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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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DIVISION III  
STATE OF WASHINGTON  
BY \_\_\_\_\_

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

Plaintiffs/Appellants/Cross-Appellees,

v.

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

Defendants/Appellees/Cross-Appellants

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PROVIDENCE HOLY FAMILY HOSPITAL'S PRIMARY BRIEF

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## I. INTRODUCTION & RELIEF REQUESTED

This medical negligence action was tried to a jury over a period of four weeks in May 2014. Lorraine Hensley developed a sinus infection that worsened into an intracranial infection, ultimately leading to her death. Ms. Hensley claims that the Defendant health care providers were negligent in failing to properly diagnose the severity of her infection and were negligent in failing to treat that infection aggressively enough. The Defendants deny Ms. Hensley's allegations.

**A. ON EACH ISSUE, MS. HENSLEY'S ARGUMENTS AIM TO REALLOCATE THE BURDENS OF PRODUCTION AND PERSUASION.**

Both the Plaintiffs (hereinafter collectively, "Ms. Hensley") and Defendant Providence Holy Family Hospital (hereinafter "Holy Family") ask the Court of Appeals to reverse trial court decisions and to enter judgment in their respective favors. Ms. Hensley asks the Court to reverse the trial court's denial of her pre-trial motion for summary judgment.<sup>1</sup> Holy Family respectfully asks the Court to reverse the trial court's denial of Holy Family's mid-trial/post-trial motions for a directed verdict.

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<sup>1</sup> Ms. Hensley did not reference or include the order denying her pre-trial motion for summary judgment in her notice of appeal. That order is, therefore, not properly before the Court.

The burdens of production and persuasion tie the parties' arguments together. For her part, Ms. Hensley proceeds from the entirely false premise that a plaintiff can bring a *Celotex* motion and thereby require the defendant to disprove her claim.<sup>2</sup> For its part, Holy Family asks the Court to reverse the trial court's decision to forgive Ms. Hensley's failure to produce *prima facie* evidence to support her agency claim and to appropriately establish Holy Family's violation of the applicable standard of care. On each issue, Ms. Hensley rejects the traditional allocation of the burdens of production and persuasion – she asks the Court to impose a burden of disproof on the defense.

Holy Family, on the other hand, respectfully asks the Court to keep faith with the traditional burdens of production and persuasion. Ms. Hensley did not carry her burden (as a plaintiff) at summary judgment. During trial, Ms. Hensley did not present *prima facie* evidence to support her agency allegations, and she failed to present adequate expert testimony to support her standard of care claims. The Court should thus affirm the trial court's denial of Ms. Hensley's pre-trial motion for summary judgment and reverse the trial court's denial of Holy Family's mid-trial/post-trial motions for a directed verdict.

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<sup>2</sup> CP 28-9; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216 (1989).

**B. REGARDLESS OF THE APPLICABLE BURDENS, MS. HENSLEY FAILED TO PRESENT ADEQUATE EVIDENCE AT SUMMARY JUDGMENT.**

As a medical negligence plaintiff, Ms. Hensley was obliged to produce expert testimony supporting the *prima facie* elements of her claim. At summary judgment, Ms. Hensley produced a single expert declaration; that declaration was from Dr. Steven Kmucha.<sup>3</sup>

The Defendants moved to strike Dr. Kmucha's declaration, arguing that Dr. Kmucha failed to satisfy RCW 7.70.040's requirement that all expert testimony apply Washington State's standard of care. Dr. Kmucha's declaration asserted, without support, that a national standard of care applied to this case.<sup>4</sup>

The trial court agreed that Dr. Kmucha's declaration did not demonstrate the requisite familiarity with Washington's standard of care. As a result, the trial court acknowledged that Ms. Hensley failed to meet her summary judgment burden and that her claim was subject to dismissal.<sup>5</sup> The trial court, however, did not dismiss Ms. Hensley's claim. Instead, the trial court permitted Ms. Hensley additional time to cure the

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<sup>3</sup> CP 41-70.

<sup>4</sup> See VRP 3566-67.

<sup>5</sup> VRP 3566-69.

defects in Dr. Kmucha's declaration. The trial court warned that failure to correct those deficiencies would result in summary dismissal.<sup>6</sup>

Dr. Kmucha's deficient declaration is the entire basis for Ms. Hensley's summary judgment appeal.<sup>7</sup> Separate and apart from the fact that Ms. Hensley's argument is contrary to the long-established burdens of production and persuasion, Ms. Hensley's argument hinges upon a declaration that, by all rights, should have been stricken. The Defendants were under no obligation to respond to Dr. Kmucha's facially invalid declaration, and Ms. Hensley's effort to transmute that defective proof into indisputable proof should be summarily rejected.

**C. MS. HENSLEY CONFLATES MEDICAL NEGLIGENCE AND INFORMED CONSENT PRINCIPLES.**

Ms. Hensley asserts that the Defendants should have diagnosed a developing intracranial infection and treated her accordingly. However, the Defendants exercised due care and prudence in treating Ms. Hensley; her sinus infection had not developed into an intracranial process, at the

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<sup>6</sup> VRP 3569.

<sup>7</sup> Dr. Kmucha submitted a supplemental declaration. CP 167-70. However, that declaration was not considered by the trial court in denying Ms. Hensley's motion for summary judgment. CP 176-9; VRP 3565-70, 3595.

time of the Defendants' treatment.<sup>8</sup> Thus, the dispute is whether the Defendants failed to exercise reasonable care in diagnosing and treating Ms. Hensley's infection.

The trial court correctly rejected Ms. Hensley's attempt to contort this medical negligence case into an informed consent case. Ms. Hensley's claim is for failure to diagnose a severe infection.<sup>9</sup> It is settled law that a physician has no duty to provide informed consent regarding a condition that he or she has not yet diagnosed. This is a necessary and common sense rule; a physician cannot disclose material facts and risks that he or she is not aware of. The trial court was therefore correct to summarily dismiss Ms. Hensley's informed consent claim. Holy Family respectfully asks the Court of Appeals to affirm that trial court decision.<sup>10</sup>

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<sup>8</sup> See VRP 1762-64, 1765-66.

<sup>9</sup> Ms. Hensley acknowledged that her claim was about medical negligence, not about informed consent. VRP 679-80.

<sup>10</sup> Ms. Hensley also argues that alleged juror misconduct requires the reversal of jury verdicts in favor of Holy Family's co-defendants. In light of the jury's failure to reach a verdict with respect to Holy Family, that issue will not be addressed herein.

## II. STATEMENT OF THE ISSUES

1. The ostensible agency doctrine allows for vicarious liability where the plaintiff establishes that a hospital acted in a manner that caused the plaintiff to reasonably believe that a provider was the hospital's employee. Ms. Hensley asserted ostensible agency against Holy Family, but she presented no evidence to support her claim. Did the trial court err in denying Holy Family's motions for judgment as a matter of law based upon Ms. Hensley's failure to prove her claim?

2. A medical negligence plaintiff must establish each defendant's violation of the applicable standard of care by expert testimony that is rendered to a reasonable degree of medical certainty. Did the trial court err in denying Holy Family's motion for judgment as a matter of law, where Ms. Hensley's experts did not offer individual opinions to a reasonable degree of medical certainty?

3. A timely notice of appeal is necessary to invoke Washington's appellate jurisdiction. Ms. Hensley filed two notices of appeal, but neither included any reference to the pre-trial summary judgment order. Having failed to identify the pre-trial summary judgment order, did Ms. Hensley perfect an appeal with respect to that order?

4. The plaintiff bears the burdens of proof. Therefore, to establish an entitlement to judgment as a matter of law (as is required to prevail at summary judgment), a plaintiff must show that no reasonable jury could find against her. Was the trial court correct to deny Ms. Hensley's motion for summary judgment that sought to shift the burdens and to, thereby, impose a burden of disproof on the Defendants?<sup>11</sup>

5. A physician cannot provide a patient informed consent with respect to a condition that the physician has not diagnosed. Ms. Hensley claimed that the Defendants failed to inform her of treatment risks and options with respect to a condition that the Defendants had not diagnosed. The Defendants, therefore, were not aware that the risks or options existed/were implicated. Under these circumstances, was the trial court correct to dismiss Ms. Hensley's informed consent claim?

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<sup>11</sup> Ms. Hensley's pre-trial motion for summary judgment argues: "[i]f a defendant party can state without any reference to any part of the record that the other side hasn't yet presented any evidence, and they are therefore entitled to summary judgment, then it works both ways. Plaintiffs are entitled to summary judgment on their claims, as none of the defendants have produced evidence to support their actions being *within* the standard of care." CP 28-9 (emphasis in original).

### III. STATEMENT OF FACTS

This is a medical negligence case arising from Ms. Hensley's death. *See* CP 3-15. Ms. Hensley developed a sinus infection that became acute and progressed to her brain. *Id.* That infection led to Ms. Hensley's death. *Id.* Ms. Hensley contends that the Defendants failed to properly diagnose the severity of her condition and to treat that condition aggressively enough. *See id.*; *see also* Ms. Hensley's Appellant's Opening Brief (hereinafter "Ms. Hensley's Brief").

Ms. Hensley does not assert any direct claim against Holy Family.<sup>12</sup> Ms. Hensley's sole claim against Holy Family asserts vicarious liability, arguing that Dr. Christopher Tullis and John Hunter, PA-C provided negligent treatment. *See generally*, Ms. Hensley's Brief; *see also* VRP 1860-61. It was undisputed that neither Mr. Hunter nor Dr. Tullis were employed by Holy Family or were otherwise express agents for Holy Family. *See* CP 90-2; VRP 1869, 3572, 3581. Ms. Hensley, therefore, asserted that Dr. Tullis and Mr. Hunter were the hospital's ostensible agents. *See id.* Ms. Hensley, however, presented no evidence to support that allegation of agency.

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<sup>12</sup> Though Ms. Hensley's complaint asserted a direct claim for corporate negligence and a direct informed consent claim against Holy Family, those claims were dismissed, and Ms. Hensley does not argue that those claims should be revived on appeal. CP 179-79; *see also* Ms. Hensley's Brief.

#### IV. STATEMENT OF CASE

Ms. Hensley filed suit on or about January 26, 2012. CP 1. After a period of discovery, the Defendants filed motions for summary judgment. CP 16-8, 19-21, 22-4. By way of response, Ms. Hensley filed a cross motion for summary judgment. CP 25-7. The trial court denied all of the motions for summary judgment, and the matter proceeded to trial in May 2014. CP 172-81; *see generally* VRP.

At the close of Ms. Hensley's case in chief, Holy Family brought a motion for judgement as a matter of law. VRP 1860-61. Holy Family pointed out that Ms. Hensley had failed to present any evidence to support her allegation of ostensible agency. *Id.* Holy Family also pointed out that undisputed evidence established that Ms. Hensley had signed, on two separate occasions, a form acknowledging that emergency department providers were not employees or agents for the hospital. *Id.* Ms. Hensley, during her case in chief, failed to present any evidence to rebut that form or to otherwise demonstrate a triable issue on her allegation of agency. *See* VRP 1860-61, 1863-64. The trial court denied the motion. VRP 1868-69.

Once all the evidence was in and all parties had rested, Holy Family renewed its motion. VRP 3401-02. Again, the trial court denied the motion. *Id.* Moreover, rather than presenting agency to the jury, as an

issue on which Ms. Hensley bore the burden of proof, the trial court affirmatively instructed the jury that Dr. Tullis and Mr. Hunter were agents for Holy Family and that Holy Family was vicariously liable for their conduct. CP 887.

The jury returned defense verdicts for the two Defendants. CP 907-09. However, the jury was unable to reach a verdict for Holy Family. *Id.* Holy Family again renewed its motion for judgment as a matter of law. Holy Family's Supplemental Designation of Clerk's Papers, Docket # 267. The trial court denied the motion and declared a mistrial. Holy Family's Supplemental Designation of Clerk's Papers, Docket # 270.

Ms. Hensley filed a timely notice of appeal. CP 1017-1033. Ms. Hensley sought review of: (i) the trial court's judgement on the jury verdict; and (ii) the trial court's July 14, 2014 Order denying Ms. Hensley's motion for a new trial. *Id.* Ms. Hensley's notice of appeal did not mention her pre-trial motion for summary judgment. *Id.* Ms. Hensley also filed an amended notice of appeal. CP 1034-46. That notice added the trial court's August 1, 2014 order dismissing Ms. Hensley's informed consent claim to Ms. Hensley's prior notice of appeal. *Id.* That amended notice also failed to mention the pre-trial summary judgment. *Id.*

Holy Family filed a timely notice of cross appeal. Holy Family's Supplemental Designation of Clerk's Papers, Docket # 271. By that notice

of cross appeal, Holy Family respectfully asks the Court of Appeals to reverse the trial court's August 1, 2014 order denying Holy Family's motion for judgment as a matter of law, which was based upon Ms. Hensley's failure to prove her agency allegations. *Id.*

## V. ARGUMENT

### A. ALL ASPECTS OF THIS APPEAL ARE TO BE REVIEWED *DE NOVO*.

Summary judgment rulings, questions of law, and motions for judgment as a matter of law are all subject to *de novo* review. *See Tanner Elect. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 668 (1996); *Wiley v. Rehak*, 143 Wn.2d 339, 343 (2001); *Clipse v. Commercial Driver Services, Inc.*, 189 Wn. App. 776, 784 (2015). On a *de novo* review, the appellate court engages in the same inquiry as the trial court. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15 (1976).

Each aspect of this appeal is subject to *de novo* review. The trial court's denial of Holy Family's motions for judgment as a matter of law should be reversed on a *de novo* review. Ms. Hensley's failure to preserve an appeal of the trial court's order denying her pre-trial motion for summary judgment presents an issue of law that is analyzed *de novo*. The merits of Ms. Hensley's summary judgment arguments, were they to be reached, would be reviewed *de novo*. And finally, the trial court's

dismissal of Ms. Hensley's informed consent claim should be affirmed *de novo*.

**B. MS. HENSLEY BORE THE BURDEN OF PRESENTING *PRIMA FACIE* EVIDENCE OF AGENCY.**

Ms. Hensley asserted that Holy Family was vicariously liable for the conduct of PA-C Hunter and Dr. Tullis. *See generally*, Ms. Hensley's Brief; *see also* VRP 1860-61. That is the sole basis for Ms. Hensley's claim against Holy Family. *Id.*

It is undisputed that neither PA-C Hunter nor Dr. Tullis were Holy Family employees. *See* CP 90-2; VRP 1869, 3572, 3581. It was also undisputed that neither provider was an express agent for Holy Family. *Id.* Thus, there is no express basis to impose vicarious liability on the hospital; Ms. Hensley's claim is, therefore, based entirely on ostensible agency.

There is no dispute regarding the fact that agency was a *prima facie* part of Ms. Hensley's claim. *See Davis v. Early Const. Co.*, 63 Wn.2d 252, 256-57 (1963) ("The burden of establishing the essentials of defendant's vicarious liability is upon the plaintiff."); *Adamski v. Tacoma General Hosp.*, 20 Wn. App. 98, 111-16 (1978) (holding that the plaintiff had presented sufficient facts to reach the jury on the question of agency). And there was no reasonable dispute regarding Ms. Hensley's failure to

present evidence on the issue. VRP 1863-64. In fact, Ms. Hensley argued that she was not required to prove agency because "agency" was not specifically enumerated as a disputed issue in the Trial Management Joint Report. *Id.*

There is no principle of law that elevates a trial management report over the fundamental allocation of burdens and due process. Spokane County Local Rule 16 governs pre-trial procedure, including the preparation of trial management joint reports. LCR 16. Nothing in the rule elevates a pre-trial report to the level of an operative pleading, and nothing in the rule requires the defendant to identify potential pitfalls in the plaintiff's *prima facie* case. *Id.* Though there are circumstances under which a defendant's failure to disclose an affirmative defense can constitute a waiver, there is no authority for the rather extraordinary proposition that a defendant's failure to remind a plaintiff to satisfy her *prima facie* burden can somehow alleviate the plaintiff of that burden. *See Lybbert v. Grant County*, 141 Wn.2d 29, 38 (2000).

Of course, trial courts may enter pre-trial orders that limit the issues for trial. CR 16. Those orders, however, are entered upon notice, with an opportunity for the parties to be heard, and upon an opportunity for appellate review. *Id.*; *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 503 (1997); *Maybury v. City of Seattle*, 53 Wn.2d 716, 716-17 (1959). If

Ms. Hensley wanted to relieve herself of the burden of presenting evidence of the *prima facie* elements of her claim, it was incumbent upon her to bring a motion for a pre-trial order, asking the Court to limit the issues for trial. *See* CR 16; LCR 16.

Ms. Hensley also attempts to excuse her failure to establish agency, based upon comments made during a pre-trial motion for partial summary judgment. VRP 1863-64; 3556-97. During that hearing, Holy Family argued that Ms. Hensley's claim for direct corporate liability, her direct claim for informed consent, and her "claim" for *res ipsa loquitur* should be dismissed. VRP 3572. In that context and for the purposes of that argument, Holy Family acknowledged that it would be vicariously liable for Dr. Tullis' and Mr. Hunter's conduct. *Id.* That was not a stipulation; it was a simple confirmation that agency and vicarious liability were not part of the motion for partial summary judgment. *See id.* The trial court succinctly stated the issue in making its summary judgment ruling: "[e]verybody acknowledges that Holy Family . . . would have vicarious liability for the actions of the medical providers involved . . . so that is not an issue before me on summary judgment." VRP 3589. That exchange did not alleviate Ms. Hensley's *prima facie* burden at trial.

In the absence of a pre-trial order limiting her *prima facie* burden, Ms. Hensley bore the burden of producing evidence to establish each

element of her vicarious medical negligence claim against Holy Family. Specifically, Ms. Hensley was obliged to produce evidence to establish that: (i) Dr. Tullis and/or Mr. Hunter owed her some duty; (ii) Dr. Tullis and/or Mr. Hunter breached that duty; (iii) those breaches caused some injury, loss or damage; and (iv) most importantly for this appeal, Holy Family was vicariously liable for Dr. Tullis' and/or Mr. Hunter's conduct.

**C. MS. HENSLEY DID NOT PRESENT ANY EVIDENCE OF AGENCY.**

Washington has acknowledged that application of "hornbook rules of agency to the hospital-physician relationship often leads to unrealistic and unsatisfactory results . . ." *Adamski*, 20 Wn. App. at 105. As a result, the Washington State Supreme Court adopted a modified test for agency in the medical context. *See generally id.* That test is based upon Section 267 of the Second Restatement of Agency, which allows for vicarious liability in cases of "ostensible" agency. *Id.* at 112.

To establish ostensible agency, the plaintiff must show that: (i) the plaintiff reasonably believed that she was dealing with an agent for the defendant-principal; (ii) the plaintiff's belief regarding the agency relationship was generated by some act or negligence on the part of the principal; and (iii) the plaintiff was not negligent in relying upon the agent's apparent authority. *Id.* at 113, 115-16, *see also DLS v. Maybin*, 130 Wn. App. 94 (2005). In short, in order to submit ostensible agency to

the jury, the plaintiff must offer evidence to show that the defendant-principal made some statement or performed some act that reasonably led the plaintiff to believe that the purported agent was acting on the purported principal's behalf. *Id.* Washington's appellate court has specifically held that the question of agency is "one of fact for the jury." *Adamski*, 20 Wn. App. at 113 (quotations and citations omitted).

The factual and procedural facts from *Adamski* are instructive. Mr. Adamski reported to the Tacoma General Hospital emergency department with a broken finger. *Id.* at 100-01. Mr. Adamski was treated in the emergency department by an independent contractor named Dr. Tsoi. *Id.* Following treatment, Mr. Adamski was discharged to home with instructions to contact his doctor if his condition did not improve. *Id.* In the days following his discharge from the emergency department, Mr. Adamski experienced increased symptoms. *Id.* at 101. He contacted the emergency department (on two occasions) and was told that his symptoms were not unusual and that he should contact his personal physician. *Id.* Mr. Adamski reported to a different hospital's emergency department, where an infection was diagnosed and treated. *Id.* at 101-02.

Mr. Adamski filed suit against Tacoma General Hospital, alleging that the hospital was vicariously liable for Dr. Tsoi's care. *Id.* The trial

court summarily dismissed the action based upon a lack of evidence that Dr. Tsoi was the hospital's agent. *Id.* at 102-03.

The Court of Appeals reversed the trial court's summary judgment order. *Id.* at 115. Importantly, the Court of Appeals did not enter an order (or make any finding) that the hospital was vicariously liable for Dr. Tsoi's conduct. Instead, the Court of Appeals held that the issue should have been presented to the jury:

. . . a jury could find that Tacoma General held itself out as providing emergency care services to the public. A jury could find that plaintiff reasonably believed Dr. Tsoi was employed by the Hospital to deliver that emergency room service. It appears plaintiff was not advised to the contrary and, in fact, he believed he was being treated by the Hospital's agent; in addition, the written instructions provided him after surgery could reasonably be interpreted as an invitation to return for further treatment if plaintiff could not contact his personal physician . . . when the facts before the trial court and the fair inferences therefrom are viewed in a light most favorable to plaintiff, a jury could find that the emergency room personnel were "held out" as employees of the Hospital. It was error, therefore, not to submit this issue to the jury.

*Id.* at 115-16. Thus, *Adamski* permits a plaintiff to make a claim of ostensible agency in the hospital context, and *Adamski* requires that plaintiff to present evidence both (i) that the hospital held the treating doctor out as its agent and (ii) that the plaintiff believed that the treating doctor was a hospital employee. *Id.*

Agency was disputed from the inception of the case, and Holy Family denied that Dr. Tullis and/or Mr. Hunter were its agents. Holy Family's Supplemental Designation of Clerk's Papers, Docket # 13. However, Ms. Hensley did not present evidence to satisfy *Adamski's* standard: Ms. Hensley did not offer any evidence to show that Holy Family held Dr. Tullis or Mr. Hunter out as Holy Family's agent; nor did she offer any evidence to show that she reasonably believed that Dr. Tullis or Mr. Hunter was a hospital employee. In fact, Ms. Hensley argued that no evidence of agency should be required. VRP 1863-64. Thus, Ms. Hensley's entire argument is based on the assertions that: (i) Dr. Tullis and Mr. Hunter provided care at Holy Family's emergency department; and (ii) Holy Family did not disprove that Dr. Tullis and Mr. Hunter were its agents.

As she did at summary judgment, Ms. Hensley presents an argument that fundamentally misstates the burdens of production and persuasion. Holy Family is not obliged to disprove Ms. Hensley's allegations of agency – Ms. Hensley is obliged to produce evidence in support of those allegations and to persuade the jury that those allegations should be accepted. *See Davis*, 63 Wn.2d at 256-57; *Adamski*, 20 Wn. App. at 111-16. No view of the record, no matter how much light is cast in Ms. Hensley's favor, can demonstrate evidence of agency. Ms. Hensley

did not produce evidence beyond the undisputed fact that Ms. Hensley was treated by Dr. Tullis and Mr. Hunter at the Holy Family emergency department.

The mere fact that a plaintiff is treated in a hospital emergency department is not enough to impose vicarious liability. *Adamski*, 20 Wn. App. at 115-16. Mr. Adamski was able to get agency to the jury because he produced affirmative evidence in support of his claim. *Id.* He established that he believed that he was being treated by hospital employees, and established that the hospital's discharge documents reasonably led him to believe that he was being treated by hospital employees. *Id.* In short, Mr. Adamski produced evidence that Ms. Hensley did not.

Furthermore, Ms. Hensley's claim that Holy Family did not present any evidence to counter her agency allegation is simply untrue. Holy Family established that on each of her visits to the Holy Family emergency department, Ms. Hensley signed a form acknowledging that she would be treated by physicians who were **not** employed by the hospital and for whose conduct the hospital would not assume liability. VRP 1860-61; CP 904 (citing Exhibits 105 and 106). Those forms were the only relevant evidence on agency that were presented.

As noted above, Holy Family brought this issue to the trial court's attention three different ways – first at the close of Ms. Hensley's case in chief; again when all the evidence was in; and lastly, in writing after the verdict was in. VRP 1860-61, 34301-02; Holy Family's Supplemental Designation of Clerk's Papers, Docket # 267. Each time, Holy Family's argument was simple: Ms. Hensley failed to present the jury with *prima facie* evidence of agency and, lacking *prima facie* evidence, her claim should be dismissed. That remains Holy Family's argument.

*Adamski* lays a fairly clear path before Washington State plaintiffs; it tells plaintiffs exactly what type of evidence is required to present an agency claim to the jury. Ms. Hensley failed to follow that path, and the trial court erred in excusing Ms. Hensley's failure.

**D. THE TRIAL COURT COMPOUNDED ITS ERROR BY AFFIRMATIVELY FINDING IN MS. HENSLEY'S FAVOR.**

The trial court instructed the jury that Dr. Tullis and Mr. Hunter were Holy Family's agents and that Holy Family was vicariously liable for their conduct. CP 887 (Instruction No. 6). That instruction was given over Holy Family's objection. VRP 3392-93.

That instruction was based upon nothing more than the trial judge's individual view on the facts; that instruction was, therefore, an unconstitutional comment on the evidence. *See* Wn. Const. Art. IV, § 16;

*State v. Steen*, 155 Wn. App. 243, 247 (2010) ("[T]he Washington Constitution prohibits a judge from conveying his or her personal perception of the merits of the case or giving an instruction that implies matters of fact have been established as a matter of law."). By instructing the jury that Holy Family was vicariously liable for Mr. Hunter's and Dr. Tullis' conduct, the trial court eliminated aspects of Ms. Hensley's burden of production, usurped the jury's fundamental fact-finding role, and deprived Holy Family of its right to a jury trial. *See* Wn. Const. Art. I, § 21; *State v. Johnson*, 152 Wn. App. 924, 934 (2009).

It was manifest error for the trial court to instruct the jury that Dr. Tullis and Mr. Hunter were Holy Family's agents. The Court of Appeals should reverse the trial court's decision and direct the trial court to summarily dismiss Ms. Hensley's claim against Holy Family.

**E. MS. HENSLEY DID NOT OFFER ADEQUATE EXPERT OPINIONS AGAINST HOLY FAMILY.**

A medical negligence plaintiff must present expert testimony to prove that particular conduct is not reasonably prudent under the applicable standard of care. *McLaughlin v. Cook*, 112 Wn.2d 829, 836-37 (1989). In multi-party cases, the plaintiff must establish a claim against each defendant, as though it was a separate lawsuit. WPI 41.03. In multi-defendant medical negligence cases, that requires the plaintiff to identify

specific violations of the standard by each defendant. *See id.*, *see also* *Grove v. PeaceHealth St. Joseph Hosp.*, 177 Wn. App. 370, 380-82 (2013), *rev'd on other grounds*, 182 Wn.2d 136 (2014). Lastly, it is settled law that expert opinions regarding the applicable standard of care must be expressed to "a reasonable degree of medical certainty" or on a more probable than not basis. *McLaughlin*, 112 Wn.2d at 836-37 (1989). Thus, in multi-party medical negligence cases, the plaintiff must present expert testimony establishing, to a reasonable degree of medical certainty, that each defendant violated the applicable standard of care.

Ms. Hensley did not meet that burden with respect to Holy Family. Ms. Hensley presented testimony from five expert witnesses, and none of them offered adequate testimony to meet Ms. Hensley's burden against Holy Family.

Dr. Elliot Felman did not express any opinion with respect to the standard of care as it relates to either Dr. Tullis or Mr. Hunter. *See* VRP 576-614.

Dr. Paul Bronston offered opinions regarding Dr. Tullis' care and regarding Mr. Hunter's care. VRP 657-72, 686-786. However, none of those opinions were elicited or offered to a reasonable degree of medical certainty. *See id.*

Dr. Richard Beck's testimony was elicited in a manner that failed to comply with Ms. Hensley's obligation to present specific opinions, expressed to a reasonable degree of medical certainty, with respect to each Defendant. Specifically, Ms. Hensley asked Dr. Beck whether he had "an opinion, to a reasonable degree of medical certainty, as to whether the standard of care . . . was violated by ARNP Ginger Blake at CHAS?" VRP 804. Dr. Beck answered in the affirmative. *Id.* Ms. Hensley then proceeded to ask Dr. Beck whether he had "an opinion as to whether that standard of care was violated" by each of the other providers at issue – including Dr. Tullis and Mr. Hunter. VRP 804-05. Ms. Hensley, however, failed to ask whether any of those opinions were held to a reasonable degree of medical certainty. *Id.*<sup>13</sup>

Dr. Richard Sokolov's testimony suffered from the same flaw as did Dr. Beck's. Ms. Hensley elicited an appropriate opinion (*viz.*, one expressed to a reasonable degree of medical certainty) with respect to the CHAS clinic providers, but failed to elicit opinions to the necessary standard with respect to the remaining Defendants. VRP 1071-73. Dr.

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<sup>13</sup> Holy Family unsuccessfully objected to Ms. Hensley's questions with respect to Dr. Tullis and Mr. Hunter – absent the necessary qualifier of "to a reasonable degree of medical certainty" or "on a more probable than not basis," those opinions lacked foundations and were, therefore, inadmissible. *See* VRP 804-05.

Sokolov arguably expressed his causation opinions to the requisite standard (*see* VRP 1114), but he did not express his standard of care opinions appropriately. *See generally* VRP 1049-117.

Finally, Dr. James Winter purported to offer a blanket opinion (which was expressed to a reasonable degree of medical certainty) that covered all of the relevant care and all of the relevant providers. VRP 1567. However, that type of blanket opinion could not satisfy Ms. Hensley's burden to establish her claim against each Defendant as though it was a separate lawsuit.<sup>14</sup> *See* WPI 41.03.

By a motion for judgment as a matter of law, counsel for the Defendants demonstrated Ms. Hensley's failure to proffer appropriate expert testimony to the trial court. VRP 1858-60. The trial court erroneously concluded that Ms. Hensley's expert testimony had been offered to the required degree of medical certainty. VRP 1868. Unfortunately, the trial court's recollection was incorrect. Ms. Hensley did not elicit her expert testimony in the manner that is required by Washington State law, and the trial court erred by denying Holy Family's motion for judgment as a matter of law on that basis.

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<sup>14</sup> Dr. Winter's deposition testimony acknowledged that he could not express a standard of care opinion against Dr. Tullis to a reasonable degree of medical certainty. VRP 1609-12.

**F. MS. HENSLEY FAILED TO PERFECT AN APPEAL OF THE TRIAL COURT'S PRE-TRIAL SUMMARY JUDGMENT ORDER.**

Filing a timely notice of appeal is necessary to invoke Washington's appellate jurisdiction. *Buckner, Inc. v. Berkey Irrigation Supply*, 89 Wn. App. 906, 911 (1998). RAP 5.3(a) requires a notice of appeal to "designate the decision or part of decision which the party wants reviewed." Washington's appellate courts will not review an order that was not designated in a timely notice of appeal. RAP 2.4(a); *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 378 (2002).<sup>15</sup>

Ms. Hensley filed a timely notice of appeal, but she did not designate the order denying her pre-trial motion for summary judgment in that notice. *See* CP 1017-33. Ms. Hensley also filed an amended notice of appeal, but that amended notice also omitted the pre-trial summary judgment order. CP 1034-46.

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<sup>15</sup> There is a narrow exception that permits review of an undesignated order where the order "prejudicially affects the decision designated in the notice." RAP 2.4(b). However, that exception requires a direct connection between the designated and undesignated orders – a connection that does not exist in this case. *See Right-Price Recreation*, 146 Wn.2d at 380. None of the orders that Ms. Hensley designated for review were affected, much less prejudicially affected, by the trial court's pre-trial summary judgment order.

Ms. Hensley bore the burden to designate all of the orders that she wanted reviewed. Ms. Hensley failed to designate the pre-trial summary judgment order, and there is no exception that can forestall the consequences of Ms. Hensley's failure. The Court should, therefore, decline to review the pre-trial summary judgment order.

**G. THE TRIAL COURT CORRECTLY DENIED MS. HENSLEY'S PRE-TRIAL MOTION FOR SUMMARY JUDGMENT.**

As the requested relief increases, so too does a plaintiff's burden. In order to avoid summary dismissal, a plaintiff need only produce sufficient facts to support her *prima facie* allegations. To prevail at trial, a plaintiff must produce sufficient evidence to persuade 10 out of 12 jurors.<sup>16</sup> To win at summary judgment, the plaintiff must show that she is entitled to judgment as a matter of law. And because she bears the burdens of production and persuasion, this requires the plaintiff to demonstrate that no reasonable jury could fail to find in her favor. *Robax Corp. v. Professional Parks, Inc.*, 2008 WL 3244150, at \*2 (N.D. Tex. 2008).

When a plaintiff moves for summary judgment, a much higher standard applies than the standard that applies to defense motions because

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<sup>16</sup> Of course, there are bench trials, and there are juries of less than 12.

the plaintiff bears the ultimate burden of proof. *See Graves v. P.J.*

*Taggares Co.*, 94 Wn.2d 298, 302 (1980) (citations omitted); *see also*

*Robax Corp.*, 2008 WL 3244150 at \*2. Thus, Ms. Hensley – as the

Plaintiff and the moving party – bore the burden of establishing:

beyond peradventure all of the essential elements of [her] claims. This means that [she] must demonstrate that there are no genuine and material fact disputes on any of the essential elements of each claim.

*See id.* (citing *Martin v. Alamo Cmty. Coll. Dist.*, 353 F.3d 409, 412 (5th

Cir.2003)). Thus, Ms. Hensley bore the burden to "**affirmatively**

**demonstrate through [her] summary judgment briefing and evidence**

**that no reasonable trier of fact could find against [her] . . ."** *Id.*

(emphasis added) (citing FRCP 56(e); *Soremekun v. Thrifty Payless, Inc.*,

509 F.3d 978, 984 (9th Cir.2007); *Watts v. United States*, 703 F.2d 346,

347 (9th Cir.1983)).

Ms. Hensley did not meet her summary judgment burden. In fact,

Ms. Hensley's entire argument is premised upon rejecting that burden:

If a defendant party can state without any reference to any part of the record that the other side hasn't yet presented any evidence, and they are therefore entitled to summary judgment, then it works both ways. Plaintiffs are entitled to summary judgment on their claims, as none of the defendants have produced evidence to support their actions being *within* the standard of care . . .

CP 28-9 (*italics in original*). Ms. Hensley did not offer evidence to support the elements of her claim. Instead, she cast her motion like a defense *Celotex* motion – she purported to challenge the Defendants to affirmatively disprove her claims. CP 28-9; *see also Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 236-8 (1989).

As demonstrated above, Ms. Hensley is simply incorrect with respect to the burdens and rules that apply to summary judgment hearings. *See Graves*, 94 Wn.2d at 302; *Robax Corp.*, 2008 WL 3244150 at \*2; *see also Lisbon v. Lyman*, 49 N.H. 553, 564-65 (1870) (holding that the plaintiff's burden "could be sustained only by evidence or legal presumption" even where "[t]he defendant merely denied the truth of the plaintiff's entire allegation."). As a plaintiff moving for summary judgment, Ms. Hensley was obliged to present irrefutable evidence in support of each element of her claim.<sup>17</sup> Ms. Hensley did not do so. The trial court considered Ms. Hensley's expert declaration and the Defendants'

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<sup>17</sup> Summary judgment in a medical negligence plaintiff's favor is only possible under extraordinary circumstances. By virtue of his or her education and training, any medical negligence defendant is competent to offer an opinion with respect to whether his or her own care complied with the applicable standard of care. As a result, no matter what quantum of evidence the plaintiff presented, disputed issues of fact would preclude summary adjudication – conflicting expert testimony exists by virtue of the defendant's denial that his or her care was substandard.

challenges to that declaration. VRP 3571-96. Based upon that analysis, the trial court denied all of the motions, finding that Ms. Hensley's expert declaration was sufficient to create triable issues but not sufficient to conclusively resolve all issues in Ms. Hensley's favor. *See id.*, *see also* CP 176-79. That decision was correct and it should be affirmed.

**H. THE TRIAL COURT CORRECTLY REFUSED MS. HENSLEY'S EFFORT TO CONFLATE MEDICAL NEGLIGENCE AND INFORMED CONSENT.**

RCW Ch. 7.70.030 provides for three separate theories of recovery for damages resulting from the provision of health care. RCW 7.70.040 allows recovery in instances where a health care provider's failure to comply with that level of skill, care and learning expected of a reasonably prudent provider of his or her class results in injury, loss or damage to a patient – that is, a claim for medical negligence. RCW 7.70.050 allows for recovery in instances where a health care provider fails to provide a patient with sufficient information regarding the material facts and risks implicated by the various treatment options (including non-treatment) available to the patient and where such lack of information proximately caused injury, loss or damage to the patient – that is, failure to secure informed consent. And finally, RCW 7.70.030(2) allows recovery in those rare instances wherein a provider guarantees a result or outcome that he or

she failed to deliver – guaranty cases are rare, and the theory has no bearing on this matter.

The vast majority of claims resulting from the provision of health care fall under RCW 7.70.040 (a claim for medical negligence) and RCW 7.70.050 (an informed consent claim). The inquiry, for purposes of this matter, is what overlap (if any) exists between medical negligence and informed consent. Properly analyzed, claims under RCW 7.70.040 and claims under RCW 7.70.050 are always and necessarily separate and distinct. Though the two claims may be implicated in the same lawsuit, the two claims can almost never be supported by the same facts because the two claims enforce separate duties. *See Gomez v. Sauerwein*, 180 Wn.2d 610, 617 (2014).

RCW 7.70.040 (medical negligence) aims to ensure both (i) that Washington State health care providers exercise due care in treating patients and (ii) that patients who are injured as a result of a provider's failure to exercise due care receive fair compensation. RCW 7.70.040 thus operates as a check on health care provider competence.

RCW 7.70.050 (informed consent) serves entirely different goals. Informed consent is not about policing the quality of medical care. Instead, it seeks to respect patient autonomy and to foster patient decision-making.

The different goals between the RCW 7.70.040 claim and the RCW 7.70.050 claim are well-illustrated by the different role for expert testimony in the two claims. A *prima facie* claim under RCW 7.70.040 (medical negligence) requires expert testimony with respect to the standard of care practiced in Washington State by members of the same class of health care provider as the defendant. *Harris v. Groth*, 99 Wn.2d 438, 449 (1983). Such evidence, however, is **not required** under RCW 7.70.050 – that is, in informed consent cases. In fact, the medical community's risk-disclosure practices have no bearing on whether the defendant owed a duty of disclosure. *See Adams v. Richland Clinic, Inc.*, P.S., 37 Wn. App. 650, 657-58 (1984). The requirement for expert testimony in informed consent cases is limited to establishing "the existence of a risk, its likelihood of occurrence, and the type of harm in question." *Seybold v. Neu*, 105 Wn. App. 666, 681-82 (2001).

The statutes' distinct aims are also well-illustrated by the fact that a "cause of action can arise against a doctor for failing to obtain the patient's knowledgeable permission to the treatment even though the doctor's actions have not been negligent and would not give rise to a cause of action in any other way." *Holt v. Nelson*, 11 Wn. App. 230, 237 (1974) (citations omitted); *see also Gomez*, 180 Wn.2d at 619.

The differences between medical negligence and informed consent are central to the proper analysis of this case. Once the two statutes' goals and purposes are understood, the wisdom of the State Supreme Court's holdings in *Gomez v. Sauerwein*, 180 Wn.2d 610 (2014), and *Backlund v. Univ. of Washington*, 137 Wn. 2d 651, 661 (1999), is undeniable. A provider may be liable under RCW 7.70.040 (medical negligence) for failing to properly **identify** the pertinent facts and risks with respect to a specific patient. However, the provider cannot be liable for failure to secure informed consent (under RCW 7.70.050) for the same failure:

. . . a health care provider who believes the patient does not have a particular disease cannot be expected to inform the patient about the unknown disease or possible treatments for it . . . in misdiagnosis cases, this rule is necessary to avoid imposing double liability on the provider for the same alleged misconduct.

*Gomez*, 180 Wn.2d at 618. Thus, a provider cannot be liable for failure to inform a patient regarding pertinent facts and risks unless he or she is **subjectively aware** of those facts and risks.

Ms. Hensley incorrectly argues that the Court of Appeals' decision in *Flyte v. Summit View Clinic*, 183 Wn. App. 59 (2014), permits an informed consent claim to go to the jury in mistaken diagnosis cases. Ms. Hensley is mistaken; *Flyte* addresses a physician's potential liability for failing to inform a patient regarding the option of prophylactic treatment

for influenza. *Id.* at 563-4. In *Flyte*, the provider "had received public health alerts" regarding a particularly strong strain of influenza, and those same public health alerts recommended prophylactic treatment for pregnant women. *Id.* at 577. Under those circumstances, the Court of Appeals held that an informed consent claim was appropriate because the "situation present[ed] an intelligent and informed choice" that the provider should have "put to the patient." *Id.* at 578.

The *Flyte* Court stressed that its holding was based upon the view that the facts before it were materially different than the missed and mistaken diagnoses that were at issue in *Gomez*, 180 Wn.2d 610, and *Backlund*, 137 Wn. 2d 651. *Flyte*, 183 Wn. App. at 577. *Stare decisis* mandates that *Flyte* address circumstances other than missed or mistaken diagnoses; any other interpretation would place *Flyte* in square conflict with *Gomez* and *Backlund*. *Stare decisis* also mandates that the Court of Appeals reject Ms. Hensley's attempt to recast *Flyte* as overruling *Gomez* and *Backlund*. *Gorman v. Pierce County*, 176 Wn. App. 63, 76 (2013) (The Court of Appeals is "bound to follow our Supreme Court's precedents and ha[s] no authority to abolish them").

It is undisputed that Ms. Hensley had an oral infection; each of the Defendant providers treated that oral infection. *See* CP 3-15; 41-51. It is equally undisputed that Ms. Hensley eventually developed an intracranial

infection. *Id.* Ms. Hensley asserts that the Defendants should have diagnosed and treated that intracranial infection; the Defendants respond that Ms. Hensley had not yet developed any intracranial infection at the time of their respective treatment. *See id.*; VRP 1762-64, 1765-66. As a result of the aggressive infection not yet existing, none of the Defendants discussed treatment more aggressive than outpatient management with oral antibiotics. This is, therefore, a classic misdiagnosis case – Ms. Hensley contends that she had a rare and serious infection, but the Defendants diagnosed a common and manageable one.

Ms. Hensley's argument runs counter to informed consent's most basic goal. Rather than fostering a patient's sound decision-making, Ms. Hensley pushes a rule that would increase the patient's stress, fear and disquiet. Ms. Hensley's rule would oblige physicians to conclude all patient encounters with a disclaimer – "Your condition could be far more serious than I appreciate; you may suffer from [whatever calamity could fit within the patient's constellation of symptoms], and the risks related to that condition are considerable." Washington has long recognized that too much information can pose as great a risk to patient sovereignty as too little information – fear of remote risks can prevent patients from obtaining necessary care. *See Mason v. Ellsworth*, 3 Wn. App. 298, 308-9 (1970). In addition, if a physician's potential for error becomes a material

fact or risk, the informed consent duty would be infinite and impossible to discharge. Washington has already resolved that a physician's experience level is not subject to the informed consent duty. *Housel v. James*, 141 Wn. App. 748, 756 (2007). If variable experience levels are not subject to the duty, then every physician's universal and human fallibility surely cannot be.

The trial court correctly rejected Ms. Hensley's attempt to twist this misdiagnosis case to fit within the informed consent doctrine. VRP 3355-58. Ms. Hensley's claim sounds in negligence, but it does not sound in informed consent. The Court of Appeals should affirm the trial court's decision to summarily dismiss Ms. Hensley's informed consent claim.

## **VI. CONCLUSION**

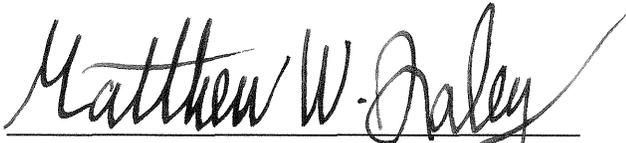
The trial court erred in denying Holy Family's post-trial motions to dismiss. Ms. Hensley bore the burden of presenting *prima facie* evidence in support of her claim for vicarious liability. The record is clear – Ms. Hensley did not present any evidence in support of her claim. Ms. Hensley also bore the burden of presenting medical opinions to a reasonable degree of medical certainty – she failed to do so. The Court of Appeals should, therefore, reverse the trial court's decision denying Holy Family's motions for judgment as a matter of law.

Ms. Hensley did not perfect an appeal with respect to her pre-trial motion for summary judgment. In addition, she failed to carry her summary judgment burden, presenting nothing more than a facially deficient declaration. The trial court was correct to deny Ms. Hensley's motion. Holy Family respectfully asks the Court of Appeals to affirm the trial court in that respect.

Finally, Ms. Hensley's claim is based upon an alleged violation of the standard of care. The allegations that Ms. Hensley made, and the facts that she presented at trial, do not support a claim for a lack of informed consent. The trial court was, therefore, correct to summarily dismiss Ms. Hensley's informed consent claim. Holy Family respectfully asks the Court of Appeals to affirm the trial court's decision in that regard as well.

RESPECTFULLY SUBMITTED, this 25th day of February, 2016.

**WITHERSPOON· KELLEY, P.S.**

A handwritten signature in black ink that reads "Matthew W. Daley". The signature is written in a cursive style and is positioned above a horizontal line.

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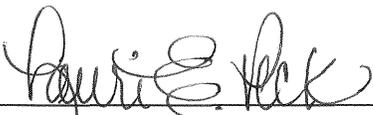
**DECLARATION OF SERVICE**

I declare that I sent a true and correct copy of the foregoing brief by the method indicated below and addressed to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED, this 25th day of February, 2016.

  
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 LAURI PECK, legal assistant