

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jul 25, 2014, 2:42 pm
BY RONALD R. CARPENTER
CLERK

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

E ORF

RECEIVED BY E-MAIL

SUPREME COURT
OF THE STATE OF WASHINGTON

PATRICIA A. GRANT,

Plaintiff/Appellant/Petitioner,

vs.

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

Defendants/Respondents.

**ANSWER OF RESPONDENTS VIRGINIA MASON HEALTH
SYSTEM AND RICHARD C. THIRLBY'S TO PETITION FOR
DISCRETIONARY REVIEW**

David J. Corey, WSBA No. 26683
Amber L. Pearce, WSBA No. 31626
Floyd, Pflueger & Ringer, P.S.
200 W. Thomas Street, Suite 500
Seattle, WA 98119
Telephone: 206-441-4455
Facsimile: 206-441-8484
Attorneys for Respondents Virginia
Mason Health System and Richard
C. Thirlby

 ORIGINAL

TABLE OF CONTENTS

I. IDENTITY OF RESPONDENTS 1

II. RESTATEMENT OF ISSUE PRESENTED FOR REVIEW 1

III. RESTATEMENT OF THE CASE 1

 A. Pertinent Facts 1

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED 4

 A. Ms. Grant’s Petition Does Not Satisfy RAP 13.4(b)
 Criteria 4

 B. The Court of Appeals’ Opinion Relies on Well-Established
 Law 5

V. CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Branom v. State,
94 Wn. App. 964, 974 P.2d 335 (1999)..... 5

Douglas v. Bussabarger,
73 Wn.2d 476, 438 P.2d 829 (1968)..... 6

McLaughlin v. Cooke,
112 Wn.2d 829, 774 P.2d 1171 (1989)..... 6

Guile v. Ballard Cmty. Hosp.,
70 Wn. App. 18, 851 P.2d 689 (1993)..... 7

Seybold v. Neu,
105 Wn. App. 666, 19 P.3d 1068 (2001)..... 6

Young v. Key Pharms, Inc.,
112 Wn.2d 216, 770 P.2d 182 (1989)..... 6

Young Soo Kim v. Choong Hyun Lee,
174 Wn. App. 319, 300 P.3d 431 (2013)..... 7

Westberg v. All-Purpose Structures, Inc.,
86 Wn. App. 405, 936 P.2d 1175 (1997)..... 9

STATUTES

RCW 7.70 3, 5

RULES

CR 56..... 7

RAP 13.4 1, 4

I. IDENTITY OF RESPONDENTS

Respondents are Virginia Mason Health System and Richard C. Thirlby, M.D. (collectively “Virginia Mason”), Defendants in the trial court and Respondents in the Court of Appeals and Supreme Court.

II. RESTATEMENT OF ISSUE PRESENTED FOR REVIEW

Relying on well-established law, the Court of Appeals affirmed summary judgment dismissal of Ms. Grant’s medical malpractice claim because she failed to produce competent medical evidence that Virginia Mason breached Washington’s standard of care, or that its actions proximately caused Ms. Grant’s injuries.

Accordingly, Ms. Grant’s petition for review should be denied because 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; or (c) involve an issue of substantial public interest. (RAP 13.4(b))

III. RESTATEMENT OF THE CASE

A. Pertinent Facts

Petitioner Patricia Grant (DOB 10/21/58) has a medical history noteworthy for morbid obesity, mental illness, hypertension, plantar fasciitis, and multiple prior surgeries. (CP 41) In June 2009, Ms. Grant

had a laparoscopic gastric bypass procedure at St. Francis Hospital. Unpublished Opinion at 1. After the procedure, she “suffered various complications and persistent symptoms, including nausea, vomiting, and the inability to tolerate solid food or thick liquids.” *Id.* at 2. She was hospitalized several times and underwent numerous diagnostic tests.

Eight months later, in February 2010, Dr. Elliot Goodman—a doctor in New York City—performed a second surgery wherein he identified and treated a “Peterson’s hernia.” *Id.* at 2 (*citing* CP 346). Most of her symptoms subsided after the second surgery.

In June 2012, Ms. Grant, *pro se*, filed a complaint for medical negligence against more than 12 defendants, including individual doctors, hospitals, healthcare institutions, and an insurer. “She alleged that the individual providers misdiagnosed, neglected, and mistreated her for various reasons. She also alleged that the providers conspired together to cover up the misdiagnoses and attributed her medical issues to mental illness.” Unpublished Opinion at 2.

After extensive discovery, the remaining 12 parties filed motions for summary judgment based on Ms. Grant’s failure to adduce competent expert testimony establishing the standard of care. The Honorable Jay V.

White heard oral argument for one-and-a-half hours on November 9, 2012.
(RP at 1-42; CP 348-49)

At oral argument, Ms. Grant presented an untimely letter, dated November 7, 2012, from Dr. Goodman. (CP 345-47) Dr. Goodman's letter was not a sworn declaration; did not establish his familiarity with Washington's standard of care; did not reference Virginia Mason; and only referenced Dr. Thirlby in "very non-specific and non-critical in nature. It makes some sort of sweeping conclusory allegations that there was some negligence here by someone." (RP 31:12-18) In sum, "nothing in this letter sets forth with adequate specificity who did what wrong, and when, and how that causally connects to any harm done." (RP 31:21-23) "There is no competent expert testimony establishing the elements of a[n RCW] 7.70 claim." (RP 32:11-12)

The trial court struck the untimely and unsworn letter. "Notwithstanding, the court determined that even if Dr. Goodman's letter was admissible, it was not sufficient to establish that any of the defendants deviated from the applicable standard of care or caused injury to the plaintiff." Unpublished Opinion at 3. The trial court dismissed Ms. Grant's medical malpractice claim against all defendants and the Court of

Appeals affirmed dismissal on April 28, 2014. The Court of Appeals denied Ms. Grant's motions to publish and for reconsideration.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Ms. Grant's Petition Does Not Satisfy RAP 13.4(b) Criteria.

Fatal to her petition, Ms. Grant fails to cite, apply or discuss the criteria in RAP 13.4(b). This Court may accept review "only" if one of the considerations governing review is satisfied. RAP 13.4(b). Her petition relies heavily on purported violations of the federal Americans with Disabilities Act ("ADA"), among violations of other federal laws, but that is properly the subject of her Ninth Circuit appeal, transpiring concurrently against the same parties as her state appeal.

Not only is her petition untethered to RAP 13.4(b), but also fails to levy any substantive criticism of the Court of Appeals' opinion. Her petition is virtually devoid of a factual or legal discussion of her medical malpractice claim, other than a one-sentence contention that filing a Certificate of Merit "unduly burdened the right of court access." (*See* Petition at 10) Since medical malpractice claims are controlled exclusively by statute, her argument is better suited for the Legislature. Finally, consistent with her criticism of the trial court, Ms. Grant likewise

accuses two of the three appellate judges of engaging in “same race” discrimination by purportedly deciding against her. (*See* Petition at 14)

The trial court and Court of Appeals fairly and patiently applied the facts to the law before ruling that Ms. Grant failed to present competent evidence that any healthcare provider breached the standard of care. Her petition for discretionary review should be denied.

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

The Court of Appeals, properly applying *de novo* review to the orders granting summary judgment dismissal, began its analysis by acknowledging that “[a]ctions for damages occurring as a result of health care are controlled exclusively by statute, regardless of how a claim is characterized.” Unpublished Opinion at 4 (citing RCW 7.70.030; *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335 (1999)).

Accordingly, under RCW 7.70.030(1), a plaintiff must prove that a defendant failed to exercise the 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; and that the failure was a proximate cause of the plaintiff’s injury. RCW 7.70.030(1).

In Washington, “[e]xpert testimony is required to establish the standard of care and whether the physician met that standard.” Unpublished Opinion at 5 (citing *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 228, 770 P.2d 182 (1989)). The Court of Appeals stated that the “policy behind this rule is to “prevent laymen from speculating as to what is the standard of reasonable care in a highly technical profession.”” Unpublished Opinion at 5 (quoting *Douglas v. Bussabarger*, 73 Wn.2d 476, 479, 438 P.2d 829 (1968)). Likewise, “[e]xpert testimony is also required to establish most aspects of causation in a medical malpractice action.” Unpublished Opinion at 5 (citing *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001)). Finally, the expert testimony must be based upon a reasonable degree of medical certainty. *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989).

Based on the foregoing, if a plaintiff lacks competent medical evidence to establish a prima facie case, then summary judgment is proper. *Young*, 112 Wn.2d at 22. Here, Virginia Mason moved for summary judgment dismissal because Ms. Grant lacked admissible evidence to support her medical malpractice claim. To defeat summary judgment, it was incumbent upon her to raise a material issue of fact, or produce an affidavit “from a qualified expert alleging specific facts to

support a cause of action.” Unpublished Opinion at 5 (citing *Guile v. Ballard Comty. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993)).

Here, Ms. Grant presented—solely at oral argument—a letter from Dr. Goodman, her New York City surgeon, in support of her medical malpractice claim. The trial court struck the evidence “for two legitimate reasons.” Unpublished Opinion at 6. The Court of Appeals affirmed that the trial court acted within its discretion in striking the evidence because: (1) Ms. Grant failed to timely submit the letter in response to defendants’ motions, thus the defendants had no opportunity to respond to Dr. Goodman’s letter prior to the hearing; and (2) CR 56(e) requires evidence offered in support or in opposition to a motion for summary judgment to “be in the form of sworn affidavits or declarations made under penalty of perjury. It is well-established in this context that without more, an unsworn letter discussing the alleged negligent treatment is not sufficient to create a genuine issue of material fact.” Unpublished Opinion at 6 (citing *Young Soo Kim v. Choong Hyun Lee*, 174 Wn. App. 319, 326-27, 300 P.3d 431 (2013)).

However, as the Court of Appeals acknowledged, the trial court “did not dismiss Grant’s case merely because of the timing and form of Grant’s evidence.” Unpublished Opinion at 6. Ignoring these deficiencies,

the trial court and Court of Appeals concluded that Dr. Goodman's letter was nevertheless insufficient to establish a factual basis for his conclusions. *Id.*

For example, (1) Dr. Goodman did not address the standard of care for physicians of any specialty in Washington, despite defendants practicing in a variety of specialties. *Id.* (2) He did not "identify any specific act that deviated from the standard of care." *Id.* at 7; *see also* RP 40:18-21. (3) Dr. Goodman referenced only two physicians by name, but failed to specify what acts or omissions they allegedly committed. *Id.* at 7. He never mentioned Virginia Mason. (4) Dr. Goodman attributed Ms. Grant's symptoms to existence of a hernia that he repaired in 2010, and asserted that there was an unreasonable delay in diagnosing the condition between 2009-10, however, "he does not say when that condition existed with any degree of certainty or precision." *Id.* at 7. (5) Dr. Goodman did not suggest that any of the diagnostic testing performed in July and December 2009 indicated the presence of a hernia. *Id.* at 7. (6) He speculates that the hernia "most likely" existed several months before the second surgery. *Id.* at 7; CP 347. Finally, Dr. Goodman failed to state that his approach to determining the problem represented the standard practice. *Id.* at 7.

The Court of Appeals properly concluded that “the letter does not demonstrate that any of the physicians failed to exercise the degree of care of a reasonably prudent health care provider, violated Washington’s standard of care, or that their actions proximately caused Grant’s injuries.” *Id.* at 7. Based on the foregoing, the Court of Appeals affirmed that summary judgment dismissal was proper because Ms. Grant failed to meet her burden by producing competent medical evidence to support her malpractice claims.

Ms. Grant contends that both the trial court and Court of Appeals were biased against her because she was/is a *pro se* litigant. (See Petition at 12-14) However, as the Court of Appeals stated, a *pro se* litigant is held to the same standard as an attorney. *Id.* at 9 (citing *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997)).

The trial court patiently allowed oral argument for one-and one-half hours at the summary judgment hearing. The Court of Appeals acknowledged that it has “carefully examined the available record” and could find no evidence that Ms. Grant was discriminated against because of her status as a *pro se* litigant “or for any other reason.” *Id.* at 9.

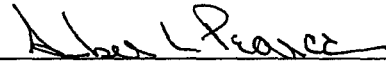
V. CONCLUSION

The Court of Appeals' unpublished opinion is a fair and sound analysis of the trial court's dismissal of Ms. Grant's claims. Her petition for review should be denied.

Dated this 25 day of July, 2014.

Respectfully submitted,

FLOYD, PFLUEGER & RINGER, P.S.



David J. Corey, WSBA No. 26683
Amber L. Pearce, WSBA No. 31626
Floyd, Pflueger & Ringer, P.S.
200 W. Thomas Street, Suite 500
Seattle, WA 98119
Telephone: 206-441-4455
Facsimile: 206-441-8484

Attorneys for Respondents Virginia
Mason Health System and Richard C.
Thirlby

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the date noted below, a true and correct copy of the foregoing was delivered and/or transmitted in the manner(s) noted below:

Patricia A. Grant
Pro Se Plaintiff
1001 Cooper Point Rd. SW
Suite 140-231
Olympia, WA 98502

Facsimile
 Messenger
 U.S. Mail
 E-Mail

Donna S. Moniz
Johnson Graffe Keay Moniz & Wick, LLP
925 Fourth Avenue, Suite 2300
Seattle, WA 98104

Facsimile
 Messenger
 U.S. Mail
 E-Mail

Timothy E. Allen
Bennett Bigelow & Leedom, PS
1700 Seventh Avenue, Suite 1900
Seattle, WA 98101

Facsimile
 Messenger
 U.S. Mail
 E-Mail

Nancy C. Elliott
Merrick Hoffstedt & Lindsey, PS
3101 Western Avenue, Suite 200
Seattle, WA 98121

Facsimile
 Messenger
 U.S. Mail
 E-Mail

Timothy L. Ashcraft
Scott O'Halloran
Michele M. Garzon
Williams Kastner & Gibbs, PLLC
1301 A. Street, Suite 900
Tacoma, WA 98402-4200

Facsimile
 Messenger
 U.S. Mail
 E-Mail

Philip J. VanDerhoef, WSBA #14564
Susan E. Wassell, WSBA #42783
Fain Anderson VanDerhoef, PLLC
701 Fifth Avenue, Suite 4650
Seattle, WA 98119-4296

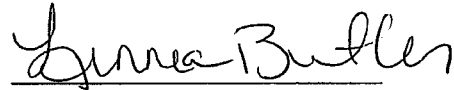
Facsimile
 Messenger
 U.S. Mail
 E-Mail

D.K. Yoshida, WSBA #17365
Ogden Murphy Wallace, PLLC
1601 5th Avenue, Ste 2100
Seattle, WA 98101-1686

Facsimile
 Messenger
 U.S. Mail
 E-Mail

Howard M. Goodfriend, WSBA #14355
Smith Goodfriend, P.S.
1619 8th Avenue North
Seattle, WA 98109-3007

Facsimile
 Messenger
 U.S. Mail
 E-Mail



Linnea Butler
Linnea Butler
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Linnea Butler
Subject: RE: Grant v. Alperovich / 90429-4

Rec'd 7/25/14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Linnea Butler [mailto:lbutler@floyd-ringer.com]
Sent: Friday, July 25, 2014 2:41 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Grant v. Alperovich / 90429-4

Case Name – Patricia A. Grant vs. Alperovich, M.D., et al.,
Case Number – 90429-4
Amber L. Pearce, (206) 441-4455, WSBA No. 31626, apearce@floyd-ringer.com

Thank you.

Linnea B. Butler
Legal Assistant

FLOYD, PFLUEGER & RINGER, PS
200 W Thomas Street
Suite 500
Seattle, WA 98119
(206) 441-4455 - Phone
(206) 441-8484 - Facsimile
lbutler@floyd-ringer.com

Confidential Attorney Work Product/Attorney-Client Privileged Communication. This message is confidential, attorney work product and subject to the attorney-client communication privilege. It is intended solely for the use of the individual named above. If you are not the intended recipient, or the person responsible to deliver it to the intended recipient, you are hereby advised that any dissemination, distribution or copying of this communication is prohibited. If you have received this email in error, please immediately notify the sender by reply email or delete and/or destroy the original and all copies of the email message.

Confidential Attorney Work Product/Attorney-Client Privileged Communication. This message is confidential, attorney work product and subject to the attorney-client communication privilege. It is intended solely for the use of the individual named above. If you are not the intended recipient, or the person responsible to deliver it to the intended recipient, you are hereby advised that any dissemination, distribution or copying of this communication is prohibited. If you have received this email in error, please immediately notify the sender by reply email or delete and/or destroy the original and all copies of the email message.