

No. 43954-9-II

COURT OF APPEALS,
DIVISION TWO
OF THE STATE OF WASHINGTON

Paul Salvage, et ux, *Appellant*

v.

Geiger Pharmacy, et al., *Appellant*.

2013 FEB 11 PM 3:51
STATE OF WASHINGTON
BY 
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

BRIEF OF APPELLANT

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ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to grant a short 2-week continuance of the summary judgment motion for the plaintiff *pro se* to procure an expert on the issue(s) of standard of care and/or causation.
2. The trial court erred in finding that the summary judgment hearing occurred on August 10, 2012. (CP at 167, para. 1.1)
3. The trial court erred in finding that notice of the hearing was served on the parties required by CR 7 and CR 56. (CP at 167, para. 1.2)
4. The trial court erred in finding that “Plaintiff[] ha[d] failed to come forward with a sufficient quantum of evidence to create a genuine issue off material fact as to the existence of the standard of care required of the Defendants.” (CP at 168, para. 2.1)

Issues Pertaining to Assignments of Error

1. Whether a trial court abuses its discretion when it fails to grant a short 2-week continuance of a summary judgment motion for the plaintiff *pro se* to procure an expert on the issue(s) of standard of care and/or causation where the plaintiff *pro se* requests the assistance of an attorney on the record and the hearing was not noted in accordance with CR 7 and CR 56.
2. Whether expert testimony is required to survive summary judgment on the issue of whether a pharmacist breached his duty of care where the pharmacist dispensed an incorrect amount of the drug prescribed to the customer/patient.

II. STATEMENT OF CASE

This is an appeal from an order granting summary judgment entered on August 17, 2012 in Kitsap County Superior Court. CP at 167-168. On February 26, 2010, Plaintiff Paul Salvage brought a civil action against Defendants Robert Geiger and Geiger Pharmacy for negligence for dispensing an incorrect prescription to Plaintiff Salvage. More specifically, Mr. Salvage alleged as follows in his complaint (CP at 4):

- 3.2 Prior to December 2006, Dr. Stephen Kramp prescribed 5 milligrams of Methadone to Mr. Salvage.
- 3.3 From December 2006 through May 2007, in Kitsap County, in the city of Port Orchard, Washington, Mr. Robert Geiger of Geiger Pharmacy dispensed a prescription for Methadone to Mr. Paul Salvage.
- 3.4 The amount of Methadone dispensed by Mr. Geiger was different from the amount of Methadone prescribed by Dr. Kramp.
- 3.5 On or about March 16, 2007, Mr. Salvage was involved in a single car collision in Thurston County, Washington.
- 3.6 The incorrect amount of Methadone dispensed to Mr. Salvage was the primary cause of the one car collision.

Kitsap County Superior Court did not issue a case scheduling order when the case was filed. As such, the case then sat idle for over 2 years. Indeed, from the docket it appears that the defendants failed to answer the complaint. *See* Appendix at 1. Plaintiff's attorney withdrew in November of 2010. *See id.* It wasn't until Spring-Summer of 2012 that the case

finally began to pick up speed. *See id.* On July 2, 2012, Defendants filed a motion for summary judgment noting the same for hearing on August 3, 2012. CP at 11, 20. This motion alleged that Plaintiff's lawsuit was essentially a medical malpractice action, that Plaintiff had not yet procured expert testimony on the issues of standard of care and causation, and that this fact required dismissal of Plaintiff's lawsuit. CP at 11-19. On July 27, 2012, the hearing was re-noted for August 10, 2012.¹ CP at 96. On July 30, 2012, Plaintiff filed his response to the motion for summary judgment. CP at 97, 102. In his response, Plaintiff *pro se* argued that no expert testimony was required was on the issue of the standard of care. CP at 99. Plaintiff conceded that expert testimony was required on the issue of causation and requested two (2) more weeks to produce such testimony. CP at 100; *see also* CP at 102-103. While he did not term his response a CR 56(f) motion for continuance, Plaintiff's response was clearly the functional equivalent of such a motion², to wit:

After receiving Defendant's motion for summary judgment, I have been in contact with medical providers who have treated me to obtain an affidavit in response to the motion. Recently, my provider at the Peninsula Pain Clinic has agreed to write the affidavit. Unfortunately, I was unable to obtain the affidavit by the date that my response to the motion is due. I am confident however, that the affidavit

¹ The hearing was re-noted for August 10, 2012 due to Mr. Salvage's health issues. *See* CP at 104-105.

² Indeed, even defense counsel, Mr. Miller, understood Mr. Salvage's response to be a CR 56(f) motion for continuance. *See* CP at 118.

will be ready within two weeks, and that is why I ask for the extension.

Per the docket, the August 10, 2012 summary judgment hearing did *not* occur; it was stricken because it was not confirmed.³ However, the same day (August 10, 2012) Defendants filed a motion to dismiss for “failure to comply with discovery order.” They then noted the motion to dismiss for one week later (August 17, 2012) and included the stricken motion for summary judgment—which now included a “supplemental declaration” filed on August 3, 2012 in support thereof—in the note for motion docket. CP at 105, 156.

On August 17, 2012, Judge Anna M. Laurie of the Kitsap County Superior Court granted Defendant’s motion for summary judgment. CP at 168; RP at 1, 24-25. Judge Laurie admitted that she had not reviewed Plaintiff’s summary judgment submission even though the order granting summary judgment indicates that Mr. Salvage’s declaration and response were “relied upon” at the hearing. RP at 11-12; CP at 168.

In granting Defendant’s motion, Judge Laurie effectively denied Plaintiff’s requests for a continuance made on the record, including at least one request to consult with an attorney, John Andrews, to whom Mr.

³ On August 10, 2012, Mr. Miller inspected the two prescription bottles in question and received seventeen (17) pages of chart notes from Dr. Kramp (Plaintiff’s treating health care provider) and printouts from Geiger Pharmacy. *See* CP at 141.

Salvage had paid over \$2,000.00. *See* RP at 20, 25; *see also* RP at 4; *but cf.* RP at 7.

The order granting summary judgment indicates that the hearing was held on August 10, 2012 (i.e. the date of the stricken summary judgment hearing.) CP at 167. It further indicates that “Notice of hearing was served on the parties within the time period required by CR 7 and CR 56.” *See id.* This timely appeal followed. CP at 170.

III. ARGUMENT

A. The trial court abused its discretion by refusing to grant a short continuance of the summary judgment motion.

The leading case on continuances of summary judgment motions is *Coggle v. Snow*, 56 Wn. App. 499 (1990). In *Coggle*, the court disapproved of the *Delno-Rehak* standard with respect to appellate review of discretionary rulings, such as whether or not to grant a CR 56(f) motion for continuance of a summary judgment hearing. *See id.* at 505-506 (“Strict application of [the ‘no reasonable man, woman or judge’] standard would mean that an appellate court would never reverse without a hearing to determine the general reasonableness of the judge.”).

The *Coggle* court went on to state that the “[t]he proper standard is whether discretion is exercised on untenable grounds or for untenable

reasons, considering the purposes of the trial court's discretion." 56 Wn.

App. at 507. It continued:

CR 56(f) states that where affidavits of the party opposing the motion for summary judgment show reasons why the party cannot present facts justifying its opposition, the court may refuse the motion for summary judgment or order a continuance in order to obtain affidavits or the depositions. Where a party knows of the existence of a material witness and shows good reason why the witness' affidavit cannot be obtained in time for the summary judgment proceeding, the court has a duty to give the party a reasonable opportunity to complete the record before ruling on the case. However, a trial court may deny a motion for a continuance when 1) the moving party does not offer a good reason for the delay in obtaining the evidence; 2) the moving party does not state what evidence would be established through the additional discovery; or 3) the evidence sought will not raise a genuine issue of fact. ... In considering the application of CR 56(f), we note that the trend of modern law is to interpret court rules and statutes to allow decisions on the merits of the case. ... In addition, the superior court rules are to be construed to secure the just, speedy, and inexpensive determination of every action. CR 1.

...

The primary consideration in the trial court's decision on the motion for a continuance should have been justice. The client, Coggle, after obtaining new counsel, should not be penalized for the apparently dilatory conduct of his first attorney. ... The court should have viewed the motions in the context of the new legal representation. We fail to see how justice is served by draconian application of time limitations here. The case had been filed two years earlier. Little discovery had been pursued. The process would have been speeded by the court after a short continuance and the consideration of Coggle's materials in response to the motion for summary judgment. Snow has not argued that he would have suffered prejudice if the court had granted a continuance, nor do we perceive any prejudice. We cannot discern a tenable ground or reason for the trial court's decision. We hold that the trial court improperly exercised its discretion in denying the motion for continuance.

See Coggle, 56 Wn. App. at 507-08 (emphasis added, citations omitted).

The *Coggle* court's approach was adopted wholesale by Division III of the court of appeals in *Butler v. Joy*, 116 Wn. App. 291 (2003). In *Butler*, the plaintiff's newly-retained counsel orally moved for a continuance of the summary judgment hearing. *See id.* at 299. The attorney was retained just the day before the hearing and appeared without written affidavits in support of the motion to continue. *See id.* The attorney's oral presentation was not even recorded and the appellate court could not have known whether he needed more time to obtain further discovery or what further evidence he expected to produce. *See id.* Indeed, despite the fact that the motion did not "fit within the guidelines of a CR 56(f) continuance[.]" the appellate court held that the denial of the motion to continue was an abuse of discretion. *Joy*, 116 Wn. App. at 299-300 ("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.").

Here, as in *Coggle* and *Joy*, the trial court's failure to grant Mr. Salvage's request for a brief continuance for the purposes of securing an affidavit from a pharmacist and to have the assistance of counsel to whom he had already paid over \$2,000 cut off any decision on the true merits of

the case. See RP at 20, 25. Moreover, there *was* evidence in the record that Mr. Salvage's case was meritorious. For example, in his declaration in support of Defendant's motion to dismiss, defense counsel, Mr. Miller, indicated as follows:

10. On August 8, 2012, I received a fax that contained two pages of documents: one page of a chart note from Dr. Kramp dated 5/1/07 and a printout of prescription from Geiger Pharmacy from the year 2007.

11. On August 10, 2012, Mr. Salvage allowed me to inspect the two supposed prescription bottles in question as well as provided me seventeen (17) pages of chart notes from Dr. Kramp and printouts from Geiger Pharmacy. Mr. Salvage also told me that he was ready to note this case for trial.

CP at 141.

Indeed, Mr. Salvage brought with him to court (and provided to counsel) a signed declaration from Mr. Salvage's former counsel, David Gehrke, that he (Mr. Gehrke) was still in possession of the prescription bottles at issue up until Mr. Salvage picked up these bottles on Monday, August 6, 2012. CP at 165; RP at 22. (Presumably, these were the bottles that Mr. Miller inspected on August 10, 2012.) Despite the above, Mr. Miller argued to the Court that "[Mr. Salvage] hasn't presented anything to the Court regarding standard of care. There is no evidence that he was prescribed ten milligrams versus five. There is no evidence before the Court that he even had a prescription with Geiger Pharmacy, so he's

utterly failed to meet his burden of proof.” RP at 23. That is, Mr. Miller’s own declaration in support of the defendant’s motion to dismiss on the basis that Mr. Salvage had violated the court’s order regarding discovery refute his arguments as to why summary judgment should be granted.

Additionally, Mr. Salvage was not accorded sufficient time to respond to what amounted to an amended motion for summary judgment. Recall that the original motion for summary judgment was filed on July 2, 2012 and noted for August 3, 2012, but was re-noted for August 10, 2012 on July 27, 2012 due to Mr. Salvage’s health issues. CP at 96, 104.

Per the docket, the August 10, 2012 hearing was then stricken because it was not confirmed. However, on August 10, 2012 the summary judgment motion, along with Defendant’s motion to dismiss, was noted for August 17, 2012. In support of the August 17, 2012 summary judgment hearing a “supplemental declaration” of Mr. Miller was filed on August 3, 2012. Thus, Mr. Salvage’s time was shortened from 17 calendar days to respond to the “supplemental declaration” to 3 calendar days. *See* CR 56(c). Indeed, if the summary judgment had gone ahead on August 10, 2012, Mr. Salvage would have had no opportunity to respond as his response had already been timely filed on July 30, 2012. CP at 97, 102. *Cf. State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, (2004) (“To establish prejudice, the party making the challenge to an order

shortening time must show a lack of actual notice, a lack of time to prepare for the motion, and no opportunity to submit case authority or provide countervailing oral argument.”).

In any event, there was no tenable reason for the trial court to proceed with the summary judgment hearing where Mr. presented two valid and legitimate reasons for a short continuance. The defense may very well argue prejudice in their response, but given the age of the case (i.e. over 2 years old with minimal activity) and the fact that little discovery had been accomplished up to that point (see CP at 102), the defense’s claim of prejudice is not persuasive under *Coggle*, to wit:

The case had been filed two years earlier. Little discovery had been pursued. The process would have been speeded by the court after a short continuance and the consideration of *Coggle*’s materials in response to the motion for summary judgment. Snow has not argued that he would have suffered prejudice if the court had granted a continuance, nor do we perceive any prejudice.

Coggle, 56 Wn. App. at 507-08.

As such, the trial court abused its discretion in refusing to grant Mr. Salvage’s motion for a 2-week continuance of the summary judgment hearing.

B. Expert testimony is not required to demonstrate a triable issue of fact on whether a pharmacist breached his duty of care where the pharmacist dispensed an incorrect amount of the drug prescribed to the customer/patient.

In its reply brief, the defendants acknowledged the rule in

Washington that “Medical testimony is required to establish negligence of a physician unless the negligence is so apparent that a layman would have no difficulty recognizing it.” See *Harris v. Groth*, 31 Wn. App. 876, 879 (1982) (emphasis added). They argued, however, that “the average layperson would not know how pharmacist fills prescriptions, what valid reason there may be for actually prescribing a larger dose, would certainly have no knowledge on when Federal warning labels are required, and would not know [sic] what type of ‘consultations’ are required or are reasonable.” CP at 123.

The defendants’ argument does not mesh with the weight of authority from other jurisdictions holding that expert testimony is not required to show a violation of the standard of care by a pharmacist who provides a drug different than the one prescribed. See, e.g., *Bender v. Walgreen Eastern Co., Inc.*, 945 A.2d 120, 399 N.J.Super. 584, 592 (2008); *Sparks v. Kroger Co.*, 200 Ga.App. 135, 407 S.E.2d 105, 106 (1991); *Walter v. Wal-Mart Stores, Inc.*, 748 A.2d 961, 972, 2000 ME 63 (Me. 2000) (“It does not take an expert to know that filing a prescription with the wrong drug and failing to take the steps in place in that pharmacy to check for the wrong drug is negligence.”).

Here, there is little difference between filling a prescription with the wrong drug and filling it with the correct drug in an amount different

than that prescribed to the patient. It is a distinction without a difference. As in the former case, “the carelessness involved is readily apparent to anyone of average intelligence and ordinary experience.” *See Bender*, 399 N.J.Super. at 592.

As such, on remand, this Court should hold that expert testimony is not required to demonstrate a triable issue of fact on whether Mr. Geiger breached his duty of care to Mr. Salvage when he dispensed an incorrect amount of Methadone to him.

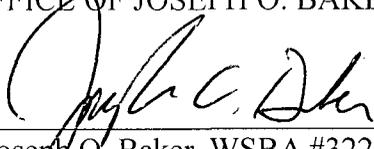
IV. CONCLUSION

For all the foregoing reasons, the appellant, Mr. Salvage, respectfully requests that this Court reverse the trial court’s decision granting Defendant’s motion for summary judgment. Justice was clearly not served in this case.

Dated this 11th day of February, 2013.

LAW OFFICE OF JOSEPH O. BAKER

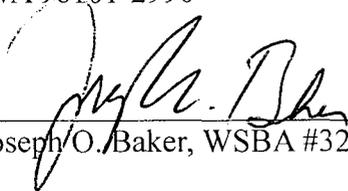
By


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CERTIFICATE

I certify that on February 11, 2013 I caused a copy of the foregoing **BRIEF OF APPELLANT** to be served on the following individuals by messenger delivery:

Theodore Miller
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Seattle, WA 98101-2990



Joseph O. Baker, WSBA #32203

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APPENDIX

JSM007 DISPLAY DOCKET KITSAP SUPERIOR 02-11-13 15:07 1 OF 6
CASE#: 10-2-00432-9 JUDGMENT# NO JUDGE ID:
TITLE: PAUL SALVAGE ET UX VS GEIGER PHARMACY ET AL
NOTE1: *COURT OF APPEALS NO. 43954-9
NOTE2:

CAUSE: MED MEDICAL MALPRACTICE STATUS: APP DATE: 09/13/2012

SUB#	DATE	CODE	DESCRIPTION/NAME	SECONDARY
1	02 26 2010	CICS	CASE INFORMATION COVER SHEET	
2	02 26 2010	SMCMP	SUMMONS & COMPLAINT	
3	03 24 2010	NTAPR	NOTICE OF APPEARANCE	
		ATD01	ABEL, STEVEN L	
4	03 24 2010	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
5	03 25 2010	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
6	03 25 2010	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
7	11 15 2010	NTIWD	NOTICE OF INTENT TO WITHDRAW	
		WTP01	GEHRKE, DAVID HENRY	
8	07 13 2011	NTIWD	NOTICE OF INTENT TO WITHDRAW	
9	11 23 2011	NTWSUB	NOTICE WITHDRAW & SUBSTITUT COUNSEL	
		ATD02	SHELTON, MELINDA HALL	
10	04 06 2012	MTAF	MOTION AND AFFIDAVIT/DECLARATION	
	04 06 2012	MTCM	MOTION TO COMPEL INTERROGS & REQUEST FOR PRODUCTION OF DOCS AND	

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SUB# DATE CODE DESCRIPTION/NAME SECONDARY

SUB#	DATE	CODE	DESCRIPTION/NAME	SECONDARY
11	04 06 2012	NTMTDK	REQUEST FOR STATEMENT OF DAMAGES NOTE FOR MOTION DOCKET	04-20-2012M
		ACTION	COMPEL DISCOVER6	
	04 06 2012	NOTE	#10 &11 PROCESSED 4/9/12	
12	04 20 2012	ORCMP	ORDER TO COMPEL PRODUCTION/DISCVRY	
		JDG01	JUDGE JEANETTE DALTON, DEPT 1	
13	04 20 2012	MTHRG	MOTION HEARING	
		JDG01	JUDGE JEANETTE DALTON, DEPT 1	
		CTR01	COURT REPORTER CARISA GROSSMAN	
			COURT SIGNS ORDER AS PRESENTED	
14	05 17 2012	NTWSUB	NOTICE WITHDRAW & SUBSTITUT COUNSEL	
		WTD02	WIEDER, MELINDA HALL	
		ATD03	MILLER, THEODORE M	
15	07 02 2012	MTSMJG	MOTION FOR SUMMARY JUDGMENT	
		DEF01	GEIGER PHARMACY	

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CAUSE: MED MEDICAL MALPRACTICE STATUS: APP DATE: 09/13/2012

SUB#	DATE	CODE	DESCRIPTION/NAME	SECONDARY
		DEF02	GEIGER, ROBERT	
16	07 02 2012	DCLR	DECLARATION OF THEODORE MILLER IN SUPPORT OF DEFS MTN FOR SM JG	
17	07 02 2012	NTMTDK	NOTE FOR MOTION DOCKET	08-03-2012M
		ACTION	DEFS GEIGERS MTN FOR SUMMARY JUDG	
	07 05 2012	NOTE	#15 - 18 PROCESSED	
18	07 27 2012	NTMTDK	NOTE FOR MOTION DOCKET *RENOTE	08-10-2012M
		ACTION	DEFS GEIGERS MTN FOR SUMMARY JUDG	
19	07 30 2012	RSP	PLAS RESPONSE TO MTN FOR SM JG	
20	07 30 2012	DCLR	DECLARATION OF PAUL SALVAGE	
	08 03 2012	HSTKNC	HRG STRICKN: NOT CONFIRMD & NOT HRD	
21	08 03 2012	DCLR	DECLARATION OF THEODORE MILLER IN SUPPORT DEFS MTN SMJG -SUPPLEMENTAL	
22	08 03 2012	RPY	DEFS REPLY TO PLAS RESPONSE TO MTN SM JG	

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SUB#	DATE	CODE	DESCRIPTION/NAME	SECONDARY
23	08 10 2012	MTDSM	DEFS MOTION TO DISMISS FOR FAILURE TO COMPLY WITH DISCOVER ORDER	
24	08 10 2012	AFS	AFFIDAVIT OF THOEDRE MILLER IN SUPPORT OF MTN TO DISMISS FOR FAILURE TO COMPLY W/DISCOVERY ORD	
25	08 10 2012	AFS	AFFIDAVIT OF MELINDA WIEDER IN SUPPORT OF DFS MTN TO DISMISS FOR FAILURE TO COMPLY W/DISCOVERY	
26	08 10 2012	HSTKNC	HRG STRICKN: NOT CONFIRMD & NOT HRD	
	08 10 2012	NTMTDK	NOTE FOR MOTION DOCKET	08-17-2012M
		ACTION	DEFS MTN FOR SM JG &MTN TO DISMISS	
27	08 14 2012	AFSR	AFFIDAVIT/DCLR/CERT OF SERVICE	
28	08 14 2012	DCLR	DECLARATION OF PAUL SALVAGE	
29	08 17 2012	MTHRG	MOTION HEARING	
		JDG03	JUDGE ANNA M. LAURIE, DEPT 3	

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SUB#	DATE	CODE	DESCRIPTION/NAME	SECONDARY
		CTR	ORDER SINGED AS PRESENTED	
			VISITING COURT REPORTER	
			SARA WOOD	
30	08 17 2012	ORGSJ	ORDER GRANTING SUMMARY JUDGMENT	
		JDG03	JUDGE ANNA M. LAURIE, DEPT 3	
31	09 13 2012	NTAPR	NOTICE OF APPEARANCE	
		ATP02	BAKER, JOSEPH ORRY-LEROY	
32	09 13 2012	NACA	NOTICE OF APPEAL TO COURT OF APPEAL	
33	09 17 2012	TRLC	TRANSMITTAL LETTER - COPY FILED	
			NOTICE OF APPEAL EFILED W/COA	
34	09 24 2012	PNCA	PERFECTION NOTICE FROM CT OF APPLS	
35	11 15 2012	DSGCKP	DESIGNATION OF CLERK'S PAPERS	
36	11 16 2012	INX	INDEX	
37	11 30 2012	TRLC	TRANSMITTAL LETTER - COPY FILED	
		CLP	CLERK'S PAPERS EFILED W/COA	

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SUB#	DATE	CODE	DESCRIPTION/NAME	SECONDARY
38	12 07 2012	VRPRC	VERBATIM REPORT OF PROCEEDINGS (1) 08/17/2012	
		CTR	VISITING COURT REPORTER SARA WOOD	
39	12 20 2012	TRLG	TRANSMITTAL LETTER - COPY FILED	
	12 20 2012	VRPT	1 VERBATIM RPT TRANSMITTED TO COA	
40	12 21 2012	RCP	RECEIPT(S)	

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