

**FILED**

AUG 3 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 306101

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IN THE COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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DEBRA JEAN BLUM,  
Plaintiff / Appellant

v.

OUR LADY OF LOURDES HOSPITAL AT PASCO  
d/b/a LOURDES HEALTH NETWORK  
Defendant / Respondent

---

BRIEF OF APPELLANT

---

Debra Jean Blum  
Pro Se Appellant

Debra Jean Blum  
Pro Se Appellant  
4807 West 2<sup>nd</sup> Avenue  
Kennewick, WA 99336  
509-737-9695

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

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August 31 2012  
Dated

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Signature  
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## I. INTRODUCTION

Appellant Debra Jean Blum visited Our Lady of Lourdes Hospital, (“OLOL”), to have blood drawn on August 24, 2007, a few days in advance of her knee replacement surgery scheduled for August 31, 2007. Upon reporting to the hospital, a laboratory technician had Ms Blum transfer to a wheelchair. Ms Blum was instructed to wait until the lab tech was behind the wheelchair before attempting to transfer, because the locks on the wheels were broken. The lab tech expressed grief to Ms Blum, complaining that OLOL is the first facility she has ever worked, where there is no procedure to report malfunctioning equipment to maintenance personnel, or to lock up malfunctioning equipment so that it would not be used. Ms Blum sat in the wheelchair that day without incident.

A few days later, Ms Blum returned to the hospital on August 31, 2007, to be admitted for her knee replacement. The hospital’s admissions clerk directed Ms Blum to transfer to a wheelchair. Ms Blum was surprised to see that it was the same wheelchair she had used a few days earlier that had broken wheel locks. Ms Blum informed the admissions clerk that the wheelchair’s locks were broken, and she recanted the lab tech’s statements from a few days earlier. The admissions clerk reassured

Ms Blum that she had control of the wheelchair, and that it was safe for Ms Blum to transfer to it.

As Ms Blum bent down to sit in the wheelchair, it flew out from underneath her, and she fell hard to the floor. She landed directly on her behind, jolting her spine from her lower back all the way through her neck and head. She felt intense pain, and experienced bright bursts of light that she reported as “seeing stars.” She began immediately to have numbness and tingling sensations down both of her legs, and her vision had become instantly blurred in both eyes.

As the hospital’s staff proceeded to prepare her for the knee replacement surgery, Ms Blum reported the incident to several nurses and medical staff, and she explained her symptoms to them<sup>1</sup>. Ms Blum feared that she had been seriously injured from the fall, because her pain did not subside; the numbness and tingling shooting down her legs would not go away; and her vision remained blurry in both eyes. But the nurses were dismissive of her complaints, and intentionally attributed her symptoms to other factors. The nurses told Ms Blum that her vision was blurry because

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<sup>1</sup> Ms Blum reported the incident and her symptoms to the ICU nurse, where she was first taken by the admissions clerk. She next reported the incident and her symptoms to three “second-floor” nurses who began Ms Blum’s pre-surgical preparations. She then reported the incident and her symptoms to a nurse who was not assigned to her case, but was a personal acquaintance who visited her after recognizing her name on medical charts. While waiting outside the surgical room, Ms Blum reported the incident and her symptoms to two additional medical personnel.

of the medications that she took in preparation for her knee replacement surgery. But Ms Blum had not taken any medications prior to the surgery, and had not yet been administered any medications in the hospital. After her intravenous port, (“IV”), was installed, the nurses told her that the numbness and tingling she felt shooting down her legs was merely a harmless side-effect of the IV solution. But her numbness and tingling sensation had begun immediately after the fall, and she had reported her symptoms to the nurses long before they installed her IV.

Ms Blum grew increasingly anxious because she feared that she had been seriously injured, and the nurses were not taking the incident seriously. She demanded to speak to her surgeon before going to surgery, so that she could report the incident to him to determine whether it was appropriate to proceed with the knee replacement that day. The staff assured her that she would be able to speak with her surgeon before the operation. Soon thereafter, however, they began to administer the pre-surgery medications to sedate her. She was not permitted to speak with her surgeon before having the knee replacement operation.

Ms Blum was still recovering from her operation on September 3, 2007, when she was finally able to report the incident to her surgeon. She

was still experiencing the symptoms from her fall. The surgeon ordered a CT scan of her spine that day. With subsequent MRI and electrical nerve conduction studies, it was confirmed that Ms Blum suffered spinal injuries from the fall. The injuries are irreversible.

When having a knee replaced, the average hospital stay is usually 2 to 3 days. Ms Blum's hospital stay was for 6 days.

Following knee surgery one is admitted to the surgical ward. Ms Blum was admitted to the Intensive Care Unit (ICU).

OLOL did not examine Ms Blum's eye until weeks later, and found that her retina had become detached. When she met with an ophthalmologist, the doctor informed Ms Blum that falls or head trauma do cause retinal detachment, and that oftentimes, small injuries can be successfully repaired with a LASER procedure on the same day or within a brief time after the incident. It was too late for Ms Blum's retina to be repaired with LASER surgery. She eventually became blind in one of her eyes from the retinal detachment. (CP 87-141)

Almost five years after the incident at the hospital, Ms Blum continues to experience irreversible and excruciatingly painful neuropathy in both legs. She is unable to lift her legs or use her feet while seated, and

she can only drive using hand controls. She has been an avid seamstress since the age of nine, but is unable to sew following the fall. She was not able to return to work following the fall, and has been unemployed since. She has been unable to resume her former hobbies, including hiking, camping, bicycling, and square dancing. She is blind in her left eye. She uses an aid to get into bed and also lift her legs to get in and out of a vehicle. She has had weight gain do to inactivity, needs assistance while bathing and getting dressed.

Ms Blum had attempted to address the issues directly with OLOL, but she felt that they were not being responsive; she made repeated attempts to obtain her medical records, but OLOL still has not yet released a complete set of medical records to her<sup>2</sup>. (CP 148-179 and 235) She eventually retained an attorney. Timely summons and complaint, (CP 245-248) were filed and served on Defendant / Respondent OLOL. OLOL moved for Summary Judgment, (CP 205-207) and was awarded Summary Judgment (CP 11-15).

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2 1. Jodie Stewart -- medical records -- requested copy of medical records September 2007

2. Janet Wright -- November 20, 2007 meeting of health concerns

3. Janet Wright and Kathy Beldon -- November 27, 2007 meeting

4. Janet Wright, Kathy Beldon, Anita Kongslic, December 6, 2007 meeting rescheduled (Anita Kongslic a no-show)

5. Janet Wright, Kathy Beldon, Anita Kongslic, December 17, 2007 meeting.

Ms Blum requested that her attorney ask for a continuance at which he replied, “We cannot get a continuance for a Summary Judgment Hearing.” For the next 36 hours, Ms Blum worked diligently to try to obtain the information requested by her attorney from her doctors, that he should have been doing all along. When the information was made available he had excuses as to why he could not go and pick-up the requested documents as requested by the doctor, thus the information provided to the courts was not complete.

Ms Blum asserts that Summary Judgment was improperly awarded to Defendant / Respondent OLOL because she produced sufficient evidence to avoid a Summary Judgment; because the trial court abused its discretion in failing to continue the Summary Judgment hearing or in the alternative to order discovery requests; because an award of Summary Judgment denies Ms Blum access to the court; and/or because an award of Summary Judgment is manifestly unjust.

## **II. ASSIGNMENTS OF ERROR**

A. The trial court erred in granting Summary Judgment against Plaintiff / Appellant Ms Blum when it concluded that Dr. Palmer’s affidavit was insufficient. (CP 66 - 69)

B. The trial court abused its discretion for failing either to grant a continuance to the Summary Judgment hearing, or to order discovery under CR 56(f) in the alternative to Summary Judgment.

C. The trial court erred in granting Summary Judgment because Summary Judgment is contrary to law.

D. The trial court erred in granting Summary Judgment because Summary Judgment in the circumstance is manifestly unjust and contrary to Public Policy. And according to her Constitution Rights for a jury trial should be guaranteed a trial according to the 7<sup>th</sup> Amendment.

E. The court erred in granting defendant's Motion for Summary Judgment as Dr. Handelman, is not an expert on Traumatic Eye Injury, only diseases of the eye of diabetic patients and has not performed detached retina operations as per his credentials in (CP 180-193).

F. The trial court erred in granting Summary Judgment because it allowed hear-say file notes from Dr. Carlson that the Defendant's presented (CP 175-179), but would not allow the same type of file notes and medical chart notes from Ms Blum's physicians, Dr. Sung, Dr. Palmer, and Dr. Cancado.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was Dr. Palmer's affidavit insufficient, when he declared that he had professionally examined Ms Blum and that his professional opinion is that her court case has merit?
2. Were the affidavits from Ophthalmologists, describing retinal detachment from falls, improperly excluded from evidence for the purpose of Summary Judgment?
3. Was it proper to exclude an expert witness medical records / office notes for the purpose of Summary Judgment on the basis that the medical records / office notes from Dr. Sung, Dr. Palmer, and Dr. Cancado were rejected as hear-say when these were the same medical records that OLOL Council received and provided to the Plaintiff / Appellant when requesting medical records and were received in an official manner? Yet, the same type of hear-say medical records from Dr. Carlson was accepted.
4. Was it proper for the courts to exclude board certified Ophthalmology expert witnesses (Dr. Palmer and Dr. Sung) who are knowledgeable and experienced in 1) detached retinas, 2) causes of detached retinas, 3) and preform detach retina operations are competent to express expert opinions regarding detached retinas and the cause there of,

when Dr. Handelman is an expert in research only for diseases of the eye caused by diabetes and does not perform detached retina operations?

5. Did the trial court apply the wrong legal standard, or fail to consider *Hill v. Sacred Heart Medical Center*, 143 Wn. App. 438, 173 P.3d 1152 (2008); *Eng v. Klein*, 127 Wn. App 171, 110 P.2d 844 (2005); and *Seybold v. Neu*, 105 Wn. App. 666, 49 P.3d 1068 (2001); and *White v. Kent Medical Center Inc. P.S.*, 61 Wn. App.163, 810 P2d 4 (1991), when the court held that the expert witnesses' lack of knowledge of general surgeon's training precluded consideration of their expert testimony?

Ms Blum's, Plaintiff / Appellant, main concern is that the Summary Judgment simply did not allow her proper access to the courts and it prevented her from developing her case because her attorney, failed to notify her in a timely manner regarding the court date for the Summary Judgment hearing, her attorney did not return telephone messages, the receptionist never informed Ms Blum that he was out of the office, or that a court date was pending, the voice mail did not state the attorney was out of the office, and then, within a two business days before the hearing the attorney contacted Ms Blum.

Ms Blum was not addressed during the Summary Judgment hearing and did not speak, but she had expressed a desire with her attorney to address the courts if possible.

Ms Blum requests a remand to the court with the admittance of Dr. Palmer's declaration (CP 75-76) and that in medical malpractice cases for defendant's Summary Judgment motion may not be brought until the first discovery cut-off date is reached.

Further, Debra Jean Blum, was acting with due diligence, and was acting in reliance upon the case law which had struck down the "certificate of merit" requirement of *RCW 7.70.150*. This case, cited below, had made clear that Ms Blum would have time to develop her discovery and her case. Through her attorney, she tried to argue the court that she should have more time to engage in discovery and to procure experts in a rapidly evolving case, and she argued that to force her to have fully-developed expert opinion so early in the case was essentially a re-imposition of the *RCW 7.70.150* "certificate of merit" requirement.

Ms Blum's main concern is that the Summary Judgment did not allow her proper access to the courts because it prevented Ms Blum from developing her case.

Ms Blum requests a remand to the court with more time to pursue her case, and requests that the court suggest a “bright-line” rule that in medical malpractice cases the defendant’s Summary Judgment motion may not be brought until the first discovery cut-off date is reached, and after that time in the discretion of the court under existing case law.

#### **IV. STATEMENT OF THE CASE**

##### **A. FACTS:**

Debra Jean Blum, then 54 years of age was referred to Dr. James Hazel for left knee pain. Ms Blum’s initial visit to Dr. Hazel was on August 14, 2007. Dr. James Hazel’s exam showed that there was bone on bone on the left knee, and suggested total knee replacement. Ms Blum was admitted to Our Lady of Lourdes (OLOL) hospital for a total left knee replacement on August 31, 2007. (CP 245-248)

This wheelchair had first been noticed in front of Ms Blum by the individual that drew her blood in August 24, 2007 prior to admittance for surgery. The name of the lab technician was requested in the Interrogatories, however, OLOL provided the name of a technician on a total different date and time.

Ms Blum was greeted by an employee of the hospital who retrieved a wheelchair for her so that she could be transported to the surgical unit at the time of admittance. Prior to sitting down in the wheelchair, Ms Blum thoroughly inspected the wheelchair and recognized it as one that she had previously used that had faulty brakes. Ms Blum then brought this to the attention of the woman who had retrieved the wheelchair and asked her to be sure to hold it into place as it does not lock properly. Ms Blum then proceeded to sit down, however, the chair was not held tight by the attendant causing the chair to go out from underneath Ms Blum and caused her to fall directly onto her buttocks on the concrete floor. The impact was so great that Ms Blum states “I fell so hard I saw stars”. Immediately Ms Blum began having pain in her lower back, numbness and tingling sensations in both legs and blurry vision in both eyes. (CP 87-141 and 245-248)

Subsequent to the fall, Ms Blum asked for assistance in standing. The woman who had greeted her and obtained the wheelchair for her, refused to offer assistance, stating that she was not a nurse and could not help her in getting up. After struggling, Ms Blum was able to eventually get into the wheelchair on her own so that she could be transported to

surgery. The hospital employee took her to the ICU ward, and left her there for her to wait for a nurse. This nurse, then found out where she was suppose to be and escorted her to the proper pre-surgical unit on the second floor of the hospital. (CP 87-141)

Numerous times Ms Blum shared her experience with the nurses, that she was experiencing numbness, tingling in both legs, and pain in her lower back, along with blurry vision in both eyes. Ms Blum, was promised that she would be able to speak with her doctor before surgery, but was not allowed, as she was sedated before being able to speak with him prior to surgery. (CP 87-141)

Ms Blum shared her experience with Jodi Stewart, as a reason was requested from Ms Stewart as to why Ms Blum wanted her medical records when she went to OLOL to pick-up her medical records requested on September 18, 2007. Ms Stewart requested that Ms Blum share her experience with Ms Janet Wright an administrator with OLOL, which she did. (CP 148-179)

This same wheelchair was still in use at the hospital during two of the meetings mentioned earlier with Janet Wright, Kathy Beldon, and Anita Konglsie, three administrators of the hospital. (CP 148-179)

Later an MRI and nerve conduction study was done, an irreversible spinal cord injury was diagnosed. (CP 128-129)

The blurred vision continued until the detached retina was diagnosed and her vision became impaired. On October 22, 2007, Ms Blum returned to OLOL emergency room. Instead of the ER doctor referring Ms Blum to a retina specialist, valuable time was lost when they referred her to Dr. Karen Heaston an optometrist. After a lengthy exam by Dr. Karen Heaston, she finally referred her to Dr. Charles Sung a retina specialist in Kennewick, WA.

Dr. Sung stated that had the ER doctor referred her immediately to him, he could have preformed surgery that same day. Instead, he had schedule surgery when his surgical staff would be back in the office two days later. Dr. Sung at the Retina Laser Eye Center also states, **“That based upon a reasonable degree of medical certainty, the fall which Ms Blum sustained in August of 2007 at Lourdes Medical Center is more likely than not to have caused the detached retina.”** (CP 87-141).

As per the Mayo Clinic, Retinal detachment is painless; sudden flashes of light in one or both eyes; sudden blur in vision; are signs and symptoms, all were mentioned by Ms Blum, but were ignored by OLOL

nursing and medical staff. According to the Mayo Clinic retinal detachment may be caused by trauma. The Mayo Clinic states that retinal detachment is a medical emergency, and time is critical. Unless the detached retina is promptly surgically reattached, this condition can cause permanent loss of vision in the affected eye. (CP 134-141)

If a tear or hole in the retina is treated before detachment develops or if a retinal detachment is treated before the central part of the retina (macula) detaches, one will probably retain much of their vision. The patient cannot always tell that a tear has appeared in the retina. The patient does not usually know they have retina problems until the retina becomes detached. (CP 134-141)

If the tear is not medically detected and the retina is left to detach, the retina can take a while before it becomes detached enough, to the point where vision is impaired before the patient is aware that medical treatment is necessary. (CP 134-141)

Ms Blum's detached retina of the right eye, was not diagnosed for some time as the location of the tear in the retina was in a different position than that of the left eye. For Ms Blum to detect it earlier, herself, she would have had to look cross-eyed at all times to see the damage

occurring. It was not until the retina had folded more than half way, that it was detected by Ms Blum in the right eye. (CP 87-141 and 148-179)

OLOL admits that the fall took place and states so in the document titled **Defendant OLOL @ Pasco D.B.A. Lourdes Health Network's Memorandum of Points and Authorities in Support of Motion for Summary Judgment.** (CP 195) Up until then, OLOL, was claiming that the fall did not happen. OLOL denied that several executive meetings were held with plaintiff at OLOL until after the deposition of both Debra Jean Blum and her significant other and care giver John R. Tadlock. Discovery was delayed and complicated by OLOL's failure to tell the truth and not complete the Interrogatories until after the said depositions of both Ms Blum and Mr. Tadlock.

However, despite her forwarding facts to new experts and continue to see physicians for both her spinal and eye injuries, and despite her theories evolving with the evidence, as would be expected during discovery and pre-trial activity, the court cut off Ms Blum's access to the courts by prematurely granting Summary Judgment, and by denying Ms Blum's CR 56 motion.

## **B. PROCEDURAL HISTORY**

1. Summons and Complaint were timely filed on July 27, 2010, and Defendant / Respondent OLOL was timely served on July 28, 2010. (CP 245-248)
2. Ms Blum's attorney(ies) propounded Interrogatories and Requests for Production upon Defendant / Respondent OLOL.
3. Defendant / Respondent OLOL returned non-responsive interrogatories and requests for production. Defendant / Respondent still has not produced Ms Blum's complete set of medical records. Ms Blum granted many extensions to responses to her Interrogatories and Requests for Production, yet they were still late and non-responsive.
4. Defendant / Respondent OLOL Moved for Summary Judgment, (CP 205-207) and was granted Summary Judgment. (CP 11-15)

## **C. EXPERT TESTIMONY SUBMITTED IN MOTION FOR SUMMARY JUDGMENT**

Plaintiff / Appellant submitted written testimony from Dr. Marvin Palmer, Ophthalmologist expert witness and one of three (3) treating Ophthalmologist of the Plaintiff / Appellant. The written testimony from Dr. Marvin Palmer established his knowledge of the detached retina and

the cause there of, citing the fall as the cause of the detached retinas. (CP 128-129)

Medical records of Dr. Sung were submitted as the treating Ophthalmologist, and written testimony provided, also stating that the fall caused the detached retina. (CP 96-127)

Medical records of Dr. Paulo Cancado, a treating neurologist, were also submitted as written testimony, as the cause of the neuropathy was a result of the fall on August 31, 2007. (CP 128-129)

All of these testimonies would have been allowed at trial if it had gone thus far, but for some reason, the defendants / respondents managed to have Plaintiff's expert testimony and statements removed from the record. However, the Defendant's state that they do admit that the fall did take place. (CP 195)

## V. ARGUMENT

An order granting Summary Judgment is reviewed *de novo*. **Hill v. Sacred Heart Medical Center**, 143 Wn. App. 438, 445, 177 P.3d 1152 (2008); **Seybold v. Neu**, 105 Wn. App. 666, 675, 19 P.3d 1068 (2001).

The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary

judgment motion. This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party. *Folsom v. Burger King*, 135 Wash. 2d 658,663, 958 P.2d 301 (1998); *Lamon v. McDonnell Douglas Corp.*, 91 Wash. 2d 345, 349, 580 P.2d 1346 (1979). The *de novo* standard of review is also consistent with the requirement that the appellate court conduct the same inquiry as the trial court. *Mountain Park Homeowners Association v. Tydings*, 125 Wash 2d 337, 341, 883 P.2d 1383 (1994); *Folsom* at 663.

An expert's qualifications and opinions are part and parcel of a Summary Judgment. *Hill* at 445; *Seybold* at 678. The appellate court does not defer to the trial judge's rulings on evidence in passing on the propriety of a summary dismissal. The appellate court decides whether evidence is sufficient or should have been considered and to what extent. *Folsom* at 663; *Hill* at 446.

An order of Summary Judgment is proper only where there are no genuine issues of material fact for trial and the moving party is entitled to judgment as a matter of law. *Gustav v. Seattle Urological Associates*, 90 Wn. App. 785, 789, 954 P.2d 319 (1998), *rev. denied*, 136 Wn.2d 1023, 969 P.2d 1064 (1998); CR 56(c). The moving party bears the initial

burden of showing the absence of genuine issues of material fact. **Young v. Key Pharmaceuticals**, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). A material fact is one on which the outcome of the litigation depends, in whole or in part. **Ford v. Hagel**, 83 Wn. App. 318 (1996).

The non-moving party must set forth specific facts showing there is a genuine issue for trial. **Young**, 112 Wn.2d at 226. The court must consider those facts in the light most favorable to the nonmoving party and the motion should be granted, only if from all the evidence reasonable persons could reach but one conclusion. **Young v. Key Pharmaceuticals**, 112 Wn. 2d at 226; **Shellenbarger v. Brigman**, 101 Wn. App. 339, 345, 3 P.3d 211 (2000); **White v. Kent Medical Center, Inc., P.S.**, 61 Wn. App. 163,810 P.2d 4 (1991).

In determining whether the moving party has met its burden of excluding any real doubt as to the existence of any genuine issue of material fact for trial, the non-moving party should be treated with indulgence. **Adamski v. Tacoma General Hospital**, 20 Wn. App. 98 (1978).

Summary Judgment will be denied if the record shows any reasonable hypothesis that the non-moving party may be entitled to the

relief sought. *White v. Kent Medical Center, Inc.*, P.S., 61 Wn. App. at 175; *Mostrom v. Pettibohn*, 25 Wn. App. 158, 162, 607 P.2d 864 (1991).

Issues of negligence in an action for medical malpractice are generally questions for the trier of fact and should be decided as a matter of law only in rare cases. *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 261, 828 P.2d 597 (1992), *rev. denied*, 119 Wn. 2d 1020, 838 P.2d 692 (1992).

The foregoing principles guide the Court's review in this case. The evidentiary law in Washington regarding the admissibility of testimony from competent expert witnesses to withstand Summary Judgment is well established. A physician with a medical degree is qualified to express an opinion on any sort of medical questions, including questions in areas in which the physician is not a specialist, so long as the physician has sufficient expertise to demonstrate familiarity with the procedure of medical problem at issue in the medical negligence action *Hill* at 447.

Washington case law establishes that the competency of expert witness testimony is based upon the witnesses' familiarity with the procedure or the medical condition at issue.

In *White v. Kent Medical Center, Supra*, the plaintiff brought an action against defendant physicians for failing to order a vocal cord

examination. An ENT specialist subsequently examined Mrs. White's larynx and discovered a mass on her left vocal cord, which was malignant. Following the granting of Summary Judgment of dismissal, an issue on appeal was the sufficiency of the plaintiff's opposing expert testimony. The defendant argued that Mrs. White's evidence of the applicable standard of care was inadequate because ENT specialists cannot testify as to the standard of care governing a general practitioner. *Id.* at 171.

The appellate court held that while a general practitioner cannot normally be held to the standard of care of a specialist, this does not automatically render the specialist's testimony about the general practitioner's standard of care inadmissible. *Id.* at 173.

The court held:

So long as a physician with a medical degree has sufficient expertise to demonstrate a familiarity with the procedure or medical problem at issue, 'ordinarily he or she will be qualified to express an opinion on any sort of medical question, including questions in areas which the physician is not a specialist. *K. Tegland, Wash Prac. Evidence*, 290[2], at 386 (3d ed. 1989). (Emphasis added)

In the light most favorable to the non-moving party, including indulging all questions of fact in her favor, and all reasonable inferences there from, the affidavit of Dr. Palmer is sufficient. It establishes that he

is a medical doctor, practices medicine, has evaluated Ms Blum, has familiarity with the lawsuit, and believes that her case has merit. The medical records from Ms Blum's doctors, Dr. Charles Sung and Dr. Palmer, should have been allowed. As well as medical records and letter from Dr. Cancado, Ms Blum's neurologist, that performed the nerve conductive study on her spine and legs, and wrote a letter stating that the fall caused my problems.

The chart notes and records of her ophthalmologist Dr. Charles Sung, was objected to and thrown out in the Summary Judgment Hearing as inadmissible. (CP 87-141)

Dr. Palmer's declaration was declined because, the court stated, that Dr. Palmer's declaration "is a conclusory declaration". The court further stated, "The conclusion would be admissible if there were some basis given to make the conclusion." Had this comment been made verbally in a trial, and Dr. Palmer cross examined about his testimony, his statement would have been admissible. Therefore, Dr. Palmer's declaration should have been allowed by the courts. (CR56) (CP 128-129)

Ms Blum's medical records had been produced to the defendants attorney, not only through Ms Blum's interrogatories, but also through the

medical releases that defendant's attorney required Ms Blum to sign. Unlike the lack of medical records provided to Ms Blum, Plaintiff / Appellant, from OLOL, which have never been provided in full to her. (CP 87-141, 148-179 and 235)

The summary conclusion of OLOL's expert Dr. Irvin L. Handelman, should not have been admissible. This doctor has never seen Ms Blum personally, had only reviewed some of Ms Blum's medical records in regards to her vision problems. Upon reviewing the credentials of Dr. Handelman, it has been discovered that Dr. Handelman does not do detached retina surgeries and has not performed a detached retina surgery. Dr. Handelman is a medical expert of optometry for patients with diabetic eye diseases. (CP 180-193)

Requirements under statute governing admissibility of expert witness testimony in medical malpractice actions that witness must have spent at least 50% of his practice time during previous two-year period in actual clinical practice in same profession as defendant physician seeks to prohibit testimony of professional witnesses, and was never intended to require that a physician may only give standard of care opinions when both he and defendant physician practice the same medical speciality. K.S.A. 60-3412.

Ms Blum's eye problems were caused by a fall that caused head trauma and not from diabetes or disease of the eye caused by diabetes. (CP

94-127) Ms Blum's spinal problems were caused by a fall that caused neuropathy in both legs. (CP 128-129)

Dr. Carlson's medical notes and comments should also be rejected. As they are admitted as "hear-say" evidence. This doctor saw Ms Blum on a one time only appointment. When the doctor came into the room, he stated that he was there strictly for a second opinion, that he would not see Ms Blum a second time, nor would he be her doctor of record. This doctor never touched Ms Blum or checked her reflexes. He had Ms Blum stand and with the use of her walker had her walk a few steps. He had Ms Blum try to do some hand eye movements. He talked with her and he DID NOT review her medical records that she had brought to him, but handed them back to her. At the most, Ms Blum was in the exam room with Dr. Carlson for no more than 15 minutes. Dr. Carlson told Ms Blum to continue on with her doctors that she was seeing in the Tri-Cities, and at no time did he tell Ms Blum that she was "malingering" as the defendants records state. The defendant's records also state that Dr. Carlson stated Plaintiff / Appellant has anger issues with OLOL over the fall that took place. Ms Blum has never expressed an out-break of anger over the fall at OLOL with anyone. (CP 175-179)

Ms Blum's own neurologist, Dr. Cancado, has written a letter stating that her injuries were caused by her fall. This was submitted to the Defendants / Respondents in the Interrogatories, and presented as evidence in the Summary Judgment hearing, but was not addressed. (CP 128-129)

Ms Blum was referred to Dr. Carlson for a second referral as a request from OLOL through her doctor, Dr. James Hazel, an agent of OLOL and potential defendant. Ms Blum wrongly assumed that Dr. Hazel was acting in her best medical interest to refer her to Dr. Carlson. This became known several months after the visit to Dr. Carlson, and had it been known, that OLOL wanted Ms Blum to see Dr. Carlson, the appointment would not have been made. Dr. Carlson has several court cases against him for medical malpractice issues. (94-2-03596-1; 96-2-05463-6; 97-2-02927-3; 98-2-07972-4; 06-2-04300-1; 07-201549-8; and 08-2-04374-1). Had any of these facts been made known to Ms Blum, she would not have made an appointment to see Dr. Carlson.

Defendants records also state that Dr. Carlson is my doctor of record. Dr. Carlson is not Ms Blum's doctor of record and she only went to him one time as a second opinion, to see if there was another treatment

that she could seek for the neuropathy and the spinal cord injury, which he states, there is no further treatment. (CP 175-179) Had Ms Blum been aware of Dr. Carlson's legal / medical issues at the time of her appointment, she would not have made the appointment.

Ms Blum's medical records from her own physicians should have been submitted and presented as evidence and should have been allowed, but the courts rejected those records as objected by defendants counsel. (CP 66-69 and 87-141)

Debra Jean Blum's, Plaintiff / Appellant, Constitution Rights for a jury trial should be guaranteed with the 7<sup>th</sup> Amendment.

Further the court erred in allowing the expert testimony from Drs. Carlson and Handelman in *Eng v. Klein* and *Hill v. Sacred Heart Medical Center*, the courts again refused to consider a physician's specific medical specialty training as the dispositive factor in considering his or her expert witness testimony. The courts applied a consistent analysis of reviewing the substance of the witnesses' knowledge of the medical condition or procedure at issue.

The Defendants' preoccupation with the fact that Plaintiffs / Appellants expert witness affidavit is of a conclusion rather than fact, is

irrelevant and cannot be considered dispositive on the admissibility of the experts' opinions (Dr. Palmer's affidavit). See *White* at 174, *Seybold* at 680; *Hill* at 451. At best, such facts go to the weight given to the expert's trial testimony, not admissibility.

Defendants ask this Court to adhere to medical class distinctions no longer relevant in present day medicine. In the series of cases of *White v. Kent Medical Center, Inc., P.S.*, *Seybold v. Neu*, *Eng v. Klein* and *Hill v. Sacred Heart Medical Center*, the court has consistently held that the standard for admissibility of expert testimony is the witness's knowledge of and familiarity with both the medical condition and the medical treatment at issue.

In keeping with *Hill v. Sacred Heart Medical Center*, Dr. Palmer's affidavit produces "demonstrable familiarity" with both the procedure and medical condition at issue such that the trial court clearly erred in not applying *White v. Kent Medical Center, Inc., P.S.*, *Seybold v. Neu*, *Eng v. Klein* and *Hill v. Sacred Heart Medical Center*. See *Hill v. Sacred Heart Medical Center* at 447.

The court should have allowed Dr. Palmer's affidavit as per: *Hill v. Sacred Heart Medical Center*. More recently, in this Court's *Hill v.*

*Sacred Heart Medical Center*, *supra*, this Court reversed a Summary Judgment of dismissal involving virtually identical legal issues. In *Hill v. Sacred Heart Medical Center*, the patient underwent bilateral knee surgery and developed post-operative heparin induced thrombocytopenia (HIn, which resulted in deep vein thrombosis, pulmonary embolism and stroke, which left Mr. Hill hemiplegic and unable to speak. *Id.* at 442-443.

In response to the defendants' multiple motions for Summary Judgment, the Hills submitted declarations from hematologist Kennet Bauer, M.D. and internist Katherine Willard, M.D. Dr. Bauer's affidavit concluded that the defendant physicians had violated the standard of care. *Id.* at 444.

Internist Willard testified that the standard of care was violated and caused Mr. Hill's injuries. *Id.*

The trial court concluded that (1) Dr. Willard's affidavit was insufficient to adequately describe the 2004 standard of care for an internal medicine resident since her information was based upon experience 20 years earlier; (2) Dr. Bauer did not have sufficient expertise in the area of residents or resident supervision; and (3) Dr. Willard failed

to show competency in the specialty of gastroenterology and, therefore, could not express opinions on the care Dr. Gottlieb rendered. *Id* at 445.

The trial judge then dismissed the Hills' action against Sacred Heart and Drs. Andrus, Benson, Swanson, Harder, and Gottlieb. *Id*

On appeal, this Court reiterated the admissibility standard for medical expert testimony:

The scope of the expert's knowledge, not his or her professional title, should govern 'the threshold question of the admissibility of expert medical testimony in a malpractice case. *Pan Kwock Eng v. Klein*, 127 Wn. App. 171, 172, 110 P.3d 844 (2005)

A physician with a medical degree is qualified to express an opinion on any sort of medical question, including questions in areas in which the physician is not a specialist, so long as the physician has sufficient expertise to demonstrate familiarity with the procedure or medical problem at issue in the medical malpractice action. *Morton v. McFall*, 128 Wn. App. 245, 253, 115 P.3d 1023 (2005). (Emphasis added)

The Washington State Supreme Court has been actively protecting the right of injured persons to have access to the courts, in order to receive compensation for their injuries and for the wrongs done to them. See, e.g. *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010), *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 216 P.3d 374

(2009), *Unruh v. Cacchiotti*, 172 Wn.2d 98, 257 P.3d 631 (2011), and see *Renner v. City of Marysville*, 168 Wn2d 540, 230 P.3d 569 (2010). Continuing the State Supreme Court’s trend of access to the courts in the tort claims context.

As in the *Putman* case, the court noted, “extensive discovery” is necessary for the plaintiff to develop their case. As with Ms Blum’s case, she has not received complete answers to the first or second set of interrogatories from the respondent when they filed with the motion CR 56(c) and both sets of interrogatories still have not been completed and returned by the respondent. It is common legal knowledge that “extensive discovery” is necessary to effectively pursue ones claim / case.

In *Nye v. University of Washington* P3d, (2001) WL 4348074  
Wn.App. Div. 1, 2001 (September 19, 2011)

“We review summary judgment orders de novo. FN6 Summary judgement is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. FN7 When reviewing a summary judgment order, we engage in the same inquiry as the trial court, considering the facts and all reasonable inferences from the facts in the light most favorable to the non-moving party.”

***Putman v. Wenatchee Valley Medical Center, P.S., 166 Wn.2d at 979.***

“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.” ***Marbury v. Madison***, 5 U.S. (1Cranch) 137, 163, 2 l.Ed. 60 (1802). The people have a right of access to courts; indeed, it is “the bedrock foundation upon which rest all the people’s rights and obligations.” ***John Doe v. Puget Sound Blood Center***, 117 Wash.2d 772, 780, 819 P.2d 370 (1991). This right of access to courts “includes the right of discovery authorized by the civil rules.” *Id.* As we have said before, “[i]t is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiffs’ claim or a defendant’s defense.” *Id.* At 782, 819 P.2d 370.

377 Requiring medical malpractice plaintiffs to submit a certificate prior to discovery hinders their right of access to courts. Through the discovery process, plaintiffs uncover the evidence necessary to pursue their claims. *Id.* Obtaining the evidence necessary to obtain a “certificate of merit” may not be possible prior to discovery, when health care workers can be interviewed and procedural manuals reviewed. Requiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiffs’ right of access to courts. It is the duty of the courts to administer justice by protecting the legal rights and enforcing the legal obligations of the people. *Id.* At 780, 819, P.2d 270 Accordingly, we must strike down this law.

## VI. SUMMARY OF ARGUMENT

Defendants / Respondents erroneously asked the courts to disallow

Dr. Palmer’s opinion, when in fact had he been a witness for the Plaintiff /

Appellant in court, his opinion would have been allowed, because he is a treating physician and is a professional ophthalmologist, and able to be cross examined.

If the court did not like the affidavit of Dr. Palmer, the court could have requested a continuance and asked for a deposition of Dr. Palmer. (CR 56(f)).

The appropriate legal test is that set forth in *Hill v. Sacred Heart Medical Center*, which is the scope of the expert's knowledge and his/her familiarity with the medical problem or procedure at issue. *Hill* at 447.

The courts dismissal should be reversed and the action remanded to the trial court.

Respectively submitted,



Signature  
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Pro Se Appellant  
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Dated

CERTIFICATE OF SERVICE

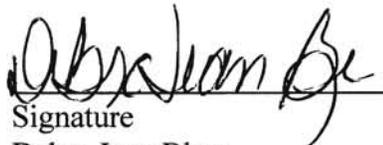
I, Debra Jean Blum, hereby certify that on August 3, 2012, I caused to be served a true copy of the Appellant Brief by the method(s) indicated below, and addressed to the following:

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Dated