73018-5

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No. 73018-5-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

GABRIELLE NGUYEN-ALUSKAR,

Appellant

v.

The LASIK Vision Institute, LLC; GORDON JENSEN, M.D., a physician; and JOHN/JANE DOE PHYSICIANS 1-10,

Respondents

APPELLANT REPLY BRIEF

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I. REPLY STATEMENT OF CASE

A. Respondent LASIK's Request for Costs

Respondents indicated in their brief that Appellant never responded to their requests for costs, pursuant to the trial court's ambiguous order. That is untrue. While Appellant did not respond in a letter, phone calls were placed to Respondents, expressing Appellant's concerns with the unclear order. Despite being aware of Appellant's concerns, Respondents did not seek to clarify the trial court's order.

B. Discovery Requests

During the initial litigation, Appellant complied with reasonable discovery requests. Appellant supplied responses to interrogatories, requests for production, requests for statement of damages, and she executed stipulations and authorizations to release medical records.[1] Respondents were in possession of Appellant's discovery responses since June 6, 2013.[2]

C. Contact with Dr. Bensinger

Respondents continue to represent that Appellant did not have any contact with Dr. Bensinger until November 26, 2014. Again, Respondents are mistaken. November 26, 2014 was the date of the in person meeting

[1] CP 338-End; CP 266-83; CP 284-306
[2] CP 266-83; CP 284-306

with Dr. Bensinger to finalize his Declaration, not the first contact in two years. Appellant had spoken with Dr. Bensinger numerous times after Respondents' summary judgment motions and prior to November 26, 2014 meeting in the hope to procure a declaration in opposition of the motions. November 26, 2014 was the first date that both Appellant and Dr. Bensinger were available to meet, not the first time contact had occurred.

D. Witness Disclosure

Appellant disclosed Dr. Bensinger in her Disclosure of Possible Primary Witnesses and in accordance to the Case Scheduling Order. All parties served their disclosures on the same date.

II. REPLY ARGUMENT

A. CR 56(f) Continuance

Respondents cite to numerous decisions in support of their assertion that the trial court properly denied Appellant's request for a continuance. Those cases are all distinguishable. In *Mossman v. Rowley*, the Court of Appeals granted the continuance for purposes of obtaining affidavits and declarations but did not allow for depositions to be taken of witnesses identified in an incident report, known to the parties for four years prior to the summary judgment hearing. 154 Wn. App. 735, 229 P.3d 812 (2009). Here, appellant did not request a deposition, only the

opportunity to obtain an expert when Dr. Bensinger withdrew in the 11th hour, at a complete surprise to Appellant.

In *Colwell v. Holy Family Hosp.*, it was unclear if counsel even requested a continuance, but the Court of Appeals held that even if a continuance was requested, the party making the request must indicate the evidence sought; if the party fails to do so, the trial court did not abuse its discretion in denying a request for additional time. 104 Wn. App. 606, 15 P.3d 210 (2001). Here, Appellant indicated that she needed additional time to locate a new expert and the opinions sought would address the standard of care and informed consent that her expert withdrew at last minute, at a complete surprise. CP 146-48. A continuance was requested and the information sought was identified.

In *Gross v. Sunding*, the trial court denied a request for a continuance made for the first time on reconsideration regarding a service of process issue. 139 Wn. App. 54, 161 P.3d 380 (2007). Defendant was served after the expiration of the statute of limitations but allegations were made that defendant had verbally agreed to accept service from the process server prior to the running of the statute. There was no dispute that service did not occur prior to the statute of limitations and the 90-day tolling period. The trial court denied the requested continuance for deposition of defendant on the basis that plaintiff failed to demonstrate

any reason for not seeking the information sought and that a deposition would not yield any additional information because the parties were in agreement as to the facts. Here, Appellant has identified the reason the information is not available – Dr. Bensinger withdrew at the 11th hour, at a complete surprise and without any warning.

In *Winston v. State/Dept. of Corrections*, the trial court denied a continuance to take depositions because plaintiff failed to provide a reason for failing to complete discovery prior to the summary judgment hearing. 130 Wn. App. 61, 121 P.3d 1201 (2005). Here, Appellant retained Dr. Bensinger and filed this suit based on his opinions. Appellant had an expert in place that withdrew at the 11th hour, at a complete surprise and without any warning.

In *Carr v. Deking*, plaintiff tried to present the opinion of a lay witness regarding the mental capacity of another individual. 52 Wn. App. 880, 765 P.2d 40 (1988). The trial court denied the requested continuance because plaintiff could not identify any information sought that would be material to the hearing. Here, Appellant has identified the information sought and how it would be material to this action.

In *Vant Leven v. Kretzler, Jr.*, the trial court denied a continuance to allow for additional discovery so that an expert could render a complete opinion. 56 Wn. App. 349, 783 P.2d 611 (1989). However, what discovery

was needed was not identified or why it was not sought in the 21 months prior to the hearing. Here, Appellant had an expert with a full opinion, which was provided on reconsideration. The opinion was obtained two years prior to the hearing, but the expert withdrew at the 11th hour, at a complete surprise and without any warning.

In *Pelton v. Tri-State Memorial Hosp., Inc.*, the trial court denied a request for a second continuance after plaintiff was previously granted a continuance but failed to complete the requested discovery before the continued hearing. 66 Wn. App. 350, 831 P.2d 1147 (1992). Here, there has not been a continuance and Appellant has already provided the necessary information on reconsideration.

In *Thongchoom v. Graco Children's Products, Inc.*, the trial court denied a continuance because plaintiff did not identify the information sought through additional discovery. 117 Wn. App. 299, 71 P.3d 214 (2003). Here, Appellant did identify the information sought and stated how it was material to the claims.

In *Durand v. HIMC Corp.*, the trial court denied a continuance because plaintiff did not attempt to take a requested deposition until after the discovery cutoff and the information sought was not identified as useful or material in avoiding summary judgment. 151 Wn. App. 818, 214 P.3d 189 (2009). Here, Appellant identified the requested information,

which would have created a material fact and precluded summary judgment.

Respondents' case law is unpersuasive and inapplicable to the case at hand. Appellant retained an expert, who provided opinions that precipitated the subject lawsuit. That expert withdrew at the 11th hour, at a complete surprise and without any warning. Such a shock and surprise is just cause for a continuance. Appellant had no reason to secure or procure a declaration of an expert prior to Respondents filing for summary judgment. Appellant had no reason to believe her expert would suddenly withdraw without warning. A continuance should have been granted and the trial court abused its discretion in denying the request.

B. CR 59 Motion for Reconsideration

Respondents argue that Dr. Bensinger's Declaration is not newly discovered evidence. The basis for that argument is that it was available at the time of the summary judgment hearing. Respondents' arguments are illogical. If the Declaration was available at the time of the summary judgment hearing, then it would have been presented and this matter would have remained on the trial court's calendar, as summary judgment would have been denied. It was not available and therefore was not presented.

Appellant stated at the hearing and in her request for a CR 56(f) continuance that Dr. Bensinger withdrew at the in person meeting to finalize his declaration in opposition to Respondents' summary judgement motions. Appellant had no reason to believe that Dr. Bensinger would schedule the meeting without any mention of his withdrawal. Appellant had no reason to believe that her expert, retained two years prior, would not be able to provide his opinion in the form of a declaration.

Appellant had no reason to obtain a declaration from her expert prior to Respondents' motions. There is no duty to provide declarations as part of discovery or witness disclosures. Respondents have failed to cite any statute, rule, or case law that stands for that proposition and instead make conclusory arguments that the declaration could have been obtained prior to the summary judgment hearing.

The trial court's order did not refuse, reject, or disregard Dr. Bensinger's Declaration. Therefore, the trial court considered the declaration in the material submitted in support of the motion for reconsideration. As such, summary judgment should have been denied. The trial court abused its discretion in not granting the motion for reconsideration.

C. Dr. Bensinger's Declaration Creates an Issue of Material Fact

In a medical negligence action, the defendant may move for summary judgment based on absence of competent medical evidence to make out a prima facie case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 226, 770 P.2d 182 (1989). Once the moving party has shown the absence of a genuine issue of material fact, the burden shifts to the nonmoving party, who must make out a prima facie case of all essential elements. *Id* at 225–26. This evidence is sufficient if it supports a "reasonable inference" of all the elements. *See Van Hook v. Anderson*, 64 Wn. App. 353, 358, 824 P.2d 509 (1992). Generally, a "reasonable inference" is founded on expert medical testimony rising to the level of reasonable medical certainty. *See McLaughlin v. Cooke*, 112 Wn.2d 829, 836–37, 774 P.2d 1171 (1989).

A physician is expected to and should take a verbal history, as it is vital to a correct diagnosis. *Kennedy v. Monroe*, 15 Wn. App. 39, 547 P.2d 899 (1976).[3]

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[3] All doctors take the history of their patients, when it is needed to arrive at a correct diagnosis. Their own skilled observations, aided by the best medical equipment, lead only to objective findings. They cannot clinically observe a pain or a functional disorder. Such subjective symptoms must be related to them by the patient, or by someone on his behalf, and are frequently indispensable to a correct diagnosis and course of treatment.

Id. at 42-43.

Here, Respondents conveniently forget that Dr. Bensinger reviewed all the same records that their experts reviewed, physically examined Appellant, and took a verbal history from Appellant. Appellant is unsure how Dr. Bensinger can lack foundation for his opinions when Respondents provided opinions from two experts that in fact had reviewed less information. Respondent has not and cannot provide any authority that a physician cannot rely upon a verbal history in forming his or her opinions. Dr. Bensinger has the foundation to provide the opinions contained in his declaration.

1. Informed Consent

The Court of Appeals discussed materiality of risk in *Villanueva v. Harrington*, 80 Wn. App. 36, 906 P.2d 374 (1995). In Villanueva, the Court of Appeals stated that,

> A fact is material if "a reasonably prudent person in the position of the patient or his representative would attach significance to it deciding whether or not to submit to the proposed treatment." The test for materiality is an objective one. A patient has the right to know those hazards which a reasonable prudent person, in that patient's position, probably would attach significance to when deciding on whether to undergo the treatment. If the risk meets this criterion, it is material and must be disclosed.
>
> The determination of materiality is a two-step process: (1) the scientific nature of the risk must be ascertained (the nature of the harm and the probability of its occurrence), and (2) the trier of fact must then decide whether that probability is a risk which a reasonable patient would consider in deciding on treatment. The first step of the test

> requires expert testimony. Only a physician or other qualified expert is capable of determining the existence of a given risk and the chance of its occurrence.

Id. at 38-39. Therefore, an expert must only identify the nature of the harm and the probability of its occurrence. The determination of "materiality" is objective and a question for the jury.

Expert testimony is also necessary to identify 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 3(d) (emphasis added).

Here, Dr. Bensinger specifically identified the risk of Appellant requiring the use of reading glasses after the procedure. Moreover, Dr. Bensinger was unequivocal regarding the probability in stating that Appellant "[w]ould require reading glasses upon completion of the enhancement procedure." It was a certainty, not a probability. At the very least, that specific risk was identified. However, Dr. Bensinger's Declaration also referenced and incorporated the 2005 consent form, which outlined additional risks from the procedure.

Not only does Dr. Bensinger identify the risks, but he further states that a reasonably prudent physician would not have performed the enhancement procedure unless the patient had insisted. Clearly, Dr. Bensinger discusses nontreatment as an ideal course of action in this case.

Dr. Bensinger has met the requirements of expert testimony regarding informed consent.

2. Additional Claims

In addition to the Declaration of Dr. Bensinger, Appellant provided the Declaration of Appellant in support of the additional claims of Consumer Protection Act; extreme and outrageous conduct; fraud and misrepresentation; negligent training, management and supervision; and for failure to warn. Appellant's Declaration outlines that basis for these claims and creates a clear question of fact for the jury in regard to these claims. The trial court reviewed and also considered this declaration. The trial court did not refuse, reject, or disregard Appellant's Declaration.

Appellant did not limit its requested review of the trial court's granting of summary judgment to one claim or another and requested review of the entire order.

Respondents have argued, and will surely argue again, that Appellant's Declaration recites information contained in the original complaint. However, that, in and of itself, is not fatal. Appellant's declaration is fact laden. Appellant chose to provide many of the same facts in her complaint as allegations. Appellant should not be punished because she chose to provide more information in her complaint than mere notice of claims.

D. Dismissal Pursuant to CR 41(b) is Not Warranted

As alternative grounds for dismissal, Respondent LVI requests this Court to dismiss Appellant's claims due to a perceived violation of CR 41(b). Dismissal is an appropriate remedy where the record indicates that (1) the party's refusal to obey a court order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed. *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 89 P.3d 242 (2004).

Respondent LVI's claims are based upon a delay in Appellant providing payment to Respondent LVI for costs in accordance with an ambiguous trial court order. Payment has been issued to Respondent LVI in full satisfaction of their alleged costs. Respondent LVI relies upon *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 896 P.2d 66 (1995).

In *Woodhead*, plaintiff did not contest a finding that he willfully and deliberately failed to comply with a court order and willfully and deliberately attempted to mislead the court with false claims of proper service. Plaintiff only argued that defendants were not prejudiced by his actions. The trial court determined that plaintiff's actions were an abuse of

judicial process. On appeal, the Court of Appeals held that trial court did not abuse its discretion and that lesser sanctions were considered.

Here, there are not findings that Appellant acted in a "willful and deliberate" fashion. Nor has there been any indication or accusation that Appellant misled the trial court. The trial court's order was ambiguous and upon clarification of that order, payment was issued.

Respondent LVI also relies upon *Jewell v. City of Kirkland* in support of their request to dismiss Appellant's claims. 50 Wn. App. 813, 750 P.2d 1307 (1988). That case is also distinguishable. In *Jewell*, the trial court made a specific order that Jewell issue payment to the city within 30 days of the order, by December 18. A letter from the City was interpreted to allow payment by December 24. At the dismissal hearing, Jewell argued that she believed the deadline was January 2. The trial court held there was no evidence of mistake or excusable neglect and further noted that there was no payment issued by January 2. The Court of Appeals affirmed the trial court ruling that Jewells actions were willful.

Here, the order in question was ambiguous. It mentioned both granting and denying relief. Further, it did not mention a time limit for when payment was due. Upon the trial court's clarification, Appellant promptly issued payment. Appellant discussed the ambiguity at the summary judgment hearing, and the trial court disagreed with the

ambiguity. However, the trial court did not make a finding of willful or deliberate conduct and merely reprimanded the parties for not promptly seeking clarification of the trial court's order.

The case at hand is analogous to *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119. In *Will*, plaintiff was dilatory in providing a copy of an amended complaint to defendant. Defendant moved for dismissal under CR 41(b). The trial court granted the motion to dismiss. Reversing on appeal, the Court of Appeals determined the trial court abused its discretion based on its "characterize[ation] of counsel's failure to serve the complaint as 'willful and deliberate.'" In distinguishing both *Woodhead* and *Jewel*, the Court of Appeals noted that plaintiff counsel's failure to served was "based on his erroneous interpretation of an arguably imprecise procedural rule." The Court of Appeals also noted that the trial court's order lacked a time frame upon which plaintiff had to serve the amended complaint. The Court of Appeals continued its analysis of prejudice to defendant and consideration of lesser sanctions, neither of which were present in the record.

Here, the court did not find, hold, or determine that any action of Appellant was willful or deliberate, no prejudice has been identified, and lesser sanctions were not considered. At best, the record is incomplete; however, Respondent LVI has not identified any prejudice, whatsoever.

Lesser sanctions are not necessary because the costs were promptly paid upon clarification of the trial court. Appellant identified her misunderstanding and corrected her erroneous interpretation of an arguably imprecise order that lacked a time frame in which to act. Dismissal of Appellant's claims pursuant to CR 41(b) would be improper.

E. An Award of Costs would Amount to a Windfall to Respondent

A large portion of Respondents' Cost Bill, $2,450.00, consisted of a medical expert's review of records. Respondents have used the same expert and record review in the current action. Respondents also allege costs for obtaining medical records, photographs, and photocopies. Respondents have used the very same medical records, photographs, and photocopies in the current action. The award of costs to recoup these expenses, especially the expert expenses, has resulted in a windfall to Respondents and punitive measures to Appellant.

Respondent, now and at the time of the original motion, did not present costs for additional review of records or the request of additional records. Nor have they supported these assertions now. Respondent has failed to identify one additional cost that Respondent would not have incurred in the original litigation. The award of such costs is a windfall, an abuse of discretion, and not in accord with Washington case law.

III. CONCLUSION

For the reasons stated above, Appellant requests that this Court reverse the trial court's orders (1) granting fees and costs to Respondent LASIK; (2) denying Appellant's request for a CR 56(f) continuance; (3) denying Appellant's motion for reconsideration of order granting summary judgment for Respondents; and (4) granting summary judgment for Respondents.

DATED June 18, 2014.

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JUN 18 2015

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CERTIFICATE OF SERVICE

The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

I certify under penalty of perjury of the laws of Washington that I caused to be delivered the following document to the Court and all parties or their attorneys of record on the 18 day of JUNE 2015, as follows:

DOCUMENTS: APPELLANT REPLY BRIEF

ORIGINAL

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DATED 9/18/2015

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