NO. 94190-4

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION 1

COA NO. 73650-7-I

SURAJ PINTO

Petitioner,

v.

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

Respondents.

On Appeal from King County Superior Court
The Honorable Judge Sean O'Donnell
King County Superior Court No. 14-2-23326-4

PETITIONER'S REPLY

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TABLE OF CONTENTS

Title **Page**

TABLE OF CONTENTS……..…….…. i

TABLE OF AUTHORITES…….…… ii

I. REPLY ARGUMENT…….....1

A. THE COURT OF APPEALS JANUARY 23, 2017 OPINION CLEARLY PROVIDES THE CASE LAW AND STANDARD OF REVIEW APPLIED IT RELIED UPON IN IT'S DECISION TO AFFIRM THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT.....1

B. APPELLANT STIPULATED TO RESPONDENTS, LEONE AND VAUGHN'S MOTION FOR A CONTINUANCE AND MADE NO OBJECTION SO AS TO ALLOW RESPONDENT MORE TIME TO ENGAGE IN DISCOVERY. APPELLANT HAS BEEN MISCHARACTERIZED IN ENGAGING IN DISCOVERY TACTICS…….…….3

II. CONCLUSION……..... 4

TABLE OF AUTHORITIES

CASES

Owen v. Burlington N. Santa Fe R.R. Co.,
153 Wn.2d 780, 787, 108 P.3d 1220 (2005)……..……...2

Burnet v. Spokane Ambulance,
131 Wn.2d 484, 933 P.2d 1036……3

CIVIL AND APPELLATE RULES OF PROCEDURE

RAP 13.4 (b) 1…….....……..1

CR 26……..2,4

CR 56 (c)……2, 3

I. REPLY ARGUMENT

A. THE COURT OF APPEALS JANUARY 23, 2017 OPINION CLEARLY PROVIDES THE CASE LAW AND STANDARD OF REVIEW APPLIED IT RELIED UPON IN IT'S DECISION TO AFFIRM THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT.

While the Court of Appeals January 23, 2017 opinion acknowledges that a summary judgment is heard *de novo* on appeal, prior to applying its methodical analysis, it erroneously and unequivocally stated the following in contradiction of RAP 13.4 (b) 1:

> "The qualifications of an expert are to be judged by the trial court, and its determination will not be set aside in the absence of a showing of abuse of discretion."

Respondents' responsive briefs do not contest this is the wrong standard of review for the Court of Appeals to have applied. Rather Respondents put forth a peculiar argument that suggests that the Court of Appeals, despite the case law it cites and the standard of review it unequivocally stated it invoked, that somehow Appellant's reading of the opinion is a mere misinterpretation of appellate court's opinion and that the Court of Appeals did indeed apply a *de novo* standard. If this is the case, judicial vagueness on the standard of review applied affects Appellant's due process rights. Respectfully, the opinion rendered cannot be severed from the erroneous standard of review applied. Much, if not all, of the analysis the Court of Appeals conducts relates to the trial court acting within it judicial discretion; therefore, suggesting that there was no abuse of discretion.

A much more concerning component of the January 23, 2017 opinion is that if the Court of Appeals did apply a *de novo* standard (which Appellant contends it did not) how it could reconcile the summary judgment standard wherein *all facts and reasonable inferences in the light most favorable to the nonmoving party* with the fact that multiple doctors, whether licensed or not licensed in the State of Washington opined that there was something wrong with the surgeries and orthodontic treatment received by Mr. Pinto. *See*, *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). The trial court found these physician's decision conclusory, but respectfully, neither the judge nor the counsels representing the parties are doctors. Asking a Plaintiff or Plaintiff's counsel to dictate what a doctor should or should not include in his declaration is impractical not to mention unethical. Arguably the "conclusory standard" wherein a judge can decide which declarations by a medical doctor are conclusory and which are not opens the door to divergent viewpoints and a lack of judicial consistency.

The January 23, 2017 opinion is further flawed as the Court of Appeals suggests that Pinto did not offer Dr. Rockwell or Dr. Grossman as experts regarding his claims against Drs. Vaughn and Leone; however, these opinions and declarations were already made as part of the record and pursuant to CR 56 (c) the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law. Again, Appellant's position for purposes of this Petition for Discretionary Review is that the Court of Appeals misapplied the wrong standard of review, as clearly expressed in its opinion; however, if the *de novo* standard was indeed applied, then opinion itself conflicts with other Supreme Court decisions interpreting CR 56 (c).

B. APPELLANT STIPULATED TO RESPONDENTS, LEONE AND VAUGHN'S MOTION FOR A CONTINUANCE AND MADE NO OBJECTION SO AS TO ALLOW RESPONDENT MORE TIME TO ENGAGE IN DISCOVERY. APPELLANT HAS BEEN MISCHARACTERIZED IN ENGAGING IN DISCOVERY TACTICS.

Under *Burnet v. Spokane Ambulance,* 131 Wn.2d 484, 933 P.2d 1036 (1997), the trial court struck Petitioner's expert witness, Dr. Panomitros, after already granting summary judgment to Respondents Leone and Vaughn; a moot point as Petitioner's claims had already been dismissed. The basis for the exclusion was that although Petitioner had disclosed this witness in accordance with the trial court's Case Scheduling Order deadline, including the name and expected testimony, the information was insufficient and amounted to a discovery abuse. Respondents, Leone and Vaughn tellingly omit to reiterate the fact that upon substitute counsel coming on board to handle the case for Respondents, Leone and Vaughn, Petitioner's counsel stipulated to their request for a continuance of the trial date and case scheduling order in order to provide them more time; a common professional courtesy. The trial court denied both stipulated motions for a continuance. That being said, if Petitioner

was engaged in discovery tactics worthy of a *Burnet* exclusion of a witness, then why was there a timely disclosure of this expert witness by Petitioner and why did Petitioner agree not to object to newly assigned counsels request for a trial continuance and continuance of discovery?

The Court of Appeals opinion states that Petitioner provided "***none***" of the other expert witness information required by CR 26. At that time of disclosure, Petitioner provided all the information he had; there was no bad faith. Nevertheless, the Court of Appeals appears to suggest that there was no abuse of discretion by the trial judge in excluding this witness based on what was wrongfully characterized as "continuous" discovery violations. What continuous discovery violations the Court of Appeals or the trial court refers to is unknown, but appears to be included to support an erroneous ruling.

II. CONCLUSION

Based on the foregoing, Petitioner, Mr. Suraj Pinto respectfully asks that the trial court's orders on summary judgment and the Court of Appeals decision affirming summary judgment be reversed and that this matter be remanded to the trial court for a trial on the merits.

Respectfully submitted on this 10nd day of April 2017

/s/ Edward C. Chung
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Attorney for Petitioner, Suraj Pinto

DECLARATION OF SERVICE

I, Angela McClurg, declare under penalty of perjury under the laws of the State of Washington that I am a Paralegal with the law firm of CHUNG, MALHAS & MANTEL, PLLC with an address of 1511 Third Avenue, Suite 1088, Seattle, Washington 98101; and that on this 10th day of April, 2017 I caused copies of **PETITIONER'S REPLY** to be served as follows:

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Respectfully submitted this 10th day of April, 2017.

/s/ Angela McClurg
Angela McClurg, Paralegal