

No. 48070-1-II

COURT OF APPEALS,
DIVISION II,
OF THE STATE OF WASHINGTON

KEISHA BAUMGARTNER, as Personal Representative of
the Estate of ANGELA BAUMGARTNER, deceased,

Appellant,

v.

THE VANCOUVER CLINIC, INC., P.S., JASON ANAST, MD,
ERIC KLINE, MD, COLUMBIA ANESTHESIA GROUP, P.S.,
MARK A. MOREHART, MD, LEGACY SALMON CREEK
HOSPITAL, a health care entity, CHRISTOPHER FRALEY, MD,
SPECIALTYCARE, INC., MICHELLE L. HENDRIX, and
DOE ENTITY NO. 1 through NO. 12,

Respondents.

APPELLANT'S BRIEF

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I. INTRODUCTION

Appellant Keisha Baumgartner, as Personal Representative of the Estate of Angela Baumgartner (“Plaintiff”), submits this Appellant’s Brief. This is a medical malpractice wrongful death action arising out of the death of Angela Baumgartner (“Ms. Baumgartner”) from blood loss occurring during a surgery, brought by one of her daughters, Keisha Baumgartner, on behalf of Ms. Baumgartner’s three children. Plaintiff appeals from the denial of her motion for partial summary judgment on the issues of assumption of risk and comparative fault, and from the grant of summary judgments dismissing the cell saver technician and anesthesiologist for her mother’s surgery, as well as the hospital where the surgery occurred.

The surgery was scheduled as a robotic assisted laparoscopic partial nephrectomy (“RALPN”) to remove a small tumor on Ms. Baumgartner’s kidney. Ms. Baumgartner was a Jehovah’s Witness who for religious reasons did not consent to allogenic blood transfusion, or the collection of blood outside the body for later infusion back into it, but did consent to autologous transfusion through the use of a cell saver, a machine which suctions out a patient’s blood during a surgery and washes and filters the blood so it can be re-infused into her own body. The

surgery was performed at Respondent Legacy Salmon Creek Hospital (“LSCH”), under their bloodless surgery program. LSCH arranged for a cell saver and technician to operate it, Respondent Michelle L. Hendrix (“Technician Hendrix”), who at the time was employed by Respondent SpecialtyCare, Inc. (“SpecialtyCare”) (collectively “SpecialtyCare/Hendrix”), for the surgery. LSCH also arranged for Respondent Mark A. Morehart, MD, (“Dr. Morehart”), of Respondent Columbia Anesthesia Group, P.S. (“CAG”) (collectively “CAG/Morehart”), to be the anesthesiologist for the surgery.

Unfortunately, there were complications during the surgery and more than expected bleeding occurred. The surgeons decided to convert to an open procedure to address the bleeding. During this conversion, the suction tube for the cell saver dropped below the sterile field. The surgical staff immediately opened new sterile tubing, but upon her return to the operating room shortly thereafter Technician Hendrix declared that the circuit required by Jehovah’s Witness protocol had been broken and that the cell saver could no longer be used. Dr. Morehart announced his agreement with this and the surgery proceeded without the cell saver. After conversion to an open procedure the kidney was removed and the bleeding was ultimately stopped, but by that time Ms. Baumgartner had

lost a great deal of blood. None of this blood was processed through the cell saver for re-infusion into Ms. Baumgartner's body. Ms. Baumgartner, who never regained consciousness following the surgery, died in intensive care a few hours later from blood loss.

Plaintiff moved for partial summary judgment on the grounds that neither her mother, her mother's heirs, or her mother's agent under a power of attorney assumed the risks of the Defendants' negligence or were at fault in connection with the surgery. This motion was denied.

SpecialtyCare/Hendrix and CAG/Morehart moved for summary judgment arguing they did not breach their standard of care toward Ms. Baumgartner and their actions were not a proximate cause of her death. Plaintiff introduced substantial evidence, including testimony by SpecialtyCare's own medical expert, testimony by the founding director of LSCH's bloodless surgery program, and testimony by Plaintiff's own medical expert, that Technician Hendrix was wrong in declaring that the cell saver could no longer be used pursuant to Jehovah's Witness protocol after the suction tubing dropped below the sterile field. Plaintiff also provided evidence and expert medical testimony that Dr. Morehart, who as the anesthesiologist for the surgery was responsible for reinfusing blood processed by the cell saver into Ms. Baumgartner's body, breached his

standard of care by agreeing with Technician Hendrix that the cell saver could no longer be used and stating he would not re-infuse any blood collected by it. Plaintiff also introduced evidence and expert medical testimony that replacing the suction tubing would have taken about as long as it took to convert to an open procedure, and that the cell saver if then used after the conversion had the capacity to have processed and re-infused most of the blood Ms. Baumgartner lost and saved her life. The trial court nevertheless granted SpecialtyCare/Hendrix and CAG/Morehart's motions. LSCH also moved for summary judgment, arguing it was not vicariously liable on Plaintiff's claims and, having dismissed SpecialtyCare/Hendrix and CAG/Morehart, the trial court granted this motion as well.

Plaintiff then settled with the defendant surgeons and brought this appeal from the trial court's rulings on summary judgment.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1

The trial court erred in granting summary judgment to Technician Hendrix and SpecialtyCare dismissing them from this action.

Issue Pertaining to Assignment of Error No. 1

Do genuine issues of material fact exist precluding dismissal of

Technician Hendrix and SpecialtyCare by summary judgment, when in opposition to their motion Plaintiff submitted the declaration of a qualified medical expert who, based on his review of medical records and depositions of the health care providers, evidence independently brought to the attention of the trial court by Plaintiff in opposition to the motion, opined that Technician Hendrix and SpecialtyCare breached their standard of care and that this breach was a proximate cause of her death?

Assignment of Error No. 2

The trial court erred in granting summary judgment to Dr. Morehart and CAG.

Issue Pertaining to Assignment of Error No. 2

Do genuine issues of material fact exist precluding dismissal of Dr. Morehart and CAG by summary judgment, when in opposition to their motion Plaintiff submitted the declaration of a qualified medical expert who, based on his review of medical records and depositions of the health care providers, evidence independently brought to the attention of the trial court by Plaintiff in opposition to the motion, opined that Dr. Morehart breached his standard of care and that this breach was a proximate cause of her death?

Assignment of Error No. 3

The trial court erred in granting summary judgment to LSCH.

Issue Pertaining to Assignment of Error No. 3

Do genuine issues of material fact exist concerning whether SpecialtyCare/Hendrix and CAG/Morehart were agents or apparent agents of LSCH with regard to the services they provided to Ms. Baumgartner in her surgery conducted under LSCH's bloodless surgery program, precluding summary judgment that LSCH is not liable for their actions?

Assignment of Error No. 4

The trial court erred in denying Plaintiff's motion for summary judgment.

Issues Pertaining to Assignment of Error No. 4

Did the trial court err in concluding there are issues of material fact for trial concerning whether Ms. Baumgartner, her agent, or her heirs assumed the risk that Ms. Baumgartner would die as a result of the Defendants' negligence in using a cell saver during the surgery?

Were Ms. Baumgartner, her agent, or her heirs at fault in connection with the surgery under RCW 4.22.015, which provides for joint and several liability of defendants when the plaintiff is fault-free?

III. STATEMENT OF THE CASE

On June 28, 2011, Dr. Jason Anast, MD (“Dr. Anast”) of The Vancouver Clinic, Inc. (“TVC”) recommended that Ms. Baumgartner undergo robotic assisted laparoscopic partial nephrectomy to remove a small tumor on her left kidney incidentally found on previous CT imaging. (Clerk’s Papers (“CP”) 101 - 102) Ms. Baumgartner advised Dr. Anast that as a Jehovah’s Witness she would not accept transfusion of stored blood. Dr. Anast advised that both he and Dr. Eric Kline, MD (“Dr. Kline”), who was also employed at TVC and would be assisting him during the surgery, were comfortable doing the procedure with this condition. (CP 102 - 103) Dr. Anast told Ms. Baumgartner that her surgery “will rarely have significant bleeding.” (CP 119 - 120)

Ms. Baumgartner’s procedure was arranged to be performed at LSCH, part of the Legacy Health System, which pioneered a bloodless surgery program it first established in 1991 and continues to market to this day. (CP 110 - 114) The web site maintained by Legacy Health concerning its bloodless surgery program states that: “We are proud to offer many high-quality, safe and effective alternatives to blood transfusions.” (CP 110) The materials maintained by Legacy Health at its website concerning its bloodless surgery program include a brochure

extolling the benefits of the program. This brochure is provided to patients in the program. (CP 113 - 114; 165:22 - 166:1) This pamphlet tells BSP patients Legacy has “A team of physicians, nurses, pharmacists, dieticians and support staff [that] work together to address each patient’s needs to achieve excellent outcomes,” tells them the benefits of bloodless surgery, among services references cell salvage, and tells patients in the BSP that “we use technologies to collect, clean and reuse a patient’s blood.” (CP 114)

Dr. David R. Rosencrantz is the founder of and one of the medical directors for the Legacy bloodless surgery program. (CP 1014:20 - 1015:24) He confirms this program was started in 1991 and was the first of its kind in this country. (CP 1016:1-6) This program was established in collaboration with the Jehovah’s Witness Watch Tower Society. (CP 1016:7-10.) LSCH has a contractual arrangement with SpecialtyCare under which SpecialtyCare provides both a cell saver machine and the cell saver technician for surgeries performed under the Legacy bloodless surgery program at that facility. (CP 1018:18 - 1019:1)

Nurse Melissa Smith, who was employed by the Legacy Health System (CP 159:14-22) as the nursing coordinator for its bloodless surgery and medicine program at the time of Ms. Baumgartner’s surgery (CP

160:5-9), is herself a Jehovah's Witness (CP 161:17-19). She meets with all patients in the bloodless surgery program prior to their surgery to provide them information concerning the program (CP 162:14-19). Nurse Smith met with Ms. Baumgartner about two weeks before her surgery. (CP 169:5-18)

During her meetings with patients in the bloodless surgery program, she goes over their blood and non-blood alternatives and then documents their choices in the chart for the medical team. (CP 1990:6-8) She ensures that on the day of the surgery there is an advanced directive and verification refusal form in the patient's chart. (CP 1990:25 - 1991:2) She asks patients, including Ms. Baumgartner, to bring in a durable power of attorney on the day of their surgery. (CP 1991:3-10; 2007 - 2008) She provided Ms. Baumgartner a document titled Jehovah's Witnesses Medical Alternatives to Blood. (CP 1992:12-19; 2014) She recommends a cell saver for all patients in the bloodless surgery program if they are comfortable with one, and recommended one for Ms. Baumgartner. (CP 1995:2-15; 2002)

On July 25, 2011, the day before the surgery, Ms. Baumgartner executed a Durable Power of Attorney for Health Care ("DPA"), which she gave to the hospital on the day of the surgery. (CP 135 - 136)

Paragraph 2 of this DPA directed that no transfusions of blood be given to her under any circumstances. (CP 135) In paragraph 3 of the DPA, Ms. Baumgartner stated she accepted all minor fractions of blood. (*Id*) Under paragraph 4, Ms. Baumgartner stated that she accepted all procedures using her own blood, including cell salvage. (*Id*) Paragraph 7 of the DPA specifically provided that Ms. Baumgartner gave “no one (including my agent) any authority to disregard or override my instructions set forth herein.” (*Id*)

Dr. Morehart had training during his anesthesiology residency regarding Jehovah Witness beliefs concerning blood products. (CP 1541:12-18). As the anesthesiologist for Ms. Baumgartner’s surgery, Dr. Morehart is the physician who met with Angela Baumgartner before the surgery. (CP 107:13-20). Legacy provides a form to its Jehovah’s Witness patients concerning which blood products they will or will not accept. Ms. Baumgartner had completed this sheet before he met with her and at their meeting Dr. Morehart clarified with her what she would and would not accept, including the use of a cell saver. (CP 108:2-23)

Ms. Baumgartner signed a Patient Informed Consent form on the day of the surgery, in which she also refused to receive stored blood. The form was signed on July 22, 2011, by Dr. Anast indicating that he had

explained the risks, benefits and alternatives enumerated on the form. (CP 133)

Bethel Tours is affiliated with The Watchtower, the official publication of Jehovah's Witnesses. (CP 167:5-15) Under the heading "Is a cell salvage machine a closed circuit system," a publication by Bethel Tours explaining the acceptable use of a cell saver machine. This publication explains that while the "giving set end" or re-infusion end of the machine is continuously connected to the patient from the start of the surgery, the other end, the end with the vacuum suction, will necessarily be in and out of the body cavity during the surgery. (CP 172) The publication further notes that it will sometimes be necessary to remove the suction device from the body, but so long as the giving end remains in continuous contact with the patient a closed circuit is maintained for the purposes of Jehovah's Witness religious convictions. (*Id*)

Dr. Rosencrantz, the founder of Legacy's bloodless surgery program, testified consistent with this publication that with a Jehovah's Witness there is the option of not even hooking up the cell saver initially but instead to have it nearby in standby ready to connect to the patient in case of a problem. (CP 1021:23 - 1022:5; 1023:22 - 1024:4) SpecialtyCare's expert, Dr. Jonathan Waters, MD, testified that at the time

of Ms. Baumgartner's surgery it was permissible under Jehovah's Witness beliefs for a cell saver to be used with a Jehovah's Witness without a continuous circuit being maintained from suction end to infusion end, so long as the patient's own red blood cells are being re-infused into her. (CP 992:19 - 993:1) Dr. Waters agrees a cell saver can even be utilized as a standby system or backup system during an operation and still stay in compliance with Jehovah's Witness protocol, by simply first connecting the IV from the reinfusion bag to the patient and priming the circuit with saline solution before any blood is collected, thereby establishing the continuous circuit between any blood subsequently collected in the reinfusion bag and the patient. (CP 594:20 - 595:15)

Plaintiff's expert, Dr. Bruce D. Spiess, MD, agrees with Drs. Rosencrantz and Waters that a "discontinuous circuit" is acceptable to Jehovah's Witnesses. (CP 504:17-24) Dr. Spiess explained in his deposition that the continuity of the connection Jehovah's Witnesses require between blood harvested out of their body and their circulatory system is typically maintained using a cell saver machine that has a return system that is flushed with saline and has a connection directly to some IV in the patient's body. (CP 618:17 - CP 619:3) The continuous feedback is not on the front end, because the suction device is not always in contact

with the body. Indeed, the suction end is rarely, if ever, in contact with body, so there is no circuit per se. The connection is between the device back to the patient. (CP 619:4-9)

Unfortunately, Technician Hendrix, the SpecialtyCare technician who operated the cell saver during Ms. Baumgartner's surgery, had a different understanding concerning what is required by Jehovah's Witnesses' religious beliefs. Technician Hendrix testified that the cell saver must be set up and connected to the patient before the first cut of the surgery is made. (CP 566:1-2) According to her, the entire system must be primed and wet before it is attached to the patient, and once connected must stay connected from both the collection site to the re-infusion site during the entire surgery. (CP 566:3-9) Technician Hendrix understood a circuit under the Jehovah's Witness protocol required a continuous connection at both ends of the cell saver, both the suction end and the re-infusion end. (CP 561: 2 - 562:9) According to Technician Hendrix, any time any part of this circuit becomes disconnected or has to be replaced or has to be clamped or turned off, the circuit is broken. (CP 566:10-17.) Technician Hendrix followed this understanding of what Jehovah's Witness protocol requires during Ms. Baumgartner's operation, with fatal results.

Technician Hendrix's understanding concerning what is required to maintain a Jehovah's Witness circuit was based on her training by SpecialtyCare. Jeff Kluth, Technician Hendrix's immediate SpecialtyCare supervisor at the time of the surgery (CP 1110:4 - 6), testified that SpecialtyCare trains its technicians on how to use a cell saver appropriately when dealing with Jehovah's Witnesses. (CP 1122:22-25) Mr. Kluth confirms that in the subject surgery Technician Hendrix followed the SpecialtyCare protocol the way she was taught to do. (CP 1111:3 - 9) According to Mr. Kluth, SpecialtyCare's notion of Jehovah's Witness "protocol" is that, if any part of the cell salvage circuit is "contaminated," the entire circuit - from the suction tip back to the anesthesiologists's IV tubing, must be replaced. (CP 1116:16 - 22)

At the outset of the surgery, Technician Hendrix advised the anesthesiologist, the surgeons, the operating room nurse, and everyone else in the operating room what Jehovah's Witness protocol entailed. (CP 983:19 - 984:22) She explained that Jehovah's Witness protocol is not something that is commonly used in surgeries, which is why she always tries to educate concerning the rules and protocols. (CP 985:1-8)

Pursuant to her understanding of Jehovah's Witness protocol, before the surgery Technician Hendrix set up her machine, which consists

of a suction line, suction reservoir, and reinfusion bag connected to the patient's IV, outside of the surgical field. (CP 561:8-19) She then provided the sterile suction tubing, which makes what she considers the required continuous circuit from the patient to her machine, to the scrub tech or surgeon in the sterile field, and they then hand off an end of the suction tubing to her so she can attach it to her machine and then regulate the suction to it. (CP 561:16-24)

The lead surgeon, Dr. Anast, explained that during the surgery it took a minute or two to cut the tumor out. They did not see any bleeding during this time. But after the tumor came out, brisk arterial bleeding was noted from the tumor bed. (CP 537:12-24.) Dr. Anast testified that the suction was slower than what they expect in a standard robotic case, but earlier in the case they had discussed this with the cell saver technician who confirmed that it was sucking and functioning properly. (CP 539:3-9) Because he was unable to clear enough blood to determine the source of and stop the bleeding, Dr. Anast decided to quickly convert to an open procedure. (CP 117) The assistant surgeon, Dr. Kline, was responsible for using the suction device during the robotic portion of the surgery. (CP 551:11-15) Dr. Kline confirmed that they converted to an open procedure when they were not able to clear enough of the initial bleeding after the

tumor was excised from the kidney. The suction was working, but not to the extent of effectively removing the blood they needed to have removed. (CP 117; CP 552:4-17)

According to SpecialtyCare's expert, Dr. Waters, the level of suction at which Technician Hendrix initially set the cell saver was only the normal setting used on the cell saver and is sufficient for routine bleeding. (CP 589:1-14) But where more extensive bleeding is encountered such as occurred in Ms. Baumgartner's surgery, the suction can be dialed up. (CP 589:14- 18) But Technician Hendrix was not in the operating room when they first encountered excessive bleeding and then undocked the robot in connection with converting to an open procedure, because she had excused herself for a bathroom break. (CP 564:18-25)

Dr. Anast explained that, in the process of undocking the robot and preparing for the open surgery, the suction tubing was dangling by the side of the bed, below the sterile field. (CP 543:20 - 544:5) He confirms the cell saver technician was not in the room when the tubing was contaminated. (CP 545:5-7) Ronald Kasco, a surgical technician (CP 601:16-20) employed by LSCH (CP 602:14-22), recalls that when the surgeons went to use suction after undocking the robot, he observed the suction was hanging below the sterile level and announced "Suction is

down.” (CP 604:6-17).

Upon returning from the restroom, Technician Hendrix also noticed that the suction line for the cell saver had been dropped out of the sterile field. (CP 565:3-5.) Another suction line had already been opened (CP 574:4-14), and Technician Hendrix testified that when the surgeons wanted another suction line attached, she could have complied with this request by simply handing an operating room nurse the new suction tubing. (CP 567:19 - 568:1) Simply replacing the contaminated tubing would only have taken less than two minutes, about the same time as it took to convert to an open procedure. (CP 633:18 - 634:5; 556:7-21) Although SpecialtyCare contends this would also be a deviation from Jehovah Witness protocol, completely replacing the entire cell saver circuit takes approximately 12 minutes. (CP 632:7 - CP 633:6) But Technician Hendrix explained to the surgeon that the circuit had been broken and that they could not maintain Jehovah’s Witness protocol by simply replacing parts that had been contaminated. (CP 569:25 - 570:8)

Dr. Anast confirms that when Technician Hendrix came back into the operating room he requested that they continue to use the suction, but she determined that the circuit had been broken and would not allow him to continue to use the suction device. (CP 544:17-21) Dr. Anast testified

that he did not know whether a Jehovah's Witness circuit was broken when the suction tubing dropped below the surgical field, this is a technical description specific to Jehovah's Witnesses' beliefs, not a medical term. (CP 544:14-17). Dr. Anast told Technician Hendrix to open a new tubing. But she said the only thing they could do was to reset the machine from scratch. (CP 545:17-25)

Heidi Schmalenberger was one of the nurses assisting in the surgery. She recalls mention of Jehovah's Witness issues and Dr. Morehart, the anesthesiologist, confirming that he would not give back any more blood collected during the surgery due to the fact it was no longer a continuous circuit. (CP 1573:16-24) She specifically recalls Dr. Morehart saying that there was no longer a circuit, so any blood collected would not be given. (CP 1574:2-3)

While this was happening, the patient was open and actively bleeding, and the surgeons had to remove the blood so they could proceed with the procedure, so they opened standard wall suction to remove the blood. (CP 546:6-19) Dr. Anast explained that the only reason for discontinuing use of the cell saver at this point was because tubing had dropped outside the sterile field and the technician felt that the circuit was broken and would not allow them to use the cell saver machine. (CP

546:21 - 547:1)

Technician Hendrix recorded that the surgeon then released her from the operation, telling her that her services were no longer needed. (CP 571:1-11) But Dr. Anast has a different recollection. He does not recall releasing Technician Hendrix from the surgery. Rather, he was under the impression that after Technician Hendrix told him that the circuit was broken and they could no longer use the cell saver machine without completely resetting it, she then proceeded to do whatever was required to reset the machine. (CP 545:17 - 546:13) This impression is confirmed by Dr. Kline, the assistant surgeon, who does not recall the cell saver technician ever being released from the surgery. (CP 553:7 - 554:2)

Technician Hendrix testified that, after she claims Dr. Anast dismissed her from the case, she dismantled the cell saver in the operating room, put the disposables in a biohazard waste bag, cleaned up the machine, wheeled it out into the storage area where the machine was kept, and then went to do her billing. (CP 583:1-19) To do her billing, she had to go to a completely different section of the hospital and log in to a computer, which took quite a bit more time. (CP 583:22-584:6) After she had completed her billing and the personnel at the OR desk saw her as she was handing in the hospital's billing sheet at the desk, they then told her

Dr. Anast wanted her to go back to the operating room and reset up suction. (CP 584:10-15) Upon returning to the operating room, Technician Hendrix testified that, having already explained this before she was dismissed from the operation originally, she again explained to Dr. Anast that resetting up suction would not comply to Jehovah's Witness protocol. (CP 584:16-22) But she then did proceed to reset the cell saver machine. According to the Autologous Blood Salvage Record she prepared, she was originally released from the surgery at 1650, and then did not start collecting blood after her return to the operating room until 1715, 25 minutes later. (CP 131-132) These record also reflects that by the time she had the cell saver hooked back up they had the bleeding under control, so no cell saver blood was processed or given. (*Id*)

Dr. Anast testified that a significant amount of blood was lost into the abdomen from the time Ms. Baumgartner starting hemorrhaging until they were able to undock the robot and address the bleeding. (CP 540:13-24) Dr. Anast believes that the bleeding was the result of either the accessory renal artery being avulsed or an issue with the stapler not functioning properly. (CP 541:18-22) After they converted to an open procedure they removed the kidney. After the kidney was removed, there was still some bleeding from where the renal artery and accessory artery

entered the aorta. But because the kidney was out of the surgical field, they were able to see the bleeding immediately and control it by putting a finger on the aorta. (CP 542:2-21)

None of the estimated 2500 ml. of blood lost was processed to salvage red blood cells for re-infusion into Ms. Baumgartner's body. (CP 126; 131) Ms. Baumgartner was severely anemic at the close of surgery. (CP 97) She died in the LSCH intensive care unit within six hours of the end of surgery. The cause of death was given as Shock and Profound Anemia. (CP 98)

IV. ARGUMENT & AUTHORITIES

A. Standard of Review

This Court reviews summary judgment orders de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). The de novo standard also applies to evidentiary determinations made in conjunction with a summary judgment motion. *Id.* As should the trial court, the appellate court is charged with construing all evidence in the light most favorable to the nonmoving party. *Id.*

The party moving for summary judgment has the burden of demonstrating that there are no genuine issues of material fact precluding summary judgment. *Atherton Condominium Apartment-Owners Ass'n Bd.*

of Directors v. Blume Development Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). This is a strict standard. “Any doubt as to the existence of a genuine issue of material fact is resolved against the moving party” and “all the facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party.” *Id*

A party may move for summary by pointing out to the court that the nonmoving party has no evidence with which to meet its burden of proof at trial as to an essential element of his claim. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The defendant has the initial burden of showing a lack of evidence on that element. *Van Hook v. Anderson*, 64 Wn.App. 353, 358, 824 P.2d 509 (1992). It is only after the defendant has met this initial burden that the plaintiff must then produce “evidence sufficient to support a reasonable inference that the defendant was negligent.” *Id*. “In determining whether the movant has satisfied his burden of excluding any real doubt as the existence of any genuine issue of material fact, the movant’s papers must be closely scrutinized, while those of the nonmovant should be treated with indulgence.” *Adamski v. Tacoma Gen. Hosp.*, 20 Wn.App. 98, 104, 579 P.2d 970 (1978).

In a medical malpractice case, genuine issues of material fact exist

precluding summary judgment if the plaintiff provides medical expert testimony that could sustain a verdict for the plaintiff on the issues of breach of the standard of care and proximate cause. *Keck v. Collins*, 184 Wn.2d 358, 370-71, 357 P.3d 1080 (2015). To sustain a verdict for the plaintiff on these issues, the plaintiff “needs an expert to say what a reasonable [health care provider] would or would not have done, that the [defendant health care provider] failed to act in that manner, and that this failure caused her injuries.” *Keck*, 184 Wn.2d at 371. The expert offers a sufficient factual basis for his opinions in this regard by identifying standard of care violations based on a review of the medical records in the case and the procedures performed by the defendants. *Id.*, at 373.

B. The Trial Court Erred in Granting SpecialtyCare/Hendrix Summary Judgment Dismissing Them From This Case.

SpecialtyCare/Hendrix moved for summary judgment, contending Plaintiff could not demonstrate breach of duty and causation. (CP 432 - 432) On the issue of duty they argued Technician Hendrix did not have the authority or duty to make medical decisions concerning the use of the cell saver. (CP 431) On the issue of causation they argued that the cell saver did not have an impact on the outcome of the surgery because it did not process any of Ms. Baumgartner’s blood and it did not have the

functional capacity to handle Ms. Baumgartner's blood loss. (CP 431)

1. Technician Hendrix Did Have A Duty To Ms. Baumgartner in Connection With Her Operation of the Cell Saver.

SpecialtyCare/Hendrix cited *Silves v. King*, 93 Wn. App. 873, 883, 970 P.2d 790 (1999), in support of their argument that Technician Hendrix did not have a duty to Ms. Baumgartner as a matter of law. In *Silves*, the Court ruled that neither a pharmacist or a discharge nurse had a duty to warn the patient of possible adverse interactions between a drug prescribed by an emergency room physician and medication the patient was already taking, noting that the physician was aware of this possible adverse interaction and, while both the pharmacist and the nurse had a duty to perform their own responsibilities correctly, neither had a duty to question a judgment made by the physician as to the propriety of a prescription. *Silves*, 93 Wn. App. at 880; 881-82.

This subject case does not involve a nurse-second guessing a physician. This is a case of a technician incorrectly advising a surgeon concerning something the technician was responsible for in the operating room. This case is more analogous to a case where a nurse responsible for a sponge count incorrectly advises a surgeon that all of the sponges had been removed following the surgery. In such a case, there is no dispute

that the nurse has and has breached a duty owed to the patient. *See Van Hook, supra*, 64 Wn.App. at 357 (“We assume that the nurses had a duty to count the sponges before and after use, that their failure to do so was negligence as a matter of law, and that the hospital was liable under the doctrine of respondeat superior.”) As the technician charged with operating the cell saver in conformance with Jehovah’s Witness protocol during the surgery, Technician Hendrix had a duty to operate it competently and consistently with correct bloodless surgery protocols. SpecialtyCare was under a duty to provide competent and properly trained cell saver technicians (CP 1019:2-22)

2. Plaintiff Provided Expert Medical Testimony Based on a Review of the Medical Records and Discovery Sufficient for a Jury to Find for Plaintiff on Breach of Duty and Proximate Causation on her Claims Against Technician Hendrix and SpecialtyCare, Creating Genuine Issues of Material Fact Precluding Summary Judgment.

In opposition to SpecialtyCare/Hendrix’s motion, Plaintiff submitted the declaration of her expert, Dr. Bruce D. Spiess, MD. (CP 497 - 508). Dr. Spiess is a board certified anesthesiologist, who has extensive experience with Jehovah’s Witnesses regarding their beliefs and attitudes toward blood in surgery. He also has extensive experience in the fields of anesthesiology, human factors in surgery, and blood management

including cell salvage. He is familiar with the standards of care regarding the cell saver, blood management and the surgical team in this case. (CP 498) Dr. Spiess reviewed the medical records and much of the discovery in this case, including LSCH and SpecialtyCare procedures regarding bloodless surgery and cell salvage, and the numerous depositions taken of the medical providers involved in the surgery. (CP 498)

Dr. Spiess notes that the anticipated blood loss in an uneventful RALPN is less than 100 to 200 ml, which would not have had any effect on the patient, and that the cell saver and technician were in the operating room solely to prevent life threatening anemia from unexpected hemorrhage. (CP 499:1-3) Dr. Spiess testifies that even if there was no blood in the cell saver after unexpected bleeding did occur and they converted to an open procedure, virtually all of the blood she was hemorrhaging before and during the conversion to open surgery remained in her body until after the conversion. (CP 501:7-11) He opines that the standard of care for all members of the surgical team was to facilitate suction of as much of that blood as possible into the cell saver to be processed and returned to Ms. Baumgartner's circulation. (CP 500:11-14)

Dr. Spiess testifies, in agreement with SpecialtyCare's expert Dr. Waters, that Jehovah Witness beliefs do not require a continuous circuit

from the suction end to the reinfusion IV end, but rather that reinfusion IV end be in continuous contact with the patient, and that to the extent Technician Hendrix thought otherwise she and SpecialtyCare were in error. (CP 504:1 - 505:1) Dr. Spiess further explained that the remedy for the suction wand and tubing falling below the sterile field was the same for a Jehovah's Witness as any other patient - simply replacing them, as the surgical staff had begun to do before technician Hendrix re-entered the room, a process taking less than two minutes. (CP 505:2-21) Suction requires the operator's depression of the suction irrigator trigger, so the inside of the wand, and tubing, and cell save and contents were not contaminated while the tubing and wand fell or hung outside the sterile field. (CP 505:22 - 506:13)

Dr. Spiess opines that Technician Hendrix breached her standard of care by failing to comply with the surgeon's directions during the surgery to do so and dictating that the cell saver could not be used without a complete reset of the machine. (CP 502:12-24) He further opines, again in agreement with SpecialtyCare's own expert, Dr. Waters, that the cell saver is as effective as wall suction but, because of Technician Hendrix's breach of her standard of care virtually all of the blood which bled into Ms. Baumgartner's surgical site which could and should have been

suctioned by the cell saver was instead wasted. (CP 503:9-25)

Dr. Spiess then addresses proximate cause. He notes that Dr. Anast estimated Ms. Baumgartner's blood loss at 2500 ml, but that such estimates are notoriously low. (CP 506:21-26) He testifies that, if Technician Hendrix had allowed them to proceed with replaced suction tubing and suction device, most of the at least 2500 ml of blood Ms. Baumgartner lost would have been processed through the cell saver, and Ms. Baumgartner more likely than not would have survived the surgery. (CP 507:21 - 508:17)

Thus, Plaintiff did provide testimony from a medical expert identifying what a reasonable a cell saver technician operating under Jehovah's Witness protocol should have done upon discovering that the suction tubing of the cell saver had dropped below the sterile field, which was to connect the new sterile suction tubing that had already been opened, that Technician Hendrix refused to do so, and that this failure was a proximate Ms. Baumgartner's death. Dr. Spiess' testimony is sufficient to sustain a jury verdict in Plaintiff's favor and establishes there are genuine issues of material fact exist precluding summary judgment to SpecialtyCare/Hendrix on both breach of duty and causation. *Keck*, 184 Wn.2d at 373. The trial court therefore erred in granting summary

judgment to Technician Hendrix and SpecialtyCare. As discussed below, Dr. Spiess provided a second declaration in opposition to CAG/Morehart's motion for summary judgment which applies equally to SpecialtyCare/Hendrix on proximate cause.

C. The Trial Court Erred in Granting Dr. Morehart and CAG Summary Judgment Dismissing Them From This Case.

After Technician Hendrix and SpecialtyCare were granted summary judgment, Dr. Morehart and CAG moved for summary judgment. As had Technician Hendrix and Specialty Care, CAG/Morehart contended they were entitled to summary judgment dismissing them from the case because Plaintiff could not produce sufficient evidence that Dr. Morehart violated the standard of care applicable to him, or that any negligence by him caused Ms. Baumgartner's death. (CP 1437)

1. Dr. Spiess Is Qualified and Competent to Give His Opinions

CAG/Morehart argued that Dr. Spiess' opinions lack factual support, by making references to certain statements in his deposition. (CP 1441 - 1442). In response to this motion and the concurrent motion of LSCH discussed below, Plaintiff submitted a second declaration by Dr. Spiess, attaching the full transcript of his deposition to that declaration. (CP 1636 - 1943)

In his second declaration, Dr. Spiess reiterates his extensive experience with both Jehovah Witness beliefs and use of cell savers. (CP 1637:19-25) In his deposition, he notes that he has spoken all over the world on blood transfusion, in which he talks about data on Jehovah's Witnesses and what is known about their survival. (CP 1764:21-25) He is familiar with how the continuous circuit is set up, and it is the same at all centers around the country. (CP 1766:7 - 1768:3) Dr. Spiess is eminently qualified and competent to provide the opinions he provides.

2. Plaintiff Provided Expert Medical Testimony Based on a Review of the Medical Records and Discovery Sufficient for a Jury to Find for Plaintiff on Breach of Duty and Proximate Causation on her Claims Against CAG/Morehart, Creating Genuine Issues of Material Fact Precluding Summary Judgment.

In his second declaration, Dr. Spiess states that an anesthesiologist, who is part of the surgical team performing RALPN for a Jehovah's Witness for whom cell salvage is acceptable, must possess and employ sufficient knowledge of what is required of a continuous circuit. The standard of care requires that the anesthesiologist be aware that a standby set up is acceptable to Jehovah's Witnesses and meets the requirements of a continuous circuit if and when a bleeding emergency makes its use necessary. The standard of care also requires that the anesthesiologist

must possess and employ the knowledge that the continuous circuit does not prohibit replacing components of the suction components that become contaminated in the course of RALPN. (CP 1640:9 - 1641:2).

Dr. Spiess then goes on to set out the specific ways in which Dr. Morehart breached his standard of care. First, Dr. Morehart breached his standard of care in failing to advise the surgical team that setting up the cell saver and connecting it to the patient before the surgery was not required by Jehovah's Witness beliefs, and in directing that it not be deployed as standby in the event of hemorrhage requiring salvage. (CP 1641:9-19) Dr. Spiess explains that with the cell saver on standby, the surgeons would have had unlimited standard wall suction through the laparoscopic suction device during the initial laparoscopic effort to clear the field and address the tumor bed. (CP 1642:4-9) Failing that, either before or after converting to an open procedure, the cell saver would have been employed using the larger bore Yankauer wand to provide both a clear surgical field and salvage the blood for processing and return to Ms. Baumgartner. (CP 1642:9-14)

Having allowed Technician Hendrix to connect the cell saver before the surgery commenced rather than setting it up in standby mode, Dr. Spiess testifies that Dr. Morehart breached his standard of care by not

directing Technician Hendrix or other members of the surgical team to employ new tubing with a larger bore suction tip to immediately suction blood into the cell saver for processing when Technician Hendrix announced that the cell saver had been contaminated and could not be used. (CP 1642:15-25).

Dr. Spiess's opinion that Dr. Morehart should have directed that the contaminated tubing be replaced and the cell saver continue to be used is consistent with the testimony of both Drs. Rosencrantz and Waters that the cell saver can be used in standby mode. (Dr. Waters: CP 594:20 - 595:15; Dr. Rosencrantz: CP 1021:23 - 1022:5 & 1023:22 - 1024:4) If the continuous circuit required by Jehovah's Witness protocol can be established at any time during the surgery by hooking up the back end, the reinfusion bag, of the cell saver machine by a saline filled IV to the Jehovah's Witness patient, nothing in Jehovah's Witness beliefs prevents replacement of the front end of the machine, the suction tubing and wand, so long as the back end connection remains attached to the patient.

In his second declaration, Dr. Spiess again testified that the cell saver did have the functional capacity to process the heavy bleeding encountered during Ms. Baumgartner's surgery and, indeed, a cell saver otherwise would have no use in a RALPN where only minimal bleeding is

ordinarily expected. (CP 1643:13-24) The cell saver suctions blood into a reservoir from which it is then processed, so it does not need to process the bleeding as it occurs. (CP 1643:25 - 1644:2)

Dr. Spiess again addressed the issue of whether, if used, the cell saver would have processed enough blood to have prevented Ms. Baumgartner from dying, providing an authoritative reference supporting his conclusion that, even if less than all the blood lost during the surgery was processed, her Hgb would have been above Hgb 5.5, where her survival was more likely than not. (CP 1645:11-23)

Plaintiff met her burden of producing competent and factually supported expert medical testimony establishing all of the prima facie elements of her claim against CAG/Morehart. Whether this testimony and evidence is persuasive is a question of fact for the jury. Therefore, the trial court erred in granting CAG/Morehart summary judgment and dismissing them from the case. *Keck, supra*, 184 Wn.2d at 373.

D. The Trial Court Erred in Granting LSCH Summary Judgment Dismissing It From This Case.

Concurrently with the motion for summary judgment filed by CAG/Morehart, LSCH also moved for summary judgment seeking dismissal from the case. LSCH confirmed in its motion that it provided

the operating suite and support staff, including nurses and a surgical technician. (CP 1509:23-24) It also confirmed that Ms. Baumgartner chose to accept the use of a cell saver during her surgery, after meeting with Nurse Smith at LSCH to discuss blood and non-blood alternatives as part of LSCH's bloodless surgery program. (CP 1509:25 - 1510:3) LSCH further confirmed that it contracted with SpecialtyCare to provide the cell saver and a technician to operate it. (CP 1510:3-5)

1. Questions of Fact Exist Concerning Whether SpecialtyCare/Hendrix and CAG/Morehart Were LSCH's Agents During Ms. Baumgartner's Surgery.

Adamski, supra, was the first decision in Washington to address the theory of respondeat superior in the context of the hospital-physician context. *Adamski*, 20 Wn.App. at 105. The Court adopted the "significant relationship" test for determining whether respondeat superior should be applied in the doctor-hospital relationship. *Adamski*, 20 Wn.App. at 108. The Court cited to the statement in *Seneris v. Haas*, 45 Cal.2d 811, 831-32, 291 P.2d 915 (1955), that: "Unless the evidence is susceptible of but a single inference, the question of agency is one of fact for the jury." *Adamski*, 20 Wn.App. at 112 - 13.

Applying this significant relationship test, the Court held that, because there was substantial evidence that the emergency room physician

who treated the plaintiff in that case was performing an inherent function of the hospital such as to make him an integral part of the hospital enterprise, a genuine issue of fact existed concerning whether he was the actual agent of the hospital. *Adamski*, 20 Wn.App. at 112. This is precisely the relationship of both SpecialtyCare/Hendrix and CAG/Morehart to LSCH in the instant case, as the services of both a cell service provider and an anesthesiologist are an integral, in fact indispensable, part of the treatment of a patient in the Legacy bloodless surgery program.

2. Questions of Fact Exist Concerning Whether SpecialtyCare/Hendrix and CAG/Morehart Were LSCH's Apparent Agents During Ms. Baumgartner's Surgery.

The *Adamski* Court went on to note that, even where a physician is found not to be the actual agent of the hospital, the hospital may still be liable for his negligence under an ostensible or apparent agency theory. *Adamski*, 20 Wn.App. at 113. The Court held an apparent agency relationship exists “when the hospital acts or omits to act in some way which leads the patient to a reasonable belief he is being treated by the hospital by one of its employees.” *Adamski*, 20 Wn.App. at 115. Noting that a jury could find in the case before it that the hospital held itself out as

providing emergency care to the public and the plaintiff reasonably believed the emergency room physician was employed by the hospital to deliver that service, the Court held that, when the facts and fair inferences were viewed in a light most favorable to the plaintiff, the issue of apparent agency was for the jury to determine. *Adamski*, 20 Wn.App. at 115-16. In *Mohr v. Grantham*, 172 Wn.2d 844, 860-61, 262 P.3d 490 (2011), the Court, citing to *Adamski*, stated the rule that a medical provider binds a hospital if the objective manifestations of the hospital make a patient's belief that the medical provider has the authority to act for the hospital objectively reasonable.

WPI 105.02.03 extracts from *Adamski* a list of seven different factors to be considered by the jury in determining apparent agency. None of these factors are stated as controlling and all seven factors are not stated as required. LSCH failed to meet its initial burden on a motion for summary judgment of establishing there is no genuine issue of material fact concerning whether SpecialtyCare/Hendrix and CAG/Morehart were its apparent agents under these factors. Legacy introduced no evidence that Technician Hendrix ever met with Ms. Baumgartner before the surgery or that Dr. Morehart ever met with her other than at its hospital. LSCH introduced no evidence or made any reference to the record that

would support the conclusion that it made any attempt to inform patients that the cell saver technicians and anesthesiologists in surgeries under its bloodless surgery program were not its agents. Indeed, all the undisputed evidence from LSCH's advertising of its bloodless surgery program and Nurse Smith's pre-surgery meeting with Ms. Baumgartner supports the opposite conclusion: that the cell saver technicians and anesthesiologists for surgeries under its bloodless surgery program were its agents. Whether personally or as determined by and through Dr. Anast, Ms. Baumgartner sought treatment primarily from LSCH, not from Technician Hendrix and Dr. Morehart; LSCH designated Technician Hendrix and Dr. Morehart to provide the surgical cell saver and anesthesia services; surgical cell saver and anesthesia services were an integral part of LSCH's operation, including its bloodless surgery program; and LSCH made no representations to Ms. Baumgartner, verbally or in writing, regarding its relationship with either SpecialtyCare/Hendrix or CAG/Morehart.

Therefore, questions of material fact concerning whether SpecialtyCare/Hendrix or CAG/Morehart were the actual or apparent agents of LSCH preclude the grant of their motions for summary judgment.

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E. The Trial Court Erred in Denying Plaintiff's Motion for Partial Summary Judgment.

Defendants SpecialtyCare/Hendrix, CAG/Morehart, and LSCH all asserted assumption of risk, comparative negligence, and/or failure to mitigate damages as affirmative defenses. (CP 32, 72, 73, 81, and 82) Plaintiff moved for partial summary judgment dismissing all of these affirmative defenses and for a ruling that all defendants found liable on Plaintiff's claim would be jointly and severally liable for any judgment entered in her favor, showing that neither Ms. Baumgartner's own heirs, nor her agent under her power of attorney could be found at fault as a matter of law under any of the various iterations of assumption of risk or fault as defined in RCW 4.22.070(1).

RCW 4.22.070(1) provides that in an action involving fault of more than one entity, the trier of fact shall determine the total fault attributable to every entity that caused the claimant's damages. RCW 4.22.015 defines "fault" for purposes of this case as follows:

"Fault" includes acts or omissions ... that are in any measure negligent or reckless toward the person or property of the actor or others ... The term also includes breach of warranty, *unreasonable assumption of risk*, and unreasonable failure to avoid an injury or to mitigate damages. * * * [Italics added.]

Under RCW 4.22.070(1)(b), if the jury finds the claimant or the

party suffering injury to be fault-free, all defendants against whom judgment is entered are jointly liable for the sum of the proportionate shares of the claimant's total damages.

Preliminarily with regard to assumption of risk, as explained in *Leyendecker v. Cousins*, 53 Wn.App. 769, 773-74, 770 P.2d 675 (1989)(citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 68, 496-97 (5th ed. 1984), Washington still recognizes four types of risk: (1) express; (2) implied primary; (3) implied reasonable; and (4) implied unreasonable.

In the first two types of assumption of the risk, express and implied primary, the plaintiff voluntarily consents to relieve the defendant of a known duty to him. Express assumption of risk arises when the plaintiff's consent is contained in an express agreement. In implied primary assumption of the risk, the plaintiff's consent is implied from the plaintiff's conduct. These types of primary assumption of risk operate "as a complete bar to a plaintiff's recovery to the extent the damages resulted from the specific risks assumed." *Leyendecker*, 53 Wn.App. at 774-75. In the last two types of assumption of the risk, implied reasonable and implied unreasonable, the plaintiff voluntarily and knowingly encounters a risk already created by the defendant. *Leyendecker*, 53 Wn.App. at 774-

75.

1. Express Assumption of Risk Does Not Apply.

“Express assumption of risk is based on contract and involves an agreement by one party to relieve another party of the duty to use reasonable care.” *Johnson v. NEW, Inc.*, 89 Wn.App. 309, 311, 948 P.2d 877 (1997). Express assumption of risk arises in the context of written hold harmless and release agreements, where the plaintiff in advance “has given his express consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone.” *Shorter v. Drury*, 103 Wn.2d 645, 655, 695 P.2d 116 (1985) (quoting W. Keeton, *Torts*, § 68, at 480 (5th ed. 1984)). *See also, Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 496, 834 P.2d 6 (1992).

Shorter was also a wrongful death medical malpractice case arising out of the 1979 bleeding death of a Jehovah’s Witness who underwent a hospital D & C following a miscarriage. Both the decedent wife and her husband were required to sign an express release of the hospital and her physicians from liability arising out of her refusal to permit blood transfusion. *Shorter*, 103 Wn.2d at 648-49. The defendant doctor lacerated Mrs. Shorter’s uterus during the procedure and she began to

bleed profusely. After the procedure both she, who remained lucid, and her husband continued to refuse to authorize a transfusion despite repeated warnings from the doctors that she would likely die due to blood loss. She bled to death.

The Washington State Supreme Court held the language of the agreement was broad enough to include the risk of bleeding to death caused by the defendant doctor's negligence, because the refusal the Shorters signed released the defendant doctor from "any responsibility whatever for unfavorable reactions or any untoward results due to my refusal to permit the use of blood or its derivatives." *Shorter*, 103 Wn.2d at 651. The Court ruled that this language was sufficiently broad to support the jury's finding that the Shorters assumed the risk of death from an operation that had to be performed without blood transfusions, even where the doctor made what would have otherwise been a correctable surgical mistake. *Id.*, at 658.

In the present case, Defendants did not request, much less require, a release, and Ms. Baumgartner did not sign a release. Neither the durable power of attorney (CP 135 - 136), the surgery informed consent form (CP 133), or the consent for anesthesia services form (CP 134) signed by Ms. Baumgartner contain any language raising the risk of surgical negligence

or the failure to provide the cell saver services offered, much less releasing Defendants from any obligations or duties to Ms. Baumgartner in connection with her refusal of blood transfusion or use of the cell saver. Therefore, the doctrine of express assumption of the risk does not apply.

2. Implied Primary Assumption of Risk Does Not Apply and Does Not Involve Fault Relieving Defendants from Their Joint and Several Liability for Any Damages Caused by Their Negligence.

a. Defendants Cannot Meet Their Burden of Establishing That Ms. Baumgartner Subjectively Understood the Specific Risk That Caused Her Death.

Implied primary assumption of the risk arises where a plaintiff by her conduct has impliedly consented to relieve a defendant of a duty to her with regard to specific known and appreciated risks. *Scott, supra*, 119 Wn.2d at 497; *Barrett v. Lowe's Home Centers, Inc.*, 179 Wn.App. 1, 5, 324 P.3d 688 (2013). The plaintiff's actions must manifest a consent to relieve the defendant of a duty of care to him with regard to a known and appreciated risk voluntarily encountered by the plaintiff. *Leyendecker, supra*, 53 Wn.App. at 775.

To establish that a plaintiff knowingly encountered a risk, a defendant must establish that at the time he made the decision to do so he subjectively understood the specific hazard that caused his injury. *Egan v.*

Cauble, 92 Wn.App. 372, 376-78, 966 P.2d 362 (1998). A defendant does not meet its burden of proof by showing that the plaintiff was aware of a general risk of encountering the defendant's activities, there must be proof the plaintiff knew of and "had full subjective understanding" "of the presence and nature of the specific risk" and "voluntarily chose" to encounter it. *Egan*, 92 Wn.App. at 376-78 (citations omitted.)

In the present case, there is absolutely no evidence that Ms. Baumgartner knew before the surgery, despite her surgeons' representations that the surgery rarely involved blood loss and that they were comfortable in doing the surgery with the limitation of no blood transfusion, despite the fact that her surgery was performed under Legacy's bloodless surgery program, and despite her consent to the use of a cell saver and other procedures involving the use of her own blood, there was still a specific increased risk of fatal bleeding in the surgery above and beyond the generalized risk of fatal bleeding inherent in any similar surgery. Neither is there any evidence that Ms. Baumgartner was aware of the risk that her providers might compromise or abandon the cell saver in the face of bleeding. As Ms. Baumgartner never regained consciousness after the surgery, she never had the chance to change her mind with regard to blood transfusions and so could not have impliedly consented to relieve

Defendants of any risk associated with their negligence by continuing to insist on no blood transfusion after the surgery.

Therefore, Defendants cannot as a matter of law meet their burden of proving that Ms. Baumgartner had full subjective understanding of any specific risk associated with a surgery without blood transfusion but using the alternatives to transfusion she authorized.

b. Implied Primary Assumption of Risk Is Not a Type of Fault Under RCW 4.22.015.

As noted above, when the Legislature adopted comparative fault in 1981, the Legislature specifically defined the fault that could be imputed and/or compared in RCW 4.22.015. With regard to assumption of risk, RCW 4.22.015 only includes unreasonable assumption of risk under its definition of fault.

In *Welch v. Southland Corp.*, 134 Wn.2d 629, 634, 952 P.2d 162 (1998), the Court held that RCW 4.22.015 and RCW 4.22.070 are unambiguous, and that “the Legislature did not intend an entity who commits an intentional tort be considered at fault for purposes of RCW 4.22.070.” More recently, in *Stout v. Warren*, 176 Wn.2d 263, 275, fn. 4, 290 P.3d 972 (2012), the Court affirmed that, since the enactment of the comparative fault statutes only implied reasonable and implied

unreasonable assumption of risk are subsumed by the contributory fault statutory scheme.

Both primary forms of assumption of risk are based on the consent of the claimant to relieve a defendant of a duty with respect to the risk assumed. The Legislature did not include either of these types of assumption of risk in the definition of fault under RCW 4.22.015. Consequently, neither express assumption of the risk or implied primary assumption of risk involve fault under RCW 4.22.015 or its imputation under RCW 4.22.020.

3. As Ms. Baumgartner Never Regained Consciousness Following the Surgery, the Doctrines of Implied Unreasonable and Reasonable Assumption of Risk Do Not Apply and She Likewise Could Not Have Been Contributorily Negligent in Connection With the Surgery.

Implied unreasonable assumption of the risk arises where the plaintiff acts unreasonably in voluntarily encountering a risk created by the defendant. This type of assumption of risk is just a form of and is treated equivalently to contributory negligence. *Kirk v. Washington State University*, 109 Wn.2d 448, 454, 746 P.2d 285 (1987). Implied reasonable assumption of the risk arises where the plaintiff acts reasonably in voluntarily encountering a risk created by the defendant. *Id.* In *Kirk*, the

Court ruled that both types of secondary assumption of risk can apply to reduce a plaintiff's recovery. *Id.*, at 458. But *Kirk* was decided under the comparative negligence statute in effect before this statute was superceded by the adoption of comparative fault statutes in 1981. *Id.*, at 452. As discussed in *Leyendecker. supra*, because the Legislature did not include implied reasonable assumption of risk in its definition of fault under RCW 4.22.015: "It thus appears that the Legislature does not consider reasonable assumption of risk as a damage-reducing factor." *Leyendecker, supra*, 53 Wn.App. at 774, fn. 2.

Both implied unreasonable and implied reasonable assumption of risk only arise "where the plaintiff is aware of a risk that already has been created by the negligence of the defendant, yet chooses voluntarily to encounter it." *Leyendecker, supra*, 53 Wn.App. at 774. But unlike the plaintiff wife in *Shorter, supra*, Ms. Baumgartner never regained consciousness following the surgery. She was never aware that her health care providers had failed to use a cell saver during the surgery or that because of complications during the surgery they thought that a blood transfusion was necessary. So she could not have chosen to voluntarily encounter the risk of those complications without blood transfusion. Consequently, neither type of implied secondary assumption of risk can

apply to Ms. Baumgartner.

A defendant asserting a plaintiff was contributorily negligent must show that the plaintiff failed to exercise reasonable care for her own safety. *Alston v. Blythe*, 88 Wn.App. 26, 31-32, 943 P.2d 692 (1997). As Ms. Baumgartner was sedated throughout the entire surgery and never regained consciousness following it, Defendants cannot show that she failed to exercise reasonable care for her own safety during or after the surgery. The only conduct by Ms. Baumgartner Defendants can point to is Ms. Baumgartner's refusal of blood transfusion before the surgery. But Ms. Baumgartner was no more contributorily negligent simply by refusing blood transfusion in connection with the surgery, than Defendants were in agreeing to perform the surgery without blood transfusion.

4. Fault Cannot Be Assessed to Ms. Baumgartner's Agent or Heirs in This Action, Because Under the Power of Attorney They Did Not Have the Authority to Act on Ms. Baumgartner's Behalf.

Absent a special relationship, an individual does not have a duty to protect a plaintiff from harm caused by a third-party. *Cox v. Malcolm*, 60 Wn.App. 894, 899, 808 P.2d 758 (1991). To the extent there was a special relationship between Ms. Baumgartner and any of Ms. Baumgartner's family members, friends, or agents present at the hospital after the surgery

under which they arguably might have had a duty to protect her against the consequences of Defendants' negligence, any such duty or authority was abrogated by the durable power of attorney, which did not give anyone the power to override Ms. Baumgartner's wishes with regard to blood transfusions. (CP 135 - 136)

Under RCW 11.94.010, pursuant to the durable power of attorney only Arlene Pridemore, Ms. Baumgartner's attorney-in-fact, had authority to act on her behalf while she was disabled. (CP 136) Ms. Pridemore remembered after the surgery a surgeon telling her something to the effect that there was a second blood vessel attaching the kidney to the body they had not seen when looking at x-rays before the surgery, and that when they went to take the kidney out they ripped out this blood vessel. (CP 197; 198:9 - 199:18) But she did not remember any discussion concerning Ms. Baumgartner's wishes with regard to blood transfusion or that Ms. Baumgartner needed blood products following the surgery. (CP 200:6-12) Therefore, neither Ms. Pridemore, Plaintiff, nor Ms. Baumgartner's other heirs could have assumed any risk on her behalf in this regard, or could themselves have been negligent, have themselves failed to mitigate Ms. Baumgartner's damages as a result of the Defendants' negligence or have themselves otherwise been at fault under RCW 4.22.015 by not

authorizing blood transfusion following the surgery.

Therefore, the trial court erred in not granting Plaintiff's motion for partial summary judgment on the bases that no form of assumption of risk applies, Ms. Baumgartner, her agent and her heirs are free from fault that can be apportioned under RCW 4.22.070, and each and every defendant against whom judgment is entered in this action is jointly and severally liable for the sum of the proportionate shares of the judgment entered against all of the Defendants in this action.

V. CONCLUSION

Plaintiff requests that this case be remanded for trial against Technician Hendrix, SpecialtyCare, Dr. Morehart, and CAG. Plaintiff further requests that this Court hold that neither Ms. Baumgartner, her children, or her agent, Ms. Pridemore, assumed the risk of Ms. Baumgartner's death as a result of any negligence by Defendants in the use of the cell saver during the surgery, or were at fault in connection with the

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surgery, and that any Defendants against whom judgment is entered are jointly and severally liable for the sum of their proportionate shares of the Plaintiff's total damages.

Respectfully submitted this 7th day of April, 2016.

s/ Laurence R. Wagner

William F. Nelson, WSBA #1013
Laurence R. Wagner, WSBA #17605

DECLARATION OF SERVICE

I, Tori K. Ring, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. On this 7th day of April, 2016, I personally deposited in the mails of the U.S., a properly stamped and addressed envelope directed to the attorney of record of Defendants containing a true copy of the document (Appellant's Brief) to which this declaration is affixed.

DATED this 7th day of April, 2016, at Vancouver, Washington.

s/ Tori K. Ring

TORI K. RING

BAUMGARTNER NELSON & WAGNER

April 07, 2016 - 4:17 PM

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