73018-5

73018-5

No. 73018-5-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

GABRIELLE NGUYEN-ALUSKAR,

Appellant

v.

The LASIK Vision Institute, LLC; GORDON JENSEN, M.D., a physician; and JOHN/JANE DOE PHYSICIANS 1-10,

Respondents

APPELLANT BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Regulations and Rules

Other Authorities

DATED April 17, 2015.

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I. ASSIGNMENTS OF ERROR

No. 1: Trial court's order granting fees and costs to Respondent LASIK

No. 2: Trial court's order denying request for CR 56(f) continuance

No. 3: Trial court's order denying reconsideration of order granting summary judgment to Respondents

No. 4: Trial court's failure to reverse its order granting summary judgment to Respondents

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1: Did the trial court abuse its discretion by awarding fees and costs to Respondent LASIK?

No. 2: Did the trial court abuse its discretion in denying request for CR 56(f) continuance?

No. 3: Did the trial court abuse its discretion in denying reconsideration of order granting summary judgment for Respondents?

No. 4: Did the trial court err in failing to reverse its order granting summary judgment for Respondents?

III. STATEMENT OF THE CASE

A. Background of Claim

This matter arises from treatment provided by Respondents The LASIK Vision Institute, LLC; Gordon Jensen, MD, and John/Jane Doe physicians 1-10 (Respondents) to Appellant Gabrielle Nguyen-Aluskar.[1] Appellant consulted with and agreed to undergo the procedure with

[1] Clerk's Papers (CP) at 1-8.

Respondents.[2] During the consultation, Respondents offered to include an enhancement procedure for $895 to correct any deterioration in Appellant's eyesight in the years following the initial LASIK procedure.[3] Respondents referred to the enhancement procedure as "falcon-vision" enhancement procedure.[4] Respondents did not discuss the "falcon-vision" procedure further, and based upon Respondents' representations, Appellant purchased the "falcon-vision" enhancement procedure option.[5] In February 2005, Respondents performed a LASIK corrective procedure on Appellant's eyes, which resulted in 20/20 vision.[6]

In the years that followed, as is typical with LASIK patients, Appellant's eyesight began to deteriorate again.[7] She returned to the Respondents, seeking to have them perform the "falcon-vision" enhancement procedure.[8] In Respondents' Communication Log, Respondents or Respondents' agent noted that Appellant's "left cornea is extremely thin @ 409 and that she is not really a candidate for an enhancement."[9]

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[2] CP 169-71, 179-80; 231-38; 260-64; 328-31.
[3] CP 169-71, 179-80; 231-38; 260-64; 328-31.
[4] CP 169-71, 179-80; 231-38; 260-64; 328-31.
[5] CP 169-71, 179-80; 231-38; 260-64; 328-31.
[6] CP 169-71, 179-80; 231-38; 260-64; 328-31.
[7] CP 169-71, 179-80; 231-38; 260-64; 328-31.
[8] CP 169-71, 179-80.
[9] CP 169-71, 179-80.

Despite acknowledging Appellant's "extremely thin cornea," Respondents agreed to perform the "falcon-vision" enhancement in January of 2012.[10] Prior to the surgery Respondents elected to have Appellant sign a one-page, generic consent form, which referenced the consent form Appellant signed in 2005.[11] Appellant signed the one-page consent form after receiving eye drops from Respondents, which inhibited her vision.[12] Appellant was not presented with the consent form prior to receiving the eye drops from Respondents.[13]

On January 27, 2012, Respondents performed the "falcon-vision" enhancement on Appellant.[14] Respondents did not inform Appellant that she had dangerously thin corneas that would leave her highly susceptible to many complications from the "falcon-vision" enhancement procedure.[15] Respondents did not discuss with Appellant that she would require reading glasses after the procedure.[16]

After completion of the "falcon-vision" enhancement procedure, Appellant's vision deteriorated further and she has suffered from blurred vision, severe dry eyes, refraction, lagophthalmos, astigmatism, throbbing

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[10] CP 169-71, 179-80; 231-38; 260-64; 328-31.
[11] CP 74; 169-71, 179-80; 231-38; 260-64; 328-31.
[12] CP 169-71, 179-80; 231-38; 260-64; 328-31.
[13] CP 169-71, 179-80; 231-38; 260-64; 328-31.
[14] CP 1-8; 169-71, 179-80; 231-38; 260-64; 328-31.
[15] CP 169-71, 179-80; 231-38; 260-64; 328-31.
[16] CP 169-71, 179-80; 231-38; 260-64; 328-31.

pain, migraines, among others.[17] Appellant's eyesight is significantly worse than it was prior to the "falcon-vision" enhancement procedure.[18] As a result of her injuries, Appellant was unable to complete a loan transaction that would have earned her approximately $320,000 in commission.

B. Respondent LASIK's Request for Costs

1. First Lawsuit

Appellant, her husband Ghokan Aluskar, and their marital community originally filed suit against Respondents on January 13, 2013.[19] They alleged multiple causes of action for incidents outlined above.[20] Importantly, Ghokan Aluskar also asserted a claim for past, present, and future damages to the marital community and loss of consortium.[21]

2. Appellants Complied With Discovery Requests

During the initial litigation, Appellant and her husband complied with reasonable discovery requests. Both supplied responses to interrogatories, requests for production, requests for statement of damages,

[17] CP 169-71, 179-80; 231-38; 260-64; 328-31.
[18] CP 169-71, 179-80; 231-38; 328-31.
[19] CP 338-End. Appellant filed Supplemental Designation of Clerk's Papers, but Plaintiff does not have specific page numbers at the time of this filing.
[20] CP 338-End.
[21] CP 338-End.

and they executed stipulations and authorizations to release medical records.[22]

3. Appellant Moved for Voluntary Non-Suit

During the course of litigation, for personal reasons, Mr. Aluskar decided to walk away from the loss of consortium claim.[23] A dismissal of former Mr. Aluskar and the loss of consortium claim was considered, however, voluntarily dismissing the lawsuit and refiling a new complaint that did not in any way mention Mr. Aluskar or the loss of consortium claim was preferred.[24]

Appellant moved for a voluntary non-suit on December 11, 2013.[25] Appellant notified Respondents and the Court that Appellant intended to re-file the matter.[26] Neither Respondent objected.[27] Neither Respondent asked for costs.[28] The Order for Voluntary Non-Suit Without Prejudice was signed by Judge Ramsdell on December 23, 2013, with no opposition and no mention of costs or conditions should the matter be refiled.[29]

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[22] CP 338-End.
[23] CP 338-End.
[24] CP 338-End.
[25] CP 338-End.
[26] CP 338-End.
[27] CP 338-End.
[28] CP 338-End.
[29] CP 338-End.

4. Second Lawsuit Involves Reduced Parties and Claims Asserted

On February 21, 2014, Appellant, individually, filed a lawsuit alleging multiple causes of action against Respondents.[30] Appellant's second complaint contained key differences from the first complaint, including the removal of Mr. Aluskar and any claims for loss of consortium.[31]

5. Respondent LASIK's Motion for Costs

Respondent LASIK alleged the following costs: legal messenger costs ($105.00); FedEx costs ($121.78); legal research costs ($190.25); jury verdict research costs ($140.00); Appellant's medical records ($237.90); photocopies ($580.30); expert-related costs ($2,450.00); parking costs ($7.00); and costs related to background information about Appellant ($20.70). Respondent LASIK alleged these costs were reasonable and amount to $3,875.42, and $200 in statutory attorney fees, for a total of $4,075.42.[32] Respondents have made no claim or showing that any of these line item costs will not be used in the current action or have no value with respect to the current lawsuit.[33] Specifically, Respondent LASIK requested $2,450.00 for expert related costs, including

[30] CP 338-End.
[31] CP 338-End.
[32] CP 338-End.
[33] CP 338-End.

a review of Appellant's medical records by Dr. McKillop, which is the same expert Respondent utilized in support of Respondent LASIK's motion for summary judgment in this action.[34]

The trial court entered an unclear order that both indicated that it granted and also denied Respondent LASIK's motion.[35] On December 12, 2014, when granting Respondent LASIK's motion for summary judgment, the trial court indicated that it intended to grant Respondent LASIK's prior motion for costs and awarded $4,075.24.[36]

C. Appellant's Request for a CR 56(f) Continuance

Respondents each filed for summary judgment, alleging Appellant did not have any expert testimony to support her claims.[37] As such, Appellant scheduled a meeting with Dr. Bensinger for purposes of drafting a declaration in opposition of Respondents' motions.[38]

1. Background

Prior to filing suit, in 2012, Appellant consulted with and retained Richard Bensinger, MD, a Board-Certified Ophthalmologist who is licensed to practice in the State of Washington, in order to provide an opinion regarding the care that Appellant received from the

[34] CP 25-43; 99-102; 338-End
[35] CP 338-End.
[36] CP 339-40.
[37] CP 25-43; 115-125.
[38] CP 170-71, 179-80; 260-264.

Respondents.[39] In 2012, Dr. Bensinger reviewed Plaintiff's medical treatment records, examined the Plaintiff, and provided opinions regarding Defendants' medical treatment, which precipitated Plaintiff filing this lawsuit.[40] Dr. Bensinger's opinions supported the allegations contained in Plaintiff's Complaint.[41]

2. 2014 Meeting with Dr. Bensinger

However, when Appellant was preparing her Opposition to Respondents' summary judgment motions, Dr. Bensinger informed Appellant that he could not serve as a witness in her lawsuit.[42] Appellant was entirely reliant upon the opinions provided by Dr. Bensinger and was then left without an expert to oppose Respondents' motions.[43]

3. Request for CR 56(f) Continuance

As such, Appellant requested a short continuance to locate a new expert to provide testimony regarding the standard of care and informed consent prior to Appellant's "falcon-vision" enhancement surgery.[44] To support the requested continuance, counsel for Appellant explained that Dr. Bensinger's withdraw was a surprise and that Appellant was reliant on

[39] CP 170-71, 179-80; 260-64.
[40] CP 170-71, 179-80; 260-64.
[41] CP 170-71, 179-80; 260-64.
[42] CP 170-71, 179-80; 260-64.
[43] CP 170-71, 179-80; 260-64.
[44] CP 172-74, 179-80.

the opinion that she obtained from Dr. Bensinger dating back to 2012.[45] Counsel indicated that any subsequent expert's opinion would address the standard of care and informed consent that Appellant received at the hands of Respondents, which would create an issue of material fact that would prohibit an order of summary judgment in Respondents' favor.[46] The trial court denied Appellant's request and granted Respondents' summary judgment motions.[47]

D. Appellant's Motion for Reconsideration

Shortly after the trial court granted Respondents' motions for summary judgment, Appellant again met with Dr. Bensinger, who clarified that a miscommunication had occurred, which led him to believe that he could not serve as her expert.[48] Appellant submitted a motion for reconsideration within 10 days of the trial court's summary judgment order and included the Declaration of Dr. Bensinger, who opined that Respondents' failed to obtain the proper informed consent prior conducting the "falcon-vision" enhancement procedure and failed to provide reasonably prudent medical care.[49] Dr. Bensinger also outlined that last-minute misunderstanding that led him to withdraw and

[45] CP 169-74, 179-80.
[46] CP 169-74, 179-80.
[47] CP 239-42.
[48] CP 243-56; 260-64; 328-331.
[49] CP 260-64.

Appellant's expert witness on the eve of the summary judgment Opposition due date.[50]

Beyond providing the Declaration of Dr. Bensinger, counsel for Appellant also provided a list of additional medical experts that Appellant contacted once Dr. Bensinger withdrew:

- Michael Steiner, MD
- John McDowall, OD
- Niraj Patal, MD
- Gary Chung, MD
- Jay Rudd, MD
- Timothy Carey, MD.[51]

Appellant was not dilatory once the miscommunication with Dr. Bensinger occurred and worked diligently to secure the opinion of another expert.[52] However, counsel for Appellant ceased this endeavor once the miscommunication with Dr. Bensinger was corrected.[53] The trial court, reviewed and therefore considered Dr. Bensinger's Declaration but denied Appellant's motion for reconsideration and upheld its previous order granting Respondents' motions for summary judgment.[54]

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[50] CP 260-64.
[51] CP 243-56.
[52] CP 243-56.
[53] CP 243-56.
[54] CP 335-37.

IV. ARGUMENT

A. Legal Standard

1. Summary Judgment

A summary judgment that fully determines a case is a final, appealable judgment. On appeal, the appellate court decides the case on a de novo basis, engaging in the same analysis as the trial court. *Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App. 769, 875 P.2d 705 (1994).

Both the law and the facts will be reconsidered by the appellate court. *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990). Any findings of fact entered by the trial court will be considered superfluous and will be disregarded by the appellate court. *Redding v. Virginia Mason Medical Center*, 75 Wn. App. 424, 878 P.2d 483 (1994).

If a motion for summary judgment is granted, the order granting the motion is subject to reconsideration. *Applied Indus. Materials Corp. v. Melton*, 74 Wn. App. 73, 872 P.2d 87 (1994). After a written judgment has been formally entered, the judgment is presumptively final but may be challenged at the trial court level by a motion to reconsider (CR 59) or by a motion to vacate (CR 60). *Lane v. Brown & Haley*, 81 Wn. App. 102, 912 P.2d 1040 (1996).

On reconsideration of summary judgment, the trial court may, in its discretion, allow the parties to submit additional materials on the issue of whether the case presents a genuine issue of material fact. Tegland, 4 Wash. Prac., Rules Practice CR 56 (6th ed.). If the trial court chooses to do so, any appeal on the propriety of entering a summary judgment will be decided **on the basis of all materials considered by the trial court, including the new materials offered on reconsideration**. *Martini v. Post*, 178 Wn. App. 153, 313 P.3d 473 (2013) (new evidence submitted on reconsideration created a genuine issue of material fact, precluding summary judgment) (emphasis added).

2. Abuse of Discretion

The proper standard for abuse of discretion is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion. *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990).

B. <u>The Trial Court Abused Its Discretion in Awarding Fees and Costs to Defendant LASIK</u>

CR 41(a)(1)(B) allows a plaintiff, before resting, upon motion, at any time before resting, to voluntarily dismiss the action. However, CR 41(d) states

> [i]f a plaintiff who has once dismissed an action in any court commences an action based upon or including the

> same claim against the same defendant, the court may make such order for the payment of taxable costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

The trial court has discretion to award costs as it may deem proper. CR 41(d).

Here Appellant sought a voluntary non-suit of the initial action under CR 41(a)(1)(B) so the originally complaint concerning Mr. Aluskar could effectively be voided and he could be removed completely from the current action, the loss of consortium claim dismissed, and the issues narrowed. In the second action, Appellant's husband is not a party and there are no claims for loss of consortium. The reduction in parties and claims presented actually benefits benefited Respondents, yet they sought to punish Appellant by seeking costs and fees that were never requested at the time of the voluntary dismissal.

In fact, Respondents were specifically informed Appellant would refile, yet they never opposed the nonsuit in any way whatsoever. They never indicated they would incur any costs as a result. Appellant may have changed course had there been an objection or an allegation that Respondents would seek costs. Appellant was diligent in prosecuting the original action and participated in discovery as discussed above. As such,

there was no good cause and were no tenable grounds for the award of such costs to Respondents

1. *Johnson v. Horizon* Distinguishable as Costs There Were Levied Due to Plaintiff's Repeated Failure to Prosecute his Own Action

Respondents relied on *Johnson v. Horizon*, 148 Wn. App. 628 201 P.3d 346 (2009), as authority for the trial court to assess costs. The plaintiff in *Johnson* sued Horizon under the Jones Act for alleged injuries he incurred while working on a Horizon ship. Respondents failed to identify the facts and reasoning behind the Court's ruling in *Johnson.*

In the trial court, defendant Horizon listed the following facts:

a. The sole cause for the non-suit and re-filing tactic was Johnson's own failure to timely prosecute the previous action due to his admitted methamphetamine use.

b. Horizon had to compel the Johnson to attend his own deposition.

c. At his deposition, Johnson admitted to methamphetamine use throughout the case.

d. Johnson's previous attorneys sought continuances on his behalf because Johnson did not respond to their calls or letters or get him into a drug treatment program.

e. In July 2006, Johnson's counsel sought a second continuance, so that Johnson could get treatment for drug dependence. The parties stipulated to a 90-day continuance.

f. Johnson's attorneys withdrew from the case; Johnson requested a third continuance, which the court refused, so Johnson filed for a voluntary dismissal.

g. Horizon incurred various costs, including charges for plaintiff's IME, court reporter fees, and witness fees for the deposition of one of plaintiff's physicians.[55]

In *Johnson*, the initial trial court "bore witness to the repeated failure of the plaintiff to timely prosecute the previous action," and the court specifically warned the plaintiff that under CR 41(d) "if plaintiff commenced another action on the same or similar claims...taxable costs of this action should be imposed on plaintiff prior to plaintiff prosecuting such claims in the future." *Id.* at 9.

The facts in *Johnson* are vastly different than those in the present case. Here, Appellant diligently prosecuted her initial lawsuit. Appellant participated in discovery. Appellant signed stipulations and authorizations for the release of her medical records. (Appellant did oppose subpoenas for employment and education records that she felt were beyond the scope of discovery.) Respondents have not demonstrated that Appellant was trying to abuse the judicial system, as was the case in *Johnson*. Critically, as further discussed below, Respondents did not oppose the nonsuit or Appellant refiling current action, Respondents did not allege they would incur any costs as a result of the nonsuit and cost of refiling the current

[55] CP 338-End (Exhibit 5 to Plaintiff's Opposition to Defendant LASIK's Motion for Costs – Defendant Horizon's Motion for Costs)

action, and they did not ask the court to include any language regarding the taxation of costs in its order granting the nonsuit. Accordingly, the trial court abused its discretion in awarding Respondents' motion for costs.

2. An Award of Costs would Amount to a Windfall to Respondents

A large portion of Respondents' Cost Bill, $2,450.00, consisted of a medical expert's review of records. Respondents have used the same expert and record review in the current action. Respondents also allege costs for obtaining medical records, photographs, and photocopies. Respondents have used the very same medical records, photographs, and photocopies in the current action. The award of costs to recoup these expenses, especially the expert expenses, has resulted in a windfall to Respondents and punitive measures to Appellant.

A hypothetical scenario might add clarity to Appellant's argument. Consider a 25th High School Reunion scheduled for the first Friday night in June at the high school gym. Expense for decorations, beverages, a banner, and perhaps even a party coordinator are incurred. As sometimes happens in life, the reunion had to be changed to next day on Saturday night. In this situation, there is virtually no additional expense because the date for the reunion was changed. They can use the same decorations and

banner. They can serve the same beverages. The party is already coordinated such that no additional expense is incurred in that regard.

Here, Respondents actually benefited by having initial discovery responses from Appellant, as well as a reduction in the number of parties and claims presented in the current lawsuit. Respondents have already selected at least one expert and they have the advantage of already having his review of records and opinions. Just as in the reunion hypothetical, Respondents have not been harmed and have suffered no prejudice by Appellant voluntarily dismissing her first lawsuit and filing the second action. Accordingly, the trial court abused its discretion in awarding Respondents' motion for costs.

3. Respondents Failed to Object—Appellant Relied Upon No Objection

It is likely that Respondents were aware of the *Johnson v. Horizon* decision at the time Appellant sought a voluntary nonsuit and informed Respondents that she would refile the current matter shortly thereafter. However, Respondents made no objection whatsoever at that time. Respondents never alluded to the fact that they might incur any costs as a result. Had Respondents objected or asserted they may incur costs, Appellant may have changed course and opted for the less desirable dismissal option. Appellant relied (to her detriment apparently) upon the

fact that Respondents did not object or indicate it would incur costs. Consequently, Respondents has waived or it should be estopped from seeking costs at this time.

In sum, Respondents benefited from Appellant's nonsuit by limiting the number of parties and claims present in the subsequent action. Respondents lied in wait, not objecting or indicating that they would seek costs when Appellant's goal was the removal of a party and claims. Then, Respondents sought costs for expenses that they would have incurred in the second suit, including expert opinions, medical records, and other discovery. Respondents have received a windfall and the Appellant has been punished without any tenable grounds upon which to do so. The trial court abused its discretion in awarding Respondents costs and fees, and its order should be reversed.

C. The Trial Court Abused Its Discretion in Denying Request for CR 56(f) Continuance

CR 56(f) allows for a party opposing summary judgment to request a continuance of the hearing

> Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The rule requires the party seeking a continuance to justify the request, demonstrating good cause for the delay. The party seeking a continuance should (1) outline the evidence sought to be discovered if the continuance is granted, and (2) demonstrate how the new evidence would support the party's position in the case. *Morgan v. PeachHealth, Inc.*, 101 Wn. App. 750, 14 p.3d 773 (2000). In considering the application of CR 56(f), the trend of modern law is to interpret court rules and statutes to allow decision on the merits of the case. *Coggle*, 56 Wn. App at 507, *citing Weeks v. Chief of Washington State Patrol*, 96 Wn.2d 893, 895–96, 639 P.2d 732 (1982).

GR 13 allows for the use of declarations in lieu of affidavits and may substantially comport with the form provided in the rule.

The ruling on the motions for a continuance is within the discretion of the trial court and is reversible by an appellate court only abuse of discretion. *Coggle*, 56 Wn. App at 504. A court may deny a motion for a continuance when 1) the moving party does not offer a good reason for the delay in obtaining the evidence; 2) the moving party does not state what evidence would be established through the additional discovery; or 3) the evidence sought will not raise a genuine issue of fact. *Id.* at 507. However, the trial court abuses its discretions when "a party knows of the existence of a material witness and shows good reason why the witness' affidavit

cannot be obtained in time for the summary judgment proceeding, the court has a duty to give the party a reasonable opportunity to complete the record before ruling on the case." *Id.*

In *Coggle*, Coggle brought a medical malpractice claim against Snow but was unable to produce an expert declaration in time for a hearing on Snow's summary judgment motion because Coggle had just hired a new attorney. The trial court denied Coggle's motion and declaration for a continuance and granted summary judgment for Snow. Coggle submitted an expert's declaration with his motion for reconsideration, which the trial court also denied. The Court of Appeals first ruled that the trial court abused its discretion by denying Coggle's motion for a continuance. *Id.* at 508. In supporting its holding, the Court of Appeals noted that (1) the modern trend in the law is to interpret court rules and statues to allow decisions on the merits of the case, *Id.* at 507; (2) the record revealed the reason for Coggle's inability to produce the declarations, *Id.* at 508; (3) Coggle identified the evidence he sought and explained how it would rebut Snow's expert testimony, *Id*; (4) the primary consideration in the trial court's decision "should have been justice," *Id*; and (5) the trial court should have viewed the request in the context of the situation. *Id.* The Court stated "We fail to see how justice is served by a draconian application time limitations here."

Here, the trial court should have granted Appellant's request for a continuance and abused its discretion by denying the motion. Appellant explained that Dr. Bensinger, who had been retained since 2012 and provided opinions that precipitated the lawsuit, withdrew a matter of days prior to the date that Appellant's Opposition was due. Appellant explained that she was wholly reliant on Dr. Bensinger's opinions and that his withdrawal came as a complete surprise. Appellant had already paid Dr. Bensinger $1,700 to examine Appellant, review her medical records, and provide opinions regarding Respondents' medical treatment and the informed consent provided to Appellant. Appellant declared a short continuance was necessary to retain a new expert to provide opinions regarding Respondents' medical treatment and the informed consent provided to Appellant, which would rebut the opinions of Respondents' experts and create issues of material fact central to the action. However, the trial court abused its discretion and denied Appellant's request for a continuance.

D. The Trial Court Abused Its Discretion in Denying Reconsideration of Order Granting Summary Judgment for Respondents

CR 59 allows for a trial Court to vacate a previous decision on motion of the aggrieved party for any one of nine reasons as follows:

RULE CR 59: NEW TRIAL, RECONSIDERATION, AND AMENDMENT OF JUDGMENTS

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties: ...

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial; ...

(9) That substantial justice has not been done.

Regarding surprise, a showing that ordinary prudence could not have guarded against the surprise is required. CR 59(a)(3).

Regarding newly discovered evidence, under CR 59(a)(4), the evidence presented cannot be evidence that was available but not presented at trial. *Wagner Dev., Inc. v. Fid. and Deposit Co. of Maryland*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999). A mere allegation of diligence is not sufficient; the moving party must state facts that explain why the evidence was not available for trial. *Peoples v. City of Puyallup*, 142 Wn. 247, 248, 252 P. 685 (1927). The evidence must be material to the merits of the case and must be evidence that would be admissible

under the usual rules of evidence. *Hinton v. Carmody*, 186 Wn. 242, 60 P.2d 1108 (1936). The evidence must be of such strength as evidence that there is a probability that it might change the result of the trial. *Paddock v. Todd*, 37 Wn.2d 711, 225 P.2d 876 (1950). Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion, which occurs when its decision is based on untenable grounds or reasons. *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 122 P.3d 729 (2005).

Regarding CR 59(a)(9), it serves as a catch-all provision allowing for reconsideration on the basis that "substantial justice has not been done."

In *Coggle*, the Court of Appeals held that the trial court abused its discretion in denying Coggle's motion for reconsideration. *Coggle*, 56 Wn. App at 504. As stated above, Coggle initially requested a CR 56(f) continuance to obtain an expert opinion to refute Snow's expert opinions. *Id.* However, the trial court denied Coggle's requested continuance. *Id.* Coggle then moved for reconsideration and provided the declaration of an expert. *Id.* The trial court also denied Coggle's motion for reconsideration. *Id.* The Court of Appeals noted that it was unclear if the trial court considered the new declaration of the expert in denying the motion for

reconsideration, but if the trial abused its discretion flowing from the denial of the requested continuance.[56] *Id.* at 508-09. In the alternative, if the trial court did consider the declaration, then the trial court erred as a matter of law because the declaration created an issue of material fact. *Id.* at 508-09.

Here, the trial court's denial of Appellant's motion for reconsideration is a *de facto* exclusion of Dr. Bensinger. Washington law requires that prior to the trial court's exclusion of a witness, the trial court must demonstrate three conditions on the record: (1) the trial court's consideration of lesser sanctions; (2) the willfulness of any action; and (3) substantial prejudice arising from the action. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). The trial court did not make any such findings on the record.

Here, the trial court should have granted Appellant's request for reconsideration and abused its discretion by denying the motion. Appellant explained that Dr. Bensinger, who had been retained since 2012 and provided opinions that precipitated the lawsuit, withdrew a matter of days prior to the date that Appellant's Opposition was due. Dr. Bensinger acknowledged his work began back in 2012 in his declaration in support

[56] The Court of Appeals did not cite to a specific subsection of CR 59 when coming to its holding; however, when considering the Court's analysis and discussion regarding the CR 56(f) continuance, it follows that subsections CR 59(a)(4) and/or (9) are applicable.

of Appellant's motion for reconsideration and opposition to summary judgment. Dr. Bensinger also acknowledged that a miscommunication caused him to withdraw as expert days prior to Appellant's Opposition due date. Appellant explained that she was wholly reliant on Dr. Bensinger's opinions and that his withdrawal came as a complete surprise. Appellant had already paid Dr. Bensinger $1,700 to examine Appellant, review her medical records, and provide opinions regarding Respondents' medical treatment and the informed consent provided to Appellant.

Appellant had no reason to believe that Dr. Bensinger would withdraw and be unable to serve as an expert. Appellant had no reason to obtain a declaration from Dr. Bensinger in opposition of a motion for summary judgment that had not yet been filed. Appellant had no reason to take the deposition of Dr. Bensinger and memorialize his testimony when he had been retained and indicated that he would testify for Appellant at trial.

Respondents' own experts signed their declarations two days prior to their filing for summary judgment. As demonstrated by counsel for both parties, ordinary diligence does not require drafting of and execution of expert declarations for motions that are not in existence. Appellant met with Dr. Bensinger 12 days after Respondents filed their motions, at which point Dr. Bensinger surprisingly withdrew. Dr. Bensinger's own

declaration confirmed these facts previously attested to by counsel for Appellant.

Clearly, Dr. Bensinger's withdrawal came as a surprise that ordinary diligence could not have prevented. Further, Dr. Bensinger's testimony was not available at the time of the summary judgment hearing; Appellant was diligent beginning in 2012 in obtaining expert opinions supporting her case; after Dr. Bensinger's withdrawal, counsel for Appellant spoke with no fewer than six other experts in hope of replacing Dr. Bensinger's testimony. Dr. Bensinger's testimony and declaration goes to the heart of this case and speaks directly to the standard of care that Appellant received in the informed consent obtained by Respondents. Dr. Bensinger's declaration is sworn testimony that would be allowed at trial and creates an issue of material fact that would have precluded summary judgment.

Instead of this case being decided on the merits, the trial court enforced the "draconian application time limitations" or precluded justice and determination on the merits. The trial court abused its discretion and not reconsidering its granting of summary judgment due to the surprise faced by Appellant; the newly discovered evidence of Dr. Bensinger's testimony; and substantial justice not being done.

E. The Trial Court Erred in Granting Summary Judgment for Respondents

A summary judgment that fully determines a case is a final, appealable judgment. On appeal, the appellate court decides the case on a de novo basis, engaging in the same analysis as the trial court. *Roger Crane & Associates, Inc.*, 74 Wn. App. 769.

Both the law and the facts will be reconsidered by the appellate court. *Brouillet*, 114 Wn.2d 788. Any findings of fact entered by the trial court will be considered superfluous and will be disregarded by the appellate court. *Redding*, 75 Wn. App. 424.

If a motion for summary judgment is granted, the order granting the motion is subject to reconsideration. *Applied Indus. Materials Corp.*, 74 Wn. App. 73. After a written judgment has been formally entered, the judgment is presumptively final but may be challenged at the trial court level by a motion to reconsider (CR 59) or by a motion to vacate (CR 60). *Lane*, 81 Wn. App. 102.

On reconsideration of summary judgment, the trial court may, in its discretion, allow the parties to submit additional materials on the issue of whether the case presents a genuine issue of material fact. Tegland, 4 Wash. Prac., Rules Practice CR 56 (6th ed.). If the trial court chooses to do so, any appeal on the propriety of entering a summary judgment will be

decided **on the basis of all materials considered by the trial court, including the new materials offered on reconsideration**. *Martini*, 178 Wn. App. 153 (new evidence submitted on reconsideration created a genuine issue of material fact, precluding summary judgment) (emphasis added).

"A material fact is one upon which the outcome of the litigation depends, in whole or in part." *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). The party moving for summary judgment has the burden of showing that there is no issue of material fact; the court must resolve all reasonable inferences from the evidence against the moving party and will grant the motion only if reasonable people could reach but one conclusion. *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 108, 751 P.2d 282 (1988). Where a motion for summary judgment is properly supported, the burden shifts to the party opposing the motion to set forth specific facts showing there is a genuine issue for trial. CR 56(e); *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980).

In a medical malpractice action, the plaintiff must produce evidence showing injury caused by a medical care provider due to the providers failure to exercise a degree of care, skill, and learning expected of a reasonably prudent practitioner in the state. RCW 7.70.040. Such actions can be based upon the failure to meet the standard of care or the

failure to obtain the proper informed consent the patient. *Smith v. Shannon*, 100 Wn.2d 26, 666 P.2d 351 (1983). A plaintiff generally must offer proof of these elements through the testimony of expert medical witnesses. *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983).

Here, Dr. Bensinger's declaration creates an issue of material fact that should preclude summary judgment for Respondents. Dr. Bensinger, in no uncertain terms, declares under penalty of perjury, that Respondents "failed to give [Appellant] proper informed consent and failed to notify [Appellant] of the potential and known risks of the procedure prior to the procedure." Moreover, Dr. Bensinger declared that "[a] reasonably prudent physician would have discouraged [Appellant] from undergoing a second LASIK procedure based upon the potential risks and side-effects." Dr. Bensinger declared that after the enhancement procedure, [Appellant] suffered worsened eyesight and decreased visual acuity, switched her vision from a negative to a positive, and caused difficulties including dryness of her eyes pulsing or throbbing sensation and vision-related migraines. Finally, Dr. Bensinger declared "[a]s a direct and proximate result of the [Respondents'] failure to provide reasonably prudent medical care and provide adequate informed consent, [Appellant] experienced worsened, diminished, and impaired vision that disoriented her for a

period after the enhancement procedure and permanently required her to use reading glasses."

Additionally, in the trial court's order denying reconsideration, the trial court acknowledges review of Dr. Bensinger's declaration and does not state that it was not considered in coming to its decision to deny reconsideration. Because the declaration was reviewed and therefore considered by the trial court, all materials, including the new materials offered on reconsideration, will be considered on appeal.

Clearly, Dr. Benzinger's declaration creates an issue of material fact that should preclude summary judgment. As such the trial court erred in upholding its original grant of summary judgment in favor of Respondents.

V. CONCLUSION

For the reasons stated above, Appellant requests that this Court reverse the trial court's orders (1) granting fees and costs to Respondent LASIK; (2) denying Appellant's request for a CR 56(f) continuance; (3) denying Appellant's motion for reconsideration of order granting summary judgment for Respondents; and (4) granting summary judgment for Respondents.

No. 73018-5-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

GABRIELLE NGUYEN-ALUSKAR,

Appellant

v.

The LASIK Vision Institute, LLC; GORDON JENSEN, M.D., a physician; and JOHN/JANE DOE PHYSICIANS 1-10,

Respondents

CERTIFICATE OF SERVICE

The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

I certify under penalty of perjury of the laws of Washington that I caused to be delivered the following document to the Court and all parties or their attorneys of record on the 17 day of APRIL 2015, as follows:

DOCUMENTS: APPELLATE BRIEF

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Trial Court Judge: Judge Tanya Thorp King County Superior Court 516 3rd Avenue, Room C-203 Seattle, WA 98104	[ ] U.S. Postal Service (First Class) [ ] Facsimile to _____ [ ] Express Mail / Courier [ ] Hand Delivery [ ] Via Legal Messenger [ ] E-Service [ ] E filed
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DATED 4/17/15

By: Amanda Griffin

Name: Amanda Griffin

Title: Paralegal