NO. 102062-7

SUPREME COURT OF THE STATE OF WASHINGTON

TERRY FOSTER,

Petitioner,

v.

BELLINGHAM UROLOGY SPECIALISTS, PLLC, and DR. SOREN CARLSEN

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTIES

Respondents Bellingham Urology Specialists (BUS) and Dr. Soren Carlsen answer Terry Foster's Petition for Review.

II. COURT OF APPEALS DECISION

In an unpublished decision, Division I unanimously affirmed dismissal of Foster's corporate negligence claim against BUS and negligent supervision claim against Dr. Carlsen concerning PA-C Denise Taylor's single visit with Foster. Although BUS and Dr. Carlsen were not Taylor's Washington Department of Health (DOH)-approved practice agreement supervisors, Foster argues that Dr. Carlsen and BUS breached duties to supervise Taylor because they "are not supposed to let her mess up," 10/1/2020 RP 141, and should have somehow double-checked her work to diagnose an extremely rare tumor.

Division I properly rejected these claims, holding that neither Washington's Physician Assistant (PA) regulations nor this Court's decisions supported creating the duties Foster sought to impose on Dr. Carlsen and BUS. This appeal also does not

present an issue of substantial public interest or constitutional concern. Foster does not need to pursue negligent supervision claims against anyone. Even if legally viable—which they are not—these claims are redundant. BUS acknowledges vicarious liability for any negligence of its providers, including Taylor, Dr. Carlsen remains in the case to defend his care, and these claims remain below.

Division I also correctly refused to consider Foster's untimely and procedurally-improper motion for discretionary review. This Court should deny review.

III. ISSUES COUNTERSTATEMENT

1. Does the corporate negligence doctrine imposed against hospitals extend to BUS to create a duty to double-check Taylor's diagnosis?

2. Does a negligent supervision claim lie against a physician who was not the PA's supervising physician?

3. Did Division I properly decline to consider Foster's challenges to interlocutory orders for which discretionary review was not timely sought or granted?

IV. CASE COUNTERSTATEMENT

In 2005, Drs. Pettit and O'Keefe formed BUS, a small urology group. CP 971-73, 1752.

In 2008, BUS employed Denise Taylor, PA-C. CP 637-38, 724. Taylor, her sponsoring physician Dr. Pettit, and her alternate supervising physician Dr. O'Keefe entered into a DOH-approved practice agreement. CP 637-38. While the practice agreement indicated that Taylor would practice in a group, and thus the sponsoring physician need not designate an alternate, Dr. Pettit and Taylor in fact chose an alternate, Dr. O'Keefe.[1] CP 637-38. Taylor, Dr. Pettit, and Dr. O'Keefe were the only signatories to the agreement. CP 638, 643.

Under the agreement, Taylor could provide those services she was competent to perform based on her education, training, and experience, and Dr. Pettit and Taylor would determine which procedures she could perform and the degree of supervision

[1] Foster's references to "post-2014 changes in the DOH WAC" regarding group practices, *Pet. at 15*, would not have applied in 2008 or 2014.

required. CP 637, 644, 724-27. The practice agreement did not require that Taylor consult with physicians about diagnoses or other medical care except surgical procedures, nor did it obligate her supervising physicians or anyone else at BUS to double-check her work. CP 637-38, 644-45. Instead, it required that the sponsoring physician or alternate be available on-site or by phone for consultation as needed. CP 637. After months of training with Drs. Pettit and O'Keefe, Taylor had a comprehensive practice where she saw new patients, performed physicals, and assisted with procedures. CP 724-27, 1744. No concerns regarding Taylor's practice or her competence arose. CP 1761, 1781.

When Dr. Carlsen joined BUS in 2009, Taylor had been seeing patients for almost a year. CP 1744, 1751-52. There is no evidence that Dr. Carlsen was Taylor's supervisor or even on shift when Taylor saw Foster.

On January 14, 2014, Foster saw Taylor at BUS. CP 129. She reviewed his medical history and questioned Foster about

urinary and sexual function, with Foster denying any concerns. CP 129-32. Foster reported noticing a penile lump four months earlier that was not painful, but had gotten slightly larger. CP 132. Taylor reviewed Foster's primary care records and a recent ultrasound report indicating findings consistent with Peyronie's Disease.[2] CP 125-27, 132-34. On examination, Taylor palpated the ventral plaque and noted it was consistent with Peyronie's, rather than a tumor, because it was not nodular or tender. CP 134; *see also* CP 735-36. Taylor diagnosed Peyronie's disease and recommended continued observation as it was not affecting Foster's function. CP 134. She did not feel the need to consult with anyone because Foster had no concerning symptoms at that time. CP 739.

In August 2014, Foster returned with worsening symptoms, including urine restriction, and Dr. Carlsen evaluated him. CP 139-41. Cystoscopy revealed a urethral stricture and

[2] A noncancerous condition resulting from fibrous scar tissue.

Dr. Carlsen recommended a biopsy. CP 141-45, 148-50. When Foster requested a second opinion, Dr. O'Keefe examined him and concurred. CP 150. Foster, however, declined the biopsy and requested referral to the University of Washington (UW), which Dr. Carlsen provided. CP 150.

At UW, Foster saw Dr. Bryan Voelzke. CP 161-64. Dr. Voelzke noted the penile stricture, believed it was chronic, and recommended an MRI to exclude occult cancer before proceeding with surgery to remove the stricture and biopsy the urethra. CP 164. The MRI revealed no evidence of malignancy. CP 158. One month later, Foster underwent the surgery. CP 157-60. When the biopsy surprisingly revealed carcinoma, Foster underwent a total penectomy, CP 154, and remains cancer-free. *See* CP 859, 863.

A. Procedure.

In January 2018, Foster sued BUS, Dr. O'Keefe, Dr. Pettit, Dr. Carlsen, Lonni Dodd (administrator), Taylor, and Bellingham Urology Group (BUG). CP 1523-24. He did not

allege corporate negligence or negligent supervision. *See* CP 1521-27.

On May 4, 2018, all these defendants except BUS sought summary judgment on statute of limitations grounds because Foster had not made a mediation request on them like he had on BUS to toll the statute. CP 1528-43, 1547. BUG also moved for dismissal because it did not exist in 2014, CP 1539-40, Dr. Pettit because he never treated Foster, CP 1539-40, and Dodd because she was an administrator who provided no care, CP 1540.

After Foster agreed to dismiss Dr. O'Keefe, Dr. Pettit, Dodd, and BUG, and BUS agreed that it would be vicariously liable for its providers to the extent Foster proved they were negligent, the trial court entered a stipulated order dismissing Dr. O'Keefe, Dr. Pettit, Dodd, and BUG. CP 31-34; 6/1/2018 RP 6-8.

At the Court's request, Taylor re-briefed her statute of limitations motion, explaining that she left BUS's employ in April 2014, had no contact with BUS since, never authorized

BUS to accept service for her, and never received a mediation request. CP 1694-95. Foster's counsel conceded that Taylor's situation was difficult, 9/7/2018 RP 14-19, and the trial court dismissed his claims against Taylor, CP 68-71.

Thereafter, only BUS and Dr. Carlsen remained defendants, and the parties spent the next two years litigating whether Taylor had been negligent in January 2014 such that BUS was vicariously liable, and whether Dr. Carlsen had been negligent in August and September 2014. *See* CP 1017.

More than two years after agreeing to dismiss Dr. O'Keefe, Dr. Pettit, Dodd, and BUG, Foster moved to vacate the June 2018 stipulated dismissal order, CP 573-94, claiming he had not conducted discovery and suggesting without evidence that defense counsel misled him. CP 580. BUS highlighted that there was no justification for vacating the order: Foster had voluntarily and knowingly stipulated to the dismissal, had chosen not to pursue discovery or otherwise act on information that Drs. Pettit and O'Keefe were Taylor's supervising physicians due to lack of

diligence, and had not provided evidence supporting his untrue suggestions of improper conduct. CP 604-18, 622-24. Foster also moved to vacate the September 2018 order dismissing his untimely claims against Taylor, again providing no justification for his two-year delay. CP 544; *see also* CP 542-50.

The trial court denied Foster's motions, CP 1004-09, concluding that vacating the June 2018 stipulated order would prejudice Drs. Pettit and O'Keefe and deprive the parties of the benefit of the stipulations they negotiated, and that Foster's motion to vacate Taylor's September 2018 dismissal was essentially a second motion for reconsideration lacking new information or argument, CP 1019.

Meanwhile, after Dr. Carlsen moved for summary judgment in August 2020, Foster contended for the first time that BUS and all of its doctors, including Dr. Carlsen, failed to adequately supervise Taylor. CP 920. Although Foster produced an expert who opined that Dr. Carlsen breached a duty to supervise, he failed to articulate what the standard of care

required or explain why Dr. Carlsen, who was not a practice agreement supervisor, had a duty to supervise Taylor. *See* CP 867-68, 871-72. Finding Foster failed to establish Dr. Carlsen had a duty to supervise, the court dismissed that claim. 9/11/20 RP 66.

In his subsequent motion for reconsideration, Foster argued BUS could be liable for negligent supervision, although he again failed to articulate what the standard of care required of BUS. CP 1022-29, 1052-62, 1334-38. After granting reconsideration, CP 1339, and following BUS's and Foster's ensuing motions for reconsideration, CP 1343-50, 1396-1404, the trial court ruled:

> 1. The doctrine of corporate negligence does not apply, under the facts of this case;
>
> 2. Bellingham Urology Specialists (BUS), as the entity employing Denise Taylor, PA-C, had a duty to supervise Ms. Taylor's work, Plaintiff may proceed against BUS on his claim that BUS breached that duty and proximately caused damage to Mr. Foster;
>
> 3. Plaintiff's claim against Dr. Carlsen as an individual, alleging breach of a duty to

> supervise Ms. Taylor, is dismissed. The plaintiff's motion for a further reconsideration of this issue is denied;
>
> 4. The Plaintiffs failure to supervise claim, against BUS, is separate and apart from the claim relating to the negligence of Denise Taylor, PA-C such that the supervisory claim does not depend on a finding that Ms. Taylor was negligent in her care of Mr. Foster.

CP 1427. The court subsequently certified these issues under CR 54(b) and RAP 2.2(d). CP 1456.

B. Appeal.

Despite the certification of only these four issues, Foster's Notice of Appeal included a "Notice of Discretionary Review" that also sought review of the orders denying his motions to vacate the 2018 dismissals of Dr. O'Keefe, Dr. Pettit, Dodd, Taylor, and BUG. Without filing a motion for discretionary review, or Division I accepting review, Foster argued in his brief that Division I should reverse those orders. Division I refused to do so because Foster had not timely sought discretionary review. *Slip Op. at 14-15.*

As to the issues it did review, Division I concluded that the

corporate negligence doctrine did not apply to impose a duty on BUS to "prevent negligence" or to adopt rules "for proper doctor supervision of PA[-C]s to prevent negligence," because BUS was not a hospital and Foster cited no Washington authority extending the corporate negligence doctrine to a non-hospital entity like BUS here. *Slip Op. at 16-17.* Division I further found that neither the law nor facts supported that Dr. Carlsen, who was not Taylor's designated sponsoring or alternate physician, assumed responsibility for Taylor's day-to-day activities. *Slip Op. at 17-20.*

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

No RAP 13.4(b) consideration warrants this Court's review. Foster contends, *Pet. at 7*, that Division I's decision conflicts with this Court's decisions, claiming Division I failed to follow "policy for expanding the corporate negligence doctrine." He also baldly asserts, *Pet. at 7-8*, that a significant constitutional question is involved, and that this is a "case

involving medical negligence affecting all citizens" implicating a substantial public interest. He is wrong on all counts.

A. Division I's Decision Does Not Conflict with This Court's Decisions.

1. Division I's decision follows PA laws.

Foster argues the corporate negligence doctrine required BUS to "train its physician assistants and their supervisors 'to prevent negligence,'" oversee a PA's practice, and "'adopt and enforce rules and policies for proper doctor supervision of PA[-C]s to prevent negligence.'" *Slip Op. at 16* (quoting Foster's brief). No authority, including the corporate negligence doctrine, supports imposing a duty for either BUS or Dr. Carlsen to supervise Taylor in such a manner inconsistent with her DOH-approved practice agreement. The legislature established who constituted Taylor's legal supervisors (her supervising physicians) and the scope of their supervisory duty (the practice agreement).

Chapter 18.71A RCW governs physician assistants' (PAs) medical practice. *Behr v. Anderson*, 18 Wn. App. 2d 341, 371-

72, 491 P.3d 189 (2021), *rev. denied*, 198 Wn.2d 1040 (2022). It authorized the Board of Medical Examiners to adopt regulations governing the extent to which PAs may practice medicine "to modernize the practice of physician assistants in order to increase access to care, reduce barriers to employment of physician assistants, and optimize the manner in which physician assistants deliver quality medical care." LAWS OF 2020, ch. 80, §1. "'The assistant acts on behalf of the physician, allowing the physician to care for many more patients at one time and reducing the cost of health care.'" *Behr*, 18 Wn. App. 2d at 371 (citation omitted).

To effectuate these purposes, "Washington statutes place PAs in the position of agents for their supervising physicians." *Id.* Hence, "a PA is properly held to the standard of care of a physician when the PA substitutes for the physician, performing services the PA is competent to perform, as agreed and reflected in his or her practice agreement." *Behr*, 18 Wn. App. 2d at 373.

Supervising physicians are thus responsible for their PAs' actions:

> The supervising physician and physician assistant shall each retain professional and personal responsibility for any act which constitutes the practice of medicine as defined in RCW 18.71.011 … when performed by the physician assistant.

RCW 18.71A.050.

Because PAs are agents for their supervising physicians, and supervising physicians are ultimately responsible for their PAs, Washington law in 2014 when Taylor saw Foster, as it does today, authorized the supervising physician and PA to determine the PA's practice scope, including the supervision, consultation, and review of work needed:

> (1) A physician assistant may practice medicine in this state to the extent permitted by the practice agreement. …
>
> (2) Physician assistants may provide services that they are competent to perform based on their education, training and experience and that are consistent with their practice agreement. The supervising physician and the physician assistant shall determine which procedures may be performed and the degree of supervision under which the procedure is performed. Physician

> assistants may practice in any area of medicine or surgery as long as the practice is not beyond the supervising physician's own scope of expertise and clinical practice and the practice agreement.

RCW 18.71A.030*; see also* WAC 246-918-140(3) (2014), Wash. St. Reg. 96-03-073 at 60-61 (1996) ("It shall be the responsibility of the certified physician assistant and the sponsoring physician to ensure that appropriate consultation and review of work are provided").

"[T]he services a PA may perform are those that they are competent to perform based on their education, training, and experience, and that fall within the scope of services that are agreed to by the PA and the PA's supervising physician in a practice agreement." *Behr*, 18 Wn. App. 2d 371 (citing RCW 18.71A.030). The supervising physician and the PA are qualified to make this determination based on their medical judgment and their practice's specific needs.

The duty to supervise Foster seeks to impose on BUS and Dr. Carlsen is inconsistent with Taylor's practice agreement, and ignores chapter 18.71A RCW's directive that it is the supervising

physicians who are legally responsible for their PAs and who determine the level of supervision needed. Under Taylor's practice agreement, she had two supervising physicians, Drs. Pettit and O'Keefe, who determined that having the sponsoring physician or alternate available on-site or by phone for consultation as needed was the supervision needed. CP 637-38, 643. If that level of supervision was somehow inadequate, which it was not[3], they could be liable based on agency principles.

The duty Foster seeks to impose on BUS also risks improperly requiring an LLC to interfere with supervising physicians' and PAs' medical judgment in determining what care PAs can appropriately provide based on their medical education, training, and experience, and the supervising physicians' medical practice needs. An LLC should not be required—or permitted—

[3] Taylor did not attempt to consult with anyone about Foster because she did not deem it necessary. CP 134, 739. No evidence suggests that her supervising physicians were not available had she wished to consult with them. Nor is there any evidence Dr. Carlsen was a designated alternate or even on shift when Taylor saw Foster.

to circumvent the DOH-approved practice agreement. Doing so would interfere with supervising physicians' medical judgment about what medical care their PAs are qualified to perform on their behalves and what level of supervision is needed. *See, e.g., Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., PLLC*, 168 Wn.2d 421, 431, 228 P.3d 1260 (2010) (corporate practice of medicine doctrine "exists to protect the relationship between the professional and the client"); *Alexander v. Gonser*, 42 Wn. App. 234, 239, 711 P.2d 347 (1985), *rev. denied*, 105 Wn.2d 1017 (1986) (informed consent duty rests with physician, not hospital, because it calls for exercise of medical judgment).

2. Division I's decision declining to extend the corporate negligence doctrine to BUS does not conflict with this Court's decisions.

At least four reasons support Division I's decision declining to apply the corporate negligence doctrine to BUS.

First, corporate negligence is a common law doctrine that imposes a duty for hospitals to, among other things, supervise

those who practice there. But here the legislature has already created a duty of supervision for PAs, designating PAs' supervising physicians as those who owe that duty, and authorizing them and their PAs to define the scope of supervision needed in their practice agreements.

Second, no Washington decision has explicitly held that the corporate negligence doctrine applies beyond hospitals. The doctrine is premised on recognition that hospitals comprehensively manage healthcare for patients and are community health centers owing nondelegable duties based on joint commission standards, bylaws, and other hospital-specific regulations:

> The doctrine of corporate negligence reflects the public's perception of the modern hospital as a multifaceted health care facility responsible for the quality of medical care and treatment rendered. The community hospital has evolved into a corporate institution, assuming "the role of a comprehensive health center ultimately responsible for arranging and co-ordinating total health care."

Pedroza v. Bryant, 101 Wn.2d 226, 231, 677 P.2d 166 (1984) (citations omitted). *Pedroza* reasoned that hospitals' licensing

and regulation "supports the limitation of a hospital's duty of care to those who are patients in the hospital", *id.* at 236, and concluded that Joint Commission standards and hospital bylaws—which do not apply to specialty groups like BUS—help define the standard of care, *id.* at 233-34. Foster was seen by a PA in a private outpatient urology group practice, rather than a comprehensive health center coordinating total healthcare. *Pedroza* does not support extending the corporate negligence doctrine to BUS.

Foster incorrectly argues, *Pet. at 11-12*, Division I erred in concluding that *Douglas v. Freeman*, 117 Wn.2d 242, 814 P.2d 1160 (1991), also does not support extending the corporate negligence doctrine to BUS. *Douglas* did not analyze whether the corporate negligence doctrine could apply to a small specialist group like BUS. While *Douglas* involved a dental "clinic," that clinic was part of Providence, a large hospital system providing comprehensive healthcare, one aspect of which

occurred at the clinic. *Id.* at 245. *Douglas* also used the word "hospital" repeatedly in discussing the duties owed:

> The doctrine of corporate negligence in cases such as this is based on a nondelegable duty that a **hospital** owes directly to its patients. One commentary finds four such duties owed by a **hospital** under the doctrine of corporate negligence: (1) to use reasonable care in the maintenance of buildings and grounds for the protection of the hospital's invitees; (2) to furnish the patient supplies and equipment free of defects; (3) to select its employees with reasonable care; and (4) to supervise all persons who practice medicine within its walls.

Id. at 248 (emphasis added). Division I's decision does not conflict with *Douglas*.

Third, no decision of this Court has applied a corporate negligence negligent supervision claim where, as here, vicarious liability also applied. *See, e.g.*, *Pedroza*, 101 Wn.2d at 229 ("plaintiff is not claiming that defendant hospital is vicariously liable for the negligence of Dr. Bryant under the theory of respondeat superior"); *Douglas*, 117 Wn.2d at 253 ("there is no claim here that the clinic is vicariously liable for Dr. Freeman's negligence under the theory of respondeat superior").

Doing so would be contrary to Washington law because it would allow Foster redundant claims against BUS for negligent supervision as well as vicarious liability for Taylor's alleged misdiagnosis, even though BUS has conceded that Taylor acted within the scope of her employment when seeing Foster and that it would have vicarious liability for her negligence, if any. CP 31-34. This Court has stated unequivocally that:

> [A]n action based on negligent training and supervision "is applicable *only* when the [employee] is acting outside the scope of his employment." Restatement (Second) of Torts § 317 cmt. a (emphasis added [by the Court]). If the employee is acting within the scope of his employment, then an employer is "vicariously liable under the principles of the law of Agency" instead. *Id.*

Anderson v. Soap Lake Sch. Dist., 191 Wn.2d 343, 361, 423 P.3d 197 (2018). Numerous decisions have consistently applied this principle. *E.g., Gilliam v. DSHS*, 89 Wn. App. 569, 584-85, 950 P.2d 20 (1998), *rev. denied*, 135 Wn.2d 1015 (1998) (negligent supervision claim "redundant" when employer admits that employee's actions occurred in scope of employment); *LaPlant*

v. Snohomish County, 162 Wn. App. 476, 479-80, 271 P.3d 254 (2011) ("a cause of action for negligent supervision requires a plaintiff to show that an employee acted *outside* the scope of his or her employment. … [A] claim for negligent hiring, training, and supervision is generally improper when the employer concedes the employee's actions occurred within the course and scope of employment"); *Club Level, Inc. v. Wash. State Liquor Control Bd.*, No. 45270-7-II, 2014 Wash. App. LEXIS 3059, *27 (Dec. 30, 2014), *rev. denied*, 183 Wn.2d 1003 (2015) ("[b]ecause the WSLCB's liability for negligent supervision would depend on the establishment of claims against Murphy and Stensatter for which the liquor board admits it would be vicariously liable should Fila prevail, *Gilliam* and *LaPlant* control. The negligent supervision claim is redundant, and the trial court did not err in dismissing it"); *Vahle v. City of Lakewood*, No. 53317-1-II, 2020 Wash. App. LEXIS 2785, *40 (Oct. 27, 2020), *rev. denied*, 196 Wn.2d 1045 (2021) ("a claim for negligent supervision is improper when the actions occurred within the scope of

employment");[4] *Hicks v. Klickitat County Sheriff's Off.*, 23 Wn. App. 2d 236, 248, 515 P.3d 556 (2022), *rev. denied*, 200 Wn.2d 1024 (2023) (same).

Fourth, even if the corporate negligence doctrine were to apply to a small urology group like BUS without creating vicarious liability redundancy, it does not support imposing a duty to supervise in the way Foster claims. There is no duty to supervise by doing everything or following an experienced, trained, practicing PA around to ensure that she not "mess up." Foster's assertion that none of the doctors reviewed Taylor's chart notes, "were called by, or gave advice-instruction" to Taylor, *Pet. at 3*, ignores that Washington law does not require such things unless the practice agreement so provides. Washington has no chart review or co-signing requirements. Washington statutes and regulations permit PAs to evaluate patients and diagnose conditions if doing so falls within the scope

[4] Unpublished opinions cited per GR 14.1.

of their practice agreement and is consistent with the degree of supervision that the supervising physician and PA have deemed appropriate, as was true in Taylor's case. *See, e.g.,* RCW 18.71A.030; *Behr,* 18 Wn. App. 2d at 371-72.

Worse, neither Foster nor his experts can specifically articulate what BUS's duty to supervise encompassed, much less how it was supposed to not let Taylor "mess up" such that she would have, in fact, diagnosed such a rare urethral cancer that no physician diagnosed until post-biopsy. *See* CP 867-68, 871-72, 1052-62, 1334-38. All Foster and his experts contend is that BUS (and Dr. Carlsen) supposedly breached a duty to supervise by not correctly supervising Taylor, but that is insufficient. *Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 89, 419 P.3d 819 (2018) ("Allegations amounting to an assertion that the standard of care was to correctly diagnose or treat the patient are insufficient").

Division I correctly concluded that Foster failed to articulate a viable corporate negligence claim against BUS.

3. Division I's decision affirming dismissal of Foster's negligent supervision claim against Dr. Carlsen does not conflict with this Court's decisions.

Division I also properly concluded that Dr. Carlsen had no duty to supervise Taylor. *Slip Op. at 17-20.* Dr. Carlsen was not Taylor's designated supervisor or alternate, was not a signatory to her practice agreement, and there is no evidence that Taylor asked for his help or that he was even present in the clinic on the day that Taylor saw Foster. CP 637-38, 1757-58. Drs. Pettit and O'Keefe, not Dr. Carlsen, initially trained Taylor and were her DOH-approved supervisors. CP 637-38, 643-45, 724, 1744, 1751-52. While Dr. Carlsen may have been available if needed, Foster does not support his assertion, *Pet. at 3, 15-16*, that all three doctors equally "trained, supervised, and advised" Taylor, and, indeed, the record does not substantiate it.

Foster also offers no authority that in 2014 when Taylor saw Foster, physicians like Dr. Carlsen who were not DOH-approved supervising physicians could be liable under RCW 18.71A.050 for alleged inadequate supervision. Foster's

reliance, *Pet. at 17-18*, on *Paetsch v. Spokane Dermatology Clinic, PS*, 182 Wn.2d 842, 348 P.3d 389 (2015), is misplaced. While the plaintiff there argued the PA was the physician's agent such that the physician could be liable for failing to supervise the PA, because the physician presented evidence that he was not the PA's supervising physician, the trial court granted the physician judgment as a matter of law. *Id.* at 847-48. This Court affirmed. *Id.* at 851. Division I's decision is consistent with *Paetsch*.

Division I appropriately appreciated the lack of authority and evidence that Dr. Carlsen had a legal duty to supervise Taylor: "nothing in the record suggests that Dr. Carlsen assumed responsibility for Taylor's day-to-day activities." *Slip Op. 20.* Division I's decision does not conflict with this Court's decisions.

B. Foster's Petition Does Not Involve an Issue of Substantial Public Interest or a Significant Constitutional Question.

Without citing any constitutional provision or presenting supporting argument, Foster asserts, *Pet. at 7-8*, his petition involves a significant question of constitutional law purportedly

related to the dismissals of Drs. Pettit and O'Keefe and Taylor. He ignores that he stipulated to dismiss Drs. Pettit and O'Keefe, and the interlocutory orders dismissing Drs. Pettit and O'Keefe and Taylor and denying motions to vacate those dismissals were never the subject of timely or procedurally-proper motions for discretionary review and thus were not properly before Division I.[5]

More importantly, because Foster cites no constitutional provision, or articulates how Division I's decision implicates one, his bald constitutional assertion does not deserve this Court's consideration. *E.g.*, *In re Pers. Restraint of Rehm*, 188 Wn.2d 321, 328, 394 P.2d 367 (2017) ("naked castings into the constitutional sea" are insufficient "to command judicial consideration and discussion"); *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) (court will not consider issues unsupported by argument and authority).

[5] *See* Part C below.

Foster also asserts, *Pet. at 8,* that this is "a case involving medical negligence affecting all citizens" giving rise to an issue of substantial public interest relating to the same interlocutory orders. Because Foster has not articulated how those orders affect the public interest, or how this case affects all citizens, this Court also should not consider these assertions. *McKee*, 113 Wn.2d at 705.

C. Division I Properly Declined to Consider Foster's Procedurally-Improper and Untimely Discretionary Review Matters.

Foster incorrectly claims Division I erred in refusing to entertain his procedurally-improper, untimely motion for discretionary review. Division I properly declined review of matters that (1) were not appealable as a matter of right under RAP 2.2(a); (2) were not certified for immediate review by the trial court; (3) were not the subject of a timely notice or motion for discretionary review under RAP 5.2(b) and RAP 6.2(b); and (4) did not meet RAP 2.3(b)(4)'s criteria for acceptance of discretionary review.

Foster claims, *Pet. at 16-19*, Division I should have accepted review of the trial court's 2020 order denying his motion to vacate the 2018 stipulated dismissal of Drs. Pettit and O'Keefe. He argues, without support, that Taylor's DOH-practice agreement supervisors were excluded "under false or unknown pretenses," *Pet. at 7*.[6] That not only is incorrect, CP 604-18, 622-24, but also does not excuse Foster's failures to diligently conduct discovery before stipulating to Drs. Pettit and O'Keefe's dismissal, or timely seek vacation of the dismissal order in 2018 or discretionary review of the order denying his belated motion to vacate in 2020.

Foster also complains at length, *Pet. at 19-30*, about the trial court dismissing Taylor in 2018 on statute of limitations grounds. But, again, Foster failed to timely pursue discretionary review. He could have sought discretionary review of the order

[6] Contrary to Foster's contention, *Pet. at 17-18*, no one posited that the practice plan supervising physicians could not be vicariously liable for Taylor under RCW 18.71A.050.

dismissing Taylor in 2018, or of the order denying his motion to vacate that order in 2020. He did neither.

Division I properly declined to consider issues relating to the 2018 and 2020 interlocutory orders concerning the dismissals of Drs. Pettit and O'Keefe and Taylor because Foster failed to properly or timely seek discretionary review of them.

VI. CONCLUSION

This Court should deny Foster's petition for review.

I declare that this document contains 4,994 words. RESPECTFULLY SUBMITTED this 18th day of July, 2023.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 18th day of July, 2023, I caused a true and correct copy of the foregoing document, "Respondents' Answer to Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 18th day of July, 2023, at Seattle, Washington.

s/Carrie A. Custer

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FAVROS LAW

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Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,062-7
Appellate Court Case Title:	Terry Foster v. Bellingham Urology Specialists, PLLC, et al.
Superior Court Case Number:	18-2-00072-2

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