IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARY FUNG KOEHLER, a single person, Appellant, v. ALLSTATE INSURANCE COMPANY, an Illinois corporation; HILLYARD INDUSTRIES, aka Hillyard, Inc., a Missouri corporation; PROFESSIONAL CLEANING AND RESTORATION SERVICES, LLC, dba SERVPRO, a Washington corporation; BRENT YOUNG and JANE DOE YOUNG, husband and wife and the marital community composed thereof; and JAMES YOUNG and JANE DOE YOUNG, husband and wife and the marital community composed thereof, Respondents.	)	NO. 62778-3-I DIVISION ONE UNPUBLISHED OPINION FILED: August 8, 2011

Leach, J. — Pro se, Mary Fung Koehler appeals a trial court's summary judgment dismissal of her claims against Allstate Insurance Co., Hillyard Industries, Professional Cleaning & Restorations Services LLC d/b/a Servpro, and the marital communities of Brent Young and Jane Doe Young and James Young and Jane Doe Young, Servpro's owners. Because she has not demonstrated any material issue of fact or misapplication of the law by the trial court, we affirm.

FACTS

This lawsuit concerns three insurance claims Koehler made to Allstate: two claims based on alleged burglaries and one water loss claim.

Ms. Koehler reported the first burglary in February 2002. Officer Maurice Parrish of the Lake Forest Park Police Department investigated Koehler's claim. Parrish concluded that "[b]ased on the examination of the house, the point of entry, condition of the house, . . . Koehler's demeanor and past history, it appeared that the claim of burglary was highly dubious."[1]

Koehler first reported the incident to Allstate in May. Allstate requested a theft loss inventory along with estimates and documentation relating to any lost property. In July, Allstate advised Koehler that if she did not respond within 10 days, it would "place your file on suspension." Koehler did not respond, and as a result, Allstate closed the claim.

In June 2004, Koehler discovered flooding in her basement hallway and bathroom. A few days later, she reported a water loss claim to Allstate. Allstate immediately contacted Servpro, and Servpro contacted Koehler to begin remediating the water damage. As part of their efforts, Servpro applied a

[1] Parrish discovered a window on the lower north side of the house slid completely open. The window had a broken corner corresponding to the placement of a sliding window lock. However, it had been raining, and Parrish noticed an absence of wet footprints on the window sill or any scuff marks on the exterior wall leading to the window. Parrish also observed a row of undisturbed books placed in front of the window and that the height of the window would have made entry difficult for a person of average height and weight. He also observed cobwebs at the bottom edge of the window and a fine layer of undisturbed dust with no signs of latent fingerprints.

disinfectant spray known as Re-Juv-Nal, an Environmental Protection Agency registered hospital grade disinfectant, mildewstat, and deodorizer commonly used for water remediation and mold control.

Three days later, Koehler notified Allstate that the smell of the disinfectant spray was too strong and that she needed to move into a hotel. Allstate agreed to pay for her hotel expenses while remediation continued. Allstate also asked a hygienist from Indoor Air & Environmental Services (IAES) to inspect Koehler's home to assess the impact of water damage, the potential growth of mold from the leak, and whether the house was chemically contaminated from Servpro's use of Re-Juv-Nal.

In her final report, the hygienist found visible mold growth but stated that she could neither detect nor identify any odors from the chemical disinfectant. She also noted that the active ingredients in Re-Juv-Nal were water soluble and, if properly diluted, were not known to have long-term health effects. According to the hygienist, proper ventilation would eliminate any residual irritants related to the use of the disinfectant.

Allstate also asked American Leak Detection (ALD) to perform an inspection to determine whether additional water leaks were present. ALD concluded that there were no additional leaks and that a long-term slow leak existed before Koehler reported water damage to Allstate.

At the end of August, Servpro reported to Allstate two reasons why it could not complete the remediation: Koehler directed them to stop working and

refused to pay her $500 deductible.

Allstate agreed to pay Koehler for the damage caused by the water leak, including remediation for mold damage. Allstate paid Koehler a total of $10,802.39, which included the $5,000.00 policy limit on mold damage, $3,174.99 in additional living expenses, and $2,627.40 for cleanup and storage.

Koehler, however, refused to move back into her house. She claimed that chemical contamination made her house uninhabitable and that she continued to suffer adverse health effects from her exposure to Re-Juv-Nal.

In December 2004, Sergeant Jason Becker of the Lake Forest Police Department responded to another reported burglary at Koehler's house. After arriving, Becker observed personal property strewn on the floors throughout the entire house, making it difficult to determine whether any property had been stolen. Koehler also could not tell him whether any items had been taken. After investigating, Becker reported that there appeared to be no forced point of entry.[2]

Koehler reported the burglary incident to Allstate later that month. When Allstate requested a list of missing items along with original documents indicating ownership (i.e., receipts, manuals, estimates, etc.), Koehler stated she

[2] Becker ruled out the broken window from the 2004 incident as the point of entry because cobwebs surrounding the window indicated that it had not been opened for some time and books in front of the window were not disturbed. Becker found a ladder leaning against the second floor balcony that led to a sliding glass door, but he eliminated that as a possible entry point because a box was leaning against the door on the inside.

was unable to provide them because she had not been living in the house since June, and she could not go into the house due to "toxic mold."

In January 2005, Allstate sent Koehler a request for a sworn proof of loss for all inventory related to the two burglary incidents and the water loss claim. Allstate also requested that Koehler appear at an examination under oath. At the examination, Koehler provided an inventory of items allegedly stolen during the 2002 and 2004 burglaries, estimating the total value of personal property taken at $30,000 and $95,000, respectively. She did not, however, provide proof of ownership. She also testified that it would cost $54,000 to conduct the water damage remediation recommended in the IAES report. She explained that she derived this value by "dowsing."[3]

During Allstate's review of the theft loss inventories, it identified several items listed on both inventories. Allstate also discovered that some of the property values stated on the inventories differed markedly from those provided on schedules filed in a 1991 bankruptcy proceeding. For instance, Koehler's inventory to Allstate showed values of $5,000 for "marriage bracelets" and $2,300 to $2,500 for Thai jewelry purchased in 1971 or 1972, but in the bankruptcy proceeding Koehler claimed all "[w]earing apparel including fur,

[3] When asked what "dowsing" meant, Koehler explained,

> It's—you know how people search for water with sticks? You can use sticks, twigs, and as you cross the point where water is, it will cross. Well, you can do it for anything. . . .
>
> So what you do is ask the questions, and the more specific you are, the answers are "yes" or "no." And with a quick mind and with the knowledge you have, you can find out all kinds of things.

jewelry, and personal ornaments" totaled only $750.

Allstate denied Koehler's theft claims, citing her attempt to conceal or misrepresent material facts and her failure to comply with the terms of the insurance contract. Allstate also denied the additional water loss claim, explaining that after conducting a full investigation, paying for all removal, storage, and cleaning of her property, and providing her with additional living expenses, it had made a good faith payment for the entire claim.

In April 2008, Koehler filed an amended complaint against Allstate; Hillyard Industries, the manufacturer of Rev-Ju-Nal; and Servpro and its owners. She asserted bad faith, negligence, and Consumer Protection Act[4] (CPA) claims against Allstate and Servpro and products liability claims against Hillyard.

Each defendant moved for summary judgment dismissal, and the trial court granted the motions. At the summary judgment hearing, Koehler had made a verbal CR 56(f) motion to continue the hearing to allow additional discovery, claiming the discovery cutoff date had not yet passed, more time was needed to compel the defendants to respond to her interrogatories, and problems with her health had caused delays in completing discovery. This was Koehler's third such request; the trial court had granted two similar requests and ruled that no additional requests would be granted unless Koehler produced supporting medical documentation. Because Koehler failed to produce that documentation when she made her third continuance motion, the court denied it.

[4] Ch. 19.86 RCW.

The trial court denied Allstate's and Servpro's motion to strike declarations Koehler submitted in opposition to summary judgment based upon untimeliness. It struck those portions of the declarations containing inadmissible hearsay, speculation, or unqualified expert opinion. The trial judge stated that he would consider the observations and lay opinions contained in the declarations.

Koehler moved for reconsideration of the summary judgment dismissals but not the order striking inadmissible portions of her supporting declarations. The trial court denied all three motions for reconsideration.

Koehler appeals.

ANALYSIS

Koehler challenges both the trial court's evidentiary rulings and its decisions on the merits of her various claims. We first address the evidentiary issues and then the substantive ones.

Declarations

Koehler argues that the court erred in striking portions of the declarations she submitted in opposition to summary judgment. We review de novo a trial court's evidentiary rulings made in connection with a summary judgment motion.[5]

Ordinarily, the hearsay rule bars admission of out-of-court statements offered to prove the truth of the matter asserted unless a recognized exception to the rule applies.[6] CR 56(e) requires that affidavits submitted in support of or

[5] Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

in opposition to a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Thus, when deciding a summary judgment motion, a trial court cannot consider inadmissible hearsay statements.[7]

Here, Koehler's supporting declarations contained inadmissible hearsay statements. The trial court properly ruled that it would not consider these declarations to the extent they contained this hearsay. The trial court did not go through the declarations line by line to identify which portions it did not consider. Ms. Koehler has not identified any part of the declarations that she claims the court should have considered but did not because it was hearsay. Therefore, we do not consider Koehler's challenge to the trial court's striking of hearsay testimony further.

The trial court considered the opinions in Koehler's declarations as lay opinions. Koehler appears to assert that the trial court should have considered them as expert testimony. But ER 701 and ER 702 preclude opinion testimony "based on scientific, technical, or other specialized knowledge" unless the witness has been "qualified as an expert by knowledge, skill, experience, training, or education."[8] In this case, Koehler failed to present any evidence

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[6] ER 801, 802.

[7] Dunlap v. Wayne, 105 Wn.2d 529, 535, 716 P.2d 842 (1986).

[8] See also Philippides v. Bernard, 151 Wn.2d 376, 393, 88 P.3d 939 (2004) (expert opinion admissible if witness is properly qualified, relies on generally accepted theories, and testimony is helpful).

qualifying the declarants as experts. The trial court properly declined to consider their opinions as those of expert witnesses.

Motion To Continue Discovery

Koehler challenges the trial court's denial of her oral motion to continue the summary judgment hearing to allow her to conduct additional discovery. We review a trial court's denial of a CR 56(f) continuance motion for a manifest abuse of discretion.[9] A court does not abuse its discretion 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."[10]

Here, Koehler failed to fulfill CR 56(f)'s requirement that she produce an affidavit identifying why she was unable to obtain evidence essential to her case. She also failed to state what evidence would be established and, if obtained, how it would create a genuine issue of material fact. The trial court did not abuse its discretion in denying Koehler's request for additional time to conduct discovery.

Additionally, given Koehler's two previous continuances and the trial court's previous warning that it would not continue the hearing again without medical documentation, the trial court reasonably rejected Koehler's request,

[9] Manteufel v. Safeco Ins. Co. of Am., 117 Wn. App. 168, 175, 68 P.3d 1093 (2003).

[10] Manteufel, 117 Wn. App. at 175.

without this documentation, for a continuance based upon the state of her health.

Koehler's Claims against Allstate

Koehler contends the court erred in dismissing her extracontractual claims against Allstate on summary judgment. She does not make the basis for this claim clear in her briefing. To the extent we can discern legal arguments, we address them below.

This court reviews a summary judgment order de novo.[11] Summary judgment is proper if, after viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law.[12] "Summary judgment in favor of the defendant is proper if the plaintiff fails to make a prima facie case concerning an essential element of his or her claim."[13] The defendant moving for summary judgment has the burden of showing an absence of material issues of fact or that the plaintiff lacks competent evidence to support an essential element of her claim.[14] If the defendant meets that burden, the burden shifts to the plaintiff to produce evidence supporting a reasonable inference of a genuine material issue of fact

[11] Weden v. San Juan County, 135 Wn.2d 678, 689, 958 P.2d 273 (1998).
[12] CR 56(c); Torgerson v. N. Pac. Ins. Co., 109 Wn. App. 131, 136, 34 P.3d 830 (2001).
[13] Seybold v. Neu, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001) (citing Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989)).
[14] Seybold, 105 Wn. App. at 676.

on an element of her claim.[15] To establish the existence of issues as to material facts, the plaintiff may not rely on mere speculation or argumentative assertions that unresolved factual issues remain.[16]

Preliminarily, Koehler's brief contains allegations of Allstate's "unclean hands," fraud, and misrepresentation. But because she failed to raise these issues below, they are not properly before this court.[17]

Koehler next argues that the trial court erred by finding no bad faith on the part of Allstate. To establish a prima facie case of bad faith, Koehler must show that Allstate's conduct was unreasonable, frivolous, or untenable.[18] Koehler failed to meet that burden.

Regarding the burglary insurance claims, Koehler does not challenge Officer Parrish's conclusion that Koehler's 2002 burglary report was "highly dubious." Nor does she refute Allstate's conclusion that she misrepresented the value of items claimed as stolen or that she claimed the same items on both theft inventories. Further, Koehler does not contest Allstate's claim that she failed to comply with the terms of her insurance contract. Allstate presented admissible evidence sufficient to establish the absence of bad faith, and Koehler presented no evidence raising an issue of fact concerning this evidence. The trial court

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[15] Seybold, 105 Wn. App. at 676.

[16] Michael v. Mosquera-Lacy, 165 Wn.2d 595, 602, 200 P.3d 695 (2009) (quoting Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

[17] RAP 2.5(a); see Cowiche Canyon Conservancy v. Bosely, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

[18] Liberty Mut. Ins. Co. v. Tripp, 144 Wn.2d 1, 23, 25 P.3d 997 (2001).

properly granted summary judgment dismissing the claims based on the alleged 2002 and 2004 burglaries.

Similarly, Koehler produced no admissible evidence showing that Allstate acted with bad faith in handling the water loss claim. The parties agree Allstate contacted Servpro shortly after Koehler reported the incident. Allstate also conducted a full investigation, paid for all removal, storage, and cleaning of her property, and provided her with additional living expenses during the period of time Servpro remediated the damage. The parties also agree that Allstate retained a certified hygienist to inspect Koehler's house and to test air quality and moisture levels on interior surfaces. Contrary to Koehler's assertions, the hygienist did not detect residual odors from the use of the chemical disinfectant. Further, Koehler offered no expert testimony controverting the hygienist's findings and opinions. Once again, Allstate presented admissible evidence sufficient to establish the absence of bad faith, and Koehler presented no evidence raising an issue of fact concerning this evidence. The trial court properly granted summary judgment dismissing the claims based on the water damage.

Also, Koehler failed to meet her burden of establishing prima facie every element of her CPA claim. To prevail under a CPA claim, the plaintiff must establish five elements:

> "(1) the defendant has engaged in an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacts the public interest, (4) the plaintiff has suffered injury in his or her business or

> property, and (5) a causal link exists between the unfair or deceptive act and the injury suffered."[19]

"'Acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the [CPA].'"[20] Thus, an insurer's reasonable denial of coverage does not constitute an unfair practice prohibited by the CPA.[21] As explained above, Koehler failed to present any evidence that Allstate's adjustment of her various claims was unreasonable or done in bad faith.

Koehler argues, however, that Allstate prematurely canceled coverage in violation of the CPA. According to Koehler, she prepaid her insurance premium to October 2005; thus, Allstate engaged in an unfair practice by canceling her policy in June. But Koehler fails to cite the record or any case law in support of this argument. We generally do not consider argument unsupported by citation to the record or authority.[22]

In light of Koehler's complete failure of proof on essential elements of her claims against Allstate, the trial court properly dismissed them.[23]

Koehler's Claims against Servpro and Hillyard

Koehler contends the trial court wrongly dismissed her negligence claims

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[19] Seattle Pump Co. v. Traders & Gen. Ins. Co., 93 Wn. App. 743, 752, 970 P.2d 361 (1999) (quoting Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 149, 930 P.2d 288 (1997)).

[20] Seattle Pump Co., 93 Wn. App. at 753 (alteration in original) (quoting Leingang, 131 Wn. 2d at 155).

[21] Seattle Pump Co., 93 Wn. App. at 753.

[22] Cowiche Canyon Conservancy, 118 Wn.2d at 809.

[23] Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

against Servpro. Again, Koehler fails to make clear in her briefing her grounds for appealing dismissal of these claims. Nevertheless, we again conclude that Koehler failed to carry her burden with respect to essential elements of her claim.

In an action for negligence, a plaintiff must prove the existence of a legal duty, a breach of that duty, and an injury proximately caused by that breach.[24] A failure to establish any of these elements is fatal to her tort claim.[25] Here, Koehler failed to show both a breach of duty and that any breach proximately caused her injuries.

Koehler produced no evidence regarding the standard of care Servpro owed to her, and she testified at her deposition that she had not retained an expert to conduct chemical testing to determine the concentration of Re-Juv-Nal that Servpro used in her house. Conversely, James Young and Michael McGrath, Servpro employees, recited that it is standard practice in the restoration industry to apply Re-Juv-Nal in water damage claims, that it is company policy to premix the Re-Juv-Nal at the Servpro warehouse according to the manufacturer's recommendations, and that the canisters containing the premixed solution are then dispatched with the field technicians. They also stated this procedure was followed by the technicians conducting remediation at Koehler's house.

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[24] Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996).

[25] See Young, 112 Wn.2d at 225 (quoting Celotex, 477 U.S. at 322-23).

Further, Koehler failed to produce any admissible evidence showing that the application of Re-Juv-Nal proximately caused her symptoms. Proximate cause, though normally an issue for the trier of fact, may be decided on summary judgment when there are no material issues of fact and only one reasonable conclusion is possible.[26] Where, as here, the nature of injury involves "'obscure medical facts which are beyond an ordinary lay person's knowledge,'" expert medical testimony is necessary to establish causation.[27] Koehler provided no medical testimony or other admissible evidence linking her symptoms to the application of the disinfectant. As a result, Koehler did not meet her burden of production on proximate cause.

Koehler attempts to avoid her obligation to establish negligence by asserting a presumption of negligence under the doctrine of res ipsa loquitur. Whether that doctrine applies in a given context is a question of law reviewed de novo.[28] We hold that the doctrine does not apply in this case.

Res ipsa loquitur is a method of proof, not a separate form of negligence.[29] This doctrine permits an inference of negligence if the plaintiff establishes three elements: (1) the occurrence producing the injury was of a

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[26] Fabrique v. Choice Hotels Int'l, Inc., 144 Wn. App. 675, 683, 183 P.3d 1118 (2008).

[27] Fabrique, 144 Wn. App. at 685 (quoting Riggins v. Bechtel Power Corp., 44 Wn. App. 244, 254, 722 P.2d 819 (1986)); see also Seybold, 105 Wn. App. at 676 (expert testimony required when an essential element is best established by an opinion beyond the expertise of a layperson).

[28] Curtis v. Lein, 169 Wn.2d 884, 889, 239 P.3d 1078 (2010).

[29] Tinder v. Nordstrom, Inc., 84 Wn. App. 787, 789, 929 P.2d 1209 (1997).

kind that ordinarily does not occur in the absence of negligence, (2) the injury was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing occurrence was not due to any contribution of the injured party.[30] If any of these three elements is missing, a presumption of negligence is unwarranted.

Servpro's brief cites two Washington cases involving res ipsa loquitur in the context of a products liability claim, Howell v. Spokane & Inland Empire Blood Bank[31] and Charbonneau v. Wilbur Ellis Co.[32] In both cases, the court found that the doctrine did not apply because the plaintiff could not establish that the defendant had exclusive control over the instrumentality that caused the injury.[33] Although these cases predate the modern products liability act,[34] the underlying logic nevertheless applies.

Here, as in the cases cited, Servpro did not have exclusive control of the Re-Juv-Nal. Before the alleged injury occurred, Servpro necessarily procured the Re-Juv-Nal from the manufacturer, Hillyard. If the compound was negligently manufactured, then Servpro could have properly diluted the compound and injury could have resulted without any fault on the part of Servpro. Because

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[30] Curtis, 169 Wn.2d at 891.

[31] 114 Wn.2d 42, 785 P.2d 815 (1990).

[32] 9 Wn. App. 474, 512 P.2d 1126 (1973).

[33] Howell, 114 Wn.2d at 58 (doctrine did not apply when HIV-infected blood was donated by one party, collected by a blood bank, and transfused by hospital); Charbonneau, 9 Wn. App. at 478 (doctrine inapplicable where defendant did not have exclusive control of chemical spray).

[34] Ch. 7.72 RCW.

Koehler failed to establish an issue of fact concerning the second prong of res ipsa loquitur, the doctrine does not apply.

For these reasons, the trial court did not err in dismissing Koehler's cause of action.

Koehler's Claims against Hillyard Industries

Koehler also challenges the dismissal on summary judgment of her products liability claim against Hillyard. She argues that Re-Juv-Nal contained unnecessary hazardous substances and that the size of the product's container could lead to improper dilution. But, again, Koehler has provided no evidence to support these allegations. As explained above, she opposed Hillyard's summary judgment motion with declarations from various laypersons, none of whom qualified as an expert regarding the design or packaging of chemical disinfectants. In the absence of any expert testimony supporting Koehler's allegations against Hillyard, the trial court properly granted summary judgment dismissing them.

Due Process Violations

Koehler asserts the trial court deprived her of due process of law in two respects: by denying her motion for a continuance and by limiting oral argument at the summary judgment hearing to half an hour. Neither argument has merit.

It is well settled that procedural due process need not follow any preset form or procedure.[35] It requires only that a party receive proper notice of the

[35] Parker v. United Airlines, Inc., 32 Wn. App. 722, 727-28, 649 P.2d 181

proceedings and an opportunity to present her case before a competent tribunal.[36] Koehler received a meaningful hearing which complied with due process requirements.

Motion for Reconsideration

Finally, Koehler assigns error to the trial court's denial of her motions to reconsider. We review the denial of a motion to reconsider for an abuse of discretion.[37] Because the trial court did not err in dismissing Koehler's claims on summary judgment and Koehler fails to provide any other justification for finding an abuse of discretion, we reject Koehler's claims.

CONCLUSION

Because Koehler has not demonstrated any material issue of fact or misapplication of the law by the trial court, we affirm.

WE CONCUR:

Leach, J.

Dwyer, C.J.

Cox, J.

(1982) (citing Mitchel v. W.T. Grant Co., 416 U.S. 600, 610, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974)).

[36] Parker, 32 Wn. App. at 728.

[37] Wagner Dev., Inc. v. Fid. & Deposit Co. of Md., 95 Wn. App. 896, 906, 977 P.2d 639 (1999).