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Division III
State of Washington

COA No. 326527
Superior Ct. No. 12-2-00325-9

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

ESTATE OF LORRAINE P. HENSLEY by and through its Personal Representative, JESSICA WILSON and LORRAINE HENSLEY, by and through her Personal Representative,

Appellants,

v.

COMMUNITY HEALTH ASSOCIATION OF SPOKANE (CHAS); PROVIDENCE HOLY FAMILY HOSPITAL; SPOKANE EAR, NOSE AND THROAT CLINIC, P.S., and MICHAEL CRUZ, M.D.,

Respondents.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

I. ASSIGNMENTS OF ERROR/ISSUES 1

II. SUMMARY JUDGMENT ERROR 2

A. Summary Judgment Procedure and Facts 2

B. Summary judgment may not be denied where the non-moving party fails to create any genuine issue of material fact 6

1) Appealability 6

2) The Standard of Review is De Novo 7

3) A plaintiff is entitled to summary judgment where no genuine issue of material fact is created by defense evidence 7

4) Holy Family Hospital: Hearsay cannot be considered as creating genuine issues of material fact for trial 11

5) CHAS: Inadmissible expert testimony cannot create a genuine issue of material fact for trial 12

6) Holy Family Hospital and CHAS: Dr. Kmucha was qualified to testify about the standard of care in Washington for the treatment of this

acute sinusitis disease for each medical specialty 13

III. TRIAL ERROR 16

A. Trial Evidence 16

B. The trial court erred in dismissing the Hensleys' informed consent claims 25

1) Standard of Review 25

2) The trial court improperly required that the Hensleys show the *probability* of the risk occurring to support an informed consent claim. RCW 7.70.050(3)(d) does not require such evidence 26

a) A serious possible risk must be disclosed to a patient 28

b) The Hensleys are not required to present expert evidence that it is probable that the risk will come to fruition 30

c) RCW 7.70.050(3)(d) and precedent require only that this "possibility" be shown on a "more likely than not" basis 32

3) The Hensleys were entitled to a directed verdict on their informed consent claims 36

C. Juror misconduct requires a new trial against all Respondents 38

1) The Record 38
2) The trial court erred in denying the Hensleys a new trial given juror misconduct 43

a) Standard of review 45

b) Undisclosed biases and bias-based arguments in deliberation require retrial 45

c) The Hensleys evidenced biased jurors advocating that other jurors not follow instructions 48

d) The injection of extrinsic evidence requires retrial 50

e) The objective evidence presented does not disprove that the misconduct was harmless, or had no impact on the verdict 53

f) The misconduct does not inhere in the verdict. The misconduct was bias, a pattern of statements of bias, and the injection of extrinsic evidence into deliberations 55

IV. CONCLUSION 56

CERTIFICATE OF SERVICE 57

TABLE OF AUTHORITIES

CASES:

Allison v. Department of Labor & Indus.,
66 Wn.2d 263, 401 P.2d 982 (1965).....45, 46, 48, 56

Anaya Gomez v. Sauerwein,
172 Wn.App. 370, 289 P.3d 755 (2012),
aff'd, 180 Wn.2d 610, 331 P.3d 19 (2014).....36, 37

Backlund v. Univ. of Wash.,
137 Wn.2d 651, 975 P.2d 950 (1999).....28

Canterbury v. Spence,
464 F.2d 772 (D.C. Cir. 1972).....33

Celotex Corp. v. Catrett,
477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).....8, 10

Chandler v. Simpson,
100 Wn.App. 1034 (2000).....33

Chaney v. Providence Health Care,
176 Wn.2d 727, 295 P.3d 728 (2013).....26

Dunlap v. Wayne,
105 Wn.2d 529, 716 P.2d 842 (1986).....11

Elber v. Larson,
142 Wn.App. 243, 173 P.3d 990 (2007).....14

Flyte v. Summit View Clinic,
183 Wn.App. 559, 333 P.3d 566 (2014).....29, 35, 36, 37

Gardner v. Malone,
60 Wn.2d 836, 376 P.2d 651 (1962).....56

Gates v. Jensen,
92 Wn.2d 246, 595 P.2d 919 (1979).....31, 36, 38

Gibson v. Clanon,
633 F.2d 851 (9th Cir.1980) 52

Gordon v. Deer Park Sch. Dist. 414,
71 Wn.2d 119, 426 P.2d 824 (1967).....46

Griswold v. Kilpatrick,
107 Wn.App. 757, 27 P.3d 246 (2001).....12

Harris v. Drake,
152 Wn.2d 480, 99 P.3d 872 (2004).....26

Harris v. Robert C. Groth, M.D., Inc.,
99 Wn.2d 438, 663 P.2d 113 (1983).....9

Hendrickson v. Konopaski,
14 Wn.App. 390, 541 P.2d 1001 (1975).....56

Hill v. Sacred Heart Medical Center,
143 Wn.App. 438, 177 P.3d 1152 (2008).....9, 15

Housel v. James,
141 Wn.App. 748, 172 P.3d 712 (2007).....28

Keogan v. Holy Family Hosp.,
22 Wn.App. 366, 589 P.2d 310 (1979).....35

Kinney v. Cook,
150 Wn.App. 187, 208 P.3d 1 (2009).....8

Kuhn v. Schnall,
155 Wn.App. 560, 228 P.3d 828 (2010)..... Passim

Mackey v. Graham,
99 Wn.2d 572, 663 P.2d 490 (1983).....11

McCoy v. Kent Nursery, Inc.,
163 Wn.App. 744, 260 P.3d 967 (2011).....45, 55, 56

Moe v. Wise,
97 Wn.App. 950, 989 P.2d 1148 (1999) 26

Morton v. McFall,
128 Wn.App. 245, 115 P.3d 1023 (2005) 15

Owen v. Burlington N. & Santa Fe R.R.,
153 Wn.2d 780, 108 P.3d 1220 (2005) 8

People v. Wilson,
43 Cal. 4th 1, 178 P.3d 1113 (2008) 48

Pleasant v. Regence Blue Shield,
181 Wn.App. 252, 325 P.3d 237 *review denied*,
181 Wn.2d 1009, 335 P.3d 940 (2014) 7, 9

Pon Kwock Eng v. Klein,
127 Wn.App. 171, 110 P.3d 844 (2005) 15

Robinson v. Safeway Stores, Inc.,
113 Wn.2d 154, 776 P.2d 676 (1989) ..... Passim

Safeco Ins. Co. v. McGrath,
63 Wn.App. 170, 817 P.2d 861 (1991) 12

Seybold v. Neu,
105 Wn.App. 666, 19 P.3d 1068 (2001) 8, 9, 10, 35

Smith v. Safeco Ins. Co.,
150 Wn.2d 478, 78 P.3d 1274 (2003) 7

Smith v. Shannon,
100 Wn.2d 26, 666 P.2d 351 (1983) ..... Passim

State v. Bennett,
161 Wn.2d 303, 165 P.3d 1241 (2007) 31, 32

State v. Briggs,
55 Wn.App. 44, 54, 776 P.2d 1347 (1989) ..... Passim

State v. Castle,
86 Wn.App. 48, 935 P.2d 656 (1997) 32

State v. Ellis,
136 Wn.2d 498, 963 P.2d 843 (1998) 13

State v. Elmore,
155 Wn.2d 758, 123 P.3d 72 (2005) 49, 50

Tiger Oil Corp. v. Dep't of Licensing,
88 Wn.App. 925, 930, 946 P.2d 1235 (1997) 9

Turner v. Stime,
153 Wn.App. 581, 222 P.3d 1243 (2009) 55

T.W. Elec. Serv. v. Pacific Elec. Contractors' Ass'n,
809 F.2d 626 (9th Cir. 1987). 10

United States v. Bagley,
641 F.2d 1235 (9th Cir.1981) 52

University Village Ltd. Partners v. King County,
106 Wn.App. 321, 23 P.3d 1090, *review denied*,
145 Wn.2d 1002, 35 P.3d 381 (2001) 6, 7

Victor v. Nebraska,
511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) 31-32

Young v. Key Pharmaceuticals, Inc.,
112 Wn.2d 216, 770 P.2d 182 (1989) 8

ZeBarth v. Swedish Hosp. Med. Ctr.,
81 Wn.2d 12, 499 P.2d 1 (1972) 31

STATUTES:

RCW 7.70.040 9

RCW 7.70.050, et seq ..... Passim

RULES:

CR 56 ..... 7, 8, 10, 11

CR 59 43-44

ER 702 12

ER 801 11

ER 802 11

SECONDARY SOURCES:

Webster's Third New International Dictionary (1976) 32

Black's Law Dictionary 875 (8th ed. 2004) 49

I. ASSIGNMENTS OF ERROR/ISSUES PRESENTED.

1. The trial court erred in failing to grant the Hensley Estate summary judgements against Respondents Providence Holy Family Hospital and CHAS on the elements of medical negligence liability and causation.

> *Issue presented*: An adverse party's failure to respond with evidence, or its presenting inadmissible testimony, cannot create a genuine issue of material fact for trial, and thereby defeat a motion for summary judgment.

2. The trial court erred in dismissing the Hensley Estate's claims of informed consent on a directed verdict.

> *Issue presented*: RCW 7.70.050(3)(d) requires evidence of a risk that is serious, and one that is possible, on a "more probable than not" basis. It is not necessary to show the percentage of probability of that risk occurring.

3. The trial court erred in denying the Hensley Estate a new trial given jury misconduct.

> *Issue presented*: The undisclosed biases of two jurors, their arguing against the trial court's instructions, and their introducing extrinsic "expert" evidence into deliberations are all jury misconduct mandating a new trial; a trial court's finding that "certainly" at least one of the biased statements "could have had some impact on the jury verdict" mandated retrial.

II. SUMMARY JUDGMENT ERROR.

Lorraine Hensley ("Lorraine"), a mother and grandmother, died at the age of 52 from a sinus infection. From January 2, 2009 through February 4, 2009, as she and her family continuously sought medical care for her from the three successive Respondent providers for a visibly deteriorating condition, Lorraine progressively deteriorated from an acute sinusitis condition into death by brain herniation from cerebromeningitis entering her brain via her right frontal sinus sinusitis. *CP 6-10.*

On January 26, 2012, the Estate of Lorraine Hensley ("Hensleys"), through her daughter Jessica Wilson, filed a wrongful death complaint based upon medical negligence per RCW 7.70 et seq. and RCW 4.20 et seq. *CP 13-15.* She alleged that the three successive Respondent medical providers, Community Health Association of Spokane (CHAS), Providence Holy Family Hospital (HFH), and physician Michael Cruz, M.D., through Spokane Ear, Nose, and Throat Clinic, P.S. (SENT), all failed to provide standard of care medical treatment to Lorraine, violated her right to informed consent, and caused her death.

A. Summary Judgment Procedure and Facts

All three Respondents moved for summary judgment against the Hensleys. *(HFH at CP 16-18, SENT and Michael Cruz, M.D. at CP 19-21, and CHAS at CP 22-24).*

On May 22, 2103, the Hensleys responded by filing a countermotion for summary judgment against all Respondent/Defendants, requesting entry of judgment on the issues of liability and causation. *CP 25-26.*

Supporting the Hensley motion was an extensive declaration from medical expert Steven T. Kmucha, M.D. *CP 41-70.* Dr. Kmucha was a full-time otolaryngologist who was familiar with the Washington standard of care of medical treatment for the acute sinusitis condition at issue in Lorraine Hensley's death. *CP 42: 3-6.* Dr. Kmucha testified in detail as to how each Respondent medical provider's medical care was below the standard of care, and that each's treatment caused Lorraine's death. *CP 42: 17 – CP 51.*

Respondent SENT's Dr. Michael Cruz testified in detail by declaration as to how he met the standard of care for his specialty, and that his actions "were not a cause of Ms. Hensley's subsequent demise." *CP 139-43.* Respondent CHAS's Dr. Pavel Conovalciuc testified summarily by declaration that he and another CHAS PA-C met the standard of care. *CP 124 -25.* The trial court would hold that Dr. Conovalciuc's declaration was "one of the most conclusory declarations I ever read," and had "no kind of meaningfulness…" *Id.* It was "just conclusions." *Id. RP 3592: 17-3593: 2.*

Respondent HFH presented no medical evidence whatsoever. Instead, in response to the Hensley motion for summary judgment,

Respondent HFH's defense counsel Steven Dixson stated that he had been unable to contact the involved HFH providers Dr. Christopher Tullis and PA-C John Hunter. *CP 91, para. 6.* He testified that those providers were represented by another attorney, William Etter. *CP 91, para. 5.* HFH presented no expert testimony.

The providers' counsel, William Etter, presented his own declaration. *CP 71-74.* Mr. Etter testified that he "believed" that Dr. Tullis would "strongly disagree with Dr. Kmucha's declaration..." *CP 72, para. 9.* He "believed" PA-C John Hunter would also disagree with Dr. Kmucha. *RP 73, para. 13.*

The Hensley countermotion for summary judgment was not heard until June 22, 2012, three months after its filing, *CP 176, and RP Vol. 16 at 3556.* Mr. Etter had filed a supplemental declaration, but it generally reiterated what he had said before. His clients "disagreed with" Dr. Kmucha. *CP 1122, paras. 7-10.*

On June 22, 2012, the trial court denied the Hensleys' motion for summary judgment against all three Respondents. *RP 3595: 5-9.*[1]

At the court's request, Dr. Steven Kmucha submitted a second

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[1] Dr. Kmucha's testimony spanned all of the medical provider standards of care, and established that the treatment for Lorraine's specific disease process would be the same regardless of specialty. *RP 3591: 19-3592: 9.* But the trial court stated, "[S]o what that generates is issues of fact that may come up between the experts, and I am okay with that." *RP 3594: 10-16.*

declaration on July 5, 2012, clarifying his phrase "national standard of care" as the standard of care in the State of Washington. *RP 3596: 10-12; CP 167-70; 169, para. 11.*

On July 20, 2012, the trial court formally denied the Hensleys' counter motion for summary judgment by written order, stating that "issues of fact exist which preclude summary judgment." *CP 176-78.* The order confirms that no medical evidence or opinion was ever presented by Respondent HFH to contradict Dr. Steven Kmucha's expert evidence. *CP 177, paras. 2-15.*

The Hensleys moved for reconsideration. *CP 182.* They argued that, at the very least, Respondent HFH had never provided *any* controverting medical evidence to Dr. Steven Kmucha's declaration. *CP 183, para. 5.* In its eight-page response, HFH again presented no controverting medical evidence. *CP 267-75.*[2]

On November 13, 2012, the trial court denied the Hensleys' motion for reconsideration, holding "it was never my intention to grant Plaintiffs' counter motion for summary judgment." *CP 301: 18-20.*

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[2] HFH's attorney's affidavit questioned Dr. Kmucha's credentials, *CP 270, para. 16, 17*, requested that Dr. Kmucha be allowed to be deposed, *CP 270, para. 18*, requested an "opportunity" to provide affidavits from the medical providers, *CP 270, para. 18*, and proposed that its requested discovery would then raise issues of fact. *CP 270, para. 19.*

Trial/Respondents HFH and CHAS.

Trial proceeded, and an order of mistrial was entered against Respondent HFH. *CP 907-09 (Verdict); 1037, para. 4.* Respondent CHAS was found to have violated the standard of care, but the jury found that CHAS's treatment was not the "cause" of injury. *CP 908, Question 2; CP 1043, para. 2.1.* The Hensleys filed an appeal of all orders. *CP 1034-49.*

B. <u>Summary judgment may not be denied where the non-moving party fails to create any genuine issue of material fact.</u>

1) <u>Appealability.</u>

Where an order denying summary judgment turns on a substantive issue of law, it is appealable even after a trial on the merits. *University Village Ltd. Partners v. King County,* 106 Wn.App. 321, 324, 23 P.3d 1090, *review denied,* 145 Wn.2d 1002, 35 P.3d 381 (2001). Here the trial court's order denying the Hensleys their summary judgment was necessarily based on a legal conclusion. Respondent HFH did not submit any medical evidence to controvert Dr. Steven Kmucha's expert medical evidence. Respondent CHAS's physician's declaration was not meaningful for summary judgment. *RP 3592:17-3593:2.*

The trial court's order thus necessarily involved holdings of law as to each Respondent. Specifically, the trial court violated substantive law as to the evidence that may be considered in a summary judgment ruling,

and it violated the law as to what facts a medical expert must establish at the time of summary judgment. The ruling is reviewable. *University Village Ltd. Partners,* 106 Wn.App at 324.

2) The Standard of Review is De Novo.

Summary judgment rulings are reviewed de novo. *Smith v. Safeco Ins. Co.,* 150 Wn.2d 478, 483, 78 P.3d 1274 (2003).

3) A plaintiff is entitled to summary judgment where no genuine issue of material fact is created by defense evidence.

CR 56 allows a plaintiff the right to summary judgment against a defendant. Wash. Super. Ct. Civ. R. 56 states as follows:

> "**a) For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof."
>
> *CR 56.*

Summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. CR 56(c). *Pleasant v. Regence Blue Shield,* 181 Wn.App. 252, 261, 325 P.3d 237 *review denied,* 181 Wn.2d 1009, 335 P.3d 940 (2014). "A material fact is one that affects the outcome of the litigation."

Kinney v. Cook, 150 Wn.App. 187, 192, 208 P.3d 1, 3 (2009), citing *Owen v. Burlington N. & Santa Fe R.R.,* 153 Wash.2d 780, 789, 108 P.3d 1220 (2005). The court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Kinney*, 150 Wn.App. at 192.

A defendant may move for summary judgment against a plaintiff by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case. *Seybold v. Neu*, 105 Wn.App. 666, 677, 19 P.3d 1068 (2001), citing *Young v. Key Pharmaceuticals, Inc.,* 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986)). Such a defendant is thus not originally required to support their *own* summary judgment motion with expert medical affidavits. *Id. Seybold, citing Young,* 112 Wn.2d at 226. But once a countermotion is filed with medical evidence, the CR 56 burden shifting applies. When the Hensleys set out their version of the facts and alleged that there was no genuine issue as to the facts as set out, that is a basis for summary judgment if not controverted. *See Seybold*, 105 Wn.App. at 677.

Here, the Hensleys responded to defense motions for summary judgment by countermotion for summary judgment, and they presented

extensive expert medical evidence in support of their countermotion. *CP 26, and CP 41-70; CP 25-27.*[3]

To prevail on their motion for summary judgment, the Hensleys were required to evidence the necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

> "(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 or she belongs, in the state of Washington, acting in the same or similar circumstances; and
>
> (2) Such failure was a proximate cause of the injury complained of."
>
> *RCW § 7.70.040 (West)*

Expert testimony is required to establish these elements, as the essential element of violation of standard of care and causation are both beyond the expertise of a layperson. *Hill v. Sacred Heart Medical Center*, 143 Wn.App. 438, 446, 177 P.3d 1152 (2008); *Seybold v. Neu*, 105 Wn.App. at 676-77, citing *Harris v. Robert C. Groth, M.D., Inc.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). The Hensleys met their burden of evidencing both elements. They presented the extensive expert medical

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[3] It has been held that by filing cross motions for summary judgment, the parties concede there are no material issues of fact. *Pleasant v. Regence Blue Shield*, 181 Wn.App. at 261, citing *Tiger Oil Corp. v. Dep't of Licensing*, 88 Wn.App. 925, 930, 946 P.2d 1235 (1997).

declaration of Dr. Steven Kmucha, which established that all Respondent providers violated the standard of care, and that those violations caused Lorraine Hensley's death. *CP 41-70.*

The burden now shifted to the Respondents to create a genuine issue of material fact as to the existence of those elements by rebutting Dr. Kmucha's evidence. *Celotex,* 477 U.S. at 322; *and see also T.W. Elec. Serv. v. Pacific Elec. Contractors' Ass'n*, 809 F.2d 626, 630-32 (9th Cir. 1987). The Respondents could now not "rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." *CR 56(e).* Any "complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Seybold,* 105 Wn.App. at 677, citing *Celotex*, 47 U.S. at 323.

Here, Respondents HFH and CHAS failed to submit expert evidence rebutting Dr. Kmucha's evidence, and failed to establish the existence of any genuine issue of material fact for trial. The Hensleys were entitled to summary judgment against both HFH and CHAS on both liability and causation.

4) Holy Family Hospital: Hearsay cannot be considered as creating genuine issues of material fact for trial.

Opposing affidavits are required to be made "on personal knowledge," and those affidavits must set forth "such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *CR 56 (e).* A court cannot consider inadmissible evidence when ruling on a motion for summary judgment. *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986). Respondent HFH presented *no* medical evidence to refute Dr. Kmucha's declaration that HFH providers violated the standard of care and caused Lorraine's death. The only evidence HFH presented was a declaration from lawyer William Etter. Mr. Etter testified as to what he thought his two clients would say. *CP 72-73.* This is classic hearsay and is not admissible. ER 801(c) and 802.[4] Such evidence may not be used at summary judgment to create a genuine issue of material fact. *CR 56.* "A party must provide affirmative factual evidence to oppose a motion for summary judgment." *Dunlap*, 105 Wn.2d at 536, citing CR 56(e); *Mackey v. Graham,* 99 Wash.2d 572, 663 P.2d 490 (1983).

[4] Evidence Rule 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 802 states that such hearsay "is not admissible except as provided by these rules, by other court rules, or by statute."

HFH thus did not submit any admissible expert evidence to counter the Hensley's expert medical evidence, and the Hensleys were entitled to summary judgment against Respondent HFH.

5) CHAS: Inadmissible expert testimony cannot create a genuine issue of material fact for trial.

As to Respondent CHAS, the trial court held that Dr. Conuvalciuc's declaration was insufficient to be meaningful. *RP 3592: 17 – RP 3593: 2.* This entitled the Hensleys to summary judgment against CHAS.

ER 702 requires that testimony by an expert, to be admissible, must be helpful to the trier of fact before such an expert may testify in the form of an opinion:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."
>
> *ER 702.*

"It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted." *Safeco Ins. Co. v. McGrath*, 63 Wn.App. 170, 177, 817 P.2d 861 (1991); *Griswold v. Kilpatrick*, 107 Wn.App. 757, 762, 27 P.3d 246, 249 (2001)(holding that expert opinions that are conclusory are inadmissible to

create an issue of material fact); *and see, e.g., State v. Ellis*, 136 Wn.2d 498, 533-34, 963 P.2d 843 (1998)(holding that testimony that is confusing, arcane, or otherwise unintelligible will not assist the trier of fact, and is not admissible).

Here, once the trial court held that the affidavit submitted by CHAS was insufficient to be meaningful, that expert testimony was in admissible and could not create a genuine issue of material fact for trial. It was error of law for the trial court to have denied summary judgment to the Hensleys against CHAS.

6) Holy Family Hospital and CHAS: Dr. Kmucha was qualified to testify about the standard of care in Washington for the treatment of this acute sinusitis disease for each medical specialty.

Ultimately, the trial court appears to have denied the Hensleys' summary judgment motion on Respondents' argument alone that Dr. Kmucha was not qualified to give opinions about the respective Respondent medical providers' standards of care because he was not a physician of each specialty. One of the court's orders held that "an issue of fact exists regarding the foundation for Dr. Steven T. Kmucha to render standard of care opinions concerning Providence Holy Family Hospitals' employees or ostensible agents." *CP 173, para. 4.* The court's discussion in open court suggests this same holding. *RP 3594: 10-16; RP 3592: 17 – RP 3593: 2.*

But if this is the basis for denying summary judgment in favor of the Hensleys, it is substantive error of law, and this court should reverse.

Review is de novo where the qualifications of an expert to express opinions pertinent to a lawsuit are part and parcel of a summary judgment proceeding. *Elber v. Larson,* 142 Wn.App. 243, 247, 173 P.3d 990, 992 (2007).

Here, Dr. Kmucha, a Board-certified otolaryngologist, testified that he is familiar with the standard of care in Washington for the treatment of an acute sinusitis condition in Washington because the standard of care for that specific medical condition is a national one. This testimony suffices to establish the Washington standard of care for the treatment of that medical condition. *CP 42: 3-6.*

In *Elber,* a summary judgment declaration by an out of state physician that is similar to that of Dr. Kmucha's was held to have properly established the standard of care in Washington. The *Elber* physician's declaration stated that he was familiar with the standard of care for Washington, because the standard of care for the medical problem at issue was a national standard. "In other words, the standard for a neurosurgeon doing this work in Washington is not any different than the standard for a neurosurgeon doing this work in California, Vermont, or any place else in

the United States." The "necessary inference from this is that he is familiar with the standard of care in Washington because the standard of care is a national standard of care and he is familiar with that standard." Such a declaration properly establishes the standard of care in Washington. *See also Pon Kwock Eng v. Klein,* 127 Wn.App. 171, 172, 110 P.3d 844 (2005).

Moreover, a physician with a medical degree is qualified to express an opinion on any sort of medical question, including questions in areas in which the physician is not a specialist, so long as the physician has sufficient expertise to demonstrate familiarity with the procedure or medical problem at issue in the medical malpractice action. *Morton v. McFall,* 128 Wn.App. 245, 253, 115 P.3d 1023 (2005)*; Hill v. Sacred Heart Med. Ctr.*, 143 Wn.App. at 447. Here, Dr. Kmucha testified that he is a Board Certified otolaryngologist well familiar with standards of care as to the medical treatment of the acute sinusitis medical problem at issue here. *CP 42, paras. 4, 5.* The standard of care, he attested, was violated by each Respondent. *RP 44, para. 16; RP 46, para. 26; RP 46, para. 27; RP 47, para. 32; RP 48, para. 35; RP 49, paras. 38, 41; RP 50, para. 44.* This evidence stood unchallenged by Respondents HFH and CHAS. Neither Respondent HFH nor CHAS submitted admissible expert evidence

to challenge Dr. Kmucha's ability to testify as to the standard of care of treatment for their specialty as to this medical condition; neither thereby created any genuine issue of material fact as to Dr. Kmucha's qualifications to testify as to the standard of care for their specialty.

The trial court's denial of the Hensleys' summary judgment motion against Respondents HFH and CHAS was error of law. That decision should be reversed, and judgment on the elements of violation of standard of care and causation entered against those two Respondents. A retrial on damages alone should follow as to those two Respondents.

III. TRIAL ERROR.

A. Trial Evidence.

At trial against all Respondents, Dr. Elliot Felman, a family medicine provider, testified on behalf of the Estate. *RP 576.* Dr. Felman pointed to Lorraine's CT scan of January 9, 2009. She was under the care of CHAS at this time. The CT was a "grossly abnormal CT scan of the sinuses." *RP 595: 19-24.*[5] A tooth root extended through, and into, Lorraine's sinus

[5] The CT evidenced complete opacification of the right maxillary sinus, the osteomeatal unit inside the sinus, nasal passageways, anterior ethmoid sinuses, and inferior right frontal sinuses—all of which were infected. *RP 602: 5-24.* In addition, bony erosion was present, meaning that a molar tooth was extending into the right maxillary sinus, which allowed for organisms from the mouth ("really dangerous organisms") getting into the sinuses through this erosion. *RP 602: 25 – RP 603: 16.* Moreover, the frontal sinus was infected, and this is where the "real big danger comes in," because now there is risk of the

cavity, and erosion of the bone itself was present, meaning that bacteria had expanded to create sufficient pressure to actually erode bone. *RP 602-03; 605: 14-19.* Lorraine's CT scan identified "an open conduit to the mouth (from the sinus cavities) where very, very dangerous organisms are." *RP 596: 14-16.* The material risk of this condition to Lorraine was that of the infection going into the brain. *RP 603: 20; RP 604: 3-12.* This risk arises because of anatomy. The frontal sinus cavity is located right outside the brain, and, if the infection pressures backward, "you go into the brain." *RP 604: 7-12.* The material risk to Lorraine of the condition depicted on the January 9th CT scan was a "high risk, extremely high risk." *RP 606: 19-23, referencing RP 596: 8-9, 19-20.* This was because the infection "will" extend into either the lining of her brain, causing meningitis, or it "will" extend into the tissue of the brain itself. "And more likely than not, if that happens, the patient's going to die." *RP 606: 19 – RP 607: 8.* Once the CT scan showed the condition, this was "an urgent medical matter because the patient is at risk, and you have to be prudent enough to not put them at risk." *RP 600: 22-24.* Dr. Felman testified as to the necessary alternative treatment—there needed to be an "urgent call" placed to an ENT doctor to see the patient. *RP 596: 21 – RP 597: 15.* The patient also needed to be

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infection going into the brain. *RP 603: 15-20.* "That's what you have to protect." *Id.* at lns. 20-21.

informed of the immediate risk. *RP 597: 9-11.* Not informing the patient of this immediate risk "does not protect the patient." *RP 597: 14-15; RP 596: 12-15.*

Dr. Felman also testified that CHAS's plan of antibiotic treatment was below the standard of care. CHAS kept "treating her with antibiotics which did not take care of the problem, when there were better choices." CHAS kept substituting antibiotics in the same (antibiotic class) that weren't working." *RP 613: 21 – RP 614: 12.* An alternative treatment was mandated. *RP 614: 13-16.*

Dr. Felman testified that CHAS's treatment of Lorraine Hensley between January 2 and January 29, 2009 violated the standard of care. *RP 586-87; RP 597: 16-22.*

As to Respondent HFH, the Hensleys presented Dr. Paul Bronston, an Emergency Room physician from Los Angeles. *RP 657.* Dr. Bronston testified that during Lorraine's visits to HFH's Emergency Department on both February 1 and February 3, 2009, HFH's Emergency Room medical providers also violated the standard of care in their treatment of Lorraine Hensley. *RP 691: 4 – RP 692: 5.* Lorraine "had a very serious, complicated, dangerous, life-threatening infection that could kill her … that was eating away at one of the bones in her face, and starting to destroy the bone." *RP*

691: 13-17. The January 9, 2009 CT was key evidence. *RP 692: 17 – RP 693: 5.* Lorraine's infection in the frontal sinus was "very, very dangerous compared to the other sinuses." *RP 696: 19 – RP 697: 2.* The back wall of the frontal sinus is a thin bone, and infection can go right through that thin bone and into the brain. *RP 697: 3-5.* The risk of infection in this frontal sinus is the risk of meningitis or brain abscess, and infection of the whole bone. *RP 697: 5-7.* The "risk" is "life-threatening. It can kill a person." *RP 698: 13-16.* "Of course" the condition depicted on the January 9th CT scan could go on to kill the patient. *RP 699: 9-12.*

Dr. Bronston detailed how this risk would result in death. The risk "would" happen numerous ways. *RP 699: 9-14; RP 699 – RP 700: 2.* This was a "very life-threatening, dangerous situation that could kill the patient." *RP 705: 4-6.*

Dr. Bronston noted that HFH's John Hunter, a PA-C, obtained another CT on February 1, 2009, and "it showed the condition actually worsening." *RP 701: 5-11.* The standard of care required that PA-C Hunter arrange for intravenous antibiotics. This was violated. *RP 704: 10-13.* The standard of care was to admit Lorraine to the hospital for IV antibiotic treatment. *RP 704: 16-25.* Mr. Hunter was required to contact an emergency medicine doctor, but never did so. *RP 705: 1-7.* Dr. Bronston

testified to the necessary alternative treatments. Given Lorraine's two CT scans and her history, this should have been "an automatic admission" to inpatient status. *RP 709: 12-17.* Additional tests required included blood panels and lab tests necessary to assess the condition. *RP 710: 6 – RP 713: 10.*

Dr. Bronston testified that SENT's Dr. Michael Cruz also had this same information on February 3, 2009 at Lorraine's office visit with him, and he also failed to implement the necessary admission, or to obtain any testing. As to Dr. Cruz, "You have something that's going on that's gonna kill somebody," and Dr. Cruz merely requested a follow-up in ten days. "That's absurd. It's dangerous." *RP 718: 20-24.*

And indeed, the next evening of February 3rd, Lorraine returned to the HFH Emergency Room, and was now evaluated by Dr. Christopher Tullis. *RP 719-20.* Again, she was not admitted to inpatient status. Dr. Tullis did not contact any Ear, Nose and Throat specialist, and gave Lorraine no continuous intravenous antibiotics or lab tests. *RP 720: 5-7.* HFH physician Tullis administered only a single course of intravenous antibiotics, administered an intravenous pain medication called Dilaudid, and discharged Lorraine. *RP 720: 19 – RP 722: 2.* All of this violated the standard of care. *RP 719-20.* Even Lorraine's level of severe pain, in and of itself, indicated a

severe, life-threatening situation. *RP 721: 11-13.*

Dr. Richard Beck, an otolaryngologist, testified as to the breach of the standard of care by all of the medical care provided by each Respondent. *Commencing at RP 792.* Dr. Beck testified that each and every medical provider in this medical care chain, from CHAS, through SENT on February 2nd, through Lorraine's ER visits to HFH on February 1st and 3rd, violated the standard of care. *RP 803: 19 – RP 807: 4-8.* This is because the January 9th CT unequivocally showed the need for a "stat referral," and the need for surgical intervention. All Respondents had that January 9th CT evidence. *RP 807: 4-8.* None of the Respondent medical providers implemented the necessary alternative treatments given the dangerous risk Lorraine faced. The January 9, 2009 CT showed need for an "immediate" consultation, and a "stat" consultation with an Ear, Nose and Throat specialist to treat a "complicated and very dangerous sinus infection." *RP 806: 20-25.* CHAS violated the standard of care by failing to initiate this specialized treatment. *RP 809: 2-21; RP 810: 10-22.* HFH Emergency Room PA-C John Hunter also violated the standard of care on February 1st in the same manner, *RP 810: 23 – RP 811: 3.* Dr. Christopher Tullis violated the same standard of care on February 3rd. *RP 811: 19 – RP 812: 7.*

And when Respondent SENT physician Michael Cruz saw Lorraine

Hensley on February 2nd on an office visit between her two HFH Emergency Room visits, he as well violated the standard of care. Even as an Ear, Nose and Throat specialist, he failed to admit Lorraine Hensley to the hospital, failed to administer her IV antibiotics, and failed to surgically drain her disease. *RP 812: 8-17.*

Dr. Beck reiterated the necessary alternative treatments—admission to the hospital, intravenous antibiotics, and surgical drainage. *RP 812: 13-17.*

Dr. Beck detailed all of the specifics of Lorraine's condition as depicted in the January 9th CT imaging which gave medical providers direct notice of the high risk of her medical condition. *RP 816: 22 – RP 827.* The next CT image taken by Respondent HFH on February 1st showed that Lorraine's infection had progressed to swelling of the skin over her involved frontal sinus. *RP 837: 15 – RP 838: 11.* The risk of her infectious condition depicted on both January 9th and February 1st was "death." *RP 850: 2-18.* Death "is" the end point of the condition depicted. *RP 850: 20 – RP 851: 7.* The CTs depicted "serious, life-threatening conditions" which could only be treated with surgery, intravenous antibiotics, hospital admission, and specialist medical care. *RP 851: 3-7.*

Dr. Beck testified that each Respondent provider "caused" the death

of Lorrie Hensley "in a direct sequence." *RP 856-57.* Ms. Hensley lost all chance of survival through the failure of each provider to render the treatment that she needed at the time each treated her. *RP 858: 24 – RP 859: 1.* Upon her negligent discharge from HFH's Emergency Room on February 4th, Lorraine's chances of survival dropped from 100% to zero. *RP 860: 6-13.* Lorraine returned to the HFH Emergency Room "that dismissed her less than 24 hours later, intubated, unresponsive, and brain dead." *RP 860: 6-16.*

Dr. Richard Sokolov is an infectious disease specialist from Los Angeles, California. *RP 1049, 1050.* Dr. Sokolov likewise testified that CHAS, through all of its providers, HFH Emergency Department providers, and SENT's Dr. Michael Cruz all violated the standard of care for the treatment of Lorraine's infectious process. *RP 1071-73.*

Dr. Sokolov reiterated the necessary alternative treatments that all providers failed to provide in violating the standard of care. These included intravenous antibiotics, decompression, and sinus drainage. Failure to implement these alternatives caused Lorraine's death. *RP 1115: 3-13.* Dr. Sokolov confirmed the risk of the condition depicted by the January 9, 2009 CT. The end point of that condition could be brain abscess, meningitis, and death. *RP 1112: 1-22.* The infection depicted was "lethal," meaning "it would kill people." *RP 1112: 23-25.* Dr. Sokolov confirmed that Lorraine

retained a 100% chance of survival, still, until she was discharged from the Providence Holy Family Hospital ER on February 3rd. *RP 1115: 20-24.* Upon her discharge, her chances of life dropped from 100% to zero. *RP 1116: 23 – RP 1117: 2.*

Lorraine's elderly parents returned their daughter home from the Emergency Room the early morning hours of Feb. 4th, and put her to bed in their front room. *RP 508-09.* The next evening, Lorraine lapsed into incoherent speech, and, in the presence of her family who had all gathered around to assist her, slumped to the floor unconscious. *RP 510-11.* Less than 24 hours after her discharge, Lorraine was delivered back to Respondent HFH by ambulance, where she died from a brain herniation caused by her sinus infection entering into her brain cavity. Her cause of death was cerebromeningitis causing a brain herniation "due to a purulent sinusitis of the right frontal sinus with erosion into the right cranium."[6] Lab testing showed that the infection that had been working its way through Lorraine's face upward to her brain was a virulent strep viradans bacteria. It had by then invaded her bloodstream as well as her brain.[7]

The Verdicts.

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6 *RP 1315: 22 – RP 1316: 4 (Coroner Sally Aiken).*

7 *RP 1316: 16-25.*

As noted above, trial against HFH resulted in an order of mistrial. *CP 1036.* The jury found that Respondent CHAS had violated the standard of care, but that CHAS's violation of the standard of care was not a proximate cause of injury to the plaintiff. *CP 1043.* The jury found that Respondents SENT and Michael Cruz had not violated the standard of care. *CP 1036.*

The Hensleys brought a motion for a new trial against Respondents CHAS and Spokane ENT, claiming jury misconduct. *CP 910.* The court denied the motion. *CP 1015.*

The Hensley filed an appeal of all three latter orders. *CP 1034-1049.*

B. <u>The trial court erred in dismissing the Hensleys' informed consent claims.</u>

The trial court entered a directed verdict in favor of all three Respondents on the Hensleys' informed consent claims by refusing to instruct the jury on those claims following trial. *RP 3355-58.* This was error requiring retrial. RCW 7.70.050(3)(d) simply requires medical proof of a risk that is serious, and proof that this serious risk is "possible" on a "more probable than not" basis. The Hensley overwhelmingly met that burden. *RP 3356: 21-23.*

1) <u>Standard of Review</u>.

The appellate court reviews a ruling on a directed verdict by applying the same standard as is applicable to the trial court. *Chaney v. Providence Health Care*, 176 Wn.2d 727, 732, 295 P.3d 728 (2013). A directed verdict is not appropriate where, as a matter of law, substantial evidence or reasonable inference would sustain a verdict for the nonmoving party. *Id.*, citing *Harris v. Drake,* 152 Wn.2d 480, 493, 99 P.3d 872 (2004) (citing *Moe v. Wise,* 97 Wn.App. 950, 956, 989 P.2d 1148 (1999)). In *Harris*, our Supreme Court states that to obtain a directed verdict, there must be *no* competent evidence or reasonable inferences existing which would sustain a verdict for the nonmoving party. *Harris*, 152 Wn.2d at 493.

2) The trial court improperly required that the Hensleys show the *probability* of the risk occurring to support an informed consent claim. RCW 7.70.050(3)(d) does not require such evidence.

In granting all three Respondents a directed verdict against all of the Hensleys' informed consent claims, the court recognized that the Hensley experts had established the material risk of "death" from Lorraine's condition. Death was "certainly" a material risk. *RP 3356: 18-19.* But the trial court then erroneously held that Plaintiffs' experts were required to also establish "how probable" that outcome of death was. *RP 3356: 23.* It held that "[T]here was very little testimony" from the Plaintiffs' experts on the

"probability of this occurrence." *RP 3357: 17-23.* There was insufficient evidence of the "probability of occurrence." *RP 3358: 4-8.* Yet this was in spite of testimony presented that the probability of death was "extremely high." *RP 3357: 1-2.* But the trial court construed the latter risk as existing only in the presence of a violation of the standard of care. This was not the evidence presented. The risk did not emanate from someone's adherence to the standard of care—it emanated from the medical condition itself. And that medical condition "could" and "would" effect the end point of "death." *RP 705: 4-6; RP 718: 20-24; RP 850-51; RP 1112: 23-25.*

From the outset, Dr. Felman, Dr. Beck, Dr. Bronston, and Dr. Sokolov all testified that the risk of death emanated from *the medical condition* as depicted on the January 9, 2009 CT imaging—the risk arose from an aggressive bone eroding infection that had made its way into the frontal sinuses and was now positioned right outside the brain cavity along the thin bone creating the wall between that sinus and the brain. This was a serious, life-threatening infection in the frontal sinus right outside the brain. The serious risk arose from this medical condition.

The court discussed *defense* experts' testimony about how what ultimately occurred with Ms. Hensley was extremely rare. *RP 3357: 17-25; 3358: 1-8.* But defense testimony had nothing to do with whether the

Hensley experts established the possible risk of death from this condition. The issue with informed consent is whether the Hensleys themselves had evidenced a "serious possible risk" to Lorraine Hensley from her medical condition per RCW 7.70.050(3)(d). *See infra, at sections a-c.* They plainly did so. If that "serious" risk was established, and that risk was "possible," then Lorraine Hensley was entitled to that knowledge. *RCW 7.70.050(3)(d).*

a. A "serious possible risk" must be disclosed to a patient.

A patient may recover for a medical provider's failure to provide a patient the right to informed consent even if the medical treatment provided was not negligent. *Housel v. James*, 141 Wn.App. 748, 755-56, 172 P.3d 712, 716 (2007), citing *Backlund v. Univ. of Wash.,* 137 Wn.2d 651, 663, 975 P.2d 950 (1999). The basis of an informed consent claim is that a patient has the right to make their own decisions about their medical treatment. *Id., and also citing Smith v. Shannon,* 100 Wn.2d 26, 29, 666 P.2d 351 (1983).

To prevail on a claim for failure to secure informed consent, the Hensleys had to establish the four necessary elements of proof:

(a) That each health care provider failed to inform Lorraine of a material fact or facts relating to her treatment;

(b) That Lorraine consented to the treatment proposed without being aware of or fully informed of such material fact or facts;

(c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;

(d) That the treatment in question proximately caused injury to Lorraine.

RCW 7.70.050(1), as cited in *Flyte v. Summit View Clinic*, 183 Wn.App. 559, 573, 333 P.3d 566 (2014).

Under RCW 7.70.050(2):

> "[A] fact is defined as or considered to be a material fact, if a reasonably prudent person in the position of the patient or his or her representative would attach significance to it deciding whether or not to submit to the proposed treatment."

Here, medical testimony was required because the material fact at issue was that of a medical condition which created a "recognized serious possible risk" of death. Subsection (3) of the statute is thus implicated. Therein, the medical evidence required to establish the "material fact" which Lorraine was entitled to know, and "which must be established by expert testimony" was:

"**(c)** The recognized possible alternative forms of treatment; or

(d) The recognized *serious possible risks*, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment."

RCW § 7.70.050, emphasis added.

The Hensleys evidenced that Lorraine's medical condition involved "recognized serious possible risks, (and) complications" per § (3)(d), because her experts testified en masse that her medical condition on January 9, 2009 was that of an infectious process progressing throughout her face, jaw, and sinuses, eroding through facial bones, and that it had already worked its way upward into her frontal sinus and was now sitting right outside the thin wall separating that sinus from her brain cavity. The "end result" of this medical condition was "death." This is medical evidence of risk that is a "recognized serious possible risk," as required by the statute.

b. <u>The Hensleys are not required to present expert evidence that it is probable that the risk will come to fruition.</u>

The trial court acknowledged that the Hensleys established the serious risk of death. *RP 3356:18-19.* Its holding, as a matter of law, was that the Hensleys must also evidence the "probability" of that "risk of death" coming to fruition, i.e. – the "probability" of that occurrence. *RP 3356-58.* But establishing the probability of the occurrence is satisfied

where the risk is evidenced as "possible." And that possibility was overwhelmingly evidenced here.

As stated in *Smith v. Shannon*, 100 Wn.2d at 30-31, the informed consent doctrine "does not place upon the physician a duty to elucidate upon all of the possible risks, but only those of a serious nature." *Id.*, citing *ZeBarth v. Swedish Hosp. Med. Ctr.*, 81 Wn.2d 12, 25, 499 P.2d 1 (1972), and also citing *Gates v. Jensen,* 92 Wn.2d 246, 251, 595 P.2d 919 (1979) ("high risk.")

Under the plain language of (3)(d), where the risk of a medical condition is a *serious* risk, i.e., death, then that risk must be disclosed to the patient if that risk is "possible" from the medical condition. *RCW 7.70.050 (3)(d).*

The word "possible" means only that such a serious risk *could*, in fact, medically occur, whether probable or not. "Possible" is defined best in the criminal law, where the law deals with the concept of beyond a reasonable doubt. *See, e.g.*, *State v. Bennett*, 161 Wn.2d 303, 311, 165 P.3d 1241 (2007). "Possible" means something more than bare imagination, or fanciful conjecture. *Id.* citing *Victor v. Nebraska,* 511 U.S. 1, 20, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). A possible doubt is more than a "fanciful doubt" (and can thereby give rise to a reasonable

doubt). *Id.*, citing *Victor,* 511 U.S. at 17. A "real" possibility—language not even used in RCW 7.70.050(3)(d)—means a "genuine possibility, as opposed to an imaginary or conjectural one." *Id.* citing *State v. Castle*, 86 Wn.App. 48, 58, 935 P.2d 656 (1997)(quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1890 (1976)).

Here, Lorraine Hensley overwhelmingly satisfied this element. She established a recognized serious risk of her specific condition, (death) and she established that this recognized serious risk (of death) was "possible." It was error to have dismissed her informed consent claims on grounds that she did not establish the "probabilities" of death occurring.

c. RCW 7.70.050(3)(d) and precedent require only that this "possibility" be shown on a "more likely than not" basis.

The trial court seemed to read RCW 7.70.050 (3)(d) as requiring that both the risk of the condition itself be serious (death), and that the risk of it actually happening also be "serious," i.e. probable. But that isn't what the statute says. Where the risk is a risk that is serious, the actuality of it happening need only be shown to be "possible," i.e. "the serious possible risks." *Id.* The trial court's belief that the "probability of occurrence" be established may erroneously emanate from a line of precedent regarding materiality.

In *Chandler v. Simpson*, 100 Wn.App. 1034 (2000), as an example, the court holds that some expert testimony is required to prove (1) the existence of a risk, (2) its *likelihood of occurrence*, and (3) the type of harm in question. But the "likelihood" of occurrence required by the statute is that the occurrence be "possible." *RCW 7.70.050(3)(d).*

Chandler cites to *Smith v. Shannon*, 100 Wn.2d 26, 34, 666 P.2d 351, 356 (1983) for the proposition that the expert testimony must show "likelihood." And indeed, our Supreme Court in *Shannon* states that expert testimony is necessary to prove the existence of a risk, "its likelihood of occurrence," and the type of harm in question. "Once those facts are shown, expert testimony is unnecessary." *Id.* But the *Smith* court, again, does not change the statute. The "likelihood" of the risk must be evidenced as simply being "possible."

Language used by the court in *Shannon* states that "[I]nitially, the scientific nature of the risk must be ascertained, *i.e.,* the nature of the harm which may result and the *probability* of its occurrence." *Id.*, 100 Wn.2d at 33, *emphasis added,* referencing *Canterbury v. Spence,* 464 F.2d 772, 787-788 (D.C. Cir. 1972). But this language also in no way obviates the statutory language. The *Shannon* court is simply stating the civil burden of proof attendant to any statutory element. The *Shannon* court is saying

only that a plaintiff must show that it is "more likely than not" that this recognized serious risk was a *possibility*. After establishing the "possibility" of the risk, the *trier of fact* is then allowed to apply their own reasoning to decide whether the "probability" of that type of harm (i.e., a possibility) is a risk which a reasonable patient would consider in deciding on treatment. *Smith v. Shannon*, 100 Wn.2d at 33.

Here, the Hensley experts well established the possibility of the serious risk of death. They testified that this serious risk of death could and would happen from this condition, absent intervention. They presented medical evidence that Lorraine's condition as depicted on a CT scan of January 9, 2009 *would* progress to death. Medical evidence described how, why, and in what order this result would transpire. This "end result" of the condition was not just a fanciful thought, or bare imagination. The condition depicted *would* lead to death. And in response, even the defense experts did not discount the "possibility" of this risk existing; they simply said that the serious risk of what occurred here was "extremely rare." *RP 3357: 23-25.* All experts thus confirmed that the risk was possible. It was error to dismiss these claims. The issue of whether the probability of death, that is, either it "*would* happen" or it "would be extremely rare," was a risk that a reasonable patient would

consider in deciding on treatment, was now up to the jury. *Seybold v. Neu*, 105 Wn.App. at 681. The jury would determine whether Lorraine should have been informed of the serious possible risk of death from her condition. It was not for the trial court to take that decision away from the jury. To do so was error, and deprived the Hensleys of a trial on their evidenced claims.[8]

In *Keogan v. Holy Family Hosp.*, 22 Wn.App. 366, 369, 589 P.2d 310, 312 (1979), the court uses the phrase "reasonably foreseeable risk to the patient." This portion of *Keogan* is reiterated in *Flyte v. Summit View Clinic*, 183 Wn.App. at 578. But even used in the context of a doctor embarking "on a diagnostic procedure which entails a reasonably foreseeable risk to the patient," in no way does this language change the statutory burden of proof either. The reasonably foreseeable risk must be shown to be "possible" where the risk is a *serious* one. *RCW 7.70.050(3)(d)*.

Ultimately, nowhere in precedent have this state's courts' rejected, altered, modified or obviated the patient's right to be informed by their medical provider of a "serious possible risk" to their health from their

[8]The *Seybold* court also references *Shannon* for the proposition that expert testimony is necessary to prove the existence of a risk, its "likelihood of occurrence," and the type of harm in question, but *Seybold* as well neither avoids nor rejects the statutory language of the "likelihood" being required as that of its being "possible" where the risk is a serious one. 105 Wn.App. at 681.

medical condition. The Hensleys established that serious possible risk on a more probable than not basis, and it was error to dismiss their claims. Retrial is required against all Respondents on the Hensleys' informed consent claims.

3) The Hensleys were entitled to a directed verdict on their informed consent claims.

Significantly, the Hensley experts not only established the serious possible risk of death, but they evidenced the second aspect of RCW 7.70.050(3)(d) by showing that upon the existence of this "serious" possible risk, alternative forms of treatments existed that Lorraine could have availed herself of, had she been so informed.

The determining factor in an informed consent claim is "whether the process of diagnosis presents an informed decision for the patient to make about his or her care." *Flyte*, 183 Wn.App. at 575, citing *Anaya Gomez v. Sauerwein,* 172 Wn.App. 370, 385, 289 P.3d 755 (2012), *aff'd,* 180 Wn.2d 610, 331 P.3d 19 (2014). "If the information is reasonably needed by the patient to make an informed decision about treatment," it must be disclosed. Any categorical statement that a physician has "no duty to disclose treatments for a condition that *may* indicate a risk to the patient's health (until the physician diagnoses that condition), flatly contradicts *Gates v. Jensen,* 92 Wn.2d 246, 250–51, 595 P.2d 919 (1979),

and misstates the law as clarified by our Supreme Court in *Anaya Gomez.*"

Flyte, 183 Wn.App. at 57, *emphasis added.*

To this end, RCW 7.70.050(3) states as follows:

"3) Material facts under the provisions of this section which must be established by expert testimony shall be either:

> (c) The recognized possible alternative forms of treatment; or
>
> (d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered *and in the recognized possible alternative forms of treatment, including nontreatment.*"

RCW § 7.70.050, emphasis added.

Here, the Hensley experts also evidenced *necessary* alternative forms of treatment for mitigating Lorraine's serious possible risk. The alternatives to the treatments provided by the Respondents were laid out in detail by the Hensley experts—hospital admission, continuous intravenous antibiotics, sinus drainage, and blood testing. No evidence was presented that any Respondent medical provider ever advised Lorraine of any of these alternative forms of treatment. It was thus uncontroverted that Lorraine consented to these providers' ineffective antibiotic treatments without being aware of the serious possible risk of death from her medical condition, or of the alternatives for treatment of her condition.

The Hensleys summarily moved for a directed verdict on their informed consent claims, and were denied. *3384:24-3385:1; 3386:21-3387:5.*[9] The Hensleys raised the issue again post trial. *CP 930: 2-7.* The Hensleys were entitled to a directed verdict on all of their informed consent claims because it was uncontroverted that the Respondent providers' failed to inform Lorraine of either her serious risk *or* her alternatives for treatment. *RCW 7.70.050(3)(d).* Not only should the Respondents' motion for a directed verdict have been denied, but the Hensleys should have received a directed verdict in their favor against all Respondents on their claims. The dismissal of the Hensleys' informed consent claims should be reversed.

This Court should so rule.

C. <u>Juror misconduct requires a new trial against all Respondents.</u>

1). <u>The Record</u>.

During the Hensleys' voir dire, their counsel told the jury panel that the purpose of voir dire was to address biases—some of the beliefs that jurors might have that might interfere with their ability to listen fairly to both sides of the equation. *RP 125: 8-22.*

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[9] The Hensleys' proposed jury instructions at 14-16 also alleged the deprivation of these alternative treatments under *Gates v. Jensen. RP 3385-86.* The Hensleys also took exception to the trial court's failure to give the proposed instructions. *RP 3385-86.*

During CHAS counsel voir dire, counsel Christopher Mertens told the panel: "You all realize that that rule, is all we want to know, is can the panel that sits here, can they be impartial to both sides, truly, to both sides ... that's the goal of this process, the jury selection process, is that we want an impartial panel who will listen to the evidence, and then listen to the law as the judge instructs you on it, and then come to your decision based upon that law." *RP 146: 22 – RP 147: 6.*

During HFH defense counsel's voir dire, jurors were asked about their specific experience in the Emergency Room. *RP 146-57.*

During SENT counsel's voir dire, counsel reiterated that the role of the juror was to be "objective as you listen to the facts in this case." *RP 164: 22-25.* One juror responded: "With any court case, you should be objective." *RP 165: 1-2.*

In the trial court's instructions to the jury, the trial court instructed the jury to be objective. "It is also your duty to accept the law as I have explained it to you, regardless of what you personally believe the law is, or what you personally think it should be." *CP 880 (Inst. 1).* Each juror must decide the case for themselves, "but only after an *impartial* consideration of all of the evidence with your fellow jurors." *CP 882.* The court instructed: "You must reach your decision based on the facts proved to you and on the

law given to you, not on … bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially, with an honest desire to reach a proper verdict." *CP 882.* The court instructed, "The law treats all parties equally …" *CP 884 (Inst. 3).*

The court instructed the jury that health care providers owed to a patient a duty to comply with the standard of care of their profession. *CP 890 (Inst. 9).* Health care providers' failure to exercise such skill, care, and learning would constitute a breach of the standard of care, and negligence. *CP 890 (Inst. 9).*

The court also instructed the jury to decide the facts in the case, "based upon the evidence presented to you during this trial." *CP 880 (Inst. 1).*

Post-verdict, juror Sharon Phillips submitted a declaration. *CP 936-40.* After entry of the verdicts, she and another juror approached the Hensleys' counsel extremely upset, and concerned with what Juror Phillips believed were improprieties occurring in the jury room. *CP 937: 3.* She testified that initial votes taken by the jury were strongly in favor of liability, first against CHAS. Just before a poll was taken against HFH, which was an 8-4 verdict in favor of the Hensleys, the jury foreman and another male juror, "Jay," began engaging in behavior "shutting down" jurors who spoke in

favor of the Hensleys' case. *CP 937: 6-10.* Both jurors began interrupting jurors who spoke favorably of liability, and "shut down" free discussion of the evidence or the instructions. *CP 937: 16-18.* The foreman and Juror Jay made statements to other jurors, e.g., that no doctor should be sued for "just trying to do his job," that no doctor should be sued "if that doctor only saw a patient once," that CHAS should not be sued because they deal with "a lot of poor people," and that CHAS doctors were not properly paid and "shouldn't be held responsible for the same standard of care." *CP 938: 1-11.* The foreman and Juror Jay "tr(ied) and make people feel guilty about voting against doctors." *CP 939, para. 5.* The (foreman) argued that, as to the plaintiffs' *lawyer*, "[I]t's well known that she only does big money cases." *CP 938: 21-22.* The discussion caused a third male juror to state, "I know a few things about the plaintiff's lawyer, but I can't say anything right now." *Id., CP 938: 23-25.*

Both of these jurors also disputed the court's instruction on the "more probable than not" burden of proof. *CP 939: 3-14.* The foreman and Juror Jay told the jurors to disregard the "more probable than not" instruction as to medical causation. Both told the other jurors that the "more probable than not" standard did not apply to causation. The foreman stated that he was the foreman, and "that's the way we would be

deciding it." *CP 939: 4-15.* Juror Jay stated that the Hensleys' "big money cases" lawyer's trying to apply a "more probable than not" standard to causation was just "spin." *CP 939: 3-11.* He stated, "We already know she can really twist things around." *CP 938: 25 – RP 939: 2.* Whenever a juror would favorably reference the Hensleys' trial counsel, the foreman and Juror Jay, then joined by another juror, would impugn the Hensleys' lawyer, "implying negative things." *CP 938: 18-26.*

Juror Jay also injected his own extrinsic medical evidence. He had taken his own mother to an emergency room, he said, they had given her Dilaudid, her speech was also slurred just as occurred with Lorraine Hensley, but his mother was fine. *CP 938: 14-17.*

All of this behavior, stated Juror Phillips, had a very negative impact on deliberations. *CP 939, para. 5.*

The Hensleys brought a motion for a new trial based on juror misconduct. *CP 910-35.*[10] The trial court denied the motion. *CP 1015-*

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[10] The jury foreman, Mark Kinney, did not dispute certain of Juror Phillips' claims, claimed "no memory" of certain other statements, and directly denied certain others. The foreman did not dispute that the jury rapidly entered a 10-2 vote in favor of liability against the first Respondent on the verdict form, or that they as rapidly polled an 8-4 vote in favor of liability against the second Respondent on the verdict form. He did not dispute that the biased statements made, at the very least, by Juror Jay, began between the taking of these two votes, as Juror Phillips testified. He did not dispute that the latter 8-4 vote for liability reversed to 3-9 against liability after the behavior began. He acknowledged that he controlled discussions, as he "allowed" commentary. He did not deny that Juror Jay injected evidence of his mother's reaction to Dilaudid, and its purported meaning, or that Juror Jay made statements that the plaintiffs' lawyer was

16. It did so after finding that "certainly" at least one of the statements "could have had some impact on the jury verdict," but "whether or not it did here is really, really unclear." *July 11, 2014 report of proceedings, page 63:7-9.*

The misconduct entitles the Hensleys to a retrial.

2) <u>The trial court erred in denying the Hensleys a new trial given juror misconduct.</u>

CR 59(a)(2) allows for a new trial on grounds of jury misconduct.[11]

"well known" to do only "big money cases," or offered, "We already know she can really twist things around." He did not deny that a third juror chipped in to offer that he knew certain things about Plaintiffs' attorney, but couldn't say anything right then. He denied that he "came up with a different instruction on causation than that provided by the court." *CP 948: 20-27.* He did not deny that Juror Jay *argued* that the "more probable than not" standard for causation was "spin," i.e., not the law.

[11] CR 59**(a) states as follows:**

"Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

.....

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

.....

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

Here, two members of the jury panel held and expressed biases in favor of doctors and against plaintiffs bringing medical claims. Not one, but two jurors, one of who was the foreman of the jury, not only *held* those biases, but openly expressed and argued them in deliberation as a basis for the jury's decision-making. Misconduct thus arose in two ways. First, as detailed *infra*, by failing to disclose these biases during voir dire, these two jurors prevented the Hensleys from receiving an impartial panel of jurors, and from meaningfully exercising challenges for cause and limited peremptory challenges. Second, as detailed *infra*, by openly arguing biases as a basis for deliberation, both jurors violated the trial court's instructions and deprived the Hensleys of a fair trial. And third, by injecting his own medical experience with his mother as a "comparative" expert opinion about the effects of the intravenous pain medication known as Dilaudid, one biased and implicated juror violated the court's instructions again, injected extrinsic evidence, and deprived the Hensleys of a fair trial.

Taken individually and as a whole, it was untenable and thus abuse of discretion for the trial court to have denied the Hensleys' motion for a new trial, and a new trial should be granted.

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(9) That substantial justice has not been done."

CR 59.

a) Standard of review.

A trial court's denial of a motion for a new trial based on juror misconduct is reviewed for abuse of discretion. *McCoy v. Kent Nursery, Inc.*, 163 Wn.App. 744, 757-58, 260 P.3d 967 (2011), citing *Robinson v. Safeway Stores, Inc.,* 113 Wn.2d 154, 158, 776 P.2d 676 (1989). A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Id.* A discretionary decision is based on untenable grounds, or made for untenable reasons, if it was reached by applying the wrong legal standard. *Id., quotes omitted.* Here, the wrong legal standard was applied.

b) Undisclosed biases and bias-based arguments in deliberation require retrial.

The right to trial by jury includes the right to an unbiased and unprejudiced jury. Where "one or more" jury members are biased or prejudiced, the result is not a constitutional trial. *Robinson v. Safeway*, 113 Wn.2d at 158-59, quoting *Allison v. Department of Labor & Indus.*, 66 Wn.2d 263, 265, 401 P.2d 982 (1965). Actual bias is the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging. *Kuhn v. Schnall*, 155 Wn.App. 560, 573-574, 228 P.3d

828 (2010). Whether bias actually affects a verdict is not the question. The parties are entitled to an impartial panel of jurors. *Id., also citing Allison v Dept. of Labor and Industries, 66 Wn. 2d at 265.*

Moreover, juror misconduct is established where a juror fails to disclose a preexisting bias, because such evidence would provide a basis for a challenge for cause, or allow for the meaningful exercise of a strike against that juror. *See. e.g.*, *State v. Briggs*, 55 Wn. App. 44, 52-53, 54, 776 P.2d 1347 (1989). Such conduct constitutes irregularity affecting substantial rights of the parties. *Robinson v Safeway,* 113 Wn. 2d at 159. Voir dire examination is designed to protect the parties' rights to a fair trial by exposing such possible biases, both known and unknown, on the part of potential jurors. In this regard, this failure of a juror to speak during voir dire regarding a material fact, i.e., bias, can amount to misconduct. *Kuhn v. Schnall*, 155 Wn.App. at 573-574; *Robinson v. Safeway*, 113 Wn.2d at 158-59. When the failure to respond in voir dire relates to a material question, the appropriate remedy is to grant a new trial. *Robinson*, 113 Wn.2d at 159, citing *Gordon v. Deer Park Sch. Dist. 414,* 71 Wn.2d 119, 122, 426 P.2d 824 (1967).

Robinson is directly on point here. In *Robinson*, a jury foreman's failure to disclose his "bias toward California residents, particularly his

perception of their role in the legal process," deprived a plaintiff of a right to a trial by an impartial jury. The foreman in *Robinson* "made numerous remarks regarding his perception of the 'California litigation process,' revealing the foreman's bias." *Robinson*, 113 Wn.2d at 158. During the course of the jury deliberation [the foreman] stated, "These Californians sue anyone they can get money from," that "Californians are sue happy," that Californians "sue for anything" and "All these people from California, they sue all the time." 113 Wn.2d at 156. Following the verdict, he went on: "They sue for anything down there. They go for the big bucks too. [The foreman] further stated that he believed it was Californians because: The fast pace, I guess. I mean you don't see the suits in Washington like California. People down there sue for anything. Children sue their parents, parents sue their children, etc. I was sued for $500,000 because of a car accident." *Robinson*, 113 Wn.2d at 156. In this *Hensley* case, it was not just the foreman involved in statements of bias regarding lawsuits against doctors and litigating clients, and "big money" lawyers suing underpaid doctors who help poor people, it was both the foreman and another juror involved in the same behavior.

The *Robinson* court holds such conduct to be evidence of bias. And bias requires retrial. When any member of a jury is biased or prejudiced,

the trial is not a constitutional trial. *Robinson,* 113 Wn.2d at 159, and *Kuhn*, 155 Wn. App at 575, both citing *Allison*, 66 Wn.2d at 265.

Here, at least two jurors, including the foreman, were demonstrably biased. Whether bias actually affected the verdict is not the question. The parties are entitled to an impartial panel of jurors. *Robinson*, 113 Wn.2d at 159; *Kuhn v. Schnall*, 155 Wn.App. at 575. The Hensleys were denied an impartial panel of jurors, and are entitled to a new trial.

c) The Hensleys evidenced biased jurors advocating that other jurors not follow instructions.

All jurors swore to follow the court's instructions. A juror who refuses to follow the court's instructions is unable to perform his duty. *People v. Wilson*, 43 Cal. 4th 1, 25-27, 178 P.3d 1113 (2008)(*addressing the California Penal Code)*. Similar to the case here, each juror in *People v. Wilson* was instructed to render a verdict "according to the evidence presented and the instructions of the court," and each juror was directed to "consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict." *Id.* Here, similar instructions were given by the court. *CP 880, 882, 884.* Here, as in *Wilson*, the duty to try the case impartially, and to decide the case based on only the facts provided to them and the law given, was violated by the two jurors who not only injected their biases into deliberation in violation of those

instructions, but, according to Juror Phillips, advocated that the jury "disregard" the trial court's instructions on causation. *CP 939: 3-4.*

Such conduct is akin to jury nullification. *State v. Elmore,* 155 Wn.2d 758, 761, 123 P.3d 72, 73 (2005). Nullification is a juror's "knowing and deliberate rejection of the evidence or refusal to apply the law ... because the result dictated by law is contrary to the [juror's] sense of justice, morality, or fairness." *Id*, citing BLACK'S LAW DICTIONARY 875 (8th ed. 2004). Here, the implicated jurors talked of their "morality and fairness" doctors dealing with "poor people," and not being properly paid. *CP 938: 1-11.* In contrast, claims were made by "big money case" lawyers. Jurors were made to feel "guilty" about voting against doctors. *CP 939, para. 5.* These types of biased arguments are plainly intended to nullify "objectivity" directives.

The same "nullification" principle appears where the same two implicated jurors went on to argue the trial court's instruction on the Hensleys' burden of proof, disputing the court's "more probable than not" burden of proof. *CR 939: 3-14.* The foreman told the jurors that the "more probable than not" standard did not apply to causation, that he was the foreman, and "that's the way we would be deciding it." *Id.* Juror Jay stated that the Hensleys' lawyer's trying to apply a "more probable than

not" standard to causation was just "spin," and "twisting things around." *CP 938-39.* This is deliberate rejection of the court's instructions as given, and is cause for a new trial. *See, e.g., State v. Elmore*, 155 Wn.2d at 768.

d) The injection of intrinsic evidence requires retrial.

Finally, another refusal to follow the trial court's instructions appeared when one of the two implicated jurors, Juror Jay, also introduced his own extrinsic medical evidence into the deliberations.

It is misconduct for a juror to introduce extrinsic evidence into deliberations. *Kuhn v. Schnall,* 155 Wn. App. at 575-76. Extrinsic evidence is "information that is outside all the evidence admitted at trial, either orally or by document." *Id.* In such instances, the court is not to make a subjective inquiry into the actual effect of the evidence on the jury. The court's inquiry is whether such extrinsic evidence *could* have affected the jury's determination. Any doubt that the misconduct affected the verdict must be resolved against the verdict. *Id.* and see *State v. Briggs,* 55 Wn.App. at 56.

Here, a biased juror *already engaging in biased argument* also injected extrinsic evidence of his own experience to defend the Respondent medical providers. Juror Jay's medical evidence was offered

as medical expertise—his mother, he reported, displayed symptoms similar to those of Lorraine Hensley after receiving an intravenous pain medication known as Dilaudid. *CP 938: 14-17.* He was explaining to the jury that he knew from experience that such symptoms did not indicate anything medically wrong. Juror Jay thus presented his own expert evidence based on his personal experience with intravenous Dilaudid as to the symptoms manifested by Dilaudid, and the lack of causation between those symptoms and a medical problem.

The trial court's discounting even these statements as "observations of his mother" and "personal observation" is untenable and thus abuse of discretion. What juror Jay was injecting into deliberation was personal expertise related to the acceptable medical symptomology arising from intravenous Dilaudid verses symptoms of a medical problem. *RP 938: 14-17 versus RP 65: 1-10.* "This is evidence outside the realm of a typical juror's general life experience and therefore should not have been introduced into the jury's deliberations." *State v. Briggs*, 55 Wn.App. at 59. This case is similar to that of *Briggs*, where a juror did not disclose a stuttering problem in voir dire, but then began to describe his personal experiences as a stutterer in deliberation. Such "personal experience" is in the vein of an expert, and it is misconduct warranting a new trial. Just as in *State v. Briggs,* juror Jay's

comments "were presented to the jury for the purpose of weighing the value of similar testimony properly introduced at trial, and might reasonably have influenced the jury's verdict. The comments were therefore prejudicial." *Briggs,* 55 Wn. App at 58.

Here, the trial court did not affirmatively find that no prejudice resulted. *July 11, 2014 RP 64-65.* It simply found that the extrinsic evidence injected did not rise to the level of that injected in either *Kuhn* or *Briggs*. RP 65:18-23. But this is an untenable analysis. In such circumstances, "[A] new trial must be granted unless 'it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.'" *State v. Briggs*, 55 Wn.App. at 56, citing *United States v. Bagley,* 641 F.2d 1235, 1242 (9th Cir.1981) (quoting *Gibson v. Clanon,* 633 F.2d 851, 855 (9th Cir.1980))[.] Where any doubt exists, a new trial is required. *Kuhn v. Schnall,* 155 Wn.App. at 573. The trial court found that biased statements "could have some impact on a jury verdict," *July 11, 2014 RP 63 at 7-9.* And it did not find that extrinsic evidence did not have impact or cause prejudice. These comments thus deprived the Hensleys of a fair trial. *Briggs at 60.* There was thus "no tenable basis for the trial court's refusal to grant the appellant a new trial based on" juror misconduct. *Briggs* at 61. The same result must apply here and retrial should be

required.

e) The objective evidence presented does not disprove that the misconduct was harmless, or had no impact on the verdict.

Even if objective evidence of impact is necessary, which it isn't, it cannot properly be said here that there was no reasonable possibility that the jury's verdict was not influenced by the two jurors' misconduct. The trial court agreed. It held that at least one statement could have had impact on the verdict. *RP 63: 16-18.* The impact of the statements thus could *not* be discounted given the evidence and given even the differing verdicts here. It was thus "untenable" for the trial court to deny a new trial.

Moreover, from a purely objective standpoint, the record reflects the influence. Prior to arguments of bias, the jurors' voting was 10-2 for liability against CHAS. Immediately after some of the biased statements began, the jury still polled at 8-4 for liability against HFH. Thereafter, during the two days of deliberation with such statements and behavior, this latter vote against HFH literally *reversed* itself to a 9-3 *against* liability. *Phillips, CP 937: 6-10 vs. CP 909 (handwritten "9 – no, 3 – yes").*[12]

Moreover, objectively, one of the biases advocated was, e.g., that "no doctor should be sued if that doctor only sees a patient once." CHAS

[12] The jury was charged out on May 29, 2014 and the foreman signed the verdict on May 31, 2014. *CP 907-09.*

saw Ms. Hensley repeatedly. HFH staff had seen Ms. Hensley at least twice. The only entity treating Lorraine only once was SENT's Dr. Cruz. And consistently, SENT's Dr. Cruz was the only medical provider found to not have violated the standard of care, even though the *very same evidence* applied to him as it did to CHAS and HFH. *See Drs. Beck, Bronston, Sokolov, supra.* If the same standard of care applied to each, if CHAS violated the standard of care, and if HFH could not be exonerated of the violation, then it made no sense to absolve a physician right in the midst of this chain. Objectively, that is questionable.

As objectively, after the foreman and Juror Jay argued that the "more probable than not" standard did not apply to causation, and that any such claim was Plaintiff "spin," by the time the jury got to the causation questions, the jury found that while the "underpaid" doctors at Respondent CHAS, who had seen Lorraine over and over, violated the standard of care, they also found that these providers' violation of the standard of care was not a proximate cause of her injury. *CP 908, Question 2.*

On an objective basis, the impact of the biased arguments and injected evidence cannot be discounted from this record. The trial court failed to assess the totality of the statements and the behavior on the jury pool, which is implicated by a near complete reversal of a vote after the

statements and behavior began, and by Juror Phillips's testimony that the statements and behavior of the two jurors *combined* to influence a jury against votes in favor of liability. Looking at the behavior as a whole, the varying verdicts, and the objective reversal of a vote against Respondent HFH over the course of this behavior, it cannot be said, and this trial court could not find, that this misconduct did not affect the verdict.

It was abuse of discretion for the trial court to deny the Hensleys a new trial. A new trial should be granted.

f) The misconduct does not inhere in the verdict. The misconduct was bias, a pattern of statements of bias, and the injection of extrinsic evidence into deliberations.

The trial court recognized that the misconduct referenced by Juror Phillips did not inhere in the verdict, and was reviewable. A trial court may rely on affidavits to establish a juror's acts constituting misconduct without probing their mental processes or other matters inhering in the verdict." *McCoy v. Kent Nursery, Inc.*, 163 Wn.App. at 766. Undisclosed bias, bias affecting the verdict, or biased behavior that affect a verdict, do not inhere in the verdict. *Id.* Where a juror, e.g., makes racially based statements that are factual in character and reveal bias, such statements are specifically probative of misconduct and do not inhere in the verdict. *Turner v. Stime*, 153 Wn.App. 581, 593, 222 P.3d 1243, 1249 (2009);

Robinson v. Safeway Stores, 113 Wn.2d at 160, also referencing *Hendrickson v. Konopaski,* 14 Wash.App. 390, 393, 541 P.2d 1001 (1975); *Allison v. Department of Labor & Indus., supra,* and *Gardner v. Malone,* 60 Wn.2d 836, 841, 376 P.2d 651 (1962).

The trial court properly considered the evidence; it simply applied the wrong standard to the evidence received.

IV. CONCLUSION.

The Hensley Estate is entitled to a new trial on all claims against all Respondents based on jury misconduct. Liability and causation should be deemed established against Respondent Providence Holy Family Hospital and Respondent CHAS via the summary judgment process, with the jury so instructed. The Hensleys are also entitled to retrial on their informed consent claims against all three Respondents.

Respectfully submitted this 17th day of November, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the **17th** day of **November, 2015**, the foregoing document was delivered to the following persons in the manner indicated below:

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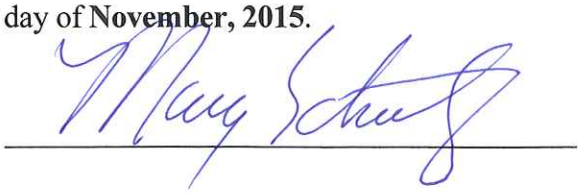
Dated this **17th** day of **November, 2015**.