

**FILED**  
AUG 17 2010  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

NO. 288463

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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LAJUANA LEAVERTON, a single individual,

Appellant (Plaintiff),

v.

CASCADE SURGICAL PARTNERS, PLLC; and ROBERT J.  
CONROY, M.D.

Respondents (Defendants).

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BRIEF OF RESPONDENTS

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## I. INTRODUCTION

This is a medical liability action against Defendants-Respondents Cascade Surgical Partners PLLC and Robert J. Conroy, M.D., a general surgeon. The claim made by the Plaintiff-Appellant regards the medical treatment, a subtotal thyroidectomy, performed by Dr. Conroy on Lajuana Leaverton, on November 26, 2003.

In this case, Plaintiff-Appellant did not present an expert qualified through expertise or knowledge to testify on the standard of care with regard to performance of a subtotal thyroidectomy, including the equipment, techniques, and procedures utilized to perform that particular surgery. In addition, the two experts presented by the Plaintiff-Appellant, who are both otolaryngologists, testified that they are not able to express opinions with regard to the standard of care applicable to a general surgeon. Therefore, no evidence was presented that the subtotal thyroidectomy performed by Dr. Conroy violated the standard of care as applicable to a general surgeon.

The law in the State of Washington states that Dr. Conroy is to be evaluated in terms of his compliance, or lack thereof, with the standard of care for a general surgeon. He is not to be held to the standard of care of an otolaryngologist, which is a specialist from a different school of

medicine. The testimony from Plaintiff-Appellant's only two expert witnesses shows that the performance of a subtotal thyroidectomy is unique to the specialty of a general surgeon. Plaintiff-Appellant's two expert witnesses do not perform subtotal thyroidectomies. Rather, as otolaryngologists, Plaintiff-Appellant's two experts were trained to perform a different surgery, total thyroidectomy, and employ different tools to complete that surgery. Thus, Plaintiff-Appellant's two otolaryngology experts, who do not perform subtotal thyroidectomies, and who are not trained to perform subtotal thyroidectomies, do not have a basis to express any criticisms of Dr. Conroy in his performance of a subtotal thyroidectomy because they are not familiar with the manner and techniques employed by Dr. Conroy to perform a subtotal thyroidectomy.

## **II. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT OF DISMISSAL**

In the Brief of Appellant, Plaintiff-Appellant assigned error to the Trial Court's granting of summary judgment through the determination that the expert testimony submitted by Plaintiff-Appellant was not legally sufficient as a matter of law for the case to proceed. From this sole assignment of error, Plaintiff-Appellant listed four "issues" pertaining to

the claimed assignment of error. These four “issues” are briefly responded to below in the format presented by the Plaintiff-Appellant.

1. The Trial Court did not err in granting summary judgment of dismissal on the basis that Plaintiff-Appellant failed to demonstrate, through qualified expert testimony, that there was a genuine issue of material fact as to a violation of the applicable standard of care. Plaintiff-Appellant’s expert witnesses, who were both otolaryngologists, testified at their depositions that they were not able to express an opinion as to the standard of care for a general surgeon in the performance of a subtotal thyroidectomy. In this regard, the experts disclosed by the Plaintiff-Appellant testified that they lacked familiarity with the training and methods of treatment used by a general surgeon and that they were not familiar with the surgery performed in this case, a subtotal thyroidectomy. By failing to present a *prima facie* case that there was a violation of the standard of care by the Defendants-Respondents, summary judgment of dismissal was properly granted as a matter of law.

2. The Trial Court did not err in granting summary judgment of dismissal in this case in which Plaintiff-Appellant’s expert witnesses acknowledged that they are not familiar with the methods and techniques

utilized by general surgeons in the performance of subtotal thyroidectomies. Again, the experts disclosed by the Plaintiff-Appellant testified that as otolaryngologists, they are not trained to perform a subtotal thyroidectomy and they are not familiar with this surgery. Further, Plaintiff-Appellant's disclosed experts both testified that they could not state what the standard of care was for a general surgeon performing a subtotal thyroidectomy and did not testify that Dr. Conroy violated the standard of care.

3. The Trial Court did not err in granting summary judgment of dismissal and correctly interpreted *Hill v. Sacred Heart Medical Center*, 143 Wn.App. 438, 173 P.3d 1152 (2008); *Eng v. Klein*, 127 Wn.App. 171, 110 P.2d 844 (2005); *Seybold v. Neu*, 105 Wn.App. 666, 19 P.3d 1068 (2001); and *White v. Kent Medical Center Inc. P.S.*, 61 Wn.App. 163, 810 P.2d 4 (1991). The Trial Court correctly determined that summary judgment of dismissal was properly granted and in conformance with existing case law.

4. Plaintiff-Appellant's board certified otolaryngology experts testified that they are not able to state the standard of care for a general surgeon in the performance of a subtotal thyroidectomy in the State of

Washington. Thus, the Trial Court properly dismissed this matter as a matter of law through summary judgment.

### **III. COUNTER STATEMENT OF THE CASE**

#### **A. Counter Statement of Facts**

On November 13, 2003, Lajuana Leaverton presented at Dr. Conroy's medical offices. CP 191. She had been referred to Dr. Conroy by her endocrinologist, Dr. Gary Treece, for surgical treatment of a multinodular goiter and hyperthyroidism, which were conditions she had dealt with for several years. CP 191.

Rather than itemize each instance in which Plaintiff-Appellant did not accurately state the facts of this case, the note from the medical record authored by Dr. Conroy is reproduced below. Thus, at the November 13, 2003 office visit, Dr. Conroy described that he:

discussed what surgical excision, such as a subtotal thyroidectomy, would entail, how we do it, and the potential risks and complications of doing it including infection, bleeding, pain, scar, recurrent nerve injury, superior laryngeal nerve injury, injury to other structures in the neck such as the trachea, major blood vessels, the parathyroid glands, etc. She stated that she understood all of that and agreed to proceed with surgery.

CP 191. Also on November 13, 2003, Lajuana Leaverton and Dr. Conroy, both reviewed and signed the “Special Consent to Operation, Post Operative Care, Medical Treatment Anesthesia, or Other Procedure” form, which listed the planned procedure as “subtotal thyroidectomy”. CP 193. Thus, from the initial visit, the plan was for Dr. Conroy to perform a subtotal thyroidectomy as discussed and agreed upon by Lajuana Leaverton on November 13, 2003.

On November 26, 2003, at Yakima Valley Memorial Hospital, Dr. Conroy performed a subtotal thyroidectomy on Lajuana Leaverton. In her brief, Plaintiff-Appellant implied at page 4 that leaving a portion of the thyroid gland and performing a subtotal thyroidectomy was a decision made by Dr. Conroy during the course of surgery. As is evident from the medical records discussed above, the planned for surgery was the subtotal thyroidectomy. In addition to the November 13, 2003 medical records that this surgery would be a subtotal thyroidectomy, the Operative Report from November 26, 2003 stated in the “PROCEDURE” section that “Subtotal thyroidectomy” was the planned for surgery. CP 106. In the “INDICATIONS” section of the Operative Report, Dr. Conroy dictated that

Mrs. Leaverton is a 47-year-old lady who has had a large multinodular goiter for several years now. She has been having problems with hyperthyroidism and has failed medical

management to control this. She presents now for surgical correction with subtotal thyroidectomy.

CP 106. Thus, Plaintiff-Appellant is inaccurate in her briefing when she suggests that a medical decision was made during the course of surgery to perform a subtotal thyroidectomy.

The recitation of facts described by Plaintiff-Appellant were also inaccurate with regard to the characterization of the surgery performed on November 26, 2003. Thus, although lengthy, Defendants-Respondents have reproduced the surgical “DESCRIPTION” from the Operative Report below:

The patient was brought to the operating room and placed on the table in the supine position. After an adequate level of general anesthesia, her neck was prepped and draped in sterile fashion. An incision was made about two fingerbreadths above the sternal notch, essentially extending medially and across from her previous surgery for her anterior cervical fusion. The dissection was carried down through the subcutaneous tissue and platysma. The midline was identified and the strap muscles were separated. The patient had a great deal of adhesions on the left side because of her previous surgery. Eventually the muscle was dissected off the thyroid gland. We started at the superior pole of the left gland, which was a little bit enlarged but not too bad. The vessels were identified, as was the superior laryngeal nerve, and the vessels were divided between clamps and tied with 2-0 silk, staying away from the nerve. This mobilized the superior pole nicely. Attention was turned to the middle thyroid vein, which was divided between hemostats and ligated with 3-0 silk. The gland was difficult to roll medially, as it was quite firm and adhered to the trachea. Both parathyroid glands were identified and separated from the thyroid gland, preserving their blood supply. The inferior pole vessels were then divided between hemostats and ligated with 2-0 silks. The recurrent nerve was not identified on the left side, so I divided

the thyroid gland with the electrocautery, approximately 0.5 cm from its mediolateral-most component, and then dissected it off the trachea. This was continued across the isthmus, freeing it up until the right side was encountered. The right side was significantly larger than the left, with a large nodule encompassing the midportion of the right lobe. Again there was some thyroiditis, and things were a little stuck. We were able to identify the superior pole vessels and the superior laryngeal nerve, and the vessels were divided between hemostats, staying away from the nerve. The middle thyroid vein was divided between hemostats and ligated with silk. The inferior pole vessels were identified, divided and tied with silk, as well. Again both the superior and inferior parathyroid glands were identified and separated from the thyroid gland, preserving their blood supply. The recurrent laryngeal nerve on the right side was clearly identified. Initially when I rolled the gland medially, it appeared that the nerve was adhered to the gland. I had planned to divide the gland above the nerve, but when I started mobilizing it superiorly it came off the trachea pretty easily in that position and actually peeled off the nerve, and the nerve appeared intact. The gland was then further removed from the trachea, and in the midposition it was adhered a little more and required a little more effort to get it off the gland, but we did this without injuring the trachea. The gland was then passed off the field with the large nodule in the right lobe. The wound was then copiously irrigated, and there was excellent hemostasis. The strap muscles were reapproximated in the midline with running 3-0 Monocryl. The platysma was reapproximated with multiple interrupted 3-0 Monocryl sutures. The skin was closed with running subcuticular Monocryl, benzoin and Steri-Strips. Sterile dressing was applied. The patient was taken to the recovery room in stable condition.

CP 106 – 107. Again, contrary to the facts described in the Brief of Appellant, the planned for surgery was a subtotal thyroidectomy and a small portion of the thyroid gland was not left because Dr. Conroy could not identify the left recurrent laryngeal nerve. Rather, when the left recurrent laryngeal nerve was not identified, Dr. Conroy divided the

thyroid gland with the electrocautery and then dissected the gland off the trachea, freeing it up until the right side was encountered. CP 106-107.

Immediately after surgery, Dr. Conroy identified that Lajuana Leaverton had stridor, which is a high pitched sound, or noisy breathing, that results from turbulent air flow in the upper airway primarily on inspiration and sometimes on expiration. CP 108. Dr. Conroy arranged for consultations by other specialists, including an otolaryngologist, Dr. Palmer Wright. CP 108. Lajuana Leaverton was discharged from the hospital on December 1, 2003. CP 108.

On December 4, 2003, Lajuana Leaverton saw Dr. Conroy in his office at a post-surgery follow-up visit. CP 185 (this factual information from the medical records was cited in Plaintiff's Complaint for Damages; the medical records are not disputed by the Defendants-Respondents). Dr. Conroy and Lajuana Leaverton discussed at this office visit that the stridor may be permanent. CP 185.

Lajuana Leaverton was referred to Dr. Allen Hillel, who is an otolaryngologist practicing at the University of Washington Medical Center. CP 186. On December 17, 2003, Lajuana Leaverton underwent a tracheostomy performed by Dr. Hillel. CP 186. She was discharged from the University of Washington Medical Center on December 23, 2003. CP 186. Thereafter, on June 8, 2004, Dr. Hillel, in a follow-up visit, noted

that Lajuana Leaverton's vocal cords remained immobile. CP 186. On December 14, 2004, Dr. Hillel found that both vocal cords were fixed in the midline position. CP 186.

**B. Counter Statement of Procedural History**

This matter was filed with Yakima County Superior Court on January 16, 2007. CP 183. A Pre-Trial Discovery Order was filed on February 24, 2009. CP 195. In accordance with the Pre-Trial Discovery Order, the Plaintiff's Disclosure of Possible Primary Expert Witnesses and Treating Healthcare Providers was filed on April 3, 2009. CP 199.

In Plaintiff's Disclosure of Possible Primary Expert Witnesses and Treating Healthcare Providers, three experts were named: Gregory K. Chan, M.D., John B. Sunwoo, M.D., and Charles R. Souliere, Jr., M.D. CP 200-201. Thereafter, counsel for Plaintiff expressed that only two experts would be used: Drs. Souliere and Chan, which was verified through written correspondence between Mr. Thorner and Mr. Golden on July 30, 2009. CP 208.

Drs. Souliere and Chan are both otolaryngologists. Thus, Plaintiff-Appellant did not declare and has not offered any expert opinion testimony from a general surgeon regarding the applicable standard of care

for a general surgeon practicing in the State of Washington in the performance of a subtotal thyroidectomy.

After completing the depositions of Drs. Souliere and Chan, Defendants-Respondents filed the Defendants' Motion for Summary Judgment of Dismissal (CP 163 – 164), the Memorandum of Points and Authorities in Support of this Motion (CP 149 – 162), as well as the supporting Declaration of Megan K. Murphy (CP 179 – 233) on October 30, 2009. The basis for Defendants-Respondents Motion for Summary Judgment was that the Plaintiff-Appellant failed to offer any expert testimony regarding the applicable standard of care for a general surgeon performing a subtotal thyroidectomy in the State of Washington. CP 149-162. In this regard, in the deposition testimony of Plaintiff-Appellant's expert witnesses, Drs. Souliere and Chan both stated that there was a difference in the approaches and techniques between an otolaryngologist and general surgeon in the utilization of subtotal thyroidectomies. CP 211-212. Otolaryngologists do not perform, and are not trained to perform, subtotal thyroidectomies. CP 211-212, 215-216. Thus, Drs. Souliere and Chan acknowledged that they are not familiar with the surgery performed in this case. *Id.* Plaintiff-Appellant's expert witnesses also testified that they could not testify on the standard of care for a general surgeon in performing a subtotal thyroidectomy because they did

not know what the standard of care would be for a general surgeon. CP 219, 222, 225-226, 229-230, 233.

In response to Defendants' Motion for Summary Judgment of Dismissal, on November 30, 2009, Plaintiff-Appellant filed Plaintiff's Memorandum and Opposition to Defendants' Motion for Summary Judgment of Dismissal (CP 88 – 101), as well as the Declaration of Thomas R. Golden in Support of Plaintiff's Memorandum (CP 102 – 148). No additional declarations or affidavits from a medical expert were filed in support of Plaintiff's Memorandum. In her opposition statement, Plaintiff-Appellant argued that otolaryngologists are knowledgeable with regard to thyroid disease and performing thyroidectomies. CP 91. A thyroidectomy and subtotal thyroidectomy are not the same surgery. In her briefing, Plaintiff-Appellant never discussed or responded to the basis of Defendants-Respondent's reason for requesting summary judgment, which was the testimony of Plaintiff-Appellant's only two experts, who both stated that they were not able to testify regarding the standard of care for a general surgeon in the performance of a subtotal thyroidectomy because this is not a surgery that they perform or are trained to perform, and they do not practice in the specialty field of general surgery.

The Defendants-Respondents' Reply to Plaintiff's Memorandum and Opposition to Defendants' Motion for Summary Judgment of

Dismissal (CP 80 – 87) was filed on December 7, 2009. In this Reply, Defendants-Respondents discussed that this case is not about the diagnosis and treatment of thyroid disease, but the claim by the Plaintiff-Appellant that Dr. Conroy did not perform the subtotal thyroidectomy surgery within the standard of care. CP 80-81. Moreover, in the Defendants-Respondents' Reply, it was argued that Plaintiff-Appellant did not present any testimony from any medical expert that Dr. Conroy violated the standard of care for a general surgeon practicing in the State of Washington because Plaintiff-Appellant's two experts both testified that they were not able to express standard of care opinions with regard to a general surgeon performing a subtotal thyroidectomy. CP 86-87.

Oral argument on the Defendants-Respondents' Motion for Summary Judgment were heard by the Trial Court on December 11, 2009 before the Honorable C. James Lust. Judge Lust issued a letter ruling filed with the Yakima County Clerk's Office on December 17, 2009 granting the Defendants' Motion for Summary Judgment. CP 79.

Plaintiff-Appellant filed her Motion for Reconsideration on December 30, 2009 (CP 73 – 78). On January 8, 2010, Defendants-Respondents filed a Response to Plaintiff's Motion for Reconsideration (CP 80 – 87), as well as the Declaration of Megan K. Murphy in Support of Defendants' Response to Plaintiff's Motion for Reconsideration (CP 19

– 59). Plaintiff’s Reply to Defendants’ Response to Plaintiff’s Motion for Reconsideration (CP 14 – 18) was filed on January 15, 2010.

The Trial Court issued the Order Denying Motion for Reconsideration on January 27, 2010 (CP 13).

### **C. Counter Statement of Expert Testimony**

At his deposition, Charles R. Souliere, Jr., M.D. agreed that there are differences in the approaches and techniques utilized by otolaryngologists and general surgeons in the treatment of thyroid disease. Dr. Souliere testified:

Q Is there a difference of practice and view between general surgeons that do thyroid surgery and otolaryngologists as to the utilization of subtotal thyroidectomy as a procedure as differentiated from the other two?

A I believe that most ear, nose and throat surgeons would not as a matter of course do a subtotal thyroidectomy. It’s just a difference in training.

Q So the answer to my question is, yes, there’s a difference in --

A Yes.

Q -- approach and utilization between the specialties of otolaryngology and the specialty of general surgery?

A I believe so.

CP 215-216 (emphasis added).

After agreeing that there was a difference between the approaches utilized by an otolaryngologist from that of a general surgeon with regard

to the utilization of a subtotal thyroidectomy, Dr. Souliere testified that he was not able to express an opinion on the standard of care for a general surgeon with regard to the performance of a subtotal thyroidectomy. This inability to express a standard of care opinion was based on Dr. Souliere's lack of training in general surgery. Thus, Dr. Souliere was unaware of the techniques employed by a general surgeon in the performance of a subtotal thyroidectomy. In this regard, Dr. Souliere testified:

Q In your opinion, at the time that the surgery was performed by Dr. Conroy in this case, in your opinion did the standard of care applicable to a general surgeon require the use of a nerve monitor during thyroid surgery?

A I can't testify as to the standard of care for a general surgeon. I'm not a general surgeon. I know the standard of care for an otolaryngologist would certainly be to use a nerve monitor.

CP 219 (emphasis added).

Similarly, Gregory K. Chan, M.D. testified that he was not able to express standard of care opinions regarding the care and treatment provided by Dr. Conroy because Dr. Chan was an otolaryngologist, not a general surgeon.

Q Let me -- because I want to make sure we're on the same page, here. Now let me back up for a minute.

Okay, you are not a board certified general surgeon. Correct?

A No.

Q You are a board certified otolaryngologist – head and neck surgeon?

A Correct.

Q And you are, presumably, familiar with the standard of care of a reasonably prudent otolaryngology – head and neck surgeon. Correct?

A Correct.

Q Now, let me ask this question to you. Do you believe that you are aware of the standard of care that is applicable to Dr. Conroy as a general surgeon?

A No.

CP 225-226 (emphasis added).

Q All right. Now, you have not practiced the medical specialty of general surgery. Correct?

A Correct.

Q And the only training you have had in general surgery is the first year of your four-year residency at Medical College of Wisconsin. Correct?

A Correct.

Q Now, I want you to tell me, if you can, please, whether or not you feel you have sufficient background, experience, and training to express opinions as to what is required to meet the standard of care by a general surgeon in the state of Washington.

MR. GOLDEN: Objection. Calls for a legal opinion.

BY MR. THORNER:

Q Go ahead.

A No.

Q You don't have any basis for that?

A No, I have no knowledge of what the standard of care in the general surgeons in the investigation of a thyroid problem.

CP 229-230 (emphasis added).

Q Well, I'm asking you in terms of Dr. Conroy, as a reasonably prudent general surgeon, whether in your opinion he

violated the standard of care in his workup of this patient and consultation with this patient on November 13 of '03.

MR. GOLDEN: Objection to the form.

BY MR. THORNER:

Q Go ahead.

A I can't answer that question because I don't know what his standard of care is.

CP 233 (emphasis added).

Thus, Plaintiff-Appellant did not present any medical expert testimony that Dr. Conroy violated the standard of care for a reasonable and prudent practicing general surgeon in the State of Washington in his performance of the subtotal thyroidectomy.

#### IV. ARGUMENT

##### A. Standard of Review

This is a *de novo* review of the Trial Court's decision. However, with regard to the testimony of an expert witness, "[c]ompetency to testify can reasonably be found by the trial court." *McKee v. American Home Products, Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989) (citations omitted). Moreover, "[t]he qualifications of an expert are to be judged by the trial court, and its determination will not be set aside in the absence of a showing of abuse of discretion." *Id.* (emphasis added), *citing, Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 413, 553 P.2d 107 (1976),

*quoting, Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wn.2d 629, 642, 453 P.2d 619 (1969).

As evident from Plaintiff-Appellant's briefing and the oral arguments made to the Trial Court by counsel for Plaintiff-Appellant, Plaintiff-Appellant does not appear to appreciate that a general surgeon is a medical specialty in and of itself. Plaintiff-Appellant seems to be under the mistaken belief that a rotation in general surgery during a Residency Program is akin to being trained to perform in the field of general surgery. This is not correct. A similar correlation can be shown in that a rotation in otolaryngology during a Residency Program does not train a doctor to work as a specialist in the field of otolaryngology. Additional and specific medical education is required to become a board certified general surgeon.

Dr. Conroy is a board certified general surgeon. In his training to become a board certified general surgeon, Dr. Conroy was taught how to perform a subtotal thyroidectomy. In his practice, Dr. Conroy regularly performs subtotal thyroidectomies. As testified by Drs. Souliere and Chan, their training in the field of otolaryngology did not include an education on how to perform subtotal thyroidectomies. Subtotal thyroidectomies are not surgeries performed by Drs. Souliere and Chan in their practice. Thus, Drs. Souliere and Chan are not "competent" to testify on the standard of care of a general surgeon performing a subtotal

thyroidectomy because they are not trained in this surgery and they do not perform this surgery.

In a medical liability case, the necessary elements of proof include the following, that:

(1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;

(2) Such failure was a proximate cause of the injury complained of.

RCW 7.70.040 (emphasis added).

If this case were to proceed to trial, Defendants-Respondents would be entitled to the following Washington Pattern Jury Instruction 105.02:

A health care professional owes to the patient a duty to comply with the standard of care for one of the profession or class to which he belongs.

A general surgeon who holds himself out as a specialist in general surgery has a duty to exercise the degree of skill, care and learning expected of a reasonably prudent general surgeon in the State of Washington acting in the same or similar circumstances at the time of the care or treatment in question. Failure to exercise such skill, care, and learning constitutes a breach of the standard of care and is negligence.

The degree of care actually practiced by members of the medical profession is evidence of what is reasonably prudent. However, this evidence alone is not conclusive on the issue and should be considered by you along with any other evidence bearing on the question.

WPI 105.02 (emphasis added).

In *Harris v. Groth*, 99 Wn.2d 438, 663 P.2d 1113 (1983), the Washington Supreme Court emphasized that:

In general, expert testimony is required when an essential element in the case is best established by an opinion which is beyond the expertise of a layperson. 5A K. Tegland, Washington Practice, *Evidence* § 300 (1982). Medical facts in particular must be proven by expert testimony unless they are “observable by [a layperson's] senses and describable without medical training.” *Bennett v. Department of Labor & Indus.*, 95 Wash.2d 531, 533, 627 P.2d 104 (1981). Thus, expert testimony will generally be necessary to establish the standard of care (*Douglas v. Bussabarger*, 73 Wash.2d 476, 479, 438 P.2d 829 (1968)), and most aspects of causation (*Bennett*, 95 Wash.2d at 533, 627 P.2d 104; *O'Donoghue v. Riggs*, 73 Wash.2d 814, 824, 440 P.2d 823(1968)).

*Id.*, at 449.

Referencing the *Harris* case, the Court in *Guile v. Ballard Community Hosp.*, 70 Wn.App. 18, 851 P.2d 689 (1993), discussed that

In a medical malpractice case, expert testimony is generally required to establish the standard of care and to prove causation. *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2 113 (1983). Thus, a defendant moving for summary judgment can meet its initial burden by showing that the plaintiff lacks competent expert testimony. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226-27, 770 P.2d 182 (1989). The burden then shifts to the plaintiff to produce an affidavit from a qualified expert witness that alleges specific facts establishing a cause of action. *Young*, at 226-27.

*Id.*, at 25 (emphasis added).

In this case, the argument that Plaintiff-Appellant's experts are not "competent" relates to the legal standard that exists for a plaintiff to establish that he or she should be able to legally proceed forward with an action. Drs. Souliere and Chan may be competent otolaryngologists. However, in this case, Drs. Souliere and Chan both testified that they are not able to testify as to the standard of care for a general surgeon in the performance of a subtotal thyroidectomy. Thus, neither Drs. Souliere nor Chan were "competent" to express expert testimony against Dr. Conroy in this case.

In a medical liability case, a defendant may move for summary judgment when there is an absence of competent medical evidence for the plaintiff to establish a *prima facie* case. *See, Colwell v. Holy Family*, 104 Wash.App. 606, 611, 15 P.3d 210 (2001), *citing, Young v. Key Pharmaceutical*, 112 Wn.2d 216 (1989). To establish a *prima facie* case, a plaintiff must show duty, breach, causation and damages. *Id.* "Summary judgment in favor of the defendant is proper if the plaintiff fails to make a *prima facie* case concerning an essential element of his or her claim." *Seybold v. Neu*, 105 Wash.App. 666, 676, 19 P.3d 1068 (2001).

Expert medical testimony on standard of care and causation must rise to the level of a reasonable medical certainty. *See, McLaughlin v.*

*Cooke*, 112 Wn.2d 829, 836-837, 774 P.2d 1171 (1989). If the plaintiff lacks competent expert testimony, the defendant is entitled to summary judgment. *See, Colwell v. Holy Family*, 104 Wash.App. 606, 611, 15 P.3d 210 (2001).

The standard of care required of a professional practitioner must be established by the testimony of an expert who practices in the same field. *See, McKee v. American Home Products, Corp.*, 113 Wash.2d 701, 706, 782 P.2d 1045 (1989). To testify that the defendant breached the applicable standard of care, “a physician must demonstrate that he or she has sufficient expertise in the relevant specialty.” *Young*, supra, 112 Wn.2d at 229. A physician will ordinarily be considered qualified to express an opinion with respect to any medical question, “[s]o long as a physician with a medical degree has sufficient expertise to demonstrate familiarity with the procedure or medical problem at issue.” *White v. Kent Medical Center, Inc.*, 61 Wash.App. 163, 173, 810 P.2d 4 (1991).

**B. Summary of Argument**

This case deals with a specialist, Dr. Conroy, who is a board certified general surgeon, who performed a subtotal thyroidectomy, which is a procedure he was specifically trained to perform. Plaintiff-Appellant did not present expert testimony from a general surgeon in furtherance of

her position that Dr. Conroy allegedly violated the standard of care. Plaintiff-Appellant also did not present testimony from a medical expert familiar with the methods and techniques of performing a subtotal thyroidectomy. Instead, Plaintiff-Appellant relied exclusively upon the testimony of two otolaryngologists, who do not practice within the same field as Dr. Conroy, who do not know the applicable standard of care for general surgeons, and who lack sufficient expertise to demonstrate a familiarity with how a subtotal thyroidectomies are to be performed through the techniques and procedures employed by a general surgeon.

**C. Judge C. James Lust Properly Granted Summary Judgment**

**1. Washington Cases Regarding Competency of an Expert Witness**

In the Brief of the Appellant, Plaintiff-Appellant cites four Washington State cases to support her argument that the competency of an expert witness is based upon the familiarity of the witness with the medical procedure or medical condition. This point of law is not disputed by Defendants-Respondents. However, the manner in which Plaintiff-Appellant argues that this should apply in this case is strongly disputed.

Plaintiff-Appellant first started with *White v. Kent Medical Center, Inc.*, 61 Wash.App. 163, 810 P.2d 4 (1991). In *White*, the medical liability claim related to the delayed diagnosis of cancer. *Id.*, at 165. The four defendant-doctors in *White* were general practitioners, who allegedly failed to take immediate and appropriate steps to diagnose the clinical symptoms presented by the patient-plaintiff regarding persistent hoarseness lasting for numerous weeks in light of her chronic smoking habit. *Id.* It was later determined that the plaintiff-patient had a mass on her left vocal cord that was malignant and subsequently required the removal of the larynx and a left neck dissection. *Id.*, at 166.

The patient-plaintiff in *White* presented testimonial evidence from an otolaryngologist against the general practitioners that when a patient who smokes complains of hoarseness for 4 to 6 weeks, then the patient's vocal cords should immediately be examined. *Id.*, at 167. In addition to this otolaryngology expert, the plaintiff in *White* also had evidence in the form of testimony from two of the defendant-doctors, both general practitioners, who both stated that a vocal cord examination was required when patient was persistently hoarse for 4 to 6 weeks. *Id.*

The *White* Court considered the testimonial evidence of the two general practitioner defendant-doctors in deciding that summary judgment should not have been granted by the trial court. *Id.*, at 171. The *White*

Court also discussed that a specialist can testify about the applicable standard of care applicable for a general practitioner in certain circumstances. *Id.*, at 173. The *White* Court recognized that usually, a general practitioner cannot be held to the standard of care of that held by a specialist. *Id.*, at 173. In regard to instances in which a specialist could testify against a general practitioner, the *White* Court held that

[s]o long as a physician with a medical degree has sufficient expertise to demonstrate a familiarity with the procedure or medical problem at issue, “[o]rdinarily [he or she] will be considered qualified to express an opinion on any sort of medical question, including questions in areas in which the physician is not a specialist.” 5A K. Tegland, Wash.Prac., *Evidence* § 290[2], at 386 (3d ed. 1989).

*Id.*

Thus, while the standard of care for a medical specialist cannot be imposed on a general practitioner, if a specialist has the requisite knowledge about the standard of practice for general practitioners, he or she may testify about that standard.

*Id.*, at 174.

The *White* case is dissimilar to the case at hand. In this case, there are doctors from one specialty or school of medicine, otolaryngology, being utilized by the Plaintiff-Appellant as experts against a doctor from a different specialty or school of medicine, general surgery. Thus, this is not a case in which there is a question as to whether a general practitioner is being held to a higher standard of that held by a specialist. Instead, this

case involves the testimony of two specialists from one school of medicine testifying against a specialist from a different school of medicine.

By way of contrast to *White*, in this case, Drs. Souliere and Chan testified that they do not have the knowledge or ability to testify regarding the applicable standard of care for a general surgeon in the performance of a subtotal thyroidectomy. With scope of knowledge existing as the threshold for whether or not a medical expert is competent to testify against a professional-doctor-defendant, in this case, Plaintiff-Appellants failed to meet the requisite threshold.

Plaintiff-Appellant next discussed *Seybold v. Neu*, 105 Wash.App. 666, 19 P.3d 1068 (2001). In *Seybold*, the patient-plaintiff went to see one of the defendant-doctors, a plastic surgeon, for examination of a lump on his lower right tibia. *Id.*, at 669. The plastic surgeon performed an excisional biopsy of the lump and learned through the pathology study that the patient had a malignant soft tissue sarcoma. *Id.*, at 670. The plastic surgeon then referred the patient-plaintiff to an orthopedic surgeon, who specialized in musculoskeletal oncology, and who was also later named as a defendant-doctor in the case. *Id.* The orthopedic surgeon recommended a course of treatment that included the excision of the patient-plaintiff's skin and bone with fresh frozen cadaver bone used to fit into the area where the bone had been removed. *Id.*, at 671. Two years later, the

patient-plaintiff suffered a fracture of the tibia and opted for a below-knee amputation to resolve the medical issue. *Id.*

In *Seybold*, the patient-plaintiff instituted the lawsuit with the allegation that the defendant-doctors failed to obtain informed consent and committed medical negligence in relation to the manner in which the cutaneous malignancy was treated. *Id.*, at 672. In support of the medical negligence claim, the plaintiff presented testimony from a plastic surgeon from California, who was an expert in the surgical removal of cutaneous malignancies and had expansive experience in treating cutaneous cancer with subsequent reconstruction and bone grafting. *Id.* Although not an orthopedic surgeon, this California plastic surgeon expert also had assisted orthopedic surgeons during surgeries and filled in as an orthopedic surgeon when an orthopedic surgeon was not available. *Id.* Moreover, the California plastic surgeon expert lectured on various subjects across the country including lecturing on the treatment of cutaneous malignancies. *Id.* This expert was also published with regard to Mohs surgery, which was the technique the California plastic surgeon expert opined should have been utilized in the patient-plaintiff's treatment such that amputation of the lower leg would not have occurred. *Id.*

At the trial court level in *Seybold*, the orthopedic surgeon defendant-doctor succeeded with his motion for summary judgment

arguing that the plaintiff's plastic surgeon expert from California lacked the requisite expertise in orthopedics or orthopedic oncology to testify on the applicable standard of care for an orthopedic surgeon. *Id.*, at 675.

On appeal, the *Seybold* Court recognized that

Ordinarily, “[t]he qualifications of an expert are to be judged by the trial court, and its determination will not be set aside in the absence of a showing of abuse of discretion.”

*Id.*, at 678 (citations omitted). However, in reviewing the case, the *Seybold* Court analyzed the fact that the plaintiff-patient did not have bone cancer or musculoskeletal cancer and instead had a cutaneous malignancy located in the subcutaneous tissue. *Id.* Thus, the medical issue encountered by the patient-plaintiff did not involve bones, and the cutaneous malignancy was located in an area of the body that was appropriate for the plaintiff's plastic surgeon expert from California to comment upon. *Id.*, at 679. Moreover, the *Seybold* Court found that this particular expert could testify with regard to the appropriate surgical choices of treatment because this plastic surgeon expert testified at his deposition that cutaneous malignancies were within his range of subject matter that he is familiar with and he was qualified to graft bone and had extensive experience in that regard. *Id.*, at 679-680. Thus, even though the plaintiff's plastic surgeon expert was not an orthopedic surgeon or musculoskeletal oncologist, this particular expert was familiar with the

surgical removal of cutaneous malignancies located subcutaneously that did not invade the bone. *Id.*, at 680. Thus, the *Seybold* Court held that this plastic surgeon expert was qualified to testify on matters of medical negligence in the case given the facts upon which the expert would be testifying and upon the expert's familiarity and experience as described through his deposition testimony. *Id.*, at 681.

By contrast, in the present case, neither Drs. Souliere nor Chan perform subtotal thyroidectomies. They are not familiar with this surgical treatment as performed by general surgeons. Drs. Souliere and Chan testified that they are not able to testify as to standard of care required of a general surgeon. Thus, Plaintiff-Appellant has failed to establish a medical expert familiar with the procedure that was performed in this case who expressed the opinion that Dr. Conroy violated the standard of care. Without the presentation of such evidence, this case was properly dismissed as a matter of law.

Plaintiff-Appellant then discussed *Eng v. Klein*, 127 Wash.App. 171, 110 P.3d 844 (2005). The issue in *Eng* related to the diagnostic methodology used between a neurosurgeon and an infectious disease specialist in recognizing and treating acute bacterial meningitis. *Id.*, at 172. *Eng* was a wrongful death action that involved a fact pattern that started with the decedent being discharged from the hospital after a

successful neurosurgery procedure. *Id.*, at 173. Regardless, a few days after the decedent's discharge, the decedent returned to the hospital with a high fever and other symptoms of infection. *Id.* Several days after that, while in this hospital, it was established through additional testing that the decedent had a rare form of meningitis. *Id.*, at 174. The decedent succumbed to the infection within a month. *Id.*

In response to a motion for summary judgment submitted by one of the defendant-doctors who was a neurosurgeon, the plaintiff presented the testimony of an infectious disease specialist. *Id.*, at 174. At the deposition of the infection disease specialist, the expert testified that he was not rendering opinions as to the standard of care of a neurosurgeon. *Id.*, at 174-175. Rather, the infectious disease specialist testified that his opinions were relevant to any doctor attending this patient and were specifically addressing the negligent actions of the attending physician, regardless of that attending physician's specialty. *Id.*, at 175. The plaintiff's infectious disease expert testified that every doctor "should be very familiar with the signs and symptoms, diagnosis and treatment of meningitis because it is a recognized complication of neurosurgery..." *Id.* Thus, the infectious disease specialist testified that the methods of diagnosis and treatment of meningitis would be the same regardless of

whether that diagnosis and treatment was carried out by a neurosurgeon or by an infectious disease specialist. *Id.*

The *Eng* Court held that in the State of Washington, “[t]he general rule is that a practitioner of one school of medicine is incompetent to testify as an expert in a malpractice action against a practitioner of another school.” *Id.*, at 176 (emphasis added), *citing, Miller v. Peterson*, 42 Wash.App. 822, 831, 714 P.2d 695 (1986). Exceptions to this general rule include only the following circumstances:

- (1) the methods of treatment in the defendant’s school and the school of the witness are the same;
- (2) the method of treatment in the defendant’s school and the school of the witness should be the same; or
- (3) the testimony of a witness is based on knowledge of the defendant’s own school.

*Id.*, *citing, Miller v. Peterson*, 42 Wn.App. 822, 831, 714 P.2d 695. Thus, the holding in *Eng* established exceptions to the general rule that a practitioner of one school of medicine is incompetent to testify as an expert in a medical malpractice action against a practitioner from another school of medicine. *Id.*

Contrary to the facts of *Eng*, in this case, the experts for Plaintiff-Appellant testified that there is a difference between the training and techniques employed by otolaryngologists as compared to that of general surgeons in performing a subtotal thyroidectomy, and that otolaryngologists do not perform subtotal thyroidectomies. Again, the

medical experts hired by Plaintiff-Appellant in this case testified that they were not able to offer opinion testimony on whether Dr. Conroy violated the standard of care as a general surgeon in his performance of the subtotal thyroidectomy. Such opinions could not be offered because Drs. Souliere and Chan testified that they do not know what the standard of care is for a general surgeon performing a subtotal thyroidectomy. Moreover, in this case, none of the three above-listed exceptions in *Eng* to the general rule that a practitioner from one school of medicine is incompetent to testify as an expert against a practitioner from another school apply.

Finally, with regard to cases from the State of Washington Plaintiff-Appellant cited, is the *Hill v. Sacred Heart Medical Center*, 143 Wash.App. 438, 177 P.3d 1152 (2008). The plaintiffs in the *Hill* case argued that the health care providers failed to recognize that the patient-plaintiff was experiencing an allergic reaction to heparin-based medications and as a result suffered a stroke. *Id.*, at 442-443. The plaintiffs sued the hospital and all of the physicians who cared for the patient-plaintiff, which included first and second year Residents, Attending Internal Medicine physicians, a Neurologist, a gastroenterologist, an orthopedic surgeon, and the nursing staff. *Id.*, at 443.

Many of the named defendants brought motions for summary judgment. In response, plaintiffs presented affidavits from a hematologist and internist, as well as a nurse. *Id.*, at 444. The trial court granted summary judgment for some of the physician-defendants in instances in which the trial court determined that the plaintiffs' experts lacked the requisite expertise in the defendant-doctors' relevant schools of medicine. *Id.*, at 451.

On appeal from the dismissals, the *Hill* Court determined that the questions to ask with regard to the competency of an expert were as follows:

(1) Is the expert a physician with a medical degree? and (2) Did the expert produce sufficient facts to demonstrate his or her familiarity with HIT [heparin-induced thrombocytopenia] as a medical problem and the procedures for diagnosing and treating HIT? RCW 7.70.040(1).

*Id.*, at 451. The *Hill* Court held that the affidavits from the plaintiffs' experts included testimony that the experts were familiar with the diagnosis and treatment of heparin-induced thrombocytopenia and that the standard of care for the physicians treating a patient-plaintiff with symptoms of heparin-induced thrombocytopenia would be the same regardless of the health care providers' specialty. *Id.*, at 452-453.

It is significant to note that in the *Hill* case, the analysis performed by the *Hill* Court was based exclusively on affidavit testimony. Upon

remand of the *Hill* case to the trial court level, the depositions of the plaintiffs' experts were taken. Thereafter, the orthopedic surgeon-defendant and the gastroenterologist-defendant were dismissed from the action through summary judgment. In the deposition testimony of the plaintiffs' experts it was evident that the plaintiffs' experts did not have the requisite knowledge to testify on the standard of care of an orthopedic surgeon or gastroenterologist.

In this case, we have the deposition testimony of Drs. Souliere and Chan. Both Drs. Souliere and Chan testified to their knowledge, skill, experience, training, and education relative to the performance of a subtotal thyroidectomy. Such knowledge on how to perform a subtotal thyroidectomy did not exist for either Dr. Souliere or Dr. Chan. Drs. Souliere and Chan testified that they were not able to express an opinion on the standard of care for a general surgeon performing a subtotal thyroidectomy.

With the deposition testimony of Drs. Souliere and Chan, Plaintiff-Appellant has failed to establish that Drs. Souliere and Chan are qualified to render standard of care opinions with regard to the performance of subtotal thyroidectomy surgery as performed by a general surgeon. Thus, Plaintiff-Appellant failed to present competent medical evidence that Dr. Conroy violated the standard of care. Drs. Souliere and Chan are not

legally competent to render standard of care opinions against Dr. Conroy because, as they described in their deposition testimony, Drs. Souliere and Chan do not know the applicable standard of care that applies to Dr. Conroy.

Therefore, in this case, Plaintiff-Appellant has not put forth medical expert testimony that Dr. Conroy violated the standard of care. At his deposition, Plaintiff-Appellant's expert Dr. Chan testified that an injury to the recurrent laryngeal nerve is not, in and of itself, an indication of a violation of the standard of care.

Q All right. And are you indicating that injury could have occurred without a standard of care violation?

A I don't think that standard of care issue, as all. I think it just an issue of where it would be the nerve was injured. And it would be the moment of time that could have injured.

Q And you're not suggesting that just because this injury occurred, that Dr. Conroy violated the standard of care?

A Oh, no. Not in this case.

CP 46.

Q Does a nerve injury occurring in thyroidectomy surgery in and of itself violated the standard of care?

A No.

CP 48.

Similar to Dr. Chan, Plaintiff-Appellant's expert Dr. Souliere testified that the occurrence of an injury to the recurrent laryngeal nerve is not, in itself, a violation of the standard of care.

Q The occurrence of a nerve injury during a thyroid procedure in and of itself is not a violation of the standard of care, correct?

A Correct. I believe it's an accepted complication.

CP 50. In fact, an injury to the recurrent laryngeal nerve is a complication that Dr. Souliere has experienced in his practice. CP 52-53.

Dr. Souliere testified that there was a difference in the practice and review performed by a general surgeon as compared to that of an otolaryngologist regarding the approach and utilization of subtotal thyroidectomies. CP 40-41. When it came to the point of answering the key question of whether Dr. Conroy violated the standard of care, Dr. Souliere acknowledged in his deposition that he did not know what the applicable standard of care was for Dr. Conroy. CP 57 and 59.

Plaintiff-Appellant did not present competent medical evidence that the Defendants-Respondents violated the standard of care. Thus, this matter was properly dismissed through summary judgment as a matter of law.

## **2. Cases From Other Jurisdictions Cited by Plaintiff-Appellant**

Plaintiff-Appellant cited cases from Texas, Kansas, and New York. The professional negligence statutes in these states are very different from

the professional negligence statute in the State of Washington. It is not necessarily worthy of a legal analysis to compare the statutes and case law between these various states because there is a sufficient amount of case law in the State of Washington to analyze the issues raised by Plaintiff-Appellant in this appeal. Thus, further discussion of these cases from Texas, Kansas, and New York will not occur herein, beyond noting that the cases from Texas and Kansas have been distinguished by other subsequent cases in those jurisdictions.

3. **The *Miller v. Peterson* Analysis is Part of the *Eng v. Klein* Discussion, Which Was Argued Prior to the Motion for Summary Judgment Hearing**

In the Brief of Appellant, at page 39, Plaintiff-Appellant stated that Defendants-Respondents arguments that were supported by the holding in *Miller v. Peterson*, 42 Wn.App. 822, 714 P.2d 695 (1986) were not made by Defendants-Respondents until after the Motion for Summary Judgment hearing, and were part of the Defendants-Respondents response to Plaintiff-Appellant's Motion for Reconsideration. This is not correct. The holding in *Eng v. Klein*, 127 Wn.App. 171, 110 P.3d 844 (2005) is significantly based upon the analysis and holding in *Miller v. Peterson*. The analysis and holding in *Eng*, which directly and repeatedly cites

*Miller v. Peterson*, is extensively discussed, and is in fact the first case analyzed, in the Defendants-Respondents Reply to Plaintiff's Memorandum and Opposition to Defendants' Motion for Summary Judgment of Dismissal. CP 80 – 87 (specific to the *Miller v. Peterson* discussion: CP 82-84). Thus, the Trial Court had the benefit of the arguments and analysis, and was able to interpret *Miller v. Peterson* in advance of and during the Motion for Summary Judgment hearing.

Also in the Brief of Appellant, Plaintiff-Appellant inappropriately claims that Drs. Conroy, Souliere, and Chan are all medical doctors, which thus makes them all from the same school of medicine. This is not correct. Dr. Conroy is a board certified general surgeon. Drs. Souliere and Chan are otolaryngologists. Drs. Chan and Souliere testified that they are not able to offer opinions with regard to the standard of care required of a general surgeon because their training and experience is different from that of a general surgeon. Also, Drs. Chan and Souliere, otolaryngologists, are not trained to perform subtotal thyroidectomies, which is something that general surgeons are trained to perform. Dr. Souliere agreed that the training of an otolaryngologist is different from that of a general surgeon and that an otolaryngologist and general surgeon will employ different techniques in treating thyroid disease.

Drs. Souliere and Chan are from a different school of medicine from Dr. Conroy. Drs. Souliere and Chan have different training from Dr. Conroy with regard to the manner of treating thyroid disease. Drs. Souliere and Chan acknowledge that they lack the requisite knowledge of a general surgeon in performing subtotal thyroidectomies such that Drs. Souliere and Chan cannot express opinions as to Dr. Conroy's standard of care.

In this case, the opinions of Drs. Souliere and Chan are the only expert opinions offered by Plaintiff-Appellant. Thus, as a matter of law, Plaintiff-Appellant has not established through credible medical expert testimony that there is a question of material fact relative to whether Dr. Conroy violated the standard of care of a general surgeon in his performance of the subtotal thyroidectomy surgery. Drs. Souliere and Chan both acknowledged that they are not equipped with the requisite training, knowledge, and practical expertise to perform a subtotal thyroidectomy as performed by Dr. Conroy, a general surgeon.

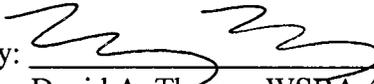
## V. CONCLUSION

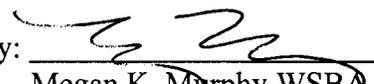
For the reasons cited above, the Trial Court properly granted the Motion for Summary Judgment of Dismissal submitted by Robert J.

Conroy, M.D. and Cascade Surgical Partners PLLC.

Respectfully submitted this 16<sup>th</sup> day of August 2010.

THORNER, KENNEDY & GANO P.S.  
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By:   
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PROOF OF SERVICE

I certify that on the 16th day of August 2010, I caused a true and correct copy of the Brief of Respondents – Cascade Surgical Partners, PLLC and Robert J. Conroy, M.D. to be served on the following in the manner indicated below:

Counsel for Plaintiff	<input checked="" type="checkbox"/> U.S. Mail
Mr. Thomas R. Golden	<input type="checkbox"/> Hand Delivery
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Signed in Yakima, Washington.

  
Melissa Wohl