69643-2

69643-2

No. 69643-2-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

PATRICIA GRANT,

Appellant,

vs.

CLAUDIO GABRIEL ALPEROVICH, ST. FRANCIS HOSPITAL-FRANCISCAN HEALTH SYSTEM, VALLEY MEDICAL CENTER, TRIET M. NGUYEN, MICHAEL K. HORI, PACIFIC MEDICAL CENTER INC., LISA OSWALD, SHOBA KRISHNAMURTHY, MICHELE PULLING, WM. RICHARD LUDWIG, U.S. FAMILY HEALTH PLAN @PACIFIC MEDICAL CENTER INC., VIRGINIA MASON HEALTH SYSTEM, RICHARD C. THIRLBY, AND UNKNOWN JOHN AND JANE DOES,

Respondents.

RESPONDENT MICHAEL K. HORI, M.D.'S BRIEF

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I. INTRODUCTION

Appellant Patricia Grant ("Ms. Grant" or "Plaintiff") sued the Respondent Michael K. Hori, M.D. ("Dr. Hori" or "Defendant"), along with multiple other defendants, for alleged injuries resulting from medical care and treatment provided by the defendants following a gastric bypass surgery. As it relates to Dr. Hori, Ms. Grant's allegations stem from a single infectious disease consultation by Dr. Hori, which was done at the request of Dr. Claudio Gabriel Alperovich, Ms. Grant's bariatric surgeon. Dr. Hori's consultation consisted of a physical examination, an order for diagnostic testing, review of the test results, a follow-up physical examination, and a recommendation to Dr. Alperovich. In total, Dr. Hori's medical care and treatment of Ms. Grant occurred over the course of three days from August 3, 2009 through August 5, 2009.

Dr. Hori sought summary judgment, asserting Ms. Grant's exclusive remedy was RCW 7.70 *et seq*. because her allegations arose from the provision of health care by Dr. Hori, and she lacked the requisite expert testimony. Also, to the extent Ms. Grant was making a civil conspiracy claim, i.e. an allegation Dr. Alperovich and Dr. Hori engaged in a cover-up regarding a misdiagnosis of thrush by Dr. Alperovich, which was not preempted by RCW 7.70 *et seq*., she failed to establish the essential elements and raise a genuine issue of material fact.

Ms. Grant failed to produce the expert testimony necessary to support a claim against Dr. Hori under RCW 7.70 *et seq.*, nor did she produce any legal or evidentiary basis to support a claim for civil conspiracy. As such, Dr. Hori's Motion for Summary Judgment was granted, and Ms. Grant's claims against Dr. Hori were dismissed with prejudice. Ms. Grant appealed.

Ms. Grant's appellate brief fails to articulate any factual or legal basis under which she would be entitled to relief from Dr. Hori based on the available record. Even when all plausible theories are considered, it is clear that Ms. Grant was not entitled to relief. Ms. Grant's allegations of bias against the trial court, and other allegations, are unavailing based on the facts in the record. Therefore, the trial court should be affirmed.

II. STATEMENT OF CASE

A. Facts.

Ms. Grant had elective gastric bypass surgery on June 17, 2009. On August 1, 2009, she was emergently taken to the Emergency Department at Valley Medical Center, where Dr. Cameron R. Buck, M.D. saw Ms. Grant for abdominal pain and vomiting. CP 542-543. Dr. Buck's ED Report notes Ms. Grant had recently been treated for a potential yeast esophagitis infection; specifically oral thrush. CP 542. Dr. Buck treated Ms. Grant with IV normal saline and discussed the case with Ms. Grant's

gastric bypass surgeon, Dr. Alperovich. CP 543.

On August 2, 2009, Dr. Alperovich saw Ms. Grant at Valley Medical Center. CP 545-546. Dr. Alperovich's note states that Ms. Grant was convinced she had an ongoing esophageal yeast infection, despite the fact a recent endoscopy at St. Francis Hospital showed no evidence of such an infection. CP 546. Significantly, Dr. Alperovich's note also states Ms. Grant showed no evidence of thrush. CP 546. Dr. Alperovich noted, however, that he would request an infectious disease consult to further explore Ms. Grant's belief she had an esophageal fungal infection. CP 546.

At the request of Dr. Alperovich, Dr. Hori provided an infectious disease consultation on August 3, 2009. CP 548-549. Dr. Hori conducted a physical examination of Ms. Grant, and based on his examination and Ms. Grant's medical history, noted it was unlikely Ms. Grant suffered from any intraabdominal or esophageal fungus. CP 548-549. He nevertheless ordered a blood and urine culture with sedimentation rate and C-reactive Protein Test to address the possibility. CP 548. Dr. Hori's note states that following the culture he would consider putting Ms. Grant on two weeks of Diflucan, if tolerated, to address any possible esophagitis. CP 548.

Two days later Dr. Hori followed up with another physical exam.

His handwritten note states:

> CC: Abdominal pain and nausea
> Subjective: Patient complains of abdominal pain nausea
> Objective: Afebrile, positive for hypertension
> Chest: clear CV: No murmur ABD: bowel sounds positive, tender without
> Rebound CRP 7, ESR 2, Blood culture x 1 negative, Urine culture, mixed Gram positive organisms
> Assessment: No evidence of invasive infection, cannot rule out esophageal infection
> Plan: Diflucan 200 mg orally as solution for 2 weeks.

CP 551.

As such, Dr. Hori evaluated Ms. Grant for fungal infection as requested by Dr. Alperovich, ruled out any invasive infection based on the test results, but also indicated Diflucan, a drug used to treat fungal infections, as a precaution for any possible esophageal fungal infection. His consult completed, Dr. Hori returned Ms. Grant to Dr. Alperovich's care and never treated her again.

B. Procedure.

Ms. Grant filed her lawsuit in King County Superior Court on June 15, 2012. She filed an Amended Complaint on July 12, 2012, which further explained her allegations against the named defendants. In sum, Ms. Grant seemed to allege medical malpractice against each defendant for failure to diagnose and treat a Petersen's hernia she allegedly suffered during her gastric bypass surgery. With respect to Dr. Hori, she also

alleged he "conspired" with Dr. Alperovich to hide Dr. Alperovich's alleged failure to diagnosis the Petersen's hernia by covering it up with a diagnosis of thrush.

On August 7, 2012, almost two months after Ms. Grant initiated this action, Dr. Hori served his First Interrogatories, Requests for Production, and Requests for Admission on Ms. Grant by first class mail to Ms. Grant's address of record. CP 558-579; 581-585. Dr. Hori requested that Ms. Grant identify any expert support for her allegations against Dr. Hori, as required to make a prima facie case of medical malpractice under Washington law. CP 570; 576; 583. In response, Ms. Grant failed to identify any expert support, so Dr. Hori filed a motion for summary judgment in the trial court on October 9, 2012. CP 590-591; 594; 596-609.

Notably, however, on September 12, 2012, almost two months before the date of Dr. Hori's Motion for Summary Judgment, Dr. Hori's counsel sent Ms. Grant a letter, by first class mail, enclosing a note for Dr. Hori's Motion for Summary Judgment scheduled for November 9, 2012. CP 685. The letter also informed Ms. Grant she would receive the actual motion and supporting documents no later than October 12, 2012, that any opposition would be due October 29, 2012 and that, if granted, her case against Dr. Hori would be dismissed. CP 685. The letter also encouraged

Ms. Grant to seek legal counsel. CP 685. Dr. Hori subsequently served his Motion for Summary Judgment and supporting documents on Ms. Grant via first class mail on October 9, 2012. CP 686. In sum, Ms. Grant was provided a full month's notice beyond that required by the Civil Rules that Dr. Hori would be filing his motion. CP 685-686.

Ms. Grant filed an opposition to Dr. Hori's motion, CP 643-656, along with a declaration under her own signature, CP 610-642, but failed to produce any expert testimony or other legal or evidentiary basis to support her claims against Dr. Hori. Therefore, Dr. Hori's motion went to hearing on November 9, 2012. At that hearing, Ms. Grant attempted to support her opposition, for the very first time, with an untimely and unsworn letter from Dr. Elliot R. Goodman. The trial court noted the letter was submitted at oral argument, was unsworn, and struck it from the record. CP 728-731. The trial court ALSO noted, however, that even if not stricken, the letter lacked foundation and failed to address the pertinent standard of care in Washington. CP 729. Thus, the Honorable Jay White of the Superior Court for the State of Washington for King County granted Dr. Hori's Motion for Summary Judgment and dismissed all claims against him. CP 687-688.

III. ISSUES

1. Did the trial court err when it granted Dr. Hori's Motion for Summary Judgment?

2. Did the trial court err by denying Ms. Grant's request for a continuance?

3. Did Ms. Grant suffer any prejudice by any action on the part of the trial court that would justify this Court reversing the trial court's grant of summary judgment?

IV. ARGUMENT

A. Standard of Review.

A motion for summary judgment presents a question of law reviewed *de novo*. *Osborn v. Mason Cnty.*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). An appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). Rulings on a motion for summary judgment are reviewed based solely on the record before the trial court at the time of the motion for summary judgment. RAP 9.12; *Wash. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 163, 849 P.2d 1201 (1993). Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue

of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). Evidence is construed in the light most favorable to the nonmoving party. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Further, an adverse party may not have rested upon mere allegations or denials, but must instead set forth specific facts showing the existence of a genuine issue for trial. CR 56(e); *McBride v. Walla Walla Cnty.*, 95 Wn. App. 33, 36, 975 P.2d 1029, 990 P.2d 967 (1999).

Lastly, 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. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301, 304-305 (1998). Thus, given Ms. Grant's appeals from the trial court's order striking the letter of Dr. Elliot R. Goodman, which Ms. Grant attempted to submit into evidence for the first time at oral argument before the trial court, that ruling is also reviewed under the *de novo* standard, just like the trial court's order granting summary judgment to Dr. Hori.

B. The Trial Court Was Obligated to Grant Summary Judgment.

Respondents' summary judgment motion established the facts set forth above and demonstrated why Ms. Grant was not entitled to relief under either RCW 7.70 *et seq.* or a civil conspiracy claim. Ms. Grant

failed to submit the expert testimony necessary to support a claim under RCW 7.70 *et seq*. Ms. Grant also failed to establish she was entitled to raise a civil conspiracy claim against Dr. Hori, given the exclusivity of her remedies under RCW 7.70 *et seq*., or submit any evidence to create a genuine issue of material fact even if she could raise such a claim. Ms. Grant had ample time to conduct discovery and, in fact, did conduct discovery. CP 553-556; 680; 685-686. While Ms. Grant did not move for a continuance under CR 56(f), and there is no order denying a continuance before this Court for review, Ms. Grant failed to satisfy the necessary requirements for a continuance under CR 56(f) in any event. CP 643-656; 687-688.

Further, it was appropriate and within the discretion of the trial court to strike the untimely and unsworn letter from Dr. Elliot R. Goodman, which would not have altered the outcome even if it was not stricken. Therefore, the trial court was obligated to grant Dr. Hori's Motion for Summary Judgment.

1. Appellant Failed to Produce the Requisite Expert Testimony to Sustain a Claim under RCW 7.70 *et seq.*

When an injury occurs as a result of health care, the action for damages based on that injury is governed exclusively by Ch. 7.70 RCW *et seq*., regardless of whether the claim is based in "tort, contract, or

otherwise." RCW 7.70.010; *Branom v. State*, 94 Wn. App. 964, 968-69, 974 P.2d 335 1999). While the term "health care" is not defined in RCW 7.70, Washington courts have construed the term to mean "the process in which [a physician is] utilizing the skills which he had been taught in examining, diagnosing, treating or caring fore the plaintiff as his patient." *Branom*, 94 Wn. App at 969 (quoting *Estate of Ely v. Linville*, 75 Wn. App. 431, 439, 878 P.2d 1241 (1994)). Moreover, "health care" is defined in RCW 70.02.010(4)(a) as "any care, service, or procedure provided by a health care provider: (a) to diagnose, treat, or maintain a patient's physical or mental condition."

Here, Dr. Hori's provision of health care to Ms. Grant is limited to the exclusive remedy afforded by RCW 7.70 *et seq*. Importantly, Ms. Grant never disputed that her claims against Dr. Hori arose from the provision of health care. Instead, Ms. Grant argued that under *Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009), and *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 216 P.3d 374 (2009), RCW 7.70 *et seq*. did not provide the exclusive remedy for claims arising from health care. RP 23:22-25:19. Neither case supports Ms. Grant or is even applicable. *See Ambach*, 167 Wn.2d at 173, 216 P.3d at 408 (holding personal injury damages are not compensable damages under the Washington Consumer Protection Act); *Putnam*, 166 Wn.2d 974, 979, 216

P.3d 374, 377 (striking down the Certificate of Merit requirement codified in RCW 7.70.150).

Under Ch. 7.70, a plaintiff who seeks recovery from a health care provider for injuries resulting from medical treatment must, except under the most unusual circumstances, offer expert testimony to establish the essential elements of her claim. *Harris v. Groth,* 99 Wn.2d 438, 449, 663 P.2d 113 (1983). A plaintiff must establish by expert testimony that the defendant failed to "exercise the degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the State of Washington, acting in the same or similar circumstances" and that the alleged negligence was the proximate cause of injury. RCW 7.70.040(1); *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989); *Morinaga v. Vue*, 85 Wn. App. 822, 831-32, 935 P.2d 637 (1997); *Harris v. Groth,* 99 Wn.2d at 451. A health care provider is entitled to summary judgment dismissal once the provider establishes that the plaintiff lacks competent expert testimony. *Morinaga*, 85 Wn.2d at 833, 935 P.2d at 638.

Here, Ms. Grant did not produce any expert testimony to show that Dr. Hori breached the applicable standard of care or that a breach proximately caused her injury or damage, as required by RCW 7.70 and the case law interpreting the statute. CP 610-656. Nothing in the record

is sufficient to discharge this burden. As such, summary judgment was mandatory.

2. The Trial Court Did Not Err In Refusing To Consider Appellant's Unsworn Letter From Her Subsequent Treating Provider, And It Was Not Sufficient To Resist Dr. Hori's Motion In Any Event.

On November 9, 2012, for the first time, Ms. Grant produced an unsworn letter from Dr. Elliot R. Goodman. RP 17:1-21:5. Ms. Grant had not previously filed Dr. Goodman's letter with the trial court, or provided the letter to defense counsel. RP 17:1-21:5 Therefore, Dr. Goodman's letter was untimely under CR 56. Further, Dr. Goodman's letter was unsworn and violated CR 56. CP 729. Thus, the trial court properly struck Dr. Goodman's letter. CP 723-731.

Even if the trial court had considered Dr. Goodman's letter, however, it failed to provide the expert testimony necessary to defeat Dr. Hori's Motion for Summary Judgment. Notably, Dr. Goodman's letter (i) was not designated for appeal; (ii) is unsworn; (iii) fails to identify Dr. Hori by name; (iv) fails to identify the foundation for any admissible opinion as to Dr. Hori; and (v) fails to establish that the author is qualified to offer any admissible opinions as to Dr. Hori. Whether to admit a professed declaration into evidence is within the discretion of the trial court. *Southwick v. Seattle Police Officer John Doe*, 145 Wn.

App. 292, 301, 186 P.3d 1089, 1093-1094 (2008) (holding it is within the discretion of the trial court whether to accept or reject an untimely declaration, and finding the trial court did not err in striking an untimely declaration offered to oppose summary judgment); *Brown v. Peoples Mortg. Co.*, 48 Wn. App. 554, 559-560, 739 P.2d 1188, 1191-1192 (1987) (stating whether to accept or deny an untimely declaration is within the trial court's discretion, and finding no abuse of discretion in the trial court's rejection of an untimely declaration offered in opposition to summary judgment). Here, the trial court did not err in failing to consider Dr. Goodman's letter in granting Dr. Hori's Motion for Summary Judgment, nor would that letter change the outcome even if it had been designated for appeal.

3. Appellant Admitted That She Was Not Seeking Redress from Dr. Hori Under Her Only Available Remedy, Which Admission Warranted Dismissal.

Dr. Hori, an infectious disease specialist, was providing "health care" at the time of his two encounters with Ms. Grant, as that term is defined in RCW 70.02.010(4)(a).[1] Under *Branom*, Ms. Grant's action

[1] "Health care" refers to "any care, service, or procedure provided by a health care provider: (a) [t]o diagnose, treat, or maintain a patient's physical or mental condition." RCW 70.02.010(4)(a).

against Dr. Hori is governed "exclusively" by RCW 7.70. *et seq.*[2] Ms. Grant provided no authority to the contrary, and, as noted supra, failed to produce the expert testimony required to survive summary judgment dismissal.

Independently, Ms. Grant admitted in her Response to Dr. Hori's Motion for Summary Judgment that she was not raising a claim under RCW 7.70 *et seq.*, her exclusively remedy. She stated in her Response that she "has made not (sic) allegations against Hori for medical malpractice [or] failure to diagnose[.]" CP 645(L:94-96); 646(L:118-120); 651(L:302-304). Because Ms. Grant admitted that she did not seek liability under her only available theory, her action should be dismissed. The preclusive effect of admissions made by a party in its pleadings was explained by the Appellate Court of Illinois in *Brummet v. Farel*, 576 N.E.2d 1232, 1234 (Ill. App. Ct. 1991):

> "Admissions come in two varieties, judicial and evidentiary. A judicial admission is conclusive upon the party making it; it may not be controverted at trial or on appeal. Judicial admissions are not evidence at all but rather have the effect of withdrawing a fact from contention." Included in this category are admissions made in pleadings, formal admissions made in open court,

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[2] *Branom v. State,* 94 Wn. App. 964, 968-69, 974 P.2d 335, *review denied,* 138 Wn.2d 1023, 989 P.2d 1136 (1999) ("Reading RCW 7.70.010 and .030 together, we conclude that whenever an injury occurs as a result of health care, the action for damages for that injury is governed ***exclusively*** by RCW 7.70. We also conclude that the specific question of whether the injury is actionable is governed by RCW 7.70.030.") (emphasis added).

> stipulations, and admissions pursuant to requests to admit." CP 670.

The doctrine of judicial admissions is recognized in Washington. *See, e.g., F. W. Woolworth Co. v. City of Seattle*, 104 Wash. 629, 633-34, 177 P. 664 (1919) (where during principal's action against city for damage to goods the general manager admitted that no damage resulted from certain backwater, plaintiff was bound by the statement as an admission made during trial). Here, Ms. Grant's ability to recover is barred by her own admission.

4. Appellant Failed To Raise A Genuine Issue Of Material Fact Under Her Alternative Cause Of Action As A Matter Of Law.

If the trial court believed there was any other theory under which Ms. Grant could proceed against Dr. Hori, which it should not have, Ms. Grant's only other claim is barred as a matter of law. Ms. Grant alleged in her Response that Dr. Hori "conspired with defendant Alperovich to placate Ms. Grant regarding an alleged psychogenic fixation on her having 'thrush'." CP 649 (Ll:220-221). Although Ms. Grant stated she "has not claimed nor alleged civil conspiracy," CP 649(Ll:219-220), there is no other cognizable claim that fits with Ms. Grant's allegation. At other places in her Response, Ms. Grant stated "Appellant is alleging that Dr.

Hori conspired with Dr. Alperovich" and outlines her "Claims of Conspiracy." CP 651(Ll:303-304); 653.

Ms. Grant's Response ignored the extensive authority governing claims of civil conspiracy outlined in Dr. Hori's Motion. Ms. Grant has the burden of proving "by clear, cogent, and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy." *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807 (2008) (quoting *All Star Gas, Inc. v. Bechard,* 100 Wn. App. 732, 740, 998 P.2d 367 (2000)). "Mere suspicion or commonality of interests is insufficient to prove a conspiracy," *All Star Gas*, 100 Wn. App. at 740, and Ms. Grant's allegations as to the existence of a civil conspiracy are based on nothing more than speculation, and do not rise to clear, cogent, and convincing evidence of a conspiracy. Dr. Hori's note makes clear that Dr. Hori did not believe it likely that Ms. Grant had Thrush, but ordered medications for Thrush as a precaution. CP 548-549. Ms. Grant has not alleged that the order for such medication violated the standard of care or proximately caused her any injury, nor does she have any expert testimony to that

effect.[3] Importantly, however, the medical record belies any suggestion that Dr. Hori was engaged in a "conspiracy" to validate Dr. Alperovich's earlier diagnosis of Thrush, which diagnosis not even Dr. Alperovich maintained at the time of Ms. Grant's treatment by Dr. Hori. CP 546.

C. Appellant Was Not Entitled To A CR 56(f) Continuance.

Under CR 56(f), a non-moving party may receive a continuance of a summary judgment motion under certain limited conditions. A court's denial of a CR 56(f) motion to continue is justified 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.

See Tellevik v. Real Property, 120 Wn.2d 68, 90, 838 P.2d 111 (1992) (emphasis added); *Ernst Home Center, Inc. v. United Food and Commercial Workers Intern. Union, AFL-CIO, Local 1001,* 77 Wn. App. 33, 49, 888 P.2d 1196 (1995); *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425 (1986). A trial court's ruling on a CR 56(f) motion for continuance on summary judgment motion to allow for further discovery is reviewed only for abuse of discretion. *Ernst Home Center*, 77 Wn. App. at 50. Under Washington law, a CR 56(f) continuance is not a free

[3] Further, any suggestion that Dr. Hori was under a continuing duty to treat Ms. Grant following the consult is false and misunderstands the very concept of a medical "consult", and at any rate is unsupported by the required expert testimony.

pass for a litigant that has sat back and done nothing until it is too late. It is a remedy for a party who knows of the specific existence of a material witness who has information expected to support the party's motion opposition, and where there is good reason why that witness' declaration might not be obtainable in time for submission against the motion. *Turner v. Kohler, M.D.*, 54 Wn. App. 688, 693-94, 775 P.2d 474 (1989). Moreover, a party's desire to conduct further discovery is irrelevant in the context of CR 56(f) if the proposed discovery does not address the precise issue of the summary judgment motion. *Turner*, 54 Wn. App at 775.

D. Appellant Had Already Conducted Discovery And Suffered No Prejudice From Any Alleged Action Or Inaction On The Part Of The Trial Court To Her Ability To Resist Dr. Hori's Motion.

Ms. Grant served her discovery by mail on August 28, 2012. Under CR 5(b)(2)(A), service was effective three days later, on Friday, August 31, 2012. Dr. Hori's responses were to be due thirty days later, on Monday, October 1, 2012.[4] Because he was unable to obtain his client's final review of the responses by that date, Counsel for Dr. Hori sent to Ms. Grant a letter on September 28, 2012, indicating the responses would be served by mail on Friday, October 5, 2012. CP 680. That is exactly what

[4] The thirtieth day, September 30, 2012, fell on a Sunday.

happened, as confirmed by the Certificate of Service. CP 682. Under CR 5(b)(2)(A), the service was effective three days later, on Monday, October 8, 2012.

There was no prejudice caused to Ms. Grant by the date on which she received Dr. Hori's discovery responses, as service for the responses was effective four days prior to when she was served with Dr. Hori's Motion, which allowed her longer than the normal seventeen (17) days to draft her response as permitted under CR 56(c).[5] Nothing that the Superior Court did or did not do affected the fact that Ms. Grant had more than ample time under the Civil Rules to obtain, if available to her, the competent expert testimony required to resist Dr. Hori's motion, which she did not do.

V. CONCLUSION

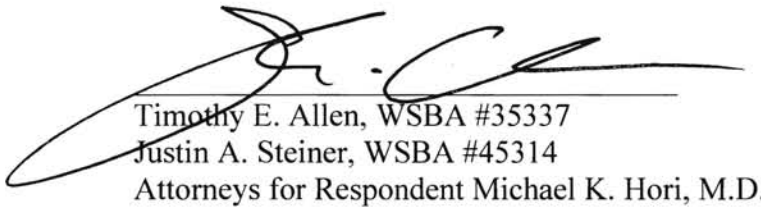
Ms. Grant's allegations against Dr. Hori stem from a single infectious disease consultation. Thus, Dr. Hori sought summary judgment, asserting Ms. Grant's exclusive remedy was RCW 7.70 *et seq.* because her allegations arose from the provision of health care by Dr. Hori, and she lacked the requisite expert testimony. Ms. Grant failed to produce timely and admissible expert testimony in opposition to Dr.

[5] The motion was served by mail on Tuesday, October 9, 2012, which service was effective Friday, October 12, 2012, as required under CR 56(c) for the Motion's noting date of Friday, November 9, 2012.

Hori's motion. The trial court acted within its discretion in striking the untimely, unsworn letter from Dr. Goodman, which would have been insufficient to repel summary judgment in any event. Also, to the extent Ms. Grant was making a civil conspiracy claim, i.e. an allegation Dr. Alperovich and Dr. Hori engaged in a cover-up regarding a misdiagnosis of thrush by Dr. Alperovich, which was not preempted by RCW 7.70 *et seq.*, she failed to establish the essential elements and raise a genuine issue of material fact. Additionally, while there is no order denying a CR 56(f) continuance on appeal, Ms. Grant had ample time to conduct discovery, did conduct discovery, and failed to establish the requisite basis for a continuance. On appeal, Ms. Grant's appellate brief fails to articulate any factual or legal basis under which she would be entitled to relief from Dr. Hori, fails to show any way in which the trial court erred, and, therefore, the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 17th day of September, 2013.

BENNETT BIGELOW & LEEDOM, P.S.



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CERTIFICATE OF SERVICE

I, certify under penalty of perjury under the laws of the State of Washington that on September 17, 2013, I caused the foregoing **(1) Respondent Michael K. Hori', M.D.'s Brief,** and **(2) this Certificate of Service** to be delivered as follows:

Patricia A. Grant Pro Se Appellant 1001 Cooper Point Road, SW Suite 140-231 Olympia, WA 98502	☒ ❑ ❑ ☒ ❑ ☒	Hand Delivered Facsimile Email 1st Class Mail Priority Mail Federal Express, Next Day
Donna Moniz, WSBA #12762 Johnson, Graffe, Keay, Moniz & Wick, LLP 925 Fourth Avenue, Suite 2300 Seattle, WA 98104 Attorneys for Defendants King County Public Hospital District No. 1 d/b/a Valley Medical Center and Trient M. Nguyen, D.O.	❑ ❑ ❑ ☒ ❑ ❑	Hand Delivered Facsimile Email 1st Class Mail Priority Mail Federal Express, Next Day
David J. Corey, WSBA #26683 Floyd, Pflueger & Ringer, PS 200 West Thomas Street, Suite 500 Seattle, WA 98119-4296 Attorneys for Defendants Virginia Mason Health System and Richard C. Thirlby, M.D.	❑ ❑ ❑ ☒ ❑ ❑	Hand Delivered Facsimile Email 1st Class Mail Priority Mail Federal Express, Next Day
Philip J. VanDerhoef, WSBA #14564 Susan E. Wassell, WSBA #42783 Fain Anderson VanDerhoef, PLLC 701 Fifth Avenue, Suite 4650 Seattle, WA 98104 Attorneys for Defendants Franciscan Health System d/b/a St. Joseph Medical Center	❑ ❑ ❑ ☒ ❑ ❑	Hand Delivered Facsimile Email 1st Class Mail Priority Mail Federal Express, Next Day

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