

FILED
Court of Appeals
Division II
State of Washington
1/18/2019 11:58 AM
No. 51893-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MONIQUE MESSENGER and KEVIN MESSENGER, wife and
husband, individually and on behalf of their minor children,
M.M., G.M., L.M., B.M., and Q.M.,

Appellants,

v.

SHANNON L. WHITEMARSH, as Administrator-Personal
Representative of THE ESTATE OF BRYAN DONALD
WHITEMARSH; and MULTICARE HEALTH SYSTEM, a
Washington nonprofit corporation,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE EDMUND M. MURPHY

BRIEF OF RESPONDENT MULTICARE HEALTH SYSTEM

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend

WSBA No. 14355

Catherine W. Smith

WSBA No. 9542

Victoria E. Ainsworth

WSBA No. 49677

1619 8th Avenue North

Seattle, WA 98109

(206) 624-0974

BENNETT BIGELOW &
LEEDOM, P.S.

By: Elizabeth A. Leedom

WSBA No. 14335

Rhianna M. Fronapfel

WSBA No. 38636

601 Union Street, Suite 1500

Seattle WA 98101-1363

(206) 622-5511

Attorneys for Respondent MultiCare

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RESTATEMENT OF ISSUES	2
III.	RESTATEMENT OF THE CASE	2
	A. Appellant Monique Messenger began an affair with her physician, Dr. Bryan Whitemarsh, in 2015.....	3
	B. Dr. Whitemarsh committed suicide after Ms. Messenger told Dr. Whitemarsh’s wife about the affair. The Messengers then sued Dr. Whitemarsh’s widow and MultiCare.....	4
	C. The trial court dismissed the Messengers’ claims against Ms. Whitemarsh and MultiCare on summary judgment.	6
IV.	ARGUMENT.....	8
	A. The Messengers do not challenge the trial court’s proper dismissal of their vicarious liability claim against MultiCare.	8
	B. The trial court properly dismissed the Messengers’ direct negligence claims against MultiCare.	11
	1. MultiCare did not negligently hire or retain Dr. Whitemarsh because it did not hire him and had no knowledge of any unfitness to practice medicine.	12
	a. The 2006 patient complaint, which did not result in any disciplinary action, is not evidence of an “unfitness” to practice medicine.	13

b.	MultiCare was not negligent in failing to discover an affair that Ms. Messenger admits she and Dr. Whitemarsh kept secret from “anyone at MultiCare.”	15
2.	MultiCare did not negligently train or supervise its employees.	18
C.	The trial court did not abuse its discretion in denying the Messengers’ motion for a continuance.	23
V.	CONCLUSION	28

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Anderson v. Soap Lake Sch. Dist.</i> , 191 Wn.2d 343, 423 P.3d 197 (2018)	10, 12, 15
<i>Bratton v. Calkins</i> , 73 Wn. App. 492, 870 P.2d 981, <i>rev. denied</i> , 124 Wn.2d 1029 (1994)	10
<i>Cho v. City of Seattle</i> , 185 Wn. App. 10, 341 P.3d 309 (2014), <i>rev. denied</i> , 183 Wn.2d 1007 (2015)	19
<i>Dunlap v. Wayne</i> , 105 Wn.2d 529, 716 P.2d 842 (1986).....	19
<i>Herron v. Tribune Publ'g Co., Inc.</i> , 108 Wn.2d 162, 736 P.2d 249 (1987).....	12
<i>Kaltreider v. Lake Chelan Community Hosp.</i> , 153 Wn. App. 762, 224 P.3d 808 (2009), <i>rev. withdrawn</i> , 249 P.3d 182 (2011).....	18-20
<i>Keck v. Collins</i> , 181 Wn. App. 67, 325 P.3d 306 (2014), <i>aff'd</i> , 184 Wn.2d 358, 357 P.3d 1080 (2015)	26-28
<i>Kelley v. Howard S. Wright Construction Co.</i> , 90 Wn.2d 323, 582 P.2d 500 (1978).....	14
<i>Mut. Of Enumclaw Ins. Co. v. Patrick Archer Const.</i> , <i>Inc.</i> , 123 Wn. App. 728, 97 P.3d 751 (2004)	23
<i>Niece v. Elmview Group Home</i> , 131 Wn.2d 39, 929 P.2d 420 (1997).....	9, 18
<i>Peck v. Siau</i> , 65 Wn. App. 285, 827 P.2d 1108, <i>rev. denied</i> , 120 Wn.2d 1005 (1992)	15-17, 22

<i>Riley v. Iron Gate Self Storage</i> , 198 Wn. App. 692, 395 P.3d 1059, <i>rev. denied</i> , 189 Wn.2d 1010 (2017)	8
<i>Roderick Timber Co. v. Willapa Harbor Cedar Products, Inc.</i> , 29 Wn. App. 311, 627 P.2d 1352, <i>rev. denied</i> , 96 Wn.2d 1003 (1981).....	16
<i>Rucshner v. ADT, Sec. Sys., Inc.</i> , 149 Wn. App. 665, 204 P.3d 271, <i>rev. denied</i> , 166 Wn.2d 1030 (2009)	13-14
<i>Seiber v. Poulsbo Marine Center, Inc.</i> , 136 Wn. App. 731, 150 P.3d 633 (2007).....	11-12, 18
<i>Smith v. Sacred Heart Med. Ctr.</i> , 144 Wn. App. 537, 184 P.3d 646 (2008).....	9
<i>Sprague v. Spokane Valley Fire Dep't</i> , 189 Wn.2d 858, 409 P.3d 160 (2018).....	9
<i>Thompson v. Everett Clinic</i> , 71 Wn. App. 548, 860 P.2d 1054 (1993), <i>rev. denied</i> , 123 Wn.2d 1027 (1994)	9-11, 18
<i>Turner v. Kohler</i> , 54 Wn. App. 688, 775 P.2d 474 (1989).....	23-26
<i>West v. Thurston County</i> , 168 Wn. App. 162, 275 P.3d 1200 (2012).....	9
Rules and Regulations	
CR 6.....	23
CR 56.....	6, 23, 25
CR 30.....	24-25
Fed. R. Civ. P. 56.....	23
RAP 10.1	2

I. INTRODUCTION

Appellant Monique Messenger had a year-long affair with her physician, Dr. Bryan Whitemarsh, before he committed suicide after Ms. Messenger told Dr. Whitemarsh's wife about their relationship. Ms. Messenger, along with her husband Kevin, then sued Dr. Whitemarsh's widow, respondent Shannon Whitemarsh as the personal representative of his estate, for medical malpractice. The Messengers also sued Dr. Whitemarsh's employer, respondent MultiCare Health System, for vicarious liability, as well as direct negligence for the negligent hiring, retention, supervision, and training of Dr. Whitemarsh and its employees. After denying the Messengers' motion for a continuance, the trial court dismissed all of the Messengers' claims on summary judgment. The Messengers do not challenge on appeal the trial court's correct dismissal of its vicarious liability claim against MultiCare. The trial court also properly dismissed the direct negligence claims against MultiCare because none of its employees knew about the affair and MultiCare had no reason to know Dr. Whitemarsh was at "risk" for developing a relationship with his patient based on an unrelated patient complaint from a decade earlier that resulted in no disciplinary action. This Court should affirm the trial court in its entirety.

II. RESTATEMENT OF ISSUES

The issues related to appellant's assignments of error are properly restated as follows:

- A. Does an appellant abandon her argument that an employer is vicariously liable for its employee's intentional torts by failing to challenge on appeal the trial court's dismissal of that claim on summary judgment on the ground that an employer cannot be held vicariously liable for its employee's intentional misconduct outside the scope of employment?
- B. Did the trial court correctly hold that an employer may not be directly liable in negligence for its hiring, retention or supervision of an employee absent evidence that it had any reason to know that its employee had previously engaged in sexual misconduct or had a propensity to do so?
- C. Did the trial court manifestly abuse its discretion in denying a continuance of a summary judgment hearing under CR 56(f) when the moving party failed to offer any reason for failing to depose for over one year what she claimed were "key witnesses," and failed to identify with specificity the evidence that she sought to obtain through additional discovery?

III. RESTATEMENT OF THE CASE

Pursuant to RAP 10.1(g), MultiCare joins in the Counterstatement of the Case in the brief of respondent Shannon Whitemarsh. This Restatement of the Case is a condensed version of the facts relevant to MultiCare.

A. Appellant Monique Messenger began an affair with her physician, Dr. Bryan Whitemarsh, in 2015.

Appellants Monique and Kevin Messenger and their three sons first sought primary care from Dr. Bryan Whitemarsh in May 2011. (CP 60, 117, 433, 462-63) At the time, Dr. Whitemarsh worked for Good Samaritan at its South Hill Clinic. (CP 433, 462) After acquiring Good Samaritan in 2011, respondent MultiCare Health System (“MultiCare”) retained Dr. Whitemarsh as a physician at the South Hill Clinic until April 2012, when he transferred to MultiCare’s Frederickson Clinic. (CP 24, 31, 433, 462)

Ms. Messenger visited Dr. Whitemarsh at the South Hill and Frederickson clinics approximately once or twice a year between 2011 and 2014. (See CP 60, 87, 92, 96, 100) In June 2015, Ms. Messenger took her eldest son to Dr. Whitemarsh for a sports physical exam. (CP 117) After the son expressed an interest in guns, Dr. Whitemarsh offered to take him to a shooting range. (CP 117) Ms. Messenger accompanied Dr. Whitemarsh and her son to the shooting range later that month. (CP 118) She and Dr. Whitemarsh subsequently developed a consensual sexual relationship in August 2015. (CP 118) Dr. Whitemarsh remained Ms. Messenger’s general practitioner during this time, although the two kept their extramarital affair secret. (CP 200-01, 246) No one at MultiCare,

including Dr. Whitemarsh's ARNP, Patti Jordan, with whom he worked daily, knew about the affair. (CP 200-01, 255-57, 276, 516)

Becoming suspicious of his wife's behavior, Mr. Messenger learned that Ms. Messenger was having an affair after he recorded a sexual encounter between her and Dr. Whitemarsh in April 2016. (CP 125; see CP 214, 330) Mr. Messenger filed a complaint with the Department of Health that same month, but destroyed all digital and physical copies of the recording within a week of filing his complaint. (CP 125-26, 214, 392)

B. Dr. Whitemarsh committed suicide after Ms. Messenger told Dr. Whitemarsh's wife about the affair. The Messengers then sued Dr. Whitemarsh's widow and MultiCare.

On June 2, 2016, Ms. Messenger and Dr. Whitemarsh ended their relationship. (CP 120, 290, 292) That same evening, Ms. Messenger went to Dr. Whitemarsh's house and informed his wife, respondent Shannon Whitemarsh, of the affair. (CP 246, 288, 292) Dr. Whitemarsh shot and killed himself outside of his home later that night, leaving his wife and daughter to find his body. (CP 285, 288, 295)

Just five days after Dr. Whitemarsh committed suicide, Ms. Messenger began taunting his widow by claiming that he had given Ms. Messenger a safety deposit key, a life insurance policy, and

access to a bank account. (CP 121) Ms. Messenger also told Ms. Whitemarsh that Ms. Messenger and Dr. Whitemarsh had a baby together. (CP 121) Ms. Messenger later admitted that these were all lies. (CP 121)

In March 2017, the Messengers sued Dr. Whitemarsh's widow, as personal representative of his estate, for medical malpractice under RCW ch. 7.70 arising from his consensual relationship with Ms. Messenger. (CP 81-85) Despite Dr. Whitemarsh having been a general practitioner, the Messengers subsequently argued a separate theory of liability for medical malpractice under the "transference phenomenon" that can arise between a patient and psychiatrist. (4/27 RP 30-34; *see also* CP 336, 458; App. Br. 2)

The Messengers also sued MultiCare for vicarious liability as well as direct negligence for its failure "to properly supervise and train its employee, Dr. Whitemarsh." (CP 5) The Messengers later alleged that MultiCare also negligently hired and retained Dr. Whitemarsh, and negligently trained and supervised its employees. (CP 449) The Messengers premised their direct negligence claims on a 2006 patient complaint made to the Medical Quality Assurance Commission ("MQAC") of alleged "unprofessional conduct" by Dr.

Whitemarsh. (CP 219, 450-51, 457, 651) MQAC closed the complaint investigation with no finding of wrongdoing and without taking any disciplinary action against Dr. Whitemarsh. (CP 651)

The Messengers claimed damages from physical and mental pain, disability, discomfort and anguish, and loss of earnings and impairment of future earning capacity. (CP 4) Mr. Messenger and each of the Messenger's five children also brought a loss of consortium claim. (CP 5)

C. The trial court dismissed the Messengers' claims against Ms. Whitemarsh and MultiCare on summary judgment.

On March 23, 2018, both Ms. Whitemarsh and MultiCare moved for summary judgment dismissal of the Messengers' claims. (CP 55-76, 187-94) The Messengers moved on March 29, 2018, for a continuance of the summary judgment motions. (CP 212-22) On April 6, 2018, the trial court denied the Messengers' motion for a continuance based on the Messengers' failure to follow the proper procedure under CR 56(f), their inability to establish with specificity the evidence additional discovery would produce, and their lack of a good reason for their delay in obtaining the evidence. (CP 429-31; 4/6 RP 14-17)

The trial court granted both defendants' motions for summary judgment. (CP 767-73) In dismissing the medical malpractice claim, the trial court recognized that injuries must "occur as a result of health care" under RCW ch. 7.70. (4/27 RP 43) The trial court found that "engaging in this type of sexual behavior does not fall within health care because it's not the doctor utilizing the skills which they've been taught." (4/27 RP 43-44) The trial court dismissed the vicarious liability claim against MultiCare for the same reason that "[t]hese acts occurred outside the scope of employment." (4/27 RP 46)

Nor did the trial court find any evidence of a "psychiatrist-patient relationship" between Ms. Messenger and Dr. Whitemarsh that would impose separate malpractice liability under the "transference phenomenon": "There's a doctor-patient relationship, and there were clearly at times some issues of mental health that were addressed, as documented in the medical records," but there was "no psychiatrist-patient relationship between Dr. Whitemarsh and Ms. Messenger." (4/27 RP 44)

The trial court also dismissed the direct negligence claims against MultiCare because Dr. Whitemarsh and Ms. Messenger "worked hard to try to keep secret" their affair, and "there was no

indication that anyone had any knowledge of it.” (4/27 RP 46) The trial court found that the 2006 patient complaint “led to an action not being taken,” and thus there is no “basis to make a finding that there was a failure to supervise or that there’s corporate negligence.” (4/27 RP 46-47)

The Messengers appeal the trial court’s orders granting Ms. Whitmarsh’s and MultiCare’s motions for summary judgment. (CP 774-75) The Messengers also challenge on appeal the trial court’s order denying the Messengers’ motion to continue the hearing on the defendants’ motions for summary judgment. (App. Br. 3)

IV. ARGUMENT

A. The Messengers do not challenge the trial court’s proper dismissal of their vicarious liability claim against MultiCare.

Although the Messengers assign error to the trial court’s order granting MultiCare summary judgment (App. Br. 3, 14 n.1), the Messengers do not challenge on appeal the trial court’s dismissal with prejudice of their vicarious liability claim against MultiCare. (App. Br. 3-4, 14) The Messengers have thus waived this claim by failing to brief the issue on appeal. *Riley v. Iron Gate Self Storage*, 198 Wn. App. 692, 712-13, ¶ 61, 395 P.3d 1059 (where appellant’s brief “does not include argument or authority to support its

assignment of error, the assignment of error is waived”), *rev. denied*, 189 Wn.2d 1010 (2017); *Sprague v. Spokane Valley Fire Dep’t*, 189 Wn.2d 858, 876, ¶ 30, 409 P.3d 160 (2018) (this Court “will not consider arguments that a party fails to brief”); *West v. Thurston County*, 168 Wn. App. 162, 187, ¶ 43, 275 P.3d 1200 (2012) (“lack of reasoned argument is insufficient to merit judicial consideration”) (quoted source omitted).

By failing to challenge the trial court’s dismissal of their vicarious liability claim, the Messengers concede that the trial court correctly found as a matter of law that MultiCare cannot be vicariously liable for Dr. Whitemarsh’s actions in engaging in a sexual relationship with Ms. Messenger. An employer may be vicariously liable only “for the torts of an employee who is acting on the employer’s behalf.” *Smith v. Sacred Heart Med. Ctr.*, 144 Wn. App. 537, 543, ¶ 13, 184 P.3d 646 (2008) (quoting *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997)). However, it is well-established that “an employee’s conduct falls outside the scope of his employment when his acts are directed toward personal, sexual gratification.” *Smith*, 144 Wn. App. at 543, ¶ 13. *See, e.g., Thompson v. Everett Clinic*, 71 Wn. App. 548, 554, 860 P.2d 1054 (1993) (clinic not vicariously liable for doctor’s sexual assault of

patient because it was an act outside scope of employment), *rev. denied*, 123 Wn.2d 1027 (1994); *Bratton v. Calkins*, 73 Wn. App. 492, 500-01, 870 P.2d 981 (school district not vicariously liable for sexual relationship between teacher and student because the relationship was not within scope of teacher's employment), *rev. denied*, 124 Wn.2d 1029 (1994); *Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343, 374, ¶ 65, 423 P.3d 197 (2018) (school district not vicariously liable for student's death from drunk driving accident after leaving high school basketball coach's house; coach acted outside scope of employment because district "clearly did not authorize its employees to serve students alcohol").

In *Thompson*, the patient sued his doctor for sexual assault that occurred during a prostate exam. The trial court dismissed the patient's vicarious liability and negligent hiring and supervision claims against the clinic that employed the doctor. The Court of Appeals affirmed, holding that the clinic could not be vicariously liable for the doctor's tortious sexual assault because the "assault emanated from Dr. Nakata's wholly personal motives for sexual gratification" and could not be "considered to have been done in furtherance of the Clinic's business, or cloaked with some apparent authority." *Thompson*, 71 Wn. App. at 554.

Thompson is dispositive. Dr. Whitemarsh’s actions regarding his relationship with Ms. Messenger arose from his “wholly personal motives for sexual gratification” and were neither done “in furtherance of the Clinic’s business, or cloaked with some apparent authority.” *Thompson*, 71 Wn. App. at 554. The trial court correctly dismissed the vicarious liability claim against MultiCare as a matter of law.

B. The trial court properly dismissed the Messengers’ direct negligence claims against MultiCare.

The trial court correctly dismissed the Messengers’ direct negligence claims against MultiCare for the negligent hiring and retention of Dr. Whitemarsh, and the negligent training and supervision of its employees. (CP 5, 449, 771-72)

As the party opposing summary judgment, the Messengers may not rely on speculation, “argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value.” *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App. 731, 736, ¶ 14, 150 P.3d 633 (2007); *Thompson*, 71 Wn. App. at 555 (nonmoving party “must submit competent testimony setting forth specific facts, as opposed to general conclusions,” to demonstrate genuine issue of material fact). Summary judgment is thus appropriate where the nonmoving party “can offer only a

‘scintilla’ of evidence, evidence that is ‘merely colorable,’ or evidence that ‘is not significantly probative.’” *Seiber*, 136 Wn. App. at 736, ¶ 13 (quoting *Herron v. Tribune Publ’g Co., Inc.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987)). The Messengers failed to raise any triable issue of fact that could establish MultiCare’s negligence.

- 1. MultiCare did not negligently hire or retain Dr. Whitemarsh because it did not hire him and had no knowledge of any unfitness to practice medicine.**

An employer negligently hires or retains an employee when “it knew or should have known that the employee was unfit for the position.” *Anderson*, 191 Wn.2d at 356, ¶ 25. Negligent hiring occurs if the employer knew of the employee’s unfitness or failed to exercise reasonable care to discover unfitness at the time of hire, while negligent retention “occurs during the course of employment.” *Anderson*, 191 Wn.2d at 356, ¶ 24. The Messengers failed to raise a genuine factual issue that MultiCare knew or should have known at any point prior to his death that Dr. Whitemarsh was unfit for his position.

- a. **The 2006 patient complaint, which did not result in any disciplinary action, is not evidence of an “unfitness” to practice medicine.**

The Messengers concede that MultiCare did not hire Dr. Whitemarsh, but rather retained him as an employee after it subsequently acquired Good Samaritan’s South Hill Clinic. (CP 433, 436, 450; App. Br. 8-9) Because MultiCare never hired Dr. Whitemarsh, as a matter of law it cannot be liable for his negligent hiring.

For this reason, the Messengers’ reliance on *Rucshner v. ADT, Sec. Sys., Inc.*, 149 Wn. App. 665, 204 P.3d 271, *rev. denied*, 166 Wn.2d 1030 (2009) (App. Br. 35-36), fails. The plaintiff in *Ruchsner* sued a residential security company for negligently hiring a door-to-door salesman that raped a minor he met during a sales call to her home. In reversing the trial court’s summary judgment dismissal, the Court held that factual issues existed as to whether the security company breached its duty of care to prevent its employees from endangering customers by failing to conduct a background check when it hired the employee. *Rucshner*, 149 Wn. App. at 679, ¶ 32. The Court held that “an affirmative duty assumed by contract may create liability to persons not a party to the contract ‘where failure to properly perform the duty results in injury to them.’” *Ruchsner*, 149

Wn. App. at 681-82, ¶¶ 38-39 (quoting *Kelley v. Howard S. Wright Construction Co.*, 90 Wn.2d 323, 334, 582 P.2d 500 (1978)).

The Messengers cite no case in which an acquiring company is liable for the acquired company's negligent hiring of an employee. And the Messengers' concession that MultiCare retained but did not hire Dr. Whitemarsh plainly disposes of *Ruchsner*, where the plaintiff asserted only a negligent hiring claim – and no additional claims for negligent retention, supervision, or training (App. Br. 35-36) – against the company. *Ruchsner* is further distinguishable because MultiCare did not provide a “contractual warranty that ‘all of its employees’ had undergone criminal background checks and drug screens” prior to hire. 149 Wn. App. at 682, ¶ 39. Even if it had, no person could reasonably find that a sole patient complaint resulting in no professional disciplinary action rendered Dr. Whitemarsh unfit to practice medicine, let alone put MultiCare on notice of any such unfitness at any time during the course of his employment.

For this reason, the 2006 patient complaint also fails to create a factual issue that MultiCare negligently retained Dr. Whitemarsh. While MultiCare learned of the complaint only after Dr. Whitemarsh's death (*see* CP 642), such knowledge would not have

led MultiCare to “discover unfitness.” *Anderson*, 191 Wn.2d at 356, ¶ 24. (App. Br. 37) In order for MQAC to “take action” regarding a patient complaint, it “must prove that there were violations of rules or regulations governing the profession.” (CP 651) MQAC was unable to find any such violation, determining instead that “disciplinary action is not necessary.” (CP 651) The unfounded complaint resulting in no disciplinary action against Dr. Whitemarsh did not (and could not) demonstrate his unfitness to practice medicine.

b. MultiCare was not negligent in failing to discover an affair that Ms. Messenger admits she and Dr. Whitemarsh kept secret from “anyone at MultiCare.”

Nor did MultiCare negligently retain Dr. Whitemarsh by failing to discover his sexual relationship with his patient when Ms. Messenger concedes she and Dr. Whitemarsh kept their affair secret from “anyone at MultiCare.” (CP 200) An employee’s knowledge can only be imputed to his or her employer if the knowledge “relate[s] to the subject matter of the agency, and the agent . . . acquired it while acting within the scope of his or her authority.” *Peck v. Siau*, 65 Wn. App. 285, 291, 827 P.2d 1108, *rev. denied*, 120 Wn.2d 1005 (1992). These limitations exist to prevent knowledge “from being imputed when the agent ‘would not likely pass such knowledge along.’” *Peck*,

65 Wn. App. at 291 (quoting *Roderick Timber Co. v. Willapa Harbor Cedar Products, Inc.*, 29 Wn. App. 311, 317, 627 P.2d 1352, *rev. denied*, 96 Wn.2d 1003 (1981)).

In *Peck*, a high school student sued a teacher and the school district for the negligent hiring, retention, and supervision of Siau, the school librarian, with whom Peck, the student, had sexual contact. Peck's negligent retention claim against the school district arose from a prior incident where Siau made sexual advances to another one of his student assistants, and that student's older brother then told his former teacher about the incident. *Peck*, 65 Wn. App. at 289. The teacher did not notify any employees or officials at the school district about the conversation, which took place two months before Peck and Siau engaged in sexual contact. The trial court dismissed Peck's claims on summary judgment. On appeal, the Court rejected Peck's argument that the knowledge the teacher acquired in his conversation with the other student's brother "should be imputed to the School District" in order to hold the district liable for negligently retaining Siau. *Peck*, 65 Wn. App. at 290.

The Court held that the conversation between the teacher and his former student did not relate to the subject matter of the teacher's agency for the school district because the record "shows only that

[he] was a teacher. It does not show that he had any supervisory authority over Siau, or that he had any administrative responsibilities for the District.” *Peck*, 65 Wn. App. at 291-92. Because the conversation related to the librarian’s “conduct with adults outside of school,” and the teacher “had no way to know whether what [the brother] was saying was true,” it was not reasonable to expect the teacher to report the conversation to school officials, “nor is it reasonable to infer that his employment imposed upon him a duty to do so.” *Peck*, 65 Wn. App. at 292.

Similarly, MultiCare cannot be liable for negligently retaining Dr. Whitemarsh because it had no knowledge of his affair or any inappropriate conduct, and no such knowledge can be imputed from its employees. It is undisputed that no MultiCare employee knew about the relationship. (CP 200-01: Ms. Messenger conceding that the affair “was not something that we spoke about with other people”; CP 246: “Our relationship was a secret”) Even Ms. Jordan, who worked with Dr. Whitemarsh every day and considered him a close friend, had no knowledge about Dr. Whitemarsh’s affair with Ms. Messenger until after his death. (CP 200, 255-57, 498-99, 510)

Ms. Messenger’s self-serving allegations that a medical assistant, Jill Fisher, witnessed inappropriate comments Dr.

Whitemarsh purportedly made to Ms. Messenger are unsupported by any other evidence and cannot be “considered at face value” to raise a factual issue. *Seiber*, 136 Wn. App. at 736, ¶ 14. (App. Br. 6, 10, 37) In fact, Ms. Messenger contradicted her own testimony by admitting that Ms. Fisher did not know about the affair. (CP 499; *see also* CP 200) Because none of its employees knew of the relationship or any other inappropriate behavior, no such knowledge can be imputed to MultiCare. The trial court properly dismissed the negligent retention claim against MultiCare.

2. MultiCare did not negligently train or supervise its employees.

An employer cannot be liable for negligent training or supervision unless the employer knew or should have known “in the exercise of reasonable care” that the employee had “dangerous tendencies” or “presented a risk of danger to others.” *Thompson*, 71 Wn. App. at 555; *see Kaltreider v. Lake Chelan Community Hosp.*, 153 Wn. App. 762, 766-67, ¶ 14, 224 P.3d 808 (2009) (employer “generally does not have a duty to guard against the possibility that one of its employees may be an [undisclosed] sexual predator”) (alteration in original) (quoting *Niece*, 131 Wn.2d at 50), *rev. withdrawn*, 249 P.3d 182 (2011).

MultiCare had no knowledge of any “dangerous tendencies” that would require it to take precautions to protect Dr. Whitemarsh’s female patients. (App. Br. 37) The patient complaint from nearly a decade before Dr. Whitemarsh and Ms. Messenger engaged in their affair, which did not result in any disciplinary action, is insufficient to raise even a factual dispute that MultiCare “should have known” Dr. Whitemarsh was a “risk” to his patients. (CP 5; App. Br. 37)

Nor does the Messengers’ expert testimony from Dr. Howard Miller create a factual issue otherwise. (App. Br. 38) To survive summary judgment, an expert’s affidavit “must include more than mere speculation or conclusory statements.” *Cho v. City of Seattle*, 185 Wn. App. 10, 20, ¶ 19, 341 P.3d 309 (2014), *rev. denied*, 183 Wn.2d 1007 (2015). A party must provide “actual affirmative evidence,” as “suggested inference[s]” do not “qualify as evidence.” *Dunlap v. Wayne*, 105 Wn.2d 529, 536, 716 P.2d 842 (1986); CR 56(e). Dr. Miller’s “belief” that MultiCare should have known about the unfounded patient complaint based on a “duty to discover these reports,” and that such knowledge would have resulted in MultiCare implementing “measures . . . to protect its patients” (CP 457), is entirely conclusory “and unsupported by any supporting facts.” *Cho*, 185 Wn. App. at 20, ¶ 19; *see also Kaltreider*, 153 Wn. App. at 766-

67, ¶ 14 (sexual misconduct giving rise to “duty to protect” must be reasonably foreseeable, and foreseeability “must be based on more than speculation or conjecture”).

There is no actual affirmative evidence that MultiCare’s knowledge of the unfounded patient complaint would have, or should have, required MultiCare to institute measures to protect its patients from Dr. Whitemarsh. In any event, MultiCare had no duty to “protect foreseeable victims like Monique from harm” (App. Br. 38) because it did not have a special relationship with Ms. Messenger giving rise to any such duty, and Dr. Whitemarsh’s actions were not “foreseeable.” *Kaltreider*, 153 Wn. App. at 766-67, ¶¶ 13-14 (hospital owed no duty to protect patient from consensual sexual relationship with nurse where patient was not a vulnerable adult and voluntarily admitted herself to hospital for treatment, and where nurse’s actions were neither foreseeable nor within the scope of employment).

Likewise, MultiCare did not fail to properly train and supervise its staff “to identify warning signs,” thereby “enabling” Dr. Whitemarsh’s conduct. (App. Br. 35, 37) In so arguing, the Messengers rely on a single occasion where Ms. Jordan saw Dr. Whitemarsh speaking to Ms. Messenger in the office after hours. (CP 201, 271-73; App. Br. 37) Dr. Whitemarsh informed Ms. Jordan

that Ms. Messenger “was a patient who was walking by” and “they were talking.” (CP 272-73) Contrary to Dr. Miller’s speculative assertion, Ms. Jordan did not have any “reason to suspect sexual misconduct” (CP 457) from this unremarkable encounter: “[T]here wasn’t a red flag there” or “anything that led me to think that there was more going on than what he said.” (CP 273)

There is no evidence that Ms. Jordan would have reported this “incident” had she been aware of the 2006 patient complaint. (App. Br. 37) First, MultiCare had no duty to disclose an unfounded patient complaint to Dr. Whitemarsh’s colleagues. (App. Br. 37) Even if MultiCare did have such a duty, Ms. Jordan’s own testimony flatly rejects the Messengers’ speculative assertion that “*perhaps* Monique’s presence” in the office after hours would have “raised a red flag” for Ms. Jordan. (App. Br. 37, emphasis added) In contrast to the Messengers’ unfettered hypothesizing, Ms. Jordan refused to speculate as to whether she would have “protected” her patients from Dr. Whitemarsh had she known about the 2006 complaint when she saw Dr. Whitemarsh and Ms. Messenger talking. (CP 514-15: “I don’t know what I would have done in that situation because I didn’t get informed of that beforehand. So I can’t comment to what I would have done.”) Indeed, even with knowledge of the patient complaint,

Ms. Jordan would have “had no way to know” whether Dr. Whitemarsh was telling her the truth, and it was neither reasonable to expect her to report the innocuous conversation nor “infer that [her] employment imposed upon [her] a duty to do so.” *Peck*, 65 Wn. App. at 292.

Finally, there is no evidence that MultiCare “enabled” Dr. Whitemarsh’s actions by failing to “prevent a culture of impropriety” between staff members. (App. Br. 37) There is, first, no evidence of a “culture of impropriety,” let alone one that MultiCare knew about or should have known existed. That Dr. Whitemarsh had a close friendship with Ms. Jordan, a colleague with whom he worked daily, is not “improper.” (App. Br. 37) Indeed, there is no evidence that Ms. Jordan and Dr. Whitemarsh had a romantic or sexual relationship, or “expressed romantic love for one another.” (App. Br. 37-38; CP 256: Ms. Jordan confirming, “We were friends”; CP 257: Ms. Messenger conceding that Dr. Whitemarsh told her he and Ms. Jordan “were just friends”; *see also* CP 254-55) Regardless, the existence of a relationship between two colleagues has no bearing on whether Dr. Whitemarsh was a “risk” to his patients.

C. The trial court did not abuse its discretion in denying the Messengers' motion for a continuance.

This Court reviews for an abuse of discretion a trial court's decision on a CR 56(f) motion for a continuance of a summary judgment hearing. *Mut. Of Enumclaw Ins. Co. v. Patrick Archer Const., Inc.*, 123 Wn. App. 728, 743-44, 97 P.3d 751 (2004). The trial court here did not manifestly abuse its broad discretion in denying the Messengers' motion for a continuance on summary judgment, improperly brought under CR 6, because the Messengers failed to satisfy any of the criteria warranting a continuance.

The party seeking a continuance on summary judgment must submit affidavits stating the reasons why "the party cannot present by affidavit facts essential to justify the party's opposition." CR 56(f). A party's failure to comply with CR 56(f) is a proper ground for denying a continuance and proceeding to summary judgment. *Turner v. Kohler*, 54 Wn. App. 688, 694, 775 P.2d 474 (1989) (looking to Fed. R. Civ. P. 56(f) for guidance). As the trial court recognized, the Messengers here "went under CR 6" instead of following the "specific procedure" set out in CR 56(f). (4/6 RP 15; CP 221) The trial court would have been well within its discretion to deny the Messengers' motion on this basis alone.

However, the trial court also properly found that the Messengers' motion for a continuance failed on the merits. A trial court may "deny a motion for a continuance where: (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact." *Turner*, 54 Wn. App. at 693.

The Messengers vaguely claim that they needed a continuance "to depose key witnesses," including "MultiCare doctors and nurses who worked with Dr. Whitemarsh" and "a CR 30(b)(6) deposition of the company itself." (App. Br. 39) But the Messengers failed to offer any "good reason" for their delay in obtaining more evidence where, as the trial court noted, the lawsuit was initiated "over a year ago, and there has been some discovery that's been going on," "depositions that have been taken," and "interrogatories and things that have gone back and forth." (4/6 RP 16)

In claiming that MultiCare "dragged its heels" in not making Dr. Whitemarsh's "supervisor and friend, Dr. Doug Smathers," available until May 2018 (App. Br. 39, 41), the Messengers entirely disregard that they did not even seek to depose Dr. Smathers until

March 21, 2018. (CP 306) Far from “dragging its heels,” MultiCare responded within one week to provide Dr. Smathers’ availability on May 17, 2018. (CP 307) It is not MultiCare’s fault that the Messengers waited an entire year after they filed their complaint to seek Dr. Smathers’ deposition. (CP 2)

Nor did the Messengers specifically “state what evidence would be established through the additional discovery.” *Turner*, 54 Wn. App. at 693. Instead, the Messengers broadly asserted that Dr. Smathers’ “testimony would be relevant to the negligent supervision claim,” and “a CR 30(b)(6) deposition is a vital discovery tool, and courts have recognized their importance.” (App. Br. 42; CP 219: Dr. Smathers “*may* have relevant information about Dr. Whitemarsh’s prior known reported incident of sexual misconduct with a patient and, *perhaps*, other incidents not yet disclosed” (emphasis added)) These vague and speculative statements are insufficient to warrant a continuance. In the trial court’s own words, the Messengers’ reasons for a continuance were “a lot of maybe, could be, possible.” (4/6 RP 16)

The trial court was well within its discretion to find that the sheer possibility of additional relevant information is insufficient to warrant a continuance under CR 56(f). This is particularly true

where the “desired evidence will not raise a genuine issue of material fact.” *Turner*, 54 Wn. App. at 693. Dr. Smathers’ “knowledge of Dr. Whitemarsh’s personal relationships” (App. Br. 42) could not have created a factual issue because Ms. Messenger conceded that no MultiCare employee knew about her relationship with Dr. Whitemarsh. (CP 200-01) Indeed, even Ms. Jordan, the person who worked closest with Dr. Whitemarsh on a daily basis, was unaware of the secret affair until “the night that he died.” (CP 598) The trial court did not abuse its discretion in denying the continuance, particularly where the court remained open to changing its ruling if it felt “there is something that’s missing” on which additional discovery would assist the court’s decision. (4/6 RP 17)

Keck v. Collins, 181 Wn. App. 67, 325 P.3d 306 (2014), *aff’d*, 184 Wn.2d 358, 357 P.3d 1080 (2015) is distinguishable (App. Br. 40-41). In *Keck*, the defendants moved for summary judgment despite knowing that plaintiff’s counsel, a sole practitioner, was involved in another jury trial and “had no time to prepare a sufficient response to [the] summary judgment motion.” 181 Wn. App. at 76, ¶ 11. The plaintiff filed two expert declarations, which the defendants challenged as lacking the required specificity. Ten days after the deadline and the day before the summary judgment hearing, the

plaintiff filed a third responsive declaration with additional, specific details, and asked the trial court to accept the late filing or continue the hearing. Instead, the trial court struck the third affidavit and dismissed the case on summary judgment.

On appeal, Division Three concluded that the trial court's denial of the continuance or to enlarge the time for filing was manifestly unreasonable where the plaintiff was "hobbled by counsel who, due to extenuating circumstances, lacked the time and attention needed to ensure [the expert's] first and second affidavits provided enough specificity to show a genuine issue of material fact exists on negligence." *Keck*, 181 Wn. App. at 88-89, ¶ 39. Because the third affidavit contained no new opinions and the dispositive motions deadline was still three months away, the Court held that the defendants would suffer no prejudice if the trial court continued the summary judgment motion to consider the third affidavit. *Keck*, 181 Wn. App. at 89, ¶ 39.

Here, the Messengers provided no good excuse for their delay in obtaining discovery. Unlike in *Keck*, the Messengers were not "hobbled by counsel who, due to extenuating circumstances, lacked the time and attention needed" to respond to the summary judgment motion. 181 Wn. App. at 88, ¶ 39. Despite being "hobbled,"

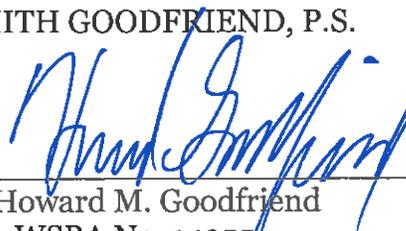
the plaintiff in *Keck* still submitted an expert affidavit to the trial court in advance of the hearing setting forth specific facts sufficient to defeat summary judgment. It was thus neither unreasonable nor prejudicial for the trial court to allow a short continuance for the parties to consider the evidence already submitted. In contrast, here the Messengers sought a continuance not to consider additional existing evidence, but simply so they could conduct further discovery on what “may” or “perhaps” could result in “relevant information,” a year after the lawsuit began. (CP 219) The trial court did not abuse its discretion in denying the continuance.

V. CONCLUSION

This Court should affirm the trial court’s summary judgment dismissal of appellants’ claims against MultiCare.

Dated this 18th day of January, 2019.

SMITH GOODFRIEND, P.S.

By: 

Howard M. Goodfriend

WSBA No. 14355

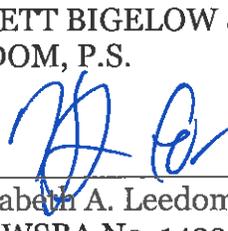
Catherine W. Smith

WSBA No. 9542

Victoria E. Ainsworth

WSBA No. 49677

BENNETT BIGELOW &
LEEDOM, P.S.

By: 

Elizabeth A. Leedom

WSBA No. 14335

Rhianna M. Fronapfel

WSBA No. 38636

Attorneys for Respondent MultiCare

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 18, 2019, I arranged for service of the foregoing Brief of Respondent Multicare Heath System, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
Elizabeth A. Leedom Rhianna M. Fronapfel Bennett Bigelow & Leedom PS 601 Union St Ste 1500 Seattle WA 98101-1363 eleedom@bblaw.com RFronapfel@bblaw.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Daniel F. Mullin Mullin Law Group PLLC 101 Yesler Way Ste 400 Seattle WA 98104 dmullin@masattorneys.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Douglas R. Cloud Law Office of Douglas Cloud 1008 Yakima Ave Ste 202 Tacoma, WA 98405-4850 drc@dcloudlaw.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

<p>Philip A. Talmadge Aaron O. Orheim Talmadge/Fitzpatrick/Tribe 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126 phil@tal-fitzlaw.com Aaron@tal-fitzlaw.com</p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>
---	--

DATED at Seattle, Washington this 18th day of January, 2019.



Andrienne E. Pilapil

SMITH GOODFRIEND, PS

January 18, 2019 - 11:58 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51893-7
Appellate Court Case Title: Monique Messenger, et al., Appellants v. Shannon L. Whitemarsh, et al.,
Respondents
Superior Court Case Number: 17-2-06482-9

The following documents have been uploaded:

- 518937_Briefs_20190118115514D2375753_5571.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 2019 01 18 Brief of Respondent Multicare.pdf

A copy of the uploaded files will be sent to:

- Aaron@tal-fitzlaw.com
- cate@washingtonappeals.com
- cmarsh@dcloudlaw.com
- cphillips@bblaw.com
- dmullin@masattorneys.com
- drc@dcloudlaw.com
- eboehmer@masattorneys.com
- eledom@bblaw.com
- matt@tal-fitzlaw.com
- phil@tal-fitzlaw.com
- rfronapfel@bblaw.com
- tduany@masattorneys.com

Comments:

Sender Name: Andrienne Pilapil - Email: andrienne@washingtonappeals.com

Filing on Behalf of: Howard Mark Goodfriend - Email: howard@washingtonappeals.com (Alternate Email: andrienne@washingtonappeals.com)

Address:
1619 8th Avenue N
Seattle, WA, 98109
Phone: (206) 624-0974

Note: The Filing Id is 20190118115514D2375753