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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 314936

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION III

CAMILLE L. MARTIN,

Plaintiff / Appellant

v.

M. SHANE McNEVIN, M.D. and JANE DOE McNEVIN,
husband and wife, and SURGICAL SPECIALISTS OF SPOKANE, P.S.,
A Washington state corporation,

Defendants / Respondents

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

I.	INTRODUCTION & RELIEF REQUESTED.....	1
	A. The Trial Court Was Correct To Summarily Dismiss Ms. Martin's Complaint Because She Did Not Come Forward With Admissible or Adequate Expert Testimony	2
II.	RESTATEMENT OF THE ISSUES PRESENTED	4
III.	STATEMENT OF FACTS.....	5
	A. In March 2011, Ms. Martin Underwent a Hemorrhoidectomy; She was Discharged From the Hospital; She Experienced Post-Operative Bleeding, and She was Re-Admitted to the Hospital.	5
	B. Ms. Martin's Description of the Events Is Unsupported by the Record.....	5
IV.	STATEMENT OF CASE	7
V.	ARGUMENT: The Trial Court Was Correct To Summarily Dismiss Ms. Martin's Complaint.....	10
	A. The Court of Appeals Reviews Summary Judgment Orders <i>De Novo</i>	10
	B. Washington Law Required the Trial Court to Limits its Review to Admissible Evidence.....	11
	1. <i>Dr. Scoma's Letter is Inadmissible Because it is Unsworn and Because it was Not Submitted Under Penalty of Perjury.....</i>	<i>12</i>
	2. <i>Dr. Scoma's Letter Consists of Improper Conclusions.</i>	<i>13</i>

3.	<i>Dr. Scoma's Letter Does Not Even Attempt to Establish His Familiarity With Washington's Standard of Care.</i>	14
C.	Regardless of Admissibility, Dr. Scoma's Letter was Substantively Insufficient to Defeat Summary Judgment.	15
1.	<i>Dr. Scoma's Letter Did Not Satisfy Ms. Martin's Prima Facie Burden to Demonstrate a Violation of the Applicable Standard of Care.</i>	16
2.	<i>Dr. Scoma's Letter Did Not Satisfy Ms. Martin's Prima Facie Burden to Demonstrate Proximate Cause.</i>	18
VI.	ARGUMENT: The Trial Court Was Correct To Deny Ms. Martin's Oral Request to Continue The Summary Judgment Hearing.	19
A.	The Court of Appeals Reviews Trial Court Orders Granting or Denying a Continuance For Abuse of Discretion.	19
B.	Washington Law Requires a Party Seeking to Continue a Summary Judgment Hearing to Make a Showing That Ms. Martin Could Not Make.	20
VII.	CONCLUSION	23
	CERTIFICATE OF SERVICE	1

TABLE OF AUTHORITIES

Cases

<i>Adams v. Richland Clinic, Inc.</i> , 37 Wn. App. 650 (1984)	17
<i>Building Industry Association of Washington v. McCarthy</i> , 152 Wn. App. 720 (2009)	11
<i>Burmeister v. State Farm Insurance Co.</i> , 92 Wn. App. 359 (1998)	11
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).....	10
<i>Coggle v. Snow</i> , 56 Wn. App. 499 (1990)	19, 20, 22
<i>Colwell v. Holy Family Hospital</i> , 104 Wn. App. 606 (2001)	15, 18
<i>Davis v. West One Automotive Group</i> , 140 Wn. App. 449 (2007)	11, 12
<i>Fabrique v. Choice Hotels Intern., Inc.</i> , 114 Wn. App. 675 (2008)	15, 17
<i>Grimwood v. University of Puget Sound, Inc.</i> , 110 Wn.2d 355 (1988).....	10, 12
<i>Guile v. Ballard Community Hospital</i> , 70 Wn. App. 18 (1993)	13
<i>Hash by Hash v. Children's Orthopedic Hospital</i> , 49 Wn. App. 130 (1987)	13
<i>Intel Corp. v. Hartford Accident & Indem. Co.</i> , 952 F.2d 1551 (9th Cir. 1991)	11
<i>King County Fire Prot. District Number 16 v. Housing Authority</i> , 123 Wn.2d 819 (1994)	12

<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).....	11
<i>McLaughlin v. Cooke</i> , 112 Wn.2d 829 (1989).....	15, 17, 18
<i>Morinaga v. Vue</i> , 85 Wn. App. 822 (1997).....	15, 18
<i>O'Donoghue v. Riggs</i> , 73 Wn.2d 814 (1968).....	16, 18
<i>Public Utility District Number 1 of Lewis County v. Washington Public Power Supply System</i> , 104 Wn.2d 353 (1985).....	12, 14
<i>Scott v. Petett</i> , 63 Wn. App. 50 (1991).....	12
<i>State ex rel. Beffa v. Superior Court</i> , 3 Wn.2d 184 (1940).....	19
<i>Vant Leven v. Kretzler</i> , 56 Wn. App. 349 (1989).....	13, 17
<i>Wagner Development, Inc. v. Fidelity and Deposit Company of Maryland</i> , 95 Wn. App. 896 (1999).....	21
<i>Winkler v. Giddings</i> , 146 Wn. App. 387 (2008).....	14
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216 (1989).....	10
Statutes	
RCW 9A.72.085.....	12

Rules

CR 56 22

CR 56(e)..... 11, 12, 14

CR 56(f) 4, 9, 20, 22

GR 13 12

I. INTRODUCTION & RELIEF REQUESTED

This appeal arises from a February 14, 2013, summary judgment order, entered by the Spokane County Superior Court. That order dismissed Camille Martin's complaint for medical negligence against Dr. Shane McNevin, his wife, and his medical group. The trial court dismissed Ms. Martin's complaint because she failed to come forward with admissible expert testimony to support a *prima facie* claim for medical negligence. Ms. Martin assigns error to the trial court's order.

In response to the Defendants' motion for summary judgment, Ms. Martin proffered a two-paragraph letter from Dr. Joseph Scoma. That letter was both procedurally and substantively inadequate to defeat summary judgment. During the summary judgment hearing, Ms. Martin made an oral request to continue the hearing to allow her additional time to procure an expert affidavit/declaration. The trial court noted that Ms. Martin already had sufficient time to do so and that the defendants had already accommodated her prior request to continue the hearing. The trial court then granted the defense motion for summary judgment. Ms. Martin also assigns error to the trial court's denial of her oral request to continue the summary judgment hearing.

The trial court was correct, both in granting summary judgment and in denying Ms. Martin's request for a second continuance of the hearing. The

Defendants, therefore, respectfully ask the Court of Appeals to affirm the trial court in every respect.

A. THE TRIAL COURT WAS CORRECT TO SUMMARILY DISMISS MS. MARTIN'S COMPLAINT BECAUSE SHE DID NOT COME FORWARD WITH ADMISSIBLE OR ADEQUATE EXPERT TESTIMONY .

Irrespective of the type of case, a plaintiff facing a motion for summary judgment bears the burden of coming forward with "facts as would be admissible in evidence" that establish triable issues. To survive summary judgment in a medical negligence case, a plaintiff must come forward with expert testimony demonstrating: (i) that the defendant failed to comply with the standard of care expected of a reasonably prudent provider; and (ii) that the defendant's conduct proximately caused injury, harm, or damage to the plaintiff. Moreover, to be admissible expert testimony must rise above speculation and conjecture. An expert cannot rely upon "mere possibilities" instead, only expert testimony that demonstrates both a breach of the standard of care and proximate cause *on a more probable than not basis or to a reasonable degree of medical certainty* can defeat summary judgment.

In this case, Ms. Martin failed to come forward with admissible or adequate expert testimony. It is undisputed that Ms. Martin's "showing" consisted solely of Dr. Scoma's letter. That letter suffers from both procedural and

substantive infirmities. The trial court was, therefore, correct in concluding that Ms. Martin had not met her summary judgment burden.

The procedural failings in Dr. Scoma's letter required summary dismissal of Ms. Martin's complaint. Dr. Scoma's letter is unsworn; it speaks in a conclusory fashion, failing the specificity required at summary judgment; and it fails to demonstrate that Dr. Scoma – a California physician – is familiar with Washington's standard of care. Those issues, alone, require the Court of Appeals to affirm the trial court's summary judgment order.

The substance of Dr. Scoma's letter fares no better. The letter does not render any opinion on a more probable than not basis. The letter does not speak to a reasonable degree of medical certainty. Instead, Dr. Scoma hedged his "opinion" by casting it in terms of his personal belief. Moreover, Dr. Scoma's letter does not offer any opinion with respect to proximate cause, much less the requisite opinion establishing that "but for" some breach of duty, Ms. Martin would not have suffered injury, loss or damage. In short, Dr. Scoma's letter does not offer the opinions necessary to defeat summary judgment and Dr. Scoma failed to offer any opinion to the degree of certainty necessary to move beyond speculation and conjecture.

Ms. Martin failed to meet her *prima facie* burden and the trial court was correct to summarily dismiss this case. The Defendants, therefore, respectfully ask the Court of Appeals to affirm the trial court in all respects.

II. RESTATEMENT OF THE ISSUES PRESENTED

A. In responding to a motion for summary judgment, a party must offer facts that would be admissible in evidence. Statements made in letters and other hearsay communications are not admissible. Was the trial court correct to enter a summary judgment of dismissal where Ms. Martin produced but a letter in response to the motion?

B. Plaintiff bears the burden of establishing a *prima facie* case of medical negligence through competent expert opinion. To be admissible and adequate expert opinions must be: (i) based upon Washington's standard of care; (ii) specific with respect to the alleged violation of the standard of care; and (iii) rendered on a more probable than not basis or to a reasonable degree of medical certainty. Was the trial court correct to summarily dismiss Ms. Martin's complaint where the only expert "testimony" proffered failed to meet Washington's standards for admissibility and adequacy?

C. CR 56(f) allows for the continuance of a motion for summary judgment where the non-moving party cannot "present by affidavit facts essential to justify his opposition" and where he or she shows: (i) good cause for the delay

in obtaining additional facts; (ii) what the additional facts would be; and (iii) how the additional facts would create triable issues. Was the trial court correct to summarily dismiss this case where Ms. Martin made an oral request but did not make the required showing?

III. STATEMENT OF FACTS

A. IN MARCH 2011, MS. MARTIN UNDERWENT A HEMORRHOIDECTOMY; SHE WAS DISCHARGED FROM THE HOSPITAL; SHE EXPERIENCED POST-OPERATIVE BLEEDING AND SHE WAS RE-ADMITTED TO THE HOSPITAL.

In early 2011, Ms. Martin elected to undergo a hemorrhoidectomy; the procedure was performed at Sacred Heart Medical Center on March 11, 2011. CP 18, 49-52. Following the procedure, Ms. Martin was discharged from Sacred Heart and she went home. CP 51-52. While at home, Ms. Martin began to experience rectal bleeding and she presented to Holy Family Hospital's emergency department. CP 49-50. Ms. Martin was admitted to Holy Family, she was treated and she recovered. CP 8.

B. MS. MARTIN'S DESCRIPTION OF THE EVENTS IS UNSUPPORTED BY THE RECORD.

This appeal focuses on the sufficiency of Dr. Scoma's "testimony." Therefore, the case's factual background is largely irrelevant. That being said, aspects of the factual statement presented by Ms. Martin are not supported by the record.

Ms. Martin's brief asserts that she was discharged from Sacred Heart, "[d]espite [her] having voiced her concern about feeling lightheaded and that her blood pressure was so low after the surgery . . ." Appellant's Opening Brief on Appeal (hereinafter "Martin Appeal Brief"), p. 2. Ms. Martin's complaint alleges that she voiced such concerns; however, Ms. Martin submitted no affidavit, declaration or other evidence to support her allegation. The record contains no indication that Ms. Martin voiced concern about any issue much less about light headedness or about her blood pressure prior to her March 11, 2011, discharge from Sacred Heart.

Ms. Martin's brief also describes her subjective feelings and thoughts following her discharge from Sacred Heart. *See id.* at 2-4. As is the case with the prior issue, Ms. Martin never submitted a declaration or other form of evidence supporting her contentions. And again, the record contains no indication, whatsoever, with respect to Ms. Martin's purported feelings and thoughts. Instead, Ms. Martin relies solely upon the allegations in her complaint. *See* CP 5-11.

Thirdly, Ms. Martin's brief describes telephone conversations between herself, her husband and "Dr. McNevin." *See* Martin Appeal Brief, pp. 2-3. Ms. Martin describes those conversations as though she and her husband spoke directly with Dr. McNevin. *Id.* Again, Ms. Martin relies solely on her complaint;

there is no evidence in the record to support Ms. Martin's contentions. Moreover, in answering the Complaint, the Defendants expressly denied that Dr. McNevin spoke directly with Ms. Martin or her husband. CP 17-19. Instead, the Defendants averred that those conversations were between the Martins and members of Dr. McNevin's office staff. *See id.*

Finally, Ms. Martin contends that "Dr. McNevin did not agree to re-admittance to the hospital and suggested that plaintiff Martin just continue to change the dressings on the wound site." Martin Appeal Brief, p. 3. Again, there is nothing in the record to support this "fact." It is based entirely on the allegations made in Ms. Martin's complaint. *See* CP 7. Moreover, in answer to the complaint, the Defendants averred that "[the] plaintiff was instructed (by Dr. McNevin's office) to pack the area and observe for 10-15 minutes and if the bleeding continued, plaintiff was instructed to go to the ER." CP 19.

In short, Ms. Martin's recitation of the factual background to this case is based upon the allegations in her complaint. Ms. Martin's factual recitation is not supported by any evidence in the record.

IV. STATEMENT OF CASE

Ms. Martin filed suit against Dr. McNevin, his wife and his medical group on July 13, 2012. CP 5-11. The Defendants answered Ms. Martin's complaint on November 8, 2012. CP 17-23. By that answer, the Defendants denied any

negligence in the care and treatment of Ms. Martin; that answer also denied that any act or omission by the Defendants was a proximate cause of injury, loss, or harm to Ms. Martin. *Id.*

During discovery, the Defendants propounded interrogatories on Ms. Martin, asking that she identify any experts that she intended to call at trial. CP 27-31. On or about October 29, 2012, Ms. Martin responded to the Defendants' discovery requests. *Id.* Ms. Martin's responses indicated that she had not yet retained any expert witness. *Id.*, *see specifically* CP 29.

On or about December 14, 2012, the Defendants brought a motion for summary judgment. CP 34-36. The motion asserted that Ms. Martin had failed to establish a *prima facie* case of medical negligence due to her failure to come forward with expert testimony in support of her claim. CP 34, 37-41.

On or about December 26, 2012, Ms. Martin asked the Defendants to continue the summary judgment hearing to allow her additional time to secure expert testimony. RP 15. The Defendants accommodated that request and Ms. Martin submitted her responsive papers on or about January 28, 2013. *Id.*; CP 42. Those responsive papers included Dr. Scoma's two-paragraph letter which was dated December 29, 2012. CP 48.

The Defendants' motion for summary judgment was heard on February 8, 2013. RP 1-24. Following oral argument, the trial court orally granted the Defendants' motion for summary judgment. *See Id.*

During the argument, Ms. Martin made an oral request that the trial court further continue the hearing to allow Ms. Martin to present Dr. Scoma's opinions in affidavit/declaration form. RP 13-15. The trial court noted that the Defendants had already continued the hearing once to allow Ms. Martin additional time to secure expert testimony. RP 20-21. The trial court then granted the Defendants' motion. *Id.*

Ms. Martin never filed or noted a motion for a continuance pursuant to CR 56(f). In fact, between her December 26, 2012, request of the Defendants and her request to the trial court (during oral argument), Ms. Martin made no request, whatsoever, for a further continuance of the summary judgment hearing. That lack of a motion was consistent with Ms. Martin's position; during oral argument, Ms. Martin purported her belief that Dr. Scoma's letter was sufficient to meet the Plaintiff's summary judgment burden. RP 10-15.

The trial court entered a written summary judgment order on February 14, 2013. CP 69-76. Ms. Martin filed a timely notice of appeal. CP 72-73.

**V. ARGUMENT: THE TRIAL COURT WAS CORRECT TO
SUMMARILY DISMISS MS. MARTIN'S COMPLAINT.**

**A. THE COURT OF APPEALS REVIEWS SUMMARY JUDGMENT ORDERS *DE
Novo*.**

The Court of Appeals reviews summary judgment decisions *de novo*; *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359 (1988). The appellate court engages in the same inquiry as the trial court and only considers evidence that would be admissible at trial. *Id.*

At summary judgment, the moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). If the moving party is a defendant, that initial showing requires nothing more than pointing out that there is an absence of evidence to support the plaintiff's case. *Id.* at 325 (cited by *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, n.1 (1989)).

The burden then shifts, and if the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," the trial court should grant the motion. *Celotex*, 477 U.S. at 322. In making this responsive showing, the plaintiff cannot rely on the allegations made in its pleadings. *Young*, 112 Wn.2d at 225. Nor is it sufficient for a plaintiff opposing summary judgment to create "some metaphysical doubt as to the material facts." *Matsushita Elec.*

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Instead, the plaintiff must provide significant and probative evidence to support each element of its claim. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). And in doing so, it must set forth competent facts that would be admissible in evidence. CR 56(e); *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365-66 (1998). Absent proof on an essential element of the plaintiff's case, all other facts are immaterial. *Building Industry Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 735 (2009).

In this case, Ms. Martin did not present admissible and adequate expert testimony in support of her claim. Specifically, Ms. Martin failed to meet her *prima facie* burden with respect to both the standard of care and causation elements of her claim. The trial court was, therefore, correct to summarily dismiss the complaint and the Court of Appeals should fully affirm the trial court's order.

B. WASHINGTON LAW REQUIRED THE TRIAL COURT TO LIMITS ITS REVIEW TO ADMISSIBLE EVIDENCE.

At summary judgment, the court is only permitted to consider admissible evidence. *Davis v. West One Automotive Group*, 140 Wn. App. 449, 455 n.1 (2007) (citing *King County Fire Prot. Dist. No. 16 v. Housing Auth.*, 123 Wn.2d

819, 826 (1994)). Inadmissible facts cannot create triable issues to defeat summary judgment. *Grimwood*, 110 Wn.2d at 359.

CR 56(e) requires that affidavits¹ submitted in response to summary judgment: (i) be made on personal knowledge; (ii) set forth admissible evidentiary facts; and (iii) affirmatively show that the affiant is competent to testify regarding the contents of his or her affidavit. *Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System*, 104 Wn.2d 353, 360 (1985).

Dr. Scoma's letter was procedurally inadmissible in a number of respects. The letter, therefore, should not have even been considered at summary judgment. The trial court was correct to summarily dismiss this matter, where Ms. Martin's sole responsive showing was Dr. Scoma's letter.

1. Dr. Scoma's Letter is Inadmissible Because it is Unsworn and Because it was Not Submitted Under Penalty of Perjury.

The most basic requirement for an evidentiary statement submitted in response to summary judgment is that it be sworn or made under penalty of perjury. *See id.*; CR 56(e); *Davis*, 140 Wn. App. at 455 n.1 (counsel's declaration,

¹ A declaration may substitute for an affidavit in summary judgment proceedings. GR 13; *Scott v. Petett*, 63 Wn. App. 50, 55-57 (1991). To substitute for an affidavit, a declaration must: (i) be certified as true under the penalty of perjury; (ii) be signed by the declarant; (iii) state the date and place of its execution; and (iv) state that this is made under the laws of the State of Washington. RCW 9A.72.085.

which attached unsworn declarations of third parties, was inadequate to place evidence before the court at summary judgment).

Dr. Scoma's letter is not an affidavit. *See* CP 48. Dr. Scoma's letter is unsworn; it is not made under penalty of perjury; and it contains no certification that its contents are true. *Id.*; *see also* RCW 9A.72.085. In fact, Dr. Scoma's letter does not contain any of indicia of an admissible statement. *See* CR 56(e); RCW 9A.72.085. Dr. Scoma's letter, therefore, does not satisfy the most basic and fundamental requirement for submission at summary judgment – it does not contain facts that would be admissible in evidence.

2. *Dr. Scoma's Letter Consists of Improper Conclusions.*

In the context of a summary judgment motion, an expert must back up his opinions with specific facts. *Hash by Hash v. Children's Orthopedic Hosp.*, 49 Wn. App. 130, 134-35 (1987); *see also* *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 26-27 (1993). An expert's general statement that the standard of care was violated cannot defeat summary judgment; an expert must identify the facts supporting his or her conclusion. *Vant Leven v. Kretzler*, 56 Wn. App. 349, 355-56 (1989).

Dr. Scoma's letter offers nothing more than general and unsupported conclusions. Dr. Scoma reports that "[he] believe[s] that there is reason to believe that the accepted standard of care in the management of Camille Martin was not

followed." CP 48. However, Dr. Scoma offers no facts to support his belief: he does not identify which health care provider he believes failed to comply with the standard of care; he does not identify what acts or omissions failed to comply with the standard of care; and he does not identify what different or additional care or treatment was required by the standard of care. *See id.* In short, Dr. Scoma's letter (regardless of its form) failed to offer the specific evidentiary facts that are required in response to a motion for summary judgment.

3. ***Dr. Scoma's Letter Does Not Even Attempt to Establish His Familiarity With Washington's Standard of Care.***

CR 56(e) requires that affidavits/declarations submitted in response to summary judgment affirmatively show that the affiant/declarant is competent to testify regarding the contents of his or her statement. *Public Utility Dist. No. 1 of Lewis County*, 104 Wn.2d at 360. To offer standard of care opinions, in a Washington medical negligence case, an expert must be familiar with Washington's standard of care. *Winkler v. Giddings*, 146 Wn. App. 387, 393 (2008).

Dr. Scoma's letter makes absolutely no effort to demonstrate his familiarity with the Washington State standard of care. CP 48. The letter fails to identify any instance wherein Dr. Scoma had an opportunity to practice medicine in the State of Washington. *Id.* The letter fails to identify any effort to inquire of,

or speak with any Washington State provider regarding the standard of care. *Id.* In fact, the letter fails to even acknowledge that Washington's is the applicable standard of care. *See id.* By failing to demonstrate Dr. Scoma's competency to testify regarding Washington's standard of care, Ms. Martin failed her burden at summary judgment.

C. REGARDLESS OF ADMISSIBILITY, DR. SCOMA'S LETTER WAS SUBSTANTIVELY INSUFFICIENT TO DEFEAT SUMMARY JUDGMENT.

To avoid summary judgment in a medical negligence case, the plaintiff must show, via expert testimony, that the defendant health care provider failed to comply with the accepted standard of care **and** that such breach of the standard of care was a proximate cause of the injury complained of. *Morinaga v. Vue*, 85 Wn. App. 822, 831 (1997). If the plaintiff lacks competent expert testimony on any *prima facie* element of the claim, the defendant is entitled to summary judgment. *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 611 (2001).

Expert medical opinions regarding the standard of care and regarding causation are not admissible unless they can be rendered on a *more probable than not* basis to a *reasonable medical certainty*. *McLaughlin v. Cooke*, 112 Wn.2d 829, 836-37 (1989); *Fabrique v. Choice Hotels Intern., Inc.*, 114 Wn. App. 675, 685-88 (2008). Additionally, medical testimony must at least be sufficiently definite to establish that the act, or failure to act, "probably" or "more likely than

not" caused the subsequent injury. *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824 (1968). Absent such testimony, the jury would improperly be left to speculation and conjecture. *McLaughlin*, 112 Wn.2d at 837-38.

Setting aside the procedural failures in Dr. Scoma's letter, Ms. Martin still failed to meet her *prima facie* burden. As a Washington medical negligence plaintiff, it was incumbent on Ms. Martin to present expert testimony on both the standard of care and on proximate cause—that expert testimony had to be offered beyond probabilities, speculation and conjecture. Dr. Scoma's letter did not even approach that standard.

1. Dr. Scoma's Letter Did Not Satisfy Ms. Martin's Prima Facie Burden to Demonstrate a Violation of the Applicable Standard of Care.

Dr. Scoma did not render any expert opinion that any specific defendant breached the standard of care in any specific manner. Instead, Dr. Scoma reported his own belief that there is "reason to believe" that the standard of care was not complied with in the management of Ms. Martin. *See* CP 48. That opinion failed in three respects – each of which was independently fatal to Ms. Martin's claim:

- Dr. Scoma's "belie[f] that there is reason to believe" is not an expert opinion. Instead, it is a personal opinion and personal opinions are "insufficient to establish a standard of care against which a jury must

measure the defendant's performance . . ." *Adams v. Richland Clinic, Inc.*, 37 Wn. App. 650, 655 (1984).

- Dr. Scoma does not identify which, if any, defendant he believes may have been negligent, which acts or omissions by that defendant were violative of the standard of care and/or what different or additional care was required by the standard of care. That level of specificity, however, is absolutely required to defeat summary judgment. *Vant Leven*, 56 Wn. App. at 355-56 (an expert is obliged to identify the facts supporting his or her conclusions).
- And Dr. Scoma did not offer any opinion on a *more probable than not* basis or to a *reasonable degree of medical certainty*. That, however, is precisely the standard that is required in Washington medical negligence cases. *McLaughlin*, 112 Wn.2d at 836-37; *Fabrique*, 114 Wn. App. at 685-88.

To defeat a motion for summary judgment, a medical negligence plaintiff bears the burden of coming forward with expert testimony establishing a specific breach of the standard of care and that expert testimony must be rendered beyond possibility, speculation, or conjecture. *McLaughlin*, 112 Wn.2d at 836-37; *Fabrique*, 114 Wn. App. at 685-88. Ms. Martin failed that burden and the trial court was correct to summarily dismiss her complaint.

2. ***Dr. Scoma's Letter Did Not Satisfy Ms. Martin's Prima Facie Burden to Demonstrate Proximate Cause.***

Nor did Ms. Martin meet her *prima facie* burden with respect to proximate cause. A medical negligence plaintiff must come forward with expert testimony establishing that the defendant's conduct was a proximate cause of injury, loss or damage. *Colwell*, 104 Wn. App. at 611; *Morinaga*, 85 Wn. App. at 831. To satisfy that burden, the Plaintiff must show that "but for" the Defendant's conduct the alleged injury, loss or damage would not have occurred. *McLaughlin*, 112 Wn.2d at 837. Expert testimony on proximate cause must be beyond speculation, conjecture and possibilities; the testimony must at least be sufficiently definite to establish that the act, or failure to act, "probably" or "more likely than not" caused the subsequent injury. *O'Donoghue*, 73 Wn.2d at 824.

Dr. Scoma's letter does not establish the necessary causal link between Ms. Martin's alleged damages and the Defendants' alleged negligence. *See* CP 48. At no point did Dr. Scoma offer an opinion regarding whether any damages were proximately caused by any alleged negligence. *Id.* Moreover, Dr. Scoma does not offer any opinion with respect to which damages (if any) were proximately caused by the alleged negligence. *Id.* Ms. Martin, therefore, failed to meet her *prima facie* burden with respect to proximate cause. *McLaughlin*, 112 Wn.2d at 837-38 (expert testimony is insufficient to support a *prima facie* case for medical

negligence where it forces the jury to resort to speculation on the causal relationship between the alleged negligence and the alleged damages).

Ms. Martin simply did not make out a *prima facie* claim for medical negligence. Dr. Scoma's two-paragraph letter constituted her sole responsive showing and that letter was both procedurally and substantively inadequate. The trial court was, therefore, correct to enter a summary judgment of dismissal.

VI. ARGUMENT: THE TRIAL COURT WAS CORRECT TO DENY MS. MARTIN'S ORAL REQUEST TO CONTINUE THE SUMMARY JUDGMENT HEARING.

A. THE COURT OF APPEALS REVIEWS TRIAL COURT ORDERS GRANTING OR DENYING A CONTINUANCE FOR ABUSE OF DISCRETION.

The Court of Appeals' review of the trial court's refusal of Ms. Martin's oral request to further continue the Defendants' summary judgment motion is pursuant to the abuse of discretion standard. *See Coggle v. Snow*, 56 Wn. App. 499, 504-05 (1990). "[A]buse of judicial discretion is not shown unless the [trial court's] discretion has been exercised upon grounds, or to an extent, clearly untenable or manifestly unreasonable." *Id.* at 505 (quoting *State ex rel. Beffa v. Superior Court*, 3 Wn.2d 184, 190 (1940)).

The trial court's denial of Ms. Martin's oral request was not an abuse of discretion. Ms. Martin had already succeeded in having the Defendants' motion continued once. RP 15, 21. Ms. Martin had more than sufficient time to secure

expert testimony in support of her claim and Ms. Martin proffered no justification for her failure to previously secure sufficient and competent expert testimony. In fact, such a showing would have been discordant with Ms. Martin's primary argument — namely that Dr. Scoma's letter was sufficient to defeat summary judgment. RP 10-15. Ms. Martin's miscalculation of her burden at summary judgment does not equate to an abuse of the trial court's discretion.

B. WASHINGTON LAW REQUIRES A PARTY SEEKING TO CONTINUE A SUMMARY JUDGMENT HEARING TO MAKE A SHOWING THAT MS. MARTIN COULD NOT MAKE.

CR 56(f) allows the court to continue a motion for summary judgment "where affidavits of the party opposing the motion for summary judgment show reasons why the party cannot present facts justifying its opposition." *Cogle*, 56 Wn. App. at 507. However, such a continuance is properly denied unless: (i) a good reason for the delay in obtaining the evidence is offered; (ii) a description of what additional evidence would be uncovered is offered; and (iii) the additional evidence would raise a genuine issue for trial. *Id.*

A party responding to summary judgment must produce all evidence in support of his or her claim or risk summary dismissal:

Both a trial and a summary judgment hearing afford the parties ample opportunity to present evidence. If the evidence was available but not offered until after the opportunity passes, the parties are not

entitled to another opportunity to submit that evidence.

Wagner Development, Inc. v. Fidelity and Deposit Company of Maryland, 95 Wn. App. 896, 907 (1999) (citations omitted). A party is not permitted to revise his or her responsive submission as convenience and expedience dictate; a party's summary judgment response is his or her opportunity to present the facts and evidence in support of his or her case. *See Id.*

Ms. Martin had more than sufficient time to secure expert testimony and present it to the Court in an admissible and adequate form. The case at issue was rendered in March 2011. CP 5-11. This suit was filed approximately sixteen months later – in July 2012. *Id.* The Defendants did not bring their motion for summary judgment for another five months. CP 34-36. Even then, the Defendants acceded to Ms. Martin's request to continue the summary judgment hearing to allow her additional time to secure prima facie evidence. RP 15. Ms. Martin submitted her responsive papers more than a month after the Defendants' motion was filed. CP 42. Ms. Martin simply could not, and cannot, show good cause for her delay.

Ms. Martin never filed a motion under CR 56(f) and Ms. Martin's responsive papers did not express any doubt regarding the sufficiency of her

responsive showing. In fact, during oral argument, Ms. Martin's expressed her belief that the responsive showing was sufficient. RP 10-15.²

It was not until the trial court indicated its intention to grant the Defendants' motion that Ms. Martin orally requested additional time. *See generally* RP 1-24. However, no provision within CR 56 (or otherwise in Washington State law) allows a party to obtain a second bite at the apple after presenting his or her response to a motion for summary judgment. Such a rule would encourage parties to strategically withhold facts and evidence at summary judgment, banking on a later opportunity to avoid dismissal. The trial court was, therefore, correct to refuse Ms. Martin's request to continue the Defendants' motion for summary judgment.

Moreover, even if Ms. Martin's oral request was properly considered a CR 56(f) motion, it was properly denied. Ms. Martin's request satisfied none of CR 56(f)'s standards. She made no explanation of why proper expert evidence could not have been previously presented. *Coggle*, 56 Wn. App. at 507. She made no showing with respect to what evidence additional time would yield. *Id.* And finally, she made no showing that additional evidence would create genuine issues for trial. *Id.*

² *See* CR 2A.

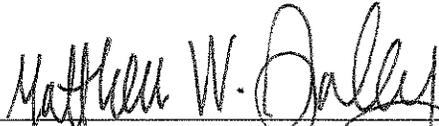
The trial court was correct to summarily dismiss Ms. Martin's complaint without a second continuance. Ms. Martin had more than sufficient time to obtain and present expert testimony and she made no showing that additional time would affect the record. The Court of Appeals should, therefore, affirm the summary dismissal of Ms. Martin's complaint.

VII. CONCLUSION

Based upon the record and the foregoing, the Defendants respectfully ask the Court of Appeals to affirm the trial court's summary judgment order. The Plaintiff had her opportunity to present expert testimony in support of her allegations. She failed to make a sufficient showing and there is no basis to allow her additional opportunities to do so.

RESPECTFULLY SUBMITTED, this 12th day of July, 2013.

WITHERSPOON·KELLEY, P.S.



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Counsel for Respondent

CERTIFICATE OF SERVICE

On the 12th day of July, 2013, I caused to be served a true and correct copy of the within document described as BRIEF OF RESPONDENTS on all interested parties to this action as follows:

George R. Guinn 605 East Holland Avenue, Suite 113 Spokane, Washington 99218 Counsel for Appellant	Via United States Mail	[]
	Via Federal Express	[]
	Via Hand Delivery	[x]
	Via Facsimile	[]
	Via Electronic Mail	[]



EVELYN M. HANSON, Legal Assistant