69643-2

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NO. 69643-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PATRICIA A. GRANT,

Plaintiff/Appellant

v.

CLAUDIO GABRIEL ALPEROVICH, M.D., FRANCISCAN HEALTH SYSTEM, ET AL.,

Defendants/Respondents

BRIEF OF RESPONDENTS ALPEROVICH AND FRANCISCAN HEALTH SYSTEM

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I. SUMMARY

This is an appeal from a "no evidence" summary judgment filed by the defendants in this medical malpractice case. When the plaintiff failed to provide admissible expert testimony to support her case, as required by Washington law, the trial court properly dismissed all claims.

This appeal largely centers around an unsworn, untimely letter by Elliott Goodman, MD. On the day of the summary judgment hearing, plaintiff for the first time presented this letter to the court and defense counsel. The letter, by a subsequent treating provider, was not in affidavit or declaration form. The court held that it would not consider the letter.

In Washington law, this letter was properly excluded. There are no exceptions to the requirement that a declaration be signed under penalty of perjury. The declaration was also untimely in that it was not presented until the day of the hearing. The trial court was well within its discretion in declining to consider this letter.

The plaintiff's other assignments of error mistake the law and are unsupported by the facts of this case. The summary judgment in favor of Alperovich and Franciscan Health System (FHS) should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

1) Did the trial court abuse its discretion when it declined to consider an untimely, unsworn letter?

2) Did the trial court abuse its discretion in declining to allow plaintiff additional time for discovery when the plaintiff had already conducted extensive written discovery and did not show what additional discovery was needed or how it was relevant?

The answer is "no" to both questions and the trial court's order dismissing this case should be affirmed.

III. COUNTERSTATEMENT OF THE FACTS

A. Substantive Facts

Plaintiff has brought a number of claims against a variety of medical providers. Plaintiff's claims against Dr. Alperovich and FHS stem from a June 17, 2009 Roux-en-Y gastric bypass surgery. Following this procedure, Plaintiff had repeated nausea and vomiting and was unable to tolerate thick liquids or solid foods. On July 14, 2009, Dr. Alperovich performed an upper endoscopy on plaintiff to determine the reasons for her nausea and vomiting. The endoscopy was unremarkable, and did not show any evidence of thrush or other infection. In short, Plaintiff was seen on numerous occasions by Dr. Alperovich regarding her nausea which she attributed to thrush, despite ample evidence to the contrary.

Based upon his interactions with Plaintiff, Dr. Alperovich felt there was a psychogenic component to her issues including her fixation upon thrush. Numerous referrals to other physicians who all capably and competently treated the Plaintiff confirmed that she did not have thrush.

Plaintiff also alleges that after her June 17, 2009 gastric bypass surgery, she developed a Petersen space hernia, which was undiagnosed. However, a number of diagnostic images did not show a Petersen space hernia subsequent to her June 17, 2009 surgery. It is believed that the Petersen space hernia developed at a later time, and Plaintiff was eventually seen by another surgeon who performed corrective surgery for the Petersen space hernia.

B. Procedural Facts

Plaintiff filed this lawsuit on June 12, 2012 alleging various claims all based on negligence from the above referenced medical care. She sent interrogatories and requests for production to the various defendants, including Dr. Alperovich and FHS. CP 754-755. Dr. Alperovich and FHS responded to these discovery requests in September 2012. CP 754-755.

Defendant Alperovich filed his summary judgment on October 12, 2012, which was joined by defendant FHS. CP 732-741; CP 744-750. The basic argument in these motions for summary judgment was that

plaintiff did not have the required expert testimony to prove that defendants violated the standard of care and caused harm to plaintiff.

Plaintiff filed responses on October 12, 2012. CP 320-329. None of plaintiff's responses to the various defendants contained any expert testimony stating that any defendant violated the standard of care and caused harm to the plaintiff.

The hearing on the motions for summary judgment took place on November 9, 2012. At this hearing, plaintiff, in the middle of her argument, produced for the first time an unsworn letter from Dr. Elliott Goodman, a New York physician who had provided care to Ms. Grant. RP 17-18.

The defendants objected to this untimely, unsworn letter. RP 28-36. The court then took a recess to review the letter from Dr. Goodman. RP 36-38. The court then came back from recess and held that the court would not consider the Goodman letter. RP 38-42; CP 728-731; 759-764. The court stated that the letter was unsworn, had an insufficient factual basis, did not address the standard of care in Washington and did not identify any specific deviation of the standard of care. RP 40; CP 729-730.

IV. ARGUMENT

The plaintiff lists 18 assignments of error. However, a review of those assignments of error reveals that the assignments of error can really be divided into three categories: 1) the issue regarding whether the unsworn letter of Dr. Goodman should have been considered; 2) the issue related to the request for additional time for discovery; and 3) the various and sundry items related to pleading standards, alleged biases, holding Ms. Grant to the same standard as attorneys, and the like. This brief will be organized accordingly.

A. While the standard of review for summary judgment motions is *de novo*, underlying aspects of the trial court's decision are reviewed for abuse of discretion.

This is an appeal following a summary judgment motion. As such, the standard of review is *de novo*. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 491, 183 P.3d 283 (2008). However, as part of this appeal, plaintiff is asserting that the court erred in not considering the unsworn letter from Dr. Goodman. The decision to consider or not consider untimely and improper evidence in a summary judgment hearing is within the sound discretion of the trial court and is also reviewed under an abuse of discretion standard. *Id. at* 499. Additionally, plaintiff is apparently asserting that the trial court should have allowed her additional time for discovery, presumably under CR 56(f). Assuming this issue was properly

preserved, the decision of whether to grant additional time under CR 56(f) is one left to the sound discretion of the trial court and the review of that decision is also reviewed under the abuse of discretion standard. *Mut. of Enumclaw v. Archer Constr.*, 123 Wn. App. 728, 743, 97 P.3d 751 (2004).

B. To defeat a summary judgment motion in a medical malpractice case, the plaintiff must provide expert testimony stating that the defendant violated the standard of care and caused harm to plaintiff; Plaintiff failed to do that here.

Civil Rule 56 provides that summary judgment should be granted where:

> The pleadings . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c).

The party moving for summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 770 P.2d 182 (1989). In *Young,* the court cited with approval *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265, 106 S. Ct. 2548 (1988), in which the United States Supreme Court held that a summary judgment is appropriate if the moving party establishes an absence of evidence to support the non-moving party's case. The *Young* court further held that a defendant need not even submit an affidavit establishing nonliability, if defendant met his initial burden of showing that plaintiff lacks proof on any essential element of plaintiff's

cause of action. This is consistent with Civil Rule 56(c) which allows the defending party to move for summary judgment with or without supporting affidavits.

A non-moving party attempting to resist summary judgment must submit competent evidence setting forth specific facts, as opposed to general conclusions, demonstrating a genuine issue of material fact. CR 56(e). If the non-moving party does not respond with evidence setting forth specific facts indicating a material issue of fact remains, summary judgment should be entered. CR 56(e). In the medical malpractice context, once the defendant meets this initial burden, the burden shifts to the plaintiff to present evidence from a qualified expert, alleging specific facts that establish the standard of care and the defendant's breach of that standard. *Young*, 112 Wn.2d at 226-27; *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993). *See also*, *Pelton v. Tri-State Memorial Hosp.*, 66 Wn. App. 350, 354-55, 831 P.2d 1147 (1992).

1. Plaintiff failed to provide admissible expert testimony to defeat summary judgment and the trial court did not err in declining to consider the untimely, unsworn letter.

RCW 7.70 governs all civil actions for injuries resulting from health care provided after June 25, 1976. RCW 7.70.040 defines the standard of care as follows:

> "[T]hat degree of skill, care, and learning expected of a reasonably prudent health care provider in the profession or the class to which he belongs, in the state of Washington, acting in the same or similar circumstances."

RCW 7.70.040.

As referenced above, in all but the most extraordinary situations, a plaintiff must submit competent, expert testimony to meet his or her burden of proof in a medical malpractice action. *Guile*, 70 Wn. App. at 25 (*citing Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983)). The plaintiff must establish the standard of care through the testimony of the professional equals. *McKee v. American Home Products*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989); *Young*, supra, 112 Wn.2d at 227-230; *Swanson v. Brigham*, 18 Wn. App. 647, 651, 571 P.2d 217 (1977).

In response to this motion, plaintiff did not set forth any expert testimony in her responsive brief. She had no expert testimony that any defendant violated the standard of care. At the hearing on November 9, Ms. Grant did bring in an unsworn letter from a New York physician, Dr. Elliott Goodman. CP 344-347. The trial court declined to consider this untimely, unsworn letter. CP 728-731, 759-764. In addition to being untimely and unsworn, the trial court held that the letter had an insufficient factual basis, did not address the standard of care in

Washington and did not identify any specific deviation of the standard of care. RP 40; CP 729-730.

The decision to accept or reject untimely affidavits is within the discretion of the trial court and reviewed for abuse of discretion. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 499, 183 P.3d 283 (2008); *Brown v. Peoples Mortgage Co.*, 48 Wn. App. 554, 559, 739 P.2d 1188 (1987). Generally, an abuse of discretion occurs when a decision is based on untenable grounds or for untenable reasons. *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990).

Here, the unsworn letter was not timely. The rules require opposing briefs and affidavits to be filed at least 11 days prior to the hearing. CR 56(c). As such, it cannot be an abuse of discretion for the trial court not to consider an untimely declaration.

Moreover, the letter was not in proper form. Ms. Grant submitted a letter, not an affidavit or declaration. While one can submit a declaration as opposed to an affidavit, to do so you must comply with GR 13 and RCW 9A.72.085. The statute requires that the person declare the statements to be true under the penalty of perjury, under the laws of the state of Washington. 9A.72.085(1) and (4). The failure to comply with GR 13 and RCW 9A.72.085 renders these declarations inadmissible. *Davis v. W. One Auto. Group*, 140 Wn. App. 449, 455, 166 P.3d 807

(2007). Thus, this letter would not have been admissible, even if it had been timely.

In *Kim v. Lee*, 174 Wn. App. 319, 326-27, 300 P.3d 431 (2013), the plaintiff appealed after the trial court had granted summary judgment in a dental malpractice case. Like the present case, the plaintiff in *Kim* attempted to rely on unsworn documents from a subsequent treating provider (a periodontist) to establish negligence and create an issue of fact. *Id.* at 326. The court of appeals upheld the summary judgment, finding the unsworn documents inadmissible. "We are aware of no case, nor has any been cited to us, that excuses in whole the requirement that statements purporting to establish a necessary element of a claim or defense be in the form of sworn affidavits or declarations made under the penalty of perjury." *Id.* at 327. The court held in *Kim* that because the statements were not in proper form, the plaintiff "cannot rely upon them to create a disputed issue of material fact." *Id.*

The *Kim* case is directly on point. It has almost the exact same facts and the purported expert testimony has the same deficiencies. The *Kim* case is dispositive of this appeal. While plaintiff refers to the Goodman letter's deficiencies as "technicalities" they are far more than that; they are clear requirements of Washington law that plaintiff failed to satisfy, mandating dismissal of her claims.

Additionally, the unsworn, untimely letter did not establish that Dr. Goodman is familiar with the standard of care in Washington. RCW 7.70.040(1) requires that the expert testimony state that "[t]he 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." (emphasis added). The letter makes no reference to anything about Washington's standard of care and has only one reference to "standard of care" on page 2 (CP 346) of his letter. Given that the statute requires testimony that finds a violation of Washington's standard of care, the trial court did not err in finding this deficiency yet another reason why the Goodman letter was not admissible.

2. The plaintiff failed to present admissible evidence that any alleged negligence proximately caused harm to her.

RCW 7.70.040(2) requires a plaintiff to prove that the defendant's act or omission proximately caused the plaintiff's injuries. Failing this, summary judgment for defendants is required. *Pelton v. Tri-State Mem. Hosp.*, 66 Wn. App. 350, 355, 831 P.2d 1147 (1992); *See also Guile*, 70 Wn. App. at 25. This requirement is in accord with the rule that in all personal injury actions a plaintiff must prove the causal relationship between the acts of defendant and the injuries for which relief is sought.

Moyer v. Clark, 75 Wn.2d 800, 454 P.2d 374 (1969). To establish this link in a medical malpractice action, a plaintiff must present expert medical testimony to show that plaintiff's injury was proximately caused by the defendant's alleged negligence. RCW 7.70.040(2); *Reese v. Stroh*, 128 Wn.2d 300, 308, 907 P.2d 282 (1995) (citations omitted); *Harris v. Groth*, supra, 99 Wn.2d at 449. If the plaintiff is unable to establish the link between a defendant's acts and the alleged injuries, the plaintiff cannot prevail on a medical negligence claim. *Pelton v. Tri-State Mem. Hosp.*, 66 Wn. App. 350, 355, 831 P.2d 1147 (1992); See also *Guile*, 70 Wn. App. at 25.

For the same reasons discussed above, the letter of Dr. Goodman was properly not considered by the court. As such, there is no expert testimony regarding causation, as required by Washington law, and summary judgment was proper.

C. To the extent that plaintiffs sought a CR 56(f) continuance, the trial court did not err in not continuing the summary judgment hearing.

It is unclear whether plaintiff properly requested from the trial court a CR 56(f) continuance, and whether she has properly preserved this issue on appeal. While there are passing references to additional discovery in her summary judgment response, there is no reference to CR 56(f) and no argument as to why a CR 56(f) continuance is justified. The

orders at issue (CP 728-731, 759-764) do not reference a CR 56(f) request and there is no order denying a CR 56(f) request. These orders were signed by plaintiff as "approved as to form." If plaintiff actually brought a CR 56(f) request that was denied, she should have obtained such an order. As such, there is no order denying a CR 56(f) request that is before this court.

Similarly, while assignment of error number three references that Grant was denied a reasonable discovery period, she references only in passing that issue in her brief (See Appellant's Brief at 14). The appellate court typically does not "review issues for which inadequate argument has been briefed or only passing treatment has been made." *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (citing *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995)).

Even if this issue is properly before this court, plaintiff has not shown that the trial court abused its discretion in not allowing additional time under CR 56(f), which is the standard of review, even when reviewing a summary judgment. *Mut. of Enumclaw v. Archer Constr.*, 123 Wn. App. 728, 743, 97 P.3d 751 (2004).

Assuming plaintiff made a CR 56(f) argument and preserved it for appeal, plaintiff has not, either below or here, even tried to articulate why

she is entitled to a CR 56(f) continuance. Trial courts enjoy broad discretion to deny 56(f) continuances: "A court may deny a motion for a continuance when (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact. **Only one of the qualifying reasons is needed for denial."** *Gross v. Sundling,* 139 Wn. App. 54, 68, 161 P.3d 380 (2007) (emphasis added); see also, *Pitzer v. Union Bank,* 141 Wn.2d 539, 556, 9 P.3d 805 (2000); *Tellevik v. Real Property,* 120 Wn.2d 68, 90, 838 P.2d 111 (1992), and *Turner v. Kohler,* 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

Here, the facts amply support that any denial of a CR 56(f) request was not an abuse of discretion. First, it is incorrect for plaintiff to state that she had not conducted any discovery. Prior to the summary judgment hearing, she had already conducted written discovery, including requests for admission, interrogatories and requests for production. CP 754-755. As to Dr. Alperovich, on August 28, 2012 she served 26 interrogatories and 23 requests for production, along with 13 separate requests for admission. CP 754-755. Dr. Alperovich provided responses to these discovery requests on September 27, 2012. CP 755.

Additionally, Ms. Grant has never stated what additional evidence she seeks, and how that would be relevant to the summary judgment motion. Such omissions are fatal. Numerous trial courts properly denied CR 56(f) continuances where the party requesting the continuance did not specifically stated what evidence would be established through additional discovery. *Briggs v. Nova Services*, 135 Wn. App. 955, 147 P.3d 616 (2006), *affirmed* 166 Wn.2d 794 (2009); *Idahosa v. King County*, 113 Wn. App. 930, 55 P.3d 657 (2002); *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 15 P.3d 210 (2001); *Janda v. Brier Realty*, 97 Wn. App. 45, 984 P.2d 412 (1999); *Molness v. City of Walla Walla*, 84 Wn. App. 393, 928 P.2d 1108 (1996).

In *Briggs*, plaintiff moved for a CR 56(f) continuance. In support of their CR 56(f) request for a continuance, the plaintiffs noted that the discovery cutoff had not yet passed and that "'we have ample opportunity to flush out the information that we believe we may find, will find, if we have the opportunity to make that effort.'" 135 Wn. App. at 961. Similar to *Briggs*, here plaintiff has failed to make the required showing and similar to *Briggs*, the cutoff for discovery has not yet passed. The mere fact that the discovery cutoff date has not yet passed does not grant an automatic extension to plaintiffs when facing a motion for summary judgment based upon lack of evidence.

As these cases make clear, the trial court has a great deal of discretion regarding CR 56(f) continuances. The trial court did not abuse its discretion in denying plaintiff's request for additional discovery.

D. The plaintiff's other assignments of error are without merit and do not justify reversing the trial court's decision.

Plaintiff has listed several other assignments of error in which Plaintiff erroneously states the law and/or the facts of this case, and do not justify the relief that Plaintiff seeks.

First, plaintiff makes several references to allowing her latitude as a *pro se* plaintiff. However, the cases she cites to deal with pleadings and motions to dismiss, not motions for summary judgment. (See, e.g., plaintiff's brief at 5, citing *Puckett v. Cox,* 456 F.2d 233 (6th Cir. 1972). The law states that even though Ms. Grant is *pro se*, she is held to the same standards as an attorney. *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997). Thus, all of her assignments of error related to latitude for her are incorrect and do not support reversal of the trial court. (Plaintiff's Assignments of Error 9, 10, 15 and 16).

Next, plaintiff assigns error to the trial court by either not reading the pleadings, not allowing her to respond, or in some way being biased against her. (Plaintiff's Assignments of Error 2, 4, 11, 12, 13 and 14). It

is unclear what the factual and legal basis is for this argument. First, it does not appear this issue was preserved for appeal. Plaintiff never raised the issue of bias or sought recusal of the trial court. It is correct that, subsequent to filing this appeal, plaintiff apparently brought a motion re: abuse of judicial discretion. However, that motion was struck by Judge Cheryl Carey on March 29, 2013, as being improperly noted (order attached to appellant's brief). Plaintiff did not amend her appeal to include the order striking motion of March 29, 2013 and it is not properly before this court.

Even if this issue was properly before the court, "the trial judge is fully informed and is presumed to perform his or her functions regularly and properly without bias or prejudice." *Tatham v. Rogers*, 170 Wn. App. 76, 88, 283 P.3d 583 (2012). A party asserting bias on the part of the judge "must produce sufficient evidence demonstrating bias, such as personal or pecuniary interest on the part of the decision maker; mere speculation is not enough." *In re Pers. Restraint of Haynes*, 100 Wn. App. 366, 377 n.23, 996 P.2d 637 (2000).

Plaintiff has no evidence of bias on the part of the trial court, absent that the court ruled against her. Obviously, a judge ruling against one party is not evidence of bias. Plaintiff also references the court "cutting her off" during oral argument. (Appellant's Brief at 17). Again,

this is not evidence of bias. The issue on summary judgment was plaintiff's failure to have admissible expert testimony, not any bias of the court. This argument fails.

V. CONCLUSION

In this appeal following a summary judgment dismissal, the most germane issue is whether the trial court erred in not considering the letter of Dr. Goodman. The law is clear that this decision is reviewed under an abuse of discretion standard. The trial court did not abuse its discretion in declining to consider this letter. Without that letter, there can be no debate: Plaintiff did not meet her burden of providing expert testimony in support of her case. As such, summary judgment was required. The trial court should be affirmed in all respects.

Dated this 18 day of September, 2013.

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