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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

NO. III-364208

ALICE L. FRITZ individually,

Appellant,

vs.

CHRIST CLINIC/CHRIST KITCHEN, a Washington non-profit
corporation, DANIELLE RIGGS, ARNP, an individual,

Respondents

**BRIEF OF RESPONDENTS IN OPPOSITION TO APPELLANT'S
OPENING BRIEF**

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I. INTRODUCTION

Ms. Fritz, the Appellant, filed a malpractice lawsuit claiming the standard of care was violated because of a multi-year delay in the diagnosis of her thyroid cancer. CP 3-6. Christ Clinic/Christ Kitchen and Danielle Riggs, ARNP, Respondents, purportedly allowed “massive growth and worsening [of] the unchecked thyroid tumor in Alice L. Fritz.” CP 5. The increased size of the tumor purportedly caused damage to Ms. Fritz’ vocal cords when the tumor was excised surgically. *Id.*

At summary judgment, Ms. Fritz failed to come forward with medical expert testimony addressing proximate cause between the tumor growth and the surgical outcome. On appeal and within her Opening Brief, Ms. Fritz abandons her thyroid tumor standard of care claim and instead proposes a new standard of care claim about a missed diagnosis of hypothyroidism between 2007 and 2011. Appellant’s Opening Brief, pp. 6-7.

Ms. Fritz’ appeal does not confront the claims and record which were before the trial court on summary judgment, so the dismissal order should be affirmed. Appellate review is only appropriate on the claims and records considered by the trial court. If Ms. Fritz is allowed to assert her newly re-characterized version

of the standard of care claim for “misdiagnosed” hypothyroidism, then Christ Clinic and Ms. Riggs are deprived of the CR 56 mechanism to challenge a plaintiff’s claims. At a minimum, Christ Clinic and Ms. Riggs should be allowed to assert the affirmative defense of a statute of limitations violation on these new claims.

II. RESPONDENTS’ STATEMENT OF ISSUES

Issue No. 1: Did the trial court properly dismiss Ms. Fritz’s claim for breach of a “fiduciary duty” when a “fiduciary duty” claim is not recognized under RCW 7.70.010?

Issue No. 2: Did the trial court properly dismiss an informed consent claim when Ms. Fritz asserted a missed or delayed diagnosis standard of care claim?

Issue No. 3: Did the trial court properly dismiss the standard of care claim because Ms. Fritz failed to provide competent expert witness testimony to support the proximate cause element of Ms. Fritz’s claim?

Issue No. 4: May Ms. Fritz assert a new standard of care claim after summary judgment was granted on her prior claim of a delayed diagnosis of thyroid cancer?

III. STATEMENT OF THE CASE

Ms. Fritz filed her Complaint on February 2, 2016, alleging failure to timely diagnose a thyroid tumor. CP 1-10. Virtually every paragraph in the Complaint refers to negligent care associated with the delayed diagnosis of the thyroid tumor. Causally, Ms. Fritz claimed the delayed diagnosis allowed the cancer to grow in size to the point that Mrs. Fritz' vocal cords were damaged when the surgical excision of the tumor occurred. CP 5.

Christ Clinic and Ms. Riggs moved for summary judgment to dismiss the three liability claims: (1) a breach of the standard of care, (2) a breach of the undefined "fiduciary duties;" and (3) a breach of the informed consent statute. CP 11-22. Ms. Fritz acknowledged having no facts or evidence to suggest anyone knew of the thyroid cancer before February 4, 2014. CP 23, 26-27.

Christ Clinic and Ms. Riggs moved for summary judgment on January 4, 2017.¹ SCP 313-314. The summary judgment

¹ On June 11, 2019, counsel for Respondents filed a Defendants' Designation of Clerk's Papers to supplement the Plaintiff's Designation of Clerk's Papers that was filed in November 2018. Certain documents that were considered by the trial court during summary judgment proceedings did not appear in Plaintiff's Designation. As of the date of this brief, the parties have not received a new Index to Clerk's Papers incorporating the additional documents identified by Respondents. Counsel for Respondents called the appellate court during the week of July 8, 2019 inquiring as to the procedure when the superior court does not transmit a clerks papers index prior to a filing deadline for appellate briefing. The clerk at the appellate court advised to insert a footnote into the brief explaining the situation and provide copies of the supplemental documents. As a

hearing was initially set for February 10, 2017. SCP 315. On January 31, 2017, Ms. Fritz moved for a continuance pursuant to CR56(f). CP 65-69. Ms. Fritz requested more time to obtain standard of care testimony from Eileen Owen-Williams, ARNP and causation/damage testimony from William Ryan, M.D. *Id.* The continuance was granted after Ms. Fritz's counsel represented that declaration testimony from each expert could be provided on or before February 28, 2017, and so the continued summary judgment hearing was re-noted for March 31, 2017. SCP 316.

On February 15, 2017, the declaration of Ms. Owen-Williams, ARNP was filed. CP 91-107. No declaration or testimony was ever provided by Dr. Ryan.

On the day before the summary judgment hearing, Ms. Fritz submitted a declaration from Brian Campbell, Ph.D., and Christ Clinic and Ms. Riggs moved to strike the declaration given the case history, the filing of the declaration one day before the summary judgment hearing, the lack of foundation, and testimonial

result, Respondents will include with this brief copies of the documents identified in the Defendants' Designation of Clerk's Papers. The supplemental documents will be attached under the document heading "Supplemental Index to Clerk's Papers" and Respondents will assign the next Clerk's Papers page numbers pursuant to the last page number that appears in the Index to Clerk's Papers which is 301-312 (Notice of Appeal to the Court of Appeals, Division III). That means the next citation to the documents not included with Plaintiff's Designation will appear as Supplemental Clerk's Papers (SCP) 313 and so forth. Please note that Respondents do not possess a copy of Plaintiff's CR 56(f) Motion to Continue although it is identified in Defendants' Designation of Clerk's Papers.

speculation and conclusional statements contained within the declaration. CP 115-120.

To date, Christ Clinic and Ms. Riggs find no indication that the declaration of Brian Campbell, Ph.D. was in fact filed and made part of the record on summary judgment. Dr. Campbell's declaration does not appear in the Index to Clerk's Papers. The trial court denied Christ Clinic's and Ms. Riggs' motion to strike and considered the declaration at summary judgment.

The Declaration of Eileen Owen-Williams, Ph.D. asserted that defendant Danielle Riggs, ARNP was negligent in failing to recognize symptoms and thyroid hormone levels between December 17, 2007 and December 2011, resulting in the failure to timely diagnose thyroid cancer. CP 95.

Dr. Campbell claimed to have reviewed the declaration of Ms. Owen-Williams. CP 129. Dr. Campbell recognized Ms. Fritz carried multiple psychological diagnoses when she first became a patient at the Christ Clinic. *Id.* Paragraph 8 of Dr. Campbell's declaration states: "Alice Fritz has suffered an aggravation of her pre-existing psychological and neuropsychological conditions as a result of violations of the standard of care identified by Eileen Ownens (sic) Williams." *Id.*

The trial court granted summary judgment dismissing the “fiduciary duty” claim since that claim is not recognized under the controlling statute, Chapter 7.70 RCW. CP 126-130; 131-134.

The trial court granted summary judgment on the informed consent claim, finding that plaintiff’s delayed diagnosis liability theory was legally inconsistent with an informed consent claim pursuant to legal precedents. *Id.*

Finally, the trial court concluded that the tardy declaration of Dr. Campbell was conclusory, that it lacked a factual foundation, and that it was based upon assumptions. *Id.* Furthermore, Dr. Campbell’s declaration did not set forth specific records or explain how or why five pre-existing psychological conditions were somehow aggravated by the delayed or missed diagnosis attributed to Christ Clinic and Ms. Riggs. *Id.*

On April 18, 2017, the trial court issued a letter ruling granting the motion for summary judgment, and presentment of the order on summary judgment was set for May 12, 2017, without oral argument. CP 126-130. Ms. Fritz was given opportunity to object to the order proposed by Christ Clinic and Ms. Riggs and to propose alternative language by memorandum. CP 130. Ms. Fritz

filed no objection or alternate language. The order on summary judgment was entered on May 18, 2017. CP 131-134.

On May 30, 2017, Ms. Fritz moved for reconsideration. CP 225-226. Ms. Fritz's attorney filed a declaration that included an "Offer of Proof," a declaration attaching the Brian R. Campbell, Ph.D. curriculum vitae, and "declaration on declaration of clarification of Brian R. Campbell." CP 135-155; 156-183; 184-204. Ms. Fritz filed a memorandum in support of the reconsideration and noted the motion for hearing on June 30, 2017. CP 205-214; 227.

The trial court found Ms. Fritz provided no legal authority as to why subsections of CR 59 applied to the circumstances or why the trial court should reconsider summary judgment given the procedural history preceding the summary judgment motion. CP 294-298.

Ms. Fritz did not brief or provide legal authority on the application of CR 59. CP 297. Christ Clinic and Ms. Riggs challenged the new testimony attributed to Dr. Campbell, and Ms. Fritz offered no explanation why Dr. Campbell's revised testimony had not been provided prior to the court's decision on summary judgment, even though the Ms. Fritz had been given three months

to respond to the motion for summary judgment and was allowed to submit Dr. Campbell's original declaration on the afternoon before the summary judgment hearing. *Id.* Christ Clinic and Ms. Riggs cited case law relating to "newly discovery evidence" under CR 59(a)(4), and Ms. Fritz did nothing to distinguish or analyze the case law in her briefing. *Id.* The trial court denied the motion for reconsideration. CP 294-298.

Ms. Fritz petitioned for appeal shortly after dismissing the other co-defendant, Rockwood Clinic. CP 299-312.

IV. ARGUMENTS AND AUTHORITIES

1. 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. *Weyerhaeuser 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 solely on the record before the trial court. *Green v. Normandy Park*, 137 Wn. App. 665, 151 P.3d 1038 (2007).

2. There Is No Fiduciary Duty Statute Or Cause Of Action Pursuant To RCW 7.70, et seq.

It is unclear whether Ms. Fritz is appealing the dismissal of this claim. Washington law is precise: all claims arising out of the

provision of healthcare must be brought under RCW 7.70 *et. seq.*

RCW 7.70.010 states:

The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury as a result of health care which is provided after June 25, 1976.

RCW 7.70.010 (emphases added). In *Hall v. Sacred Heart Medical Center*, the court unambiguously stated: “RCW 7.70.010 modified the ‘procedural and substantive aspects of all civil action for damages for injury occurring as a result of health care, regardless of how the action is characterized.’” *Hall v. Sacred Heart Medical Center*, 100 Wn. App. 53, 61, 995 P.2d 621 (2000). The Legislature decreed only three claims on which a plaintiff could recover damages for injury that occurred as a result of healthcare, including: (1) that injury resulted from the failure of a health care provider to follow the accepted standard of care; (2) that a health care provider promised the patient or his representative that the injury suffered would not occur; and (3) that the injury resulted from health care to which the patient or his representative did not consent. *Id.* at 61-62. Breach of fiduciary duty is not a

recognized cause of action in the medical negligence setting. The *Hall* court went on to explain that “whenever an injury occurs as a result of health care, the action for damages is governed exclusively by RCW 7.70.” *Id.* at 62, 995 P.2d 621 (citing *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335 (1999)).

Here, during trial court summary judgment proceedings, Ms. Fritz alleged that Christ Clinic and Ms. Riggs failed to test for or detect thyroid cancer before February 5, 2012. The claims in the Complaint arises out of the provision of healthcare. As a result, the causes of action available to Ms. Fritz are limited by statute and the statute does not contemplate a breach of fiduciary duty in medical negligence actions. Dismissal of that claim by the trial court was appropriate.

3. **Informed Consent Claims are Properly Dismissed When the Gravamen of the Underlying Standard of Care Claim is One for Missed or Delayed Diagnosis.**

Standard of care and informed consent claims are “two distinct causes of action.” *Gustav v. Seattle Urological Assoc.*, 90 Wn. App. 785, 789, 954 P.2d 319 (1998). “**Allegations supporting one normally will not support the other.**” *Id.* (emphasis added). “A physician who misdiagnoses the patient’s condition, and is therefore unaware of an appropriate category of treatment

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

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

...that Dr. Gottesman and Lilly 'failed to fully inform [plaintiff] of the appropriate frequency of diagnostic testing, the dangers involved in not testing more frequently, and the consequences of not completing the 1991 biopsy.' Nothing in these allegations relates to a failure to warn of potential consequences of treating Gustav's cancer, a condition he could not have treated because he failed to diagnose it.

Gustav, 90 Wn. App. at 790.

The court emphasized that the duty of informed consent “does not arise until the physician becomes aware of the condition by diagnosing it.” *Id.*

In *Gomez v. Sauerwein*, 180 Wn.2d 610, 331 P.3d 19 (2014), the deceased plaintiff presented to a healthcare provider with a suspected urinary tract infection. Blood tests revealed a culture positive for yeast, but the culture had not grown to the point where the strain could be determined. The family practitioner defendant decided to wait on further treatment based on the mistaken belief that the yeast was simply a contaminant. The patient developed fungal sepsis and died. The Estate’s informed consent claim was dismissed on a directed verdict because the cause of action was not applicable to the facts of the case. The court of appeals affirmed, holding:

Simply put, a health care provider who believes the patient does not have a particular disease cannot be expected to inform the patient about the unknown disease or possible treatments for it. In such situations, a negligence claim for medical malpractice will provide the patient compensation if the provider failed to adhere to the standard of care in misdiagnosing or failing to diagnose a patient’s condition.

In misdiagnosis cases, this rule is necessary to avoid imposing double liability on the provider

for the same alleged misconduct. *Backlund*, 137 Wn.2d at 661-62 n.2, 975 P.2d 950. The proposition that a provider cannot be liable for failure to inform in a misdiagnosis case has been referred to as ‘the *Backlund* rule.’ *Id.* at 661, 975 P.2d 950. *Backlund* followed several Court of Appeals opinions applying the same rule. See *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 261, 828 P.2d 597 (1992) (“Failure to diagnose a condition is a matter of medical negligence, not a violation of the duty to inform a patient.”); *Burnet v. Spokane Ambulance*, 54 Wn. App. 162, 168-69, 772 P.2d 1027 (1989) (“[T]he issues presented were confined to negligence and misdiagnosis rather than a violation of the informed consent laws.”); *Bays v. St. Luke’s Hosp.*, 63 Wn. App. 876, 881, 825 P.2d 319 (1992) (“[T]he duty to disclose does not arise until the physician becomes aware of the condition by diagnosing it.”).

Gomez, 180 Wn.2d 610, 618-19, 331 P.3d 19.

In this case, the trial court properly found Christ Clinic and Ms. Riggs could not be liable under an informed consent statute for failing to inform Ms. Fritz of treatment options regarding a thyroid cancer which was not known or recognized by Christ Clinic and Ms. Riggs. Deductively, it is not reasonable to allow Ms. Fritz to argue (1) that Christ Clinic and Ms. Riggs failed to diagnose cancer and thereby violated the standard of care, and (2) that Christ Clinic and Ms. Riggs failed to inform Ms. Fritz about a condition

for which they had no knowledge or recognition. Dismissal of the informed consent claim should be affirmed.

The analysis remains the same despite Ms. Fritz's attempt to craft an entirely new claim on appeal for failure to diagnose and treat hypothyroidism. On appeal, Ms. Fritz asserts failure to diagnose and treat hypothyroidism between 2007 and 2011, but the same case law precluding informed consent liability on a "misdiagnosis" of a tumor applies to a "misdiagnosis" of a different medical condition. Regardless of whether the standard of care claim is for a misdiagnosis of a tumor or hypothyroidism, the failure to appreciate the medical condition precludes informed consent exposure. The provider who does not recognize or diagnose a condition cannot logically be expected to warn of or discuss that same condition with the patient.

The trial court's dismissal of Ms. Fritz's informed consent claim was proper and should be affirmed.

4. **Dismissal of the Standard of Care Claim was Appropriate on the Record before the Trial Court.**

After continuances to allow acquisition of expert testimony on the standard of care and medical causation, Ms. Fritz supplied a last minute declaration from an entirely new witness, Dr.

Campbell, and the declaration made no reference to medical causation. Despite allegations about the thyroid cancer growing larger and creating harm to vocal cords with surgical excision, Ms. Fritz abandoned this allegation and offered no medical expert testimony to support medical or physical harm/injury.

Instead, Dr. Campbell signed a declaration offering a generalized and conclusional statement without facts or admissible evidence. His opinion is detailed by the trial court's Letter Ruling on Motion for Summary Judgment (CP 126-130):

- Dr. Campbell reviewed the Declarations of Eileen Owen-Williams, Ph. D. as to her opinions on the standard of care for nurse practitioners for Alice Fritz at the Christ Clinic. He assumed Ms. Owen-Williams' opinion as to the violation of the standard of care is true.
- Based upon the *foregoing assumption* on the violation of the standard of care, the following is Dr. Campbell's opinion [on a more probable than not basis]. (Emphasis added).
- Alice Fritz had multiple psychological conditions when she became a patient of Christ Clinic. Her pre-existing conditions include F43.23 Adjustment disorder with mixed anxiety and depressed mood; History of F34.1 Dysthymia major depression; F43.12 Posttraumatic stress disorder; F90.0 Attention Deficit Hyperactivity Disorder, predominantly attentive type; and G31.84 Mild Neurocognitive Disorder due to multiple factors (persistent ADHD, hepatitis C, radiation therapy,

hypothyroidism, and PTSD). These conditions made Alice Fritz more susceptible to injury.

- ***Alice Fritz has suffered an aggravation of her pre-existing psychological and neuropsychological conditions as a result of violations in the standard of care identified by Eileen Owens-Williams*** (Syntax original). (Emphasis added).

In a medical negligence case, when a defendant moves for summary judgment, the burden shifts to the plaintiff, and where the plaintiff files medical expert affidavits or declarations opposing summary judgment, those affidavits or declarations must set forth specific facts supporting the expert's opinions, *not conclusory statements without adequate factual support*. *Keck v. Collins*, 181 Wn. App. 67, 91, 325 P.3d 306 (2014) (emphasis added); *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993); *See also Thompson v. Everett Clinic*, 71 Wn. App. 548, 555-56, 860 P.2d 1054 (1993); *Ruffer v. St. Francis Cabrini Hospital*, 56 Wn. App. 65, 784 P.2d 1288 (1990). "Broad generalizations and vague conclusions are insufficient to resist a motion for summary judgment...." *Thompson, supra* at 555-56.²

In *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (Sept. 2015), the Washington Supreme Court held that, in a medical negligence case, the testimony of a plaintiff's expert in a declaration or affidavit is sufficient to defeat a motion for summary judgment if the testimony would be sufficient to support a verdict in the favor of the plaintiff at trial. 357 P.3d at 1086. But, that does not mean an expert declaration in opposition to a motion for summary judgment can be speculative or conclusory or fail to establish the experts'

For purposes of CR 56(e), the competency of an affiant to testify to a matter either supporting or opposing summary judgment must be demonstrated by the contents of the affidavit itself. *Bernal v. American Honda Motor Company*, 87 Wn.2d 406, 553 P.2d 107 (1976). Affidavits in support of, or in opposition to, a motion for summary judgment must be based on personal knowledge, set forth admissible evidentiary facts, and affirmatively show that the affiant is competent to testify to the matters therein. *Davies v. Holy Family Hospital*, 144 Wn. App. 483, 183 P.3d 283 (2008). A bare allegation of fact by affidavit without any showing of evidence is insufficient to raise a genuine issue of fact for purposes of a motion for summary judgment. *Meissner v. Simpson Timber Company*, 69 Wn. App. 949, 421 P.2d 674 (1966).

While experts have latitude as compared to fact witnesses, even an expert must show that his opinions have a foundation in fact and they are not conclusory. *See* ER 703; *Katara v. Katara*, 175 Wn.2d 23, 39 (2012) (citing *Walker v. State*, 121 Wn.2d 214,

qualifications. Indeed, expert testimony that is speculative and conclusory is not enough to sustain a verdict in favor of the plaintiff. *See, e.g., Donoghue v. Riggs*, 73 Wn.2d 814, 440 P.2d 823 (1968). Thus, whether analyzed under the rubric of materiality, as in *Keck*, or the requirement that expert declarations/affidavits not be speculative or conclusory, as in *Guile*, the standard of proof is the same. Significantly, in *Keck*, the qualifications of the plaintiff's expert were not at issue.

218 (1993) (“Expert opinions lacking an adequate foundation should be excluded.”); *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 787-89 (1991) (“The affidavit also contains statements or conclusions with no evidence of factual support. . . . The opinion of an expert which is only a conclusion which is based on assumptions is not evidence which satisfies the summary judgment standards because it is not evidence which will take a case to the jury.”)

In *Guile*, plaintiff brought a medical malpractice action alleging negligent performance of a gynecological surgery. The trial court granted summary judgment for defendants, and the trial court’s ruling was affirmed because the affidavit of plaintiff’s medical expert merely summarized plaintiff’s postsurgical complications and was coupled with an unsupported conclusion that complications were caused by defendant’s “faulty technique.” Similarly, Dr. Carpenter rounds up all the assumptions into a conclusion in paragraph 8 without any evidence or basis.

Although *Reyes v. Yakima Health District*, 197 Wn. App. 1072, 1075-76, ___ P.3d ___ (2017), addressed the sufficiency of the patient’s standard of care expert testimony in opposition to the physician’s summary judgment motion, the analysis is equally

instructive as to the sufficiency of expert testimony on the causation element. The *Reyes* Court addressed the testimony as follows:

In her declaration, Dr. Rosa Martinez (plaintiffs' expert) opined that the conduct of Dr. Christopher Spitters and the Yakima Health District constituted medical negligence and breached the standard of care. Nevertheless, Dr. Martinez failed to identify the discrete conduct of Dr. Spitters or the health district that violated the standard of care. She also failed to declare the applicable standard. We might be able to guess that she considered the defendants to breach the standard by failing to quickly diagnose liver disease and by prescribing tuberculosis medications. ***But we should not be left to guess. A conclusory affidavit does not defeat a summary judgment motion.***

Several Washington decisions support our holding. In *Vant Leven v. Kretzler*, 56 Wn. App. 349, 356, 783 P.2d 611 (1989), the plaintiff's expert witness submitted an affidavit stating that the defendant physician's conduct more probably than not fell below the applicable standard of care. Nevertheless, the affidavit failed to identify what facts supported the conclusion. This court affirmed a summary judgment dismissal on behalf of the physician.

Id. at 1075-76.

In the instant case, Dr. Campbell's testimony addressed causation in the same conclusory and non-specific manner. Dr. Campbell's declaration: (1) cites no facts, (2) does not and cannot say when delay in diagnosis started or how long it lasted, (3) cannot cite to any medical causation testimony indicating Ms. Fritz suffered a worse medical/physical outcome due to a purported

delay in diagnosis, and (4) points to no facts in support of his global, sweeping conclusion that every pre-existing psychological condition somehow became aggravated. In sum, Dr. Campbell does not approach or even attempt to explain how and why the diagnosis of hypothyroidism would be the proximate cause of the alleged psychological conditions.

Dr. Campbell made no attempt to say how or why there was “aggravation.” Instead, he merely declares that all conditions were aggravated. In *Schudel v. General Electric Co.* 35 Fed. Appx. 481, 484 (2002), the court rejected plaintiffs’ expert’s conclusion that “all physical problems” were due to exposure in a work place. Here, Dr. Campbell offers the same sweeping generalization that “all pre-existing psychological and neuro-psychological conditions” have been aggravated. This generalized, catch-all opinion is not based on any specific admissible facts, evidence, or analysis.

Accordingly, and pursuant to longstanding Washington law, generalized and conclusional affidavits offered by medical experts in medical negligence actions are not sufficient to create an issue of fact to preclude summary judgment. Dr. Campbell’s declaration is no different.

4. **Appellant Seeks to Introduce New Issues and Claims on Appeal**

In the Complaint and at summary judgment, Ms. Fritz claimed a delay or failure to work up and diagnose a thyroid tumor until it had grown in size such that surgical excision caused injury to vocal cords and other damages. Now, Ms. Fritz goes to great lengths to ignore the assertions the original Complaint because she never produced a medical expert to support the causation element of her “misdiagnosed” cancer claim.

While attempting to earn a continuance, Ms. Fritz represented to the trial court that Dr. Ryan would testify that earlier diagnosis of a smaller thyroid tumor would have resulted in a lower staged cancer and surgery would have avoided a laryngeal nerve injury. CP 65-69. The claim was one of delayed or misdiagnosis of thyroid cancer with resulting physical harm. On appeal, Ms. Fritz still has no medical causation testimony, so she has re-characterized her claims and lawsuit. Ms. Fritz now asserts that ongoing but undiagnosed hypothyroidism is the medical condition giving rise to the standard of care violation between 2007 and 2011. This novel assertion at this juncture of the case is both prejudicial to Christ Clinic and Ms. Riggs and highly unusual.

RAP 2.5 provides: “the appellate court may refuse to review any claim of error which was not raised in the trial court.” Generally, appellate courts will not entertain issues raised for the first time on appeal. *River House Development Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 272 P.3d 289 (2012); See also *Johnson v. Lake Cushman Maintenance Co.*, 5 Wn. App.2d 765 (2018) (“An argument that was neither pleaded nor argued to the superior court on summary judgment cannot be raised for the first time on appeal.”); *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52 (2014) (“An appellate court will not review an issue, theory, argument or claim of error not presented at the trial court level.”) The reason for the rule generally precluding an appellate court from entertaining issues for the first time on appeal is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. *Rapid Settlements, Ltd.’s Application for Approval of Transfer of Structured Settlement Payment Rights*, 166 Wn. App. 683, 271 P.3d 925 (2012).

Christ Clinic and Ms. Riggs assert that Ms. Fritz has restructured her claim for appellate review while ignoring the summary judgment record which was before the trial court. A

failure to diagnosis or treat “hypothyroidism” was not asserted in Ms. Fritz’s Complaint as a condition causing damage or injury.

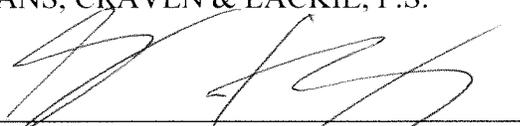
In sum, Ms. Fritz is changing her claims on appeal to avoid the proper dismissal at the trial court level. Christ Clinic and Ms. Riggs request that the Court 1) affirm the trial court’s summary judgment rulings and 2) disregard the new theories and arguments submitted by Ms. Fritz for the first time on appeal.

V. CONCLUSION

For the reasons set forth above, Christ Clinic and Ms. Riggs respectfully request the trial court’s summary judgment order in their favor be affirmed in all respects.

DATED this 19th day of July, 2019

EVANS, CRAVEN & LACKIE, P.S.

By 

ROBERT F. SESTERO, JR., #23274

SEAN M. KING, #52104

Attorneys for Respondents

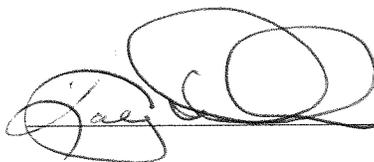
CERTIFICATE OF SERVICE

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 19th day of ~~June~~^{July}, 2019, the foregoing was delivered to the following persons in the manner indicated:

Dennis W. Clayton
Clayton Law Firm, PLLC
423 W. First Ave.
Suite 210
Spokane, WA 99201

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

7-19-19 /Spokane, WA
(Date/Place)



**RESPONDENTS' SUPPLEMENTAL
CLERK'S PAPERS (SCP)**

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8 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
9 IN AND FOR THE COUNTY OF SPOKANE

10 ALICE L. FRITZ,

11 Plaintiff,

12 vs.

13 CHRIST CLINIC/CHRIST KITCHEN, a
14 Washington non-profit corporation,
15 DANIELLE RIGGS, ARNP, an individual,

16 Defendants.
17

No. 16-2-00440-1

COA No. 364208

DEFENDANTS' DESIGNATION
OF CLERK'S PAPERS

CLERK'S ACTION REQUIRED

18 TO THE CLERK OF THE COURT:

19 This designation serves to supplement the Plaintiff's Designation of Clerk's Papers filed
20 in November 2018. The following documents did not appear in the Plaintiff's Designation
21 although they were considered by the trial court during summary judgment proceedings.

22 Please prepare the following documents as indicated as Defendants'/Respondents'
23 clerk's papers for transmittal to the COURT OF APPEALS DIVISION III, COA NO. 364208.

<u>Docket:</u>	<u>Filed:</u>	<u>Title:</u>
41	01/04/2017	Defendants' Christ Clinic/Danielle Riggs Motion for
Summary Judgment		
44	01/04/2017	Note for Motion Docket; 2-10-17 at 10:30 a.m.

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29 DEFENDANT'S DESIGNATION OF CLERK'S PAPERS
30 page 1

Evans, Craven & Luckie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200; fax (509) 455-3632

1 47 01/31/2017 CR 56(f) Motion to Continue

2 51 02/10/2017 Notice of Hearing Amended; 3-31-17 at 11:30 a.m.

3
4 Send a copy of each index to each of the parties and prepare a coversheet, a copy of
5 which is to be sent to each party pursuant to RAP 9.6 and 9.7.

6
7 DATED this ____ day of June, 2019.

8 EVANS, CRAVEN & LACKIE, P.S.

9
10 _____
11 ROBERT F. SESTERO, #23274

12 SEAN M. KING, #52104

13 Attorneys for Defendants Christ Clinic & Riggs
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29 DEFENDANT'S DESIGNATION OF CLERK'S PAPERS
30 page 2

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CERTIFICATE OF SERVICE

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Dennis W. Clayton
Clayton Law Firm, PLLC
423 W. First Ave.
Suite 210
Spokane, WA 99201

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/Spokane, WA

(Date/Place)

DEFENDANT'S DESIGNATION OF CLERK'S PAPERS
page 3

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Spokane, WA 99201-0910
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SCP 313-314

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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
8 IN AND FOR THE COUNTY OF SPOKANE
9

10 ALICE L. FRITZ, an individual,

11 Plaintiff,

12 vs.

13
14 ROCKWOOD CLINIC, P.S., a Washington
15 Corporation, CHRIST CLINIC/CHRIST
16 KITCHEN, a Washington Corporation,
17 DANIELLE RIGGS, ARNP, an individual

18 Defendants.

No. 16200440-1

DEFENDANTS CHRIST CLINIC
AND DANIELLE RIGGS, ARNP'S
MOTION FOR SUMMARY
JUDGMENT

19 Defendants Christ Clinic and Danielle Riggs ARNP move the court for an order
20 dismissing plaintiff's claims and causes of action with prejudice under CR 56. First,
21 defendants assert that plaintiff's claims for liability based on a "fiduciary duty" and on
22 purported "informed consent" claim are not recognizable under the law and should be
23 dismissed as a matter of law.

24 Second, defendants assert that plaintiff does not have the required, competent expert
25 witness evidence on the applicable standard of care, its breach and a proximate cause
26 relationship between an alleged breach and some new or aggravated injury or damages to
27 survive summary judgment. In particular, the standard of care was met. Mrs. Fritz had
28 thyroid cancer which was always going to need surgical excision with attendant issues relating
29 to surgery, recovery and adjuvant therapies. As a result, the timing of any purported delay in
30 diagnosis would not change the patient's outcome, so there is no proximate causation.

1 This motion is based on CR 56 and is supported by the defendants' memorandum of
2 authorities and the declaration of Robert Sestero with attached documentation.

3
4 DATED at Spokane, Washington this ____ day of January, 2017.

5 EVANS, CRAVEN & LACKIE, P.S.

6
7 By: _____
8 ROBERT F. SESTERO, JR., #23274
9 Attorneys for Defendants Christ Clinic & Riggs
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under
3 the laws of the State of Washington, that on the ____ day of January, 2017, the foregoing was
4 delivered to the following persons in the manner indicated:

5 Marcia M. Meade VIA REGULAR MAIL []
6 Dawson & Meade VIA CERTIFIED MAIL []
1310 W. Dean Avenue VIA FACSIMILE []
7 Spokane, WA 99201-2015 HAND DELIVERED []

8 William Maxey VIA REGULAR MAIL []
9 Maxey Law Office, P.S. VIA CERTIFIED MAIL []
10 1835 West Broadway VIA FACSIMILE []
11 Spokane, WA 99201 HAND DELIVERED []

12 James B. King VIA REGULAR MAIL []
13 Evans, Craven & Lackie, P.S. VIA CERTIFIED MAIL []
14 818 W. Riverside Ave. VIA FACSIMILE []
15 Suite 250 HAND DELIVERED []
16 Spokane, WA 99201

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20 _____/Spokane, WA _____
21 (Date/Place)

SCP 315

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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
8 IN AND FOR THE COUNTY OF SPOKANE

9
10 ALICE L. FRITZ, an individual,

11 Plaintiff,

12 vs.

13
14 ROCKWOOD CLINIC, P.S., a Washington
15 Corporation, CHRIST CLINIC/CHRIST
16 KITCHEN, a Washington Corporation,
17 DANIELLE RIGGS, ARNP, an individual

18 Defendants.

No. 16200440-1

NOTE FOR HEARING RE:

DEFENDANTS CHRIST CLINIC
AND DANIELLE RIGGS, ARNP'S
MOTION FOR SUMMARY
JUDGMENT

19 **TO THE CLERK AND TO:** Plaintiffs above-named; and

20 TO: Marcia Meade, Plaintiffs' Attorney

21
22 The undersigned has scheduled a MOTION FOR SUMMARY JUDGMENT, copies of
23 which are attached hereto. The hearing is scheduled for **February 10, 2017 at 10:30 a.m.**

24 **before THE HONORABLE RAYMOND F. CLARY** at the Spokane County Court House.

25 DATED at Spokane, Washington this ____ day of January, 2017.

26
27 EVANS, CRAVEN & LACKIE, P.S.

28
29 By: _____

ROBERT F. SESTERO, JR., #23274

Attorneys for Defendants Christ Clinic & Riggs

1 CERTIFICATE OF SERVICE

2 Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under
3 the laws of the State of Washington, that on the ____ day of January, 2017, the foregoing was
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15 Spokane, WA 99201

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21 (Date/Place)

SCP 316

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

ALICE L. FRITZ, an individual,

Plaintiff,

vs.

ROCKWOOD CLINIC, P.S., a Washington
Corporation, CHRIST CLINIC/CHRIST
KITCHEN, a Washington Corporation,
DANIELLE RIGGS, ARNP, an individual

Defendants.

No. 16200440-1

AMENDED NOTE FOR HEARING
RE:

DEFENDANTS CHRIST CLINIC
AND DANIELLE RIGGS, ARNP'S
MOTION FOR SUMMARY
JUDGMENT

TO THE CLERK AND TO: Plaintiffs above-named; and

TO: Marcia Meade, Plaintiffs' Attorney

The undersigned has scheduled a MOTION FOR SUMMARY JUDGMENT, copies of
which are attached hereto. The hearing is scheduled for **March 31, 2017 at 11:30 a.m.**
before THE HONORABLE RAYMOND F. CLARY at the Spokane County Court House.

DATED at Spokane, Washington this ____ day of February, 2017.

EVANS, CRAVEN & LACKIE, P.S.

By: _____
ROBERT F. SESTERO, JR., #23274
Attorneys for Defendants Christ Clinic & Riggs

Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200; fax (509) 455-3632

1 **CERTIFICATE OF SERVICE**

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20 _____/Spokane, WA

21 (Date/Place)

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30 *Evans, Craven & Lackie, P.S.*

818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200; fax (509) 455-3632