Supreme Court No. 90429-4
Court of Appeals No. 69643-2-I

SUPREME COURT
OF THE STATE OF WASHINGTON

PATRICIA A. GRANT,

Plaintiff/Appellant

v.

CLAUDIO GABRIEL ALPEROVICH, M.D., FRANCISCAN HEALTH SYSTEM, ET AL.,

Defendants/Respondents

ALPEROVICH AND FRANCISCAN HEALTH SYSTEM'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF THE RESPONDING PARTIES

Respondents Claudio Alperovich, M.D. and Franciscan Health System ask this Court to deny Patricia Grant's Petition for Review.

II. RESTATEMENT OF THE ISSUE

Should this Court accept review of the Court of Appeals decision when:

1) The Court of Appeals decision was based on well-established case law;
2) Plaintiff Grant failed to identify, argue or support any reason why the requirements of RAP 13.4(b) have been satisfied;
3) The Court of Appeals decision does not conflict with any other case law, either from the Court of Appeals or this Court;
4) The Court of Appeals decision does not present any issue of state or federal constitutional law, nor any substantial public interest.

III. RESTATEMENT OF THE CASE

This Petition for Review is based on the Court of Appeals affirming a "no evidence" summary judgment filed by the defendants in this medical malpractice case. When the plaintiff failed to provide admissible expert testimony to support her case, as required by Washington law, the trial court properly dismissed all claims, which was

properly affirmed by the Court of Appeals.

This appeal largely centers around an unsworn, untimely letter by Elliott Goodman, M.D., a subsequent treating provider for Ms. Grant. On the day of the summary judgment hearing, plaintiff for the first time presented this letter to the court and defense counsel. The letter was not in affidavit or declaration form. The court held that it would not consider the letter.

Under Washington law, this letter was properly excluded. There are no exceptions to the requirement that a declaration be signed under penalty of perjury. The declaration was also untimely in that it was not presented until the day of the hearing. The trial court was well within its discretion in declining to consider this letter and the Court of Appeals properly affirmed this decision.

In this Petition, Plaintiff Grant has failed to set forth the reasons under RAP 13.4(b) that this Court should accept review. It is not enough that Plaintiff disagrees with the Court of Appeals decision. She must demonstrate that she has satisfied one or more of the enumerated reasons under RAP 13.4(b). She has failed to do so.

A. Substantive Facts

Plaintiff has brought a number of claims against a variety of medical providers. Plaintiff's claims against Dr. Alperovich and FHS

stem from a June 17, 2009 Roux-en-Y gastric bypass surgery. Following this procedure, Plaintiff had repeated nausea and vomiting and was unable to tolerate thick liquids or solid foods. On July 14, 2009, Dr. Alperovich performed an upper endoscopy on plaintiff to determine the reasons for her nausea and vomiting. The endoscopy was unremarkable, and did not show any evidence of thrush or other infection. In short, Plaintiff was seen on numerous occasions by Dr. Alperovich regarding her nausea which she attributed to thrush, despite ample evidence to the contrary. Based upon his interactions with Plaintiff, Dr. Alperovich felt there was a psychogenic component to her issues including her fixation upon thrush. Numerous referrals to other physicians who all capably and competently treated the Plaintiff confirmed that she did not have thrush.

Plaintiff also alleges that after her June 17, 2009 gastric bypass surgery, she developed a Petersen space hernia, which was undiagnosed. However, a number of diagnostic images did not show a Petersen space hernia subsequent to her June 17, 2009 surgery. It is believed that the Petersen space hernia developed at a later time, and Plaintiff was eventually seen by another surgeon who performed corrective surgery for the Petersen space hernia.

B. Procedural Facts

Plaintiff filed this lawsuit on June 12, 2012 alleging various claims all based on negligence from the above referenced medical care. She sent interrogatories and requests for production to the various defendants, including Dr. Alperovich and FHS. CP 754-755. Dr. Alperovich and FHS responded to these discovery requests in September 2012. CP 754-755.

Defendant Alperovich filed his summary judgment on October 12, 2012, which was joined by defendant FHS. CP 732-741; CP 744-750. The basic argument in these motions for summary judgment was that plaintiff did not have the required expert testimony to prove that defendants violated the standard of care and caused harm to plaintiff.

Plaintiff filed responses on October 12, 2012. CP 320-329. None of plaintiff's responses to the various defendants contained any expert testimony stating that any defendant violated the standard of care and caused harm to the plaintiff.

The hearing on the motions for summary judgment took place on November 9, 2012. At this hearing, plaintiff, in the middle of her argument, produced for the first time an unsworn letter from Dr. Elliott Goodman, a New York physician who had provided care to Ms. Grant. RP 17-18.

The defendants objected to this untimely, unsworn letter. RP 28-36. The court then took a recess to review the letter from Dr. Goodman. RP 36-38. The court then came back from recess and held that the court would not consider the Goodman letter. RP 38-42; CP 728-731; 759-764. The court stated that the letter was unsworn, had an insufficient factual basis, did not address the standard of care in Washington and did not identify any specific deviation of the standard of care. RP 40; CP 729-730.

C. Court of Appeals Decision

On April 28, 2014, the Court of appeals affirmed the trial court's summary judgment dismissal of this case, holding that:

1) Ms. Grant was required to submit admissible evidence by a qualified expert that the defendants violated the standard of care and caused harm to her;
2) Ms. Grant did not submit admissible evidence of a violation of the standard of care and causation;
3) The trial court acted within its discretion in striking the letter of treating physician Dr. Goodman because it was untimely (produced on the day of the hearing) and unsworn;
4) Even if the letter was timely and in proper form, the letter was insufficient because it did not address the appropriate standard

of care in Washington (or anywhere else) and did not state the specific act(s) that deviated from the standard of care;

5) Ms. Grant did not specifically request a CR 56(f) continuance. Even if she had, she did not demonstrate that she satisfied the requirements of CR 56(f);

6) There was no bias by the trial court against Ms. Grant for any reason.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

Review by this Court of a Court of Appeals decision is governed by RAP 13.4. According to RAP 13.4(b), "a petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

In her petition for review, Ms. Grant does not even attempt to argue how she has satisfied any of the RAP 13.4(b) conditions. Still, a review of those factors demonstrates that none has been satisfied.

A. The Court of Appeals decision does not conflict with a decision of this Court or another Court of Appeals decision.

1. The Court of Appeals correctly held that Ms. Grant failed to present admissible evidence of a violation of the standard of care.

As noted above, the primary issue decided by the Court of Appeals related to Ms. Grant's failure to present admissible evidence of a violation of the standard of care and causation. Though Ms. Grant refers to several state court cases, none of those cases support Ms. Grant's position and none conflict with the decision of the Court of Appeals. As such, her petition fails under RAP 13.4(b)(1) and (b)(2).

The Court of Appeals correctly applied the law. The Court correctly held that expert testimony is required on both standard of care and causation. *Court of Appeals Opinion at 5*, citing *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 228, 770 P.2d 182 (1989); see also, *McKee v. American Home Products*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989); *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993)(*citing Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983)).

The Court of Appeals correctly determined that Ms. Grant had not presented admissible evidence on standard of care and causation. The only evidence she offered was the unsworn, untimely letter of treating

physician Dr. Goodman. That unsworn letter was not timely and the trial court correctly declined to consider it. The rules require opposing briefs and affidavits to be filed at least 11 days prior to the hearing. CR 56(c). As such, it cannot be an abuse of discretion for the trial court not to consider an untimely declaration. The Court of Appeals correctly held that the decision to accept or reject untimely affidavits is within the discretion of the trial court and reviewed for abuse of discretion. *Court of Appeals Opinion at 6*, citing *Southwick v. Seattle Police Officer John Doe Nos. 1-5*, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008); see also, *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 499, 183 P.3d 283 (2008); *Brown v. Peoples Mortgage Co.*, 48 Wn. App. 554, 559, 739 P.2d 1188 (1987).

Moreover, the Court of Appeals also correctly held that the unsworn letter was not in proper form. *Court of Appeals Opinion at 6*, citing *Young Soo Kim v. Choong-Hyun Lee*, 174 Wn. App. 319, 326-27, 300 P.3d 431 (2013). Ms. Grant submitted a letter, not an affidavit or declaration. While one can submit a declaration as opposed to an affidavit, to do so you must comply with GR 13 and RCW 9A.72.085. The statute requires that the person declare the statements to be true under the penalty of perjury, under the laws of the state of Washington. 9A.72.085(1) and (4). The failure to comply with GR 13 and RCW

9A.72.085 renders these declarations inadmissible. *Davis v. W. One Auto. Group*, 140 Wn. App. 449, 455, 166 P.3d 807 (2007). Thus, the Court of Appeals correctly held that this letter would not have been admissible, even if it had been timely.

Finally, the Court of Appeals correctly held that even if admissible, the unsworn, untimely letter did not establish that Dr. Goodman is familiar with the standard of care in Washington and did not establish specific violations. *Court of Appeals Opinion at 6-7.* RCW 7.70.040(1) requires that the expert testimony state that "[t]he health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, ***in the state of Washington***, acting in the same or similar circumstances." (emphasis added). The letter makes no reference to anything about Washington's standard of care and has only one reference to "standard of care" on page 2 (CP 346) of his letter. Given that the statute requires testimony that finds a violation of Washington's standard of care, the Court of Appeals correctly held that the trial court did not err in finding this deficiency yet another reason why the Goodman letter was not admissible.

2. The Court of Appeals correctly held that no CR 56(f) request for continuance was made, and even if one had been made, the trial court was within its discretion to deny the request.

Ms. Grant never made a CR 56(f) request for additional discovery. The record indicates that she had already conducted written discovery. But even if she had made a request, the Court of Appeals correctly held that her request was deficient, in that she never identified the reason for the delay in not obtaining the needed discovery, what she sought to establish or how it would raise a genuine issue of material fact. *Court of Appeals Opinion at 8-9* citing *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989). Additionally, the decision of whether to grant additional time under CR 56(f) is one left to the sound discretion of the trial court and the review of that decision is also reviewed under the abuse of discretion standard. *Mut. of Enumclaw v. Archer Constr.*, 123 Wn. App. 728, 743, 97 P.3d 751 (2004). There was no abuse of discretion.

3. Ms. Grant did not cite to any cases that conflict with the Court of Appeals decision.

Grant does not show how the Court of Appeals decision conflicts with any other case. Though she cites to several cases, none of them support her position. These cases, such as *Seybold v. Neu*, 105 Wn. App. 666, 19 P.3d 1068 (2001), *Morinaga v. Vue*, 85 Wn. App. 822; 935 P.2d

637 (1997) and *McLaughlin v. Cooke*, 112 Wn.2d 829, 774 P.2d 1171 (1989) all confirm the requirement for admissible expert testimony on standard of care and causation. None of these cases conflict with the Court of Appeals decision here. Ultimately, Grant fails to cite to any Washington case that conflicts with the decision of the Court of Appeals.

B. The Court of Appeals decision does not present a significant question of law under either the Washington State or United States' Constitutions.

Ms. Grant's petition does not satisfy RAP 13.4(b)(3). The closest she comes to identifying a constitutional issue is to argue that she was denied equal protection and due process, though it is unclear the basis for her argument. These unsupported arguments should not be considered. *See State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (passing treatment of constitutional issue does not merit review); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court will not consider unsupported arguments). Regardless, she provides no evidence for any such violation.

1. There is no equal protection or due process violation related to court access.

One theme of Ms. Grant's Petition, it appears, is the denial of court access and that denial being a violation of equal protection and/or due process protections. She is incorrect. First, it should be noted that there was no barrier to court access. Ms. Grant filed her Complaint, participated

in discovery, responded to the motions for summary judgment and appeared on the day of the summary judgment hearing.

Ms. Grant cites to numerous cases, both state and federal, in support of her argument related to court access. These cases do not support her position. Many of the cases, such as *NAACP v. Alabama,* 357 U.S. 449, 78 S. Ct. 1163 (1958), *Stromberg v. CA*, 283 U.S. 359, 51 S. Ct. 532 (1931), and *Davis v. Wechsler*, 263 U.S. 22, 44 S. Ct. 13 (1923), are cases addressing pleadings-related issues. This is not a pleadings case. The issue on summary judgment was not whether Ms. Grant had sufficiently pled her case, but rather whether she had sufficient evidence to defeat summary judgment. These cases do not support any constitutional violation. Likewise, the state cases she cites, such as *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 574 (2009), do not support her position. *Putman* addressed the issue of whether RCW 7.70.150, requiring a certificate of merit to be filed with the complaint in a medical malpractice suit, violated the Washington State Constitution. This case does not have certificate of merit issues.

Finally, Ms. Grant argues that she was held to an improper standard as a *pro se* litigant. But the Court of Appeals correctly held that she is held to the same standard as attorneys. *Court of Appeals Opinion at 9*, citing *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411,

936 P.2d 1175 (1997). As to the federal case cited by Ms. Grant referencing less stringent standards for *pro se* litigants, *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594 (1972), that standard is both inapplicable in Washington state courts and inapplicable because that case dealt with pleadings standards, not summary judgment standards.

2. There is no equal protection or due process violation related to mental stigma, or any other purported reason.

Ms. Grant also alleges an equal protection or due process violation related to mental stigma, or other disabilities/classifications. Ms. Grant simply has no evidence to support such allegations. As the Court of Appeals astutely pointed out, "after carefully examining the available record, we have discovered no evidence that the trial court discriminated against Grant because of her *pro se* status of for any other reason. Instead, it appears that the court displayed considerable patience with Grant and appropriate sensitivity to her position." *Court of Appeals Opinion at 9.*

Ms. Grant also claims that her ADA accommodations request was denied. It is unclear what request she is referring to. The record does not contain an ADA-related request. At best, the only "request" appears to be for more time to conduct discovery. This is not an ADA request, but, apparently, a request for additional time pursuant to CR 56(f). But as noted by the Court of Appeals and discussed above, Ms. Grant never made

a CR 56(f) request. Even assuming that she did, she did not satisfy the requirements for a CR 56(f) continuance.

C. This case does not present issues of substantial public interest.

The issues here deal with Ms. Grant's case only. Outside of the parties to this litigation, this matter does not contain issues of substantial public interest. This Court generally accepts review under this prong when the outcome of the case will affect numerous people or entities who are not parties to the present litigation. *See, e.g., State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005)(accepting review under RAP 13.4(b)(4) because "[t]his case presents a prime example of an issue of substantial public interest. The Court of Appeals holding, while affecting parties to this proceeding, also has the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue."). While certainly of importance to the parties to this litigation, the issues in this appeal will not have any impact on those outside of this litigation.

V. CONCLUSION

The Court of Appeals correctly affirmed the trial court's granting of summary judgment. The trial court's decision, affirmed by the Court of Appeals, is based on long-standing, well-established case law. Though Ms. Grant disagrees with those decisions, her dissatisfaction is not

grounds for review by this Court. This Court has set forth specific standards by which it will accept review. Ms. Grant has failed to even address, much less persuasively argue, that any of those criteria has been met. This Petition should be denied.

Dated this 28th day of July, 2014.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that on this date a copy of the foregoing document was forwarded for service upon the parties as follows:

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Signed at Tacoma, Washington this 28th day of July, 2014.

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