

**FILED**

OCT 13 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**Court of Appeals of the State of Washington, Division III**

**Case No. 299112**

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**Sandra Taylor, Appellant**

**v.**

**Dr. Brent Maughn and Deaconess Hospital, Respondents**

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**Brief of Appellant**

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Craig Mason, WSBA#32962  
Attorney for Appellant  
W. 1316 Dean  
Spokane, WA 99201  
509-325-4828

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## **I. INTRODUCTION**

Sandra Taylor, Plaintiff-Appellant, was left with an untreated uterine infection, which devastated her life over 7 months. She filed her Complaint against the Respondents on 8/13/10, and served Deaconess, and then served Dr. Maughan. Mr. Rekofke appeared for Deaconess on 8/26/10, and Mr. Sestero appeared on 11/22/10, and Mr. Sestero immediately filed an affidavit of prejudice against Judge Tompkins. The case was transferred to Judge Leveque, at which time the Respondents immediately moved for summary judgment.

Ms. Taylor's initial expert had promised his declaration by early January. However, as he continued to review the records, the expert decided that Ms. Taylor's infection had, indeed, not been treated in violation of standards of care, but since Dr. Maughan was denying that he had ever received word from his staff of Ms. Taylor's infection, and her agonies, the focus of expert opinion shifted to the staff for not communicating the injuries to Dr. Maughan. Thus, liability for Dr. Maughan shifted from a failure to treat properly to a failure to sufficiently supervise and train his staff. Deaconess was liable for the same issues.

Ms. Taylor promptly located new experts (on nursing and on hospital administration), who filed appropriate declarations as quickly as

possible, on 3/7/2011. Ms. Taylor also filed a CR 56(f) request, which was denied, and filed a Motion to Amend her Complaint, which was also denied by the trial court.

Ms. Taylor was acting with due diligence, and was acting in reliance upon the case law which had struck down the “certificate of merit” requirement of RCW 7.70.150. This case law, cited below, had made clear that Ms. Taylor would have time to develop her discovery and her case. Ms. Taylor argued to the trial court that she should have more time to engage in discovery and to procure experts in a rapidly evolving case, and she argued that to force her to have fully-developed expert opinion so early in the case was essentially a re-imposition of the RCW 7.70.150 “certificate of merit” requirement. However, despite her forwarding the facts to new experts, promptly engaged, and despite her theories evolving with the evidence, as would be expected during discovery and pre-trial activity, the trial court cut off Ms. Taylor’s access to the courts by prematurely granting summary judgment, and by denying Ms. Taylor’s CR 56(f) motion.

Other rulings are also appealed herein. However, Ms. Taylor’s main concern is that the summary judgment simply did not allow her proper access to the courts because it prevented Ms. Taylor from developing her case.

Ms. Taylor requests a remand to the trial court with more time to pursue her case, and requests that the court suggest a “bright-line” rule that in medical malpractice cases the defendant’s summary judgment motion may not be brought until the first discovery cut-off date is reached, and, after that time, in the discretion of the court under existing case law.

## **II. ASSIGNMENTS OF ERROR**

**A.** The court abused its discretion to sign the Defendant’s Order of 2/4/11 Continuing Summary Judgment (CP 55-56), and abused its discretion to issue the related Order of 3/11/11 Denying Reconsideration of Order of Continuance. (CP 151-52)

**B.** The court abused its discretion in the Order of 3/23/11 Denying Plaintiff’s Request for CR 56(f) Continuance (CP 174-76).

**C.** The court erred as a matter of law in its Order of 3/11/11 Granting Defendant Maughan’s Motion for Summary Judgment (CP 153-55), and in its Order of 3/14/11 Granting Summary Judgment in Favor of Defendant Deaconess (CP 156-60), and in its Order of 3/21/11 Granting Summary Judgment in Favor of Defendant Deaconess (CP 170-73), and in the related Order of 3/23/11 Denying Plaintiff’s Request for CR 56(f) Continuance (CP 174-76), and in the Order of 4/14/11 Denying Reconsideration vis-à-vis summary judgment in favor of Dr. Maughan (CP 190-91).

**D.** The court abused its discretion in entering the Order of 6/13/11

Denying Plaintiff's Motion to Amend Complaint. (CP 240-42)

### **III. ISSUES RELATING TO ASSIGNMENTS OF ERROR**

#### **A. Substantial Deviation of Written Order from Oral Order**

**Issue #A.1:** Should the court have signed a written order of 2/4/11 which deviated so far from the trial court's oral ruling of 1/21/11, especially once the court knew that the Plaintiff relied upon the oral ruling? (Answer: No. The oral order was reasonably relied upon by the Plaintiff, and the written order deviated too far from the oral ruling.)

**Issue #A.2:** Should the court have refused to reconsider its written order of 2/4/11 once Plaintiff provided the transcript of 1/21/11? (Answer: No.)

#### **B. CR 56(f) Continuance Should Have Been Granted**

**Issue #B.1:** Should the court have granted the Plaintiff a CR 56(f) continuance when the case was freshly-filed, when the evidence and expert opinion was evolving, and when the discovery cut-off was months away on the first scheduling order? (Answer: Yes, continuance should have been granted. It was an abuse of discretion to deny the Plaintiff a CR 56(f) continuance.)

**Issue #B.2:** Did the trial court deny Sandra Taylor access to the courts by denying her CR 56(f) motion, and by denying her reconsiderations of that

decision? (Answer: Yes, the Plaintiff's access to the courts was denied in violation of recent case law.)

**Issue #B.3:** Did the trial court act in a manner akin to the judicial re-creation of RCW 7.70.150, and did the trial court essentially recreate a "certificate of merit" requirement, by allowing Dr. Maughan and Deaconess to rush to summary judgment? (Answer: Yes. The trial court essentially re-established a "certificate of merit" requirement in a medical malpractice case.)

**C. Genuine Issues of Material Fact Exist in the Record**

**Issue #C.1:** Do genuine issues of material fact already exist in the record, which should preclude summary judgment? (Answer: Yes.)

**D. The Motion to Amend the Complaint Should Have Been Granted.**

**Issue #D.1:** Should the trial court have granted the Plaintiff's Motion to Amend the Complaint? (Answer: Yes.)

**IV. STATEMENT OF THE CASE**

Dr. Brent Maughan performed a caesarian-section delivery of a child upon Sandra Taylor on 2/27/08, after which Ms. Taylor suffered sustained illness from an undiagnosed and untreated uterine infection, which, discovered after prolonged infection and suffering, was insufficiently treated. (CP 6-9) Sandra Taylor repeatedly called Dr. Maughan's offices and nurses and asked for assistance, and was

repeatedly dismissed. Even once Dr. Maughan finally took Ms. Taylor's complaints seriously and treated her infection, he treated her insufficiently, as commented upon by his nurse at the time. (CP 6-9) Dr. Maughan withdrew as Ms. Taylor's physician, and Dr. Brown saw her through to healing. (CP 6-9, 68-69)

During the interim of her sustained and debilitating infection, Ms. Taylor lost her business and her husband, and could not properly bond with her young child. (CP 6-9, 67-84)

Ms. Taylor filed suit against Dr. Maughan and Deaconess Hospital on August 13, 2010, and served Deaconess Hospital shortly thereafter, and then served Dr. Maughan in November, 2010. Once Mr. Bob Sestero appeared to represent Dr. Maughan, Mr. Sestero filed an affidavit of prejudice against Judge Linda Tompkins, and the case was re-assigned to Judge Leveque.

Deaconess set a summary judgment motion for 1/21/11, at which time Ms. Taylor made a CR 56(f) request, supported by proper affidavits, for more time to gather additional affidavits and evidence, and Ms. Taylor requested time to receive answers to interrogatories from Dr. Maughan and Deaconess. (CP 15-18) Ms. Taylor further presented to the court her good reason for any delay in producing her affidavits, what evidence

would be established during a two-month continuance, and how that new evidence would create genuine issues of material fact. (CP 19-51)

At the oral hearing of 1/21/11, the trial court indicated it would review the lack of production of discovery by Deaconess on 2/25/11. (VRP 32-33. Note: On p. 33 the court corrects the date of the next hearing [to the 25<sup>th</sup>], which the court indicates, on p. 32, is the 17<sup>th</sup> of February.) See, esp., p.32, lines 18-25, where the court says, “We’ll have to take a look... I still can take a look at that stuff.” There was no clear statement that the court would be proceeding with summary judgment on 2/25/11, if Deaconess had not produced discovery, or if more discovery time was needed, and yet the ultimate written order ignored the discovery review language of the oral ruling. (CP 55-56) (The court also refused to reconsider this order at CP 151-52, and see CP 142-44.)

Deaconess did not provide discovery answers until 2/18/11, and Sandra Taylor’s expert failed to provide a response or explanation by this time, despite due diligence in contacting him. (CP 65) Sandra Taylor filed this information as part of her Reply briefing in request of a CR 56(f) continuance. (CP 63-66) In addition to supplementary affidavits (e.g. CP 67-84), Ms. Taylor also filed recent authority, *Lowy v. PeaceHealth*, 159 Wash.App. 715, 247 P.3d 7 (2011), to argue that the Deaconess answers to interrogatories were clearly insufficient, and that this was a reason why

more time was needed under CR 56(f). (CP 85-103) Dismissing Ms. Taylor's arguments, the trial court granted summary judgment for Deaconess on 2/25/11, and a written order was entered on 3/21/11. (CP 156-60)

Dr. Maughan set a motion for summary judgment, despite having acknowledged the case had "just commenced," and without answering Ms. Taylor's interrogatories. (CP 111-112, and exhibits cited) Ms Taylor again raised the issue, as she had done with Deaconess, that for the court to accept an immediate summary judgment motion is tantamount to reinstating the RCW 7.70.150 "certificate of merit" that was struck down in *Putnam v. Wenatchee Valley Medical Center*, 166 Wn. 2d 974, 216 P.3d 374 (2009). (CP 113-14)

As it was early in the case, the theory was evolving in the light of discovery, as was anticipated by the Complaint of Ms. Taylor which read:

**4.3 Leave to Amend:** The Defendant has notice of the factual basis of the claims, and Plaintiff reserves her leave to amend the causes of action to conform to the evidence of the incidents of which the Defendants have notice. (CP 10)

The medical expert initially contacted by Ms. Taylor at first blamed Dr. Maughan for her sustained and debilitating infection. Upon additional review, the expert shifted his view of the lack of treatment of Ms. Taylor's infection as the result of Dr. Maughan not being informed of

her symptoms, due to the deficiencies of Dr. Maughan's staff and the staff of Deaconess. The nursing liability expert, Natalie Mohammed, then filed a declaration (CP 128-133), and the hospital administration expert, Brian Heller, Ph.D, also filed a declaration (CP 134-141) stating that the failure to train and to supervise staff had caused Ms. Taylor's damages.

These declarations were filed to resist Dr. Maughan's summary judgment motion. More time was also requested under CR 56(f), as these declarations showed the case was developing. (CP 145-47). The declarations of Heller and Mohammed were also filed in reply on reconsideration of the Deaconess summary judgment. (CP 106-108, and see CP 68-69 for Deaconess' staff also ignoring Ms. Taylor's complaints.)

Reconsideration vis-à-vis the Deaconess Order of Continuance was denied on 3/11/11 (CP 151-52).

Summary judgment was granted to Dr. Maughan on 3/11/11. (CP 153-55) An order granting Deaconess summary judgment was also filed on 3/14/11. (CP 156-60) Reconsideration on both orders was filed by Sandra Taylor. (CP 161-89) And an order denying reconsideration regarding Dr. Maughan was entered on 4/14/11. (CP 190-91) On 5/20/11, the trial court orally decided that it had addressed both defendant parties with its order of 4/14/11. (VRP 81). However, another order granting Deaconess summary judgment was filed by Deaconess on 3/21/11 (CP

170-73), and a reconsideration of that order was taken, which reconsideration lay dormant until the court orally addressed this reconsideration on 5/20/11, when it articulated that all reconsiderations were denied on 4/14/11. (VRP 81)

Ms. Taylor believed notice-pleading rules likely did not require her to amend her complaint; nonetheless, she filed a Motion to Amend her Complaint to conform it to the evidence of experts Heller and Mohammed, which motion was denied by an order of 6/13/11 (CP 240-42) after oral hearing of 5/20/11. This appeal timely followed.

#### **V. SUMMARY OF ARGUMENT**

While arguments on all issues listed above are developed, below, the three major arguments are: (1) The rush to summary judgment essentially re-establishes the certificate of merit requirement of RCW 7.70.150, struck down in *Putnam v. Wenatchee Valley Medical Center*, 166 Wn. 2d 974, 216 P.3d 374 (2009). (2) Further, a CR 56(f) should have been granted to Ms. Taylor under the governing case law as she presented to the court her good reason for any delay in producing her affidavits, she stated what evidence would be established during the requested two-month continuance, and she described how that new evidence would create genuine issues of material fact. (3) Finally, Ms.

Taylor did present sufficient affidavits and expert opinion to avoid summary judgment on the facts as pled.

## **VI. ARGUMENT**

### **A. Substantial Deviation of Written Order from Oral Order**

**Issue #A.1:** Should the court have signed a written order of 2/4/11 which deviated so far from the trial court's oral ruling of 1/21/11, especially once the court knew that the Plaintiff relied upon the oral ruling? (Answer: No. The oral order was reasonably relied upon by the Plaintiff, and the written order deviated too far from the oral ruling.)

The trial court had stated on 1/21/11 that it would "take a look" at discovery issues on 2/25/11, including Deaconess' late answers to discovery, prior to any summary judgment hearing. (CP 107, VRP 32-33.) The 2/25/11 hearing should have addressed the need for additional discovery to be provided from Deaconess, and the trial court should have continued the summary judgment motion under CR 56(f).

**Issue #A.2:** Should the court have refused to reconsider its written order of 2/4/11 once Plaintiff provided the transcript of 1/21/11? (Answer: No.)

The transcript was provided to the trial court on reconsideration. (CP 107) The court was correct on oral argument to keep the door open to additional continuances, and abused its discretion to shut the door on such continuance on 2/25/11 and on reconsideration.

## **B. CR 56(f) Continuance Should Have Been Granted**

**Issue #B.1:** Should the court have granted the Plaintiff a CR 56(f) continuance when the case was freshly-filed, when the evidence and expert opinion was evolving, and when the discovery cut-off was months away on the first scheduling order? (Answer: Yes, continuance should have been granted. It was an abuse of discretion to deny the Plaintiff a CR 56(f) continuance.)

The Appellant, Sandra Taylor, had been led to believe by Clinical Consultants that an expert was preparing a declaration for her. Instead, the delay was due to the expert shifting his view from Dr. Maughan's direct malpractice to Dr. Maughan's failure to train and supervise his staff to communicate Ms. Taylor's symptoms of infection to Dr. Maughan. Thus, Sandra Taylor's theory of the case evolved during the pre-trial and discovery process to one of corporate liability for both Deaconess and for Dr. Maughan in their failure to train and supervise staff.

The declarations of Natalie Mohammed (nursing expert) and of Bruce Heller (hospital administrative expert) were a natural part of the development of the case, which would proceed in conjunction with discovery, and in conjunction with Dr. Maughan's additional responses to discovery and, certainly, necessary motions to compel more discovery from Deaconess and Dr. Maughan.

A Plaintiff's CR 56(f) motion should be granted when: (1) the requesting party has a good reason for the delay in obtaining evidence; (2)

the requesting party indicates what evidence would be established by further discovery; and (3) the new evidence would raise genuine issues of material fact. *Qwest Corp. v. City of Bellevue*, 161 Wash.2d 353, 369, 166 P.3d 667 (2007). These factors are addressed in turn, below:

(1) Sandra Taylor had good reason for her delay in being able to answer the Respondent's CR 56(c) motion: (a) It was so early in the case that she was just procuring expert evidence, and (b) the expert opinion was evolving as the facts were developed through the discovery and litigation process, and, in fact, (c) the evolution of the case toward the failure to supervise and train staff was simply part of the normal litigation process, which was de-railed by the premature summary judgment motion of the Respondents.

(2) Sandra Taylor had indicated what additional evidence would be established through the discovery and litigation process. Namely, that Ms. Taylor's untreated infection was due to the failure of Dr. Maughan and Deaconess to properly train and supervise their staff members.

(3) Sandra Taylor believes that the declarations of nursing expert, Natalie Mohammed, and hospital expert, Bruce Heller, raise genuine issues of material fact. Certainly, Ms. Taylor should have been allowed to continue to develop her case, and it was an abuse of discretion not to allow Ms. Taylor to do so.

The failure to grant the CR 56(f) continuance is reviewed as an abuse of discretion. *MRC Receivables Corp. v. Zion*, 152 Wash.App. 625, 628-29, 218 P.3d 621 (2009). Other grounds to grant the CR 56(f) continuance include the following:

**Issue #B.2:** Did the trial court deny the Plaintiff access to the courts by denying her CR 56(f) motion? (Answer: Yes, the Plaintiff's access to the courts was denied in violation of recent case law.)

The Washington State Supreme Court has been actively protecting the right of injured persons to have access to the courts, in order to receive compensation for their injuries and remedies for the wrongs done them. See, e.g., *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010), *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 216 P.3d 374 (2009), *Unruh v. Cacchiotti*, 172 Wn.2d 98, 257 P.3d 631 (2011), and see *Renner v. City of Marysville*, 168 Wn.2d 540, 230 P.3d 569 (2010) (continuing the State Supreme Court's trend of access to the courts in the tort claims context).

In *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 216 P.3d 374 (2009), the Washington Supreme Court struck down the "certificate of merit" prerequisite to filing, RCW 7.70.150. The Putman court wrote (emphasis added):

I. Does RCW 7.70.150 Unduly Burden the Right of Access to Courts?

“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803). The people have a right of access to courts; indeed, it is “the bedrock foundation upon which rest all the people's rights and obligations.” *John Doe v. Puget Sound Blood Ctr.*, 117 Wash.2d 772, 780, 819 P.2d 370 (1991). This right of access to courts “includes the right of discovery authorized by the civil rules.” *Id.* As we have said before, “[i]t is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense.” *Id.* at 782, 819 P.2d 370.

**\*\*377** Requiring medical malpractice plaintiffs to submit a certificate prior to discovery hinders their right of access to courts. Through the discovery process, plaintiffs uncover the evidence necessary to pursue their claims. *Id.* Obtaining the evidence necessary to obtain a certificate of merit may not be possible prior to discovery, when health care workers can be interviewed and procedural manuals reviewed. Requiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiffs' right of access to courts. It is the duty of the courts to administer justice by protecting the legal rights and enforcing the legal obligations of the people. *Id.* at 780, 819 P.2d 370. Accordingly, we must strike down this law.

*Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d at 979.

Applying *Putman* to the facts of Sandra Taylor's case, she was in the middle of the discovery process, and she did not yet have the time to receive, let alone review, all the “procedure manuals” and other means of training and supervision which would have led medical staff to better inform Dr. Maughan of the magnitude and virulence of Sandra Taylor's infection.

Plainly, under *Putman v. Wenatchee Valley Medical Center, P.S.*, Sandra Taylor's case should be remanded so that she can continue to develop her case and provide data to her experts, whose opinions may continue to evolve during the discovery process.

The trial court effectively re-established RCW 7.70.150, and the certificate of merit requirement, when it allowed summary judgment against Sandra Taylor so early in the discovery process.

**Issue #B.3:** Did the trial court act in a manner akin to the judicial re-creation of RCW 7.70.150, and did the trial court essentially recreate a "certificate of merit" requirement, by allowing Dr. Maughan and Deaconess to rush to summary judgment? (Answer: Yes. The trial court essentially re-established a "certificate of merit" requirement in a medical malpractice case.)

As the *Putman* court noted, "extensive discovery" is necessary for Sandra Taylor to develop her case. Ms. Taylor had not received answers to her first set of discovery from either respondent when they filed their CR 56(c) motions, and the Deaconess answers that did arrive shortly before their motion were noticeably incomplete.

As the *Putman* court also noted, as a matter of notice-pleading, extensive discovery is expected in cases such as Sandra Taylor's:

Under notice pleading, plaintiffs use the discovery process to uncover the evidence necessary to pursue their claims. *Doe*, 117 Wash.2d at 782, 819 P.2d 370. The certificate of merit requirement essentially requires plaintiffs to submit evidence supporting their claims before they even have an opportunity to

conduct discovery and obtain such evidence. For that reason, the certificate of merit requirement fundamentally conflicts with the civil rules regarding notice pleading-one of the primary components of our justice system.

*Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d at 983.

The trial court essentially re-established the RCW 7.70.150 certificate of merit requirement, and essentially defeated the process inherent in notice-pleading of being able to invoke extensive discovery, and thereby the trial court denied Sandra Taylor access to the courts.

### **C. Genuine Issues of Material Fact Exist in the Record**

Even in the melee of undue haste imposed upon Ms. Taylor by the Respondents, she was able to respond to the early factual developments in the case by locating the nursing expert, Ms. Natalie Mohammed, and the hospital administration expert, Bruce Heller, to pursue her case, which was evolving in light of the facts, as would be expected in a case initiated by notice-pleading. Genuine issues of material fact had been created.

**Issue #C.1:** Do genuine issues of material fact already exist in the record which should preclude summary judgment? (Answer: Yes.)

Although the matter was prematurely brought to hearing, Dr. Heller and Natalie Mohammed have shown that genuine issues of material fact exist regarding the supervision and training of staff by Dr. Maughan

and by Deaconess which appear to have interfered with Dr. Maughan learning of the severity and extent of Sandra Taylor's infection.

We review summary judgment orders de novo.<sup>FN6</sup> Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>FN7</sup> When reviewing a summary judgment order, we engage in the same inquiry as the trial court, considering the facts and all reasonable inferences from the facts in the light most favorable to the nonmoving party.<sup>FN8</sup>

*Nye v. University of Washington*, --- P.3d ----, 2011 WL 4348074

Wn.App. Div. 1, 2011 (Sept. 19, 2011) (footnotes omitted).

Construing the facts in Sandra Taylor's favor, as the non-moving party, the trial court erred to dismiss her case on summary judgment, and erred to deny her motions for reconsideration.

**D. The Motion to Amend the Complaint Should Have Been Granted.**

In the event that the notice-pleading authority, cited above, was not sufficient, Ms. Taylor also moved to amend her complaint under CR 15(a) before the matter was fully final.

**Issue #D.1:** Should the trial court have granted the Plaintiff's Motion to Amend the Complaint? (Answer: Yes.)

In the original *Complaint*, section 4.3 read:

**4.3 Leave to Amend:** The Defendant has notice of the factual basis of the claims, and Plaintiff reserves her leave to amend the causes of action to conform to the evidence of the incidents of which the Defendants have notice.

The facts pled remain essentially the same. The difference is that expert opinion faults the supervision of the staff by Deaconess and by Dr. Maughan as the cause of the failure to treat, and the *Amended Complaint* makes clear this cause of action.

### **1. Law of Corporate Negligence**

The failure to supervise falls under the aegis of corporate negligence. In *Douglas v. Freeman*, it was a small dental clinic that breached its duties of corporate liability:

It is well settled that under the doctrine of corporate negligence, a hospital can be held liable for its own negligence in the absence of any negligence on the part of the treating physician.<sup>FN23</sup>

FN23. Annot., *Hospital's Liability for Negligence in Failing to Review or Supervise Treatment Given By Doctor, or To Require Consultation*, 12 A.L.R.4th 57, 61 (1982); see also *Bivens v. Detroit Osteopathic Hosp.*, 77 Mich.App. 478, 487-88, 258 N.W.2d 527 (1977), (decedent's doctor exonerated but hospital liable for violating standard of ordinary care owed decedent), *rev'd on other grounds*, 403 Mich. 820, 282 N.W.2d 926 (1978).

*Douglas v. Freeman*, 117 Wash.2d 242, 252-53, 814 P.2d 1160 (1991).

As the court wrote in *Freeman*, a corporate liability claim is entirely distinct from any malpractice of the physician:

Similarly, there is no claim here that the clinic is vicariously liable for Dr. Freeman's negligence under the theory of respondeat superior. Rather, the claim is one of corporate negligence which imposes on the clinic a nondelegable duty owed directly to plaintiff, regardless of the details of the doctor-clinic relationship.<sup>FN28</sup>

FN28. See *Pedroza v. Bryant*, 101 Wash.2d 226, 229, 677 P.2d 166 (1984).

*Freeman*, 117 Wash.2d at 253.

The *Freeman* court clearly delineated that the duty to supervise was the duty applicable to its facts, as they are in this present case (emphasis added):

The doctrine of corporate negligence in cases such as this is based on a nondelegable duty that a hospital owes directly to its patients.<sup>FN7</sup> One commentary \*\*1164 finds four such duties owed by a hospital under the doctrine of corporate negligence: (1) to use reasonable care in the maintenance of buildings and grounds for the protection of the hospital's invitees; (2) to furnish the patient supplies and equipment free of defects; (3) to select its employees with reasonable care; and (4) to supervise all persons who practice medicine within its walls.<sup>FN8</sup> It is this latter duty, the duty of supervision, that is at issue in this case.

FN7. See *Pedroza v. Bryant*, 101 Wash.2d 226, 230, 677 P.2d 166 (1984); *Alexander v. Gonser*, 42 Wash.App. 234, 240, 711 P.2d 347 (1985), *review denied*, 105 Wash.2d 1017 (1986); Comment, *The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Physicians*, 50 Wash.L.Rev. 385 (1975).

FN8. Comment, 50 Wash.L.Rev. at 412.

*Freeman*, 117 Wash.2d at 248.

The expert opinions of Natalie Mohammed (nursing) and of Bruce Heller, Ph.D (administration expert) support the corporate liability claims of Sandra Taylor against Deaconess and against Dr. Maughan. "To sue a sole proprietorship, one must sue the individuals compromising the

business.” *Dolby v. Worthy*, 141 Wash.App. 813, 816, 173 P.3d 946 (2007).

As the physician in charge of the staff in his sole proprietorship, Dr. Maughan has corporate liability for the medical treatment (or non-treatment) provided by his staff. *Douglas v. Freeman*, 117 Wash.2d 242, 248, 252-53, 814 P.2d 1160 (1991). Deaconess has the same duty. *Id.* These duties to Sandra Taylor were breached by both entities, and by Dr. Maughan individually, causing Ms. Taylor harm for which it would be unjust to deny compensation.

## **2. Case Not Final at Time of Motion**

Summary judgment orders are always provisional. As the *Washburn* court stated:

Absent a proper certification, an order which adjudicates fewer than all claims or the rights and liabilities of fewer than all parties is subject to revision at any time before entry of final judgment as to all claims and the rights and liabilities of all parties. CR 54(b); *see Fox*, 115 Wash.2d at 504, 798 P.2d 808. The partial summary judgment order was not properly certified and it was not a final judgment; the trial court had the authority to modify the order at any time prior to final judgment.

*Washburn v. Beatt Equipment Co.*, 120 Wash.2d 246, 300, 840 P.2d 860 (1992) (emphasis added), referencing *Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 798 P.2d 808 (1990) (even though a judgment against one defendant was certified to the Court of Appeals, the decision remained

interlocutory and subject to revision until the entry of final judgment against all defendants, and remained appealable as to the first defendant). *See also Alwood v. Aukeen Dist. Court*, 94 Wash.App. 396, 973 P.2d 12 (1999) (the court retains the power to revisit any interlocutory order at any time). As the order in reconsideration of Deaconess had not yet been filed by the court, this motion was properly brought, and the cause of action was within the ambit of the facts pled, per notice-pleading.

Ms. Taylor's motion to amend should have been granted, and the failure to do so was an abuse of discretion. *Caruso v. Local Union No. 690 Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983) (leave to amend should be freely given except where prejudice to the opposing party would result).

## **VII. CONCLUSION**

The trial court erred in its haste to reach a summary judgment dismissal of the case against the Respondents. In this haste, numerous errors were made, most significant of which were to deny Sandra Taylor access to the courts, and to essentially re-establish the certificate of merit requirement of RCW 7.70.150, struck down in *Putnam v. Wenatchee Valley Medical Center*, 166 Wn. 2d 974, 216 P.3d 374 (2009).

Additionally, a CR 56(f) should have been granted to Ms. Taylor under the governing case law as she presented to the court her good reason

for any delay in producing her affidavits, she stated what evidence would be established during the requested two-month continuance, and she described how that new evidence would create genuine issues of material fact. The trial court abused its discretion to deny her continuance.

Finally, Ms. Taylor's expert declarations were sufficient to defeat summary judgment, and/or were sufficient to allow her Complaint to be amended to fit the evidence as it evolved in the litigation process.

In sum, Ms. Taylor requests that the trial court be reversed, and that the case be returned to the trial court so that her litigation can resume.

Respectfully submitted,



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10/12/11

## VIII. APPENDIX

### RCW 7.70.150:

The text of this statute is omitted as the text of it does not require study by the court. RAP 10.4(c) This certificate of merit requirement was struck down by *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 216 P.3d 374 (2009).

### CR 15(a):

#### AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated "proposed" and unsigned, shall be attached to the motion. If a motion to amend is granted, the moving party shall thereafter file the amended pleading and, pursuant to rule 5, serve a copy thereof on all other parties. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

### CR 56(f):

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.