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No. 73018-5-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

GABRIELLE NGUYEN-ALUSKAR,

Appellant,

v.

The LASIK Vision Institute, LLC; GORDON JENSEN, M.D., a physician; and JOHN/JANE DOE PHYSICIANS 1-10,

Respondents.

BRIEF OF RESPONDENT THE LASIK VISION INSTITUTE, LLC

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I. INTRODUCTION

Plaintiff/Appellant Gabrielle Nguyen-Aluskar ("Nguyen-Aluskar") appeals from two King County Superior Court orders, denying her CR 56(f) Motion for Continuance and her CR 59 Motion for Reconsideration, entered pursuant to Defendants' Motions for Summary Judgment. Nguyen-Aluskar also raises an additional assignment of error not included in her Notice of Appeal, regarding the trial court's Order Granting Defendant The LASIK Vision Institute, LLC's ("LVI") CR 41(d) Motion for Costs. LVI respectfully requests that the Court of Appeals affirm each of the trial court orders at issue.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court act within its discretion in denying Nguyen-Aluskar's CR 56(f) request for a continuance of the summary judgment hearing, when she did not demonstrate by affidavit: (a) any good reason for failing to proffer evidence sufficient to reveal the existence of any issue of material fact prior to the summary judgment hearing; or (b) what evidence would be established through additional discovery?

2. Did the trial court act within its discretion in denying Nguyen-Aluskar's CR 59 Motion for Reconsideration, when the evidence she proffered on that Motion was not "newly discovered" or "surprise" evidence that she could not, with reasonable diligence, have produced prior to the summary judgment hearing?

3. Did the trial court act within its discretion in denying Nguyen-Aluskar's CR 59 Motion for Reconsideration, when the evidence proffered on that Motion was insufficient to reveal the existence of any material fact?

4. Should this Court affirm dismissal of Nguyen-Aluskar's

claims for medical negligence, for violation of Washington's Consumer Protection Act, for "extreme and outrageous conduct," for "Fraud and Misrepresentation," for "Negligent Training, Management, and Supervision," and for "Failure to Warn," when she has not challenged the dismissal of those claims in her briefing to this Court?

5. Should this Court affirm dismissal of Nguyen-Aluskar's claims against LVI on the alternative basis, pursuant to CR 41(b), that she willfully and deliberately failed to comply with the trial court's Order Granting Defendant's Motion for Costs?

6. Should this Court affirm the trial court's Order Granting Defendants' Motion for Costs pursuant to CR 41(d), when: (a) Nguyen-Aluskar failed to designate that issue in her Notice of Appeal; and (b) Costs are expressly permitted where, as here, a plaintiff takes a voluntary dismissal of her action and subsequently files a nearly-identical action?

III. COUNTERSTATEMENT OF THE CASE

A. Facts.

This appeal is from the second of two substantively identical lawsuits involving claims for alleged medical negligence.

Nguyen-Aluskar was first seen at LVI in 2005. On February 5, 2005, independent contractor physician Dr. Mark Nelson performed a photorefractive keratectomy (PRK) procedure for Nguyen-Aluskar. CP 61. A PRK is a common type of laser refractive surgery to correct nearsightedness, farsightedness, and astigmatism.

Prior to surgery, Nguyen-Aluskar signed a detailed consent form for the procedure, which discussed several risks and possible side effects, including dry eye syndrome, over-correction or under-correction which

may require the permanent use of glasses or contact lenses, and increased dependence on reading glasses. CP 65. The form also indicated:

> I understand that the visual acuity I initially gain from Laser Vision Correction could regress, and my vision may go partially or completely back to the level it was immediately prior to having the procedure.

CP 66.

The procedure was successful and performed without complication. Five days following surgery, Nguyen-Aluskar was evaluated and found to have 20/20 vision in both eyes. CP 70.

In 2011, over six years later, Nguyen-Aluskar presented again to LVI, requesting an enhancement procedure. CP 72. She was evaluated by co-defendant Dr. Gordon Jensen to determine whether she was an appropriate candidate for the enhancement. *Id.* Dr. Jensen explained the indications, alternatives, risks and benefits of the procedure to Nguyen-Aluskar. *Id.; see also* CP 74. Again, Nguyen-Aluskar signed a detailed patient consent form that discussed several risks of the procedure, including:

> [O]ver or under correction, progressive corneal thinning, cosmetic deformity, loss of vision, loss of eye, distortion of vision, double vision, poor visual image, glare, halos, starburst, pain and vision which cannot be completely corrected with glasses or contact lenses.

CP 74 (emphases added). In signing the form, Nguyen-Aluskar acknowledged that "I have re-read, understand and agree with my original LASIK/PRK consent form and a copy of both informed consent forms have been offered to me." *Id.*

The enhancement procedure was performed by Dr. Jensen on January 27, 2012. CP 72. The records indicate that the procedure was performed successfully and without complication. *Id.* By six-weeks postoperatively, Nguyen-Aluskar's vision was 20/50 in her right eye and 20/40 in her left eye. CP 76. She did not return to LVI after that date.

Despite the allegations in plaintiff's briefing to this Court, there are no records suggesting that Dr. Jensen or anyone else at LVI ever referred to any procedure performed for Nguyen-Aluskar (or anyone else) as a "falcon-vision" procedure. She has also submitted no evidence that her cornea was too thin for an enhancement, no evidence that she suffered any deterioration of vision subsequent to the enhancement, and no evidence that she suffered any of her claimed financial consequences.[1]

B. Procedural History.

1. Nguyen-Aluskar's two substantively identical lawsuits.

[1] Nguyen-Aluskar's citations to the record are largely to her own trial court briefing and to declarations that, as discussed herein, do not constitute competent evidence.

Nguyen-Aluskar filed her Complaint in the initial lawsuit against LVI and Dr. Jensen on January 17, 2013. CP 49-56. Eleven months later she moved for voluntary dismissal of that lawsuit, and the trial court granted the motion by Order dated December 22, 2013. CP 58-59.

Nguyen-Aluskar filed her Complaint in the instant case on February 14, 2014. CP 1-8. The Complaint in this second lawsuit was identical to her Complaint in the first, and alleged the same claims against the same parties. As did her first Complaint, her Complaint in the present action alleged that the care provided by co-defendant Dr. Jensen, purportedly acting as an agent of LVI, was negligent and administered without informed consent.[2] *Id.* Both Complaints also alleged various miscellaneous claims, including a claim pursuant to Washington's Consumer Protection Act ("CPA"), RCW 19.86 *et seq.*; for "extreme and outrageous conduct"; for "Fraud and Misrepresentation"; for "Negligent Training, Management, and Supervision"; and for "Failure to Warn". *Id.*

2. Order granting costs pursuant to CR 41(d).

[2] LVI provides management services to independent physician contractors, such as Dr. Jensen, who provide vision enhancement procedures. LVI is not a medical provider and does not exercise supervision or control over the clinical decisions of independent contractor physicians. LVI denies any vicarious liability for any alleged negligence of Dr. Jensen. However, because LVI's Motion for Summary Judgment was based on lack of evidence, rather than absence of vicarious liability, the issue of vicarious liability is not presently before this Court. *See* CP 25-43.

On May 30, 2014, LVI filed a Motion for Costs and for Discovery Stay as to the Plaintiff pursuant to CR 41(d), which authorizes an award of costs incurred in a previously dismissed action when the plaintiff commences a subsequent action based upon or including the same claim. CP 338-45. The Court granted the Motion for Costs on June 14, 2009 and denied the requested stay of discovery. CP 446-49. The Court penned its own order, entitled "Order Granting Defendants' Motion for Costs and Denying Discovery Stay as to Plaintiff." The Order contained several findings and conclusions, including: (1) Nguyen-Aluskar's second Complaint is not substantially different from her earlier Complaint; (2) there was no requirement for LVI to provide notice, prior to a voluntary dismissal, of its intention to seek costs pursuant to CR 41(d); and (3) CR 41(d) expressly provides for the requested relief. CP 447.

Following entry of the Order, LVI made several requests over three months that Nguyen-Aluskar remit her $4,075.42 payment owed in compliance with the Order. *See* CP 78, 84, 86. Having received no response to those requests, in September 2014 LVI notified Nguyen-Aluskar that it intended to file a Motion to Dismiss her lawsuit pursuant to CR 41(b) if payment was not received by October 1, 2014. CP 86. That request, as had the others, went unanswered. CP 46.

3. Order granting summary judgment dismissal.

On August 29, 2014, LVI served plaintiff with its First Interrogatories and Requests for Production. CP 88-98. That discovery included requests for any expert opinions supporting her claims. CP 92-93. Nguyen-Aluskar never responded to the discovery requests, and never requested an extension of the deadline by which to respond. CP 46.

LVI filed its Notice for Hearing on its anticipated Motion for Dismissal on October 22, 2014, noting the hearing on the Motion for almost two months later, December 12, 2014. CP ____.[3] LVI filed its Motion on November 14, 2014, requesting dismissal of all claims against it pursuant to CR 56 pursuant to CR 41(b). CP 25-43. In conjunction with its Motion to Dismiss, LVI submitted the declaration of two experts, Dr. Stephen Phillips and Dr. Brian McKillop, each of whom opined that Dr. Jensen complied with the standard of care in his treatment of Nguyen-Aluskar in all respects, and that he appropriately secured her informed consent for treatment. CP 99-105; CP 106-114.

In her Response, filed on December 1, 2014, Nguyen-Aluskar submitted only one piece of evidence: an invoice from a Dr. Richard Bensinger for a one hour record review and attorney consult performed on November 7, 2012, over two years prior to the filing of the defendants'

[3] Approx. CP 450. At the time of filing this brief, LVI had made supplemental designation of Clerk's Papers which had not yet been numbered by the Court.

Motions for Summary Judgment. CP 183. Nguyen-Aluskar asserted in her briefing that, when counsel met with Dr. Bensinger again on November 26, 2014 (for the first time in over two years and only one Court day prior to the day Nguyen-Aluskar's opposition to the summary judgment motions was due), Dr. Bensinger withdrew as an expert. CP 144. She submitted no explanation for her failure to have any contact with Dr. Bensinger in the intervening two years, despite discovery requests for expert information and a witness disclosure deadline. *See* CP 141-166. Instead, she moved for a continuance pursuant to CR 56(f) on the basis that she desired additional time to search for another expert to support her claims. *Id.* She did not submit any affidavit explaining why a continuance was necessary or justified. *Id.*

On December 10, 2014, two days prior to the hearing on the Motions for Summary Judgment, Nguyen-Aluskar filed two declarations – an unsworn and unsigned declaration of Nguyen-Aluskar herself, CP 223-230, and a declaration of her counsel, CP 209-22, both quoting verbatim from Nguyen-Aluskar's Complaint and summary judgment briefing.

The following day, LVI and Dr. Jensen filed a Joint Motion to Strike Plaintiff's Untimely and Improper Declarations on shortened time.

CP ____.[4] On the day of the summary judgment hearing, Nguyen-Aluskar filed her declaration again, this time signed but still unsworn and unattested to under penalty of perjury. CP 231-238.

During the December 12, 2014 argument on the Defense Motions, The trial court indicated that the Motions to Strike would be considered as objections to Plaintiff's declarations pursuant to KCLR 56(e).[5] VRP 25-27. The trial court ruled that neither declaration constituted competent evidence and sustained the objections. CP ___.[6] As the trial court concluded, Nguyen-Aluskar's declaration simply "parroted" her Complaint, and her counsel's declaration likewise contained merely unsupported allegations. VRP 26-27.

The trial court denied Nguyen-Aluskar's request for a continuance, ruling that Nguyen-Aluskar had not demonstrated good cause for such a

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[4] Approx. CP 461-68.

[5] KCLR 56(e) states: "A party objecting to the admissibility of evidence submitted by an opposing party must state the objection in writing in a responsive pleading, a separate submission shall only be filed if the objection is to materials filed in the reply." (emphases added). The official comment to that rule states:

> Amended effective September 1, 2011, Subsection (e) is added to obviate the filing of motions to strike objectionable evidence, to relieve the parties of the need to file such motions six days in advance and thus, under LCR 7, to file an accompanying motion to shorten time for the timely consideration of the objection. This rule is intended to clarify local practice and to conform to *Cameron v. Murray,* 151 Wn. App. 646, 658, 214 P.3d 150 (Div. 1, 2009).

KCLR 56(e) cmt. (emphasis added).

[6] Approx. CP 471-72 (Clerk's Minutes).

continuance given her conduct in failing to obtain and proffer expert support or other evidence sufficient to demonstrate the existence of an issue of material fact for trial on any of her claims. VRP 27-28. As the trial court explained, "Dilatory conduct is not a basis for a continuance. In two years there's nothing to support that this was a surprise or should have been a surprise." VRP 27:15.

The trial court granted summary judgment of all claims in favor of both defendants. VRP 28:8-9; CP 239-240; CP 241-242.

With respect to LVI's Motion for CR 41(b) Dismissal, the trial court noted that Nguyen-Aluskar was dilatory in failing to either comply with the June 10, 2014 Order for Costs or, alternatively, to seek clarification with the Court if she did not understand the Order's mandates. VRP 28-29. However, the trial court declined to reach the issue of dismissal pursuant to CR 41, as all claims against LVI had been dismissed pursuant to CR 56. CP 239-240.

4. Order denying Motion for Reconsideration.

On December 22, 2014, Nguyen-Aluskar filed a Motion for Reconsideration of the trial court's summary judgment orders pursuant to KCLR 56(c)(4), attaching the Declaration of Richard Bensinger, M.D., as well as various additional pleadings. CP 243-331. Again, the only

documentary evidence provided was the previously-produced invoice of Dr. Bensinger, reflecting his work of two years prior. CP 258.

The trial court did not call for any response to, or oral argument on, the request for reconsideration.[7] Instead, the trial court denied the motion for reconsideration by Order dated January 15, 2015. CP 335-337.

5. Notice of Appeal.

Nguyen-Aluskar filed her Notice of Appeal on February 3, 2015, seeking review of the Orders granting summary judgment to each of the defendants, and the Order denying the motion for reconsideration. CP _____.[8] She did not seek review of the June 10, 2014 Order granting costs to LVI.

In her briefing to this Court, Nguyen-Aluskar does not assign error to the trial court's original grant of summary judgment to either defendant, apparently conceding that summary judgment was properly granted on the

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[7] KCLR 59 provides, in relevant part:

> **(a)** .... The motion will be considered without oral argument unless called for by the court.
>
> **(b)** ***Response and Reply.*** No response to a motion for reconsideration shall be filed unless requested by the court. No motion for reconsideration will be granted without such a request. If a response is called for, a reply may be filed within two days of service of process.

(emphasis added).

[8] Approx. CP 473-484 (approx.).

record before the trial court.[9] She also does not challenge the trial court's ruling sustaining the defense objections to the improper declarations of Nguyen-Aluskar and her attorney. Nguyen-Aluskar assigns error only to the trial court's denial of her request for a CR 56(f) continuance and the trial court's denial of her motion for reconsideration, contending that the late-provided declaration of Dr. Bensinger constitutes "newly discovered evidence" that creates an issue of material fact as to her failure to secure informed consent claim. She does not address the dismissal of her medical negligence, CPA or various additional claims.

She raises an additional challenge to the Order that the trial court found she had ignored for several months – the June 10, 2014 Order granting LVI's request for costs.

III. STANDARDS OF REVIEW

When reviewing a summary judgment order, the appellate court undertakes the same inquiry as the trial court. *Thompson v. Peninsula Sch. Dist.*, 77 Wn. App. 500, 504, 892 P.2d 760 (1995). A summary judgment is properly granted if the pleadings, affidavits, depositions or admissions on file show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.

[9] *See, e.g., Bohn v. Cody,* 119 Wn.2d 357, 368, 832 P.2d 71 (1992) (appellate court will not consider inadequately briefed argument); *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument unsupported by citation to the record or authority will not be considered); *see also* RAP 10.3(a)(6).

CR 56(c); *see Teagle v Fisher & Porter Co.*, 89 Wn.2d 149, 152, 570 P.2d 438 (1977). Argumentative assertions and speculation that a genuine material issue exists will not defeat a summary judgment motion. CR 56(c); *see White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Affidavits containing conclusory statements without adequate factual support are also insufficient to defeat a motion for summary judgment. CR 56(e).[10] Specifically, Civil Rule 56(e) instructs that "an adverse party may not rest upon mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.* If the plaintiff does not so respond, summary judgment shall be entered. *Id.*

The Court of Appeals reviews a trial court's decision to grant or deny a motion for CR 56(f) continuance for abuse of discretion. *See Turner v. Kohler,* 54 Wn. App. 688, 693, 775 P.2d 474 (1989). The same standard of review applies to motions for reconsideration. *See Wilcox v. Lexington Eye Institute,* 130 Wn. App. 234, 241, 122 P.3d 729 (2005). A trial court abuses its discretion only when its decision is manifestly

[10] *See, e.g., Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993); *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288, *rev. denied*, 114 Wn.2d 1023, 792 P.2d 535 (1990); *Vant Leven v. Kretzler*, 56 Wn. App. 349, 355-56, 783 P.2d 611 (1989).

unreasonable or based on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

CR 41(d) provides authority to the trial court to enter an order awarding costs of a previously dismissed action "as it may deem proper." CR 41(d). This Court has indicated that an order awarding costs pursuant to CR 41(d) is reviewed de novo. *Johnson v. Horizon Fisheries, LLC,* 148 Wn. App. 628, 633, 201 P.3d 346 (2009).

IV. ARGUMENT

A. The trial court acted within its discretion in denying Nguyen-Aluskar's CR 56(f) Motion for Continuance.

Nguyen-Aluskar assigns error to the trial court's denial of her motion for a CR 56(f) continuance, asserting that she should have been provided additional time to search for a supportive expert. The trial court was well within its discretion in denying Nguyen-Aluskar's request.

CR 56(f) provides as follows:

> Should it appear from the affidavits of a party opposing the motion that he cannot, for the reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The Court may deny a continuance under this rule 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.

Turner, 54 Wn. App. at 693. If any one of these grounds is present, denial is proper. *Pelton v. Tri-State Mem'l Hosp.*, 66 Wn. App. 350, 356, 831 P.2d 1147 (1992). Denial of a motion for continuance under this rule will be upheld absent a showing of manifest abuse of discretion. *Turner*, 54 Wn. App. at 693.

LVI's Summary Judgment Motion sought dismissal of Nguyen-Aluskar's medical negligence and informed consent claims on the basis that she had, after two years, failed to identify any expert testimony sufficient to demonstrate the existence of any material fact for trial. In a medical malpractice matter, a health care provider is "entitled to summary judgment once [the provider] establishes that the plaintiff lacks competent expert testimony." *Morinaga v. Vue,* 85 Wn. App. 822, 832, 935 P.2d 637 (1997). Nguyen-Aluskar failed to proffer any such evidence in response to LVI's motion, and instead sought a continuance pursuant to CR 56(f).

By her own admission, however, Nguyen-Aluskar did not contact her presumed expert in the two–year period between November 7, 2012 and November 26, 2014 (one court day prior to the due date for her response to the motions for summary judgment). There had been several prior opportunities, and obligations, for Nguyen-Aluskar to have

confirmed the existence of supportive expert testimony over the two years prior to the summary judgment hearing. She could have and should have done so when LVI served plaintiff with its First Interrogatories and Requests for Production several months prior to the summary judgment hearing.[11] She could have and should have done so when she learned, nearly two months prior to the hearing, that LVI would be filing a motion for summary judgment. She could have and should have done so after the Motion for Summary Judgment was filed on November 14, 2014. She could have and should have done so prior to the due date for her Disclosure of Witnesses, November 24, 2014.

Under circumstances in which the non-moving party has failed to diligently seek evidence necessary to defeat a motion for summary judgment, Washington Courts have properly denied a non-moving party's motion for continuance. In *Mossman v. Rowley*, 154 Wn. App. 735, 229 P.3d 812 (2009), for example, the plaintiff requested a CR 56(f) continuance, arguing that a deposition of a witness previously-unknown to the plaintiff was required to oppose defendant's summary judgment

[11] As KCLR 4, Official Comment n. 6 provides:

> The deadlines in the case schedule do not supplant the duty of parties to timely answer interrogatories requesting the names of individual with knowledge of the facts or with expert opinions..

motion. *Id.* at 742. The Court of Appeals affirmed the trial court's denial of the continuance request, noting that:

> [T]here is no reason that [plaintiff] could not have attempted to ascertain [the witness's] identity in the four years between the accident and the summary judgment hearing.... there was no reasonable explanation for the delay."

Id. at 743-44. [12]

In addition, Nguyen-Aluskar failed to identify what evidence would be established through additional discovery. A CR 56(f) continuance for the purpose of acquiring a testifying expert witness, as opposed to obtaining identifiable evidence through additional discovery that may provide necessary information to an already-acquired expert, is inappropriate. Case law is clear that "a trial court may properly deny a motion for a continuance if the requesting party fails to indicate what evidence would be established through more discovery." *Colwell v. Holy Family Hospital*, 104 Wn. App. 606, 615, 15 P.3d 240 (2014) (citation omitted).[13] Simply arguing to the effect that "I need more time to find an

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[12] *See, e.g., Gross v. Sunding*, 139 Wn. App. 54, 68, 161 P.3d 380 (2007) (continuance denied); *Winston v. Dept. of Corrections*, 130 Wn. App. 61, 65, 121 P.3d 1201 (2005) (continuance denied); *Carr v. Deking*, 52 Wn. App. 880, 886-87, 765 P.2d 40 (1988) (continuance denied)); *Vant Leven v. Kretzler, Jr,* 56 Wn. App. 349, 352-53, 783 P.2d 6111 (1989) (continuance denied); *Pelton*, 66 Wn. App. at 356 (continuance denied).

[13] *See also Thongchoom v. Graco Children's Products, Inc.,* 117 Wn. App. 299, 308, 71 P.3d 214 (2003) ("A continuance is not justified if the party fails to support the request with an explanation of the evidence to be obtained through additional discovery.") (citation and internal quotations omitted).

expert that may say something helpful to my case" is patently insufficient, and a CR 56(f) continuance request is justifiably denied under such circumstances.

With respect to Nguyen-Aluskar's collateral claims, for alleged violation of the CPA, "extreme and outrageous conduct," for "Fraud and Misrepresentation," for "Negligent Training, Management and Supervision," and for "Failure to Warn," Nguyen-Aluskar likewise proffered no evidence on these claims. She also advanced no argument to the trial court, or to this court, as to why she was unable, to provide the court with any supporting evidence on these claims after two years of discovery. For example, while Nguyen-Aluskar alleged in support of her CPA claim that she was promised "falcon-like vision," she failed to proffer any evidence, at all, that anyone ever assured her or anyone else that they would receive such "falcon-like vision."

In asserting that the trial court abused its discretion in refusing to grant plaintiff's request for a continuance, Nguyen-Aluskar relies on this court's decision in *Coggle v. Snow,* 65 Wn. App. 499, 784 P.2d 554 (1990). That case is distinguishable. In *Coggle,* the defendant filed a motion for summary judgment noted for hearing 14 days later. *Id.* at 501. Seven days later, a new attorney appeared for the plaintiff and filed a motion for continuance along with an affidavit. That affidavit indicated

that a particular expert, the plaintiff's treating physician, was expected to supply a declaration opining the defendant breached the standard of care, and that such breach proximately caused the alleged damages. Due to the substitution of counsel, the expert declaration could not be obtained in the 7 days between the appearance of counsel and the summary judgment hearing. *Id.* at 502-503. The appellate court reasoned that Coggle had satisfied the requirements of 56(f) by proffering good cause as to why an affidavit could not be presented in time for the hearing (the substitution of counsel seven days prior) and describing the specific evidence that would be provided with additional time (a declaration by a specific expert satisfying the specific elements of a medical negligence claim). *Id.* at 508.

While the plaintiff in *Coggle* demonstrated good reason why he was unable to submit a specific affidavit by a specific individual in the seven days in which he had the opportunity to do so, Nguyan-Aluskar proffered no good reason for not solidifying expert support in the two years she had to do so. She identified no specific evidence that she intended to obtain other than hypothetical testimony by a hypothetical expert. She did not provide an affidavit demonstrating good cause for her delay. CP 141-153. As such, she failed to demonstrate cause for a continuance pursuant to the factors established by *Turner*, *supra*. Failure

to exercise diligence in obtaining discovery does not justify continuance. *Durand v. HIMC Corp.* Wn. App. 818, 828, 214 P.3d 189 (2009).

The trial court acted well within its discretion in ordering denial of Nguyen-Aluskar's continuance and that decision should be affirmed.

B. The trial court acted within its discretion in denying Nguyen-Aluskar's CR 59 Motion for Reconsideration.

Nguyen-Aluskar next asserts that the trial court abused its discretion in denying her motion for reconsideration, contending that the declaration of Dr. Bensinger creates an issue of material fact for trial.

As a preliminary matter, Nguyen-Aluskar appears to assert that the trial court reviewed and therefore "considered" the declaration of Dr. Bensinger in coming to its decision to deny the motion for reconsideration, regardless of any procedural deficiency, and that such declaration must be accordingly considered by this Court regardless of any such deficiency. Based on recent case law of this Court, however, evidence submitted pursuant to a motion for summary judgment will not be stricken from the record, regardless of whether it is procedurally deficient. *See Cameron v. Murray,* 151 Wn. App. 646, 214 P.23d 150 (2009). In *Cameron,* this Division noted:

> [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. Thus, it is misleading to denominate as a "motion to strike" what is actually an objection to the admissibility of evidence…

Id. at 658 (emphasis added).

In order to conform to this Court's decision in *Cameron*, in 2011 King County amended its Local Rule 56 to provide that any objection to the admissibility of evidence submitted on a motion for summary judgment must be asserted in a responsive pleading, not in a separate motion to strike. KCLR 56(e). The amendment left in place KCLR 56(c), governing Motions for Reconsideration. That subsection of KCLR 56 incorporates by reference KCLR 59(b), which itself provides that a response to a motion for reconsideration may not be submitted unless requested by the trial court. At oral argument on the motions for summary judgment in this case, the trial court correctly referenced the amended KCLR in explaining that materials submitted on a motion for summary judgment must be reviewed by the trial court in order to determine if they may be "considered" by the court. VRP 26.

Accordingly, the fact that the trial court necessarily reviewed the declaration of Dr. Bensinger in order to determine whether it constituted evidence appropriately submitted on a motion for reconsideration does not

necessarily indicate that the court "considered" the substance of the declaration, regardless of any procedural deficiency.

The trial court did not specifically indicate in its Order denying Nguyen-Aluskar's motion for reconsideration whether the denial was based on a procedural deficiency of Dr. Bensinger's declaration, a substantive deficiency of that declaration, or both. CP 335. However, denial on either ground was a proper exercise of the trial court's discretion in this case. Dr. Bensinger's declaration was appropriately disregarded by the trial court because it was not "newly discovered evidence" sufficient to warrant reconsideration.[14] Alternatively, the declaration does not contain competent evidence sufficient to create an issue of material fact for trial on any of Nguyen-Aluskar's claims.[15]

1. The evidence proffered by Nguyen-Aluskar on

[14] LVI acknowledges the existence of prior case law that appears to stand for the proposition that a party is not entitled to argue on appeal procedural deficiency of evidence submitted on a motion for reconsideration when that party has not filed a motion to strike such evidence before the trial court. *See Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLV,* 139 Wn. App. 743, 162 P.3d 1153 (2007) ("Where a party believes that proffered evidence is not properly before the trial court, it must move the trial court to strike such evidence from the record). *But see Davis v. West One Automotive Group,* 140 Wn. App. 449, fn 1, 166 P.3d 807 (2007) ("[W]e have refused to consider improper evidence in reviewing an order on summary judgment, notwithstanding the opposing party's failure to object.")

In light of this Court's holding in *Cameron,* 151 Wn. App. at 658, and pursuant to KCLR 56(c), 56(e) and 59(b), discussed herein, LVI respectfully suggests that such case law is no longer controlling in a situation such as that here at issue, where a trial court rules on a motion for reconsideration without providing the opportunity for any response briefing pursuant to which an evidentiary objection may be raised.

[15] *See Nast v. Michaels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986); *Heath v. Uraga*, 106 Wn. App. 506, 515, 24 P.3d 413 (2001) (the appellate court may affirm the trial court on any correct ground).

reconsideration was not "newly discovered."

Initially, the trial court was well within its discretion in disregarding the declaration of Dr. Bensinger based on its procedural deficiency pursuant to CR 59.

CR 59 authorizes a court to vacate a judgment based on "accident or surprise which reasonable prudence could not have guarded against," or "newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at trial. CR 59(3)-(4) (emphases added). This rule does not permit a party to submit evidence which, with reasonable prudence or diligence, could have been submitted prior to a summary judgment ruling. *See Wagner Development, Inc. v. Fidelity and Deposit Co. of Maryland,* 95 Wn. App. 896, 906-907, 977 P.2d 639 (1999). As the court in *Wagner* explained:

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

Id. at 907.[16]

[16] *See, e.g., Tellevik v. 31641 W. Rutherford St.,* 120 Wn.2d 68, 90, 838 P.2d 111 (1992) (a court may deny a motion for continuance when "the requesting party does not offer a good reason for the delay in obtaining the desired evidence."); *Adams v. Western Host, Inc.,* 55 Wn. App. 601, 608, 779 P.2d 281 (1989) ("The realization that [the] first declaration was insufficient does not qualify the second declaration as newly discovered evidence").

Here, Nguyen-Aluskar failed to demonstrate that she could not with reasonable prudence have obtained the declaration of Dr. Bensinger, or any other purported expert, prior to the summary judgment hearing. By her own admission, she retained Dr. Bensinger in 2012 and did not speak to him again until one court day prior to the day her Response to the summary judgment motion was due to be filed. Whatever statements she made to induce Dr. Bensinger to provide a declaration on her behalf in the ten days following the entry of summary judgment, could have been made to him anytime in the two years during which she failed to have any contact with him. At the very least, she could have solidified her expert support at any time during the two months she was on notice of the summary judgment motions or in the four months that outstanding discovery requests for her expert information were pending. Dilatory conduct is not grounds for reconsideration. *See Go2Net, Inc., v. CI Host, Inc.,* 115 Wn. App. 73, 89-90, 60 P.3d 1245 (2003) ("There is no abuse of discretion where the trial court refuses to consider an untimely affidavit concerning matters that occurred well before the suit was brought.").

In asserting that the Court abused its discretion here, Nguyen-Aluskar relies again on this Court's decision in *Coggle,* 65 Wn. App. at 509. That case held that the trial court's failure to grant reconsideration was an abuse of discretion "flowing from the initial denial of the motion

for continuance." *Id.* As discussed above, the trial court in *Coggle* was found to have abused its discretion in denying a continuance based on the recent substitution of plaintiff's counsel, which left too little time for plaintiff to present an expert affidavit prior to the summary judgment hearing. *Id.* at 507.

Such is not the case here, where Nguyen-Aluskar has been represented by the same counsel during the entire pendency of her two lawsuits, and where that counsel could have, and should have, solidified expert support at any time in the two years those lawsuits were pending. As such, Nguyen-Aluskar's reliance on *Coggle* is misplaced.

Nguyen-Aluskar also relies on *Martini v. Post,* 178 Wn. App. 153, 313 P.3d 473 (2013), a case that is likewise distinguishable. In *Martini,* the Court of Appeals held that the trial court had not abused its discretion in considering newly submitted evidence on a motion for reconsideration. *Id.* at 162. As the court explained, "The decision to consider new or additional evidence presented with a motion for reconsideration is squarely within the trial court's discretion." *Id.*

The abuse-of-discretion standard is key to the holding in *Martini.* While it is within the discretion of a trial court to consider new evidence, as the trial court did in *Martini*, it is similarly within the discretion of a trial court to disregard such new evidence. *See, e.g., Southwick v. Seattle*

Police Officer John Doe #s 1-5, 145 Wn. App. 292, 186 P.3d 1089 (2008) ("the trial court has discretion whether to accept or reject an untimely declaration."); *Adams v. W. Host, Inc.,* 55 Wn. App. 601, 608, 779 P.2d 281 (1989) (a trial court properly disregards evidence that could have been discovered and produced before summary judgment).

Here, it was well within the discretion of the trial court to disregard the declaration of Dr. Bensinger, which contained statements of opinions based on medical treatment that had occurred several years prior. Nguyen-Aluskar has presented no reasonable reason why his opinions could not have been earlier proffered. The procedural deficiency of Dr. Bensinger's declaration provides ample justification for denial of Nguyen-Aluskar's motion for reconsideration, and that denial should be affirmed.

2. The evidence proffered by Nguyen-Aluskar on reconsideration was insufficient to demonstrate the existence of any genuine issue of material fact.

Even assuming that the trial court considered the substance of Dr. Bensinger's declaration, that declaration is not sufficient to create an issue of material fact on any of plaintiff's claims. As such, the motion for reconsideration was properly denied on this basis as well.

Whenever an injury occurs as a result of health care, the action for damages for that injury is governed exclusively by RCW 7.70 *et. seq. Branom v. State*, 94 Wn. App. 964, 968-69, 974 P.2d 335 (1999). RCW

7.70.010 is broad in scope and requires a plaintiff to proceed under RCW 7.70 if seeking recovery for "injuries resulting from health care," regardless of whether the cause of action is based in "tort, contract, or otherwise." RCW 7.70.010.

a. Expert testimony is necessary to support medical negligence and informed consent claims.

In a medical malpractice matter such as this one, a health care provider "is entitled to summary judgment once [the provider] establishes that the plaintiff lacks competent expert testimony." *Morinaga,* 85 Wn. App. at 833. In other words, a plaintiff who seeks recovery from a health care provider for injuries resulting from medical treatment must, except under unusual circumstances, be prepared to offer expert testimony to establish the essential elements of her claim. *Harris v. Groth,* 99 Wn.2d 438, 449, 663 P.2d 113 (1983). Without this necessary expert testimony, a plaintiff cannot prevail. *Harris*, 99 Wn.2d at 449.

With respect to a medical negligence claim, a plaintiff must be able to demonstrate that the defendant failed to "exercise the degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which [s]he belongs, in the State of Washington, acting in the same or similar circumstances." RCW 7.70.040(1). A plaintiff must establish this element with competent expert

testimony. *See, e.g., McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989); *Morinaga*, 85 Wn. App. at 831. Second, a plaintiff must establish that the alleged negligence was the proximate cause of the injuries claimed, and must establish this element with competent expert testimony as well. *See, e.g., Harris*, 99 Wn.2d at 451; *Morinaga*, 85 Wn. App. at 831-32;

RCW 7.70.050 outlines the elements of a claim for informed consent. The pertinent section of that statute reads:

> The following shall be necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his representatives against a health care provider:
>
> (a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;
>
> (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;
>
> (c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;
>
> (d) That the treatment in question proximately caused injury to the patient.

RCW 7.70.050(1) (emphasis added).

A plaintiff is also required to support an informed consent claim with expert testimony. The determination of whether a fact is "material"

pursuant to RCW 7.7.050 is a two-step process: (1) the scientific nature of the risk must be ascertained, *i.e.*, the nature of the harm which may result and the probability of occurrence; and (2) it must be determined whether the probability of that type of harm is a risk that a reasonable patient would consider in deciding on treatment. *Smith v. Shannon*, 100 Wn.2d 26, 33-34, 666 P.2d 351 (1983). Expert testimony is required to establish the first prong of the materiality test. *Smith*, 100 Wn.2d at 33. That expert testimony must establish the existence of a risk, its likelihood of occurrence, and the type of harm in question. *Id.* at 34. Only a physician, or other qualified expert, can assess the existing risks and the likelihood of their occurrence. *Id.* at 33.

Expert testimony is also required to demonstrate the recognized possible alternative forms of treatment, and the risks and benefits of those alternatives. RCW 7.70.050(3). *See, e.g. Seybold v. Neu*, 105 Wn. App. 666. 682-83, 19 P.3d 1068 (2001); *Ruffer*, 56 Wn. App. at 631; *Adams v. Richland Clinic*, 37 Wn. App. 650, 657, 681 P.2d 1305 (1984). Both RCW 7.70.050 and Washington case law mandate that expert testimony on informed consent is absolutely necessary. *See, e.g.*, RCW 7.70.050(3); *Ruffer,* 56 Wn. App. at 631.

A defendant moving for summary judgment can meet its initial burden by showing that the plaintiff lacks competent expert testimony.

Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 226-27, 770 P.2d 182 (1989). The burden then shifts to the plaintiff to produce an affidavit from a qualified expert witness that alleges specific facts establishing a cause of action. *Young,* 112 Wn.2d at 226-27.

Washington courts have also established the degree of certainty to which experts must testify in order to establish a successful medical negligence claim. Importantly, expert testimony must be to a reasonable degree of medical certainty, and cannot be mere conjecture or speculation. *See, e.g., McLaughlin v. Cooke*, 112 Wn.2d at 836; *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn. App. 155, 163, 194 P.3d 274 (2008).

b. Expert affidavits based on a plaintiff's self-serving claims are insufficient.

Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment. *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993). As such, expert affidavits that do "little more than reiterate the claims" asserted by the plaintiff are similarly insufficient. *Guile*, 70 Wn. App. at 26. This is a corollary to the rule that a party opposing summary judgment is not entitled to have her "affidavits considered at face value." *Segaline v. State,* 144 Wn. App. 312, 322, 182 P.3d 480 (2008). Rather, the nonmoving party must make "some showing that related evidence [is]

available to justify a trial." *Reed v. Strieb,* 65 Wn.2d 700, 707, 399 P.2d 338 (1965).[17] Here, the declaration of Dr. Bensinger is insufficient to create an issue of material fact on any of Nguyen-Aluskar's claims, for multiple reasons. First, Dr. Bensinger's opinions lack an adequate foundation because they are based on the self-serving statements of Nguyen-Aluskar, rather than on any competent evidence in the record before the Court. Second, Dr. Bensinger's opinions fail to establish the materiality of the risk in question, as required to demonstrate the existence of an issue of material fact on an informed consent claim. Third, even assuming that Dr. Bensinger's opinions are sufficient to create an issue of material fact on informed consent, those opinions do not raise any issue as to Nguyen-Aluskar's distinct claim for medical negligence, and Nguyen-Aluskar has failed to raise any argument in her briefing as to how or why Dr. Bensinger's opinions support a medical negligence claim. Finally, Dr. Bensinger's opinions raise no issues of material fact as to Nguyen-Aluskar's various additional claims, including her claim pursuant to the

[17] *See, e.g., Grimwood v. Univ. of Puget Sound, Inc.,* 110 Wn.2d 355, 359-61, 753 P.2d 517 (1988) (a party's self-serving statements of conclusions and opinions are insufficient to defeat a summary judgment motion); *Davies v. Holy Family Hospital*, 144 Wn. App. 483, 383 P.3d 283 (2008) (affidavits made in opposition to a motion for summary judgment must be based on personal knowledge and "set forth admissible evidentiary facts."); *Lily v. Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1997) ("the opinion of an expert that is only a conclusion or that is based on assumptions does not satisfy the summary judgment standard").

CPA, and she has similarly failed to raise any argument in her briefing as to these additional claims.

c. Dr. Bensinger's declaration lacks an adequate foundation.

As the declaration of Dr. Bensinger reveals, his opinions were based on the self-serving statements of Nguyen-Aluskar herself, unsupported by any evidence in the record before this Court. These statements, and the opinions arising therefrom, are not competent evidence for the purpose of overcoming a motion for summary judgment.

Dr. Bensinger's declaration concluded that Dr. Jensen failed to adequately obtain Nguyen-Aluskar's informed consent. CP 260-64. In considering the basis for that opinion, it is important to consider the evidence of informed consent that is actually contained in the record before the trial court and this Court. That evidence is as follows: (1) the notation by Dr. Jensen that he discussed the risks and benefits of the enhancement procedure with Nguyen-Aluskar; and (2) the informed consent forms that Nguyen-Aluskar herself signed, which specifically discuss the complications that she herself claims to have experienced. CP 65-68, 72, 74. A written consent form constitutes prima facie evidence of consent. RCW 7.70.060. *See e.g. Morinaga,* 85 Wn. App. at 830; *Vasquez v. Markin,* 46 Wn. App. 480, 485-86, 731 P.2d 510 (1986).

In concluding that Nguyen-Aluskar was not adequately consented, even in light of this compelling evidence, Dr. Bensinger relied only on the self-serving statements of Nguyen-Aluskar herself, many of which are repeated directly from her Complaint. For instance, Dr. Bensinger relies on Nguyen-Aluskar's claim that she was promised "falcon-vision," a claim that is asserted in her Complaint but not reflected by any evidence before the trial court or this Court. Dr. Bensinger also relies on Nguyen-Aluskar's self-serving narrative regarding the consent process, including her claim that Dr. Jensen did not review the consents with her and that she was unable to read the consents due to the administration of eye drops. Again, these claims are bare allegations lifted from plaintiff's Complaint, and belied by any and all evidence in the record before this Court.

The law is clear that a plaintiff cannot rely merely on her own self-serving allegations to overcome a motion for summary judgment. *See Discover Bank v. Bridges*, 154 Wn. App. 722, 727, 226 P.3d 191 (2010) ("mere allegations or conclusory statements of facts unsupported by evidence do not sufficiently establish a genuine issue" of fact on motion

for summary judgment).[18] It follows from this principle that a plaintiff may not relay these unsupported allegations to a purported expert, instruct that expert to base his opinions on those unsupported allegations, and call it evidence sufficient to overcome a motion for summary judgment. While ER 703 allows an expert to relay hearsay statements for the limited purpose of explaining the basis for his opinions, those hearsay statements do not themselves constitute substantive evidence. *See Allen v. Asbestos Corp., LTD,* 138 Wn. App. 564, 579, 157 P.3d 406 (2007). Further, expert opinions based on plaintiff's unsupported, hearsay allegations are not sufficient to defeat a summary judgment motion. *See Guile,* 70 Wn. App. at 25.

This Court's opinion in *Guile* is particularly instructive. In that case, the plaintiff submitted an expert declaration opining that the plaintiff suffered a variety of post-surgical complications due to the "faulty technique" of the surgeon. *Id.* In concluding that the declaration was insufficient to overcome summary judgment, the Court of Appeals noted that the declaration "does little more than reiterate the claims made in [the plaintiff's] complaint." *Id.*

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[18] *See, e.g., Lane v. Harborview Medical Center*, 154 Wn. App. 279, 288, 227 P.3d 297 (2010) ("A declaration that contains only conclusory statements without adequate factual support does not create an issue of material fact that defeats a motion for summary judgment"); *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054 (2008) ("statements of ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to overcome a summary judgment motion").

Here as well, Dr. Bensinger's opinions were based on Nguyen-Aluskar's bare allegations, unsupported by any evidence in the record. While Dr. Bensinger states in his declaration that he reviewed medical records at issue in forming his opinions, he fails to direct the Court to any actual evidence in the record that supports his opinions that informed consent was not properly obtained. CP 260-64. Significantly, while he asserts that Dr. Jensen should have relied on the longer-form consent form rather than the short-form consent prior to the enhancement procedure, Nguyen-Aluskar specifically acknowledged by signature that she had re-read the long-form consent prior to the enhancement procedure. CP 74. Even more significantly, as a matter of law, any failure to use a specific form is not admissible as evidence of failure to obtain consent. RCW 7.70.060. As such, Dr. Bensinger's assertion that Dr. Jensen should have relied on one form over another is not legally competent evidence sufficient to overcome LVI's summary judgment motion.

Dr. Bensinger's only other apparent reference to the medical record are with regard to Nguyen-Aluskar's alleged medical condition prior to and subsequent to surgery. CP 263-264. Because Nguyen-Aluskar did not submit any supporting evidence demonstrating her medical condition at either point in time, it appears that these references themselves are based on what was relayed to Dr. Bensinger by Nguyen-

Aluskar herself. Even if they were based on some medical records that have not been produced to defendants or submitted to the Court, negligence cannot be inferred from the mere fact that Nguyen-Aluskar experienced complications following a medical procedure. *Guile,* 70 Wn App. at 26-27 (*citing Watson v. Hockett,* 107 Wn.2d 158, 161, 727 P.2d 669 (1986) ("[A] doctor will not normally be held liable under a fault based system simply because the patient suffered a bad result")).

Because Dr. Bensinger's opinions are based on the self-serving statements of Nguyen-Aluskar herself, they do not constitute evidence sufficient to overcome the motion for summary judgment.

d. Dr. Bensinger's declaration is insufficient to demonstrate the existence of a material issue of fact on plaintiff's informed consent claim.

Dr. Bensinger's declaration fails to create an issue of material fact on Nguyen-Aluskar's informed consent claim for the additional reason that it does not satisfy those elements of an informed consent claim for which expert testimony is mandated.

As discussed above, expert testimony on an informed consent claim is required to establish the existence, nature, and likelihood of occurrence of the risk at issue. RCW 7.70.050(3). *See, e.g. Seybold*, 105 Wn. App. at 682-83; *Ruffer*, 56 Wn. App. at 631; *Adams*, 37 Wn. App. at

657. Expert testimony is similarly required to establish the potential complications and benefits of treatment and the recognized alternative forms of treatment. *See, e.g.*, RCW 7.70.050(3); *Seybold,* 105 Wn. App. at 682. This threshold expert testimony is necessary before a jury may determine whether the risk in question is one that a reasonable patient would consider in deciding on treatment. *Smith,* 100 Wn.2d at 33-34.

Here, Dr. Bensinger offered the bare conclusion that Dr. Jensen "failed to give [Nguyen-Aluskar] informed consent and failed to notify her of the potential and known risks of the procedure." CP 263. However, he failed to identify any specific risk as a "material" risk, and failed to identify the probability of any occurrence of any specific risk. *Id.* The only specific purported risk discussed in his declaration is the possibility that Nguyen-Aluskar would "require reading glasses upon completion of the enhancement procedure." *Id.* He failed to identify this as a "material" risk of treatment, failed to explain why it was material, and failed to discuss the scientific nature of the risk, *i.e.* its likelihood or probability of occurrence. Simply identifying the risk, with no discussion of materiality, is insufficient. As this Court has held:

> As has been shown, unless the **risk** is serious—whether characterized as grave, medically significant, or reasonably foreseeable—and unless expert testimony can establish its existence, nature, and likelihood of occurrence, the presence of the

> **risk**, as a matter of law, **is not material** and **no duty** of disclosure manifests in the health care provider.

Ruffer. 56 Wn. App. at 631 (emphasis in original).

Our Supreme Court's decision in *Smith,* 100 Wn.2d 26, is also instructive on this issue. In that case, the evidence established that the physician had not disclosed several risks of a procedure that were referenced in the *Physician's Desk Reference* (PDR), including that complication that the plaintiff subsequently experienced. The trial court concluded that the plaintiff failed to prove that any of the risks referenced in the PDR were in fact material, noting in particular that the plaintiff failed to provide sufficient expert testimony on the issue. Our Supreme Court agreed and affirmed. *Id.* at 28-29.

Here as well, Nguyen-Aluskar offered no expert testimony, by Dr. Bensinger or anyone else, regarding the materiality of any of the complications she claims to have experienced. Dr. Bensinger's declaration also entirely failed to address the possible alternative forms of treatment, and the risks and benefits of those alternatives. RCW 7.70.050(3). *See, e.g. Seybold*, 105 Wn. App. at 682-83.

This lack of adequate expert testimony was and is fatal to her informed consent claim. The order granting summary judgment to LVI should be affirmed on this basis as well.

e. Dr. Bensinger's declaration is insufficient to demonstrate a material issue of fact on plaintiff's breach of standard of care claim.

Even assuming that Dr. Bensinger's declaration was sufficient to overcome summary judgment on LVI's informed consent claim, it is manifestly insufficient to create an issue of material fact as to the claim for medical negligence.

As discussed above, a plaintiff asserting a medical negligence claim must demonstrate that the defendant failed to "exercise the degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which [s]he belongs, in the State of Washington, acting in the same or similar circumstances." RCW 7.70.040(1). Second, a plaintiff must establish that the asserted negligence was the proximate cause of the injuries alleged. *See Morinaga*, 85 Wn. App. at 831. Both of these elements must be established with competent expert testimony. *Id.* *See McLaughlin*, 112 Wn.2d at 836.

Of particular significance here, the case law is in unison that a party may not conflate a medical negligence claim with an informed consent claim, as the two claims address different duties owed by the practitioner to the patient, and carry different substantive burdens. *See Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 469-71, 656 P.2d 483 (1983) (discussing at length different standards imposed on healthcare

providers under the statute).[19] Indeed, the case law has recognized repeatedly that allegations supporting a failure to secure informed consent claim will not support a medical negligence claim, or vice versa. *See Gustav v. Seattle Urological Associates*, 90 Wn. App. 789, 945 P.2d 319 (1998) (referring to the claims, stating "[a]llegations supporting one will normally not support the other").[20] Here, Dr. Bensinger's only allegation as to Dr. Jensen's care was that he failed to appropriately discuss the risks of treatment with Nguyen-Aluskar. CP 263. Dr. Bensinger did not contend that the enhancement procedure was not indicated. He did not contend that Dr. Jensen fell below the standard of care in his technical performance of the procedure. He did not articulate what the standard of care required. He contended only that the procedure should not have been performed unless Nguyen-Aluskar insisted on proceeding after being fully informed of the risks of the procedure. *Id.* This allegation could only be relevant to an informed consent claim, not a medical negligence claim.

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[19] *See, e.g., Stewart-Graves*, 162 Wn.2d 115, 170 P.3d 1151 (2007); *Shellenbarger v. Brigman*, 101 Wn. App. 339, 348, 3 P.3d 211 (2000).

[20] *See, e.g.,Nicholson v. Deal*, 52 Wn. App. 814, 821, 764 P.2d 1007 (1988) ("A doctor's liability for failure to obtain informed consent is founded, not upon a violation of a standard of care among the medical community, but on failure to disclose material information to a patient"); *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 261, 828 P.2d 597 (1992) ("[i]nformed consent and medical negligence are alternate theories of liability"). *See also* RCW 4.24.290 (actions based on professional negligence, "in no event shall... apply to an action based on the failure to obtain the informed consent of a patient").

In addition, it is notable that plaintiff has failed to address the dismissal of her medical negligence claim in her briefing to this Court, and has not attempted to persuade the Court as to how or why Dr. Bensinger's declaration creates an issue of material fact as to the medical negligence claim. As such, any assignment of error as to the dismissal of these claims is waived. As our Supreme Court has held, "contentions that are not supported by argument or authority" will not be considered on appeal. *Talps v. Arreola,* 83 Wn.2d 655, 657, 521 P.2d 206 (1974).[21]

Nguyen-Aluskar's medical negligence claim fails on this basis.

f. Dr. Bensinger's declaration is insufficient to demonstrate the existence of a material issue of fact on any of plaintiff's remaining claims.

Finally, Dr. Bensinger's declaration did not address the elements of any of Nguyen-Aluskar's remaining claims, including those claims brought pursuant to Washington's Consumer Protection Act, for "extreme and outrageous conduct," for "Fraud and Misrepresentation," for "Negligent Training, Management and Supervision," and for Failure to Warn." Neither has Nguyen-Aluskar discussed, or even mentioned these

[21] *See, e.g., Cowiche Canyon* 118 Wn.2d at 809 (argument unsupported by citation to the record or authority will not be considered); *Nakatani,* 109 Wn. App. 622 (the Court of Appeals does not consider arguments raised for the first time in a reply brief); RAP 10.3(a)(6).

claims in her briefing to this Court. Accordingly, any assignment of error as to the dismissal of these claims is also waived. *Talps,* 83 Wn.2d at 657.

Nguyen-Aluskar's additional claims fail on this basis as well.

C. Dismissal of Nguyen-Aluskar's claims against LVI was appropriate pursuant to CR 41(b).

Even if this Court held that Nguyen-Aluskar had demonstrated the existence of an issue of material fact sufficient to reverse the trial court's grant of summary judgment to LVI, CR 41(b) provides an additional basis for the dismissal of Nguyen-Aluskar's claims against LVI.

CR 41(b) provides as follows:

> **(b) Involuntary Dismissal; Effect.** For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

Id. This rule provides courts with authority to order an involuntary dismissal for the plaintiff's failure to comply with the rules or orders of the court. *Woodhead v. Discount Waterbeds, Inc.,* 78 Wn. App. 125, 129, 896 P.2d 66 (1995). Courts also have the discretionary authority to manage their own affairs to achieve the orderly and expeditious disposition of cases. *Id. See also Jewell v. Kirkland,* 50 Wn. App. 813, 817, 750 P.2d 1307 (1988) (the trial court is vested with the authority to impose reasonable sanctions for the breach of reasonable rules).

While Washington Courts do not resort to dismissal lightly,

"where... a court has found that a party has acted in willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice and has prejudiced the other side by doing so, dismissal has been upheld as justified." *Woodhead,* 78 Wn. App. at 129-130. Disregard of a court order without reasonable excuse or justification is deemed willful. *Id. See also Alexander v. Food Services of America, Inc.,* 76 Wn. App. 425 (1994) (failure of plaintiff to attend trial constituted failure to comply with scheduling order and justified CR 41(b) dismissal).

The court's decision in *Jewell,* 50 Wn. App. 813, is instructive here. In that case, the trial court ordered the City to certify the record to Superior Court, and ordered plaintiff Jewell to pay the cost of preparing the record. *Id.* at 815. The City's attorney sent a letter to the plaintiff's attorney requesting $2,800 for the cost of preparing the record. *Id.* at 816. Ten days later, the City's attorney sent another letter requesting payment and warning that the City would move to dismiss the lawsuit if funds were not received. *Id.* Funds were not received, the City moved to dismiss, and the trial court granted the motion pursuant to the authority provided under CR 41(b). *Id.* In upholding the dismissal, the Court of Appeals reasoned that "The administration of justice will be best served by a policy of treating court orders as meaning what they say and requiring strict compliance therewith." *Id.* at 822.

Here, the trial court granted LVI's Motion for Costs on June 10, 2014, over 5 months prior to the hearing on LVI's Motion to Dismiss. LVI's several follow-up requests for payment went ignored. CP 78-86.

LVI reasonably incurred significant costs to defend plaintiff's initial action. Plaintiff chose to prevent trial by requesting and obtaining a voluntary dismissal. After plaintiff re-filed a substantively identical lawsuit, this Court ordered the plaintiff to reimburse LVI the costs incurred in the original action. CP 446-49. At the time of the hearing on LVI's Motion to Dismiss, over five months later, Nguyen-Aluskar had failed to comply with the Court's order or to respond to LVI's numerous requests for compliance. CP 86. That failure forced LVI to incur the time and additional expense to pursue this issue with the trial court.

In response to LVI's request for dismissal pursuant to CR 41(b), plaintiff raised only a single argument: that the "Order Granting Defendants' Motion for Costs and Denying Discovery Stay as to Plaintiffs," did not actually grant LVI's motion for costs. CP 178. In support of that argument, Nguyen-Aluskar relied on a snippet of text in the Order that would appear to any reasonable reader to be a scrivener's error. CP 446-448.

During the hearing on LVI's Motion for Summary Judgment pursuant to CR 56, and Motion for Dismissal pursuant to CR 41(b), the

trial court expressed dismay at Nguyen-Aluskar's disregard of the Order it has issued several months prior. As the Court stated:

> As to the CR 41 dismissal, I am greatly concerned about the interpretation of my order. Now, it seems very clear to me that there was, at most, a clerical error. You have the caption. You have the footer, "Order Granting Defendants' Motion for Costs and Denying Discovery Stay."
>
> ***
>
> And to completely ignore the sentence before the one [Nguyen-Aluskar] quote[s] is just amazing to me, particularly since I entered this order in June and I have been sitting here and it is now December and at no point did anyone ever contact the Court if they were confused about this order. There was never a motion to clarify. There was never – it was never brought back before this Court.
>
> If there was true confusion and people did not understand what this order meant, I see no responses to the letters. I see no requests to the Court to clarify. Instead, what I see is dilatory conduct.

VRP 28:10-29:6. The trial court further indicated that Nguyen-Aluskar had failed to comply with the Order granting costs, but declined to enter a dismissal order pursuant to CR 41 because it was granting dismissal of all claims pursuant to CR 56. VRP 29:15-19.

Parties are not entitled to ignore trial court orders that they do not like, and this Court may affirm the trial court on any correct ground. *See, e,g., Nast,* 107 Wn.2d at 308; *Heath,* 106 Wn. App at 515. In the event that this Court holds that an issue of material fact warrants reversal of the summary judgment dismissal of any of Nguyen-Aluskar's claims against LVI, LVI requests that the dismissal of those claims be affirmed pursuant

to CR 41(b).

D. The trial court's order granting CR 41(d) costs to LVI should be affirmed.

Nguyen-Aluskar's final assignment of error is with respect to the trial court's June 10, 2010 Order granting costs to LVI – the Order which, as discussed above, Nguyen-Aluskar chose to ignore for several months.

As an initial matter, Nguyen-Aluskar failed to designate this issue in her notice of appeal. CP ____. Under RAP 2.4 an appellate court will review "the decision or parts of the decision designated in the notice of appeal." When a party fails to include an issue in its notice of appeal the appellate court may, in its discretion, decline to entertain the argument on that issue. *See Hiner v. Bridgestone, Inc.,* 138 Wn.2d 248, 262-64, 978 P.2d 505 (1999). LVI requests that this Court exercise its discretion and decline to consider Nguyen-Aluskar's assignment of error with respect to the order that she willfully and deliberately ignored for several months.

Alternatively, LVI requests that this Court affirm the cost award on the basis that the trial court acted appropriately in granting costs. Such relief is expressly permitted in circumstances such as those here presented..

Nguyen-Aluskar voluntarily dismissed her initial lawsuit pursuant to CR 41. CP 58-59. That rule allows a plaintiff broad authority to

voluntarily dismiss a lawsuit without prejudice. *See* CR 41(a)(4). Several weeks later, Nguyen-Aluskar commenced a nearly-identical action. Other than the omission of Nguyen-Aluskar's husband as a plaintiff, and his loss of consortium claim, the Complaint in the second action is exactly the same as the Complaint in the first. CP 1-8, 49-56.

CR 41(d), provides as follows:

> If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for payment of taxable costs of the action previously dismissed as it may deem proper and may stay proceedings in the action until the plaintiff has complied with the order.

CR 41(d). By the plain language of CR 41(d), the trial court has the discretion to award costs "as it may deem proper."

In *Johnson v. Horizon Fisheries, LLC,* 148 Wn. App. 628, 201 P.3d 346 (2009), this Court upheld a trial court cost order that required the plaintiff to repay costs similar to those requested in this case. In that case, the plaintiff sued Horizon Fisheries, alleging that he was injured while working on a Horizon ship. *Id.* at 631. Horizon incurred costs associated with discovery and defense. *Id.* After the withdrawal of his counsel, Johnson moved for a CR 41(a) motion to voluntarily dismiss his lawsuit without prejudice, which was granted. *Id.* Johnson then re-filed the same complaint against Horizon. *Id.*

Horizon moved for costs under CR 41(d), claiming a total of $2,762 as reimbursement for: a CR 35 examination; obtaining Johnson's medical, Social Security, Employment Security, and Coast Guard records; deposing Johnson's treating providers; document production costs (photocopier and postage fees); jury demand filing fee; legal messenger fees; and statutory attorney fees. *Id.* at 632. The trial court granted Horizon's Motion, ordered Johnson to pay all of Horizon's requested costs, and entered a one-party stay to prevent Johnson from proceeding further until he paid Horizon. *Id.* This Court upheld the trial court in all respects. *Id.* at 636. It noted that the cost recovery authorized under CR 41 gave the trial court discretion to award any costs "as it may deem proper[,]" and reasoned that:

> Because the plaintiff has chosen to prevent a trial when he takes a voluntary dismissal, he should be responsible for the costs the defendant reasonably incurred in anticipation of trial. We affirm the trial court's cost order.

Id. at 634-36. Here, LVI reasonably incurred significant costs to defend plaintiff's initial action. As was the case in *Johnson*, these costs were necessary to prepare for the anticipated trial of plaintiff's initial action. Plaintiff here, just like the plaintiff in *Johnson*, chose to prevent trial by taking a voluntary dismissal. Therefore, plaintiff here, just like the plaintiff in Johnson, was properly found responsible to reimburse LVI for

its costs incurred in the first action - legal messenger costs; FedEx costs; legal research costs; jury verdict research costs; costs associated with obtaining plaintiff's medical records; photocopy costs; expert-related costs; electronic court filing costs; parking costs; and costs relating to researching plaintiff's background information. CP 446-48.

Despite Nguyen-Aluskar's contentions to the contrary, LVI was not required to put her on notice that it intended to seek costs pursuant to CR 41(d) prior to her dismissal of the first lawsuit. CR 41(d) is a well-known court rule, plainly applies to the facts of this case, and does not require LVI to preserve its right to move for costs in any respect. Nguyen-Aluskar cited no authority for the proposition that a defendant is obligated to warn a plaintiff that it will seek costs if the plaintiff chooses to re-file a substantively identical action.

In addition, plaintiff's assertion that the costs awarded to LVI will result in a "windfall" is based only on her speculative contentions. Nguyen-Aluskar does not represent LVI and is not in a position to determine whether LVI would be able or willing to use the same evidence or experts in one lawsuit that it had used in an earlier one. When one lawsuit is dismissed and another is filed, defendants must re-retain experts (or retain new ones if the prior experts are unavailable), re-send records, re-pay for reviews, and re-confer with them regarding their opinions.

Because Nguyen-Aluskar filed a new complaint, LVI must incur additional repeat costs, including those associated with, for example, preparing, serving and filing the answer, obtaining updated medical and employment records, and serving another set of initial discovery. Diligent representation requires that LVI incur these costs in the second action, rather than merely rely on outdated discovery and investigation obtained in the first.

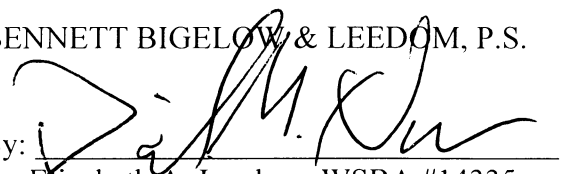
While CR 41 allows plaintiffs broad authority to take a voluntary non-suit in many circumstances, CR 41(d) is a reasonable means by which to defray the costs incurred by defendants as a result of such non-suits. The trial court's order granting Costs pursuant to CR 41(d) should be affirmed.

V. CONCLUSION

LVI respectfully requests that this court affirm all challenged actions of the trial court, including the dismissal of all claims against LVI.

Respectfully submitted this 18th day of May, 2015.

BENNETT BIGELOW & LEEDOM, P.S.

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of the foregoing **BRIEF OF RESPONDENT LASIK VISION INSTITUTE, LLC** to be delivered VIA LEGAL MESSENGER as follows:

Court of Appeals – Division I One Union Square 600 University St. Seattle, WA 98101-1176	☑ ❑ ❑ ❑	Messenger Facsimile U.S. Mail E-filed
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington this 18th day of May, 2015.

Heather K. Poltz

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