

268 Fed.Appx. 684, 2008 WL 636823 (C.A.9 (Wash.))  
**(Not Selected for publication in the Federal Reporter)**  
**(Cite as: 268 Fed.Appx. 684, 2008 WL 636823 (C.A.9 (Wash.)))**

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This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,  
 Ninth Circuit.  
 Vickie BAYLOR, Plaintiff-Appellant,

v.

TRIDENT SEAFOODS CORPORATION, Defendant,  
 and

Icicle Seafoods, Inc., Defendant-Appellee.

No. 06-35113.

Argued and Submitted Oct. 18, 2007.

Filed March 7, 2008.

**Background:** Seaman brought action alleging that her employer failed to timely provide maintenance and cure. The United States District Court for the Western District of Washington, [Marsha J. Pechman](#), J., entered summary judgment in employer's favor, and seaman appealed.

**Holding:** The Court of Appeals held that seaman was not entitled to recover damages for pain and suffering allegedly caused by employer's failure to timely provide maintenance and cure.

Affirmed.

West Headnotes

**Seamen 348 ↪11(9)**

[348](#) Seamen

[348k11](#) Medical Treatment and Maintenance of Disabled Seamen

[348k11\(9\)](#) k. Actions. [Most Cited Cases](#)

Seaman was not entitled to recover damages for pain and suffering allegedly caused by employer's failure to timely provide maintenance and cure, where there was no evidence that financial hardship impacted her mental state, or that delay had negative effect on her prognosis.

\***685** [Dennis M. O'Bryan](#), Birmingham, MI, for Plaintiff-Appellant.

[Kara Heikkila](#), Esq., Holmes Weddle & Barcott, Seattle, WA, for Defendant-Appellee.

Appeal from the United States District Court for the Western District of Washington, [Marsha J. Pechman](#), District Judge, Presiding. D.C. No. CV-04-02272-MJP.

Before: D.W. NELSON, BEAM <sup>FN\*</sup>, and [RYMER](#), Circuit Judges.

<sup>FN\*</sup> The Honorable [C. Arlen Beam](#), Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

MEMORANDUM <sup>FN\*\*</sup>

<sup>FN\*\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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\*\*1 Vickie Baylor appeals the summary judgment entered in favor of Icicle Seafoods, Inc. We affirm.

Baylor's arguments for compensatory damages for pain and suffering fail because she produced insufficient evidence to raise a triable issue of fact. [Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 \(1986\)](#) (noting that the nonmoving party cannot rely on its pleadings, but must submit evidence showing that there is a genuine issue for trial). She produced no evidence at all that financial hardship impacted her mental state. While Dr. Peterson did say that delay would likely cause a negative effect on Baylor's prognosis, his view was unsubstantiated and he admitted that he couldn't prove it.

Baylor also contends that the district court ignored her contention that delay prolonged her pain and suffering and that prolongation is compensable. We do not need to decide whether or under what circumstances pain and suffering caused by delay is compensable, because we disagree that the district court erred. Both the theory Baylor pled, and the responses she gave in discovery, focus on *aggravation* of the underlying condition caused by delay. Cf. [Coleman v. Quaker Oats Co., 232 F.3d 1271, 1291-92 \(9th Cir.2000\)](#). Neither put prolongation of pain and suffering at issue. Nor did her opposition to Icicle's motion for summary judgment present, or develop, the issue such that the district court should have addressed it. Her citation to an out-of-circuit district court decision for the proposition that prolongation of pain and suffering is compensable, and the observation that Baylor suffered before an MRI was authorized, were subsidiary to the topic point she stated in her memorandum: "Plaintiff has alleged a claim for aggravation of the underlying condition because Defendant did not timely provide maintenance and cure." Accordingly, the district court did not err in failing to consider the issue.

Remaining disputes are immaterial in light of this disposition.

AFFIRMED.

C.A.9 (Wash.),2008.

Baylor v. Trident Schools Corp.

268 Fed.Appx. 684, 2008 WL 636823 (C.A.9 (Wash.))

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