

No. 73327-3-I

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

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COURT OF APPEALS, DIVISION I  
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**ESTATE OF DOUGLAS E. KAFKA, JR., et al.,**

**Appellants,**

**v.**

**PROVIDENCE HEALTH & SERVICES, et al.,**

**Respondents.**

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**APPELLANTS' REPLY**

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## A. Introduction.

Providence's<sup>1</sup> opposition to this appeal is clearly without merit. The issues on review are directly controlled by settled law, and the trial court's rulings were manifestly unreasonable choices, constituting abuse of its discretion. The judgment should be reversed and this case remanded.

Providence contends this Court should affirm the trial court's summary judgment dismissal based on its speculation that, even if the trial court had granted Kafka a CR 56(f) continuance, Kafka,<sup>2</sup> through their expert, "would" not have raised a genuine issue of material fact to defeat Providence's motion.<sup>3</sup> This is entirely backwards. A continuance literally "continues" the summary judgment determination to give the moving party time to obtain the evidence sought. CR 56(f). The Court cannot affirm (or even consider) the summary judgment dismissal without first examining the errors in denying a CR 56(f) continuance and

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<sup>1</sup> Providence Health & Services, Providence Health & Services Western Washington, Providence Health & Services Washington, and Providence Everett Medical Center (collectively, Providence).

<sup>2</sup> Kristen M. Kafka, individually and as Personal Representative of the Estate of Douglas E. Kafka, Jr., Douglas E. Kafka, Sr., and Susan G. Kafka (collectively, Kafka).

<sup>3</sup> Providence's issue statement candidly reveals the question is completely hypothetical: "Should this Court affirm ... where the Kafkas **would have** failed to adduce sufficient medical expert testimony on causation, even if Nurse Wanek's declaration would have been timely filed?" Resp. Br., 1-2 (emphasis added). Providence further claims "**Because** Nurse Wanek's declaration **would have** been insufficient to defeat summary judgment ..., this Court need not address the motions for a continuance or reconsideration." Resp. Br., 9 n.5. And Providence contends reversal of the denial of a continuance would be "unprecedented in light of the Kafkas' complete failure to obtain the evidence sought." Resp. Br., 28. As discussed here and in Appellants' Opening Brief, Providence's argument misconstrues civil procedure and summary judgment specifically.

reconsideration. If the trial court had properly granted a continuance or reconsideration, there very likely would be no order of summary judgment dismissal at all, because Kafka would have had time to secure and file Nurse Wanek's declaration **before** the summary judgment hearing. But instead of addressing the questions presented on this appeal, Providence leaps to assumptions about what might have happened at a properly-continued summary judgment hearing, and then argues the Court need not address any of the actual issues presented on this appeal.

The cascade of erroneous rulings on which the dismissal was based began with the trial court's legal error and manifest abuse of discretion in denying Kafka a CR 56(f) continuance when directly-applicable precedent required one in closely similar circumstances: Kafka's new counsel entered the case two weeks before the summary judgment hearing, and demonstrated more than sufficient good reasons for the delay in obtaining an expert opinion, which all parties agreed was necessary to defeat Providence's summary judgment motion. In *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990), *Butler v. Joy*, 116 Wn. App. 291, 65 P.3d 671 (2003), and *Keck v. Collins*, 181 Wn. App. 67, 325 P.3d 306 (2014), *review granted*, 181 Wn.2d 1007 (2014) (*oral argument on* Feb. 12, 2015), this Court instructed that the trial court has a duty to allow medical malpractice plaintiffs the opportunity to complete the record before ruling

on the merits of the claims. Particularly where there is no trial date, no case deadlines, and no formal discovery,<sup>4</sup> the court must grant a continuance so the claims can be resolved on the merits, rather than dismiss due to strict adherence to procedural deadlines.

The trial court also abused its discretion by failing to grant reconsideration with Kafka's expert declaration available in the record, and erred as a matter of law in granting summary judgment dismissal when the expert opinion raised genuine issues of material fact. The court erred as a matter of law in granting summary judgment dismissing the Estate's and Kristen Kafka's claims, since the parties vigorously disputed whether Providence properly served its motion on them.<sup>5</sup>

**B. Providence Fails To Distinguish Washington Precedent Requiring A Continuance.**

**1. Providence's Arguments.** Providence contends this Court should affirm the denial of a CR 56(f) continuance because striking the written motion for a continuance indicated no need for one and unfairly

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<sup>4</sup> Providence insists their unanswered set of interrogatories served shortly after this case was filed (6/14) somehow constitutes "discovery" in this case. *E.g.*, Resp. Br., at 4 n.1 (citing its S.J. Motion, CP 253). While unanswered interrogatories are not full reciprocal discovery, the important point is that Kafka never had the opportunity to conduct discovery which would have helped to defeat summary judgment. It is not known whether or not he received all medical records Providence has always possessed. *See* Appellants' Br., 12, 37-38.

<sup>5</sup> The Court should disregard Providence's mischaracterization of the facts throughout Respondents' Brief. For example, as noted below, *e.g.*, Section D, Providence repeatedly imputes intentions to the trial court as well as to Kafka's counsel. Kafka asks the Court to rely on the record citations and statement of facts provided by Kafka.

surprised them; Kafka (pro se) already received a continuance in October 2014; Kafka's reasons for a continuance were not good enough, and they had nearly 5 years from Mr. Kafka's death; Kafka did not demonstrate the expert testimony "would have" raised genuine issues of material fact; summary judgment "would be eviscerated" by reversal,<sup>6</sup> Resp. Br., 25-35; and they did not need to show prejudice. *Id.*, 23 n.7.7 Providence egregiously distorts the law and facts on each of these contentions.

## **2. Reversal Is Completely Consistent With All Authority.**

Providence contends reversal of the denial of a continuance would be "unprecedented in light of the Kafkas' complete failure to obtain the evidence sought." Resp. Br., 28. But it is exactly the opposite: Reversing the trial court's erroneous denial of a continuance will simply confirm the law and results in *Coggle, Butler, Keck, and Vant Leven*, and will not create the slippery slope Providence fantasizes.

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<sup>6</sup> Citing *Coggle, Butler, Keck, and Vant Leven v. Kretzler*, 56 Wn. App. 349, 783 P.2d 611 (1989).

<sup>7</sup> Providence claims, without citation, that in "most (if not all) cases" challenging the denial of a CR 56(f) continuance, "the movants were ultimately able to secure the evidence originally sought." Resp. Br., 27. This Court "need not consider arguments ... for which a party has not cited authority." *Collins v. Clark Cy. Fire Dist. No. 5*, 155 Wn. App. 48, 95-96, 231 P.3d 1211 (2010) (quoting *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004)); see RAP 10.3(a)(6). While Kafka too was able to secure evidence to defeat summary judgment, an accurate accounting of published decisions would show that movants who show good reasons obtain a continuance, and those who do not, failed. *E.g., Coggle, Butler, Keck; cf. Vant Leven.*

In *Vant Leven v. Kretzler*, 56 Wn. App. 349, 352-53, 783 P.2d 611 (1989), the oldest of these cases and the only one where the court affirmed denial of a continuance, the facts were far from “similar ... to this case”. Resp. Br., 29. Contrary to Providence’s argument and completely unlike the situation in *Vant Leven*, Kafka demonstrated “why expert reviews could not have been obtained to date”: his new lawyer was only involved in the case for two weeks (Jan. 22, 2015-Feb. 5, 2015), CP 235-37, CP 62-63; his first-consulted expert did not have complete records and reviewed them under a theory of negligent over-prescription, different than the later theory, CP 62-63, 170; the second expert, Nurse Baggenstos, withdrew due to a conflict of interest since she worked for Providence, CP 16, CP 35; prior attorney David Duce had been involved for only three weeks, CP 262, CP 259-60;<sup>8</sup> otherwise the plaintiffs were acting pro se; there was no trial date and no formal discovery, apart from Providence’s staggered production of records, which may still be incomplete. Apps.’ Br., 8-12; Appendix I (Timeline).

In *Vant Leven*, after injury in an automobile accident, plaintiff underwent operations and treatment by orthopedic surgeon Kretzler. Vant

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<sup>8</sup> Providence also improperly speculates that attorney Duce withdrew “presumably after reviewing the medical records and weighing the merits of the claim”. Resp. Br., 26. The record contain no proof of this, and no authority holds that an opponent may divine the supposed intent of a withdrawing attorney may be considered here.

Leven filed an action against the surgeon on July 31, 1986. Twenty months later, **represented by counsel throughout**, Vant Leven served interrogatories on Dr. Kretzler, on April 1, 1988. On April 21, 1988, Dr. Kretzler moved for summary judgment, providing a detailed summary of his operations (which Providence did not offer here). *Id.* at 355. This Court affirmed the trial court's denial of a continuance and reconsideration because Vant Leven had failed to explain why (with legal representation), she had not taken Dr. Kretzler's deposition earlier during the 21 months since the case was filed; she failed to identify any interrogatories that would have supplied information for an expert opinion; and her expert Dr. Hoover's vague affidavit also did not describe what "additional records" he needed. *Id.* at 351, 354. Moreover, Vant Leven offered nothing to dispute the facts on summary judgment, and Dr. Hoover similarly provided no facts to support his opinion on standard of care. *Id.* at 356.<sup>9</sup>

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<sup>9</sup> In a footnote, Providence cites the distinguishable case of *Lewis v. Bell*, 45 Wn.App. 192, 196, 724 P.2d 425 (1986) (relied on in *Vant Leven*, at 353), which involved the tort of outrage. In *Lewis*, this Court affirmed the denial of plaintiffs' motion for a continuance, because plaintiffs had offered no reason why they could not have deposed defendants during the 16 months since the action was filed, and "failed to even speculate" what evidence they hoped to establish through depositions or how they could raise triable issues of fact. Here, it is undisputed that expert opinion was necessary to defeat summary judgment, and that is exactly what Kafka diligently sought through a continuance.

Nothing of the kind occurred here. Unlike *Vant Leven*, Kafka was unrepresented for most of the time since the case was filed<sup>10</sup> until **two weeks** (not 21 months as in *Vant Leven*) before the summary judgment hearing when Mr. Krafchick appeared. Unlike *Vant Leven* and her expert, Mr. Krafchick provided detailed good reasons for the delay in securing an expert opinion, despite the lack of discovery, specifying his persistent attempts and explanations for each turn of events. The first expert he contacted, who was considering the theory of negligent over-prescription, had incomplete medical records. CP 64.<sup>11</sup> The second expert, with whom Mr. Krafchick spoke only 3 days before the summary judgment hearing (February 2, 2015), withdrew due to a conflict.<sup>12</sup> On February 25, 2015, Mr. Krafchick spoke with Karen Wanek, M.S.N., R.N., and he filed her

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<sup>10</sup> Kafka acted pro se from April 2014 until November 13, 2014 (seven months), and from December 15, 2014, through January 22, 2015 (five weeks). App. Br., 26; Appendix I (Timeline).

<sup>11</sup> Another example of factual distortion the Court should disregard is Providence's incorrect description of what occurred with regard to each expert Kafka consulted, e.g., Resp. Br., 7-8 n. 4. Kafka refers the Court to the record and citations in his Statement of the Case.

<sup>12</sup> See App. Br., 27. Nurse Baggenstos outlined the theory Nurse Wanek ultimately described and which the evidence firmly supports: Providence was negligent in failing to monitor closely the drugs prescribed to Mr. Kafka, in light of his known drug abuse, and after Mr. Kafka's first negative urine screen, Providence should have required him to take all medications in the presence of a nurse who would check that he swallowed them. CP 61, 63, 168-69, 171-72. Mr. Krafchick reported Nurse Baggenstos's opinions to the trial court at the Feb. 5, 2015 hearing. CP 169, 23, 54-55. Mr. Krafchick timely filed a motion for reconsideration Feb. 17, 2015 (the deadline was Feb. 19, 2015, 10 days from entry of summary judgment), stating Baggenstos would sign her declaration that week. CP 63. On Feb. 20, 2015, Baggenstos withdrew due to her conflict. CP 35.

thorough, competent declaration March 2, 2015, CP 29-31, before the court denied reconsideration.

Providence glosses quickly over *Coggle v. Snow*, claiming the case is distinguishable because (1) Nurse Baggenstos was “not a material witness”, but rather was “fungible”; (2) unlike the plaintiff in *Coggle*, Kafka “failed to give a good reason for the delay”, adding it is “irrefutable” that Kafka “did not show what evidence would be established” since Nurse Baggenstos did not produce a declaration. Resp. Br., 32.

First, the contention that an expert witness in a medical malpractice case is **not material** is clearly without merit and contradicts Providence’s own demand below (and here) that, to defeat summary judgment, Kafka must produce expert testimony establishing a genuine issue of material fact on standard of care and causation. CP 256; CP 218-19 (citing, *e.g.*, *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983)); Resp. Br., 13. If such experts were truly fungible, plaintiffs would win medical malpractice cases more frequently. Providence knows this is untrue.

Second, Providence repeatedly overlooks that Nurse Baggenstos withdrew due to a conflict of interest. Having a conflict of interest is obviously not the same as refusing to produce an expert opinion in the

case because of a lack of evidence. Kafka's good reason for the delay was that counsel was diligently seeking the expert testimony both parties agreed he needed to defeat summary judgment. Providence cannot plausibly turn around and argue the pursuit of expert testimony on standard of care and causation is not a good reason for a continuance.

Apart from these meritless claims, Providence does not address *Cogle* because they cannot avoid its dictates. There, just as in this case, new counsel moved for a CR 56(f) continuance of the defendant physician's motion for summary judgment, stating he could not obtain the expert/treating physician's affidavit within the deadline. *Id.*, 56 Wn. App. at 502. This Court reversed, holding that the trial court abused its discretion "flowing from the court's initial denial" of a continuance, given Cogle's expert and lawyer's declarations. *Id.* at 503. Alternatively, the court erred as a matter of law in granting summary judgment by concluding the declarations did not raise an issue of material fact. *Id.* at 508-09. Likewise, in this case, when the trial court denied reconsideration, Kafka's expert declaration (Nurse Wanek's) was available in the record before it. In light of Nurse Wanek's declaration and Mr. Krafchick's declarations, the trial court abused its discretion by denying a CR 56(f) continuance and reconsideration. Alternatively, if the court evaluated these declarations on reconsideration under the summary

judgment standard, it erred as a matter of law in granting summary judgment dismissal. *Id.* There is nothing to distinguish in *Coggle* that would justify affirming the result here.

Providence next argues *Keck v. Collins* is distinguishable because there, the trial court had before it an expert declaration by the time it heard the summary judgment motion. This contention is irrelevant, and shows Providence misses the relevant point of *Keck*. There, this Court held that plaintiff demonstrated good cause for an extension (continuance) to file the final expert affidavit, which substantiated the expert's opinions in earlier, insufficient declarations. *Id.* at 87. The "primary consideration" of justice "**required** continuing the summary judgment hearing to allow full consideration of Dr. Li's third affidavit" because "appellants were hobbled by counsel who, due to extenuating circumstances, lacked the time and attention needed to ensure Dr. Li's first and second affidavits provided enough specificity to show a genuine issue of material fact exists on negligence." *Id.* (emphasis added). "With the trial date still three and one-half months away and the dispositive motions deadline still three months away, **respondents would suffer no prejudice** if the trial court continued the summary judgment hearing and considered the third affidavit." *Id.* at 88-89 (emphasis added). As in this case, denial of a continuance was "manifestly unreasonable, considering the unrefuted

reasons given by appellants' counsel” and “outside the range of acceptable choices”. *Id.* at 89.

Here, Kafka’s reasons for a continuance were similarly unrefuted. Providence agreed, as it only could, that expert testimony was necessary to defeat its summary judgment motion, and the diligent efforts Kafka’s lawyer took to secure that testimony, the contents of that testimony, or the reasons the first efforts were unsuccessful are also not disputed. “Denying a continuance under these circumstances would untenably elevate deadlines over justice and technicalities over the merits and, thus, deny appellants an opportunity to try their case to a jury.” *Id.* at 89.

Providence argues that *Butler v. Joy* does not help Kafka because its discussion of CR 56(f) is “mere dicta.” Resp. Br., 34. This contention is disproved by the many decisions relying on exactly the same portion of *Butler*.<sup>13</sup> Providence then claims Kafka’s new lawyer “had sufficient time to prepare, brief, and argue the motion for summary judgment, unlike Butler’s attorney”, because Mr. Krafchick was retained more than one day before the hearing. Resp. Br., 35. But no court has drawn the line for

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<sup>13</sup> *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 370, 166 P.3d 667 (2007); *Keck*, at 88; *Building Indus. Ass’n of Wash. v. McCarthy*, 152 Wn. App. 720, 743, 218 P.3d 196 (2009); *Durand v. HMC Corp.*, 151 Wn. App. 818, 828, 214 P.3d 189 (2009); *Briggs v. Nova Servs.*, 135 Wn. App. 955, 961, 147 P.3d 616 (2006); *Winston v. Dept. of Corrections*, 130 Wn. App. 61, 65, 121 P.3d 1201 (2005).

granting a continuance based on new counsel at one day before summary judgment; Providence cites no authority for this absurd claim.

Providence further argues *Butler* is distinguishable because Kafka had obtained one “formal” continuance, and Providence had struck the motion, giving attorney Duce a meager 11 days to respond (continuing the motion from November 14 to November 25, 2014, CP 302, CP 262), before striking it, CP 64. It is unclear what Providence means by “formal”, because there was no written motion for the pro se request for continuance in October 2014. The fact that Providence gave attorney Duce an inadequate extension or that the parties struck the motion is also not a “formal” court decision, does not somehow justify the trial court’s denial of a continuance with Mr. Krafchick’s later appearance and persistent search for expert testimony, and does not overcome the holdings of *Coggle*, *Butler*, and *Keck*. In *Butler*, plaintiff previously obtained **two** continuances—one pro se, and one by her first lawyer. *Id.* at 294, 299. Here, the court granted Kafka (pro se) only **one** continuance “to obtain counsel”. CP 302. And in *Butler*, the parties agreed to take depositions before hearing the summary judgment motion. *Butler*, at 294. Providence made no such offer. Kafka received no discovery other than Providence’s informal and staggered disclosure of medical records. Moreover, in *Butler*, as in this case, the CR 56(f) motion for a continuance was oral, and

there is no transcribed record of the summary judgment hearing. *Butler*, at 292, 294, 299. The continuance granted in *Butler* was the first one plaintiff had requested on the second-filed summary judgment motion, just as in this case the oral motion for continuance was the first request before the court on Providence's second-filed motion. *Butler* had "obtained new counsel in a little over a month" after her first lawyer withdrew. *Id.* at 299. Similarly, Kafka obtained new counsel in little over a month after the effective date of Mr. Duce's withdrawal (December 15, 2014, to January 22, 2015).

In *Butler*, the Court echoed *Coggle*, holding, "it is hard to see 'how justice is served by a draconian application of time limitations' when a party is hobbled by legal representation that has had no time to prepare a response to a motion that cuts off any decision on the true merits of a case." *Id.* at 299-300 (quoting *Coggle*, at 508). Likewise, here the trial court improperly cut off any decision on the merits of this case when Kafka's new counsel had only recently appeared and begun looking for expert opinions, with only partial, informally-disclosed medical records, no formal discovery, and no trial date. As in *Butler*, here, the trial court overlooked the interests of justice, which should have been "the primary consideration". *Id.* at 299. The trial court abused its discretion, requiring reversal and remand for trial.

### **3. The Court Should Disregard Providence's Speculation.**

Contrary to Providence's implication, the record contains no indication whether or not the court considered that Kafka had filed and struck a motion for a CR 56(f) continuance, and Providence cites nothing to that effect. And Mr. Krafchick's declarations repeatedly contradict Providence's unsubstantiated assumption that striking the hearing "clearly indicated" Kafka no longer "believed they needed a continuance". As stated in the declarations and Motion for Reconsideration, Mr. Krafchick did not confirm the motion for continuance because at that time Kafka had an unsupportive expert review to defeat summary judgment. CP 21, CP 64 (¶16); CP 15 (¶ 6); CP 170. The Court should disregard Providence's speculation. Nor is Providence's claim of unfair surprise in any way credible. The first thing defense counsel should anticipate when a new lawyer appears is a continuance. *See, e.g., Coggle, Butler, Keck*. Providence had no reasonable grounds to oppose a continuance.

### **4. The Pro Se Continuance Does Not Justify Denial Of This**

**One.** The law does not give Providence a "credit" for a pro se continuance. Providence cites its own *ipse dixit*<sup>14</sup> summary judgment

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<sup>14</sup> "*Ipse dixit*" means "a bare assertion resting on the authority of an individual." Black's Law Dictionary (5th ed.). *See, e.g., Prison Legal News, Inc. v. Dep't of Corr.*, 154 Wn.2d 628, 643 (2005).

motion as authority on this point, but there is no record of the hearing before Judge Fair and nothing to support the uncited claim that she “reluctantly” granted a continuance to pro se plaintiff Douglas Kafka, Sr., on October 14, 2014. Resp. Br., 4. A denial of a continuance to a pro se plaintiff at that point would surely also be reversed based on the rules and case law cited here.

Providence then claims Kafka had “nearly *four additional months* to prepare the case with the assistance of two separate attorneys.” Resp. Br., 26. But *Coggle, Butler, Keck, and Vant Leven* demonstrate that “delay” is not measured by ignoring the facts as to when new counsel appeared (Jan. 22, 2015), his efforts to obtain expert testimony, and the time Kafka acted without counsel (October 14-November 13, 2014; December 2014-January 22, 2015).

**5. “Delay” Is Not Counted From Date Of Death.** Providence suggests, without any authority (because there is none) that this Court should measure “delay” from the time of Douglas Kafka, Jr.’s death in April 21, 2010, giving Kafka “nearly five years” to find evidence defeating summary judgment. This is not only absurd, but directly contrary to all applicable law.<sup>15</sup> Appellants’ Br., 37. Until attorney Duce

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<sup>15</sup> This includes statutes of limitation and the constitutional right to discovery, e.g., *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 979, 219 P.3d 374

appeared in November 2014, more than 4 years after Mr. Kafka's death, Providence withheld medical records from the pro se plaintiffs. None of that time counts against them.

Providence also wants the Court to count delay from its first summary judgment motion (September 10, 2014), arguing Kafka should have been held to the standard of a lawyer while acting pro se. *Butler* in particular contradicts this assertion.<sup>16</sup>

#### **6. Kafka Demonstrated Good Reasons: Expert Testimony.**

Providence's argument that Kafka failed to show the desired evidence would raise triable factual issues makes no sense. *See* CP 256; CP 218-19; *e.g.*, *Coggle*, at 510; *Keck*, at 91; *Harris v. Groth*, 99 Wn.2d at 449. Kafka demonstrated in every pleading filed that he was seeking exactly that, and he ultimately produced a competent expert declaration. The trial court, in denying reconsideration, failed to properly evaluate the expert testimony and records before the court.

Nor is the claim "stale" – that is a term referring to actions filed after the statute of limitations or repose. *See, e.g.*, *Schroeder v. Weighall*, 179 Wn.2d 566, 580-581, 316 P.3d 482 (2014) ("**Statutes of limitations**

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(2009) (without "extensive discovery", a party cannot effectively "uncover" enough evidence to prove his claims).

<sup>16</sup> *Batten v. Abrams*, 28 Wn. App. 737, 739 n.1, 626 P.2d 984 (1981), cited by Providence, involved a quiet title/property dispute, not medical malpractice. This area has since been regulated to allow **trained** nonlawyers to practice. *E.g.*, *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 308, 45 P.3d 1068 (2002).

in general operate to immunize alleged tortfeasors from lawsuits once claims become stale”(emphasis added; cited in Response, 28, fn. 8). See *Also North Coast Air Servs. v. Grumman Corp.*, 111 Wn.2d 315, 330-31, 759 P.2d 405 (1988) (Callow, J., dissenting).

**7. Providence Never Demonstrated Any Prejudice.** Providence denies the requirement that to defeat Kafka’s motion for continuance, it would have had to demonstrate prejudice. See Appellants’ Br., e.g., at 15, 24, *Keck*, at 85, 88; *Coggle*, at 508; *Butler*, at 299-300. However, prejudice is completely absent in this case, with no trial date or case scheduling deadlines and no formal discovery.

**C. Kafka Articulated Overwhelming Grounds for Reconsideration.**

Contrary to Providence’s argument, Kafka articulated grounds for reconsideration under CR 59 in his Motion for Reconsideration and three Krafchick Declarations: abuse of discretion/error of law, CR 59(a)(1); newly discovered evidence, CR 59(a)(4), no evidence or inference to justify the decision, CR 59(a)(7), and failure to do substantial justice, CR 59(a)(9). CP 34-38, 59-109, 117-65, 166-72.

To accept Providence’s argument that denial of reconsideration should be affirmed because Nurse Wanek’s declaration was untimely, this Court would have to first affirm the denial of a continuance, directly contrary to *Coggle*, *Butler*, *Keck*, and *Vant Leven*.

Providence further contends Nurse Wanek's declaration does not qualify as newly discovered evidence under CR 59(a)(4) because it claims Kafka never proved he could not have obtained an expert declaration before the summary judgment hearing on February 2, 2015. Kafka has thoroughly addressed these issues and distinguished the relevant cases in his Opening Brief, at 42-45. The record refutes Providence's repeated claim that Kafka failed to demonstrate his persistent, diligent search for expert testimony.

Providence never addresses these grounds for reconsideration, including "substantial justice". While the record and case law present overwhelming reasons to reverse the denial of a continuance and grant of summary judgment here, this catch-all basis provides additional cause to reverse the unjust rulings in this case.

#### **D. Nurse Wanek's Declaration Defeated Summary Judgment.**

##### **1. Wanek And Medical Examiner Raise Triable Jury Questions.**

Before ever dealing with the issues presented on this appeal, Providence spends more than a third of its Response (13-1/2 pages) arguing summary judgment was proper because Nurse Wanek's declaration does not satisfy the "more probable than not" test for causation in fact. Resp. Br., 13-14, 17. As noted, the core issue on this appeal is whether the trial court erred in denying Kafka a CR 56(f) continuance so

that he could obtain expert testimony defeating summary judgment. Kafka agrees that this Court may decline to address any issue not necessary to resolve this appeal, which includes Providence's admitted hypothetical about summary judgment. But if this Court reaches summary judgment, then Nurse Wanek's declaration, together with Snohomish County Medical Examiner Stanley Adams, M.D.'s Autopsy Report, was more than sufficient to defeat summary judgment on causation.<sup>17</sup>

Nurse Wanek's declaration provides her opinions, facts, and inferences demonstrating, more probably than not, Providence's negligence in allowing Mr. Kafka to accumulate enough medication to overdose "ultimately led to his death":

[Providence's Master Care Plan's] procedure to make sure prescribed oxycodone and other oral medications were actually swallowed was indicated and **should have been done** from his date of admission given his history and the observations on admission. **The failure to make sure he swallowed the oxycodone and other drugs prescribed during his hospitalization and in light of his death due to oxycodone toxicity it is likely that he stashed the drugs rather than swallowed them enabling him to take them leading to his death.**

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<sup>17</sup> The record does not support Providence's claim that "[i]t appears that Judge Wynne did not consider Nurse Wanek's declaration". Resp. Br., 8. The Wanek Declaration, CP 32-33, was filed in the record on Monday, March 2, 2015, attached to Mr. Krafchick's Declaration, CP 29-31, and never stricken. The Order denying reconsideration states that court considered the "Declaration of Steven Krafchick, including exhibits". CP 7. If the court failed to consider the Wanek Declaration, it abused its discretion in denying reconsideration. *Cogle*, at 508-09. If the court considered the Wanek Declaration, it erred as a matter of law in failing to grant reconsideration and deny summary judgment. *Id.*

... The autopsy report stated that Mr. Kafka died from accidental acute multidrug intoxication from oxycodone and diphenhydramine. Both of these medications were being administered throughout Mr. Kafka's hospital stay. ...

In my professional nursing opinion, **it is clear** that the level of care provided by the nursing staff responsible for Mr. Kafka's care deviated from and fell below the minimum accepted standard of care required of nurses<sup>18</sup> in that they failed to exercise the degree of skill, care, and learning expected for a patient like Douglas Kafka as follows:

The record shows that Mr. Kafka was **at very high risk** of abusing narcotics during his hospitalization. Hospital staff expressed concerns about pill hoarding and drug seeking behavior almost immediately [after] being admitted to the hospital. **Hospital staff knew** he was able to access his own central lines yet there were no measures put into place to secure equipment to prevent this from happening. Very late in his stay they developed a plan to prevent him from hoarding medication but there was no indication that the plan was ever fully implemented. **Based on the autopsy findings it is clear that the hospital's actions or lack thereof allowed Mr. Kafka to obtain and self-administer medications in what ultimately proved to be a fatal dose.**

According to the Institute of Medicine, "Patients must rely on health care professionals and institutions for their safety and well-being". **It was the responsibility of Providence Regional Medical Center to provide a safe environment for Mr. Kafka. Despite a clear understanding of the risks, the hospital utterly failed to take basic measures to assure Mr. Kafka's safety, which ultimately led to his death.**

CP 33 (emphasis added). *See also* CP 60-61 (Krafchick Decl.), CP 89-98.

The Snohomish County Medical Examiner's Office Autopsy Report, CP 101-08, states that Douglas Kafka, Jr., "died of *acute multidrug (oxycodone, diphenhydramine) intoxication.*" CP 101.

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<sup>18</sup> Providence concedes this "may arguably meet the requirement of providing competent medical expert testimony that Providence's nursing staff fell below the standard of care." Resp., 16.

Postmortem toxicological examinations for ethanol and common drugs of abuse are significant for levels of oxycontin that have been reported to cause death in the medical literature. There is also diphenthydramine present, which may have had an untoward synergistic effect with the oxycontin.

CP 102. The Autopsy Report is signed by physician Stanley Adams, M.D., Associate Medical Examiner, on June 2, 2010. CP 102. Dr. Adams' report is a medical expert's opinion providing the undisputed factual cause of death. Nurse Wanek's opinion and Dr. Adams' report, together with all inferences therefrom, raise genuine triable issues as to whether Providence's failure to follow its Master Care Plan,<sup>19</sup> including failing to monitor Mr. Kafka's oxycodone, resulted in Kafka stashing medications until he had an oversupply, and ingesting an overdose that caused his death.

Providence contends the phrase "leading to his death" in Nurse Wanek's Declaration is insufficient, and that Kafka's expert should have excluded "an alternative hypothesis such as Mr. Kafka obtaining the drugs through another source such as visitors." Resp. Br., 17 (misquoting *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968)). In *O'Donoghue*, the court examined testimony that "perhaps 50 per cent" of the plaintiff's urinary retention "**might** be attributed to immobilization"

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<sup>19</sup> Providence's counterstatement of the facts is vague about what happened when, never mentioning the date of the Master Care Plan on April 14, 2010, and citing repeatedly to its **summary judgment motion** rather than the actual evidence (medical records). See Appellants' Br., 3-5, and citations to the evidence in the record.

necessary for treating her fractured leg. *Id.* at 823-24. Without diagnostic studies, which were never made, plaintiff's expert was unable to state the probable cause of her condition with that degree of medical certainty necessary to give it probative value. *Id.* at 822. Because Nurse Wanek's opinion rests on a more-probable-than-not basis, *O'Donoghue* has no bearing here.

In the portion of *O'Donoghue* Providence relies on for exclusion of alternatives, the Court quoted a 1916 case observing, "in considering medical testimony to the effect that there **could be more than one possible cause** for a condition ..., '[t]he testimony, whether direct or circumstantial, must reasonably exclude every hypothesis other than the one relied on.'" *Id.* at 824 (emphasis added; quoting *Anton v. Chicago, Milwaukee & St. Paul R. Co.*, 92 Wash. 305, 308, 159 P. 115 (1916)). But in this case, there is no testimony about any other "possible" cause: Nurse Wanek's testimony concerns only how Providence's negligent care, lack of supervision and absence of follow-through on its own Master Care Plan proximately caused Kafka's death. Nurse Wanek's opinion, together with that of the Medical Examiner in the Autopsy Report and all reasonable inferences therefrom,<sup>20</sup> demonstrates, more probably than not, Providence's negligence (which she describes in detail) proximately

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<sup>20</sup> *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 611, 15 P.3d 210 (2001); *McLaughlin v. Cooke*, 112 Wn.2d 829, 836-37, 774 P.2d 1171 (1989).

caused (led to) Mr. Kafka's death by overdosing on drugs he stashed while under Providence's negligent care, precluding judgment against Kafka as a matter of law.

Providence ignores that expert testimony on causation is sufficient in a medical malpractice case if "it supports a 'reasonable inference' of all the elements." *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 611, 15 P.3d 210 (2001); *McLaughlin v. Cooke*, 112 Wn.2d 829, 836-37, 774 P.2d 1171 (1989)). "It is not always necessary to prove every element of causation by medical testimony. If, from the facts and circumstances and the medical testimony given, a reasonable person can infer that the causal connection exists, the evidence is sufficient." *E.g., McLaughlin*, at 837-38. Nurse Wanek's Declaration and the Medical Examiner's Report provide more than enough facts and inferences to defeat summary judgment.

Importantly, "cause in fact"—the only part of causation Providence attacks—is generally left to the jury. ...[S]uch questions of fact are not appropriately determined on summary judgment unless but one reasonable conclusion is possible." *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985); *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); *Ang v. Martin*, 154 Wn.2d 477, 490, 114 P.3d 637 (2005) ("Under our precedent, cause in fact is determined by the jury as a

question of fact.”). Cause in fact refers to the “but for” consequences of an act, or the physical connection between an act and the resulting injury. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985); *Mohr v. Grantham*, 172 Wn.2d 844, 850-851, 262 P.3d 490 (2011). This means but for Providence’s negligence in caring for Mr. Kafka during his hospitalization there—particularly with Providence’s clear notice of his history of drug abuse and having implemented a Medical Care Plan—Mr. Kafka would not have accumulated a lethal amount of drugs and overdosed. Nurse Wanek’s opinion, together with the undisputed cause of death found by Dr. Adams, satisfies this standard. The evidence of causation is far above speculation, conjecture, or mere possibility. *McLaughlin*, at 837.

## **2. Service On Kristen Kafka Is A Triable Factual Issue.**

Providence claims insufficiency of service on the Estate’s Personal Representative, Ms. Kafka, is not a genuine issue of material fact that can preclude summary judgment.<sup>21</sup> Not so, according to *Butler* and many other cases. Insufficiency of service is a defense that can be the subject of

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<sup>21</sup> Providence incorrectly characterizes the trial court’s ruling as “discretionary”, separate from summary judgment, and involving findings. *E.g.*, Resp. Br., 6, 19-20. The order does not reflect anything of the kind. There is no “discretion” involved in summary judgment rulings; the court rules “as a matter of law”, CR 56(c), and no findings are required because review is *de novo*. Findings would be gratuitous, superfluous, and of no consequence on appeal. *E.g.*, *Chelan Cy. Dep. Sheriffs’ Ass’n v. County of Chelan*, 109 Wn.2d 282, 294 n. 6, 745 P.2d 1 (1987); *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707 (2004).

a summary judgment motion. Lack of service on Ms. Kafka was material: without it, the Estate could not be dismissed.<sup>22</sup> *Butler* was an appeal from the grant of the defendant physician's motion for summary judgment based in part on insufficient service. Because Joy waived the defense by her conduct, the Court reversed summary judgment dismissal. *Butler*, at 292, 295, 297-98. No such waiver occurred here. *See also Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000) ("no genuine issues of material fact ... regarding service").<sup>23</sup>

**E. Conclusion.**

Providence never presents a single reason for this Court to affirm the improper denial of a CR 56(f) continuance and denial of reconsideration in this case, which are entirely contrary to the directly applicable law in *Coggle*, *Butler*, *Keck*, and *Vant Leven*. Nor does it explain how summary judgment dismissal was proper in light of Nurse Wanek's expert declaration. The case should be reversed and remanded for trial.

DATED: September 22, 2015.

  
Steven P. Krafchick, WSBA # 13542  
Carla Tachau Lawrence, WSBA #14120

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<sup>22</sup> Ms. Kafka identified the expert who first provided an opinion that Providence failed to properly monitor Mr. Kafka.

<sup>23</sup> *Miebach v. Colasurdo*, 102 Wn.2d 170, 179, 685 P.2d 1074 (1984), cited by Providence, involved a challenge to a default judgment in a quiet title action that went to trial. The court necessarily made "finding[s]" with regard to service on a defaulted party. The case has no bearing on the summary judgment question here.