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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 326527

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

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

**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.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT CRUZ

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TABLE OF CONTENTS

1. Hensley’s Experts Did Not Express Their Standard of Care
Opinions Against Dr. Cruz in Terms of Reasonable
Medical Certainty or Probability1

2. Reasonable Medical Certainty or Probability is a
Foundational Requirement for Trial Testimony of an
Expert Witness, Not A Frye Determination to be Made Pre-
Trial.....1

3. Conclusion3

TABLE OF AUTHORITIES

Cases

Anderson v. Axo Nobel Coatings, Inc.,
172 Wn.2d 593, 260 P.3d 857 (2011)..... 2, 3

McLaughlin v. Cook,
112 Wn.2d 829, 836-837 (1989)..... 3

1. **Hensley's Experts Did Not Express Their Standard of Care Opinions Against Dr. Cruz in Terms of Reasonable Medical Certainty or Probability**

At the outset, Hensley argues that her experts did, in fact, express their standard of care opinions against Dr. Cruz in terms of reasonable medical certainty or probability. That is simply incorrect. Dr. Beck used those terms in connection with his standard of care opinion relative to ARNP Ginger Baker at CHAS. RP 804. However, he did not use those terms in expressing his standard of care opinion against Dr. Cruz. RP 805. Similarly, Dr. Fellman used those terms when he expressed a standard of care opinion against CHAS, but not Dr. Cruz. RP 586-87. And while Dr. Sokolov agreed that his opinions on causation were held with reasonable medical certainty or probability, RP 1114-1115, the only standard of care opinion he expressed with reasonable medical certainty or probability was against CHAS. *See*, RP 1071.

2. **Reasonable Medical Certainty or Probability is a Foundational Requirement for Trial Testimony of an Expert Witness, Not A Frye Determination to be Made Pre-Trial**

Hensley goes on to argue that “reasonable medical certainty” is a standard for a pretrial motion in limine, not a question for consideration during trial. According to Hensley, if the expert is on the stand testifying, by definition the expert is testifying with reasonable medical certainty or probability.

There is no authority for this novel argument, and it should be rejected. The requirement that an expert, in a medical negligence case, couch his/her opinions on standard of care and causation in terms of reasonable medical certainty or probability is foundational. And the foundation for any expert testimony is laid by the proponent at trial. The logical extension of Hensley's argument is that all evidentiary foundations are to be laid before trial, via motion practice, so that by the time any witness testifies, the foundation for their testimony has been established. That is clearly not the law.

Curiously, Hensley argues that "[r]easonable medical certainty is a *Frye* standard, not a trial question," citing *Anderson v. Axo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011). Hensley's Brief at page 36. In *Anderson*, however, the Washington Supreme Court made it abundantly clear that other requirements for expert medical testimony established by Washington law, such as the requirement that the testimony meet the standard of reasonable medical certainty or reasonable medical probability, are separate and apart from the *Frye* test.

Next, Hensley argues that none of the respondents moved to exclude any of her experts' testimony on the ground that their opinions were not based on the standard of reasonable medical certainty or probability. But of course respondents were not required to anticipate that Hensley, at trial,

would fail to elicit appropriate foundational testimony from her experts, or that her experts would fail to express their standard of care opinions in the manner required by Washington law. The logical extension of Hensley's argument is that a defendant is required to anticipate any potential flaw in an expert's testimony, including lack of qualification, and address that in pretrial motions. Again, that is simply not the law.

Finally, Hensley claims that *McLaughlin v. Cook*, 112 Wn.2d 829, 836-837 (1989) "does not require expert witnesses to testify in a particular format, as such would elevate form over substance." Hensley's Brief at page 37. But *McLaughlin*, and subsequent cases such as *Anderson, supra*, clearly state that an expert's opinion must be expressed in terms of reasonable medical probability or certainty. In essence, Hensley's position is that the key language from *McLaughlin* is meaningless. Clearly it is not. And that is no doubt why Hensley was careful to use those terms in the formulation of some of her expert questions at trial. Hensley should not be allowed to interpret the requirement of *McLaughlin* out of existence simply because she overlooked it in the elicitation of her experts' standard of care opinions against Dr. Cruz.

3. Conclusion

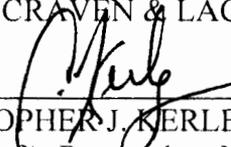
For the reasons set forth above and in his opening Brief, Dr. Cruz respectfully submits that the trial court erred by denying his Motion for

Judgment as a Matter of Law on Hensley's standard of care claim.

Dated this 16 day of June, 2016.

EVANS, CRAVEN & LACKIE, P.S.

By


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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 17 day of June, 2016, a copy of the REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT CRUZ'S REPLY was delivered to the following persons in the manner indicated:

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