

NO. 68513-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TERRENCE J. MULLAN, individually, and as Personal Representative of
the Estate of DANA MULLAN, and for MATTHEW D. MULLAN, a
minor, MICHAEL P. MULLAN, a minor, and CHRISTOPHER R.
MULLAN, a minor,

Appellants,

v.

NORTH CASCADE CARDIOLOGY, PLLC, a Washington professional
limited liability company; ANDREW and JANE DOE COLETTI, a
marital community; MARIA and JOHN DOE HEALEY, a marital
community; and ST. JUDE MEDICAL, INC., a Minnesota corporation,

Respondents.

BRIEF OF RESPONDENTS NORTH CASCADE CARDIOLOGY,
PLLC, COLETTI, AND HEALEY

Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466
WILLIAMS, KASTNER & GIBBS PLLC
Attorney for Respondents North Cascade
Cardiology, PLLC, Coletti and Healey

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

2012 JUL 18 PM 3:55
COURT OF APPEALS
STATE OF WASHINGTON
110

TABLE OF CONTENTS

	<u>Page</u>
I. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW	1
II. COUNTERSTATEMENT OF THE CASE.....	2
A. Nature of the Lawsuit.....	2
B. Factual Background.	3
C. Defense Motions for Summary Judgment.	7
D. Mr. Mullan’s Response to the Summary Judgment Motions.	8
E. Mr. Mullan’s Alternative Request for CR 56(f) Continuance.	12
F. The Defendants’ Replies in Support of Summary Judgment.	13
G. The Hearing on the Motions for Summary Judgment.	14
H. Court’s Rulings Denying Mr. Mullan’s Request for CR 56(f) Continuance and Granting Defendants’ Motions for Summary Judgment.	15
III. STANDARDS OF REVIEW.....	18
A. Grant of Summary Judgment.....	18
B. Denial of CR 56(f) Motion for Continuance.....	19
IV. ARGUMENT.....	20
A. The Trial Court Properly Dismissed Mr. Mullan’s RCW 7.70.030(2) “Breach of Promise” Claim Because There Is No Evidence that Anyone Promised Ms. Mullan She Would Not Die.	20

B.	The Trial Court Also Properly Dismissed Mr. Mullan’s RCW 7.70.030(1) Health Care Malpractice Claims.	22
C.	The Trial Court Did Not Abuse Its Discretion in Denying Mr. Mullan’s Motion for a CR 56(f) Continuance.	26
1.	The trial court did not ignore the declarations of Mr. Mullan’s experts.	28
2.	The trial court did not summarily dismiss, but was properly unimpressed with, Mr. Mullan’s arguments for a CR 56(f) continuance.	29
3.	The trial court had tenable grounds and tenable reasons for denying the motion for a CR 56(f) continuance.	31
V.	CONCLUSION.....	35

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES	
<i>Branom v. State</i> , 94 Wn. App. 964, 974 P. 335, <i>rev. denied</i> , 138 Wn.2d 1023 (1999)	7
<i>Butler v. Joy</i> , 116 Wn. App. 291, 299, 65 P.3d 671, <i>rev. denied</i> , 150 Wn.2d 1017 (2003)	19
<i>Colwell v. Holy Family Hosp.</i> , 104 Wn. App. 606, 15 P.3d 210, <i>rev. denied</i> , 144 Wn.2d 1016 (2001)	19, 23
<i>Guile v. Ballard Community Hospital</i> , 70 Wn. App. 18, 851 P.2d 689 (1993)	23
<i>Hansen v. Virginia Mason Med. Ctr.</i> , 113 Wn. App. 199, 53 P.3d 60 (2002), <i>rev. denied</i> , 149 Wn.2d 1005 (2003)	9, 13, 20-21
<i>Lallas v. Skagit County</i> , 167 Wn.2d 861, 864, 225 P.3d 910 (2009)	18
<i>Lindgren v. Lindgren</i> , 58 Wn. App. 588, 794 P.2d 526 (1990), <i>rev. denied</i> , 116 Wn.2d 1009 (1991)	19
<i>Qwest Corp. v. City of Bellevue</i> , 161 Wn.2d 353, 166 P.3d 667 (2007)	19, 26, 32, 33
<i>Redding v. Virginia Mason Med. Ctr.</i> , 75 Wn. App. 424, 878 P.2d 483 (1994)	19
<i>Seybold v. Neu</i> , 105 Wn. App. 666, 19 P.3d 1068 (2001)	23

Tracfone Wireless, Inc. v. Dep't of Revenue,
170 Wn.2d 273, 242 P.3d 810 (2010).....18

Wilson v. Steinbach,
98 Wn.2d 434, 656 P.2d 1030 (1982).....18

STATUTES

RCW 7.70.0307

RCW 7.70.030(1)..... passim

RCW 7.70.030(2)..... passim

RCW 7.70.0407, 9

RCW ch. 7.70.....7

RULES

CR 12(b)(6).....7

CR 56(c).....18

CR 56(f) passim

I. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court properly dismiss plaintiff's breach of promise claim under RCW 7.70.030(2) on the ground that plaintiff failed to present evidence that any health care provider made any legally enforceable promise to Dana Mullan that the injury suffered (*i.e.*, her death) would not occur?

2. Did the trial court properly dismiss plaintiff's RCW 7.70.030(1) health care malpractice claim where plaintiff had no expert testimony establishing either that Dr. Coletti breached the applicable standard of care or caused Ms. Mullan's death, or that any asserted breach of the nursing standard of care by Nurse Healey proximately caused Ms. Mullan's death?

3. Did the trial court properly exercise its discretion in denying plaintiff's request for a CR 56(f) continuance of the health care defendants' summary judgment motion, where plaintiff failed to provide a good reason why he had not already obtained the evidence he proposed to seek in discovery, or that, by engaging in discovery, he expected to develop relevant and admissible evidence to create a genuine issue of material fact as to whether: (a) either Dr. Coletti, Nurse Healey, or anyone else at North Cascade Cardiology promised Ms. Mullan that she would not die; (b) health care Dr. Coletti provided to Ms. Mullan in September 2008

fell below the applicable standard of care and caused Ms. Mullan's death; or (c) on October 12, 2008, the battery in Ms. Mullan's pacemaker was depleted to the point that the pacemaker did not operate as programmed and that a negligent act or omission on the part of Nurse Healey was a but-for cause of Dana Mullan's death?

II. COUNTERSTATEMENT OF THE CASE

A. Nature of the Lawsuit.

More than two years and nine months after his wife, Dana Mullan, died on October 12, 2008, Terence J. Mullan, on July 25, 2011, filed this wrongful death action. CP 1-5. He sued Dr. Andrew Coletti, Nurse Maria Healey, and their employer, North Cascade Cardiology, PLLC (collectively, "the health care defendants"), claiming that, on September 11-12, 2008, they failed to exercise "ordinary care" in interrogating Ms. Mullan's pacemaker and estimating the pacemaker battery's remaining useful safe life, proximately resulting in Ms. Mullan's death a month later. CP 3-4. Mr. Mullan also sued the manufacturer of his wife's pacemaker, St. Jude Medical, Inc., claiming that it "failed to exercise ordinary care in providing current, accurate and timely technical assistance to Dana Mullan's health care providers" with regard to the useful life of her pacemaker battery. CP 4. Defendants denied liability. CP 100-03; *see* CP 17. All claims were dismissed on summary judgment. CP 321-29.

B. Factual Background.

Dana Mullan had a condition called third degree heart block, CP 222, which caused her heart to beat too slowly, CP 223 (¶ 15). Ms. Mullan had a pacemaker installed in her chest in November 1989, when she was 24. CP 122, 222-23 (¶¶ 14, 16, 17). The pacemaker helped complete a defective electrical conduction path by which contraction of the right atrium stimulated contraction of the right ventricle to pump blood. CP 198 (¶ 11), 222-23 (¶ 14). A pacemaker provides “pacing therapy,” but does not guarantee that a patient will not die or suffer an unrelated cause of death. CP 275 (¶ 24).

In May 1994, Ms. Mullan’s original pacemaker was replaced with a St. Jude Medical Synchrony II, Model 2023 Pacemaker pacemaker. CP 143 (¶ 6), 223 (¶ 17), powered by a lithium-iodide battery developed to provide a low current for a long period of time so that it can be used in implantable medical devices, CP 199 (¶ 13). The battery, at settings similar to those of Ms. Mullan’s, had an estimated mean longevity of 13.1 years, with a projected range of 7.7 to 18.5 years.¹ CP 272 (¶ 17). Pacemaker batteries cannot be recharged or replaced except surgically by replacing the entire pacemaker. CP 199 (¶ 13).

¹ One of plaintiff’s experts, Mr. Bilancia, opined that the mean longevity of Ms. Mullan’s pacemaker battery was 11.3 years, with a projected range of 7.1 to 15.5. years, CP 199 (¶ 15), but that estimate was based on different lead impedances than those reported by Ms. Mullan’s records, CP 272 (¶ 17).

On September 11, 2008, Ms. Mullan made her first visit, having referred herself, to North Cascade Cardiology, PLLC, in Bellingham for cardiology care. CP 122 (History), 224 (¶ 20). By then, her St. Jude Medical pacemaker had been in her chest for 14.3 years. On September 11, Ms. Mullan was seen separately by both Dr. Andrew Coletti, a North Cascade Cardiology cardiologist, and Maria Healey, a North Cascade Cardiology arrhythmia nurse. CP 107, 122-124, 145-46, 158. Dr. Coletti obtained a full medical history and review of systems, noted that Ms. Mullan reported no acute symptoms, conducted a physical examination, and planned for a surface echocardiogram to be performed, for Ms. Mullan to be followed by the Arrhythmia Group, and for the arrhythmia nurse to contact St. Jude Medical for a better determination of the longevity of Ms. Mullan's pacemaker battery. CP 122-24.

Nurse Healey saw Ms. Mullan on September 11, 2008, for testing of her pacemaker and consultation concerning the pacemaker's battery function. CP 142, 145-46. In order to assess the condition of the pacemaker and the remaining longevity of its battery, Nurse Healey "interrogated" the pacemaker. CP 224 (¶ 21). Pacemaker interrogation involves noting the device's settings and checking its function by connecting it wirelessly to a computer. CP 142 (¶ 3), 144-46, 224 (¶ 21).

Nurse Healey communicated the interrogation data to St. Jude Medical by fax. CP 142 (¶ 3), 146.

St. Jude Medical responded on September 11 or 12, 2008, advising Nurse Healey that the pacemaker battery had five to six months left before the pacemaker would have to be replaced. CP 142 (¶ 4), 148-49. Based on that information from St. Jude Medical, Nurse Healey so informed Ms. Mullan. CP 142-43 (¶ 5), 148. Citing insurance reasons, Ms. Mullan told Nurse Healey that she would like to have the battery replaced before the end of 2008. CP 143 (¶ 5), 148. Pending scheduling of a visit by Ms. Mullan to Dr. John MacGregor, a North Cascade Cardiology electrophysiologist, Nurse Healey prepared an order for monthly phone monitoring of Ms. Mullan's pacemaker's performance. CP 124, 125, 148.

Ms. Mullan passed away on October 12, 2008. CP 1. The record contains no evidence of the circumstances of her death.² The Snohomish County Medical Examiner conducted an autopsy on October 16, 2008. CP 268 (¶ 10). A representative of St. Jude Medical was present at the autopsy and, after the pacemaker had been explanted, tested the battery that same day. CP 268 (¶ 10), 281. The testing showed a battery voltage

² The only information in the record concerning the cause of Ms. Mullan's death is the complaint allegation, CP 3 (¶ 3.4) (also quoted in plaintiff's response to the summary judgment motion, CP 157), that "[h]er cause of death was determined by the San Juan County Coroner's Office to be due to cardiac arrhythmia [sic]."

that was low, 2.14V, but the testing occurred at room temperature rather than body temperature. CP 268 (¶ 10). The pacemaker was sent to St. Jude Medical's Cardiac Rhythm Management Division in California, CP 292, in order to conduct product analysis as required by, and under protocols approved by, the U.S. Food and Drug Administration, which regulates medical devices. CP 263-64 (¶ 4), 268 (¶ 10). St. Jude Medical received the device on October 20, CP 264, and conducted the product analysis on October 28. CP 264 (¶ 6), 284, 286-91.³

The results of St. Jude Medical's postmortem analyses of the pacemaker and its battery were conducted at 37° C (body temperature), CP 43 (¶ 4), 268 (¶ 10), 286-87, and established that the battery had reached "ERI" status – an indication that the battery was approaching, but had not yet reached, the end of its useful life and was still powering the pacemaker as prescribed for Ms. Mullan, CP 43-44, 48 (¶ 5), 268 (¶ 10), 269-70 (¶¶ 11-12), 272 (¶ 16). The pacemaker device had no malfunction. *Id.*

In August 2009, St. Jude Medical sent Mr. Mullan's lawyer, Bill Pierson, at his request, the results of its analysis of the pacemaker and underlying data, CP 263 (¶ 2), 279-301, and invited him to contact Ronald G. Ronick, at a phone number provided, if he had questions, CP 282.

³ There is no evidence that any of the health care defendants had a role or say in how St. Jude Medical analyzed Ms. Mullan's pacemaker post-mortem (or even that any of them knew the device was being or would be tested).

C. Defense Motions for Summary Judgment.

Mr. Mullan filed his complaint on July 25, 2011. CP 1. On October 24, 2011, St. Jude Medical moved for CR 12(b)(6) dismissal or, alternatively, summary judgment. CP 17-37. On December 13, 2011, the health care defendants moved for summary judgment. CP 105-16. St. Jude Medical re-noted its motion, so that its motion would be heard on the same day as the health care defendants' motion. CP 150-51.

In their motion, the health care defendants noted that the complaint asserted no causes of action under RCW ch. 7.70, even though Mr. Mullan sought to hold them liable for injuries resulting from health care and even though *Branom v. State*, 94 Wn. App. 964, 968-69, 974 P. 335, *rev. denied*, 138 Wn.2d 1023 (1999), and other decisions hold that such claims are limited to those listed in RCW 7.70.030. CP 111-12.

The health care defendants also argued that Mr. Mullan lacked the expert medical testimony needed to establish the essential elements of a health care malpractice claim, *i.e.*, the applicable standard of care and its breach by either Dr. Coletti or Nurse Healey and causation, CP 113-16. *See* RCW 7.70.040. For their motion, the health care defendants relied upon exhibits to the Declaration of Bruce W. Megard, Jr., CP 118-39, including excerpts from Ms. Mullan's medical records, CP 122-25; the Declaration of Maria Healey, R.N., CP 141-49; and, with respect to

causation, the declarations of Chris Sorenson, CP 42-44, and Daryel Davis, CP 46-99, that St. Jude Medical had filed in support of its summary judgment motion, including Mr. Sorenson's testimony, CP 43-44, that *post mortem* product analysis of Ms. Mullan's explanted pacemaker confirmed that it continued to work and provide normal therapy, and that battery failure could not have been the cause of her death, *see* CP 108, 115-16.

D. Mr. Mullan's Response to the Summary Judgment Motions.

In his January 3, 2012 opposition to the health care defendants' summary judgment motion, CP 156-73, Mr. Mullan argued that his complaint should be read as stating claims under RCW 7.70.030(2) (health care providers' breach of promise that the injury complained of would not occur), CP 163-64, and/or RCW 7.70.030(1) (health care provider's failure to follow the applicable standard of care), CP 164-65.

Mr. Mullan offered no eyewitness or earwitness testimony that any of the health care defendants or their agents promised Ms. Mullan that she would not die. Nor did he cite any entry in any medical record that he contended proved the making of such a promise. His argument concerning his unpleaded breach-of-promise claim consisted of: (1) an assertion that unspecified "facts set forth by defendants in support of their own motion" show that he could establish that they "violated RCW 7.70.030(2)," CP 164 (lines 4-5); (2) a statement paraphrasing RCW

7.70.030(2), CP 164 (lines 5-9); (3) a characterization of the holding in *Hansen v. Virginia Mason Med. Ctr.*, 113 Wn. App. 199, 207-08, 53 P.3d 60 (2002), *rev. denied*, 149 Wn.2d 1005 (2003), CP 164 (lines 10-14); (4) an assertion that he is not required to support a breach-of promise claim with expert testimony, CP 164 (line 19); and (5) assertions that “defendants informed Ms. Mullan on September 12, 2008 that the battery for her pacemaker would last another five to six months, and put her on a course of treatment that simply involved checking the condition of her pacemaker’s battery once a month,” and that she died “[b]efore the first month had elapsed,” CP 164 (lines 15-18).

As for his unpleaded health care malpractice claim under RCW 7.70.030(1) and RCW 7.70.040, Mr. Mullan argued that the declaration of Dr. Siefert, an Arizona cardiological electrophysiologist, was sufficient to establish that Nurse Healey failed to meet the applicable nursing standard of care, CP 167-71, and that (according to plaintiff’s memorandum, not Dr. Siefert), Dr. Coletti is “vicariously liable for the actions of Nurse Healey . . . ,” CP 164. Mr. Mullan asserted that “Dr. Siefert’s declaration is also sufficient to causally connect Mr. Mullan’s death to the alleged nursing and staff deficiencies alleged by plaintiffs [sic].” CP 170.

To the extent Dr. Siefert’s declaration addressed causation (as opposed to nursing standards of care), it stated that “[t]here appears to

have been no testing [by St. Jude Medical] of the pacemaker battery voltage at the actual lead impedance loads of Ms. Mullan's leads, and therefore no basis to suggest the device was not at EOL ["End of Life"] status [and thus no longer able to function as designed, *see CP 226* (§ 24)] at the time of her death." CP 228. Dr. Siefert did not affirmatively opine that the device was at EOL status or was *unable* to function as designed at the time of Ms. Mullan's death.

Mr. Mullan also offered a declaration by an electrical engineer, Louis F. Bilancia, Jr., who speculated as to how St. Jude Medical had gone about conducting its *post mortem* product analysis of Ms. Mullan's pacemaker and withheld testing information,⁴ and declared that, because he was not satisfied that the testing had been done properly:

No scientifically reliable conclusion can be made at the moment as to the root cause of the depletion in voltage for the battery in Ms. Mullan's pacemaker from September 11, 2008 to the time of her death on October 12, 2008 until the pacemaker can be accessed by plaintiffs to determine if the programmed settings present and condition of the device

⁴ *See* CP 201 (§ 22) ("Based on my experience with [another pacemaker manufacturer, what Nurse Healey reported having been told by St. Jude Medical] would most likely have been determined as follows..."); CP 202 (§ 23) ("Several reasonable [but unspecified] hypotheses exist to explain why Ms. Mullan died that cannot be tested without access to the pacemaker itself"); CP 203 (§ 25) ("Based on information provided in [St. Jude Medical's analysis report] it appears that the pacemaker was reprogrammed to its original factory settings and tested (test #1) before testing the pacemaker according to the pacemaker's programmed parameters present at the time of Ms. Mullan's death (test #2)"); CP 204 (27b) (The data "suggests the distinct possibility that there is additional testing information in the possession of St. Jude Medical that has not been disclosed...").

components in the pacemaker at the time of Ms. Mullan's death can be retrieved and/or examined.

CP 206 (¶ 29). Mr. Bilancia did not opine, or profess the expertise to opine, that battery depletion caused Dana Mullan's death.

Although Mr. Bilancia referred to "the depletion in voltage for the battery" as if it were established fact, CP 29, he did not opine, much less to a reasonable degree of scientific probability, that the battery had actually *been* depleted at the time of Ms. Mullan's death. Nor did he specify what inquiry or tests plaintiff would need to have someone make or conduct, if plaintiff got "access" to the pacemaker – after plaintiff had waited from October 2008 to January 2012 to even suggest that he *wanted* such "access" – that would make it possible to reach any "scientifically reliable conclusion" concerning the status of the battery on the day of Ms. Mullan's death in 2008. Nor did Mr. Bilancia opine that testing of the battery and/or pacemaker in 2012 would yield results that would enable one to *say* how the battery and device had operated on October 12, 2008.

In opposing the health care defendants' summary judgment motion, Mr. Mullan also asserted that, for causation purposes, the health care defendants were not entitled to rely on St. Jude Medical's evidence that the pacemaker worked properly *post mortem* for the same reasons he stated in his own opposition to St. Jude Medical's summary judgment

motion, *i.e.*, his claim that St. Jude Medical had “failed to present any competent evidence to establish that Ms. Mullan’s pacemaker was working properly at the time of her death.” CP 171 (lines 11-14).

E. Mr. Mullan’s Alternative Request for CR 56(f) Continuance.

Mr. Mullan requested, alternatively, a CR 56(f) continuance, CP 171-772, 194, arguing that:

The root cause of the depleted condition of the battery for Ms. Mullan’s pacemaker’s battery cannot be reliably determined at present based upon the medical records provided and the documentation supplied by St. Jude Medical to date. Several reasonable hypotheses exist to explain why Ms. Mullan died that cannot be tested without access to the pacemaker itself. Plaintiffs have yet to gain access to the pacemaker in this lawsuit; it remains exclusively in the possession of defendant, St. Jude Medical. Plaintiffs request this Court that it grant plaintiffs’ sufficient time, which plaintiffs estimate will require six (6) months, to gain access to Ms. Mullan’s pacemaker, and all electronically stored information concerning St. Jude Medical’s analysis of Ms. Mullan’s pacemaker from September 11, 2008 to the present, in order to place before this Court sufficient evidence to establish the root cause of the depleted condition of the battery for Ms. Mullan’s battery [sic].

CP 172. In his opposition to the health care defendants’ motion, Mr. Mullan made no argument that a CR 56(f) continuance would enable him to develop evidence to support a breach-of-promise claim against Dr. Coletti, Nurse Healey, or North Cascade Cardiology. Nor did he make any argument that a CR 56(f) continuance would enable him to develop evidence, that he had been unable to gather on his own by consulting Dr.

Siefert or other physicians, either to support a malpractice claim against Dr. Coletti, or to support the causation element of a nursing malpractice claim against Nurse Healey.

F. The Defendants' Replies in Support of Summary Judgment.

On January 5 and 9, 2012, both defense motions were re-noted for hearing on January 27, 2012. CP 231-35. On January 23 and 24, the health care defendants and St. Jude Medical, respectively, filed their replies in support of dismissal of plaintiff's claims. CP 237-43, 245-60.

In their reply, the health care defendants argued that Mr. Mullan had not alleged or shown that any of them had ever promised Ms. Mullan that she would not pass away, or expressly guaranteed that her pacemaker would continue working for up to six months, or otherwise expressly and specially undertook or committed to obtain certain results or a cure through a procedure or course of treatment, as required by *Hansen*, 113 Wn. App. at 206-07, the decision plaintiff acknowledged as controlling. CP 239-40.

The health care defendants also pointed out that, even with Dr. Siefert's declaration, Mr. Mullan lacked competent expert medical testimony establishing that Dr. Coletti had violated any applicable standard of care, CP 240, and failed to identify any facts establishing any basis on

which Dr. Coletti would have vicarious liability for any claimed malpractice by Nurse Healey. CP 240-41.

Moreover, the health care defendants pointed out that Dr. Siefert's declaration included no opinion testimony causally linking any claimed violation of the standard of care by Nurse Healey to Ms. Mullan's death, CP 241-42, and that Mr. Mullan had not pleaded or argued any basis by which North Cascade Cardiology could have any liability, except vicariously as the employer of Dr. Coletti and Nurse Healey, CP 242.

Finally, the health care defendants opposed any CR 56(f) continuance, arguing that Mr. Mullan had offered no good reason for his delay in seeking discovery, had not adequately stated what evidence additional discovery might yield, and had not shown that additional evidence would raise an issue of material fact precluding summary judgment. CP 242-43.

G. The Hearing on the Motions for Summary Judgment.

The trial court heard oral argument on the summary judgment motions on January 27, 2012. With respect to Mr. Mullan's causation arguments based on the Bilancia declaration, St. Jude Medical's counsel explained to the court that:

[Plaintiff's expert Bilancia] has the data. He can do his ohms calculation⁵ and tell us whether he disagrees . . . [b]ut he's not going to get any more information. That's the crux of this, your Honor. The [2008] measured data is what we got. Is he saying that we could have – we could have gotten different measured data? No. The measured data is what the measured data is. No discovery is going to change what was reported by the device itself in the bench testing three years ago.

RP 81. Mr. Mullan's counsel offered no rebuttal to that point.

Counsel for the health care defendants advised the court that, during the three months since dispositive motions were filed, Mr. Mullan had propounded no discovery. RP 106; 119. Mr. Mullan's counsel replied with his speculation that the defendants would not have responded to discovery requests on the ground that there were motions pending, RP 110, and his assertion that Mr. Mullan needed a CR 56(f) continuance to get "sufficient information" and to "come up with what we believe is reliable scientific data" to respond to the health care providers' dispositive motion, RP 115.

H. Court's Rulings Denying Mr. Mullan's Request for CR 56(f) Continuance and Granting Defendants' Motions for Summary Judgment.

Following the January 27, 2012 oral argument, the trial court issued its letter ruling on February 9, 2012, CP 317-19, which was then

⁵ The transcript is probably correct, and counsel did say "ohms calculation," not "own calculation," in light of the prior discussion concerning ohms calculations and Ohms' Law at RP 64-65 and 72-73. In context, counsel's point was that Mr. Bilancia could use the St. Jude Medical data from 2008 and do "his own ohms calculation."

incorporated into the trial court's February 22, 2012 order granting the health care providers' motion for summary judgment, CP 321-26.

In denying Mr. Mullan's request for a CR 56(f) continuance, the court indicated that it was not persuaded that Mr. Mullan would be able to obtain any additional evidence to create a material issue of fact if given more time for discovery. CP 325. With regard to Mr. Mullan's RCW 7.70.030(1) health care malpractice claim, the court reasoned that, although Mr. Mullan claimed to need more time to examine the pacemaker, Mr. Mullan had failed to explain how examination of the pacemaker would provide either the expert medical testimony needed to establish that Dr. Coletti breached the applicable standard of care and thereby caused Ms. Mullan's death, or the expert medical testimony needed to provide a causal link between Ms. Mullan's death and Nurse Healey's alleged negligence. CP 325. The trial court also reasoned that Mr. Mullan had failed to explain why the expert testimony needed to oppose the health care defendants' summary judgment motion had not been obtained and was not available by the time of the summary judgment hearing, some six months after the complaint had been filed. CP 325.

The court further explained that the real question as to Mr. Mullan's RCW 7.70.030(1) claim was whether, with additional time, Mr. Mullan could obtain evidence, through further testing of the pacemaker or

review and evaluation of the tests performed by St. Jude Medical, that would enable an expert to provide the necessary expert testimony on causation. CP 326. The court concluded that further testing of the pacemaker battery would be useless,⁶ and that Mr. Mullan had had the results of the St. Jude Medical testing since August of 2009, yet still had not provided any expert testimony establishing that Ms. Mullan's death, to a reasonable degree of medical certainty, was caused by any act or omission of the health care defendants, or provided any good reason why that testimony had not already been obtained. CP 326.

With regard to Mr. Mullan's vicarious liability claims, the court reasoned that, although Mr. Mullan sought more time to establish an agency relationship between Dr. Coletti and Nurse Healey, or perhaps to obtain further facts as to their relationships with North Cascade Cardiology, Mr. Mullan's failure to provide necessary expert testimony showing a causal link between any breach of duty by Dr. Coletti or Nurse Healey would not be cured by obtaining further evidence of an agency relationship between any of the health care defendants. CP 325-26.

⁶ The court had earlier explained, in connection with its denial of plaintiff's requested continuance of St. Jude Medical's motion, that, as St. Jude Medical had pointed out, "any test of the battery at this time would be meaningless due to the passage of over three years since the device was explanted." CP 325; *see also* the Reply Declaration of Chris Sorenson, CP 276 (¶ 27), relied upon by the trial court in its order granting the health care providers' summary judgment motion, CP 322 (# 12).

Finally, as for Mr. Mullan's RCW 7.70.030(2) "breach of promise" claim, the court reasoned that Mr. Mullan had not identified any additional information he hoped to obtain in support of that claim from a continuance of the summary judgment motion. CP 326.

On the merits of the health care providers' motion for summary judgment, the trial court granted the motion on grounds that Mr. Mullan failed to provide expert testimony on causation necessary to the RCW 7.70.030(1) malpractice claim, and that the undisputed facts material to Mr. Mullan's RCW 7.70.030(2) "breach of promise" claim were legally insufficient to support that claim. CP 326.

The Court also granted St. Jude Medical's summary judgment motion. CP 327-29. Mr. Mullan timely appealed. CP 330-44.

III. STANDARDS OF REVIEW

A. Grant of Summary Judgment

A court reviews a grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Lallas v. Skagit County*, 167 Wn.2d 861, 864, 225 P.3d 910 (2009); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Tracfone Wireless, Inc. v. Dep't of Revenue, 170 Wn.2d 273, 280-81, 242 P.3d 810 (2010). An order granting summary judgment can be affirmed

on any basis supported by the record. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424 , 426, 878 P.2d 483 (1994).

B. Denial of CR 56(f) Motion for Continuance

An appellate court reviews a trial court's denial of a motion for continuance for 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, *rev. denied*, 144 Wn.2d 1016 (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.* (quoting *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990), *rev. denied*, 116 Wn.2d 1009 (1991)). A trial court properly may deny a motion for continuance 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.

Id. (quoting *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671, *rev. denied*, 150 Wn.2d 1017 (2003)).

IV. ARGUMENT

A. The Trial Court Properly Dismissed Mr. Mullan's RCW 7.70.030(2) "Breach of Promise" Claim Because There Is No Evidence that Anyone Promised Ms. Mullan She Would Not Die.

One of three ways that recovery may be had for an injury occurring as a result of health care is to prove "[t]hat a health care provider promised the patient or his or her representative that the injury suffered would not occur." RCW 7.70.030(2). To recover under RCW 7.70.030(2) for breach of a promise "that the injury suffered"—in this case, death—"would not occur," a plaintiff has to prove that the defendant health care provider made an enforceable promise by committing to obtain certain results through a procedure or course of treatment. *Hansen v. Virginia Mason*, 113 Wn. App. 199, 206-07, 53 P.3d 60 (2002), *rev. denied*, 149 Wn.2d 1005 (2003).

As the court noted in *Hansen*, "[t]he legislative history provides no indication that the legislature intended to alter the scope of the preexisting common law cause of action." *Id.* at 204. At common law, a cause of action existed "when medical practitioners expressly promise to obtain a specific result or cure through a course of treatment or a procedure." *Id.* at 206. The provider "had to expressly and specially contract and guarantee particular results," not merely offer "an opinion regarding the effect of a

course of treatment.” *Id.* 206-07. No claim could be predicated on “a promise regarding a diagnosis or prognosis.” *Id.* at 207.

Thus, in *Hansen*, where the physician’s chart entry stated that she had “assured” the patient and his family that the patient, who died ten months later, was not “terminal within the next year,” the court held that no legally enforceable promise within the meaning of RCW 7.70.030(2) had been made:

Dr. Taylor did not commit through this assurance or undertake a specific result or cure through a course of treatment or a procedure. An assurance is not an undertaking or commitment to obtain a specific result.

Hansen, 113 Wn. App. at 208. As the *Hansen* court explained:

Because we presume that the legislature intended to codify the common law, we conclude that an enforceable promise under RCW 7.70.030(2) must relate to the provision of specific medical services and the practitioner must expressly undertake or commit to obtain certain results or cure through a procedure or course of treatment. Here, under either version of the facts: whether Dr. Taylor told the family that Kurt Hansen would not die, or whether she assured them that it did not seem to be the case that he would die during the year, there is no evidence of a legally enforceable promise.

Id. at 208-09.

In this case as well, there is no evidence of a legally enforceable promise. At most, Nurse Healey relayed to Ms. Mullan, by phone, St. Jude Medical’s prognosis of a five-to-six-month life expectancy for her pacemaker battery. Nurse Healey did not assure, much less promise, Ms.

Mullan that she would not die, or even that the pacemaker battery would not become depleted within five months. After all, Nurse Healey set Ms. Mullan up for monthly monitoring of her pacemaker's function, which is hardly consistent with a promise that Ms. Mullan could safely forget about her pacemaker for five months.

The trial court correctly dismissed Mr. Mullan's unpleaded and belatedly asserted RCW 7.70.030(2) "breach of promise" claim.

B. The Trial Court Also Properly Dismissed Mr. Mullan's RCW 7.70.030(1) Health Care Malpractice Claims.

The trial court properly granted summary judgment to the health care defendants on Mr. Mullan's RCW 7.70.030(1) health care malpractice claims because Mr. Mullan (1) failed to present competent expert medical testimony that Dr. Coletti breached an applicable standard of care or proximately caused Ms. Mullan's death; (2) failed to show that Dr. Coletti was vicariously liable for any breach of the applicable nursing standard of care by Nurse Healey; and (3) failed to present competent expert testimony causally tying any breach of the applicable nursing standard of care by Nurse Healey to Ms. Mullan's death.⁷

⁷ The only basis upon which Mr. Mullan sought to hold North Cascade Cardiology liable was vicariously as Dr. Coletti's and Nurse Healey's employer. Thus, Mr. Mullan's failure to present sufficient evidence to support his claims against Dr. Coletti and Nurse Healey required the dismissal of his claims against North Cascade Cardiology.

In response to the health care defendants' summary judgment motion, it was incumbent on Mr. Mullan to present competent expert medical testimony to substantiate his RCW 7.70.030(1) health care malpractice claims. As he correctly acknowledges, *App. Br. at 14-15*:

Expert medical testimony is generally required to establish the standard of care and to prove causation in a medical negligence action. *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993). Therefore, to defeat summary judgment in most medical negligence cases, the plaintiff must produce competent medical expert testimony establishing that the injury complained of was proximately cause by a failure to comply with the applicable standard of care. *Seybold [v. Neu]*, 105 Wn. App. [666,] at 676 [19 P.3d 1068 (2001)]. "If the plaintiff in a medical negligence suit lacks competent expert testimony, the defendant is entitled to summary judgment." *Colwell v. Holy Family Hospital*, 104 Wn. App. 606, 611, 15 P.3d 210 (2001).

In his opening appellate brief, Mr. Mullan does not reference any expert testimony that he submitted to the trial court in support of his RCW 7.70.030(1) health care malpractice claims against any health care defendant. Nor does he contend that he presented sufficient competent expert testimony to support his RCW 7.70.030(1) malpractice claims. Rather, he asserts only that the dismissal of those claims should be reversed if this Court accepts the arguments he makes as to why he believes the trial court abused its discretion in denying his motion for CR

56(f) continuance with respect to St. Jude Medical's summary judgment motion. *See App. Br. at 28.*

Even with respect to Mr. Mullan's RCW 7.70.030(1) nursing malpractice claim against Nurse Healey, where Mr. Mullan did produce some expert medical testimony concerning breach of the nursing standard of care, Mr. Mullan does not contend on appeal (nor could he) that he presented sufficient competent expert medical testimony to support the causation element of that claim.

Although Mr. Mullan does not say so in his appellate brief, Dr. Siefert opined in his declaration that Nurse Healey obtained inaccurate information from her interrogation of Dana Mullan's pacemaker, or communicated inaccurate information to St. Jude Medical, on September 11, 2008. CP 225-27 (¶¶ 23-26). Based on those opinions, counsel for the health care defendants withdrew their argument that Mr. Mullan lacked evidence of a breach of the standard of care for purposes of a claim against Nurse Healey (and, vicariously) North Cascade Cardiology. RP 100-01, 106.

Even if the statements in those paragraphs of Dr. Siefert's declaration suffice to support the *breach* element of a malpractice claim against Nurse Healey (and, vicariously, against North Cascade Cardiology), Mr. Mullan still failed to offer competent medical expert

opinion testimony supporting a causal link between such nursing malpractice and Ms. Mullan's death. For example, Mr. Mullan offered no medical expert testimony that there is only one type of heart arrhythmia, and/or that the St. Jude Medical pacemaker is able, and was programmed, to prevent death whenever that type of arrhythmia occurs. Nor did he offer medical expert testimony or other evidence that whatever heart arrhythmia Ms. Mullan may have experienced on October 12, 2008 was a type of arrhythmia that her St. Jude Medical pacemaker probably would have kept from being fatal if its battery was adequately charged.

Dr. Siefert, Mr. Mullan's only medical expert, did not opine that the pacemaker battery actually *was* too depleted on October 28, 2008, to operate the pacemaker properly, or that Ms. Mullan died from a heart arrhythmia of the type the St. Jude Medical pacemaker was implanted to correct or probably would have been able to prevent from causing death if its battery had been adequately charged. Dr. Seifert did not provide any causal link between Ms. Mullan's death and the alleged inaccuracies in the information Nurse Healey obtained or communicated to St. Jude Medical. Without such expert medical testimony, a jury could not attribute Ms. Mullan's death to her pacemaker battery except through rank speculation.

Because Mr. Mullan did not present sufficient expert medical testimony to substantiate the essential elements of his RCW 7.70.030(1)

health care malpractice claims, the trial court properly dismissed those claims on summary judgment.

C. The Trial Court Did Not Abuse Its Discretion in Denying Mr. Mullan's Motion for a CR 56(f) Continuance.

As Mr. Mullan's own counsel advised the trial court, CP 171-72, to obtain a CR 56(f) continuance, the law required him to (1) offer a good reason for the delay in obtaining the desired evidence; (2) state what evidence would be established through the additional discovery he proposed to do; and (3) show that the desired evidence would raise a genuine issue of material fact. *Qwest Corp.*, 161 Wn.2d at 369.

Having told the trial court that, Mr. Mullan then offered only the following statements in his opposition to the health care defendants' motion for summary judgment to try to show that he satisfied the CR 56(f) continuance criteria:

The root cause of the depleted condition of the battery for Ms. Mullan's pacemaker's battery cannot be reliably determined at present based upon the medical records provided and the documentation supplied by St. Jude Medical to date. Several reasonable hypotheses exist to explain why Ms. Mullan died that cannot be tested without access to the pacemaker itself. Plaintiffs have yet to gain access to the pacemaker in this lawsuit; it remains exclusively in the possession of defendant, St. Jude Medical. Plaintiffs request this Court that it grant plaintiffs' sufficient time, which plaintiffs estimate will require six (6) months, to gain access to Ms. Mullan's pacemaker, and all electronically stored information concerning St. Jude Medical's analysis of Ms. Mullan's

pacemaker from September 11, 2008 to the present, in order to place before this Court sufficient evidence to establish the root cause of the depleted condition of the battery for Ms. Mullan's battery [sic].

CP 172.

Yet, with respect to his RCW 7.70.030(1) health care malpractice claims, Mr. Mullan failed to explain how examination of the pacemaker would provide either the expert medical testimony needed to establish that Dr. Coletti breached the applicable standard of care and thereby caused Ms. Mullan's death or the expert medical testimony needed to provide a causal link between Ms. Mullan's death and Nurse Healey's alleged negligence. Nor did he explain why he had been unable to obtain the expert testimony needed to substantiate his health care malpractice claims in the more than three years since his wife's death, or in the more than six months since filing the complaint. And, with respect to his RCW 7.70.030(2) "breach of promise" claim, Mr. Mullan did not even attempt to identify what, if any, additional information he hoped to obtain through discovery that would raise an issue of material fact as to that claim.

In arguing on appeal that the trial court abused its discretion in denying his motion for a CR 56(f) continuance, Mr. Mullan asserts that the trial court: (1) "appeared to completely ignore the declaration of the Estate's electrical engineering expert, Louis Bilancia," *App. Br. at 18*; (2)

“without explanation and without even any reference to the Estate’s experts’ declaration testimony, summarily dismissed the notion that the cause of Ms. Mullan’s death could not at the moment be determined in a scientifically reliable manner,” *App. Br. at 18-19*, and (3) “without explanation, chose to ignore all of these requests put forth by the Estate . . . ,” such as “to access the pacemaker to examine and retrieve data from it; . . . to conduct its own forensic testing on the battery . . . ,” *App. Br. at 27*; *see also App. Br. at 20*. Notwithstanding Mr. Mullan’s protestations to the contrary, the trial court did not ignore the declarations of Mr. Mullan’s experts, was properly unimpressed with Mr. Mullan’s arguments for a continuance, had tenable grounds and tenable reasons for denying the requested continuance and, thus, did not abuse its discretion in doing so.

1. The trial court did not ignore the declarations of Mr. Mullan’s experts.

Mr. Mullan, *App. Br. at 18-19, 21-22, 27*, would have this court infer that the trial court completely ignored his experts’ declarations. But no such inference is warranted or can be drawn. Although a trial court, when denying a CR 56(f) continuance, is not obliged to list everything it has considered, the trial court did in this case. In its order granting the health care defendants’ motion for summary judgment and denying Mr.

Mullan's continuance request, CP 321-26, the trial court listed both Mr. Bilancia's declaration and Dr. Siefert's declaration as among the things it considered, CP 322 (## 8, 9). Furthermore, the hearing transcript shows that Mr. Mullan's counsel invoked the Bilancia (or "Bellasia [sic]") declaration, both in trying to explain why the court should not grant summary judgment based on the defendants' showings, RP 61-63, 65, and in arguing that he needed to "get that [the ohms'] calculation," RP 67-68, to determine whether St. Jude tested the pacemaker *post mortem* according to an FDA-approved manual, RP 69-72. The hearing transcript shows that the court was engaged while Mr. Mullan's counsel made his arguments and referred to the Bilancia declaration in justifying his continuance request. RP 61-72.

2. The trial court did not summarily dismiss, but was properly unimpressed with, Mr. Mullan's arguments for a CR 56(f) continuance.

The trial court was right to be unimpressed with Mr. Mullan's arguments for a CR 56(f) continuance. As the court noted, RP 73, CP 325, 326, Mr. Mullan had been given St. Jude Medical's *port mortem* product analysis results in August 2009⁸ (ten months after Ms. Mullan's death and

⁸ In August 2009, St. Jude Medical sent Mr. Mullan's lawyer, Bill Pierson, at his request, the results of its analysis of the pacemaker and underlying data, CP 263 (¶ 2), 279-301. St. Jude Medical even invited Mr. Pierson to contact, and gave Mr. Pierson the name and telephone number of the person at St. Jude Medical to contact, if Mr. Pierson had questions. CP 282.

more than two years before the summary judgment hearing), and had filed suit more than six months before the summary judgment hearing. Yet, Mr. Mullan still failed to explain why he or his counsel, well before having to respond to the defense motions for summary judgment, had not claimed that they needed “access” to the pacemaker, or made any effort to obtain such access.

Mr. Mullan offered no reason why he needed further discovery to establish his “breach of promise” claim, or his claim that Dr. Coletti somehow violated the applicable standard of care. Moreover, even as to causation, Mr. Mullan only speculated that “access” to the pacemaker might yield evidence relevant to that element of his health care malpractice claims. He offered no competent evidence, even through the Bilancia declaration, that it was still *possible*, more than three years after Ms. Mullan’s death, to obtain information concerning the status of the battery on the date of Ms. Mullan’s death that would be more reliable than the data St. Jude obtained in its testing of the battery right after her death.⁹

⁹ Through Mr. Bilancia’s declaration, Mr. Mullan purported to identify facts from which the trial court could rule that whether the battery had been depleted enough to cause Ms. Mullan’s pacemaker to fail was an issue of fact. Mr. Bilancia asserted, CP 203 (¶ 26) that examination and analysis of the pacemaker removed from Ms. Mullan’s body on October 16, 2008 “determined the battery voltage for the pacemaker on that date was 2.14V, well below St. Jude Medical’s specified end-of-life (EOL) threshold of 2.2V for the battery for the pacemaker.” As defendants pointed out in their replies, CP 249-52; *see* CP 242, and explained in the Reply Declaration of Chris Sorensen, CP 265-74, Bilancia’s assertions were disingenuous and/or self-serving speculation as to what *might* have been inadequate in the way St. Jude had conducted its *post mortem* product analysis. Mr. Bilancia, like

If the battery is adequately charged now, that might well confirm St. Jude Medical's conclusion that it was adequately charged 16 days *post mortem*. The converse, however, is not necessarily true, and Mr. Mullan has conspicuously failed to offer testimony that, if the battery were to be tested now and found to be depleted, that would mean the battery was depleted on October 12, 2008. Mr. Bilancia did not need "access" to the pacemaker or information from St. Jude Medical to address that point. The proposition is either true or not true. The omission of testimony that a battery's depleted charge state today (more than three years after Ms. Mullan's death) would be probative of whether it was depleted in October 2008 was fatal to Mr. Mullan's stated rationale for needing "access" to the pacemaker or a continuance of the summary judgment motions.

3. The trial court had tenable grounds and tenable reasons for denying the motion for a CR 56(f) continuance.

The trial court, in its letter opinion, carefully articulated why it was not persuaded that Mr. Mullan, if given more time for discovery, would be able to obtain additional evidence to create a genuine issue of material fact on his claims against the health care defendants. *See* CP 325-26. The trial

Dr. Siefert, never affirmatively stated, to a reasonable degree of probability under principles of his profession and based on actual evidence, that there was something wrong with the pacemaker battery or the pacemaker itself on October 12, 2008. Thus, based on the record before the trial court, the court properly concluded that the Siefert and Bilancia declarations fell short of demonstrating the existence of genuine issues of material fact concerning causation for purposes of Mr. Mullan's claims against all defendants, including the health care defendants.

court's stated reasons for denying the motion for continuance were tenable and, thus, not an abuse of discretion. *Qwest Corp.*, 161 Wn.2d at 369 (“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’”).

With respect to his unpleaded “breach of promise” claim under RCW 7.70.030(2), Mr. Mullan made no attempt to explain how further discovery might yield evidence to support that claim. Ms. Mullan obviously was unavailable to testify that Nurse Healey promised her that she would not die. Mr. Mullan never asserted that any witness would testify that Nurse Healey made such a promise. Nor did he ever suggest that an interrogatory, production request, deposition, or third-party subpoena might unearth such a witness or any other evidence of a promise being made to Ms. Mullan that she would not die. The trial court’s conclusion that Mr. Mullan had not “in any way identified what additional information [he] would hope to obtain” as to his RCW 7.70.030(2) “breach of promise” claim if the summary judgment motion were continued, CP 326, not only was true, but also was a tenable basis for denying the requested continuance.

To the extent Mr. Mullan was asking the trial court for a CR 56(f) continuance to develop evidence for his RCW 7.70.030(1) health care

malpractice claim against Dr. Coletti, Mr. Mullan never explained why he had been unable to present such evidence in response to the health care defendants' summary judgment motion, even though counsel had been representing him since no later than August 2009 (*see* CP 282), and he had obviously had enough time to consult a cardiologist, Dr. Siefert, from whom he obtained a 28-paragraph declaration, CP 220-29, that was devoid of any criticism of Dr. Coletti's care and treatment of Ms. Mullan. Mr. Mullan proffered no explanation as to why he lacked, or had been unable to obtain, competent expert testimony establishing that Dr. Coletti breach the applicable standard of care, or how further discovery might cure that fatal defect in his case against Dr. Coletti.

Under the CR 56(f) continuance criteria Mr. Mullan cited to the trial court, *see* CP 171-72, and set forth in the case law, *see Qwest Corp.*, 161 Wn.2d at 369, Mr. Mullan was obligated to indicate what evidence he proposed to obtain if given a continuance that would raise a genuine issue of fact as to his claims against Dr. Coletti, and to provide a good reason why he had not *already* obtained that evidence. Yet Mr. Mullan's counsel never said what evidence he proposed to obtain to establish the essential elements of his malpractice claim against Dr. Coletti or why he had been unable to obtain the expert testimony he needed to establish any breach of the standard of care by Dr. Coletti. The trial court's denial of Mr.

Mullan's requested continuance on that basis, CP 325, was tenable and not an abuse of discretion.

With respect to Mr. Mullan's RCW 7.70.030(1) nursing malpractice claim against Nurse Healey, the trial court also had tenable reasons for denying Mr. Mullan's request for a continuance. *See* CP 325-326. Mr. Mullan failed to explain why he had been unable to obtain the expert testimony he needed to establish a causal link between Nurse Healey's alleged negligence and Ms. Mullan's death. Nor did he explain how examination of the pacemaker would provide the expert medical testimony needed to provide a causal link between Ms. Mullan's death and Nurse Healey's alleged negligence. At the risk of belaboring the point, neither of Mr. Mullan's experts, even in opposing the motions for summary judgment, asserted that any particular "testing" of the device as of 2012 would probably shed more or better light on the question of battery function than the data St. Jude obtained in October 2008 does.

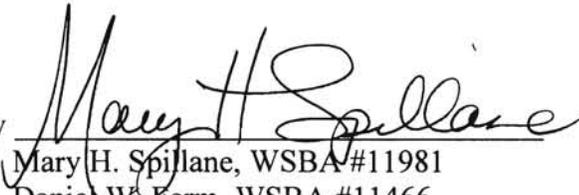
Because the trial court had tenable reasons and tenable grounds for denying Mr. Mullan's request for a CR 56(f) continuance, the trial court did not abuse its discretion in doing so.

V. CONCLUSION

For the foregoing reasons, Mr. Mullan's claims against Dr. Coletti, Nurse Healey, and North Cascade Cardiology, PLLC, were properly dismissed. This Court should affirm.

RESPECTFULLY SUBMITTED this 18th day of July, 2012.

WILLIAMS, KASTNER & GIBBS PLLC

By 
Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466

Attorney for Respondent North Cascade
Cardiology, Coletti, and Healey

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 18th day of July, 2012, I caused a true and correct copy of the foregoing document, "Brief of Respondents North Cascade Cardiology, PLLC, Coletti, and Healey," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Appellants:

William E. Pierson, Jr., WSBA #13619
LAW OFFICE OF WILLIAM E. PIERSON,
JR., P.C.
600 First Ave., Suite 233
Seattle, WA 98104
Ph: (206) 254-0915
Fx: (206) 254-0916
Email: bill.pierson@weplaw.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Co-counsel for Respondents North Cascade
Cardiology, Dr. Andrew Coletti and Dr. Maria
Healey:

Bruce W. Megard, Jr. WSBA # 27560
BENNETT, BIGELOW & LEEDOM, P.S.
1700 Seventh Ave., Suite 1900
Seattle, WA 98101
Ph: (206) 622-5511
Fx: (206) 622-8986
Email: bmegard@bblaw.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Defendant/Respondent St. Jude
Medical, Inc.:

Jeffrey M. Thomas, WSBA # 21175
Susannah C. Carr, WSBA # 38475
GORDON TILDEN THOMAS & CORDELL LLP
1001 4th Ave Ste 4000
Seattle, WA 98154-1007
Ph: (206) 467-6477
Fx: (206) 467-6292
Email: jthomas@gordontilden.com
scarr@gordontilden.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

DATED this 18th day of July, 2012, at Seattle, Washington.



Paula Polet, Legal Assistant