

No. 73327-3-I

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

ESTATE OF DOUGLAS E. KAFKA, JR., et al.,

Appellants,

v.

PROVIDENCE HEALTH & SERVICES, et al.,

Respondents.

BRIEF OF APPELLANTS

Steven P. Krafchick, WSBA #13542
Carla Tachau Lawrence, WSBA #14120
Of Attorneys for Appellants

KRAFCHICK LAW FIRM
100 W. Harrison St.
South Tower, Suite 300
Seattle, WA 98119
Phone: (206) 374-7370
Fax: (206) 374-7377

FILED
COURT OF APPEALS
DIVISION I
SEATTLE, WA
JAN 11 2007
10:51 AM

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ASSIGNMENTS OF ERROR & ISSUES 2

 Assignments of Error 2

 Issues..... 3

III. STATEMENT OF THE CASE..... 4

IV. SUMMARY OF ARGUMENT 14

V. ARGUMENT 16

 A. Standard of Review..... 16

 1. Continuance and Reconsideration: Abuse of Discretion..... 16

 2. Summary Judgment: De Novo. 19

 B. The Trial Court Violated Directly Applicable Precedent by Denying Kafka A Continuance of Summary Judgment. 19

 1. The Trial Court Breached Its Duty To Allow Kafka The Opportunity To Secure The Identified Written Expert Testimony And Then Proceed To The Merits. 19

 2. The Similar Facts Of *Coggle, Butler, and Keck* Demonstrate That A Continuance Was Required Here..... 25

 3. Providence Presented No Valid Reasons To Deny A CR 56(f) Continuance. 36

 C. The Trial Court Improperly Denied Reconsideration. 41

 1. The Trial Court Erred By Denying Reconsideration In Spite of Kafka’s Expert’s Declaration..... 41

 2. The Expert’s Declaration Was Newly Discovered Evidence. 42

D. The Trial Court Erred As A Matter of Law In Granting Summary Judgment..... 46

 1. Summary Judgment Was Defeated By Kafka’s Expert Declaration.
 46

 2. Summary Judgment Was Improper Because Questions Of Fact Exist As To Whether Providence Properly Served Its Motion On The Estate..... 48

VI. CONCLUSION..... 50

TABLE OF AUTHORITIES

Cases

Adams v. W. Host, Inc., 55 Wn. App. 601, 779 P.2d 281 (1989) 43, 44

Allyn v. Boe, 87 Wn. App. 722, 943 P.2d 364 (1997)..... 18

Babcock v. State, 116 Wn.2d 596, 809 P.2d 143 (1991) 47

Bank of N.Y. v. Hooper, 164 Wn. App. 295, 263 P.3d 1263 (2011)..... 18

Bio-Medical Research, Ltd. v. Thane Int'l, Inc., 249 Fed. Appx. 539, 541 (9th Cir. 2007)..... 37

Butler v. Joy, 116 Wn. App. 291, 65 P.3d 671 (2003)..... passim

Cedell v. Farmers Ins. Co. of Washington, 176 Wn.2d 686, 295 P.3d 239 (2013)..... 38

Cofer v. Pierce County, 8 Wn. App. 258, 505 P.2d 476 (1973)
.....22, 24, 33, 47

Coggle v. Snow, 56 Wn. App. 499, 784 P.2d 554 (1990)..... passim

Cook v. Brateng, 180 Wn. App. 368, 321 P.3d 1255 (2014)..... 18

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 L.Ed.2d 359, 110 S. Ct. 2447 (1990)..... 18

Folsom v. Burger King, 135 Wn.2d 658, 958 P.2d 301 (1998)..... 19

Go2net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 60 P.3d 1245 (2003)....
..... 42, 43

Harris v. Groth, 99 Wn.2d 438, 663 P.2d 113 (1983)..... 23

Holaday v. Merceri, 49 Wn. App. 321, 742 P.2d 127 (1987)..... 42

In re Estate of Toland, 180 Wn.2d 836, 329 P.3d 878 (2014)..... 18, 19

In re Marriage of Farmer, 172 Wn.2d 616, 259 P.3d 256 (2011) 18

In re Marriage of Littlefield, 133 Wn.2d 39, 950 P.2d 1362 (1997) 17

Keck v. Collins, 181 Wn. App. 67, 325 P.3d 306 (2014)..... passim

Lowy v. PeaceHealth, 174 Wn.2d 769, 280 P.3d 1078 (2012)..... 38

<i>Mannington Carpets, Inc. v. Hazelrigg</i> , 94 Wn. App. 899, 973 P.2d 1103 (1999).....	39
<i>Meridian Minerals Co. v. King County</i> , 61 Wn. App. 195, 810 P.2d 31 (1995).....	43, 44
<i>Mutual of Enumclaw v. Archer Constr.</i> , 123 Wn. App. 728, 97 P.3d 751 (2004).....	39
<i>Preston v. Duncan</i> , 55 Wn.2d 678, 349 P.2d 605 (1960).....	47
<i>Putman v. Wenatchee Valley Med. Ctr., P.S.</i> , 166 Wn.2d 974, 219 P.3d 374 (2009).....	37, 38
<i>Richter v. Trimberger</i> , 50 Wn. App. 780, 750 P.2d 1279 (1988).....	43
<i>Shooting Park Ass'n v. City of Sequim</i> , 158 Wn.2d 342, 144 P.3d 276 (2006).....	19
<i>Sligar v. Odell</i> , 156 Wn. App. 720, 233 P.3d 914 (2010).....	43, 44
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	17
<i>Tellevik v. Real Property Known as 31641 West Rutherford Street</i> , 120 Wn.2d 68, 838 P.2d 111 (1992).....	21
<i>Turner v. Kohler</i> , 54 Wn. App. 688, 775 P.2d 474 (1989).....	21
<i>Vant Leven v. Kretzler</i> , 56 Wn. App. 349, 783 P.2d 611 (1989).....	40, 45
<i>Wagner Development, Inc. v. Fidelity & Deposit Co.</i> , 95 Wn. App. 896, 977 P.2d 639 (1999).....	43
<i>Waldron v. British Petroleum Co.</i> , 231 F.Supp. 72, 94 (D.N.Y. 1964)....	37
<i>Washington St. Physicians Insur. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	18

Statutes

RCW 4.16.350	7
RCW 7.70.040	23
RCW 7.70.110	7

Other Authorities

Benjamin Cardozo, *The Nature of the Judicial Process* 141 (1921) 17

Rules

CR 1 24
CR 5(d)(2)..... 24
CR 6(a)..... 13
CR 56(f) passim
CR 59(a)..... 41
CR 59(a)(4) 42
CR 59(a)(7) 45
CR 59(a)(9) 45
CR 59(b)..... 13

I. INTRODUCTION

This is a straightforward appeal from the improper summary judgment dismissal of a medical malpractice action. The lawsuit was brought by the deceased patient's family, pro se. When the trial court dismissed it, no trial date had been set, new counsel had recently appeared and shown his diligent search for a medical expert to support the claims, and valid grounds existed to continue the summary judgment motion so that the identified expert could provide testimony to defeat it. The defendant hospital never demonstrated any prejudice from a continuance.

Appellants Kafka¹ contend that the trial court erred in denying their motion to continue Respondents Providence's² summary judgment motion under CR 56(f), in violation of directly on-point authority. Washington cases hold that in a medical malpractice action where new counsel appears and demonstrates good reasons why expert testimony is not available in time for a summary judgment hearing, it is an outright abuse of discretion to deny a continuance. In fact, the trial court has a duty to give the party moving for a continuance a reasonable opportunity to complete the record before considering the summary judgment motion.

¹ Kristen M. Kafka, individually and as Personal Representative of the Estate of Douglas E. Kafka, Jr., Douglas E. Kafka, Sr., and Susan G. Kafka (collectively, Kafka).

² Providence Health & Services, Providence Health & Services Western Washington, Providence Health & Services Washington, and Providence Everett Medical Center (collectively, Providence).

Further, a trial court abuses its discretion by refusing to grant reconsideration of an order denying such a continuance, and commits legal error by dismissing the medical malpractice claims on summary judgment.

With Kafka's lawyer continuously reporting his diligent search for expert testimony to defeat summary judgment, no showing of prejudice to Providence, and Kafka's expert declaration filed before the trial court decided the motion for reconsideration, the court erred in all three respects—denying a continuance, granting summary judgment dismissal, and denying reconsideration. These errors precluded Kafka from having a jury consider his case on the merits. In addition, the trial court erred as a matter of law by dismissing claims brought by Kristen Kafka (both as Personal Representative of the Estate of Douglas Kafka, Jr., and individually), when the parties vigorously disputed the genuine issue of material fact whether Providence properly served Ms. Kafka.

This Court should reverse the denials of a continuance and reconsideration, reverse summary judgment dismissal, and remand for trial.

II. ASSIGNMENTS OF ERROR & ISSUES

Assignments of Error: Kafka assigns error to the following:

1. Denial of Kafka's motion for a continuance on Providence's summary judgment motion (February 5, 2015), CP 184;

2. Denial of Kafka's motion for reconsideration of the order granting summary judgment to Providence and denying a continuance (March 3, 2015), CP 6-7; and

3. Grant of Providence's motion for summary judgment (February 5, 2015), CP 4-5.

Issues: 1. When new counsel appeared for medical malpractice plaintiffs (Kafka) two weeks before the defendant hospital's (Providence's) summary judgment motion and showed good reasons for a continuance, including diligence in seeking specifically-described expert testimony, did the trial court abuse its discretion by denying Kafka's motion for a CR 56(f) continuance of the summary judgment motion? (Assignment of error 1.)

2. On Kafka's motion for reconsideration of the summary judgment dismissal and the denial of a continuance, when counsel again specified good reasons for the requested continuance and filed his expert's declaration immediately upon obtaining the expert's testimony, before the court decided the motion for reconsideration, did the trial court abuse its discretion in denying reconsideration? (Assignment of error 2.)

3.a. Given the erroneous denial of a continuance, did the trial court err as a matter of law in granting summary judgment to Providence and dismissing Kafka's claims? (Assignment of error 3.)

3.b. Considering the record, including Kafka's expert testimony, in the light most favorable to Kafka, did the trial court err as a matter of law in granting summary judgment to Providence and dismissing Kafka's claims? (Assignments of error 1-3.)

4. Considering the record in the light most favorable to Kafka, when genuine issues of material fact exist as to whether Providence properly served Kristen Kafka, pro se (as Personal Representative of the Estate of Douglas Kafka, Jr., and individually), did the trial court err as a matter of law in dismissing the Estate's and Ms. Kafka's claims? (Assignment of error 3.)

III. STATEMENT OF THE CASE

Kafka alleges that Providence and its staff failed to properly care for 29-year-old patient Douglas E. Kafka, Jr., when he was at Providence Regional Medical Center in Everett, Washington (Providence-Everett), from March 10, 2010, until his death on April 21, 2010. The record shows that Providence, knowing Douglas Kafka, Jr., had a history of drug abuse, with evidence that he was abusing drugs during his Providence hospital stay and was at risk for continued abuse, was negligent in at least the following ways: failing to provide a safe environment for Mr. Kafka, failing to take precautions to monitor his drug use, failing to maintain a medication log, failing to prevent Mr. Kafka from hoarding medications

and from self-administering them in a fatal dose, and violating the hospital's own Master Care Plan, including failing to ensure that Mr. Kafka actually ingested his prescribed medications. CP 32-33 (Wanek Decl.). *See also, e.g.*, CP 59-62; CP 68-87; CP 167; CP 339-47.

Mr. Kafka was admitted to Providence-Everett on **March 10, 2010**, for treatment of an abscess in his thigh. Mr. Kafka reported to Providence that the infection was caused by injecting himself with morphine. CP 32; CP 59 (¶2.a); CP 70-72.³ He stated that he began injecting morphine two weeks before his admission, and before that he had been taking oxycodone for back pain. CP 32; CP 70-72.

Between **March 15 and March 20, 2010**, Providence staff twice discovered drug paraphernalia in Mr. Kafka's hospital room. CP 32; CP 60 (¶ 2.d), CP 78; CP 86; CP 264. Providence also documented Mr. Kafka's narcotic-seeking behaviors, including pocketing of opioids and creating a stash from the medications dispensed in the hospital. CP 32; CP 78. As of **March 20, 2010**, Providence initiated protective measures; specifically, they limited visitors to Mr. Kafka's room (CP 78). CP 32; CP 264. Providence staff also documented that there was evidence Mr. Kafka "was probably injecting something, possibly crushed oxycodone" into his

³ **Appendix I** is a timeline of the procedural history. **Appendix II** is a chronological set of orders and Declarations of Steven Krafchick.

peripherally inserted central catheter (PICC) line, which became infected and was removed. CP 32; CP 80-81.

Providence performed a urine toxicology screen on **April 5, 2010**, which was negative for opiates, despite the fact that Providence had prescribed a “significant amount of narcotics for pain control”, (CP 82), while the next day, **April 6, 2010**, the urine test was positive (CP 79, 82). CP 32; CP 60 (¶ 2.e). A urine screen drawn on **April 11, 2010**, was also negative for opiates, which “raises a suspicion that the urine supplied for the patient’s drug screen today may not have been the patient’s own urine.” CP 76. The negative urine test results signified that Mr. Kafka was not ingesting the oxycodone Providence had prescribed; he was either stashing the pills or, as noted, was providing urine that was not his own. CP 32; CP 60-61; CP 76; CP 81-82. On **April 13, 2010**, Providence noted that Mr. Kafka needed “to be observed with any medications to make sure that he swallows some.” CP 82.

On **April 14, 2010**, Providence imposed a written Master Care Plan to prevent Mr. Kafka from hoarding and using drugs or otherwise harming himself. CP 32, CP 60 (¶¶ 2.d-e); CP 283-84 (Master Care Plan). Though this Plan required hospital staff to be present and verify Mr. Kafka swallowed his medications (“by asking Doug to stick out his tongue and cough”), there is no documentation that Providence followed this

procedure, apart from the notation the day before the Master Care Plan. CP 32, CP 60.

On **April 21, 2010**, Providence nurses found Mr. Kafka unconscious in his room. Shortly thereafter, he died from respiratory and cardiac arrest. The autopsy report indicated the cause of death was accidental acute multidrug intoxication from oxycodone and diphenhydramine (brand name Benadryl), both of which Providence administered during Mr. Kafka's hospital stay. CP 33; CP 61-62; CP 100-08. Benadryl and oxycodone taken together have an increased sedating effect. CP 61; CP 95-96.

Acting pro se, Mr. Kafka's parents—Douglas E. Kafka, Sr., and Susan G. Kafka—together with his sister, Kristen M. Kafka, individually and as Personal Representative of the Estate of Douglas E. Kafka, Jr.—filed suit against Providence on **April 18, 2014**.⁴ CP 339-47. On **September 12, 2014**, Providence filed a Motion for Summary Judgment, noted for October 14, 2014. CP 45 (Docket Nos. 5-6).

On **October 14, 2014**, the decedent's father, Douglas Kafka, Sr., appeared pro se at the summary judgment hearing. CP 302 (Minute

⁴ The statute of limitations was tolled by Kafka's request for mediation. RCW 7.70.110 ("The making of a written, good faith request for mediation of a dispute related to damages for injury occurring as a result of health care prior to filing a cause of action under this chapter shall toll the statute of limitations provided in RCW 4.16.350 for one year"); CP 342 (§2.2). Providence conceded this. CP 252 (noting request for mediation).

Entry). The court granted the family's "motion for a continuance **in order to obtain counsel**". CP 302 (emphasis added). *See also* CP 298 (K. Kafka Decl.); CP 303 (D. Kafka Decl.); CP 319. The court continued the summary judgment motion to November 14, 2014. CP 302.

On **November 11, 2014**, the Kafka family met with attorney David Duce. CP 261. On **November 13, 2014**, they retained Mr. Duce to represent them, subject to allowing him the opportunity to review the case. CP 261-62. Mr. Duce requested a reasonable briefing schedule from Providence to allow him to prepare an adequate response. CP 262. Providence renoted the summary judgment motion for a mere two weeks later, **November 25, 2014**. CP 262; CP 46 (Docket No. 11).

Mr. Duce filed a Notice of Appearance on **November 14, 2014**. CP 316-18. The same day, Mr. Duce received 1,700 pages of medical records from Providence. CP 263. These newly-produced records revealed that the 900-1,000 pages of medical records that Providence previously disclosed to Personal Representative Kristen Kafka in May 2010 were incomplete: for example, the newly-produced records included the critically-important Master Care Plan. CP 298-99 (K. Kafka Decl.)

On **November 24, 2014**, Mr. Duce filed a response to Providence's summary judgment motion. CP 306-15. Thereafter, the

parties agreed to strike the summary judgment motion. CP 64; CP 46 (notation after Docket No. 16).

On **December 5, 2014**, Mr. Duce filed a Notice of Intent to Withdraw as counsel, effective **December 15, 2014**. CP 259-60.

On **January 5, 2015**, knowing the Kafka family was again unrepresented by legal counsel, Providence refiled its Motion for Summary Judgment, noting it for **February 5, 2015**. CP 251-58. Providence mailed the motion to the address of decedent's parents (Douglas Kafka, Sr., and Susan Kafka) on Camano Island, Washington. CP 285. But Douglas Kafka, Sr., and Kristen Kafka testified they had each informed Providence that Ms. Kafka did not reside at her parents' Camano Island address: (1) Mr. Kafka notified Providence on October 14, 2014, CP 187 (D. Kafka Decl.), and (2) Ms. Kafka in November 2014, CP 43 (K. Kafka email); CP 62 (K. Kafka Decl., ¶¶ 8-9).

Providence's lawyer later denied knowing this information, declaring the Kafkas' testimony was not true. Providence's denial confirmed (rather than resolved) a factual dispute as to whether it properly served its summary judgment motion on the Estate of Douglas Kafka, Jr., and Kristen Kafka individually. CP 40.⁵ Thus, if this Court affirms dismissal of the parents' claims, there remains a genuine material factual

⁵ Providence blamed Mr. Duce for giving the wrong address in December 2014. CP 52. That does not eliminate the factual dispute.

dispute defeating summary judgment dismissal of the Estate's and Ms. Kafka's claims.

On **January 22, 2015**, attorney Steven P. Krafchick filed a Limited Notice of Appearance Re: Defendants' Motion for Summary Judgment, on behalf of decedent's parents (Douglas Kafka, Sr., and Susan Kafka). CP 235-37. Mr. Krafchick had not spoken to or been retained by Kristen Kafka. CP 15 (¶ 4), CP 62.

Also on **January 22, 2015**, Mr. Krafchick filed a Motion to Continue Defendants' Summary Judgment Motion from February 5, 2015, to March 5, 2015. CP 232-34; CP 223-25. At that time, a potential expert (forensic pathologist) was reviewing the case on the theory that Providence had overprescribed medications to Mr. Kafka. *E.g.*, CP 21. But unbeknownst to Mr. Krafchick, this review was based on an incomplete set of records: for example, there was no medication log for Mr. Kafka's treatment. CP 64 (¶ 16); CP 15 (¶ 6), CP 21. Later that week, the forensic pathologist indicated he could not identify any negligence by Providence.

Without potential expert testimony, Kafka's motion to continue Providence's summary judgment hearing was futile. Therefore, Kafka's counsel did not confirm the motion, and it was stricken from the calendar on **January 29, 2015**. CP 47 (Docket No. 29); CP 170 (lines 19-20).

However, on **January 30, 2015**, Douglas Kafka, Sr., provided Mr. Krafchick with contact information for Personal Representative Kristen Kafka, and Mr. Krafchick left Ms. Kafka a message the same day. On **February 2, 2015**, Mr. Krafchick and Ms. Kafka spoke. Ms. Kafka did not know Providence had filed a summary judgment motion scheduled for hearing three days later. CP 15; CP 62 (¶9); CP 63 (¶11). Ms. Kafka had found a potential expert, Barbara Baggenstos, A.R.N.P., who identified a theory new to Mr. Krafchick—that Providence failed to supervise, monitor, and ensure Mr. Kafka was ingesting the prescribed medications, until it was too late—that is, a theory of “system failure” by Providence. But Nurse Baggenstos was out-of-town and could not evaluate or report on the case until February 10, 2015, after the summary judgment hearing. CP 15; CP 21; CP 62-63.

Two weeks after filing a Limited Notice of Appearance, Mr. Krafchick appeared at the **February 5, 2015** summary judgment hearing. Mr. Krafchick orally moved the court to deny or continue the motion under CR 56(f). Mr. Krafchick informed the court that as new counsel, he was still seeking expert testimony and the identified expert was unavailable to review the case until after this hearing, CP 35; CP 166; CP 169-72. He vigorously objected to the lack of proper service on the Estate of Douglas Kafka, Jr., and Kristen Kafka. CP 166; CP 169-70.

No trial date or case scheduling deadlines had been set and no discovery accomplished, other than Providence's staggered production of medical records. At the hearing on February 5, 2015, the court orally denied the motion to continue, CP 184, and granted Providence's summary judgment motion. CP 4-5. The Court entered the Order **February 9, 2015**.

On **February 17, 2015**, Mr. Krafchick filed Kafka's Motion for Reconsideration of Court's Order Granting Summary Judgment to Defendants, asking the court to extend the summary judgment motion an additional 60 days. CP 59-65;⁶ CP 166-73. On that day, Nurse Baggenstos had stated she would provide her expert opinion in a declaration later that week. CP 63.

On **February 20, 2015**, Nurse Baggenstos informed Mr. Krafchick she could not provide her expert opinion due to a conflict (she worked with Providence). CP 16.

On **February 24, 2015**, Providence filed a brief and declaration opposing reconsideration. CP 39-53. Providence's opposition did not address Kafka's detailed reasons for requesting a continuance. Providence did not mention Kafka's demonstrated ongoing search for expert

⁶ The February 17, 2015 declaration was Mr. Krafchick's second declaration filed in this case. CP 59-108; CP 117-65; CP 109-116. The first Krafchick declaration was part of Kafka's Motion to Continue (Jan. 22, 2015, stricken Jan. 29, 2015).

testimony, and did not argue it would be prejudiced by a continuance. CP 50-51.⁷ Instead, as stated, Providence denied notice that Personal Representative Kristen Kafka did not reside at the parents' address. CP 39-40; CP 52. This confirmed that genuine issues of material fact existed as to whether Providence properly served Ms. Kafka (who, like the parents, was pro se). Kafka filed a Reply on the motion for reconsideration on **February 24, 2015**. CP 54-58.

With the motion for reconsideration pending, on **February 25, 2015**, Mr. Krafchick spoke to a new potential expert, Karen Wanek, M.S.N., R.N. On **February 25, 2015**, Mr. Krafchick filed his third declaration in this matter, informing the court that Nurse Baggenstos had withdrawn from providing an opinion due to a conflict of interest, and a different expert (Nurse Wanek) was reviewing the case and would provide an opinion on the new theory of hospital negligence in the care and treatment of Douglas Kafka, Jr. Mr. Krafchick stated he believed he could obtain this new expert's written opinion in two weeks. CP 34-37.

⁷ As to the dismissal and denial of a continuance, Providence contended, incorrectly, that the motion for reconsideration was untimely, and that Kafka was simply restating arguments the court had rejected. CP 50-51. To the contrary, Kafka timely filed the motion for reconsideration on February 17, 2015: the order granting summary judgment was not entered until Feb. 9, so the 10 days did not expire until Feb. 19, 2015. CR 59(b) (motion shall be filed "not later than 10 days after entry of ... order"). Even counting from Feb. 5, when the order was signed, the first court day after Feb. 15 (a Sunday) was Tuesday, Feb. 17, because Monday, Feb. 16 was President's Day, a court holiday. CR 6(a); CP 56. And the information concerning expert testimony was new and specific.

On **February 27, 2015** (Friday), Nurse Wanek signed her expert declaration. Mr. Krafchick filed Ms. Wanek's expert opinion, CP 32-33, on Monday, **March 2, 2015**, with his declaration, CP 29-31, all in support of reconsideration.

The court denied the motion for reconsideration on **March 3, 2015**. CP 6-7. The Order denying reconsideration states that court considered the "Declaration of Steven Krafchick, including exhibits" and "Plaintiff's reply". CP 7. This appeal timely followed.

IV. SUMMARY OF ARGUMENT

The trial court erred as a matter of law in denying Kafka's well-supported motion for a CR 56(f) continuance, in granting summary judgment dismissal of all plaintiffs' claims, and in denying reconsideration, when: (1) Kafka's new lawyer (a) had recently appeared, (b) specifically explained undisputed good reasons for the delay in securing expert testimony necessary to defeat summary judgment, and (c) demonstrated his active pursuit of competent expert testimony to support Kafka's claims; (2) Providence never argued or showed any prejudice could possibly result from the requested extension, with no trial date, no case schedule, and no formal discovery having occurred; and (3) Providence disputed whether it properly served the Estate of Douglas

Kafka, Jr., and Kristen Kafka, defeating summary judgment dismissal of the Estate's and Ms. Kafka's claims.

Directly on-point Washington decisions from this Court expressly hold that in these circumstances, the trial court has a duty to give the party requesting a continuance (Kafka) a reasonable opportunity to complete the record before ruling on the case. The stated purpose of imposing a duty on the court to exercise its discretion in favor of a continuance is to allow the moving party a decision on the merits of the claims. This is particularly true in a medical malpractice action where a new lawyer appears, because in order to defeat summary judgment, a medical malpractice plaintiff needs an expert's opinion that, more probably than not, the defendant committed medical negligence. The only reason to deny a continuance in this context would be if the defendant could demonstrate prejudice. But Providence showed none.

Moreover, Providence's flat denial that it had notice the Personal Representative did not reside with her parents (when all three were pro se) confirmed rather than resolved the squarely-contested issue whether it properly served the Estate and Kristen Kafka. This alone defeated summary judgment as well as justified a continuance for the Estate and Ms. Kafka.

The trial court abused its discretion by denying Kafka's request for a continuance, abused its discretion by denying reconsideration, and erred as a matter of law by dismissing Kafka's claims on summary judgment, when expert testimony was in the record raising genuine issues of material fact for the jury to resolve, and when the parties disputed the sufficiency of Providence's service of the summary judgment motion on the Estate and Ms. Kafka.

V. ARGUMENT

A. Standard of Review.

1. Continuance and Reconsideration: Abuse of Discretion.

A trial court's rulings on motions for reconsideration and for continuance are reviewed for abuse of discretion. *Keck v. Collins*, 181 Wn. App. 67, 94, 325 P.3d 306 (2014), *review granted*, 181 Wn.2d 1007 (2014) (*oral argument* on Feb. 12, 2015); *Coggle v. Snow*, 56 Wn. App. 499, 505, 784 P.2d 554 (1990). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Coggle*, at 506-07.

This "discretionary" ruling still "requires decisionmaking founded upon principle and reason." *Coggle*, at 505. The *Coggle* court took great care to explain what "discretion" means, especially for motions involving summary judgment:

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.

Id. at 506-07 (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal ... He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to “the primordial necessity of order in the social life.”

Id. at 504-05 (quoting Benjamin Cardozo, *The Nature of the Judicial Process* 141 (1921)).⁸ In short, “[t]he proper standard is whether discretion is exercised on untenable grounds or for untenable reasons **considering the purposes of the trial court’s discretion.**” *Coggle*, at 507 (emphasis added).

Considering the purposes of discretion on a motion for CR 56(f) continuance, *Coggle* held that the court:

(1) Has a “**duty to give the party a reasonable opportunity to complete the record before ruling on the case**”; and

⁸ See also *Keck*, at 88 n.8 (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 950 P.2d 1362 (1997) (“A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.”))

(2) Must “interpret court rules and statutes to **allow decision on the merits of the case**”. *Id.* at 507 (emphasis added).

In this case, the trial court ignored these explicit guidelines in denying a continuance and reconsideration and in granting summary judgment to Providence. When a court improperly denies a CR 56(f) continuance and then proceeds to grant summary judgment, it by definition abuses its discretion in refusing to grant reconsideration of both erroneous orders. *Keck*, at 94 (citing *Bank of N.Y. v. Hooper*, 164 Wn. App. 295, 305, 263 P.3d 1263 (2011)).

A court also abuses its discretion by making an error of law or applying a legally erroneous standard. *In re Estate of Toland*, 180 Wn.2d 836, 851, 329 P.3d 878 (2014).⁹ “An error of law constitutes an untenable reason.” *Cook v. Brateng*, 180 Wn. App. 368, 375, 321 P.3d 1255 (2014) (quoting *In re Marriage of Farmer*, 172 Wn.2d 616, 625, 259 P.3d 256 (2011)). Stated another way, when the court bases a ruling on an erroneous view of the law, “no element of discretion is present.” *Allyn v. Boe*, 87 Wn. App. 722, 729, 943 P.2d 364 (1997)). In that instance, the court

⁹ *Toland*, at 851 (an error of law constitutes an abuse of discretion; citing *Washington St. Physicians Insur. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 338-39, 858 P.2d 1054 (1993) (“A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law”; citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 L.Ed.2d 359, 110 S. Ct. 2447 (1990)).

abuses its discretion as a matter of law. *E.g., Toland*, at 851. *See also Keck*, at 94; *Coggle*, at 508-09.

2. Summary Judgment: De Novo.

The Court reviews all aspects of the grant of summary judgment against all three Kafkas and the Estate de novo. “The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.” *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). This Court engages in the same inquiry as the trial court, treating all facts and reasonable inferences from the facts in the light most favorable to Kafka (the nonmoving party), and evaluating anew all evidence available to the trial court for consideration. *Id.*; *Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 350, 144 P.3d 276 (2006). Upon reversal of the trial court’s denial of a continuance and reconsideration, this Court must consider Kafka’s expert testimony submitted on reconsideration. *Coggle*, at 507-09; *Keck*, at 81, 94.

B. The Trial Court Violated Directly Applicable Precedent By Denying Kafka A Continuance Of Summary Judgment.

1. The Trial Court Breached Its Duty To Allow Kafka The Opportunity To Secure The Identified Written Expert testimony And Then Proceed To The Merits.

Washington law could not be clearer in holding that when the plaintiff in a medical malpractice case faces a defendant’s motion for

summary judgment while diligently attempting to secure expert testimony which would raise triable factual issues, and the defendant shows no prejudice, it is an abuse of discretion to deny a CR 56(f) continuance.¹⁰ *Keck*, at 87-89; *Butler v. Joy*, 116 Wn. App. 291, 298-300, 65 P.3d 671 (2003); *Coggle v. Snow*, 56 Wn. App. 499, 507-09, 784 P.2d 554 (1990). This is especially true when the plaintiff's counsel is new to the case. *Butler*, at 298-300, *Coggle*, at 508. It is the law in Washington even if the moving party previously obtained a continuance acting pro se or through prior counsel, *Butler*, at 294 (one continuance pro se, one by prior counsel); or when counsel presents any good reason for the delay. *Keck*, at 88-89 (unrefuted reasons that counsel lacked the time and attention needed to ensure expert affidavits had sufficient specificity). *Keck*, *Coggle*, and *Butler* are directly on point, and were cited to the trial court. CP 22-23.¹¹

The definitive test for a continuance in closely similar circumstances was articulated in *Coggle*, reiterated in *Butler*, and recently confirmed in *Keck*.¹²

¹⁰ CR 56(f) provides: “**When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.”

¹¹ See also CP 311-14 (Resp. to SJ by prior counsel).

¹² The issues on review in the Supreme Court in *Keck* do not impact those involved in the present appeal; consequently, the holdings in *Keck* that a trial court abuses its discretion (1) in denying a CR 56(f) continuance where the moving party shows a good reason to allow more time to obtain expert testimony, *id.* at 87-89, and (2)

If, by affidavit, the nonmoving party states reasons why he or she cannot currently present evidence opposing summary judgment, the trial court “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.” CR 56(f). The trial court may deny the motion for continuance **solely** if ““(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.””

Keck, at 87-88 (emphasis added; quoting *Tellevik v. Real Property Known as 31641 West Rutherford Street*, 120 Wn.2d 68, 90, 838 P.2d 111 (1992) (denial of plaintiff’s CR 56(f) motion was abuse of discretion where defendant failed to respond to discovery); quoting *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989)). In this case, Kafka’s new lawyer met all three requirements:

- (1) He offered good reasons for the delay in obtaining the desired evidence: he was new to the case; the first expert consulted was unable to provide an opinion on partial records; and Providence did not properly serve the Estate’s Personal Representative, Kristen Kafka (pro se), who had more complete knowledge of the case and was in

in denying reconsideration, *id.* at 94, are solid precedent governing this case. The Supreme Court in *Keck* is addressing the following issues only: (1) Does the appellate court have de novo review of a ruling striking as untimely plaintiff’s expert affidavit opposing summary judgment? (2) Should the Court overrule the standard that conclusory expert affidavits are inadequate to defeat summary judgment in a medical malpractice action?

http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2015Jan#P739_72569.

contact with a potential expert but did not know about the summary judgment motion until three days before the hearing;

- (2) He stated he was on the brink of securing expert testimony, and described the expert's opinion; and
- (3) The desired evidence is necessary in medical malpractice actions to raise genuine issues of material fact defeating summary judgment, and would undeniably do so.

In *Keck*, this Court emphasized the trial court's "duty" to give the parties "a reasonable opportunity" to complete the record on a summary judgment motion, which the trial court utterly failed to do in this case:

[W]hen a trial court has been shown a good reason why an affidavit of a material witness cannot be obtained in time for a summary judgment proceeding the court has a duty to accord the parties a reasonable opportunity to make their record complete before ruling on a motion for a summary judgment, especially where the continuance of the motion would not result in a further delay of the trial.

Id. at 88 (emphasis added; quoting *Cofer v. Pierce County*, 8 Wn. App. 258, 262-63, 505 P.2d 476 (1973); citing *Coggle*, at 507):

Where a party knows of the existence of a material witness and shows good reason why the witness' affidavit cannot be obtained in time for the summary judgment proceeding, the court has a duty to give the party a reasonable opportunity to complete the record before ruling on the case.

Coggle, at 507.

Cogle, *Butler*, and *Keck* emphasize that “justice” is to be the trial court’s “primary consideration”, even when the request for a continuance is oral or informal: “The trial court must make justice its primary consideration in ruling on a motion for continuance, even an informal one.” *Keck*, at 88 (citing *Cogle*, 56 Wn. App. at 508; *Butler*, 116 Wn. App. at 299). Justice is simply not served by a draconian application of time limitations, particularly in a medical malpractice case where (as *Keck* and *Cogle* both noted) expert testimony is critical to defeating summary judgment.¹³

“[I]t is hard to see ‘how justice is served by a draconian application of time limitations’ when [the nonmoving] party is hobbled by legal representation that has had no time to prepare a [sufficient] response to a motion that cuts off any decision on the true merits of a case.”

Keck, at 88 (quoting *Butler*, at 300 (quoting *Cogle*, at 508)).

The *Cogle* court explicitly instructed trial judges applying CR 56(f) “to interpret court rules and statutes **to allow decision on the merits of the case.**” *Cogle*, at 507 (emphasis added). In *Keck*, the court confirmed that “[d]enying a continuance under these circumstances would **untenably elevate deadlines over justice and technicalities over the**

¹³ “The plaintiff in a medical negligence action must produce evidence showing injury caused by the health care provider’s failure to exercise that degree of care, skill, and learning expected of a reasonably prudent practitioner in the state of Washington. RCW 7.70.040 **The plaintiff generally must offer proof of these elements through the testimony of expert medical witnesses.**” *Cogle*, at 510 (emphasis added); *Keck*, at 91 (both citing *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983)).

merits and, thus, deny appellants an opportunity to try their case to a jury.” *Id.* at 89 (emphasis added). “In addition, the Superior Court Civil Rules are to be construed to secure the just, speedy, and inexpensive determination of every action. CR 1.” *Coggle*, at 507-08.¹⁴

The only possible reason for denying a CR 56(f) continuance in this context would be if the nonmoving party could show prejudice: “Absent prejudice to the moving party, the trial court should grant a motion for continuance under such circumstances.” *Keck*, at 88 (citing *Coggle*, at 299-300). Prejudice is completely absent, however, when no trial date or case scheduling deadlines have been set and no formal discovery has occurred; in that instance, no “further delay of the trial” can possibly occur. *Keck*, at 88; *Cofer*, at 262-63. In *Keck*, trial was three and one-half months in the future, and the dispositive motions deadline was three months away. The court concluded there was no prejudice to defendants from a “short delay” to allow defendants to respond to plaintiffs’ expert’s detailed affidavit and for the trial court to consider all relevant materials. *Keck*, at 85. Here, no trial date (or other deadlines) had been set at all. There was no prejudice to Providence.

¹⁴ Kafka also cited CR 5(d)(2) (“If a party fails to file any other pleading or paper under this rule, the court ... may dismiss the action or strike the pleading ... **unless good cause is shown for, or justice requires, the granting of an extension of time.**”). CP 171 (emphasis added). In *Keck*, at 87, the Court applied CR 5(d)(2) to conclude plaintiff’s delay in filing a late expert affidavit was due to “excusable neglect”.

And in *Coggle*, defendant Dr. Snow did not argue he would have suffered prejudice from a continuance, nor did the court “perceive any”. *Id.* at 508. The case had been filed two years earlier, and “[l]ittle discovery had been pursued.” *Id.* Similarly, in the present case, Providence never demonstrated prejudice, and the record reveals none.¹⁵

2. The Similar Facts Of *Coggle*, *Butler*, and *Keck* Demonstrate That A Continuance Was Required Here.

A review of the facts in *Coggle*, *Butler*, and *Keck* eliminates any doubt that the trial court should have granted Kafka a continuance.

Like this action, *Coggle* is a medical malpractice case. *Coggle* involved plaintiff’s injuries from adult respiratory distress syndrome (ARDS) caused by defendant Dr. Snow’s administration of medications during surgery. Plaintiff *Coggle*’s first attorney was in the process of retiring when new counsel filed a notice of association and motion for CR 56(f) continuance of Dr. Snow’s motion for summary judgment. *Coggle*, 56 Wn. App. at 502. *Coggle*’s new lawyer (Harvey Grad) stated that his treating physician would provide an expert opinion to establish the elements of Dr. Snow’s negligence and defeat Dr. Snow’s summary

¹⁵ Providence asserted “prejudice” in its opposition to Kafka’s stricken motion to continue, claiming it “had to expend time and resources responding to the Kafkas’ various attempts to delay the inevitable” (*i.e.*, hearing on summary judgment). CP 220 (Jan. 30, 2015). But spending time and money opposing a motion to continue a summary judgment hearing is simply the work of litigation. Under *Keck*, *Coggle*, and *Butler*, that is not the prejudice contemplated by CR 56(f).

judgment motion, but it was not possible to obtain the physician's affidavit within the time limits for the summary judgment hearing. *Id.* at 502. The trial court denied the motion for continuance and granted Dr. Snow's motion for summary judgment. *Id.* at 503.

Cogle filed a motion for reconsideration, supported by the expert/treating physician's affidavit as well as his own affidavit. The trial court denied that motion too. *Id.* at 503. Applying the above guidelines, this Court reversed the trial court's denials of the motions for CR 56(f) continuance and for reconsideration. *Id.* at 503-04. The Court held that Cogle, "after obtaining new counsel, should not be penalized for the apparently dilatory conduct of his first attorney. ... The court should have viewed the motions in the context of the new legal representation." *Id.* at 508.

Likewise, here, with no trial date, no formal discovery, and no deadlines in the case, Kafka should not have been penalized for any action or inaction before Mr. Krafchick appeared on January 22, 2015: not for the withdrawal of Kafka's first counsel, Mr. Duce, who was involved for only three weeks; not for the fact that Kafka, at the time pro se, had obtained a 30-day continuance in October 2014 to secure legal representation; and in fact, not for the any of the time when Kafka was pro

se, from April 2014 until November 13, 2014 (seven months), and from December 15, 2014, through January 22, 2015 (five weeks).

This was not a case that was neglected or abandoned. The court failed to view the summary judgment motion, motion for a continuance, and motion for reconsideration in the context of Mr. Krafchick's new legal representation and his continuous diligence in seeking an expert opinion. Mr. Krafchick provided detailed reasons for the delay in securing an expert opinion, specifying his persistent attempts and explanations for each turn of events. The first expert he contacted did not have complete medical records and was unable to state Providence was negligent. CP 64. That expert was considering whether Providence overprescribed drugs to Douglas Kafka, Jr.

On February 2, 2015 (three days before the summary judgment hearing), when Mr. Krafchick first spoke with Personal Representative Kristen Kafka (who was previously unaware of the new motion, CP 62-63), he learned about a different theory—that Providence failed to monitor and supervise Mr. Kafka, an admitted narcotics addict. Potential expert Barbara Baggenstos, A.R.N.P., was prepared to testify that Providence was negligent in failing to monitor closely the drugs prescribed to Mr. Kafka, in light of his known drug abuse, CP 63, and that after Mr. Kafka's first negative urine screen, Providence should have required him to take all

medications in the presence of a nurse who would check that he swallowed them. CP 61; CP 168-69, 171-72. Mr. Krafchick reported Nurse Baggenstos's opinions to the trial court at the February 5, 2015 hearing. CP 169 (describing "systems error" theory); CP 23; CP 54-55 (describing "a theory of liability that was not evident until the Tuesday before" the February 5, 2015 hearing, "i.e., failure of Defendants to adequately care for Douglas Kafka based upon lack of adequate precautions in light of his known addiction and illegal drug use").

After the court denied a continuance and granted summary judgment dismissal, Mr. Krafchick timely filed a motion for reconsideration on February 17, 2015, stating that Nurse Baggenstos informed him she was prepared to sign a declaration with her opinion later that week. CP 63. But three days later, on February 20, 2015, Nurse Baggenstos informed Mr. Krafchick she would not provide her opinion due to a conflict in her ongoing work relationship with Defendant Providence. CP 35.

Five days after Nurse Baggenstos withdrew, on February 25, 2015, Mr. Krafchick spoke with another potential expert, Karen Wanek, M.S.N., R.N. After reviewing the file, on Friday, February 27, 2015, Nurse Wanek signed her expert declaration, and Mr. Krafchick filed it on Monday,

March 2, 2015. CP 29-31.¹⁶ That declaration was sufficient to defeat summary judgment, and more than adequate to grant reconsideration and a continuance.

Addressing similar circumstances, *Coggle* held that the trial court abused its discretion “flowing from the court’s initial denial” if it refused to evaluate the declarations of plaintiff Coggle and the treating physician, and their impact on summary judgment. “In the alternative, if the court considered the declarations and concluded they did not raise an issue of material fact, then we hold, in accord with the following analysis, that **the court erred as a matter of law** and we reverse on that basis.” *Coggle*, at 508-09 (emphasis added). Likewise, in this case, when the trial court denied reconsideration, Kafka’s expert declaration (Nurse Wanek’s) was available in the record before it. If the court did not consider Nurse Wanek’s declaration, then it abused its discretion flowing from the denial of reconsideration and denial of a CR 56(f) continuance. If the court did consider the expert declaration, then it erred as a matter of law in granting summary judgment dismissal. *Coggle*, at 508-09.

¹⁶ In an Opposition brief filed after the denial of reconsideration, on March 4, 2015, Providence argued that the Wanek Declaration was untimely, CP 8-13. However, by March 4, 2015, the trial court had entered its Order denying reconsideration. The Wanek Declaration was before the trial court, not stricken, and is part of the record on review.

In the medical malpractice case of *Butler*, the court further instructed that a continuance should be granted even when:

- The plaintiff previously obtained **two** continuances—one pro se, and one by her first lawyer, *id.* at 294, 299 (here, the court granted Kafka (pro se) one continuance “to obtain counsel”, CP 302);
- Some discovery occurred, *Butler* at 294 (none in this case other than medical records, initially incomplete);
- The motion for a continuance is oral, and there is no transcribed record of the summary judgment hearing (as here); *Butler*, at 292, 294, 299;
- “Strictly speaking, [the] motion does not fit within the guidelines of a CR 56(f) continuance”, *id.* at 299 (though here, the motion does fit).

In *Butler*, plaintiff Mary Butler, like Kafka, filed suit pro se in June 2001. Less than a month later, defendant Dr. Joy moved for summary judgment dismissal. The hearing on Dr. Joy’s motion was continued twice: first, on Butler’s pro se motion (like Kafka’s on October 14, 2014); and second, when Butler’s recently-retained counsel requested a continuance to prepare a response. Ultimately, the hearing was scheduled for late October 2001. *Id.* at 294. The parties then agreed to strike the motion in order to take depositions. *Id.* at 294. After depositions had occurred, in early January 2002, Butler’s lawyer withdrew from representation.

On January 16, 2002, Dr. Joy again moved for summary judgment against Butler (again pro se), with a hearing set for February 22, 2002. *Id.* at 294. The day before the hearing, Butler’s new lawyer (Uche Umuolo) filed a notice of appearance. The new lawyer appeared at the hearing, which was not recorded, and orally requested a continuance. *Id.* at 294. The trial court denied the motion and granted summary judgment dismissal. *Id.* at 295.

The *Butler* Court reversed the summary judgment order, holding that Dr. Joy waived the defense on which the court granted dismissal—that is, insufficient service of process. *Id.* at 299. The Court then held that the trial court erred in denying Butler’s request for a CR 56(f) continuance (though this ruling was not necessary to the disposition of the case). *Id.* at 298. Because the summary judgment hearing was not recorded, the court had “no indication whether Mr. Umuolo argued that he needed more time to obtain further discovery or what further evidence he expected to produce.” *Id.* at 299. Here, however, the Court has Mr. Krafchick’s unrefuted declarations including his statements to the trial court at the February 5, 2015 hearing.

The *Butler* Court confirmed that “the primary consideration in the trial court’s decision on the motion for a continuance should have been justice.” *Id.* at 299 (quoting *Coggle*, 56 Wn. App. at 508). As in this case,

the trial court overlooked the interests of justice. The Court in *Butler* noted this was the first continuance Butler requested on the second-filed summary judgment motion, and Butler had “obtained new counsel in a little over a month” after her first lawyer withdrew. *Id.* at 299. The same is true here: Kafka obtained new counsel in little over a month after the effective date of Mr. Duce’s withdrawal. In *Butler*, “[a]lthough additional discovery was not needed to decide the issue of insufficient service of process, Mr. Umuolo deserved an opportunity to prepare a response on the issues of law.” *Id.* at 299 (emphasis added). Unlike *Coggle*, some discovery had been completed. Even so, the court echoed *Coggle*’s observation that “it is hard to see ‘how justice is served by a draconian application of time limitations’ when a party is hobbled by legal representation that has had no time to prepare a response to a motion that cuts off any decision on the true merits of a case.” *Id.* at 299-300 (quoting *Coggle*, at 508). As in *Coggle*, the Court held both the denial of a continuance and summary judgment dismissal were improper, and reversed:

Because we cannot find a tenable ground for the trial court’s decision, we hold that the denial of the continuance was an abuse of discretion. However, because we also hold that the trial court erred as a matter of law in granting summary judgment dismissal, we reverse.

Butler, at 300. See also *Cofer v. Pierce County*, 8 Wn. App. 258, 260 n.1, 262-63, 505 P.2d 476 (1973) (in negligence action, abuse of discretion to deny continuance to permit plaintiffs to obtain affidavit from crucial witness, where counsel just learned of the witness, had been out of town for a week, witness was in hospital and could not prepare affidavit; counsel's affidavit for continuance recited what witness's affidavit would say). Here, Kafka deserves the same opportunity as Coggle and Butler.

In *Keck*, medical malpractice plaintiffs' counsel was in trial in Ephrata, Washington, during the time he was attempting to obtain the expert's opinion. One of the two defense lawyers was also involved in the Ephrata trial and so was aware of the reasons for Keck's delay in obtaining the expert's full opinion. *Keck*, at 76-77.

During the month before the hearing on defendants' summary judgment motion, Kecks' counsel first filed two affidavits from their expert (Dr. Li). Ten days after the deadline for responsive affidavits, the day before the summary judgment hearing, Keck filed a third affidavit from Dr. Li with additional specific detail regarding the alleged standard of care violations. Keck's lawyer also filed his own affidavit explaining the reasons for the delay in the expert's third affidavit, and asked the court to forgive the late filing or continue the hearing to allow full evaluation of the late filing's contents. *Id.* at 77.

The defendants in *Keck* (a dentist, dental surgeon, and their practice, collectively “Collins”) moved to strike the expert’s third affidavit, and requested permission to reply if the court permitted the late filing. *Id.* at 77. The court granted the motion to strike, denied Keck’s motion to continue the summary judgment hearing, and granted Collins’ summary judgment motions on negligent postoperative care. Keck moved for reconsideration, which the court also denied. *Id.* at 77-78. The court later granted Collins’ additional summary judgment motions, and Keck appealed.

Reviewing the denial of continuance for abuse of discretion, this Court reversed, confirming the holdings of *Coggle* and *Butler*. The Court applied de novo review to the rulings on the motion to strike and summary judgment, *id.* at 82-83, and reversed both on the grounds that Keck showed good cause for an extension to file the third expert affidavit. *Id.* at 87.

The *Keck* Court explained that the “primary consideration” of justice “required continuing the summary judgment hearing to allow full consideration of Dr. Li’s third affidavit”:

[A]ppellants were hobbled by counsel who, due to extenuating circumstances, lacked the time and attention needed to ensure Dr. Li’s first and second affidavits provided enough specificity to show a genuine issue of material fact exists on negligence. Appellants’ counsel needed to file Dr.

Li's third affidavit to substantiate his previously stated opinions. But the third affidavit stated no new opinions. With the trial date still three and one-half months away and the dispositive motions deadline still three months away, respondents would suffer no prejudice if the trial court continued the summary judgment hearing and considered the third affidavit.

Id. at 88-89.

The trial court's decision to deny a continuance or enlarge the time for filing was manifestly unreasonable, **considering the unrefuted reasons given by appellants' counsel. Considering the strength of the factors outlined above, we conclude it was outside the range of acceptable choices for the trial court to say those reasons were not good enough.** A continuance would have allowed the trial court to fully evaluate the third affidavit and given respondents time to respond to the specific facts raising a genuine issue of material fact on negligence. **Denying a continuance under these circumstances would untenably elevate deadlines over justice and technicalities over the merits and, thus, deny appellants an opportunity to try their case to a jury.** Therefore, we conclude the trial court abused its discretion and erred in denying appellants' motion to continue the summary judgment hearing.

Id. at 89 (emphasis added). Again, the court's holdings reversing the denial of a continuance and denial of reconsideration (*id.* at 94) are not before the Washington Supreme Court on review.

In the present case, as in *Coggle*, *Keck*, and *Butler*, the trial court's denials of a continuance and reconsideration run afoul of CR 56(f)'s purposes, are contrary to the interests of justice and circumvent the goal of

trying cases on their merits. The trial court abused its discretion, requiring reversal and remand for trial.

3. Providence Presented No Valid Reasons To Deny A CR 56(f) Continuance.

As discussed, Providence never demonstrated it would suffer prejudice from a continuance. Instead, in a bizarre reversal of the meaning of justice, Providence claimed Kafka had not met the burden under CR 56(f) (CP 217-20):

- Providence asserted it (instead of Kafka) was “entitled to its day in court”. CP 220, 218.
- To the contrary, it is Kafka who has a right to his day in court and to have his claims heard on the merits. *Keck*, at 88; *Cogle*, at 507-08;¹⁷ *Butler*, at 298-300.¹⁸ Providence’s summary judgment motion argued only that Kafka had no competent expert testimony establishing his claims. CP 253.
- Providence argued Kafka had not provided a “good reason” for a continuance, claiming Kafka had four and one-half years since the death, CP 217, and over four months since Providence initially filed its

¹⁷ “[T]he court has a duty to give the party a reasonable opportunity to complete the record before ruling on the case. ... [T]he trend of modern law is to interpret court rules and statutes to allow decision on the merits of the case.” *Cogle*, at 507-08.

¹⁸ Justice is not served by “a draconian application of time limitations when a party is hobbled by legal representation that has had no time to prepare a response to a motion that **cuts off any decision on the true merits of a case.**” *Butler*, at 299-300 (emphasis added; internal quotations omitted).

summary judgment motion (ignoring that Kafka was unrepresented at the time and that service to the Estate was directly disputed), CP 220.

- Providence’s assertions in this regard demonstrate a gross misunderstanding of medical malpractice actions. Washington law absolutely does not require Kafka to independently find evidence to defeat summary judgment after merely filing a complaint, without the benefit of civil rules governing discovery. Kafka has a constitutional right to discovery, tied to the right of open access to the courts.¹⁹ As the Washington Supreme Court declared in *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 979, 219 P.3d 374 (2009), without “extensive discovery”, a party cannot effectively “uncover” enough evidence to prove his claims:

It is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense. ... Through the discovery process, plaintiffs uncover the evidence necessary to pursue their claims.

¹⁹ The fact that Providence has always had the records necessary to defend itself on this malpractice claim, but Kafka has not, is additional grounds to continue or deny Providence’s summary judgment motion. “Rule 56(f) motions should be liberally granted ... especially where, as here, all of the allegedly material facts are within the exclusive knowledge of the opposing party.” *Waldron v. British Petroleum Co.*, 231 F.Supp. 72, 94 (D.N.Y. 1964). The party moving for a continuance “need not even present the proof creating the minimal doubt on the issue of fact which entitled him to a full trial; it is enough if he shows the circumstances which hamstring him in presenting that proof by affidavit in opposition to the motion.” *Id.* (quotations omitted). *See also, e.g., Bio-Medical Research, Ltd. v. Thane Int’l, Inc.*, 249 Fed. Appx. 539, 541 (9th Cir. 2007) (denial reversed where plaintiffs showed additional information was crucial to their claim).

Putman, at 979 (citations and quotations omitted).

The right of discovery and the rules of discovery are integral to the civil justice system. ... The “right of access includes the right of discovery authorized by the civil rules, subject to the restrictions contained therein.”

Lowy v. PeaceHealth, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012);

Cedell v. Farmers Ins. Co. of Washington, 176 Wn.2d 686, 695, 295 P.3d 239 (2013) (“The right to discovery is an integral part of the right to access the courts embedded in our constitution.”).

- Providence claimed Kafka already obtained a continuance. CP 220.
- In making this argument, Providence blatantly ignored and then denied the contents of the trial court’s October 14, 2014 Minute Order, CP 302, which explicitly granted Kafka’s pro se oral “motion for a continuance **in order to obtain counsel**”. CP 302 (emphasis added). *See also* CP 298 (K. Kafka Decl.); CP 303 (D. Kafka Decl.);²⁰ CP 261-62.²¹

²⁰ Douglas Kafka, Sr., testified: “The Court ordered that I had 30 days to obtain counsel. The Court did not order that I had 30 days to respond to Defendant’s Summary Judgment Motion. I complied with the Court’s order and obtained counsel within the 30 days I was permitted.” CP 303.

²¹ Previous attorney David Duce testified he was informed the Kafkas’ claims would be summarily dismissed on November 14, 2014, unless an attorney appeared of record before that date. If an attorney did appear, “the Kafkas would have satisfied the court’s October [14], 2014 order, and I would then have an opportunity” to review the merits of the case. CP 261-62.

- Providence argued that to obtain a continuance, CR 56(f) actually required Kafka to present an expert declaration setting forth the supported medical opinion on a more probable than not basis. CP 218.
- This frivolous argument actually states the burden for CR 56(e), *Keck*, at 91, not for a continuance under CR 56(f).
- Providence speculated that a continuance would not change the lack of an expert declaration. CP 219.
- As the record (including Nurse Wanek’s declaration) and the applicable cases show, Providence was factually and legally wrong.

Cases in which the trial court properly denied a CR 56(f) continuance are entirely distinguishable. *Mutual of Enumclaw v. Archer Constr.*, 123 Wn. App. 728, 744, 97 P.3d 751 (2004), the only case cited by Providence applying CR 56(f) (CP 218), was a declaratory judgment action to determine whether insurance coverage existed for claims against the general contractor of a condominium project. The evidence for which the general contractor sought a continuance—“additional discovery on alleged missing endorsements to the policy”, *id.* at 732—did not raise a genuine issue of material fact. Coverage was definitively established through the existing evidence previously developed in discovery. *Id.* at 744. See also *Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn. App. 899, 902-03, 973 P.2d 1103 (1999) (distinguishing *Coggle*; no abuse of

discretion in denying continuance where moving party “might have had the right to a continuance given their late substitution of counsel”, but had several weeks between oral grant of summary judgment and entry of order to file affidavits or complete the record and did not); *Vant Leven v. Kretzler*, 56 Wn. App. 349, 352-53, 783 P.2d 611 (1989) (no abuse of discretion in denying continuance where case was pending for 21 months, some discovery occurred, plaintiff had no explanation for inability to obtain expert opinion and did not show what evidence might be established through further discovery).

In contrast, in this medical malpractice action, Kafka’s counsel (Mr. Krafchick) explained repeatedly and in detail the expert testimony he sought through a continuance and reported his continuing efforts to obtain it. His investigation was based on initially incomplete medical records, without discovery. Mr. Krafchick made the request for a continuance orally in court on February 5, 2015, and through declarations on February 17, 2015, February 25, 2015, and March 2, 2015. CP 65; CP 34-36; CP 29-33. On March 3, 2015, he submitted the expert’s declaration setting out her well-supported opinion. As discussed above, Providence never refuted the legitimate reasons for the delay and never showed prejudice from a continuance.

The trial court abused its discretion by ignoring the dictates of *Coggle*, *Butler*, and *Keck* and denying Kafka a CR 56(f) continuance.

C. The Trial Court Improperly Denied Reconsideration.²²

1. The Trial Court Erred By Denying Reconsideration In Spite of Kafka’s Expert Declaration.

When the trial court abuses its discretion in denying a motion for a CR 56(f) continuance, the court also abuses its discretion in denying reconsideration. *Coggle*, at 508-09. The trial court’s errors in refusing to evaluate Kafka’s and his expert’s declarations submitted on reconsideration and the impact of these declarations on summary judgment “flow[s] from the court’s initial denial”. *Id.* “In the alternative, if the court considered the declarations and concluded they did not raise an issue of material fact, then ... the court erred as a matter of law”, and the Court may “reverse on that basis.” *Coggle*, at 509.

Here, as discussed, Kafka’s expert declaration by Nurse Wanek was available to the court on March 3, 2015, before it denied

²² CR 59(a) provides allows the court to grant reconsideration for “any one of the following causes materially affecting the substantial rights” of the parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial; ...

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial; ...

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law; ...

(9) That substantial justice has not been done.

reconsideration. If the court did not consider Nurse Wanek's declaration, then it abused its discretion.

2. The Expert's Declaration Was Newly Discovered Evidence.

Alternatively, the trial court abused its discretion in denying reconsideration because Kafka's expert declaration was newly discovered evidence which could not have been discovered with reasonable diligence before the summary judgment hearing, under CR 59(a)(4).²³ Kafka described the expert testimony he was in the process of securing as soon as Mr. Krafchick appeared in this case, first on a theory of overprescribing medications, then on the grounds established by Nurse Karen Wanek's expert opinion. Nurse Wanek's declaration filed March 2, 2015 was based on a "new and previously unavailable liability theory". CP 56; CP 59-65; CP 170-72. The trial court's denial of reconsideration for newly discovered evidence is based on untenable grounds and is therefore an abuse of discretion.

Moreover, as in *Coggle*, the present situation is distinguishable from cases where the court properly refused to consider evidence

²³ To qualify as newly discovered evidence, the information must (1) probably change the result of the decision; (2) have been discovered since the decision; (3) could not have been discovered before then by the exercise of due diligence; (4) be material; and (5) not be merely cumulative or impeaching. *Go2net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88-89, 60 P.3d 1245 (2003) (citing *Holaday v. Merceri*, 49 Wn. App. 321, 329, 742 P.2d 127 (1987)). Kafka satisfied all of these grounds.

submitted on reconsideration, because in those cases, unlike here, the “evidence ... could have been discovered prior to the trial court’s ruling.” *Coggle*, 56 Wn. App. at 509 n.3 (citing *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989); *Richter v. Trimberger*, 50 Wn. App. 780, 785, 750 P.2d 1279 (1988)).

The cases cited by Providence after the trial court denied reconsideration are distinguishable. CP 10-11. In *Go2net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88-89, 60 P.3d 1245 (2003), the evidence presented by the party requesting reconsideration was not "newly discovered" since it was produced to the moving party the day before the summary judgment hearing and entry of the order, and unlike *Kafka*, the moving party had **not** sought a continuance. *Wagner Development, Inc. v. Fidelity & Deposit Co.*, 95 Wn. App. 896, 977 P.2d 639 (1999) was a wrongful attachment action where the court affirmed the trial court’s refusal to consider late documents on reconsideration, because the evidence was previously available but not offered until after *Wagner’s* unsuccessful summary judgment motion. *Id.* at 900, 907.

Meridian Minerals Co. v. King County, 61 Wn. App. 195, 203, 810 P.2d 31 (1995), *Adams v. W. Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989), and *Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010) likewise have no bearing on this case. In *Meridian*, a land use

dispute, the parties stipulated to the pertinent facts on summary judgment challenging one decision “in light of the *facts found by*” defendant King County Building and Land Development Division, and agreed “they would not assert any issues of fact.” *Id.* at 198 (emphasis in original); *id.* at 203. In those circumstances, the trial court did not err by excluding voluminous additional evidence offered by Meridian on its motion for reconsideration, “in disregard of the parties’ stipulation.” *Id.* at 203-04. Moreover, unlike this case, in *Meridian*, the order denying summary judgment was not a final appealable order. *Id.* at 204.

In *Adams*, a personal injury action, the court affirmed the denial of plaintiff’s motion for reconsideration of summary judgment dismissal, because plaintiff’s realization that the first expert declaration was insufficient did not make her expert’s later, more detailed declaration “newly discovered evidence.” The expert’s testimony was available to plaintiff at the time she presented the first declaration to the court. *Id.* at 608. Here, however, Nurse Wanek’s was the first and only detailed expert declaration; the trial court should have granted a continuance to allow Kafka time to obtain it, or reconsidered and vacated the grant of summary judgment dismissal, with a continuance.

In *Sligar*, a dog bite case, plaintiff’s new declaration on her motion for reconsideration was not “newly discovered evidence” because she

failed to show she could not have presented it when the court was considering the summary judgment motion. *Id.* at 734. Here, in contrast, Kafka fully demonstrated why he could not provide the expert testimony earlier. e.g. CP 34-36; CP 29-33.

In addition, a trial court may reconsider its summary judgment order if “there is no evidence or reasonable inference from the evidence to justify ... the decision, or [the decision] is contrary to law,” or “substantial justice has not been done.” CR 59(a)(7), (9); *Keck v. Collins*, 181 Wn. App. at 94. In this case, granting summary judgment was entirely contrary to law because Kafka had met the requirements for a CR 56(f) continuance. *Coggle; Butler; Keck*. Moreover, genuine issues of material fact existed as to whether Providence properly served its motion on the Estate and Kristen Kafka. With Kafka’s unrefuted expert declaration in the record before the court, there was no evidence or reasonable inference to justify dismissing Kafka’s medical malpractice claims. *Coggle*, 56 Wn. App. at 509 n.4 (contrasting *Vant Leven v. Kretzler*, 56 Wn. App. 349, 783 P.2d 611 (1989)). The court misapplied the law on all three motions and never addressed the disputed facts.

The court abused its discretion on Kafka’s motion for reconsideration, requiring reversal.

D. The Trial Court Erred As A Matter of Law In Granting Summary Judgment.

1. Summary Judgment Was Defeated By Kafka's Expert Declaration.

As noted, if the trial court considered Kafka's expert declaration, then it erred as a matter of law in granting summary judgment dismissal. *Cogle*, at 508-09; *Keck*, 181 Wn. App. at 81-82. If the court did not consider the expert declaration, that decision would also be reversible error. *Cogle*, at 508-09; *Keck*, at 93.

[T]he determining factor is whether the evidence was “on file” with the trial court, CR 56(c), and “called to the attention of the trial court” on summary judgment, RAP 9.12 While Dr. Li's third affidavit was untimely under CR 56(c), the clerk accepted the filing. See CR 5(e). Under these circumstances, the evidence was available to the trial court for potential consideration on summary judgment. Striking the evidence does not change our conclusion that the third affidavit was “on file” with the trial court, CR 56(c), and “called to the attention of the trial court” on summary judgment, RAP 9.12; see *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009) (“[M]aterials submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration as is true of evidence that is removed from consideration by a jury; they remain in the record to be considered on appeal.”); accord *Ensley*, 155 Wn. App. at 751 n.7.

Keck, at 81-83 (footnote omitted; emphasis added). See also *Keck*, at 86-87.²⁴

²⁴ *Keck* turned to previous Washington Supreme Court decisions favoring consideration of all available evidence on summary judgment so that plaintiff's claims may be heard on the merits:

[S]ummary judgment ... may not ... encroach upon a litigant's right to place his evidence before a jury of his peers. Summary judgment is a procedure for testing the existence of a party's evidence. Only where it appears from the pleadings, depositions and affidavits on file that a party will not be able to present an issue of material fact before the trier of fact should a summary judgment be granted.

Cofer v. Pierce County, 8 Wn. App. 258, 261-262, 505 P.2d 476 (1973) (emphasis added). As the court stated in *Coggle*, “the courts indulge a certain degree of leniency in reviewing the affidavits of the nonmoving party. ... Upon review of the entire declaration, we believe that, while not a model of legal precision, Dr. Billingsley's declaration successfully raises an issue of fact as to Snow's compliance with the standard of care and causation.” *Id.* at 511-512 (citation omitted). “We also conclude that *Coggle's* response was sufficient to defeat the motion for summary judgment as to the informed consent claim.” *Id.*

Here, Nurse Wanek’s declaration was in the court record on March 2, 2015, “available” to the trial court in resolving Kafka’s motion for

In a seminal case, our Supreme Court held, “We feel impelled to set aside the summary judgment, lest there be evidence available that will support the plaintiff's allegations.” *Preston v. Duncan*, 55 Wn.2d 678, 683, 349 P.2d 605 (1960). After all,

“Summary judgment procedure ... is a liberal measure, liberally designed for arriving at the truth. Its purpose 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.”

Id. ...; see also ... *Babcock v. State*, 116 Wn.2d 596, 599, 809 P.2d 143 (1991) (“Summary judgment exists to examine the sufficiency of legal claims and narrow issues, not as an unfair substitute for trial.”).

Keck, at 86-87.

reconsideration, decided the next day. The trial court's order denying reconsideration lists the Declaration of Krafchick as well as Kafka's Reply on the motion. The trial court should have considered Kafka's expert testimony when reviewing Kafka's motion for reconsideration of the denial of a CR 56(f) continuance and grant of summary judgment. *Keck*, at 93; *Coggle*, at 508-09. The court erred as a matter of law if it ignored the expert declaration, which clearly raised genuine issues of fact to defeat Providence's summary judgment motion and allow Kafka's claims to proceed to a jury on the merits. *Id.*

2. Summary Judgment Was Improper Because Questions Of Fact Exist As To Whether Providence Properly Served Its Motion On The Estate.

In the event that this Court reverses on the grounds that the trial court erred in denying Kafka's motion for a CR 56(f) continuance and motion for reconsideration and in granting summary judgment, this Court will not need to address whether the trial court erred in dismissing the Estate's and Kristen Kafka's claims, when the parties vigorously disputed whether Providence properly served Ms. Kafka with its motion. Nevertheless, insufficiency of service on Kristen Kafka is an alternative basis to reverse the order granting summary judgment dismissal of the Estate's and Ms. Kafka's claims.

Kristen Kafka, the Personal Representative of the Estate of Douglas Kafka, Jr., testified she did not receive service of Providence's re-filed summary judgment motion when she was unrepresented, and had no knowledge of it until February 2, 2015, three days before the summary judgment hearing. Mr. Krafchick did not represent Ms. Kafka until after he informed her of Providence's motion on February 2, 2015. Both Ms. Kafka and Douglas Kafka, Sr., testified they separately informed Providence that Ms. Kafka did not live at her parents' Camano Island address—Mr. Kafka told Providence at the October 14, 2014 hearing in court; and Ms. Kafka told Providence in November. CP 39-40; CP 43, CP 185-86, CP 187-88.

Providence flatly denied any knowledge that Ms. Kafka lived elsewhere, and blamed the family's prior counsel, Mr. Duce, for stating she lived at her parents' address. CP 40. *See also* CP 216-17. Providence's denial never resolved the disputed issue of fact as to whether it properly served Ms. Kafka and the Estate. Unbeknownst to the parents, during that time, Ms. Kafka was in contact with potential expert Baggenstos. This information, together with Mr. Krafchick's appearance and request in court on February 5, 2015, justified a CR 56(f) continuance and also defeated summary judgment. The trial court had no proper basis to dismiss the Estate's and Ms. Kafka's claims on summary judgment. At

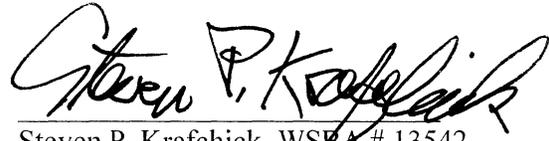
a minimum, dismissal of the Estate's and Ms. Kafka's claims must be reversed.

VI. CONCLUSION

The trial court abused its discretion in denying Kafka's motion for a CR 56(f) continuance, when Kafka had new counsel who demonstrated multiple good reasons for the delay in obtaining an expert opinion to defeat Providence's summary judgment motion. In *Keck, Coggle, and Butler*, this Court instructed that the trial court has a duty to allow medical malpractice plaintiffs the opportunity to complete the record before ruling on the claims. Particularly where there is no trial date, no case deadlines, and no formal discovery, the court must grant a continuance so the claims can be resolved on the merits, rather than dismissed due to strict adherence to procedural deadlines.

The trial court also abused its discretion by failing to grant reconsideration when Kafka's expert declaration was available in the record, and erred as a matter of law in granting summary judgment dismissal when the expert opinion raised genuine issues of material fact. The trial court erred as a matter of law in granting summary judgment dismissing the Estate's and Kristen Kafka's claims, when the parties vigorously disputed whether Providence properly served its motion on them. The case should be reversed and remanded for trial.

DATED: July 29, 2015.

A handwritten signature in black ink that reads "Steven P. Krafchick". The signature is written in a cursive style with a large, stylized initial "S".

Steven P. Krafchick, WSBA # 13542
Carla Tachau Lawrence, WSBA #14120

**APPENDIX I
TIMELINE OF PROCEDURAL HISTORY**

Estate of Douglas E. Kafka, Jr., et al., v. Providence Health & Services, et al.

DATE	Description	CP No.
April 18, 2014	Kafkas (pro se) file Complaint. (Statute of limitations tolled by Kafka's request for mediation. RCW 7.70.110.)	CP 337-47 CP 342 (§2.2); CP 252 (noting request for mediation)
September 12, 2014	Providence files Motion for Summary Judgment against Kafka (pro se), noted for October 14, 2014.	CP 324-30
October 9, 2014	Providence files reply on its Summary Judgment Motion.	CP 320-23
October 14, 2014	Hearing in Snohomish County Superior Court (Judge Ellen Fair). Decedent's father, Douglas Kafka, Sr., appearing pro se , requests continuance. Court enters Order granting Kafka's "motion for continuance in order to obtain counsel ". Summary Judgment Motion continued to November 14, 2014. Mr. Kafka, Sr., informs Providence's counsel that Personal Representative Kristen Kafka does not reside with the parents on Camano Island.	CP 302, CP 319 CP 186 (K. Kafka Decl.) CP 187 (D. Kafka, Sr., Decl.)
November 2014	Kristen Kafka informed Providence's attorney (Erica Roberts) she did not live with her parents.	CP 43 (K. Kafka Decl., Feb. 5, 2015)

DATE	Description	CP No.
November 13, 2014	Attorney David Duce meets with Kafkas, requests reasonable briefing schedule from Providence; Providence extends and renotes summary judgment motion only 2 weeks, to November 25, 2014.	CP 262 (Declaration of David Duce, ¶¶ 3-4; filed Nov. 24, 2014)
November 14, 2014	Attorney Duce files Notice of Appearance for plaintiffs.	CP 316-18
November 24, 2014	Attorney Duce files Response to Providence's Summary Judgment Motion.	CP 306-15
	Parties agree to strike Providence's Summary Judgment Motion.	CP 64 (Krafchick Decl. on Motion for Reconsideration)
December 5, 2014	Mr. Duce files Notice of Intent to Withdraw as of December 15, 2014.	CP 259-60, 249-50
January 5, 2015	Providence re-files Motion for Summary Judgment, noted for February 5, 2015. Providence mails Motion to home address of decedent's parents. Personal Representative of Estate of Douglas Kafka, Jr. (Kristen Kafka) did not reside there and did not receive Motion or notice of it. Providence denies being informed that Kristen Kafka did not live at parents' residence.	CP 251-58 CP 177 CP 40
January 22, 2015	Attorney Steven Krafchick files Limited Notice of Appearance Re: Defendants' Motion for Summary Judgment.	CP 235-37

DATE	Description	CP No.
January 22, 2015	Kafka (Mr. Krafchick) files Motion to Continue Defendants' Summary Judgment Motion to March 5, 2015.	CP 232-34 (Motion); CP 223-25 (Declaration of Steven Krafchick)
January 29, 2015	After forensic pathologist reviews partial medical records on theory of overprescribing medications and cannot offer opinion, Kafka does not confirm Motion to Continue SJ, which is stricken from calendar.	CP 47, CP 170
January 30, 2015	Providence files Opposition to Motion to Continue SJ.	CP 213-22
February 2, 2015	Mr. Krafchick has first contact with Kristen Kafka, Personal Representative of Estate of Douglas Kafka, Jr. Kristen Kafka receives first notice of Providence's new summary judgment motion. Kristen Kafka discusses testimony of potential expert Baggenstos, but Baggenstos is out-of-town and unable to provide opinion until after summary judgment hearing.	CP 185 (K. Kafka Decl.); CP 176, lines 3-12 CP 15, CP 62-63 (Krafchick Decls.)
February 5, 2015	Hearing on Providence's Summary Judgment Motion. Kafka's counsel requests continuance, informing court that as new counsel, he was seeking expert testimony, which he described. Orders Granting Summary Judgment, Denying Motion for Continuance.	CP 169, CP 35 (Krafchick Decl.) CP 182-84

DATE	Description	CP No.
February 15, 2015	Sunday	
February 16, 2015	President's Day Holiday	
February 17, 2015	<p>Kafka files Motion for Reconsideration, requesting 60 days' extension, demonstrating:</p> <ul style="list-style-type: none"> ▪ Kafka was pro se when Providence served SJ Motion by mail to parents' residence, where PR Kristen Kafka did not live; ▪ Kafka parents retained counsel about 2 weeks before the Feb. 5, 2015 SJ hearing date; ▪ Kafka filed motion for CR 56(f) continuance, but did not confirm it when there was no expert testimony; ▪ At Feb. 5, 2015 hearing, Kafka's counsel informed the court of the above facts, including his need for time to consult with new potential expert (Baggenstos); ▪ Kafka was unable to secure expert Baggenstos's declaration in time to move for reconsideration. 	<p>CP 166-73 (Motion) CP 59-65 (Declaration of Steven Krafchick)</p>
February 20, 2015	Nurse Baggenstos withdraws due to conflict of interest.	CP 16, CP 35 (¶7)

DATE	Description	CP No.
February 24, 2015	Kafka files Reply on Motion for Reconsideration, stating Nurse Baggenstos is unable to provide expert testimony due to conflict of interest (ongoing working relationship with Providence)	CP 54-58
February 25, 2015	Mr. Krafchick files additional Declaration on Motion for Reconsideration, identifying new expert Karen Wanek, M.S.N., R.N.	CP 34-38
March 2, 2015	Mr. Krafchick files Declaration providing expert testimony by Karen Wanek, RN, in support of Motion for Reconsideration	CP 29-33
March 3, 2015	Order Denying Plaintiffs' Motion for Reconsideration of Court's Order Granting Summary Judgment to Providence.	CP 6-7

FILED

 CL16730446	SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY	2014 OCT 14 AM 11:17 SONYA KRASKI COUNTY CLERK SNOHOMISH CO. WASH
--	--	---

ESTATE OF DOUGLAS E. KAFKA JR. ET AL (PLAINTIFF)	CAUSE NO.:	14-2-03559-2
VS.	JUDGE:	ELLEN J. FAIR
PROVIDENCE HEALTH & SERVICES ET AL (DEFENDANT)	REPORTER:	NOT REPORTED
	CLERK:	CASEY R. BRESIN
	DATE:	10-14-14 @ 9:30 A.M.

THIS MATTER CAME ON FOR: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
CONTINUED DATE/TIME/CALENDAR AND CONTINUANCE CODE: 11-14-14 / 9:30 A.M. / HCNTDA (MA)
HEARING DATE SET/TIME/CALENDAR CODE:

ACTION:
HEARING STRICKEN/CODE:
PLAINTIFF DOUGLAS KAFKA SR. APPEARED: YES COUNSEL: PRO SE
DEFENDANTS APPEARED: THROUGH COUNSEL COUNSEL: ERICA ROBERTS
OTHER PARTIES PRESENT:

DOCUMENTS FILED:
ORDERS ENTERED: ORDER

PROCEEDINGS/COURT'S FINDINGS:
PLAINTIFF'S MOTION FOR A CONTINUANCE IN ORDER TO OBTAIN COUNSEL:
GRANTED. THE PLAINTIFF HAS 30 DAYS TO OBTAIN COUNSEL, OTHERWISE DEFENDANT'S
MOTION WILL GO FORWARD.

DEFENDANT PROVIDENCE HEALTH & SERVICES, DEFENDANT PROVIDENCE HEALTH &
SERVICES WESTERN WASHINGTON, DEFENDANT PROVIDENCE HEALTH & SERVICES
WASHINGTON, AND DEFENDANT PROVIDENCE EVERETT MEDICAL CENTER'S MOTION FOR
SUMMARY JUDGMENT: NOT RULED UPON.

MA
10/14/14

FILED

2014 OCT 14 AM 11:17

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



CL16730447

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

Kafka PLAINTIFF/PETITIONER

and

Providence DEFENDANT/RESPONDENT

NO. 14-2-03559-2

ORDER

IT IS HEREBY ORDERED: that this motion for summary
judgment be continued 30 days to
be heard on November 14, 2014.

DONE IN OPEN COURT this date: 10-14-14

Presented By:

Gregory M. Roberson WSBA #
US519
D. E. Kafka Sr.

EMMY H.
JUDGE / COURT COMMISSIONER

Copy Received:

9

FILED

2015 FEB -9 AM 10:30

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



CL17128504

Date: February 5, 2015
Time: 9:30 a.m.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH**

**ESTATE OF DOUGLAS E. KAFKA, JR.,
KRISTEN M. KAFKA, individually and as
the personal representative for the Estate of
Douglas E. Kafka, Jr., DOUGLAS E.
KAFKA, SR., and SUSAN G. KAFKA, as
individuals and for the marital community,**

Plaintiffs,

vs.

**PROVIDENCE HEALTH & SERVICES, an
active Washington corporation;
PROVIDENCE HEALTH & SERVICES
WESTERN WASHINGTON, an active
Washington corporation, PROVIDENCE
HEALTH & SERVICES WASHINGTON,
an active Washington corporation,
PROVIDENCE EVERETT MEDICAL
CENTER, an active Washington corporation,
and "Does" 1 through 40, inclusive,**

Defendants.

NO. 14-2-03559-2

**ORDER GRANTING PROVIDENCE
HEALTH & SERVICES, PROVIDENCE
HEALTH & SERVICES WESTERN
WASHINGTON, PROVIDENCE
HEALTH & SERVICES d/b/a
PROVIDENCE REGIONAL MEDICAL
CENTER EVERETT'S MOTION FOR
SUMMARY JUDGMENT**

Clerk's Action Required

[Proposed]

THIS MATTER having come regularly before the Court upon motion of Providence Health & Services, Providence Health & Services Western Washington, and Providence Health & Services Washington d/b/a Providence Regional Medical Center Everett ("Providence") for an

[PROPOSED] ORDER GRANTING
PROVIDENCE'S MOTION FOR SUMMARY
JUDGMENT - 1

ORIGINAL

FLOYD, PFLUEGER & RINGER P.S.
200 WEST THOMAS STREET, SUITE 300
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

CLOSED

35

1 order summarily dismissing all Plaintiffs' claims with prejudice, and the Court, having reviewed
2 all pleadings and files herein, including:

- 3 1. Providence's Motion for Summary Judgment and supporting declaration;
- 4 2. Plaintiffs' Response and supporting declaration, if any;
- 5 3. Providence's Reply, if any;
- 6 4. _____;
- 7 5. _____;
- 8 6. _____;
- 9 7. The oral arguments of the parties;

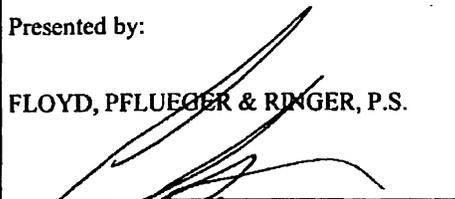
10 NOW, THEREFORE,

11 IT IS HEREBY ORDERED that Providence's Motion for Summary Judgment is
12 GRANTED in its entirety. IT IS FURTHER ORDERED, ADJUDGED and DECREED that all
13 Plaintiffs' claims against Providence be dismissed with prejudice.

14 There being no just reason for delay, the clerk is hereby directed to enter judgment upon
15 this matter forthwith.

16 DONE IN OPEN COURT this 5th day of Feb, 2015.

17
18 
HONORABLE/COMMISSIONER

19 Presented by:
20 FLOYD, PFLUEGER & RINGER, P.S.
21 
22 Rebecca S. Ringer, WSBA #16842
23 Colin F. Kearns, WSBA # 45282
Of Attorneys for Defendants

24 [PROPOSED] ORDER GRANTING
25 PROVIDENCE'S MOTION FOR SUMMARY
JUDGMENT - 2

FLOYD, PFLUEGER & RINGER P.S.
200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

FILED

2015 FEB 17 PM 4:35

SUNYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



CL17129838

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

ESTATE OF DOUGLAS E. KAFKA, JR., et
al.

NO. 14-2-03559-2

Plaintiffs,

v.

PROVIDENCE HEALTH & SERVICES, et
al.,

STEVEN P. KRAFCHICK
DECLARATION IN SUPPORT OF
PLAINTIFFS' MOTION FOR
RECONSIDERATION OF ORDER
GRANTING DEFENDANTS'
SUMMARY JUDGMENT MOTION

Defendants.

Steven P. Krafchick, attorney for Plaintiffs, makes the following statement under
penalty of perjury under the laws of the State of Washington:

1. Attached as **Exhibit 1** are true and correct copies of Douglas E. Kafka, Jr.'s
Providence Regional Medical Center records bates stamped 1-20.
2. These records set out some of the basic facts.
 - a. Douglas Kafka was admitted to the hospital March 10, 2010 through the
emergency room because of an infection in his left thigh from him injecting
himself with morphine for back pain.

SK DECLARATION IN SUPPORT OF PLAINTIFFS'
MOTION FOR RECONSIDERATION OF COURT'S
ORDER GRANTING SJ TO DEFENDANTS - 1

KRAFCHICK LAW FIRM PLLC
100 W. HARRISON
SOUTH TOWER, SUITE 300
SEATTLE, WASHINGTON 98119
(206) 374-7370 FAX: (206) 374-7377
KLF@KRAFCHICK.COM

43

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

- b. Douglas Kafka remained in the hospital until he died 4/21/2010 at 1:41 AM of a reported cardiac arrest.
 - c. Douglas Kafka was therefore in the hospital 42 days, under the hospital's care.
 - d. Providence developed a Master Care Plan for Douglas Kafka based after drug paraphernalia was discovered in his room. Pursuant to that Plan he was not permitted visitors from 4/14/2010 until 4/21/2010 (7 days). He died on 4/21/2010 before his visiting hours occurred. The day he died was the first day the Plan would permit visitors, visits which never occurred because of his death.
 - e. As part of the plan, the hospital wanted to address the negative urine screens for benzodiazepines and opiates which he had been given during his hospital stay. These negative urine scans occurred a couple times with no evidence of opiates or benzodiazepines. This was information that should have led the hospital to understand that Douglas Kafka was not taking his pills as directed or was providing someone else's urine. This is further complicated by the absence of a Medication Log in the records we have.
 - f. These negative urine screens were evidence Douglas Kafka was either "cheeking" his oxycodone and tramadol pills (not swallowing them and stashing them) or he had urine that was not his. Given the restricted visitation and his death due to oxycodone intoxication, it is most likely he was cheeking and stashing the oxycodone to take at a later time. Yet the hospital did nothing to find pills he had stashed even once they put in place the Master Care Plan.
- We expect this to be the testimony of the Nurse, Case Planner Baggestos.

SK DECLARATION IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION OF COURT'S ORDER GRANTING SJ TO DEFENDANTS - 2

KRAFCHICK LAW FIRM PLLC
100 W. HARRISON
SOUTH TOWER, SUITE 300
SEATTLE, WASHINGTON 98119
(206) 374-7370 FAX: (206) 374-7377
KLF@KRAFCHICK.COM

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

g. In the master care plan, Doug agreed to take all medications in front of a nurse who will check that he actually swallowed the medications. This is something that Providence could have done once they had the first negative urine screen when they were giving him oxycodone. Exhibit 3 below indicates that ingesting oxycodone should be evident from evaluating urine for up to 3 days following ingestion. This is something Nurse Baggenstos is expected to testify should have happened at least after the first negative urine tox screen.

h. The medical examiner on autopsy attributed his death to oxycodone intoxication. Exhibit 4.

- 3. Attached as Exhibit 2 is a true and correct copy of Opiate vs. Opioid – What’s the Difference, <http://opium.com/derivatives/opiate-vs-opioid-whats-difference>. This online site identifies oxycodone as an opioid.
- 4. Attached as Exhibit 3 is a true and correct copy of a Mayo Clinic online document that shows that opiates such as hydrocodone can be detected in the urine for up to 3 days after ingestion. It also identifies oxycodone as an opiate. The web address where this information appears is: <http://www.mayomedicallaboratories.com/articles/drug-book/opiates.html>.
- 5. Attached as Exhibit 4 is a true and correct copy of a printout from the internet reviewed by a physician regarding the effects of Benadryl and oxycodone, indicating that there is an increased sedating effect when the two are taken together as was the case in the prescribing of these two medications to Douglas Kafka leading to his death.

SK DECLARATION IN SUPPORT OF PLAINTIFFS’
MOTION FOR RECONSIDERATION OF COURT’S
ORDER GRANTING SJ TO DEFENDANTS - 3

KRAFCHICK LAW FIRM PLLC
100 W. HARRISON
SOUTH TOWER, SUITE 200
SEATTLE, WASHINGTON 98119
(206) 374-7370 FAX: (206) 374-7377
KLF@KRAFCHICK.COM

- 1 6. Attached as Exhibit 5 is the medical examiner's report on the evaluation of the
- 2 decedent concluding he died as a result of oxycodone overdoes combined with
- 3 Benadryl.
- 4 7. We conducted a computer search for Kristin Kafka to see if we could locate her
- 5 online. Through Accurant we were able to find her current address. She has lived
- 6 there since last year, so Defense Counsel could have done a similar search after being
- 7 informed Kristin Kafka no longer lived at her parents' Camano Island address. Our
- 8 report also identified her prior Camano Island address. Our ability to locate Ms.
- 9 Kafka, the PR by a simple computer search underscores the lack of diligence of
- 10 defense counsel once they were told Kristin Kafka no longer resided with her parents
- 11 on Camano Island. See DKTs 24 and 25.
- 12 8. Docket 24 in the Court's file is the filed Declaration of Douglas Kafka Sr filed on
- 13 11/22/2015. He testifies that he informed counsel for defendants that Kristin Kafka the
- 14 PR did not live with them anymore.
- 15 9. Docket 25 in the Court file is the filed Declaration of Kristin Kafka, the personal
- 16 representative of the Estate of the Decedent Douglas Kafka. She makes clear that she
- 17 no longer lived with her parents in January 2015, and that she did not learn of the
- 18 summary judgment motion set for February 5 until February 2, 2015. That is why she
- 19 did not proceed with getting declaration from Nurse Baggenstos despite knowing that
- 20 she supported the case.
- 21 10. Docket 14 is also a Declaration of Kristin Kafka showing issues that should justify a
- 22 continuance to make sure the record is complete as well as difficulties she has had in
- 23 obtaining counsel. It notes that the Defendant "lost" her decedent brother Douglas
- 24
- 25
- 26

SK DECLARATION IN SUPPORT OF PLAINTIFFS'
 MOTION FOR RECONSIDERATION OF COURT'S
 ORDER GRANTING SJ TO DEFENDANTS - 4

KRAFCHICK LAW FIRM PLLC
 100 W. HARRISON
 SOUTH TOWER, SUITE 300
 SEATTLE, WASHINGTON 98119
 (206) 374-7370 FAX: (206) 374-7377
 KLR@KRAFCHICK.COM

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Kafka' personal effects. It notes she had talked with Nurse Baggenstos as far back as November and knew that she would support the case. However, without counsel, and with knowledge that the summary judgment was refiled, she did not know she needed a declaration from Ms. Baggenstos.

11. Furthermore, I was never informed Ms. Baggenstos or her opinions as a possible witness in time to provide that information in a response to summary judgment. I learned of her name and potential opinions for the first time February 2, 2015, but I was unable to contact her until after the hearing to confirm she would indeed support the case, had reviewed the records, but had never been asked by prior counsel to prepare a declaration.

12. In fact, I was first able to speak with her today to confirm that she has opinions that include Defendants failure to monitor closely the drugs being prescribed in light of decedent Douglas Kafka's known drug abuse and his underlying heart condition. She is unable to provide any declaration confirming her opinions until later this week as she is not at home where she has her records, and will not return home until tomorrow evening. She was out of town all of last week.

13. This means we can work with her to get a declaration to the Court by Thursday afternoon or Friday this week, and we ask the Court's indulgence to let us do that in the interests of justice.

14. The context of this motion is important as the Motion as originally brought in October by Defendants. Plaintiff responded while being represented by Mr. Duce. The Court continued the motion and gave Plaintiffs time to locate other counsel.

SK DECLARATION IN SUPPORT OF PLAINTIFFS'
MOTION FOR RECONSIDERATION OF COURT'S
ORDER GRANTING SJ TO DEFENDANTS - 5

KRAFCHICK LAW FIRM PLLC
100 W. HARRISON
SOUTH TOWER, SUITE 300
SEATTLE, WASHINGTON 98119
(206) 374-7370 FAX: (206) 374-7377
KLF@KRAFCHICK.COM

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

15. The court record shows that while the Mr. Duce represented Plaintiffs, the Defendants filed a motion for summary judgment on 9/12/2014 (Dkt 5); renoted the motion for 10/14/2014 before Judge Fair. The motion at that time was continued. DKT 9. David Duce appeared on 11/14/2014, for all Plaintiffs. DKT 10. Defendants renoted their summary judgment DKT 11. Mr. Duce provided a response. DKT 11-16. The motion was cancelled by mutual request of the parties. Mr. Duce then filed a Notice of Intent to Withdraw on 12/5/2014. DKT 17. The Summary Judgment motion was then renoted for January 5, 2015 by agreement. On 1/22/2015, I filed a limited Notice of Appearance. DKT 22, and a Motion to Continue the Summary Judgment motion set for February 5, 2015.

16. Unaware of Ms. Baggenstos, we had the case reviewed by a forensic pathologist who based on the records could not identify any negligence in the prescribing of oxycontin. However, he did not he did not have the medication log for the hospital, so he did not know precisely how much oxycontin was provided to decedent Douglas Kafka before his death. He also did not comment on Mr. Kafka's underlying heart condition and did not provide a report.

17. Apparently Nurse Practitioner Baggenstos has records that I have not seen obtained from Kristin Kafka. I have only reviewed records provided by defense counsel with their highlighting.

18. The records provided by defense counsel do not include a medication log based on my review nor do they contain the agreement signed by decedent Douglas Kafka before death after they found drug paraphernalia in his room. See Declaration of Kristin Kafka from 11/24/2014, DKT 14. She had a chance to review the records provided by

SK DECLARATION IN SUPPORT OF PLAINTIFFS'
MOTION FOR RECONSIDERATION OF COURT'S
ORDER GRANTING SJ TO DEFENDANTS - 6

KRAFCHICK LAW FIRM PLLC
100 W. HARRISON
SOUTH TOWER, SUITE 300
SEATTLE, WASHINGTON 98119
(206) 374-7370 FAX: (206) 374-7377
KLF@KRAFCHICK.COM

.1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

defense counsel and do some comparison finding at least one very significant difference.

19. When I met with the parents and they retained me they noted that they were missing records.

20. It now appears that Ms. Baggenstos may have those records. I will not be able to obtain and review them until Friday at the earliest.

21. In light of these facts, the Court should reconsider its order dismissing this case and continue the summary judgment motion for 60 days to enable Plaintiff and their counsel to obtain necessary expert evaluations and reports to resist the summary judgment filed by Defendants and granted by the Court.

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct. *Dated 2/17/2015 at Seattle WA.*

KRAFCHICK LAW FIRM PLLC

By: *Steven P. Krafchick*
Steven P. Krafchick, WSBA #13542
Attorney for Plaintiffs

SK DECLARATION IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION OF COURT'S ORDER GRANTING SJ TO DEFENDANTS - 7

KRAFCHICK LAW FIRM PLLC
100 W. HARRISON
SOUTH TOWER, SUITE 300
SEATTLE, WASHINGTON 98119
(206) 374-7370 FAX: (206) 374-7377
KLF@KRAFCHICK.COM

FILED

2015 FEB 25 PM 12:59

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26



CL17110249

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

ESTATE OF DOUGLAS E. KAFKA, JR., et
al.,

Plaintiffs,

v.

PROVIDENCE HEALTH & SERVICES, et
al.,

Defendants.

NO. 14-2-03559-2
KRAFCHICK DECLARATION 3 IN
SUPPORT OF RECONSIDERATION

STEVEN P. KRAFCHICK declares as follows:

1. I hereby incorporate all my prior declarations in this case including the declaration filed in the unconfirmed motion for a continuance and declarations submitted in opposition to the Motion for Summary Judgment and in this motion:

48

- 1 2. As the Court is aware I have not had this case for very long, only a matter of weeks,
- 2 and I have been seeking an expert to evaluate this case on a theory different from
- 3 overprescribing of oxycodone as I told the Court at the Summary Judgment hearing.
- 4 3. At the hearing I asked the Court to deny the motion for summary judgment or continue
- 5 it pursuant to CF 56 to permit me to obtain an expert.
- 6 4. Under 56(f) the court should continue the motion if it appears affidavits cannot be
- 7 timely procured, the Court should continue or dismiss the motion.
- 8 5. At this time, I have an expert reviewing the case. I urge the court to withhold a
- 9 decision on the Motion for Reconsideration until I can get a declaration to submit from this
- 10 expert. From preliminary discussions, it appears that this expert will be able to testify
- 11 regarding hospital negligence with respect to the care and treatment provided to Douglas
- 12 Kafka Jr., leading to his death.
- 13 6. I expect to be able to confirm the expert's opinion and reduce it to writing within the
- 14 next two weeks. I would ask that the Court give us this time.
- 15 7. The expert identified previously in my Motion for Reconsideration told me last Friday
- 16 that her husband did not want her to get involved so she declined to get involved. She was
- 17 concerned that her relationship with the Defendant Providence would be harmed if she
- 18 testified against the hospital. She told me this after she had agreed to provide expert
- 19 testimony.
- 20 8. The expert I have retained is Karen Warnck RN. She is a teaches nursing, and she
- 21 has had experience working in hospital in medical, surgery, and ER services.
- 22 9. She is in the process of reviewing records.
- 23
- 24
- 25
- 26

1 10. I therefore request that the Court delay ruling on the Motion for Reconsideration until ,
2 we have chance to learn this expert's opinion, and , as appropriate, reduce it to declaration
3 form.

4 11. I will advise the Court within the next 2 weeks whether or not, upon review of records
5 this expert can support the case.

6 12. We ask the Court , in the interests of justice, to allow this time.

7
8 DATED this 25th day of February, 2015
9

10 KRAFCHICK LAW FIRM PLLC

11
12
13
14 By: 

15
16 Steven P. Krafchick, WSBA# 13542

17 Attorneys for Plaintiffs
18
19
20
21
22
23
24
25
26



CL17113916

FILED

2015 MAR -2 PM 3:48

JONIA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

THE HONORABLE JUDGE THOMAS WYNNE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

ESTATE OF DOUGLAS E. KAFKA, JR., et al.,

Plaintiffs,

v.

PROVIDENCE HEALTH & SERVICES, et al.,

Defendants.

NO. 14-2-03559-2

KRAFCHICK DECLARATION FOUR
PROVIDING DECLARATION OF KAREN
WANEK, RN IN SUPPORT OF
RECONSIDERATION PURSUANT TO CR
56(f)

STEVEN P. KRAFCHICK declares as follows:

1. I hereby incorporate all my prior declarations in this case including the declaration filed in the unconfirmed motion for a continuance and declarations submitted in opposition to the Motion for Summary Judgment and in this motion.

- 1

KRAFCHICK LAW FIRM PLLC
100 W. HARRISON
SOUTH TOWER, SUITE 300
SEATTLE, WASHINGTON 98119

50

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

- 2. Attached is a true and correct copy of a signed Declaration by Karen Wanek, MSN, RN.
- 3. This declaration was obtained from an expert willing to review the case and the new theory that came up the week of the summary judgment motion for which we requested time pursuant to CR 56(f).
- 4. This declaration supports Plaintiffs' theory of liability.

DATED this 2nd day of March, 2015

KRAFCHICK LAW FIRM PLLC

By: 

Steven P. Krafchick, WSBA# 13542
Attorneys for Plaintiffs

-2

KRAFCHICK LAW FIRM PLLC
100 W. HARRISON
SOUTH TOWER, SUITE 300
SEATTLE, WASHINGTON 98119
(206) 461-1111

Karen L Wanek, Registered Nurse, declares as follows

I am a Master's prepared registered nurse licensed to practice nursing in the states of Washington and California. I have actively been practicing nursing for 15 years in the capacity of acute care nursing in the Emergency Department, Intensive Care Unit, Oncology and as a House Supervisor. I have been teaching nursing in RN, BSN and MSN programs for ten years during which I have taught all levels of pre-licensure nursing. During that time I taught Pharmacology for seven years. As part of my practice as a registered nurse, I have attended and provided care to patients with narcotic seeking behavior, and other critical health issues.

I make this statement based upon my knowledge, training, and experience as a registered nurse and my review of the medical record of Mr. Douglas E. Kafka from Providence Regional Medical Center in Everett, Washington related to Mr. Kafka's admission from March 10, 2010 to his death on April 21, 2010.

The following is a summary of relevant factual content that I found when I reviewed the documentation of Mr. Kafka's case to which I had access:

Mr. Kafka, a 29 year-old male, was admitted to the hospital on March 10, 2010, with an abscess to his left thigh caused by self-reported intramuscular injections of morphine. Mr. Kafka stated that the morphine was obtained, not from a prescription but from a friend. Mr. Kafka reported that there were three of these injections. Mr. Kafka stated that he had been taking 120 mg Oxycodone daily for back pain until two weeks prior to admission when he started injecting morphine. After admission, hospital staff documented that Mr. Kafka exhibited narcotic seeking behaviors, including pocketing of opioids and creating a stash from those medications dispensed in the hospital. Hospital staff documented that on two separate occasions, during a five-day period, drug paraphernalia had been found in his room, and on one occasion, the hospital staff was alerted because a smoke alarm activated while visitors were in the room. Also, on one occasion, the hospital tested urine from Mr. Kafka, and the urine testing was negative for opiates. If he had taken the oxycodone as prescribed there should have been opiates in his urine. As a result, the doctor wrote an order to prohibit visitors to Mr. Kafka's room. On March 20, 2010, after the hospital staff was unable to draw blood from Mr. Kafka's peripherally inserted central catheter (PICC) line came to the nurse's station and informed the nurses that he was able to flush his own PICC line and draw blood. Hospital staff documented a concern that the PICC line had become infected because the patient was using it to inject crushed medication through the line.

On April 14th, XX number of days after he was admitted and XX days after hospital staff had expressed significant concerns about his drug-seeking behavior, the hospital staff put into effect a written Master Care Plan that outlined procedures required to prevent Mr. Kafka from hoarding and using drugs and harming himself. The plan required him to take all medication in front of a nurse who would verify that Mr. Kafka had swallowed the medication by asking him to stick out his tongue and cough. After the plan went into effect, at no time did hospital staff verify that he swallowed his medication. Interestingly this was only ever documented on April 13, 2010, which was before they implemented the Master Care Plan.

This procedure to make sure prescribed oxycodone and other oral medications were actually swallowed was indicated and should have been done from his date of admission given his history and the observations on admission. The failure to make sure he swallowed the oxycodone and other drugs prescribed during his hospitalization and in light of his death due to oxycodone toxicity it is likely that he stashed the drugs rather than swallowed them enabling him to take them leading to his death.

On April 21, 2010, nurses heard a loud noise and subsequently found Mr. Kafka unconscious on the floor leaning against the wall. They were able to arouse him, but five minutes later he went into respiratory then cardiac arrest and died as a result. The autopsy report stated that Mr. Kafka died from accidental acute multidrug intoxication from oxycodone and diphenhydramine. Both of these medications were being administered throughout Mr. Kafka's hospital stay. The autopsy report also states that there is evidence in the lung parenchyma that is consistent with long-term history of grinding up oral medications and then administering them intravenously. The medical examiner also noted that there were multiple scars, recent needle puncture marks and needle tracks on his upper extremities indicating potential injection sites. There is nothing in his treatment record that indicates that these injection sites would have been part of his treatment.

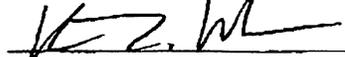
In my professional nursing opinion, it is clear that the level of care provided by the nursing staff responsible for Mr. Kafka's care deviated from and fell below the minimum accepted standard of care required of nurses in that they failed to exercise the degree of skill, care, and learning expected for a patient like Douglas Kafka as follows:

The record shows that Mr. Kafka was at very high risk of abusing narcotics during his hospitalization. Hospital staff expressed concerns about pill hoarding and drug seeking behavior almost immediately being admitted to the hospital. Hospital staff knew he was able to access his own central lines yet there were no measures put into place to secure equipment to prevent this from happening. Very late in his stay they developed a plan to prevent him from hoarding medication but there was no indication that the plan was ever fully implemented. Based on the autopsy findings it is clear that the hospital's actions or lack thereof allowed Mr. Kafka to obtain and self-administer medications in what ultimately proved to be a fatal dose.

According to the Institute of Medicine, "Patients must rely on health care professionals and institutions for their safety and well-being". It was the responsibility of Providence Regional Medical Center to provide a safe environment for Mr. Kafka. Despite a clear understanding of the risks, the hospital utterly failed to take basic measures to assure Mr. Kafka's safety, which ultimately led to his death.

I DECLARE, UNDER PENALTY OF PERJURY, UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 2/27/15 at Arlington, WA



Karen Wanek, MSN, RN

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25



CL16830475

FILED

2015 MAR -3 AM 9:37

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

ESTATE OF DOUGLAS E. KAFKA, JR.,
KRISTEN M. KAFKA, individually and as
the personal representative for the Estate of
Douglas E. Kafka, Jr., DOUGLAS E.
KAFKA, SR., and SUSAN G. KAFKA, as
individuals and for the marital community,

Plaintiffs,

vs.

PROVIDENCE HEALTH & SERVICES, an
active Washington corporation;
PROVIDENCE HEALTH & SERVICES
WESTERN WASHINGTON, an active
Washington corporation, PROVIDENCE
HEALTH & SERVICES WASHINGTON,
an active Washington corporation,
PROVIDENCE EVERETT MEDICAL
CENTER, an active Washington corporation,
and "Does" 1 through 40, inclusive,

Defendants.

NO. 14-2-03559-2

ORDER DENYING PLAINTIFFS'
MOTION FOR RECONSIDERATION OF
COURT'S ORDER GRANTING
SUMMARY JUDGMENT TO
PROVIDENCE

~~[Proposed]~~

THIS MATTER having come regularly before the Court upon motion of the Estate of
Douglas E. Kafka, Jr., Kristen M. Kafka, Douglas E. Kafka, Sr., and Susan G. Kafka for
reconsideration of the Court's order granting summary judgment to Providence, and the Court,
having reviewed all pleadings and files herein, including:

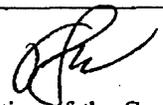
[PROPOSED] ORDER DENYING PLAINTIFFS'
MOTION FOR RECONSIDERATION OF COURT'S
ORDER GRANTING SUMMARY JUDGMENT TO
PROVIDENCE - 1

FLOYD, PFLUEGER & RINGER P.S.
200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

ORIGINAL

51

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

- 1. Plaintiffs' Motion for Reconsideration;
- 2. Declaration of Kristen Kafka;
- 3. Declaration of Douglas Kafka, Sr.;
- 4. Declaration of Steven Krafchick, including exhibits;
- 5. Providence's Opposition to Motion for Reconsideration;
- 6. Declaration of Erica M. Roberts, including exhibits;
- 7. Plaintiff's reply _____;
- 8. _____;
- 9. ~~The oral arguments of the parties, if requested by the Court;~~ 

IT IS HEREBY ORDERED that Plaintiffs' motion for reconsideration of the Court's order granting summary judgment to Providence is DENIED.

DONE IN OPEN COURT this 3rd day of March, 2015.



 JUDGE/COMMISSIONER

Presented by:
 FLOYD, PFLUEGER & RINGER, P.S.



 Rebecca S. Ringer, WSBA #16842
 Erica M. Roberts, WSBA # 45519
 Of Attorneys for Defendants

[PROPOSED] ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF COURT'S ORDER GRANTING SUMMARY JUDGMENT TO PROVIDENCE - 2

FLOYD, PFLUEGER & RINGER P.S.
 200 WEST THOMAS STREET, SUITE 500
 SEATTLE, WA 98119-4296
 TEL 206 441-4455
 FAX 206 441-8484



Courts Home | Search Case Records

Home | Summary Data & Reports | Resources & Links | Get Help



Search | Site Map | eService Center

Superior Court Case Summary

Court: Snohomish Superior
Case Number: 14-2-03559-2

Sub	Docket Date	Docket Code	Docket Description	Misc Info
-	04-18-2014	FILING FEE RECEIVED	Filing Fee Received	240.00
1	04-18-2014	SUMMONS & COMPLAINT	Summons & Complaint	
-	04-18-2014	APPEARANCE PRO SE PSP0001	Appearance Pro Se Kafka, Kristen M	
		PSP0002	Kafka, Douglas E Sr & Susan G	
2	06-04-2014	NOTICE OF APPEARANCE ATD0001	Notice Of Appearance Ringer, Rebecca Sue	
		ATD0002	Kearns, Colln All Dfdts	
3	06-04-2014	JURY DEMAND RECEIVED - TWELVE	Jury Demand Received - Twelve	250.00
4	06-19-2014	ANSWER & AFFIRMATIVE DEFENSE ATD0001	Answer & Affirmative Defense Ringer, Rebecca Sue	
		DEF0003	Providence Health & Services	
		ATD0002	Kearns, Colln	
5	09-12-2014	MOTION FOR SUMMARY JUDGMENT	Motion For Summary Judgment	
6	09-12-2014	NOTE FOR CALENDAR ACTION	Note For Calendar #5-kearns	10-14- 2014MA
		ACTION	Confirmed/kearns	
		ACTION	Dfdt's Motion For Summary Judgment	
7	10-09-2014	REPLY	Dfdt's Reply To Motion	
8	10-14-2014	SUMMARY JUDGMENT HEARING JDG0019	Summary Judgment Hearing Judge Ellen J. Fair	
-	10-14-2014	HEARING CONTINUED:DEF/RESP REQUEST ACTION	Hearing Continued:def/resp Request Dfdt's Motion For Summary Judgment	11-14- 2014MA
		ACTION	#5	

About Dockets

About Dockets

You are viewing the case docket or case summary. Each Court level uses different terminology for this information, but for all court levels, it is a list of activities or documents related to the case. District and municipal court dockets tend to include many case details, while superior court dockets limit themselves to official documents and orders related to the case.

If you are viewing a district municipal, or appellate court docket, you may be able to see future court appearances or calendar dates if there are any. Since superior courts generally calendar their caseloads on local systems, this search tool cannot display superior court calendaring information.

Directions

Snohomish Superior
3000 Rockefeller Ave, MS 502
Everett, WA 98201-4046

Map & Directions
425-388-3421[Phone]
425-388-3498[Fax]
Visit Website
425-388-3700[TDD]

Disclaimer

What is this website? It is a search engine of cases filed in the municipal, district, superior, and appellate courts of the state of Washington. The search results can point you to the official or complete court record.

App. II - 021

2/20/2015

Washington Courts - Search Case Records

9	10-14-2014	ORDER OF CONTINUANCE	Order Of Continuance		
-	11-14-2014	HRG STRICKN: NOT CONFIRMD & NOT HRD	Hrg Strickn: Not Confirmd & Not Hrd		
10	11-14-2014	NOTICE OF APPEARANCE	Notice Of Appearance All Pitfs		How can I obtain the complete court record? You can contact the court in which the case was filed to view the court record or to order copies of court records.
11	11-17-2014	ATP0001 NOTE FOR CALENDAR ACTION ACTION ACTION ACTION	Duce, David W. Note For Calendar - Re-note #5-kearns Dfdt's Motion For Summary Judgment Confirmed/kearns Stricken/kearns	11-25-2014MA	How can I contact the court? Click here for a court directory with information on how to contact every court in the state.
12	11-24-2014	RESPONSE	Pitfs' Response To Dfdts' Motion		
13	11-24-2014	DECLARATION	Declaration Of Douglas E Kafka Sr		Can I find the outcome of a case on this website?
14	11-24-2014	DECLARATION	Declaration Of Kristen M Kafka		No. You must consult the local or appeals court record.
15	11-24-2014	DECLARATION	Declaration Of David W Duce		
16	11-24-2014	AFFIDAVIT OF MAILING	Affidavit Of Mailing		
-	11-25-2014	HEARING CANCELLED:DEF/RESP REQUEST	Hearing Cancelled:def/resp Request		How do I verify the information contained in the search results? You must consult the court record to verify all information.
17	12-05-2014	NOTICE OF INTENT TO WITHDRAW WTP0001 PSP0001 PSP0002	Notice Of Intent To Withdraw Duce, David W. Kafka, Kristen M Kafka, Douglas E Sr & Susan G		Can I use the search results to find out someone's criminal record? No. The Washington State Patrol (WSP) maintains state criminal history record information. Click here to order criminal history information.
18	01-05-2015	MOTION FOR SUMMARY JUDGMENT	Motion For Summary Judgment		
19	01-05-2015	DECLARATION	Declaration Of Erica M Roberts		
20	01-05-2015	NOTE FOR CALENDAR ACTION ACTION ACTION	Note For Calendar Dfdts' Motion For Summary Judgment #18-ringer/roberts ** Set As Noted **	02-05-2015CT	
21	01-22-2015	NOTE FOR CALENDAR ACTION ACTION ACTION	Note For Calendar - Amended Dfdts' Motion For Summary Judgment #18-ringer/roberts Confirmed/ringer	02-05-2015MA	Where does the information come from? Clerks at the municipal, district, superior, and appellate courts across the state enter information on the cases filed in their courts. The search engine will update approximately twenty-four hours from the time the clerks enter the information. This website is maintained by the Administrative Office of the Court for the State of Washington.
22	01-22-2015	NOTICE OF APPEARANCE ATP0002	Limited Notice Of Appearance For Pitfs Krafchick, Steven P.		
23	01-22-2015	MOTION TO CONTINUE	Motion To Continue		
24	01-22-2015	DECLARATION	Declaration Of Douglas E Kafka Sr		
25	01-22-2015	DECLARATION	Declaration Of Kristen M Kafka		
26	01-22-2015	DECLARATION	Declaration Of Steven P Krafchick		Do the government agencies that provide the information for this site and maintain this site:
27	01-22-2015	NOTE FOR CALENDAR ACTION	Note For Calendar Motion To Continue Summary	01-29-2015MA	▶ Guarantee that the information is

App. E - 022

2/20/2015

Washington Courts - Search Case Records

		ACTION	Judgment Hearing #23	
28	01-23-2015	NOTE FOR CALENDAR	Note For Calendar - Amended (on Calendar, #21)	
29	01-26-2015	NOTE FOR CALENDAR ACTION	Note For Calendar - Re-note Judgment Hearing #23	02-03- 2015MA
-	01-29-2015	ACTION HRG STRICKN: NOT CONFIRMD & NOT HRD	Motion To Continue Summary Hrg Strickn: Not Confirmd & Not Hrd	
30	01-30-2015	OBJECTION / OPPOSITION	Providence's Opposition To Motion	
31	01-30-2015	DECLARATION	Declaration Of Erica M Roberts	
-	02-03-2015	HRG STRICKN: NOT CONFIRMD & NOT HRD	Hrg Strickn: Not Confirmd & Not Hrd	
32	02-04-2015	DECLARATION	Declaration Of Douglas E Kafka Sr	
33	02-04-2015	DECLARATION	Declaration Of Kristen M Kafka	
-	02-05-2015	HRG STRICKN: NOT CONFIRMD & NOT HRD	Hrg Strickn: Not Confirmd & Not Hrd	
34	02-05-2015	SUMMARY JUDGMENT HEARING JDG0013	Summary Judgment Hearing Judge Thomas J. Wynne	
35	02-09-2015	ORDER GRANTING SUMMARY JUDGMENT	Order Granting Summary Judgment	
-	02-09-2015	ORDER OF DISMISSAL WITH PREJUDICE JDG0013	Order Of Dismissal With Prejudice Judge Thomas J. Wynne	
-	02-09-2015	EX-PARTE ACTION WITH ORDER	Ex-parte Action With Order	
36	02-17-2015	MOTION FOR RECONSIDERATION	Motion For Reconsideration	
37	02-17-2015	NOTE FOR MOTION DOCKET-LATE FILING	Note For Motion Docket-late Filing	
38	02-17-2015	MOTION FOR RECONSIDERATION	Motion For Reconsideration	
39	02-17-2015	NOTE FOR MOTION DOCKET-LATE FILING	Note For Motion Docket-late Filing	
40	02-17-2015	NOTE FOR CALENDAR ACTION	Note For Calendar Judgment #38	02-24- 2015MA
		ACTION	Motion For Reconsideration Of	
		ACTION	Court's Order Granting Summary	
41	02-17-2015	DECLARATION	Declaration Of Steven P Krafchick W/attached Exhibits	
42	02-17-2015	DECLARATION	Declaration Of Steven P Krafchick	
43	02-17-2015	DECLARATION	Declaration Of Steven P Krafchick	
44	02-17-2015	PROPOSED ORDER/FINDINGS	Proposed Order/findings *****	

accurate or complete?
NO
▶ Guarantee that the information is
in its most current form?
NO
▶ Guarantee the identity of any
person whose name appears on
these pages?
NO
▶ Assume any liability resulting from
the release or use of the
information?
NO

App. II - 023

No. 73327-3-I

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

ESTATE OF DOUGLAS E. KAFKA, JR., et al.,

Appellants,

v.

PROVIDENCE HEALTH & SERVICES, et al.,

Respondents.

NON-WASHINGTON AUTHORITIES CITED UNDER GR 14.1

Steven P. Krafchick, WSBA #13542
Carla Tachau Lawrence, WSBA #14120
Of Attorneys for Appellants

KRAFCHICK LAW FIRM
100 W. Harrison St.
South Tower, Suite 300
Seattle, WA 98119
Phone: (206) 374-7370
Fax: (206) 374-7377



Cited

As of: July 24, 2015 6:57 PM EDT

Bio-Medical Research, Ltd. v. Thane Int'l, Inc.

United States Court of Appeals for the Ninth Circuit

August 6, 2007; September 27, 2007, Filed

No. 02-56997, No. 03-56223

Reporter

249 Fed. Appx. 539; 2007 U.S. App. LEXIS 23243

BIO-MEDICAL RESEARCH LTD., a corporation; BMR NEUROTECH, INC., a corporation, Plaintiffs - Appellants, v. THANE INTERNATIONAL, INC.; THANE DIRECT, INC., a Delaware corporation; WILLIAM I. HAY; DENISE DUBARRY-HAY; SUSAN LESLIE; TIME PROPHETS, INC., a California corporation; LEANN JOHNSON; BISMARCK LABS CORPORATION, a California corporation; HUDSON BERKLEY CORPORATION; MATTHIAS GRANIC; SMART INVENTIONS INC, a California corporation; BERND EBERT, an individual; TV PRODUCTS FULFILLMENT INC, a California corporation, aka TV Product Fulfillment Inc.; JON NOKES, Chief Executive Officer; HUDSON BERKLEY CORPORATION, Defendants - Appellees. BIO-MEDICAL RESEARCH LTD., a corporation; BMR NEUROTECH, INC., a corporation, Plaintiffs - Appellants, v. THANE INTERNATIONAL, INC.; THANE DIRECT, INC., a Delaware corporation; WILLIAM I. HAY; DENISE DUBARRY-HAY; SUSAN LESLIE; TIME PROPHETS, INC., a California corporation; LEANN JOHNSON; BISMARCK LABS CORPORATION, a California corporation; HUDSON BERKLEY CORPORATION; MATTHIAS GRANIC; SMART INVENTIONS INC, a California corporation; BERND EBERT, an individual; TV PRODUCTS FULFILLMENT INC, a California corporation, aka TV Product Fulfillment Inc.; JON NOKES, Chief Executive Officer; SMART LIVING, INC., Defendants - Appellees.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[**1]** Appeal from the United States District Court for the Central District of California. D.C. No. CV-02-01179-R, D.C. No. CV-02-01179-MLR. Manuel L. Real, District Judge, Presiding.

Disposition: REVERSED IN PART; AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Core Terms

district court, prospective economic advantage, defendants', discovery, summary judgment motion, granting summary judgment, summary judgment, competitor, endeavor, vacate, conspiracy to interfere, tort of interference, state law, depositions, outstanding, plaintiffs', congruent, functions, pleadings, requests, adduced

Case Summary

Procedural Posture

The United States District Court for the Central District of California granted defendants' motion for summary judgment on the ground that plaintiffs lacked competitor standing under the Lanham Act and substantially congruent state laws. In doing so, the district court implicitly denied plaintiffs' request for further discovery under *Fed. R. Civ. P. 56(f)*.

Overview

Plaintiffs requested further discovery and identified the specific information they sought that would preclude summary judgment. Specifically, plaintiffs sought depositions of defendants' witnesses to determine the specific role each defendant had in distributing and selling the product in question. On appeal, the court found that such information was crucial to establish that plaintiffs and defendants did, in fact, endeavor to perform the same functions for purposes of establishing competitor standing. Thus, it was error for the trial court to grant defendants' motion for summary judgment without first having determined the merits of plaintiff's pending discovery motion. However, the district court properly dismissed plaintiffs' causes of action for interference with prospective economic advantage and conspiracy to interfere with prospective economic advantage pursuant to *Fed. R. Civ. P. 12(b)(6)*. Plaintiffs did not identify any existing economic

relationship that had been disrupted and thus failed to state a claim.

Outcome

The court vacated the grant of defendants' summary judgment motion, affirmed the dismissal of the remaining claims, vacated the grant of attorneys' fees and remanded the action.

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

HN2 If matters outside the pleadings are presented to and not excluded by a court, the district court's ruling is a grant of a motion for summary judgment. *Fed. R. Civ. P. 12(c)*.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

HN1 A district court errs in denying a request under *Fed. R. Civ. P. 56(f)* if a movant can show how allowing additional discovery would have precluded summary judgment. Summary denial is especially inappropriate where the material sought is also the subject of outstanding discovery requests.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN3 The tort of interference with prospective economic advantage does not, however, protect mere potential relationships, which are at most a hope for an economic relationship and a desire for a future benefit. One of the elements of the tort of interference with prospective economic advantage is an existing relationship with an identifiable buyer.

Counsel: For BIO-MEDICAL RESEARCH LTD., a corporation, Plaintiff - Appellant: Brian J. Donato, HYMAN, PHELPS & McNAMARA, Irvine, CA; Robert A. Dormer, Esq., John R. Fleder, HYMAN, PHELPS & McNAMARA, Washington, DC; Thomas V. Reichert, Esq., BIRD MARELLA, ET AL., PC, Los Angeles, CA.

For BMR NEUROTECH, INC., a corporation, Plaintiff - Appellant: Brian J. Donato, Esq., HYMAN, PHELPS & McNAMARA, Irvine, CA; Robert A. Dormer, Esq., HYMAN, PHELPS & McNAMARA, Washington, DC; Thomas V. Reichert, Esq., BIRD MARELLA, ET AL., PC, Los Angeles, CA.

For BISMARCK LABS CORPORATION, a California corporation, Defendant - Appellee: Stephen R. Mick, Esq., AKIN GUMP STRAUSS HAUER & FELD, LLP, Los Angeles, CA; Lawrence B. Steinberg, Esq., Hall Dickler Kent Goldstein & Wood, Beverly Hills, CA.

For MATTHIAS GRANIC, Defendant - Appellee: Matthias Granic, Pal Springs, CA.

For SMART INVENTIONS INC, a California corporation, TV PRODUCTS FULFILLMENT INC, a California corporation aka TV **[**2]** Product Fulfillment Inc., JON NOKES, Chief Executive Officer, Defendants - Appellees: Jesse Z Weiss, AKIN GUMP STRAUSS HAUER & FELD, LLP, Dallas, TX; Jonathan Gottlieb, AKIN GUMP STRAUSS HAUER & FELD, LLP, Los Angeles, CA.

For BERND EBERT, an individual, Defendant - Appellee: Bernd Ebert, Cathedral City, CA.

HUDSON BERKLEY CORPORATION, Defendant - Appellee: No appearance. No appearance.

Judges: Before: BERZON and IKUTA, Circuit Judges, and SINGLETON ***

Opinion

[*541] MEMORANDUM *

Before: BERZON and IKUTA, Circuit Judges, and SINGLETON***, Chief District Judge.

The district court granted defendants' summary judgment motion on the ground that plaintiffs lacked competitor standing under the Lanham Act and substantially congruent

*** The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

state laws.¹ In doing so, the district court implicitly denied plaintiffs' request for further discovery under *Fed. R. Civ. P. 56(f)*. *Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998) (district court may implicitly deny a *Rule 56(f)* motion). [**3] Generally, **HNI** a district court errs in denying such a request "if the movant can show how allowing *additional* discovery would have precluded summary judgment." *Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994). "Summary denial is especially inappropriate where the material sought is also the subject of outstanding discovery requests." *VISA Int'l Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986).

The district court's ruling appears to be based on the ground that plaintiffs had "adduced no evidence that they endeavor to perform the same functions" as the defendants.² The plaintiffs here filed a timely response to the defendants' motion for summary judgment. In that response, plaintiffs requested further discovery and identified the specific information they sought that would preclude summary judgment. [**4] Specifically, plaintiffs sought [**542] depositions of the defendants' witnesses to determine "the specific 'things' each defendant did in distributing and selling the AbTronic." Such information was crucial to establish that plaintiffs and defendants did, in fact, "endeavor to perform the same functions" for purposes of establishing competitor standing.³ These requests for depositions were outstanding at the time the district court granted summary judgment. Thus, "[i]t was error for the trial court to have granted defendants' motion for summary judgment without first having determined the merits of plaintiff's pending discovery motion." *Garrett*, 818 F.2d at 1519. In light of this

error, we reverse the district court's implicit *Rule 56(f)* ruling.

Because we conclude that the district court should not have granted summary judgment without allowing the plaintiffs to conduct further discovery, we vacate the court's order granting defendants' summary judgment motion.

The district court did not err in dismissing plaintiffs' causes of action for interference with prospective economic advantage and conspiracy to interfere with prospective economic advantage pursuant to *Fed. R. Civ. Proc. 12(b)(6)*. In their complaint, plaintiffs allege that defendants interfered with the "relationship between Plaintiffs and potential consumers." **HN3** The tort of interference with prospective economic advantage does not, however, protect mere "potential" relationships--which are "at most a hope for an economic relationship and a desire for a future benefit." *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 527, 49 Cal. Rptr. 2d 793. One of the elements of the tort of interference with prospective economic advantage is "an existing relationship with an identifiable buyer." *Id.* Because plaintiffs do not identify any such existing [**6] economic relationship that has been disrupted, they fail to state a claim for either interference with prospective economic advantage or conspiracy to interfere with prospective economic advantage.

Because we reverse the district court in part, we vacate and remand the grant of attorneys' fees to defendants.

REVERSED IN PART; AFFIRMED IN PART; VACATED IN PART AND REMANDED.

¹ The district court granted defendants' alternative motions for judgment on the pleadings pursuant to *Fed. R. Civ. P. 12(c)* and for summary judgment. **HN2** Because "matters outside the pleadings [were] presented to and not excluded by the court," we consider the district court's ruling to be the grant of a motion for summary judgment. *Fed. R. Civ. P. 12(c)*.

² To the extent the district court granted the summary judgment motion on the alternate ground that plaintiffs had "not adduced any evidence that they sell any competitive product in the United States," the court erred, because there is undisputed evidence that BMR Neurotech sold the Flex in the United States.

³ On this incomplete record, we do not reach the issue whether the district court was correct in ruling that plaintiffs must endeavor to do the [**5] same things as the defendants in order to establish competitor standing under the Lanham Act and substantially congruent state law.

COURT OF APPEAL OF WASHINGTON
DIVISION I

ESTATE OF DOUGLAS E. KAFKA, JR., et
al.,

Appellants,

v.

PROVIDENCE HEALTH & SERVICES, et
al.,

Respondents.

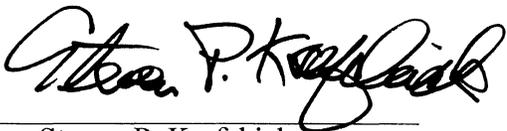
NO. 73327-3-I

CERTIFICATE OF SERVICE OF
BRIEF OF APPELLANTS

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein. On July 28, 2015, I caused to be served a copy of Brief of Appellants on the following counsel of record: Ms. Rebecca Ringer, Ms. Erica Roberts, and Ms. Amber Pearce, Floyd, Pflueger & Ringer PS, 200 West Thomas Street, Suite 500, Seattle, WA 98119-4296, Attorneys for Defendants.

DATED this 28th day of July, 2015.

KRAFCHICK LAW FIRM

By: 
Steven P. Krafchick

2015 JUL 29 PM 3:31
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON