No. 92713-8

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

GABRIELLE NGUYEN-ALUSKAR,

Appellant/Petitioner,

v.

The LASIK Vision Institute, LLC; GORDON JENSEN, M.D., a physician; and JOHN/JANE DOE PHYSICIANS 1-10,

Respondents.

Court of Appeals Case No. 73018-5-I
Appeal from Superior Court of the State of Washington for King County

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RESPONDENTS JOINT ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDING PARTIES

Respondents Gordon Jensen, MD ("Dr. Jensen") and The Lasik Vision Institute ("LVI") respectfully request that the Court deny Ms. Nguyen-Aluskar's petition for discretionary review.

II. COURT OF APPEALS DECISION

The Court of Appeals, in its November 30, 2015 unpublished decision, affirmed the trial court's order dismissing with prejudice all medical malpractice claims against the defendants/respondents Dr. Jensen and LVI. With respect to her informed consent claim - the only issue upon which she seeks discretionary review - the Court of Appeals held that Ms. Nguyen-Aluskar had submitted no evidence sufficient to demonstrate the existence of a genuine issue of material fact. In so holding, the Court of Appeals reasoned that Ms. Nguyen-Aluskar had signed consent forms warning her of those complications that she later claimed to have experienced. *Slip. Op.* at 18-19. Those signed consent forms constitute *prima facie* evidence that Ms. Nguyen-Aluskar gave her informed consent to the treatment administered. *Id.*

Division One further reasoned that a declaration of Ms. Nguyen-Aluskar's purported expert witness, Dr. Bensinger, did not create an issue of material fact sufficient to rebut her signatures on the consent forms.

She submitted Dr. Bensinger's declaration with her motion for reconsideration of the trial court's order granting summary judgment to Dr. Jensen and LVI (after the trial court had granted Dr. Jensen and LVI's motions for summary judgment, and denied her CR 56(f) motion for continuance).

The declaration of Dr. Bensinger was insufficient to demonstrate the existence of a genuine issue of material fact on the informed consent claim because Dr. Bensinger's conclusion - that Mr. Nguyen-Aluskar was not appropriately consented - was based on hearsay statements that were unsupported by any evidence in the record before the Court. While such hearsay statements were admissible for the limited purpose of showing the basis of Dr. Bensinger's opinion, the admission of those facts was not substantive proof of them. *Slip Op.* 19-22. As the Court of Appeals concluded:

> [W]hether an LVI technician put drops in her eyes prior to her signing the consent form so she could not read, whether she discussed any substantive issues or informed consent with Dr. Jensen, and whether LVI recommended that she undergo the procedure are factual matters for which Dr. Bensinger has no personal knowledge. And, they are not matters of ophthalmological expertise. In the context of Dr. Bensinger's declaration they are simply hearsay statements. Those statements cannot be considered as substantive evidence and do not create a genuine issue of material fact merely by virtue of being included in his declaration.

> Significantly, Nguyen-Aluskar did not include those key foundational facts relied upon by Dr. Bensinger in her declaration. The facts simply were not in evidence. Without them, Dr. Bensinger's declaration lacks the factual foundation necessary to support its ultimate conclusions.

Slip. Op. 21-22.

III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether discretionary review should be denied because the Court of Appeals' unpublished decision is harmonious and consistent with its other decisions, which apply the well-established rule that hearsay statements in an expert's declaration cannot be considered as substantive evidence.

2. Whether discretionary review should be denied because the petition does not involve any issue of substantial public interest.

IV. COUNTERSTATEMENT OF THE CASE

The Court of Appeals' unpublished decision adequately states the facts. The salient facts are as follows.

A. Medical Records

Ms. Nguyen-Aluskar sued Dr. Jensen and LVI alleging (among other claims not raised on discretionary review) a claim for lack of informed consent for a vision-enhancement procedure performed by Dr. Jensen. LVI provides management services to independent physician

contractors who perform vision enhancement procedures, and LVI had a contract with Dr. Jensen to provide management services for his practice. On February 5, 2005, Dr. Mark Nelson, an independent contractor affiliated with LVI, performed a PRK vision enhancement procedure for Ms. Nguyen-Aluskar, without complication. CP 61. Prior to the procedure, she signed a six-page consent form, acknowledging that there were risks of the procedure, including an increased risk of eye irritation and permanent over-corrective or under-corrective vision requiring the use of glasses or lenses for reading or distance vision. CP 65-66. Ms. Nguyen-Aluskar had 20/20 vision following her procedure. CP 70.

On January 27, 2012, Ms. Nguyen-Aluskar underwent an enhancement procedure at LVI, performed by Dr. Jensen. CP 72. Ms. Nguyen-Aluskar signed another consent form stating that "General LASIK/PRK complications discussed in your original LASIK/PRK patient consent form apply to the enhancement procedure." CP 74. The procedure was performed successfully, and six weeks thereafter Ms. Nguyen-Aluskar's vision was 20/50 in her right eye and 20/40 in her left eye. CP 72; 76.

B. Procedural History

On January 17, 2013, Ms. Nguyen-Aluskar and her then-husband Gokhan Aluskar, sued Dr. Jensen and LVI claiming injuries as a result of

the 2012 enhancement procedure. CP 40-56. Their claims included medical negligence, lack of informed consent, and a violation of the Consumer Protection Act (CPA). *Id.* On December 11, 2013, they filed a voluntary nonsuit without prejudice purusant to CR 41(a)(1)(B), which the trial court granted. CP 58-59.

On February 21, 2014, Ms. Nguyen-Aluskar re-filed her lawsuit, asserting the same claims against Dr. Jensen and LVI. CP 1-8. On October 22, 2014, LVI filed a notice of hearing for its summary judgment motion, to be heard on December 12, 2014. CP 450. Both Dr. Jensen and LVI filed motions for summary judgment on November 14, 2014, on the basis that the plaintiff was without the expert testimony necessary to support her medical negligence and informed consent claims, and without evidence necessary to support her CPA claim. CP 25-43; 115-125.

In her response to the summary judgment motions, Ms. Nguyen-Aluskar simultaneously moved for a CR 56(f) continuance, asserting that her previous expert witness withdrew while she was preparing her summary judgment response. CP 141-166. In their replies, Dr. Jensen and LVI argued that a CR 56(f) continuance was not warranted given the nearly two-years Ms. Nguyen-Aluskar's claims had been pending and her failure to satisfy the requirements of CR 56(f). CP 193-199; 200-205.

The trial court granted the summary judgment motions and denied Ms. Nguyen-Aluskar's motion for CR 56(f) continuance, ruling that dilatory conduct is not a basis for continuance. CP 239-240; 241-242; VRP 27-28.

Ms. Nguyen-Aluskar subsequently filed a motion for reconsideration of the trial court's summary judgment orders, attaching for the first time the declaration of an expert, Dr. Bensinger. CP 243-331. In his declaration, Dr. Bensinger opined that Ms. Nguyen-Aluskar was not appropriately consented for the enhancement procedure. CP 260-264. In reaching this opinion, he relied on information he purportedly received in an interview with Ms. Nguyen-Aluskar, during which she told him that Dr. Jensen had not discussed any substantive risks with her, and that she was unable to read the consent form that she signed because of the administration of eye drops. *Id.*

Significantly, these factual contentions in Dr. Bensinger's declaration – regarding Ms. Nguyen-Aluskar's conversation with Dr. Jensen and the administration of eye drops – were not reflected in any evidence submitted to the trial court. Nor were the factual contentions included in Ms. Nguyen-Aluskar's own declaration that was also submitted with the motion for reconsideration.

The trial court denied Ms. Nguyen-Aluskar's motion for reconsideration. On appeal, Ms. Nguyen-Aluskar asserted that the trial court erred by not granting her motion for reconsideration of the Order dismissing her claims on summary judgment. The Court of Appeals held that Ms. Nguyen-Aluskar had waived any appeal with respect to her medical negligence and CPA claims by not addressing those claims in her opening briefing to the Court.

With respect to her remaining claim, for lack of informed consent, the Court of Appeals first noted that the declaration of Dr. Bensinger was submitted not in conjunction with Ms. Nguyen-Aluskar's summary judgment motion, but instead with her later motion for reconsideration. As the Court noted:

> Under CR 59(a)(3), a motion for reconsideration may be granted if a party's rights were materially affected by surprise which orderinary prudence could not have guarded against. Nguyen-Aluskar argued that she was entitled to a continuance, because Dr. Bensinger withdrew at the last minute. In other words, she argued that Dr. Bensinger's withdrawal was a complete surprise. But the trial court concluded that learning of Dr. Bensinger's withdrawal so late was as a result of Nguyen-Aluksar's dilatory conduct. The same facts and reasons that supported denial of the continuance affirm that it was not an abuse of discretion to deny reconsideration on this basis.

Slip. Op. at 17, n. 9.

The Court of Appeals further reasoned that Dr. Bensinger's declaration did not create a genuine issue of material fact sufficient to rebut her signatures on the consent forms, because the purported facts upon which he relied in forming his opinions were not anywhere in evidence. *Slip Op.* at 19-22.

The Court of Appeals affirmed the trial court's denial of Ms. Nguyen-Aluskar's motion for reconsideration in its unpublished decision. Ms. Nguyen-Aluskar subsequently filed a motion to publish the decision, which the Court denied on January 6, 2016.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4(b) sets forth the criteria upon which the Supreme Court will consider accepting discretionary review.

Here, Ms. Nguyen-Aluskar asserts that the decision of the Court of Appeals satisifies RAP 13.4(b)(2) (the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals); and RAP 13.4(b)(4) (the petition involves an issue of substantial public interest that should be determined by the Supreme Court). However, she has failed to establish that the Court of Appeals' decision conflicts with any other decision of the Court of Appeals, and has similarly failed to demonstrate that her petition involves an issue of substantial public interest sufficient for determination by the Supreme Court. Accordingly, she has failed to

satisfy the requirements of RAP 13.4(b), and her petition for discretionary review should be denied.

A. Ms. Nguyen-Aluskar Does Not Establish that the Court of Appeals Decision Conflicts with a Decision of This Court or Another Decision of the Court of Appeals.

Ms. Nguyen-Aluskar fails to identify any Washington published decision that conflicts with the unpublished decision of the Court of Appeals. This is no mere oversight, for the Court of Appeals correctly applied the relevant law. Division One correctly relied upon basic tenets of evidentiary law, including the fact that a declaration submitted in opposition to a motion for summary judgment must set forth admissible evidentiary facts, and affirmatively show that the declarant is competent to testify to the matters stated. *Slip Op.* at 19-20, citing *McKee v. Am. Home Prods., Corp,* 113 Wn.2d 701, 706, 782 P.2d 1045 (1999).

While an expert witness may base his or her opinions on hearsay, and while a trial court may allow the admission of otherwise inadmissible hearsay for the limited purposes of showing the basis of an expert's opinion, the admission of these facts is "not substantive proof of them." *Slip. Op.* at 20, citing *Allen v. Asbestos Corp.,* 138 Wn. App. 564, 579-80, 157 P.3d 406 (2007), *review denied,* 162 Wn.2d 1022 (2008) ("'[I]f an expert states the ground upon which his opinion is based, his explanation is not proof of the facts which he says he took into consideration. His

explanation merely discloses the basis of his opinion in substantially the same manner as if he had answered a hypothetical question.'") (alteration in original) (citation and internal quotation marks omitted) (quoting *Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue*, 106 Wn.2d 391, 399-400, 722 P.2d 787 (1986)).

Based on these well-established principles, the Court of Appeals held that those foundational facts relied upon by Dr. Bensinger, purportedly obtained during a private interview with Ms. Nguyen-Aluskar, constituted hearsay admissible only to demonstrate the basis of Dr. Bensinger's opinions, not to demonstrate the truth of the facts themselves. *See State v. Dan J. Evans Campaign Comm.,* 865 Wn.2d 503, 506-07, 546 P.2d 75 (1976) (statements in affidavits based on hearsay evidence carry no weight at summary judgment); *Doe v. Puget Sound Blood Ctr.,* 117 Wn.2d 772, 787, 819 P.2d 370 (1991) ("The opinion of an expert which is only a conclusion or which is based on assumptions is not evidence which satisfies the summary judment standards because it is not evidence which will take a case to the jury.").

Because the hearsay facts attested to by Dr. Bensinger were unsupported anywhere in the record before the court (even in the declaration of Ms. Nguyen-Aluskar herself), they were not in evidence and, accordingly, could not be considered as substantive evidence. *Slip*

Op. at 21. Without those facts in evidence, Dr. Bensinger's declaration "lacks the factual foundation necessary to support its ultimate conclusions." *Slip. Op.* at 22.

The cases upon which Ms. Nguyen-Aluskar relies in her petition for discretionary review neither conflict with these fundamental rules of evidence, nor with the Court of Appeals' unpublished opinion. In fact, they re-affirm the fundamental principles upon which the Court of Appeals relied. In *Kennedy v. Monroe,* 15 Wn. App. 39, 547 P.2d 899 (1976) (cited in Pet. Discretionary Review at 5), the Court considered whether a testifying expert medical witness may base his opinions on facts narrated to him by the plaintiff. The Court held that the trial court may allow the admission of otherwise hearsay evidence for the limited purpose of showing the basis of an expert's opinions, but not as substantive evidence. *Id.* at 47-48. The Court stated:

> By so holding we do not expand upon the limited purpose for which such a narrative of the patient's history is admitted. The historical recitation by the doctor is not admitted as proof of the facts recited, but as proof only that the statements were made and utilized in party by the doctor as a basis for reaching his medical conclusions[.]

Id. at 48. The Court concluded:

> Because the patient's recitals are received for this limited purpose, and are not substantive evidence of the facts recited, a claimant may fail in his proof if he does not

> present those facts in his own sworn testimony or through that of others.

Id. at 49.

Because *Kennedy v. Moore* is harmonious and consistent with Division One's decision in the case at bar, petitioner fails to satisfy the criteria of RAP 13.4(b)(2). Her petition for discretionary review should be denied.

Ms. Nguyen-Aluskar similarly contends that the opinion at bar conflicts with another Division One opinion, *Sunbreaker Condo. Ass'n v. Traveler's Co.*, 79 Wn. App. 368, 901 P.2d 1079 (1995), *review denied*, 129 Wn.2d 1020 (1996). (*See* Pet. Discretionary Review at 5). But the Court in *Sunbreaker* similarly held that an expert could rely on information about which he did not have personal knowledge, for the limited purpose of demonstrating the basis for his opinion. The Court did *not* hold that the information relayed by the expert could be considered as substantive evidence. *Id.* at 374. *Sunbreaker Condo.*'s holding corresponds with the unpublished decision at bar. Because there is no conflict, Ms. Nguyen-Aluskar's petition does not trigger review under RAP 13.4(b)(2).

In sum, Ms. Nguyen-Aluskar fails to identify a published Washington decision that conflicts with any of the authorities cited by the Court of Appeals. Discretionary review should be denied.

B. Ms. Nguyen-Aluskar Does Not Establish that Her Petition Involves an Issue of Substantial Public Interest that Should be Determined by the Supreme Court.

Ms. Nguyen-Aluskar contends that her petition for discretionary review should be accepted because "it involves an issue of substantial public interest." (*See* Pet. Discretionary Review at 8) (relying on RAP 13.4(b)(4)). She asserts that "the Court of Appeals has held that a medical expert cannot rely upon a history of a plaintiff in formulating opinions." (*See* Pet. Discretionary Review at 8). But this is a dramatic mis-characterization of the Court's unpublished opinion.

In fact, the Court of Appeals came to the unsurprising conclusion, based on established Washington precedent, that an expert may rely on hearsay statements to demonstrate the basis of his or her opinions, but the expert's recitation of such statements is not substantive proof of them. To hold otherwise would allow parties to circumvent the rules of evidence and CR 56(e) by removing the obligation to submit admissible evidence and specific facts showing that there is a genuine issue for trial in order to overcome a motion for summary judgment. Such a dramatic shift in the common law and rules of evidence would not serve the public interest.

Ms. Nguyen-Aluskar spins out a few examples of the "severe consequences for practitioners" that this unpublished decision purportedly invokes. (*See* Pet. Discretionary Review at 9). First, because the decision is unpublished, it has no precedential value beyond the immediate parties. *See* RCW 2.06.040 ("Decisions determined not to have precedential value shall not be published.")

Second, petitioner's two examples conflate an expert's reliance on hearsay testimony (which is admissible in a summary judgment proceeding) with an expert's recitation of purported facts that are neither in the record nor part of the evidence (which is inadmissible in a summary judgment proceeding). The examples also demonstrate a fundamental misunderstanding of the deficiencies in her expert's declaration in the case at bar.

Finally, Ms. Nguyen-Aluskar contends that her duty (to ensure that proof of the facts upon which her expert relies is properly in evidence) creates a new and burdensome "additional step" for summary judgment. (*See* Pet. Discretionary Review at 10). Not so. This purported "additional step" has been part of Washington's jurisprudence since at least 1968.

Division One's holding in the case at bar is controlled by stare decisis, including *Allen v. Asbestos Corp.*, 138 Wn. App. 564, 579-80, 157 P.3d 406 (2007) (*see* Slip Op. at 20-22). Likewise, *Allen* relies on several

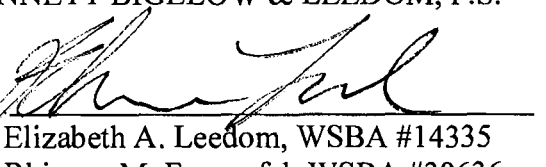
Supreme Court cases (*State v. Wineberg*, 74 Wn.2d 372, 384, 444 P.2d 787 (1968) and *Group Health Coop. v. Dep't of Revenue*, 106 Wn.2d 391, 399-400, 722 P.2d 787 (1986)) and the classic treatise, Wigmore on Evidence § 655 (3rd ed). In sum, the issue involved in this appeal does not raise any issue of substantial public interest. The Court should decline review.

VI. CONCLUSION

Ms. Nguyen-Aluskar's petition for discretionary review should be denied because it neither conflicts with other decisions of the Court of Appeals nor involves an issue of substantial public interest. (*See* RAP 13.4(b)(2), (4)). The Court of Appeals unpublished decision is fair and grounded on well-established case law. Discretionary review should be denied.

Respectfully submitted this 28th day of January, 2016.

BENNETT BIGELOW & LEEDOM, P.S.

By: 

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of: **RESPONDENTS JOINT ANSWER TO PETITION FOR DISCRETIONARY REVIEW** to be delivered VIA LEGAL MESSENGER as follows:

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SIGNED at Seattle, Washington this 28th day of January, 2016.

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