Supreme Court No. 101113-0
Court of Appeals No. 82780-4-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SHEILA PATRICE ANDERSON,

APPELLANT,

v.

SWEDISH MEDICAL CENTER, a Washington State Health Care Corporation; AND JENS CHAPMAN,

RESPONDENTS.

CONSOLIDATED ANSWER TO MOTION FOR EXTENSION OF TIME AND PETITION FOR REVIEW

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I. INTRODUCTION

Sheila Anderson had previously been given leave to extend time for her untimely Motion for Reconsideration to the Court of Appeals, despite filing the motion more than four (4) days past the Motion for Reconsideration deadline imposed by RAP 12.4(b). She subsequently filed an untimely Petition for Review and twice failed to timely pay the filing fee required by RAP 13.4(a). It is clear that there has been no degree of reasonable diligence made by Anderson regarding filing requirements during any part of the pendency of this appeal. The Court should deny the Motion for Extension of Time and deny the Petition for Review.

In requesting review of the summary judgment dismissal of her claims, C. Olivia Irwin's disqualification as Anderson's attorney, and a bare allegation of a due process abuse without elaboration[1], Anderson continues to confuse issues of law and

[1] Although Anderson raises an unspecified due process issue and the attorney disqualification issue in her "Issues Presented for Review," Anderson fails to brief the issues in her "Argument"

facts that have already been properly addressed by the trial court and subsequently affirmed by the Court of Appeals.

None of the grounds raised in her Petition for Review meet the requirements of RAP 13.4(b). The Petition for Review should be denied.

II. IDENTITY OF THE ANSWERING PARTY

Respondents Swedish Medical Center and Jens R. Chapman, M.D., (collectively "Swedish"), by and through their attorneys of record, Kevin Khong and David J. Corey, respectfully ask the Court deny the Motion for Extension of Time for Petitioner to file the Petitioner for Review. In the event that the Court reaches the substance of her Petition for Review, the Respondents respectfully request the Court deny the Petition for Review.

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section. These issues should be considered abandoned on appeal and not considered for purposes of the Petition for Review. Blue Spirits distilling LLC v. Washington State Liquor & Cannabis Bd., 15 Wn. App. 2d 779, 794, 478 P.3d 153 (2020), quoting Holder v. City of Vancouver, 136 Wn. App. 104, 107, 147 P.3d 641 (2006).

III. RESTATEMENT OF THE CASE

On November 3, 2020, Sheila Anderson ("Anderson") brought claims of medical malpractice against Swedish under RCW 7.70.030 and RCW 7.70.050. CP 1. When the Complaint was filed, Anderson was represented by her daughter, C. Olivia Irwin ("Irwin"). CP 5. On February 16, 2021, Swedish moved to disqualify Irwin as attorney due to her status as a necessary witness pursuant to RPC 3.7 and RPC 1.7. CP 43. Irwin was legally designated as Anderson's medical decisionmaker under the power of attorney. CP 92-93. Therefore, Irwin was the only witness who can testify about what medical care she authorized on behalf of Anderson, especially when Irwin claims that her mother was incapacitated and legally not able to provide informed consent for some of the decision-making at issue. CP 85-86, 89.

Irwin further claims that she observed Anderson's chipped tooth immediately after extubation and claims that she spoke to Dr. Chapman personally about this issue. CP 85. The

Respondents deny that this conversation occurred and Irwin appears to be the only witness that could establish this factual contention and be cross-examined upon it since Anderson, herself, was apparently not aware of the chipped tooth "until my daughter pointed it out to me." CP 368.

Finally, Irwin undisputedly admits to feeding Anderson during the NPO[2] period, causing the postponement of a surgical procedure to correct a neurological emergency that Anderson was facing and for which every hour mattered. CP 46-47, 86, 95, 97. The disqualification was granted by the trial court on February 16, 2021. CP 134.

On April 27, 2021, Swedish moved for summary judgment due to Ms. Anderson's failure to produce expert testimony required to maintain her Chapter 7.70 RCW claims. CP 141. That motion was granted on May 28, 2021. CP 363.

[2] NPO is Latin for "*nil per os*", and is a medical shorthand for a period of time in which a patient may not eat or drink anything.

On direct appeal, Division I of the Court of Appeals affirmed (1) the trial court's order disqualifying Anderson's counsel and daughter, Olivia Irwin[3]; (2) the trial court's order denying Anderson's continuance request; and (3) the trial court's order summarily dismissing Anderson's lawsuit. The unpublished Court of Appeals decision has been attached to this Answer as **Appendix A** for the Court's ease of reference.

Following the Court of Appeals decision, Anderson filed an untimely Motion for Reconsideration requesting the Court of Appeals reconsider its decision that affirmed the trial court order. The Court of Appeals denied reconsideration. Her untimely Petition for Review followed.

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[3] Despite the order disqualifying Irwin remaining valid and active, Irwin has appeared in this appeal representing Anderson as counsel. The Respondents object to Irwin's participation and believes there is a basis for this Court to sua sponte direct Irwin comply with her disqualification. State v. White, 80 Wn. App. 406, 413, 907 P.2d 310 (1995).

IV. ANSWER TO MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW

RAP 13.4(a) requires the filing of a petition for review within 30 days after a decision terminating review is filed. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed. Id.

The Petition for Review was due on July 22, 2022. **Appendix B**. Anderson's Petition for Review was considered filed on July 25, 2022, and she failed to pay the filing fee. Id. Anderson was then directed to file a Motion for Extension of Time and to pay the filing fee by August 1, 2022. Id. While Anderson filed her Motion for Extension of Time on July 29, 2022, the filing fee was not received until August 2, 2022. **Appendix C**.

An extension of time within which a party must file a petition for review will only be granted "in extraordinary circumstances and to prevent a gross miscarriage of justice." RAP 18.8(b). This test is applied rigorously and "there are very

few instances in which Washington appellate courts have found that this test was satisfied." State v. Moon, 130 Wn. App. 256, 260, 122 P.3d 192 (2005).

The phrase "extraordinary circumstances" is defined as "circumstances, wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control." Beckman ex rel. Beckman v. State, Dep't of Soc. & Health Servs., 102 Wn. App. 687, 693-94, 11 P.3d 313 (2000). Negligence, or lack of "reasonable diligence," does not amount to "extraordinary circumstances." Id. at 695. Nor does the failure for an attorney to take necessary steps to meet the time requirements constitute "extraordinary circumstances" because "[i]t is incumbent upon any attorney to institute internal office procedures" sufficient to ensure that the prerequisite steps are taken and are timely. Id.

Anderson provides an analogy of having started to timely file the Petition for Review, but having the process take longer than expected, which resulted in the untimely filing. App. Mot.

for Ext. of Time to File Pet. For Rev., p. 2. However, Beckman is clear that such an excuse is not sufficient and it is incumbent upon the attorney to institute internal office procedures to ensure that the process does not result in an untimely filing. 102 Wn. App. at 695. Further, no explanation is given at all for why the filing fee was not timely paid on the original due date or why it was again untimely paid on August 2, 2022, even after being given a second, extended due date of August 1, 2022. The Respondent has failed to provide a sufficient excuse or demonstrated sound reasons to abandon this Court's preference for finality. Schaefco, Inc. v. Columbia River Gorge Comm'n, 121 Wn.2d 366, 368, 849 P.2d 1225 (1993).

Furthermore, Anderson was already given leave to extend time for her untimely Motion for Reconsideration to the Court of Appeals, despite filing the motion more than four (4) days past the Motion for Reconsideration deadline imposed by RAP

12.4(b).[4] It is clear that there has been no degree of reasonable diligence made by Anderson with filing requirements during any part of the pendency of this appeal. The Court should deny the Motion for Extension of Time and deny the Petition for Review.

V. ANSWER TO PETITION FOR REVIEW

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) if the Decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

[4] The Court of Appeals Decision was issued on April 25, 2022. Anderson filed her Motion for Reconsideration and a contemporaneous Motion for Extension of Time to File Motion for Reconsideration on May 19, 2022.

A. The Court of Appeals Decision Affirming Summary Dismissal Was Correct and Not in Conflict with Any Decision by This Court.

Anderson continues to conflate the procedural pleading requirements required by the Washington State Civil Rules of Procedure with the well-established substantive law requirement of expert testimony for her legal claims. The summary judgment dismissal was based upon the lawsuit's substantive deficiencies, not its procedural ones. The Court of Appeals appropriately affirmed the trial court's ruling that she failed to *substantively* establish material facts to support her medical negligence and lack of informed consent claims. As a result, the Court of Appeals affirmation of the summary dismissal of Anderson's claims does not conflict with this Court's decision in Putnam v. Wenatchee Valley Medical Center, P.S., 166 Wn.2d 974, 216 P.3d 374 (2009).

Citing Putnam, Anderson attempts to rehash the argument that the trial court inappropriately relied upon a certificate of merit requirement for the summary judgment dismissal. Pet. for

Rev., p. 11. As the Respondents argued in their response brief and as the Court of Appeals appropriately held, "the certificate of merit requirement in former RCW 7.70.150 is distinct from the requirement that on summary judgment in a medical malpractice case the nonmoving party must produce an affidavit from a medical expert alleging that the health care provider violated the standard of care."[5] **Appendix A**, p. 10.

The Court of Appeals further correctly concluded that neither the trial court nor the Respondents relied upon the certificate of merit procedural requirement for the summary judgment dismissal and that Anderson was misguided in relying upon it as a dispositive appellate issue. **Appendix A**, p. 10.

Anderson needed a medical expert to establish a *prima facie* claim for medical negligence and the lack of informed

[5] This Court further reiterated this very point in an En Banc opinion on a certified question from the U.S. District Court for the Western District of Washington on May 26, 2022. Martin v. Dep't of Corrections, 199 Wn.2d 557, 564-65, 510 P.3d 321 (2022).

consent—to establish a legitimate claim that would survive summary judgment. She failed to do so. This Court should deny her Petition for Review.

B. The Court of Appeals Decision Does Not Implicate Either of the U.S. Constitution or the Washington State Constitution.

The ultimate issues in this case for both of Anderson's claims require material facts to be established by expert testimony. RCW 7.70.040(1); RCW 7.70.050(3); see also, **Appendix A**, p. 8-10. It is well-settled that in a medical malpractice case, expert testimony is generally required to establish and define that standard of care because such analysis is beyond the expertise of a layperson. Harris v. Groth, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). A health care provider's conduct is to be measured against the standard of care of a reasonably prudent practitioner possessing the degree of skill, care and learning possessed by other members of the same area of specialty in the State of Washington. Id. at 451.

In addition, in order to establish the materiality of fact in a lack of informed consent claim, Anderson was required to produce expert testimony that demonstrates the existence of a risk, its likelihood of occurrence, and the type of harm in question with regard to her informed consent claim. Smith v. Shannon, 100 Wn.2d 26, 33-34, 666 P.2d 351 (1983). "Just as patients require disclosure of risks by their physicians to give an informed consent, a trier of fact requires description of risks by an expert to make an informed decision." Smith, 100 Wn.2d at 34.

Citing Article I, Section 8 and 12 of the Washington State Constitution, Anderson argues that the informed consent statute in RCW 7.70.050, "does not require that the expert witness be identified prior to the discovery/witness list deadline set by (sic) scheduling order" and that the non-expert declarations that she and her Attorney/Daughter Irwin provided were sufficient to establish "genuine factual issues" which should have resulted in

denial of summary judgment in favor of trial. Pet. for Rev., p. 14-15.

Anderson does not explain how this implicates the Privileges and Immunities sections of the Washington State Constitution that she cites, but ultimately her conclusion is incorrect anyhow. The statute she cites and places her own emphasis upon is clear that material facts under the provisions of RCW 7.70.050 must be established by expert testimony. RCW 7.70.050(3) (emphasis added).

Further, in their discovery requests, the Respondents asked Anderson to "identify all experts upon whom you rely and/or intend to call as witnesses at trial on any issue in this case," and with regard to each expert "provide all information set forth in CR 26(b)(5)(A)(i)." CP 73. Anderson, through Irwin as counsel, responded by indicating that "[i]nformation requested is not currently available. Will be provided once an expert is identified and completes review." Id. Anderson never followed up with

identification of any medical expert in lead up to her lawsuit's eventual dismissal. CP 157–94, RP 7:19–20:16.

Finally, Anderson has already unsuccessfully raised the argument that the summary judgment decision was premature because discovery had not yet closed. App. Br., p. 22. However, even a discovery schedule is not intended to restrict the trial court's ability to grant summary judgment when a motion is properly brought. Guile v. Ballard Cmty. Hosp., 70 Wn. App. 18, 25 n. 4, 851 P.2d 689 (1993).

Accordingly, there is no constitutional issue implicated by the Court of Appeals affirmation of the summary judgment dismissal. The Petition for Review should be dismissed.

C. The Court of Appeals Decision Does Not Involve an Issue of Substantial Public Interest.

Anderson cites the legislative findings and intent in the session laws associated with RCW 5.64.010 for the admissibility of evidence of furnishing or offering to pay medical expenses and/or expressions of apology, sympathy, fault, etc., but fails to provide any argument for how the Court of Appeals decision

implicates either the statute or the legislative findings and intent outlined in the session laws. RCW 5.64.010; Laws of 2006, Ch. 8, §1. The Court should consider this issue as abandoned and disregard it. Blue Spirits distilling LLC, 15 Wn. App. 2d at 779.

If the citation to the unrelated statute was an attempt at arguing that the Court of Appeals decision was inconsistent with the legislative intent for Chapter 7.70 RCW, that argument is misguided. Sherman v. Kissinger, 146 Wn. App. 855, 866, 195 P.3d 539 (2008) citing RCW 7.70.030 ("The legislature expressly limit[s] medical malpractice actions for injuries against health care providers to claims based upon the failure to follow the accepted standard of care, the breach of an express promise by a health care provider, and the lack of consent."). The Petition for Review should be denied.

VI. CONCLUSION

Anderson's Petition for Review was untimely without an adequate showing under RAP 18.8(b) which provides a sufficient excuse to abandon this Court's preference for finality. Further,

Anderson fails to present a sufficient basis under RAP 13.4(b) which would justify the acceptance of discretionary review by this Court. Thus, the Court should deny her Petition for Review.

Respectfully submitted this 5th day of August, 2022.

I certify that this brief produced using word processing software contains 2,706 words in compliance with RAP 18.17, exclusive of the title sheet, table of contents, table of authorities, this certification of compliance, certificate of service, and signature blocks, as calculated by the word processing software used to prepare this motion.

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CERTIFICATE OF SERVICE

I, Guzal Khakimova, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman, LLP, 1001 4th Avenue, Suite 4200, Seattle, WA 98154.

3. In the supreme matter of SHEILA PATRICE ANDERSON vs. SWEDISH MEDICAL CENTER, a Washington State Health Care Corporation; AND JENS CHAPMAN, Respondents, I did on the date listed below, (1) cause to be filed with this Court a Consolidated Answer to Motion for Extension of Time and Petition for Review; and (2) to be delivered via EMAIL to those stated on the attached Service List:

Christal Olivia Irwin
Irwin Law Firm Inc
204 South Oak Street, Unit 304
Colville, WA 99114

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

DATED this 5th day of August, 2022.

/s/ Guzal Khakimova
_____
Guzal Khakimova, Legal Assistant

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

SHEILA PATRICE ANDERSON, Appellant, v. SWEDISH HOSPITAL, a Washington state health care corporation, and JENS CHAPMAN, Respondents.	)	No. 82780-4-I UNPUBLISHED OPINION

VERELLEN, J. — Sheila Anderson challenges the trial court's grant of Swedish Hospital's motion to disqualify her counsel under RPC 3.7(a). RPC 3.7(a) provides that a lawyer cannot represent a client where the lawyer is a "necessary witness" in the client's case. Because Anderson's counsel was the only witness to some of the events necessary to establish her medical malpractice and lack of informed consent claims, the court did not abuse its discretion in disqualifying her counsel.

Anderson also challenges the court's denial of her motion to continue the summary judgment hearing. But because Anderson provided no meaningful analysis of the CR 56(f) factors, the court did not abuse its discretion in denying Anderson's motion.

Finally, Anderson challenges the court's grant of summary judgment in favor of Swedish. But because Anderson failed to provide an expert witness in

support of her medical malpractice and lack of informed consent claims, summary judgment was proper.

Therefore, we affirm.

FACTS

Between October 14 and November 10, 2016, Sheila Anderson had four surgeries at Swedish Hospital "to correct severe scoliosis and associated complications."[1] Dr. Jens Chapman performed the second, third, and fourth stages of surgery.[2]

In November 2020, Anderson filed a complaint against Swedish Hospital and Dr. Chapman alleging medical malpractice and lack of informed consent. Anderson asserted that Dr. Chapman "failed to perform/complete the surgery as agreed/explained to [her], nor exercise the appropriate level of care resulting in irreversible damage to [her] spinal cord, and cause other undue harm."[3]

Anderson's daughter, Christal Irwin, an attorney admitted to practice in Washington state, was Anderson's attorney-in-fact under a power of attorney, as well as Anderson's counsel. During Anderson's hospital stay, Irwin witnessed Dr. Chapman chip Anderson's tooth during intubation. Irwin admitted to feeding Anderson a snack during an NPO[4] period, resulting in a delay of a time sensitive

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[1] Clerk's Papers (CP) at 2.

[2] CP at 84. Anderson's claims of medical malpractice and lack of informed consent only relate to the second, third, and fourth surgeries.

[3] CP at 2.

[4] NPO is "medical shorthand for a period of time in which a patient may not eat or drink anything." Resp't's Br. at 8.

surgery, and Irwin alleged that informed consent "was never sought from me as the patient's power of attorney."[5]

That December, in its discovery requests, Swedish asked Anderson to "identify all experts upon whom you rely and/or intend to call as witnesses at trial."[6] Anderson responded that the information was "currently" unavailable.[7]

A few months later, Swedish filed a motion to disqualify Irwin as counsel. The trial court granted Swedish Hospital's motion. Irwin withdrew as counsel but filed a notice of appearance as an "interested party."[8]

In April, Swedish moved for summary judgment on Anderson's claims. Anderson, together with Irwin as an "interested party," filed a motion to continue the summary judgment hearing. The trial court denied the motion. After the hearing, the trial court granted Swedish Hospital's summary judgment motion.

Anderson appeals.

ANALYSIS

I. Motion to Disqualify Counsel

Anderson argues that the trial court erred in granting Swedish Hospital's motion to disqualify her counsel under RPC 3.7(a). We review a trial court's decision to disqualify an attorney for an abuse of discretion.[9] A trial court abuses

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[5] CP at 89.

[6] CP at 73.

[7] Id.

[8] CP at 237.

[9] State v. Schmitt, 124 Wn. App. 662, 666, 102 P.3d 856 (2004).

its discretion when its decision is based on untenable grounds or untenable reasons.[10]

RPC 3.7(a) provides "[a] lawyer shall not act as [an] advocate at a trial in which the lawyer is likely to be a necessary witness." A lawyer is likely to be a necessary witness if "he or she will present testimony related to substantive contested matters."[11]

Here, Irwin's testimony is necessary to support Anderson's medical malpractice and lack of informed consent claims. First, on the issue of medical malpractice, Irwin was present when Dr. Chapman performed the intubation procedure on Anderson and chipped her tooth. Anderson did not know Dr. Chapman chipped her tooth until Irwin "pointed it out to [her]."[12] And Irwin individually followed-up with Dr. Chapman after the incident. Further, Irwin fed Anderson during an NPO period despite "an NPO sign on the door and being told not to do so by the nursing staff."[13] As a result, the surgery was delayed.

Second, on the issue of informed consent, Irwin had a "singular role" as Anderson's attorney-in-fact, and she was the only person who witnessed some of Anderson's discussions with Dr. Chapman. For example, when Dr. Chapman proposed the fourth surgery, Irwin opposed the operation, but Anderson consented. Irwin stated, "We had words over the [fourth] surgery, because I

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[10] Id.

[11] State v. Nation, 110 Wn. App. 651, 659, 41 P.3d 1204 (2002).

[12] CP at 282.

[13] CP at 95.

opposed it and thought mom was not lucid enough to make a competent decision. . . . I was present when she verbally consented to the surgery."[14] Because Irwin is the only person who can testify to many of these events and her testimony regarding her role in the violation of the NPO restriction may be prejudicial to Anderson under a non-party at fault theory, she is a "necessary witness" and cannot also represent Anderson under RPC 3.7(a).

Anderson contends that even if Irwin's testimony was necessary to establish her claims, Irwin can still represent her under RPC 3.7(a)(3), the substantial hardship exception. The exception provides that a lawyer may still represent a client if "disqualification of the lawyer would work substantial hardship on the client."[15] In her reply to Swedish Hospital's motion to disqualify Irwin, Anderson stated, "If my daughter can't represent me, I can't afford another [lawyer]."[16] But Anderson seems to suggest she was primarily disadvantaged because her daughter was not available to assist her with a motion to continue the summary judgment and allow more time to obtain the necessary expert witness. To the contrary, after the court disqualified Irwin, Anderson submitted a motion to continue the summary judgment hearing with Irwin acting as an "interested party." And Irwin signed Anderson's motion to continue as her counsel.[17] Anderson cannot establish that the court's disqualification of Irwin resulted in a substantial

[14] CP at 86.

[15] RPC 3.7(a)(3).

[16] CP at 99.

[17] CP at 233-37.

hardship when Irwin continued to represent her even after the trial court's order. Anderson does not establish that the substantial hardship exception applies here.[18]

In a related argument, Anderson contends that the trial court violated her right to due process in not holding oral argument on Swedish Hospital's motion to disqualify Irwin. But oral argument on a motion is not a due process right.[19] And KCLR 7(b)(3) permits a court to decide nondispositive motions, such as a motion to disqualify, without oral argument. Anderson's argument is not compelling.[20]

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[18] Anderson also contends that the trial court incorrectly disqualified Irwin under RPC 1.7. But because the court did not abuse its discretion in disqualifying Irwin under RPC 3.7, we need not address her alternative argument. Glasgow v. Georgia-Pac. Corp., 103 Wn.2d 401, 407, 693 P.2d 708 (1985).

[19] Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 697, 41 P.3d 1175 (2002) ("'Due process does not require any particular form or procedure. . . . [I]t requires only that a party receive proper notice of proceedings and an opportunity to present [its] position before a competent tribunal.'") (alterations in original) (quoting Hanson v. Shim, 87 Wn. App. 538, 551, 943 P.2d 322 (1997)).

[20] Additionally, Anderson argues that the trial court erred in denying her motion for mandatory mediation under RCW 7.70.100. RCW 7.70.100 provides, "Before a superior court trial, all causes of action, whether based in tort, contract, or otherwise, for damages arising from injury occurring as a result of health care provided after July 1, 1993, shall be subject to mandatory mediation prior to trial." But CR 53.4(d) provides, "Upon petition of any party that mediation is not appropriate, the court shall order or the mediator may determine that the claim is not appropriate for mediation." Here, Swedish filed a CR 53.4(d) motion asserting that mediation was not appropriate because Anderson failed to provide expert testimony supporting the essential elements of her claims. CP at 247-55. The trial court did not err in granting Swedish Hospital's motion.

II. Motion to Continue CR 56(f)

Anderson contends that the trial court erred in denying her motion to continue the summary judgment hearing. We review a trial court's denial of a CR 56(f) motion for an abuse of discretion.[21]

The trial court can deny a motion for continuance under CR 56(f) "where: (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact."[22]

Here, Anderson's motion to continue argued that "discovery [was] not complete" because Swedish had not submitted "any admissible evidence that did not originate" with Anderson, Swedish failed to submit any evidence to "controvert" Anderson's claim for lack of informed consent, and Swedish failed to provide evidence establishing an "alternative explanation" for her injuries.[23] But at the summary judgment hearing, the court stated, "I don't believe that the responsive pleadings that [Anderson] has put forth, actually even comply with any of the Court Rules, let alone CR 56."[24] And, both in the trial court and in her opening brief on

[21] Briggs v. Nova Servs., 135 Wn. App. 955, 961, 147 P.3d 616 (2006), aff'd, 166 Wn.2d 794, 213 P.3d 910 (2009).

[22] Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

[23] CP at 241-42.

[24] Report of Proceedings (RP) (May 28, 2021) at 11.

appeal, Anderson provided no meaningful analysis of the CR 56(f) factors.[25] She offers no specific explanation for her failure to provide an expert witness and no prospects that such an expert would soon be acquired. The trial court did not abuse its discretion in denying Anderson's CR 56(f) motion.

III. Summary Judgment

Anderson contends that the trial court erred in granting summary judgment in favor of Swedish Hospital on her medical malpractice and lack of informed consent claims. We review an order granting summary judgment de novo.[26] Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[27] A genuine issue of material fact exists if the evidence is sufficient for a reasonable person to return a verdict for the nonmoving party.[28]

First, in a medical malpractice claim based on medical negligence, a "defendant moving for summary judgment can meet its initial burden by showing that the plaintiff lacks competent expert testimony."[29] "The burden then shifts to the plaintiff to produce an affidavit from a qualified expert witness that alleges specific facts establishing [the] cause of action."[30] The plaintiff "must show that

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[25] Bright v. Frank Russell Invs., 191 Wn. App. 73, 86, 361 P.3d 245 (2015).

[26] Berger v. Sonneland, 144 Wn.2d 91, 102, 26 P.3d 257 (2001).

[27] Id.

[28] Reyes v. Yakima Health Dist., 191 Wn.2d 79, 86, 419 P.3d 819 (2018).

[29] Guile v. Ballard Cmty. Hosp., 70 Wn. App. 18, 25, 851 P.2d 689 (1993).

[30] Id.

'[t]he health care provider failed to exercise the degree of care, skill, and learning expected of a reasonably prudent health care provider . . . in the same or similar circumstances.'"[31]

Here, in response to Swedish Hospital's interrogatories, Anderson was asked to "identify all experts upon whom you rely and/or intend to call as witnesses at trial on any issue in this case."[32] Anderson responded, "[i]nformation requested is not currently available. Will be provided once an expert is identified and completed review."[33] A few months later, Swedish filed for summary judgment arguing that "Anderson has failed to identify an expert to testify that a health care provider failed to exercise the requisite degree of 'care, skill, and learning' reasonably expected of him or her in the [s]tate of Washington at the time of the care in question."[34] And at the summary judgment hearing, Anderson still did not provide an expert. Anderson failed to meet her burden on summary judgment.

Anderson argues that the trial court erred because our Supreme Court in Putman v. Wenatchee Valley Medical Center[35] held that the certificate of merit requirement was unconstitutional. Former RCW 7.70.150 (2006) required plaintiffs in medical malpractice actions to file a certificate of merit with their pleadings that

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[31] Reyes, 191 Wn.2d at 86 (first alteration in original) (quoting RCW 7.70.040(1)).

[32] CP at 73.

[33] Id.

[34] CP at 142.

[35] 166 Wn.2d 974, 216 P.3d 374 (2009).

contained a statement from an expert supporting the plaintiff's claim that there was a reasonable probability that the defendant's conduct violated the standard of care.[36] But the certificate of merit requirement in former RCW 7.70.150 is distinct from the requirement that on summary judgment in a medical malpractice case the nonmoving party must produce an affidavit from a medical expert alleging that the health care provider violated the standard of care.[37] Further, neither Swedish Hospital nor the trial court relied on the certificate of merit procedural requirement.[38] Anderson's argument is misguided.

Second, to establish a lack of informed consent the plaintiff must show material facts by expert testimony. Specifically, RCW 7.70.050 provides:

> (3) Material facts under the provisions of this section which must be established by expert testimony shall be either:
>
> (a) The nature and character of the treatment proposed and administered;
>
> (b) The anticipated results of the treatment proposed and administered;
>
> (c) The recognized possible alternative forms of treatment; or
>
> (d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.

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[36] Id. at 982-83.

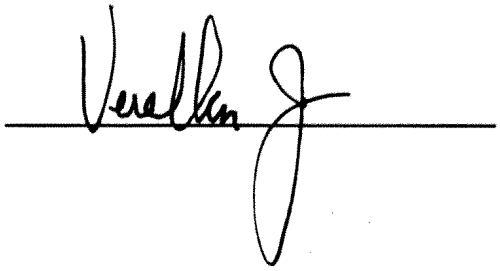
[37] Compare former RCW 7.70.150 with Guile, 70 Wn. App. at 25.

[38] See CP at 141-56, 361-65; RP (May 28, 2021) at 5-15, 21-23.

As discussed, Anderson did not provide the court with an expert. And without an expert, Anderson cannot establish material facts to support her lack of informed consent claim. Anderson's claim necessarily fails.

Because Anderson failed to present the court with an expert establishing the existence of genuine issues of material fact on her medical malpractice and lack of informed consent claims, summary judgment in favor of Swedish Hospital was proper.

Therefore, we affirm.



WE CONCUR:

THE SUPREME COURT
STATE OF WASHINGTON

ERIN L. LENNON
SUPREME COURT CLERK

SARAH R. PENDLETON
DEPUTY CLERK/
CHIEF STAFF ATTORNEY

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July 25, 2022

LETTER SENT BY E-MAIL ONLY

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Hon. Lea Ennis, Clerk
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Kevin Khong
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Re: Supreme Court No. 101113-0 – Sheila Anderson v. Swedish Hospital, et al.
Court of Appeals No. 82780-4-I

Clerk and Counsel:

The Court of Appeals has forwarded the "PETITION FOR REVIEW" in the above referenced matter. The matter has been assigned the Supreme Court cause number indicated above.

RAP 13.4(a) requires the filing of a petition for review within 30 days after a decision terminating review is filed. GR 30(c) provides that an electronic document is filed when it is received during the clerk's business hours, otherwise the document is considered filed at the beginning of the next business day. In this case, the petition for review was due by 5:00 p.m. on July 22, 2022. The petition for review was filed at 5:56 p.m. on July 22, 2022. Under GR 30(c), the filing is considered filed on July 25, 2022, and therefore, it is untimely.

The Petitioner may seek an extension of time in which to file the petition for review by filing a motion for extension of time to file a petition for review. Any such motion should be served and filed in this Court by **August 1, 2022**. The motion should be supported by an appropriate affidavit establishing good cause for the delay in filing the petition for review; see RAP 18.8 for information on extension of time for filings and RAP Title 17 for the general rules

governing motions. A motion for extension of time to file is normally not granted; see RAP 18.8(b).

In addition, the $200 filing fee did not accompany the petition. The filing fee should also be paid by **August 1, 2022**.

To continue with this case, by **August 1, 2022**, the $200 filing fee must be paid and a motion for extension of time must be received by this Court. Otherwise, it is likely that this case will be dismissed.

Upon receipt of the filing fee and the motion for extension of time, due dates will be set for filing any answer to the petition for review and the motion for extension of time.

Counsel are referred to the provisions of General Rule 31(e) regarding the requirement to omit certain personal identifiers from all documents filed in this court. This rule provides that parties "shall not include, and if present shall redact" social security numbers, financial account numbers and driver's license numbers. As indicated in the rule, the responsibility for redacting the personal identifiers rests solely with counsel and the parties. The Clerk's Office does not review documents for compliance with the rule. Because briefs and other documents in cases that are not sealed may be made available to the public on the court's internet website, or viewed in our office, it is imperative that such personal identifiers not be included in filed documents.

Counsel are advised that future correspondence from this Court regarding this matter will most likely only be sent by an e-mail attachment, not by regular mail. For attorneys, this office uses the e-mail address that appears on the Washington State Bar Association lawyer directory. Counsel are responsible for maintaining a current business-related e-mail address in that directory.

Sincerely,

Sarah R. Pendleton
Supreme Court Deputy Clerk

SRP:jm

THE SUPREME COURT
STATE OF WASHINGTON

ERIN L. LENNON
SUPREME COURT CLERK

SARAH R. PENDLETON
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August 3, 2022

LETTER SENT BY E-MAIL ONLY

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Re: Supreme Court No. 101113-0 – Sheila Anderson v. Swedish Hospital, et al.
Court of Appeals No. 82780-4-I

Counsel:

On July 29, 2022, this office received Petitioner's "MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW". On August 2, 2022, the $200 filing fee (check #1034) was received.

Both the motion for extension to file petition for review and the petition for review have been set for consideration without oral argument by a Department of the Court. If the members of the Department do not unanimously agree on the manner of the disposition, consideration of the matter will be continued for determination by the En Banc Court.

Counsel for Respondent should serve and file any answer to the motion for extension and any answer to the petition for review by **September 2, 2022**. If the Respondent wishes, a combined answer may be served and filed. If the Respondent wants to raise an issue which is not raised in the petition for review, the Respondent must raise the new issue in the answer.

If the Court grants the motion for an extension of time to file the petition for review, the Court will consider the petition for review on the merits.

Any amicus curiae memorandum in support of or in opposition to a pending petition for review should be served and received by this Court and counsel of record for the parties and other amicus curiae by 60 days from the date the petition for review was filed; see RAP 13.4(h).

Sincerely,

Sarah R. Pendleton
Supreme Court Deputy Clerk

SRP:jm

HELSELL FETTERMAN LLP

August 05, 2022 - 3:34 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,113-0
Appellate Court Case Title:	Sheila Anderson v. Swedish Hospital, et al.

The following documents have been uploaded:

- 1011130_Answer_Reply_20220805152142SC168164_4613.pdf
  This File Contains:
  Answer/Reply - Answer to Motion
  The Original File Name was Ans. to Mot. for Ext. of Time and Pet. for Rev.pdf

A copy of the uploaded files will be sent to:

- atty@irwinfirm.com
- dcorey@helsell.com
- gkhakimova@helsell.com
- mpham@helsell.com
- pchu@helsell.com
- seastley@helsell.com

Comments:

Consolidated Answer to Motion for Extension of Time and Petition for Review

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Sender Name: Kevin Khong - Email: kkhong@helsell.com
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1001 4TH AVE STE 4200
SEATTLE, WA, 98154-1154
Phone: 206-689-2147

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