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Court of Appeals
Division I
State of Washington

No. 73327-3

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

ESTATE OF DOUGLAS E. KAFKA, JR., KRISTEN M. KAFKA,
individually and as the personal representative for the Estate of Douglas E.
Kafka, Jr., DOUGLAS E. KAFKA, SR., and SUSAN G. KAFKA, as
individuals and for the marital community,

Appellants,

vs.

PROVIDENCE HEALTH & SERVICES, an active Washington
corporation; PROVIDENCE HEALTH & SERVICES WESTERN
WASHINGTON, an active Washington corporation, PROVIDENCE
HEALTH & SERVICES WASHINGTON, an active Washington
corporation, PROVIDENCE EVERETT MEDICAL CENTER, an active
Washington corporation, and "Does" 1 through 40, inclusive

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The Kafkas ask this Court to hold that the trial court abused its discretion in denying a CR 56(f) motion for a continuance based on evidence they were never able to obtain. Even if given a generously lengthy continuance, the Kafkas could never have acquired a supportive declaration from Nurse Practitioner Baggenstos, who withdrew from the case without providing any support. The Kafkas further request that this Court hold that the trial court abused its discretion in denying a motion for reconsideration based on the untimely declaration of Nurse Wanek, which was filed almost two weeks after their motion for reconsideration. Most significantly, even if Nurse Wanek's declaration had been timely filed in opposition to summary judgment, Providence would still have been entitled to dismissal of all claims against it. Because Nurse Wanek's declaration contained only standard of care and not causation opinions, it was insufficient to preclude summary judgment. For these reasons, this Court should affirm the trial court.

II. ISSUES ON APPEAL

1. Should this Court affirm the trial court's order granting summary judgment dismissal to Providence where the Kafkas would have failed to adduce sufficient medical expert testimony on causation, even if

Nurse Wanek's declaration would have been timely filed?

2. Should this Court affirm the trial court's discretionary denial of the Kafkas' oral CR 56(f) motion for a continuance where the Kafkas (1) failed to demonstrate good cause; (2) failed to demonstrate what evidence would be obtained and that it would raise an issue of material fact; and (3) never obtained the declaration for which they sought the CR 56(f) continuance?

3. Should this Court affirm the trial court's discretionary denial of reconsideration where the Kafkas failed to demonstrate grounds for reconsideration under CR 59?

III. COUNTER-STATEMENT OF THE CASE

On 03/10/10, Douglas E. Kafka (DOB 01/26/1981) presented to Providence with a self-inflicted left thigh abscess after he attempted to inject liquid morphine into his thigh on three separate occasions. Clerk's Papers (CP) at 252:4-5. Mr. Kafka exhibited drug-seeking behaviors early in his hospitalization with documented pocketing and stashing of opioids. CP at 252:5-6. On two separate occasions, within a five day period, drug paraphernalia was discovered in Mr. Kafka's room. CP at 252:6-7. On one evening, with visitors present, the smoke alarm went off in Mr. Kafka's restroom. CP at 252:7-8. After this, security was notified and

began performing sweeps of his room. On 03/20/10, it was decided that Mr. Kafka would no longer be allowed visitors. CP at 252:9-10. On 04/15/10, Mr. Kafka was again permitted visitors but only with security present. CP at 252:10-11. Providence implemented a plan to manage Mr. Kafka's drug-seeking behavior. CP at 283-84.

Mr. Kafka remained hospitalized at Providence in order to receive treatment for osteomyelitis (infection) of his spine, as well as a line infection that was apparently caused by Mr. Kafka tampering with his central line. Despite Providence's efforts to prevent Mr. Kafka's illicit drug use during his hospitalization, he persisted in crushing pills and injecting them into his central line, resulting in an infection. CP at 252:11-13. On 04/21/10, he suffered cardiac arrest on the floor of his hospital room. CP at 252:14. Cardiopulmonary resuscitation efforts were administered but providers were unable to regain a rhythm. CP at 252:15-16. Mr. Kafka's autopsy report states he died of "acute multidrug intoxication." CP at 101; 252:16-17. Due to Mr. Kafka's drug use, he had become septic with endocarditis, pneumonia, and discitis of the thoracic vertebrae. CP at 252:16-18.

Mr. Kafka's family filed a complaint against Providence *pro se* on 04/18/14 following a request for mediation made to Providence on

04/19/13. CP at 252:19-20; 339-47. Included in the Kafkas' complaint are allegations of medical negligence and wrongful death. *Id.* Providence filed an answer and affirmative defenses on 06/17/14. CP at 331-36.

On 06/17/14, Providence served its First Set of Requests for Production and First Set of Interrogatories to the Kafkas, who never responded.¹ CP at 253:1-2. On 07/14/14, Providence sent a letter to the Kafkas informing them of its intention of filing a motion for summary judgment. The Kafkas again did not respond. CP at 253:2-4. Providence filed a motion for summary judgment on 09/10/14. CP at 253:4-5; 324-30. At the hearing on 10/14/14, appellant Douglas Kafka, Sr., appeared *pro se*. CP at 253:5. He immediately asked Judge Ellen Fair for a CR 56(f) continuance. Judge Fair reluctantly granted a continuance, but informed Mr. Kafka that he would have only 30 more days before the motion for summary judgment would be heard. CP at 253:6-7. The hearing was reset for 11/14/14. CP at 253:7-8.

One day before Providence's motion for summary judgment was set to be heard, attorney David Duce sent a Notice of Appearance on

¹ The Kafkas repeatedly claim in Appellants' Brief that no discovery was ever propounded in this case. This is incorrect. Providence propounded a first set of written discovery on the Kafkas on 06/17/14 (CP at 253:1-2), notified them of the late discovery responses by letter dated 08/01/14, discussed the late discovery with attorney David Duce upon his Notice of Appearance, and again provided the discovery requests to him. Despite these efforts and representation by two separate attorneys, the Kafkas never responded to Providence's written discovery requests.

behalf of the Kafkas to defense counsel. CP at 196-97; 253:9-10. Defense counsel immediately provided Mr. Duce with the pleadings and medical records in the case and the hearing was voluntarily struck. CP at 253:10-12. Providence's motion for summary judgment was re-noted for 11/25/14, but was again voluntarily struck when Mr. Duce indicated he would be seeking another continuance. CP at 253:12-13. On 12/05/14, approximately three weeks after entering his Notice of Appearance, Mr. Duce filed a Notice of Intent to Withdraw, effective 12/15/14. CP at 200-01; 249-50; 253:13-14. This Notice listed the address for all Kafkas, including Kristen Kafka, as 1190 Portage Road; Camano Island, WA 98282, and provided that "all future pleadings in this matter should be directed to them at said address." CP at 250. The Kafkas again proceeded with the case *pro se*. CP at 253:14-15.

Providence re-filed its motion for summary judgment to be heard on 02/05/15. CP at 215:17-18. Providence properly served the Kafkas via First Class Mail on 01/02/15. CP at 215:18. Pursuant to CR 5(b)(2)(A), service was complete on 01/05/15 - 31 days before the 02/05/15 hearing. CP at 217:1-4. The motion for summary judgment was mailed to the address listed by all appellants, including Kristen Kafka, on the face of the complaint. CP at 339-47. This is the same address listed for all appellants

on attorney David Duce's Notice of Intent to Withdraw. CP at 249-50. Appellants never informed Providence's counsel that Kristen Kafka allegedly lives at a different address. CP at 39-41. Nonetheless, such claims that they did are immaterial where the Kafkas failed to file a notice with the court updating the address listed on the complaint and Mr. Duce's Notice of Intent to Withdraw.² Because Mr. Duce's Notice of Intent to Withdraw provided the most recent information on the Kafkas' address – later in time than when the Kafkas allege they told Providence's counsel that Kristen Kafka had moved – the Notice provided the “last known address” for service under CR 5(b)(1).

On 01/22/15, attorney Steven Krafchick entered a Limited Notice of Appearance on behalf of the Kafkas. CP at 210-12; 215:20-22; 235-37.³ On 01/22/15, the Kafkas' counsel filed a motion to continue Providence's motion for summary judgment. CP at 232-34. Providence

² Notably, Judge Wynne considered the appellants' claims of improper service at the summary judgment hearing and, determining that such claims were entirely without merit, granted summary judgment dismissal to Providence. CP at 182-84.

Also of significance, the filed version of Kristen Kafka's declaration regarding service is unsigned. CP at 185-86. This reason alone provides sufficient grounds for the trial court to have exercised its discretion in finding that service was proper.

³ Although Mr. Krafchick entered this Limited Notice of Appearance on behalf of all plaintiffs, including the Estate of Douglas Kafka, Jr. and Kristen Kafka, he claims he did not actually have contact with Kristen Kafka until 02/02/15. CP at 15; 185; 235-36. It is not clear how or why an attorney would enter a Notice of Appearance on behalf of a plaintiff without having any contact with her or obtaining her permission. Although Mr. Krafchick claims he only represented the parents at that time (CP at 14-15), his Notice of Appearance is entered on behalf of all plaintiffs. CP at 235 (“the undersigned appears as the attorney for plaintiffs Estate of Douglas E. Kafka, Jr., et al.”). Kristen Kafka is the personal representative of the Estate. CP at 55.

filed an opposition to the CR 56(f) motion to continue. CP at 213-22. After the motion to continue was fully briefed by both parties, the Kafkas' counsel did not confirm the motion to continue, so the motion was struck from the court calendar. CP at 47; 213-22. The Kafkas now claim that this motion was not confirmed because their first expert returned an unsupportive review on their over-prescription theory. *See* App. I-3 to Brief of Appellants. Even though the Kafkas' counsel failed to confirm his motion for a continuance that was briefed and scheduled to be heard on 02/03/15, two days later at the summary judgment hearing, the Kafkas' counsel orally moved for a CR 56(f) continuance. *See* App. I-3 to Brief of Appellants. Judge Wynne denied the motion for a continuance. CP at 184. Because the Kafkas had failed to adduce any medical expert testimony regarding standard of care and causation, Judge Wynne granted Providence's motion for summary judgment. CP at 182-83.

On 02/17/15, the Kafkas filed a motion for reconsideration of the order granting summary judgment dismissal to Providence on the grounds that the Kafkas were unable to secure Nurse Practitioner Baggenstos' testimony before the summary judgment hearing.⁴ CP at 166-73. On

⁴For the purposes of clarity, the Kafkas consulted the following three experts:

(1) The Kafkas moved for a CR 56(f) continuance on the grounds that their first expert needed more time. This motion was struck when their first expert

02/20/15, while the Kafkas' motion for reconsideration was pending, Nurse Practitioner Baggenstos withdrew from the case before providing an expert declaration. *See* App. I-4 to Brief of Appellants. On 02/25/15 – over one week after filing their motion for reconsideration - the Kafkas' counsel filed an additional declaration for the first time identifying a new expert, Karen Wanek, M.S.N, R.N. CP at 34-38. More than a week later, the Kafkas' counsel untimely filed the declaration of Nurse Wanek. CP at 29-33. Providence opposed Nurse Wanek's declaration as untimely. CP at 8-13. It appears that Judge Wynne did not consider Nurse Wanek's declaration or Providence's opposition on reconsideration, as they were not listed on the Order. CP at 7. Because he denied the motion for reconsideration, Judge Wynne did not rule on Providence's motion to strike Nurse Wanek's declaration.

returned an unsupportive review. CP at 47; 213-22; App. I-3 to Brief of Appellants.

- (2) Two days after the CR 56(f) hearing was set to be heard but was struck by the Kafkas, the Kafkas' counsel orally moved for a CR 56(f) continuance on the grounds that their second expert, Nurse Practitioner Baggenstos, needed more time to draft a supportive declaration. The Kafkas moved for reconsideration on the same grounds. CP at 59-65; 166-73. After summary judgment was granted to Providence, Nurse Practitioner Baggenstos withdrew without providing a declaration. CP at 166-73; App. I-4 to Brief of Appellants.
- (3) Two weeks after filing a motion for reconsideration professing a need for more time for Nurse Practitioner Baggenstos' declaration (which was never completed), the Kafkas filed a declaration from their third expert, Karen Wanek, M.S.N., R.N. CP at 29-33. The declaration provided standard of care but not causation opinions. *Id.*

Although Nurse Wanek's declaration provides opinions on standard of care, she does not opine on causation. As such, even if the trial court considered Nurse Wanek's expert declaration, the Kafkas never adduced any expert testimony regarding the cause of Douglas Kafka, Jr.'s death. On 03/03/15 – the day after the Kafkas filed Nurse Wanek's declaration – Judge Wynne denied reconsideration of his order granting summary judgment. CP at 6-7. The Kafkas filed a Notice of Appeal on the orders granting summary judgment and denying reconsideration. CP at 1-2.

IV. ARGUMENT

A. This Court Should Affirm the Trial Court's Summary Judgment Dismissal of all Claims Against Providence.⁵

1. This Court Reviews Orders Granting Summary Judgment De Novo.

CR 56(b) enables a defendant to move for summary judgment dismissing an action or any part thereof. The summary judgment procedure dispenses with the time and cost of litigating meritless actions through trial. *W.G. Platts, Inc. v. Platts*, 73 Wn.2d 434, 442-43, 438 P.2d

⁵ This brief addresses the issues out of chronological order, first considering whether summary judgment was properly granted before addressing the motions for a continuance and reconsideration. Because Nurse Wanek's declaration would have been insufficient to defeat summary judgment even if available and filed by the summary judgment hearing, this Court need not address the motions for a continuance or reconsideration.

867 (1968); *Padron v. Goodyear Tire*, 34 Wn. App. 473, 475, 662 P.2d 67 (1983), *rev. den.*, 100 Wn.2d 1003. “Summary judgment is . . . not . . . a disfavored procedural shortcut, but . . . an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive termination of every action.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). For this reason, “[r]ule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses . . . , but also for the rights of persons opposing such claims and defenses to demonstrate . . . prior to trial, that the claims and defenses have no factual basis.” *Id.*

A defendant may move for summary judgment without supporting affidavits on the grounds that the plaintiff lacks competent evidence to support an essential element of her case. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 23-24, 851 P.2d 689 (1993), *rev. den.*, 122 Wn.2d 1010 (citations omitted). In a medical malpractice case, expert testimony is usually required to establish standard of care and causation. *Harris v. Groth*, 99 Wn.2d 438, 451, 663 P.2d 113 (1983). Once the defendant demonstrates that the plaintiff lacks competent expert testimony, “the burden shifts to the plaintiff to produce an affidavit from a qualified expert witness that alleges specific facts establishing a cause of action. Affidavits containing conclusory statements without adequate factual support are insufficient to avoid summary judgment.” *Guile*, 70 Wn. App.

at 25. Consequently, medical negligence claims lacking supportive expert testimony cannot survive summary judgment.

A trial court's order granting summary judgment is reviewed de novo. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). Providence is entitled to summary judgment where there are "no genuine issues as to any material fact and . . . [it] is entitled to judgment as a matter of law." *Id.* (quoting CR 56(c)).

2. Chapter 7.70 RCW Exclusively Governs Actions Alleging Injury From Healthcare.

By its own terms, chapter 7.70 RCW exclusively governs all Washington civil actions based on tort, contract, or otherwise, for damages arising from health care. "RCW 7.70 modifies procedural and substantive aspects of *all* civil actions for damages for injury occurring as a result of health care, regardless of how the action is characterized." *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335 (1999), *rev. den.*, 138 Wn.2d 1023; *see also Orwick v. Fox*, 65 Wn. App. 71, 86, 828 P.2d 12 (1992), *rev. den.*, 120 Wn.2d 1014 ("[b]y its terms, RCW 7.70 applies to all actions against health care providers, whether based on negligence or intentional tort."). Health care is "the process in which [a health care provider] utilize[es] the skills which [he or she] has been taught in examining, diagnosing, treating or caring for" the patient. *Branom*, 94 Wn. App. at 970-71 (citations omitted).

Significantly, “the legislature expressly limit[s] medical malpractice actions for injuries against health care providers to claims based on the failure to follow the accepted standard of care, the breach of an express promise by a health care provider, and the lack of consent.” *Sherman v. Kissinger*, 146 Wn. App. 855, 866, 195 P.3d 539 (2008) (citing RCW 7.70.030). To survive summary judgment, the Kafkas were required to establish a prima facie claim for medical negligence which requires a showing that: (1) the health care providers breached the acceptable standard of care; and (2) this breach was the proximate cause of Douglas Kafka, Jr.’s death. RCW 7.70.040. Even if Nurse Wanek’s declaration had been available at the time of summary judgment, the Kafkas could not have met this burden.

3. Providence Was Entitled to Summary Judgment Where the Kafkas Failed to Produce Competent Medical Expert Testimony that: (1) Providence Breached the Standard of Care; and (2) the Breach Caused Mr. Kafka’s Death.

RCW 7.70.040 sets forth the necessary elements of proof for a medical negligence claim based on a breach in the standard of care:

- (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the

state of Washington, acting in the same or similar circumstances;

- (2) Such failure was a proximate cause of the injury complained of.

RCW 7.70.040(1)-(2). As a result, to defeat summary judgment, the Kafkas would have had to produce competent expert testimony establishing that: (1) Providence breached the applicable standard of care in the treatment of Douglas Kafka, Jr.; and (2) the breach proximately caused Douglas Kafka, Jr.'s death. *Harris*, 99 Wn.2d at 449 (“expert testimony will generally be necessary to establish the standard of care . . . and most aspects of causation”); *Shoberg v. Kelly*, 1 Wn. App. 673, 677, 463 P.2d 280 (1969), *rev. den.*, 78 Wn.2d 992 (affirming summary judgment dismissal of medical negligence claims on the grounds that “plaintiffs were under the necessity of showing at the minimum through a medical expert, or otherwise, that they had or would have medical expert testimony to prove the applicable standard of care and its violation. Without such expert medical testimony plaintiffs could not prove negligence and could not recover”).

- a) The Kafkas Failed to Provide any Medical Expert Testimony on Causation.

Plaintiffs in medical malpractice actions must provide competent medical expert testimony to prove causation. *Berger v. Sonneland*, 144

Wn.2d 91, 111-12, 26 P.3d 257 (2001) (requiring expert medical evidence as to causation where causation is not observable by lay person); *Reese v. Stroh*, 128 Wn.2d 300, 308, 907 P.2d 282 (1995) (“the general rule in Washington is that expert testimony on the issue of proximate cause is required in medical malpractice cases”); *McLaughlin v. Cooke*, 112 Wn.2d 829, 837, 774 P.2d 1171 (1989) (“[a]s a general rule, expert medical testimony on the issue of proximate cause is also required in medical malpractice cases”). The medical testimony must establish that the event more likely than not caused the injury, and must reasonably exclude as a probability every other hypothesis. *O’Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968). Because the Kafkas failed to provide any competent medical expert testimony regarding causation, Providence was entitled to summary judgment.

b) Even if the Kafkas Had Provided Nurse Wanek’s Declaration In Opposition to Summary Judgment, Providence Would Still Have Been Entitled to Dismissal of All Claims Against It.

By the time of the summary judgment hearing on 02/05/15, the Kafkas did not have any medical expert support for their malpractice claims against Providence. Instead, in a CR 56(f) motion set to be heard on 02/03/15 but later struck by the Kafkas, they claimed that they needed

more time to get a declaration from their first expert. CP at 232-34. This expert later returned an unfavorable review to the Kafkas. CP at 47; 213-22; App. I-3 to Brief of Appellants.

At the summary judgment hearing, the Kafkas' counsel orally moved for a CR 56(f) continuance on the grounds that he needed more time to get Nurse Practitioner Baggenstos' (the second expert) declaration. App. I-3 to Brief of Appellants. Judge Wynne denied the motion for a CR 56(f) continuance and granted summary judgment to Providence on the grounds that the Kafkas did not have competent medical expert testimony to support: (1) a breach in the standard of care; and (2) causation, as is required by Washington precedent. CP at 182-83. The Kafkas then moved for reconsideration on the grounds that they needed more time to get Nurse Practitioner Baggenstos' declaration. CP at 166-73. Several days later, Nurse Practitioner Baggenstos withdrew without providing even one declaration for the Kafkas. *Id.* Accordingly, by the time of summary judgment (and reconsideration), the Kafkas did not have any medical expert testimony to support their medical malpractice claims. As such, Providence was entitled to summary judgment as a matter of law.

As demonstrated in section 3, *supra*, to survive summary judgment, a plaintiff in a medical malpractice action must adduce competent medical expert testimony showing: (1) a breach in the standard of care; and (2) causation. On the causation prong, the expert must state

that, more probably than not, the breach in the standard of care caused the alleged injury. *O'Donoghue*, 73 Wn.2d at 824. Absent such expert support, the movant is entitled to summary judgment dismissal of all claims against it.

Here, the declaration of Nurse Wanek was not provided in support of summary judgment. It was not even contemplated at the time of summary judgment – or reconsideration – because the Kafkas' counsel had not even found Nurse Wanek as a potential expert until after he already moved for reconsideration of the trial court's grant of summary judgment dismissal in favor of Providence. CP at 59-65; 166-73. The Kafkas now claim that reconsideration of summary judgment dismissal should have been granted in light of Nurse Wanek's declaration. Nonetheless, even if the declaration had been provided in time for the summary judgment hearing, it was insufficient to preclude summary judgment because it does not address causation.

According to Nurse Wanek, "In my professional nursing opinion, it is clear that the level of care provided by the nursing staff responsible for Mr. Kafka's care deviated from and fell below the minimum accepted standard of care required of nurses[.]" CP at 33. This statement may arguably meet the requirement of providing competent medical expert testimony that Providence's nursing staff fell below the standard of care.

However, Nurse Wanek's declaration does not address causation, which is the second prong required to survive summary judgment. Although the declaration vaguely suggests that the hospital's breach allowed Mr. Kafka to stash and swallow pills, "leading to his death,"⁶ this is insufficient under Washington precedent. To survive summary judgment, the Kafkas were required to provide competent medical expert testimony that the breach in the standard of care caused the alleged injury **on a more probable than not basis**. *O'Donoghue*, 73 Wn.2d at 824 (emphasis added). The causation expert must also reasonably exclude as a possibility every other hypothesis. *Id.* Even if it would have been filed before the summary judgment hearing – which it was not – Nurse Wanek's declaration fails to provide the required causation testimony.

To survive summary judgment, the Kafkas would have to provide a competent medical expert declaration that, more probably than not, Mr. Kafka's death was caused by the hospital's administration and monitoring of medication rather than an alternative hypothesis such as Mr. Kafka obtaining the drugs through another source such as visitors. The likelihood that Mr. Kafka obtained the fatal dose of drugs from a visitor rather than from the hospital is well-supported by the Providence records, which document probable drug-related behaviors from Mr. Kafkas'

⁶ CP at 33.

visitors. CP at 252. Because Nurse Wanek failed to state any causation opinions on a more probable than not basis, and failed to refute the hypothesis that Mr. Kafka actually obtained the fatal dose of drugs from visitors rather than the hospital, her declaration is insufficient to survive summary judgment.

The Kafkas did not file Nurse Wanek's declaration in time for the summary judgment hearing. Neither did they mention it in either of their CR 56(f) motions for a continuance or motion for reconsideration. The trial court properly denied the oral CR 56(f) motion, granted summary judgment, and denied reconsideration. But even if Nurse Wanek's declaration had been timely filed in opposition to Providence's motion for summary judgment, Providence would still have prevailed. Nurse Wanek's declaration was insufficient to overcome summary judgment because it did not address causation.

4. The Trial Court Properly Exercised its Discretion in Finding that Service of the Summary Judgment Motion on All Parties Was Adequate.

a) Judge Wynne's Discretionary Finding that Service Was Proper Is Well-Supported By the Record and Should Not Be Disturbed on Appeal.

The argument that Kristen Kafka was not properly served with the summary judgment motion was raised at the summary judgment hearing.

In granting summary judgment to Providence, Judge Wynne implicitly found that service on all parties was proper. CP at 182-83.

The Kafkas claim that the competing declarations between the Kafkas and Providence's attorney regarding verbal notification of a change of address create a genuine issue of material fact precluding summary judgment. This argument demonstrates a flawed understanding of material facts. Judge Wynne's finding that service was proper was a discretionary decision warranting review for abuse of discretion, not de novo review as the Kafkas claim. *See Miebach v. Colasurdo*, 102 Wn.2d 170, 179, 685 P.2d 1074 (1984) (holding that a trial court's finding that service was proper was not an abuse of discretion).

Judge Wynne reviewed the various service documents from Providence, the complaint (with the Camano Island address listed for all plaintiffs), attorney David Duce's Notice of Intent to Withdraw listing all the Kafkas' address as the Camano Island address, as well as the competing declarations, including the fact that Kristen Kafka's filed declaration was unsigned. CP at 185-91; 200-01; 339-47. Judge Wynne made this discretionary decision regarding service before considering the merits of the summary judgment motion. These were two separate decisions warranting two different levels of review from this Court.

Moreover, service by mail to the “last known address” of a party is sufficient under CR 5(b)(1). Even if the party claims to have never received the motion, service by mail is deemed complete on the third day after mailing. CR 5(b)(2)(A). Here, mailing the motion for summary judgment to all Kafkas (including Kristen) at the address listed on the complaint and David Duce’s Notice of Intent to Withdraw was sufficient under the rule. Whether the Kafkas told Providence’s attorney that Kristen had a different address *before* David Duce provided the Camano Island address as their last known address is irrelevant. Whether Kristen Kafka ever received the motion is also irrelevant under CR 5.

Judge Wynne’s finding that Kristen Kafka had been properly served should be upheld. Because the record shows that proper service was made to the address on file with the court, that this was the same address listed on attorney David Duce’s Notice of Intent to Withdraw, and the Kafkas never filed a notice of change of address with the court, Judge Wynne’s finding was well-supported by the record. As such, it should remain undisturbed on appeal.

- b) Service Is Not a Genuine Issue of Material Fact That Can Preclude Summary Judgment.

The Kafkas' claim that the service issue creates a genuine issue of material fact that precludes summary judgment is entirely unsupported by court rules and Washington precedent. First, Kristen Kafka's declaration was unsigned and therefore does not meet CR 56(e)'s specificity requirement. CP at 185-86. Second, an alleged dispute over service does not concern material facts. "A genuine issue of material fact exists if, after weighing the evidence, reasonable minds could reach different factual conclusions about an issue that is material to the disputed **claim**." *Jones v. State*, 170 Wn.2d 338, 352, 242 P.3d 825 (2010) (emphasis added). "A material fact is one upon which the outcome of the litigation depends, in whole or in part." *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). Because collateral issues such as service do not concern the legal merits of the underlying claims at issue in the summary judgment motion, they are not genuine issues of material fact. In other words, the outcome of the litigation does not depend on whether service of the summary judgment motion was proper. Had Judge Wynne found service to be improper, Providence would have simply re-served and refiled the motion.

More significantly, because Providence moved for summary judgment on the grounds that the Kafkas could not satisfy an essential

element of their case - expert support - the Kafkas' claim regarding genuine issues of material fact necessarily fails. "A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts **immaterial.**" *Young*, 112 Wn.2d at 225 (emphasis added).

c) Because Providence Would Have Been Entitled to Summary Judgment Regardless of When Nurse Wanek's Declaration Was Filed, This Court Need Not Reach the Other Issues in this Case.

Appellate courts may decline to reach issues that are rendered moot by their other holdings in the case. *See, e.g., Unruh v. Cacchiotti*, 172 Wn.2d 98, 111 n.9, 257 P.3d 631 (2011); *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 61 n.7, 164 P.3d 454 (2007). Here, because Providence would have been entitled to summary judgment even if Nurse Wanek's declaration had been timely filed, this Court need not reach the motions to continue or for reconsideration. However, if this Court holds that Nurse Wanek's declaration would have been sufficient to preclude summary judgment if timely filed, this Court should still hold that denying the motions to continue and for reconsideration and granting the motion for summary judgment was proper.

B. This Court Should Affirm the Trial Court's Discretionary Denial of the Kafkas' Oral Motion for a CR 56(f) Continuance.

1. This Court Reviews Orders Denying CR 56(f) Motions for a Continuance for an Abuse of Discretion.

Under CR 56(f), a court may order a continuance “[s]hould 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[.]” CR 56(f) “has been construed to require that the nonmoving party show why he is unable to respond without the extension and what essential facts he needs to secure.” *Farmer v. Davis*, 161 Wn. App. 420, 430, 250 P.3d 138 (2011), *rev. den.*, 172 Wn.2d 1019. A CR 56(f) motion for a continuance should be denied 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 v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989) (emphasis added); accord *Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 90, 838 P.2d 111 (1992).⁷

⁷ The Kafkas consistently misstate that the burden was on Providence to show why it would be prejudiced by a continuance. *Turner* and *Tellevik* demonstrate that the movant

A trial court's denial of a CR 56(f) motion is reviewed under an abuse of discretion standard. *Tellevik*, 120 Wn.2d at 90. A trial court's discretionary denial of a CR 56(f) motion will not be disturbed on appeal unless the decision is based on untenable grounds or untenable reasons. *Briggs v. Nova Servs.*, 135 Wn. App. 955, 961, 147 P.3d 616 (2006), *aff'd*, 166 Wn.2d 794.

2. The Kafkas Filed – and then Struck – a CR 56(f) Motion Scheduled to be Heard Just Two Days Before Their Oral CR 56(f) Motion.

On 01/22/15, the Kafkas' counsel filed a motion to continue Providence's motion for summary judgment. CP at 232-34. Providence filed an opposition to the CR 56(f) motion to continue. CP at 213-22. After the motion to continue was fully briefed by both parties, the Kafkas' counsel did not confirm the motion to continue, so the motion was struck from the court calendar. CP at 47; 213-22. The Kafkas now claim that this motion was not confirmed because their first expert returned an unsupportive review on their over prescription theory. *See* App. I-3 to Brief of Appellants. Even though the Kafkas' counsel failed to confirm

bears the burden of showing a good reason for the delay, what evidence would be established, and that the evidence will raise a genuine issue of material fact. In response to a CR 56(f) motion for a continuance, the non-moving party bears no burden whatsoever. Even if Providence had born the burden of proving prejudice, the burden would have been met here. *See, infra*, at n.8, regarding the prejudice inherent in requiring healthcare providers to respond to stale claims.

his motion for a continuance which was briefed and scheduled to be heard on 02/03/15, two days later at the summary judgment hearing, the Kafkas' counsel orally moved for a CR 56(f) continuance. *See* App. I-3 to Brief of Appellants.

It was well within the trial court's discretion to consider that the Kafkas had struck their CR 56(f) motion for a continuance which was scheduled for just two days before the summary judgment hearing. Striking the hearing certainly indicated that the Kafkas no longer believed they needed a continuance. The oral motion presented unfair surprise to Providence given that the fully briefed motion had been struck, indicating that the Kafkas no longer wished to pursue a CR 56(f) continuance. This procedural timeline coupled with the Kafkas' failure to meet their burden supports Judge Wynne's discretionary decision to deny the motion.

3. The Kafkas Were Already Granted a CR 56(f) Continuance in October 2014.

Providence originally moved for summary judgment in September 2014. CP at 324-30. Upon oral motion of *pro se* plaintiff Douglas Kafka, Sr., Judge Fair granted a 30-day continuance, informing Mr. Kafka that he would have only 30 more days before the motion for summary judgment would be heard. CP at 253:6-7. The Kafkas began seeking more time to develop their case back in October 2014. Providence was more than

accommodating in voluntarily striking the reset motion when the Kafkas obtained counsel. CP at 253:10-13. Because the Kafkas had already been granted a CR 56(f) motion in October 2014, and they were afforded nearly *four additional months* to prepare the case with the assistance of two separate attorneys, Judge Wynne's discretionary decision to deny the oral CR 56(f) motion for a continuance is well-supported by the record.

4. The Kafkas Failed to Meet Their Burden of Providing a "Good Reason" For the Delay in Obtaining Experts.

The decedent died on 04/21/10. CP at 252:15-16. The Kafkas had nearly five years to acquire the medical records, secure counsel, and obtain expert reviews. Providence's motion for summary judgment was originally filed on 09/10/14. CP at 253:6-7; 324-30. Judge Fair granted the Kafkas a 30-day CR 56(f) continuance. CP at 253:6-7. The Kafkas then obtained counsel who withdrew after two weeks (presumably after reviewing the medical records and weighing the merits of the claim). CP at 196-97; 253:9-10. After Providence refiled its motion, the Kafkas again obtained counsel. CP at 210-12; 215:20-22; 235-37.

In undertaking the role of a lawyer, *pro se* litigants "assume[] the duties and responsibilities and [are] accountable to the same standards of ethics and legal knowledge." *Batten v. Abrams*, 28 Wn. App. 737, 739

n.1, 626 P.2d 984 (1981), *rev. den.*, 95 Wn.2d 1033. This includes the responsibility to respond to discovery, investigate the claim, and seek medical expert support. Even while *pro se*, the Kafkas had ample opportunity to obtain the necessary expert reviews. They were also represented by two separate attorneys in this action. The Kafkas failed to show a good reason for the delay in obtaining expert reviews in the nearly five years since the decedent's death.

5. The Kafkas Failed to Meet Their Burden of Showing That The Desired Evidence Would Raise Genuine Issues of Material Fact.

In most (if not all) cases assigning error to the denial of a CR 56(f) motion for a continuance, the movants were ultimately able to secure the evidence originally sought. That is not the case here. The Kafkas orally moved for a CR 56(f) continuance so they could have more time to obtain the expert review of Nurse Practitioner Baggenstos. *See* App. I-3 to Brief of Appellants. In seeking the continuance, the Kafkas assured the court that they would be able to obtain a supportive review from her. But Nurse Practitioner Baggenstos withdrew without providing an expert declaration. CP at 166-73. Throughout this litigation, the Kafkas have established a pattern of requesting more time on the assurances that they will be able to

obtain supportive evidence, only to later admit that the evidence did not exist. It would be unprecedented to overturn the trial court's discretionary denial of the CR 56(f) continuance in light of the Kafkas' complete failure to obtain the evidence sought.

Any additional delay in hearing Providence's motion for summary judgment would have prejudiced Providence, which had to expend time and resources responding to the Kafkas' various attempts to delay the summary judgment hearing. More significantly, courts have recognized that requiring healthcare providers to respond to stale claims is inherently prejudicial.⁸ Under CR 56, Providence was entitled to its day in court, and the Kafkas were required to bring forth competent medical expert testimony supporting their claims. The trial court's discretionary decision to deny the Kafkas' oral CR 56(f) motion for a continuance should be affirmed.

⁸ *Ruth v. Dight*, 75 Wn.2d 660, 664-66, 453 P.2d 631 (1969) (recognizing for various reasons that "compelling one to answer stale claims in the courts is in itself a substantial wrong"); *Deen v. Egleston*, 597 F.3d 1223, 1233 (11th Cir. 2010) (observing that "[d]efending law suits is hard; defending malpractice suits is harder; and defending old malpractice suits is harder still"); *Owens v. White*, 380 F.2d 310, 315 (9th Cir. 1967) (acknowledging that justice requires that physicians not be faced with stale claims because the passage of time eliminates their ability to present a meritorious defense).

Schroeder v. Weighall, 179 Wn.2d 566, 580-81, 316 P.3d 482 (2014) (J.M. Johnson, J., dissenting).

6. Washington Case Law Supports Judge Wynne's Discretionary Decision to Deny the Kafka's Oral CR 56(f) Motion.

If this Court accepts the Kafkas' reading of Washington case law interpreting CR 56(f), the summary judgment mechanism would be eviscerated. In essence, the CR 56(f) exception would swallow CR 56 altogether. Under the Kafkas' reading of the cases, as long as a party continues to assure the trial court that it is doing a diligent search for expert support, it never has to face a summary judgment hearing. That cannot possibly be the state of the law in Washington, where the summary judgment mechanism remains a critical piece of our state's litigation system. *See W.G. Platts, Inc.*, 73 Wn.2d at 442-43; *Padron*, 34 Wn. App. at 475.

a) *Vant Leven v. Kretzler*⁹

In *Vant Leven*, Division I of the Court of Appeals considered a similar set of facts to this case. In response to a motion for summary judgment, Vant Leven's counsel filed a declaration stating that summary judgment was premature as he needed more discovery in order to obtain an opinion from his expert. *Id.* at 351. The trial court granted summary judgment dismissal. Vant Leven moved for reconsideration on the

⁹ 56 Wn. App. 349, 783 P.2d 611 (1989).

grounds that she should be able to complete discovery and obtain a finalized expert opinion. In support of reconsideration, she filed a preliminary expert declaration. *Id.* at 351-52. On appeal, Vant Leven claimed that the trial court erred in denying the continuance. *Id.* at 352. Upholding the trial court's denial, the Court noted that Vant Leven offered no explanation for why a deposition could not have been held during the 21 months that the case was pending.¹⁰ *Id.* at 353. "Based on the absence of any explanation for appellant's inability to obtain an expert's opinion or of any indication as to what evidence might be established through further discovery," the Court held that they "could not say that the trial court abused its discretion in denying a continuance" of the summary judgment motion. *Id.* at 354. The Court further held that the expert's declaration on reconsideration failed to raise any genuine issues of material fact. *Id.* at 356.

Under the direction of *Vant Leven*, this Court should uphold the trial court's decisions in this case. As in *Vant Leven*, the Kafkas failed to demonstrate why expert reviews could not have been obtained to date. Following the Court's lead in *Vant Leven*, this Court should hold that

¹⁰ Similarly, in *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425 (1986), the Court of Appeals upheld the denial of a motion for a CR 56(f) continuance where the movant failed to demonstrate why the requested depositions had not been taken during the pending litigation.

summary judgment was proper where the late-filed expert declaration was insufficient to preclude summary judgment.

b) Cogle v. Snow¹¹

The Kafkas rely heavily on *Cogle* for the proposition that the trial court had a duty under CR 56 to allow them to complete the record before the summary judgment hearing. There, Cogle's newly-associated attorney moved for a CR 56(f) continuance in part on the grounds that it was not possible to obtain the declaration of Cogle's treating physician in time for the summary judgment hearing. 56 Wn. App. at 502. The trial court denied the motion for a continuance and granted summary judgment. *Id.* at 503. Cogle then moved for reconsideration supported by an affidavit of the treating physician, Dr. Billingsley, which was denied. *Id.* The Court of Appeals held that the trial court erred in denying the motions for a continuance and reconsideration. *Id.* at 504.

The Court acknowledged that "[t]he ruling on the motions for a continuance and for reconsideration is within the discretion of the trial court and is reversible by an appellate court only for a manifest abuse of discretion." *Id.* The Court recognized that "[w]here a party knows of the existence of a **material** witness and shows good reason why the witness'

¹¹ 56 Wn. App. 499, 784 P.2d 554 (1990).

affidavit cannot be obtained in time for the summary judgment proceeding, the court has a duty to give the party a reasonable opportunity to complete the record before ruling on the case.” *Id.* at 507 (emphasis added). The Court went on to clarify that *even if* this condition is met, the court may deny the motion for a continuance for one of the three reasons articulated in *Turner*.¹² *Id.*

As demonstrated in section B(4)-(5), *supra*, the Kafkas failed to give a good reason for the delay and did not show what evidence would be established. In hindsight, the Kafkas’ failure under prong two of the *Turner* test is irrefutable; the Kafkas were never able to obtain an expert declaration from Nurse Practitioner Baggenstos. Moreover, unlike the treating physician in *Coggle* who ultimately filed a supportive declaration on reconsideration, Nurse Practitioner Baggenstos was not a material witness. Unlike fact witnesses and treating providers, expert witnesses are fungible. This is demonstrated by the Kafkas’ ability to obtain Nurse Wanek’s declaration within several weeks of learning that Nurse Practitioner Baggenstos would not provide a supportive declaration. On these grounds, *Coggle* is distinguishable.

¹² (1) the moving party does not give a good reason for the delay; (2) the moving party does not state what evidence would be established; or (3) the evidence sought will not raise a genuine issue of material fact. *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

c) *Keck v. Collins*¹³

In *Keck*, the Court of Appeals held, among other things, that the trial court erred in denying a motion for a continuance, granting summary judgment, and denying reconsideration. 181 Wn. App. at 73. There, the expert filed two supportive affidavits in response to a motion for summary judgment, but they lacked the required specificity. *Id.* at 76. The day before the summary judgment hearing, Keck filed a third expert declaration. Keck requested the trial court forgive the late filing or continue the summary judgment hearing. *Id.* at 77.

The Court of Appeals acknowledged that “[u]nder these circumstances, the [third expert declaration] was available to the trial court for potential consideration on summary judgment.” *Id.* at 82. Citing *Cofer v. Pierce County*, 8 Wn. App. 258, 261, 505 P.2d 476 (1973), the Court of Appeals recognized that “[u]ntil a formal order granting or denying the motion for summary judgment is entered, a party may file affidavits to assist the court in determining the existence of an issue of material fact.” *Id.* at 83.

These are simply not the facts of this case. In *Keck*, the trial court denied the motion for a continuance even though the third expert

¹³ 181 Wn. App. 67, 325 P.3d 306 (2014). Note that the Court of Appeals’ decision is on review before the Washington State Supreme Court. 181 Wn.2d 1007, 335 P.3d 941.

declaration was filed and served the day before the summary judgment hearing. As such, the court had the third declaration in hand by the time of the summary judgment hearing and still granted summary judgment to Collins. Here, there was no supportive declaration by the time of the summary judgment hearing. Neither was there an expert declaration when the Kafkas moved for reconsideration on 02/17/15. CP at 166-73. Rather, the Kafkas' expert declaration was filed on 03/02/15, nearly two weeks after moving for reconsideration on an entirely different theory. CP at 29-33. On these facts, *Keck* is distinguishable.

d) *Butler v. Joy*¹⁴

In *Butler*, the outcome of the case turned on the Court's holding that Joy waived the issue of insufficient service of process. 116 Wn. App. at 293. As such, any discussion of the CR 56(f) continuance is mere dicta. *Id.* at 295 (“[t]he dispositive issue on appeal is whether Dr. Joy waived the affirmative defense of insufficient service of process”). In dicta, the Court of Appeals noted that Butler's attorney was retained the day before the summary judgment hearing and Butler had not yet requested a continuance. *Id.* at 299. The Court found that the denial of the motion to continue was an abuse of discretion. *Id.* at 300.

¹⁴ 116 Wn.App. 291, 65 P.3d 671 (2003), *rev. den.*, 150 Wn.2d 1017.

Here, although Mr. Krafchick had not been the Kafkas' attorney for long, he had sufficient time to prepare, brief, and argue the motion for summary judgment, unlike Butler's attorney. The Kafkas had also obtained one formal CR 56(f) continuance on Providence's motion for summary judgment, and Providence had voluntarily struck the motion two other times in order to allow the Kafkas' former attorney to prepare. These facts alone support the trial court's discretionary denial of the Kafkas' CR 56(f) motion for a continuance. On these facts, *Butler* is distinguishable.

C. This Court Should Affirm the Trial Court's Discretionary Decision to Deny Reconsideration.

1. This Court Reviews Orders Denying Reconsideration for Abuse of Discretion.

A motion for reconsideration “does not provide litigants with an opportunity for a second bite at the apple.” 15A Karl B. Tegland and Douglas J. Ende, Wash. Prac. § 65.1 (2008-2009 ed.). “Courts will not permit parties to merely re-argue issues already addressed.” *Id.* (citing *Anderson v. Farmers Ins. Co. of Wash.*, 83 Wn. App. 725, 923 P.2d 713 (1996), as amended on denial of reconsideration by 1996 Wn. App. LEXIS 686 (1996)); *Eugster v. City of Spokane*, 121 Wn. App. 799, 811, 91 P.3d 117 (2004), *rev. den.*, 153 Wn.2d 1012. Indeed, “courts may

decline to consider new arguments or new evidence on reconsideration where those arguments or evidence were available earlier.” *Id.* (citing *Eugster*, 121 Wn. App. 799). The Court of Appeals reviews reconsideration rulings for an abuse of discretion. *Keck*, 181 Wn. App. at 94.

2. The Kafkas Failed to Articulate Grounds for Reconsideration under CR 59.

In the instant case, in addition to re-arguing the same issues and evidence available and argued in response to Providence’s motion for summary judgment, the Kafkas’ motion for reconsideration failed to show how the court did anything other than exercise sound judgment in granting Providence’s motion for summary judgment. Moreover, the motion for reconsideration was based largely on a desire to obtain the expert declaration of Nurse Practitioner Baggenstos, who ultimately withdrew from the case without providing expert support. CP at 166-73.

CR 59 authorizes the court to reconsider a prior order only on nine narrow grounds:

- (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

- (2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;
- (3) Accident or surprise which ordinary prudence could not have guarded against;
- (4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;
- (5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;
- (6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;
- (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

- (8) Error in law occurring at the trial and objected to at the time by the party making the application; or
- (9) That substantial justice has not been done.

The Kafkas' motion for reconsideration failed to even cite the rule or articulate facts which would justify reconsideration under any of the nine enumerated causes. CP at 166-73.

3. Nurse Wanek's Declaration was Untimely Under CR 59(c).

CR 59(c) provides that when a CR 59 motion "is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits[.]" Here, the last possible day the Kafkas could timely file an affidavit in support of their motion for reconsideration was 02/17/15 – the day they filed their motion. They failed to file the declaration of Nurse Wanek until 03/02/15. CP at 29-33. The filing of Nurse Wanek's declaration did not comport with the strict timing requirements set forth at CR 59(c).

4. The Kafkas Failed to Meet Their Burden of Proving that Nurse Wanek's Declaration was "Newly Discovered Evidence" Under CR 59(a)(4).

CR 59(a)(4) provides that one of the enumerated grounds for reconsideration is “[n]ewly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.” In *Wagner Dev. v. Fidelity & Deposit*, 95 Wn. App. 896, 907, 977 P.2d 639 (1999), *rev. den.*, 139 Wn.2d 1005, the Court of Appeals held that if evidence was available but not offered until after summary judgment, the parties are not entitled to another opportunity to submit that evidence. *See also Meridian Minerals Co. v. King Cnty.*, 61 Wn. App. 195, 203, 810 P.2d 31 (1991), *rev. den.*, 117 Wn.2d 1017; *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.”). In *Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010), *rev. den.*, 170 Wn.2d 1019, the plaintiff submitted a new declaration on her motion for reconsideration of summary judgment. The Court held that the declaration was not “newly discovered evidence” under CR 59(a)(4) because it could have been presented at the original summary judgment hearing. The plaintiff bore the burden of proving she could not have obtained the declaration in time and she failed to meet that burden. *Id.*

Here, the Kafkas failed to meet their burden of proving that an expert declaration could not have been obtained before summary judgment. The Kafkas filed this case in April 2014. In that time, they have been represented by two separate attorneys. Because expert reviews could have been pursued and timely obtained since the filing of this case, Nurse Wanek's declaration does not constitute "newly discovered evidence" for the purposes of CR 59(a)(4). Consequently, the trial court's denial of reconsideration should remain undisturbed on appeal.

V. CONCLUSION

Because Nurse Wanek's declaration did not provide any causation opinions, it would have been insufficient to defeat summary judgment regardless of when it was filed. The Kafkas failed to meet their burden of adducing competent medical expert testimony on: (1) the standard of care; and (2) causation. Providence was, therefore, entitled to summary judgment dismissal of all claims against it. For this reason, this Court need not reach the motions for a continuance or reconsideration.

If this Court does reach these issues, the trial court's discretionary rulings should be upheld. In moving for a CR 56(f) continuance, the Kafkas failed to demonstrate a good reason for the delay in obtaining expert reviews, and what evidence would be obtained. Such failure is

indisputable given that they were unable to obtain the expert declaration for which they sought the continuance. The Kafkas were also unable to demonstrate why the trial court's decision should be reconsidered under CR 59. Because the trial court's discretionary decisions are well-supported by court rules, Washington precedent, and the factual record, they should be upheld.

Providence respectfully requests that this Court affirm the trial court.

Respectfully submitted this 24th day of August, 2015.

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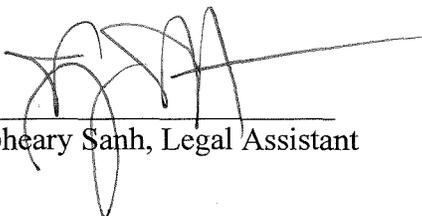
CERTIFICATE OF SERVICE

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 24th day of August, 2015.



Sopheary Sanh, Legal Assistant