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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.

BRIEF OF RESPONDENT SHANNON L. WHITEMARSH
As Administrator-Personal Representative of
THE ESTATE OF BRYAN DONALD WHITEMARSH

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Francis M. Dougherty,
*Annotation, Physician's or Other Healer's Conduct,
or Conviction of Offense, Not Directly Related to
Medical Practice, as Ground for Disciplinary Action,*
34 A.L.R.4th 609 (1984) 24-25

I. INTRODUCTION

Appellants sued the Estate of Bryan Donald Whitemarsh, M.D., for medical malpractice, claiming that Dr. Whitemarsh, a family practice physician, violated the applicable standard of care by engaging in a sexual relationship with his patient, Monique Messenger. On summary judgment, the trial court correctly concluded that the sexual relationship between Dr. Whitemarsh and Mrs. Messenger could not provide the basis for a medical malpractice claim. A non-mental health physician, by engaging in a sexual relationship, is in no way, shape, or form utilizing the specialized skills the physician was taught in examining, diagnosing, treating or caring for patients. To hold otherwise would contravene established Washington authority holding that sexual conduct does not constitute medical treatment.

In a failed effort to avoid this authority, Appellants accused Dr. Whitemarsh of using “transference” to seduce Mrs. Messenger. “Transference” is the term used by psychiatrists and psychologists to denote a patient's emotional reaction to a therapist. The mishandling of the transference phenomenon is the basis for finding that a mental health physician, as distinguished from a non-mental health physician, can be liable for medical malpractice for a sexual relationship with a patient.

The only evidence of a therapist-patient relationship between Dr. Whitemarsh and Mrs. Messenger is Mrs. Messenger’s self-serving

testimony. The medical records do not corroborate Mrs. Messenger's testimony regarding mental health treatment. Thus, Dr. Whitemarsh, if still living, could contradict Mrs. Messenger's testimony with his own knowledge of what transpired. Under such circumstances, the trial court correctly applied Washington's dead man statute and found Mrs. Messenger's self-serving testimony inadmissible. Because a sexual relationship between a non-mental health physician and patient cannot provide the basis of a medical malpractice claim, and because the record was devoid of admissible evidence establishing any therapist-patient relationship, the trial court correctly held that the Estate was entitled to summary judgment as a matter of law.

The trial court also correctly denied Appellants' request for a CR 56(f) continuance. Appellants failed to offer a good reason for the delay in obtaining the desired evidence, failed to state what evidence would be established through the additional discovery, and failed to demonstrate how the desired evidence would have made a difference. Accordingly, both the trial court's order granting the Estate's Motion for Summary Judgment and the trial court's order denying Appellants' motion for a CR 56(f) continuance should be affirmed.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court correctly find that a sexual relationship between a non-mental health physician and his patient does not constitute “health care” for the purposes of a medical malpractice claim under RCW 7.70?
2. Did the trial court correctly find that there was no admissible evidence of a therapist-patient relationship between Dr. Whitemarsh and Mrs. Messenger that could give rise to an independent basis of liability under RCW 7.70?
3. Did the trial court correctly apply the dead man statute (RCW 5.60.030) where Mrs. Messenger submitted direct testimony about statements by and transactions with Dr. Whitemarsh as opposed to testimony concerning her feelings and impressions?
4. Did the trial court correctly find that the Estate did not waive the dead man statute where (a) the statute does not apply to documents; (b) the Estate did not rely on Mrs. Messenger’s testimony to establish facts favorable to its position; (c) the Estate only offered Mrs. Messenger’s testimony in the context of explaining its inadmissibility; and (d) the Estate did not mislead the trial court or knowingly offer falsified evidence?
5. Did the trial court correctly deny Appellants’ motion to continue the summary judgment hearings where (a) Appellants failed to offer a good reason for the delay in obtaining the desired evidence; (b) Appellants failed to state what evidence would be established through additional discovery; and (c) the desired evidence would not have raised a genuine issue of material fact?

III. COUNTERSTATEMENT OF THE CASE

- A. Mrs. Messenger Initiates Care with Dr. Whitemarsh in May of 2011.
- Mrs. Messenger and her family moved from Spokane to Puyallup in 2010. CP 471. Through recommendations, Mrs. Messenger chose Dr.

Whitemarsh, a family practice physician, as the primary care physician for herself, her husband and her children. CP 475.

B. Mrs. Messenger and Dr. Whitemarsh Begin an Affair in the Summer of 2015.

On June 2, 2015, Mrs. Messenger took her eldest son, M. M., to see Dr. Whitemarsh for a sports physical. CP 117. Dr. Whitemarsh was a gun enthusiast and asked whether M. M. and his father would like to go out shooting. CP 117. M. M. was interested. CP 117. Dr. Whitemarsh asked Mrs. Messenger for her phone number so they could make arrangements. CP 117. Initially, it was going to be M. M. and Mr. Messenger. CP 118. However, the only day Dr. Whitemarsh had available was a Sunday. CP 118. Mr. Messenger worked on Sundays, so rather than postpone, Dr. Whitemarsh asked Mrs. Messenger if she would go along with them to the gun range. CP 118. Mrs. Messenger contends that from there, things evolved, and in August the relationship turned sexual. CP 118.

C. Mr. Messenger Discovers Affair and Files Complaint with Department of Health.

Over time, Mr. Messenger became suspicious. CP 124. He claims that he put a recording device in the family car and obtained a recording of Mrs. Messenger and Dr. Whitemarsh having a sexual encounter. CP 124-25. On April 25, 2016, Mr. Messenger filed a Complaint against Dr.

Whitemarsh with the Department of Health based on his sexual relationship with Mrs. Messenger. CP 126.

D. The Relationship Ends Tragically.

On June 2, 2016, Dr. Whitemarsh and Mrs. Messenger met to discuss their relationship. CP 120. Mrs. Messenger told Dr. Whitemarsh that the relationship was over. CP 120. Mrs. Messenger then drove directly to Dr. Whitemarsh's home where she confronted Mrs. Whitemarsh and informed her that she had been sleeping with her husband. CP 120. Later that evening, Dr. Whitemarsh shot himself outside his family home. CP 535. Mrs. Whitemarsh and her daughter heard the gun shot, ran outside, and discovered Dr. Whitemarsh's body. CP 535, 538.

E. Appellants File a Medical Malpractice Lawsuit against the Estate.

In March of 2017, Appellants filed a medical malpractice lawsuit against the Estate. CP 2-6. Appellants claimed that Dr. Whitemarsh "breached the accepted standard of care for medical treatment" by engaging in an affair with Mrs. Messenger. CP 2-6. The Complaint sought damages for Mrs. Messenger, Mr. Messenger, and their five children. CP 2-6.

F. The Medical Records Do Not Indicate Mental Health Treatment.

During discovery, Mrs. Messenger testified that Dr. Whitemarsh treated her for postpartum depression following the April 2014 birth of her twins, counseled her following the July 2015 death of her brother, and

offered her medication for depression. CP 116, 118-19, 129, 481, 483, 487-88. According to Mrs. Messenger, the alleged counseling and treatment for depression took place during appointments where no one else was present and through text messages which she immediately destroyed. CP 118-19, 130-32, 466. However, nothing in the medical records reflects any complaints about or diagnosis of postpartum depression. CP 87-113. Similarly, nothing in the medical records indicates that Dr. Whitmarsh ever suggested or offered Mrs. Messenger an antidepressant. CP 87-113. The sole mention of any depression or counseling appears in connection with a November 8, 2012, office visit—a visit that took place more than a year before the birth of Mrs. Messenger’s twins and more than two years before the death of her brother. CP 89.

During the November 8, 2012, office visit, Mrs. Messenger presented to Dr. Whitmarsh for a screening test for her work. CP 89. She reported that she was having difficulty with her separation from her husband and had periods of depression. CP 89. She also reported that she had been seeing a counselor. CP 89. The November 8, 2012, chart note reflects Dr. Whitmarsh’s plan to have Mrs. Messenger continue seeing her current counselor. CP 89.

Dr. Whitmarsh entered certain diagnostic codes for the November 8, 2012, office visit, including a code for “[a]djustment disorder with

depressed mood.” CP 87. Nothing in the medical records indicates that Dr. Whitemarsh treated Mrs. Messenger for depression or provided her with mental health counseling during the November 8, 2012, office visit or at any time thereafter. CP 87-113.

G. The Estate Successfully Moved for Summary Judgment.

The Estate moved for summary judgment on the grounds that a sexual relationship between a non-mental health physician and a patient is not “health care” within the meaning of RCW 7.70. CP 55-76. The Estate anticipated Appellants’ argument that a therapist-patient relationship existed between Dr. Whitemarsh and Mrs. Messenger. CP 70-74. Unlike non-mental health physicians, mental health physicians can be subject to medical malpractice liability for engaging in sexual relationships with their patients. CP 70-74. The Estate therefore alerted the trial court to the absence of any admissible evidence establishing the existence of a therapist-patient relationship between Dr. Whitemarsh and Mrs. Messenger. CP 72-74. Specifically, the Estate argued that the dead man statute precluded Appellants from offering self-serving testimony that Dr. Whitemarsh provided her with mental health treatment. CP 72-74.

As anticipated, Appellants opposed the Estate’s motion for summary judgment by relying on the inadmissible self-serving deposition testimony of Mrs. Messenger. CP 432-53, 467-545, 546-639. Mrs. Messenger also

submitted a declaration stating Dr. Whitemarsh diagnosed her with adjustment disorder with depressed mood, her symptoms of depression worsened after the birth of her twins, and she had frequent conversations with Dr. Whitemarsh about her depression symptoms both inside and outside of the office. CP 463-66. Mrs. Messenger claimed that Dr. Whitemarsh frequently introduced the topic of her depression symptoms, counseled her in connection with the same, and offered her further treatment including antidepressant medication. CP 466. Mrs. Messenger also claimed that all of Dr. Whitemarsh's records were false or incomplete to the extent they did not contain any reference to him counseling her for depression or offering her an antidepressant. CP 463-66.

Appellants also submitted the expert declaration of Dr. Howard Miller. CP 454-461. Dr. Miller opined that Dr. Whitemarsh breached his fiduciary duties and fell below the applicable standard of care by initiating and participating in a sexual relationship with his patient, by threatening to kill Mr. and Mrs. Messenger, and by committing suicide as an act of purported retaliation. CP 454-61. The Estate moved to strike Dr. Miller's Declaration because, among other reasons, the Estate's motion posed a legal question that could not be resolved by competing expert testimony. CP 667-70. The Estate also moved to strike Mrs. Messenger's Declaration to the extent it ran afoul of the dead man statute. CP 666-67.

After hearing the arguments of counsel, the trial court granted summary judgment in the Estate's favor. CP 767-770. The trial court found Washington law to be clear that a sexual relationship between a non-mental health physician and a patient cannot provide the basis for a medical malpractice claim because "it's not the doctor utilizing the skills which they've been taught." 4/27/18 RP 43. The trial court also concluded that the dead man statute applied and that no admissible evidence existed establishing a therapist-patient relationship between Dr. Whitmarsh and Mrs. Messenger. 4/27/18 RP 42-46. Finally, the trial court gave no weight to the Declaration of Dr. Miller because the issue before it was "a legal question" and an expert "can't tell the Court what the law is." 4/27/18 RP 45-46. The order granting summary judgment in the Estate's favor struck the Declaration of Dr. Miller and the offending portions of Mrs. Messenger's Declaration. CP 767-70.

H. Procedural History

The Estate filed its Motion for Summary Judgment on March 23, 2018. CP 55-76. On March 29, 2018, the Appellants filed a motion for a CR 56(f) continuance. CP 212-22. The trial court denied Appellants' motion for continuance on April 6, 2018. CP 429-31. On the eve of the hearing on the Estate's Motion for Summary Judgment, Appellants filed a motion for leave to amend their complaint to add a claim for breach of

fiduciary duty. CP 754-66. The following day, the trial court granted the Estate's Motion for Summary Judgment and denied Appellants' motion for leave to amend their complaint. CP 767-70, 4/27/18 RP 47-48. Appellants appeal from the trial court's rulings denying the CR 56(f) continuance and granting summary judgment in the Estate's favor, but do not appeal from the ruling denying their motion for leave to amend. CP 774-85.

IV. ARGUMENT

A. The Trial Court Correctly Dismissed Appellants' Medical Malpractice Claim against the Estate.

1. Standard of Review

On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 197-98, 943 P.2d 286 (1997). When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom most favorably toward the nonmoving party. *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995); *see also* CR 56(c).

2. A Sexual Relationship between a Non-Mental Health Physician and a Patient Cannot Form the Basis of a Medical Malpractice Claim.

Appellants' sole cause of action against the Estate was for medical malpractice under RCW 7.70. RCW 7.70 provides the exclusive remedy for damages for injuries resulting from health care. *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335 (1999). The Legislature's declaration of policy provides in relevant part:

The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350...certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care....

RCW 7.70.010 (emphasis added).

RCW 7.70 does not define the phrase "health care." However, courts have construed "health care" to mean "the process in which [a physician is] utilizing the skills which he had been taught in examining, diagnosing, treating or caring for the plaintiff as his patient." *Branom*, 94 Wn. App. at 969-70; *Estate of Sly v. Linville*, 75 Wn. App. 431, 439, 878 P.2d 1241 (1994) (quoting *Tighe v. Ginsberg*, 146 A.D.2d 268, 540 N.Y.S.2d 99, 100-01 (1989)). This is consistent with a common dictionary definition. *Beggs v. State, Dept. of Social & Health Services*, 171 Wn.2d 69, 79, 247 P.3d 421 (2011) (citing *Berger v. Sonneland*, 144 Wn.2d 91,

109, 26 P.3d 257 (2001) (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 833 (3d. ed. 1992))). Thus, the fact that conduct occurs during the course of the physician-patient relationship does not automatically render it “health care” for the purposes of RCW 7.70. See *Linville*, 75 Wn. App. at 440 (holding misrepresentations by a doctor about another doctor’s previous care of the patient, though “made during the course of the physician/patient relationship,” did not automatically render them “health care”); *Wright v. Jeckle*, 104 Wn. App. 478, 484-85, 16 P.3d 1268 (2001) (finding entrepreneurial activities are motivated by financial gain only and do not constitute health care); *Beggs*, 171 Wn.2d at 79-80 (concluding that a doctor’s duty to report suspected child abuse is not necessarily health care).

To prevail on a claim concerning violation of the accepted standard of care, the plaintiff bears the burden of proving that (1) the health care provider failed to exercise that degree of care, skill and learning expected of a reasonably prudent health care provider acting in the same or similar circumstances; and (2) such failure was a proximate cause of the injury complained of. RCW 7.70.040. It follows that to constitute a viable medical malpractice claim under RCW 7.70, a physician’s alleged breach of his duty must arise during the process in which he was utilizing the skills which he had been taught in examining, diagnosing, treating or caring for

patients. *Linville*, 75 Wn. App. at 440; *Wright*, 104 Wn. App. at 484-85; *Beggs*, 171 Wn.2d at 79-80.

Here, nothing in the Complaint or the treatment records suggests that Dr. Whitemarsh's utilization of the skills he was taught as a physician fell below the applicable standard of care. Instead, Appellants merely allege that Dr. Whitemarsh breached the accepted standard of care by "pursu[ing] his married patient, Monique Messenger, for an inappropriate, intimate relationship" and "flirt[ing] with Mrs. Messenger while he was treating her children." CP 3-4. There is no Washington authority holding that a sexual relationship between a non-mental health physician and his patient involves the utilization of a physician's special skills. On the contrary, Washington courts have consistently held that a physician's sexual relationship with a patient *does not* constitute the rendering of professional services and therefore cannot provide the basis for a medical malpractice claim.

a. A Sexual Relationship Does Not Constitute "Health Care" under RCW 7.70.

Glaringly absent from Appellants' Brief is any discussion of Washington case law holding that a sexual relationship between a physician and a patient does not constitute medical treatment. In *Washington Ins. Guar. Ass'n v. Hicks*, 49 Wn. App. 623, 624-26, 744 P.2d 625 (1987), the court addressed whether a medical malpractice policy, which limited

coverage to injury caused by a “medical incident,” provided coverage to a chiropractor who engaged in sexual intercourse with a patient during a treatment session. The policy defined “medical incident” as “any act or omission in the furnishing of professional medical or dental services.” *Id.* at 625. The *Hicks* court rejected the argument that the incident was covered simply because it occurred during a scheduled appointment at the insured’s place of business, reasoning that the relationship of the incident to the furnishing of professional services is more than one of time and place. *Id.* at 626-27. In so ruling, the *Hicks* court stated as follows:

Courts generally hold that medical malpractice insurance policies do not cover the insured physician’s sexual contact with patients. In determining whether a particular act involves professional services, courts look to the act itself, rather than the title of the party performing the act or the place where the act occurred. ***When the physician’s sexual contact with his patient is not necessitated by the particular course of medical treatment, then the malpractice insurance does not provide coverage for the damages sustained by the victim.***

Id. at 627 (emphasis added) (citations omitted). Because the sexual conduct was not a part of the chiropractor’s treatment, the *Hicks* court upheld the trial court’s denial of coverage. *Id.* at 627-28.

Similarly, in *Standard Fire Ins. Co. v. Blakeslee*, 54 Wn. App. 1, 11, 771 P.2d 1172 (1989), this Court held that a dentist was not covered under his professional liability policy for fondling a patient’s breast while she was

under the effects of nitrous oxide. The dentist's professional liability policy limited coverage to damages for injury arising out of the rendering or failure to render "professional services." *Id.* at 3. Relying on *Hicks*, this Court observed:

We know of no legitimate course of treatment that involves sexual contact between a practitioner of the healing arts and his or her patient, and we can conceive of none.

Id. at 9.

In determining that coverage was lacking, this Court rejected the argument that improper sexual conduct was somehow intertwined with and inseparable from the services provided by the physician. *Id.* This Court also rejected the argument that the use of nitrous oxide brought the sexual contact within the course of treatment by making the patient more susceptible and less resistant to the fondling of her breast. *Id.* at 10. There must be a causal relationship between the treatment and the harm alleged by the victim. *Id.* Although the dentist's administration of nitrous oxide was a professional service, it could not be said to be the proximate cause of the injuries alleged by the patient, nor could the dentist's fondling of his patient's breast be said to have arisen out of the rendering or failure to render professional services. *Id.* at 11.

The holdings in *Hicks* and *Blakeslee* demonstrate that it is the act itself, rather than the title of the party performing the act or the place where

the act occurred, that is determinative. Where, as here, the alleged sexual conduct was not necessitated by any particular course of medical treatment, it cannot be considered the rendering of professional services, much less the rendering of “health care” within the meaning of RCW 7.70. Indeed, because the alleged sexual conduct did not involve the utilization of the medical skills Dr. Whitemarsh was taught in examining, diagnosing, treating and caring for patients, there can be no causal relationship between the health care Dr. Whitemarsh provided and Mrs. Messenger’s alleged injuries. Under such circumstances, the trial court appropriately held that the existence of a sexual relationship between Dr. Whitemarsh and Mrs. Messenger was insufficient to form the basis of a medical malpractice claim.

The fact *Hicks* and *Blakeslee* were decided in the context of medical malpractice coverage does not make their reasoning any less compelling. Indeed, a ruling that a non-mental health physician’s sexual relationship with a patient necessarily constitutes “health care” would effectively overrule *Hicks* and *Blakeslee* and potentially force insurers to provide legal defenses for non-professional acts. Appellants’ position simply cannot be reconciled with the decades-old precedent that sexual contact is not a part of medical treatment. The trial court therefore correctly dismissed

Appellants' medical malpractice claim and its ruling in favor of the Estate should be affirmed.

b. Washington Law Is Consistent with Law from Other Jurisdictions.

Hicks and *Blakeslee* are consistent with decisions from other jurisdictions addressing whether a sexual relationship can form the basis of a medical malpractice claim. For example, in *Atienza v. Taub*, 194 Cal.App.3d 388, 390, 239 Cal.Rptr. 454 (Cal. Ct. App.1987), the court upheld the dismissal of a plaintiff's medical malpractice claim and stated as follows:

The relevant authorities...agree that a physician who induces a patient to enter into sexual relations is liable for professional negligence only if the physician engaged in the sexual conduct on the pretext that it was a necessary part of the treatment for which the patient has sought out the physician. In the case at bar, however, [the patient] does not make this allegation. Instead, [the patient] seeks to combine the care given to her by respondent for her phlebitis and the emotionally destructive effect of her romantic and sexual involvement with him under the rubric of "treatment" simply because the two things took place over the same period of time. [The patient] does not allege that she was induced to have sexual relations with [her physician] in furtherance of her treatment. Essentially, [the patient] complains that she had an unhappy affair with a man who happened to be her doctor. This is plainly insufficient to make out a cause of action for professional negligence under any of the theories presented.

Id. at 393-94.

Decisions from other jurisdictions are in accord. *See Odegard v. Finne*, 500 N.W.2d 140 (Minn. Ct. App. 1993) (holding a physician who treated his patient for colitis was not liable in medical malpractice for having a sexual relationship with the patient where the patient did not claim the physician entered into the sexual relationship under the guise of treating her, where the patient did not claim the treatment for colitis was unsuccessful or deficient, and where the affair occurred after or at the very end of the physician’s successful treatment of the condition); *Gunter v. Huddle, M.D.*, 724 So.2d 544 (Ala. Ct. App. 1998) (concluding a sexual relationship between a patient and a non-psychiatric physician was outside the scope of the physician’s professional services and did not constitute professional malpractice in the absence of evidence that the physician led the patient to believe that the sexual relationship was part of the patient’s treatment); *Darnaby v. Davis, D.O.*, 57 P.3d 100 (Ok. Ct. App. 2002) (ruling that in order to impose liability for a medical malpractice claim involving sexual activity between a physician and a patient, a patient must prove that the sexual activity was represented by the physician to be part of the treatment regimen); *Korper v. Weinstein*, 57 Mass.App.Ct. 433, 783 N.E.2d 877 (Mass. Ct. App. 2003) (stating “[i]t is settled that consensual sexual conduct between a medical practitioner and a patient does not constitute medical malpractice” and rejecting that any kind of transference

phenomenon occurs in the ordinary patient-physician relationship); *Mindt v. Winchester, M.D.*, 151 Or.App. 340, 948 P.2d 334 (Or. Ct. App. 1997) (finding urologist who was treating patient for infertility was not liable for medical malpractice based on engaging in a sexual relationship with the patient's wife because the relationship was not undertaken as part of the patient's treatment and did not affect the patient's physical condition or the treatment he received).¹

Here, Mrs. Messenger does not allege that she was induced to have sexual relations with Dr. Whitemarsh under the guise of treatment, nor does she allege that the medical treatment Dr. Whitemarsh provided was in any way deficient. Rather, Mrs. Messenger contends that Dr. Whitemarsh committed medical malpractice simply by engaging in a sexual relationship with her during the timeframe that she was also his patient. CP 2-6. As recognized in *Atienza*, and consistent with the holdings in *Hicks* and *Blakeslee*, the mere fact that the alleged sexual relationship and Dr. Whitemarsh's treatment of Mrs. Messenger took place over the same period of time does not make the alleged sexual relationship part of Mrs.

¹ Appellants' reliance on the Ohio Supreme Court's decision in *Pons v. Ohio State Med. Bd.*, 614 N.E.2d 748 (Ohio 1993), is misplaced. The *Pons* case involved a disciplinary action, not a claim for medical malpractice. The issue before this Court is not whether Dr. Whitemarsh's conduct warranted disciplinary action, but whether it constituted "health care" within the meaning of RCW 7.70.

Messenger's treatment. On the contrary, engaging in a sexual relationship in no way requires a family practice physician, such as Dr. Whitemarsh, to utilize the skills he was taught as a physician in examining, diagnosing, treating or caring for his patients. Like the patient in *Atienza*, Mrs. Messenger is merely complaining that she had an unhappy affair with a man that happened to be her doctor—not that her doctor's utilization of his medical skills fell below the applicable standard of care. Such a complaint is insufficient to make out a medical malpractice claim under RCW 7.70. The trial court appropriately entered summary judgment in the Estate's favor and its ruling should be affirmed.

c. Washington Law on Vicarious Liability Further Supports the Trial Court's Decision.

Washington law concerning vicarious liability further illustrates why a sexual relationship between a non-mental health physician and a patient cannot constitute medical malpractice. In *Thompson v. Everett Clinic*, 71 Wn. App. 548, 551, 860 P.2d 1054 (1993), the court addressed the issue of whether a clinic could be held vicariously liable for the sexual misconduct of a physician. The physician misled his patient into believing a sperm sample was required and normally obtained by manually stimulating the patient to ejaculation. *Id.* at 550. In refusing to find the clinic vicariously liable, the *Thompson* court held that sexual acts

committed by the physician, even though engaged in while in the employment of a clinic, could not be attributed to the clinic because they emanated from the physician's wholly personal motives for sexual gratification. *Id.* at 554. Consequently, there could be no basis for finding that a sexual act was done in furtherance of the clinic's business or cloaked with some apparent authority. *Id.*

The reasoning in *Thompson* underscores why Mrs. Messenger's medical malpractice claim did not survive summary judgment. Just as there is no basis for finding that a physician engaged in sexual acts to further a clinic's business interests, there is no basis for finding that the physician who engaged in such acts utilized the medical skills he was taught as a physician in doing so. In both instances, the sexual acts emanate wholly from personal motives of sexual gratification. Under such circumstances, any alleged damages flowing therefrom do not occur "as a result of health care." RCW 7.70.010. Because Mrs. Messenger could not establish a viable cause of action under RCW 7.70, the trial court appropriately entered summary judgment in the Estate's favor.

d. Whether a Sexual Relationship Would Have Warranted Professional Discipline Is Irrelevant.

The fact that the alleged sexual misconduct violated professional ethical rules is irrelevant to the inquiry before this Court—namely, whether

the alleged sexual misconduct constitutes “health care” for the purposes of RCW 7.70 liability. The purpose of WAC 246-16 is to: “define certain acts of unprofessional conduct for health care providers under the jurisdiction of the secretary of the department of health” and “provide for sanctions.” WAC 246-16-010. The statutory authority for WAC 246-16 *et seq.* is found in RCW 18.130 *et seq.*, the uniform disciplinary act for health care professionals. Unlike the requirement for a finding of liability under RCW 7.70, nothing in WAC 246-16 *et seq.* or RCW 18.130 *et seq.* requires that the conduct subjecting a physician to professional discipline be related to the utilization of the skills he or she has been taught in examining, diagnosing, treating or caring for patients.

Indeed, the Washington Supreme Court has recognized that conduct may subject a physician to professional discipline even though such conduct is not specifically related to the skills needed for the practice of medicine. *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 733-35, 738-39, 818 P.2d 1062 (1991). In *Haley*, a physician appealed the disciplinary board’s finding that his sexual relationship with a former teenage patient constituted “unprofessional conduct” warranting disciplinary action against his medical license. *Id.* at 725-26. To serve as grounds for professional discipline under RCW 18.130.180(1), the physician’s conduct had to be “related to” the practice of his profession. *Id.* at 731. The *Haley* court construed the

“related to” requirement as meaning that the conduct must indicate unfitness to bear the responsibilities of, and enjoy the privileges of, the profession. *Id.*

The physician argued that his sexual relationship with his former patient did not “relate to” the practice of his profession because she was not his patient during the time of their sexual contact and, as the disciplinary board found, he exercised no improper influence over her when she was his patient. *Id.* at 737. The physician maintained that any improper conduct in which he may have engaged was not related to his practice of medicine because it was not performed during the course of his medical diagnosis, care, or treatment of patients. *Id.*

In upholding the disciplinary board’s finding of unprofessional conduct, the *Haley* court acknowledged that conduct may indicate unfitness to practice a profession or occupation without being directly related to the specific skills needed for that practice. *Id.* at 733 (citing *In re Kindschi*, 52 Wn.2d 8, 319 P.2d 824 (1958) (recognizing that a conviction for tax fraud is a valid reason to take disciplinary action against a physician even though it does not indicate any lack of competence in the technical skills needed to be a physician) and *Standow v. Spokane*, 88 Wn.2d 624, 564 P.2d 1145 (1997) (holding that a felony conviction may be the basis for denying a taxicab license because the nature of the occupation puts the general public

in a particularly vulnerable position should the licensee fail to discharge his occupation with a sense of justice and honesty)).

The conduct need not have occurred during the actual exercise of professional or occupational skills, nor need the conduct raise general doubts about the individual's grasp of those skills. In the context of medical disciplinary proceedings, and in the light of the purposes of such proceedings, conduct may indicate unfitness to practice medicine if it raises reasonable concerns that the individual may abuse the status of being a physician in such a way as to harm members of the public, or if it lowers the standing of the medical profession in the public's eyes.

Id.

The *Haley* court also recognized that other jurisdictions adhere to the principle that conduct may subject a physician to professional discipline without that conduct being narrowly related to the technical competence needed to practice medicine. *See, e.g., Windham v. Board of Med. Quality Assur.*, 104 Cal.App.3d 461, 163 Cal. Rptr. 566 (1980) (holding that a physician's conviction for tax evasion was sufficiently related to the practice of medicine as to justify revocation of his license); *Erdman v. Board of Regents of Univ. of State of N.Y.*, 24 A.D.2d 698, 261 N.Y.S.2d 634 (1965) (approving the revocation of a physician's license after he was convicted of conspiring to improperly influence a judge). The decisions in *In re Kindschi*, *Standow*, *Windham*, and *Erdman* illustrate the majority rule that

disciplinary action may be taken against a medical or dental practitioner because of acts or offenses which are not directly connected with his technical competence to practice but which only evidence weaknesses of character which are regarded by the licensing authorities and the courts as inconsistent with the general standards of the profession.

Id. at 735 (quoting Francis M. Dougherty, Annotation, *Physician's or Other Healer's Conduct, or Conviction of Offense, Not Directly Related to Medical Practice, as Ground for Disciplinary Action*, 34 A.L.R.4th 609, 613 (1984)).

Applying these principles to the facts before it, the *Haley* court concluded the physician's sexual relationship with his former patient warranted professional discipline even though it was not narrowly related to his technical skills and did not occur during the actual performance of his professional practice. *Id.* at 735-36, 738-39. In so ruling, the *Haley* court differentiated a case expressly holding that sexual contact could not serve as the basis for a medical malpractice action because the issue before the disciplinary board was the broader question of whether disciplinary action was warranted. *Id.* at 739 (distinguishing *Atienza v. Taub*, 194 Cal.App.3d 388).

This case presents the opposite scenario. The issue is not whether Dr. Whitemarsh's alleged affair with Mrs. Messenger warranted disciplinary action, but whether the alleged affair can serve as the basis for

Mrs. Messenger's action for medical malpractice. The *Haley* decision demonstrates that a physician's sexual relationship with a patient can indicate unfitness to practice medicine even though it is unrelated to the specific skills needed for the practice of medicine. *Id.* at 733-35, 738-39. The same cannot be said for a finding of liability under RCW 7.70. RCW 7.70.010 limits medical malpractice claims to injuries "occurring as a result of health care." Where, as here, the conduct allegedly warranting professional discipline did not involve the utilization of the skills Dr. Whitemarsh was taught in examining, diagnosing, treating or caring for patients, it cannot be the basis of a medical malpractice claim. Any violation of professional disciplinary rules is therefore irrelevant to Dr. Whitemarsh's liability for medical malpractice under RCW 7.70.

Appellants' reliance on case law relating to attorney discipline is similarly unpersuasive. Appellants cite to no authority, and none exists, for the proposition that a lawyer's violation of the Rules of Professional Conduct—specifically the rule prohibiting a lawyer from having sexual relations with a client—necessarily subjects the lawyer to liability for legal malpractice. Just as an attorney can be disciplined for conduct that is not directly related to the skills needed to practice law, a physician can be disciplined for conduct that is not directly related to the skills needed to practice medicine. However, where a physician's conduct, even if

unethical, does not involve the utilization of the skills the physician was taught in examining, diagnosing, treating or caring for patients, it cannot form the basis of a medical malpractice claim. RCW 7.70.010. Accordingly, the trial court correctly entered summary judgment in the Estate's favor.

e. Appellants Are Foreclosed from Arguing Breach of Fiduciary Duty.

Appellants erroneously contend that Dr. Whitemarsh's conduct fell below the applicable standard of care based on his alleged abuse of the trust and confidence inherent in the fiduciary physician-patient relationship. CP 454-61. However, Appellants have not asserted a claim for breach of fiduciary duty. CP 2-6. Rather, Appellants' sole cause of action against the Estate is for medical malpractice. CP 2-6. After the Estate's Motion for Summary Judgment was fully briefed and on the eve of the date the matter was scheduled for hearing, Appellants moved for leave to amend their complaint to add a claim for breach of fiduciary duty. CP 754-66. The trial court denied Appellants' motion for leave to amend and Appellants did not appeal from or assign error to the trial court's decision. 4/27/1/ RP 47-48, CP 774-85; Appellants' Corrected Brief at pp. 3-4. Appellants are therefore foreclosed from recharacterizing any breach of fiduciary duty claim as one for violation of RCW 7.70.

Even if Appellants are not foreclosed from arguing breach of fiduciary duty, which the Estate maintains they are, summary judgment was nonetheless appropriate. “The existence of a fiduciary relationship does not mean that all interaction between the parties to that relationship is measured by the standards applicable to fiduciaries; the fiduciary is held to a higher standard of conduct only as to matters within the scope of the fiduciary relationship.” *Korper*, 57 Mas. App. Ct. at 437. In Washington, the scope of a physician’s fiduciary duty to patients is based upon the medical treatment relationship.

Pursuant to [the fiduciary doctor-patient] relationship, it is the duty of the physician to exercise the utmost good faith in dealing with his or her patient. The relationship is predicated on the proposition that the physician has special knowledge and skill in diagnosing and treating diseases and injuries and that the patient has sought and obtained the services of the physician because of this expertise. Mutual trust and confidence are essential to the physician-patient relationship, and from these elements flow the physician’s obligations to fully inform the patient of his or her condition, to continue to provide medical care once the patient-physician relationship has been established, to refer the patient to a specialist if necessary, and to obtain the patient’s informed consent to the medical treatment proposed...In short, a physician’s duties toward a patient...focus upon medical treatment and medical advice....”

Carson v. Fine, 123 Wn.2d 206, 219, 867 P.2d 610 (1994) (citations omitted) (emphasis added). Because sexual affairs and alleged death threats do not constitute the rendering of medical treatment or medical advice, such

conduct is outside the scope of a physician's fiduciary duty and cannot provide the basis for a claim for damages for "injury occurring as a result of health care." The trial court's ruling was therefore appropriate and the entry of summary judgment in favor of the Estate should be affirmed.

f. Alternative Legal Remedies Exist to Adequately Address Public Policy Concerns.

Refusing to recognize sexual conduct between a non-mental health physician and a patient as a basis for a medical malpractice action does not leave patients out in the cold. Other more appropriate avenues exist to deter unwanted and undesirable physician behavior. Criminal penalties exist to prevent the most egregious instances of sexual misconduct. Administrative penalties also exist to regulate the medical profession. Indeed, Mr. Messenger availed himself of these administrative penalties when he filed a complaint against Dr. Whitemarsh with the Department of Health. CP 126. The Department of Health has a wide range of sanctions at its disposal, including license suspension and license revocation. RCW 18.130.160. These administrative sanctions, including the potential loss of the physician's livelihood, adequately address the public policy concerns underlying the ban of sexual relationships between physicians and their patients.

3. There Is No Admissible Evidence of a Therapist-Patient Relationship.
 - a. Mental Health Physicians Are Held to a Different Standard than Non-Mental Health Physicians.

Washington courts recognize a distinction between mental health physicians and non-mental health physicians when it comes to the potential for malpractice liability based on a sexual relationship with a patient. This distinction is based on the “transference” phenomenon. “Transference” is a phenomenon wherein a psychotherapy patient becomes enamored of his or her therapist. In *Simmons v. U.S.*, 805 F.2d 1363, 1364-65 (9th Cir. 1986), the Ninth Circuit explained the transference phenomenon as follows:

Transference is the term used by psychiatrists and psychologists to denote a patient's emotional reaction to a therapist and is “generally applied to the projection of feelings, thoughts and wishes onto the analyst, who has come to represent some person from the patient's past.”...Transference is crucial to the therapeutic process because the patient “unconsciously attributes to the psychiatrist or analyst those feelings which he may have repressed towards his own parents.... [I]t is through the creation, experiencing and resolution of these feelings that [the patient] becomes well.” “Inappropriate emotions, both hostile and loving, directed toward the physician are recognized by the psychiatrist as constituting...the transference. The psychiatrist looks for manifestations of the transference, and is prepared to handle it as it develops.” “Understanding of transference forms a basic part of the psychoanalytic technique.” The proper therapeutic response is countertransference, a reaction which avoids emotional involvement and assists the patient in overcoming problems.

Id. at 1364-65 (citations omitted).

Relying on *Simmons*, the *Hicks* court recognized that it is the mishandling of the transference phenomenon which forms the basis for finding that a mental health physician, as distinguished from a non-mental health physician, is entitled to coverage for medical malpractice. 49 Wn. App. at 627.

The crucial factor in the therapist-patient relationship which leads to the imposition of legal liability for conduct which arguably is no more exploitative of a patient than sexual involvement of a lawyer with a client, a priest or minister with a parishioner, or a gynecologist with a patient is that lawyers, ministers and gynecologists do not offer a course of treatment and counseling predicated upon handling the transference phenomenon.

Id. (quoting *Simmons v. U.S.*, 805 F.2d 1363, 1366 (9th Cir. 1986)).

- b. The Dead Man Statute Precludes an Interested Party from Giving Self-Serving Testimony about Conversations or Transactions with a Deceased Person.

In the proceedings below, the Estate anticipated the Appellants' argument that Dr. Whitmarsh should be held to the standard of a mental health physician. CP 70. The Estate therefore alerted the trial court that the only evidence of a therapist-patient relationship between Dr. Whitmarsh and Mrs. Messenger was Mrs. Messenger's own self-serving testimony—evidence that is inadmissible under Washington's dead man statute and therefore insufficient to create a genuine issue of material fact. CP 72-74.

Washington's dead man statute provides in pertinent part:

[I]n an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person,...a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased...person....

RCW 5.60.030. The purpose of this statute is to prevent interested parties from giving self-serving testimony about conversations or transactions with a dead or incompetent person. *Wildman v. Taylor*, 46 Wn. App. 546, 549, 731 P.2d 541 (1987).

c. Mrs. Messenger Is Precluded from Giving Self-Serving Testimony that Dr. Whitemarsh Provided Her with Mental Health Treatment.

During her deposition, Mrs. Messenger testified that Dr. Whitemarsh counseled her following the death of her brother, treated her for postpartum depression following the birth of her twins, and offered to put her on medication for depression. CP 116, 118-19, 481, 483, 487-88. Mrs. Messenger also submitted a declaration stating Dr. Whitemarsh diagnosed her with adjustment disorder with depressed mood in November 2012, her symptoms of depression worsened after the birth of her twins, and she had frequent conversations with Dr. Whitemarsh about her depression symptoms both inside and outside of the office. CP 463-66. Mrs. Messenger claimed that Dr. Whitemarsh frequently introduced the topic of

her depression symptoms, counseled her in connection with the same, and offered her further treatment including antidepressant medication. CP 466.

Mrs. Messenger's self-serving testimony is not corroborated by her medical records. Nothing in the medical records indicates that Dr. Whitmarsh ever suggest or offered Mrs. Messenger an antidepressant. CP 87-113. Similarly, nothing in the medical records following the birth of Mrs. Messenger's twins reflects any complaints about or diagnosis of postpartum depression. CP 100-113. Indeed, the sole mention of any depression or counseling appears in connection with a November 8, 2012, office visit—a visit that took place more than a year before the birth of Mrs. Messenger's twins and more than two years before the death of her brother. CP 89. During that office visit, Mrs. Messenger presented to Dr. Whitmarsh for a screening test for her work. CP 89. She reported that she was having difficulty with her separation from her husband and had periods of depression. CP 89. She also reported that she had been seeing a counselor. CP 89.

The diagnostic codes associated with the November 8, 2012, office visit, include a code for “[a]djustment disorder with depressed mood.” CP 87. The entry of a diagnostic code based on Mrs. Messenger self-report of periods of depression hardly turns Dr. Whitmarsh into her mental health therapist. CP 87-89. Indeed, the medical records do not indicate that Dr.

Whitemarsh provided Mrs. Messenger with mental health counseling on November 8, 2012, or at any time thereafter. CP 87-113. On the contrary, the medical records indicate that on November 8, 2012—the only time Mrs. Messenger reported periods of depression—Dr. Whitemarsh’s plan was for Mrs. Messenger to continue seeing her current counselor. CP 89.

Mrs. Messenger claims that the November 8, 2012, chart note—created more than two years prior to her affair with Dr. Whitemarsh—was falsified. CP 89, 463. Specifically, she contends that she was never separated from her husband and never saw a counselor until her husband learned of the affair. CP 89, 463. In fact, she contends that all of Dr. Whitemarsh’s records are false or incomplete to the extent they do not contain any reference to him counseling her for depression or offering her an antidepressant. CP 466. As the trial court correctly recognized, this is precisely the type of self-serving testimony the dead man statute is designed to protect against:

I think, as I said, the dead man statute does apply, and any doubts that I had about the basis for doing that were removed when there was the amended declaration, the one that just came in the last couple of days from Mr. Cloud with Ms. [sic] Messenger’s declaration about the medical records not being accurate and all these other things that took place. That’s exactly why the dead man statute’s in place because Dr. Whitemarsh, through his own hand, is not here. But to come back and say that even the records aren’t accurate, the dead man statute does apply. So really you’re not even

considering anything beyond what is in the medical records themselves.

4/27/18 RP 45.

Washington's dead man statute forbids Mrs. Messenger, a party in interest, from testifying about statements made by Dr. Whitemarsh and about transactions with Dr. Whitemarsh. Alleged conversations between Dr. Whitemarsh and Mrs. Messenger clearly come within the dead man statute. Dr. Whitemarsh, if still living, could contradict Mrs. Messenger's memory with his own knowledge of what transpired. Furthermore, Dr. Whitemarsh's medical treatment of Mrs. Messenger is a "transaction" under the statute because it is the doing of "some business" between Dr. Whitemarsh and Mrs. Messenger. *Erickson v. Robert F. Kerr, M.D., P.S., Inc.*, 69 Wn. App. 891, 898, 851 P.2d 703 (1993), *aff'd in part, rev'd in part on different grounds*, 125 Wn.2d 183, 883 P.2d 313 (1994). The dead man statute therefore operates to preclude Mrs. Messenger from offering testimony about conversations and transactions she had with Dr. Whitemarsh, including but not limited to testimony that he provided her with mental health counseling, treated her for depression, or offered her medication for depression.

Absent Mrs. Messenger's self-serving testimony, the record is devoid of any evidence whatsoever that Dr. Whitemarsh provided Mrs.

Messenger with mental health treatment. Indeed, Mrs. Messenger admits that “[a]ny and all documentation and communications relating to [her] relationship with [Dr. Whitemarsh] were immediately destroyed and/or deleted after being created, read, listened to, etc.” CP 130-32. Because there is no admissible evidence of a therapist-patient relationship between Dr. Whitemarsh and Mrs. Messenger, any alleged sexual relationship between them cannot form the basis of a viable medical malpractice claim. The trial court appropriately entered summary judgment in the Estate’s favor and its ruling should be affirmed.

d. “Feelings and Impressions” Exception Does Not Apply to Mrs. Messenger’s Testimony.

Appellants cannot avoid the operation of the dead man statute by claiming that Mrs. Messenger’s testimony merely relates to her feelings and impressions. Firstly, the testimony submitted by Mrs. Messenger in opposition to the Estate’s motion for summary judgment was not limited to her feelings and impressions. CP 463-466, 467-68, 471-499, 546-47, 551-83, 672, 676-77. Rather, she specifically testified that Dr. Whitemarsh counseled her regarding her symptoms of depression on many occasions from 2012 until after their sexual relationship commenced, counseled her following her brother’s death, treated her for postpartum depression following the birth of her twins, and offered to put her on medication for

depression. CP 463-66, 481, 487-88, 564, 570-71. This is direct testimony about statements by and transactions with Dr. Whitmarsh, not testimony about her own feelings or impressions.

Even if Mrs. Messenger had couched her testimony in terms of her own “feelings and impressions,” which she did not, such testimony would nonetheless be inadmissible. “[A]n interested party may testify as to her own feelings or impressions, so long as they do not concern a specific transaction or reveal a statement made by a decedent.” *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 577, 291 P.3d 906 (2012) (citing *Jacobs v. Brock*, 73 Wn.2d 234, 237-38, 437 P.2d 920 (1968)) (emphasis added). Indeed, if an interested party could avoid the operation of the dead man statute simply by recharacterizing his or her testimony as impression testimony, the exception would swallow the rule. Washington courts have consistently held that where “impression” testimony does indirectly what cannot be done directly—namely, make clear what the decedent’s statements were and what the transaction with him was—the testimony is inadmissible. *See, e.g., In re Estate of Miller*, 134 Wn. App. 885, 143 P.3d 315 (2006) (finding that witness’s testimony that it was her impression that certain money she had given the decedent was a loan and not a gift indirectly sought to prove the existence of loan transactions between her and the decedent and was therefore precluded by the dead man statute); *Lappin v.*

Lucurell, 13 Wn. App. 277, 534 P.2d 1038 (1975) (holding that witness's testimony as to his impressions that money given to him was a gift made it obvious what the decedent's statements were and what the underlying transaction was and therefore fit within the prohibition of the dead man statute).

Here, Mrs. Messenger did not offer *any* impression testimony, and she cannot breathe new life into her claim by recharacterizing her testimony on appeal. Her direct testimony makes clear what Dr. Whitemarsh's statements allegedly were (that he frequently counseled her and offered her treatment for her symptoms of depression, counseled her with respect to her brother's death, counseled her for alleged post-partum depression, and suggested she take an anti-depressant) and what the underlying transaction was (that he provided her with mental health treatment). This is precisely the type of testimony which Dr. Whitemarsh, if still living, could contradict with his own knowledge of what transpired. The feelings and impressions exception is therefore inapplicable, and the trial court appropriately held that the dead man statute barred Mrs. Messenger's self-serving testimony.

e. The Estate Did Not Waive the Protections of the Dead Man Statute.

Appellants erroneously contend that the Estate waived the protections of the dead man statute by introducing Mrs. Messenger's

medical records and deposition testimony. With respect to the medical records, an adverse party does not waive the protection of the dead man statute by introducing documentary evidence. The statute applies to testimony, not documents. *Erickson*, 69 Wn. App. at 900. Indeed, the Washington Supreme Court expressly held that an estate's introduction of medical records in a medical malpractice action does not waive the dead man statute. *Erickson*, 125 Wn.2d at 189.

Moreover, and as recognized in the very case upon which Appellants rely, testimony about transactions or communications with the decedent may only constitute waiver of the dead man statute where such testimony is "favorable to the estate." See Appellants' Corrected Brief at p. 30 (quoting *Kellar*, 172 Wn. App. at 477); see also *Botka v. Estate of Hoerr*, 105 Wn. App. 974, 980, 21 P.3d 723 (2001); *Thor v. McDearmid*, 63 Wn. App. 193, 202, 817 P.2d 1380 (1991). In this case, the Estate offered the deposition testimony of Mrs. Messenger concerning Dr. Whitemarsh's purported provision of mental health treatment solely for the purpose of explaining the inadmissibility of such evidence. Mrs. Messenger's deposition testimony is not favorable to the Estate. On the contrary, Mrs. Messenger's self-serving deposition testimony, by its very nature, is only favorable to the Appellants. Where, as here, an estate offers deposition testimony favorable to the interested party for the sole purpose of explaining

the inadmissibility of same, there is nothing to rebut and there can be no waiver.

Appellants' reliance on *Estate of Lennon v. Lennon*, 108 Wn. App. 167, 29 P.3d 1258 (2001), is misplaced. In *Lennon*, the estate brought an action to recover proceeds from stock certificates sold by the decedent's stepson. *Id.* at 170. In support of its motion for summary judgment, the estate submitted portions of the stepson's declaration and deposition testimony to establish the physical trail of the stock certificates and the proceeds from the sale. *Id.* at 177. By doing so, the *Lennon* court held that the estate waived the protections of the dead man statute. *Id.* at 180.

Unlike in this case, however, the estate in *Lennon* did not identify the subject testimony as inadmissible. Instead, the estate in *Lennon* explicitly relied on the subject testimony to establish facts favorable to its position on summary judgment. *Id.* at 177. In contrast, the Estate in this case has consistently maintained that Mrs. Messenger's self-serving deposition testimony is barred by the dead man statute. Because the Estate only offered such testimony in the context of explaining its inadmissibility, the *Lennon* decision is inapposite. The trial court appropriately held that the Estate did not waive the protections of the dead man statute. Accordingly, its ruling entering summary judgment in the Estate's favor should be affirmed.

f. The Estate Did Not Mislead the Trial Court or Knowingly Offer Falsified Evidence.

In a last-ditch effort to avoid the operation of the dead man statute, Appellants lob baseless allegations of ethical misconduct against the Estate and its counsel. *See* Appellants' Corrected Brief at pp. 32-34. Appellants claim the Estate and its attorneys abused "the evidence rules, ethical rules, and the adversarial system itself" by introducing Mrs. Messenger's medical records into evidence—evidence which Appellants contend the Estate and its attorneys knew to be false. *Id.* at 32-33. The source of Appellants' ire is an eight-word chart note from February 2016 that states "[s]ingle current partner for past 7 months/years." CP 374; Appellants' Corrected Brief at p. 32. Appellants contend that the Estate knew this statement to be false because it admitted that Dr. Whitemarsh began a sexual relationship with Mrs. Messenger in August 2015. *See* Appellants' Corrected Brief at p. 32. Appellants go so far as to suggest that by putting the medical record that contained this statement into evidence, the Estate and its attorneys committed a fraud on the court. *See* Appellants' Corrected Brief at p. 33.

Appellants did not argue below that the Estate waived the protections of the dead man statute by knowingly offering false evidence, and this Court need not consider Appellants' argument for the first time on appeal. RAP 2.5(a); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

That notwithstanding, the Estate and its attorneys do not take Appellants' accusations of professional misconduct lightly. The Estate assumed for the purpose of summary judgment that a sexual relationship existed. CP 55. Under such circumstances, Appellants cannot be heard to argue that the Estate or its attorneys knowingly misled the trial court. Furthermore, the Estate did not offer the medical records to prove the absence of evidence of a sexual relationship. Rather, it offered the medical records to prove the absence of evidence of a therapist-patient relationship. CP 60; 72-74; 666-67.

Appellants' accusations are especially disingenuous given their own reliance on the purportedly falsified medical records. In the proceedings below, Mrs. Messenger submitted a declaration claiming Dr. Whitemarsh falsified multiple entries in her medical records about the status of her relationship with her husband, and that he did so years before their affair even began. CP 462-66. Incredulously, Appellants now rely on those very same entries as evidence that Mrs. Messenger confided in Dr. Whitemarsh regarding her struggles in her relationship with her husband. *See* Corrected Brief of Appellants at pp. 25-26. As the trial court astutely observed, Mrs. Messenger's attempt to re-write her medical records is precisely the type of situation to which the dead man statute applies. 4/27/18 RP 45. Indeed, Appellants' unsubstantiated claims of professional misconduct underscore

the lack of any substantive arguments warranting reversal of the trial court's decision.

4. Appellants Are Foreclosed from Relying on the Testimony of Dr. Miller.
 - a. Dr. Miller's Testimony Contravenes Washington Law.

Dr. Miller's testimony failed to create a genuine issue of material fact sufficient to defeat the Estate's Motion for Summary Judgment. The question of whether any injury allegedly flowing from a sexual relationship between a non-mental health physician and a patient occurs "as a result of health care" is not one to be resolved by competing expert testimony. Rather, and as the trial court appropriately recognized, it is a question of law. 4/27/18 RP 45. Where, as here, an expert's opinions contravene Washington law, his declaration is insufficient to create a genuine issue of material fact. The decision in *Korper v. Weinstein* is instructive.

In *Korper*, a patient had a two-year sexual affair with a physician who treated her in connection with the investigation of a breast lump. 57 Mass.App.Ct. at 434. Despite well settled law that consensual sexual conduct between a medical practitioner and patient did not constitute medical malpractice absent a psychiatrist's mishandling of the "transference phenomenon" or sexual conduct purporting to be medical treatment, the patient filed a medical malpractice action against the physician's estate and

argued that a kind of transference phenomenon occurs in the ordinary patient-physician relationship. *Id.* at 435. The *Korper* court rejected this argument, noting that such a proposed exception would swallow the rule.

Id. The *Korper* court also stated as follows:

Nor is plaintiff aided by the affidavits supplied by her experts, which are based on an erroneous view of the law. These affidavits state that, in the expert view of the affiants, the defendant's actions were injurious to her because of the possibility for corroding the trust between physician and patient, and fell below the standard of care for physicians. An expert opinion is required and permitted in medical malpractice cases to inform the question whether the professional services rendered by the physician deviated from the standard of care owed by the physician to the patient, thereby causing damage to the patient. Such opinions are received only on the topic of professional services. On the facts of this case, the law does not regard consensual sexual conduct between the plaintiff and the defendant as a species of medical professional services. The opinion of medical experts to the contrary is foreclosed.

Id. at 435-36.

Like the opinions of the experts in *Korper*, Dr. Miller's opinions that Dr. Whitemarsh breached the applicable standard of care by initiating and participating in a sexual relationship with his patient, by threatening to kill Mr. and Mrs. Messenger, and by committing suicide as an act of purported retaliation, are each based on an erroneous view of the law. CP 454-61. In Washington, expert testimony is required and received to inform the questions of whether the "health care" rendered by the physician deviated

from the standard of care and proximately caused the patient's injury. RCW 7.70.010; RCW 7.70.030; RCW 7.70.040; *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). Washington law does not regard sexual conduct, death threats, or suicide as a species of health care, nor does it recognize any kind of transference phenomenon in the ordinary patient-physician relationship. *Branom*, 94 Wn. App. at 969-70; *Linville*, 75 Wn. App. at 440; *Hicks*, 49 Wn. App. at 627; *Blakeslee*, 54 Wn. App. at 11. Dr. Miller's opinions to the contrary are therefore foreclosed and the trial court appropriately gave no weight to his testimony. 4/27/18 RP 45-46.

b. Dr. Miller's Opinions Are Based on Inadmissible Testimony.

Dr. Miller also improperly relied on the inadmissible testimony of Mrs. Messenger for his opinions that Dr. Whitmarsh breached the standard of care applicable to medical providers rendering mental health treatment. The dead man statute bars Mrs. Messenger from testifying that Dr. Whitmarsh provided her with mental health treatment. RCW 5.60.030. Dr. Miller cannot do indirectly what Mrs. Messenger is precluded from doing directly. Affidavits containing conclusory statements or allegations without adequate factual support are insufficient to defeat a motion for summary judgment. *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993). Because there was no admissible testimony

establishing that Dr. Whitmarsh ever provided Mrs. Messenger with mental health treatment, Dr. Miller's opinions concerning such treatment were conclusory, and the trial court correctly found them insufficient to defeat the Estate's Motion for Summary Judgment.

c. Dr. Miller's Opinions Regarding Breach of Fiduciary Duty Are Irrelevant.

Dr. Miller also improperly opined that Dr. Whitmarsh breached his fiduciary duties to Appellants by engaging in a sexual relationship with Mrs. Messenger and allegedly threatening to kill the Messengers. CP 456-58. Appellants' Complaint does not contain a breach of fiduciary claim. CP 2-6. Their sole claim against the Estate is for medical malpractice. CP 2-6. The trial court denied Appellants' request for leave to amend their complaint to add a breach of fiduciary claim and Appellants did not appeal from or assign error to that ruling. 4/27/18 RP 47-48, CP 774-85; Appellants' Corrected Brief at pp. 3-4. Dr. Miller's opinions regarding Dr. Whitmarsh's alleged breach of his fiduciary duties are therefore irrelevant to the issues on appeal. Because Appellants are foreclosed from relying on the testimony of Dr. Miller, the trial court appropriately entered summary judgment in the Estate's favor.

B. The Trial Court Correctly Denied Appellants' Request to Continue the Estate's Motion for Summary Judgment.

The trial court's grant or denial of a motion for a CR 56(f) continuance will not be disturbed absent a showing of manifest abuse of discretion. *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989). Denial is proper when "(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." *Id.* A court may ground its denial on any one of the three bases identified above. *Gross v. Sunding*, 139 Wn. App. 54, 68, 161 P.3d 380 (2007). Denial is especially appropriate where, as here, Appellants failed to satisfy all the prerequisites justifying a CR 56(f) continuance.

1. Appellants Failed to Offer a Good Reason for the Delay.

As the purported basis for their requested continuance of the Estate's Motion for Summary Judgment, Appellants expressed a desire to depose a laundry list of witnesses, including Mrs. Whitmarsh, Jordan Whitmarsh (the Whitmarshes' daughter), Mrs. Whitmarsh's brother, Mrs. Whitmarsh's father, the Whitmarshes' neighbors, police officers and Sheriff's deputies who responded to the incident and were involved in Dr. Whitmarsh's death investigation, Dr. Whitmarsh's former friends and co-workers, Department of Health investigators, and "several" of Dr.

Whitemarsh's other patients. CP 216-17. However, Appellants failed to provide the trial court with a good reason for their delay in obtaining this desired evidence. CP 212-22. Indeed, at the time the Estate's Motion for Summary Judgment was filed, Appellants' lawsuit had been pending for an entire year yet none of these depositions had been accomplished. CP 2-6, 55-76. The trial court was therefore well within its discretion in denying their motion for continuance.

2. Appellants Failed to State What Evidence Would Be Established through Additional Discovery.

In multiple instances, Appellants failed to inform the trial court what evidence would be established through the desired depositions. CP 212-22. Appellants also claimed to be preparing a second set of interrogatories and requests for production to the Estate that were "pertinent" to the Estate's Motion for Summary Judgment but failed to state how they were pertinent or what evidence would be established therefrom. CP 220. To the extent Appellants failed to state what evidence would be established through the desired additional discovery, the trial court appropriately exercised its discretion in denying Appellants' motion.

3. The Desired Evidence Would Not Have Created a Genuine Issue of Material Fact.

Most importantly, Appellants failed to demonstrate how the desired evidence would make a difference. CP 212-22. The Estate's Motion for

Summary Judgment involved a question of law—namely, whether a sexual relationship between a non-mental health physician and his patient could provide the basis for a medical malpractice claim. Appellants did not contend, nor could they, that they needed to discover additional “facts” in order to respond to this purely legal question. CP 212-22.

Appellants also did not contend, nor could they, that the desired additional discovery would have created a genuine issue of material fact on the issue of whether Dr. Whitmarsh provided Mrs. Messenger with mental health treatment. Indeed, according to Mrs. Messenger, the alleged counseling and treatment for depression took place during appointments where no one else was present and through text messages which she immediately destroyed. CP 118-19, 130-32, 466. Because Appellants failed to establish that the desired evidence would create a genuine issue of material fact, the trial court was well within its discretion in denying their request for a continuance. Accordingly, the trial court’s ruling denying Appellants’ motion to continue the Estate’s Motion for Summary Judgment should be affirmed.

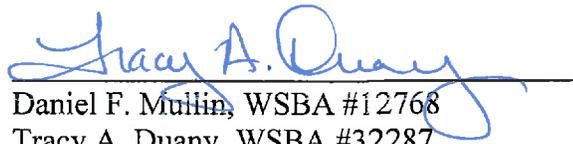
V. CONCLUSION

For the foregoing reasons, the trial court’s Order Granting Defendant Shannon L. Whitmarsh’s Motion for Summary Judgment, as well as the trial court’s Order Denying Plaintiffs’ Motion for Order Granting

Continuance of Defendant Shannon L. Whitemarsh's and MultiCare Health System's Motion for Summary Judgment, should be affirmed.

RESPECTFULLY SUBMITTED this 18th day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically served a true and correct copy of the foregoing in Court of Appeals Cause No. 51893-7-II upon the following parties:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of January, 2019.

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