No. 1014708

SUPREME COURT OF
THE STATE OF WASHINGTON

COURT OF APPEALS DIVISION I
STATE OF WASHINGTON NO. 83002-3

DR. HUNG DANG M.D., a single person,

Petitioner.

v.

FLOYD PFLUEGER & RINGER, P.S., a Washington Professional Services Corporation, and; REBECCA SUE RINGER, an individual,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTY

Defendants-Respondents are Floyd Pflueger & Ringer, P.S. and Rebecca Sue Ringer (hereinafter collectively "Ms. Ringer").

II. CITATION TO COURT OF APPEALS DECISION

Dang v. Ringer et al., __ Wn. App. 2d __, 518 P.3d 671 (2022).

III. ISSUE PRESENTED FOR REVIEW

Whether this Court should deny Plaintiff-Appellant Dr. Dang's Petition for Review under RAP 13.4(b), where:

1. Dr. Dang fails to establish any basis for review under RAP 13.4;

2. Dr. Dang fails to establish that the Court of Appeals' decision conflicts with any other reported Washington decision;

3. This Court previously decided the question that this petition for review presents: a legal-malpractice plaintiff

must present proof that the client would have fared better in the underlying action but for the attorney's alleged negligence; and

4. Dr. Dang presented no such proof in response to Ms. Ringer's motion for summary judgment, which King County Superior Court Judge Judith Ramseyer therefore properly granted, and the Court of Appeals affirmed.

IV. STATEMENT OF THE CASE

Ms. Ringer adopts by reference her Statement of the Case in her Brief of Respondents to Division One of the Court of Appeals. However, Dr. Dang makes factual assertions which require correction.

A. Dr. Dang and his expert make assertions that the record entirely fails to support.

Dr. Dang offers factual statements that he fails to support with citations to the record and/or that the record entirely fails to support. The court should disregard all uncited statements. RAP 10.3(a)(5); *Hurlbert v. Gordon*, 64 Wn. App. 386, 399-401, 824 P.2d 1238 (1992). Specifically, Dr. Dang mischaracterizes his own expert's opinions by suggesting Ms.

Ringer's alleged negligence somehow "induced" errors in the Medical Quality Assurance Commission's ("MQAC") interpretation and application of RCW 18.130.180 and/or the Emergency Medical Treatment and Labor Act ("EMTALA").

However, the opinions of Dr. Dang's standard-of-care expert, Mr. Kagan, solely concern an alleged failure to "marshal all available evidence" concerning the ongoing community call issue. CP 1484. Specifically, Mr. Kagan contends Ms. Ringer should have further fleshed out the on-call issue[1] by contacting certain witnesses, offering additional exhibits, and deposing two witnesses. CP 1481-1485. Nowhere in Mr. Kagan's declaration did he opine Ms. Ringer violated the standard of care by failing to cite to certain cases or statutes when litigating the Underlying Action. *Id.* Instead, Mr. Kagan baldly asserts Ms. Ringer failed to make informed decisions by not offering enough evidence on the on-call issue, which purportedly was Dr. Dang's "justification" for not treating patients "who were

not his responsibility." CP 1483.

Yet the MQAC Panel found Patient C was Dr. Dang's responsibility, irrespective of Dr. Dang's "justification" for why he refused to treat Patient C. CP 85. The Panel found that once Patient C was transferred to St. Joseph Medical Center ("SJMC), regardless of the propriety of the transfer, Dr. Dang was obligated to treat Patient C, and he refused to do so. *Id.* Moreover, contrary to Mr. Kagan's contention that Dr. Dang's "justification" for not doing so was because of the on-call issue, Dr. Dang testified at the hearing that he failed to treat Patient C because he had taken Oxycodone for pain relief. CP 84. Prior to the hearing, Ms. Ringer expressed grave concern to Dr. Dang regarding this position "**in part because it is nowhere reflected in the medical records."** CP 182 (emphasis added). The Panel expressly found Dr. Dang's testimony as to why he failed to treat Patient C not credible. CP 84, 86.

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[1] In addition to Dr. Dang, two of his colleagues testified in the Underlying Action on the on-call issue. CP 153-54, 156-57.

B. Division I followed Washington law and affirmed dismissal of Dr. Dang's claim, because he offered no proof that he would have fared better but for Ms. Ringer's conduct.

In a 3-0 decision, Division I affirmed the superior court's order granting Ms. Ringer's Motion for Summary Judgment. *Dang*, 518 P.3d at 674. Despite Dr. Dang's attempt to relitigate the propriety of the MQAC's findings entered and affirmed on appeal in the Underlying Action, Division I reasoned the alleged negligent conduct clearly had no impact on the MQAC's findings:

> Moreover, the evidence Dr. Dang asserts was negligently omitted concerning the community call dispute would not have had any bearing on Dr. Dang's assertion at the hearing that he did not see patient C because he was under the influence of medication, nor the MQAC panel's rejection of that assertion. Because it was undisputed that Dr. Dang was on call at St. Joseph, while Patient C was facing a potentially life-threatening condition, additional evidence that there had been a dispute about call requirements would not support a trier of fact in the legal negligence case in arriving at a more favorable outcome for Dr. Dang.
>
> . . .

> We do not need to determine whether MQAC was correct in concluding Dr. Dang violated EMTALA when he failed to treat Patient C, because the community call e-mails do not support a conclusion other than that he failed to treat the patient. Because the omitted community call emails would not alter MQAC's factual findings, they likewise would not alter the panel's conclusion about the significance of those findings.

Id. at 683-684. Accordingly, Division I held Dr. Dang failed to raise a genuine issue of material fact on causation. *Id.*

V. ARGUMENT

1. Dr. Dang does not argue that grounds for review exist under RAP 13.4(b)(3) or (4).

Dr. Dang has asserted grounds for Supreme Court review under RAP 13.4(b)(1) and (2) only. He does not offer any argument in support of any other basis for this court to accept review. Dr. Dang therefore concedes that review is not warranted under either RAP 13.4(3) or RAP 13.4(4).

2. Review is not warranted under any of the grounds in RAP 13.4.

Dr. Dang claims – wrongly – that grounds for review exist under RAP 13.4(b)(1) and (2). Pursuant to RAP 13.4, this

Court will grant a petition for review only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals[.]

RAP 13.4(b).

Dr. Dang's petition for review should be denied because it fails to satisfy either basis for Supreme Court review.

Furthermore, nothing in RAP 13.4 or in Washington law entitles Dr. Dang to review by this Court simply because he disagrees with the Court of Appeals' decision:

> [I]t is a mistake for a party seeking review to make the perceived injustice the focus of attention in the petition for review. RAP 13.4(b) says nothing in its criteria about correcting isolated instances of injustice. This is because the Supreme Court, in passing upon petitions for review, is not operating as a court of error. Rather, it is functioning as the highest policy-making judicial body of the state. ...
>
> The Supreme Court's view in evaluating petitions is global in nature. Consequently, the primary focus of a petition for review should be on why there is a compelling need to have the issue or issues presented decided *generally*. The

> significance of the issues must be shown to transcend the particular application of the law in question. Each of the four alternative criteria of RAP 13.4(b) supports this view. The court accepts review sparingly, only approximately 10 percent of the time. Failure to show the court the "big picture" will likely diminish the already statistically slim prospects of review.

Wash. Appellate Prac. Deskbook § 27.11 (1998) (italics in original).

Dr. Dang asserts that Division I "erred" when it (1) "refused to review the MQAC findings based on those erroneous interpretations," Petition for Review at 20; and (2) "held that the attorney judgment rule is a 'component' of the standard of care." *Id.* at 25. Neither assertion is true. Yet even if they were, none of RAP 13.4(b)'s four enumerated grounds permits Supreme Court review merely to correct errors by the Court of Appeals. Rather, Dr. Dang must show that this case is sufficiently exceptional to "transcend the particular application of the law in question." Wash. Appellate Prac. Deskbook § 27.11. He shows nothing of the sort. Thus, neither of these

assertions meets RAP 13.4 to warrant the extraordinary step of review by this Court.

3. The Court of Appeals' decision does not conflict with any decision of this Court.

The Court of Appeals' decision does not conflict with any Supreme Court decision.

First, Dr. Dang falsely claims that it conflicts with *Barr v. Day*, 124 Wn.2d 318, 879 P.2d 912 (1994). Petition for Review at 19.

In *Barr*, this Court held that a client, who obtained judicial approval of a settlement in a personal-injury suit, was not collaterally estopped from later challenging in a legal-malpractice suit against her attorneys, the reasonableness of attorney fees awarded in the settlement. *Id.* at 321. This Court found the fourth element, the injustice prong, of collateral estoppel was not met, holding it would be unjust for the client to be collaterally estopped from bringing a legal malpractice claim if the client agreed to settle the underlying action based on attorney misfeasance or nonfeasance. *Id.* at 326.

Inexplicably, Dr. Dang contends Division I's decision conflicts with *Barr* by suggesting Ms. Ringer's conduct somehow "induced" errors in the MQAC's findings, and thus "Division I erred when it refused to review the MQAC findings based on those erroneous interpretations." Petition for Review at 20. *Barr* has no application to present action, and even if it did, the Court of Appeals' decision would not conflict with it. Dr. Dang's contention that Division I's opinion somehow conflicts with *Barr* reveals a fundamental misunderstanding of Division I's decision.

Division I did not explicitly hold Dr. Dang is collaterally estopped from challenging the MQAC's findings; the opinion does not even mention collateral estoppel. *Dang*, 518 P.3d 671. Rather, Division I reasoned that it need not determine whether the MQAC's findings were correct

> because the community call emails do not support a conclusion other than that he failed to treat the patient. Because the omitted community call e-mails would not alter MQAC's factual findings,

> they likewise would not alter the panel's conclusions.

Id. at 684.

Again, the alleged negligent conduct solely concerns Ms. Ringer's failure to offer sufficient evidence on the on-call issue, which purportedly was Dr. Dang's "justification" for refusing to treat certain patients. CP 1483. It is plainly clear from the MQAC's findings that Dr. Dang's "justification" for refusing to consult with fellow physicians and treat patients was irrelevant in determining Dr. Dang failed to comply with his professional obligations as a physician. CP 79-90. No amount of additional evidence offered and admitted on the on-call issue would have changed the fact Dr. Dang refused to consult and treat a patient transferred to a facility where he was the on-call ENT specialist. Thus, Division I's decision does not conflict with *Barr*, because Ms. Ringer's conduct had no negative impact on the outcome of the Underlying Action.

Dr. Dang next asserts genuine issues of material fact with respect to proximate cause by challenging the propriety of the

MQAC's findings entered and affirmed on appeal in *Dang v. Wash. DOH*, 195 Wn.2d 1004, 458 P.3d 781 (2020), *review den'd*, U.S. __, 141 S. Ct. 371, 208 L. Ed. 2d 94 (2020). Petition for Review at 20-25. Specifically, Dr. Dang attempts to relitigate (1) whether he violated RCW 18.130.180 relative to Patients B and C and (2) whether he violated EMTALA relative to Patient C. Petition for Review at 20-21. Dr. Dang offers nothing new, but simply rehashes arguments set forth in his opening appeal briefs in this action and in the Underlying Action. He fails to explain how Division I's causation analysis in the context of legal malpractice conflicts with any Supreme Court decision.

Division I's decision follows this Court's settled precedent: a legal malpractice plaintiff must offer proof that he would have fared better but for the attorney's conduct. *Daugert v. Pappas*, 104 Wn.2d 254, 257-59, 704 P.2d 600 (1985); WPI 107.07 (7th ed. 2019).

Here, Dr. Dang's claim necessarily failed because he

offered no such proof. He failed to meet his burden of proving that additional evidence at the hearing concerning his basis for disputing call responsibilities would have changed the fact he failed to consult with fellow physicians and treat patients. When setting forth the undisputed facts supporting the MQAC's conclusions that Dr. Dang violated RCW 18.130.180 and EMTALA, the Panel stated:

> 2.4 Here, the Respondent's refusal to aid and consult with fellow physicians while acting as an on-call specialist, constitute acts of moral turpitude and lowers the standing of the profession in the eyes of the public.
>
> . . .
>
> 2.6 Here, the Respondent's refusal to consult with fellow physicians and treat patients, while acting as an on-call specialist, created an unreasonable risk of patient harm.
>
> . . .
>
> 2.8 Here, the Respondent violated EMTALA when he failed to appear in the SJMC emergency department to treat Patient C, while on call for SJMC as an ENT specialist.

CP 87-89. Clearly, any offer of additional evidence by Dr. Dang as to his purported "justification" for his refusal to treat

patients would have made no difference in the order issued by the MQAC. Thus, Dr. Dang cannot show a trier of fact could reasonably find Dr. Dang would have fared better but for Ms. Ringer's conduct.

Next, Dr. Dang contends that the analysis of the attorney judgment rule in Division I's opinion conflicts with *Fergen v. Sestero*, 182 Wn.2d 794, 346 P.3d 708 (2015). In *Fergen*, a medical-malpractice action, the petitioner-plaintiff challenged the propriety of the following exercise-of-judgment instruction: "A physician is not liable for selecting one of two or more alternative diagnoses, if, in arriving at a diagnoses a physician exercised reasonable care and skill within the standard of care the physician was obligated to follow." *Id.* at 800-01. In affirming the use of that instruction, this Court held:

> **It is used to clarify the general standard of care**; it does not alter it or add any additional elements for a plaintiff to prove. We follow this clear precedent and again approve of the use of the exercise of judgment jury instruction here.

Id. at 805 (emphasis added).

Curiously, Dr. Dang contends Division I's opinion conflicts with *Fergen* by suggesting the opinion somehow requires a legal-malpractice plaintiff to prove an additional element, simply because Division I referred to the attorney judgment rule as a "component" of the standard of care. Petition for Review at 26.

This Court has long held that an attorney is not liable for malpractice where the method employed to solve a legal problem is one recognized and approved by reasonably skilled attorneys practicing in the community as a proper method in the particular case. *Cook, Flanagan & Berst v. Clausing*, 73 Wn.2d 393, 396, 438 P.2d 865 (1968). The attorney judgment rule insulates an attorney from liability for making an erroneous decision involving honest, good faith judgment if (1) that decision was within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington; and (2) in making that judgment the attorney exercised reasonable care. *Clark Cty. Fire Dist. No. 5 v.*

Bullivant Houser Bailey P.C., 180 Wn. App. 689, 701-704, 324 P.3d 743 (2014).

Contrary to Dr. Dang's assertion, the Court of Appeals' analysis of the attorney judgment rule clearly adheres to *Fergen*. Nowhere does Division I's opinion hold that a legal-malpractice plaintiff must prove any sort of "additional element" to establish a violation of the standard of care. Rather, Division I correctly determined the attorney judgment rule provides context when evaluating the sufficiency of the plaintiff's evidence on breach:

> The attorney judgment rule reflects that a range of strategic approaches may be reasonable and within the standard of care in a given representation, notwithstanding that a reasonable strategy based on an appropriate evaluation may not lead to the desired outcome.
>
> This principle is not an affirmative defense that must be pleaded in a defendant's answer CR 8, but rather **reflects the definition of the standard of care. By definition, when a professional judgment or a trial tactic falls into the attorney judgment rule because it was a reasonable decision, appropriately arrived at, within the standard of care, and made in good faith, it does not amount to negligence.**

Dang, 518 P.3d at 679 (emphasis added). Clearly, Division I's analysis of the attorney judgment rule is in harmony with *Fergen*, as Division I used the rule merely "to clarify the general standard of care."

Because Division I's opinion does not conflict with a decision of the Supreme Court, Dr. Dang's Petition for Review must be denied.

4. The Court of Appeals' decision in this case does not conflict with the Court of Appeals' decisions in *Spencer* and *Clark Cty. Fire Dist.*

Finally, Dr. Dang claims Division I's holding that the attorney judgment rule is not an affirmative defense conflicts with language in the Court of Appeals' decisions in *Clark Cty. Fire Dist.*, 180 Wn. App. at 707, and in *Spencer v. Badgley Mullins Turner PLLC*, 6 Wn. App. 2d 762, 796, 432 P.3d 821 (2018). Petition for Review at 26. Yet the context of these cases shows Dr. Dang's form-over-substance assertion is misplaced.

In *Spencer*, a jury found that an attorney committed legal malpractice by failing to submit available evidence that plaintiffs would have been able to buy out co-owners of investment real estate, to avoid a sale to a third party. *Spencer*, 6 Wn. App. 2d at 770-72. While *Spencer* described the attorney judgment rule as an affirmative defense to a legal-malpractice claim, that statement was dicta. The *Spencer* court said so when evaluating a breach of fiduciary duty claim based on alleged violations of the Rules of Processional Conduct ("RPC"). *Id.* at 793-96. The trial court held the attorney did not violate any RPC and did not breach any fiduciary duty. *Id.* at 800-01.

The *Spencer* court's comment about the attorney judgment rule concerned whether an attorney's good-faith exercise of judgment may be asserted as a defense to a claim that the attorney had violated the RPCs. *Id.* at 796. *Spencer* did not comment on the elements of legal malpractice, but merely identified the issue raised by the parties of whether good

faith may be a defense to alleged RPC violations. *Spencer* ultimately did not determine whether the attorney judgment rule would provide a defense to alleged RPC violations, because the court affirmed the trial court's findings that the attorney did not violate the RPCs. *Id.* at 796.

Division I's opinion plainly does not conflict with *Spencer*, as *Spencer* was not even evaluating the attorney judgment rule in the context of a legal-malpractice claim. Moreover, *Spencer* did **not** apply the attorney judgment rule as a defense requiring the defendant-attorney to make an affirmative showing.

Although the *Clark Cty. Fire Dist.* court referred to the attorney judgment rule as an affirmative defense, **the court analyzed the rule in the context of evaluating the sufficiency of the plaintiff's evidence on breach**. *Clark Cty. Fire Dist.*, 180 Wn. App. at 701, 705. The court held that plaintiff's expert testimony that the attorney's decisions violated the standard of care supported the inference that the decisions were not within

the range of reasonable alternatives from the perspective of a reasonably prudent attorney. *Id.* at 702, 709, 711. As in *Spencer*, the court in *Clark Cty. Fire Dist.* did not apply the attorney judgment rule as an affirmative defense requiring the defendant-attorney to make any sort of affirmative showing.

Here, Division I's opinion in the present action conforms with the decision in *Clark Cty. Fire Dist.* Just as in *Clark Cty. Fire Dist.*, Division I reasoned the attorney judgment rule provides context when evaluating the sufficiency of the plaintiff's evidence on breach, and "reflects the definition of the standard of care." *Dang*, 518 P.3d at 679.

Thus, because Division I's opinion does not conflict with another Court of Appeals' decision, RAP 13.4(b)(2) is not a proper basis for this Court to accept review. Dr. Dang's Petition for Review must be denied.

VI. CONCLUSION

Dr. Dang has not presented grounds under RAP 13.4(b) on which this Court should grant review. Accordingly, Ms. Ringer

respectfully requests that Dr. Dang's Petition for Review be denied.

Respectfully submitted this 30th day of November, 2022.

I certify that this memorandum contains 3,733 words, in compliance with RAP 18.17.

LEE SMART, P.S., INC.

By: */s/ Andrew H. Gustafson*

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on November 30, 2022, I caused service of the foregoing pleading on each and every attorney of record herein via the Court of Appeals E-Service and via email:

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November 30, 2022 - 4:46 PM

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