73650-7

No. 73650-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SURAJ PINTO,

Appellant,

vs.

GREGORY VAUGH and "JANE DOE" VAUGH; PAOLA LEONE AND "JANE DOE" LEONE; LEONE & VAUGHN, DDS, PS, DBS LEONE & VAUGHN ORTHODONTICS; L. DOUGLAS TRIMBLE AND "JANE DOE" TRIMBLE,

Respondents.

RESPONDENT L. DOUGLAS TRIMBLE'S BRIEF

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I. INTRODUCTION

Appellant Suraj Pinto ("Pinto") sued his oral and maxillofacial surgeon, Respondent L. Douglas Trimble ("Dr. Trimble"), for medical malpractice in connection with a complicated orthognathic surgical procedure. The trial court properly dismissed Pinto's claims against Dr. Trimble on summary judgment because Pinto failed to produce competent medical testimony establishing that Dr. Trimble: (1) failed to meet the standard of care, or (2) failed to obtain Pinto's informed consent to perform the procedure. The dismissal of Dr. Trimble should be affirmed.

II. ISSUES PRESENTED FOR REVIEW

1. The trial court properly dismissed Pinto's claims against Dr. Trimble because Pinto failed to produce competent medical testimony establishing that Dr. Trimble: (1) failed to meet the standard of care, or (2) failed to obtain Pinto's informed consent.

2. The trial court did not abuse its discretion when it denied Pinto's CR 56(f) motion because Pinto: (1) failed to offer a good reason for his delay in obtaining competent medical testimony supporting his claims, and (2) failed to state what evidence would be established if he was given more time.

III. STATEMENT OF THE CASE

Pinto commenced his medical malpractice lawsuit against Dr. Trimble and two of Pinto's orthodontists in August 2014. (CP 9-11.) Dr. Trimble is an oral and maxillofacial surgeon. Pinto alleged that Dr. Trimble was negligent in connection with complicated maxillary and mandibular orthognathic surgery and failed to obtain Pinto's informed consent to perform the surgery. *Id.* Pinto's claims were based on RCW 7.70.030(1) (failure to follow the accepted standard of care), and RCW 7.70.030(3) (failure to obtain informed consent).

In his Disclosure of Possible Primary Witnesses and in his responses to Dr. Trimble's First Interrogatories and Requests for Production to Plaintiff, Pinto failed to disclose any medical expert witness who would testify that Dr. Trimble: (1) failed to follow the accepted standard of care, or (2) failed to obtain Pinto's informed consent. (CP 66-184.)

Consequently, in May 2015, nine months after Pinto commenced the lawsuit, Dr. Trimble filed a Motion for Summary Judgment based on the absence of competent medical testimony necessary to support Pinto's claims against him. (CP 52-63.)

In response to the motion, Pinto submitted declarations from James C. Rockwell, M.D. (CP 287-288) and Jay Grossman, DDS (CP 274-286).

Dr. Rockwell provided no opinions regarding standard of care or informed consent. (CP 287-288.)

Dr. Grossman stated that he is "a licensed Dentist in the State of California and the Nevada*[sic]*." (CP 274.) Dr. Grossman's one-page declaration incorporated by reference a report he prepared in September 2014 which contained opinions regarding standard of care and informed consent. (CP 274-286.) However, nowhere in Dr. Grossman's declaration or attached report did he describe his qualifications as a general dentist, his familiarity with the orthognathic surgery performed by Dr. Trimble, or how he is qualified to offer standard of care opinions regarding an oral surgeon's practice for a procedure he is neither qualified nor licensed to perform. *Id.*

In his summary judgment response brief, filed ten months after he commenced the lawsuit, Pinto requested a CR 56(f) continuance "if the declarations provided by Mr. Pinto are deemed not competent . . . [in order] to obtain other experts." (CP 223.) Pinto failed to submit an affidavit supporting the request, as required by CR 56(f), failed to provide any reason for his delay in obtaining competent medical testimony supporting his claims, and failed to state which experts he would retain and what testimony such experts would provide if Pinto was given more time.

On June 12, 2015, after oral argument, King County Superior Court Judge Sean O'Donnell signed an Order Granting Defendant L. Douglas Trimble's Motion for Summary Judgment and dismissed Pinto's claims against Dr. Trimble. (CP 472-474.)

IV. ARGUMENT

A. Standard of Review for Summary Judgment Dismissal is De Novo

A trial court's ruling on a summary judgment motion is subject to a de novo standard of review. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). "A motion for summary judgment is properly granted where 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003) (alteration in original) (quoting CR 56(c)). The reviewing court should view "the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party." *Id.*, at 794.

B. The Trial Court Properly Dismissed Pinto's Claims

1. Required Elements of Pinto's Malpractice Claims

Pinto alleged that Dr. Trimble was negligent for failing to follow the accepted standard of care and failing to obtain Pinto's informed consent. For the failure to follow the standard of care claim, Pinto was required to prove that Dr. Trimble "failed to exercise that degree of care,

skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he . . . belongs, in the state of Washington, acting in the same or similar circumstances" and that "[s]uch failure was a proximate cause of the injury complained of." RCW 7.70.040.

For the failure to obtain informed consent claim, Pinto was required to prove that Dr. Trimble "failed to inform [Pinto] of a material fact or facts relating to the treatment," that Pinto "consented to the treatment without being aware of or fully informed of such material fact or facts," "that a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material facts," and "that the treatment in question proximately caused injury to [him]." RCW 7.70.040.

2. Summary Judgment Standard Applicable to Dr. Trimble's Motion for Summary Judgment

Motions for summary judgment examine the sufficiency of the evidence supporting a party's allegations. Civil Rule 56(c). The purpose of summary judgment is to avoid unnecessary trials where insufficient evidence exists. *Pelton v. Tri-State Memorial Hosp., Inc.*, 66 Wn. App. 350, 355, 831 P.2d 1147 (1992) (citing *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 214, 226, 770 P.2d 182 (1989)).

The party moving for summary judgment bears the initial burden of showing the absence of an issue of material fact. *Cox v. Malcolm*, 60 Wn. App. 894, 897, 808 P.2d 758, *rev. denied*, 117 Wn.2d 1014 (1991); *see also*, *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993). The defendant may meet this burden by challenging the sufficiency of the plaintiff's evidence. *Young*, 112 Wn.2d at 225; *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272, 275, 896 P.2d 750, *rev. denied,* 128 Wn.2d 1004 (1995). As the *Guile* court noted:

> [A] defendant moving for summary judgment now has a choice: the defendant can attempt to establish through affidavits that no material factual issue exists, *or, alternatively, the defendant can point out to the trial court that the plaintiff lacks competent evidence to support an essential element of his or her case. Young*, at 225 and n.1; *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 170, 810 P.2d 4 (1991). If a defendant chooses the latter alternative, the requirement of setting forth specific facts does not apply. The reason for this result is that "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other fact immaterial." *Celotex*, 477 U.S. at 323.

Guile, 70 Wn. App. at 23 (*emphasis added*).

Once the defendant has made its showing, the non-moving party must:

> (1) Rehabilitate the evidence attacked in the moving party's papers,
>
> (2) Produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or

(3) Submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).

Young, 112 Wn.2d 216, 226, n.2, 770 P.2d 182 (1989) (citing the dissent in *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1988)). If the plaintiff's response "fails to make a showing sufficient to establish the existence of an element essential to his case," then defendant's motion for summary judgment should be granted. *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990); *Young*, 112 Wn.2d 216 at 225 (citing *Celotex Corp.*, *supra*).

When a plaintiff fails to establish the existence of an essential element of his case, then there is no genuine issue as to any material fact since "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Young*, 112 Wn.2d at 225.

Dr. Trimble satisfied his burden under CR 56 by pointing out that Pinto had no competent medical evidence establishing that Dr. Trimble: (1) failed to meet the standard of care, or (2) failed to obtain Pinto's informed consent to perform the procedure. Pinto's argument in his Appellant's Brief that Dr. Trimble was required to submit evidence in order to satisfy his burden is contrary to Washington law. After Dr.

Trimble pointed out that that Pinto lacked evidence to prove his claims, it was Pinto's burden to "set forth specific facts showing that there [was] a genuine issue for trial." CR 56(e). He failed to do so.

3. Pinto Failed to Meet His Burden with Respect to His Claim That Dr. Trimble Failed to Follow the Standard of Care

In a medical negligence case, the plaintiff must "prove by a preponderance of the evidence that the defendant or defendants failed to exercise that degree of skill, care, and learning possessed at that time by other persons in the same profession, and that as a proximate result of such failure the plaintiff suffered damages...." RCW 4.24.290. RCW 7.70.040(1) further requires proof that:

> The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances.

Except in unusual circumstances, medical testimony is required to establish the standard of care and proximate cause issues in medical negligence actions.[1] *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113

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[1] Although Pinto argues that this case is one of those unusual circumstances, he does not explain how his post-surgical complaints render this a case which does not require expert testimony on the standard of care. To the contrary, this is a complicated case involving major oral surgery well outside the common knowledge of a lay person and must be supported by expert testimony. *See Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn. App. 155, 194 P.3d 274 (2008).

(1983); *Morinaga v. Vue*, 85 Wn. App. 822, 831-32, 935 P.2d 637, *rev. denied*, 133 Wn.2d 1012, 946 P.2d 401 (1997). Mere citation to medical records and assertions of negligence by a lay plaintiff are insufficient to create a genuine issue of material fact. The standard of care must be established by the testimony of experts who practice in the same field. *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 706-07, 782 P.2d 1045 (1989). Summary judgment dismissal is appropriate in cases like this one where a plaintiff fails to submit competent medical testimony and/or evidence establishing that a health care provider deviated from the standard of care. *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn. App. 155, 194 P.3d 274 (2008); *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001).

a. Pinto Failed to Show That Dr. Grossman Is Qualified to Express Standard of Care Opinions

In response to Dr. Trimble's Motion for Summary Judgment, Pinto submitted the declarations of Dr. Rockwell and Dr. Grossman.[2] Dr. Rockwell provided no opinions regarding the standard of care. Dr. Grossman, a general dentist licensed to practice in California and Nevada, offered standard of care opinions, but failed to describe his qualifications as a general dentist, whether he is familiar with the orthognathic surgery

[2] Pinto did not submit a declaration from Dr. Panomitros, who is identified in Appellant's Brief, in response to Dr. Trimble's summary judgment motion. Dr. Panomitros expressed no opinions regarding Dr. Trimble.

performed by Dr. Trimble, or how he is qualified to offer standard of care opinions regarding an oral surgeon's practice for a procedure he is neither qualified nor licensed to perform.

A witness is not qualified to offer expert testimony outside of the witness's area of expertise. *See, e.g., Esperaza v. Skyreach Equip.*, 103 Wn. App. 916, 924, 15 P.3d 188 (2000) ("the expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witnesses' area of expertise." (citation omitted)). A medical degree does not automatically "bestow[] the right to testify on the technical standard of care. A physician must demonstrate that he or she has sufficient expertise in the relevant specialty." *Young v. Key Pharm, Inc.*, 112 Wn.2d 216, 226-27, 770 P.2d 182 (1989); *see also Winkler v. Giddings*, 146 Wn. App. 387 (2008) (plaintiff's expert, a physician from Pennsylvania, was not qualified to testify regarding the standard of care in Washington); *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 613, 15 P.3d 210 (2001) (trial court properly precluded nurse from testifying as to causation).

Davies v. Holy Family Hosp., 144 Wn. App. 483, 183 P.3d 283 (2008), is particularly instructive. In that case, the plaintiff's decedent died while hospitalized following kidney surgery as a result of undiagnosed and untreated internal bleeding. *Id.* at 488. Plaintiffs alleged

various health care providers at the hospital fell below the applicable standard of care. *Id.* at 489. Defendants moved for summary judgment based on lack of expert testimony. In response, plaintiffs filed two declarations of Randall Patten, M.D., a radiologist. Dr. Patten opined as to breach of the standard of care by various hospital providers, none of whom were radiologists. *Id.* at 490. The trial court granted summary judgment because Dr. Patten was not qualified to testify as to the standard of care regarding other medical specialties. In affirming the trial court, the Court of Appeals reasoned as follows:

> While Dr. Patten's declaration states that he is "familiar" with the appropriate measures to be taken by "hospital staff, including nursing staff" in response to symptoms of internal bleeding, he does not state that he had knowledge of the relevant standards of care for those specific health care providers...Dr. Patten's declarations also fail to provide any basis for his familiarity. Here, neither of the declarations show that Dr. Patten, as a radiologist, had sufficient expertise to be considered qualified to express an opinion regarding the standard of care applicable to nurses and other health care providers. In fact, Dr. Patten's declarations fail to reference any education, medical training, or supervisory experience which could demonstrate his familiarity with the standard of care in other health care fields. Under CR 56(e), declarations which contain conclusory statements unsupported by facts are insufficient for purposes of summary judgment.

Id. at 495-96 (internal citations omitted).

Unlike Dr. Patten's declaration in *Davies*, Dr. Grossman's declaration in this case failed to establish that he has <u>any</u> experience or

familiarity with orthognathic surgery. Like Dr. Patten's declaration, Dr. Grossman's declaration "fail[s] to reference any education, medical training, or supervisory experience which could demonstrate his familiarity with the standard of care" of an oral surgeon performing complicated orthognathic surgery. Pinto failed to establish that Dr. Grossman was competent to express any opinions in this case. The trial court properly determined that Dr. Grossman's declaration did not create a genuine issue of material fact as to whether Dr. Trimble met the standard of care.

b. Dr. Trimble Did Not Waive His Right to Object to Dr. Grossman's Declaration

Pinto incorrectly argues that Dr. Trimble waived his right to challenge the sufficiency of Dr. Grossman's summary judgment declaration because he did not file a motion to strike. Appellant's Brief, page 16. He cites *Meadows v. Grant's Auto Brokers, Inc.,* 71 Wn.2d 874, 881, 431 P.2d 216 (1967), a case in which defendants waited until their appeal to first complain about the evidentiary competency of plaintiff's summary judgment affidavits.

In the instant case, Dr. Trimble devoted his entire five-page summary judgment reply brief to attacking the evidentiary competency of Dr. Grossman's summary judgment declaration. (CP 341-345.) As

explained in *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009):

> [M]aterials submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration as is true of evidence that is removed from consideration by a jury; they remain in the record to be considered on appeal. Thus, it is misleading to denominate as a "motion to strike" what is actually an objection to the admissibility of evidence that could have been preserved in a reply brief rather than by a separate motion.

King County Superior Court's Local Civil Rule (LCR) 56(e) was amended in 2011 to conform to *Cameron.* It now states: "A party objecting to the admissibility of evidence submitted by an opposing party must state the objection in writing in a responsive pleading, a separate submission shall only be filed if the objection is to materials filed in the reply." Dr. Trimble complied with LCR 56(e) when he argued in his summary judgment reply brief that Pinto failed to establish that Dr. Grossman was competent to provide standard of care opinions.

c. Pinto's Identification of Treating Physicians as Potential Witnesses, His Discovery Responses, His Medical Records, and His Own Unsworn Statements Do Not Create an Issue of Fact Regarding Standard of Care

As explained above, Pinto was required to produce competent medical testimony establishing the standard of care and Dr. Trimble's alleged failure to comply with such standard. His failure to do so is fatal

to his claims against Dr. Trimble. All of the other, non-expert evidence he cites in his Appellant's Brief does not, and cannot, substitute for the missing expert testimony.

In addition, Pinto misrepresents the contents of one of his declarations filed in the trial court. At page 17 of his Appellant's Brief, Pinto states, "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**." Pinto made no allegations regarding representations made by Dr. Trimble in the referenced declaration or anywhere else in the record on appeal.

4. Pinto Failed to Meet His Burden with Respect to His Lack of Informed Consent Claim

a. Pinto Failed to Produce Required Competent Medical Expert Testimony

RCW 7.70.050 identifies the following necessary elements of proof in a medical malpractice case involving the alleged breach of a duty to secure an informed consent by a patient:

> (1) (a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;
>
> (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;
>
> (c) That a reasonably prudent patient under similar circumstances would not have

consented to the treatment if informed of such material fact or facts; and

(d) That the treatment in question proximately caused injury to the patient.

Under the doctrine of informed consent, a doctor must inform the patient of the material facts, including the attendant risks, for a given treatment before obtaining the patient's consent to treatment. *Adams v. Richland Clinic, Inc., P.S.,* 37 Wn. App. 650, 656, 681 P.2d 1305 (1984) (citing *Smith v. Shannon,* 100 Wn.2d 26, 29, 666 P.2d 351 (1983)); *see generally* RCW 7.70.050. The determination of materiality consists of a two-prong test, and expert testimony is required to prove the first prong: the existence and nature of the risk and the likelihood that it will happen. *Id.,* at 657-58 (citing *Smith,* 100 Wn.2d at 33-34). "Just as patients require disclosure of risks by their physicians to give an informed consent, a trier of fact requires description of risks by an expert to make an informed decision." *Smith,* 100 Wn.2d at 33-34.

Dr. Rockwell and Dr. Grossman offered no opinions regarding the existence and nature of the risks of the subject surgery, or the likelihood of a bad result. Furthermore, as discussed above, Dr. Grossman failed to lay a foundation regarding his competency to offer any opinions regarding the surgery. In the absence of competent medical testimony regarding the existence and nature of the risks of the subject procedure and the

likelihood of such risks, the trial court properly dismissed Pinto's claim based on lack of informed consent.

b. Dr. Trimble Was Not Required to Assert an Affirmative Defense of Informed Consent

At page 23 of his Appellants' Brief, Pinto states: "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*[sic]* was never alleged or pled on the record." This statement demonstrates Pinto's misunderstanding of Dr. Trimble's summary judgment argument regarding informed consent. Dr. Trimble argued that the lack of informed consent claim should be dismissed because Pinto produced no competent medical evidence regarding the existence and nature of the risks of the surgery and the likelihood of such risks. It was Pinto's burden to produce such evidence. He failed to do so. As a result, the trial court properly dismissed his lack of informed consent claim.

C. The Trial Court Properly Denied Pinto's CR 56(f) Request

1. Standard of Review for Denial of CR 56(f) Motion Is Abuse of Discretion

"A ruling on a CR 56(f) motion for a continuance is reviewed for manifest abuse of discretion. Discretion is not abused if: (1) the requesting party does not offer a good reason for the delay in obtaining the

desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact." *Janda v. Brier Realty*, 97 Wn. App. 45, 54, 984 P.2d 412 (1999) (internal quotations and citations omitted).

2. The Trial Court Properly Denied Pinto's CR 56(f) Request

In his summary judgment response brief, Pinto requested a CR 56(f) continuance "if the declarations provided by Mr. Pinto are deemed not competent . . . [in order] to obtain other experts." (CP 223.)

CR 56(f) states as follows:

> (f) **When Affidavits Are Unavailable.** 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.

Pinto failed to submit an affidavit in support of his contingent request for more time, as required by CR 56(f), failed to provide any reason for his delay in obtaining competent medical testimony supporting his claims, and failed to state which experts he would retain and what testimony such experts would provide if Pinto was given more time. Significantly, Dr. Grossman's report, which was appended to his summary

judgment declaration, was dated September 26, 2014, nine months before the summary judgment hearing. (CP 274-286.) The trial court properly exercised its discretion in denying Pinto's request.

V. CONCLUSION

Pinto failed to meet his burden under CR 56 to provide competent medical testimony that Dr. Trimble: (1) failed to meet the standard of care; or (2) failed to obtain Pinto's informed consent. As a result, the trial court properly dismissed Pinto's claims against Dr. Trimble. Dr. Trimble requests that this Court affirm the trial court's order.

RESPECTFULLY SUBMITTED this 18th day of May, 2016.

FORSBERG & UMLAUF, P.S.

By: _____

Patrick C. Sheldon, WSBA #11398
Jeffrey T. Kestle, WSBA #29648
Attorneys for Respondent L. Douglas Trimble

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the **RESPONDENT L. DOUGLAS TRIMBLE'S BRIEF** on the following individuals in the manner indicated:

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SIGNED this 18th day of May, 2016, at Seattle, Washington.

Lynda T. Ha