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SUPREME COURT NO. 90011-6

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IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

LEONARDO C. MARIANO,
Appellant

v.

SWEDISH CARDIAC SURGERY,
Respondent.

**RESPONDENT'S ANSWER TO MOTION FOR EXTENSION
AND ANSWER TO PETITION FOR REVIEW**

Court of Appeals, Division I No. 68924-0-I

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 ORIGINAL

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I. RESPONSE TO MOTION FOR EXTENSION OF TIME

The Petitioner's request for an extension of time to file his petition should be denied.

RAP 13.4(a) uses mandatory terms (RAP 1.2(b)) in providing that the filing of a petition for review must occur within 30 days after the decision terminating review is filed.

RAP 18.6(c) specifically provides that a petition for review is timely filed only if it is received by the appellate court within the time permitted for filing. RAP 18.8(b) provides that only under "extraordinary circumstances" or to prevent a "gross miscarriage of justice" will an extension of time to file a petition for review be granted.

Here, the Court of Appeals' decision terminating review was filed on January 9, 2014 thereby requiring the filing of a petition for review within 30 days of that decision. Here, the petition was due for filing on February 10, 2014 but was not filed until February 12, 2014. When this error was brought to Petitioner's attention he filed a motion for an extension of time to file his petition admitting that the reason the petition was untimely was due to his own misreading of the applicable Rules of Appellate Procedure. According to Petitioner, he mailed his petition on February 10 relying upon RAP 18.6(b) which applies to service by mail rather than relying upon the very next paragraph RAP 18.6(c) which

applies to filing by mail.

Petitioner's apparent misreading of the rules is not an extraordinary circumstance. Secondly, a "gross miscarriage of justice" would not result were the court to enforce the governing rules. Here, as explained below, petitioner seeks review pursuant to RAP 13.4(b) which provides that review will only be granted if the issues presented meet at least one of the four bases set forth in RAP 13.4(b). Here, Petitioner's submission to the court completely ignores the requirements of RAP 13.4(b); presents absolutely no argument whatsoever as to why his petition should be accepted for review by this Court and instead, re-argues the factual issues he raised both in the trial court and the Court of Appeals, and fails to challenge any of the legal standards which mandate dismissal of his claims.

Given that Petitioner's motion for an extension of time failed to identify any extraordinary circumstances and fails to explain how a gross miscarriage of justice would ensue if his petition were not accepted as timely, Petitioner's motion for an extension of time to file his petition should be denied.¹

¹ Respondent notes that Petitioner made a clerical error in the payee on his filing fee which Respondent appreciates is a deficiency but further appreciates such an oversight would likely not be recognized as a fatal flaw so long as the petition itself is timely filed. Here, Respondent does not seek a denial of the motion for extension of time based upon the improper payee on Petitioner's filing fee check, but instead Respondent relies upon

Therefore, based upon the applicable rules of appellate procedure, Petitioner's motion for an extension of time should be denied and his petition therefore not considered by this Court.

II. ANSWER TO PETITION FOR REVIEW

A. Identity of Respondent.

Respondent "Swedish Cardiac Surgery" (hereinafter "Swedish") the defendant in the trial court; Respondent in the Court of Appeals and Respondent herein opposes this petition for review.

B. Issues Presented for Review.

1. Did the trial court correctly dismiss appellant's complaint for medical negligence damages when appellant failed to present expert testimony supporting his claims in response to a properly served and filed motion for summary judgment?

2. Did the amount of time allowed for oral argument on the motion for summary judgment allow the parties the opportunity to argue their respective positions in further support of the briefing submitted to the court?

the fatal flaw of Petitioner's failure to demonstrate how relying upon the wrong section of RAP 18.6 (which Petitioner admits he read and which rule unambiguously distinguishes between "Service by Mail" and "Filing by Mail") could constitute an "extraordinary circumstance."

C. Introduction.

Mr. Mariano filed a medical negligence action against Swedish on May 2, 2011. [CP 1-6]. On November 22, 2011 Swedish filed a motion for summary judgment based on the appellant's failure to identify or produce for deposition a qualified expert witness supporting his claim. [CP 7-15]. Mr. Mariano first informally asked counsel for Swedish for a continuance of the date for hearing the summary judgment motion to accommodate a trip to the Philippines. [CP 191]. This request was granted. [CP 189-190]. Mr. Mariano then formally sought another continuance from the trial court that, ultimately, was denied. [CP 16-25, CP 200, CP 201-214, CP 215-16]. When Mr. Mariano failed to present any evidence to support his claim of medical negligence, the trial court properly granted Swedish's motion for summary judgment dismissing his claims. [CP 36-37].

Mr. Mariano then moved for reconsideration of the Court's order dismissing his claims. [CP 38-41]. The trial court's order denying that motion cited both the lack of evidence (expert testimony) supporting the claim, and plaintiff's untimely filing in violation of the statute of limitations as support for the original order dismissing all claims. [CP 42-43].

Mr. Mariano appealed the trial court decision. In his appellate brief he attached extraneous information that was not presented to the trial court

but instead appeared to be printouts of articles from the Internet. The Court of Appeals properly struck the improper appendages to the briefing as they were not proper clerk's papers.

On November 25, 2013 the Court of Appeals issued its ruling affirming the orders of the trial court. Mr. Mariano moved for reconsideration of the Court of Appeals' ruling which was denied by the Court of Appeals on January 9, 2014.

On February 10, 2014 Mr. Mariano mailed his Petition for Review to the Supreme Court. The Supreme Court deputy clerk issued a letter March 19, 2014 advising Mr. Mariano and counsel that his petition was untimely. Mr. Mariano thereafter filed a motion for an extension of time within which to file his Petition for Review.

Mr. Mariano brought his medical negligence lawsuit without proper evidentiary support. Instead, his claims were based on his misunderstanding of his own health conditions and his personal interpretations of the medical records, as well as some unauthenticated, inappropriate articles he printed from the Internet which were inappropriately appended to his appellate brief. Mr. Mariano has presented no issues which warrant review by this Court.

D. Counter Statement of The Case.

1. Underlying Facts.

On May 2, 2011, Mr. Mariano filed an action under RCW 7.70 for professional negligence in which he alleged that the Swedish Cardiac Surgery failed to exercise the degree of care and skill expected of healthcare providers in the State of Washington when Mr. Mariano was treated by healthcare providers at the facility. [CP 3-6]. Specifically, Mr. Mariano appears to believe that the coronary artery bypass surgery he received on April 4, 2006 was negligent or unwarranted.

Mr. Mariano did not have the required expert support for his claims. In answers to discovery seeking the identity of the expert witness(es) supporting plaintiff's claim, Mr. Mariano failed to identify a single witness. [CP 148-184]. Defense counsel wrote multiple letters and emails explaining plaintiff's burden of proof in a medical negligence case and supplying the statutory source of the applicable legal standards for this claim. [CP 186-187, CP 189-191, CP 193-194].

Instead of providing this necessary proof, Mr. Mariano indicated that his experts would be identified after the close of discovery, and then attempted to suggest that the doctrine of *res ipsa loquitur* applied to some or all of his claims. [CP 139-199]. Based on the nature of this claim and the presenting facts, *res ipsa loquitur* cannot apply to this healthcare

negligence case. The primary basis for Swedish's motion for summary judgment was Mr. Mariano's lack of evidence and expert testimony relating to his allegations that Swedish or Swedish's providers breached the applicable standard of care. [CP 7-15].

In addition, Swedish's original motion offered by way of footnote, the fact that the statute of limitations for this claim expired in April 2009, well before Mr. Mariano filed this lawsuit on May 2, 2011. [CP 8]. In response, Mr. Mariano asserted that the alleged negligence was only recently discovered due, allegedly, to the actions of certain healthcare providers. Swedish argued that, given the facts of this matter, Mr. Mariano's claimed "recent discovery" was not reasonable, nor was his failure to timely bring his action excusable.

Swedish relies on the evidence presented to the trial court in asserting Mr. Mariano unquestionably failed to produce the necessary evidence to proceed with his claim. That fact alone provides a sufficient basis for summary dismissal. However, the evidence also establishes that due to his untimely filing of his complaint, the applicable statute of limitations also bars his claim. RCW 4.16.350; [CP 42-43].

Swedish's motion for summary judgment was served and filed to provide Mr. Mariano, a pro se plaintiff, nearly a month longer than the court rules establish for notice to be given. CR 56. [CP 139-199]. The

original hearing date was first continued at Mr. Mariano's request. Unquestionably Mr. Mariano had ample time in which to offer support for his claim but failed to do so.

2. Mr. Mariano's Claim

After studies demonstrated significant three vessel coronary artery disease, Mr. Mariano had a quadruple coronary artery bypass grafting (CABG) surgery on April 4, 2006. Based on his allegations, Mr. Mariano has no issue with the bypass surgery in general, or the specific bypass of his right coronary artery. [CP 3-6]. Instead, his claim is premised on his personal belief that the bypass of his left coronary artery was unnecessary. [CP 3-6]. Mr. Mariano, however, failed to present any expert testimony supporting his personal belief.

Instead, in his appeal and again in this petition, he relies on medical records that predate the subject surgery, in addition to his personal opinion that a left artery bypass was not necessary. He also relies on his own interpretation of his medical records and various Internet publications. Mr. Mariano is not, and does not purport to be, a qualified medical expert. The information he presented as "evidence" appended to his appellate brief and again referenced in his petition was inappropriate and was stricken to the extent any of the attachments to his appellate brief

were not included in the clerk's papers or otherwise made a part of the record on appeal. RAP 10.3(a)(8) Appellate Court Opinion, page 7.

Mr. Mariano misunderstands both the surgery that he had, and his own medical condition. He presented no evidence that the bypass of his left coronary artery caused him actual damages. Mr. Mariano failed to demonstrate any negligence and his claims were appropriately dismissed based upon the proper application of existing legal precedent to the factual record presented.

E. Argument

1. This Court Should Deny Review as Petitioner Has Not Shown a Basis for Review under RAP 13.4(b).

Petitioner has failed to not only cite to any basis for review as required by RAP 13.4(b) but his petition in substance fails to meet any of the requirements of RAP 13.4(b). Instead, Petitioner simply re-argues factual matters he raised both in the trial court and the Court of Appeals and voices his opinion, without any legal support, that the rules of evidence and existing Supreme Court legal precedent should not apply to his case. Simply re-arguing issues previously argued, and ignoring legal standards and binding precedent, does not provide a basis for review under RAP 13.4(b). Therefore, Petitioner's request for review should be denied.

2. **The Court of Appeals properly applied existing legal precedent in rendering its decision; there is no conflict between its decision and any decision of this Supreme Court and no constitutional issue or issue of substantial public interest is presented by this petition.**

Petitioner identifies five issues, Issues A–E, in his petition to this court. None of the issues raised warrant review.

Issues A-C address Mr. Mariano's failure to properly establish that he suffered an injury from the failure of a healthcare provider to follow the accepted standard of care as is required by RCW 7.70.030(1). Mr. Mariano presents no evidence or argument to support error by the Court of Appeals in its application of existing legal precedent to the facts presented. As the Court of Appeals cited, only experts are permitted to testify regarding the standard of care and whether a physician met that standard. *Young v. Key Pharmaceuticals Inc.*, 112 Wn.2d 216, 228–229, 770 P.2d 182 (1989). Here, because Mr. Mariano failed to identify any expert who would testify in support of his claims that the treatment he received at Swedish fell below the applicable standard of care, Swedish was entitled to judgment as a matter of law.

Mr. Mariano's assertion that a layperson can understand coronary bypass surgery and his allegations of negligent care is a hollow argument and was so recognized by the Court of Appeals in its decision. In his Petition for Review Mr. Mariano offers no legal authority or persuasive

argument other than his own "strong" contention that his medical malpractice complaint is a simple matter which has no "medical parameters at all." Such an assertion is meritless.

Existing Washington State Supreme Court legal standards supported dismissal of Mr. Mariano's claims at the trial court and supported the affirmation of the trial court ruling by the Court of Appeals. RCW 7.70.040; *Miller v. Jacoby*, 145 Wn.2d 65, 72, 303 P.3d 68 (2001); *Berger v. Sonneland*, 144 Wn.2d 91, 111, 206 P.3d 257 (2001).

Issue D asserts that because the summary judgment hearing lasted only approximately 18 minutes Mr. Mariano was denied due process and the Court of Appeals failed to appreciate the citations Mr. Mariano provided to support his argument. However, the record reflects that the Court of Appeals recognized Mr. Mariano's argument that he was denied due process of the summary judgment hearing because the hearing was too short and not recorded, but that Mr. Mariano's opening brief contained no authority to support the claim. In his petition Mr. Mariano asserts that a partial quote from a Ninth Circuit ruling wherein, based on the facts in that matter he quotes the Ninth Circuit as stating:

We agree that the IJ denied Cruz Renton and a full and fair hearing in violation of the Due Process Clause... And this prejudiced Cruz Renton's ability to present evidence..."

Petition at page 6.

This partial quotation does not provide legal support for Mr. Mariano's contention that he was denied due process because the summary judgment hearing lasted less than 20 minutes.

Issue E has six subparts. First, Issue E(1) is unintelligible. On its face it appears to affirm that many months before the summary judgment hearing Swedish in fact produced certain requested documents through discovery. There is no impropriety identified or even argued by petitioner. It appears on its face this issue is moot as it was not addressed before the Court of Appeals and does not appear to be an issue at all.

Issue E(2) addresses the Court of Appeals' decision to strike exhibits which were not part of the clerk's papers. The Court of Appeals properly followed rules of appellate procedure in striking documents which were not properly part of the record on appeal or identified as clerk's papers in the appeal. RAP 9.12; 10.3 (a)(8). No argument on legal authority is presented which would support the contention that the Court of Appeals' ruling on the motion to strike was improper.

Issue E(3) deals with Mr. Mariano's claim of a lack of informed consent. As the Court of Appeals properly advised, if plaintiff is alleging breach of the duty to secure informed consent, he must follow the standards set forth in RCW 7.70.050(1). Again, expert testimony is

required to establish the nature and character of the treatment administered; the risks and benefits to such treatment and any possible alternative forms of treatment. RCW 7.70.050(3). Because Mr. Mariano failed to provide any expert testimony of any kind, be it in support of his claim for medical malpractice or in support of his claim for lack of informed consent, he could not, and did not, meet his burden to set forth specific facts showing a genuine issue of material fact for trial. Therefore, the trial court properly dismissed this claim and the Court of Appeals properly affirmed that dismissal.

Issue E(4) that Mr. Mariano believes the Court of Appeals should have considered the statute of limitations issue is a non-issue. The Court of Appeals found that Mr. Mariano's claim, when faced with Swedish's supported summary judgment motions, failed to demonstrate material facts in dispute. Therefore, the Court of Appeals did not need to go further and address whether or not Mr. Mariano's claim also failed under an analysis regarding the applicable statute of limitations. Mr. Mariano takes exception to the court not addressing the statute of limitations issue as he apparently believes he could present a question of fact on that issue and that by doing so it would serve to create a question of fact with respect to whether or not he demonstrated material facts in dispute regarding the issue of medical malpractice. In simple analysis, Mr. Mariano is confused

as to whether a material fact on a question of law regarding the stature of limitations would also create a material fact as to whether or not there was sufficient evidence presented to allow a claim of medical malpractice to proceed.

In the present case, because the Court of Appeals found there was not sufficient evidence to allow the medical malpractice claim to proceed it did not have to address the next issue which was, even if there had been evidence to proceed on a medical malpractice claim, was that claim barred by the applicable statute of limitations. Mr. Mariano presents no argument or authority to support the contention that the Court of Appeals needed to address a moot issue.

Issue E(5) again addresses the identification and sufficiency of identification of expert testimony which has been thoroughly addressed above.

The last issue raised, Issue E(6), is Mr. Mariano's dispute that he should have been granted additional time to respond to the summary judgment motion. As the Court of Appeals properly stated in its opinion, although Mr. Mariano argued that the trial court erred in failing to continue the summary judgment hearing so that he could conduct additional discovery, the record demonstrated that the trial court did continue the hearing for more than two months on Mr. Mariano's request.

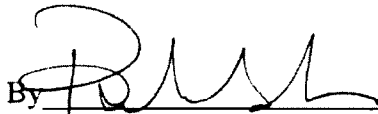
Thereafter Mr. Mariano did not move for an additional continuance. Mr. Mariano had almost a year from the date of the filing of his complaint to conduct discovery before the complaint was dismissed. Mr. Mariano has presented nothing to this court to support a contention that the Court of Appeals' affirmation of the trial court's consideration of the summary judgment motion under these circumstances was improper.

III. CONCLUSION

Because petitioner has failed to identify any basis for discretionary review pursuant to RAP 13.4(b) and, the issues presented for review do not in substance satisfy any of the bases for which a petition for review will be accepted by the State Supreme Court, Mr. Mariano's petition for review should be denied

RESPECTFULLY SUBMITTED this 1st day of May, 2014.

ANDREWS • SKINNER, P.S.

By 

PAMELA M. ANDREWS, WSBA #14248
Attorneys for Respondent Swedish Cardiac
Surgery

DECLARATION OF SERVICE

The undersigned hereby declares as follows:

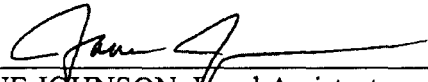
1. That I am a citizen of the United States and of the State of Washington, living and residing in King County, in said State, I am over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness therein.

2. On the date below I caused a copy of the foregoing document to be served upon the following in the manner noted:

Pro Se Appellant
Leonardo C. Mariano
1123 Rainier Avenue, Suite 415
Everett, WA 98201
Via U.S. Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 1st day of May, 2014 at Seattle, Washington.



JANE JOHNSON, Legal Assistant

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Subject: Mariano v. Swedish Cardiac Surgery; Case No. 90011-6
Importance: High

Re: Mariano v. Swedish Cardiac Surgery; Case No. 90011-6

Attached for filing please find Respondent's Answer to Motion for Extension and Answer to Petition for Review regarding the above matter.

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Thank you.

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