

**FILED**

SEP 06 2012

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

No. 306101-III

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

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**DEBRA JEAN BLUM,**

**Plaintiff/Appellant,**

**v.**

**OUR LADY OF LOURDES HOSPITAL AT PASCO  
d/b/a LOURDES HEALTH NETWORK,**

**Defendant/Respondent.**

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**BRIEF OF RESPONDENT LOURDES HEALTH  
NETWORK**

---

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**I. INTRODUCTION**

Defendant Our Lady of Lourdes (hereafter “Lourdes”) properly moved for summary judgment. Plaintiff Debra Blum’s (hereafter “Blum”) response was untimely and woefully inadequate. The trial court properly granted summary judgment.

**II. RESPONSE TO ASSIGNMENTS OF ERROR**

- A. The trial court properly determined that Dr. Palmer’s declaration was legally insufficient under CR 56.
- B. Blum never raised the issue of a CR 56(f) continuance at the trial court level and it cannot therefore be considered for the first time on appeal.
- C. Blum never raised this issue at the trial court level. Moreover, Blum cites no pertinent law in support of that argument.
- D. Summary judgment is a valid procedural mechanism for dismissal of deficient lawsuits in Washington that does not unlawfully restrict access to the courts.
- E. Dr. Handelman’s declaration was legally sufficient.
- F. Blum never raised this issue at the trial court level.

### **III. COUNTER STATEMENT OF CASE**

This appeal involves a claim of medical negligence by Blum against Lourdes. Blum presented to Lourdes on August 31, 2007. (CP 156). Under Blum's version of the facts, as set forth in her deposition, Complaint, and discovery responses,<sup>1</sup> after she entered the hospital she was told she needed to report to the third floor. (CP 156-58). She requested assistance from someone in the area. (CP 157). A wheelchair was brought to her. (CP 157). When she was attempting to sit down in the wheelchair, she claims she instead "continued down" and fell in a sitting position "flat on [her] buttocks so hard [she] saw stars." (CP 158-59). She did not strike any part of her head or neck. (CP 158-59).

Blum filed a Complaint against Lourdes on July 26, 2010. (CP 247-48). The Complaint alleges Lourdes

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<sup>1</sup> Blum did not submit any declarations or sworn statements at the trial court level establishing a factual record. The factual statement contained in her brief is unsupported by the trial court record. The factual statement contained and referenced herein is based upon Blum's Complaint, discovery responses, and deposition testimony, which Lourdes cited and referenced in its initial summary judgment filings. (CP 195-96). While Lourdes disputes Blum's version of the facts, it accepted them as true for the purposes of summary judgment, and reiterates them now for the purposes of appeal with the same reservation.

“was negligent in its care, moving, transportation and treatment of Plaintiff causing her to fall and sustain severe injuries.” (CP 247 ¶ 3). Blum also submitted discovery responses, alleging that Lourdes “by and through it’s [sic] agents provided a defective and broken wheelchair and the employee who was [sic] care to me failed to operate it properly and caused me to fall.” (CP 172).

Blum claims that the alleged fall caused the retinas in both her left and right eyes to detach and caused the eventual loss of vision in her left eye. (CP 173). She also claims that the fall caused numbness and loss of sensation in both her legs. (CP 173). The evidence in fact shows that the detached retina in Blum’s left eye actually did not occur until over a month after the alleged fall. (CP 164). The detached retina in her right eye did not occur for over a year later. (CP 164).

Lourdes filed an Answer on June 14, 2011 denying it was negligent. (CP 215-18). On August 18, 2011, over a year after the Complaint was filed, Lourdes filed for summary judgment,

arguing that Blum could not establish the elements of proximate causation and damages. (CP 194-203). In support of its motion, Lourdes submitted the lengthy declaration of Dr. Handelman, an Ophthalmology expert, who reviewed Blum's medical records and deposition. (CP 181). He testified on a more probable than not basis that Blum's "retinal detachments were not proximately caused by the alleged fall on August 31, 2007." (CP 181).

Lourdes also relied on a neurologist, Scott E. Carlson, M.D., who examined Blum and concluded that the alleged numbness in Blum's legs was likely psychological rather than physiological in nature. (CP 177-78).

Blum filed a response on September 16, 2011, arguing issues of fact prevented summary judgment in favor of Lourdes. (CP 87-92). Blum's response relied entirely on (1) a letter purportedly from Charles Sung, M.D., which was never provided to Lourdes or filed with the trial court, (2) medical records purportedly from Dr. Sung, (3) a letter purportedly from

Paulo Cancado, M.D., (4) a report purportedly from the Swedish Medical Center, and (5) a report purportedly from the Mayo Clinic. (CP 89, 82). Blum did not submit any declarations or sworn statements in support of her opposition, or any documents authenticating the records. Blum did not seek a continuance.

Lourdes moved to strike the documents on September 21, 2011, on the grounds that they were inadmissible hearsay and unauthenticated. (CP 81-85). In response, Blum merely filed the untimely Declaration of Marvin Palmer, M.D. on September 26, 2011, the day of the summary judgment hearing. (CP 75-76). Dr. Palmer's declaration states, in its entirety, as follows:

1. I am the doctor whom [sic] saw and examined Mrs. Blum in 2008 for her detached retina after her fall.
2. Based upon a reasonable degree of medical certainty, the fall which Mrs. Blum sustained in August of 2007 at Lourdes Medical Center is more likely than not to have caused the detached retina.

(CP 76).

The declaration does not contain a statement of Dr. Palmer's qualifications (nor does it provide them as an exhibit) or reference his expertise in issues involving retinal detachments. (CP 76). It does not provide any factual basis for Dr. Palmer's opinion or reference the documents and information he reviewed prior to rendering his opinion. (CP 76). It also does not indicate when Dr. Palmer saw Blum or what retinal detachment he concludes was caused by the alleged fall. (CP 76). Lourdes moved to strike Dr. Palmer's declaration on September 26, 2011, arguing that it was legally insufficient. (CP 66-68).

The trial briefs Blum filed make no mention of any argument that the trial court should have granted a CR 56(f) continuance, or that granting summary judgment in Lourdes's favor would violate the law or public policy, as Blum now (and for the first time on appeal) contends.

Lourdes's Motion for Summary Judgment came on for hearing before Judge Cameron Mitchell on September 26,

2011. (RP 1). The trial court agreed with Lourdes and granted summary judgment in Lourdes's favor. (CP 70-72; RP 13-14). The trial court found that Dr. Palmer's declaration was insufficient under CR 56 to defeat summary judgment as well as untimely:

[F]irst of all, the court does not find, as I said, that the declaration was timely. Secondly, the court does not find that the declaration meets the requirements of CR 56.

I would agree with defense counsel that the declaration which reads, I am a doctor and saw and examined Mrs. Blum on [sic] 2008 for a detached retina after her fall. Based upon a reasonable degree of medical certainty, the fall which Mrs. Blum sustained on August 20th of 2007 at Lourdes Medical Center is more likely than not to have caused the detached retina. I think that is a conclusory declaration. And certainly the conclusion would be admissible if there were some basis given for making the conclusion. Simply to assert a conclusion without any basis I don't think meets the requirements of CR 56.

(RP 12-13) (emphasis added).

The trial court also found that the records and letters purportedly from Dr. Sung, Dr. Cancado, the Swedish Medical

Center, and the Mayo Clinic were inadmissible because they were not accompanied by declarations or sworn testimony:

The other information that was provided by the plaintiff in response to the initial motion, it does not contain any declaration or sworn testimony. There are a number of doctor's records, et cetera, that have been submitted; but I don't think that those are admissible as evidence for the purpose of a summary judgment motion, since they would not, by themselves, be admissible at the time of trial.

(RP 13) (emphasis added).

The trial court concluded, "Essentially the court is left without any response to the defendant's motion for summary judgment, so the court is going to grant the motion for summary judgment in this particular matter." (RP 13-14). Blum never sought a continuance during the summary judgment hearing. (See Report of Proceedings). The trial court entered an order the same day. (CP 70-72).

On October 5, 2011, Blum's prior counsel filed a Motion for Reconsideration, arguing for the first time that he was not given adequate notice of the summary judgment hearing. (CP

57-61).<sup>2</sup> The Motion for Reconsideration did not argue that the trial court erred in finding Dr. Palmer's declaration (or the other medical records and documents Blum submitted in response to Lourdes's initial motion) insufficient and inadmissible. (CP 57-61). It also does not argue that the trial court should have granted a CR 56(f) continuance, or that granting summary judgment in Lourdes's favor would violate the law or public policy, as Blum now (and for the first time on appeal) contends. (CP 57-61).

On November 11, 2011, per the trial court's request, Lourdes filed a response to the Motion for Reconsideration, pointing out that Blum had adequate notice of the summary judgment hearing, (CP 47-49), and, furthermore, that Blum actually was able to file a response and a declaration by an expert (*i.e.*, Dr. Palmer's declaration) before the hearing. (CP

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<sup>2</sup> Blum does not challenge the trial court's determination that her prior counsel had adequate notice of the summary judgment hearing, and she does not reassert here any of the arguments made in her Motion for Reconsideration. Thus, adequacy of notice of the summary judgment hearing is a verity on appeal. Boyd v. Kulczyk, 115 Wn. App. 411, 413, n.2, 63 P.3d 156 (2003).

50). Lourdes also pointed out that Blum never asked the trial court for a continuance. (CP 50).

The trial court agreed with Lourdes and denied the Motion for Reconsideration on December 29, 2011, finding that Blum “was adequately alerted to the Defendant’s intentions and provided more than adequate time to respond.” (CP 11, 14). Blum then appealed.

#### **IV. ARGUMENT**

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

Appellate courts “review a trial court’s denial of a motion for reconsideration for abuse of discretion.” Davies v. Holy Family Hosp., 144 Wn. App. 483, 497, 183 P.3d 283, 290 (2008). “A trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons.” Id. “An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court.” Id.

**B. THIS COURT SHOULD NOT CONSIDER FACTS OUTSIDE THE RECORD**

RAP 10.3(a)(5) states that “[r]eference to the record must be included for each factual statement.” Courts of appeals will not consider matters outside the trial record. State v. McFarland, 127 Wn 2d 322, 335, 899 P.2d 1251, 1257 (1995). Accord State v. Stockton, 97 Wn.2d 528, 530, 647 P.2d 21 (1982) (matters referred to in the brief but not included in the record cannot be considered on appeal). An appellate court will not ordinarily consider an alleged error if the relevant part of the record is not provided. State v. Mannhalt, 33 Wn. App. 696, 658 P.2d 15 (1983) (pro se supplemental brief assigned error to motions and orders not included in record); Bich v. General Elec. Co., 27 Wn. App. 25, 614 P.2d 1323 (1980) (alleged improper remarks on final argument not contained in record). Specifically, self-serving statements in appellate brief that are unsupported in record will not be considered on appeal.

Housing Authority of Grant County v. Newbigging, 105 Wn. App. 178, 184, 19 P.3d 1081 (2001).

Blum's brief is replete with factual material not submitted to or considered by the trial court. Examples are numerous. By way of specific illustration, Blum references statements allegedly made to her by Lourdes's staff, her observations and comments about her stay at Lourdes, comments about her discovery requests and the responses by Lourdes thereto, conversations with her prior counsel, and references that one of her examining physicians, Dr. Carlson, has purportedly been the subject of litigation. (Appellant Br. 1-6, 8, 15, 24). There are many others. None of those factual assertions were submitted to or considered by the trial court, and Lourdes was not thus presented with the opportunity to consider or refute them, as necessary. This Court should not consider them, or any other facts not in the record.

**C. THE COURT SHOULD NOT CONSIDER BLUM'S NEW ARGUMENTS BECAUSE THEY WERE NOT RAISED AT THE TRIAL COURT LEVEL AND THUS WERE NOT PROPERLY PRESERVED FOR REVIEW**

“The general rule is that appellate courts will not consider issues raised for the first time on appeal.” State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). See also Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 844, 847-48 (2005) (“In general, issues not raised in the trial court may not be raised on appeal.”); Wilson Son Ranch, LLC v. Hintz, 162 Wn. App. 297, 303, 253 P.3d 470, 473 (2011) (same) (declining to consider argument not raised at the trial court level). Likewise, courts do not consider theories not presented below. Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 780, 819 P.2d 370, 374 (1991) (“Because this theory was not advanced below, we decline to rule upon the existence of any common law privilege.”).

In Wilson, this Court declined to consider an argument relating to an easement the plaintiff raised for the first time on

appeal, finding that considering it would cause the defendants prejudice, since they were never on notice a record of the issue needed to be made. Wilson, 162 Wn. App. at 304-05.

At summary judgment, Blum argued that an issue of fact precluded entry of summary judgment in favor of Lourdes, because Dr. Palmer's declaration stated he had seen Blum and believed, on a more probable than not basis, that the alleged fall caused a retina to detach. (RP 8). Blum also relied on the other (purported and unauthenticated) medical records and letters she had submitted, which Lourdes moved to strike. (RP 9). Blum's oral argument and summary judgment filings demonstrate the sole argument Blum made was that the records and declaration submitted created an issue of fact precluding summary judgment. (RP 7-9; CP 87-91). Blum did not argue that summary judgment is contrary to law. Blum also did not seek a continuance. (CP 87-91; RP 7-9).

Now, for the first time, Blum claims (1) the trial court should have continued the summary judgment hearing; (2) the

summary judgment violated the law and public policy; (3) Dr. Handelman is unqualified to provide expert opinions regarding retinal detachments; and (4) the trial court erred in ruling that unauthenticated medical records and letters she had submitted were inadmissible. (Appellant Br. 8-9). These issues were never raised at the trial court level either in evidence or in argument. The trial court record lacks any semblance of Blum's new arguments. Allowing Blum to raise the arguments now would result in a significant injustice to Lourdes, since it was never on notice that it needed to make a record of those issues. Wilson, 162 Wn. App. at 304-05. Accordingly, this Court should not consider them.

**D. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF LOURDES BECAUSE DR. PALMER'S DECLARATION WAS INSUFFICIENT**

“In a medical negligence case, the defendant may move for summary judgment based on absence of competent medical evidence to establish a prima facie case.” Colwell v. Holy

Family Hosp., 104 Wn. App. 606, 611, 15 P.3d 210 (2001). The burden then shifts to the plaintiff to produce expert testimony to establish the standard of care and causation. Guile v. Ballard Cmty. Hosp., 70 Wn. App. 18, 25, 851 P.2d 689 (1993). If the plaintiff fails to produce competent expert testimony, the defendant is entitled to summary judgment. Colwell, 104 Wn. App. at 611. The standard of care must be established by experts who practice in the same field. Seybold v. Neu, 105 Wn. App. 666, 679, 19 P.3d 1068 (2001) (quoting McKee v. Am. Home Prods. Corp., 113 Wn.2d 701, 706, 782 P.2d 1045 (1989)).

RCW 7.70.030(1) requires a plaintiff to establish that his or her injury resulted from the failure of a health care provider to follow the accepted standard of care. “To prevail on a claim of medical negligence, the plaintiff must prove that the defendant health care provider ‘failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he

belongs, in the state of Washington, acting in the same or similar circumstances’ and “[s]uch failure was a proximate cause of the injury complained of.” Davies v. Holy Family Hosp., 144 Wn. App. 483, 492, 183 P.3d 283 (2008) (quoting former RCW 7.70.040 (1983)).

A declaration that contains only conclusory statements without adequate factual support does not create an issue of material fact that defeats a motion for summary judgment. Guile, 70 Wn. App. at 25. In Guile, Division One of the Court of Appeals held that a declaration submitted by an expert in opposition to a motion for summary judgment was insufficient where it failed to identify any specific facts supporting the opinion and merely reiterated the allegations in the complaint. Id. at 26. The court noted there that specific facts were needed because “negligence cannot be inferred from the mere fact that Guile suffered from complications following her surgery.” Id.

In this case, the trial court properly granted summary judgment in favor of Lourdes. Plaintiff did not offer

declarations of expert opinion needed to establish her prima facie case. The declaration of Dr. Palmer was insufficient because it failed to identify any specific facts supporting his conclusion that the alleged fall caused Plaintiff's detached retinas. Dr. Palmer's declaration is set forth above verbatim. Dr. Palmer does not indicate what records, materials, or information, if any, he looked at and reviewed to form his opinion. (CP 76). It does not even indicate when he saw Blum or what retina he claims was detached by the alleged fall. (CP 76). As in Guile, Dr. Palmer's declaration merely regurgitates the allegations Blum made in her Complaint. It draws a conclusion without providing factual support. Blum had the opportunity to gather this evidence before the trial court granted summary judgment. She did not. The law is clear that conclusory statements cannot defeat summary judgment.

Dr. Palmer's declaration is also insufficient because it does not show Dr. Palmer is competent to express expert opinions. (CP 76). It does not contain a summary of

Dr. Palmer's qualifications showing affirmatively that he is competent to testify as to Blum's medical condition. McKee v. American Home Prods., Corp., 113 Wn.2d 701, 706, 782 P.2d 1045 (1989) ("For purposes of CR 56(e) the affidavit must: (1) be made on personal knowledge, (2) set forth admissible evidentiary facts, and (3) affirmatively show that the affiant is competent to testify to the matters stated therein."). Plaintiff failed to present expert opinion that would establish the standard of care for a hospital.

Blum's brief mistakenly focuses on whether Dr. Palmer had the expertise and qualifications to render an expert opinion.<sup>3</sup> (Appellant Br. 19-21). Dr. Palmer's expertise was not an issue at the trial court level, except to the extent that Lourdes pointed out that Dr. Palmer's qualifications were never submitted to the trial court or to Lourdes and thus were undetermined. (CP 68). Rather, Lourdes's objection, and the

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<sup>3</sup> Blum provided no evidence at the trial court level establishing Dr. Palmer's expertise or qualifications, (CP 75-76), and her statements in her brief that Dr. Palmer is in fact qualified are without factual support.

trial court's decision, rested on the fact that Dr. Palmer's declaration was conclusory and lacked any factual basis for the opinion, and therefore did not meet the requirements of CR 56. (CP 66-68; RP 12-13).

Moreover, the cases Blum cites, such as Hill v. Sacred Heart Medical Center, 143 Wn. App. 438, 173 P.3d 1152 (2008) and Seybold v. Neu, 105 Wn. App. 666, 49 P.3d 1068 (2001) do not support her argument. Those cases deal with expertise, not the legal sufficiency of an expert declaration under CR 56. They are inapplicable.

**E. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT BECAUSE BLUM NEVER REQUESTED A CONTINUANCE OF THE SUMMARY JUDGMENT HEARING**

CR 56(f) allows for a continuance when a party knows the existence of a material witness and shows why he cannot obtain the witness affidavits in time for the summary judgment proceeding. Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d

474 (1989).<sup>4</sup> If the party who requests the continuance can make such a showing, the trial court's duty is to allow the party a reasonable opportunity to complete the record before deciding on the summary judgment motion. Id. "The trial court may, however, deny a motion for continuance where: (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." Id.

A party seeking a continuance under CR 56(f) must submit an affidavit or affidavits setting forth the evidence the party seeks and how it will preclude summary judgment. Durand v. HIMC Corp., 151 Wn. App. 818, 828, 214 P.3d 189

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<sup>4</sup> CR 56(f) states as follows:

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.

(2009). The affidavit must also state why additional time is necessary. Briggs v. Nova Servs., 135 Wn. App. 955, 961, 147 P.3d 616 (2006), *aff'd*, 166 Wn.2d 794, 213 P.3d 910 (2009).

The trial court obviously did not fail to grant a continuance or order discovery because Blum did not request a continuance or submit any declarations or affidavits at the trial court level indicating that she could not present facts essential to her opposition. (CP 87-91; RP 7-9). Indeed, Blum's prior counsel actually responded to Lourdes's motion and filed a declaration (albeit insufficient) with the trial court prior to the summary judgment hearing. (CP 76-76, 87-91). Lourdes emphasized these facts in its response to Blum's Motion for Reconsideration, and the trial court recognized and confirmed them in its order denying the same. (CP 14, 49-50).

It is not the trial court's responsibility to continue summary judgment hearings *sua sponte* to allow parties to correct deficient filings. Washington law expressly does not permit trial courts to continue summary judgment hearings

unless the opposing party affirmatively asserts he is lacking facts essential to his opposition. CR 56(f). Lourdes submits it would have been inappropriate for the trial court to have ordered a continuance in this case, where Blum made no such showing by affidavit or declaration.

The pertinent fact is that Blum's counsel of record did not seek a continuance, and Blum is bound by that decision. Russell v. Maas, 166 Wn. App. 885, 889-90, 272 P.3d 273, 276 (2012) ("Once a party has designated an attorney to represent the party in regard to a particular matter, the court and the other parties to an action are entitled to rely upon that authority until the client's decision to terminate it has been brought to their attention. Absent fraud, the actions of an attorney authorized to appear for a client are generally binding on the client.").

**F. THE TRIAL COURT DID NOT ERR IN FINDING THE ALLEGED RECORDS SUBMITTED BY BLUM INADMISSIBLE**

The purported medical records and letters from Dr. Sung, the Mayo Clinic, the Swedish medical Center, and Dr. Cancado

Blum submitted on September 16, 2011 are inadmissible hearsay.<sup>5</sup> Hearsay is an out-of-court statement used to prove the truth of the matter asserted. ER 801(c). The basic rule is that hearsay is inadmissible unless a specific exception applies. ER 801. It is well-settled that “[a] trial court may not consider inadmissible evidence when ruling on a summary judgment motion.” Raymond v. Pacific Chemical, 98 Wn. App. 739, 744, 992 P.2d 517 (1999), reversed on different point 143 Wn.2d 349, 20 P.3d 921 (2001).

Blum submitted the documents to prove the truth of the matter asserted (*i.e.*, to show that the alleged fall caused Blum’s detached retinas). Thus, they fall within the ER 801 definition. None of the hearsay exceptions applies. As the trial court observed, the documents were not accompanied by any declarations or sworn statements from the physicians or persons who purportedly prepared them. (RP 13). Thus, the trial court acted properly in finding the records insufficient to defeat

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<sup>5</sup> Blum’s response brief listed five exhibits. She never submitted to the trial court or to Lourdes the letter purportedly from Dr. Sung. (CP 82).

summary judgment. Tellingly, Blum provides no authority or argument establishing the admissibility of those documents.

In addition, the trial court acted properly because the documents were unauthenticated. Documents must be authenticated to be admissible. ER 901. ER 901(a) provides, “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” ER 901(a). Blum, however, submitted no declaration or sworn statement to authenticate the documents. They therefore violated ER 901 and the trial court properly found them inadmissible.

Blum’s argument that the trial court should have found the records admissible because it “allowed” Lourdes to present medical records from Dr. Carlson, (Appellant Br. 7), is unpersuasive. Lourdes received Dr. Carlson’s records from Blum’s counsel and properly authenticated them (CP 149).

**G. THE SUMMARY JUDGMENT PROCEDURE DOES NOT DEPRIVE A LITIGANT ACCESS TO THE COURTS**

Blum's claim that that the trial court's grant of summary judgment in favor of Lourdes cut off "her proper access to the courts and it prevented her from developing her case" and that the trial court's decision essentially is "a re-imposition of the RCW 7.70.150 'certificate of merit' requirement." (Appellant Br. 8, 10-11), is unpersuasive. "The certificate of merit requirement essentially require[d] plaintiffs to submit evidence supporting their claims before they even have an opportunity to conduct discovery and obtain such evidence." Putman v. Wenatchee Valley Med. Ctr., 166 Wn.2d 974, 983, 216 P.3d 374 (2009). In Putman, the Washington Supreme Court struck down the certificate of merit requirement in former RCW 7.70.150 because the requirement unconstitutionally limited a person's access to the courts and violated the separation of powers. Id. at 985. The certificate of merit statute Putman addressed did not allow medical malpractice claimants to even

get to a courthouse to claim the protection of tort law unless they had a certificate of merit.

Putman did not change the general rule that an expert declaration is needed to defeat summary judgment. Putman did not hold or suggest that a defendant may only move for summary judgment after the discovery cut-off. That argument is contrary to settled law. A defendant (or other party defending against a claim, counterclaim, or cross claim) may move for summary judgment at any time per CR 56(b), and discovery orders do not restrict when summary judgment may be brought. Guile, 70 Wn. App. at 25 (“[T]he discovery schedule does not restrict the trial court’s ability to amend time lines for the disclosure of evidence or to grant summary judgment when a motion is properly brought. The schedule is merely intended to help the trial court manage the progress of a particular case.”). Putman in fact held that “[r]equiring plaintiffs to submit evidence supporting their claims prior to the discovery process

violates the plaintiffs' right of access to courts." Putman, 166 Wn.2d at 979 (emphasis added).

In this case, Plaintiff sued Lourdes and then conducted discovery. She had notice that she would be required to present expert testimony to create a material issue of fact. She filed her Complaint on July 26, 2010, and Lourdes did not move for summary judgment until August 18, 2011. (CP 194). Over a year passed between the filing of the lawsuit and the summary judgment hearing. Plaintiff had ample time to make a prima facie case. She in fact she did conduct discovery and responded to discovery. (CP 166-73).

Plaintiff's claim that summary judgment was premature fails for another reason. "[I]f a nonmoving party needs more time to obtain expert witnesses or otherwise respond to a summary judgment motion, CR 56(f) allows the court to order a continuance. Guile, 70 Wn. App. at 24 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986) ("Any potential problem with such premature motions can be adequately dealt with under

Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.” Blum never sought a continuance. In fact, she submitted a response and expert declaration to the trial court prior to the summary judgment hearing.

Because Plaintiff failed to produce the necessary expert opinion, dismissal at this stage in the proceeding was appropriate. The constitutional concerns expressed in Putman are not implicated here. Blum had her opportunity in court and failed to submit evidence sufficient to defeat summary judgment. Blum had access to the court for over a year and could not maintain a prima facie case. She does not have a right to a remedy. Ruth v. Dight, 75 Wn.2d 660, 665, 453 P.2d 631, 634 (1969).

## **H. SUMMARY JUDGMENT IS A FAVORED PROCEDURE**

Blum asserts in Assignment of Error No. C that “Summary Judgment is contrary to law.” (Appellant Br. 6). This argument is without merit. Summary judgment is a commonly used and appropriate mechanism for the dismissal of meritless cases prior to trial established by law. See CR 56. It is a favored procedure:

The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed “to secure the just, speedy and inexpensive determination of every action.”

Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548 (1986). Summary judgment is clearly not contrary to law.

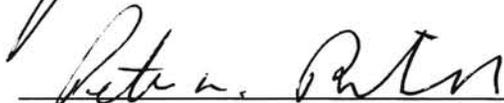
**V. CONCLUSION**

This Court should affirm the trial court's grant of summary judgment in favor of Lourdes.

Respectfully submitted this 4 day of September, 2012.

**MEYER, FLUEGGE & TENNEY, P.S.**  
Attorneys for Defendant/Respondent

  
By: JEROME R. AIKEN, WSBA #14647

  
By: PETER M. RITCHIE, WSBA #41293

**CERTIFICATE OF SERVICE**

I, SHERYL JONES, declare under penalty of perjury of the laws of the state of Washington, that on the 12 day of September, 2012, I deposited in the mails of the United States Postal Service a properly stamped and addressed envelope containing BRIEF OF RESPONDENT LOURDES HEALTH NETWORK to the following:

**Plaintiff Pro Se:**

Ms. Debra Blum  
4807 W. 2<sup>nd</sup> Avenue  
Kennewick, WA 99336

  
SHERYL A. JONES