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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STEPHEN NOEL, Individually and as the Personal Representative of the Estate of NATHANIEL NOEL

Petitioner

v.

FRANCISCAN HEALTH SYSTEM, IAN D. COWAN, M.D., et al,

Respondents

BRIEF OF RESPONDENTS FRANCISCAN HEALTH SYSTEM AND IAN D. COWAN M.D.

Timothy L. Ashcraft, WSBA #26196
Michelle M. Garzon, WSBA #31558
WILLIAMS, KASTNER & GIBBS PLLC
Attorneys for Respondent Franciscan Health System and Appellate Attorneys for Franciscan Health System and Ian D. Cowan, M.D.
1301 A Street, Suite 900
Tacoma, WA 98402
(253) 593-5620

Christopher H. Anderson, WSBA #19811
Karen R. Griffith, WSBA #42681
FAIN ANDERSON VANDERHOEF PLLC
Attorneys for Ian D. Cowan, M.D.
701 Fifth Avenue, Suite 4650
Seattle, WA 98104
(206) 749-0094

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I. INTRODUCTION

This is a negligence case related to the death of an infant, Nathaniel Noel. Plaintiffs, the Estate of Nathaniel Noel (the "Estate") and Stephen Noel, Nathaniel's father, sued the Department of Social and Health Services ("DSHS") as well as physician Ian Cowan, M.D., and Franciscan Health System (FHS). DSHS settled and is a not a party to this appeal. Plaintiffs did not sue Domenique A. Conway, the mother of Nathaniel, who pled guilty to second-degree murder in the death of Nathaniel and is currently in prison.

The lawsuit against Cowan and FHS involves allegations of medical negligence and failure to report child abuse, based on a visit to the Emergency Room ("ER") on March 7, 2008. During that visit ER physician Cowan evaluated Nathaniel, who presented to the ER with a small area of swelling and bruising above the left eye. Dr. Cowan evaluated the child, and expressly charted that he did not believe this condition was the result of abuse. Nathaniel was discharged to the care of his mother. According to the medical examiner, subsequent to this ER visit, Ms. Conway struck Nathaniel with a closed fist causing his death.

Defendants Cowan and FHS brought a motion for partial summary judgment seeking, among other things, to dismiss two statutory claims brought by Stephen Noel under RCW 4.24.010 (wrongful death) and

RCW 26.44.030 (failure to report suspected child abuse). The trial court granted that motion. Prior to trial, defendants sought to limit the testimony of plaintiff's expert Dr. Kenneth Coleman, arguing that Dr. Coleman's causation testimony was inadmissible because it was based on impermissible hearsay and would cause the jury to speculate. The trial court granted that motion in part, and plaintiff's counsel then conceded that based on those rulings, he could not prevail. A directed verdict was entered on behalf of the defendants. This appeal followed in which plaintiff appealed only three issues: 1) the dismissal of the father's claim under RCW 4.24.010; 2) the dismissal of the father's claim under RCW 26.44.030; and 3) the exclusion of Dr. Coleman's causation testimony.

The trial court's rulings were correct and not an abuse of discretion. Dr. Coleman sought to give opinions for which he was not qualified and which relied on impermissible hearsay. Without that testimony, plaintiff could not prevail. The trial court also correctly dismissed Stephen Noel's claims under RCW 4.24.010 and RCW 26.44.030 both for lack of causation and the inability to meet the mandates of each statute. The trial court's decisions should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in dismissing Stephen Noel's claim under RCW 4.24.010 on summary judgment when there is no admissible evidence of causation and no evidence of damages given that Stephen Noel did not have significant involvement with Nathaniel?

2. Did the trial court err in dismissing the claim based on RCW 26.44.030 on summary judgment when there are no statutory beneficiaries, Dr. Cowan had no subjective belief that any abuse had occurred and there is no admissible evidence of causation?

3. Did the trial court err in excluding the causation testimony of plaintiff's expert Dr. Coleman when it was based on inappropriate hearsay and was speculative?

III. COUNTERSTATEMENT OF THE CASE

A. Substantive Factual Background of the Case.

At the outset, it is important to note that plaintiff-appellant Stephen Noel presented a lengthy factual background of 26 pages. However, the vast majority of this factual background is irrelevant to this appeal. Most of plaintiff's factual background dealt with a time period and events not involving Dr. Cowan and FHS but rather addressed issues with DSHS with whom plaintiff settled. The timeframe related to Dr. Cowan and FHS is more narrow. In fact, there is only one visit, that of March 7, 2008, that

is at issue. As such, Cowan and FHS will not be addressing the irrelevant portions of the plaintiff's factual background.

On October 14, 2007, Nathaniel Noel and his twin brother, Stephen Noel, Jr., were born 13 weeks premature. CP 736. Nathaniel Noel returned home with his mother, Dominique Conway, and father, Stephen Noel. Stephen Noel, Jr. remained hospitalized until February 19, 2008, at which point he went directly into foster care, never to have returned to his natural parents.

A number of referrals to Child Protective Services ("CPS") were made beginning from the time of the twins' births. *See, e.g.*, CP 1086-90. As a result of the referrals, multiple social services were provided to the family including home public health nursing assistance, voluntary support services with home visits and multiple home visits by a therapist with the Institute for Family Development. Additionally, CPS initiated an investigation which included multiple home visits from the CPS investigator. In the months preceding Nathaniel's death, he was seen 17 times by various service providers, including two separate providers who saw him on March 6 (the day before the ER visit at issue here). None of these service providers found any signs of physical abuse and none found any signs that Nathaniel had suffered a skull fracture. The CPS investigation was completed as "unfounded."

On February 18, 2008, patient Nathaniel Noel was a four month old child who was brought to the St. Clare Hospital Emergency Department at 11:30 by his father. CP 98-100. According to the record, the chief complaint was a red area on his right eye. The child was evaluated by emergency physician, Dr. Daniel Stene. His evaluation of the child revealed two possible abnormalities: A minor area of diaper rash around his anus, and a small area of subconjunctival hemorrhage of the right eye. The child had none of the telltale signs of physical abuse. In fact, Dr. Stene did not believe this child needed any intervention at all and did not need to be seen in the Emergency Department. Nonetheless, Dr. Stene counseled the child's father on what a subconjunctival hemorrhage is, and that there is no necessary care. Dr. Stene did not call CPS or the police in this matter as he clearly did not suspect any physical abuse. Although this visit was originally the subject of a claim of negligence by plaintiff, all claims relating to this visit were dismissed and that visit is not at issue in this appeal.

On March 7, 2008, Nathaniel returned to the Emergency Department. That evening he was brought in by his mother with a swollen left eye lid. CP 1043-53. Of note, the nursing records specifically indicate that while the child was asleep at presentation, he awoke easily when touched, was awake with a normal Glascow coma scale score, and

was not fussy. CP 1047. In the Emergency Department the child was seen by Ian Cowan, M.D., a board certified Emergency Physician. Dr. Cowan evaluated the child at 2135, finding a very small area of swelling and bruising above the left eye only. *Id.* There was no swelling below the eye as though a hand had struck the child, nor were there any signs or symptoms that might lead one to suspect abuse. Dr. Cowan discussed the cause of the injury with the child's mother, who reported her belief that one of her other children had thrown a toy into the child's crib, striking him above the eye. CP 1094. Based on this examination, Dr. Cowan believed that this story matched the injury, and believed that the mother was appropriately concerned about the child. He specifically noted that Ms. Conway's "history is consistent w[ith] observed injury. Mom appropriate. I do <u>not</u> suspect NAT [non-accidental trauma]." (underlining in original). CP 1046.

In short, nothing Dr. Cowan saw led him to believe that the likely cause of injury was child abuse. CP 1095. Although Dr. Cowan had no way of knowing the family dynamic at the time of his exam, the CPS records support that Nathaniel's older brother, Dayshaun, was a threat to Nathaniel because he was observed trying to hit him in the head. Nathaniel's mother likely saw this on occasion, which likely led her to give the history that the injury was caused by a sibling. Mr. Noel also

confirmed that Dayshaun was just punished the week prior for throwing a toy into Nathaniel's crib. CP 110.

Dr. Cowan later discharged Nathaniel with instructions on caring for the eye contusion and to follow-up with his primary care physician the following Monday (the patient was seen on Friday evening). CP 1051. Two days later, on March 9, 2008, Ms. Conway contacted 911 to report that Nathaniel had stopped breathing. A rescue team arrived at the home within several minutes and Nathaniel was ultimately reported dead at the scene. CP 1055-60. After an investigation, Ms. Conway eventually admitted to having hit Nathaniel on the left side of his face two times with a closed fist, pled guilty to Murder in the Second Degree of her son Nathaniel and was sentenced to 23 years in prison. CP 85-96.

On March 10, 2008, the state removed Nathaniel's siblings from the home of Mr. Noel. On September 29, 2010, following voluntary relinquishment of his parental rights, the Court terminated the parent-child relationship between Mr. Noel and his children. CP 1039-41.

B. Relevant Procedural History.

1. Defendants' Motion for Partial Summary Judgment.

Defendants Cowan and FHS filed partial summary judgment motions in October 2012, seeking, among other things, to dismiss plaintiffs' claims under RCW 4.24.010 and 26.44.030. CP 1016-1035.

After carefully considering the extensive briefing and argument, the trial court granted defendants' motions for partial summary judgment on December 18, 2012. CP 1733-36. The trial court ruled:

(1) Plaintiff's claims damages resulting from medical negligence were limited to provable economic damages only under RCW 4.20.046 because there are no statutory beneficiaries as required by the wrongful death and survival statutes;

(2) Stephen Noel was not entitled to recovery for injury or death of a child under RCW 4.24.010 as there was no proximate cause with regard to Nathaniel's death; and

(3) Plaintiff's claims for violation of RCW 26.44.030 were dismissed because there were no statutory beneficiaries and because Dr. Cowan had no subjective suspicion of abuse.

2. Defendants' Motion to Limit the Testimony of Dr. Coleman.

Prior to trial, defendants brought a motion in limine to exclude the causation opinions of plaintiff's expert, Dr. Coleman, based on a lack of qualifications in pathology, speculative testimony regarding the actions of CPS and attempting to improperly repeat hearsay testimony. CP 2136-48. Dr. Kenneth Coleman is a family practice physician who also has a small emergency department practice in Eastern Washington. Dr. Coleman

sought to offer causation opinions relating to the pathology findings made by forensic and anatomical pathologist Dr. Eric Kiesel relating to the autopsy Dr. Kiesel performed on Nathaniel Noel. However, Dr. Coleman admitted that he did not possess the requisite knowledge relating to the pathology issues and therefore consulted with two pathologists, Dr. Carl Wigren and Dr. Jeff Reynolds in order to comment on these issues. During deposition, Dr. Coleman testified at deposition as follows:

> Q. What information did [pathologist] Dr. Wigren tell you about this case?
>
> A. We discussed -- I asked for confirmation and some medical literature to help confirm the time for macrophages and hemosiderin in the brain. That was actually the content in the March 2012 telephone call as well. The basic issue was I wanted to better firm up with literature my understanding about the causation issues here.
>
> Q. Okay. ***Because those causation issues were reliant upon pathology issues?***
>
> *A.* ***To a significant degree, yes.***
>
> *Q.* ***And the pathology issues, I take it, were beyond your area of expertise.***
>
> *A.* ***That's right . . .***

CP 2155 (emphasis added).

Additionally, Dr. Coleman was prepared to testify that if CPS and the police had gotten involved (allegedly because Dr. Cowan should have reported suspected abuse on March 7, 2008), then "the child [Nathaniel]

would have been kept, would have been hospitalized, would have been treated, and would have lived." CP 2170.

However, Dr. Coleman did not have any knowledge of the actions of CPS or law enforcement. When specifically questioned regarding Dr. Coleman's experience with those agencies, he testified that in his 39 years of practice, ***he has never had a situation where he felt there was a reasonable suspicion of child abuse and, therefore, has never contacted CPS or law enforcement.*** CP 2157 (emphasis added). He further testified:

> Q. Okay. If CPS is called by an emergency physician, how long do they have to complete -- initiate or complete their evaluation or investigation?
>
> A. That I don't know. ***I'm not a CPS expert.***
>
> Q. And during -- that's fine. During the course of that investigation, however long it does take, can the child be returned to the parents?
>
> A. That's a CPS decision.
>
> Q. So there will be times, will there not, where an investigation for potential child abuse is occurring and the child remains with his or her parent?
>
> A. I'm quite sure that is the case. Again, I'm not a CPS expert.
>
> Q. Okay. ***If the police are called*** by you at the emergency department, ***how long do the police have to initiate an investigation?***
>
> A. ***That I do not know.***

* * *

> Q. So let me go back. If the police are called to your emergency department because you called them out of concern, they then take over the investigation at that point?
>
> A. I don't know how it operates between CPS and the police.

CP 2158, 2161 (emphasis added).

Dr. Coleman's testimony showed that he lacked personal experience in working with CPS or law enforcement on cases involving suspected abuse, and was also unfamiliar with the process in general. He testified as follows:

> Q. If in this case Dr. Cowan or Nurse Johnson or anyone else had called CPS on the evening of March 7th, 2008 -- first of all, you don't know who they would have spoken to at CPS or DSHS.
>
> A. No.
>
> * * *
>
> Q. All right. And fair to say you don't know what information would have been provided from CPS/DSHS back to the reporting health care provider.
>
> A. That's correct.
>
> Q. Okay. And you can't tell us, can you, that that phone call necessarily would have resulted in removal of the child from his or her parent?
>
> A. What I can tell you is that, if the provider explained the high unlikelihood of a bruise on an immobile infant and that child abuse had to be strongly considered, then that puts the onus on CPS to make the decisions.

> Q. And as we sit here, you're not sure what that decision would ultimately be; fair?
>
> A. Well, I'm not a CPS expert.
>
> * * *
>
> Q. If the police are called, in any case, and actually come out, say, to the emergency department and evaluate the child, do they then take charge of what ultimately happens with that child?
>
> A. I do not know.

CP 2159-60. When pressed further on whether a report to CPS would have resulted in any different outcome, Dr. Coleman testified as follows:

> Q. . . . Ultimately, would the child have gone back to his parents?
>
> A. I have no way to know that, but obviously it would have been reported at that point to CPS by somebody and —
>
> Q. And that would have been someone's decision.
>
> A. Somebody else's decision in terms of where this child goes when he gets discharged from the hospital.
>
> * * *
>
> Q. And if the child had gone back to the parents, we don't know whether the child would have been abused more or killed at some later time; right?
>
> A. That's true.

CP 2171.

Next, Dr. Coleman wanted to testify regarding the timing of the fatal blow to Nathaniel by his mother. The source of his testimony was

the alleged unsworn confession of Ms. Conway and the pathology report. Yet, Dr. Coleman himself questioned Ms. Conway's credibility on this matter.

> Q. When do you believe the strike occurred that caused the skull fracture?
>
> A. ***I have no way of knowing with certainty. If the mother's history subsequently taken is to be believed, then it occurred on March 5th***. And I -
>
> Q. Do you believe it?
>
> A. I don't have any way to know or believe her credibility or not.

CP 2162-63 (emphasis added).

On the first day of trial, the court heard argument regarding the issue of Dr. Coleman's testimony. 3/24/14 RP 5-32. After considering the issues overnight, the next morning the court held that:

1) Dr. Coleman was not qualified to speak about pathology issues and could not base his opinions on his conversations with Drs. Wigren and Reynolds. 3/25/14 RP 3-4;
2) Dr. Coleman could not speak about what CPS and the police would or would not have done. 3/25/14 RP 4-5;
3) Dr. Coleman could not base his testimony on the confession of Ms. Conway as it is hearsay. 3/25/14 RP 6-7;

4) The trial court reserved on the issue of whether Dr. Coleman would be able to testify about additional tests he believed should have been done. 3/25/14 RP 5.

Following the trial court's rulings, there was discussion between the trial court and counsel regarding the impact of those rulings. 3/25/14 RP 11-21. During this discussion, plaintiff's counsel conceded that plaintiff could no longer prove his case. 3/25/14 RP 19-20. Based on that concession, the trial court granted the defense motion for a directed verdict. 3/25/14 RP 20-21. Thus, the case never proceeded beyond motions in limine.

IV. ARGUMENT

A. Summary of Argument.

The trial court correctly granted a directed verdict after plaintiff conceded that he could not prove his case. Despite the court's evidentiary rulings, the plaintiff had an obligation to either attempt to prove his case through other witnesses and evidence or present valid offers of proof on each essential element of his case. He did neither. As such, the directed verdict should be affirmed.

Additionally, the trial court did not abuse its discretion in limiting the testimony of Dr. Coleman. He is not a pathologist, and sought to give pathology testimony based on his conversations with two non-testifying

pathologists. Not only is this hearsay, but there is no record that this testimony satisfied the mandates of ER 703. His attempted testimony regarding what CPS or the police would have done in this case was speculation and was properly excluded. Finally, the trial court correctly prevented him from testifying about the timing of the fatal blow to Nathaniel based on hearsay statements of Ms. Conway. He was not giving an opinion, but trying to get into evidence factual information from Ms. Conway. This was hearsay which only could have come, if admissible at all, from Ms. Conway herself.

Finally, the trial court's dismissal of the claims under RCW 4.24.010 (wrongful death) and RCW 26.44.030 (failure to report suspected abuse) on summary judgment was appropriate. First, there was no admissible causation testimony to support either of these claims. Additionally, as to the claim under RCW 4.24.010, Mr. Noel could not show significant involvement in his son's life and therefore had no damages. Finally, there were no proper statutory beneficiaries for the RCW 24.44.030 claim and Dr. Cowan, after careful examination, had no subjective belief that any abuse had occurred, which means that there was nothing to report. RCW 26.44.030 now defines "reasonable cause" to suspect child abuse as requiring either witnessing the abuse or receiving a

credible report of abuse. Dr. Cowan neither witnessed abuse nor received any report of abuse, and therefore his actions were appropriate.

B. Standard of Review.

In reviewing a decision to grant a motion for directed verdict (judgment as a matter of law), the standard is the same as used by the trial court. *Stiley v. Block,* 130 Wn.2d 486, 504, 925 P.2d 194 (1996). "'Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the non-moving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.' *Sing v. John L. Scott, Inc.,* 134 Wn.2d 24, 29, 948 P.2d 816 (1997). 'Such a motion can be granted only when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the verdict can rest.' *State v. Hall,* 74 Wash.2d 726, 727, 446 P.2d 323 (1968). 'Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.' *Brown v. Superior Underwriters,* 30 Wn. App. 303, 306, 632 P.2d 887 (1980)." *Guijosa v. Wal-Mart Stores, Inc.,* 144 Wn.2d 907, 915, 32 P.3d 250 (2001).

The standard of review for summary judgments is de novo. *Jones v. Allstate Ins. Co.,* 146 Wn.2d 291, 300, 45 P.3d 1068 (2002) (citing *Lybbert v. Grant County,* 141 Wn.2d 29, 34, 1 P.3d 1124 (2000)). The

decision whether or not to admit expert testimony is within the discretion of the trial court and will not be disturbed absent a showing of an abuse of that discretion. *State v. Swan*, 114 Wn.2d 613, 655, 790 P.2d 610 (1990); see also, *Hendrickson v. King Cnty.*, 101 Wn. App. 258, 265, 2 P.3d 1006 (2000); *Allyn v. Boe,* 87 Wn. App. 722, 738, 943 P.2d 364 (1997), *review denied,* 134 Wn.2d 1020, 958 P.2d 315 (1998).

C. The Court did not err in Granting the Directed Verdict as Plaintiff did not put on a Case and Conceded That he Could not Prove his Case Without the Testimony of Dr. Coleman.

Following the motions in limine, and the exclusion of certain testimony of Dr. Coleman, plaintiff's counsel admitted that he could not prove his case. 3/25/14 RP 19-20. The trial court then granted the directed verdict. 3/25/14 RP 20-21. The trial did not go forward.

There was no evidence presented at trial by which a jury could find for the plaintiff. Plaintiff has the burden of proving his case and there is no record supporting that case. As such, the motion for directed verdict was proper, as "there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Sing v. John L. Scott, Inc.,* 134 Wn.2d 24, 29, 948 P.2d 816 (1997).

Plaintiff will argue that the trial court's exclusion of parts of Dr. Coleman's testimony made the trial a worthless exercise. We will never know. Evidence gets excluded from every case. Whether that means that

the plaintiff cannot prove his or her case is based on the evidence that is presented to the jury. Here, no evidence was presented.

It was plaintiff who decided not to go forward with the trial. Plaintiff's counsel stated that "I don't want to have him [Dr. Coleman] come all the way out here, and, you know, waste three or four days here if you're telling us that he can't testify to that [certain causation opinions] and that's an essential element of the proof in our case." 3/25/14 RP 13. The court responded that "all of my rulings impact both sides of the case, I think. But I don't think it's up to me to say what you should do next with this in terms of whether or not you now don't have a critical piece in your elements. That's up to you." 3/25/14 RP 13-14.

Plaintiff's counsel stated that "I think your rulings essentially have dismissed our case or given the case a slow death . . . ." 3/25/14 RP 16. The court responded that "I wasn't asked to make a ruling on dismissal, and I wasn't asked to look at the elements and the burden of proof." 3/25/14 RP 16-17. She further stated that she did not know what the witnesses would ultimately say. 3/25/14 RP 17.

Plaintiff's counsel admitted that he could not prove his case based on the court's rulings regarding Dr. Coleman, and based on that concession the court granted the directed verdict. 3/25/RP 20-21. Plaintiff's counsel indicated that the only reason he did not agree with the

directed verdict was because of the court's rulings on the motions in limine. 3/25/RP 21.

Though the plaintiff did not agree with the trial court's rulings, he still had an obligation to attempt to prove his case. He did not do so. There is no evidence that plaintiff satisfied ***any*** of the elements of his case. The rulings regarding Dr. Coleman went only to certain causal opinions, which, as the court noted, might have been able to be proved through other witnesses. 3/25/14 RP 17. In addition to causation, plaintiff did not prove duty, breach and harm, and these were not the basis of the motions in limine that resulted in the directed verdict. As such, this Court has no evidence by which plaintiff can prove each element of his case and the judgment as a matter of law should be affirmed.

D. The Trial Court did not err in its Decisions on Summary Judgment and in Limiting the Testimony of Dr. Coleman.

As noted above, notwithstanding the directed verdict, there are three issues to be reviewed: 1) the summary judgment dismissal of Stephen Noel's claim under RCW 4.24.010; 2) the summary judgment dismissal of Stephen Noel's claim under RCW 26.44.030; and 3) the exclusion of certain opinions of plaintiff's expert Dr. Coleman.

While Cowan/FHS believe the trial court correctly dismissed the two statutory claims, this brief will start with the causation opinions of Dr.

Coleman. Dr. Coleman was the only witness to provide causation testimony. Because this testimony was excluded, plaintiff had no ability to prove any of his claims, including the claims under RCW 4.24.010 and RCW 26.44.030. Thus, the lack of causation testimony mandates affirming the trial court as a whole, because even if the statutory claims had not been dismissed on summary judgment, the lack of causation testimony was fatal to those claims.

1. The Trial Court did not Abuse its Discretion in Excluding the Causation Testimony of Plaintiff's Expert Dr. Coleman.

As part of their motions in limine, the defendants sought to exclude the causation opinions of plaintiff's expert Dr. Coleman. CP 2136-48. As noted above, the motion had four bases. The first was Dr. Coleman's lack of pathology knowledge and his attempt to parrot the opinions of two non-testifying pathologists who were never identified as testifying witnesses. The second was Dr. Coleman's opinions as to what CPS or the police would have done had Dr. Cowan reported the alleged abuse, when Dr. Coleman had never reported a single abuse case in his career and had no knowledge as to what CPS would have done. The third issue addressed Dr. Coleman's opinion regarding the timing of the fatal blow to Nathaniel, that was based on the hearsay statements of Ms. Conway. The trial court

did not abuse its discretion in determining that these opinions were not admissible.

a. Plaintiff did not Properly Preserve this Argument and Therefore it has Been Waived.

While the trial court correctly excluded Dr. Coleman's causation opinions, plaintiff did not properly preserve this argument. Pursuant to ER 103(a)(2), when evidence is excluded, the party has an obligation to make an offer of proof demonstrating what evidence would have been presented if permitted. "An offer of proof, properly presented, serves three purposes. First, it should inform the court of the legal theory under which the offered evidence is admissible. Second, it should inform the trial judge of the specific nature of the offered evidence so the court can judge its admissibility. Third, it thereby creates a record adequate for appellate review. It is the desirable practice to have the offered evidence in the form of questions and answers from the witness rather than conclusionary statements by counsel." *Mad River Orchard, Inc. v. Krack Corp.,* 89 Wn.2d 535, 537, 573 P.2d 796, 797 (1978). The "offer of proof must be specific and the theory of admissibility disclosed." *Id.* If a party fails to make a proper offer of proof, "the appellate court will not make assumptions in favor of the rejected offer." *Id.* quoting *Tomlinson v. Bean*, 26 Wn.2d 354, 361, 173 P.2d 972 (1946).

Here, plaintiff failed to preserve this issue for appeal. At the trial court, plaintiff failed to set forth the specific testimony at issue for review and explain why that specific testimony is admissible. Indeed, after granting the motion to exclude and discussing how to proceed, the court noted: "I don't know what ultimately Dr Coleman is going to testify about. . . . I haven't been given the opportunity to take that close of a look at what exactly all the experts were going to say. For all I know, Dr. Kiesel might – you might be able to use Dr. Kiesel to prove—I don't know, frankly." 3/25/14 RP 17.

Ultimately, plaintiff did not make adequate offers of proof and this by itself supports affirming the trial court's decisions.

b. Even if Properly Preserved, the Trial Court did not Abuse its Discretion in Excluding Dr. Coleman's Causation Opinions Relating to the Pathology Findings.

The decision whether to admit expert testimony is within the sound discretion of the trial court. *State v. Swan*, 114 Wn. 2d 613, 655, 790 P.2d 610 (1990). The analysis begins with ER 702. *See Reese v. Stroh*, 128 Wn.2d 300, 306, 907 P.2d 282 (1995); *State v. Cauthron*, 120 Wn.2d 879, 880-90, 846 P.2d 502 (1993). Rule 702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

> knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. "Expert testimony is usually admitted under ER 702 if helpful to the jury's understanding of a matter outside the competence of an ordinary layperson." *Reese* at 308 (citations omitted). However, an expert attempting to offer opinions that a physician violated the standard of care and caused injury "must demonstrate that he or she has sufficient expertise in the relevant specialty." *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 228, 770 P.2d 182 (1989). Indeed, "the expert testimony of an otherwise qualified witness ***is not admissible*** if the issue at hand lies ***outside the witness' area of expertise***." *State v. Farr-Lenzini*, 93 Wn. App. 453, 461, 970 P.2d 313 (1999) (citing *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 102, 882 P.2d 703, 891 P.2d 718 (1994))(emphasis added).

Thus, it is not the specialty that determines admissibility but rather the expert's scope of knowledge.

> A physician with a medical degree is qualified to express an opinion on any sort of medical question, including questions in areas in which the physician is not a specialist, **so long as the physician has sufficient expertise to demonstrate familiarity with the procedures or medical problem at issue in the medical malpractice action**.

Hill v. Sacred Heart Med. Ctr., 143 Wn. App. 438, 448, 177 P.3d 1152 (2008)(emphasis added).

Here, Dr. Coleman sought to opine on causation issues based on the pathology findings. However, he admittedly does not possess the requisite knowledge or expertise in the specialized field of forensic pathology. He is not a pathologist and this area is outside of the scope of his expertise. CP 2155. As such, he was not qualified to speak on these issues.

In an attempt to get around this infirmity, Dr. Coleman sought information from other physicians who actually practice in the field of pathology. CP 2155. Dr. Coleman was then attempting to give opinions based on the information he learned from these pathologists.

Dr. Coleman's attempt was properly rejected by the trial court. This issue is governed by ER 703, Bases of Opinion Testimony By Experts, which provides as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

When expert witnesses base their opinion on information and data interpreted by another, courts have held that certain requirements must be met. *State v. Nation*, 110 Wn. App. 651, 662-63, 41 P.3d 1204 (2002); *State v. Ecklund*, 30 Wn. App. 313, 317-18, 633 P.2d 933 (1981). These requirements are as follows:

> First, the judge should find the underlying data are of a kind reasonably relied upon by experts in the particular field in reaching conclusions. And second, since the rule is concerned with trustworthiness of the resulting opinion, the judge ***should not allow the opinion*** if (1) the expert can show only that he customarily relies upon such material, and (2) the data are relied upon only in preparing for litigation.

Nation, 110 Wn. App. at 662-63 (citing *Ecklund*, 30 Wn. App. at 317-18) (emphasis added).

In *Nation*, the court excluded the testimony of an expert forensic scientist who based his opinion on a chemical analysis performed by a technician in his office. As the court noted, the expert could "testify to the procedures used by everyone in his office and to his ultimate supervisory responsibility over the methods and results reached" by his technician. *Id.* at 663. However, the expert admitted that the "tests [were] prepared for court testimony" and thus the second part of the 703 test was not met. *Id.* at 663-64. That is, the "trustworthiness of the resulting opinion" was in doubt as the data was relied upon only in preparing for litigation.

In *Ecklund*, a case relied upon and distinguished in *Nation*, a FBI serology expert was permitted to give opinion testimony based on laboratory tests performed by his subordinate technician and recorded on laboratory work sheets. As the court noted, the expert was the laboratory supervisor with knowledge and ultimate responsibility for all office testing procedures and decisions. Further, and as distinguishable from *Nation*, the tests were not being specifically prepared for use in litigation. *Ecklund*, 30 Wn. App. at 317-18. Thus, the court held that the "trustworthiness of the

resulting opinion" was sound, as the expert relied on information and data prepared by an office technician ***over which he had supervision and control of procedures***.

In *State v. Nation*, the court, in referring to the work of non-testifying experts, ruled that:

> absent an exception to the hearsay rule, hearsay statements of the opinions of third parties are inadmissible. *See Martinez*, 78 Wn. App. at 880 (ER 703 not designed to allow witness to summarize and reiterate all manner of inadmissible evidence); *Campos*, 32 Cal. App. 4th 304, 38 Cal. Rptr. 2d 113 (expert may not reveal on direct examination the content of reports prepared or opinions expressed by nontestifying experts); *Towne*, 142 Vt. 241, 453 A.2d 1133 (one expert may not put in evidence of the opinion of a nontestifying expert without running afoul of the hearsay rule).

State v. Nation, 110 Wn. App. 651, 662, 41 P.3d 1204 (2002).

Plaintiff failed to demonstrate to the trial court, and this court, that he complied with the requirements of ER 703, as there is nothing in the record showing compliance with this rule. The information he gathered was for the purpose of litigation, and, unlike the *Ecklund* case, was gathered from individuals over which Dr. Coleman had no supervisory responsibilities.

This limitation on expert testimony is well-founded. The problem is in defendants' inability to cross examine these other physicians. Defendants had no way of determining what information was actually given to pathologists Drs. Wigren and Reynolds or what information they

gave back to Dr. Coleman. Thus, defendants had no way of testing the medical accuracy and reliability of the statements and opinions that were passed from Drs. Wigren and Reynolds to Dr. Coleman and ultimately attempted to be stated to the jury.

If plaintiff wanted to offer expert opinions on causation based on the pathology findings at autopsy, he could have retained an expert pathologist. He did not do that. The trial court correctly rejected plaintiff's attempt to circumvent the hearsay rule and expert knowledge requirement by having his family practice/emergency physician expert discuss other physicians' alleged opinions.

c. The Trial Court did not Abuse its Discretion in Excluding Dr. Coleman's Causation Opinions Relating to the Future Actions of CPS and/or the Police Department.

Like the pathology testimony, any argument as to what the police or CPS would have done if they had been contacted on March 7, 2008 was not preserved for appeal by a proper offer of proof. ER 103. But even if it was, the trial court did not abuse its discretion in excluding this testimony as it was speculation.

Evidence related to causation of a party's injuries is not admissible unless it is offered on a "more likely than not" basis. *Miller v. Staton*, 58 Wn.2d 879, 886, 365 P.2d 333 (1961); *Fabrique v. Choice Hotels*

International, Inc., 144 Wn. App. 675, 685, 183 P.3d 1118 (2008)(holding that testimony that an event "might have," "could have," or "possibly did" cause injury is not sufficient); *Baxter v. Safeway Stores, Inc.*, 13 Wn. App. 229, 235, 534 P.2d 585 (1975)(same). Moreover, it is improper for a jury to engage in speculation or conjecture. *Cook v. Cook*, 80 Wn.2d 642, 646, 497 P.2d 584 (1972). Expert testimony that is offered to establish proximate cause must be based upon a reasonable degree of certainty and "rise above speculation, conjecture, or mere possibility." *Reese v. Stroh*, 128 Wn.2d 300, 309, 907 P.2d 282 (1995); *see also*, *Carlos v. Cain,* 4 Wn. App. 475, 477, 481 P.2d 945 (1971). "It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted." *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991).

Here, Dr. Coleman purportedly sought to testify to the jury that had additional investigations been done, "the child would have been kept, would have been hospitalized, would have been treated, and would have lived." CP 2170. This testimony was pure speculation and conjecture that was properly excluded by the trial court.

Dr. Coleman admitted that in his professional career, he never suspected child abuse and never contacted CPS or law enforcement. CP 2157. He admitted that he was not a CPS expert and the decision of

removing a child from his parents is a CPS decision. He did not know, however, the details of that process or how long it took. CP 2158, 2161, 2171.

Dr. Coleman's own testimony demonstrated his lack of foundation in testifying about CPS or law enforcement involvement. Thus, any testimony as to what actions would have been taken by CPS or law enforcement would have invited the jury to speculate.

When an expert cannot say to a reasonable degree of probability what effect different treatment or actions by the medical providers would have had, it is improper to leave the jury in the position of having to guess. ER 403. In this case, Dr. Coleman's realm of knowledge on the subject matter did not come close to the requisite standard of probability; rather he simply did not know what CPS or law enforcement would have done in this case. His testimony was properly excluded and the trial court did not abuse its discretion.

d. The Trial Court did not Abuse its Discretion in Excluding Dr. Coleman's Opinions Regarding the Timing of the Fatal Blow to Nathaniel.

The final opinion excluded by the trial court was Dr. Coleman's opinion regarding the timing of the blow that killed baby Nathaniel.[1] This

[1] As referenced above, defendants also sought to exclude Dr. Coleman's opinions related to additional testing he believed should have been done. However, the trial court

opinion was likewise inadmissible and the trial court did not abuse its discretion in excluding it.

Like the pathology opinions, Dr. Coleman sought to base his opinions on the testimony of other non-testifying witnesses. Here, Dr. Coleman's only source that the skull fracture occurred prior to the Emergency Department visit is from Ms. Conway's unsworn confession and plea of guily.[2] Yet, Dr. Coleman did not know whether Ms. Conway should be believed or not. CP 2162-63. The trial court further noted that the plea itself was internally inconsistent. 3/25/14 RP 7.

A review of the proceedings demonstrates that this attempt was really to get into evidence the hearsay statements of Ms. Conway without calling her as a witness. 3/25/14 RP 7-10. After the court's ruling, plaintiff's counsel stated "how do you [the court] propose that we get that ***fact*** in . . . .?" 3/25/14 RP 7 (emphasis added). Plaintiff's counsel then proposed a motion to amend the complaint to add Ms. Conway as a defendant, to arrange to bring her from prison to trial or for a preservation deposition. 3/25/14 RP 8. The court denied the motion to add Ms.

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reserved on this part of the motion in limine, 3/25/14 RP 5, and those rulings are not at issue in this appeal.

[2] To the extent Dr. Coleman sought to base his opinions on the pathology findings, his opinions are not admissible for the reasons discussed in Section IV.B.1.b, above. Such testimony would also be contradictory to the medical examiner, who testified that the skull fracture more likely than not occurred less than 24 hours prior to Nathaniel's death on March 9, i.e. after the ER visit on March 7. CP 2175.

Conway as a defendant, noting that the case had been pending for three years and that the real purpose was to admit her statements and guilty plea as admissions of a party opponent. 3/25/14 RP 9-10.[3] As to getting Ms. Conway to testify at trial, the court left that to plaintiff's counsel to arrange. 3/25/14 RP 10.

Regardless of the credibility of Ms. Conway, Dr. Coleman was not permitted to give testimony based on her unverified statement or plea. First, this was not an opinion, but merely re-stating what Ms. Conway allegedly said, i.e. a fact. This is hearsay rather than proper expert testimony. The Rules of Evidence do not permit an expert to state hearsay in the form of an expert opinion. *State v. Nation*, 110 Wn. App. 651, 662, 41 P.3d 1204 (2002). Moreover, if this was potentially admissible, Dr. Coleman's testimony would have to satisfy the mandates of ER 703, as discussed above. *Id. at* 662-63. It does not. The trial court was well within its discretion in excluding this testimony.

Because the trial court did not abuse its discretion in excluding the causation opinions of Dr. Coleman, plaintiff was without the required testimony to prevail. This was admitted by plaintiff's counsel. 3/25/14 RP 20-21. As such, the analysis ends here, as plaintiff's statutory claims

[3] That ruling is not at issue in this appeal.

under RCW 4.24.010 and 26.44.030 fail for lack of causation, regardless of the propriety of their dismissal on summary judgment.

2. The Trial Court Correctly Dismissed Stephen Noel's Claim Under RCW 4.24.010.

The trial court dismissed any claim of Stephen Noel under RCW 4.24.010.[4] Plaintiff argues that, as it pertains to his non-economic damages claim, this was error.[5] Plaintiff is incorrect.

RCW 4.24.010 creates a cause of action in favor of a child's parents for the injury or death of their minor children. That statute provides in relevant part:

> A mother or father, or both, who has regularly contributed to the support of his or her minor child, and the mother or father, or both, of a child on whom either, or both, are dependent for support may maintain or join as a party an action as plaintiff for the injury or death of the child.

RCW 4.24.010. This statute is not a survival action, but rather creates a new cause or right of action. *Cavazos v. Franklin*, 73 Wn. App 116, 119, 867 P.2d 674 (1994); *Upchurch v. Hubbard*, 29, Wn.2d 559, 188 P. 2d 82 (1947).

Plaintiff apparently believes that defendants argued that Stephen Noel, as a father, did not have a claim under RCW 4.24.010. That is not

[4] The trial court also dismissed the Estate's claims under this statute. Plaintiff has not assigned error to this ruling.
[5] Plaintiff has not argued, nor assigned error to the dismissal of any economic damages claim.

correct. Rather, there was a lack of causation both as to liability and damages that required dismissal of the claim.

First, as discussed extensively above, the plaintiff lacked the requisite causation evidence to prove liability. Plaintiff did not establish the requisite causal link between Dr. Cowan's treatment and Nathaniel's death. Rather, plaintiffs' causation theory rested entirely on speculation and conjecture, wholly unsupported by specific facts. Plaintiff's evidence would have required a jury to assume if Dr. Cowan had suspected child abuse and made a referral to CPS, that a CPS investigation would have been conducted and that the child would have been removed from the parent's custody, thereby preventing the murder of the child by his mother. There were no facts to support this theory and the trial court correctly dismissed this claim.

Second, even if plaintiff could have proved a causal link between the medical care and Nathaniel's death, there was no causal link to the claimed damages of loss of love and companionship and destruction of the parent-child relationship because of the lack of significant involvement in the child's life. *See, e.g., Philippides v. Bernard*, 151 Wn. 2d 376, 394-95, 88 P.3d 939 (2004). One of the initial CPS referrals in this case was made from the hospital social worker when Nathaniel and his twin brother were born, based on lack of visitation by Mr. Noel and the mother. CP 1086-

90. In fact, there was a period of at least 14 days when neither parent was in the hospital to visit the children. *Id.* Additionally, Nathaniel's twin required surgery and the hospital was unable to get a hold of Mr. Noel or the child's mother despite repeated attempts. *Id.* When the children were ultimately able to come home, Mr. Noel opted to voluntarily place Nathaniel's twin brother in foster care custody.

Plaintiff's own brief highlighted the lack of parental relationship. Plaintiff stated that the parents' visits "were extremely short, usually minutes." *Plaintiff's Opening Brief at 10*, citing CP 1351-55. Plaintiff further stated that "the hospital was having difficulty contacting the parents and that the parents were not visiting the newborns." *Plaintiff's Opening Brief at 10.* DSHS knew about the lack of visits and that there was a lack of bonding. *Plaintiff's Opening Brief at 11* citing CP 1198, 1165-67. DSHS was concerned about the lack of follow through by the parents. *Plaintiff's Opening Brief at 11.*

Ultimately, Mr. Noel later voluntarily relinquished his parental rights to Nathaniel's twin, without ever having him in his house. CP 1039-41. Based on these set of specific facts, any breakdown in the parent-child relationship was caused by Mr. Noel's own actions or inactions, not that of Nathaniel's' health care providers. The trial court did not err in dismissing Mr. Noel's claim under RCW 4.24.010.

3. The Trial Court Correctly Dismissed the Claim Under RCW 26.44.030.

Like the claim under RCW 4.24.010, the trial court correctly dismissed this claim because of the lack of causation evidence, as discussed above. Regardless of the causation deficiency, the claim was properly dismissed because: 1) Stephen Noel, as the parent, does not have a claim under RCW 26.44.030; and 2) there was no subjective suspicion of child abuse by Dr. Cowan.

a. There are no Statutory Beneficiaries.

RCW 26.44.030 reads, in pertinent part,

> When any practitioner, county coroner or medical examiner, law enforcement officer, professional school personnel, registered or licensed nurse . . . has reasonable cause to believe that a child has suffered abuse or neglect, he or she shall report such incident, or cause a report to be made, to the proper law enforcement agency or to the department as provided in RCW 26.44.040.

In *Beggs v. DSHS*, 171 Wn.2d 69, 247 P.3d 421 (2011), the Washington Supreme Court held, for the first time, that RCW 26.44.030 creates a private cause of action. *Id.* at 77-78. In that case, the decedent's adoptive siblings and the estate brought wrongful death and survivor actions, as well as an action for failure to report suspected child abuse. *Id.* at 72. The adoptive siblings were second tier beneficiaries but were not dependent upon the minor decedent for support. Therefore, they were not statutory beneficiaries, under the survivor statutes. The Court held that

"**because a claim for failure to report suspected child abuse could be brought only as a survival action** under RCW 4.20.046 (the general survival action statute) or RCW 4.20.060 (the special survival action statute)," dismissal of the failure to report a claim by the Superior Court was proper. *Id.* at 85 (emphasis added).

A review of the survival statutes, RCW 4.20.046 and 4.20.060, demonstrates that Mr. Noel does not have a claim. The appeal here was on behalf of Mr. Noel. But under RCW 4.20.046, only the estate has a potential claim. Under RCW 4.20.060, the surviving spouse has a claim, or, if no spouse exists then the parents have a claim, but only if dependent on the decedent for financial support. Obviously, as an infant, Nathaniel was not providing financial support to his father.[6] Ultimately, then, like *Beggs*, there are no statutory beneficiaries and the claim was properly dismissed.

b. <u>There was No Subjective Suspicion of Child Abuse.</u>

Plaintiffs' claim was also properly dismissed because there was no subjective suspicion of child abuse on the part of Dr. Cowan.

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[6] The *Beggs* Court recognized the prior holding in *Philippides v. Bernard*, 151 Wn.2d 376, 384-85, 88 P. 3d 939 (2004), which held that "the legislature's expansion of support under RCW 4.24.010, the child death statute, to include emotional support did not abolish the financial support requirement for second tier beneficiaries in RCW 4.20.020." It further recognized that "the same standard of substantial dependency applies when the second tier beneficiary is a sibling of the decedent." *Beggs v. DSHS*, 171 Wn.2d at 82.

Here, Dr. Cowan carefully evaluated Nathaniel and specifically found that there was no cause to believe that he was the victim of child abuse. During his deposition, Dr. Cowan detailed his analysis to determine whether or not the child's minor eye injury was due to non-accidental trauma (*i.e.* child abuse):

> I go through a process. . . . first of all, entering the room and making observations of what's going on with the patient and the mother or the caretaker who might be present to see how they interact. . . . At the same time, I'm in my mind evaluating whether the history that they give me is consistent with the bruising that I'm seeing, if the two, in other words, match up. So, for example, there are certain injuries that would not match up and would immediately serve as a red flag to indicate the possibility or the probability of child abuse. So, in order to arrive at a conclusion, I also have to thoroughly examine the patient, and then for infants this involves examining the child without any clothes on, at a minimum getting them down to a diaper and undoing the diaper and checking for, for example, any bruising on the buttocks, any deformities, any tenderness, any sign of previous injury because this would also be a red flag or tip-off that today's presentation could be potentially due to abusive trauma. I'll evaluate in the history whether the caregiver seems to be appropriately concerned about the patient. ***In this case mom seemed to be totally appropriately concerned about her son.*** I evaluate whether they have gotten medical -- whether they're getting medical care, and mom told me that the patient had just gone in to the doctor for an RSV shot yesterday. . . . So, the possibility of non-accidental trauma or specifically with any bruising about the head, abusive head injury is always in my mind when I see a child, particularly a preverbal child, but the way I evaluate the patient is through a combination of these observations, and, if you will, a gut check seeing if the history is told credibly

> by the caregiver and if it matches what I'm seeing as I look at the patient.

CP 1093-94.

Based on Dr. Cowan's examination and his observations of the mother and her interaction with Nathaniel, Dr. Cowan believed that the history presented was consistent with the injury. He specifically reported, "History is consistent w/ observed injury. Mom appropriate. I do <u>not</u> suspect NAT [Non-accidental Trauma]." CP 1046. (emphasis in original). In short, nothing Dr. Cowan saw led him to believe that the likely cause of injury was child abuse. Therefore, there was nothing to report.

In determining whether violation of RCW 26.44.030 could be brought as a separate cause of action, the court in *Beggs* turned, in part, to an analysis of the criminal penalty for failure to report, as well as other jurisdictions which have addressed this issue. The Court noted that a mandatory reporter named in RCW 26.44.030 "who knowingly fails to report suspected child abuse shall be guilty of a gross misdemeanor." *Beggs v. DSHS*, 171 Wn.2d at 77, quoting RCW 26.44.080. Thus, the criminal violation of failure to report requires that the physician actually have a suspicion of child abuse and to knowingly fail to report it. It requires a certain level of subjective intent of behalf of the physician. It

follows that the civil penalty for failure to report *suspected* child abuse also requires a level of subjective suspicion on the part of the reporter.

The *Beggs* Court also noted that the majority of jurisdictions deciding the issue of whether RCW 24.44.080 implies a separate cause of action for failure to report, have found no implied cause of action in reporting statutes. The Washington Court of Appeals, however, decided with the minority (California and Tennessee) that a separate cause of action is implied within the statute. The California case cited by the Washington Court found that in order to prevail on a claim for failure to report, the plaintiff must show that the defendant "actually observed [the] injuries and formed the opinion they were intentionally inflicted" upon the child. *Landeros v. Flood*, 17 Cal. 3d 399, 415, 551 P.2d 389 (1976).

This interpretation is consistent with the revisions to RCW 26.44.030, which were effective as of December 1, 2013. Of note here is that the legislature has now statutorily defined "reasonable cause" as used in the statute when it states that a provider "has reasonable cause to believe that a child has suffered abuse or neglect." The statute now states that "reasonable cause" "means a person witnesses or receives a credible written or oral report alleging abuse, including sexual contact, or neglect of a child." RCW 26.44.030(1)(b)(iii). This new statute began as Senate Bill 5359, and the digest for that bill provides that the revision "clarifies

the meaning of certain terms for the purposes of mandatory reporting requirements of child abuse and neglect."

This statutory definition, then, controls the analysis. When the legislature clarifies a term, such as here, especially one that has not been previously defined, retroactive application is appropriate. *McGee Guest Home, Inc. v. DSHS*, 142 Wn.2d 316, 324-26, 12 P.3d 144 (2000). Indeed, it should be noted that the case that created the private cause of action, *Beggs*, was decided in 2011, four years after baby Nathaniel died. If the interpretation of the statute to provide a private cause of action is retroactive, so should the legislature's definition of the term "reasonable cause." Under that definition, Dr. Cowan did not have "reasonable cause" to believe that abuse had occurred. He did not witness any abuse nor receive any report (credible or otherwise) of any abuse.

Plaintiff's reliance on *Yonkers v. Dept of Social and Health Srvcs*, 85 Wn. App. 71, 930 P.2d 958 (1997) is misplaced. The issue in *Yonkers* was whether DSHS owed a duty to investigate a report of suspected child abuse that was made to the Department by the victim minor's mother, under the Public Duty Doctrine. The Court analyzed RCW 26.44.050, which imposes a duty upon the Department and law enforcement to investigate reports concerning possible occurrences. In *Yonkers*, then, the mother actually suspected abuse by the child's father and reported it to

CPS. CPS then failed to investigate the report. Under that scenario, *i.e.* once suspicion has been raised and reported, the Department has the duty to investigate "the possible occurrence of abuse." *Yonkers v. DSHS*, 85 Wn. App at 80. That is consistent with the new definition of "reasonable cause" in RCW 24.44.030, as there was a credible report of abuse. Here, however, there was no suspicion of abuse by Dr. Cowan, even after a careful evaluation.

V. CONCLUSION

After getting certain evidence excluded, plaintiff failed to go forward with trial, conceding that he could not meet his burden of proof. The failure to properly present proper offers of proof, however, results in a waiver of his claims. Notwithstanding this, the exclusion of this testimony was proper, and the trial court did not abuse its discretion. Without causation evidence, the plaintiff's claims all fail. The statutory claims were also properly dismissed on summary judgment, as plaintiff was either not a proper beneficiary or could not meet the requirements of the statute. The trial court should be affirmed.

RESPECTFULLY SUBMITTED this 20th day of January, 2015.

WILLIAMS, KASTNER & GIBBS PLLC

By _____
Timothy L. Ashcraft, WSBA #26196
Michelle M. Garzon, WSBA #31558
Attorneys for Respondent FHS
Appellate attorneys for FHS and Cowan

FAIN ANDERSON VANDERHOEF PLLC

By: _____ #31558
for Christopher H. Anderson, WSBA #19811
Karen R. Griffith, WSBA #42681
Attorneys for Cowan

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the law of Washington that I caused a true and correct copy of the foregoing Brief of Respondents Franciscan Health System and Ian D. Cowan, M.D. to be delivered in the manner indicated below to the following counsel of record:

Attorneys for Petitioner:

Thaddeus P. Martin
Thaddeus P. Martin & Associates
4928 109th Street SW
Lakewood, WA 98499

Sent Via:
- ☐ Fax
- ☑ ABC Legal Services
- ☐ Express Mail
- ☐ Regular U.S. Mail
- ☑ Email

Attorneys for Respondent Cowan:

Christopher H. Anderson
Karen R. Griffith
Fain Anderson VanDerhoef PLLC
701 Fifth Avenue, Suite 4650
Seattle, WA 98104

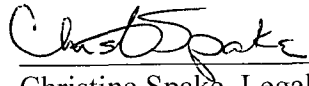
Sent Via:
- ☐ Fax
- ☐ ABC Legal Services
- ☐ Express Mail
- ☐ Regular U.S. Mail
- ☑ Email

Attorneys for Respondent DSHS:

Garth A. Ahearn
Office of the Attorney General
1250 Pacific Avenue, Suite 105
Tacoma, WA 98402

Sent Via:
- ☐ Fax
- ☐ ABC Legal Services
- ☐ Express Mail
- ☐ Regular U.S. Mail
- ☑ Email

Signed at Tacoma, Washington this 20th day of January, 2015.



Christine Spake, Legal Assistant