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APR 29 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 33593-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CYNTHIA VENEZIANO,

Appellant (Plaintiff),

v.

PATRICIA J. CHVATAL,

Respondent (Defendant).

**RESPONDENT PATRICIA J. CHVATAL'S RESPONSE
TO BRIEF OF APPELLANT**

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STATUTES AND COURT RULES

CR 56(f)6

I. IDENTITY OF THE RESPONDING PARTY

Respondent is Attorney Patricia Chvatal, prevailing Defendant in her Motion for Summary Judgment of Dismissal at the trial court level.

II. AFFIRM THE TRIAL COURT'S RULINGS

Respondent Ms. Chvatal respectfully requests the Court of Appeals affirm the rulings made by the Honorable Douglas L. Federspiel that Plaintiff-Appellant claims were made in error.

1. AFFIRM THE TRIAL COURT'S DENIAL OF PLAINTIFF'S MOTION TO CONTINUE

A. COUNTER STATEMENT OF RELEVANT FACTS ON THE TRIAL COURT'S DENIAL OF PLAINTIFF-APPELLANT'S MOTION FOR CONTINUANCE

Timothy Veneziano and Cynthia Veneziano were married on October 17, 1976. They separated on September 1, 1997. A Petition for Dissolution of Marriage was filed by Timothy Veneziano on January 24, 2000. The Decree of Legal Separation was filed on January 18, 2001. This was later converted to a Decree of Dissolution on August 23, 2005.

With regard to the pension, the provision in the Decree of Legal Separation entered on January 18, 2001 stated that Cynthia Veneziano was awarded "[o]ne-half (1/2) of husband's accrued Operating and

Engineering Pension accrued from the date of the parties marriage (10/17/76) through January 1, 2000”, which was similarly confirmed in the filed Qualified Domestic Relations Order – Fluor Daniel Hanford entered on the same date, January 18, 2001. The Qualified Domestic Relations Order was reviewed and accepted by Fluor Hanford, Inc., as confirmed in a letter dated January 31, 2001, which stated that the gross monthly annuity would be payable to Cynthia Veneziano upon reaching age 65, with the disclosed notification that the amount would be actuarially reduced if an election to receive monthly annuity payments prior to age 65 was chosen. Cynthia Veneziano, on November 30, 2007, voluntarily elected to receive a single lump sum distribution that represented the present value of what otherwise would have been paid to her as a monthly benefit for the duration of her life.

On June 19, 2014, Plaintiff Veneziano filed a Complaint for Legal Malpractice and Breach of Contract against her former attorney Patricia Chvatal. Discovery commenced.

In accordance with the Amended Civil Case Scheduling Order, Plaintiff was to disclose lay and expert witnesses on April 15, 2015, and by agreement of counsel, an additional week was permitted for disclosure. Plaintiff’s Disclosure of Witnesses was not filed with the court, but was provided to the defense on or about April 21, 2015. Defendant Patricia J.

Chvatal's Response to Plaintiff's Motion to Continue Summary Judgment Motion CR 56(f) quoted the disclosure of experts as made by Plaintiff. *See*, CP 217. Plaintiff disclosed experts Clay Randall and Michael Moss. Interestingly, neither named expert was an active attorney, with Mr. Randall not having worked as an attorney for over 20 years, and Mr. Moss being a CPA.

The Motion for Summary Judgment with supportive briefing was filed on April 24, 2015. *See*, CP 23, 118 – 140, 30 – 117, 24 – 27, 28 – 29, 16 – 20, 21 – 22, and 141. On May 1, 2015, Plaintiff Veneziano filed a Motion to Continue Summary Judgment Motion CR 56(f). *See*, CP 142 – 148.

In response to Plaintiff's request for a continuance, it was stated in briefing that Defendant's Motion for Summary Judgment of Dismissal was based primarily on legal questions rather than factual issues, and included:

- Any claim related to the QDRO and what formula should or should not have been utilized is moot because Plaintiff Cynthia Veneziano made a voluntary election for a lump sum payment in 2007.
- The statute of limitations is a bar to any claim.
- Plaintiff Veneziano has no basis to claim that she would be entitled to any additional pension benefit because what she claims she could have received was not available through the Fluor-Hanford pension plan.
- As to any claim related to the maintenance award, Plaintiff failed to put forth any expert testimony that she could have

improved the award of maintenance, which is completely discretionary with the court, and any claim relative to the award of maintenance is similarly barred by the statute of limitations since maintenance was determined in 2001.

See, CP 215 – 219.

At the May 8, 2015 hearing on Plaintiff's Motion to Continue [the Report of Proceedings are in error and list the date as "8th of June, 2015", but page 4 through 23 of the RP constitute the May 8, 2015 hearing], the Honorable Douglas L. Federspiel conducted a colloquy in which he stated his impressions of the allegations in the Complaint (*see*, RP page 7, lines 19 – 25; page 8, lines 1 – 22), and then discussed "the quintessential elements necessary for a motion to continue". RP 8, line 25.

Judge Federspiel summarized Plaintiff's facts, authorities, and arguments described in briefing, and queried: "What I'd like you to point out to me is where, in the materials specifically, your [sic] explaining what specific evidence you need that you don't have to warrant continuing the summary judgment." RP page 9, lines 11 – 14.

Judge Federspiel then goes through each point raised in isolation and continues to ask Plaintiff's counsel questions on what information he does not already have or has had access to that he would need to respond to the Motion for Summary Judgment. *See*, RP page 9 – 16. Judge Federspiel continues to inquire throughout the discussion: "What is it that

you need now that you don't have to warrant the continuance just on that issue?" RP page 13, lines 6 – 8. And: "Can you help me understand what you need that you don't already have that you have to secure to create a material issue of fact that defeats or attempts to defeat the motion for summary judgment?" RP page 14, lines 23 – 25, page 15, line 1.

After this dialogue, Judge Federspiel ruled: "there's been a failure to bring to the court's attention specific pieces of evidence that aren't already within the possession or readily available possession through experts and existing witnesses of evidence that could create a material issue of fact to oppose the pending motion for summary judgment and the other issues raised in the motion for summary judgment appear to be pure issues of law." RP page 19, lines 24 – 25, page 20, lines 1 – 5.

B. AUTHORITIES AND ARGUMENTS

The Trial Court properly denied Plaintiff Veneziano's motion for continuance. A trial court has broad discretion in granting or denying a continuance; the court's decision will only be overturned for abuse of discretion. *See, Winston v. State/Dept. of Corrections*, 130 Wn.App. 61, 65, 121 P.3d 1201 (2005); *and see, Colwell v. Holy Family Hosp.*, 104 Wn.App. 606, 615, 15 P.3d 210 (2001), *and see, Coggle v. Snow*, 56 Wn.App. 499, 504, 784 P.2d 554 (1990). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *See, State v. ex*

rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court may deny a CR 56(f) motion for a continuance when “(1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact.” *Butler v. Joy*, 116 Wn.App. 291, 299, 65 P.3d 671, *review denied*, 150 Wn.2d 1017, 79 P.3d 446 (2003) (citing *Tellevik v. Real Prop. Known as 31641 W. Rutherford St.*, 120 Wn.2d 68, 90, 838 P.2d 111, 845 P.2d 1325 (1992)).

In this case, Judge Federspiel received briefing and heard argument on Plaintiff’s request for a continuance. Judge Federspiel entered a detailed colloquy with Plaintiff’s counsel as to each point raised in the Motion for Summary Judgment and what evidence Plaintiff sought that was not already available. Through the thorough and meticulous scrutiny of Plaintiff’s arguments, Judge Federspiel arrived at the conclusion that CR 56(f) did not permit a basis through which a continuance of the summary judgment hearing should be granted. Judge Federspiel held that no good reason had been shown for further delay; no statement was offered by Plaintiff as to what evidence would be obtained through further discovery that was not already in the possession of Plaintiff or available to

Plaintiff that would create a genuine issue of material fact. *See*, CP 19 – 21.

Judge Federspiel engaged the proper standard for a motion to continue a summary judgment hearing. He engaged in an in-depth conversation with Plaintiff's counsel as to the basis of the request for the continuance, and through that dialogue, in addition to the submitted briefing, found that Plaintiff's motion was lacking. Judge Federspiel established a tenable basis to deny Plaintiff's request for a continuance. Judge Federspiel did not abuse the trial court's discretion in denying Plaintiff's request for a continuance.

Judge Federspiel's ruling that denied Plaintiff's request for a continuance was properly determined and should be affirmed.

2. AFFIRM THE TRIAL COURT'S GRANTING OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. COUNTER-STATEMENT OF RELEVANT FACTS

Appellant incorrectly asserts that that proximate causation was not raised in Defendant's Motion for Summary Judgment. And further incorrectly asserts that the trial court raised this issue *sua sponte*.

Proximate causation was raised as an issue in the Motion for Summary Judgment. *See*, Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment of Dismissal, CP

126, 127, 129 (recitation of what a plaintiff must prove in a legal malpractice case), 130, 134 – 137. Plaintiff’s claim, with regard to the division of the pension, is that the “time rule method” articulated in *Bulicek v. Bulicek*, 59 Wn.App. 630, 800 P.2d 394 (1990) was required to meet the standard of care of a lawyer. This is not correct. Not only does the standard of care not require it, it was not even a possibility for utilization under the pension plan. As argued by Defendant in briefing:

Not only is Plaintiff incorrect in asserting that the *Bulicek* method must be used, what Plaintiff Veneziano appears to request now for the division of the pension benefit is not, and never has been something offered under the Fluor – Hanford Pension Plan.

CP 134. The *Bulicek* method of dividing a pension, which addresses pension plans that permit cost of living increases, was not and is not an option for Plaintiff Veneziano under the Fluor – Hanford Pension Plan. Even if the pension division had been done incorrectly, which Defendant-Respondent Attorney Chvatal has not and will not ever concede, Plaintiff-Appellant has never answered the question of how anything Attorney Chvatal did or did not do with regard to the pension would have changed the outcome, especially in light of the voluntary election Plaintiff Veneziano took in 2007 for a lump sum distribution of the pension benefits.

Proximate causation was responded to in advance of the trial court hearing the Motion for Summary Judgment by Plaintiff in her responsive briefing. In Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, *see*, CP 222 – 238, Plaintiff abandoned an entire claim: the allegation that Attorney Chvatal committed legal malpractice in negotiating the maintenance award, presumably in an attempt to bolster her claim with regard to the pension division. *See*, CP 226. This was done to further her claim that the outcome would have been different if the "time rule method" articulated in *Bulicek* had been used.

Proximate causation was argued with facts and authorities cited in Defendant's Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment. *See*, CP 292 – 298. In the reply brief, Defendant specifically inquired:

Plaintiff has never answered the following question: What did Attorney Patricia Chvatal not do that she should have done, and if she had done it, what would have changed?

CP 296. This is the proximate cause question. Plaintiff-Appellant has never connected, via evidence, that the claimed legal negligence was a proximate cause of claimed damages.

Proximate causation was argued at the Motion for Summary Judgment hearing before the Honorable Judge Federspiel. During and after oral argument presented by counsel for Plaintiff and Defendant,

Judge Federspiel inquired of both counsel about specific aspects of proximate causation, in addition to how the legal theories on proximate causation fit with the existing facts, and the arguments of counsel as to the law on proximate causation in the context of a legal malpractice claim.

At the May 22, 2015 hearing, the defense again raised the question:

MURPHY: I did pose in my reply a series of questions that have never been answered. What did Ms. Chvatal not do that should have been done? And if she had done it, what would have changed? I don't think that still has been answered by plaintiffs [sic] in this case.

Again, coming back to an earlier argument, it's not the defendant's burden to present a prima facie case, it is the plaintiffs [sic]. I don't believe that has been presented. I don't believe that they have presented evidence that would support that Ms. Veneziano would have been entitled to any more money through the pension program than [sic – than] what was documented in the letter from Fluor Hanford, which is at Exhibit ten, which is the letter from January 31, 2001 in which Fluor Hanford goes through this is the amount of money that you can anticipate to receive if you wait until the age of sixty-five and so at this point the only evidence before Your Honor is that Fluor Hanford documented in January of 2001 what Ms. Veneziano was going to receive as the alternative payee.

RP page 42, lines 20 – 25; page 43, lines 1 – 10. Although raised, Plaintiff did not answer the questions in oral argument.

The Trial Court then inquired of Plaintiff's counsel:

JUDGE: Were you going to go to the merits then or ---

WAYNE: The merits of the ---

JUDGE: Of the --- of your response in terms of the evidence on the four elements of a negligent malpractice ---

WAYNE: Sure.

JUDGE: Case and you asked me if I had a particular question or point of focus for today's argument and for your position I'd be particularly interested in causation.

WAYNE: **Well, the question of causation is fairly straightforward in this.** If Ms. Chvatal's settlement document produced a pension that produced thirteen hundred dollars a month and if the *Bullicheck [sic]* formulation, which should have been used, produces thousands more, I believe what we've seen and the declarations of both Bugdi and Stenzel support the idea that it would be substantially more, the causation is that by getting this, you don't get that. When you don't get that, you suffer the incremental difference. The incremental difference of value over time, which in times becomes thousands of dollars.

JUDGE: **Where is it though in the record and this is what I was struggling with on causation. Where is it that your client through Ms. Chvatal could have secured that, but for the alleged negligence.** It was a given that your client could have secured that valuation methodology.

RP page 50, lines 4 – 25; page 51, line 1. (Emphasis added.) Plaintiff Veneziano's counsel did not answer the Trial Court's question. RP page 51 – 52. Judge Federspiel followed up:

JUDGE: ... Coming back to causation though in responding to the motion for summary judgment, doesn't the record have to include some evidence from your client a connection between the malpractice.... Don't I still have to have evidence on the record that shows that the connection between that negligence and alleged malpractice and that would have caused damages?

RP page 52, lines 8 – 10, 17 – 24. Plaintiff Veneziano's counsel spoke, but other than stating conclusory assertions, offered no evidence to advance the position of Plaintiff on proximate causation. RP page 53 – 54.

It is inaccurate, without merit, and disingenuous for Appellant to claim that proximate causation was not briefed, argued, and submitted to the Trial Court for determination.

The Trial Court orally ruled on Defendant's Motion for Summary Judgment at the May 22, 2015 hearing.

JUDGE: To recover, the plaintiff must demonstrate that he or she would have prevailed or would have achieved a better result had the attorney not been negligent. And I don't find that there are material issues of fact that would allow the case to go forward on the fourth element [proximate causation]. The records [sic – is] devoid of any evidence that had the plaintiff been informed, so if we take negligence and for purposes of the summary judgment accept that negligence occurred, would it be the but for causation of the alleged damages and here we don't have anything in the record indicating from the plaintiff that she would not have accepted the terms and conditions of the divorce decree --- pardon me, I'm not using the right term, of the decree of legal separation as it was adopted through subsequent amended findings, amended decree of legal separation and then the conversation [sic – conversion] to dissolution. The terms and conditions splitting the pension are set forth in those four pleadings and from that the terms and conditions of the qualified --- of the QDRO were drafted by the defendant attorney, nor is --- well, there is [sic – are] abundant facts alleged and opinions advanced by the two rebuttal experts from the plaintiff in the record that the alleged as [sic] fell below the standard of care, not to attempt to secure the time rule. There was no evidence from them or opinion advanced by them that had the plaintiff rejected the settlement that she could have done better in the entire distribution of the assets and liabilities in the divorce had it gone to trial.

RP page 68, lines 10 – 25; page 69, lines 1 – 7.

The underlying legal separation / dissolution of marriage litigation is critical to the analysis of this case. Timothy Veneziano and Cynthia

Veneziano were married on October 17, 1976. They separated on September 1, 1997. A Petition for Dissolution of Marriage was filed by Timothy Veneziano on January 24, 2000. The Decree of Legal Separation was filed on January 18, 2001, with that being converted to a Decree of Dissolution on August 23, 2005.

With regard to the pension, in the Decree of Legal Separation Cynthia Veneziano was awarded “[o]ne-half (1/2) of husband’s accrued Operating and Engineering Pension accrued from the date of the parties marriage (10/17/76) through January 1, 2000”, which was similarly confirmed in the Qualified Domestic Relations Order – Fluor Daniel Hanford. The following was provided for in the QDRO:

4. Interest of the Alternate Payee to the Participant’s Pension Plan. This Order hereby creates and recognizes the existence of the Alternate Payee’s right to receive fifty (50) percent of the Participant’s monthly benefit that has accrued from the date of marriage (10/17/76) to 01/01/00.

6. Calculation of Amount of Pension Plan Payment. The calculation of the amount of payments to the Alternate Payee shall be based on fifty (50) percent of the Participant’s monthly accrued benefits as of January 1, 2000, under the terms of the Plan at the time benefits are available under the Plan to be paid to the Alternate Payee.

The Qualified Domestic Relations Order was reviewed and accepted by Fluor Hanford, Inc., as confirmed in a letter dated January 31, 2001. In that letter, the gross monthly annuity that would be payable to

Cynthia Veneziano upon reaching age 65 was stated, with the disclosed notification that the amount would be actuarially reduced if an election to receive monthly annuity payments prior to age 65 was chosen. The calculation of the monthly annuity Cynthia Veneziano may have received at 65 is irrelevant, however. On November 30, 2007, Cynthia Veneziano voluntarily elected to receive a single lump sum distribution that represented the entire benefit.

The pension plan through Fluor-Hanford does not include a provision for cost of living adjustments, which is what the *Bulicek* method accounts for. Judge Federspiel even raised this lack of evidence presented by Plaintiff to support her claims at the May 8, 2015 hearing when the Trial Court addressed Plaintiff's request for a continuance.

WAYNE: However, on the [inaudible] for example this cost of living argument, which frankly is hard to understand, the only evidence produced by the defense, the only evidence, is a hearsay statement contained in paragraph ten of Mr. Svennungsen's declaration. ...

JUDGE: **Oh, I'm sorry. Do you have a copy of the pension plan? Doesn't your client have a copy of the pension plan so your expert could look at it and see if it's got a cost of living provision or paragraph or clause in it?**

RP page 11, lines 8 – 11 and lines 15 – 18.

The answer is **NO**. Plaintiff **does not, and did not, and never will** have a copy of the pension plan relative to Hanford Operations and Engineering Pension Plan that includes a provision for a cost of living

increase because that is **NOT** part of the Fluor-Hanford Pension Plan. It is **not** available in the pension plan. It is the Plaintiff's obligation and responsibility to prove her case. She cannot do it. Defendant Attorney Chvatal is not even in a position to obtain this piece of evidence. Plaintiff Cynthia Veneziano is able to obtain this information as an "Alternate Payee" (Timothy Veneziano, who is not a party to the subject cause of action, is the "Plan Participant" and therefore he could obtain a copy of his pension plan). But, Plaintiff has never produced the pension plan despite this being a piece of evidence that would support her claim that a cost of living increase and the *Bulicek* method was available as part of the pension plan.

With regard to spousal maintenance, the following language is in the Decree of Legal Separation:

The husband shall continue to pay \$3,000 per month to the wife, with \$2,000 being designated as spousal maintenance and \$1,000 being being [sic] designated as child support, until trial or until an agreement occurs concerning permanent support. This shall be paid by the husband by automatic wage assignment and deposited into the wife's checking account at the rate of \$1,385 every pay period. This agreement is contingent on this child support and alimony being paid until our trial date. Reimbursement for med[ical] bills shall be discussed at trial.

Amended Findings of Fact and Conclusions of Law ("Amended FFCL") were filed on March 31, 2003, with the corresponding Amended

Decree of Legal Separation (“Amended DCLGSP”) also being filed. Neither document amended, in any way, the pension plan provision. As to spousal maintenance, the Amended FFCL stated as follows:

SPOUSAL MAINTENANCE OBLIGATION

The wife is presently disabled and because of her present disability is not gainfully employed. The wife is receiving gross monthly social security disability income of \$1,189.00 and a net monthly social security income of \$1,045.00

The husband is currently employed at Fluor Hanford. The husband’s current gross monthly income is \$10,802.00 and his current net monthly income is \$5669.51.

Presently, the wife is in need of spousal maintenance and the husband has the present ability to pay spousal maintenance to the wife.

Commencing the first day of April, 2003 the husband shall pay to the wife the sum of \$1,955.00 each month for spousal maintenance and a like sum of \$1,9.55.00 [sic] each month thereafter until the husband dies, the wife dies, the wife remarries or the husband retires. Provided, however, the husband shall not voluntarily retire prior to his 62nd birthday. If the husband voluntarily retires because of a reduction in force and husband receives a severance package husband will be obligated to pay wife until his age 62. (If involuntarily reduction, the court will review terms of severance package if modif [sic] issue arises.)

Spousal maintenance payments shall be paid directly by husband to wife by automatic wage assignment and deposited into wife’s checking account at the rate of \$902.30 every two (2) weeks.

The husband’s monthly spousal maintenance obligation to the wife is subject to modification as provided by law.

As to spousal maintenance, the Amended DCLGSP stated:

SPOUSAL MAINTENANCE

Commencing the first day of April, 2003 the husband shall pay to the wife the sum of \$1,955.00 each month for spousal maintenance and a like sum of \$1,955.00 each month thereafter until the husband dies, the wife dies, the wife remarries or the husband retires. Provided, however, the husband shall not voluntarily retire prior to his 62nd birthday. If the husband voluntarily retires because of a reduction in force and husband receives a severance package husband will be obligated to pay wife until his age 62. (If involuntarily reduction, the court will review terms of severance package if modif [sic] issue arises).

Spousal maintenance payments shall be paid directly by husband to wife by automatic wage assignment and deposit into wife's checking account at the rate of \$902.30 every two (2) weeks.

The husband's monthly spousal maintenance obligation to the wife is subject to modifications as provided by law.

On August 23, 2005, an Order on Motion to Convert Decree of Legal Separation to Decree of Dissolution was signed and filed with the court.

B. AUTHORITIES AND ARGUMENTS

The plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship that gives rise to a duty of care, (2) an act or omission by the attorney in breach of that duty, (3) damages to the client, and (4) proximate causation between the breach of duty and the damage incurred. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992).

No evidence presented by Plaintiff Veneziano supports a *prima facie* case that Plaintiff Veneziano can prove she could have done better on a pension and maintenance award had the case gone through trial. Plaintiff Veneziano has not presented any evidence that a trial judge would have ordered more maintenance or a different division of the pension.

Plaintiff's claim that the division of a pension pursuant to the "time rule" method as stated in *Bulicek v. Bulicek, supra*, is not a legitimate argument. Family law does not support a solitary method for the division of a pension. Again, the "time rule" method is not even available through the Fluor-Hanford Pension Plan. The division of property is within the discretion of the trial court. *See, In re Marriage of Nicholson*, 17 Wn.App. 110, 561 P.2d 1116 (1977). The only limitation is that, in light of the relevant factors, the award must be just. *See, In re Marriage of Morrow*, 53 Wn.App. 579, 585, 770 P.2d 197 (1989). The division of property considers maintenance and pensions as tools to use in settlement. If a spouse wants money now rather than later, then perhaps an award of maintenance will be of assistance with a concession on the pension. Or, perhaps, a spouse wants the family home, and negotiates for ownership of the home in lieu of maintenance or a pension. Community property and separate property, similarly, can be utilized in various and numerous ways.

The division of property is utterly discretionary, as long as it is fair. In this case, the division of property was the result of a negotiated resolution and a judge signed off on that division as fair.

Proximate causation was raised as an issue in the Motion for Summary Judgment and supportive briefing. Respondent Chvatal respectfully requests the Court of Appeals affirm Judge Federspiel's ruling.

3. **AFFIRM THE TRIAL COURT'S DENIAL OF PLAINTIFF'S MOTION TO SUPPLEMENT THE RECORD, OR, IN THE ALTERNATIVE, RECONSIDERATION**

A. COUNTER-STATEMENT OF FACTS

Lengthy oral argument on the Defendant's Motion for Summary Judgment was heard on May 22, 2015. *See*, RP 25 – 77. At the insistence of Plaintiff Veneziano's counsel, Robert Wayne, the suggested hearing date of June 8, 2015 was scheduled for entry of an Order on the Trial Court's oral ruling. *See*, RP 74, line 19.

Appellant in her briefing cleverly contends that by "agreement" supplemental declarations were filed before presentation of the Order on Summary Judgment. *See*, Brief of Appellant, page 19. This is not true.

After the Trial Court granted Defendant's Motion for Summary Judgment, Plaintiff's counsel, argued about a "breach of contract" claim

and complained that he had not received written discovery that would support his claim. Judge Federspiel addressed that specific concern by ordering a formal answer to an interrogatory and request for production.

JUDGE: Okay, well here's --- here's what I'm going to do. I'd like for you to note up a presentation of the order granting the motion for summary judgment in the way I've outlined my various decisions today. Note it up for presentation out ten business days or more from today. Notwithstanding my ruling, in the interim, the defendant [sic] answer formally the interrogatories and requests for production of documents as they relate to those that might cover that contract. If those surface and disclose the existence of a contract sir then I will entertain your motion for a continuance on that contract because I think that is fair and just.

RP page 73, lines 5 – 17. On June 1, 2015 (transmitted on May 27, 2015), Defendant's Answer and Response to Interrogatory No. 14 and Request for Production No. 14 Submitted at the Direction of the Court was filed. *See*, CP 339 – 342.

The Trial Court on May 22, 2015 permitted the record to remain open only as to the question of whether a contract existed.

After this was done, Plaintiff's counsel then stated the following:

WAYNE: Your Honor, I don't believe in doing things surreptitiously, so let me just be direct with the court. I'm going to file a motion for reconsideration.

JUDGE: Okay.

WAYNE: I'm going to give you declarations that meet your two points. And the reason I asked if your order was final is because it goes to the question of the ---

JUDGE: Of the timeliness of the motion for reconsideration.

WAYNE: Timeliness. And frankly, I'd rather get it to you before June 8th, I'd like to get it to you sooner, but I can't reconsider that which is not final.

JUDGE: Right, right.

WAYNE: So, I'm going to make it as a motion in the alternative to supplement and/or alternatively for reconsideration.

JUDGE: Okay.

WAYNE: And you'll get those declarations.

JUDGE: Very well, sir.

WAYNE: Thank you.

JUDGE: I just didn't want to have today be the start of the clock on the ten days for motion for reconsideration.

WAYNE: I appreciate that.

RP page 76, lines 2 – 23.

It is disingenuous and inaccurate for Appellant to claim that there was any "agreement" permitting supplementation of the record. Plaintiff's counsel told the Court what he planned to file. That is not the same as the Trial Court holding the record open for Plaintiff to supplement the record. That simply did not happen as confirmed by the Report of Proceedings.

On June 2, 2015, Plaintiff's Motion to Supplement the Record, or in the Alternative, for Reconsideration re: Summary Judgment was filed. *See*, CP 343 – 384.

Benton County Superior Court has a Local Court Rule that governs motions for reconsideration.

LCR 59. NEW TRIAL, RECONSIDERATION, AND AMENDMENT OF JUDGMENTS

(e) Hearing on Motion.

(1) *Motions for New Trial, Reconsideration, or Judgment NOV.* Motions for New Trial, reconsideration, or for judgment NOV shall be submitted without oral argument unless the Court orders otherwise as hereinafter provided. The motion shall be served and filed as provided in CR 59(b). At the time of filing the motion, the moving party shall serve and file a statement of points and authorities and deliver a copy of the motion, supporting documents and memorandum to the trial judge. The trial judge may (1) deny the motion, (2) call for a written response from the opposing party, or (3) call for oral argument.

At the June 8, 2015 hearing, Judge Federspiel addressed Plaintiff's Motion to supplement the record or for reconsideration:

JUDGE: Okay, so now we've got the issue of Mr. Wayne has filed a motion to supplement the record or in the alternative for reconsideration for the summary judgment. There was not a formal response from the defendant through Ms. Murphy's office, but a request that I forego consideration of one or both of those motions. **I have read the motions and looked at the supplemental declarations. The record wasn't held open for [those] purposes nor did I invite supplement on the record and in those regards there were no acceptable or material or viable reasons given for why there was a delay in supplementing the record or needing additional time to supplement with what was submitted by the plaintiff in her declaration and I reject the premise that the absence of the proximate cause testimony and the two experts declarations weren't necessary because that is an issue of law based on the case cited. I reject that proposition and find that under the circumstances of this case it was an issue of fact that would have needed to be put forward in the summary judgment to defeat the plaintiff, pardon me, the defendant's motion for summary judgment on those issues and the plaintiff failed to sustain its burden. So, I'm going to exercise my discretion and deny the motion to supplement the record with those proposed affidavits that came in along with the proposed motion.**

I'm also looking at the submitted motion for reconsideration. I am sitting as a visiting judge, superior court judge in Benton County and as I understand Benton County's local rule once the motion for reconsideration is filed and then similar to the local rules in Yakima County the judge makes a decision whether to invite briefing and then whether or not to invite oral argument or as an alternative option **after having considered the initial motion for reconsideration, deny it outright**, which I am doing in this case. I believe that the primary issue that surrounds the proposition that I am to determine as a matter of law whether or not the alleged legal malpractice that resulted in a factual issue on whether or not the defendant lawyer was negligent was the proximate cause of potential damage had the settlement been rejected and gone to trial. The case that was presented for the proposition advanced by the defendant [sic – plaintiff] in proposing its motion for reconsideration and supplementing the record was premised upon the full blown transcript in which a judge would have been in a position in that case to say that the lawyer's failure to file a timely notice of appeal could have preserved here allowing the judge to review the trial transcripts and rule as a matter of law that it could have been ruled erroneous and was a proximate cause allowing the remainder of the findings of fact to go to a jury in that underlying case.

That is materially different than the facts that present themselves in the case before us today under this cause number and I go back and reiterate my reliance on the case that we talked about at some length. *Albertson's v. Ferguson* [sic – *Halvorsen v. Ferguson*, 46 Wn.App. 708, 735 P.2d 675, *reconsideration denied* 1986)], in which a grant of summary judgment was upheld on appeal because of the failure to establish proximate cause. **Here, it would be next to impossible for the court given a record of a settlement to say that it was nothing but mere speculation to assume that had the matter not settled that the parties would have come out better, worse or the same.**

The damages that we're talking about are less than \$1,000.00 per month. If you isolate the differential and the time value application of the pension versus the 50/50 evaluation at the time of the divorce and at best looking at somewhere between nine to ten thousand dollars a year damages with an allegation in one of the affidavits that the damages are four hundred thousand dollars.

That doesn't make any sense unless the retiree was going to live in excess of one hundred years.

It's too speculative and even if I were to take a look at this and rule as a matter of law, which I don't think is the appropriate standard, but if it would be I would rule as a matter of law that the proximate cause can't be established on summary judgment given the record because you can't isolate one asset. All of the other assets are at play. **The division was agreed upon and it's impossible speculation to determine what a trial court judge would have done on assessing credibility of the witnesses, the valuation of the assets, whether other assets may have been challenged under a different valuation methodology and for those reasons, I'm denying the motion for reconsideration without a further request for additional briefing and oral argument.**

RP page 81, lines 22 – 25; page 82, lines 1 – 25; page 83, lines 1 – 25; page 84, lines 1 – 18. (Emphasis added.)

B. AUTHORITIES AND ARGUMENTS

Appellate courts are to apply the abuse of discretion standard in review of a trial court's determination as to a request for consideration of supplemental materials. *See, Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (2015); *and see, Garza v. McCain Foods, Inc.* 124 Wn.App. 908, 917, 103 P.3d 848 (2004); *and see, O'Neill v. Farmers Ins. Co. of Wash.*, 1124 Wn.App. 516, 521-22, 125 P.3d 134 (2004). Likewise, motions for reconsideration are addressed to the trial court's sound discretion, and appellate review is via the abuse of discretion standard. *See, Perry v. Hamilton*, 51 Wn.App. 936, 938, 856 P.2d 150 (1988).

Abuse of discretion is the appropriate standard for appellate review as supported by case law. In her argument, Petitioner places undue emphasis on *Keck v. Collins, supra*, and *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). This line of cases state that the trial court is to evaluate factors stated in *Burnet* before striking untimely filed evidence, but that is not the scenario or context in which the Honorable Judge Federspiel issued his ruling on June 8, 2015. Instead, on May 22, 2015, Judge Federspiel presided over the lengthy Motion for Summary Judgment hearing and made his oral ruling. Then, Plaintiff submitted materials on June 2, 2015, in advance of the hearing that was scheduled for the purpose of entering the Order Granting Defendant's Motion for Summary Judgment consistent with Judge Federspiel's oral ruling.

Plaintiff's materials were submitted in the alternative as either a motion to supplement the record **after** the Trial Court had already orally ruled on the Motion for Summary Judgment, or as a motion for reconsideration. As to the Plaintiff's motion to supplement the record, these were not materials submitted in advance of the summary judgment hearing, they were submitted after that hearing and after Judge Federspiel had ruled, with Judge Federspiel stating at the June 8, 2015 hearing that he did not hold the record open nor invite supplementation. *See*, RP page 82,

line 3. In that regard, Judge Federspiel did not accept or review the materials. *See*, RP page 82, lines 4 – 5.

After ruling on Plaintiff's Motion to Supplement, Judge Federspiel then engaged Plaintiff's request for reconsideration.

In stating his ruling on Plaintiff's Motion for Reconsideration, Judge Federspiel specifically mentioned the materials submitted by Plaintiff, not striking those materials, but specifically considering the submitted materials for the purpose of Plaintiff's Motion for Reconsideration. *See*, RP page 84, line 4.

In his ruling, Judge Federspiel noted the options available to him under Benton County Superior Court Local Rule, which permitted him to deny the motion for reconsideration outright, call for briefing, or call for oral argument.

Judge Federspiel announced an erudite ruling citing the facts of the case and applicable case law that formed the basis for his denial of Plaintiff's Motion for Reconsideration without the request for additional briefing or oral argument. *See*, RP page 82, lines 18 – 25; page 83, lines 1 – 25; and page 84, lines 1 – 18.

Appellant's asserted claimed error with regard to the Trial Court's denial of Plaintiff's Motion to Supplement, or, in the alternative, Motion for Reconsideration is a contortion of what the Trial Court did. Judge

Federspiel properly held that he did not hold the record open for supplementation after he made his ruling granting Defendant's Motion for Summary Judgment, and therefore he did not consider the submitted materials relative to that motion.

Judge Federspiel then directed his attention to Plaintiff's Motion for Reconsideration and did consider all submitted materials as referenced in his oral ruling. Judge Federspiel properly denied Plaintiff's Motion for Reconsideration, even in light of the additional information, and still found Plaintiff failed to present a *prima facie* case such that he would reverse his earlier ruling granting summary judgment.

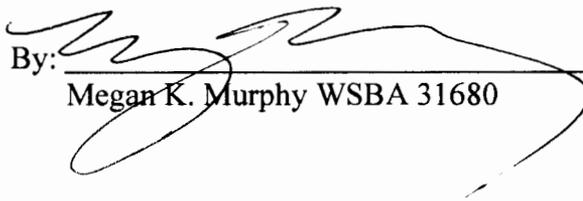
The Court of Appeals should affirm Judge Federspiel's ruling on June 8, 2015 denying Plaintiff's motion to supplement, or, in the alternative, for reconsideration.

III. CONCLUSION

Respondent Patricia Chvatal respectfully requests the Supreme Court affirm the Trial Court.

Respectfully submitted this 27th day of April 2016.

THORNER, KENNEDY & GANO P.S.
Attorneys for Respondent Patricia J. Chvatal

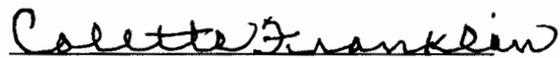
By: 
Megan K. Murphy WSBA 31680

PROOF OF SERVICE

I certify that on the 27th day of April 2016, I caused a true and correct copy of RESPONDENT PATRICIA J. CHVATAL'S RESPONSE TO BRIEF OF APPELLANT to be served on the following in the manner indicated below:

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Mr. Kenneth H. Kato
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 Hand Delivery
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Colette Franklin