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Division I  
State of Washington

NO. 74127-6

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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Kerry J. Taylor

Appellant,

v.

Alan P. Nohr, et al.,

Respondents.

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BRIEF OF RESPONDENTS

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## I. SUMMARY OF RESPONSE

Kerry Taylor sued Dr. Alan Nohr, claiming that he provided negligent dental care, causing injury to her teeth. Ms. Taylor identified Dr. Kim Larson as her expert witness. At his deposition, Dr. Larson testified that he could not say that any act or omission by Dr. Nohr caused injury to Ms. Taylor. Dr. Nohr moved for summary judgment, arguing that because Dr. Larson's deposition testimony did not present a genuine issue of material fact as to proximate cause, Ms. Taylor had failed to state a *prima facie* case of medical negligence.

Dr. Larson then prepared a "corrected" deposition transcript by deleting certain statements and adding extensive new material, in direct contradiction to his original testimony. Dr. Larson did not provide any reason for his changed opinions. Ms. Taylor submitted Dr. Larson's revised deposition transcript, along with his declaration containing additional new opinions, in opposition to Dr. Nohr's summary judgment motion.

After considering all the evidence submitted by the parties, the trial court granted Dr. Nohr's summary judgment motion. Because Ms. Taylor failed to produce sufficient expert medical testimony, based on the facts of the case rather than speculation and conjecture, to support the essential

element of proximate cause, the trial court's order granting summary judgment dismissal should be affirmed.

## II. COUNTERSTATEMENT OF ISSUES PRESENTED

(1) Did the trial court properly consider all evidence submitted by the parties for the purposes of summary judgment?

(2) Did the trial court properly determine that Dr. Larson's contradictory testimony did not create a genuine issue of material fact?

(3) Did the trial court properly grant Dr. Nohr's motion for summary judgment because Ms. Taylor failed to present sufficient expert medical testimony to raise a genuine issue of material fact as to whether any negligence by Dr. Nohr proximately caused injury to Ms. Taylor?

## III. COUNTERSTATEMENT OF THE CASE

### A. Factual Background.

#### 1. Ms. Taylor's initial dental appointment.

Ms. Taylor initially sought dental treatment from Dr. Nohr in November 2007. CP 53, 365. She brought x-rays that she had obtained from another dentist and requested treatment for two teeth with temporary crowns, a severely decayed tooth, and a tooth with a damaged restorative onlay. CP 53, 365-66. Over the next months, Dr. Nohr extracted the decayed tooth and provided certain restorations on other teeth. CP 53-54.

As Ms. Taylor experienced additional problems, she only agreed to limited treatment on certain teeth. CP 54-56.

2. Dr. Nohr provides limited treatment.

Between November 2007 and June 2011, Dr. Nohr recommended various treatment options to address Ms. Taylor's concerns. CP 53-58. Ms. Taylor chose to address only certain teeth at particular times and often refused to follow Dr. Nohr's advice. *Id.* Ultimately, as for prosthodontic care, Dr. Nohr provided restorations on four teeth and placed a single bridge. *Id.*

B. Procedural Background.

1. Ms. Taylor's medical negligence claim.

On February 13, 2014, Ms. Taylor filed a complaint for dental malpractice against Dr. Nohr.<sup>1</sup> CP 1-9. She alleged that Dr. Nohr negligently diagnosed her condition, negligently designed and placed substandard restorations, and failed to inform her of the risks of the treatment provided. CP 4. Ms. Taylor alleged that Dr. Nohr's negligence caused her pain and suffering, injury to her teeth, gums, and supporting structures, additional dental expenses, and lost income. CP 4.

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<sup>1</sup> Although Ms. Taylor's complaint also asserted claims against Dr. Warren Libman and Ellie McCormick, she later stipulated to their dismissal, leaving only claims against Dr. Nohr, Jane Doe Nohr, their marital community, and Dr. Nohr's professional corporation. CP 2-3.

2. Deposition of Ms. Taylor's expert, Dr. Kim Larson.

At his July 31, 2015 deposition, Dr. Kim Larson, Ms. Taylor's expert, testified that he could not identify any injury to Ms. Taylor proximately caused by any violation of the applicable standard of care by Dr. Nohr. CP 50, 67-71.

3. Dr. Nohr's motion for summary judgment.

On August 7, 2015, Dr. Nohr filed a motion for summary judgment, arguing that Ms. Taylor lacked competent medical expert testimony to establish a *prima facie* medical negligence claim. CP 22. Because "Dr. Larson specifically testified multiple times during his deposition that nothing Dr. Nohr did or did not do caused any injury to" Ms. Taylor, Dr. Nohr argued that Dr. Larson's testimony could not raise a genuine issue of material fact on the essential element of proximate cause. CP 31.

4. Ms. Taylor opposes summary judgment with Dr. Larson's declaration and "corrected" deposition testimony.

On September 8, 2015, Ms. Taylor filed a response to Dr. Nohr's summary judgment motion, including a declaration from Dr. Larson, as well as extensive "corrections" to his deposition testimony. CP 77, 78, 86. In his declaration, which is also dated September 8, 2015, Dr. Larson opined that Dr. Nohr violated the standard of care for dentists by failing to clearly document his diagnoses in writing in his chart. CP 87. According

to Dr. Larson, Dr. Nohr's records contained "findings" for various teeth, "but no diagnosis," such that "all the work done cannot be justified as reasonably probably required." *Id.* He opined that "at the very least, Ms. Taylor has been damaged by suffering through unnecessary unjustified treatment which caused her harm and pain." *Id.*

Dr. Larson also indicated that he had provided "corrections" to his deposition transcript to the court reporter and identified pages attached to his declaration as excerpts of his "corrected deposition." CP 87, 88-106.

5. Dr. Nohr asks the trial court to strike Dr. Larson's declaration and revised deposition, or, in the alternative, to rule that Dr. Larson's new opinions are insufficient to defeat summary judgment.

In reply, Dr. Nohr argued that Dr. Larson's "voluminous and substantive revisions to his deposition testimony," as well as his "sham declaration," "completely contradict[ed] his prior testimony." CP 108. Because Dr. Larson violated CR 30(e) by failing to provide a reason for his changes, and because he deprived defense counsel of the opportunity to question him about his new opinions, Dr. Nohr contended that the trial court should not consider the revised deposition transcript. CP 107-09.

In the alternative, Dr. Nohr argued that Dr. Larson's changed testimony was "insufficient to defeat summary judgment," because he did not "explain factually and mechanically what specific treatment by Dr.

Nohr proximately caused injury to Ms. Taylor, or what specific injury was allegedly incurred by Ms. Taylor.” CP at 111.

In support of his reply, Dr. Nohr prepared a chart comparing each correction with the original deposition answer and provided a complete copy of Dr. Larson’s original deposition transcript and a copy with the corrections incorporated. CP 115, 124, 240. The copy with corrections includes a correction and signature page bearing Dr. Larson’s signature, dated August 23, 2015, and stating:

Please see the corrected deposition pdf file. My corrections are in red. I used Adobe Acrobat Pro DC to correct the document. There was not enough room on this correction and signature page to correct the document.

CP 240.

6. Ms. Taylor files portions of Dr. Nohr’s deposition.

On the day of the hearing on the motion for summary judgment, Ms. Taylor filed portions of Dr. Nohr’s deposition, arguing that he admitted to violating the standard of care requiring dentists to “make a diagnosis and put that diagnosis in the chart before rendering care.” CP 339, 355, 360-67. Thus, Ms. Taylor argued, by failing to write a diagnosis in the chart before extracting one tooth and preparing a crown for another tooth, Dr. Nohr “at the very least ... pulled a tooth he should not have and ground down another.” CP 355.

7. The trial court grants summary judgment dismissal.

At the hearing on his summary judgment motion, Dr. Nohr argued that Dr. Larson's contradictory testimony, offered without explanation or justification, could not create a genuine issue of material fact. RP 5-9. Dr. Nohr also argued that even Dr. Larson's new opinions were too general and conclusory to establish proximate cause. RP 5-6, 10.

In response, Ms. Taylor argued that Dr. Larson's declaration and deposition testimony and Dr. Nohr's deposition testimony established that "the standard of care requires a dentist to have a diagnosis, put [the] diagnosis in the chart." RP at 14. She contended that Dr. Nohr breached the standard by "at least yanking one tooth without any diagnosis whatsoever ... [and] ... grinding down and recapping another tooth, again with no diagnosis in the record." RP 14-15.

While admitting in his rebuttal argument that the question of charting errors may be relevant to an expert's standard of care opinions, Dr. Nohr emphasized the lack of expert medical testimony establishing a *prima facie* case with respect to proximate cause. RP 18-19.

After discussing the authority cited by the parties regarding changed depositions, the trial court stated:

I think looking at Larson's answers to the deposition, comparing them to the so-called corrections, particularly in light of the failure to comply with the requirement

that the changes be explained by a statement of reasons, and also looking at Nohr's deposition, I conclude that no reasonable jury could possibly find that the plaintiff has proved causation by Nohr; and therefore, I'm going to grant summary judgment.

RP at 23.

The trial court's order granting summary judgment lists all materials submitted by both parties, including Dr. Larson's declaration, deposition, and revised deposition, as well as Dr. Nohr's deposition. CP 369-71.

8. Ms. Taylor's motion for reconsideration.

Ms. Taylor filed a motion for reconsideration, arguing that although CR 30(e) requires a witness to give a reason for making "changes in form or substance" to a deposition, the law does not "require that the reason make sense." CP 374-75. Ms. Taylor also argued that summary judgment dismissal was improper because Dr. Nohr admitted at his deposition that he failed to warn her of "actions or in actions [sic] by the plaintiff that could result in harm to plaintiff." CP 375. The trial court denied the motion. CP 386-87. Ms. Taylor appeals.<sup>2</sup> CP 388.

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<sup>2</sup> Although Ms. Taylor sought review of the order denying reconsideration in her notice of appeal, she did not assign error or include any argument in her brief addressing the trial court's denial of her motion for reconsideration. CP 388.

#### IV. STANDARD OF REVIEW

Summary judgment is proper when the pleadings, depositions, and admissions in the record, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The purpose of a summary judgment motion is to avoid an unnecessary trial where no genuine issue as to a material fact exists. *Young*, 112 Wn.2d at 226. “An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party.” *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).

Summary judgment is proper in a medical malpractice case if the plaintiff lacks competent medical evidence to establish a *prima facie* case. *Young*, 112 Wn.2d at 226. “Expert medical testimony is generally required to establish the standard of care and to prove causation in a medical negligence action.” *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 492, 183 P.3d 283 (2008). Appellate courts review an order granting summary judgment de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party. *Keck*, 184 Wn.2d at 370.

## V. ARGUMENT

### A. The trial court properly considered all evidence submitted by the parties.

Ms. Taylor first contends that the trial court erred by refusing to consider Dr. Larson's declaration and his revisions to his deposition testimony. *App. Br.* at 8-10. However, the record does not support her claim.

The trial court did not grant Dr. Nohr's request to strike Dr. Larson's declaration and revised deposition testimony. RP at 23; CP 369-71. To the contrary, the summary judgment order clearly states that the trial court considered Dr. Larson's original deposition, his revised deposition, and declaration, as well as all the other evidence and argument submitted by the parties. RP 369-71. The trial court's oral ruling also demonstrates that the court considered all the evidence. RP 21-23. Rather than ruling on the admissibility of Dr. Larson's testimony, the trial court considered all the evidence before determining that Ms. Taylor failed to produce *sufficient* evidence "for a reasonable jury to return a verdict for the nonmoving party." *Keck*, 184 Wn.2d at 370; RP at 23; *see also*, *Schonauer v. DCR Entertainment*, 79 Wn. App. 808, 817-18, 905 P.2d 392 (1995) ("To say evidence is admissible is to say it may be considered. To say evidence is sufficient is to say, after considering it, that it is capable of raising an issue of fact for the jury."). Because the record reveals that the

trial court considered all the evidence and argument presented by both parties, Ms. Taylor fails to establish that the trial court erroneously refused to consider Dr. Larson's declaration or revised deposition.

B. The trial court correctly determined that Dr. Larson's declaration and revised deposition did not create a genuine issue of material fact.

"A summary judgment motion will not be denied on the basis of an unreasonable inference." *Marshall v. AC&S Inc.*, 56 Wn. App. 181, 184, 782 P.2d 1107 (1989). A self-serving declaration that contradicts prior unambiguous deposition testimony does not allow a *reasonable* inference as to the existence of a genuine issue of material fact. *Id.*

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.

*Id.* at 185 (quoting *Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11<sup>th</sup> Cir. 1984)). The *Marshall* rule applies to the "traditional scenario" "in which a party – in an effort to create a genuine issue of material fact – introduces a self-serving affidavit that directly contradicts that party's own unambiguous sworn testimony." *Taylor v. Bell*, 185 Wn. App. 270, 294, 340 P.3d 951 (2014), *review denied*, 183 Wn.2d 1012, 352 P.3d 188 (2015).

In *Marshall*, a group of asbestos manufacturers moved for summary judgment dismissal of Marshall's personal injury claim, under the statute of limitations, based on the following evidence: (1) Marshall's unequivocal deposition testimony that he learned of his asbestosis during his first visit to Harborview; (2) his admission that the first visit was in 1982 or 1983; (3) Harborview records of his first visit in July 1982; and (4) a workers' compensation form in which he listed "7-12-82" as the date he first learned of his disease. *Id.* at 183-85. In response to the summary judgment motion, Marshall filed an affidavit claiming he was first told he had an asbestos related disease in 1985. *Id.* at 183. In his appeal of the summary judgment order of dismissal, this Court held that it was "not reasonable" to "infer from his affidavit that there is a genuine issue of material fact concerning when he learned of his illness and its cause." *Id.* at 184. Because the "self-serving" "contradictory affidavit" did not raise a genuine issue of material fact, "the trial court did not err in granting summary judgment." *Id.* at 185. *Cf., Taylor*, 185 Wn. App. at 293-95 (where the party's testimony was "neither unambiguous nor in direct contradiction to itself" and the party "provided a reasonable explanation for the potential inconsistencies," the *Marshall* rule did not apply).

Similarly, in *Marthaller v. King County Hosp., Dist. 2*, 94 Wn. App. 911, 918, 973 P.2d 1098 (1999), the plaintiff's expert first testified at

his deposition that he would not offer opinions on (1) the standard of care applicable to paramedics, or (2) whether the paramedics met that standard while performing an intubation. In opposition to a summary judgment motion, the plaintiff submitted the same expert's affidavit stating that he was familiar with the applicable standard of care and that he was of the opinion that the intubation procedure failed to meet that standard. *Id.* at 918-19. This Court held that the affidavit failed to create a genuine issue of fact because it "effectively contradicts his deposition testimony regarding the applicable standard of care and whether the paramedics in this case breached that standard." *Id.* at 919; *see also, Klontz v. Puget Sound Power & Light*, 90 Wn. App. 186, 191-92, 951 P.2d 280 (1998) (after plaintiff testified at deposition that he had not read the policy guide before his termination, his affidavit stating that he relied upon the policy guide contradicted his previous, unambiguous deposition testimony and could not raise genuine issue of material fact to prevent summary judgment).

Here, the trial court properly applied the *Marshall* rule. Dr. Larson's declaration and revised deposition transcript directly contradict his original deposition testimony and he failed to provide any reasonable explanation for the differences. At his deposition, Dr. Larson testified repeatedly and unambiguously that he could not say that any negligence

on the part of Dr. Nohr caused any injury to Ms. Taylor. CP 120-22, 188-89, 192-93, 215, 219. In his declaration, however, Dr. Larson opined for the first time that Dr. Nohr's failure to write his diagnoses in the chart injured Ms. Taylor by making her suffer "through unnecessary unjustified treatment which caused her harm and pain." CP 87. And, in his "revised" deposition transcript, Dr. Larson changed "No" to "Yes," deleted "I can't say," and added completely new statements indicating that Dr. Nohr "damaged all the teeth he worked on" by providing treatment without a diagnosis written in the chart. CP 120-22, 305-06, 309-10, 332. Even Ms. Taylor admits that Dr. Larson's changes were "voluminous," "substantive," and "in some cases a complete change of his prior position," such that Dr. Larson "may have contradicted himself." *App. Br.* at 6-7, 12.

Because Dr. Larson's declaration and revised deposition transcript ignore or delete unambiguous answers and present new information and different opinions rather than merely explaining his previous testimony, they represent "a change in testimony" in "flat contradiction" to his deposition. *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 112, 992 P.2d 511 (1999) (declaration flatly contradicted previous deposition by presenting new information and a different recollection of events

representing a change in testimony rather than mere explanation of prior testimony).

As in *Marshall*, Ms. Taylor's production of Dr. Larson's contradictory testimony in response to Dr. Nohr's motion for summary judgment was nothing more than a self-serving attempt to create a genuine issue of material fact. *Marshall*, 56 Wn. App. at 185. Dr. Larson's revisions to his deposition testimony and his declaration indicate that he signed both documents well after Dr. Nohr filed his summary judgment motion. CP 22, 87, 240. Dr. Larson did not acknowledge or offer any explanation for the contradictions between his deposition testimony and his declaration and revisions to the deposition transcript. CP 86-87, 240.

Ms. Taylor suggests that Dr. Nohr's deposition "supported the changes made by" Dr. Larson because Dr. Nohr admitted that he violated the standard of care as to charting by failing to note his diagnosis in the chart before extracting a tooth. *App. Br.* at 7, 12-13. However, the fact that Dr. Nohr made admissions regarding the charting standard of care at his September 14, 2015, deposition in no way explains why Dr. Larson completely changed his opinion regarding proximate cause between July 15, when he was deposed, and August 23, when he revised his deposition transcript, or September 8, when he signed his declaration. CP 67, 87, 240. Again, given his lack of explanation, the timing indicates that the

drastic change in Dr. Larson's opinions resulted solely from Ms. Taylor's self-serving attempt to prevent summary judgment. *Marshall*, 56 Wn. App. at 185.

Without citation to relevant authority, Ms. Taylor also contends that the *Marshall* rule does not apply to Dr. Larson's revisions to his deposition transcript because the revised deposition is not a declaration and because he completed his changes within the 30-day time frame provided by CR 30(e).<sup>3</sup> According to CR 30(e), "any changes in form or substance" to a deposition transcript that a "witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them." Ms. Taylor does not contend that Dr. Larson properly submitted his desired changes and reasons for making them to the court reporter for "the officer" to enter into the deposition. No authority suggests that partial compliance with CR 30(e) prevents the application of the *Marshall* rule in the circumstances here.<sup>4</sup> This Court should reject Ms. Taylor's invitation to elevate form over substance.

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<sup>3</sup> CR 30(e) provides that a deposition must be signed by the witness "within 30 days of its submission to the witness."

<sup>4</sup> Instead, some authority indicates that a witness's failure to comply with CR 30(e) impacts the admissibility of the witness's corrections or reasons for refusing to provide a signature. *See e.g., Young v. Group Health Coop.*, 85 Wn.2d 332, 334-38, 534 P.2d 1349 (1975) (where expert failed to state a reason for additions to deposition transcript, corrections could not be considered in determination of whether deposition testimony of speaking agent could be properly admitted as admission against interest by hospital);

In sum, after Dr. Larson unambiguously and repeatedly testified at his deposition that no action or omission by Dr. Nohr caused injury to Ms. Taylor, his contradictory declaration and revised deposition transcript, offered without any reasonable explanation for the contradictions, did not create a genuine issue of material fact as to proximate cause. *Marshall*, 56 Wn. App. at 185; *Marthaller*, 94 Wn. App. at 919. Under these circumstances, the trial court properly determined that it would be unreasonable to infer from Dr. Larson's testimony that any negligence by Dr. Nohr proximately caused any subsequent injury to Ms. Taylor. *Id.*

C. The trial court properly granted summary judgment dismissal because Ms. Taylor failed to present sufficient expert testimony to establish proximate cause.

Even if Dr. Larson had not provided contradictory testimony, Ms. Taylor still failed to present sufficient expert medical testimony to raise a genuine issue of material fact as to proximate cause. Essentially, Dr. Larson opined that (1) Dr. Nohr breached the standard of care by failing to write a complete diagnosis in his chart before providing treatment, and (2) any dental work performed without first writing a diagnosis in a chart is unnecessary and unjustified and causes damage to teeth. CP 87, 305-06,

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*Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 588-89, 915 P.2d 581 (1996) (where witness submitted declaration regarding reasons for not signing deposition over 30 days after deposition, trial court did not abuse discretion by ruling declaration was inadmissible hearsay). But, as discussed above, the relevant inquiry under *Marshall* is not the admissibility of particular evidence, but its sufficiency to raise a genuine issue of material fact.

309-10, 332. Importantly, Dr. Larson did not opine that any diagnosis that Dr. Nohr actually made or any *treatment* Dr. Nohr actually provided – an extraction of a severely decayed tooth, restorations, and placement of a bridge – failed to meet the applicable standard of care in any way or caused injury to Ms. Taylor. Because Ms. Taylor failed to offer any expert testimony suggesting that Dr. Nohr negligently performed dental treatment that proximately caused her injury, summary judgment was proper.

“The ‘facts’ required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. Likewise, conclusory statements of fact will not suffice.” *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) (citation omitted). Expert medical testimony must be sufficiently definite, based on the facts of the case and a reasonable degree of medical certainty, to establish that an act or omission “probably” or “more likely than not” caused the subsequent injury. *Davies*, 144 Wn. App. at 494, 496. Evidence establishing proximate cause must rise above speculation, conjecture, or mere possibility. *Reese v. Stroh*, 128 Wn.2d 300, 309, 907 P.2d 282 (1995). “Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment.” *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 25,

851 P.2d 689 (1993); *accord Keck*, 184 Wn.2d at 373 (“expert in *Guile* failed to link his conclusions to any factual basis, including his review of the medical records”).

Dr. Larson’s testimony is insufficient because he failed to causally connect any allegedly negligent act or omission by Dr. Nohr to any injury suffered by Ms. Taylor. As to negligence, Dr. Larson opined only that Dr. Nohr violated the standard of care by failing to include his diagnosis for each procedure in writing in his chart. CP 87, 305-06. Although Dr. Nohr agreed at his deposition that his chart did not include a complete written diagnosis for work he performed on two specific teeth, Dr. Nohr further testified that he did have a diagnosis, which was based on his examination and radiographic findings. CP 366-67. Dr. Nohr testified that his treatment decisions were also based on Ms. Taylor’s expressed concerns, as well as impressions he “sent to the lab to perform a diagnostic wax-up, which sets the road map as to how to restore” particular teeth. CP 365-66. Dr. Larson did not criticize the method Dr. Nohr used for diagnosing the condition of Ms. Taylor’s teeth and did not offer any opinion suggesting that he would have made a different diagnosis as to any particular tooth.

As to proximate cause, Dr. Larson opined only generally that Dr. Nohr caused “damage” or injury to all the teeth he treated “without a reason clearly written in the chart.” CP 305-06, 309-10, 332. According

to Dr. Larson, any work performed without a written diagnosis in the chart “cannot be justified as reasonably probably required.” CP 87. Such “[b]road generalizations and vague conclusions are insufficient to resist a motion for summary judgment.” *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993).

Dr. Larson never acknowledged the obvious difference between keeping accurate records and properly performing dental treatment or explained how any charting omission by Dr. Nohr proximately caused injury to Ms. Taylor. The lack of a diagnosis written in the chart does not logically prove that Dr. Nohr did not make a diagnosis or that Dr. Nohr failed to properly perform a particular extraction or restoration. Thus, Dr. Larson failed to link the alleged breach of the standard of care (regarding dental charting for two teeth) to any injury Ms. Taylor suffered from the treatment Dr. Nohr actually provided for those teeth.

Moreover, Dr. Nohr testified that the tooth he extracted “presented with extensive decay, having eaten through the entire coronal aspect of the tooth making the tooth nonrestorable.” CP 366. Dr. Nohr testified that he based his diagnosis on “[v]isual and radiographic findings.” *Id.* Dr. Larson did not opine that the severely decayed tooth should not have been extracted or that Dr. Nohr caused injury to Ms. Taylor by extracting it. Similarly, Dr. Nohr provided restorative treatment to the other tooth at

issue based on his observation and x-rays indicating that “a gold onlay had come off” the tooth. CP 367. Dr. Larson did not opine that the tooth did not need treatment or that Dr. Nohr’s restoration of the tooth caused any injury to Ms. Taylor. Dr. Larson did not offer any factual basis, based on the medical records or any other evidence, to support a conclusion that (1) Dr. Nohr had no reason to provide treatment for those two teeth, or (2) Ms. Taylor suffered injury to those two teeth, based solely on Dr. Nohr’s alleged failure to write his complete diagnoses in the chart before providing dental treatment.

Because Dr. Larson’s conclusory opinions lack factual support and fail to connect any alleged negligence in Dr. Nohr’s performance of dental work to any subsequent injury to Ms. Taylor, they are insufficient to establish the causation element of Ms. Taylor’s claim. *Davies*, 144 Wn.2d at 496. Accordingly, the trial court properly granted Dr. Nohr’s motion for summary judgment. *Guile*, 70 Wn. App. at 25.

## VI. CONCLUSION

For the foregoing reasons this Court should affirm the trial court’s order granting summary judgment dismissal to Dr. Nohr.

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RESPECTFULLY SUBMITTED this 29 day of July, 2016.

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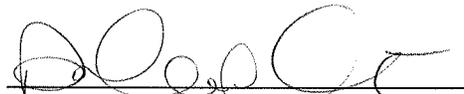
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the date indicated below, I caused a true and correct copy of the foregoing *Brief of Respondent* to be delivered in the manner indicated below to the following counsel of record:

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DATED this 29 day of July, 2016, at Seattle, Washington.

  
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Danielle C. Nouné, Legal Assistant