NO. 94190-4

**IN THE SUPREME COURT FOR THE STATE OF WASHINGTON**

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION 1

COA NO. 73650-7-I

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SURAJ PINTO

Petitioner,

v.

GREGORY VAUGHN AND "JANE DOE" VAUGHN; PAOLA LEONE AND "JANE DOE" LEONE; LEONE & VAUGHN, DDS, PS, DBA LEONE & VAUGHN ORTHODONTICS; L. DOUGLAS TRIMBLE AND "JANE DOE" TRIMBLE,

Respondents.

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On Appeal from King County Superior Court
The Honorable Judge Sean O'Donnell
King County Superior Court No. 14-2-23326-4

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# APPELLANT'S PETITION FOR REVIEW

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Edward C. Chung, WSBA#34292
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## I. IDENTITY OF PETITIONER

Petitioner, Mr. Suraj Pinto, by and through his counsel of record, Edward C. Chung, files this Petition for Review.

## II. CITATION TO COURT OF APPEALS DECISION

On January 23, 2017, the Court of Appeals, Division I (hereafter "Court of Appeals") affirmed the trial court's order granting Respondent, L. Douglas Trimble's Motion for Summary Judgment that effectively dismissed Mr. Pinto's claims for medical malpractice and lack of informed consent. *See*, **Appendix A** attached hereto and within is a true and correct copy of the January 23, 2017 order. The June 12, 2015 order was predicated on the fact that Mr. Pinto's medical experts, James C. Rockwell, MD, a Washington State licensed medical doctor, specializing in ears, nose and throats (*aka,* ENT), as well as Jay Grossman, DDS; a licensed dentist from the State of California and the State of Nevada, failed to provide the requisite opinion on the standard of care and the material risks required for consent. In terms of Dr. Grossman, his testimony was disregarded as he was not qualified to provide competent testimony in accordance with RCW 7.70.040. *See*, **Appendix B** attached hereto and within is a true and correct copy of the Statute RCW 7.70.040.

Petitioner, Mr. Suraj Pinto, seeks also seeks review of the Court of Appeals' decision entered on January 23, 2017 affirming the trial court's September 17, 2015 order dismissing Respondents, Leone & Vaughn Orthodontics and Gregory Vaughn and Paola Vaughn in their individual capacity, as well as the October 12, 2015 court order striking Mr. Pinto's expert, Nicholas E. Panomitros, DDS based on *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

## III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals' January 23, 2017 decision applied the wrong standard of review is assessing the qualification of expert medical testimony and if so whether such decision conflicts with Washington State Supreme Court and Court of Appeals decisions?

   **Answer:** *Yes, the January 23, 2017 (Page 7) decision evidences that the Court of Appeals applied an abuse of discretion standard as oppose to de novo standard in relation to the qualifications of medical expert testimony.* This amounts to reversible error.

2. Did the Court of Appeals err in affirming the trial court's order it striking Mr. Pinto's expert, Dr. Panomitros, as an expert for discovery violations?

   **Answer**: *Yes, the Court of Appeal's affirmation of trial court's imposition of the severe sanction of excluding Mr. Pinto's expert without first having at least considered, on the record, a less severe sanction that could have advanced the purposes of discovery was clearly contrary to the established case law of both its own previous decisions and the decisions of this Court.*

3. As the practice medical dentistry is subject to regional board examination by the Western Regional Examining Board, whether as a matter of substantial public interest such standard of care should be based on a national standard of care as opposed to a state standard of care?

**Answer:** *Yes, in the case at bar, Mr. Pinto's dental expert is Nicholas Panomitros, DDS. He is a dental examiner belonging to the Western Regional Boards in the United States (WREB), wherein the State of Washington belongs. As a matter of substantial public interest, if dentistry licensure is subject to a regional examination, then it may warrant the Washington State Supreme Court revisiting whether this practice area be subject solely to a state standard of care.*

## IV. STATEMENT OF THE CASE

Petitioner, Suraj Pinto initiated a medical malpractice case against L. Douglas Trimble, MD, Gregory Vaughn, DDS and Paola Leone, DDS (collectively the "Respondents") after he experienced complications following orthognathic surgery and wilkodontics treatment. (CP 256-259). His claims focused on the quality of treatment that he received prior to and following surgery, which he alleges fell below the applicable standard of care. Additionally, he alleged a failure to receive the requisite informed consent related to his treatment from the named Respondents.

On May 15, 2015 Respondent, L. Douglas Trimble filed a Motion for Summary Judgment. Except for Dr. Trimble's counsel of record, there was no supporting declaration from Dr. Trimble nor any medical expert filed in conjunction with Dr. Trimble's Motion for Summary Judgment nor submitted in strict reply to Mr. Pinto's Response. In fact, Dr. Trimble's initial Motion for Summary Judgment contained Mr. Pinto's voluminous responses to Dr. Trimble's First Set of Interrogatories and Request for Production of Documents, many of which identified treating physicians and sufficient inferences sufficient to defeat Dr. Trimble's Motion for Summary Judgment.

Moreover, the record indisputably contained the declarations of Dr. James C. Rockwell, a Washington State licensed medical doctor, specializing in ears, nose and throats (aka ENT), as well as Jay Grossman, DDS; a licensed dentist from the State of California and the State of Nevada. (CP 52-65) Despite omitting any declaration from a medical expert or from Dr. Trimble himself, the trial court and the Court of Appeals wrongfully relied upon Dr. Trimble's legal memorandum and the declaration of his legal counsel to grant Dr. Trimble's Motion for Judgment on June 12, 2015. (CP 472-474).

Approximately four months later, Gregory Vaughn, DDS and Paola Leone, DDS, husband and wife and partners of Leone & Vaughn dental office, filed their Motion for Summary Judgment on August 7, 2015, seeking to dismiss Mr. Pinto's medical malpractice and informed consent claims. (CP 501-520). Thereafter, on September 9, 2015 they separately filed a Motion to Strike the testimony of Nicholas Panomitros, DDS on the grounds that disclosure of this witness was untimely and that he was not a qualified medical expert. (CP 704-713). It is important to note that prior to granting Leone & Vaughn's motion to strike, the trial court had already granted Defendants Motion for Summary Judgment, which should have rendered Leone & Vaughn's Motion to Strike Expert Testimony moot as all matters had been resolved. It should also be noted that Leone & Vaughn did not cite *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) or address the *Burnet* factors in their Motion to Strike and the trial court

conducted such analysis *sua sponte* at what was supposed to be a non-dispositive motion without oral argument. Furthermore, Leone & Vaughn's claimed prejudice for alleged discovery violations was the result of their failure to conduct a CR 26i conference until after the Court Ordered discovery cut-off and after the trial court denied both their motions for a continuance of the trial date and motion to amend the Case Scheduling Order. (CP 484-485, 668-669). *See*, **Appendix C** attached hereto and within is a true and correct copy of CR 26i.

Mr. Pinto contends that if there is a legal basis to grant Defendants Motion to Exclude Witnesses, there was no willful violation on his part. At the outset, Mr. Pinto timely disclosed Dr. Panomitros as a witness both in June 2015 (Compliant with the Trial Court's Scheduling Order) and in Plaintiff's September 14, 2015 Exchange of Witnesses and Exhibits for Trial.

At present and at the time following the surgery and treatments by Respondents, Mr. Pinto alleges he experiences symptoms of the tingling of the hands and feet, chest pains, high pulse rates, shortness of breath and sleep apnea. (CP 259).

## V. ARGUMENT

A. THE STANDARD OF REVIEW TO BE APPLIED ON APPEAL IN DETERMINING THE QUALIFICATIONS FOR EXPERT TESTIMONY IN A SUMMARY JUDGMENT PROCEEDING IS "DE NOVO" **NOT** "ABUSE OF DISCRETION". ACCORDINGLY, THE JANUARY 23, 2017 COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS RENDERED BY THE WASHINGTON STATE SUPREME COURT AND THE COURT OF APPEALS.

On Page 7 of the January 23, 2017 decision, the Court of Appeals states, "the standard for review on the qualifications of an expert is to be judged by the trial court, and its determination will not be set aside in the absence of a showing of abuse of discretion; this reasoning conflicts with the procedural facts and Washington State Supreme decisions. As such the analysis contained within the January 23, 2017 decision is flawed as a *de novo s*tandard should have more appropriately been applied.

On April 18, 2016 Mr. Suraj Pinto, appealed the King County Superior Court's June 12, 2015, September 17, 2015 and October 12, 2015 court orders granting summary judgment in favor of Respondents Dr. Douglas L. Trimble and Leone & Vaughn. Appellant's appeal was predicated, in part, on the trial court's determination that the appellant lacked qualified medical expert testimony and witnesses to overcome summary judgment. In accordance with CR 56 (c), Mr. Pinto puts forth that the trial court's granting of summary judgment and the Court of

Appeals decision affirming summary judgment amounted to reversible error because Mr. Pinto has provided declarations from qualified medical experts, a declaration from Appellant attesting to injuries, as well as interrogatory responses. *See*, **Appendix D** attached hereto and within is a true and correct copy of CR 56(c).

On January 23, 2017 this Court affirmed the trial court's granting of summary judgment and within its opinion reasoned the following:

> "the qualifications of an expert are to be judged by the trial court, and its determination will not be set aside in the absence of a ***showing of abuse of discretion***."
>
> *Citing*, *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989) (*quoting*, *Bernal v. America Honda Motor Co.*, 8 Wn.2d 406, 413, 533 P.2d 107 (1976)

Generally speaking, the *McKee* holding is both correct and applicable; however, where the qualifications and opinions are part of a summary judgment proceeding, an appeal on the qualifications of an expert witness is subject to ***de novo*** review. *See*, *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) ["*The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.*"]; *emphasis added.*

Thus Mr. Pinto does not bear the burden on appeal in highlighting how the trial court judge abused his or her discretion in relation to the

qualification of a medical expert. The decision on whether Appellant's medical experts qualified as competent witnesses for purposes of overcoming summary judgment is ***de novo***. Like the trial court, the Court of Appeals must construe all evidence and reasonable inferences in the light most favorable to the non-moving party, in this case, Mr. Pinto. *Barber v. Bankers Life & Cas. Co.*, 81 Wash.2d 140, 142, 500 P.2d 88 (1972*); Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). As Mr. Pinto delineated in his response to summary judgment filed in the trial court and addressed in his opening brief, Respondents did not provide any competent evidence wherein there shows an absence of material facts wherein Mr. Pinto could not support his claims for medical negligence and informed consent.

In fact, although Respondents appears to suggest that only expert testimony qualifies in overcoming a summary judgment medical malpractice case, our Washington State Supreme Courts disagrees. In *Miller v. Jacoby*, 145 Wn.2d 65, 33 P.3d 68 (2001) the Washington State Supreme Court held that expert testimony is not required when medical facts are observable by a lay person's senses and describable without medical training. *Id.* at 72-73; emphasis added. In this case, Mr. Pinto made numerous documented contentions immediately following the surgery on how he did not feel right after the surgery performed. Moreover, while this surgery would expect to resolve sleep apnea; Mr. Pinto was diagnosed with severe sleep apnea in 2014.

As for the testimony of Dr. Grossman that was filed in conjunction with this Mr. Pinto's Response to Dr. Trimble's Motion for Summary Judgment, it is important to note Dr. Grossman is a practicing Dentist licensed in the State of California and the State of Nevada. Although Dr, Grossman is not a doctor licensed in the State of Washington, an out-of-state practitioner of medicine may testify as an expert in a malpractice action against a defendant who is a practitioner of the same school of medicine if the practitioner has knowledge of the medical problem at issue and the standard of care required in the particular situation is a national one, not one that varies with geographic location. The Court of Appeal January 23, 2017 decision appears to conflict with *Elber v. Larson*, 142 Wn. App. 243, 247, 173 P.3d 990 (2007). As highlighted above, it is important to reiterate that Dr. Trimble received his education in Canada and received national certification from ABOMS, which is the certifying board for the specialty of oral and maxillofacial surgery in the United States, not Washington.

Although Dr. Grossman is not a maxillofacial surgeon, this does not matter in the realm of medical malpractice claims as the relevant field of expertise is not necessarily determined by the specific practice specialty, but rather by the familiarity with the treatment or disease. The January 23, 2017 decision appears to conflict with a litany of cases addressing this issue such as, *Morton v. McFall*, 128 Wn. App. 245, 253, 115 P.3d 1023 (2005) (internist qualified to testify against pulmonologist as to standard of care;

"[t]here is no general rule that prohibits ... a specialist in one area from testifying about another area"); *Eng v. Klein*, 127 Wn. App. 171, 172, 110 P.3d 844 (2005) (infectious disease expert qualified to testify against neurosurgeon regarding diagnosis of meningitis; diagnostic methods the same; "[i]t is the scope of a witness's knowledge and not artificial classification by professional title that governs the threshold question of admissibility of expert medical testimony in a malpractice case"); *Seybold v. Neu*, 105 Wn. App. 666, 677-80, 19 P.3d 1068 (2001) (plastic surgeon qualified to testify against orthopedic surgeon regarding cutaneous malignancies and bone grafting, where plastic surgeon also trained and experienced with the disease and treatment); *White v. Kent Med. Ctr.*, 61 Wn. App. 163, 173-74, 810 P.2d 4 (1991) (physician is qualified as an expert where familiarity demonstrated with the procedure or medical problem at issue, even if not a specialist with respect to same; ENT physician qualified to testify as to standard of care for general practitioner); *Miller v. Peterson*, 42 Wn. App. 822, 830, 714 P.2d 695 (1986) (orthopedic surgeon qualified to testify about podiatrist's standard of care so long as both used the same methods of treatment). Where the methods of treatment are or should be the same as the defendant, the expert is qualified to testify. *Eng v. Klein*, 127 Wn. App. 171, 176, 110 P.3d 844 (2005); *Miller v. Peterson*, 42 Wn. App. 822, 830, 714 P.2d 695 (1986).

As this was *de novo,* Dr. Trimble never put forth a medical expert to oppose any of the contentions that Mr. Pinto's expert put forth and never objected to such testimony, respectfully on de novo, the Court in applying all reasonable inference in favor of the non-moving party must find that Mr. Pinto's expert affidavits contained sufficient factual support to defeat summary judgment.

B. COURT OF APPEALS DECISION TO UPHOLD THE STRIKING OF DR. PANOMITROS DOES NOT COMPLY WITH THE *BURNET* DECISION.

At page 10 of its opinion, the Court of Appeals states that "The trial court concluded the case schedule set out deadlines to facilitate discovery and trial preparation and '[defendants and their counsel are entitled to rely on the case schedule and state and local court rules.' The court opined that "'just cause for delay' means something that is unusual that prevents the identification of expert witnesses and their opinions and factual bas[e]s and reason for the same, despite the exercise by counsel of due diligence."

It is thus very clear that the Court of Appeals essentially allowed the trial court to impose the ultimate sanction of excluding ***the*** central expert, Dr. Panometros, for nothing more than the fact that defendants were entitled to "rely on the case schedule." However, this Court has clearly held that "In any case, we are satisfied that it was an abuse of discretion for the trial court to impose the severe sanction of limiting discovery and ***excluding expert witness testimony*** on the credentialing issue ***without first having at least***

***considered, on the record, a less severe sanction*** that could have advanced the purposes of discovery and yet compensated Sacred Heart for the effects of the Burnets' discovery failings. See *Fisons*, 122 Wash.2d at 355-56, 858 P.2d 1054. Furthermore, ***even if*** the trial court had considered other options before imposing the sanction that it did, we would be forced to conclude that the sanction imposed in this case was ***too severe*** in light of the length of time to trial, the undisputedly severe injury to Tristen, and the absence of a finding that the Burnets willfully disregarded an order of the trial court. See *Lane v. Brown & Haley*, 81 Wn.App. 102, 106, 912 P.2d 1040 ***("[T]he law favors resolution of cases on their merits.***"), review denied, 129 Wn.2d 1028, 922 P.2d 98 (1996)."

It was clear from the record that Mr. Pinto identified Dr. Panomitros as an expert witness in a supplemental disclosure. Clearly, there was no issue here how willfully trying to "hide" the existence of this expert, or otherwise gain a litigation advantage of some sort. Mr. Pinto is mindful that it was not Defendant's obligation to provide the additional expert witness information required by CR 26. *See*, **Appendix E** attached hereto and within is a true and correct copy of CR 26. At the same time, Defendants are sophisticated doctors and hospitals, it is hard to imagine that they were so prejudiced by Mr. Pinto's late disclosure that it was justified to altogether throw Dr. Panometros out. Such a measure was unduly harsh. The fact is, it is clear from the record that Mr. Pinto was doing a lot of legwork, and that he had

already obtained Dr. Rockwell or Dr. Grossman to support his claim. Then, not stopping to breath, he also secured Dr. Panometros in the final hour. It is difficult and expensive to secure medical experts, yet due to his conviction that he had been injured, Mr. Pinto tirelessly worked to build his case. Yet, despite all this, the trial court excluded his witness, just because it was past the deadline, and the Court of Appeals affirmed this draconian measure. Mr. Pinto feels so wronged by this that he now brings the issue before this Court, for justice.

The reasons that the trial court excluded Dr. Panometros are not clear from the record, and the Court of Appeals did not mention anything specific, other than a general reference to "discovery violations." But, "it must be clearly stated on the record so that meaningful review can be had on appeal. When the trial court "chooses one of the harsher remedies allowable under CR 37(b), ... it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed," and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial. *Snedigar v. Hodderson*, 53 Wn.App. 476, 487, 768 P.2d 1 (1989). *See*, **Appendix F** attached hereto and within is a true and correct copy of CR 37(b).

Furthermore, the trial court's October 12, 2016 Order mentions the *Burnete* factors only in name and failed, on its face, to substantially consider

lessor sanctions. Essentially, it states that: "granting a trial continuance would to allow for additional discovery would effectively give plaintiff relief for violating court rules..." Again, basically, and circularly, the trial court stated that the witness should be excluded because of the case schedule, and that no lessor sanctions were available, also because of the case schedule.

This Court has stated that "Our precedent establishes that trial courts must consider the factors from *Burnet*, 131 Wn.2d 484, ***before excluding untimely disclosed evidence***; rather than de novo review under Folsom, we then review a decision to exclude for an abuse of discretion. See, e.g., *Blair v. TA–Seattle E. No. 176*, 171 Wn.2d 342, 348, 254 P.3d 797 (2011) (holding trial court abused its discretion by not applying Burnet factors before excluding witnesses disclosed after court's deadline). We have said that the decision to exclude evidence that would affect a party's ability to present its case amounts to a severe sanction. *Id.* And before imposing a severe sanction, the court ***must consider the three Burnet factors on the record: whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party***. *Jones v. City of Seattle*, 179 Wn.2d 322, 338, 314 P.3d 380 (2013).

Here, besides not properly addressing the other factors mentioned above, short of pointing to the case schedule, trial court totally failed to explain how Mr. Pinto's conduct was "willful or deliberate." And the Court

of Appeals, rather than correcting this gross error, affirmed it, despite how fundamentally unfair and inconsistent with established case law it is.

What further speaks to the fundamental unfairness of the holdings of the trial court and Court of Appeals is that the October 12, 2015 Order striking Mr. Pinto's witness was entirely gratuitous, in that on September 17, 2015, the trial court entered an Order granting summary judgment to defendants Vaughn, Leon and Vaughn & Leon, P.S.'s motion for summary judgment and dismissed the case. Defendants Motion to Strike was moot after the case was dismissed, and yet the trial court still felt the need to strike Mr. Pinto's expert, for no reason whatsoever, other than to do it. This is further evidence of the harshness and unwillingness to entertain lessor means already discussed here in. In essence, if we may put it so, the trial not only shot a bear that it could have just tranquilized, but after it did so, it actually took the trouble to resuscitated it, take out it's heart, and then shot it again. Him.

C. THE PRACTICE MEDICAL DENTISTRY IS SUBJECT TO REGIONAL BOARD EXAMINATION BY THE WESTERN REGIONAL EXAMINING BOARD, AS A MATTER OF SUBSTANTIAL PUBLIC INTEREST SUCH STANDARD OF CARE SHOULD BE BASED ON A NATIONAL STANDARD OF CARE.

Medical dentistry in Washington State is subject to regional board examination by the Western Regional Examining Board. However, the trial court took issue with, and the Court of Appeals condoned the Trial Court's by stating Dr. Panomitros' first declaration states that he is a "licensed general dentist in the state of Illinois". However, excluding Dr.

Panomitros, DDS, a ***dental examiner belonging to the Western Regional Boards in the United States (WREB),*** reveals a policy issue that should be addressed. As a matter of substantial public interest, if dentistry licensure is subject to a regional examination, then it may warrant the Washington State Supreme Court revisiting whether this practice area be subject solely to a state standard of care.

A number of cases, including two recent cases from this court, argue that testimony of a "national standard" is sufficient to satisfy the statutory requirement. *Hill v. Sacred Heart Med. Ctr.,* 143 Wn. App. 438, 453, 177 P.3d 1152 (2008); *Elber v. Larson,* 142 Wn. App. 243, 247, 173 P.3d 990 (2007); *Pon Kwock Eng v. Klein,* 127 Wn. App. 171, 176-77, 110 P.3d 844 (2005). Indeed, as this nation changed attitudinally regarding the how scientific and medical issues are treated, researched, and attended to, a less provincial attitude should also follow on the part of the legal system. Sometimes, a complicated medical issue might include doctors from many states, comparing data, often issuing research even from abroad. It should thus follow that, if not the ability to practice, then at least the recognition of the expertise of doctors should follow. After all, unlike the law, the human body does change so very much, from state to state, despite what it may seem after talking to our countrymen from other regions. This issue has been addressed in Michelle Huckaby Lewis, John

K. Gohagan & Daniel J. Merenstein, *The Locality Rule and the Physician's Dilemma: Local Medical Practices vs the National Standard of Care*, 297 JAMA 2633, 2635 (2007) and lists forty-five states that have adopted either a national or similar locality standard in place of a "same community" or "statewide" standard.

## VI. CONCLUSION

Based on the foregoing, Petitioner, Mr. Suraj Pinto respectfully asks that the trial court's orders on summary judgment and the Court of Appeals decision affirming summary judgment be reversed and that this matter be remanded to the trial court for a trial on the merits.

*Respectfully submitted on this 22nd day of February 2017*

*/s/ Edward C. Chung*
Edward C. Chung, WSBA 34292
Attorney for Petitioner, Suraj Pinto

## DECLARATION OF SERVICE

I, Margaret Grant, declare under penalty of perjury under the laws of the State of Washington that I am a Paralegal with the law firm of CHUNG, MALHAS & MANTEL, PLLC with an address of 1511 Third Avenue, Suite 1088, Seattle, Washington 98101; and I caused copies of **APPELLANT'S PETITION FOR REVIEW** to be served as follows:

| | | |
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*Respectfully submitted this 22nd day of February, 2017.*

/s/ Margaret Grant
Margaret Grant, Paralegal

## APPENDIX

An appendix containing a copy of the Court of Appeals decision, any order granting or denying a motion for reconsideration of the decision, and copies of statutes and constitutional provisions relevant to the issues presented for review.

In the Superior Court of the State of Washington in and for King County

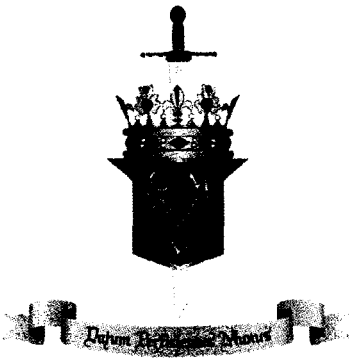
*Suraj Pinto v Gregory Vaughn and "Jane Doe" Vaughn; Paola Leone and "Jane Doe" Leone; Leone & Vaughn, DDS, PS, DBA Leone & Vaughn Orthodontics; L. Douglas Trimble and "Jane Doe" Trimble.*

King County Case No. 14-2-23326-4

Court of Appeals No. 73650-7-I

# APPENDIX A

January 23, 2017 Court of Appeals Decision



CHUNG, MALHAS, & MANTEL, PLLC.

RICHARD D. JOHNSON,
*Court Administrator/Clerk*

*The Court of Appeals*
of the
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January 23, 2017

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CASE #: 73650-7-I
Suraj Pinto, Appellant v. Gregory Vaughn, Respondent

King County, Cause No. 14-1-123326-4.SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We affirm."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

emp

Enclosure

c: The Honorable Sean O'Donnell

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
# DIVISION ONE

| | | |
|---|---|---|
| SURAJ PINTO,<br><br>Appellant,<br><br>v.<br><br>GREGORY VAUGHN and JANE DOE VAUGHN; PAOLA LEONE and JANE DOE LEONE; LEONE & VAUGHN, DDS, P.S., d/b/a LEONE & VAUGHN ORTHODONTICS; L. DOUGLAS TRIMBLE and JANE DOE TRIMBLE,<br><br>Respondents. | ) | No. 73650-7-I<br><br>UNPUBLISHED OPINION<br><br>FILED: January 23, 2017 |

VERELLEN, C.J. — Suraj Pinto received orthodontic treatment from Dr. Gregory Vaughn and Dr. Paola Leone. They referred Pinto to Dr. L. Douglas Trimble, an oral and maxillofacial surgeon, who performed two procedures on Pinto. The trial court granted summary judgment dismissing Pinto's claims for malpractice and lack of informed consent against Drs. Vaughn, Leone, and Trimble.

Given the nature of the procedures and alleged injury, Pinto needed to present qualified expert testimony regarding the standard of care and the material risks requiring informed consent. As to Dr. Trimble, one of Pinto's experts offered no opinion on the standard of care or material risks requiring consent. The other did not adequately establish his qualifications. As to Drs. Vaughn and Leone, the trial court

struck Pinto's experts for discovery violations. Pinto's challenges to the order striking the experts are not compelling.

Therefore, we affirm.

## FACTS

Suraj Pinto sought an orthodontic consultation with Dr. Gregory Vaughn on September 9, 2008. Drs. Vaughn and Leone are husband and wife. Dr. Vaughn examined Pinto and presented treatment options to him. Pinto started orthodontic treatment and agreed to "do five-teeth wilkodontics" on his "upper teeth only."[1] According to Pinto, the treatment involved poking holes in his gums to move his upper front teeth forward and Dr. Vaughn assured him that it was an easy and noninvasive way to move his teeth.

Before his final wilkodontics procedure, Pinto remembered receiving a voicemail from Drs. Vaughn and Leone's office asking him to either "do jaw surgery or full mouth wilkodontics."[2] When Pinto spoke to Dr. Vaughn at his next appointment, Dr. Vaughn told Pinto about the orthognathic procedure. Pinto said Dr. Vaughn described orthognathic surgery as a "mid-level outpatient procedure, similar to wilkodontics but with far better results. [Dr. Vaughn] also stated that this procedure had the same recovery time, same out of pocket expenses and no risks or side effects involved."[3] Based on Dr. Vaughn's description of the procedure, Pinto

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[1] Clerk's Papers (CP) at 256-57.

[2] CP at 257.

[3] CP at 257.

followed the treatment plan and "[a]t their request, [Pinto] was asked to sign a financial contract. There was no change in informed consent however."[4]

Dr. Leone referred Pinto to Dr. L. Douglas Trimble for extractions and an orthognathic surgery evaluation. Dr. Trimble is an oral and maxillofacial surgeon.

Dr. Trimble extracted Pinto's bicuspids on September 3, 2009, and then performed maxillary and mandibular orthognathic surgery on August 24, 2011. Pinto started experiencing symptoms including tingling of his hands and feet, chest pains, high pulse rates, shortness of breath, and restless nights of sleep after the first procedure. According to Pinto, he had never been diagnosed or had issues with sleep apnea or any other disorder until he "began pre-surgery dental work with Dr. Leone, Dr. Vaughn, and Dr. Trimble."[5] Pinto also said that he "was verbally told that any nasal congestion or nerve damage were all temporary and not permanent."[6]

After the orthognathic surgery, Pinto had orthodontic appointments on October 12, 2011 and November 4, 2011. Pinto told Dr. Vaughn that he was unhappy with the outcome of the orthognathic surgery and did not attend his next scheduled appointment.

Pinto filed a lawsuit on August 21, 2014, alleging Drs. Trimble, Vaughn, and Leone failed to meet the required standard of care and did not obtain his informed consent. The case schedule listed trial for October 5, 2015 with an August 17, 2015

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[4] CP at 258.

[5] CP at 258.

[6] CP at 259.

discovery cutoff date. The parties later agreed to extend the discovery cutoff to August 31, 2015.

*Dr. Trimble's Motion for Summary Judgment*

Dr. Trimble filed a motion for summary judgment citing Pinto's lack of expert testimony to support his claims. In response, Pinto produced declarations from Dr. James Rockwell and Dr. Jay Grossman. In the alternative, Pinto asked for a 60-day extension to present additional expert testimony.

Dr. Rockwell, an ear, nose, and throat doctor, made no mention of the standard of care or risks requiring informed consent.

Dr. Grossman, "a licensed Dentist in the State[s] of California and Nevada,"[7] incorporated by reference a report he had prepared in 2014. The report included limited opinions regarding Pinto's treatment, standard of care, and informed consent.

The trial court granted Dr. Trimble's motion for summary judgment in June 2015.

*Drs. Vaughn and Leone's Motion for Summary Judgment*

Two months later, Drs. Vaughn and Leone moved for summary judgment. Drs. Vaughn and Leone moved to strike Pinto's experts as a penalty for repeated discovery violations. The trial court granted the motion.[8] The court found, to the extent Pinto did provide any responses to Drs. Vaughn and Leone's discovery

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[7] CP at 274.

[8] As part of its findings and conclusions, the trial court submitted a detailed analysis addressing the standards in Jones v. City of Seattle, 179 Wn.2d 322, 314 P.3d 380 (2013), as corrected (Feb. 5, 2014), and Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997). See CP at 922.

requests, the responses were untimely and inadequate.

In the alternative, the court rejected the substance of expert opinions offered by Pinto. Dr. Panomitros's report did not include any references to his training or experience in orthodontics. The court concluded Dr. Panomitros's declaration and report were insufficient:

> The declaration does not identify any education from Dr. Panomitros related to orthodontia. It does not refer to any medical training related to orthodontia. It does not refer to any supervisory experience related to orthodontia—anything that would demonstrate his familiarity, his experience, his exposure to the standard of care for this specialty. And there are differences between general dentistry and orthodontia.[9]

The court also concluded Dr. Panomitros's declaration contained conclusory opinions; did not contain "any recitation of the salient facts, or documents" to support his opinions, failed to articulate the standard of care for orthodontists, and failed to articulate how "each defendant individually violated the standard of care and/or failed to obtain informed consent."[10]

The court noted that the opinions of Drs. Grossman and Rockwell were never identified to be used against Drs. Vaughn and Leone and granted summary judgment.

The trial court denied Pinto's motion for reconsideration. Although Pinto submitted a supplemental declaration from Dr. Panomitros, the trial court found that the new declaration did not reference any experience in treating the conditions at issue in this case. Further, Pinto did not offer an explanation as to why the

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[9] Report of Proceedings (RP) (Sept. 17, 2015) at 54.

[10] CP at 924.

supplemental information could not have been provided sooner.

Pinto appeals.

ANALYSIS

We review a summary judgment order de novo, engaging in the same inquiry as the trial court.[11] Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[12] "'Summary judgment in favor of the defendant is proper if the plaintiff fails to make a prima facie case concerning an essential element of his or her claim.'"[13]

Generally, expert testimony is required to establish the standard of care and proximate cause in dental or medical negligence actions.[14] The standard of care must be established by the testimony of experts who practice or have expertise in the relevant specialty.[15] An exception exists when the standard of care is self-evident.[16] "'The qualifications of an expert are to be judged by the trial court, and its

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[11] Lallas v. Skagit County, 167 Wn.2d 861, 864, 225 P.3d 910 (2009).

[12] CR 56(c); Bohn v. Cody, 119 Wn.2d 357, 362, 832 P.2d 71 (1992).

[13] Rounds v. Nellcor Puritan Bennett, Inc., 147 Wn. App. 155, 162, 194 P.3d 274 (2008) (quoting Seybold v. Neu, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001)).

[14] Harris v. Groth, 99 Wn.2d 438, 449, 663 P.2d 113 (1983).

[15] McKee v. American Home Products, Corp., 113 Wn.2d 701, 706-07, 782 P.2d 1045 (1989); Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 770 P.2d 182 (1989)).

[16] Miller v. Jacoby, 145 Wn.2d 65, 74, 33 P.3d 68 (2001) (a foreign substance was unintentionally left in a surgical patient.); Young, 112 Wn.2d at 228 ("Where the determination of negligence does not require technical medical expertise, such as the negligence of amputating the wrong limb or poking a patient in the eye while stitching a wound on the face, the cases also do not require testimony by a physician.").

determination will not be set aside in the absence of a showing of abuse of discretion.'"[17]

A doctor must inform the patient of the material facts, including the attendant risks, for a given treatment before obtaining the patient's consent to treatment.[18] A fact is material "if a reasonably prudent person in the position of the patient or his or her representative would attach significance to it deciding whether or not to submit to the proposed treatment."[19] Such material facts must be established by expert testimony.[20]

Generally, proximate cause is a question for the jury; however, it is a question of law for the court if the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt.[21] "'[M]edical testimony must demonstrate that the alleged negligence "more likely than not" caused the later harmful condition leading to the injury; that the defendant's actions "might have," "could have," or "possibly did" cause the subsequent condition is insufficient.'"[22]

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[17] McKee, 113 Wn.2d at 706 (quoting Bernal v. American Honda Motor Co., 87 Wn.2d 406, 413, 533 P.2d 107 (1976)).

[18] RCW 7.70.050; Adams v. Richland Clinic, Inc., P.S., 37 Wn. App. 650, 656, 681 P.2d 1305 (1984); Smith v. Shannon, 100 Wn.2d 26, 29, 666 P.2d 351 (1983).

[19] RCW 7.70.050(2).

[20] RCW 7.70.050(3).

[21] Shellenbarger v. Brigman, 101 Wn. App. 339, 348, 3 P.3d 211 (2000).

[22] Id. (quoting Attwood v. Albertson's Food Ctrs., Inc., 92 Wn. App. 326, 331, 966 P.2d 351 (1998)).

*Dr. Trimble*

As to Dr. Trimble, Pinto relies on the declarations of Drs. Grossman and Rockwell, but their declarations do not reveal any genuine issue of material fact.

Dr. Rockwell, the ear, nose and throat doctor, does not even mention the standard of care for or material risks presented by oral surgery.

Pinto concedes "Dr. Grossman is not a maxillofacial surgeon."[23] He argues Dr. Grossman, a licensed dentist, is qualified because the relevant field of expertise is not always determined by the specific practice specialty but rather by the familiarity with the treatment or disease.

In Davies v. Holy Family Hospital, the plaintiffs relied on a radiologist to address the standard of care for several different health care providers.[24] But the radiologist failed to provide any basis for his familiarity with, or expertise in the specialties at issue.[25] Similar to the radiologist in Davies, Dr. Grossman failed to identify education, medical training, or supervisory experience that demonstrated his familiarity with the standard of care for an oral surgeon.

Additionally, the few references by Dr. Grossman to the standard of care were vague and conclusory.[26] Pinto contends Dr. Grossman's reference to an

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[23] Appellant's Br. at 18.

[24] 144 Wn. App. 483, 489-95, 183 P.3d 283 (2008).

[25] Id. at 495.

[26] For example, "[I]t appears that there are valid complaints regarding breaches of the standard of care." CP at 284; "[T]heir actions [unspecified] failed to meet the requisite standards of care of orthodontists and surgeons collaborating to resolve Mr. Pinto's chief complaint which was quite simply adjusting his midline." CP at 285.

"unnecessary surgery and the failure to address Pinto's chief complaint all created the inference that there was a breach in the standard of care."[27] But he offers no authority supporting such a generous inference.

Alternatively, Pinto suggests Dr. Trimble waived his right to challenge the sufficiency of Dr. Grossman's declaration on summary judgment because he did not move to strike. But Dr. Trimble complied with LCR 56(e) by devoting a portion of his summary judgment reply brief to argue Dr. Grossman's declaration was inadequate. Dr. Trimble did not waive his right to object to the proffered expert declarations.

Pinto also suggests experts were not required, but the standard of care for the maxillary and mandibular orthognathic surgery performed by Dr. Trimble is not self-evident. Pinto failed to establish the appropriate standard of care for Dr. Trimble.

As to informed consent, neither Dr. Rockwell nor Dr. Grossman provided qualified expert testimony defining "the existence and nature of the risk and the likelihood of its occurrence."[28] Thus, Pinto failed to satisfy materiality requirements. In the absence of sufficient expert medical testimony regarding the existence and nature of the risks of the procedure and the likelihood of the risks, the trial court properly dismissed Pinto's informed consent claim against Dr. Trimble.

*Drs. Vaughn and Leone*

Pinto argues the trial court abused its discretion when it struck his proffered expert declarations as a sanction for discovery violations.[29]

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[27] Appellant's Reply Br. at 16.

[28] Adams, 37 Wn. App. at 657-58.

[29] Appellant's Br. at 25; see King County Fire Prot. Dists. v. Hous. Auth. of King County, 123 Wn.2d 819, 826, 872 P.2d 516, 519 (1994).

The trial court concluded the case schedule set out deadlines to facilitate discovery and trial preparation and "[d]efendants and their counsel are entitled to rely on the case schedule and state and local court rules."[30] The court opined that "'just cause for delay' means something that is unusual that prevents the identification of expert witnesses and their opinions and factual bas[e]s and reason for the same, despite the exercise by counsel of due diligence."[31]

Pinto offers no compelling challenge to the order. First, he argues he identified Dr. Panomitros as an expert witness in a supplemental disclosure. But as the trial court pointed out, he provided none of the other expert witness information required by CR 26. Second, he suggests Drs. Vaughn and Leone could have taken depositions and failed to propose dates for expert depositions. But there is no requirement that they do so. Third, he notes that Drs. Vaughn and Leone requested a continuance, failed to provide dates for expert depositions, and then delayed seeking a CR 26(i) conference. But Pinto cites no authority that such conduct excused his repeated discovery violations. Finally, he argues the electronic filing of the motion to strike was untimely by one minute. But he provides no authority that the trial court lacked the discretion to accept such an electronic filing as timely.

Pinto fails to support his narrow challenges to the trial court order striking his expert witnesses with any compelling authority. He fails to establish any abuse of discretion or legal error.[32]

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[30] CP at 922.

[31] CP at 922.

[32] The trial court considered the Burnet factors on the record in its analysis. Pinto does not assign error to the trial court's analysis of those factors.

Alternatively, even disregarding the order striking Pinto's expert witnesses, summary judgment was warranted.

The alleged breach of the standard of care and lack of informed consent by Drs. Vaughn and Leone require qualified expert witness testimony. Pinto did not offer Dr. Rockwell or Dr. Grossman as experts regarding his claims against Drs. Vaughn and Leone.

Dr. Panomitros's first declaration states that he is a "licensed general dentist in the state of Illinois," but does not mention any experience or training in orthodontia.[33] This declaration did not qualify him to testify as to the appropriate standard of care for Drs. Vaughn or Leone.

As to his informed consent claims against Drs. Vaughn and Leone, Pinto argues he presented adequate evidence to warrant a trial. We disagree. He failed to provide an expert with the expertise to address materiality. We conclude the trial court properly dismissed Pinto's informed consent claim.

*Denial of CR 56(f) Extension*

Pinto argues the trial court abused its discretion when it denied his request for an extension under CR 56(f) to allow the trial court to "fully evaluate other medical testimony."[34] CR 56(f) allows the court the discretion to grant an extension when affidavits are unavailable. The trial court may deny a 56(f) request if

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[33] CP at 685.

[34] Appellant's Br. at 45.

> (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 the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.[35]

Pinto requested a continuance in his response to summary judgment but failed to submit an affidavit in support of his contingent request for more time.[36] The case had been filed 10 months earlier. The discovery cutoff had been extended. And Pinto failed to (i) identify a reason for the delay, (ii) identify any new experts he expected to retain, and (iii) describe what testimony the experts would provide.

We conclude the trial court did not abuse its discretion when it denied Pinto's request for a CR 56(f) continuance.

*Motion for Reconsideration*

Finally, Pinto argues the trial court abused its discretion when it denied his motion for reconsideration.[37] Pinto failed to set forth any specific reasons why the trial court's order was contrary to law, or that substantial justice had not been done.[38] The new declaration from Dr. Panomitros included more information about his experience and expertise in orthodontics, but Pinto did not explain why this information was not available when the first declaration was filed. He does not

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[35] Janda v. Brier Realty, 97 Wn. App. 45, 54, 984 P.2d 412 (1999) (quoting Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989)).

[36] See CR 56(f).

[37] See Wilcox v. Lexington Eye Institute, 130 Wn. App. 234, 240, 122 P.3d 729 (2005).

[38] CR 59(a)(7), (9).

present a "newly discovered evidence" rationale.[39] Pinto did not cite any authority or make any legal arguments supporting relief specific to CR 59(a)(7) or CR 59(a)(9).

We conclude the trial court did not abuse its discretion in denying Pinto's motion for reconsideration.

We affirm.

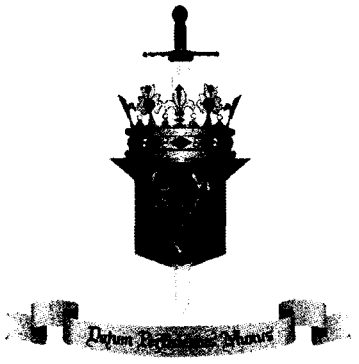
WE CONCUR:

[39] CR 59(a)(4) ("Newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial.").

In the Superior Court of the State of Washington in and for King County
*Suraj Pinto v Gregory Vaughn and "Jane Doe" Vaughn; Paola Leone and "Jane Doe" Leone; Leone & Vaughn, DDS, PS, DBA Leone & Vaughn Orthodontics; L. Douglas Trimble and "Jane Doe" Trimble.*
King County Case No. 14-2-23326-4
Court of Appeals No. 73650-7-I

# APPENDIX B

RCW 7.07.040



CHUNG, MALHAS, & MANTEL, PLLC.

## RCW 7.07.040

### Waiver and preclusion of privilege.

(1) A privilege under RCW 7.07.030 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(a) In the case of the privilege of a mediator, it is expressly waived by the mediator; and

(b) In the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(2) A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under RCW 7.07.030, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

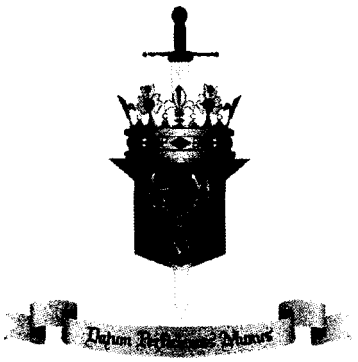
(3) A person that intentionally uses a mediation to plan, attempt to commit, or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under RCW 7.07.030.

[ 2005 c 172 § 5.]

In the Superior Court of the State of Washington in and for King County
*Suraj Pinto v Gregory Vaughn and "Jane Doe" Vaughn; Paola Leone and "Jane Doe" Leone; Leone & Vaughn, DDS, PS, DBA Leone & Vaughn Orthodontics; L. Douglas Trimble and "Jane Doe" Trimble.*
King County Case No. 14-2-23326-4
Court of Appeals No. 73650-7-I

# APPENDIX C

CR 26i



CHUNG, MALHAS, & MANTEL, PLLC.

## CR 26
## GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that:

(A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

(2) Insurance Agreements. A party may obtain discovery and production of: (i) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and (ii) any documents affecting coverage (such as denying coverage, extending coverage, or reserving rights) from or on behalf of such person to the covered person or the covered person's representative. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.

(3) Structured Settlements and Awards. In a case where a settlement or final award provides for all or part of the recovery to be paid in the future, a party entitled to such payments may obtain disclosure of the actual cost to the defendant of making such payments. This disclosure may be obtained during settlement negotiations upon written demand by a party entitled to such payments. If disclosure of cost is demanded, the defendant may withdraw the offer of a structured settlement at any time before the offer is accepted.

(4) Trial Preparation: Materials. Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including a party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this section, a statement previously made is:

(A) a written statement signed or otherwise adopted or approved by the person making it; or

(B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(5) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. (ii) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.

(B) A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(5)(A)(ii) and (b)(5)(B) of this rule; and (ii) with respect to discovery obtained under subsection (b)(5)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subsection (b)(5)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(6) Claims of Privilege or Protection as Trial-Preparation Materials for Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified. Either party may promptly present the information in camera to the court for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(7) Discovery From Treating Health Care Providers. The party seeking discovery from a treating health care provider shall pay a reasonable fee for the reasonable time spent in responding to the discovery. If no agreement for the amount of the fee is reached in advance, absent an order to the contrary under section (c), the discovery shall occur and the health care provider or any party may later seek an order setting the amount of the fee to be paid by the party who sought the discovery. This subsection shall not apply to the provision of records under RCW 70.02 or any similar statute, nor to discovery authorized under any rules for criminal matters.

(8) Treaties or Conventions. If the methods of discovery provided by applicable treaty or convention are inadequate or inequitable and additional discovery is not prohibited by the treaty or convention, a party may employ the discovery methods described in these rules to supplement the discovery method provided by such treaty or convention.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that the contents of a deposition not be disclosed or be disclosed only in a designated way;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement response with respect to any question directly addressed to:

(A) the identity and location of persons having knowledge of discoverable matters; and

(B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert witness is expected to testify, and the substance of the expert witness's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:

(A) the party knows that the response was incorrect when made; or

(B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.

(f) Discovery Conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.

Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party.

Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by rule 16.

(g) Signing of Discovery Requests, Responses, and Objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the attorney or party has read the request, response, or objection, and that to the best of their knowledge, information, and belief formed after a reasonable inquiry it is:

(1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) Use of Discovery Materials. A party filing discovery materials on order of the court or for use in a proceeding or trial shall file only those portions upon which the party relies and may file a copy in lieu of the original.

**(i) Motions; Conference of Counsel Required. The court will not entertain any motion or objecti on with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37 (b). Any motion seeking an order to compel discovery or obtain protection shall include counsels' certification that the conference requirements of this rule have been met.**

(j) Access to Discovery Materials Under RCW 4.24.

(1) In General. For purposes of this rule, "discovery materials" means depositions, answers to interrogatories, documents or electronic data produced and physically exchanged in response to requests for production, and admissions pursuant to rules 26-37.

(2) Motion. The motion for access to discovery materials under the provisions of RCW 4.24 shall be filed in the court that heard the action in which the discovery took place. The person seeking access shall serve a copy of the motion on every party to the action, and on nonparties if ordered by the court.

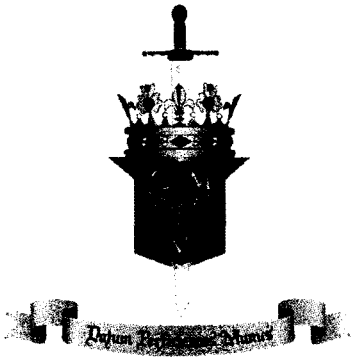
(3) Decision. The provisions of RCW 4.24 shall determine whether the motion for access to discovery materials should be granted.

[Originally effective July 1, 1967; amended effective July 1, 1972; September 1, 1985; September 1, 1989; December 28, 1990; September 1, 1992; September 17, 1993; September 1, 1995; January 12, 2010; April 28, 2015.]

In the Superior Court of the State of Washington in and for King County
*Suraj Pinto v Gregory Vaughn and "Jane Doe" Vaughn; Paola Leone and "Jane Doe" Leone; Leone & Vaughn, DDS, PS, DBA Leone & Vaughn Orthodontics; L. Douglas Trimble and "Jane Doe" Trimble.*
King County Case No. 14-2-23326-4
Court of Appeals No. 73650-7-I

# APPENDIX D

CR 56(c)



CHUNG, MALHAS, & MANTEL, PLLC.

## CR 56
## SUMMARY JUDGMENT

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

(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in such party's favor as to all or any part thereof.

**(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.**

(d) Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

[Originally effective July 1, 1967; amended effective September 1, 1978; September 1, 1985; September 1, 1988; September 1, 1990; September 1, 1993; April 28, 2015.]

In the Superior Court of the State of Washington in and for King County
*Suraj Pinto v Gregory Vaughn and "Jane Doe" Vaughn; Paola Leone and "Jane Doe" Leone; Leone & Vaughn, DDS, PS, DBA Leone & Vaughn Orthodontics; L. Douglas Trimble and "Jane Doe" Trimble.*
King County Case No. 14-2-23326-4
Court of Appeals No. 73650-7-I

# APPENDIX E

CR 26

CHUNG, MALHAS, & MANTEL, PLLC.

## CR 26
## GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that:

(A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

(2) Insurance Agreements. A party may obtain discovery and production of: (i) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and (ii) any documents affecting coverage (such as denying coverage, extending coverage, or reserving rights) from or on behalf of such person to the covered person or the covered person's representative. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.

(3) Structured Settlements and Awards. In a case where a settlement or final award provides for all or part of the recovery to be paid in the future, a party entitled to such payments may obtain disclosure of the actual cost to the defendant of making such payments. This disclosure may be obtained during settlement negotiations upon written demand by a party entitled to such payments. If disclosure of cost is demanded, the defendant may withdraw the offer of a structured settlement at any time before the offer is accepted.

(4) Trial Preparation: Materials. Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including a party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this section, a statement previously made is:

(A) a written statement signed or otherwise adopted or approved by the person making it; or

(B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(5) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. (ii) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.

(B) A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(5)(A)(ii) and (b)(5)(B) of this rule; and (ii) with respect to discovery obtained under subsection (b)(5)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subsection (b)(5)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(6) Claims of Privilege or Protection as Trial-Preparation Materials for Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified. Either party may promptly present the information in camera to the court for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(7) Discovery From Treating Health Care Providers. The party seeking discovery from a treating health care provider shall pay a reasonable fee for the reasonable time spent in responding to the discovery. If no agreement for the amount of the fee is reached in advance, absent an order to the contrary under section (c), the discovery shall occur and the health care provider or any party may later seek an order setting the amount of the fee to be paid by the party who sought the discovery. This subsection shall not apply to the provision of records under RCW 70.02 or any similar statute, nor to discovery authorized under any rules for criminal matters.

(8) Treaties or Conventions. If the methods of discovery provided by applicable treaty or convention are inadequate or inequitable and additional discovery is not prohibited by the treaty or convention, a party may employ the discovery methods described in these rules to supplement the discovery method provided by such treaty or convention.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that the contents of a deposition not be disclosed or be disclosed only in a designated way;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement response with respect to any question directly addressed to:

(A) the identity and location of persons having knowledge of discoverable matters; and

(B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert witness is expected to testify, and the substance of the expert witness's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:

(A) the party knows that the response was incorrect when made; or

(B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.

(f) Discovery Conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.

Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party.

Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by rule 16.

(g) Signing of Discovery Requests, Responses, and Objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the attorney or party has read the request, response, or objection, and that to the best of their knowledge, information, and belief formed after a reasonable inquiry it is:

(1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) Use of Discovery Materials. A party filing discovery materials on order of the court or for use in a proceeding or trial shall file only those portions upon which the party relies and may file a copy in lieu of the original.

(i) Motions; Conference of Counsel Required. The court will not entertain any motion or objecti on with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37 (b). Any motion seeking an order to compel discovery or obtain protection shall include counsels' certification that the conference requirements of this rule have been met.

(j) Access to Discovery Materials Under RCW 4.24.

(1) In General. For purposes of this rule, "discovery materials" means depositions, answers to interrogatories, documents or electronic data produced and physically exchanged in response to requests for production, and admissions pursuant to rules 26-37.

(2) Motion. The motion for access to discovery materials under the provisions of RCW 4.24 shall be filed in the court that heard the action in which the discovery took place. The person seeking access shall serve a copy of the motion on every party to the action, and on nonparties if ordered by the court.

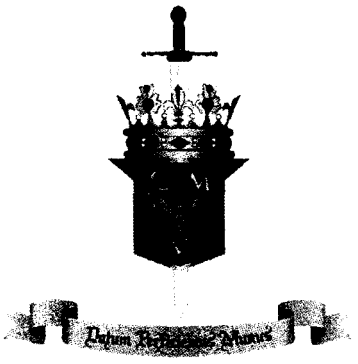
(3) Decision. The provisions of RCW 4.24 shall determine whether the motion for access to discovery materials should be granted.

[Originally effective July 1, 1967; amended effective July 1, 1972; September 1, 1985; September 1, 1989; December 28, 1990; September 1, 1992; September 17, 1993; September 1, 1995; January 12, 2010; April 28, 2015.]

In the Superior Court of the State of Washington in and for King County
*Suraj Pinto v Gregory Vaughn and "Jane Doe" Vaughn; Paola Leone and "Jane Doe" Leone; Leone & Vaughn, DDS, PS, DBA Leone & Vaughn Orthodontics; L. Douglas Trimble and "Jane Doe" Trimble.*
King County Case No. 14-2-23326-4
Court of Appeals No. 73650-7-I

# APPENDIX F

CR 37(b)



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CR 37
FAILURE TO MAKE DISCOVERY: SANCTIONS

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, and upon a showing of compliance with rule 26(i), may apply to the court in the county where the deposition was taken, or in the county where the action is pending, for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or on matters relating to a deposition, to the court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the county where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under rules 30 or 31, or a corporation or other entity fails to make a designation under rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under rule 33, or if a party, in response to a request for inspection submitted under rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, any party may move for an order compelling an answer or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before the proponent applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to rule 26(c).

(3) Evasive or Incomplete Answer. For purposes of this section an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

**(b) Failure To Comply With Order.**

**(1) Sanctions by Court in County Where Deposition Is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.**

**(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or rule 35, or if a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:**

**(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;**

**(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;**

**(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;**

**(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination;**

**(E) Where a party has failed to comply with an order under rule 35(a) requiring the party to produce another for examination such orders as are listed in sections (A), (B), and (C) of this subsection, unless the party failing to comply shows that the party is unable to produce such person for examination.**

**In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or her or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that** the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure To Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that:

(1) the request was held objectionable pursuant to rule 36(a); or

(2) the admission sought was of no substantial importance; or

(3) the party failing to admit had reasonable ground to believe the fact was not true or the document was not genuine; or

(4) there was other good reason for the failure to admit.

(d) Failure of Party To Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Production or Inspection. If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails;

(1) to appear before the officer who is to take his or her deposition, after being served with a proper notice; or

(2) to serve answers or objections to interrogatories submitted under rule 33, after proper service of the interrogatories; or

(3) to serve a written response to a request for production of documents or inspection submitted under rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 26(c). For purposes of this section, an evasive or misleading answer is to be treated as a failure to answer.

(e) Failure To Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by rule 26(f), the court may, after opportunity for hearing, require such party or such party's attorn ey to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

[Adopted effective July 1, 1967; amended effective July 1, 1972; September 1, 1985; September 1, 1992; September 1, 1993; April 28, 2015.]