73650-7

**NO. 73650-I**

**IN THE COURT OF APPEALS, DIVISION I**
**OF THE STATE OF WASHINGTON**

SURAJ PINTO

*Appellant,*

v.

GREGORY VAUGHN AND "JANE DOE" VAUGHN; PAOLA LEONE AND "JANE DOE" LEONE; LEONE & VAUGHN, DDS, P.S., DBA LEONE & VAUGHN ORTHODONTICS; L. DOUGLAS TRIMBLE AND "JANE DOE" TRIMBLE,

*Respondents.*

On Appeal from King County Superior Court

Court No. 14-2-23326-4

# APPELLANT'S BRIEF

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## I. INTRODUCTION

This is a medical malpractice, lack of informed consent matter initially filed in King County Superior Court. Appellant, Mr. Suraj Pinto, initiated, *pro se*, this medical malpractice lawsuit on August 21, 2014 against Defendants' Dr. L. Douglas Trimble (hereinafter referred to as "Dr. Trimble") and Leone & Vaughn. Until October 2014, Mr. Pinto was formally representing himself *pro se* but on October 23, 2015 Appellant retained the law firm of CHUNG, MALHAS & MANTEL, PLLC and a Notice of Appearance was filed and served on his behalf to the respective Counsel of Records for the Defendants.

Mr. Pinto's claims for medical negligence were dismissed in two separate motions for summary judgment, one brought by Respondent, L. Douglas Trimble's counsel and subsequently by Respondents Leon & Vaughn. The basis for granting summary judgment on Respondent, L. Douglas Trimble's claim, as well as Respondents' Leone & Vaughn's claims is that Appellant's medical experts and evidence presented at the summary judgment hearing did not create genuine issues of material fact and that the experts were, in part, not qualified to give testimony. It should be noted Appellant had experts and statements of treating physicians in discovery responses on the record that Appellant contends shows a breach in the standard of care by both medical professionals.

The declarations of Jay Grossman, DDS and James C. Rockwell, M.D., Dr. Panomistros, DDS. We hope, given its utter specificity and thoroughness, that the sworn testimony proffered will be sufficient for all parties to concede that genuine issues of material fact have been raised and the trial court's decision to grant summary judgment be reversed. Altogether if almost 100 years of combined experience does not manage to raise a genuine issue of material fact, Appellant can only scratch his head in utter befuddlement and wonder what will? In short, the evidence provided must be entirely sufficient expert testimony to support the claims that Respondent's dental and orthodontic care was botched, fell below the standard of care, caused Appellant's injuries and horrendous snoring and issues.

## II. ASSIGNMENT OF ERROR

1. The Trial Court's June 12, 2015 Order granting Defendant, L. Douglas Trimble's Motion for Summary Judgment amounted to reversible error wherein Appellant had provided competent medical expert testimony where in the light most favorable to the Appellant, genuine issues of material exist that warrant the need for a civil trial on Plaintiff's informed consent and professional negligence claim?

2. The Trial Court September 17, 2015 Order and October 12, 2015 Supplemental Order granting Leone & Vaughn, DDS, P.S. Motion for Summary Judgment amounted to reversible error wherein Plaintiff had provided competent medical expert testimony wherein in the light most favorable to the Appellant, genuine issues of material existed that warranted the need for a civil trial on Appellant's Informed Consent and professional negligence claim?

3. The Trial Court September 17, 2015 Order and October 12, 2015 Supplemental Order granting Gregory Vaughn and Paola Leone's Motion for Summary Judgment amounted to reversible error wherein Plaintiff had provided competent medical expert testimony wherein in the light most favorable to the Plaintiff genuine issues of material exist that warrant the need for a civil trial on Plaintiff's informed consent and professional negligence claim?

4. The Trial Court's June 12, 2015 Order granting Defendant, L. Douglas Trimble's Motion for Summary Judgment and October 12, 2015 Supplemental Order granting Leone & Vaughn, DDS, P.S., Gregory Vaughn and Paola Leone's Motion for Summary Judgment amounted to reversible error wherein the pleadings, declarations and interrogatory responses made by Plaintiff created genuine issues of material fact wherein a trial was warranted.

5. The Trial Court abused his discretion when it granted Plaintiff Motion to Strike Plaintiff's Experts following the initial September 17, 2015 Order granting Leone & Vaughn, DDS, P.S., Gregory Vaughn and Paola Leone's Motion for Summary Judgment.

6. The Trial Court committed error when it denied Plaintiff and Defendants' Leone & Vaughn, DDS, P.S., Gregory Vaughn and Paola Leone's Stipulated Motions for Continuances and to amend the trial court's case scheduling order?

7. Trial Court committed reversible error in signing two different Court Orders and entering an October 22, 2015 Order Denying Plaintiff's Motion for Reconsideration?

## III. STATEMENT OF THE CASE

### A. Factual and Procedural Background on L. Douglas Trimble Motion for Summary Judgment.

Appellant, Mr. Suraj Pinto, initiated on his own behalf a medical malpractice lawsuit on August 21, 2014 against Defendants' L. Douglas Trimble and Leone & Vaughn, DDS, P.S. (hereinafter referred to as "Leon & Vaughn"). *See* Appellant's Complaint in **CP 1 – 11**.

On October 8, 2014 the law firm of Forsberg & Umlauf, P.S. filed and served their Notice of Appearance of Counsel on behalf of L. Douglas Trimble and subsequently filed and served an Answer to Appellant's civil Complaint on October 16, 2014. *See* Forsberg & Umlauf, P.S. Notice of Appearance of Counsel in **CP 17 - 19**. It should be noted, for the purposes of this appeal and pending motion that Respondent did not raise any affirmative defense of Assumption of the Risk, although Respondent sought a release of liability on Appellant's informed consent claim *via* an alleged signed informed consent form. It should also be noted that that throughout the proceedings, Respondent never sought any motion for an amendment to the Complaint wherein a signed informed consent form defense may be raised. Contrary to this argument presented by Appellant, Summary Judgment was granted despite the fact that the defense was never alleged or pled on the record (*See,* **CP 292 - 319**). Up until October 2014, Appellant was formally representing himself pro se when on October 23, 2015 Appellant retained the law firm of Chung, Malhas & Mantel, PLLC and a Notice of Appearance was filed and served on his behalf to the respective Counsel of Records for the Respondent (*See,* **CP 29 - 30**).

As delineated in Respondent's Motion for Summary Judgment filed in the trial court, discovery requests were propounded on Appellant's counsel on November 25, 2014. *See,* **CP 52 - 65,** Respondent Douglas D. Trimble's Motion for Summary Judgment, Page 3, Line 16. These discovery questions

received were voluminous, required redactions and *per* stipulation were served on Respondent's counsel on February 23, 2015. Shortly thereafter, Appellant counsel received an additional discovery request in April 2015, but this time from counsel for Leone & Vaughn, the orthodontist that provided care for Mr. Suraj Pinto. In short, discovery has been voluminous and Appellant's counsel had worked diligently and in good faith in responding to multiple Interrogatories and Requests for Production of Documents.

In terms of expert testimony, Appellant has a number of physicians he received treatment from, as well as, prior to retaining counsel he sought to retain medical professionals to testify. There are voluminous medical and dental records to review in this case as there are years of treatment Appellant received orthodontic work from Leone & Vaughn and a significant time span between the two surgeries he received from Respondent, not to mention significant post-operative consults. Moreover, in Appellant's counsel's efforts in seeking to retain experts and conferring with past doctors, there appear to be conflicts of interest in testifying against Respondent, as is common in Washington State medical malpractice cases because of the unwillingness of experts to testifying against colleagues that work within the same locality. *See*, **EX B** of Plaintiff's Response to Defendant L. Douglas Trimble's Motion for Summary Judgment in **CP 292 - 319**.

Despite the foregoing, and despite Appellant having put forth sworn declarations of Jay Grossman, DDS and James C. Rockwell, M.D. the trial court denied Appellant's request for a CR 56 (f) 60 day extension to supply supplemental affidavits in response to Respondent's Motion for Summary Judgment.

In terms of Respondent's credentials, Respondent received his DMD in Canada in 1976 from the University of Manitoba and then his MD degree in 1976 from the same. He completed his residency in Oral and Maxillofacial Surgery at the University of Washington in 1982 and became board certified by the American Board of Oral and Maxillofacial Surgery (ABOMS), which is the certifying board for the specialty of oral and maxillofacial surgery in the United States; a national certification.

Appellant first received treatment from Respondent Trimble on September 3, 2009 from a dental referral from a dental group known as Respondents, Leon & Vaughn, also parties to the civil action. The referral made to Respondent Trimble was made in relation to orthodontic work performed on Appellant by Leon & Vaughn and was specifically for the extraction of four bicuspids teethe from Appellant's mouth which was alleged to be necessary due to an occlusion. An occlusion, in a dental context, means simply contact between teeth. From a surgical standpoint, an occlusion is the relationship between the maxillary (upper) and mandibular (lower) teeth when they approach each other. Based on the medical records received, the

extraction of the four bicuspids was performed to provide spatial work for continued orthodontic treatment Appellant had been receiving from Leon & Vaughn.

Subsequent to the first surgical procedure by Respondent Trimble, Appellant revisited Trimble in 2011 wherein he recommended continue orthognathic surgery of Appellant's jaw to correct his bite problems. As summarized in Respondent Trimble's Motion for Summary Judgment, Appellant's surgery occurred on August 24, 2011 at Overlake Hospital. *See*, **CP 52 - 65**. Shortly thereafter, Appellant noticed remarkable discomfort, and as contained in medical records, he was having significant issues breathing. In 2014, a sleep study was performed on Appellant that revealed that he had severe sleep apnea a serious sleep disorder in which breathing repeatedly stops and starts. To date, Appellant suffers from Sleep Apnea and his physical condition has been affected wherein he has higher pressure, weight gain and a life expectancy that may have been decreased due to the stress on his heart.

Filed in conjunction with Appellant's response to Respondent Trimble's Motion for Summary Judgment was a medical report by Jay Grossman, DDS a doctor that Appellant had retained following his surgery from Respondent, as well as a declaration obtained from James C. Rockwell, M.D. a Washington State licensed Otolaryngology (ear, nose and throat) with more than 30 years of experience working and studying patients with sleep apnea. *See t*he declaration of Jay Grossman, DDS in **CP 274 - 286** and the

declaration of James C. Rockwell, M.D. in **CP 287 - 289**. *See* **CP 341 - 347**, Respondent's Reply and Declaration of Defendants Counsel.

Since the date Appellant retained the services of legal counsel, his legal counsel diligently sought other doctors to provide testimony; however, such experts had declined to provide testimony on the basis of a conflict of interest with the parties named in the lawsuit. Nevertheless, based on the analysis and conjecture made by the current experts that were brought before the trial court, Appellant contends that genuine issues of material fact existed to overcome Respondent Trimble's Motion for Summary Judgment.

**B. Factual & Procedural Background on Respondents Leon & Vaughn Motion to Strike Expert Testimony and Motion for Summary Judgment.**

Leon & Vaughn are engaged in the practice of Orthodontics. On September 17, 2015 The King County Superior Court Judge, Sean O'Donnell held hearing on both Defendants', Leon & Vaughn's Motion for Summary Judgment and Defendants' Motion to Strike Plaintiff's Expert Witnesses[1] from testifying at trial. Defendants', Leon & Vaughn Motion for Summary Judgment sought to exclude any expert testimony because the experts identified to that date lacked credentials to give testimony on the standard of care, causation and damages. While Defendants address a number of experts identified in interrogatory

[1] Defendants' Motion to Strike Witnesses was a non-dispositive motion; however, oral argument was considered at the hearing. Defendants counsel was arguably unsure when inquired by Judge O'Donnell

responses submitted of a dismissed party (Dr. Trimble), they tellingly make no reference to the disclosure of Dr. Panomitros as an expert witness in their initial motion which in fact did show that Plaintiff made the disclosure of this witness in compliance August 21, 2014 Case Scheduling Order on June 15, 2015.

Defendants' Reply, which raised new arguments about Dr. Panomitros not contained or addressed in their initial motion suggests that Dr. Panomitros report that was submitted as a Response to Defendants' Motion for Summary Judgment, suggests he was not qualified to comment on the standard of care because he had no experience in orthodontics as a specialty, his report was not detailed on the standard of care breached and he was not a Washington State licensed orthodontist. Although Appellant's counsel advised the Court and opposing counsel that Dr. Panomitros' Curriculum Vitae indicated he was part of an orthodontics society, the Court found that insufficient to overcome a motion for summary judgment. At the time of filing a Motion for Reconsideration with the trial court, Appellant's expert provided further clarity on his extensive experience in orthodontics, that orthodontics is a subspecialty of a DDS license and that the standard he has commented on is a national standard, not a state standard of care. That being said, Dr. Panomitros sits on a regional board that oversees admission to practice dentistry in the

State of Washington, therefore making him qualified to comment on the standard of care. It should be noted, that Defendants had not provided any expert contradicting the findings of Dr. Panomitros.

In terms of exclusion of Dr. Panomitros, Appellant contended this was not willful as disclosure of this witness was made in June of 2015 in compliance with the case scheduling order. Defendants', Leone & Vaughn argued that they acknowledged disclosure; however, Appellant had a further obligation of identifying which experts it would be calling for trial out of the experts identified. Defendants did not file a motion to compel prior to filing a Motion to Strike, although they objected to this use of Dr. Panomitros as an expert. No CR 26 (i) conference was conducted until after the discovery cut-off and only weeks away from trial. The Court held and Defendants argued that Plaintiff had a further obligation of the June 2015 disclosure of Dr. Panomitros as an expert and that Appellant had an affirmative duty to identify which experts it would use at trial. Again, although acknowledging knowledge of all these experts, never set a deposition of any expert and only took the deposition of Appellant, no one else. Appellant further contends that the joined Defendants in two motions for continuance to amend case scheduling order and to allow for additional time for discovery. It should be noted, the Court denied Defendants' motion for continuance and although it instructed for any additional

extensions be noted before the court, Defendants never did and instead claim prejudice for discovery violations.

Plaintiff contends Dr. Panomitros is qualified to testify as an expert on orthodontics, the standard of care is a national standard and summary judgment should not have been granted. Additionally, since the Court's granted Defendants Motion for Summary Judgment, the issue on exclusion of witnesses was moot and should not have been considered nor granted as all issues were resolved. That being said, Plaintiff contend that if there is a legal basis to grant Defendants Motion to Excluded Witnesses, there was no willful violation because Plaintiff's decision on ***which witness*** to call is part of Plaintiff's trial strategy and non-discoverable. Moreover, in compliance with the Case Scheduling Order, Plaintiff did in fact timely disclose Dr. Panomitros as a witness both in June 2015 and in Plaintiff's September 14, 2015 Exchange of Witnesses and Exhibits for Trial.

## IV. ARGUMENT

A. STANDARD OF REVIEW FOR SUMMARY JUDGMENT ON APPEAL IS *DE NOVO*. BASED ON THE PLEADINGS, MOTIONS, DECLARATIONS AND DISCOVERY CONTAINED ON THE RECORD, THE TRIAL COURT ERRED IN GRANTING RESPONDENTS, L. DOUGLAS TRIMBLE AND LEONE AND VAUGHN'S MOTION FOR SUMMARY JUDGMENT AS GENUINE ISSUES OF MATERIAL FACT EXISTS WARRANTING A TRIAL.

When reviewing a summary judgment, the Court engages in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (*citing, Kruse v. Hemp*, 121 Wn .2d 715, 722, 853

P.2d 1373 (1993)). The standard of review is *de novo*. *Hisle*, 151 Wn.2d at 860. Summary judgment is appropriate only if "the pleadings, depositions, and answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

When considering a motion for summary judgment on review, the Court reviews all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No.* 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (*citing, Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)

B. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING RESPONDENT, L. DOUGLAS TRIMBLE'S MOTION FOR SUMMARY JUDGMENT.

On appeal, a summary judgment order is heard *de novo*, engaging in the same inquiry as the trial court. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wash.2d 6, 15, 548 P.2d 1085 (1976); *Mahoney v. Shinpoch*, 107 Wash.2d 679, 683, 732 P.2d 510 (1987). Like the trial court, this Court must construe all evidence and reasonable inferences in the light most favorable to the nonmoving party, in this case the Appellant, Appellant. *Barber v. Bankers Life & Cas. Co.*, 81 Wash.2d 140, 142, 500 P.2d 88 (1972); *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). As Appellant

contended in the trial court and puts forth now, Respondent did not provide any competent evidence wherein there shows an absence of material facts wherein Appellant could not support his claims for medical negligence and informed consent. In fact the Respondent nearly entirely relied upon the declarations of Respondent's legal counsel and Appellant's sworn Interrogatory responses. *See*, **CP 1 – 11**. That being said, this Court must solely consider evidence and issues the parties called to the trial court's attention. RAP 9.12

*1. The Trial Court Committed Reversible Error in Finding that Appellant's Response to Respondent, L. Douglas Trimble's Motion for Summary Judgment had an "Absence" of a Dispute of a Genuine Issue of Material Fact*

Summary judgment is appropriate when viewing the facts in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A genuine issue of material fact exists when reasonable minds could reach different conclusions. *Michael v. Mosquero-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 69S (2009). Summary judgment is not proper if reasonable minds could draw different conclusions from undisputed facts or if all of the facts necessary to determine the issues are not present" *Schwindt v.Underwriters at Lloyd's of London*, 81 Wn. App. 293, 297-298, 914 P.2d 119 (*citing, Wan v. Coldwell Banker/San Juan Props., Inc.*, 74 Wn. App. 157,161, 872 P.2d 69 (1994)), review denied, 130 Wn.2d 1003 (1996).

In briefing the standard of review for summary judgment in Respondent's motion, Defendant cites both *Pelton v. Tri-State Memorial Hospital*, 66 Wn. App. 350, 831 P.2d 1147(1992), and G*uile v. Ballard Community Hospital*, 70 Wn. App. 18 , 851 P.2d 689 (1993). While both cases are on point in presenting two cases which upheld defendants' motions for summary judgment; they can be distinguished from the case at bar because in both those cases the Defendants had provided evidence (e.g., medical expert testimony) in support of their motion for summary as the first part of the analysis and then indicated that the Plaintiff had an absence of competent medical evidence to overcome Defendant's evidence. In this case, Respondent made a blanket generalization on the "absence" of competent evidence, even though treating physicians and experts were identified in Appellant's Interrogatory Responses attached to Respondent's motion. As stated in the footnote on Page 1 of Appellant's motion for Summary Judgment, Appellant's Motion for Summary Judgment provides only the declaration of Defendant's counsel, Erin Barmby, which is not competent testimony that may be heard as she is unable to testify at trial. *See, Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 431 P.2d 216 (1967) (The information from the Mayo Clinic, resulting from a telephone conversation with the Peltons' counsel as stated in his affidavit, is inadmissible.)

Moreover, while Respondent made reference to a signed informed consent form, no signed consent form was included with their motion. What

Respondent did provide is all of Appellant's Interrogatory Responses; which only further creates disputed issues of material fact as to causation and the standard of care. In short, the evidence Respondent uses in praying for relief in the form of a dismissal is not helping their cause as they fail to identify why the evidence produced is not competent to be used at trial. Again, if Defendant now intends to supplement the record on appeal to remedy this shortfall, Appellant objects and seeks to strike any declaration not part of their initial motion as Appellant will not be afforded an opportunity to respond. In short, Respondent failed to meet the evidentiary threshold in a medical malpractice summary judgment related to its burden of showing an "absence of competent evidence" by Appellant, as no analysis was provided on how the evidence contained in Appellant's Interrogatory Responses is not competent from an evidentiary standpoint. Moreover, there was no motion to strike such evidence or any declaration remitted by Appellant. Under Washington State case law, by failing to make such an objection, a party waives its right to challenge the sufficiency of the affidavit. *See*, *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 881, 431 P.2d 216 (1967); *emphasis added.*

2. *The Trial Court Committed Reversible Error in Finding that Appellant's Response to Respondent, L. Douglas Trimble's Motion for Summary Judgment, With its Supporting Declarations and Evidence Filed, as well as the Evidence Contained on the Court Record Did not Create a "Reasonable Inference" that there was a Breach in the Standard of Care.*

Should this Court agree with the trial court that there was an absence of competent evidence within Appellant's claims, the burden would then shift to the nonmoving party, in this case Appellant, who would need to show a "reasonable inference" of the elements of his underlying claims. *See*, *Van Hook v. Anderson*, 64 Wn.App. 353, 358, 824 P.2d 509 (1992); *emphasis added.* In the instant case there are numerous issues of material fact that exists by looking at the statements made by Mr. Suraj Pinto in the attached Interrogatory Responses Respondent Trimble has included with its Motion for Summary Judgment. Moreover, medical records from Leon & Vaughn further indicated that Appellant made complaints of discomfort following his 2011 surgery by Respondent Trimble. *See*, **CP 292 - 319** - Leon and Vaughn medical records attached as **EX C** to Plaintiff's Response to Defendant's Motion for Summary Judgment.

Although Respondent appears to suggest that only expert testimony qualifies in overcoming a summary judgment medical malpractice case, our Washington State Supreme Courts disagrees. In *Miller v. Jacoby*, 145 Wn.2d 65, 33 P.3d 68 (2001) the Washington State Supreme Court held that expert testimony is not required when medical facts are observable by a layperson's senses and describable without medical training. *Id.* at 72-73; *emphasis added.* In this case, Appellant made numerous documented contentions immediately following the surgery on how he did not feel right after the surgery Respondent Trimble performed. Moreover, while this surgery would

expect to resolve sleep apnia; Appellant was diagnosed with severe sleep apnia in 2014. *See*, **CP 292 – 319** Attached as **EX D** to Plaintiff's Response to Defendant Douglas L. Trimble's Motion for Summary Judgment.

Appellant also contends that these doctors repeatedly represented that the surgery would resolve his breathing issues. *See*, Declaration of Suraj Pinto in **CP 320 - 340**. In total, this evidence, in addition to the Declarations of Jay Grossman, DDS and James Rockwell, M.D. all create a reasonable inference that the surgery performed on a more probable than not basis contributed to Appellant's existing ailments, as well as the lack of informed consent.

3. *The Trial Court Committed Reversible Error Wherein it did not Find That the Declaration of Jay Grossman, DDS Created a Genuine Issue of Material Fact on the Breach of the Standard of Care, Informed Consent, Causation and Damages.*

Filed in conjunction with this Appellant's Response to Respondent's Motion for Summary Judgment was the Declaration of Jay Grossman, DDS.2 Dr. Grossman is a practicing Dentist licensed in the State of California and the State of Nevada. Although Dr, Grossman is not a doctor licensed in the State of Washington, an out-of-state practitioner of medicine may testify as an expert in a malpractice action against a defendant who is a practitioner of the same school of medicine if the practitioner has knowledge of the medical problem at issue and the standard of care required in the particular situation is a national one, not one that varies with geographic location. *See*, *Elber v. Larson*, 142 Wn. App. 243, 247, 173 P.3d 990 (2007). As highlighted above, Respondent Trimble received his education in Canada and received national

certification from ABOMS, which is the certifying board for the specialty of oral and maxillofacial surgery in the United States, not Washington.

Although Dr. Grossman is not a maxillofacial surgeon, this does not matter in the realm of medical malpractice claims as the relevant field of expertise is not necessarily determined by the specific practice specialty, but rather by the familiarity with the treatment or disease. See, Morton v. McFall, 128 Wn. App. 245, 253, 115 P.3d 1023 (2005) (internist qualified to testify against pulmonologist as to standard of care; "*[t]here is no general rule that prohibits ... a specialist in one area from testifying about another area*"); *Eng v. Klein*, 127 Wn. App. 171, 172, 110 P.3d 844 (2005) (infectious disease expert qualified to testify against neurosurgeon regarding diagnosis of meningitis; diagnostic methods the same; "[i]t is the scope of a witness's knowledge and not artificial classification by professional title that governs the threshold question of admissibility of expert medical testimony in a malpractice case"); *Seybold v. Neu*, 105 Wn. App. 666, 677-80, 19 P.3d 1068 (2001) (plastic surgeon qualified to testify against orthopedic surgeon regarding cutaneous malignancies and bone grafting, where plastic surgeon also trained and experienced with the disease and treatment); *White v. Kent Med. Ctr.*, 61 Wn. App. 163, 173-74, 810 P.2d 4 (1991) (physician is qualified as an expert where familiarity demonstrated with the procedure or medical problem at issue, even if not a specialist with respect to same; ENT physician qualified to testify as to standard of care for general practitioner);

Miller v. Peterson, 42 Wn. App. 822, 830, 714 P.2d 695 (1986) (orthopedic surgeon qualified to testify about podiatrist's standard of care so long as both used the same methods of treatment). Where the methods of treatment are or should be the same as the defendant, the expert is qualified to testify. *Eng v. Klein*, 127 Wn. App. 171, 176, 110 P.3d 844 (2005); *Miller v. Peterson*, 42 Wn. App. 822, 830, 714 P.2d 695 (1986).

In light of the foregoing and the fact that Respondent never objected to the testimony (thus waived rights), Dr. Grossman's declaration was competent medical testimony sufficient to overcome Defendant's Motion for Summary Judgment as it is not conclusory, his opinion is based on the medical/dental records in Appellant's case and it creates a "reasonable inference" that Appellants' claims have merit. In terms of his professional opinion as a doctor of dental medicine, he writes:

- Dr. Trimble *performed a second surgery, which in my opinion was **unnecessary***, due to the fact that simple Wilkodontics would have solved his minor problem of midline aberration." *See*, Medical Report attached to Declaration of Jay Grossman, DDS; *emphasis added.*

- "In addition, despite the fact Appellant had mild sleep apnea prior to his treatment with the named dentists, his condition worsened significantly postsurgical treatment. Appellant cannot be blamed for losing confidence in his providers due to the lack of consent and failure to follow his instructions, and it is reasonable that he did not return for further treatment. In conclusion, the concerted efforts of Dr. Trimble, Dr. Leone and Dr. Vaughn significantly contributed to Appellant's demise, and their actions failed to meet the requisite standard of care of orthodontists and surgeons collaborating to resolve Appellant's chief complaint, which was quite simply, adjusting his midline." See, Medical Report attached to Declaration of Jay Grossman, DDS; emphasis added.

An unnecessary surgery and the failure to address Appellant's chief complaint all create the inference that there was a breach in the standard of care. Consequently, Respondent Trimble's Motion for Summary Judgment should be denied.

4. *The Trial Court Committed Reversible Error Wherein it Ruled that the Declaration of Jason Rockwell, MD did not Create a Genuine Issue of Material Fact Wherein the Light Most Favorable to the Non-Moving Party a Reasonable Inference May Be Made on Causation and Damages.*

Dr. Rockwell is a Washington State licensed Otolaryngology (an ENT doctor) with more than 30 years of experience working and studying patients with sleep apnea. Based on his declaration he reviewed the medical records of Mr. Suraj Pinto from 2008 to 2014. The medical and dental records that included x-rays, charts, photos, consult records, reports and notes regarding Appellant's dental work at Leon & Vaughn Orthodontist and oral surgery with Dr. Douglas L. Trimble. Other documents reviewed include orthognathic surgery operative reports by Dr. Trimble, maxillary LeForte one osteotomy and mandibular bilateral sagittal osteotomy. Again, while not a maxillofacial surgeon; he is qualified within Washington State to provide competent testimony related to the facts on this matter. *See*, *Eng v. Klein* , 127 Wn. App. 171 , 172, 110 P.3d 844 (2005) ("It is the scope of a witness's knowledge and not artificial classification by professional title that governs the threshold question of admissibility of expert medical testimony in a malpractice case.").

In consideration of his expertise, he undoubtedly creates genuine issues of material fact when he states, in part, the following:

- [t]he surgery performed on Mr. Suraj Pinto on a more probable than not basis narrowed his airway resulting in Appellant's sleeping disorder and the alleged damages he is suffering. See, Declaration of Jason Rockwell, M.D. FAC Page 2, Lines 1-3.

5. *The Trial Court Committed Reversible Error in not Finding that the Declaration of Suraj Pinto and his Treating Physician Medical Records Created Genuine Issue of Material Fact Wherein in the Light Most Favorable to the Non-Moving Party a Reasonable Inference May Be Made on Causation and Damages. Moreover, Trial Court Neglected Statements the Relevance of Treating Physicians That May be Used as Experts.*

As indicated earlier in this Response Appellant's testimony is sufficient to overcome a Motion for Summary Judgment. Appellant is the only true witness who was the victim of Respondent Trimble's scalpel so to speak and his testimony is probative to causation and damages because he noticed a recognizable difference in breathing after the surgery. In *Miller v. Jacoby*, 145 Wn.2d 65, 33 P.3d 68 (2001) the Washington State Supreme held that expert testimony is not required when medical facts are observable by a layperson's senses and describable without medical training. *Id.* at 72-73; emphasis added. In this case, Appellant made numerous documented contentions immediately following the surgery on how he did not feel right after the surgery Respondent performed. See, **CP 292 - 319, EX C.** Moreover, while this surgery would expect to resolve sleep apnia; he was diagnosed with severe Sleep Apnia in 2014. *See*, **CP 292 - 319, EX D.** The

fact that Appellant started to feel discomfort and experienced difficulty breathing after the surgery in 2011 creates a reasonable inference on the elements of causation and damages. Thus in the light most favorable to Appellant, the governing standard in all motions for summary judgment, genuine issues of material facts exist that warrant a denial of Respondent Trimble's Motion for Summary Judgment.

Furthermore, as shown in Appellant's Interrogatory Responses, his treating physcians may be called as experts. In Washington State, a plaintiff may call a patient's treating physician as an expert witness, where the testimony is relevant and not unduly prejudicial under ER 403. *Carson v. Fine*, 123 Wn.2d 206, 219, 867 P.2d 626 (1994). A treating physician, whose knowledge and opinions were not derived in anticipation of litigation, is not a consulting expert under CR 26. *Paiya v. Durham Constr. Co.*, 69 Wn. App. 578, 579, 849 P.2d 660 (1993); *Peters v. Ballard*, 58 Wn. App. 921, 930, 795 P.2d 1158 (1990).

6. *Respondent Did Not Raise the Affirmative Defense of Informed Consent in Their Answer to Appellants' Complaint, Nor Did Respondent Introduce an Informed Consent Form as Part of Their Motion. Moreover, Respondent did not Brief the Variable Factors Courts Consider When Assessing Summary Judgment Claims for Informed Consent as Respondent Trimble's Motion Makes no Distinction Between Medical Negligence and Informed Consent*

As a preliminary matter, Respondent Trimble acknowledges a claim for Informed Consent by Appellant; however, he never pled an affirmative defense for informed consent or assumption of the risk. Nor has Respondent Trimble sought any motion for an amendment to his Complaint wherein a

signed informed consent form defense may be raised. To the extent respondent seeks a signed informed consent as a release of liability to a RCW 4.24.290 claim, Appellant asks this Court to disregard such argument as is was never alleged or pled on the record.

Under Washington law, there are basically three theories under which a medical malpractice action may be brought (1) basic negligence, (2) negligence as a matter of law; and (3) informed consent. Respondent Trimble's Motion for Summary Judgment seems to not recognize this distinction. Although RCW 4.24.290 is referenced on Page 3 of Respondent's Motion for Summary Judgment, it appears he concedes that through Appellant's Complaint there is a claim under RCW 4.24.290. It should be noted however that actions based on professional negligence, "*in no event shall . . . apply to an action based on the failure to obtain the informed consent of a patient.*"; *See, Harbeson v. Parke-Davis, Inc.*, 98Wn.2d 460, 469-71, 656 P.2d 483 (1983) (explaining history of informed consent doctrine in Washington and noting the statutory distinction between informed consent actions and professional negligence actions). In ascertaining the merits of an informed consent claim.

In *Wagenblast v. Odessa School Dist. No. 105-157-166J*, 110 Wn.2d 845, 758 P.2d 968, 85 A.L.R.4TH 331 (1988), the Washington State Supreme Court adopted six (6) factors to guide courts in deciding whether a pre-injury exculpatory agreement violates public policy. Respondent Trimble does not

provide any analysis of these factors in his Motion for Summary Judgment. The process of informed consent is a critical aspect of the doctor–patient relationship. Doctors, such as Respondent Trimble have a professional duty to provide patients with sufficient information if a treatment is associated with a significant risk. In the case of jaw surgery, risks can broadly be divided into early and late complications. Early complications have a close temporal relationship with the operation. In contrast, postoperative injuries may affect the normal anatomy that can adversely affect function many years and even decades after the original operation, leaving patients like Appellant at lifelong risk for late complications. These late complications are often neglected during the consent process. However, the risks to patients from late complications are serious and well in excess of the accepted threshold where it could be considered a breach in the duty of care not to inform patients. That said, exculpatory language in a pre-injury release must be clearly stated. *Vodopest v. MacGregor*, 128 Wn.2d 840, 848, 913 P.2d 779 (1996) (*citing*, *Scott v. Pacific W. Mountain Resort*, 119 Wn.2d 484, 490, 834 P.2d 6 (1992)).

In this case Respondent Trimble does not provide an Informed Consent Form for the Court to consider. The test for an informed consent claim is whether a reasonably prudent patient in plaintiff's position would have chosen a different course if fully informed. *Backlund v. University of Wash.*, 137 Wn.2d 651, 665-66, 975 P.2d 950 (1999); *Degel v. Buty*, 108 Wn.

App. 126, 132, 29 P.3d 768 (2001); *Brown v. Dahl*, 41 Wn. App. 565, 574, 705 P.2d 781 (1985). Arguably, Appellant litany of maladies suggest that any reasonable person would not have consented to jaw surgery. In fact, as Dr. Grossman points out, Appellant was against the surgery according to his medical records. Furthermore where the health care practitioner fails to inform the patient of the risks of a course of treatment or alternatives to that treatment, the practitioner may be liable to the injured patient even if the standard of care for medical practitioners was met with respect to treatment.

C. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING RESPONDENTS, **LEONE & VAUGHN'S**, MOTION FOR SUMMARY JUDGMENT

*1. The Trial Court Committed Reversible Error in Striking Appellant's' Orthodontist Expert Because Appellant Identified his Expert Witnesses Prior To Respondents, Leone & Vaughn' Noting Their Motion for Summary Judgment. Respondent, Leone & Vaughn Failed To Conduct A Cr 26 (I) Conference or Request to Conduct A Single Depositions Of Any Treating Physicians Or Expert Witnesses. Discovery Cut-Off Has Now Passed.*

Respondents, Leon & Vaughn argued in the trial court that Appellant had not identified expert or provided discovery in relationship to the expert disclosure. This is not correct as Appellant identified Dr. Panometros as their expert in their Additional Disclosures of Witnesses. It should be noted Respondents Leon & Vaughn did not conducted a single deposition prior to the discovery cut-off although numerous treating physicians and experts witnesses were identified. Moreover Respondents Leon & Vaughn only held its first CR 26 (i) conference on September 4, 2015 for the alleged untimely

discovery claimed in their Motion for Summary Judgment and there has been no Motion to Compel filed.

In short Leon & Vaughn argument on disclosure of Dr. Panometros as an expert is anemic. Moreover, since on September 4, 2015 there was a CR 26 (i) conference, Appellant will be providing the discovery responses. The delay in part, in providing the responses is that the Legal Assistant formatting the responses recently left on maternity leave.

2. *The Trial Court Committed Reversible Error in Granting Respondent, Leone & Vaughn's Motion for Summary Judgment Because Appellant had Competent Expert Testimony to Survive Summary Judgment by Showing that Respondents, Leone & Vaughn, Breached the Orthodontic Standard of Care.*

In addition to the expert testimony of Jay Grossman, DDS and James C. Rockwell, M.D, Plaintiff now has the declaration of Dr. Panomistros, DDS. Dr. Panomistros is a licensed general dentist in the state of College of Dentistry since 1989. From August 2007 through August 2012 he was an Assistant Clinical Professor at the University of Illinois College of Dentistry Department of Restorative Dentistry. He was also on staff at Illinois Masonic Hospital Dental Department from 1996-2000 in the general practice residency program. He was also an Assistant Professor at Kennedy King College Dental Hygiene Program 2011-2014. He is currently Assistant Clinical Professor in the Department of Surgery, Maxillofacial Surgery and General Practice Residency Program, Loyola

Medical School, Chicago. He is a dental examiner for the Northeast Regional Boards(NERB), Central Regional Boards, Central Interstate Testing Agency(CITA), Southern Regional Testing Agency(SRTA), and Western Regional Boards in the United States(WREB); all five dental clinical testing agencies of the United States. ***All of these testing agencies' examinations are accepted in the State of Washington for procurement of their dental license.*** He has 26 years of full time practice diagnosing and clinically treating patients with general dental pathologies. His qualifications, including a list of classes taught, are outlined in his Curriculum Vitae, attached to his declaration as EX "A". We sincerely hope no objections will be raised to this man.

Now, Dr. Panomitros has testified that:

- "After a review of the records it is clear that a diagnosis was never given to Pinto prior to commencing orthodontic treatment nor was it in his informed consent (PINTO 000011, 000015). A proper diagnosis, one within the standard of care, requires all parties treating patients to preliminarily confer as to what the diagnosis is, what the treatment plan options are, how each treatment plan can be coordinated and conducted, what are risks and benefits for each treatment plan option along with prognosis. I opine, that here, the standard of care was breached. Pinto was never told and explained by Leone and Vaughn what his diagnosis was, he was never explained his treatment options, how each option could be performed and coordinated with the medical team, the risks, benefits, and prognosis for each option."

- "In addition, Leone and Vaughn admit they do not know enough about surgery nor have the training, to be able to diagnose the surgeon's part of the treatment; thus even more

the reason to make sure that the patient is seen by the oral surgeon so there is coordination by the whole dental team in diagnosing and treatment planning (Leone Deposition p.40 lines 19-25)."

- "By this time Pinto suffered from a 2.0 mm underbite. It is clear and convincing, that Leone and Vaughn jumped the gun and started treating Pinto without informing him and they hadn't diagnosed the case correctly. This below standard of care treatment was the proximate cause of Pinto's current pain and suffering."

- "The below standard of care treatment that Pinto received from Leone and Vaughn caused this and he may suffer further complications. Pinto suffers from lower nerve damage and loss of feeling on the lower lip and jaw areas. The below standard care treatment Pinto received from Leone and Vaughn Pinto also causes him to suffer from left pelvic bone pain, the area where an autogenous bone graft was harvested."

- "I understand that Leone and Vaughn did not take a CT scan of Pinto and do not know how to read a CT scan thus do not request them for their patients (Leone Deposition p.36, lines15-25, p.37 lines 3-8). A CT scan for surgical cases even back in 2008 was crucial. If Leone and Vaughn could not read a CT scan they should have either worked closer with the surgeon who could, or referred the case to someone else with more expertise. The CT scan which I ordered and was taken August 24, 2015 finds patient with a severe deviated nasal septum which is the cause of his nasal airway blockage. Pinto also presents with external nasal valve collapse (ENT Final Report 04/20/2012). I understand from my review of CT scan Pinto has a shorter and large neck which makes he more prone to have severe apnea. Vaughn claims that orthodontics cannot reduce airway space for a patient (Vaughn Deposition p. 68 lines 1-13). He is incorrect because it has been shown that jaw positioning can certainly contribute to this and certainly when it is combined with surgery. Here, oral surgeon concurs that sleep study should have been done so that accommodations could have been made with the orthodontic treatment and surgery (Trimble Deposion p.41, lines 1-4)."

- "In his deposition, Vaughn comments that there were jaw discrepancies with proclined teeth, however, nowhere is it documented in his initial records nor in Pinto's consent signed September 18,2008."

- "Here, oral surgeon concurs that sleep study should have been done so that accommodations could have been made with the orthodontic treatment and surgery..."

- "Vaughn claims that orthodontics cannot reduce airway space for a patient (Vaughn Deposition p. 68 lines 1-13). He is incorrect because it has been shown that jaw positioning can certainly contribute to this and certainly when it is combined with surgery."

Additionally, already on the record, is the Declaration of Jay Grossman, DDS. Dr. Grossman is a practicing Dentist licensed in the State of California and the State of Nevada. Although Dr, Grossman is not a doctor licensed in the State of Washington, an out-of-state practitioner of medicine may testify as an expert in a malpractice action against a defendant who is a practitioner of the same school of medicine if the practitioner has knowledge of the medical problem at issue and the standard of care required in the particular situation is a national one, not one that varies with geographic location. *See, Elber v. Larson,* 142 Wn. App. 243, 247, 173 P.3d 990 (2007). Dr. Grossman has said:

- In conclusion, the concerted efforts of Dr. Trimble, Dr. Leone and Dr. Vaughn significantly contributed to Appellant's demise, and their actions failed to meet the requisite standard of care of orthodontists and surgeons collaborating to resolve Appellant's chief complaint, which was quite simply, adjusting his midline.

For the above reasons, Appellant made a *prima facia* case regarding the breach of the standard of care and causation. Summary judgment dismissal of Appellant's claims against Leone & Vaughn is reversible.

3. *The Trial Court Committed Reversible Error in Granting Respondent, Leone & Vaughn's Motion for Summary Judgment on the Basis That Appellant Failed to Show That Respondents, Leone & Vaughn Were the Proximate Cause of His Injuries.*

A plaintiff is entitled to compensation for damages that are proximately caused by a health care provider's failure to adhere to the relevant standard of care. A proximate cause of an injury is a cause which, in a direct sequence that is unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened. *Hill v. Sacred Heart Medical Center*, 177 P.3d 1152, 1158 (Wn. App. Div. 11, 2008), *citing*, *Hertog v. City of Seattle*, 138 Wn.2d 265, 2820283, 979 P.2d 400 (1999).

Expert testimony is usually required to establish proximate cause in medical malpractice cases. *Douglas v. Freeman*, 117 Wn. 2d 242, 252, 814 P.2d 1160 (1991), citing *McLaughlin*, 112 Wn.2d at 837. However, expert testimony is not specifically required to establish the elements of causation where a reasonable person can infer a causal connection from the facts, circumstances, and medical testimony provided. *Hill*, 177 P.3d at 1157, citing *Douglas v. Freeman*, 117 Wn.2d 242, 252, 814 P.2d 1160 (1991).

Here, Dr. Panomistros testifies to the issue of causation:

- "By this time Pinto suffered from a 2.0 mm underbite. It is clear and convincing, that Leone and Vaughn jumped the gun and started treating Pinto without informing him and they hadn't diagnosed the case correctly. This below standard of care treatment was the proximate cause of Pinto's current pain and suffering."

- "The below standard of care treatment that Pinto received from Leone and Vaughn caused this and he may suffer further complications. Pinto suffers from lower nerve damage and loss of feeling on the lower lip and jaw areas. The below standard care treatment Pinto received from Leone and Vaughn Pinto also causes him to suffer from left pelvic bone pain, the area where an autogenous bone graft was harvested."

- "Pinto never gave his informed consent and this uncoordinated care without informed consent is what led up to this compromised treatment, which is below the standard of care. Here ,we even notice that the decision for primary surgical evaluation was late and well into the treatment...."

- The below standard of care treatment that Pinto received from Leone and Vaughn caused this and he may suffer further complications. Pinto suffers from lower nerve damage and loss of feeling on the lower lip and jaw areas. The below standard of care treatment Pinto received from

- Leone and Vaughn also caused him to suffer from left pelvic bone pain, the area where an autogenous bone graft was harvested.

Additionally, Appellant made numerous documented contentions on the record following his treatments with Leone & Vaughn. Indeed, the fact that Appellant started to feel discomfort and experienced difficulty breathing after his various treatments, and started snoring so bad his ceiling shook, is also evidence that the surgery in 2011 creates a reasonable inference on the elements of causation and damages. Thus in the light most favorable to Appellant, the governing standard in all motions for summary judgment, genuine issues of material facts exist that warranted a ***denial*** of Respondents Leon & Vaughn's Motion for Summary Judgment.

*4. Appellant Presented the Requisite Evidence to Support his Claims for Respondent, Leone & Vaughn's Failure to Provide Informed Consent*

Under the doctrine of informed consent, a health care provider has a fiduciary duty to disclose relevant facts about the patient's condition and the proposed course of treatment so that the patient may exercise the right to make an informed health care decision. *Miller v. Kennedy*, 11 Wash.App. 272, 282, 522 P.2d 852 (1974), aff'd, 85 Wash.2d 151, 530 P.2d 334 (1975). A health care provider may be liable to an injured patient for breaching this duty even if the treatment otherwise meets the standard of care. RCW 7.70.050; *Keogan v. Holy Family Hosp.*, 95 Wash.2d 306, 313, 622 P.2d 1246 (1980). The doctrine of informed consent is based on

"***the individual's right to ultimately control what happens to his body***." *Id.* at 313–14, 622 P.2d 1246. This court first recognized the doctrine in *ZeBarth v. Swedish Hospital Medical Center*, 81 Wash.2d 12, 499 P.2d 1 (1972). The legislature subsequently codified the prima facie elements of an informed consent claim in RCW 7.70.050. LAWS OF 1975–76, 2d Ex.Sess., ch. 56, § 10; *Edwin Rauzi*, Informed Consent in Washington: Expanded Scope of Material Facts That the Physician Must Disclose to His Patient, 55 WASH. L.REV. 655 (1980). *Stewart-Graves v. Vaughn*, 162 Wn. 2d 115, 122-23, 170 P.3d 1151, 1155 (2007)

As such, in addition to his claim for breaching the standard of care, Appellant has a valid claim against Leone and Vaughn for failing to get his consent for his course of treatment. It should be noted, moreover, that need for expert testimony regarding informed consent is somewhat ***less*** than in the area of breach of the standard of care. For it has been held: "We have concededly shifted to an extent on the issue of an expert testimony requirement." In *ZeBarth v. Swedish Hosp. Med.* Ctr., supra, the court noted that "in most instances, and as a general rule, the duty to inform the patient must be established by expert medical testimony or reasonable inferences to be drawn from it." *ZeBarth*, 81 Wash.2d at 24, 499 P.2d 1. However, a test was enunciated for materiality based on the standard of disclosure in the medical profession. *See ZeBarth*, at 26–27,

499 P.2d 1. That test has since been replaced by the "reasonable patient" test enunciated and recognized in *Keogan v. Holy Family Hosp.*, 95 Wash.2d 306, 318, 622 P.2d 1246 (1980). Where the focus of the materiality test is on the ***patient*** rather than the profession, expert testimony is of secondary importance. The jury is capable of deciding whether the doctor did not tell the patient about something that should have been revealed. The jury does not need testimony from physicians about the norm of disclosure in the community. The usual conduct of doctors in this matter is not relevant to the establishment of the liability which is imposed by law. The jury, as lay people, are equipped to place themselves in the position of a patient and decide whether, under the circumstances, the patient should have been told. *Smith v. Shannon*, 100 Wn. 2d 26, 32, 666 P.2d 351, 355 (1983).

All in all, it appears that the standard **now** is that "Some" expert testimony "is necessary to show this aspect of materiality because such facts are generally not describable without medical training." *Smith*, at 33-34, 666 P.2d 351. Well, whatever one may feel about the testimony of Drs. Grossman and Rockwell, it seems fair to say that in conjunction with Dr. Panomitros's testimony, for heaven's sake, that "some'' testimony has been produced! And, when this testimony is added to the fact that each juror would be fit to decide for himself if or not he would have wished to

be told, *inter alia*, if his life would be shortened and bedeviled by snoring, it must be concluded that the trial court committed probable error by dismissing even the informed consent claim.

Certainly, Appellant has established throughout the record that he would have liked to know beforehand the dangers that he faced, and that he might suffer as he now suffers. If the man had made the decision for himself he might now be better reconciled to his lot.

Again, Dr. Panomistros is very through in his testimony:

- "In the instant case, Pinto told Vaughn prior to commencing treatment that he did not want surgery or extraction of teeth (Vaughn Deposition p. 22 lines 21-25). After my review of this informed consent, there is no information given pertaining to sleep apnea, airway passage issues, or sleep issues, or potential deviation in treatment to include surgery (PINTO 000011; Vaughn Deposition p. 19, lines 18-21). I understand that Leone and Vaughn never referred Pinto for a sleep study when it is obvious from the records that Pinto had the high likelihood of sleep apnea due to his shorter neck and wider neck (Vaughn Deposition p. 83 lines 8-9). I opine that informed consent was not obtained by Leone and Vaughn, and this document if intended to be the process by which informed consent was obtained, certainly fell below the standard of care. I believe that a reasonable and prudent dentist, in the instant case, would concur that surgery was a highly likely part of treatment, and that Leone and Vaughn had a duty to have Pinto get an oral surgery consultation with Trimble or another oral surgeon; but that is not enough. Leone and Vaughn should have designed the treatment plan options together with the oral surgeon, so they could understand the surgical aspects well enough to diagnose, treatment plan, and apprise Pinto. Unfortunately, this was not the case."

- "Pinto never gave his informed consent and this uncoordinated care without informed consent is what led up to this compromised treatment, which is below the standard of care. Here, we even notice that the decision for primary surgical evaluation was late and well into the treatment. There should have been a surgical evaluation prior to consultation on a case like Pinto's because of the realized skeletal issues; however, realized skeletal issues does not mean that it is a diagnosis."

- "I understand that Leone and Vaughn never referred Pinto for a sleep study when it is obvious from the records that Pinto had the high likelihood of sleep apnea due to his shorter neck and wider neck (Vaughn Deposition p.83 lines 8-9). I opine that informed consent was not obtained by Leone and Vaughn,and this document if intended to be the process by which informed consent was obtained, certainly fell below the standard of care."

- "Pinto currently suffers from temporomandibular pain causing him to have headaches. He cannot even close his mouth completely (Pinto Letter 03/25/2013 to Dr. Lyndon Low). All these are things Pinto needed to know could happen from his orthodontic treatment with surgery."

For the forgoing reasons, Appellant's claims based on lack of informed consent should have been disregarded.

D. THE TRIAL COURT COMMITTED ERROR IN DENYING APPELLANT'S MOTION FOR RECONSIDERATION AND NOT CONSIDERING APPELLANTS REPLY.

*1. Appellant's Motion for Reconsideration Should Have Been Granted Because Appellant's Case for Medical Negligence Had Been Dismissed in its Entirety on the Grounds that Appellant's Expert Lacked the Requisite Credentials to Testify on the Standard of Care. Appellant Provided Further Clarification From Plaintiff's Expert, Dr. Panomitros, Demonstrating his Experience in Orthodontia, the Proper Standard of Care is a National Standard and that his Qualifications Permits him to Testify on the Standard of Care of a Washington State Licensed DDS and Orthodontist.*

Contrary to Leone & Vaughn's Response to Appellant's Motion for Reconsideration, Appellant identified CR 59 (a) (7) and CR 59(a) (9) as the grounds for the Court to consider whether reconsideration should be granted. In Appellant's Response to Leone & Vaughn's Motion for Summary Judgment Appellant provided in depth legal analysis and factual contentions as why Appellant's expert report, in light most favorable to the non-moving party, overcomes summary judgment. The basis for summary judgment being granted was that Plaintiff's expert was not qualified to comment on the standard of care, specifically for a lack of experience in orthodontia. The result was the dismissal of Plaintiff's case in its entirety with prejudice.

Although Appellant's counsel did raise that Dr. Panomitros had expertise in that he belonged to a orthodontic society, neither Defendant's counsel nor the Court found that as compelling evidence of Dr. Panomitros qualifications to testify on the standard of care. The Court granted Summary Judgment on September 17, 2015; therefore dismissing any sort of relief available to Plaintiff to be compensated for his injuries. It goes without saying that *substantial justice requires* that Appellant be afforded the opportunity to proceed with a trial on the merits because he has put forth a competent medical expert to testify on the applicable standard of care, causation and the damages he suffered and continues to suffer to date. Plaintiff has already delineated the legal grounds as to why Plaintiff is qualified to testify.

2. *Dr. Panomitros Familiarity and Experience in the Field Orthodontia is the Only Criteria That Need Be Examined on a Motion for Summary Judgment Wherein Leon & Vaughn Failed to Provide No Contradictory Expert Testimony. Dr. Panomitros is more than Qualified to Testify on the Standard of Care and Raised a Reasonable Inference that Defendants Breached the Standard of Care. Defendants' Legal Counsel Personal Impression of Alleged Shortcoming of Dr. Panomitros Expert Report is not Competent Evidence.*

Its concerning that Appellant's expert was not considered qualified to comment on the standard of care when Summary Judgment was granted as Defendants have not provided contradictory expert testimony refuting Dr. Panomitros contentions. In Washington State, it is the scope of a witness's knowledge and not ***artificial classification by professional title*** that governs the threshold question of admissibility of expert medical testimony in a malpractice case. *See*, *White v. Kent Med. Ctr., Inc.* , 61 Wn. App. 163 , 173, 810 P.2d 4 (1991); *Eng v. Klein* , 127 Wn. App. 171 , 172, 110 P.3d 844 (2005). Dr. Panomitros medical report commenting on the standard of care is sufficient as it supports a "*reasonable inference*" of all the elements. *See, Van Hook v. Anderso*n, 64 Wn.App. 353, 358, 824 P.2d 509 (1992). In short, once the moving party has shown the absence of a genuine issue of material fact, in this case Plaintiff, the burden shifts to the nonmoving party, who *must make out a prima facie case of all essential element*s. *See, Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). In Washington State, Defendants' legal counsel's assessment or comments on the applicable standard of care is not competent evidence which this Court

can rely upon. *See, Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 431 P.2d 216 (1967). That being said, most, if not all of the grounds for which Defendants rely upon in suggesting that Dr. Panomitros medical report is improper or does not comment accurately on the standard of care is based on Defendants' legal counsel's own impression. Defendants' legal counsel, Lisa Lackland is not qualified to testify on the correct standard of care or provide any impression of the reliability of Dr. Panomitros expert testimony; she is not qualified and her opinions are not to be considered.

Assuming the Court, despite the case law that has been presented, is inclined to consider the Defendants' legal counsel's impression that Dr. Panomitros expert report and his declaration do not provide the requisite criteria to overcome summary judgment, Plaintiff reiterates that the relevant field of expertise of an expert is not determined by the specific practice specialty, but rather by the familiarity with the treatment. *See, Morton v. McFall*, 128 Wn. App. 245, 253, 115 P.3d 1023 (2005) (*internist qualified to testify against pulmonologist as to standard of care*; "*[t]here is no general rule that prohibits ... a specialist in one area from testifying about another area*"); *Eng v. Klein*, 127 Wn. App. 171, 172, 110 P.3d 844 (2005) (infectious disease expert qualified to testify against neurosurgeon regarding diagnosis of meningitis; diagnostic methods the same; "*[i]t is the scope of a witness's knowledge and not artificial classification by professional title that governs the threshold question of admissibility of expert medical testimony in*

*a malpractice case*"); *See*, Seybold v. Neu, 105 Wn. App. 666, 677-80, 19 P.3d 1068 (2001) (plastic surgeon qualified to testify against orthopedic surgeon regarding cutaneous malignancies and bone grafting, where plastic surgeon also trained and experienced with the disease and treatment); *White v. Kent Med. Ctr.*, 61 Wn. App. 163, 173-74, 810 P.2d 4 (1991) (*physician is qualified as an expert where familiarity demonstrated with the procedure or medical problem at issue, even if not a specialist with respect to same; ENT physician qualified to testify as to standard of care for general practitioner*); *Miller v. Peterson*, 42 Wn. App. 822, 830, 714 P.2d 695 (1986) (*orthopedic surgeon qualified to testify about podiatrist's standard of care so long as both used the same methods of treatment*). Where the methods of treatment are or should be the same as the defendant, the expert is qualified to testify. *Eng v. Klein*, 127 Wn. App. 171, 176, 110 P.3d 844 (2005); *Miller v. Peterson*, 42 Wn. App. 822, 830, 714 P.2d 695 (1986).

Respondent's Leon & Vaughn have mustered up no ***competent*** evidence to overcome that Dr. Panomitros medical impressions that Defendants violated the standard of care was not proper. The evidence made available to the Court only further provides clarification that Dr. Panomitros is a competent medical expert. Based on the foregoing, reconsideration should be granted.

3. *Appellant Disclosed Dr. Panomitros as an Expert in Accordance With KCLR 26 (k) (1). Plaintiff identified Dr. Panomitros as a Medical Expert and no Notice of Deposition Date of Dr. Panomitros, Specifically Was Ever Served Upon Appellant. Under Washington State's Rules of Civil Procedure, Appellant Does Not Have an Affirmative Duty to Disclose Which Medical Expert, Already Identified, that Defendants Should Submit a Notice of Deposition. Respondent's Leon & Vaughn Never Noted a Deposition, Although Plaintiff Agreed to Extend the Discovery Cut-Off Date.*

It should be noted that Respondent's, Leon & Vaughn requested two uncontested Motions for Continuances to extend the trial date and amend the Court's Case Scheduling Order based, in part, on the vast number of experts identified by Plaintiff's interrogatory response to Dr. Trimble. Respondent's, Leon & Vaughn allege that Appellant failed to provide deposition dates for the experts that Defendants claim were provided months prior to the discovery cut-off. Simply put, Respondent's, Leon & Vaughn have not provided wherein the Washington State Civil Rules of Procedure that Plaintiffs in cases have an affirmative duty to disclose or choose which experts Defendants should note for depositions. Dr. Panomitros, as admitted by Defendants, was timely disclosed by Plaintiff. Why have Respondent's, Leon & Vaughn simply not set a deposition date for Dr. Panomitros? They instead note a Motion to Strike his testimony, essentially voicing their **objection** to the use of his testimony at trial. That said, Respondent's, Leon & Vaughn conducted a CR 26 (i) conference only after the discovery cut-off and Plaintiff's complied and also Appellant disclosed/supplemented Dr. Panomitros expert report when received, well in advance of trial. Moreover,

Appellant disclosed Dr. Panomitros in accordance with the Case Scheduling Order. *See*, Exhibit A attached hereto and incorporated herein by reference.

4. *Appellant's Compliance with Discovery Has Been Complied With. There are no Tenable Grounds for Which Summary Judgment Should Have Been Granted. Summary Judgment Should be Granted as the Evidence Propounded on the Court Shows That was no Intentional Grounds for Excluding Witnesses and Plaintiff has Complied With the Applicable Case Law and Rules of Procedure.*

Plaintiff has been mischaracterized throughout these proceedings and the Proposed Orders to Strike and the Supplemental Order on Defendants Motion for Summary Judgment proffered by Defendants' counsel places Defendants in a false light in relation to alleged discovery abuses. Plaintiff's made disclosures of Dr. Panomitros in accordance with the Washington State Rules of Procedure, King County Superior Court Rules of Procedure and case law. Simply put, the case law on point and applicable factual grounds for why Summary Judgment should not have been granted on the basis of Dr. Panomitros qualifications has been reiterated again and again wherein reconsideration is proper. Defendants' legal counsel is not an expert and the court on sitting on a Motion for Summary must consider the statements by Plaintiff's expert as true. Defendants have failed to provide any competent evidence contradicting Plaintiff's expert, thus summary judgment was not proper.

5. *Plaintiff's Motion for Reconsideration Was Denied Prior to Submitting a Reply*

On October 6, 2012 Appellant's counsel was identified by the Court's Bailiff to Reply to Defendants' Motion for Reconsideration. On October 12, 2015 at 1:13pm, prior to receiving Plaintiff's Reply, the Court sent Defendants' legal counsel an order denying Plaintiff's Motion for Reconsideration and granting Defendants' Motion to Strike and granting Supplemental Order on Reconsideration. Plaintiff contends that the Court's denial of Plaintiff's Motion for Reconsideration was improper in light that Plaintiff was not afforded the opportunity to Reply in accordance with the Court's request. Essentially only allowing Defendants to provide a Response only supplements the record in favor of Defendants, and substantial justice has not been served and such decision amounts to abuse of discretion.

E. STANDARD OF REVIEW OF TRIAL COURT'S DENIAL OF A CR 56 (F) REQUEST FOR EXTENSION AND GROUND FOR WHY THE TRIAL COURT ABUSED ITS DISCRETION

The standard for review for a denial of a request for extension under CR 56 (f) is an "abuse of discretion" standard. *See*, *Keck v. Collins*, App. LEXIS 1101 (Lexis Advance), 325 P.3d 306 (Div. 3, 2014). Accordingly, the issue before this Court is whether the trial court abused its discretion in denying Appellant's request to extend summary judgment ruling so as to allow Appellant additional time to find an expert if the Court ruled that r. Pinto's experts were not competent or declarations were conclusory. Appellant, in light of all the evidence put forth to oppose summary judgment

that the trial court abused its discretion when it denied Appellant's request for additional time.

In short, when a trial court has been shown a good reason why an affidavit of a material witness cannot be obtained in time for a summary judgment proceeding the court has a duty to accord the parties a reasonable opportunity to make their record complete before ruling on a motion for a summary judgment, especially where the continuance of the motion would not result in a further delay of the trial. *Cofer v. Pierce County*, 8 Wash.App. at 262-63, 505 P.2d 476; *see also Coggle v. Snow*, 56 Wash.App. 499, 507, 784 P.2d 554 (1990). The trial court must make justice its primary consideration in ruling on a motion for continuance, even an informal one. Coggle, 56 Wash.App. at 508, 784 P.2d 554; *Butler v. Joy*, 116 Wash.App. 291, 299, 65 P.3d 671 (2003). And "i*t is hard to see how justice is served by a draconian application of time limitations' when [the nonmoving] party is hobbled by legal representation that has had no time to prepare a [sufficient] response to a motion that cuts off any decision on the true merits of a case.*" Butler, 116 Wash.App. at 300, 65 P.3d 671 (*quoting*, *Coggle*, 56 Wash.App. at 508, 784 P.2d 554). Absent prejudice to the moving party, the trial court should grant a motion for continuance under such circumstances. Id. at 299-300, 784 P.2d 554.

Here, justice required continuing the summary judgment hearing to allow Appellant to either supplement the declaration of his experts under CR

56 (e) or to provide additional time to replace the medical professional that the Court contends was not competent. Again, evidence contained throughout the record reveal efforts made to obtain experts in Washington State and conflicts of interests that arose due to knowledge of the parties involved.

The trial court denied a continuance after deciding Appellant's counsel's request and the trial court did not offer any good reason for granting a continuance The trial court's decision to deny a continuance or enlarge the time for filing was manifestly unreasonable, considering the unrefuted3 reasons given by Appellant's counsel. Considering the strength of the factors outlined above, Appellant contends that the denial was outside the range of acceptable choices for the trial court to rule; especially since Respondent's counsel did not contest the CR 56 (f) extension in their Reply. A continuance would have allowed the trial court to fully evaluate other medical testimony, including but not limited to treating physicians. Therefore, we conclude the trial court abused its discretion and erred in denying appellants' motion to continue the summary judgment hearing

In terms if the applicable language Washington State Civil Rule 56 (f) it provides that:

> When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's 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.

*See*, CR 56(f).

The forgoing basis for an extension is well-settled that "if a nonmoving party needs more time to obtain expert witnesses or otherwise respond to a summary judgment motion, CR 56(f) allows the court to order a continuance. *See*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). ("*Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.*") In this case, discovery was ongoing and if the declarations provided by Appellant are deemed not competent, then Appellant should have been allowed additional time to supplement the record or have additional experts, especially since Respondent's did not brief any objection to the CR 56 (f) request. In light of this fact, the trial court committed probable error.

## V. CONCLUSION

Based one foregoing, Appellant respectfully request that the Court reverse the trial Court's Order granting Summary Judgment and denying Appellant's Motion for Reconsideration and also reverse the trial court's order Striking Respondent's Expert Witness and remand this matter for further proceedings.

*Respectfully submitted this 18th day of April 2016.*

**CHUNG, MALHAS & MANTEL, PLLC.**

*/s/ Edward C. Chung*
Edward C. Chung, WSBA # 34292
Attorney for Appellant

## CERTIFICATE OF SERVICE

I, ANGELA McCLURG, declare under penalty of perjury under the laws of the State of Washington that I am a legal resident of the United States, I am over the age of eighteen years old, and I am not a party to this matter. I further declare that I am a Paralegal with the law firm of CHUNG, MALHAS & MANTEL, PLLC, with an address of 1511 Third Avenue, Suite 1088, Seattle, Washington 98101; and on this 31st day of March, 2016, I caused a copy of the foregoing document, designated as Appellants' Brief along with the attached Appendices _ through _ to be served via Legal Messenger and electronically served, per stipulation, as follows:

| | | |
|---|---|---|
| Washington State Court of Appeals<br>Division One<br>One Union Square<br>600 University Street<br>Seattle, Washington 98101-1176 | ☐<br>☒<br>☐<br>☐<br>☐ | Legal Messenger<br>Hand Delivered<br>Electronic Mail<br>Facsimile<br>First Class Mail |
| ***Attorney for Respondent:***<br><br>**Betts, Patterson & Mines, P.S.**<br>One Convention Place<br>701 Pike Street, Suite 1400<br>Seattle, Washington 98101-3927<br>*Skangas@bpmlaw.com*<br>*Llackland@bpmlaw.com*<br>*Lgreen@bpmlaw.com* | ☐<br>☐<br>☒<br>☐<br>☐ | Legal Messenger<br>Hand Delivered<br>Electronic Mail<br>Facsimile<br>First Class Mail |
| ***Attorney for Respondent:***<br><br>**Forsberg & Umlauf, P.S.**<br>901 Fifth Avenue, Suite 1400<br>Seattle, Washington 98164-1039<br>*Psheldon@forsberg-umlauf.com*<br>*Esado@forsberg-umlauf.com* | ☐<br>☐<br>☒<br>☐<br>☐ | Legal Messenger<br>Hand Delivered<br>Electronic Mail<br>Facsimile<br>First Class Mail |

Dated this 18th day of April 2016.

/s/ Angela McClurg
Angela McClurg, Paralegal for
CHUNG, MALHAS & MANTEL, PLLC