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No. 82780-4-I

COURT OF APPEALS DIVISION I

SHEILA PATAppellate Ct. Div I No. 82780-4-I

SUPREME COURT OF THE STATE OF WASHINGTON

SHEILA PATRICE ANDERSON,
Petitioner/Appellant(s)

v.

SWEDISH HOSPITAL,
a health care corporation,
And
JENS CHAPMAN,
Respondent/Appellee(s).

PETITION FOR REVIEW

APPEAL FROM THE SUPERIOR COURT FOR
KING COUNTY

Hon. Patrick Oishi
Cause No. 20-2-16208-6 SEA

C. Olivia Irwin, J.D. (WSBA #43924)
Attorney/Power of Attorney for
Appellant(s) Sheila Anderson

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N.A.

A. IDENTITY OF PETITIONER
(RAP 13.4(c)(3))**:**

SHEILA PATRICE ANDERSON, (Plaintiff/Appellant below) asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION
(RAP 13.4(c)(4), RAP 13.4(c)(9)**:**

A copy of the decision originally entered on APRIL 25, 2022 is attached as APPENDICE A.

A copy of the order denying petitioner's motion for reconsideration denied on JUNE 22, 2022 is attached as APPENDICE B.

C. ISSUES PRESENTED FOR REVIEW
(RAP 13.4(c)(5)

1. Does the Right to Be Heard include the Right to Be Heard?

2. Did the Trial Court err/abuse discretion in prematurely granting Swedish's *Motion to Disqualify* Ms. Anderson's attorney under RPC 3.7(a) prior to trial—when (a) that

attorney was not a necessary witness; (b) the movants were clearly invoking the rule as a litigation tactic under RPC 3.7(a)(4)[1]; and (c) Ms. Anderson's circumstances clearly came under the hardship exception under RPC 3.7(a)(3)?

3. Did the Trial Court overturn This Court's decision in *Putman v. Wenatchee Valley Medical Center* when it prematurely dismissed her case for lack of an expert affidavit under (former) RCW 7.70.040 and RCW 7.70.050(3) (failure to secure informed consent) prior to trial, and prior to the experation of deadline for providing possible witnesses; where CR 56(f) specifically provides for continuance of summary judgment motions to obtain necessary affidavits?

4: Should provisions of former RCW 7.70.040[2] and RCW 7.70.050(3) making expert witnesses method of proof in medical malpractice cases be stricken for the same reasons This Court struck down the *Certificate of Merit* pre-filing requirement in RCW 7.70.150 in *Putman*?

5. Should provisions of RCW 7.70.040 and/or RCW 7.70.050(3) making expert witnesses the sole method and manner of proof be stricken as law(s) granting a "citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms do not equally belong to all citizens, or corporations" as prohibited under WA Const., Article 1 § 12?[3]

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[1]See *In re PPA Products Liability Litigation,* 2006 WL 2473484 (WD. Wash. Aug. 28, 2006 (unpublished)

[2] In 2020 the Washington State Legislature amended this statute to: RCW 7.70.040 "Necessary elements of proof that injury resulted from failure to follow acceptd standard of care—COVID-19 pandemic" altering the elements of proof, and providing additional immunity from suit. See RCW 7.70.040(2)(b)(ii)(B)

[3]Argued, but not addressed in the *Putman*.

D. STATEMENT OF CASE
(RAP 13.4(c)(6)**)**

Petitioner Sheila P. Anderson was scheduled for a three-part back reconstruction surgery at Swedish Medical Center at Cherry Street, the second and third stages of which were to be conducted and overseen by Jens Chapman, a neurosurgeon, as well as his team and other staff at Swedish. (Hereinafter, "Swedish")

After the second surgery she had been so distressed by continued tracheal intubation, that she chipped a tooth on the apparatus it trying to break free of it.

Swedish botched the third stage, leaving Ms. Anderson with long-term injuries. At the commencement of the third surgery family members were assured of a call every 2 hours regarding the status. However, communication stopped after the first call, and Ms. Anderson disappeared from the surgery tracking board(s). When family members met with Dr. Chapman during the early morning hours after she was

returned to a room, he informed them that it things did not go well. Dr. Chapman had "lost signal" from her legs, and decided to let Ms. Andersons back "relax back into the s-curve she had been admitted to repair. Records reflect that Ms. Anderson was also subjected to additional transportation and screenings post-surgery without consulting either of Ms. Anderson's Power of Attorney, Alternate Power of Attorney, or any other member of her family who was present during the (purported) emergency.

Ms. Anderson was paralyzed in both legs and in extreme pain. In her declaration she recounts being dropped from the operating table and she provided a photo of the injuries she sustained consistent with this allegation. Swedish additionally had camoflaged this injury by covered her lower legs with warming units placed on her legs. Ms. Anderson's distress would be exacerbated by excessive intubation, sleep deprivation and medication, leading to secondary issues such as stress/anxiety, extreme pain, diarhea, and blood clotting.

Days after the third surgery Dr. Chapman advised an additional surgery to “remove a screw that may be laying on a nerve.” Ultimately the forth surgery appeared to have no effect. Ms. Anderson provided x-ray images of what appear to be free-floating nuts and bolts in and around her spine. It would take Ms. Anderson a year of rehabilitation and physical therapy and other care to learn to walk again, and only with the help of a cane. She continues to need physical therapy and pain therapy, and likely will for the rest of her life, representing ongoing physical, emotional and financial injury as a result of Swedish's negligence.

After Ms. Anderson, now disabled and on a fixed income, was turned away by several attorneys/firms for representation on contingency, the Plaintiff’s daughter –an attorney and also a Power of Attorney-- filed the case on her behalf from across the state of Washington. Ms. Anderson's complaint for damages was filed 11/3/2020.

Swedish served a voluminous set of requests for discovery and interrogatories, and as soon as she replied, they moved to disqualify the Plaintiff's attorney under RPC 3.7 (Attorney as Necessary Witness) and RPC 1.7 (Conflict of Interest) implying contributory negligence on the part of Ms. Anderson's daughter for giving her mother a bite of food during an arbitrary 24-hr fasting period before an IVC filter placement procedure (NOT associated with Ms. Anderson's fourth back surgery, as Swedish continues to assert). The Trial Court abused discretion in granting the order, wtihout oral argument, and over Ms. Anderson's objections that her situation fit the hardship exemption under RPC 3.7 and she had affirmatively waived any conflict under RPC 1.7.

Swedish moved for summary judgment as soon as she was lawyerless, and before they would have to answer Ms. Anderson's request for discovery, which had been filed and served, along with a motion to continue, a motion for mandatory mediation, and a motion for intervention—all of

which the Trial Court unjustly discarded without a hearing, and over objection to same—and without specific written findings as to why.

At summary judgment hearing, the Trial Court disparaged this attorney to her own mother; remarked without basis as to whether pleadings were admissible and threatened the Plaintiff with sanctions under CR 11/CR 56 (e) before she had an opportunity to say a single word on the merits. Once she did speak, the Trial Court making no effort to respond to or address the issues she raised or the pleas that she made for justice before issuing its ruling. (VRP 20 line 17-20, VRP 21 Lines17 – VRP 22 lines 1-17) Summary Judgment was awarded solely on the fact that, although there were valid declarations and other evidence before the court raising genuine issues of fact under the relevant statutes, Ms. Anderson had not secured an expert witness as of the date of summary judgment. (VRP5 lines 19-26, VRP 7 lines 5-22)

Appellants request that This Court clarify its stance under Putman, sever RCW 7.70.040(3) as unconstitutional, and reversed/remanded for further proceedings.

E. ARGUMENT
(RAP 13.4(c)(7))

RAP 13.4(B) *Considerations Governing Acceptance of Review* states:

> " A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. "

Ms. Anderson's *Petition* is based on the fact that dismissal was premature and an abuse of discretion under relevant rule and caselaw, and is in conflict with a

decision of the Supreme Court RAP 13.4(b)(1); because RCW 7.70.050(3) is an unconstitutional violation of the Separation of Powers Doctrine, an illegitimate grant of immunity from suit(RAP 13.4(b)(3)); and a denial of access justice to injured medical malpractice plaintiffs; which is an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

1. The decision of the Court of Appeals is in conflict with a decision of the Supreme Court. (RAP 13.4(b)(1))

RCW 7.70.150 - Actions alleging violation of accepted standard of care—Certificate of merit required. States:

> (1) In an action against an individual health care provider under this chapter for personal injury or wrongful death in which the injury is alleged to have been caused by an act or omission that violates the accepted standard of care, the plaintiff must file a certificate of merit at the time of commencing the action. If the action is commenced within forty-five days prior to the expiration of the applicable statute of limitations, the plaintiff must file the certificate of merit no later than forty-five days after commencing the action.

(2) The certificate of merit must be executed by a health care provider who meets the qualifications of an expert in the action. If there is more than one defendant in the action, the person commencing the action must file a certificate of merit for each defendant.

(3) The certificate of merit must contain a statement that the person executing the certificate of merit believes, based on the information known at the time of executing the certificate of merit, that there is a reasonable probability that the defendant's conduct did not follow the accepted standard of care required to be exercised by the defendant.

(4) Upon motion of the plaintiff, the court may grant an additional period of time to file the certificate of merit, not to exceed ninety days, if the court finds there is good cause for the extension.

(5)(a) Failure to file a certificate of merit that complies with the requirements of this section is grounds for dismissal of the case.
(b) If a case is dismissed for failure to file a certificate of merit that complies with the requirements of this section, the filing of the claim against the health care provider shall not be used against the health care provider in professional liability insurance rate setting, personal credit history, or professional licensing and credentialing.

This Court struck down this provision in *Putman v. Wenatchee Valley Medical Center,* 216 P.3d 374, 166 Wn.2d 974 (2009) holding that RCW 7.70.150 unduly burdens the right of medical malpractice plaintiffs to conduct discovery and, therefore, violates their right to access courts; and changes the procedures for filing pleadings in a lawsuit, thereby jeopardizing the court's power to set court procedures in violation of the separation of powers doctrine, if not other constitutional prohibitions against special privileges and immunities—something argued but not reached by This Court in *Putman* had also argued (and we argue here), but the courts opinion did not reach.[4] P*utman v.*

[4]"Because we find that the certificate of merit requirement unduly burdens the right of access to courts and violates the separation of powers, we do not reach Putman's arguments that the certificate of merit requirement (1) violates the privileges and immunities clause of the Washington State Constitution and the equal protection clause of the United States Constitution, (2) violates the prohibition on special laws in the Washington State Constitution, and (3) violates the due process clause of the United States Constitution."

Putman v. Wenatchee Valley Medical Center, 216 P.3d 374, 380 (2009), Footnote 1

Wenatchee Valley Medical Center, 216 P.3d 374, 379-80, 166 Wn.2d 974, 979-80 (2009)[i5]

2. The decision of the Court of Appeals involves more than one significant question of law under the Constitution of the State of Washington or of the United States. (RAP 13.4(b)(3))

WA CONST. Article I, §§ 8 and 12. WA State Constitution, Article I, Section 12 States:

> "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

WA Const., Article 1, Section 8: SECTION 8 IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED States:

> "No law granting irrevocably *any* privilege, franchise or immunity, shall be passed by the legislature." (Emphasis Added)

[5]See also *McDevitt v. Harborview Med. Ctr.* (Wash. 2012)"

Similar to RCW RCW 7.70.150, RCW 7.70.050 - Failure to secure informed consent—Necessary elements of proof—Emergency situations. states:

> "(1) The following shall be necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his or her representatives against a health care provider:
>
> (a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;
>
> (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;
>
> (c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;
>
> (d) That the treatment in question proximately caused injury to the patient.
>
> (2) Under the provisions of this section a fact is defined as or considered to be a material fact, 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.
>
> (3) Material facts under the provisions of this section <u>which must be established by expert testimony</u> shall be either:
>
> (a) The nature and character of the treatment proposed and administered;

(b) The anticipated results of the treatment proposed and administered;
(c) The recognized possible alternative forms of treatment; or
(d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.

(4) If a recognized health care emergency exists and the patient is not legally competent to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, his or her consent to required treatment will be implied for reversing this part of his decision.

(emphasis added)

Although the portion of this statute regarding informed consent does require proof by expert witness, it does not require that the expert witness be identified prior to the discovery/witness list deadline set by scheduling order. So too CR 56 requires that the Court construe all facts in the Plaintiff's favor as the non-moving party. Here Ms. Anderson had provided declarations establishing that Swedish failed to meet any standard in paralyzing her; and that no consent was given

or sought when an emergency arose. On motion for Summary Judgment, Swedish retained the burden of proving these were not genuine factual issues for trial, and they did not meet that burden.

3. This Petition involves an issue of substantial public interest that should be determined by the Supreme Court. (RAP 13.4(b)(4))

RCW 5.64.010 *Findings and Intent* (2006) states, in pertinent part:

> "It is the intent of the legislature to prioritize patient safety and the prevention of medical errors above all other considerations as legal changes are made to address the problem of high malpractice insurance premiums. Thousands of patients are injured each year as a result of medical errors, many of which can be avoided by supporting health care providers, facilities, and carriers in their efforts to reduce the incidence of those mistakes. It is also the legislature's intent to provide incentives to settle cases before resorting to court, and to provide the option of a more fair, efficient, and streamlined alternative to trials for those for whom settlement negotiations do not work. Finally, it is the intent of the legislature to provide the insurance commissioner with the tools and information necessary to regulate medical malpractice

> insurance rates and policies so that they are fair to both the insurers and the insured."

F. CONCLUSION

Conclusion. A short conclusion stating the precise relief sought. RAP 13.4(c)(8)

RCW 7.70.050(3) must be severed from the remainder of the statute on the same basis as it has in *Putman.*

Alternatively, For *Putman* and its articulated principles to still have effect, Court must at the very least clarify *Putman* by articulating a clear deadline for obtaining an expert witness for the purposes of summary judgment in a malpractice case and remand this matter for further proceedings on that basis.

Respectfully submitted this 22nd Day of July, 2022 with an automated word count of 2911[6] by

C. Olivia Irwin (WSBA No. 43924)

[6]exclusive of words appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images. RAP 18.17(b);(c)(16), RAP 17.4(c)(17)

APPENDIX

RAP 13.4(c)(9)

APPENDICE A:

UNPUBLISHED OPINION 4/25/2022.

FILED
4/25/2022
Court of Appeals
Division I
State of Washington

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

SHEILA PATRICE ANDERSON, Appellant, v. SWEDISH HOSPITAL, a Washington state health care corporation, and JENS CHAPMAN, Respondents.	)	No. 82780-4-I UNPUBLISHED OPINION

VERELLEN, J. — Sheila Anderson challenges the trial court's grant of Swedish Hospital's motion to disqualify her counsel under RPC 3.7(a). RPC 3.7(a) provides that a lawyer cannot represent a client where the lawyer is a "necessary witness" in the client's case. Because Anderson's counsel was the only witness to some of the events necessary to establish her medical malpractice and lack of informed consent claims, the court did not abuse its discretion in disqualifying her counsel.

Anderson also challenges the court's denial of her motion to continue the summary judgment hearing. But because Anderson provided no meaningful analysis of the CR 56(f) factors, the court did not abuse its discretion in denying Anderson's motion.

Finally, Anderson challenges the court's grant of summary judgment in favor of Swedish. But because Anderson failed to provide an expert witness in

support of her medical malpractice and lack of informed consent claims, summary judgment was proper.

Therefore, we affirm.

FACTS

Between October 14 and November 10, 2016, Sheila Anderson had four surgeries at Swedish Hospital "to correct severe scoliosis and associated complications."[1] Dr. Jens Chapman performed the second, third, and fourth stages of surgery.[2]

In November 2020, Anderson filed a complaint against Swedish Hospital and Dr. Chapman alleging medical malpractice and lack of informed consent. Anderson asserted that Dr. Chapman "failed to perform/complete the surgery as agreed/explained to [her], nor exercise the appropriate level of care resulting in irreversible damage to [her] spinal cord, and cause other undue harm."[3]

Anderson's daughter, Christal Irwin, an attorney admitted to practice in Washington state, was Anderson's attorney-in-fact under a power of attorney, as well as Anderson's counsel. During Anderson's hospital stay, Irwin witnessed Dr. Chapman chip Anderson's tooth during intubation. Irwin admitted to feeding Anderson a snack during an NPO[4] period, resulting in a delay of a time sensitive

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[1] Clerk's Papers (CP) at 2.

[2] CP at 84. Anderson's claims of medical malpractice and lack of informed consent only relate to the second, third, and fourth surgeries.

[3] CP at 2.

[4] NPO is "medical shorthand for a period of time in which a patient may not eat or drink anything." Resp't's Br. at 8.

surgery, and Irwin alleged that informed consent "was never sought from me as the patient's power of attorney."[5]

That December, in its discovery requests, Swedish asked Anderson to "identify all experts upon whom you rely and/or intend to call as witnesses at trial."[6] Anderson responded that the information was "currently" unavailable.[7]

A few months later, Swedish filed a motion to disqualify Irwin as counsel. The trial court granted Swedish Hospital's motion. Irwin withdrew as counsel but filed a notice of appearance as an "interested party."[8]

In April, Swedish moved for summary judgment on Anderson's claims. Anderson, together with Irwin as an "interested party," filed a motion to continue the summary judgment hearing. The trial court denied the motion. After the hearing, the trial court granted Swedish Hospital's summary judgment motion.

Anderson appeals.

ANALYSIS

I. Motion to Disqualify Counsel

Anderson argues that the trial court erred in granting Swedish Hospital's motion to disqualify her counsel under RPC 3.7(a). We review a trial court's decision to disqualify an attorney for an abuse of discretion.[9] A trial court abuses

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[5] CP at 89.

[6] CP at 73.

[7] Id.

[8] CP at 237.

[9] State v. Schmitt, 124 Wn. App. 662, 666, 102 P.3d 856 (2004).

its discretion when its decision is based on untenable grounds or untenable reasons.[10]

RPC 3.7(a) provides "[a] lawyer shall not act as [an] advocate at a trial in which the lawyer is likely to be a necessary witness." A lawyer is likely to be a necessary witness if "he or she will present testimony related to substantive contested matters."[11]

Here, Irwin's testimony is necessary to support Anderson's medical malpractice and lack of informed consent claims. First, on the issue of medical malpractice, Irwin was present when Dr. Chapman performed the intubation procedure on Anderson and chipped her tooth. Anderson did not know Dr. Chapman chipped her tooth until Irwin "pointed it out to [her]."[12] And Irwin individually followed-up with Dr. Chapman after the incident. Further, Irwin fed Anderson during an NPO period despite "an NPO sign on the door and being told not to do so by the nursing staff."[13] As a result, the surgery was delayed.

Second, on the issue of informed consent, Irwin had a "singular role" as Anderson's attorney-in-fact, and she was the only person who witnessed some of Anderson's discussions with Dr. Chapman. For example, when Dr. Chapman proposed the fourth surgery, Irwin opposed the operation, but Anderson consented. Irwin stated, "We had words over the [fourth] surgery, because I

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[10] Id.

[11] State v. Nation, 110 Wn. App. 651, 659, 41 P.3d 1204 (2002).

[12] CP at 282.

[13] CP at 95.

opposed it and thought mom was not lucid enough to make a competent decision. . . . I was present when she verbally consented to the surgery."[14] Because Irwin is the only person who can testify to many of these events and her testimony regarding her role in the violation of the NPO restriction may be prejudicial to Anderson under a non-party at fault theory, she is a "necessary witness" and cannot also represent Anderson under RPC 3.7(a).

Anderson contends that even if Irwin's testimony was necessary to establish her claims, Irwin can still represent her under RPC 3.7(a)(3), the substantial hardship exception. The exception provides that a lawyer may still represent a client if "disqualification of the lawyer would work substantial hardship on the client."[15] In her reply to Swedish Hospital's motion to disqualify Irwin, Anderson stated, "If my daughter can't represent me, I can't afford another [lawyer]."[16] But Anderson seems to suggest she was primarily disadvantaged because her daughter was not available to assist her with a motion to continue the summary judgment and allow more time to obtain the necessary expert witness. To the contrary, after the court disqualified Irwin, Anderson submitted a motion to continue the summary judgment hearing with Irwin acting as an "interested party." And Irwin signed Anderson's motion to continue as her counsel.[17] Anderson cannot establish that the court's disqualification of Irwin resulted in a substantial

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[14] CP at 86.

[15] RPC 3.7(a)(3).

[16] CP at 99.

[17] CP at 233-37.

hardship when Irwin continued to represent her even after the trial court's order. Anderson does not establish that the substantial hardship exception applies here.[18]

In a related argument, Anderson contends that the trial court violated her right to due process in not holding oral argument on Swedish Hospital's motion to disqualify Irwin. But oral argument on a motion is not a due process right.[19] And KCLR 7(b)(3) permits a court to decide nondispositive motions, such as a motion to disqualify, without oral argument. Anderson's argument is not compelling.[20]

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[18] Anderson also contends that the trial court incorrectly disqualified Irwin under RPC 1.7. But because the court did not abuse its discretion in disqualifying Irwin under RPC 3.7, we need not address her alternative argument. Glasgow v. Georgia-Pac. Corp., 103 Wn.2d 401, 407, 693 P.2d 708 (1985).

[19] Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 697, 41 P.3d 1175 (2002) ("'Due process does not require any particular form or procedure. . . . [I]t requires only that a party receive proper notice of proceedings and an opportunity to present [its] position before a competent tribunal.'") (alterations in original) (quoting Hanson v. Shim, 87 Wn. App. 538, 551, 943 P.2d 322 (1997)).

[20] Additionally, Anderson argues that the trial court erred in denying her motion for mandatory mediation under RCW 7.70.100. RCW 7.70.100 provides, "Before a superior court trial, all causes of action, whether based in tort, contract, or otherwise, for damages arising from injury occurring as a result of health care provided after July 1, 1993, shall be subject to mandatory mediation prior to trial." But CR 53.4(d) provides, "Upon petition of any party that mediation is not appropriate, the court shall order or the mediator may determine that the claim is not appropriate for mediation." Here, Swedish filed a CR 53.4(d) motion asserting that mediation was not appropriate because Anderson failed to provide expert testimony supporting the essential elements of her claims. CP at 247-55. The trial court did not err in granting Swedish Hospital's motion.

II. Motion to Continue CR 56(f)

Anderson contends that the trial court erred in denying her motion to continue the summary judgment hearing. We review a trial court's denial of a CR 56(f) motion for an abuse of discretion.[21]

The trial court can deny a motion for continuance under CR 56(f) "where: (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."[22]

Here, Anderson's motion to continue argued that "discovery [was] not complete" because Swedish had not submitted "any admissible evidence that did not originate" with Anderson, Swedish failed to submit any evidence to "controvert" Anderson's claim for lack of informed consent, and Swedish failed to provide evidence establishing an "alternative explanation" for her injuries.[23] But at the summary judgment hearing, the court stated, "I don't believe that the responsive pleadings that [Anderson] has put forth, actually even comply with any of the Court Rules, let alone CR 56."[24] And, both in the trial court and in her opening brief on

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[21] Briggs v. Nova Servs., 135 Wn. App. 955, 961, 147 P.3d 616 (2006), aff'd, 166 Wn.2d 794, 213 P.3d 910 (2009).

[22] Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

[23] CP at 241-42.

[24] Report of Proceedings (RP) (May 28, 2021) at 11.

appeal, Anderson provided no meaningful analysis of the CR 56(f) factors.[25] She offers no specific explanation for her failure to provide an expert witness and no prospects that such an expert would soon be acquired. The trial court did not abuse its discretion in denying Anderson's CR 56(f) motion.

III. Summary Judgment

Anderson contends that the trial court erred in granting summary judgment in favor of Swedish Hospital on her medical malpractice and lack of informed consent claims. We review an order granting summary judgment de novo.[26] Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[27] A genuine issue of material fact exists if the evidence is sufficient for a reasonable person to return a verdict for the nonmoving party.[28]

First, in a medical malpractice claim based on medical negligence, a "defendant moving for summary judgment can meet its initial burden by showing that the plaintiff lacks competent expert testimony."[29] "The burden then shifts to the plaintiff to produce an affidavit from a qualified expert witness that alleges specific facts establishing [the] cause of action."[30] The plaintiff "must show that

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[25] Bright v. Frank Russell Invs., 191 Wn. App. 73, 86, 361 P.3d 245 (2015).

[26] Berger v. Sonneland, 144 Wn.2d 91, 102, 26 P.3d 257 (2001).

[27] Id.

[28] Reyes v. Yakima Health Dist., 191 Wn.2d 79, 86, 419 P.3d 819 (2018).

[29] Guile v. Ballard Cmty. Hosp., 70 Wn. App. 18, 25, 851 P.2d 689 (1993).

[30] Id.

'[t]he health care provider failed to exercise the degree of care, skill, and learning expected of a reasonably prudent health care provider . . . in the same or similar circumstances.'"[31]

Here, in response to Swedish Hospital's interrogatories, Anderson was asked to "identify all experts upon whom you rely and/or intend to call as witnesses at trial on any issue in this case."[32] Anderson responded, "[i]nformation requested is not currently available. Will be provided once an expert is identified and completed review."[33] A few months later, Swedish filed for summary judgment arguing that "Anderson has failed to identify an expert to testify that a health care provider failed to exercise the requisite degree of 'care, skill, and learning' reasonably expected of him or her in the [s]tate of Washington at the time of the care in question."[34] And at the summary judgment hearing, Anderson still did not provide an expert. Anderson failed to meet her burden on summary judgment.

Anderson argues that the trial court erred because our Supreme Court in Putman v. Wenatchee Valley Medical Center[35] held that the certificate of merit requirement was unconstitutional. Former RCW 7.70.150 (2006) required plaintiffs in medical malpractice actions to file a certificate of merit with their pleadings that

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[31] Reyes, 191 Wn.2d at 86 (first alteration in original) (quoting RCW 7.70.040(1)).

[32] CP at 73.

[33] Id.

[34] CP at 142.

[35] 166 Wn.2d 974, 216 P.3d 374 (2009).

contained a statement from an expert supporting the plaintiff's claim that there was a reasonable probability that the defendant's conduct violated the standard of care.[36] But the certificate of merit requirement in former RCW 7.70.150 is distinct from the requirement that on summary judgment in a medical malpractice case the nonmoving party must produce an affidavit from a medical expert alleging that the health care provider violated the standard of care.[37] Further, neither Swedish Hospital nor the trial court relied on the certificate of merit procedural requirement.[38] Anderson's argument is misguided.

Second, to establish a lack of informed consent the plaintiff must show material facts by expert testimony. Specifically, RCW 7.70.050 provides:

> (3) Material facts under the provisions of this section which must be established by expert testimony shall be either:
>
> (a) The nature and character of the treatment proposed and administered;
>
> (b) The anticipated results of the treatment proposed and administered;
>
> (c) The recognized possible alternative forms of treatment; or
>
> (d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.

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[36] Id. at 982-83.

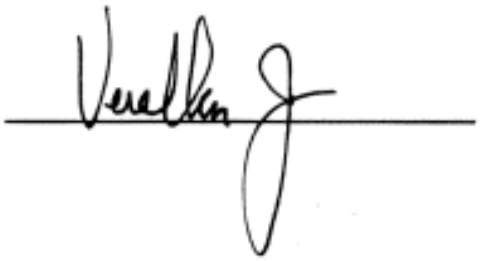
[37] Compare former RCW 7.70.150 with Guile, 70 Wn. App. at 25.

[38] See CP at 141-56, 361-65; RP (May 28, 2021) at 5-15, 21-23.

As discussed, Anderson did not provide the court with an expert. And without an expert, Anderson cannot establish material facts to support her lack of informed consent claim. Anderson's claim necessarily fails.

Because Anderson failed to present the court with an expert establishing the existence of genuine issues of material fact on her medical malpractice and lack of informed consent claims, summary judgment in favor of Swedish Hospital was proper.

Therefore, we affirm.



WE CONCUR:

APPENDICE B:

ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO PUBLISH and MOTION TO EXTEND TIME, 6/22/2022.

FILED
6/22/2022
Court of Appeals
Division I
State of Washington

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

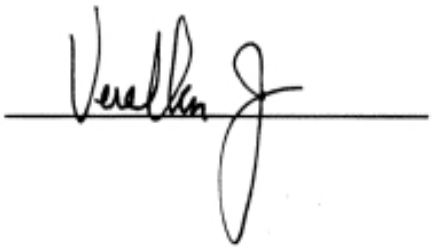
SHEILA PATRICE ANDERSON, Appellant, v. SWEDISH HOSPITAL, a Washington state health care corporation, and JENS CHAPMAN, Respondents.	)	No. 82780-4-I ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO PUBLISH AND GRANTING MOTION TO EXTEND TIME

Appellant has filed a motion for reconsideration and a motion to publish the court's April 25, 2022 opinion. Pursuant to RAP 12.4(d) and RAP 12.3(e), the court requested an answer to both from the respondents, which was filed June 3, 2022. After consideration of the motions and response, the panel has determined the motions should be denied. It is therefore

ORDERED that the appellant's motion for reconsideration and motion to publish are denied. It is further

ORDERED that the appellant's motion to extend time to file her motion for reconsideration and motion to publish is granted.

FOR THE PANEL:



IRWIN LAW FIRM, INC.

July 22, 2022 - 5:56 PM

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Appellate Court Case Number:	82780-4
Appellate Court Case Title:	Sheila Anderson, Appellant v. Swedish Medical Center et ano, Respondents

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