washington State law. And neither of Mr. Behr's arguments are supported by the record.

***1. Mr. Behr Cannot Establish Causation Because Dr. Anderson Specifically Ruled Compartment Syndrome Out.***

Washington State law acknowledges that a superseding act severs the causal connection between a party's alleged negligence and the plaintiff's harm where the "intervention prevents the actor from being liable for harm to another for his antecedent negligence." *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 813 (1987). In determining whether an intervening act severs the causal chain, the Court must consider the facts and circumstances, including whether the intervening acts "operated independently of any situation created by the actor's negligence." *Id.* Mr. Behr's central criticism related to the Deaconess nurses' obligation to report information to his physicians. *See* VRP 842-43, 867-68, 873-74,

883-84, 884-85, 889, 891, 893-95 (Testimony from Nurse Linda Newman).<sup>7</sup>

The undisputed facts demonstrate that Dr. Anderson's decision to rule compartment syndrome out at approximately 3:00 p.m. on December 11, 2010, severed the causal connection between the nursing care and Mr. Behr's alleged injuries. This fact, more than any other, required the Trial Court to dismiss Mr. Behr's claim against Deaconess.

As articulated by Mr. Behr's brief, his experts testified that the standard of care required the Deaconess nurses to "escalate" their reporting of Mr. Behr's status and symptoms until there was "an appropriate" response. Mr. Behr's Opening Brief, pp. 52-53. However, Nurse Newman recognized that nurses do not (and cannot) diagnose compartment syndrome. VRP 871, 905-07. Nurse Newman also recognized that nurses cannot do compartment pressure testing. *Id.* The nurses' role, therefore, is limited to getting the information to the physician or physician assistant so that he or she can determine whether the patient has compartment syndrome. *See* VRP 908, 932.

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<sup>7</sup> Nurse Newman also had criticisms related to pain management and charting (VRP 847, 884-85). However, Mr. Behr does not even contend that those criticisms are causally connected to the damages sought in this case. *See generally*, Mr. Behr's Opening Brief.

Mr. Behr's physician experts testified that Mr. Behr's compartment syndrome should have been diagnosed before Dr. Anderson's December 11, 2010 examination (approximately 3:30 p.m.). VRP 718-19. Mr. Behr's experts also testified that by the afternoon of December 11, 2010, Mr. Behr had already suffered muscle death and the resulting damages. VRP 1252-55.

Thus, whether the nurses sufficiently "escalated" Mr. Anderson's status and symptoms on December 10 and December 11, 2010, is an academic inquiry. The undisputed facts show that Dr. Anderson (i) was at Mr. Behr's bedside, (ii) had full access to Mr. Behr's medical chart, (iii) took a history from Mr. Behr; (iv) conducted a physical examination of Mr. Behr; and (v) ruled compartment syndrome out as a diagnosis. VRP 1386, 1391-1402. Mr. Behr's experts testified that his damages were active and ongoing by the time of Dr. Anderson's examination. VRP 1252-55. Against that evidence, Mr. Behr cannot establish any causal connection between the Deaconess' nurses' conduct and his alleged injuries. Dr. Anderson's decision to rule compartment syndrome out as a diagnosis severed any possible causal connection between the nurses' reporting of Mr. Behr's symptoms and status and Mr. Behr's ultimate injury.

**2. *Mr. Behr's Assertion that the Causation Testimony was Sufficient to Permit a Lay Jury to Establish Causation is Not Supported by the Evidence.***

Mr. Behr argues that the evidence was sufficient to allow a lay jury to establish the necessary connections to support a finding of liability. Mr. Behr's Opening Brief, pp. 50-1. However, analyzing Mr. Behr's claims makes it clear that no person – expert or lay – could establish the necessary connection between the Deaconess nurses' conduct and Mr. Behr's alleged injuries.

Broken into its "logical" steps, Mr. Behr's claim (as articulated through expert opinions) was as follows: (i) that the nursing standard of care required Deaconess' nurses to timely report symptoms to the attending physicians; (ii) that the nursing standard of care required Deaconess' nurses to "escalate" their reporting until there was "an appropriate orthopedic response"; (iii) that Mr. Behr's physicians and physician assistants misdiagnosed his condition by ruling compartment syndrome out; (iv) that the only appropriate orthopedic response to Mr. Behr's condition was surgical intervention (*viz.*, a fasciotomy); and (v) that the failure to timely diagnose Mr. Behr's compartment syndrome and the failure to perform a timely fasciotomy proximately caused a loss of muscle and function in Mr. Behr's leg. *See generally*, Mr. Behr's Opening

Brief. Looking at these steps highlights a hidden premise. Bringing that premise to light reveals the fatal flaw in Mr. Behr's claim.

By asserting that the Deaconess nurses had an obligation to "escalate" their reports regarding Mr. Behr's status and symptoms "until there was an appropriate orthopedic response," and by asserting that "[t]he orthopedic response known to nurses and all medical providers would have been fasciotomy" (*See* Mr. Behr's Opening Brief, p. 48), Mr. Behr is asserting that the Deaconess nurses owed a duty to escalate their reporting of Mr. Behr's status and symptoms until he received a fasciotomy. *See id.* Thus, the hidden premise – namely, that the Deaconess nurses knew or should have known that Mr. Behr's compartment syndrome had been misdiagnosed.

There was absolutely no evidence offered at trial to support this hidden premise. In fact, the evidence offered at trial demonstrated that nurses cannot diagnose compartment syndrome. VRP 871, 905-07. Being unable to diagnose the condition, Mr. Behr's hidden presumption that the nurses had an obligation to know when the condition had been misdiagnosed is baseless.

Mr. Behr's failure to present expert testimony to demonstrate that the nurses knew or should have known that Dr. Anderson's orthopedic response was inappropriate is fatal to Mr. Behr's claim. Without that

evidence, it was impossible for Mr. Behr to causally connect the nursing care to Mr. Behr' claimed injuries.

Mr. Behr attempts to minimize the issue by calling it a "causal gap[]." Mr. Behr's Opening Brief, pp. 53-54.<sup>8</sup> Whether it is characterized as a "hidden premise" or a "causation gap," the issue is well beyond the ken of a lay juror and, therefore, can only be established through expert testimony. *See In Re Detention of Bedker*, 134 Wn.App. 775, 778-79 (2006). While Washington law permits a claim to go to the jury without every solitary step of the causal chain being established through expert testimony, "the evidence will be considered **insufficient** to support the trial verdict if it can be said that, considering all the medical testimony presented at trial, the **jury must resort to speculation or conjecture** in determining the causal relationship." *McLaughlin v. Cooke*, 112 Wn.2d 829, 837-38 (1989) (emphasis added). Mr. Behr's evidence offers naught but speculation and conjecture with respect to the causal relationship between Deaconess' conduct and the alleged damages.

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<sup>8</sup> At page 54 of Mr. Behr's Opening Brief, the phrase "causal gaps" is placed in quotations and followed by a citation to *McLaughlin v. Cooke*, 112 Wn.2d 829, 837-38 (1989). However, the phrase "causal gaps" does not appear in the State Supreme Court's *McLaughlin* decision. In fact, research identifies no Washington medical negligence case that contains the phrase "causal gaps."

The undisputed facts reveal a break in the causal chain that Mr. Behr did not fill with expert testimony. That failure of proof required Mr. Behr's claim against Deaconess to be dismissed. The Trial Court's dismissal order should, therefore, be affirmed.

**C. THE TRIAL COURT WAS CORRECT TO REFUSE TO PERMIT NURSE NEWMAN TO OFFER CAUSATION OPINIONS.**

Mr. Behr argues that the Trial Court erred in entering a pretrial order precluding Nurse Newman from offering causation opinions. Mr. Behr's Opening Brief, p. 52; CP 5557-58. The Trial Court's decision was correct on both procedural and substantive grounds.

**1. *The Trial Court's Decision to Preclude Nurse Newman From Offering Causation Opinions is Reviewed for Abuse of Discretion.***

A Trial Court's evidentiary decisions are reviewed under the abuse of discretion standard. *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 231 (2017). There is nothing in the record (or in the law) to support Mr. Behr's assertion that the Trial Court's decision refusing to permit Nurse Newman to offer causation opinions was an abuse of discretion.

**2. *Nurse Newman, as a Registered Nurse, was Legally Incompetent to Offer Medical Causation Opinions Regarding Compartment Syndrome.***

Mr. Behr argues that a nurse is legally competent to offer opinions on medical causation if the nurse has sufficient professional experience.

Mr. Behr's Opening Brief, p. 52. Mr. Behr relies on the State Supreme Court's decision in *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227 (2017) for support. *Id.* However, neither the *Frausto* opinion, nor any other provision in Washington State law, permits a registered nurse to offer opinions with respect to a medical condition that she is not competent to diagnose.

As a general rule, a registered nurse is incompetent to offer opinions regarding medical causation. *Davies v. Holy Family Hosp.*, 144 Wn.App. 483, 501 (2008); *Colwell v. Holy Family Hosp.*, 104 Wn.App. 606, 609 (2001). Prior to the State Supreme Court's decision in *Frausto*, Washington State law categorically precluded nurses from offering opinions regarding medical causation. *See generally*, 188 Wn.2d 277. In *Frausto*, the Court determined that an expert's individual qualifications, rather than mere professional title should determine the expert's ability to offer opinions related to medical causation. *Id.* However, there are two critical differences between the situation in *Frausto* and the situation presented by this case.

Firstly, the witness at issue in the *Frausto* case was an ARNP (an Advanced Registered Nurse Practitioner). *Id.* at 235. The Court noted that, contrary to an RN (a Registered Nurse), an ARNP has an "expanded role in providing health care services." *Id.* Furthermore, the Court

observed that – unlike an RN – an ARNP is "empowered to practice independently and 'to assume primary responsibility and accountability for the care of patients.'" *Id.* Specifically, the Court observed that an ARNP has authority to "establish diagnoses by patient history, physical examinations and other methods of assessment." *Id.* Nothing in the *Frausto* opinion supports Mr. Behr's assertion that Linda Newman (as an RN) was legally competent to offer causation opinions.

Secondly, the *Frausto* Court stressed that the key inquiry in determining whether a non-physician can offer opinions on medical causation is whether the witness "is qualified to independently diagnose the requisite condition." *Id.* at 234. Contrary to Mr. Behr's assertion, *Frausto* does not hold that a nurse is competent to offer opinions regarding medical causation. Instead, *Frausto* holds that under narrow circumstances, where the record demonstrates that the witness is qualified to independently diagnose the condition at issue, a non-physician provider may be able to offer medical causation opinions.

Nurse Newman was not competent to offer causation opinions regarding compartment syndrome. No Washington State case holds that an RN (as opposed to an ARNP) can offer expert causation testimony. The Trial Court specifically noted that the *Frausto* analysis applied to an ARNP rather than an RN. VRP 118-19. Further, the record is undisputed

that Nurse Newman, as an RN cannot diagnose compartment syndrome. VRP 871, 905-07. The Trial Court also noted that Mr. Behr failed to show that an ARNP (much less an RN) was competent to diagnose and offer medical causation opinions regarding compartment syndrome. VRP 118-19. The Trial Court was, therefore, correct to hold that Nurse Newman was incompetent to offer opinions regarding medical causation in this case.

**3. *Nurse Newman was Properly Precluded from Testifying on Undisclosed Issues.***

Separate and apart from the substantive evidentiary issues, the Trial Court was within its discretion to refuse to permit Nurse Newman from testifying regarding issues that were not disclosed in discovery. *See* CP 5557-58. Mr. Behr disclosed Nurse Newman as a potential witness on causation approximately one year after the deadline for expert witness disclosures had passed. *See* CP 5529-31.

The Trial Court has broad discretion to craft a sanction and remedy for untimely discovery. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494 (1997). The Trial Court has authority to preclude evidence in cases of willful violations of discovery orders and deadlines. *See Jones v. City of Seattle*, 179 Wn.2d 322, 343 (2013).

Deaconess noted that Mr. Behr's disclosure came well after Nurse Newman had been deposed and that significant prejudice would result from having to conduct duplicative discovery late in the case. CP 5533; VRP 116. The Trial Court considered the issues and the Parties' position and entered an Order refusing to permit Nurse Newman to offer previously undisclosed opinions. CP 5621-23.

The record clearly shows that Nurse Newman was not timely designated as a causation witness. The record also clearly shows that Deaconess would have been prejudiced through duplicative discovery. VRP 118-19.

The record shows that the Court determined that the failure to timely disclose the full scope of Nurse Newman's opinions was "deliberate." VRP 119. The Trial Court specifically considered whether a lesser sanction would suffice and concluded that permitting Nurse Newman to offer standard of care opinions but not causation opinions was the appropriate resolution. VRP 119-20.

Critically, despite Mr. Behr's present assertion that the Trial Court abused its discretion, Mr. Behr previously acknowledged (pursuant to CR 2A) that the Trial Court was within its discretion:

And then as indicated in the response, although Deaconess now indicates they would be prejudiced, they did not in their opening motion. And so, you know, under the Burnett

factors, I would certainly understand if the Court decided to not allow Nurse Newman to make causation opinions. I believe it's within the Court's discretion under the Burnett factors to also grant their motion. So it's entirely within the Court's discretion . . .

VRP 116-17.

The Trial Court was well within its discretion to refuse to permit Nurse Newman to offer previously undisclosed opinions. The Court of Appeals should, therefore, affirm the Trial Court's decision.

**D. MR. BEHR'S ARGUMENTS REGARDING HIS 2014 MOTION FOR SUMMARY JUDGMENT MUST BE DISREGARDED.**

Mr. Behr asks the Court to enter an affirmative judgment in his favor based upon the Trial Court's denial of his 2014 motion for summary judgment. Mr. Behr's Opening Brief, p. 54. The Court of Appeals cannot review a pre-trial summary judgment order once a trial has been completed, where the denial was based upon the existence of genuine issues of material fact. *Washburn v. City of Federal Way*, 169 Wn.App. 588, 609 (2012). Mr. Behr's request should, therefore, be disregarded.

The Court of Appeals has the benefit of an extensive written opinion from the Trial Court. CP 1686-96. That opinion demonstrates that Mr. Behr's motion for summary judgment was denied because Mr. Behr had not met his burden of coming forward with sufficient information to demonstrate the lack of a genuine issue of material fact. *Id.*

Once this matter proceeded to trial, Mr. Behr became unable to seek review of the Trial Court's 2014 summary judgment order. Mr. Behr's attempt to include that issue in this appeal is improper and should be disregarded.

## VI. CONCLUSION

As it pertains to Deaconess, this case is straightforward. Mr. Behr's expert testimony establishes that a diagnosis of compartment syndrome needed to be made prior to the afternoon of December 11, 2010, for Mr. Behr's harm to be avoided. The record demonstrates that Dr. Anderson unambiguously ruled compartment syndrome out after that point in time. With that evidence, it was impossible for Mr. Behr to establish proximate cause against Deaconess.

Mr. Behr offered no competent expert testimony to establish causation with respect to Deaconess. That failure was fatal to his claim. The Trial Court, therefore, correctly dismissed the claim against Deaconess. Deaconess respectfully asks the Court to affirm the Trial Court's decision.

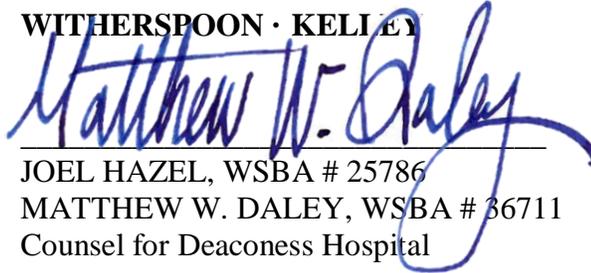
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RESPECTFULLY SUBMITTED, this 1st day of June, 2020.

**WITHERSPOON • KELLEY**

A handwritten signature in blue ink that reads "Matthew W. Daley". The signature is written in a cursive style and is positioned over a horizontal line.

JOEL HAZEL, WSBA # 25786

MATTHEW W. DALEY, WSBA # 36711

Counsel for Deaconess Hospital

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 1st day of June, 2020, the foregoing was delivered to the following persons in the manner indicated:

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DEBBY GLATT, Legal Assistant

# WITHERSPOON KELLEY

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