69643-2

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NO. 69643-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PATRICIA A. GRANT,

Appellant,

v.

CLAUDIO GABRIEL ALPEROVICH, M.D., et., al.

Respondents.

BRIEF OF RESPONDENTS PACIFIC MEDICAL CENTERS, INC., U.S. FAMILY HEALTH PLAN AT PACIFIC MEDICAL CENTERS, INC., AND DRS. KRISHNAMURTHY, LUDWIG AND OSWALD

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I. INTRODUCTION AND RELIEF REQUESTED

Appellant Patricia Grant filed a medical negligence claim against Respondents Pacific Medical Centers, Inc., U.S. Family Health Plan at Pacific Medical Centers, Inc., and Drs. Krishnamurthy, Ludwig and Oswald (herein collectively "Pacific Medical Centers"). In response to a motion for summary judgment, Appellant failed to come forward with evidence to demonstrate a genuine issue of material fact sufficient to justify a trial on the allegations in her Complaint. CP 3-60. Specifically, Appellant failed to present competent and admissible expert medical evidence to establish the alleged standard of care in Washington as to Pacific Medical Centers. Further, Appellant failed to present admissible expert evidence as to the alleged breach of this standard and the causal relationship between the alleged violation and her claim of damage. After providing Appellant opportunity to respond, and considering her proffered evidence, the Honorable Judge Jay White of King County Superior Court correctly dismissed Appellant's complaint as to Pacific Medical Centers as a matter of law.

Respondents Pacific Medical Centers respectfully request that this Court deny appellant's appeal of the summary judgment of dismissal entered by Judge White on November 9, 2012. The decision of Judge White was based on review of the evidence presented and considered in a

light most favorable to Appellant as the non-moving party. Judge White also provided exception to the pleading requirements to accommodate appellant's *pro se* status. Despite these presumptions and accommodation in Appellant's favor, she failed to satisfy her burden of proof in opposition to Pacific Medical Centers' summary judgment. The judgment of the trial court on behalf of Pacific Medical Centers was correct and should be affirmed.

II. STATEMENT OF THE CASE

A. Factual Background

Patricia A. Grant, the *pro se* Appellant, is a disabled veteran with multiple health concerns. CP 3-13; 67-72. Appellant received health care through the Department of Defense Health Care Program, entitled the Uniformed Services Family Health Plan at Pacific Medical Centers, Inc. CP 9-11; CP 708-710. This program offers health insurance coverage through Department of Defense for medical services, medication and dental care to veterans of the military and military families. CP 708-710. U.S. Health Plan does not provide care to active military members. CP 708-710.

The allegations in Appellant's Complaint selectively refer to care received in 2009 when seen by Linda Oswald, M.D., a board certified family practice physician. CP 10-11. Dr. Oswald actually provided care

to Appellant from 2008 through 2010, for many medical issues and conditions. CP 7. Appellant's medical history includes morbid obesity, mental illness, hypertension, plantar fasciitis, and diabetes. Appellant also has underwent multiple prior surgeries, including a Roux Y Gastric Bypass procedure performed at Valley Medical Center in June 2009. CP 3-13, 67-72, 284-285, 289.

After Appellant's gastric bypass procedure at Valley Medical Center—performed by Dr. Alperovich, a board certified general surgeon—Appellant returned to Dr. Oswald at Pacific Medical Centers. CP 3-13, 67-72. Appellant also consulted with several other medical professionals at Pacific Medical Centers during this follow up period. CP 7-11.

In September 2009, Appellant was referred to Shoba Krishnamurthy, M.D.—a board certified gastroenterologist—for nausea, vomiting, and gastrointestinal systems issues. CP 8-9, 258. Appellant also discussed her care with Dr. Ludwig, a board certified internal medicine specialist, and he tried to work with her. CP 9-10, 275-276.

Dr. Ludwig made multiple recommendations, but Appellant wanted Dr. Ludwig to review Appellant's medical records specifically to critique her previous health care and health care providers. CP 277-278

The health care providers at Pacific Medical Centers then referred Appellant to appropriate specialists for her continuing medical issues of nausea and vomiting. CP 277-278. Appellant was last seen at Pacific Medical Centers through the U.S. Family Health Program in 2010.

B. Procedural Background

Appellant filed her original Complaint in King County Superior Court in June of 2012. CP 3-13. Appellant amended her complaint on July 16, 2012. CP 67-72. Appellant's amended complaint alleges medical negligence against Respondents, including Pacific Medical Centers. CP 67-74.

Respondents Pacific Medical Centers—and other Respondents—moved for summary judgment to dismiss the lawsuit before Judge White on November 9, 2012, challenging the prime facie Appellant's medical malpractice claim, specifically the lack of a qualified medical professional, who was to testify regarding the applicable standard of care in Washington, how this standard of care was violated in this case and how the violation of the standard caused Appellant's damage. CP 691-707.

In response to the motion for summary judgment, Appellant failed to produce competent and admissible expert opinions demonstrating a genuine issue of material fact requiring trial.

During oral argument, Appellant presented an unsworn letter from Dr. Elliot R. Goodman for the first time. CP 344-347; RP [Nov. 9, 2012] 19-21. The Court appropriately struck this evidence as untimely, inadmissible and lacking foundation. CP 728-731; RP [Nov. 9, 2012] 40. The Court explained that even if the letter was not stricken it failed to provide a factual basis for the assertions and opinions. CP 728-731; RP 40.

Specifically, as to Respondents Pacific Medical Centers, the letter did not address the specific standard of care alleged applicable to Pacific Medical Centers, its physicians and health care plan. CP 728-731; RP 40. Finally, the letter failed to set forth the required alleged breach of the applicable standard of care—had it been identified—and the causal link explaining how the alleged breach by Respondents Pacific Medical Centers proximately caused harm claimed by Appellant. CP 728-731; RP 40.

Without admissible evidence to demonstrate a prime facie showing under RCW 7.70.030 and RCW 7.70.040, Respondents Pacific Medical Centers' summary judgment was granted and Appellant's claims were dismissed. CP 728-731; RP 39-40.

III. ARGUMENT

A. Summary Judgment was appropriate due to Appellant's failure to present evidence of the applicable Washington standard and how it was breached

1. Appellant had the burden of production on summary judgment to respond to Respondents Pacific Medical Centers' motion with competent and admissible evidence demonstrating a genuine issue of fact.

"A defendant may move for summary judgment on the ground that a plaintiff has presented no medical evidence to make a prima facie case of medical malpractice." *Berger v. Sonneland*, 144 Wn.2d 91, 111, 26 P.3d 257 (2001); s*ee also Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L.Ed.2d 265, 106 S. Ct. 2548 (1986). In the face of a proper challenge by Pacific Medical Centers, the burden shifted to the Appellant—the party with the burden of proof at trial—to establish all elements essential to her case. *Young*, 112 Wn.2d at 225. Appellant could not rely on speculation, argumentative assertions that unresolved factual issues remain. Rather, she was required to set forth specific facts that sufficiently rebut the Pacific Medical Centers' contentions and challenges her expert evidence. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

Appellant failed to make a showing sufficient to establish the existence of the key element of her case—the applicable standard of care in Washington and that a breach of this standard had occurred. Appellant

bore the burden of proof at trial. Appellant's failure to produce medical evidence in support of her claim was fatal to her claim and summary judgment was appropriate. *Young*, 112 Wn.2d at 225; *Celotex Corp.*, 477 U.S. at 322.

2. Summary Judgment was appropriate where plaintiff failed to present competent and admissible medical evidence to resist the summary judgment challenge

Revised Code of Washington section 7.70.040 identifies the necessary elements a plaintiff must prove in an action alleging injury from health care. Section 7.70.040 states:

> The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:
>
> (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;
>
> (2) Such failure was a proximate cause of the injury complained of. (Emphasis Added)

RCW 7.70.040. These elements are particularized expressions of the traditional elements of negligence: duty, breach, proximate cause, and damage or injury. *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257 (2001).

The "'existence of duty is a question of law,' not a question of fact" and therefore may be decided on summary judgment. *Osborn v.*

Mason County, 157 Wn.2d 18, 23, 137 P.3d 197 (2006) (*quoting Tae Kim v. Budget Rent A Car Sys. Inc.,* 143 Wn.2d 190, 195, 15 P.3d 1283 (2001)). Appellant did not produced any expert medical testimony to establish the standard of care, a violation of the standard of care or proximate causation.

In Washington, "[w]henever an injury occurs as a result of health care, the action for damages for that injury is governed exclusively by RCW 7.70." *Branom v. State of Washington*, 94 Wn. App. 964, 969, 974 P.2d 335, *review denied* 138 Wn.2d 1023 (1999). Appellant's cause of action is, therefore, controlled exclusively by statute. Thus, she must satisfy the procedural and substantive requirements of RCW 7.70.010-.040.

Washington's medical malpractice statute, lists three distinct types of claims that may be brought by a plaintiffs claiming injury as a result of health care. The list is exclusive. Medical malpractice plaintiffs may claim only the following:

> (1) That injury resulted from the failure of a health care provider to follow the accepted standard of care;
>
> (2) That a health care provider promised the patient or his representative that the injury suffered would not occur;
>
> (3) That injury resulted from health care to which the patient or his representative did not consent.

RCW 7.70.030. Here, Appellant asserts a medical malpractice claims under paragraph one. No claims were alleged under paragraph two or three.

To establish a claim for breach of standard of care, medical malpractice plaintiffs must show that "the health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the State of Washington, acting in the same or similar circumstances." RCW 7.70.040(1).

Expert testimony is required to establish both the standard of care and breach thereof. *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). The chosen expert must have the equivalent expertise of the defendant in order to testify regarding the standard of care applicable to that defendant. *McKee v. American Home Products*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 228-29, 770 P.2d 182 (1989).

A defendant can move for summary judgment by pointing out to the trial court that the plaintiff lacks competent evidence to support his or her case. *See Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 27, 851 P.2d 689 (1993). The burden then shifts to the plaintiff to produce competent evidence, from a qualified expert witness, setting forth specific

facts establishing a cause of action. *Young*, 112 Wn.2d at 226-27; *see also Pelton v. Tri-State Memorial Hospital*, 66 Wn. App. 350, 355, 831 P.2d 1147 (1992). Absent such evidence, summary judgment for the defendant is proper. *See Pelton*, 66 Wn. App. at 354-55; *see also Guile,* 70 Wn. App. at 25.

The expert medical testimony produced by a plaintiff in response must be based upon a reasonable degree of medical certainty and must rise above speculation, or conjecture. *Reese v. Stroh*, 128 Wn.2d 300, 309, 907 P.2d 282 (1995); *see also McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989); *see also Pelton,* 66 Wn. App. at 354-55. Moreover, a motion for summary judgment cannot be defeated based on speculation or the possibility that the claims can be supported. *Pelton,* 66 Wn. App. at 354-55.

Here, plaintiff failed to present admissible evidence of the applicable standard of care in Washington that applied to Respondent Pacific Medical Centers. Appellant also failed to demonstrate through admissible expert medical testimony how that standard was breached under the particular facts. Finally, Appellant produced no admissible expert medical testimony as to how the alleged breach of the standard of care by Respondents Pacific Medical Centers caused her alleged harm.

This failure was fatal to Appellant's claims and being challenged on the sufficiency of evidence to support her claim, it was Appellant's burden to come forward with admissible and competent evidence demonstrating a genuine issue of fact justifying a trial on the merits. She failed to do so and her claims were appropriately dismissed.

3. Plaintiff was required to present evidence of causation between the alleged breach of the applicable standard of care and the damages claimed, but failed to do so

Causation must also be proven by expert testimony. Plaintiffs must present expert medical testimony to show that their alleged injuries were proximately caused by the defendant's negligence. *Reese*, 128 Wn.2d at 308; *Harris*, 99 Wn.2d at 449. If plaintiffs are unable to establish that defendant's acts proximately caused the alleged injuries, they cannot prevail on their medical negligence claim. *Pelton*, 66 Wn. App. at 355; *see also Guile*, 70 Wn. App. at 25.

Here, Appellant failed to present the trial court with any evidence demonstrating causation between the alleged violation of applicable standard of care (which was not identified as to Respondents Pacific Medical Centers) and the alleged damage incurred. Therefore, dismissal under CR 56(c) was appropriate as proximate cause is an essential element of Appellant's claim of medical negligence.

B. The untimely and unsworn letter of Dr. Elliot Goodman was properly stricken by the Court

Appellant failed to respond to Respondent Pacific Medical Centers' motion for summary judgment with evidence demonstrating she had expert testimony to support her claim of the appropriate standard of care in Washington, its breach and causation related to the alleged injuries.

During oral argument, Appellant offered a letter from a treating doctor in New York. This letter was unsworn. It did not identify the applicable standard of care in the state of Washington as it relates to Respondent Pacific Medical Centers. Further, it does not demonstrate how that standard of care was breached under the facts asserted by Appellant. Finally, the correspondence failed to address the required causal relationship between the alleged breach of the standard of care by Respondents Pacific Medical Centers and the alleged injury resulting from that breach to the Appellant.

1. <u>The Goodman letter was untimely</u>

Appellant was required to provide all responsive documents to Respondents summary judgment motion within 11 days of the noting date for oral argument. CR 56(c). It is in the trial court's sound discretion whether to reject untimely submissions. *See, e.g., Southwick v. Seattle Police Officer John Doe No. 1*, 145 Wn. App. 292, 301, 186 P.3d 1089 (2008) ("The trial court has discretion whether to accept or reject an

untimely declaration."); *O'Neill v. Farmers Ins. Co.*, 124 Wn. App. 516, 521-522, 125 P.3d 134 (2004); *see also Brown v. Park Place Homes Realty*, 48 Wn. App. 554, 557-560, 739 P.2d 1188 (1987) (finding no abuse of discretion in rejecting an untimely declaration containing inadmissible hearsay and irrelevant issues).

Here, plaintiff failed to provide the letter from Dr. Goodman until during oral argument. CP 344-347. Respondents counsel objected and moved to strike. RP 28-29, 32. The Court correctly excluded the evidence. RP 39-42; CP 728-731.

2. The letter was unsworn

Any declaration submitted in opposition are required to be sworn or certified and "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." CR 56(e).

Here, the letter submitted was unsworn and contained no certification of the witness's competence to testify, what materials were reviewed or to which of the numerous medical professionals who provided appellant care the letter was intended to address. Further, as noted by Judge White, the letter contained internal inconsistencies related to the dates of treatment and the familiarity of Goodman with the specific care of

each of the Respondents. RP 40; CP 344-347; CP 728-731 . It was properly excluded on these grounds.

3. The letter constitutes inadmissible hearsay

Inadmissible hearsay is not permitted in opposition to summary judgment. CR 56(e); *see Davis v. Fred's Appliance, Inc.*, 171 Wn. App. 348, 357, 287 P.3d 51 (2012); *compare Dunlap v. Wayne,* 105 Wn.2d 529, 535, 716 P.2d 842 (1986) (upholding a trial court's exclusion of hearsay evidence when deciding summary judgment) *with Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 667 (9th Cir. Cal. 1980) ("Hearsay evidence is inadmissible and may not be considered by this court on review of a summary judgment.").

A common hearsay exception is available for medical records so long as they are "reasonably pertinent to diagnosis or treatment" of a patient. WA ER 803(4). However, even where portions of a record may satisfy the hearsay exception, those portions that do not should be excluded. *See, e.g., Miller v. Arctic Alaska Fisheries*, 133 Wn.2d 250, 260 n4, 944 P.2d 1005 (1997) ("It is not an abuse of discretion, for example, to exclude from evidence a medical record containing expressions of a doctor's opinion which has been offered as a business record exception to hearsay."); *see also Young v. Liddington*, 50 Wn.2d 78, 84, 309 P.2d 761 (1957) ("It was never intended that, under the guise of a business record,

the exception to the hearsay rule would be extended so that the maker of a record could express, through the medium of the record itself, an opinion as to causation that he would not be permitted to express in open court, if he based his opinion solely upon the factual information which is shown in the report.").

Here, the letter was not drafted during the "diagnosis or treatment" of Appellant as the letter states that Dr. Goodman's treatment "culminated with the surgery in February of 2010." CP 346. While there was an additional follow up, it is clear that the November 7, 2012 letter was written after Appellant had stopped seeing Dr. Goodman. CP 346.

Even if the letter constituted a medical record, the specific portions of Dr. Goodman's letter which could be offered in support of Appellant's response to summary judgment are not "reasonably pertinent to the diagnosis or treatment" of Appellant. It is an incomplete opinion, based on an incomplete review of the medical history and is clearly developed to aid in litigation rather than for "diagnosis or treatment." Those inadmissible hearsay portions of the letter were, therefore, properly stricken and not considered in opposition to summary judgment as they did not comply with CR 56(e) and the pertinent portions of the letter would not be admissible at trial.

4. The letter does not address Pacific Medical Centers

Dr. Goodman's letter, to the extent it is considered, fails to address Respondents Pacific Medical Centers. The letter does not set forth the applicable standard of care Pacific Medical Centers owed, how it was allegedly breached or the causal connection between a breach and the alleged harm. *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257 (2001).

Specifically the letter does not even mention Pacific Medical Centers or its doctors by name, nor indicate that any of the specific care was in violation of the standard of care which caused harm to Appellant. CP 344-347. The letter contains only two statements of alleged wrongdoing. The first states "it is my opinion (to a reasonable degree of medical certainty) that there was a deviation in the appropriate standard of care in the care and treatment to Patricia Grant by Dr. Alperovich and the other physicians treating the patient during the period between June 2009 and January 2010." CP 346. This statements is vague as to who is covered by the latter phrase "other physicians treating the patient."

The second statement, however, clarifies who is meant by "other physicians." It states, "It is my opinion that the patient [Appellant] has a meritorious case of malpractice against those ***physicians in the***

Franciscan Healthcare System treating her from June 2009 to January 2010." CP 347 (emphasis added).

Even if the letter of Dr. Goodman not been stricken, its content failed to create a genuine issue of material fact sufficient under CR 56(c) to overcome the challenge by Respondents Pacific Medical Centers as to the applicable standard of care, alleged breach and the required causal link between Appellant's alleged damages and the specific care provided by these Respondents.

5. Goodman's letter does not establish that a nation standard of care applies to Pacific Medical Centers' Doctors' practice areas or that Goodman is qualified to opine as to the applicable standard outside of his specialty.

Appellant claims that Goodman's letter demonstrates that a national standard of care applies. The letter is silent as to what standard of care is and how Goodman applies that standard of care to these Respondents (whether he is applying a New York standard, a Washington standard or a "national standard"). Goodman's letter is also silent as to whether the standard of care for a general surgeon, his medical specialty, even applies to the care provided by physicians trained and specializing in family practice and gastroenterology at Pacific Medical Centers in the state of Washington.

While the cases cited by Appellant demonstrate that this is a *possibility*, each of the cited cases contained expert testimony stating affirmatively that a national standard applied and that the opining expert was sufficiently qualified to opine about the standards of care applicable to other schools of medicine outside of the expert's stated practice area. *See Pon Kwock Eng v. Klein*, 127 Wn. App. 171, 179-180, 110 P.3d 844 (2005) (holding that expert testimony that the standard of care was a national standard, and was the same as between infectious disease doctors and neurosurgeons in diagnosis of a fever, was sufficient when unchallenged); *see also Elbert v. Larson*, 142 Wn. App. 243, 248-249, 173 P.3d 99 (2007) (citing *Pon Kwock Eng* and accepting a declaration stating familiarity with specific medical care claimed to be in breach of the standard of care and the standard was a national one).

Here, there is no evidence from Goodman or anyone else, that the standard of care is the same throughout the nation or that the standard of care that applies to Dr. Goodman, a surgeon, would even be applicable and relate to each of the physicians, with different care, skill and learning, and different profession and practice than Dr. Goodman, at Pacific Medical Centers. It was Appellant's burden to make this showing in response to the summary judgment challenge. She failed to do so and her claims were properly dismissed.

C. *Appellant failed to demonstrate the need for further discovery and her request was not proper under CR 56(f).*

1. **Appellant failed to move under CR 56(f) and the issue was not before the Court and has not been specified as an error on appeal.**

Appellant did not move, pursuant to CR 56(f), for additional time to conduct discovery before or at the hearing of the November 9, 2012 summary judgment by Respondent Pacific Medical Centers. Appellant also does not specifically assign error on appeal to the issue of a CR 56(f) request as it related to Respondent Pacific Medical Centers' motion for summary judgment.[1] Therefore, the matter is not before the Court and should not be addressed on appeal.

Nevertheless, had Appellant so moved, she fails to demonstrate the specific additional discovery necessary to address the particular issue on summary judgment. This issue was addressed by counsel at oral argument on summary judgment. RP 8.

Appellant's sole task in response to summary judgment was to identify and produce with sufficient expert testimony to support her claims of medical negligence. She failed to do so and could not have obtained such evidence through discovery.

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[1] Assignment of Error No. 3 appears to discuss the need for discovery, but is focused neither on Respondents Pacific Medical Center nor the November 9, 2012 summary judgment hearing.

The expert testimony needed was within Appellant's own control and not obtainable through discovery from another party. The required expert testimony was a fundamental to Appellant's claim of medical negligence. Appellant's failure to obtain the necessary required expert testimony to support her own claim would not have been aided by additional time to conduct discovery from opposing parties.

D. The Trial Court exercised its discretion in granting summary judgment without a further continuance

Regardless, counsel addressed the issue at oral argument and the Court considered it. RP 8. The denial of the request was appropriate and was within the trial court's discretion.

A trial court's denial of a CR 56(f) request will be upheld absent a showing of abuse of discretion. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 369, 166 P.3d 667 (2007) (citing *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 615, 15 P.3d 210 (2001)). "A trial court abuses its discretion if it 'exercised its discretion on untenable grounds or for untenable reasons' or if the discretionary act was 'manifestly unreasonable.'" *Id.* at 369 (quoting *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990)).

CR 56(f) states that a party may seek a continuation of a pending summary judgment motion to conduct focused and identifiable discovery

to address specific points raised on summary judgment. A plaintiff cannot, however, simply request to conduct more discovery based on "speculation about what the evidence might be." *Ingersoll v. Debartolo, Inc.*, 123 Wn.2d 649, 656, 869 P.2d 1014 (1994). Nor can a plaintiff avoid summary judgment by "wishfully thinking that proof might somehow appear to give life to a moribund claim." *Robinson v. Avis Rent a Car Sys.*, 106 Wn. App. 104, 117 n34, 22 P.3d 818 (2001) (citing *Gray v. Town of Darien,* 927 F.2d 69, 74 (2nd Cir. 1999), *cert. denied,* 502 U.S. 856 (1991)).

A trial court properly denies a CR 56(f) request when, "(1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 369, 166 P. 3d 667 (2007).

Here, appellant's request for more discovery failed to identify what aspects of the pending summary judgment motion required additional discovery, how the discovery sought would impact the resistance to the motion and when the planned discovery could be completed. Further, because the challenge was to appellant's own expert evidence to support a

prime facie case of medical negligence, additional discovery would have been a futile endeavor.

Appellant failed to make a specific demand for a CR 56(f) continuance. Even if she had, discovery would not have been able to develop the expert testimony she needed to have to support her claim. Rather than seeking a CR 56(f) continuance, Appellant's request was a reprieve from the legal requirements of CR 56(c). This request was not based on discrete, identifiable, missing and obtainable discovery that could be obtained through the use of CR 26-36. It instead was a thinly veiled request from relief from the deadlines of CR 56 which required Appellant to put forward her expert evidence and meet the challenge to her claims set forth by Respondents. Appellant simply failed to do so.

E. Appellant was provided additional considerations by the Court given her pro-se status, yet was still required to comply with Court rules

Contrary to Appellant's argument, a pro se party is held to the same standards of legal knowledge and ethical considerations as an attorney. *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993) ("[T]he law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel -- both are subject to the same procedural and substantive laws."); *see Westberg v. All-Purpose Structures*, 86 Wn. App. 405, 411, 936 P.2

1175 (1997) ("[P]ro se litigants are bound by the same rules of procedure and substantive law as attorneys."); *see also Batten v. Abrams*, 28 Wn. App. 737, 739 n1, 626 P.2d 984 (1981) ("In undertaking the role of a lawyer, [pro se plaintiff] also assumes the duties and responsibilities and is accountable to the same standards of ethics and legal knowledge. *Hecomovich v. Nielsen*, 10 Wn. App. 563, 571-72, 518 P.2d 1081 (1974). The maxim of Roman law, "*ignorantia legis neminem excusat*" applies.")

The cases cited by plaintiff are distinguished as they discuss legal burdens under CR 12, not CR 56. *See, e.g., Haines v. Kerner*, 404 U.S. 519; 92 S. Ct. 594 (1972) (cited at p. 21 of Appellant's brief). Different burdens apply. *Compare Corrigal v. Ball & Dodd Funeral Home*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978) ("... [A] motion made pursuant to CR 12(b)(6) must be denied unless it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.") *with Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (hold that CR 56 "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'") (quoting Fed. R. Civ. P. 56(e)).

Despite the application of an equal standard to comply with filing deadlines and substantive compliance with the law, Appellant was provided special consideration due to her *pro se* status. For example, CR 56(c) requires all opposition to a motion for summary judgment to be filed and served 11 days prior to the motion. Appellant failed to comply with this deadline as it related to the evidence of Dr. Goodman's letter. Judge White nevertheless admitted the letter at the hearing and took the time to consider. It was made part of the record and specifically addressed in the Order granting summary judgment.

Further, the record of proceeding demonstrates that Judge White provided Appellant with significant latitude in terms of her medical record evidence presented and during arguments. RP 14-28; CP 137- 298.

Appellant's argument that a separate standard applies to *pro se* plaintiffs is without merit. Nevertheless, it is clear that Appellant was provided special consideration and despite this, failed to satisfy her burden under CR 56(c) in the face of Respondent Pacific Medical Centers' summary judgment challenge.

IV. CONCLUSION

In the face of Respondents' motion for summary judgment challenging the Complaint, Appellant failed to come forward with evidence to demonstrate a genuine issue of material fact necessary to

require a trial upon the merits. Appellant specifically failed to present competent and admissible expert medical testimony as to the standard of care in the state of Washington for Pacific Medical Centers, how this standard of care was violated by each physician and the health care plan and the causal relationship between the alleged violated and her claimed damages. After providing plaintiff an opportunity to respond and considering all of her proffered evidence, Judge White correctly dismissed Appellant's Complaint as a matter of law. This judgment should be affirmed on appeal.

RESPECTFULLY SUBMITTED this 18th day of September, 2013.

MERRICK, HOFSTEDT & LINDSEY, P.S.

By _____
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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2013, I caused to be served true and correct copies of the foregoing on the following as indicated below:

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