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Court of Appeals
Division III
State of Washington

COA No. 33593-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CYNTHIA VENEZIANO,

Appellant,

v.

PATRICIA J. CHVATAL,

Respondent.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Cynthia Veneziano's motion to continue the summary judgment motion under CR 56(f).

2. The trial court erred by entering its order granting summary judgment dismissal of her legal malpractice claim.

3. The trial court erred by denying her motion to supplement the record or, in the alternative, for reconsideration.

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A. B. Did the trial court err by denying Ms. Veneziano's motion to continue the summary judgment under CR 56(f)? (Assignment of Error 1).

B. Did the trial court err by granting summary judgment dismissal when genuine issues of material fact existed as to the element of proximate cause? (Assignment of Error 1).

C. Did the trial court err by denying her motion to supplement the record or, in the alternative, for reconsideration? (Assignment of Error 3).

II. STATEMENT OF THE CASE

Cynthia Veneziano filed a complaint for legal malpractice and breach of contract against her former lawyer, Patricia Chvatal, who represented her in a dissolution action against her then

husband, Timothy Veneziano. (CP 1-2). He was employed at Hanford and was eligible for a pension from the Hanford Site Multi-Employer Operations and Engineering Pension Plan. (CP 2). Ms. Veneziano alleged her lawyer “was aware of that pension plan and undertook to ensure that Plaintiff received a proper distribution of the benefits under that plan.” (*Id.*).

The basis of the malpractice claim was that Ms. Chvatal undertook various steps to divide the pension to protect Ms. Veneziano’s interest in it and “otherwise providing Plaintiff with a proper division of the marital community.” (CP 2). But in doing so, she fell below the standard of care in Washington, resulting in damages to Ms. Veneziano. (*Id.*).

She also alleged a written contract for representation in the dissolution and Ms. Chvatal breached that contract because she did not meet the “implied provision that the services of Defendant Chvatal would meet the standards of competence for a lawyer in the state of Washington and provide quality legal services.” (CP 2). As a result, Ms. Veneziano suffered damages. (*Id.*). She also alleged a failure of consideration and sought recoupment of attorney fees paid to Ms. Chvatal. (CP 2-3).

The underlying dissolution, precipitating this malpractice action, was filed by Mr. Veneziano on January 24, 2000. (CP 222). The Venezianos had married in 1976 and separated in 1997. (CP 118). A decree of legal separation was filed in 2001 and later converted to a decree of dissolution in 2005. (*Id.*). The separation decree and QDRO filed on January 21, 2001, required Ms. Veneziano to pay half the debts. (CP 223). It also directed division of the pension plan:

6. Calculation of Amount of Pension Plan Payment.

The calculation of payments to the Alternate Payee shall be based on fifty (50) percent of the Participant's monthly accrued benefits as of January 1, 2000, under the terms of the Plan at the time benefits are available under the Plan to be paid to the Alternate Payee. (CP 223).

This was reflected in the filed QDRO – Fluor Daniel Hanford. (CP 118). The alternate payee was Ms. Veneziano. (CP 223). The QDRO was accepted and implemented by Fluor Hanford, which determined Mr. Veneziano's monthly pension benefit would have been \$2726/month had he left the pension plan on January 1, 2000, and took his pension when he turned 65 on June 11, 2011, with Ms. Veneziano's 50% share being \$1363/month, payable when she turned 65 in 2017. The amount of the total pension was based on his salary on January 1, 2000. (*Id.*). On November 30,

2007, Ms. Veneziano elected to receive a lump sum distribution representing the present value of the amount that would have been paid to her as a monthly benefit for the rest of her life. (CP 119, 123-24).

Ms. Chvatal moved for summary judgment dismissal on April 24, 2015. (CP 118). In her memorandum, she pointed to Ms. Veneziano's answer to interrogatory 3, which asked her to state the events forming the basis of the claims in the legal malpractice complaint and how and in what respect Ms. Chvatal was negligent and breached a contract:

ANSWER:

Ms. Chvatal drafted a flawed property settlement and Qualified Domestic Relations Order (QDRO) that failed to protect my interests. In the Decree of Legal Separation, she failed to secure the full value of my community property share of my former husband's pension benefits. . . (CP 125).

In seeking summary judgment, she argued Ms. Veneziano's QDRO claim was moot and the case was barred by the statute of limitations. (CP 127). Although there was a claim of malpractice based on maintenance, that issue was abandoned. (CP 226).

Ms. Veneziano moved for a continuance of the summary judgment motion under CR 56(f) "to permit the receipt of discovery

now pending and the taking of depositions to provide evidence that will be used to oppose Defendant's motion." (CP 142). Finding "Plaintiff has not brought to the Court's attention what evidence is not already available that would create a genuine issue of material fact such that a continuance should be granted," the court denied the motion. (CP 314).

At the hearing, the court granted summary judgment dismissal. (CP 395). Although not argued by Ms. Chvatal in her motion for summary judgment as a basis for granting relief, the court *sua sponte* raised the issue of proximate cause:

JUDGE: . . . [A]nd for [the Plaintiff's] position I'd be particularly interested in causation.

[PLAINTIFF'S COUNSEL]: Well, the question of causation is fairly straightforward on this. If Ms. Chvatal's settlement document produced a pension that produced thirteen hundred dollars a month and if the *Bulicek* formulation, which should have been used, produces thousands more, I believe what we've seen and the declarations of both Bugni and Stenzel support the idea that it would be substantially more, the causation is that by getting this, you don't get that. When you don't get that, you suffer the incremental difference. The incremental difference of value over time, which in times becomes thousands of dollars.

In making its oral decision, the court articulated the basis for granting summary judgment dismissal:

There was no evidence from [Plaintiff's experts] that had the plaintiff rejected the settlement that she could have done better in the entire distribution of the assets and liabilities in the divorce had it gone to trial.

So, while I find material issues of fact on three of the four elements, I don't find – I find a lack of material issue of fact on proximate cause and grant the defendant's motion for summary judgment on that issue. (5/22/15 RP 69).

In the interim before a written order was entered, Ms. Veneziano moved to supplement the record or, in the alternative, for reconsideration. (CP 343). She sought to have the court entertain supplemental declarations, *i.e.*, the second declaration of Ms. Veneziano and the second declarations of her experts, addressing the proximate cause issue. (*Id.*; CP 353, 359,364).

The court subsequently signed an order granting summary judgment dismissal. (CP 394). Although superfluous, the court entered written findings that were consistent with its oral decision explaining the reasons for its decision:

The Court having considered the above-identified motion, briefing, and other documents, as well as the arguments of counsel . . . as well as the files and records in this matter, and being fully advised in the premises;

FINDS,

The affirmative defense on statute of limitations includes genuine issues of material fact on questions relative to the discovery rule, and therefore summary judgment on that basis is denied.

The Court rejects the argument that the 2007 voluntary election of Ms. Veneziano in taking a lump sum distribution of the pension precludes the present action.

The Court grants summary judgment on any claim of negligence or error related to the award of maintenance in the dissolution of marriage action, to which Plaintiff conceded there was no cause of action.

No contracts were submitted that would present an issue for a claim of breach of contract, and therefore the Court grants summary judgment.

Plaintiff advanced the legal theory that Ms. Chvatal failed to provide alternate valuations of the pension in negotiating the division of property. There are material issues of fact to defeat a motion for summary judgment on the legal malpractice claim in this regard.

The elements of a legal malpractice claim are laid out in *Halvorsen v. Ferguson*, 46 Wn. App. 708, 711, 735 P.2d 675, *review denied*, 108 Wn.2d 1008 (1987): a) the existence of an attorney-client relationship; b) the existence of a duty on the part of the lawyer; c) failure to perform the duty, and d) the negligence of the lawyer must have been a proximate cause of the damages to the client. With regard to the final element, proximate causation, in the context of this case, the Plaintiff must show that she would have prevailed at a dissolution of marriage trial with regard to a different

pension division. The Court does not find material issues of fact have been presented that would allow the case to proceed on this element. There is nothing in the record that Plaintiff would have done better in the divorce had the case gone to trial. (CP 396-97).

The court accordingly granted summary judgment dismissal with prejudice. (CP 397). Ms. Veneziano's motion to supplement the record or, in the alternative, for reconsideration, was denied as well. (CP 388). This appeal follows.

III. ARGUMENT

A. The trial court erred by denying the motion for continuance of the summary judgment motion.

CR 56(f) provides:

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.

The decision on a motion for continuance lies within the trial court's discretion and will be reversed only for a manifest abuse of that discretion. *Martonik v. Durkan*, 23 Wn. App. 47, 50, 596 P.2d 1054 (1979), *review denied*, 93 Wn.2d 1008 (1980). A manifest abuse of discretion occurs when the decision is manifestly

unreasonable or is based on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn. 12, 482 P.2d 775 (1971).

Ms. Veneziano sought the continuance to permit receipt of pending discovery and to take the deposition of Ms. Chvatal to provide evidence for opposing the summary judgment motion. (CP 142). The motion, supported by Ms. Veneziano's affidavit as well as counsel's, identified the specific areas of inquiry and efforts made to secure that information. (CP 143-47, 192, 204). After all, Ms. Chvatal was the only one who could attest to what she was thinking and considering when she drafted the overall separation agreement and QDRO dividing the pension.

When knowledge of material facts are particularly within the knowledge of the moving party, summary judgment is generally inappropriate and the matter should proceed to trial to resolve the facts. *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 661-62, 240 P.3d 162 (2010). Here, Ms. Veneziano sought to take Ms. Chvatal's deposition on facts known particularly to her in handling the division of property in the separation agreement and QDRO. Moreover, she could not locate the written contract of representation and sought to get it from Ms. Chvatal. (5/22/15 RP

69). Yet, the trial court denied the continuance because “Plaintiff has not brought to the Court’s attention what evidence is not already available that would create a genuine issue of material fact such that a continuance should be granted.” (CP 315).

To the contrary, Ms. Veneziano did identify what evidence was not already available, *i.e.*, pending discovery and facts peculiarly within the knowledge of Ms. Chvatal. In these circumstances, the court abused its discretion by denying the motion for continuance because the decision was based on untenable grounds and for untenable reasons. *Junker, supra*. In light of the legal principle that summary judgment should generally be denied when facts are particularly within the knowledge of the moving party and discovery is pending, the trial court further abused its discretion by making the legal error of denying the continuance to discover those particular facts. *Spreen v. Spreen*, 107 Wn. App. 341, 349-50, 28 P.3d 769 (2001). The court therefore erred. The summary judgment should be reversed, including the dismissal of the breach of written contract claim, and the matter remanded for the pending discovery and taking the deposition of Ms. Chvatal.

B. The trial court erred by granting summary judgment when genuine issues of material fact existed as to the element of proximate cause.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Locke v. City of Seattle*, 162 Wn.2d 474, 483, 172 P.3d 705 (2007). When determining whether any genuine issue of material fact exists, the court construes all facts and inferences in favor of the nonmoving party. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). A genuine issue of material fact exists when reasonable minds could reach different conclusions. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The appellate court engages in the same inquiry as the trial court and review is de novo. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

A defendant in a civil action is entitled to summary judgment if she can show there is an absence or insufficiency of evidence supporting an element that is essential to the plaintiff's claim. *Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc.*, 169 Wn. App. 111, 118, 279 P.3d 487, review denied, 175 Wn.2d 1024 (2012). The moving party bears the initial burden of establishing it is entitled to

judgment because there are no disputed issues of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If that initial showing is made, the burden shifts to the nonmoving party to establish there is a genuine issue for the finder of fact to resolve. *Id.* at 225-26. A material fact is one that affects the outcome of the litigation. *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). A party may not rest on speculation or having its own affidavits accepted at face value, but must present evidence showing the existence of a triable issue. *Seven Gables Corp. v. MGM/UA Entertainment, Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

For a legal malpractice action, the plaintiff must show (1) the existence of an attorney-client relationship which gives rise to a standard of care, (2) an act or omission by the attorney in breach of that duty, (3) damage to the client, and (4) proximate causation between the breach of duty and the damage incurred. *Halversen*, 46 Wn. App. at 711; *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). The only element at issue is proximate cause, the court having determined there were genuine issues of material fact as to the other three elements of the legal malpractice claim. (5/22/15 RP 69; CP 394).

Although superfluous and improper, the trial court's findings in its summary judgment order are telling because they show the court weighed conflicting evidence and improperly made factual findings. See *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991). The court cannot, as it did here, resolve questions of fact on summary judgment as that determination must be made at trial. *Jones v. State*, 170 Wn.2d 338, 354, 242 P.3d 825 (2010).

As stated in its oral decision and written order, the court granted summary judgment dismissal because it found no genuine issues of material fact as to the absence of proximate cause. (5/22/15 RP 69; CP 396-97). The court was very specific in articulating its thinking on that issue:

To recover, the plaintiff must demonstrate that he or she would have prevailed or would have achieved a better result had the attorney not been negligent. And I don't find that there are material issues of fact that would allow the case to go forward on the fourth element. The record's devoid of any evidence that had the plaintiff been informed, so if we take negligence and for purposes of the summary judgment accept that negligence occurred, would it be the but for causation of the alleged damages and here we don't have anything in the record indicating from the plaintiff that she would not have accepted the terms and conditions of the divorce decree – pardon me, I'm not using the right term, of the decree of legal separation as it was adopted through subsequent findings,

amended decree of legal separation and then the conversion to dissolution. The terms and conditions splitting the pension are set forth in those four pleadings and from that the terms and conditions of the qualified – of the QDRO were drafted by the defendant attorney, nor is – well, there is abundant facts alleged and opinions advanced by the two rebuttal experts from the plaintiff in the record that the alleged as fell below the standard of care, not to attempt to secure the time rule. There was no evidence from them or opinion advanced by them that had the plaintiff rejected the settlement that she could have done better in the entire distribution of the assets and liabilities in the divorce had it gone to trial.

So, while I find material issues of fact on three of the four elements, I don't find – I find a lack of material issue of fact on proximate cause and grant the defendant's motion for summary judgment on that issue. (5/22/15 RP 68-69).

The court's oral pronouncement comported with the written order granting summary judgment dismissal as to the proximate cause issue:

With regard to the final element, proximate causation, in the context of this case, the Plaintiff must show that she would have prevailed at a dissolution of marriage trial with regard to a different pension division. The court does not find material issues of fact have been presented that would allow the case to proceed on this element. There is nothing in the record that Plaintiff would have done better in the divorce had the case gone to trial. (CP 396-97).

To the extent oral rulings conflict with a written order, the written order controls over any apparent inconsistency with the court's earlier oral ruling. *State v. Skuza*, 156 Wn. App. 886, 898, 235 P.3d 842 (2010). There is no conflict or inconsistency, so the court's reasoning for its decision is clear.

Since the court determined there was nothing in the record showing Ms. Veneziano would have done better in the divorce had the case gone to trial, it decided there were no genuine issues of material fact on proximate cause. A legal malpractice trial in effect requires a trial within a trial on the causation element. The finder of fact must decide if the underlying cause of action would have resulted in a favorable verdict for the client; only then is the suit against the attorney viable. *Daugert v. Pappas*, 104 Wn.2d 254, 258, 704 P.2d 600 (1985). Where the underlying cause of action presents a legal question, a judge must decide the case within a case rather than a jury. *Id.* at 258-59.

But in all cases raising factual questions, a jury must decide the merits of the underlying claim. See *Brust v. Newton*, 70 Wn. App. 286, 852 P.2d 1092 (1993), *review denied*, 123 Wn.2d 1010 (1994) (question of how much judge would have awarded for spousal maintenance was factual issue for the jury). Ms.

Veneziano's claim of malpractice based on the pension valuation is similarly not a legal question, but a factual one of how much the judge would have awarded her in the division of property. *Id.* It was not the judge's function here to decide this factual issue. The court erred in granting summary judgment by improperly resolving this factual question that should have been left to the jury.

Moreover, In her declaration opposing summary judgment, she demonstrated genuine issues of material fact in that the Fluor Hanford pension was one of two major assets of the marriage, the other being a 401(k) split down the middle; her 50% share of the pension was \$1363/month when it was divided in 2001 with payments to begin when she turned 65 in 2017; and that amount was far less than the \$6857/month pension set for her ex-husband as of his actual date of retirement in July 2011. The declarations of her two experts, Bugni and Stenzel, also stated a lot of money was left on the table by Ms. Chvatal's "fixed percentage method of division" of the pension and its effect was to provide a smaller amount to the wife than would have been available under the "time rule" method of division in *Bulicek v Bulicek*, 59 Wn. App.630, 800 P.2d 394 (1990). (CP 239, 247). Whether Ms. Veneziano "would have done better in the divorce had the case gone to trial" was a

factual question which the trial court could not resolve by summary judgment on conflicting evidence. *Brust, supra; Slack v. Luke*, 2016 Wash. App. LEXIS 427 (Wash. Ct. App. March 10, 2016).

The court erred by weighing the evidence and resolving disputed facts on a motion for summary judgment, which can only be granted if there are no genuine issues of material fact. *Brogan & Anensen, LLC v. Lamphiear*, 165 Wn.2d 773, 775, 202 P.3d 960 (2009). The order granting summary judgment must be reversed and the case remanded for trial. *Id.*

C. The court erred by denying the motion to supplement the record or, in the alternative, for reconsideration.

Resolution of this issue requires an overview of exactly what grounds Ms. Chvatal raised in her motion for summary judgment dismissal. The defendant's memorandum in support contended dismissal was appropriate because (1) Ms. Veneziano elected a lump sum distribution from the QDRO in 2007 so the issue was moot and (2) her case was barred by the statute of limitations. (CP 127). Ms. Chvatal confirmed the grounds on which she sought summary judgment in her memorandum opposing Ms. Veneziano's motion to continue the hearing. (CP 215). The defense argued that no answer to propounded discovery "will raise a genuine issue

of material fact relevant to the above-identified reasons Defendant moved for summary judgment. (CP 216). Those reasons were:

Boiled down to its basic premises, Defendant's Motion for Summary Judgment of Dismissal is based on the following with regard to the pension: any claim related to the QDRO and what formula should or should not have been utilized is moot because Plaintiff Cynthia Veneziano made a voluntary election for a lump sum payment in 2007, and the statute of limitations is a bar to any claim. (CP 215).

The trial court, however, rejected all of her argued grounds for summary judgment and instead raised the proximate cause issue *sua sponte*. (5/22/15 RP 50-56; 65-69).

Before the written order was entered, Ms. Veneziano filed a motion to supplement the record or, in the alternative, for reconsideration that was supported by her declaration and those of her experts addressing the proximate cause issue raised by the court at the summary judgment hearing. (CP 369). Since mootness and the statute of limitations were the only grounds on which summary judgment was sought, Ms. Veneziano wanted to submit supplemental material to further address the proximate cause issue raised by the court. (*Id.*).

The second declarations of her experts opined that, under the circumstances, she would have done substantially better at trial

in terms of the entire distribution of property and particularly with the pension benefit. (CP 360-62, 366-67). In her second declaration, Ms. Veneziano stated she would have insisted on the "time rule division" of the pension and would have pursued the matter at trial if she had known of it. (CP 353-54). The declarations created genuine issues of material fact and responded to the court's stated intention of granting summary judgment on the proximate cause issue that was not raised by Ms. Chvatal and on which Ms. Veneziano had no notice.

CR 56(e) states in part that the court may permit affidavits to be supplemented or opposed by depositions in a summary judgment proceeding. To deny supplementation on an issue raised by the trial court at the hearing, with no prior notice, is an abuse of discretion – particularly when the supplemental declarations here created genuine issues of material fact on the proximate cause. *Felsman v. Kessler*, 2 Wn. App. 493, 498, 468 P.2d 691, review denied, 78 Wn.2d 994 (1970); *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015).

By agreement, the supplemental declarations were filed before presentment on the summary judgment order so the trial court had them beforehand. (5/22/15 RP 76). The court

nonetheless denied Ms. Veneziano's motion to supplement the record:

I have read the motions and looked at the supplemental declarations. The record wasn't held open for purposes nor did I invite supplement on the record and in those regards there were no acceptable or material or viable reasons given for why there was a delay in supplementing the record or needing additional time to supplement with what was submitted by the plaintiff in her declaration and I reject the premise that the absence of the proximate cause testimony and the two experts' declarations weren't necessary because that is an issue of law based on the case cited. I reject that proposition and find that under the circumstances of this case it was an issue of fact that would have needed to be put forward in the summary judgment to defeat the plaintiff, pardon me, the defendant's motion for summary judgment on those issues and the plaintiff failed to sustain its burden. So I'm going to exercise my discretion and deny the motion to supplement the record with those proposed affidavits that came in along with the proposed motion. (6/8/15 RP 81-82).

The court squarely rejected the idea that the proximate cause question was an issue of law, as argued by Ms. Veneziano's counsel. (*Id.* at 82). Rather, the court correctly determined that proximate cause was an issue of fact and the matters stated in the supplemental declarations needed to be put forward in the summary judgment. (*Id.*). In other words, the supplemental

declarations creating genuine issues of material fact as to proximate cause were essentially stricken as untimely because Ms. Veneziano had no acceptable, material, or viable reason for the delay in submitting them. (*Id.*).

To the contrary, the reason for seeking supplementation was to controvert the court's observation that there was no factual evidence submitted by Ms. Veneziano showing proximate cause. She pointed out to the court in her motion to supplement that this ground was not argued by the defense as a basis for granting summary judgment and she thus had no prior opportunity to respond to the court's raising the issue *sua sponte* at the summary judgment hearing. (CP 343). In these circumstances, that was an acceptable, material, and viable reason for the "delay" in submitting them. *Keck, supra*.

More importantly, the supplemental declarations created genuine issues of material fact as to proximate cause and the trial court so recognized their value. (6/8/15 RP 82). In essence, the court struck what it deemed the untimely submission of the controverting affidavits. *See Keck*, 184 Wn.2d at 362. The trial court erred because its order denying supplementation struck untimely evidence on summary judgment without first considering

the factors in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), on the record. *Keck*, 184 Wn.2d at 362, 368.

Noting that review of a summary judgment order requires all evidence to be considered in favor of the nonmoving party, the *Keck* court determined what evidence was actually before it:

Our precedent establishes that trial courts must consider the factors from *Burnet*, 131 Wn.2d 484, before excluding untimely disclosed evidence; rather than de novo review under *Folsom*, we then review a decision to exclude for an abuse of discretion. . . We have said that the decision to exclude evidence that would affect a party's ability to present its case amounts to a severe action. . . And before imposing a severe sanction, the court must consider the three *Burnet* factors on the record: whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party. . .

While our cases have required the *Burnet* analysis only when severe sanctions are imposed for discovery violations, we conclude that the analysis is equally appropriate when the trial court excludes untimely evidence submitted in response to a summary judgment motion. Here, after striking the untimely filed expert affidavit, the trial court determined that the remaining affidavits were insufficient to support the contention that the Doctors' actions fell below the applicable standard of care. Essentially, the court dismissed the plaintiffs' claim because they filed their expert affidavit late. But "our overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action." . . The purpose [of summary judgment] is not to cut litigants off from their right of trial by

jury if *they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exists.*" . . . (citations omitted). 184 Wn.2d at 368-69.

Here, the trial court did not consider the *Burnet* factors before deciding to exclude the supplemental declarations because they were late. They should have been considered. Like *Keck*, the court also made no findings regarding willfulness or the propriety of a lesser sanction. The court therefore abused its discretion by not considering the *Burnet* factors before excluding the supplemental declarations. *Keck*, 184 Wn.2d at 369. The order denying supplementation of the record must be reversed.

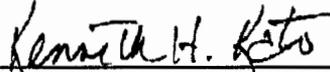
Viewed in a light most favorable to Ms. Veneziano, the supplemental affidavits were evidence that created genuine issues of material fact sufficient for a reasonable jury to return a verdict for the nonmoving party. *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989). Because the evidence could sustain a verdict for Ms. Veneziano, the nonmoving party, it was sufficient to withstand summary judgment dismissal. *Keck*, 184 Wn.2d at 374. Accordingly, the summary judgment must be reversed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Veneziano respectfully urges this court to (1) reverse the order granting granting summary judgment dismissal, the order denying the motion for continuance, and the order denying the motion to supplement and (2) remand for trial.

DATED this 28th day of March, 2016.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on March 28, 2015, I served the Brief of Appellant by email, as agreed, on Megan Murphy at mkm@tkglawfirm.com.

