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

SUPREME COURT OF THE STATE OF WASHINGTON

PATRICIA A. GRANT, PhD.,

Petitioner,

v.

CLAUDIO GABRIEL ALPEROVICH, ST FRANCIS HOSPITAL-
FRANCISCAN HEALTH SYSTEM; VALLEY MEDICAL, CENTER,
TRIENT M. NGUYEN, MICHAEL K. HORI; PACIFIC MEDICAL,
CENTER, INC.; LISA OSWALD; SHOBA KRISHNAMURTHY;
MICHELE PULLING; WM. RICHARD LUDWIG; U.S. FAMILY
HEALTH PLAN AT PACIFIC MEDICAL CENTER INC.; VIRGINIA
MASON MEDICAL CENTER; RICHARD C. THIRLBY, MD,

Respondents.

**ANSWER OF RESPONDENTS PACIFIC MEDICAL CENTER,
INC.; LISA OSWALD; SHOBA KRISHNAMURTHY;
WM. RICHARD LUDWIG; U.S. FAMILY HEALTH PLAN
AT PACIFIC MEDICAL CENTER, INC. TO PETITION FOR
DISCRETIONARY REVIEW AND JOINDER IN ANSWERS OF
CO-RESPONDENTS**

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Inc.; Lisa Oswald, M.D.; Shoba Krishnamurthy,
M.D.; Wm. Richard Ludwig, M.D.; U.S. Family
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TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY OF RESPONDENTS	1
II. STATEMENT OF RELIEF SOUGHT	1
III. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW	1
IV. RESTATEMENT OF THE CASE	2
A. Pertinent Background Facts	2
B. Pertinent Procedural Facts	4
V. MS. GRANT’S PETITION FOR REVIEW SHOULD BE DENIED	6
A. The Petition Does Not Satisfy RAP 13.4(b) Criteria	6
B. The Court of Appeals’ Opinion Relies on Well-Established Law	7
VI. CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

<i>Berger v. Sonneland</i> , 144 Wn.2d 91, 26 P.3d 257 (2001)	8
<i>Branom v. State of Washington</i> , 94 Wn. App. 964, 974 P.2d 335, <i>rev. denied</i> , 138 Wn.2d 1023 (1999)	8
<i>Guile v. Ballard Cmty. Hosp.</i> , 70 Wn. App. 18, 851 P.2d 689 (1993)	9, 10
<i>Harris v. Groth</i> , 99 Wn.2d 438, 449, 663 P.2d 113 (1983)	9
<i>McKee v. American Home Products</i> , 113 Wn.2d 701, 782 P.2d 1045 (1989)	9
<i>McLaughlin v. Cooke</i> , 112 Wn.2d 829, 774 P.2d 1171 (1989)	10
<i>Osborn v. Mason County</i> , 157 Wn.2d 18, 137 P.3d 197 (2006)	8
<i>Pelton v. Tri-State Memorial Hospital</i> , 66 Wn. App. 350, 831 P.2d 1147 (1992)	10
<i>Reese v. Stroh</i> , 128 Wn.2d 300, 907 P.2d 282 (1995)	10
<i>Tae Kim v. Budget Rent A Car Sys. Inc.</i> , 143 Wn.2d 190, 15 P.3d 1283 (2001)	8
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989)	7, 9

STATUTES

RCW 7.70	5, 7, 8, 9
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RULES

RAP 13.4	1, 6
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I. IDENTITY OF RESPONDENTS

Respondents are Pacific Medical Center, Pacific Medical Center, Inc.; Lisa Oswald, M.D.; Shoba Krishnamurthy, M.D.; Wm. Richard Ludwig, M.D.; U.S. Family Health Plan At Pacific Medical Center, Inc., Defendants in the King County Superior Court and Respondents in the Court of Appeals and the Supreme Court (hereinafter “Respondents” unless otherwise specified).

II. STATEMENT OF RELIEF SOUGHT

Respondents ask this court to deny the motion for discretionary review seeking review of the trial court dismissal of Ms. Grant’s medical malpractice lawsuit, the dismissal of which was subsequently upheld by the Court of Appeals.

III. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Petitioner fails to satisfy any of the requirements of RAP 13.4(b); specifically, the Court of Appeals’ opinion: (a) does not conflict with a decision of the Supreme Court or another Court of Appeals; (b) does not raise a significant question of constitutional law; and (c) does not involve an issue of substantial public interest.

2. The Court of Appeals affirmed summary judgment dismissal of Ms. Grant’s medical malpractice claim based on well-established law because she failed to produce competent medical evidence

that Pacific Medical Center, Inc. and/or its physicians breached Washington's standard of care or that their actions proximately caused Ms. Grant's alleged injuries.

IV. RESTATEMENT OF THE CASE

Respondents respectfully join and incorporate the Restatements of Facts submitted by respondents Franciscan Health Systems, Virginia Mason Medical Center, and Dr. Pulling ask this Court to take judicial notice of the same. Respondents further set forth the below additional facts:

A. Pertinent Factual Background.

Patricia A. Grant, the *pro se* Petitioner, is a veteran with multiple health concerns. CP 3-13; 67-72. She received health care through the Department of Defense Health Care Program, entitled the Uniformed Services Family Health Plan at Pacific Medical Centers, Inc. CP 9-11; CP 708-710. This program offers health insurance coverage through Department of Defense for medical services, medication and dental care to veterans of the military and military families. CP 708-710. U.S. Health Plan does not provide care to active military members. CP 708-710.

The allegations in Petitioner's Complaint selectively refer to care received in 2009 by Linda Oswald, M.D., a board certified family practice physician. CP 10-11. Dr. Oswald actually provided care to Appellant

from 2008 through 2010, for many medical issues and conditions. CP 7. Petitioner's medical history includes morbid obesity, mental illness, hypertension, plantar fasciitis, and diabetes. Ms. Grant also had underwent multiple prior surgeries, including a Roux Y Gastric Bypass procedure performed at Valley Medical Center in June 2009. CP 3-13, 67-72, 284-285, 289.

After Petitioner's gastric bypass procedure at Valley Medical Center—performed by Dr. Alperovich, a board certified general surgeon—she returned to Dr. Oswald at Pacific Medical Centers. CP 3-13, 67-72. Petitioner also consulted with other medical professionals at Pacific Medical Centers and at other facilities during this follow up period. CP 7-11.

In September 2009, Petitioner was referred to Shoba Krishnamurthy, M.D.—a board certified gastroenterologist—for nausea, vomiting, and gastrointestinal systems issues. CP 8-9, 258. Grant also discussed her care with Dr. Ludwig, a board certified internal medicine specialist, and he tried to work with her. CP 9-10, 275-276.

Dr. Ludwig made multiple recommendations, but Petitioner wanted Dr. Ludwig to review her medical records specifically to critique her previous health care and health care providers. CP 277-278.

The health care providers at Pacific Medical Centers then referred Appellant to appropriate specialists for her continuing medical issues of nausea and vomiting. CP 277-278. Petitioner was last seen at Pacific Medical Centers through the U.S. Family Health Program in 2010.

B. Pertinent Procedural Background.

Petitioner filed her original Complaint in King County Superior Court in June of 2012. CP 3-13. Ms. Grant amended her complaint on July 16, 2012. CP 67-72. The amended complaint alleges medical negligence against Respondents, including Pacific Medical Centers. CP 67-74.

Respondents, along with other parties, moved for summary judgment to dismiss the lawsuit before Judge White on November 9, 2012, challenging Ms. Grant's prima facie medical malpractice claim, specifically the lack of a qualified medical professional, who was to testify regarding the applicable standard of care in Washington, how this standard of care was violated in this case and how the violation of the standard caused Petitioner's alleged damages. CP 691-707.

In response to the motion for summary judgment, Ms. Grant failed to produce competent and admissible expert opinions demonstrating a genuine issue of material fact requiring trial.

During oral argument, Petitioner presented an unsworn letter from Dr. Elliot R. Goodman for the first time. CP 344-347; RP [Nov. 9, 2012] 19-21. The Court appropriately struck this evidence as untimely, inadmissible and lacking foundation. CP 728-731; RP [Nov. 9, 2012] 40. The Court explained that even if the letter was not stricken it failed to provide a factual basis for the assertions and opinions. CP 728-731; RP 40.

Specifically, as to these Respondents, the letter did not address them. The letter did not state the specific standard of care applicable to Pacific Medical Centers, its physicians and health care plan. CP 728-731; RP 40. Finally, the letter failed to set forth the alleged breach of the applicable standard of care by Respondents—had it been identified—and the causal link explaining how the alleged breach proximately caused the injury claimed by Appellant. CP 728-731; RP 40.

Without admissible evidence to demonstrate a prime facie showing under RCW 7.70.030 and RCW 7.70.040, Respondents' summary judgment was granted and Petitioner's claims were dismissed. CP 728-731; RP 39-40.

V. MS. GRANT'S PETITION FOR REVIEW SHOULD BE DENIED

Respondents respectfully join and incorporate the Arguments submitted by appellees Franciscan Health Systems and Virginia Mason Medical Center, and ask this Court to take judicial notice of the same. Respondents further set forth the below additional argument:

A. The Petition Does Not Satisfy RAP 13.4(b) Criteria.

Review by this Court of a Court of Appeals decision is governed by RAP 13.4, providing limited circumstances whereby a petition for discretionary review may be granted; a significant consideration which Petitioner fails to cite, apply or discuss. Pursuant to RAP 13.4(b), this Court may accept review “only” if one of the specific considerations governing review is satisfied. Petitioner makes no attempt to establish the criteria for review; instead, she argues purported violations of the federal Americans with Disabilities Act (“ADA”), among violations of other federal laws, which are the subject of her Ninth Circuit appeal rather than the instant matter.

Ms. Grant’s petition not only fails to satisfy the RAP 13.4(b) criteria, but it equally fails to identify any error in the Court of Appeals’ opinion. Her petition is essentially silent relative to the underlying medical malpractice claim, which was the sole basis of her trial court suit

and the subject of the summary judgment dismissal and Court of Appeals approval.

At both the trial court level and in her subsequent appeal, Petitioner failed to make a showing sufficient to establish the existence of the key element of her case—the applicable standard of care in Washington and that a breach of this standard occurred causing her injury. She bore the burden of proof and her failure to produce medical evidence in support of her allegations was fatal to her case and summary judgment was appropriate. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1982).

Petitioner's motion for discretionary review should be denied.

B. The Court of Appeals' Opinion Relies on Well-Established Law.

Revised Code of Washington section 7.70.040 identifies the necessary elements a plaintiff must prove in an action alleging injury from health care. Section 7.70.040 states:

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

- (1) The 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 belongs, in the state of Washington, acting in the same or similar circumstances;

(2) Such failure was a proximate cause of the injury complained of. (Emphasis Added)

RCW 7.70.040. These elements are particularized expressions of the traditional elements of negligence: duty, breach, proximate cause, and damage or injury. *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257 (2001).

The “‘existence of duty is a question of law,’ not a question of fact” and therefore may be decided on summary judgment. *Osborn v. Mason County*, 157 Wn.2d 18, 23, 137 P.3d 197 (2006) (quoting *Tae Kim v. Budget Rent A Car Sys. Inc.*, 143 Wn.2d 190, 195, 15 P.3d 1283 (2001)). Ms. Grant failed to produce any expert medical testimony to the trial court to establish the standard of care, a violation of the standard of care or proximate causation; and equally failed to raise any legitimate issues in this regard to the Court of Appeals.

In Washington, “[w]henver an injury occurs as a result of health care, the action for damages for that injury is governed exclusively by RCW 7.70.” *Branom v. State of Washington*, 94 Wn. App. 964, 969, 974 P.2d 335, *rev. denied*, 138 Wn.2d 1023 (1999). Petitioner’s cause of action is, therefore, controlled exclusively by statute. Thus, she was required to satisfy the procedural and substantive requirements of RCW 7.70.010- .040, which she failed to do. Ms. Grant alleged only breach of

the statutory standard of care in her suit at the trial court. *See*, RCW 7.70.030.

To establish a claim for breach of standard of care, medical malpractice plaintiffs must show that “the 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 belongs, in the State of Washington, acting in the same or similar circumstances.” RCW 7.70.040(1).

Expert testimony is required to establish both the standard of care and breach thereof. *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). The chosen expert must have the equivalent expertise of the defendant in order to testify regarding the standard of care applicable to that defendant. *McKee v. American Home Products*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 228-29, 770 P.2d 182 (1989).

A defendant can move for summary judgment by pointing out to the trial court that the plaintiff lacks competent evidence to support his or her case. *See Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 27, 851 P.2d 689 (1993). The burden then shifts to the plaintiff to produce competent evidence, from a qualified expert witness, setting forth specific facts establishing a cause of action. *Young*, 112 Wn.2d at 226-27; *see also*

Pelton v. Tri-State Memorial Hospital, 66 Wn. App. 350, 355, 831 P.2d 1147 (1992). Absent such evidence, summary judgment for the defendant is proper. *See Pelton*, 66 Wn. App. at 354-55; *see also Guile*, 70 Wn. App. at 25.

The expert medical testimony produced by a plaintiff in response must be based upon a reasonable degree of medical certainty and must rise above speculation, or conjecture. *Reese v. Stroh*, 128 Wn.2d 300, 309, 907 P.2d 282 (1995); *see also McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989); *see also Pelton*, 66 Wn. App. at 354-55. Moreover, a motion for summary judgment cannot be defeated based on speculation or the possibility that the claims can be supported. *Pelton*, 66 Wn. App. at 354-55.

The above procedure is exactly what was applied here, resulting in Petitioner's inability to present qualified testimony of the standard of care in Washington applicable to Respondents. Moreover, Petitioner failed to demonstrate through admissible expert medical testimony how that standard was breached under the particular facts. Finally, Petitioner produced no expert medical testimony as to how the alleged breach of the standard of care by Respondents causing her alleged injury.

These failures were fatal to Ms. Grant's lawsuit. When challenged on the sufficiency of evidence to support her claims, both the trial court


and Court of Appeals found it incumbent that Ms. Grant come forward with admissible competent evidence demonstrating a genuine issue of fact justifying a trial on the merits. Petitioner failed to do so and her claims were appropriately dismissed and affirmed on appeal.

VI. CONCLUSION

The Court of Appeals' unpublished opinion fairly and correctly affirmed the trial court's dismissal on summary judgment. Both the trial court dismissal and the approval by the Court of Appeals are supported by well, and long-standing, Washington law. This Court has established limited grounds and specific standards by which it will authorize review, Ms. Grant has failed to establish any of those criteria. Accordingly, her petition for review should be denied.

RESPECTFULLY SUBMITTED this 30th day of July, 2014.

MERRICK, HOFSTEDT & LINDSEY, P.S.

By 

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Attorneys for Respondents Pacific Medical Center, Inc.; Lisa Oswald, M.D.; Shoba Krishnamurthy, M.D.; Wm. Richard Ludwig, M.D.; U.S. Family Health Plan At Pacific Medical Center, Inc.

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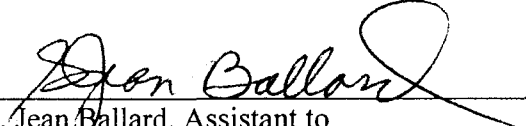
THIS IS TO CERTIFY that a copy of the **Answer of Respondents Pacific Medical Center, Inc.; Lisa Oswald; Shoba Krishnamurthy; Wm. Richard Ludwig; U.S. Family Health Plan At Pacific Medical Center, Inc. to Petition for Discretionary Review and Joinder in Answers of Co-Respondents** was served July 30, 2014, on the following individuals:

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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.

EXECUTED this 30th day of July, 2014, at Seattle, Washington.


S. Jean Ballard, Assistant to
Tamara K. Nelson, WSBA #27679

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Dear Clerk:

Attached for filing please find Answer of Respondents Pacific Medical Center, Inc.; Lisa Oswald; Shoba Krishnamurthy; Wm. Richard Ludwig; U.S. Family Health Plan At Pacific Medical Center, Inc. to Petition for Discretionary Review and Joinder in Answers of Co-Respondents.

All counsel of record have been copied on this email. Thank you for your time and effort.

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