

**FILED**  
PETITION FOR REVIEW, ZAITSEV v. KELLER, No. 95030-0  
**SUPREME COURT**  
**STATE OF WASHINGTON**  
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No. 95030-0

Court of Appeal Cause No. 74626-0

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**TAMARA ZAITSEV**  
Petitioner  
v.  
**SHAWN KELLER, DDS (SMILES BY DESIGN),**  
Respondent

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**PETITION FOR REVIEW**

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## **I. IDENTITY OF THE PETITIONER**

Tamara Zaitsev, Petitioner in the Superior Court and Appellant in the Court of Appeals, asks this Court to accept review of the Court of Appeals decision terminating review designated in part II of this petition.

## **II. COURT OF APPEALS DECISION**

Division I of the Court of Appeals filed its unpublished decision on July 31, 2017. *Appendix 1.* A timely motion for reconsideration was filed on August 18, 2017 and was denied on September 12, 2017. *Appendix 2.*

## **III. ISSUES PRESENTED FOR REVIEW**

A. After two attorneys neglect her case, with the second one withdrawing only two months before the (apparent) statute of limitations date runs, and subsequent numerous unsuccessful attempts to retain an attorney, Petitioner Tamara Zaitsev, a 71-year-old retired person, low income, computer-illiterate, non-English speaking, is compelled to plead her cause in court pro se, while still consulting attorneys who are reluctant to retain her case because they don't see sufficient financial gain from it. Is Zaitsev being denied due process by 1) being held to the same standards as WBAR certified attorneys, and 2) not provided by courts with an attorney to assist her with legal pleadings? Yes.

B. When dismissing Zaitsev's case "with prejudice", trial court erroneously calculated the date of when statute of limitations had run, that is 3-years after the date of initial injury. However, Zaitsev was still under Respondent Dr. Keller's care and still continued a patient-doctor relationship with Dr. Keller until about six months after the date of initial injury. The injury was continuous: initially she was injured when drill bit (Foreign body "FB") broke in her jaw at the time of dental implant procedure that Dr. Keller was performing, and then injury continued when Dr. Keller sent her to a dental school, where Zaitsev sustained more injuries

from a failed FB removal procedure, which Dr. Keller also paid for. Was Zaitsev denied her right for due process when the trial court failed to properly address the statute of limitations issue to determine the correct date, before dismissing the case “with prejudice”, thus precluding petitioner from further court hearing of her cause? Yes.

C. Zaitsev was not assisted in trial court with a certified court interpreter, which violates RCW 2.43.030. (1)(c) and Fed.R.Civ.P.604.2, Instead of acting in the court’s and Zaitsev’s best interests and providing her with an interpreter, trial court allows Zaitsev’s daughter, who is not a court interpreter, to interpret for the petitioner. If Zaitsev had a qualified interpretation in court should would have made a better assessment of what was conveyed by the court, would not have given the court a permission to decide on written documents, and her cause of action would have not been dismissed with prejudice. Are the petitioner’s due process rights violated when the trial court violates court rules? Yes.

D. The Court of Appeals had the discretion to allow Zaitsev’s “Waiver and Estoppel” argument, but failed to do so, citing that this issue was raised for the first time on appeal, without taking into account Zaitsev’s extraordinary circumstances. Were Petitioners due process rights violated when the appellate court refused to take Zaitsev’s disadvantaged circumstances and the fact that she was misled and “trapped” by Dr. Keller’s attorney, and thus consider her “Waiver and Estoppel” argument? Yes.

E. Zaitsev acted in good faith and exhibited excusable neglect when serving the process. Did the appellate court violate petitioner’s due process rights by not taking these facts into consideration and not giving her a chance to re-serve Dr. Keller? Yes.

F. The trial court and the court of appeals had the discretion to find the service insufficient but curable. Did the trial court and court of appeals abuse their discretion and

violated petitioner's due process rights by not deeming the service of process insufficient but curable? Yes.

G. Washington State Department of Health ("WDOH") public records exhibit a disturbing number of public complaints that describe low standard of care, negligence, and malpractice at Dr. Keller's place of business. Petitioner's injuries directly co-relate to the pattern of reoccurrence involving other patient's related incidents, as well as complaints submitted to WDOH by Dr. Keller's former employees. Does this case involve a significant public interest issue? Yes.

#### **IV. STATEMENT OF THE CASE**

A. On or about June 21, 2012 Petitioner Tamara Zaitsev ("Zaitsev") was severely injured by Respondent Dr. Shawn Keller ("Dr. Keller"), who performed an implant surgery in her mouth and failed to remove a piece of drill bit ("FB") which was broken off at the time of the procedure and retained in Zaitsev's lower jawbone, later causing complications with Zaitsev's health and a necessity of additional medical procedures and surgeries. Since the incident, Zaitsev has not been able to lead a normal lifestyle and has been seeking medical advice and treatment from numerous doctors and medical institutions.<sup>1</sup> [CP @ 3, 4].<sup>2</sup> Zaitsev was under care of Dr. Keller until about January 15, 2013, and communicated with his office until about March, 2013, and believes that the last decision to leave the FB in her jaw was made by Dr. Keller between January and March, 2013 (last omission). Dr. Keller failed to provide adequate removal of the broken drill bit piece, which had to be done by a specialist in controlled conditions (estimated at least \$60,000). Failing to exercise a due care, and motivated by a low price, Dr. Keller sent

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<sup>1</sup> Complaint included in Clerk's Papers, PDF pages 3 & 4.

<sup>2</sup> Clerk's Papers designation [CP @ X] where X is PDF page number of reference.

Zaitsev to the University of Washington School of Dentistry (“UWSD”), instead of qualified experienced provider, and paid some \$300 for the FB removal procedure (continuous doctor-patient relationship). On January 15, 2013, Zaitsev sustained more significant injuries from the FB removal procedure at the UWSD, and FB was never recovered.

B. Zaitsev retained two attorneys who procrastinated much time in her case. The last attorney has withdrawn from representing the case two months before the 3-year statute of limitations deadline (if calculated from the day of the incident). Although, Zaitsev had contacted numerous lawyers, at this crucial point it was impossible to retain an attorney on contingency fee, and she could not afford to pay out of pocket due to her indigent status, age of retirement, and health issues. Zaitsev has not been able to retain an attorney to this day. Zaitsev presented to court of appeals as evidence some of the numerous attorney letters/emails of refusal before and after the case dismissal.<sup>3</sup> Many attorneys were contacted by phone. Zaitsev was left no choice but to represent herself pro se with the help of her daughters and family friends, who have no legal education, and limited English. Zaitsev does not read nor write English and requires an interpreter.

C. On May 7, 2015, with the help of her daughter and a family friend, Zaitsev filed a short COMPLAINT [CP @ 3, 4] against Dr. Keller in the King County Superior Court. On May 8, 2015, Zaitsev, with the help of her daughter, and a family friend submitted the service of process documents to the Sheriff’s office for delivery to Dr. Keller’s attorney Mr. Versnel (Versnel). Zaitsev was certain the following documents were given to the Sheriff: 1) ORDER SETTING CIVIL CASE SCHEDULE and supporting information pages [CP @ 5-9], SUMMONS [CP @ 1, 2], and COMPLAINT [CP @ 3, 4].

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<sup>3</sup> Exhibits 14-23 included in Brief of Appellant (not in Clerk’s Papers).

D. On May 21, 2015, Versnel filed a NOTICE OF APPEARANCE [CP @ 13], but has not responded with any answer, motion, nor pleading that would indicate that the service of process was incomplete or insufficient until six months later on Nov 15, 2016, when he finally filed a MOTION TO DISMISS [CP @ 18-24] based on insufficient/incomplete service of process. Versnel argued that he only received the Order Setting Civil Case Schedule and never received Complaint and Summons. He also argues that the Service of Process had to be served directly on his client Dr. Keller. and not on him (Versnel), therefore, the court does not have jurisdiction to hear this case.

E. Zaitsev asserts that she acted in good faith, and the reason why she did not serve the process on Dr. Keller directly is because she believed that she was precluded and warned by Versnel not to bother Dr. Keller anymore. On more than one occasion, in his correspondence to Zaitsev's former attorney, Versnel insisted that he is representing Dr. Keller as well as Dr. Keller's business Smiles by Design LLC and does not want his client bothered, and that all future concerns and correspondence has to be addressed to him (Versnel). The last letter from Versnel was written less than 3 months before the commencement of the suit, and Versnel never indicated in any way that he is not representing Dr. Keller any longer. Zaitsev argues that she was misled by attorney Versnel's letters who represents the law and she was reluctant to break the law.<sup>4</sup>

F. Zaitsev asserts that she tried to serve the Defendant in good faith. Because of her poor eye sight and general health, and limited English, she relied upon the help of her daughter and family friend for help, and was unaware of the missing documents. The circumstances were not in the scope of her control. Zaitsev was certain that a complete package of Service of Process

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<sup>4</sup> See PLAINTIFF'S RESPONSE TO MOTION TO DISMISS [CP @ 40-43] and supporting letters from Versnel [CP @ 47-48].



documents were handed to the Sheriff for delivery to Versnel. Zaitsev had no idea the Summons and Complaint somehow went missing, and believes it could have been a clerical mistake. But, if she would have been timely notified by the Defendant's attorney about the incomplete service of process, she would have corrected the error by contacting the Sheriff's office, or/and re-serving the process.<sup>5</sup>

G. Zaitseva was not represented by an attorney, and the court did not appoint her one, despite her request in writing.<sup>6</sup>

H. Zaitsev tried negotiations with the Defendant and has sent a Demand Letter<sup>7</sup> to Versnel on October 12, 2015, by certified mail. Versnel never responded. Zaitsev also filed a complaint with the WA Department of Insurance because Versnel also represents the liability insurance company for Dr. Keller's insurance policy who is responsible for this claim. The claim was denied.

I. On Dec.16, 2015, Dr. Keller filed DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS [CP @ 51-55], as well as DECLARATION OF JOHN C. VERSNEL, III IN SUPPORT OF DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS [CP @ 56-57]. Zaitsev did not have sufficient time to respond before Dec. 22 court hearing to address Versnel's statements, because she was relying on free legal help which only entitles her to occasional 30-minute appointments with different attorneys who know nothing about her case, and who are, in most cases, do not practice in the pertinent area of law. Zaitsev prepared her Declaration and supporting documents<sup>8</sup> in response and e-filed the documents on Dec.19, 2015.

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<sup>5</sup> See PLAINTIFF'S RESPONSE TO MOTION TO DISMISS [CP @ 40-43] and supporting letters from Versnel [CP @ 47-48].

<sup>6</sup> See PLAINTIFF'S RESPONSE TO MOTION TO DISMISS [CP @ 43].

<sup>7</sup> See Exhibit 11 included with this Brief (not in Clerk's Papers).

<sup>8</sup> See Exhibit 12 included with this Brief (not in Clerk's Papers).

Zaitsev was notified by the court's automatic e-system the next day, after the dismissal judgement was already entered, that these documents did not go through. So, the trial court never received Exhibits 11 and 12.<sup>9</sup>

J. On Dec. 22, 2015, Zaitsev appeared before the trial court for a hearing of MOTION TO DISMISS [CP @ 18-24]. The trial court did not provide Zaitsev with a qualified interpreter; instead, her daughter Elena Zaitseva assisted her in interpreting. Her daughter is not a qualified court interpreter. At the time of the hearing, the court informed Zaitsev that she has an option to allow the court to make judgement without oral arguments, based on the written documents that court had.<sup>10</sup> She agreed, assuming that the court acted in her best interests. However, trial court did not disclose the documents that it had, and Zaitsev was not aware that the court did not have all the documents that were e-filed.

K. Zaitsev asserts that from Versnel's actions it is evident that he purposely concealed the fact that service was insufficient. These actions, or failure to act on the part of Versnel delayed the case action significantly and prejudiced Zaitseva substantially, because at this point the Sheriff's department refused to even discuss the recovery of missing documents from six months ago; Zaitsev was not given an option by the trial court to cure or re-serve the process.

L. The trial court assumed that the 3-year statute of limitations for filing of the case has run, and dismissed the case "with prejudice"<sup>11</sup>, thus precluding Zaitsev from further pleading her cause of action.

M. Zaitsev appealed to the Court of Appeals, Division I. Court of Appeals Affirmed trial court's ruling.<sup>12</sup>

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<sup>9</sup> See Exhibits 11 & 12 included with Brief of Appellant (not in Clerk's Papers).

<sup>10</sup> See CLERK'S MINUTE ENTRY [CP @ 62].

<sup>11</sup> See ORDER GRANTING CR 12(b) MOTION FOR DISMISSAL [CP @ 63-64].

<sup>12</sup> See Appendix-1 COURT OF APPEALS UNPUBLISHED OPINION.

**V. ARGUMENT WHY REVIEW SHOULD BE GRANTED**

This Court should grant review of the Court of Appeals' decision for the following reasons:

**A. TRIAL COURT AND COURT OF APPEALS ERRED BY HOLDING A 71-YEAR-OLD, NON-ENGLISH-SPEAKING, ILLETERATE, PRO SE PETITIONER TO THE SAME STANDARDS AS WABA CERTIFIED ATTORNEYS.**

1. The Court of Appeals' decision involves a significant question of constitutional law, namely, whether the due process rights of petitioner were violated when the courts held her to the same standard as WABA certified attorneys, while disregarding the fact that her Pro Se status is not due to her choice, but due to her inability to retain an attorney.

2. After being injured by a negligent dentist Dr. Keller, who also did not provide Zaitsev with due care in correcting the negligent act, and placing her in a position of sustaining more injuries, Zaitsev is compelled to plead her cause pro se, because her attorneys failed to represent her. The first attorney she retained held the case for a year without making any progress, and second attorney had quit only two months before the (apparent) statute of limitations run. Zaitsev consulted numerous attorneys, but none wanted to take her case. Zaitsev is the injured party in this case, and is placed at disadvantage, and being prejudiced by the legal system because of not being able to retain an attorney, due attorneys not seeing sufficient monetary interest in her case, and thus refusing to take it. Petitioner is a retired, low income, computer-illiterate, non-English speaking, 71-year-old person, not trained in the law, relied on family and friends who are also not trained in the law, which puts her in a great disadvantage

before the opposing party, whom she sustained injuries from, and who is represented by a well-established law firm with substantial resources. Zaitsev is misled by Dr. Keller's attorney's letters and obscure legal language in his notice of appearance, which did not clearly disclose that the service was ineffective until six months after the service, thus manipulating the legal system to his advantage, while knowing that the petitioner is an elderly person, who is not represented by an attorney and does not speak English. Zaitsev explains her position in trial court, but despite, she is held to the same standards as the WABAR certified attorneys. Thus, trial court and the court of appeals violated her due process rights by holding her to the same standard as WABAR certified attorneys, and not providing her with an attorney to assist her.

**B. TRIAL COURT AND COURT OF APPEALS ERRED BY  
MISCALCULATING THE STATUTE OF LIMITATIONS AND THUS  
ERRONEOUSLY DISMISSING PETITIONER'S CAUSE OF ACTION "WITH  
PREJUDICE".**

1. The Court of Appeals' decision involves a significant question of constitutional law, namely, whether the due process rights of Zaitsev were violated when the trial court did not hold a hearing to determine when the statute of limitations has run in Zaitsev's case, and erroneously assumed that the statute of limitations had started running at the time of initial injury (when the FB broke in her jaw), referencing the date in Zaitsev's initial court Complaint<sup>13</sup>, and dismissed the case "with prejudice"<sup>14</sup>, precluding Zaitsev from further raising this issue.

2. Zaitsev asserts that she still continued a doctor-patient relationship with Dr. Keller after the initial injury as further described, and the statute of limitations had begun running when

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<sup>13</sup> See COMPLAINT [CP @ 3, 4].

<sup>14</sup> See ORDER GRANTING CR 12(b) MOTION FOR DISMISSAL [CP @ 63-64].

she was last under his care, which is about six months after the date of the first injury she sustained. The injury she has sustained from Dr. Keller was continuous: 1) first she was injured by the broken drill bit piece in her jaw on June 21, 2012, when he performed an implant procedure, and then, 2) injury continued when Dr. Keller, motivated by a low price and not by Zaitsev's well-being, referred Zaitsev to the UW School of Dentistry ("UWSD") for the FB removal procedure, and he paid some \$300 for it, where on January 15, 2013, (six months after the initial injury) she sustained more injuries from unexperienced dental school student, and FB was never recovered. After the failed procedure at UWSD, Zaitsev stayed in contact with Dr. Keller's office until about March, 2013.

3. On December 22, 2015, the trial court held hearing for Dr. Keller's Motion to Dismiss (due to alleged insufficient service of process)<sup>15</sup>, and dismissed Zaitsev's cause of action "with prejudice" the same day. The trial court stated their reason for dismissal "with prejudice" - because "statute of limitations has run"<sup>16</sup>. The trial court used the June 21, 2012 date and not January 15, 2013 for the beginning of 3-year statute of limitations. If trial court used January 15, 2013, the petitioner would have been able to re-file the cause of action, because the statute of limitations would have run only on or about January 15, 2016 (or possibly until March). Zaitsev was not given an opportunity in trial court to present her argument about the statute of limitations, because this issue was never brought up by the court. The arguments during the trial court's only hearing for Dr. Keller's Motion to Dismiss were about the insufficient service of process, and not about the statute of limitations or substance of the case. The trial court informed Zaitsev that it will make a decision based on paperwork in front of it, but did not state which

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<sup>15</sup> See Defendant/Respondent's MOTION TO DISMISS [CP @ 18-24]

<sup>16</sup> See ORDER GRANTING CR 12(b) MOTION FOR DISMISSAL [CP @ 63-64].

paperwork was there, nor did it state that it will not only decide on the issue of insufficient service, but also on when the statute of limitations should run. Had the trial court informed Zaitsev that it will decide on statute of limitations, Zaitsev would not have agreed to let the decision be made merely on the paperwork, but she would have presented pertinent information to determine date for the statute of limitations. The trial court did not ask pertinent questions to determine the date for statute of limitations, nor did it hold a separate hearing to address this issue. Therefore, by dismissing Zaitsev's cause of action "with prejudice" based on its own mere assumption, the trial court has violated her due process rights.

**C. THE TRIAL COURT AND THE COURT OF APPEALS ERRED BY NOT PROVIDING PETITIONER WITH A COURT CERTIFIED INTERPRETER**

The Court of Appeals' decision involves a significant question of constitutional law, namely, whether the due process rights of the petitioner are violated when the trial court violated the court rules, and does not provide Zaitsev with an interpreter, making the accurate interpretation of court proceedings unavailable to Petitioner, thus denying her a day in court. RCW 2.43.030. (1)(c) states: "Except as otherwise provided in this section, when a non-English-speaking person is involved in a legal proceeding, the appointing authority shall appoint a qualified interpreter." Fed.R.Civ.P.604. states: "An interpreter must be qualified and must give an oath of affirmation to make a true translation."

On Dec. 22, 2015, Zaitsev appeared before the trial court for a hearing of MOTION TO DISMISS [CP @18-24]. It appeared that the court wanted to speed thing up and make a fast ruling on the case. The court did not provide Zaitsev with a qualified interpreter, instead, the court allowed Zaitsev's daughter do the interpreting.<sup>17</sup> . If Zaitsev had a qualified interpretation

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<sup>17</sup> See CLERK'S MINUTES ENTRY [CP @ 62].

in court should would have made a better assessment of what was conveyed by the court, would not have given the court a permission to decide on written documents, and her cause of action would have not been dismissed with prejudice. The trial court and the court of appeals has violated RCW 2.43.030 (1)(c) and Fed.R.Civ.P.604. by not providing Zaitsev with court qualified interpreter, and thus violated Zaitsev's due process rights.

**D. THE COURT OF APPEALS ERRED BY REFUSING TO USE ITS  
DISCRETION TO CONSIDER “WAIVER AND ESTOPPEL” ARGUMENT**

1. The Court of Appeals' decision involves a significant question of constitutional law, namely, whether the due process rights of petitioner were violated when the court of appeals had the discretion to consider her “Waiver of Estoppel” argument, but refused to do so, despite the fact that Petitioner is greatly disadvantaged considering her involuntary pro se status addressed earlier in this petition (Part IV & V(A)), and her being misled and “trapped” by Dr. Keller's attorney.

2. Dr. Keller's attorney Mr. Versnel did not alert Zaitsev to the issue of ineffective service of process before the 90-day service period expired. Versnel attempted to conceal the issue by using obscure language in his Motion to Appear. Had Versnel, as the WABAR certified attorney, acted in the best interests of the law, he would have CLEARLY stated that the service of process was not complete and not effective, instead of concealing this fact in a standard phrase, that was obscure and did not clearly state what really happened.

After receiving the allegedly incomplete service of process, on May 21, 2015, Versnel filed a NOTICE OF APPEARANCE [CP @ 13-14], but has not responded with any answer, motion, nor pleading that would indicate that the service of process was incomplete or

insufficient, until SIX months later on Nov 16, 2015, when he finally filed a MOTION TO DISMISS [CP @ 18-24] based on insufficient/incomplete service of process, where he also claims that he was not authorized by the Defendant to accept the service of process. Versnel argues that his obscure and standard statement in the Notice of Appearance<sup>18</sup> "... without waiving objection as to improper service of jurisdiction..." was supposed to somehow alert the Plaintiff that the process was served incorrectly. When evidently this is the standard language Versnel uses in his notices of appearance on regular basis, and cannot serve as a clear warning that the service was in fact insufficient. For comparison, Appendix-3<sup>19</sup> shows another Notice of Appearance with the Department of Health, where Versnel exhibits similar standard language "without waiving, and specifically reserving, any and all objections as to improper service, jurisdiction, compliance". Additional statement, in Versnel's NOTICE OF APPEARANCE<sup>20</sup>, "You are requested to serve all **further** [emphasis added] papers and proceedings in said cause, except original process, upon said attorneys at their address below stated"<sup>21</sup> cannot serve as a warning to Zaitsev that the service of process she **already** performed is incorrect. Since Zaitseva has **already** performed the service of process on the Defendant's attorney Versnel -- the reason for his appearance -- and had no idea that service was insufficient, she believed that she had no need to perform another **further** service of process. The fact that Versnel did not state that the service which was already made on him was incorrect, and appeared in court to defend the case, made Zaitseva believe that the service was sufficient. The language in Versnel's Notice of Appearance was obscure and vague, not clear to a layperson, and cannot serve as a notice of insufficient service to Zaitsev. If Versnel wanted to alert Zaitsev of insufficient service in good

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<sup>18</sup> See NOTICE OF APPEARANCE [CP @ 13]

<sup>19</sup> See Appendix-3 NOTICE OF APPEARANCE TO DEPARTMENT OF HEALTH

<sup>20</sup> See NOTICE OF APPEARANCE [CP @ 13]

<sup>21</sup> See NOTICE OF APPEARANCE [CP @ 13]



faith, he would have stated this fact in plain language, and not in disguise, playing “hints” and “riddles”.

a. Defendant cannot justifiably be allowed to “lie and wit”, masking by misnomer its contention, that service of process has been insufficient, and then obtain a dismissal on that ground only after the statute of limitation has run, thereby depriving the Plaintiff of the opportunity to cure the service defect (*Santos, 902 F 2d at 1966*).

b. Versnel’s Motion to Dismiss is dated and signed by him on August 25, 2015, but filed with the court only on November 16, 2015 [CP @ 24]. Evidently, Versnel had been concealing the fact of insufficient service from the court and from Zaitsev until the last possible minute. Had Versnel timely alerted to this matter, Zaitsev would have had sufficient time to cure the defective service. The Defendant waived the defense of insufficient service of process that was asserted only after the time clock run out (*Romique, 60 Wash. At 281, 803P, 2d 57*).

c. “Trial by ambush” of advocacy which has little place in our present day adversarial system, is employed with the present circumstances in this case (*Matthias v. Knodel 19 Wash. App.1, 5-6, 573 P.2d 1332 (1977)*).

d. The Doctrine of waiver is “designed to prevent a Defendant from ambushing a Plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage” (*King v. Snohomish County, 146 Wash, 2d 420,424,47 P.3d 563 (2002)*).

e. In this case the Defendant is estopped from asserting the defense of insufficient service of process. Without alerting the plaintiff to any possible defects of service and plaintiff ran out of time to effect valid service. The court reasoned that by doing so, the

defendants in effect “Lured (the) Plaintiff into a “false sense of security” and prevented (the) Plaintiff from discovering her error and effecting valid service within the statutory period (*Storry, 114 N.C. app. At 176, 441 SE 2d at 604*).

f. These actions, or failure to act on the part of Versnel delayed the case action significantly and prejudiced Zaitseva substantially. The Court of Appeals erred in not taking Zaitsev’s disadvantaged situation, not looking into the facts, and not protecting Zaitsev’s rights and interests under the law as an injured party, but instead, siding with party who is manipulating the law to their advantage, thus violating Zaitsev’s due process rights.

**E. THE COURT OF APPEALS ERRED BY DISREGARDING EXCUSABLE  
NEGLECT IN PETITIONER’S ACTIONS**

1. The Court of Appeals' decision involves a significant question of constitutional law, namely, whether the due process rights of petitioner were violated when the court of appeals did not take into account the “Excusable Neglect” in Petitioner’s actions.

2. Zaitsev was misled by Dr. Keller’s attorney Mr. Versnel’s letters warning her not to contact his client Dr. Keller directly, which caused Zaitsev to serve the process on Versnel and not on Dr. Keller, making the service ineffective. Zaitsev exhibited excusable neglect in her actions which should have been considered by the court.

a. Excusable neglect is not limited strictly to omissions caused by circumstances beyond the control of the Plaintiff. The question is 1) Whether it was within the reasonable control of the Plaintiff, and whether the 2) Plaintiff acted in good faith.

b. Although, the service of process was insufficient, nevertheless, Zaitsev performed it on the Dr. Keller’s attorney in good faith. Because of the lack of legal representation, poor eye sight and general health, lack of proper education, retirement age, and limited English,

she relied on other people for help, in particular on one of her daughters and a family friend, and was unaware that Summons and Complaint were missing until six months after the filing of the complaint. Zaitsev was certain that she followed the court clerk's instructions, which she received when filing the case. Zaitsev believed that the complete package of Service of Process documents was handed to the Sheriff for delivery to Versnel. Zaitsev had no idea the Summons and Complaint somehow went missing, and believes it could have been a clerical mistake, or a mistake of people helping her.<sup>22</sup> However, if she would have been timely notified by Defendant's attorney about the incomplete service of process, she would have corrected the error and cured the service of process in a timely manner. The circumstances were not within her reasonable control.

c. Although insufficient, but Zaitsev acted in good faith when she served the Dr. Keller's attorney, instead of Dr. Keller himself. Dr. Keller's attorney Versnel has made it clear in his correspondence to Zaitsev, through her former attorney, that he (Versnel) is acting as an attorney for Dr. Keller and Smiles by Design LLC. The reason why Zaitseva did not serve the process on the Defendant Dr. Keller directly is because she was warned by Versnel not to bother Dr. Keller anymore. On more than one occasion, in his correspondence to Zaitsev's former attorney, Versnel insisted that he is representing Dr. Keller as well as Dr. Keller's business Smiles by Design LLC and does not want his client bothered, and that all future concerns and correspondence has to be addressed to him (Versnel).<sup>23</sup> Versnel did not state any exceptions to this demand. To Zaitsev attorney Versnel represented the law, and she was reluctant to break the law. Versnel has never indicated in any way that he was not representing Dr. Keller or his business any longer. Zaitsev was also advised by the trial court

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<sup>22</sup> See PLAINTIFF'S RESPONSE TO MOTION TO DISMISS [CP @ 40-43] and supporting declarations [CP @ 44-46].

<sup>23</sup> See Versnel's letters to Zaitsev [CP @ 47, 48].

clerk to serve the process on the attorney if the Defendant is represented by one. Therefore, Zaitsev acted in good faith by serving the Defendant's attorney.

**F. THE TRIAL COURT AND THE COURT OF APPEALS ERRED BY NOT ALLOWING PETITIONER TO CURE INEFFECTIVE SERVICE OF PROCESS**

1. The Court of Appeals' decision involves a significant question of constitutional law, namely, whether the due process rights of petitioner were violated when the court of appeals did not find the service of process ineffective but curable, and not permitted Petitioner to cure the service. If the Plaintiff is unable to satisfy its burden of demonstrating an effective service, the court has discretion to dismiss or retain the action (*Stevens v. Sec.Pac. Nat'l Bank* 5.38 F. 2d 1387.1389 (9<sup>th</sup> Cir).

2. Zaitsev should have been given the opportunity to re-serve Dr. Keller. The trial court and the court of appeals had the discretion to find the service insufficient but curable. By not doing so, the trial court and the court of appeals had abused their discretion. Taking into consideration all the facts previously stated, the court of appeals should have quashed the service and gave Zaitsev the opportunity to re-serve the Dr. Keller. By not doing so, the court of appeals denied Zaitsev her due service rights.

**G. THE COURT OF APPEALS ERRED BY NOT TAKING INTO ACCOUNT THE SIGNIFICANT PUBLIC INTREST WHEN REFUSING TO EXCERSIZE ITS DISCRETION.**

1. The Court of Appeals' decision involves a significant question of public interest, namely public health and safety issue. Washington State Department of Health ("WDOH")

public records<sup>24</sup> exhibit a disturbing number of public complaints that describe unprofessional, unethical, and potentially dangerous conduct at Dr. Keller's place of business. Petitioner's injuries directly co-relate to the pattern involving other patient's related incidents, as well complaints submitted to WDOH by Dr. Keller's former employees.<sup>25</sup>

2. Below are the excerpts from the summaries of some of the Washington Department of Health records of cases, where Dr. Shawn Keller appears as the "respondent", enclosed in Appendix 4:

Case#2015-12145DE. Allegations: Unprofessional Conduct: "The complainant alleges that the respondent's marketing claims which are false possibly due to lack of proper understanding, and at worse a deliberate attempt to mislead and deceive the public by claiming unique training, materials and skill set."<sup>26</sup>

Case#2016-1861DE. Allegations: Health and Safety, Infection Control, Patient Care, Unprofessional Conduct, Violation of Federal of State Statutes, Regulations or Rules: "Respondent is alleged to: 1. Not be sterilizing test strips; 2. Dental assistants are not registered; 3. The respondent dropped a dental implant on the floor, rinsed it off and then place it in the patient's mouth; 4. Using "try-in implants" for sizing and cleaning and reusing; 5. Respondent is alleged to had front desk call in a prescription for narcotic for him under her name and picked it up for the respondent; Dental assistants signing prescriptions."<sup>27</sup>

Case#2017-10706DE. Allegations: Advertising or Marketing Services or Products that are Discriminatory, Misleading, False or Deceptive; Insurance Fraud (Medicare, Medicaid or Other

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<sup>24</sup> See Appendix-4 WASHINGTON DEPARTMENT OF HEALTH PUBLIC RECORDS.

<sup>25</sup> See Appendix-4 WASHINGTON DEPARTMENT OF HEALTH PUBLIC RECORDS.

<sup>26</sup> See Appendix-4 WASHINGTON DEPARTMENT OF HEALTH PUBLIC RECORDS, p.1

<sup>27</sup> See Appendix-4: WASHINGTON DEPARTMENT OF HEALTH PUBLIC RECORDS, p.2

Insurance); Substandard or Inadequate Care: “The complainant alleges the respondent is providing substandard care and is danger to patients. The complainant alleges the respondent threatened suicide last year. The respondent is also allegedly fraudulently billing patients and overprescribing medication.”<sup>28</sup>

Case#2017-10823DE: Allegations: Infection Control, Insurance Fraud (Medicare, Medicaid, or Other Insurance); Substandard or Inadequate Care: “The respondent is allegedly providing substandard care to patients. The respondent uses tattoo cream to numb patients. The respondent tries on patient’s bridges or orthotics and doesn’t sanitize them. The respondent allegedly does not change gloves when conducting multiple surgeries and has abandoned patients on the chair. The respondent is allegedly fraudulently billing.”<sup>29</sup>

Case# 2016-1861DE: Allegations: Patient Care: “The complainant alleges that her bite is not correct, and is worse than it was when she originally came to see the respondent. She also has a hole inside f the right side of the front tooth in gum line. She alleges that the veneers are ill-fitting, and the jaw alignment and veneer installation has been ineffective and poorly done.”<sup>30</sup>

Case# 2017-10773 DE: Allegations: Patient Care, Unprofessional Conduct: “Respondent is alleged to have: 1. Let staff licenses go un-renewed for 2 years; 2. Let a staff member get her RDA without the schooling or experience; 3. Let a staff member who was drunk perform the x-rays for ta patient exam; 4. Wrote prescriptions (10-15 for norco/Percocet/valium for a patient for a full mouth reconstructin; 5. Respondent would give the patient a discount if they didn’t bill their insurance company, they would agree but the respondent would later go after the insurance;

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<sup>28</sup> See Appendix-4: WASHINGTON DEPARTMENT OF HEALTH PUBLIC RECORDS, p.3

<sup>29</sup> See Appendix-4: WASHINGTON DEPARTMENT OF HEALTH PUBLIC RECORDS, p.4

<sup>30</sup> See Appendix-4: WASHINGTON DEPARTMENT OF HEALTH PUBLIC RECORDS, p.5

6. Respondent wouldn't review patient charts if they had medical issues such as taking blood thinners and staff wouldn't advise a patient they would need a driver if they had anesthesia; 7. Respondent had staff send medical records over email that was not encrypted.”<sup>31</sup>

Complaint# 2012-9887DE: Allegations: Mandatory Malpractice Report: "The complainant claims the respondent paid a single final payment settlement in the amount of...due to multiple incorrect diagnoses leading to unnecessary treatment and permanent damage to a patient's teeth.”<sup>32</sup>

Complaint# 2011-154743: Allegations: Standard of Care: "Respondent placed porcelain/ceramic crowns on #'a 7-1 1 Complainant assumed these were permanent and took out a loan for \$7500 August 2010 # 8, 1 0 & 1 1 broke off, she returned to respondent to have them fixed, the charge was \$ 350 for each tooth, she says this was to have them "glued' back in. She states a week later they broke off again, a few weeks later they again broke off, this time she swallowed them and had to take a laxative and retrieve them from her feces. This happened 2 more times. She saw a sub as she was unable to afford the cost of \$350 per tooth respondent was charging her. The sub stated they could not be fixed so he had to pull the crown porcelain off all the teeth and make a temp plate. Complainant says she has nothing in her mouth that she paid for and would have never taken out a loan for \$7500 had she known the work respondent did was only temporary work.”<sup>33</sup>

Case# 2009.1333380E: Allegations: Standard of Care/Services “The Complainant alleges the Respondent severely burned their mouth by accidentally spilling bottle of primer. The

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<sup>31</sup> See Appendix-4: WASHINGTON DEPARTMENT OF HEALTH PUBLIC RECORDS, p.6

<sup>32</sup> See Appendix-4: WASHINGTON DEPARTMENT OF HEALTH PUBLIC RECORDS, p.7

<sup>33</sup> See Appendix-4: WASHINGTON DEPARTMENT OF HEALTH PUBLIC RECORDS, p.8

Complainant had deep oral bumps that fumed while and peeled daily revealing cherry red bright gums for months and months"<sup>34</sup>.

3. Correspondence between the investigator and one of Dr. Keller's employees shows a disturbing resignation letter to Dr. Keller: "Dr. Keller, it is with a heavy heart that I am sending you this email. After much consideration throughout the weekend I need to inform you I will not be returning to work. When I gave my notice on Friday I was not able to say what needed to be said and there are many things that weigh heavy on my mind. The work environment is unsafe, toxic, and unethical. I cannot look people in the eye and tell them they are getting the best care. I have been in dental too long and know what good dentistry is, and your office does not provide it. The moment I saw you drop an implant on the floor, rinse it off, and then place it in a patients mouth I knew I needed out. The patients should get the best care by trained staff and not just an unlicensed person you pull off the streets. I have anxiety even thinking about returning to that office and I know it also would not be good for you to have me there. I will come by Monday to turn in my key, please have my check in hand waiting for me. Best Regards"<sup>35</sup>

4. Zaitsev believes that it is imperative that her cause of action is heard in court in order to protect the public from future potentially dangerous incidents that are going on at Dr. Shawn Keller's place of business.

## VI. CONCLUSION

It is clear that the trial court and the court of appeals have violated Petitioner Zaitsev's due process rights by not addressing errors stated in this Petition and in her Brief of Appellant, and

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<sup>34</sup> See Appendix-4: WASHINGTON DEPARTMENT OF HEALTH PUBLIC RECORDS, p.9

<sup>35</sup> See Appendix-4: WASHINGTON DEPARTMENT OF HEALTH PUBLIC RECORDS, p.10



violated Petitioner's due process rights. This case also presents a public interest issue that is directly related to Zaitsev's cause of action. Therefore,

This Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted this \_\_\_12th\_\_\_ day of November, 2017.

A handwritten signature in black ink that reads "Zaitsev T." The signature is written in a cursive style and is positioned above a horizontal line.

Tamara Zaitsev, Petitioner, Pro Se

# APPENDIX 1

# APPENDIX 1

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

TAMARA ZAITSEV,	)	
	)	No. 74626-0-1
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
SHAWN KELLER D.D.S., d/b/a SMILES	)	
BY DESIGN,	)	
	)	FILED: July 31, 2017
Appellant.	)	

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APPELWICK, J. — Zaitsev challenges a trial court order dismissing her complaint alleging negligence in the course of dental treatment. Zaitsev failed to accomplish valid service of process according to the requirements of RCW 4.28.080(15) by serving only the defendant’s attorney. The evidence in the record indicates that the defendant’s attorney was not authorized to accept service of process on the clients’ behalf. We affirm.

**FACTS**

On May 7, 2015, Tamara Zaitsev, acting pro se, filed a “Demend [sic] Letter for Settlement Purpose” on a preprinted complaint form. The caption of the document named “Shawn Keller DDS (Smiles by Design)” as the defendant. Zaitsev alleged that during a dental procedure performed by Dr. Keller on June 21, 2012, a piece of a drill broke off. She claimed that the broken piece of the drill remained lodged in her jaw and caused or exacerbated a variety of health problems. Zaitsev alleged “negligent performance” and claimed she was entitled to damages of \$500,000, which included

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medical expenses incurred, estimated future medical expenses, and damages for pain and suffering. She stated that she wanted to settle her case before the June 21, 2015 "deadline," but was also "ready to proceed to trial," and "hopeful for a positive outcome."

Shortly after filing this document, Zaitsev arranged for the sheriff to serve Dr. Keller's attorney. However, according to the attorney, the only document delivered to him on May 12, 2015 was a trial court order setting the case schedule

On May 21, 2015, ten days after the attempted service on Dr. Keller's attorney, defense counsel filed a notice of appearance in the case, "without waiving objection as to improper service or jurisdiction." The notice provided that "all further papers" excluding "original process" must be served on defense counsel.

Approximately six months later, on November 16, 2015, Dr. Keller and Smiles by Design (collectively, "Dr. Keller") filed a motion to dismiss. Dr. Keller asserted that although Zaitsev served a copy of the case scheduling order on his attorney on May 12, 2015, she otherwise failed to personally serve him with a copy of the summons and complaint. Dr. Keller argued that the plaintiff's claims should be dismissed under CR 12(b)(5) due to insufficient service and under CR 12(b)(4) due to insufficient process. In support of the motion, Dr. Keller submitted his attorney's declaration. The attorney confirmed that he received only a copy of an order setting the case schedule on May 12, 2015 and stated that, in any event, he had not been authorized by Dr. Keller to accept service of process. Dr. Keller also submitted his own declaration, stating that Zaitsev had not served him with a copy of the summons and complaint nor had he authorized his attorney to accept service of process.

No. 74626-0-I/3

Zaitsev filed a response to the motion. She acknowledged that she attempted to serve Dr. Keller's attorney, not Dr. Keller. But, according to Zaitsev, she delivered all the required documents, including the summons and complaint, to the clerk at the Sheriff's Office. Zaitsev further maintained that she served Dr. Keller's attorney because she was following the attorney's previous instruction not to contact Dr. Keller directly. Zaitsev argued that her complaint should not be dismissed because she was misled by defense counsel and because she was pro se by necessity, not by choice. Zaitsev provided three declarations, including her own, stating that she delivered the summons and complaint to the Sheriff's Office clerk. She also provided a January 15, 2015 letter Dr. Keller's attorney sent to her former attorney. The letter states, in relevant part:

Your client's daughter, Elena Zaitsev[a], recently e-mailed my client, Dr. Keller, and requested her mother's x-ray taken on June 21, 2012, for you. As you are aware, I represent Dr. Keller. Accordingly, your client and your client's daughter should not be contacting Dr. Keller directly. In addition, if you want any of Dr. Keller's records, there will need to be a release signed and that request needs to be made through me.

The parties appeared for a hearing on the motion to dismiss. Zaitsev's daughter spoke on her mother's behalf and informed the court that her mother did not understand English well enough to answer the court's questions. The court determined that a hearing on the motion could not proceed in the absence of an official court interpreter. The court offered to either reschedule the hearing for a later date when arrangements could be made for a court interpreter to participate or to rule on the motion as scheduled based on the written materials, without oral argument. Zaitsev's daughter told the court that her mother "would like that you decide today." Defense counsel did not object. The

No. 74626-0-1/4

court informed the parties that it would decide the motion based on the written submissions and issue a written order.

On the same day, the trial court issued an "Order Granting CR 12(b) Motion for Dismissal." The order states:

The plaintiff did not accomplish proper service either by personal service upon Dr. Keller or by effective service on the entity Smiles by Design. The court records do not contain any Return of Service documents at all. Service upon the attorney for Dr. Keller was not authorized and would not be sufficient. Although this ruling may seem harsh, the fact is that with the Court lacking jurisdiction, any judgment that might be entered would later be declared void.

Due to the insufficiency of service of process and because "the Statute of Limitations has run," the court dismissed Zaitsev's claims with prejudice.

Zaitsev appeals.

#### DISCUSSION

Zaitsev challenges the dismissal of her claims. She maintains that she acted in good faith by serving Dr. Keller's attorney because she relied on the attorney's explicit directions and reasonably believed she was required to serve the attorney.

Without proper service of the summons and complaint, the court does not obtain personal jurisdiction over a party. Streeter-Dybdahl v. Huynh, 157 Wn. App. 408, 412, 236 P.3d 986 (2010). "[P]roper service of process must not only comply with constitutional standards but must also satisfy the requirements for service established by the legislature." Farmer v. Davis, 161 Wn. App. 420, 432, 250 P.3d 138 (2011). Whether service of process was proper is a question of law that we review de novo. Streeter-Dybdahl, 157 Wn. App. at 412. Where, as here, the court considers matters outside the pleadings in ruling on a motion to dismiss, we treat the motion as a motion

No. 74626-0-1/5

for summary judgment. Freestone Capital Partners, L.P. v. MKA Real Estate Opportunity Fund I, LLC, 155 Wn. App. 643, 653, 230 P.3d 625 (2010). As such, we review the facts and reasonable inferences in the light most favorable to the nonmoving party. Id. at 653-54.

RCW 4.28.080(16) requires that the plaintiff serve the defendant with a copy of the complaint and summons either personally or through substituted service at the defendant's residence or usual abode. Lepeska v. Farley, 67 Wn. App. 548, 551, 833 P.2d 437 (1992). Specifically, RCW 4.28.080(16) states that the plaintiff must serve process by delivering a copy of the summons "to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein."

An attorney may not surrender a substantial right of a client without specific authority granted by the client, and therefore, "an attorney needs the client's express authority to accept service of process." Russell v. Maas, 166 Wn. App. 885, 890, 272 P.3d 273 (2012). Express authority is necessary to protect clients from possibly serious consequences arising from a misunderstanding between the client and the attorney. Graves v. P.J. Taggares Co., 94 Wn.2d 298, 304, 616 P.2d 1223 (1980). It also ensures that clients will be consulted on all important decisions. Id.

Essentially, Zaitsev argues that Dr. Keller should be equitably estopped from asserting the defense of insufficient service because defense counsel misled her about the requirements for proper service. Equitable estoppel requires (1) an admission, statement, or act inconsistent with a claim afterwards asserted, (2) action by another in reasonable reliance upon that act, statement, or admission, and (3) injury to the relying



No. 74626-0-I/6

party from allowing the first party to contradict or repudiate the prior act, statement or admission. Lybbert v. Grant County, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000). "Where both parties can determine the law and have knowledge of the underlying facts, estoppel cannot lie." Id. The party asserting estoppel must show each element by clear, cogent, and convincing evidence. Id.

Lybbert is instructive. In that case, the plaintiffs attempted to sue Grant County but mistakenly served the county commissioner's administrative assistant. The first element of equitable estoppel was met because for nine months following the defective service, the County "gave multiple indications that it was preparing to litigate this case." Id. at 35-36. For instance, the County served interrogatories and requests for production on the Lybberts. Id. at 32. And, when the Lybberts then asked in interrogatories if the County would rely on the affirmative defense of insufficient service of process, the County waited for months to respond. Id. at 33. When it finally did respond, the statute of limitations had run on the Lybberts' claim. Id. at 33-34. The County then moved for dismissal for that reason. Id. In spite of these inconsistent acts, the court concluded that the Lybberts failed to establish justifiable reliance on the conduct of the defense counsel because the statute governing service of process on counties explicitly requires service on the county auditor. Id. at 36. Because the legal requirement was clear, "it was not at all reasonable, much less justifiable for the Lybberts to rely on the County's failure to expressly claim, prior to the expiration of the statute of limitations, that the service upon it was ineffective." Id.

Here, on the other hand, after Zaitsev filed an ambiguous document on a complaint form, neither Zaitsev nor Dr. Keller took any action toward litigating the case.

No. 74626-0-1/7

Defense counsel filed only a notice of appearance. In that notice, counsel explicitly informed the plaintiff that all documents “except original process” should be served on the attorney. Defense counsel did nothing to create an impression that Dr. Keller intended to litigate the merits of the case instead of relying on a procedural defense.

Also, RCW 4.28.080(16) is explicit in prescribing the two acceptable methods of service: personal service or substituted service at a defendant's usual abode. Defense counsel's January 2015 letter predated the filing of a complaint and was directed toward Zaitsev's former counsel, not Zaitsev. The letter does not mention service of process, let alone indicate an intent to waive the statutory service requirements. The context of the letter indicates that at the plaintiff's lawyer's request, Zaitsev's daughter contacted Dr. Keller directly to obtain records. Lawyers must refrain from contacting represented clients. See Rules of Professional Conduct (RPC) 4.2. Accordingly, defense counsel merely asked counsel to neither instruct nor allow her client or her client's family members to contact Dr. Keller directly about the underlying incident. It is not reasonable nor justifiable to interpret this letter as authorization for the attorney to accept service of process on the client's behalf. Zaitsev failed to establish equitable estoppel by clear, cogent, and convincing evidence.

Zaitsev also claims that the trial court erred by refusing to “lower the standard bar” in view of the obstacles she faced as a pro se litigant. She also argues that the court was required and failed to liberally construe her pro se complaint in accordance with federal court rules. Although we are mindful of the difficulties Zaitsev faced in proceeding pro se, in Washington, courts “must hold pro se parties to the same standards to which it holds attorneys.” Edwards v. Le Duc, 157 Wn. App. 455, 460, 238

No. 74626-0-1/8

P.3d 1187 (2010); In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993). And, Zaitsev's argument about the proper construction of her complaint is misplaced because insufficiency of the complaint was not the basis for the dismissal.

Zaitsev asserts that the trial court erred by dismissing her claims with prejudice, because the court mistakenly assumed that the statute of limitations expired. She claims that she remained under Dr. Keller's care following the June 2012 procedure and so she could have argued that a later negligent act triggered the commencement of the limitations period. See RCW 4.16.350(3). But, both Zaitsev's complaint and her response to the motion to dismiss identify the June 21, 2012 procedure as the negligent act that caused her injury. Her complaint further acknowledges the expiration of the statute of limitations on June 21, 2015.

Zaitsev also contends that the court committed procedural errors in resolving the motion to dismiss. In particular, she claims that she was deprived of the assistance of an interpreter at the hearing on the motion, she had insufficient time to prepare for the hearing, and the trial court failed to identify the specific written submissions it would consider in resolving the motion. It is clear from the record that the court did not, in fact, hold a substantive hearing on Dr. Keller's motion without an interpreter. Zaitsev had the opportunity to reschedule the hearing so that an interpreter could participate. She declined. Contrary to Zaitsev's claim, it also appears that Dr. Keller filed and served his reply more than five days before the hearing date. See CR 56(c). And, while Zaitsev appears to contend that the court failed to consider an additional declaration she filed the day before the scheduled hearing date, the declaration is not included in the

No. 74626-0-I/9

appellate record.<sup>1</sup> It is not clear that the court did not consider it, and in any event, no authority supports her position that the court was required to consider her untimely submission.

Finally, Zaitsev claims that Dr. Keller waived the defense of insufficient service, because he failed to alert her about the defective service before the statute of limitations expired and did not raise the defense until six months after she filed her complaint. Zaitsev's argument is unconvincing, chiefly because defense counsel's May 21, 2015 notice of appearance alerted her to the fact that counsel was not authorized to accept service of process. But, it is ultimately unnecessary to address waiver because Zaitsev did not oppose Dr. Keller's motion to dismiss on this basis and failed to preserve the claim of error. Generally, we do not consider issues raised for the first time on appeal. RAP 2.5(a); Karlberg v. Otten, 167 Wn. App. 522, 531, 280 P.3d 1123 (2012). While appellate courts retain discretion to consider arguments not raised below, we exercise such discretion sparingly. Id. Specific to summary judgment, RAP 9.12 provides that the "appellate court will consider only evidence and issues called to the attention of the trial court." See, e.g., Vernon v. Aacres Allvest, LLC, 183 Wn. App. 422, 436, 333 P.3d 534 (2014), review denied, 182 Wn.2d 1006, 342 P.3d 326 (2015) (declining to consider argument on appeal that was not made during summary judgment proceedings below). The purpose of this rule is to ensure that we engage in the same inquiry as the trial

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<sup>1</sup> Zaitsev has appended the declaration dated December 19, 2015 to her opening brief. We do not consider this document and the other materials in her appendix because "[a]n appendix [to an appellate brief] may not include materials not contained in the record on review without permission from the appellate court." RAP 10.3(a)(8).

No. 74626-0-1/10

court. Id. Accordingly, we decline to address Zaitsev's waiver argument for the first time on appeal.

We affirm.

WE CONCUR:

Munn, J.

Appelwick, J.  
Beach, J.

FILED  
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STATE OF WASHINGTON  
2017 JUL 31 AM 9:29

# APPENDIX 2

# APPENDIX 2

FILED  
9/12/2017  
Court of Appeals  
Division I  
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TAMARA ZAITSEV,  
Appellant.  
v.  
SHAWN KELLER D.D.S., d/b/a SMILES  
BY DESIGN,  
Respondent.

No. 74626-0-1

DIVISION ONE

ORDER DENYING MOTION  
FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



# APPENDIX 3

# APPENDIX 3



Appendix - 3

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STATE OF WASHINGTON DEPARTMENT OF HEALTH  
DENTAL QUALITY ASSURANCE COMMISSION

In the Matter of the Investigation Concerning:

NO. 2016-1861DE

SHAWN KELLER, DDS,

NOTICE OF APPEARANCE

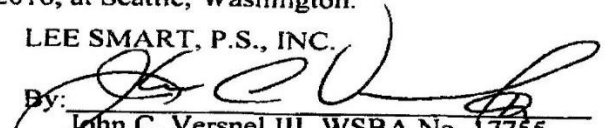
Respondent.

TO: Mike A. Friebal, Health Care Investigator

PLEASE TAKE NOTICE that respondent, SHAWN KELLER, DDS, without waiving, and specifically reserving, any and all objections as to improper service, jurisdiction, compliance with the United States Constitution, compliance with the Washington State Constitution and compliance with all Washington state and federal statutory and administrative rules, hereby enters his appearance by the undersigned attorneys, on behalf of himself and all his employees, agents, servants, successors, heirs, executors, administrators, and any other similar person. Respondent specifically objects to the initiation of this investigation to the extent it is in violation of the Uniform Disciplinary Act (RCW 43.70.075 et al.) and all statutes and administrative code sections governing Department of Health and Commission conduct. Respondent will withdraw this objection upon showing of compliance. You are requested to serve all further papers, proceedings, and anything else related to this matter, except original process, upon said attorneys at their address below stated.

DATED this 25 day of March, 2016, at Seattle, Washington.

LEE SMART, P.S., INC.

By:   
John C. Versnel III, WSBA No. 17755  
Of Attorneys for Respondent

NOTICE OF APPEARANCE - 1  
5886356.DOC

LEE SMART  
P.S., Inc. - Pacific Northwest Law Offices  
1800 One Convention Place - 701 Pike Street - Seattle - WA - 98101-3929  
Tel. 206.624.7990 - Toll Free 877.624.7990 - Fax 206.624.5944

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# APPENDIX 4

# APPENDIX 4

Appendix 4, P. 1

COMPLAINT INTAKE  
SUMMARY WORKSHEET

RESPONDENT INFORMATION

Name & Address	SHAWN M KELLER 7530 164TH AVE NE STE 230 REDMOND, WA 98052-7812					Case #	2015-12145 DE	
						Allegation	• Unprofessional Conduct	
						License #	DENT.DE.00009100	
						Issued	07/12/2001	
						Expires	02/04/2017	
Phone #						Status	Active	
Legal Action	Yes	No	Compliance	Yes	No	Cases	Open:	Closed:
	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>	<input checked="" type="checkbox"/>		0	8

COMPLAINANT INFORMATION

Name & Address		
Phone #		

1 - Name - Whistleblower Regarding Health Care Provider or Health Care Facility - RCW 42.07.01(1), RCW 42.56.070(1)

SUMMARY OF COMPLAINT

The complainant is alleges that the respondent's marketing claims which are false possibly due to lack of proper understanding, and at worse a deliberate attempt to mislead and deceive the public by claiming unique training, materials and skill set.

Appendix 4 P. 2

COMPLAINT INTAKE  
SUMMARY WORKSHEET

RESPONDENT INFORMATION

Name & Address	SHAWN M KELLER 7530 164TH AVE NE STE 230 REDMOND, WA 98052-7812				Case #	2016-4176 DE		
					Allegation	<ul style="list-style-type: none"> <li>• Health and Safety</li> <li>• Infection Control</li> <li>• Patient Care</li> <li>• Unprofessional Conduct</li> <li>• Violation of Federal or State Statutes, Regulations or Rules</li> </ul>		
					License #	DENT.DE.00009100		
					Issued	7/12/01		
					Expires	2/4/17		
Phone #					Status	Active		
Legal Action	Yes	No	Compliance	Yes	No	Cases	Open:	Closed:
	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input checked="" type="checkbox"/>		2	

COMPLAINANT INFORMATION

Name & Address		
Phone #		

1 - Name - Whistleblower Regarding Health Care Provider or Health Care Facility - ISDW 43.70.070(1), RCW 42.56.070(1)

SUMMARY OF COMPLAINT

Respondent is alleged to:

1. not be sterilizing test strips
2. dental assistants are not registered
3. the respondent dropped a dental implant on the floor, rinsed it off and then placed it in the patient's mouth.
4. using "try in implants" for sizing and cleaning and reusing.
5. Respondent is alleged to had front desk call in a prescription for a narcotic for him under her name and picked it up for the respondent.

Dental assistants signing prescriptions.

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COMPLAINT INTAKE  
SUMMARY WORKSHEET

RESPONDENT INFORMATION

Name & Address	SHAWN M KELLER 7530 164TH AVE NE STE 230 REDMOND, WA 98052-7812				Case #	2017-10706DE		
					Allegation	<ul style="list-style-type: none"> <li>Advertising or Marketing Services or Products that are Discriminatory, Misleading, False, or Deceptive</li> <li>Insurance Fraud (Medicare, Medicaid or Other Insurance)</li> <li>Substandard or Inadequate Care</li> </ul>		
					License #	DENT.DE.00009100		
					Issued	7/21/01		
					Expires	2/4/18		
Phone #					Status	Active		
Legal Action	Yes	No	Compliance	Yes	No	Cases	Open:	Closed:
	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input checked="" type="checkbox"/>		1	10

COMPLAINANT INFORMATION

Name & Address	<small>* - Name - Whistleblower Regarding Health Care Provider or Staff.</small>		
Phone #	E-Mail		

SUMMARY OF COMPLAINT

The complainant alleges the respondent is providing substandard care and is a danger to patients. The complainant alleges the respondent threatened suicide last year. The respondent is also allegedly fraudulently billing patients and overprescribing medication.

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COMPLAINT INTAKE  
SUMMARY WORKSHEET

RESPONDENT INFORMATION

Name & Address	SHAWN M KELLER 7530 164TH AVE NE STE 230 REDMOND, WA 98052-7812				Case #	2017-10823DE		
					Allegation	<ul style="list-style-type: none"> <li>• Infection Control</li> <li>• Insurance Fraud (Medicare, Medicaid or Other Insurance)</li> <li>• Substandard or Inadequate Care</li> </ul>		
					License #	DENT.DE.00009100		
					Issued	7/12/01		
					Expires	2/4/18		
Phone #					Status	Active		
Legal Action	Yes	No	Compliance	Yes	No	Cases	Open:	Closed:
	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input checked="" type="checkbox"/>		2	11

COMPLAINANT INFORMATION

Name & Address	UNKNOWN COMPLAINANT		
Phone #		E-Mail	

SUMMARY OF COMPLAINT

The respondent is allegedly providing substandard care to patients. The respondent uses tattoo cream to numb patients. The respondent tries on patient's bridges or orthotics and doesn't sanitize them. The respondent allegedly does not change gloves when conducting multiple surgeries and has abandoned patients on the chair. The respondent is allegedly fraudulently billing.

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COMPLAINT INTAKE  
SUMMARY WORKSHEET

RESPONDENT INFORMATION

Name & Address	SHAWN M KELLER 7530 164TH AVE NE STE 230 REDMOND, WA 98052-7812					Case #	2016-1861DE	
						Allegation	• Patient Care	
						License #	DENT.DE.00009100	
						Issued	07/12/2001	
						Expires	02/04/2017	
Phone #						Status	ACTIVE	
Legal Action	Yes	No	Compliance	Yes	No	Cases	Open:	Closed:
	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input checked="" type="checkbox"/>		1	8

COMPLAINANT INFORMATION

Name & Address		
Phone #		

1 - Name - Whistleblower Regarding Health Care Provider or Health Care Facility - RCW 43.70.075(1), RCW 42.56.070(1)

SUMMARY OF COMPLAINT

Period of Care: 07/15/2015-12/15/2015

The complainant reports that she was seeking treatment for an infected tooth which was part of an existing bridge. She requested that the bridge be removed and that implants be placed for the abscessed tooth and a tooth that had been missing.

She alleges that the respondent stated that her bite was off and that if it wasn't adjusted she would increase the risk of bone loss and "rocking" of the teeth which would lead to more cavities. She opted for jaw realignment and full veneers/crowns.

The complainant alleges that her bite is not correct, and is worse than it was when she originally came to see the respondent. She also has a hole inside of the right side of the front tooth in the gum line. She alleges that the veneers are ill-fitting, and the jaw alignment and veneer installation has been ineffective and poorly done.

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COMPLAINT INTAKE  
SUMMARY WORKSHEET

RESPONDENT INFORMATION

Name & Address	SHAWN M KELLER 7530 164TH AVE NE STE 230 REDMOND, WA 98052-7812					Case #	2017-10773 DE	
						Allegation	<ul style="list-style-type: none"> <li>• Patient Care</li> <li>• Unprofessional Conduct</li> </ul>	
						License #	DENT.DE.00009100	
						Issued	07/12/01	
						Expires	2/4/18	
Phone #						Status	Active	
Legal Action	Yes	No	Compliance	Yes	No	Cases	Open:	Closed:
	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input checked="" type="checkbox"/>		1	

COMPLAINANT INFORMATION

Name & Address	
Phone #	

1 - Name - Whistleblower Regarding Health Care Provider or Health Care Facility - RCW 43.70.075(1), RCW 42.56.070(1)

SUMMARY OF COMPLAINT

Respondent is alleged to have:

1. let staff licenses go unrenewed for 2 years.
2. let a staff member get her RDA without the schooling or experience.
3. let a staff member who was drunk perform the xrays for a new patient exam.
4. wrote prescriptions (10-15 for norco/percocet/valium for a patient for a full mouth reconstruction.
5. respondent would give the patient a discount if they didn't bill their insurance company, they would agree but the respondent would later go after the insurance.
6. respondent wouldn't review patient charts if they had medical issues such as taking blood thinners and staff wouldn't advise a patient they would need a driver if they had anethesia.
7. respondent had staff send medical records over email that was not encryted.



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**COMPLAINT INTAKE  
SUMMARY WORKSHEET**

**RESPONDENT INFORMATION**

<b>Name &amp; Address</b>	SHAWN M KELLER 7530 184TH AVE NE STE 230 REDMOND WA 98052-7812				<b>Case #</b>	2012 9887DE		
					<b>Allegation</b>	• Mandatory Malpractice Reports		
					<b>License #</b>	DENT DE 00009100		
					<b>Issued</b>	07/12/2001		
					<b>Expires</b>	02/04/2013		
<b>Phone #</b>					<b>Status</b>	Active		
<b>Legal Action</b>	Yes	No	<b>Compliance</b>	Yes	No	<b>Cases</b>	Open 0	Closed 6
	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input checked="" type="checkbox"/>	<input type="checkbox"/>			

**COMPLAINANT INFORMATION**

<b>Name &amp; Address</b>	Columbia Casualty Co 333 S Wabash Ave Ste 26 Chicago IL 60604-4107		
<b>Phone #</b>		<b>E-Mail</b>	

**SUMMARY OF COMPLAINT**

The complainant claims the respondent paid a single final payment settlement in the amount of ... Successful Proceedings ... due to multiple incorrect diagnoses leading to unnecessary treatment and permanent damage to a patient's teeth

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**COMPLAINT INTAKE  
SUMMARY WORKSHEET**

**RESPONDENT INFORMATION**

<b>Name &amp; Address</b>	SHAWN M KELLER				<b>Case #</b>	2011 154743		
	7530 184TH AVE NE STE 230				<b>Allegation</b>	Standard of care		
	REDMOND WA 98052-7812				<b>License #</b>	DENT DE 00009100		
					<b>Issued</b>	7/12/01		
					<b>Expires</b>	2/4/12		
<b>Phone #</b>					<b>Status</b>	active		
<b>Legal Action</b>	<b>Yes</b>	<b>No</b>	<b>Compliance</b>	<b>Yes</b>	<b>No</b>	<b>Cases</b>	<b>Open</b>	<b>Closed</b>
	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input checked="" type="checkbox"/>		1	4

**COMPLAINANT INFORMATION**

<b>Name &amp; Address</b>			
<b>Phone #</b>		<b>E Mail</b>	

**SUMMARY OF COMPLAINT**

On 10/09 respondent placed porcelain/ceramic crowns on #'s 7-11 Complainant assumed these were permanent and took out a loan for \$7500 August 2010 #'s 10 & 11 broke off she returned to respondent to have them fixed the charge was \$350 for each tooth, she says this was to have them "glued" back in She states a week later they broke off again, a few weeks later they again broke off this time she swallowed them and had to take a laxative and retrieve them from her feces This happened 2 more times She saw a sub as she was unable to afford the cost of \$350 per tooth respondent was charging her The sub stated they could not be fixed so he had to pull the crown porcelain off all the teeth and make a temp plate Complainant says she has nothing in her mouth that she paid and would have never taken out a loan for \$7500 had she known the work respondent did was only temporary work

S:\SQA\CSO\ComplaintIntake\Dentist DE\Case Summaries\2011\3 March\Keller Shawn\2011 154743 doc

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**CUSTOMER SERVICE COMPLAINT INTAKE  
SUMMARY WORKSHEET**

**RESPONDENT INFORMATION**

<b>Name &amp; Address</b>						<b>Case #</b>	2009-133338DE		
						<b>Allegation</b>	Standard of Care/Services		
						<b>Licenses #</b>	DE00		
						<b>Issued</b>	07/12/2001		
						<b>Expires</b>	02/04/2010		
<b>Phone #</b>						<b>Status</b>	Active		
<b>Legal Action</b>	<b>Yes</b>	<b>No</b>	<b>Compliance</b>	<b>Yes</b>	<b>No</b>	<b>Cases</b>	<b>Open</b>	<b>Closed</b>	
	X				X			3	

**COMPLAINANT INFORMATION**

<b>Name &amp; Address</b>			
<b>Phone #</b>		<b>E-Mail</b>	

**SUMMARY OF COMPLAINT**

The Complainant alleges the Respondent severely burned their mouth by accidentally spilling a bottle of primer. The Complainant had deep oral burns that turned white and peeled daily revealing cherry red bright tight gums for months and months.

Date Summary Created 11/10/2009

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**Friebel, Mike (DOH)**

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**From:** <mfriebel@doh.wa.gov>  
**Sent:** Thursday, September 22, 2016 5:27 AM  
**To:** Friebel, Mike (DOH)  
**Subject:** Fwd: My resignation

Sent from my iPhone

Begin forwarded message:

**From:** <drshawnkeller@outlook.com>  
**Date:** March 13, 2016 at 10:00:31 AM PDT  
**To:** "drshawnkeller@outlook.com" <drshawnkeller@outlook.com>  
**Subject:** My resignation

Dr Keller,

It is with a heavy heart that I am sending you this email. After much consideration throughout the weekend I need to inform you I will not be returning to work. When I gave my notice on Friday I was not able to say what needed to be said and there are many things that weigh heavy on my mind.

The work environment is unsafe, toxic, and unethical. I can not look people in the eye and tell them they are getting the best care. I have been in dental too long and know what good dentistry is, and your office does not provide it. The moment I saw you drop an implant on the floor, rinse it off, and then place it in a patients mouth I knew I needed out. The patients should get the best care by trained staff and not just an unlicensed person you pull off the streets.

I have anxiety even thinking about returning to that office and I know it also would not be good for you to have me there. I will come by Monday to turn in my key, please have my check in hand waiting for me.

Best Regards,

Sent from my iPad

0008

1

KELLER, SHAWN 2016-4176DE PAGE 84

**SELF**

**November 12, 2017 - 7:38 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 95030-0  
**Appellate Court Case Title:** Tamara Zaitsev v. Shawn Keller, DDS  
**Superior Court Case Number:** 15-2-11270-8

**The following documents have been uploaded:**

- 950300\_Petition\_for\_Review\_20171112193218SC585024\_9264.pdf  
This File Contains:  
Petition for Review  
*The Original File Name was PetitionForReview.pdf*

**A copy of the uploaded files will be sent to:**

- dcm@leesmart.com
- jcv@leesmart.com
- wxe@leesmart.com
- yelenazaitseva@hotmail.com

**Comments:**

---

Sender Name: Zaitseva Zaitseva - Email: yelenazaitseva@hotmail.com

Address:

278 Melissa St

Camano Island, WA, 98282

Phone: (425) 736-1266

**Note: The Filing Id is 20171112193218SC585024**