

NO. 29911-2

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION NO. III

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SANDRA TAYLOR,

Appellant

vs.

BRENT MAUGHAN, M.D.; DEACONESS HOSPITAL

Respondents

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RESPONDENT BRENT MAUGHAN, M.D.'S RESPONSE BRIEF

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**FILED**

NOV 29 2011

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## **I. INTRODUCTION**

This is an ordinary medical malpractice case. The plaintiff's ("Appellant") lack of diligence and inability to procure necessary expert testimony, despite having ample time in which to secure such evidence, led inevitably to the dismissal of her claims on summary judgment. She now appeals (1) the denial of her CR 56(f) motion for a continuance, (2) the entry of summary judgment against her, and (3) the denial of her Motion for Reconsideration. The Appellant's claims were, and remain, without merit. The trial court did not abuse its discretion in denying both the Appellant's CR 56(f) motion and her Motion for Reconsideration and did not err in granting Respondent's ("Dr. Maughn") summary judgment. Dr. Maughan respectfully requests this Court AFFIRM the trial court's orders in their entirety.

## **II. STATEMENT OF THE ISSUES**

- (1) Did the trial court abuse its discretion in denying Appellant's motion for continuance of Dr. Maughan's summary judgment motion?
- (2) Did the Appellant establish a genuine issue of material fact in support of all of the necessary elements of her standard of

care claim in response to Dr. Maughan's summary judgment motion?

(3) Did the trial court abuse its discretion in denying the Appellant's Motion for Reconsideration.

### **III. STATEMENT OF THE CASE**

The Appellant filed her Complaint against Dr. Maughan asserting a violation of the standard of care relative to the performance of a caesarean section delivery on February 27, 2008, a failure to diagnose an alleged infection, and a failure to properly treat that infection. (CP 3-11.) The record reflects that the Appellant, on or about August 18, 2008, was terminated as a patient and left a voicemail message with Dr. Maughan indicating that she felt her "infection" should have been treated over the prior months. (CP 75-76; 325-326.) Despite the Appellant's belief in 2008 that she had a "infection" which should have been treated over the prior months, she waited and filed her medical malpractice action on August 13, 2010.

After denying all allegations in the Appellant's Complaint, Dr. Maughan filed a motion for summary judgment on or about January 28, 2011, noting the motion for hearing on March 4, 2011. (CP 289-291; CP 295-297.) In support of the summary

judgment motion, Dr. Maughan filed an extensive declaration outlining his training, education, experience, as well as cataloguing his multiple and frequent interactions with the Appellant after the delivery of her child on February 27, 2008. (CP 276-281.)

On February 23, 2011, Appellant filed a response to the summary judgment motion with declarations from the Appellant, the Appellant's ex-husband, and the Appellant's sister. (CP 63-66; CP 67-78; CP 79-84; CP 59-62.) The Appellant also moved for a continuance of the summary judgment hearing under CR 56(f). (CP 63-66.)

On March 7, 2011, just four days prior to the summary judgment hearing, the Appellant filed the declarations of Natalie Mohammed, R.N., and Brian Heller, Ph.D. (CP 128-133; 134-141.) The nurse was admittedly not competent to create an issue of material fact as against an OB/GYN physician. (CP 129-133; 143). *See Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 612-613, 15 P.3d 210 (2001) (a nurse may not supply causation testimony relative to a standard of care violation asserted against a physician). The declaration of Brian Heller, Ph.D., did not

pertain to Dr. Maughan and was directed toward the Appellant's claims against Deaconess Hospital. (CP 134-141; 143.)

On March 11, 2011, the trial court heard the Appellant's motion for continuance before entertaining Dr. Maughan's motion for summary judgment. (Verbatim Report of Proceedings "VRP" 54-65.)

At the hearing, the Appellant conceded that nurses are not competent or qualified to provide testimony on the applicable standard of care for physicians. (VRP 62-63.) The trial court denied the Appellant's motion for continuance. (CP 174-176.) Appellant had knowledge of the purported delayed diagnosis and treatment of an infection dating back to August 2008. (CP 75). Appellant had the same belief at the filing of the malpractice suit in August 2010. (CP 8.) By the time of the continuance motion in March 2011, Appellant was clearly on notice that expert testimony was required, and Appellant acknowledged there was no physician willing and able to render the necessary testimony to support a prima facie case. (VRP 63-65.)

Having no expert on the standard of care for an OB/GYN physician under the circumstances facing Dr. Maughan in 2008, and presenting no testimony or evidence on causation or damages, the trial court granted Dr. Maughan's motion for summary judgment. (CP 153-155.)

#### **IV. ARGUMENT**

##### **A. STANDARD OF REVIEW**

A trial court's denial of a CR 56(f) motion is reviewed for abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (1990).

An appellate court reviews an order granting summary judgment *de novo*. *U.S. Bank v. Whitney*, 119 Wn. App. 339, 347, 81 P.3d 135 (2003).

Appellate courts review a trial court's denial of a motion for reconsideration for abuse of discretion. *Brinnon Grp. v. Jefferson County*, 159 Wn. App. 446, 485, 245 P.3d 789 (2011).

##### **B. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR A CR 56(f) CONTINUANCE**

A trial court may exercise its discretion and deny a motion for continuance pursuant to CR 56(f) when (1) the requesting

party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.<sup>1</sup> *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668–69, 230 P.3d 583 (2010). "A discretionary decision 'is based on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (citation omitted).

Below, Appellant argued that a party opposing summary judgment has a virtually unlimited time frame to pursue additional discovery pursuant to *Putnam v. Wenatchee Valley*

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<sup>1</sup> On page 11 of her Opening Brief, the Appellant appears to contend that she suffered prejudice from an ostensible "deviation" between the trial court's oral rulings and its written orders. This contention is meritless and does not warrant discussion. *See State v. Hatchie*, 133 Wn. App. 100, 118, 135 P.3d 519 (2006) (A court's oral ruling has no binding or final effect until it is reduced to writing; a court's oral opinion is no more than an oral expression of the court's informal opinion at the time rendered; it is "necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.") (citation omitted).

*Medical Center*, 166 Wn.2d 974, 216 P.3d 734 (2009). In *Putnam*, the Washington Supreme Court struck down RCW 7.70.150 as an unconstitutional barrier to access to the court system. The *Putnam* holding does not set forth any bright line rule or justification for delaying a defendant's right to seek dismissal of claims unsupported by required evidence. *Id.*

The Appellant quotes extensively from *Putnam* in her Opening Brief. (Appellant's Opening Brief at 14-15.) In support of her claims, the Appellant quotes the following language from *Putnam*:

Requiring medical malpractice plaintiffs to submit a certificate prior to discovery hinders their *right of access* to courts. [...] 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.

*Putman*, 166 Wash.2d at 979 (emphasis added). This language does not support the Appellant's contentions because the Supreme Court was clearly concerned only with the certificate of merit of RCW 7.70.150, not with fashioning judicial rationalizations to absolve a plaintiff from the consequences of a dilatory pursuit of his/her case *several months* after filing it with

the court. Moreover, the plaintiff / patient is allowed to pursue communication with treating and expert witnesses health care providers at anytime, while the defendant may only access records after the plaintiff signs a release or through formal discovery after a suit is initiated. The Appellant was not denied *access* to the court system, she merely failed to pursue and develop her case before and after walking through the courthouse doors. Wrapping herself in the cloak of *Putnam* does not ameliorate the Appellant's lack of diligence.

Despite feeling that she received substandard care in 2008, Appellant apparently took no action to formally investigate a basis for a malpractice claim before filing her Complaint in mid-August 2010. Prior to the continuance hearing on March 11, 2011, Appellant was unable to obtain any expert who would opine that Dr. Maughan had violated the applicable standard of care, causing damage. In fact, Appellant now concedes that a retained expert found no standard of care violation by Dr. Maughan. (Appellant's Opening Br. at 1.)

During the continuance hearing, Appellant's counsel acknowledged that the declarations from the nurse and the

hospital administrator were addressing claims against Deaconess Hospital and not Dr. Maughan. (VRP 56.) Appellant then conceded that she did not know if she could find an expert in the future much less supply the identity of an individual who would sign the required affidavit with opinion testimony against Dr. Maughan. (VRP 56-57.) Appellant did not identify an individual health care provider who would provide the required evidence establishing the necessary proof even if more time was provided for discovery. (*See* CP 145-147.)

The trial court did not abuse its discretion in concluding that Appellant had ample time to acquire records, to consult with expert witnesses, and to develop evidence supporting a genuine issue of material fact on the necessary elements. Moreover, there was no abuse of discretion in denying the continuance where Appellant essentially agreed that there were no experts available to give the required testimony if additional time were granted.

Contrary to Appellant's unspoken position, mere speculation concerning additional evidence which may be discovered does not justify granting a CR 56(f) continuance. *See Margolis v. Ryan*, 140 F.3d 850, 854 (9th Cir. 1998) ("wild

speculation" that facts and testimony sought to be discovered could actually be discovered will not support a continuance or denial of summary judgment motions under Fed. R. Civ. P. 56(f)); *Paul Kadair, Inc. v. Sony Corp. of Am.*, 694 F.2d 1017, 10230 (5th Cir.1983) (holding that plaintiff could not rely upon Fed. R. Civ. P. 56(f) to defeat motion for summary judgment "where the result of a continuance to obtain further information would be wholly speculative"); *Sherry Associates v. Sherry-Netherland, Inc.*, 273 A.D.2d 14, 15 (N.Y. App. Div. 2000) ("Plaintiffs' speculation that further discovery may disclose evidence in their favor does not justify denial or continuance of the summary judgment motion.") The closest Appellant ever came to articulating evidence which might be established through additional discovery was her counsel's statement two days before the summary judgment hearing that "Dr. Douglas Brown is currently reviewing [Appellant's] file to determine *if* he believes the care of Dr. Maughan fell below the standard of care." (CP 146.) (Emphasis added). Appellant now contends that such evidence does not exist. (*See* Appellant's Opening Br. at 1.) Appellant's lack of diligence and the speculation about

what additional discovery may disclose were and are unjustifiable. The trial court did not abuse its discretion in denying Appellant's CR 56(f) continuance motion.

**C. SUMMARY JUDGMENT IN FAVOR OF DR. MAUGHAN WAS APPROPRIATE**

In health care negligence claims, the respective burdens on summary judgment are relatively well defined. In *Guile v. Ballard Comm. Hosp.*, 70 Wn. App. 18, 851 P.2d 689 (1993), the court specifically adopted the burden-shifting mechanism at summary judgment that had its origin in *Celotex Corp. v. Catarett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). See *Guile*, 70 Wn. App. at 21-22.

On summary judgment, the moving party bears the initial burden of showing the absence of an issue of material fact; once the defendant meets this initial showing, the inquiry shifts to the plaintiff. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The plaintiff bears the burden of showing sufficient facts to establish the existence of every essential case element required at trial. *Id.* The trial court should grant summary judgment when there is an evidentiary failure of proof

on any essential element of the plaintiff's case, and the failure renders all other facts immaterial. *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 779–80, 133 P.3d 944 (2006). In making a responsive showing, the nonmoving party must set forth specific facts showing a genuine issue and cannot rely on mere allegations, speculation, or argumentative assertions. *Id.* at 780, 133 P.3d 944; *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

A medical malpractice plaintiff responding to a defendant's motion for summary judgment is required to bring forth expert testimony to establish the standard of care, its breach, and proximate cause. *McLaughlin v. Cooke*, 112 Wn.2d 829, 837, 774 P.2d 1171 (1989); *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 15 P.3d 210 (2001). Summary judgment shall be rendered "forthwith" if responsive pleadings, depositions, answers to interrogatories, and admissions on file along with any affidavits fail to establish a genuine issue of material fact in support of the necessary elements of RCW 7.70.030. CR 56.

Statements within affidavits and declarations submitted in summary judgment proceedings must contain admissible evidence, and statements that are deemed inadmissible must be disregarded. *Country Express Stores v. Sims*, 87 Wn. App. 741, 750, 943 P.2d 374 (1997).

Here, the Appellant filed no evidence to create a genuine issue of material fact on the elements required for a standard of care claim against Dr. Maughan. The only physician expert to review the matter concluded that Dr. Maughan had not violated the standard of care. (Appellant's Opening Br. at 1.)

The Appellant now asserts that a nursing liability expert and a hospital administration expert both supplied sworn testimony against Dr. Maughan in the maintenance and supervision of his staff. Those allegations are not found in the Complaint, and no motion to amend the Complaint to assert these allegations was made before the summary judgment hearing. Respondent moved for summary judgment on all claims and causes of action. (CP 289-291.)

The declarations do not provide any evidence in support of this claim which is not found in the Complaint. (CP 128-133;

CP134-141). Appellant conceded this fact during argument on the motion to continue. (VRP 55-56.) Appellant's inconsistent positions regarding the scope and breadth of these experts' opinions should be rejected. *See Graham v. Graham*, 41 Wn.2d 845, 851, 252 P.2d 313 (1953) (noting the anomaly of one taking a position on appellate review inconsistent with that taken in the trial court and applying the doctrine of invited error by analogy in rejecting the appellant's inconsistent position). *See also Mavis v. King County Public Hosp. No. 2*, 159 Wn. App. 639, 650, 248 P.3d 558 (2011) (judicial estoppel prevents a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position in another court proceeding).

In the absence of the necessary evidence, dismissal was warranted as a matter of law. The trial court's summary judgment should be affirmed.

#### **D. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR RECONSIDERATION**

Appellate courts review a trial court's denial of a motion for reconsideration for abuse of discretion. *Brinnon Grp. v. Jefferson County*, 159 Wn. App. 446, 485, 245 P.3d 789 (2011).

On March 21, 2011, Appellant filed a motion for reconsideration. (CP 167-169.) The motion for reconsideration was nothing more than an attempt to re-argue the previously denied motion for continuance. Again, the nurse and hospital administration expert declarations were submitted in support of claims against Deaconess and not in support of any claim against Dr. Maughan.

In the motion for reconsideration, Appellant took a directly contrary position to the earlier representations about these declarations. (CP 167-169). Appellant claimed on reconsideration that these recycled declarations somehow supported a claim on the OB/GYN standard of care. The motion for reconsideration did nothing but attempt to re-characterize Appellant's claims and couch them in different terminology to avoid the obvious absence of the required expert testimony.

There was no newly discovered evidence; instead, there was merely a newly formulated expression of the previously dismissed claims. (CP 167-169.)

Claim splitting is improper because it would lead to duplicative suits and force a defendant to defend against multiple suits arising out of the same nexus of facts. *See Landry v. Luscher*, 95 Wn. App. 779, 782, 979 P.2d 1274 (1999). The general rule is that if an action is brought for part of a claim, "a judgment obtained in the action precludes the plaintiff from bringing a second action for the residue of the claim" *Id.* Claim splitting seeks to prevent relief sought on a subsequent claim when the relief "could have and should have been determined in a prior action." *Id.*

On reconsideration, Appellant still provided no factual, testimonial evidence to refute Dr. Maughan's motion for summary judgment. The previously filed declaration of Dr. Maughan and the affidavit of counsel with attached medical records provided a long litany of individuals who oversaw and tended to Appellant after the birth of her child and up to August 2008. (CP 276-281; 308-326.) These facts were not

controverted in any meaningful fashion, and at no time did the Appellant address causation or damage. Denial of the Motion for Reconsideration was proper and was not an abuse of discretion.

## **VI. CONCLUSION**

As a plaintiff in a medical malpractice case, Appellant was obligated to obtain expert testimony to supply necessary evidence in support of the elements outlined in RCW 7.70.030. Despite awareness of the purported or alleged wrongdoing in 2008, Appellant could not retain an expert witness in OB/GYN medicine who was willing to sign an affidavit critical of Dr. Maughan and his care of the Appellant by the Spring, 2011. The Appellant could not identify the name of an expert who would be willing to sign the required affidavit or declaration even if additional time were granted pursuant to her motion for a continuance.

A defendant health care provider faces the same stress of litigation as a plaintiff, in addition to further anxieties about reputational harm, when malpractice claims are pending. Dr. Maughan has a strong interest in an expeditious adjudication of

a claim which lacks the necessary evidence to survive to a jury trial. Such was the case here.

The Appellant had no such evidence, and dismissal of her claims was warranted as a matter of law. Dr. Maughan respectfully requests this Court AFFIRM the trial court's orders in their entirety.

Dated this 29<sup>th</sup> day of November, 2011.

EVANS, CRAVEN & LACKIE, P.S.

By 

ROBERT F. SESTERO, JR., #23274  
Attorneys for Respondent Dr. Maughan

**CERTIFICATE OF SERVICE**

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 29 day of November, 2011, the foregoing was delivered to the following persons in the manner indicated:

Craig Mason	VIA REGULAR MAIL [ ]
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