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73018-5

No. 73018-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GABRIELLE NGUYEN-ALUSKAR, an individual,

Appellant,

v.

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

Respondents.

RESPONDENT GORDON JENSEN, M.D.'S RESPONSE BRIEF

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ORIGINAL

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I. INTRODUCTION

In this medical negligence case, Appellant Gabrielle Nguyen-Aluskar failed to submit competent medical expert testimony to support her claims in response to Respondent Dr. Jensen's motion summary judgment—despite having secured favorable expert opinions two years prior to the hearing. She moved for a continuance under CR 56(f), which the trial court denied. Her claims were dismissed. She moved for reconsideration on her informed consent claim, relying on CR 59(a)(3)-(4), and a declaration from a physician that was premised on self-serving allegations from the complaint. The trial court denied her motion.

Dr. Jensen respectfully requests that the Court of Appeals affirm the trial court's rulings.

I. RESTATEMENT OF ISSUES

1. Did the trial court properly exercise its discretion in denying Nguyen-Aluskar's request for a CR 56(f) continuance of the summary judgment hearing when she did not submit an affidavit or declaration: (1) offering a good reason for the delay in obtaining her expert's declaration; (2) stating what evidence would be established through additional discovery; or (3) stating that the desired evidence would raise a genuine issue of material fact?

2. Did the trial court properly exercise its discretion in denying Nguyen-Aluskar's motion for reconsideration when she: (a) failed to establish "surprise," which ordinary prudence would have guarded against under CR 59(a)(3); (b) failed to present evidence that was "newly discovered" under CR 59(a)(4); and (c) failed to raise a genuine issue of material fact with respect to her expert's declaration?
3. Should the Court of Appeals affirm the trial court's dismissal of Nguyen-Aluskar's CPA and medical negligence claim because she failed to assign error or address these claims in her Opening Brief?

II. RESTATEMENT OF FACTS

A. Appellant Had an Elective Eye Procedure in 2005.

On February 5, 2005, independent contractor Dr. Mark Nelson performed an elective Photo-Refractive Keratectomy ("PRK") procedure for Appellant Gabrielle Nguyen-Aluskar ("Nguyen-Aluskar") at Lasik Vision Institute ("LVI"). Clerk's Papers ("CP") at 61. PRK is a common laser surgery that corrects nearsightedness, farsightedness, and astigmatism. The surgery was successful; she had 20/20 vision in both eyes. CP at 62.

Before the 2005 surgery—which is not the subject of this lawsuit Nguyen-Aluskar signed a six-page Patient Consent Form wherein she acknowledged that "despite the best of care, complications and side effects

may occur," including temporary and permanent dry eye syndrome, and over-corrective or under-corrective vision that is permanent, thus requiring the use of glasses or contact lenses. CP at 65. The Consent Form also states that "I understand that the visual acuity I initially gain from Laser Vision Correction could regress, and my vision may go partially or completely back to the level it was immediately prior to having the procedure." CP at 66.

Even though Nguyen-Aluskar was only 36 years old at the time of her elective surgery, the Consent Form states that "[m]any patients over 40 years of age have a condition causing a reduced ability to see or read up close also known as presbyopia. I understand Laser Vision Correction may increase my dependence on reading glasses." CP at 65.

B. Appellant Had an Elective Enhancement Procedure in 2012.

In 2011, Nguyen-Aluskar requested an enhancement procedure. On January 27, 2012, Nguyen-Aluskar—43 years old at that time— signed the Patient Consent Form, which explained some of the risks:

- "Any ocular procedure is neither 100% safe nor 100% effective." CP at 74;
- "Complications can and do occur from these enhancements." CP at 74;

- "These risks and complications include but are not limited to . . . over or under correction . . progressive corneal thinning . . . loss of vision . . . and vision which cannot be completely corrected with glasses or contact lenses[.]" CP at 74.

Nguyen-Aluskar acknowledged that "[a]ll of my questions have been answered to my complete satisfaction, I have re-read, understand and agree with my original LASIK/PRK consent form and a copy of both informed consent forms have been offered to me." CP at 74. Dr. Jensen also signed the 2012 Consent Form, affirming that "I am knowledgeable about LASIK/PRK and its risks and benefits. I personally discussed the consent form with the patient, have given the patient an opportunity to ask questions, and have answered those questions to the best of my ability." CP at 74.

LVI's website has a "Frequently Asked Questions" page, wherein a common question and answer is:

Will I need reading glasses?

The goal of laser vision correction is to reduce or eliminate your dependence on distance glasses. The need for reading glasses is a normal age related change. Having laser vision correction does not change this.

www.lasikvisioninstitute.com/candidate-lasik/faqs/

After the enhancement procedure, her vision was 20/60; six weeks later her vision continued to improve. CP at 76. She did not return to LVI.

C. She Filed a Medical Negligence Suit Against Dr. Jensen and LVI in January 2013, then Dismissed it in December 2013.

Nguyen-Aluskar filed her initial medical negligence lawsuit against Respondents LVI and Dr. Jensen on January 17, 2013. CP at 49-56. However, eleven months later, she moved to voluntary non-suit her claim, which the trial court granted on December 23, 2013. CP at 58-59.

Her interrogatory answers from her first lawsuit, revealed that her *primary complaint* was "the permanent use of glasses for reading" which she alleged "was a side effect of the procedure that was never disclosed to me." CP at 276:12-14. She also complained that she has "trouble seeing things that are close up and my vision at a distance has changed for the worse as well." CP at 275:14-15.

D. She Re-Filed the Medical Negligence Suit in February 2014.

On February 21, 2014, Nguyen-Aluskar re-filed a virtually identical lawsuit, including the same claims against the same parties.[1] She alleged that Dr. Jensen and LVI (Dr. Jensen's purported employer)

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[1] Appellant contends that there are "key differences" between the first and second complaints. *See* Opening Brief at 6. This is incorrect. There are only two minor differences. She: (1) removed her husband as a party; and (2) removed his "loss of consortium" claim from her *prayer for relief*. Notably, his claim for loss of consortium was never actually plead.

negligently performed the enhancement procedure, failed to obtain her informed consent, and violated the Consumer Protection Act by representing that she would have "falcon-like vision." CP at 1-8; CP at 6. Her CPA claim also included allegations of fraud and misrepresentation; failure to warn; and negligent training, management, and supervision. CP at 5:17; CP at 6:5-6; CP at 6:9-10. She alleged damages of deformity, disfigurement, disability, mental anguish, pain, and suffering. CP at 6:18-19.

In August 2014, LVI propounded its First Interrogatories and Requests for Production, requesting a summary of her expert's medical opinions, his/her CV, and a copy of her expert's reports, letters, and other documents. CP at 92:14-26. Nguyen-Aluskar never answered these interrogatories and requests for production.

E. LVI and Dr. Jensen Separately Moved for Summary Judgment Dismissal.

On October 22, 2014, LVI filed and served its Notice for Hearing on the upcoming motions for summary judgment. CP at __.[2] On November 14, 2014, LVI and Dr. Jensen separately filed and served their motions for summary judgment dismissal of Nguyen-Aluskar's medical negligence, informed consent, and CPA claim. CP at 25-42; CP 115-125.

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[2] *See* Supplemental Designation of Clerk's Papers currently being filed.

Dr. Jensen argued that Washington's medical malpractice statute, RCW 7.70 *et seq.*, requires that standard of care, causation, and informed consent claims be supported by the testimony of a qualified medical expert—and that the medical negligence/informed consent claims failed based on an absence of supportive medical expert opinions. CP at 115-24. Dr. Jensen also challenged Nguyen-Aluskar to present admissible evidence to sustain the CPA claim that she was promised "falcon-like vision." CP at 122-24.

Conversely, LVI secured the opinions of two medical experts who were both supportive of Dr. Jensen's care and the provision of informed consent. CP at 99-101; CP at 106-08. Brian M. McKillop, M.D., and Stephen G. Phillips, M.D., both ophthalmologists who *frequently* perform PRK and PRK enhancement procedures, opined that: (1) Dr. Jensen's procedures were appropriate, indicated, and performed in compliance with the standard of care; and (2) the informed consent documents were thorough, understandable, and typical for these kinds of procedures. CP at 99-101; CP at 106-08.

Dr. McKillop stated that the "problems alleged by Ms. Nguygen-Aluskar, including loss of visual acuity and dry eyes, *are known complications of surgery* that do not themselves indicate performance below the standard of care." CP at 100:25-101:1. He also opined that the

"[m]edical records contain consent forms, signed by Ms. Nguyen-Aluskar, which specifically detail potential complications including *loss of vision, pain and dry eyes*. The medical records do not indicate that the LASIK Vision Institute, LLC, or any provider, made any unwarranted or inappropriate guarantees regarding the results of treatment." CP at 100:19-22.

Dr. Phillips stated that the "PRK enhancement procedure at issue in this case was appropriate and indicated for Ms. Nguygen-Aluskar" and that she had "sufficient corneal thickness to support the procedure." CP at 107:12-14. He also opined that the "informed consent documentation was thorough, understandable, and well within the standard for informed consent disclosures in the refractive surgery community." CP at 107:14-16. In sum, while "it appears that Ms. Nguyen-Aluskar experienced dry eye post-operatively, dry eye is a known complication of her refractive surgery. The appearance of dry eye, as well as decreased visual acuity, can occur even when the procedure is properly performed. They are not, in and of themselves, indicative of any breach of the standard of care." CP at 107:18-22.

F. Her Response Was Unsupported by a Medical Expert; Relied on Unsupported Allegations; and Failed to Comply with CR 56(f).

Nguygen-Aluskar's consolidated response to the summary judgment motions, filed on December 1, 2014, was unsupported by qualified medical expert testimony. Instead, she stated that: (1) she had hired an expert *two years ago* in November 2012 (CP at 157); (2) she failed to obtain his opinions in writing over this two-year period; and (3) despite receiving the Notice of Hearing on October 22, followed by the motions for summary judgment on November 14, she waited until November 26[3] to contact her expert—who indicated that he was withdrawing "due to a non-parallel interpretation of Ms. Nguyen-Aluskar's experiences and procedures." CP at 142:19-20; CP at 261:19.

Her response was also wholly unsupported by any competent evidence. Instead, it relied primarily on the allegations in her complaint and bare assertions. CP at 141-54. Finally, her request for continuance of the summary judgment hearing failed to comply with CR 56(f).

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[3] Notably, Wednesday, November 26 was immediately followed by the Thanksgiving holiday on Thursday, November 27; Friday, November 28; and the weekend of November 29-30. Her response was due December 1.

G. Dr. Jensen Submitted a Reply; She and Her Counsel Submitted Sur-Declarations.

On December 8, Dr. Jensen argued in reply that Nguyen-Aluskar failed to submit a CR 56(f)-compliant affidavit or declaration expressly requesting a continuance; stating what discovery was contemplated; or why the discovery could not have been obtained prior to the summary judgment hearing. CP at 202. Dr. Jensen argued that Nguyen-Aluskar had two years to secure expert testimony and that the record indicated that she consulted with an expert in November 2012, but had no further contact with him until November 26, 2014—the day before the Thanksgiving holiday. CP at 201. Finally, she failed to support her CPA claim with admissible, competent evidence. CP at 203.

On December 10—*two days before the hearing*—Nguyen-Aluskar's attorney filed an untimely affidavit "to comply with Defendants' formalistic and technical concerns." CP at 210:7-8. Her attorney's sur-reply affidavit *literally* restated the response to the motion for summary judgment, almost word-for-word, including case law analysis, but again was wholly unsupported by admissible evidence. *Compare* CP at 142-53 *with* CP 210-220.

On December 10, Ms. Nguyen-Aluskar also filed an untimely declaration—which *literally copied and pasted allegations from her*

complaint to her declaration. CP at 223-29. Her sur-reply declaration was (1) unsworn; and (2) unsigned. CP at 229.

H. LVI and Dr. Jensen Moved to Strike the Untimely and Improper Declarations.

On December 11, LVI and Dr. Jensen filed a joint motion to shorten time and to strike the declarations of both Nguyen-Aluskar and her attorney. CP at ____.[4] The defense argued that the declarations were untimely; unsupported by admissible factual evidence; unsigned; and unsworn. *Id.*

I. The Trial Court Sustained the Objections to the Declarations and Granted Dr. Jensen's Motion for Summary Judgment.

At the hearing on December 12, 2014, the Honorable Tanya Thorp explained that she was considering the motions to strike and shorten time as objections to the declarations, under King County local rule 56(e). Verbatim Report of Proceedings ("VRP") at 26:3-7 (Dec. 12, 2014). She sustained the objections, ruling as follows:

> The plaintiff, Ms. Nguyen-Aluskar's declaration is unsigned. And, frankly, it parrots the -- the complaint, even if it were signed. *The case law is clear that when a defendant files a motion for summary judgment, the plaintiff cannot simply rely on the mere allegations in their complaint. No matter how detailed they think they are, they*

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[4] *See* Docket Nos. 41-44, which have been recently designated as Supplemental Clerk's Papers.

> *must put forth competent evidence in support of their complaint.*
>
> As far as the declaration of Mr. Bendele, *he -- can't be a fact witness.* The only thing I can consider for summary judgment is admissible evidence at a trial. ***An attorney cannot be a witness in their own case.*** It's one thing to have a declaration that attests to authenticity of -- of attached documents. It's another to make factual statements and allegations about this falcon-like or hawk-like vision.
>
> ***There is no competent evidence that has been put forth to this Court to demonstrate or find a genuine issue of material fact that could be admitted at trial on either the negligence claims or the CPA claims****. Mere speculation and mere conjecture is not enough. Mere conclusions is not enough.*

VRP at 26:13-27:8 (emphasis added).

With respect to Nguyen-Aluskar's failure to secure expert testimony to support her medical negligence claim, the trial court stated that "I have nothing in front of me from an expert pursuant to medical negligence requirements of –to support a breach of a standard of care. This case has been pending for an exorbitantly long amount of time." VRP at 27:9-12.

The trial court considered and denied Nugyen-Aluskar's request for a CR 56(f) continuance, noting that: (1) she had been dilatory; (2) there was no basis for "surprise" with respect to her expert's withdrawal; (3) she did not make an effort to find another expert during the two-week period that her response was due; (4) she failed to answer interrogatories served

five months ago (in the second lawsuit) that asked her to identify her experts and a summary of their opinions; and (5) there was no reason to keep the case open—to grant a continuance "would be to support this dilatory conduct." Her ruling is as follows:

> In looking at the motion to continue the summary judgment motion, I can't help but look at the conduct of the parties. ***Dilatory conduct is not a basis for a continuance. In two years there's nothing to support that this was a surprise or should have been a surprise.***
>
> In the three and a half weeks, in the 16 days since the response was due, I have seen nothing in front of me to support that any efforts have been made to find this -- to find another expert.
>
> ***When interrogatories were served five months ago, there was no response to those, when it specifically asked to identify the experts listed.*** And simply because counsel decides not to bring someone back into court does not obviate your responsibilities to respond to discovery. That, to me, is the clearest trigger time of all. There is no good cause. In fact, there -- ***to grant this continuance at this time would be to support this dilatory conduct in pursuit and prosecution of one's own case.***
>
> The -- the difficulty here is that there's absolutely no reason and no purpose and nothing in front of me to keep these cases open. I'm granting summary judgment pursuant to CR 56 as to both defendants.

VRP at 27:13-28:9; *see also* CP at 241-42 (order of dismissal).[5]

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[5] The trial court further admonished Nguyen-Aluskar for her misguided reading of the trial court's *June 2014* Order Granting LVI's Motion for Costs and Fees under CR 41(a) with respect to the first lawsuit. The trial court ruled that Nguyen-Aluskar's failure to seek clarification of the order and pay the costs and fees to LVI "is dilatory conduct." VRP at 29:5-6.

J. She Moved for Reconsideration Based on "Newly Discovered" Material, Which the Trial Court Denied.

On the last day possible, Nguyen-Aluskar moved for reconsideration of the trial court's dismissal, based on "newly discovered" evidence. CP at 243-55. The "new evidence" was actually a Declaration from her expert of two years, Dr. Richard Bensinger, who had stated on December 19 that he had withdrawn earlier "due to a non-parallel interpretation of Ms. Nguyen-Aluskar's experiences and procedures." CP at 261:19.

Her motion for reconsideration essentially reargued and elaborated on her summary judgment response because she was repeatedly "caught off guard" at the hearing.[6] She agreed that "[i]t is true that Plaintiff reiterated many of the facts contained in Plaintiff's Complaint" in response to the motion for summary judgment. CP at 247:14-15. However, she "should not be faulted because it provided a great number of facts in its complaint." CP at 247:16-17. Finally, she argued that her original (unsworn and unsigned) declaration "was sufficient." CP at 248:2-3.

In addition to rearguing her case and presenting unsupported assertions, her motion for reconsideration relied on CR 59(a)(3) ("surprise" that Dr. Bensinger could no longer support her claim); CR

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[6] *See* CP at 245:18 ("caught off guard"); CP at 246:11 ("caught off guard"). This is not a basis for a CR 59 motion for reconsideration.

59(a)(4) ("newly discovered evidence" of Dr. Bensinger's declaration now supporting her claim); CR 59(a)(7) (no evidence or reasonable inference from the evidence to justify the trial court's decision dismissing her case); and CR 59(a)(9) (substantial justice). CP at 250-51. For the first time, she submitted Dr. Bensinger's declaration to support her informed consent claim. CP at 252; CP at 260-64.

On January 5, 2015, without inviting Dr. Jensen or LVI's response, the trial court denied her motion for reconsideration. CP at 335-37. On the last day possible, Nguyen-Aluskar filed a Notice of Appeal of the trial court's orders: (1) granting Dr. Jensen's motion for summary judgment; (2) granting LVI's motion for summary judgment and for fees and costs, as previously ordered on June 10, 2014; (3) denying a CR 56(f) continuance; and (4) denying reconsideration.

Nguyen-Aluskar did not appeal the trial court's order sustaining LVI and Dr. Jensen's objections (submitted as motions to strike) to the improper and unsupported declarations of both Nguyen-Aluskar and her attorney.[7] Likewise, her Opening Brief does not address the dismissal of

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[7] *See* Dkt. No. 45 (Clerk's Minute Entry) that is being designated in a Supplemental Designation of Clerk's Papers. It notes that the trial court sustained the objections originally characterized as motions to strike. *See also* VRP at 26:13-27:8 (sustaining the objection to Nguyen-Aluskar's declaration because it parrots the complaint and a plaintiff cannot simply rely on mere allegations in a summary judgment proceeding, but must submit competent evidence; and sustaining the objection to Mr. Bendele's declaration because an attorney cannot be a fact witness in his own case and his declaration would not be admissible at trial).

her CPA and medical negligence claim. Her Opening Brief and Dr. Bensinger's declaration focus solely on resurrecting her informed consent claim.

III. LEGAL ARGUMENT

A. THE STANDARD OF REVIEW FOR DENYING A MOTION FOR A CR 56(F) CONTINUANCE IS ABUSE OF DISCRETION.

"The trial court's grant or denial of a motion for continuance will not be disturbed absent a showing of manifest abuse of discretion." *Turner v. Kohler*, 54 Wn. App. 688, 593, 775 P.2d 474 (1989). "Under this standard, we must determine whether discretion is 'exercised on untenable grounds, or for untenable reasons.'" *Mannington Carpets v. Hazelrigg*, 94 Wn. App. 899, 902, 973 P.2d 1103 (1999) *review denied*, 139 Wn.2d 1003 (1999) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) ("Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.")

In *Junker*, the Supreme Court stated that when the "decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is,

discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Junker*, 79 Wn.2d at 26.

B. THE TRIAL COURT EXERCISED SOUND JUDGMENT IN DENYING HER REQUEST FOR A CONTINUANCE.

The trial court exercised sound judgment in denying her request for a CR 56(f) continuance. First, Nguyen-Aluskar did not comply with CR 56(f), which states:

> (f) **Should it appear from the affidavits of a party opposing the motion** that he cannot, for reasons stated, present by affidavit facts essential to justify his 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.

CR 56(f) (emphasis add). The trial court may deny a motion for continuance 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. *Turner*, 54 Wn. App. at 693. Only one of the qualifying grounds is needed to deny a continuance. *Pelton v. Tri-State Mem'l Hosp.*, 66 Wn. App. 350, 356, 831 P.2d 1147 (1992). Denial of a motion for continuance under CR 56(f) will be upheld absent a showing of manifest abuse of discretion. *Turner*, 54 Wn. App. at 693.

Here, Nguyen-Aluskar's response to summary judgment did not contain an affidavit or declaration that referenced CR 56(f); did not offer a good reason for her delay in obtaining a declaration from her medical expert; and did not state what evidence would be established through additional discovery. CP at 153. The subjoined declaration was also defective because it was not based on personal knowledge as required by CR 56(e). *Id.*

The issue of whether a CR 56(f) continuance should be granted to allow a plaintiff in a medical malpractice case additional time to find an expert was considered in *Turner v. Kohler,* 54 Wn. App. 688, 693, 775 P.2d 474, 477 (1989). Turner filed a complaint against Kohler alleging medical malpractice. *Id.* Kohler filed a motion for summary judgment. In opposition, Turner filed a medical report prepared by Dr. John Mullins. The report states: "[Turner]...probably did have hypertension prior to the onset of the first stroke in 1984 and if this had been present at this time [the] proper medical procedure would be to treat the hypertension." *Id.* at 690. Turner's attorney also submitted an affidavit that stated in part: "Until further discovery has been taken, [Dr. Mullins' report] raises genuine issues of factual dispute, and defense Motion for Summary Judgment should be denied as a result." *Id.* at 690-692.

The trial court granted summary judgment and denied Turner's request for a CR 56(f) continuance. The appellate court affirmed, finding that Turner's attorney's affidavit was insufficient to grant a CR 56(f) continuance. *Id.; see also Durand v. HIMC Corp.*, 151 Wn. App. 818, 214 P.3d 189 (2009), *review denied*, 168 Wn.2d 1020, 231 P.3d 164 (2010) (to obtain a continuance for additional discovery before hearing on motion for summary judgment, the party seeking the continuance *must provide an affidavit* stating what evidence the party seeks and how it will raise an issue of material fact to preclude summary judgment). Here, Nguyen-Aluskar did not provide any affidavit supporting the request for a CR 56(f) continuance, as required by the rule, and for the same reasons set forth in *Turner,* the trial court properly denied her request for a continuance of the hearing.

A trial court may also deny a CR 56(f) continuance where the record shows that the nonmoving party was provided several months to conduct discovery. *Schmitt v. Langenour*, 162 Wn. App. 397, 256 P.3d 1235 (2011). Here, Nguyen-Aluskar had *two years* to find an expert to support her claims. While she consulted with Dr. Bensinger in November 2012, she apparently had no contact with him until November 26, 2014 (over two years later)—despite knowing on October 22, 2014 that the defense intended to move for dismissal.

Despite having already filed a response, her attorney filed an untimely affidavit t*wo days before the December 12 hearing* that duplicated, almost word-for-word the unsupported factual allegations contained in her response brief. CP at 209-21. But her attorney's affidavit did not offer a good reason for the delay in obtaining the desired evidence, as required in *Turner*, 54 Wn. App. at 693. Likewise, she did not indicate what evidence would be established through more discovery. "A continuance is not justified if the party fails to support the request with an explanation of the evidence to be obtained through additional discovery." *Thongchoom v. Graco Children's Prods., Inc.*, 117 Wn. App. 299, 308, 71 P.3d 214 (2003) *review denied*, 151 Wn.2d 1002 (2004) (citation and internal quotations omitted). Simply arguing for a continuance because "my expert changed his mind during the two years that I lost contact with him, and now I need to find another expert that may support my case" is inadequate. As the trial court stated, "[d]ilatory conduct is not a basis for a continuance. In two years there's nothing to support that this was a surprise or should have been a surprise." VRP at 27:15-17.

Nguyen-Aluskar relies on *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990) for proposition that the trial court abused its discretion in denying her continuance. However, *Coggle* is distinguishable because the defendant (1) noted the hearing on a 14-day calendar; and (2) seven days

later a new attorney appeared on behalf of plaintiff. *Id.* at 501. The new attorney requested a continuance to obtain a treating physician's declaration opining that defendant breached the standard of care, which proximately caused the alleged damages.

The Court of Appeals noted that Mr. Coggle satisfied the CR 56(f) criteria because he had explained why the affidavit could not be obtained by the hearing date (substitution of counsel), and described the specific evidence that he would obtain during the continuance. *Id.* at 508.

Unlike *Coggle*, Nguyen-Aluskar was on notice two months before the hearing that the defense was moving for dismissal. She failed to submit an affidavit demonstrating good cause for her delay in securing expert testimony. She failed to identify the specific evidence that she intended to secure other than assumed testimony from a putative expert.

Here, the trial court exercised sound judgment "with regard to what is right under the circumstances and without doing so arbitrarily or capriciously." *Junker*, 79 Wn.2d at 26. In addition to dilatory conduct, she failed to respond to LVI's interrogatories, propounded five months earlier, which asked her to identify her experts, provide a summary of their opinions, and produce their reports. "To grant this continuance at this time would be to support this dilatory conduct in pursuit and prosecution of one's own case." VRP 28:3-5. Failure to exercise diligence in obtaining

discovery does not justify a motion for a continuance. *Durand*, 151 Wn. App. at 828.

The Court of Appeals should affirm the trial court's denial of a CR 56(f) continuance as a fair and just exercise of discretion based on the circumstances presented to the trial court.

C. THE STANDARD OF REVIEW FOR DENYING RECONSIDERATION IS ABUSE OF DISCRETION.

"This court reviews a trial court's order on reconsideration for a manifest abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." *Sligar v. Odell*, 156 Wn. App. 720, 734 233 P.3d 914 (2010), *review denied*, 170 Wn.2d 1019 (2011), citing *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004) (same); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000) (same).

With respect to newly discovered evidence presented under CR 59(a)(4), *Sligar* instructs that a declaration submitted in support of the motion of reconsideration is not "[n]ewly discovered evidence" under CR 59(a)(4). It is not newly discovered evidence if it "could have been presented at the time the trial court was considering the original summary judgment motion. There is no showing that it could not have been presented then." *Id.* at 734.

The *Sligar* Court was also unpersuaded by plaintiff's argument that substantial justice had not been done under CR 59(a)(9). *Id.* "Courts rarely grant reconsideration under CR 59(a)(9) for lack of substantial justice because of the other broad grounds afforded under CR 59(a)." *Id.*

Similarly, in seeking reconsideration, the Court noted that Sligar "merely repeated the arguments that she made in her motion for summary judgment." Accordingly, "under these circumstances, she has failed to demonstrate that the trial court abused its discretion in denying reconsideration." *Id.*

D. THE TRIAL COURT EXERCISED SOUND JUDGMENT IN DENYING HER MOTION FOR RECONSIDERATION.

Nguyen-Aluskar contends that the trial court abused its discretion in denying her motion for reconsideration. But the lion's share of her motion for reconsideration simply repeats and elaborates on arguments previously submitted in response to summary judgment. Accordingly, "under these circumstances, she has failed to demonstrate that the trial court abused its discretion in denying reconsideration." *Sligar*, 156 Wn. App. 724.

She admits that her declaration reiterates the allegations contained in her complaint, speciously arguing that their level of detail deem them admissible. CP at 247:14-17. However, as the trial court explained, her

declaration parrots the complaint and, "the case law is clear that when a defendant files a motion for summary judgment, the plaintiff cannot simply rely on the mere allegations in their complaint. No matter how detailed they think they are, they must put forth competent evidence in support of their complaint." VRP at 26:14-20.

She also reargued the merits of her CPA claim. CP at 252-53. Nevertheless, her repeated assertions that she was promised "falcon-like vision" and was "upsold" with a vision "tune-up" package were (again) wholly unsupported by the record.

Dr. Bensinger's declaration is the *only additional evidence* submitted with her motion for reconsideration. However, she failed to explain how this evidence triggered reconsideration under CR 59(a)(4), (7), or (9). Ordinary prudence would have guarded against any alleged "surprise" that Dr. Bensinger no longer supported her claim at the summary judgment hearing, while inexplicably providing a declaration after her claim was dismissed. Whatever statements Nguyen-Aluskar made to induce Dr. Bensinger to provide a declaration one week after judgment was entered against her certainly could have been made to him over the two years during which her claim was pending.

CR 59 does not permit a party to submit evidence which, with reasonable prudence or diligence could have been submitted prior to a

summary judgment ruling. *Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn. App. 896, 906-07, 977 P.2d 639 (1999), *review denied*, 139 Wn.2d 1005 (1999). *Wagner* instructs that:

> Both a trial and summary judgment hearing afford the parties ample opportunity to present evidence. If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence.

Id. at 907; *see also Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989) ("The realization that [the] first declaration was insufficient does not qualify the second declaration as newly discovered evidence.").

Exercising ordinary prudence and reasonable diligence under CR 59(a)(3)-(4) would have involved: (1) solidifying Dr. Bensinger's opinions over the two-year period after first consulting with him in 2012; (2) contacting him after notice on October 22 that a summary judgment hearing was scheduled for December 12; and at the very least, (3) contacting him after receipt of LVI and Dr. Jensen's summary judgment motions on November 14.

Dr. Bensinger's opinion was not "newly discovered" evidence when it "could have been presented at the time the trial court was considering the original summary judgment motion." *Sligar*, 156 Wn.

App. at 734. There was no showing that it could not have been presented then.

Nguyen-Aluskar's reliance on *Coggle* is misplaced. In *Coggle*, plaintiff had one week to secure an expert declaration due to a substitution of plaintiff's counsel. *Coggle*, 65 Wn. App. at 507. Here, she has been represented by the same attorney over the course of two years and two lawsuits. She had ample opportunity to secure a concrete opinion from a medical expert.

Similarly, Nguyen-Aluskar's relies on *Martini v. Post*, 178 Wn. App. 153, 313 P.3d 473 (2013), which is distinguishable. The touchstone of *Martini* is the trial court's *discretion* to consider new or additional evidence with a motion for reconsideration. *Id.* at 162. Also, unlike the case at bar, the *Martini* Court was not analyzing CR 59(a) under the lense of CR 59(a)(3) ("[a]ccident or surprise which ordinary prudence could not have guarded against") or CR 59(a)(4) ("[n]ewly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered or produced at trial"). It was reviewing a motion for reconsideration pursuant to CR 59(a)(7-9), which apply different standards.

Additionally, the *Martini* Court was persuaded that the defendant "suffered no prejudice from the trial court's consideration of additional

evidence because [the defendant] was previously aware of the evidence and of Martini's theory of [the] cause of death." *Id.* at 162. Here, Dr. Jensen would have suffered prejudice if the trial court had considered additional evidence (submitted pursuant to CR 59(a)(3)-(4)) because he was completely unaware of Nguyen-Aluskar's evidence and her theory of causation. Because of her failure to answer discovery, Dr. Jensen only had pleading notice of her allegations.

With this case pending off and on for two years, it was *fair and just* to resolve the case at the summary judgment stage. Accordingly, it was within the trial court's discretion to disregard additional evidence. *See Southwick v. Seattle Police Officer John Doe No. 1,* 145 Wn. App. 292, 186 P.3d 1089 (2008) ("the trial court has discretion whether to accept or reject an untimely declaration"); *Adams*, 55 Wn. App. at 608 (a trial court properly disregards evidence that, with reasonable diligence, could have been discovered and produced before summary judgment).

E. HER INFORMED CONSENT CLAIM FAILS.

In an action based on informed consent, the Nguyen-Aluskar must prove by a preponderance of the evidence that her injuries resulted from health care to which she did not consent. RCW 7.70.030. To prevail on a claim for failure to secure informed consent, she must establish the following: (1) Dr. Jensen failed to inform Nguyen-Aluskar of a material

fact relating to treatment; (2) Nguyen-Aluskar consented to the treatment without being aware of or fully informed of such fact; (3) a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such fact; and (4) the treatment in question proximately caused the injury. RCW 7.70.050(1).

When securing a patient's informed consent, "the rule is that physicians need not disclose to a patient facts of which he is already aware." *Adams v. Richland Clinic*, 37 Wn. App. 650, 659, 681 P.2d 1305 (1984). Under RCW 7.70.060, a patient's signature on a consent form that discloses the potential risks and complications of a proposed treatment, as well as the alternative of nontreatment, is *prima facie* evidence of informed consent.

A claim for informed consent must be supported by expert testimony. To determine whether a fact is "material" under RCW 7.70.050, the Court engages in a two-step process: (1) the scientific nature of the risk must be ascertained, *i.e.*, the nature of the harm which may result and the probability of its occurrence; and (2) whether the probability of that type of harm is a risk which a reasonable patient would consider in deciding on treatment. *Smith v. Shannon*, 100 Wn.2d 26, 33-34, 666 P.2d 351 (1983). Expert testimony is necessary to establish the first step of "materiality." *Id.* at 33.

In moving for summary judgment, a defendant can meet its initial burden by demonstrating that the plaintiff lacks competent expert testimony. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226-27, 770 P.2d 182 (1989). Thereafter, the burden shifts to the plaintiff to produce an affidavit from a qualified expert witness stating specific facts that support a cause of action. *Id.* The expert must have an adequate factual basis for his expert opinion. "Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment." *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689 (1992). CR 56(e) requires that "[a]ffidavits (1) must be made on personal knowledge, (2) shall set forth such facts as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) ("conclusory statements of fact will not suffice").

Here, Dr. Bensinger's declaration lacks an adequate foundation because it is premised on the self-serving statements of Nguyen-Aluskar. However, it is incumbent on him to rely on competent evidence in the record before the Court. The trial court sustained LVI and Dr. Jensen's objections to Nguyen-Aluskar's declaration. She does not assign error to the trial court's rulings.

There is no competent foundation upon which Dr. Bensinger may opine. He does not cite to or quote from her medical records. Instead, he summarily concludes that Dr. Jensen failed to sufficiently obtain Nguyen-Aluskar's consent. However, the only evidence in the record with respect to informed consent is (1) Dr. Jensen's signed affirmation that he discussed the enhancement procedure's risks and benefits with her; and (2) the signed Consent Form that Nguyen-Aluskar signed, *specifically acknowledging the risks and complications that she later alleged occurred.*

- "Complications can and do occur from these enhancements." CP at 74;
- "These risks and complications include but are not limited to . . . over or under correction . . progressive corneal thinning . . . loss of vision . . . and vision which cannot be completely corrected with glasses or contact lenses[.]" CP at 74.

A patient's signature on a consent form that discloses the potential risks and complications of a proposed treatment, as well as the alternative of nontreatment, is *prima facie* evidence of informed consent. RCW 7.70.060.

Here, Dr. Bensinger's opinions are simply based on Nguyen-Aluskar's bare assertions, unsupported by the evidence in the record. He opines that Dr. Jensen should have used the six-page Consent Form that she signed in 2005, rather than the shorter one-page Consent Form that she signed in 2012. However, her signature acknowledges that she re-read the lengthier six-page 2005 form before undergoing the enhancement procedure. CP at 74. Nevertheless, as a matter of law, an alleged failure to use a specific form is inadmissible as evidence of an failure to obtain consent. *See* RCW 7.70.060. Accordingly, Dr. Bensinger's contention that Dr. Jensen should have used a different form is legally incompetent evidence to defeat Dr. Jensen's motion for summary judgment.

Further, Dr. Bensinger opines about Nguyen-Aluskar's visual acuity before and after the enhancement procedure. CP at 263-64. However, there is no admissible evidence in the record to establish her condition before or after the procedure other than her own self-serving statements to him—upon which he clearly relies in forming his opinion. However, a poor result is not of itself evidence of negligence. *Miller v. Kennedy*, 91 Wn.2d 155, 588 P.2d 734 (1978).

Dr. Bensinger also relies on Nguyen-Aluskar's self-serving claim that she was promised "falcon-like vision," which is merely an allegation in her complaint. It is completely unsupported by competent evidence. He

also parrots Nguyen-Aluskar's self-serving claim that Dr. Jensen did not go over the Consent Forms with her, and that her alleged inability to read the Forms resulted, inexplicably, from a technician's administration of eye drops. Again, these are bare assertions copied directly from her complaint. *See Lane v. Harborview Med. Ctr.*, 154 Wn. App. 279, 288, 227 P.3d 297 (2010) ("A declaration that contains only conclusory statements without adequate factual support does not create an issue of material fact that defeats a motion for summary judgment.")

Finally, Dr. Bensinger's declaration fails to create a genuine issue of material fact supportive of Nguyen-Aluskar's informed consent claim because it does not identify any specific risk as a "material" risk. The declaration likewise fails to identify the probability of any occurrence of any specific risk. CP at 263.

Rather, the only risk that Dr. Bensinger identifies is that she would "require reading glasses upon the completion of the enhancement procedure." *Id.* But he does not establish that this is a "material" risk, and fails to discuss the scientific nature of the risk. Identifying a risk divorced from a discussion of its materiality is inadequate. *See Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 784 P.2d 1288 (1990), *review denied*, 114 Wn.2d 1023 (1990) ("unless expert testimony can establish [the risk's] existence, nature, and likelihood of occurrence, the presence of

its risk, as a matter of law is not material and no duty of disclosure manifests in the health care provider).

The trial court properly exercised its discretion in denying Nguyen-Aluskar's motion for reconsideration. Based on the foregoing, the trial court's denial should be affirmed.

F. She Has Waived any Alleged Error Regarding the Admissibility of Her and Her Counsel's Declaration.

Nguyen-Aluskar did not ask the trial court to reconsider its ruling sustaining the objections to the admissibility of (a) her unsigned, unsworn, unsupported declaration; and (b) her attorney's unsupported and improper declaration.

Likewise, she does not assign error to nor address in her Opening Brief the trial court's ruling or any alleged error. Accordingly, she has abandoned any claim of error as to the ruling. *Lassila v. Wenatchee*, 89 Wn.2d 804, 809, 576 P.2d 54 (1978) (noting that "appellant has not argued or briefed six of the challenged findings of fact. Thus, he is deemed to have abandoned any claim of error as to them"); *Seattle First-Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 243, 588 P.2d 1308 (1978) (the appellate court does "not consider issues apparently abandoned at trial and clearly abandoned" on appeal). Accordingly, the trial court's ruling

sustaining Dr. Jensen's objections to the admissibility of both Nguyen-Aluskar and her attorney's declaration stand.

Significantly, Nguyen-Aluskar's Opening Brief recites "Statements of Fact" directly from her inadmissible and unsworn declaration, as well as unsupported allegations recited in her response to summary judgment. *See* Opening Brief at 2-4 (citing unsupported allegations from her response brief designated as CP at 169-71; her attorney's declaration that lacks personal knowledge and is designated as CP at 179-80; and her unsworn declaration that copies and pastes her complaint into her declaration and makes other allegations of fact that lack evidentiary support, designated as CP at 231-28—all to which Dr. Jensen objected and which the trial court sustained).

Since the trial court's ruling is unchallenged and final, Dr. Jensen requests that this Court not consider pages 2-4 of Nguyen-Aluskar's Opening Brief.

G. SHE HAS WAIVED HER RIGHT TO APPEAL THE DISMISSAL OF HER CLAIMS FOR CPA VIOLATIONS AND MEDICAL NEGLIGENCE.

Nguyen-Aluskar's Opening Brief did not address, brief, or assign error to the trial court's dismissal of her Consumer Protection Act and medical negligence claim. In fact, "Consumer Protection Act" or "CPA" exist nowhere in her Opening Brief.

Similarly, her Opening Brief does not address the trial court's dismissal of her medical negligence claim. Instead, her appeal focusses solely on her informed consent claim. *See* Opening Brief at 29 (relying on Dr. Bensinger's declaration that "Respondents failed to give [Appellant] proper informed consent and failed to notify [Appellant] of the potential and known risk of the procedure prior to the procedure.")

Dr. Bensinger's criticisms of Dr. Jensen's care correlate directly to informed consent and not to a breach of the standard of care in the actual performance of the enhancement procedure. For example, Dr. Bensinger offers no criticisms that Dr. Jensen made a wrong incision; tapped the lid speculum on her eyeball; or any other aspects of the actual enhancement procedure. The only case upon which Nguyen-Aluskar relies with respect to a medical malpractice action is *Smith v. Shannon*, 100 Wn.2d 26, 666 P.2d 351 (1983), which is an informed consent case.

Arguments, errors, and contentions not raised in an Opening Brief are waived and claims are abandoned. *See State v. Wood*, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977) ("Appellant did not address these contentions in his brief and we will not consider assignments of error which are supported neither by argument nor authority"); *Talps v. Arreola*, 83 Wn.2d 655, 657, 521 P.2d 206 (1974) ("Appellant's brief and reply brief make it evident that she has, for all intents and purposes, abandoned her original

claim of conversion as well as the assertion that respondents have violated RCW 19.86.020 *et seq.*, for which she had asked treble damages.") The *Talps* Court noted that the Appellant did not argue these issues or cite any cases. Accordingly, "[c]ontentions that are not supported by argument or authority will not be considered by us."

Based on the foregoing, Dr. Jensen submits that the CPA and medical negligence claims are waived because Nguyen-Alsukar did not assign error and did not brief the dismissal of these two claims.

IV. CONCLUSION

Under the circumstances of this case, the trial court exercised sound judgment in denying Nguyen-Alaskar's request for a CR 56(f) continuance and in denying her motion for reconsideration. Dr. Jensen respectfully requests that the Court of Appeals affirm the trial court's rulings, *in toto*.

Dr. Jensen also requests that the Court decide as a matter of law that Nguyen-Alaskar's CPA and medical negligence claims are waived, based on her failure to assign error and brief the respective issues. Alternatively, if the Court of Appeals reverses and remands the case, then Dr. Jensen requests that the Court of Appeals decide that the only surviving claim on remand is a purported lack of informed consent.

Respectfully submitted this 18 day of May, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the date noted below, a true and correct copy of the foregoing was delivered and/or transmitted in the manner(s) noted below:

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DATED this 18 day of May, 2015.

for Sopheary Sanh, Legal Assistant