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ORIGINAL

NO. 73650-7

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

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.

RESPONDENTS GREGORY VAUGHN, PAOLA LEONE, AND LEONE & VAUGHN, DDS, P.S.'S BRIEF

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B. Whether the trial court abused its discretion in denying Pinto's Motion for Reconsideration of the trial court's grant of summary judgment dismissing claims against Drs. Vaughn and Leone. NO. 4

C. Whether the trial court's order Striking Pinto's experts should be affirmed. YES. 4

1. Pinto has waved this assignment of error. 4

2. The trial court did not abuse its discretion in granting the motion to strike Pinto's experts. 4

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D. Whether Pinto has waived his assignment of error as to the trial court's denial of the parties' stipulated motion for a trial continuance by failing to present argument and citations in support. YES. 4

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I. INTRODUCTION

Appellant Suraj Pinto ("Pinto") is a disgruntled former patient who sued his oral and maxillofacial surgeon, Respondent L. Douglas Trimble ("Dr. Trimble"), for medical negligence relating to a complicated maxillary and mandibular orthognathic surgery that Dr. Trimble performed at Overlake Medical Center. Pinto's suit also included claims against Respondents Gregory Vaughn ("Dr. Vaughn"), Paola Leone ("Dr. Leone")[1], the orthodontists who referred Pinto to Dr. Trimble, and who provided Pinto with orthodontic care before and after Dr. Trimble's surgery.

In separate motions, the trial court dismissed all of Pinto's claims on summary judgment as to all Respondents, ruling that Pinto failed to produce the competent expert medical testimony necessary to support his claims for failure to meet the standard of care and for lack of informed consent. Dr. Trimble filed his motion first and it was granted on June 15, 2015. In dismissing all of Pinto's claims against Dr. Trimble, the trial court noted, among other deficiencies, that Pinto's case was filed in August 2014 and that he had at least ten months to find a qualified expert but had failed to do so. Drs. Vaughn and Leone's motion followed and

[1] Pinto also sued Respondent Leone & Vaughn, DDS, PS, Drs. Vaughn and Leone's orthodontic practice. Respondents may be referred to collectively as "Vaughn and Leone" or the "Orthodontists".

was granted on September17, 2015, as Pinto still had not procured the requisite expert testimony despite having had three additional months since Dr. Trimble's dismissal, and more than a year since his case was filed.

After granting Dr. Vaughn and Leone's motion for summary judgment, in a separate order, the trial court also granted their motion to strike Pinto's proffered experts based on Pinto's failure to provide discovery related to said experts. This ruling constituted a separate basis, unrelated to the court's grant of summary judgment, for dismissal of Pinto's claims.

In short, the trial court made two rulings in dismissing Pinto's claims as to Drs. Vaughn and Leone. Either ruling, standing alone, resulted in dismissal of all Pinto's claims. First, the court granted Drs. Vaughn and Leone's motion for summary judgment on the basis that Pinto failed come forth with the expert testimony required to sustain his claims. The trial court considered the expert materials Pinto provided and found such to be insufficient. In so ruling, the trial court judge noted that the report of Pinto's proffered expert against the Respondent Orthodontists was not made by an orthodontist, that the expert never articulated the appropriate standard of care for orthodontists, and that he did not clearly

identify the failures of each defendant but instead set forth a "mishmash" of "conclusory pronouncements." RP (9/17/15) pp. 55-56.

Secondly, the trial court granted Drs. Vaughn and Leone's motion to strike Pinto's experts based on Pinto's repeated discovery violations. The striking of Pinto's experts equated to dismissal of all claims because Pintos' claims all require expert medical testimony.

The trial court's dismissal of all Pinto's claims should be affirmed. Both rulings by the trial court were sound, and supported by detailed orders that reflected thorough and thoughtful consideration of all materials submitted. Pinto's appeal is based on a series of the same flawed arguments that the trial court considered in various motions, including on reconsideration, and dismissed after careful deliberation. The record before this Court demonstrates that the trial court carefully considered the same arguments that Pinto raises and presents again here, verbatim. Indeed, Appellant's Brief is but a hodgepodge of material copied word for word, typo for typo, from prior pleadings and presented to this Court without any additional insight or analysis. The trial court gave these same arguments ample consideration before dismissing Pinto's claims in a thoughtful and deliberate fashion. The trial court's dismissal of Pinto's case should be affirmed.

II. ISSUES FOR REVIEW

A. Whether the trial court properly dismissed Pinto's claims against Drs. Vaughn and Leone because Pinto failed to produce competent expert testimony establishing that Drs. Vaughn and Leone deviated from the standard of care, failed to obtain Pinto's informed consent, and that such lapses proximately caused Pinto harm. YES.

B. Whether the trial court abused its discretion in denying Pinto's Motion for Reconsideration of the trial court's grant of summary judgment dismissing claims against Drs. Vaughn and Leone. NO.

C. Whether the trial court's order Striking Pinto's experts should be affirmed. YES.

1. Pinto has waved this assignment of error.

2. The trial court did not abuse its discretion in granting the motion to strike Pinto's experts.

3. The striking of Pinto's experts is another basis on which the dismissal of all claims against Drs. Vaughn and Leone should be affirmed.

D. Whether Pinto has waived his assignment of error as to the trial court's denial of the parties' stipulated motion for a trial continuance by failing to present argument and citations in support. YES.

E. Whether dismissal of all claims against the Respondents' corporate entity should be affirmed due to Pinto's waiver of this assignment of error. YES.

III. COUNTERSTATEMENT OF THE CASE

This Counterstatement is necessary because Pinto's Statement of the Case (Appellant's Brief ("AB") 3-11) is factually inaccurate in many

respects and wholly fails to comply with RAP 10.3(a)(5). Pinto's "facts" as to Drs. Vaughn and Leone (AB 8-11), does not contain a single reference to the record. Moreover, Pinto's entire Statement of the Case is fraught with improper argument and except for a handful of "CP's" that dot a few pages, there are no references to the record as required under RAP 10.3(a)(5). The entire section should be stricken and Pinto's brief should be disregarded in its entirety because of Pinto's abject failure to comply with the Rules of Appellate procedure.[2]

A. Drs. Vaughn and Leone Provided Specialty Orthodontic Care to Pinto

Respondents Dr. Vaughn and Leone are husband and wife owners of Respondent Leone and Vaughn Orthodontics (CP 502-503). Drs. Vaughn and Leone and are both members of the American Board of Orthodontists and their practice is limited to orthodontics[3] (CP 503). Pinto sought an orthodontic consultation with Dr. Vaughn on September 9, 2008

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[2] The Court already returned Pinto's brief to him once on April 7, 2016 for failure to comply with the RAP. Specifically, the Court directed Pinto to provide references to "specific pages in the Clerk's Pages or Report of Proceedings." Pinto's second submission still fails.

[3] Orthodontics is one of nine dental specialties recognized by the American Dental Association ("ADA"). The ADA defines the specialty of "Orthodontics and Dentofacial Orthopedics" as "the diagnosis, prevention, interception, and correction of malocclusion, as well as neuromuscular and skeletal abnormalities of the developing or mature orofacial structures." American Dental Association, Definitions of Recognized Dental Specialties, available at http://www.ada.org/en/education-careers/careers-in-dentistry/dental-specialties/specialty-definitions (CP 503).

(CP 502-504). He was a transfer case, and already had braces on (CP 502-504). Dr. Vaughn examined Pinto and presented treatment options (CP 502-504). Pinto considered the options and commenced orthodontic treatment on September 18, 2008 (CP 502-504). On February 13, 2009, Pinto consulted with Dr. Leone, who referred him to Dr. Trimble for extractions and orthognathic surgery evaluation (CP 502-504). Pinto consulted with Dr. Trimble several times before deciding to proceed with orthognathic surgery by Dr. Trimble (CP 502-504). Dr. Trimble extracted Pinto's bicuspids on September 3, 2009, and then performed a complicated maxillary and mandibular orthognathic surgery on August 24, 2011 (CP 502-504).

After the orthognathic surgery, Mr. Pinto had orthodontic appointments on October 12, 2011 and November 4, 2011 (CP 502-504). Pinto told Dr. Vaughn then that he was unhappy with the outcome of the orthognathic surgery (CP 504). Pinto then failed to appear for his next scheduled appointment in December 2011 (CP 504). Instead, Pinto sued (CP 1-11).

B. Procedural Background.

This medical malpractice case was filed by Appellant Suraj Pinto on August 21, 2014 (CP 1-11; CP 502). The Complaint alleged negligence by Respondent Dr. Trimble, an oral and maxillofacial surgeon, related to

orthognathic surgery she performed on Pinto. Pinto also sued Respondents Dr. Vaughn and Dr. Leone, orthodontists who provided orthodontic treatment before and after Dr. Trimble's surgery (CP 1-11, CP 502). The Case Schedule issued at filing set trial for October 5, 2015 and a discovery cutoff of August 17, 2015 (CP 14). The parties later agreed to extend the discovery cutoff to August 31, 2015, per KCLR 4 (CP 502-503).

In May 2015, Dr. Trimble filed a motion for summary judgment dismissal ("MSJ") based on Pinto's lack of requisite expert testimony (CP 52-63). Pinto moved for 60 additional days to respond under CR 56(f) and also produced limited declarations from Drs. Jay Grossman and James Rockwell in opposition (CP 223, CP 274-288). On June 12, 2015, after oral argument, the King County Superior Court Judge Sean O'Donnell granted Dr. Trimble's MSJ, dismissing all of Pinto's claims against Dr. Trimble, ruling that Pinto failed to provide the necessary expert testimony and deeming the Grossman and Rockwell materials insufficient (CP 472-474).

Drs. Vaughn and Leone moved for summary judgment dismissal based on lack of expert testimony in August 2015 (CP 496-645). At Pinto's request, the MSJ hearing was continued from September 4 to September 16, 2015, then moved at the trial court's request to September

17, 2015 (CP 646). In response to Drs. Vaughn and Leone's MSJ, Pinto proffered an "expert report" from Nicholas Panomitros, DDS, MA, JD, LLM, a self-described "general dentist in the state of Illinois" (CP 685), whose report did not include any references to training or experience in orthodontics (CP 685-699). Pinto did not submit any materials from Drs. Grossman or Rockwell in opposition to Drs. Vaughn and Leone's MSJ, Pinto's counsel acknowledging that the trial court had already "kicked out" these experts (CP 670-699; RP 9/17/25, p. 24). On September 17, 2015, the trial court granted Drs. Vaughn and Leone's MSJ after determining that Dr. Panomitros' materials and Pinto's overall response was insufficient to defeat MSJ (CP 879-881; RP 9/17/15, pp. 52-61).

In addition to moving for summary judgment for Pinto's lack of expert testimony, Drs. Vaughn and Leone also moved to strike Pinto's experts for improper disclosure and other discovery violations (CP 704-748; details at Section III.C., *infra*). The trial court granted that motion at the hearing on September 17, 2015, providing its analysis and rationale on the record (RP 9/17/15) and memorializing its ruling in an Order dated October 26, 2015, which contained detailed findings of fact and conclusions of law to supporting the court's *Jones* and *Burnet* analysis (CP 919-925).

Pinto moved for reconsideration of the trial court's granting of MSJ and the order striking his experts (CP 882-895). Per the trial court's request, Drs. Vaughn and Leone filed an opposition to reconsideration (Sub 123; Respondents' Supplemental CP ____)[4]. Pinto then filed reply—late—but the court considered it anyway (CP 898-905; CP 917-918). The trial court denied reconsideration in an order filed October 26, 2015 (CP 917-918).

C. Pinto's Witness Disclosures and Failure to Provide Discovery Responses

1. Pinto Never Disclosed Any Expert in Orthodontics

The Case Schedule required Pinto to disclose primary witnesses by May 4, 2015 (CP 14; 704-709). Pinto served Dr. Trimble with a primary witness disclosure, but never served his primary witness disclosure on Drs. Vaughn and Leone, as the disclosure's certificate of service reflects (CP 69-75; 704-709). In any event, Pinto's disclosure did not include anyone identified as an orthodontist, nor did any of the "trial testimony" disclosed include anything about orthodontics (CP 69-75; 704-709).

Likewise, Pinto provided a "Disclosure of Possible Additional Witnesses" on June 15, 2015 that also failed to list an expert in

[4] Drs. Vaughn and Leone are filing their supplemental designation of clerk's papers with this brief.

orthodontics (CP 707; 827-828). Dr. Panomitros was the sole witness listed on that disclosure. However, like the previous deficient disclosure, the disclosure listed only his name, contact information, and a the following generic description, which fails to include any reference to orthodontics: "Dr. Panomitros is a Dental and Oral Surgeon specialist. Dr. Panomitro's [sic] opinions are based upon his background, training and review of all the relevant medical records and other materials relating to this case" (CP 827-828); again, there was no mention that Dr. Panomitros would provide any testimony as to orthodontics, to the care and treatment of Drs. Vaughn and Leone, or any causal relationship between either orthodontists' care and Pinto's alleged damages (CP 827-828).

2. Pinto Failed to Respond to Discovery Requests Regarding Expert Witnesses

Dr. Trimble served discovery requests on Pinto on November 25, 2014 (CP 504-506). Dr. Trimble asked Pinto for information regarding anticipated trial experts and a summary of each expert's opinions and the bases therefor. Dr. Trimble's Interrogatory No. 9 called for plaintiff to provide information on all anticipated trial experts—*i.e.*, the interrogatory did not pertain only to experts as to Dr. Trimble's treatment, but included experts as to Drs. Vaughn and Leone as well (CP 504-506). Pinto did not

respond for three months. When he did respond, Pinto again did not list any orthodontists or disclose that any experts would provide specific testimony that Dr. Vaughn and/or Dr. Leone breached the standard of care, failed to obtain informed consent, and/or caused injury to Pinto (CP 504-506).

On April 21, 2015, the Orthodontists served Pinto with interrogatories, requests for production and requests for admission, including specific requests for detailed information on Pinto's experts (CP 505-506; 524-526; 704-747). Pinto failed to respond within 30 days. Pinto never requested an extension (CP 708; 714-747). Before the August 31, 2015 discovery cutoff, defense counsel inquired about the status of responses multiple times (in writing and orally) and never received any substantive response (CP 708; 714-747). The discovery cutoff came and went and responses were not received. While the issue had previously been discussed multiple times, defense counsel requested a formal "Discovery Conference" that Pinto's counsel finally agreed to hold on September 4, 2015. Pinto's counsel represented on September 4, 2015, for the first time, that responses would be provided on September 8, 2015 (CP 707-708; 714-747).

After the close of business on September 8, 2015, and after Drs. Vaughn and Leone's counsel had already drafted a motion to strike

Pinto's experts, Pinto finally provided a pleading purporting to be Plaintiff's Responses (CP 707-708; 714-747). Such Response did not contain any new information as to experts, and instead referred to Pinto's response to Drs. Vaughn and Leone's MSJ. Plaintiff's response to RFP No. 1 (request for expert CV's or resume) as to Dr. Panimitros was to refer to Plaintiff's Response to MSJ. Pinto's response to RFP No. 3 (request for each expert's complete file, including all correspondence, draft and final reports), was simply, "[s]ee response to previous RFP" (CP 707-708; 714-747). No additional documents were provided. For example, not a single page of the 23 categories of "records listed below in reaching [Dr. Panimitros's] opinions" was provided in response to Defendants' RFP No. 3 (CP 707-708; 714-747).

Drs. Vaughn and Leone moved to strike Pinto's experts based on his pattern of discovery violations (CP 704-747). The trial court granted Drs. Vaughn and Leone's motion on September 17, 2015 (RP 9/17/15) and filed a corresponding order on October 26, 2015 (CP 919-925).

IV. ARGUMENT

A. The Trial Court Properly Dismissed Pinto's Claims in Granting Drs. Vaughn and Leone's Motion for Summary Judgment Based On Lack of Expert Support

1. Standard of Review is de Novo.

A court reviews a grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Lallas v. Skagit County*, 167 Wn. 2d 861, 864, 225 P.3d 910 (2009); *Wilson v. Steinbach*, 98 Wn. 2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). *Tracfone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 280-81, 242 P.3d 810 (2010). An order granting summary judgment can be affirmed on any basis supported by the record. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

2. Drs. Vaughn and Leone's Summary Judgment Motion Properly Challenged Pinto to Provide Competent Expert Testimony to Support His Claims

Pinto's arguments demonstrate a fundamental misunderstanding of Washington law on summary judgment motions in the medical malpractice context. Pinto essentially argues that his "identification" of "treating physicians and experts" (i.e., listing a name with a brief description of the person's identity) should have been sufficient to defeat

summary judgment (CP 14, 25). That is clearly not so, lest summary judgment would never be granted in favor of defendants, and the courts would be clogged with claims, such as Pinto's, that are unsupported by any qualified expert. Pinto also fails to understand that an expert declaration opposing MSJ "must affirmatively show that the affiant is competent to testify to the matters stated therein." *Lilly v. Lynch*, 88 Wn. App. 306, 320, 945 P.2d 727 (1997).

Motions for summary judgment examine the sufficiency of the evidence supporting 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)). To that end, while the party moving for summary judgment bears the initial burden of showing absence of an issue of material fact, the defendant may meet this burden by challenging the sufficiency the plaintiff's evidence. *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. 21, 851 P.2d 689 (1993); *Young*, 112 Wn.2d at 225; *Carlyle v. Safeway Stores, Inc.*, 78 App. 272, 275, 896 P.2d 750, *rev. denied*, 128 Wn.2d 1004 (1995). "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." *Guile*, 70 Wn. App. at 23 (citing *Young, at 225 and n.l; White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 170, 810 P.2d 4 (1991)).

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. *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 Assn 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*). This is because when a plaintiff fails to establish the existence of an essential element of their 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.

Drs. Vaughn and Leone moved for summary judgment by pointing to Pinto's lack of competent expert support (CP 501-645). The burden then shifted to Pinto to produce the expert testimony necessary to support his claims. He failed to do so. The trial court's dismissal should be affirmed.

3. Pinto Failed to Meet His Burden with Respect to Providing Expert Testimony to Establish His Malpractice Claims

a) Expert Testimony Required As to Standard of Care, Informed Consent and Proximate Cause

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, none of which apply here, medical testimony is required to establish the standard of care and

proximate cause issues in medical negligence actions.[5] *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (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).

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. In order to survive summary judgment on his medical negligence claims, plaintiff must therefore establish that (1) each defendant doctor deviated from the standard of care, **and** that (2) such deviation caused plaintiff's alleged

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[5] 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).

injuries. Pinto must establish both elements, as to each named defendant here, through competent expert testimony.

The expert testimony must be based on a reasonable degree of medical certainty. *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989). Additionally, 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 Pinto failed 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) Washington courts routinely hold that summary judgment dismissal is appropriate when 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).

Similarly, expert testimony is required to support claims for lack of informed consent. Informed consent and medical negligence are distinct claims that apply in different situations. RCW 7.70.050 sets forth the

essential elements of an informed consent claim against a health care provider as follows:

> (1) The following shall be necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his or her representatives against a health care provider:
>
> > (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;
> >
> > (d) That the treatment in question proximately caused injury to the patient.

The statute goes on to explain that "[u]nder the provisions of this section a fact is defined as or considered to be a material fact, if a reasonably prudent person in the position of the patient or his or her representative would attach significance to it deciding whether or not to submit to the proposed treatment." RCW 7.70.050(2); *Stewart-Graves v. Vaughn*, 162 Wash.2d 115, 125, 170 P.3d 1151 (2007) (citations omitted). Further, the material facts "must be established by expert testimony." RCW 7.70.050(3).

In sum, 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. *Adams v. Richland Clinic, Inc.*, P.S., 37 Wn. App. 657-58, 681 P.2d 1305 (1984) (citing *Smith*, 100 Wn.2d 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.

Finally, in a medical malpractice action, a plaintiff's prima facie case requires expert testimony establishing proximate causation. *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989); *Shellenbarger v. Brigman*, 101 Wn. App. 339, 348, 3 P.3d 211, 215 (2000). As a general rule, expert testimony on the issue of proximate cause is also necessary in medical negligence cases and must be based upon a reasonable degree of medical certainty. *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989). Washington courts have made

that requirement clear: "the plaintiffs must produce competent medical expert testimony establishing that the injury was proximately caused by a failure to comply with the applicable standard of care." *Seybold*, 105 Wn. App. at 676 (citing RCW 7.70.040; *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 706-07, 782 P.2d 1045 (1989)). "The testimony must be sufficient to establish that the injury-producing situation `probably' or `more likely than not' caused the subsequent condition, rather than the accident or injury `might have,' `could have,' or `possibly did' cause the subsequent condition." *Merriman v. Toothaker*, 9 Wn. App. 810, 814, 515 P.2d 509 (1973). Proximate cause is also a necessary element of an informed consent claim. RCW 7.70.050(1)(d). "Proximate cause" means "(1) the cause produced the injury in a direct sequence, and (2) the injury would not have happened in the absence of the cause." *Gomez v. Sauerwein*, 180 Wn. 2d 610, 624, 331 P.3d 19, 25-26 (2014), citing 6 Washington Practice: Washington Pattern Jury Instructions: Civil 15.01.01, at 183 (4th ed.2002).

b) Pinto Failed to Proffer an Expert Support Regarding the Specialty Orthodontic Treatment At Issue Because Dr. Panomitros Was Unqualified to Opine as to the Orthodontic Care At Issue.

In response to the Orthodontists' motion for summary judgment, Pinto proffered an "expert report" from Nicholas Panomitros, DDS, MA, JD, LLM (CP 685-699), who described himself in his "Qualifications" section as a "general dentist in the State of Illinois" (CP 685). The trial court agreed that Dr. Panomitros' report was insufficient to defeat summary judgment for multiple reasons; including his failure to affirmatively set forth is qualifications to opine as to the orthodontic care at issue.[6]

As a threshold matter, Dr. Panomitros' report and his opinions were insufficient to defeat summary judgment because he is a general dentist who was impermissibly attempting to opine as to the standard of

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[6] Pinto's MSJ response also made passing reference to the declarations of Dr. Jay Grossman and Dr. James Rockwell but Pinto MSJ response did not contain any discussion as to how the Grossman and Rockwell declarations pertained to Drs. Vaughn and Leone. Although the declarations of those two doctors were previously submitted in response to Dr. Trimble's motion for summary judgment—pinto had never disclosed either Dr. Grossman or Dr. Rockwell as an expert as to Drs. Vaughn and/or Leone, nor had Pinto ever listed Drs. Grossman or Rockwell on any witness disclosures (CP 800). If the Court is inclined to consider either declaration, Drs. Vaughn and Leone adopt and incorporate by reference the authority and argument set forth in Dr. Trimble's Respondent's Brief as to deficiencies in the Grossman and Rockwell declarations.

care and informed consent duties of orthodontists (and oral surgeons), distinct specialties in which he is unqualified to opine. Even if he were qualified (which he is not), his opinions lack the specificity required to overcome summary judgment and are so conclusory, confusing and unsupported that they should not even be admissible under CR 56 and the Rules of Evidence.

Washington law is well-settled in that "the standard of care required of professional practitioners must be established by the testimony of experts who practice in the same field." *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 782 P.2d 1045 (1989) (the standard of care of a pharmacist practicing in Washington was not established by an affidavit of an Arizona physician); WPI 105.02, cmt 2 (6th ed. 2012). Pinto's MSJ response made no showing that Dr. Panomitros was competent to testify as to the standard of care for an orthodontist practicing in Washington State between 2008 and 2011. Dr. Panomitros is, by his own description, a "general dentist in the state of Illinois" (CP 685). He is not an orthodontist, and nowhere in his declaration does he state that he is familiar with the standard of care for orthodontists, much less that of orthodontists practicing in Washington State from 2008 to 2011 (CP 685-699). Likewise, Dr. Panomitros is not an oral surgeon either, yet he

attempts to opine on orthodontics as well as what an orthodontist should have done in regard to orthognathic surgery (CP 685-699).

An expert's affidavit "must affirmatively show that the affiant is competent to testify to the matters stated therein." *See Lilly*, 88 Wn. App. at 320 (holding that trial court did not abuse its discretion in striking portion of expert's davit where expert failed to explain how he was qualified to reach his conclusions). This did not occur in this case—Dr. Panomitros' report was devoid of the credentials necessary to make expert opinions and conclusions about any requirements or standards in the practice of orthodontics (and oral surgery). Similarly, Dr. Panomitros' report lacked information to support that he had the expertise to render the medical causation opinions he attempted to state, including regarding Pinto's alleged injuries of "left pelvic bone pain," "sleep apnea," "nerve damage and loss of feeling on the lower lip and jaw areas" and "headaches." Dr. Panomitros' purported opinions on standard of care, informed consent and causation were properly disregarded by the trial court for all of these reasons.

As our Supreme Court has held, 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) (plaintiffs 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, plaintiffs alleged various health care providers at a 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 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).[7]

Like the declaration submitted by Dr. Patten, the report provided in this case by Dr. Panomitros failed to establish that he has "sufficient expertise to be considered qualified to express an opinion regarding the standard of care" applicable to an orthodontist in providing orthodontic care. Orthodontics is a recognized dental specialty and a practitioner must complete additional and specific training and education beyond general dentistry before being able to practice as an orthodontist (CP 503-504). Dr. Panomitros' report "fail[s] to reference any education, medical

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[7] *See also* Evidence Rule 702, which states that "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702. Moreover, "[a]n expert must stay within the area of his expertise." *Queen City Farms, Inc. v. Central Nat. Ins. Co. Omaha*, 126 Wn.2d S0, 102, 882 P.2d 703 (1994) (holding that trial court abused its discretion by admitting testimony of insurance underwriting practices expert where expert was not qualified to testify about the insurance policies at issue); *State v. Farr-Lenzini*, 93 Wn. App. 453, 461, 970 P.2d 313 (1999)(superseded by statute on other grounds) (noting that "the expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witness' area of expertise"); *See also Germain v. Pullman Baptist Church*, 96 Wn. App. 826, 838, 980 P.2d 809 (1999) (holding that trial court did not abuse discretion in striking affidavit of expert psychologist qualified in secular counseling because she was not qualified to evaluate pastoral counseling.)

training, or supervisory experience which could demonstrate his familiarity with the standard of care" of an orthodontist. Overall, Pinto made no showing that Dr. Panomitros was competent to testify as to the standard of care for an orthodontist practicing in Washington State between 2008 and 2011. An expert's affidavit "must affirmatively show that the affiant is competent to testify to the matters stated therein." *See Lilly*, 88 Wn. App. at 320 (holding that trial court did not abuse its discretion in striking portion of expert's davit where expert failed to explain how he was qualified to reach his conclusions). That did not occur in this case — Dr. Panomitros lacks the credentials necessary to make expert opinions and conclusions about any requirements or standards in the practice of orthodontics and oral surgery. Similarly, he lacks the expertise to render the medical causation opinions he attempts to state as to plaintiff suffering from "left pelvic bone pain," "sleep apnea," "nerve damage and loss of feeling on the lower lip and jaw areas" and "headaches." Dr. Panomitros' opinions on standard of care, informed consent and causation were properly disregarded by the trial court and should not be sufficient for this Court either.

c) Pinto's "Expert's" Opinions Were Unintelligble, Conclusory, Confusing and Unsupported and Therefore Insufficient to Defeat Summary Judgment

Evidence submitted in support of and in opposition to a motion for summary judgment must comply with Washington's Civil Rules and evidentiary rules. *King County Fire Prot. Dist. No. 16 v. Hous. Auth.*, 123 Wn.2d 819, 825, 872 P.2d 516 (1994). Under CR 56(e), affidavits and declarations must be based on personal knowledge. Furthermore, affidavits and declarations "shall set forth such facts as would be admissible in evidence." *Id.*; *see also Lilly v. Lynch*, 88 Wn. App. 306, 320, 945 P.2d 727 (1997) (citing *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 787, 819 P.2d 370 (1991)) ("[t]he opinion of an expert that is only a conclusion or that is based on assumptions does not satisfy the summary judgment standard."). Lastly, "It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted." *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991). Such conclusory opinions are not sufficient to withstand summary judgment. *Griswold v. Kilpatrick*, 107 Wn. App. 757, 762, 27 P.3d 246 (2001).

Dr. Panomitros' report submitted by Pinto in opposition to MSJ failed on all of the above counts.

There is no gentle way to say this, but Dr. Panomitros' report was basically a disorganized jumble of conclusory statements and unsupported assumptions. While the report is peppered with the terms "standard of care" and "informed consent," Dr. Panomitros never explained what the standard of care required of orthodontists Drs. Vaughn and/or Leone (indeed, he cannot because he is not an orthodontist), how either orthodontist allegedly violated the standard of care in their orthodontic treatment of Pinto, and how such violation caused specific harm. Dr. Panomitros' opinion appears to be that Drs. Vaughn and Leone should have consulted with Dr. Trimble more[8]—yet he did not explain this thoroughly, nor did he explain in any linear fashion how Dr. Vaughn and/or Leone's referral of Pinto to Dr. Trimble for orthognathic surgery consultation (which surgery Dr. Trimble eventually performed, after securing approval from Pinto's insurer for the procedure and after obtaining Pinto's signature on surgical informed consent forms) violated the standard of care (CP 804). As to informed consent, he does not discuss or explain what the material risks were for certain procedures, nor does he otherwise discuss the elements of an informed consent claim as set forth in

[8] Dr. Panomitros' opinion that the Respondents did not collaborate enough is in conflict with the declaration of Dr. Grossman, who opined that the "concerted efforts" of the three defendants and their "collaborating" was somehow wrongful (CP 470; 804).

the RCW—instead, he impermissibly, and repeatedly, concludes that "informed consent was not obtained." He also suggests that Drs. Vaughn and Leone were required to obtain informed consent from Pinto for procedures that another provider, Dr. Trimble, performed as to Pinto. There is no Washington law to support that Drs. Vaughn and Leone were required to obtain informed consent for procedures they did not perform, e.g., the orthognathic surgery performed by former co-defendant Dr. Trimble.

d) Pinto's "Expert" failed to set forth which respondent allegedly committed which wrongful act.

Part of the confusion in Dr. Panomitros' expert report concerned his failure to specifically set forth which doctor, between Dr. Vaughn, Dr. Leone and Dr. Trimble, allegedly violated the standard of care and/or failed to inform Pinto of material risks in relation to the treatment that the same provider rendered to Pinto. To the contrary, Dr. Panomitros' report improperly lumped the actions of Drs. Vaughn, Leone and at times Dr. Trimble all together, as if the three of them were a single person. The report acknowledged that Dr. Leone treated Pinto on only two visits ("I understand that Vaughn treated Pinto, although he did see Leone on two occasions, February 13, 2009 and November 25, 2008" (CP 688), yet he then went on to make sweeping and conclusory generalizations that care

outside of these two visits violated the standard of care and harmed Pinto. Dr. Panomitros' report is filled with allegations against Dr. Leone (and at times Dr. Vaughn) for care in which she was not involved. For example, Dr. Panomitros opined that the "below standard of care treatment Pinto received from Leone and Vaughn Pinto [sic] also causes him to suffer from left pelvic bone pain, the area where an autogenous bone graft was harvested" (CP 695-696). However, nowhere does he explain how treatment by *orthodontists* who were treating Pinto's mouth and teeth caused *pelvic bone pain.* In this instance, Dr. Panomitros cannot connect Pinto's pelvic pain to Drs. Vaughn and/or Leone for another reason—Dr. Trimble was the party who performed Pinto's jaw surgery and it was therefore Dr. Trimble, not Dr. Leone or Dr. Vaughn, who harvested bone from Pinto's pelvic bone (CP 504). Dr. Panomitros' attempts to connect Dr. Vaughn and Leone to the outcome of a surgery that neither performed is improper.

This is but one example of many in Dr. Panomitros' report where he made a conclusory statement without explaining exactly what treatment Dr. Vaughn or Dr. Leone (or Dr. Trimble) provided that was supposedly below the standard of care, how such treatment violated the standard of care, and how the violation in the standard of care supposedly caused Pinto's alleged injury. Overall, Dr. Panomitros report does not even

attempt to specify which doctor (out of three) acted wrongfully, nor does he explain what s/he supposedly did wrong.

Dr. Panomitros' report is replete with similar general and conclusory allegations as to vague wrongdoing by the Respondents collectively (even including Dr. Trimble, at times). However, nowhere in his report did he set forth that a certain act by a specific doctor fell below the standard of care, let alone how that failure to meet the standard of care resulted in harm to Pinto. In another glaring example, Dr. Panomitros wrote, "I opine that the inadequate and below standard of care treatment that Pinto received was more likely than not the reason he is currently suffering and also the reason by his maxilla and mandible are shortened and will necessitate repeat bimaxillary surgery (Virginia Mason Medical Center 11/13/2008 p. 4,9)" (CP 696) (the citation to the "Virginia Mason" medical records was in the text of Dr. Panomitros' report).[9]

First, like much of Dr. Panomitros' report, this sentence does not make grammatical sense. Defendants (and the Court) are essentially forced to guess what he is attempting to convey. Second, this statement is

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[9] Pinto never produced a copy of this 2008 record to Drs. Vaughn and Leone. Pinto's MSJ opposition and Dr. Panomitros' report did not include copies of any of the records that he reviewed or that he relied upon. Pinto failed to provide Drs. Vaughn and Leone with a single page of the 23 categories of records that Dr. Panomitros listed in his report as records he reviewed in "reaching his opinions" in this matter. Drs. Vaughn and Leone had propounded discovery request for these materials (CP 809).

not factually sound—it is undisputed that Pinto's jaw surgery by Dr. Trimble occurred on August 24, 2011 (although Dr. Panomitros does not reference that date in his report), yet Dr. Panomitros cites to a record from 2008, three years earlier, to support that the surgery caused Pinto harm (CP 809). This makes no sense. Third, he does not explain which doctor (Vaughn, Leone or Trimble) rendered the exact care that Dr. Panomitros criticizes, nor does he explain how the care failed to meet the standard of care and how such failure caused harm to Pinto.

Overall, the lack of specificity in Dr. Panomitros' report and the report's failure to provide a complete and coherent explanation for Dr. Panomitros' opinions are additional reasons why Dr. Panomitros' report was not sufficient to defeat summary judgment. Moreover, Dr. Panomitros' attempts to connect Dr. Vaughn and Leone to the outcome of a surgery that neither performed is improper—it is ridiculous (and legally unsupported) for Dr. Panomitros to opine that Drs. Vaughn and/or Leone had a duty to disclose material risks to Pinto about a surgery that was being performed by someone else, Dr. Trimble. Washington law does not require a medical provider to obtain informed consent for procedures performed by someone else.

For all of these reasons, Dr. Panomitros' report was properly determined by the trial court to be insufficient to defeat MSJ.

Dr. Panomitro is a general dentist who was impermissibly attempting to opine as to the standard of care and informed consent duties of orthodontists and oral surgeons, distinct specialties in which he is unqualified to opine. Even if he were qualified (which he is not), the "opinions" in his report were confusing and lacked the specificity required to overcome summary judgment and were so conclusory and unsupported overall that they would not even be admissible under CR 56 and the Rules of Evidence.

e) Dr. Panomitros' Report Failed to Establish That Drs. Vaughn and/or Leone Failed to Disclose Any Material Risk to Pinto

As to informed consent, as touched upon above, Dr. Panomitros' report did not discuss or explain what the material risks were for certain procedures, nor did he otherwise discuss the elements of an informed consent claim as set forth in the RCW—instead, he merely impermissibly, and repeatedly, concluded that "informed consent was not obtained." It is not sufficient for Pinto to claim that he did not consent to the procedure. Pinto's own testimony and that from his "expert" did not meet his burden on an informed consent cause of action.

Further, while failing to set forth any specific material risks, Dr. Panomitros also suggested, bizarrely, that Drs. Vaughn and Leone

were required to obtain informed consent from Pinto for procedures that another provider, Dr. Trimble, performed on Pinto. There is no Washington law to support that Drs. Vaughn and Leone were required to obtain informed consent for procedures they did not perform, e.g., the orthognathic surgery performed by former Dr. Trimble.

The trial court properly dismissed Pinto's informed consent claims and there is nothing in the record to find otherwise.

f) Dr. Panomitros' report failed to establish the required element of proximate cause.

Similarly, just as Dr. Panomitros' expert report failed to provide competent expert testimony as standard of care and informed consent, it also failed to establish that any such violation proximately caused harm to Pinto. All of the deficiencies explained in detail above also apply to the proximate cause element, and accordingly, Pinto failed to establish through competent expert testimony that Drs. Vaughn and Leone failed to inform him of a material fact. That failure alone warranted dismissal of Pinto's claims. *See* RCW 7.70.050(1)(a).

Overall, the trial court correctly determined that Pinto failed to come forth with the expert support necessary to sustain his claim and properly dismissed Pinto's case. That decision should be affirmed.

4. Standard of Review for Denial of CR 59 Motion is Abuse of Discretion.

The standard of review for the denial of a motion for reconsideration is abuse of discretion. *West v. Dep't of Licensing*, 182 Wn. App. 500, 516, 331 P.3d 72, 79, *review denied*, 339 P.3d 634 (2014). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; and it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *West v. Dep't of Licensing*, 182 Wn. App. 500, 516-17, 331 P.3d 72, 79, *review denied*, 339 P.3d 634 (2014). Additionally, the appellate court may affirm on any basis supported by the record. *Id.* Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's denial of reconsideration absent a showing of manifest abuse of discretion, which occurs when its decision is based on untenable grounds or reasons. *River House Development Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 272 P.3d 289 (2012); *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 122 P.3d 729 (2005).

5. The Trial Court Did Not Abuse Its Discretion In Denying Pinto's Motion for Reconsideration Because Pinto Failed to Fulfill The Requirements of CR 59.

Pinto's Motion for Reconsideration was properly denied and that decision should be affirmed here. Pinto's motion was but a thinly-veiled second bite at the apple—he submitted another declaration from Dr. Panomitros but this second declaration still failed to shore-up all the problems of the initial declaration, despite being given a precise roadmap by the trial court as to what was necessary. The obvious implication is that Dr. Panomitros could not, in good faith, set forth the qualifications and opinions necessary, lest he would have done so the second time around.

a) Pinto Did Not Meet His Burden Under CR 59

CR 59(a) provides nine limited circumstances under which a motion for reconsideration may be granted. Pinto sough reconsideration under CR 59(a)(7) and (9). Subsection (7) requires the moving party to show that the order is "contrary to law." Subsection (9) requires the moving party to show that "substantial justice has not been done." A motion for reconsideration must identify the specific reasons in fact and law as to each ground on which the motion is based. CR 59(b). Courts will not generally grant motions for reconsideration that merely repeat the

arguments made in a motion for summary judgment. *See Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010). A motion for reconsideration "does not provide litigants with an opportunity for a second bite at the apple" and generally, courts will not permit parties to merely re-argue issues already addressed. *Anderson v. Farmers Ins. Co. of Wash.*, 83 Wn. App. 725, 923 P.2d 713 (1996).

In order for a motion to be granted under CR 59(a)(7), there must be no evidence or reasonable inference to support the Court's decision. *See Kohfeld v. United Pacific Ins. Co.*, 85 Wn. App 34, 41, 931 P.2d 911, 915 (1997); *Nord v. Shoreline Sav. Ass'n*, 116 Wn.2d 477, 486-487, 805 P.2d 800, 805 (1991). Here, Pinto failed to set forth specific reasons as required by CR 59(b) as to how the trial court's prior order was "contrary to law." Pinto's motion for reconsideration set forth no new law at all, let alone establish that the prior decision was "contrary to law."

With respect to motions brought under CR 56(a)(9), courts rarely grant reconsideration under CR 59(a)(9) because of the other grounds already provided for under CR 59(a). *See, e.g., McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 769, 260 P.3d 967 (2011); *Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010) (plaintiff did not show that substantial justice had not been done as would warrant reconsideration after summary judgment had been granted to defendants; in seeking

reconsideration plaintiff merely repeated the prior arguments, and failed to demonstrate that the trial court had erred in granting summary judgment for defendants.) Here, Pinto's arguments for reconsideration merely rehashed the same arguments the trial court already rejected.

Dr. Panomitros' New Declaration Is Still Deficient and Does Not Warrant Reversal of Dismissal

b) Dr. Panomitros' Second Report Was No Better Than His First

The only fact that could even be considered "new" on reconsideration is the new declaration from Dr. Nicholas Panomitros[10] (CP 891-893). Tellingly, however, Pinto did not move for reconsideration under CR 59(a)(4), the prong that pertains to "[n]ewly discovered evidence." Pinto failed to cite to CR 59(a)(4) likely because it is obvious that the new declaration would not constitute grounds for reconsideration under CR 59(a)(4) because Pinto could have presented this same information in his original opposition to defendants' summary judgment motion. Pinto made no showing that the information in Dr. Panomitros' second declaration could not have been presented initially. To the contrary, this information could have and should have been presented in

[10] While the declaration was "new" in support of reconsideration, the contents of the declaration simply re-stated arguments that Pinto had already made, arguments that were rejected by the trial court (compare CP 685-699 with CP 891-893).

Pinto's original opposition because CR 56 provides that affidavits made in opposition to a motion for summary judgment must "**affirmatively show** that the affiant is competent to testify to the matters therein." *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 493, 183 P.3d 283, 288 (2008), citing *Seybold v. Neu*, 105 Wn. App. 666, 10 P.3d 1068 (2001) (emphasis added).[11] Dr. Panomistros' "new" declaration was properly rejected by the trial court as sufficient to warrant reconsideration, just as the trial court in *Davies* rejected the new expert declaration submitted on reconsideration in that case.

Moreover, even though Dr. Panomitros' new declaration professed himself to now have practice experience in "orthodontics" generally and Pinto also represented that Dr. Panomitros had "training and knowledge of *orthopedics*" (note, not "orthodontics") (CP 888), Pinto and

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[11] The *Davies* case sets forth the requirements of a CR 56 affidavit as follows, "[i]mportantly, CR 56(e) provides that affidavits made in support of, or in opposition to, a motion for summary judgment must be based on personal knowledge, set forth admissible evidentiary facts, and affirmatively show that the affiant is competent to testify to the matters therein. Expert testimony must be based on the facts of the case and not on speculation or conjecture. *Seybold*, 105 Wn. App. at 677, 19 P.3d 1068. Such testimony must also be based upon a reasonable degree of medical certainty. *McLaughlin v. Cooke*, 112 Wn. 2d 829, 836, 774 P.2d 1171 (1989). 'Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment.' *Guile [v. Ballard Com. Hosp.]*, 70 Wn. App. at 25, 851 P.2d 689," *Davies*, 144 Wn. App. at 493 (2008).

Dr. Panomitros still failed to affirmatively set forth that this expert has education, training or supervisory experience in dealing with the specific malocclusion and neuromuscular and skeletal abnormalities at issue in Pinto's specific case. The new declaration still failed to set forth that Dr. Panomitros has trained in or treated a similar condition. The case law is clear that expert support must be from a practitioner of the same specialty or who demonstrates familiarity with the particular care at issue. The new declaration still failed in this regard.

The trial court properly refused to grant reconsideration based on Dr. Panomitros' new declaration because it was not "newly discovered evidence," and the declaration still failed to affirmatively set forth the qualifications required to opine as to the specific care at issue here. Moreover, the second declaration failed to remedy the myriad additional deficiencies with Dr. Panomitros' prior declaration beyond his lack of qualifications. Except for two sentences, the entirety of Dr. Panomitros' new declaration was an attempt to shore up his qualifications. The new declaration does not remedy the multiple, other deficiencies that the Court found with his first declaration. The new declaration contains only two sentences that pertained to Drs. Vaughn and Leone, to wit: "The defendants in this matter also have training from schools that are not in the State of Washington. They breached the standard of care and were the

proximate cause of Mr. Pinto's problems that he now has" (CP 892-893).

These two sentences were not sufficient to overcome summary judgment.

The new declaration was still deficient in, at least, the following ways:

1. The new declaration still failed to "articulate the standard of care for orthodontists" in this case, which the trial court previously remarked upon as a deficiency.

2. The new declaration still failed to state how exactly Drs. Vaughn and Leone supposedly breached the standard of care (which as previously noted, was never set forth by Pinto).

3. The new declaration still did not clearly identify whether Dr. Panomitros' criticisms were directed to standard of care or informed consent claims.

4. The new declaration still contained a sweeping and conclusory criticism of the collective defendants and still failed to delineate which defendant supposedly did what wrong. The expert's opinions were still the "mishmash" that the trial court previously noted as deficient.

5. The trial previously noted that the conclusory nature of the first declaration was "fatal." The new declaration did not even attempt to address the conclusory and unsupported allegations made in the first declaration. Specific factual discrepancies set forth in the first declaration remained and were not clarified. Confusing and non-sensical statements were not clarified.

6. Dr. Panomitros still failed to set forth that he was qualified to render causation opinions.

7. Pinto still failed to provide copies of the documents and evidence that Dr. Panomitros reviewed and purportedly relied upon. This information was specifically

> requested in defendants' discovery requests and the trial court noted that Pinto had failed to provide such information.

Overall, even after being given a roadmap as to the evidence necessary, Pinto still failed to shore up his prima facie case.

c) The Trial Court Did Consider Pinto's Reply

In a non-sequittur, Pinto appears to suggest (but does not actually argue) that the trial court abused its discretion in denying Pinto's Motion for Reconsideration because it rendered its ruling "prior to [Pinto] submitting a reply" (AB 43). This notion should be rejected as a flat-out mischaracterization of fact. The Order Denying Plaintiff's Motion for Reconsideration (CP 917-918) plainly states "[t]he Court has reviewed plaintiff's reply to defendants' response to plaintiff's motion for reconsideration. The brief [plaintiff's reply brief] was filed on Oct. 12, 2015 at 2:40 p.m. the brief was due at 12:00 p.m. that same day." The trial court judge handwrote the above notation into the order, explaining that despite having been untimely filed, he had read Pinto's reply. The trial court did not abuse its discretion for failing to consider Pinto's reply (or for any other reason).

d) Pinto Has Waived Any Assignment of Error Regarding the Trial Court's Denial of Pinto's Motion to Reconsider the Order Striking Pinto's Experts

To the extent Pinto assigned error to the trial court's denial of reconsideration of its order striking Pinto's experts, Pinto has waived this assignment of error because Appellant's Brief does not contain any argument or citations to case law establishing this claimed assignment, as RAP 10.3(a)(6) requires. Accordingly, this assignment of error is waived. *Cowiche Canyon Conservancy v.* Bosley, 118 Wn. 2d 801, 809, 828 P.2d 549, 553 (1992); *Smith v. King*, 106 Wn.2d 443, 451–52, 722 P.2d 796 (1986). The Court need not consider this assignment of error, given Pinto's failure to support his contention with developed argument and citations to supporting case law, as RAP 10.3(a)(6) requires. *Id.* Further, Pinto cannot remedy this waiver by asserting argument in Reply. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549, 553 (1992), citing *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990) (assignment of error waived when no argument is presented in opening brief; an issue raised and argued for the first time in a reply brief is too late to warrant consideration).

Waiver aside, Pinto set forth no specific reasons (at the trial court level, or now) in fact or law as to why the trial court's decision on

Defendants' Motion to Strike Plaintiff's Experts was "contrary to law" or how "substantial justice has not been done." Strangely, on reconsideration Pinto attempted to excuse his failures to comply with court rules and discovery requests by arguing that he hid the identity and opinions of his experts because such are "trial strategy and non-discoverable" (CP 889). Pinto's trial-by-ambush excuse is contrary to court rules, court orders and well-settled case law. In making his argument, Pinto essentially conceded that he failed to provide Drs. Vaughn and Leone requested discovery responses as to Pinto's experts and did so as a matter of *trial strategy*. This portion of the trial court's order denying reconsideration should be affirmed.

Overall, the trial court did not abuse its discretion in denying Pinto's motion for reconsideration. Dr. Panomitros' "new" declaration did nothing to clarify his mangled and deficient prior "expert report," which the trial court found to be an insufficient "mishmash" of "largely conclusory" allegations (RP 9/17/15, p. 56).

B. The Trial Court's Order Striking Pinto's Experts Should Be Affirmed

a) Pinto Has Waived His Assignment of Error as to the trial court's granting of Drs. Vaughn and Leone's Motion to Strike Pinto's Experts

Pinto's Notice of Appeal contains an assignment of error as to the trial court's granting of Drs. Vaughn and Leone's Motion to Strike Plaintiff's Experts (Notice of Appeal, Assignment of Error No. 5, CP 928; 942-48; misidentified by Pinto as "Plaintiff's Motion"). However, Appellant's Brief does not contain any argument or citations to case law establishing this claimed assignment, as RAP 10.3(a)(6) requires. Accordingly, this assignment of error is waived. *Cowiche Canyon Conservancy v.* Bosley, 118 Wn. 2d 801, 809, 828 P.2d 549, 553 (1992); *Smith v. King*, 106 Wn.2d 443, 451–52, 722 P.2d 796 (1986). The Court need not consider this assignment of error, given Pinto's failure to support his contention with developed argument and citations to supporting case law, as RAP 10.3(a)(6) requires. *Id.* Further, Pinto cannot remedy this waiver by asserting argument in Reply. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549, 553 (1992), citing *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990) (assignment of error waived when no argument is presented in opening brief; an issue raised and argued for the first time in a reply brief is too late to warrant

consideration). For these reasons, the Order Striking Plaintiff's Experts should be affirmed.

b) Even if Pinto has not waived this argument, the trial court's order dismissing Pinto's experts should be affirmed because there was no abuse of discretion.

Waiver aside, the trial court did not abuse its discretion in granting Drs. Vaughn and Leone's motion to strike plaintiff's experts. The decision should be affirmed.

In its Order Striking Plaintiff's Experts, the trial court entered numerous findings of fact in support of its *Jones* and *Burnet* analysis (CP 942-47). Pinto has not challenged any of these findings. Therefore, the findings of fact in the trial court's order are verities on appeal. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 808, 828 P.2d 549, 553 (1992), citing *Nearing v. Golden State Foods Corp.*, 114 Wn.2d 817, 818, 792 P.2d 500 (1990). As verities on appeal, Pinto cannot show that the trial court abused its discretion in making such findings. *Id.*

C. The Striking Of Pinto's Experts Is Another Basis on Which the Dismissal of All Claims Against Drs. Vaughn and Leone Should Be Affirmed

As explained above, all of Pinto's claims require expert testimony. Accordingly, because all of Pinto's experts were properly stricken in that the trial court determined that "plaintiff's expert disclosures, reports and

declarations are excluded from consideration" and that Pinto "may not call any expert witness at trial" (CP 943), the dismissal of Pinto's case should be affirmed. Pinto cannot sustain his case without any experts and all of his potential "experts" were properly stricken/excluded in an order that has not been properly challenged by Pinto in this appeal. The trial court's dismissal of all claims against Drs. Vaughn and Leone should be affirmed for this reason alone.

D. Pinto Has Waived His Assignment of Error Regarding the Trial Court's Denial of the Parties' Stipulated Motion to Continue Trial.

Pinto's Notice of Appeal contains an assignment of error as to the trial court's denial of the parties "Stipulated Motions for Continuances" (CP 928). Appellant's Brief lists this assignment of error in the "Assignment of Error" numbered list section of the brief. However, the brief is devoid of any argument or citations to case law establishing this claimed assignment, as RAP 10.3(a)(6) requires. Accordingly, this assignment of error is waived. *Cowiche Canyon Conservancy v.* Bosley, 118 Wn. 2d 801, 809, 828 P.2d 549, 553 (1992); *Smith v. King*, 106 Wash.2d 443, 451–52, 722 P.2d 796 (1986).

E. Pinto Never Requested a CR 56(f) Continuance In Response to the Orthodontists' Motion for Summary Judgment

The last section of Pinto's Appellate Brief regarding the trial court's denial of Pinto's request for a CR 56(f) continuance (AB 43-46) is not directed to Drs. Vaughn and Leone. However, because this section appears after Pinto's discussion as to Drs. Vaughn and Leone, it may appear that this argument relates to Drs. Vaughn and Leone. It does not. Pinto never requested a CR 56(f) continuance in response to Drs. Vaughn and Leone's MSJ. There was no assignment of error in this regard (CP 928), and there are no relevant Clerk's Papers.

F. Dismissal of Pinto's Claims Against Leone and Vaughn, DDS, P.S. Should Be Affirmed

To the extent Pinto assigned error to the trial court's dismissal of Drs. Vaughn and Leone's orthodontic office, "Leone & Vaughn, DDS, P.S., d/b/a Leone & Vaughn Orthodontics," the Court should affirm dismissal. Pinto has not briefed this assignment of error and it is therefore waived.

V. CONCLUSION

The Court should affirm the dismissal of all claims against Drs. Vaughn and Leone, and their orthodontic office. The record contains ample facts and legal analysis to support that summary judgment dismissal

was proper and that the trial court did not abuse its discretion as to any associated rulings.

RESPECTFULLY SUBMITTED this 18th day of May, 2016.

BETTS, PATTERSON & MINES, P.S.

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CERTIFICATE OF SERVICE

I, Laraine Green, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on May 18, 2016, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **RESPONDENTS GREGORY VAUGHN, PAOLA LEONE, AND LEONE & VAUGHN, DDS, P.S.'S BRIEF; and Certificate of Service.**

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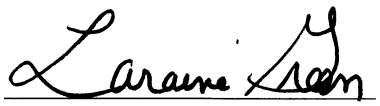
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of May, 2016.



Laraine Green