NO. 94190-4

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

NO. 73650-7 - I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

SURAJ PINTO,
Petitioner,

v.

GREGORY VAUGHN, PAOLA LEONE, LEONE & VAUGHN, DDS, P.S., L. DOUGLAS TRIMBLE, ET AL,
Respondents.

ANSWER TO PETITION FOR REVIEW BY RESPONDENTS GREGORY VAUGHN, DDS, PAOLA LEONE, DDS, AND LEONE & VAUGHN, DDS, P.S.

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I. INTRODUCTION & IDENTITY OF RESPONDENTS

Gregory Vaughn, DDS, Paola Leone, DDS, and Leone & Vaughn, DDS, P.S. (collectively, "the Orthodontists") ask the Court to deny Suraj Pinto's petition for review of the Court of Appeals' unanimous, unpublished opinion filed on January 23, 2017.

Suraj Pinto is a disgruntled former patient who sued his oral and maxillofacial surgeon, Respondent Dr. L. Douglas Trimble for medical negligence relating to a complicated maxillary and mandibular orthognathic surgery that Dr. Trimble performed at Overlake Medical Center in 2011. Mr. Pinto's suit also included claims against the respondent Orthodontists for referring him to Dr. Trimble and for orthodontic care provided before and after Dr. Trimble's surgery. This orthodontic care occurred between 2008 and 2011.

In separate motions granted in June and September 2015, the trial court dismissed all of Mr. Pinto's claims on summary judgment as to all Respondents, ruling that Mr. Pinto failed to produce the competent expert medical testimony necessary to support his claims for failure to meet the standard of care and his informed consent claim. In granting summary judgment, the trial court judge noted that the report of Mr. Pinto's proffered expert against the respondent Orthodontists was not made by an orthodontist, that the expert never articulated the appropriate standard of

care for orthodontists, and that he did not clearly identify the failures of each defendant but instead set forth a "mishmash" of "conclusory pronouncements." RP (9/17/15) pp. 55-56.

In sum, despite having had years to garner expert testimony, Mr. Pinto failed to do so and all his claims were dismissed in Summer 2015.

After granting Dr. Vaughn and Leone's motion for summary judgment, in a separate order, the trial court also granted their motion to strike Mr. Pinto's proffered expert based on failure to provide expert discovery. This ruling constituted a separate basis, unrelated to the court's grant of summary judgment, for dismissal of Mr. Pinto's claims. The trial court issued a detailed, seven-page order that expressly referenced *Burnet* and the trial court's consideration of all the *Burnet* factors.

Mr. Pinto opposed these rulings with various objections and motions to reconsider. These efforts were all denied.

The issues before the Court of Appeals were not novel. Summary judgment dismissal due to lack of requisite expert testimony is hardly a unique legal concept for the Court of Appeals and the three judge panel dutifully applied the correct standard of review in rendering its unanimous decision. The Opinion represents a routine, well-reasoned application of long-settled Washington law requiring expert testimony in medical

malpractice cases and of the law regarding discovery sanctions. The Opinion does not conflict with any Washington case law, nor does it pertain to issues of significant public interest. The Petition does not demonstrate any bases for review by the Supreme Court under RAP 13.4(b).

II. COURT OF APPEALS DECISION

The Court of Appeals did not err in its unpublished Opinion filed on January 23, 2017. The unanimous Opinion by a three-judge panel correctly affirmed the trial court's summary judgment dismissal of Mr. Pinto's lawsuit and determined the trial court did otherwise abuse its discretion. The Petition does not demonstrate any bases for review by the Supreme Court under RAP 13.4(b).

III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does Mr. Pinto demonstrate any conflict between the Court of Appeals' unpublished decision and any Supreme Court or Court of Appeals' decision to warrant review under RAP 13.4(b)(1) or (2)?

2. Does Mr. Pinto identify any issue of substantial public interest raised by the Court of Appeals' unpublished decision that warrants review under RAP 13.4(b)(4)?

3. Is Discretionary Review of whether the Court of Appeals correctly determined that the trial court adhered to the *Burnet* decision in striking plaintiff's expert warranted when Petitioner did not assign error to the trial court's analysis of the *Burnet* factors?

4. Is Discretionary Review of the Court of Appeals' determination that the trial court did not abuse its discretion in issuing discovery sanctions proper when Petitioner's case was correctly dismissed on separate grounds, independent of any discovery ruling?

5. In the alternative, did the Court of Appeals properly conclude that the trial court did not abuse its discretion in striking plaintiff's expert when the trial court issued a seven-page order including findings of fact and conclusions of law that expressly state that the court has "conducted a *Burnet* analysis" and also sets forth in detail the court's consideration of each *Burnet* factor?

IV. COUNTERSTATEMENT OF THE CASE

The Introduction above represents a summary of the relevant facts and is based on the detailed Counterstatement of Facts set forth Respondent's Brief filed in the Court of Appeals, which the Orthodontists incorporate herein by reference. (Respondents' Brief at 4-12.) The Orthodontists also refer the Court to the "Facts" section of the Opinion (Op. at 2-6.)

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Petitioner Fails to Meet the Standards of Review Under RAP 13.4(b). The Court of Appeals' Unpublished Decision Is Consistent with Well-Settled Case Law and Does Not Conflict with any Supreme Court or Court of Appeals' Decision.

Mr. Pinto does not cite to the RAP provision under which he seeks review; the entire Petition is devoid of a single citation to any RAP. The responding Orthodontists must, therefore, attempt to discern what Mr. Pinto is trying to argue. There is nothing in the convoluted Petition

that meets *any* of the RAP 13.4(b) bases to warrant review by this Court. Discretionary review should be denied.

1. Petitioner's Argument that the Appellate Court Applied the Wrong Standard is Flat-Out Wrong. The Opinion Applied the Correct Standard and is Consistent with this Court's Prior Decisions.

Petitioner contends that the Court of Appeals incorrectly applied an "abuse of discretion" standard in reviewing the trial court's summary judgment dismissal. Petitioner is wrong. The first sentence of the "ANALYSIS" portion of the Opinion plainly states, "[w]e review a summary judgment order **de novo**, engaging in the same inquiry as the trial court" and cites to *Lallasv. Skagit County*, 167 Wn.2d 861, 22d P.3d 910 (2009) (emphasis added). (Op. at 6.) The Opinion then goes on for several pages discussing the evidence before the Court of Appeals. The Court of Appeals methodically explains why Petitioner's evidence fails to create any genuine issues of material fact. The Court of Appeals explained, in detail, that it reviewed all of the evidence before it and deemed that Mr. Pinto failed to create any issue of material fact. In other words, the Court of Appeals engaged in the same inquiry as the trial court. The appellate court arrived at the same decision as the trial court -- summary judgment dismissal is the appropriate outcome. This is not surprising, given that plaintiff failed to satisfy his requirements under

well-settled Washington law regarding the evidence necessary for medical negligence claims.

In a stretch, Mr. Pinto has latched on to one phrase in the Opinion and attempts to craft his whole argument around this phrase. True the Opinion does include a statement of law from *McKee v. Am. Home Prods.*, Corp., 113 Wn.2d 701, 706, 782 P.2d 145 (1989) (citation omitted), which includes the words, " the qualifications of an expert are to be judged by the trial court, and its determination will not be set aside in the absence of a showing of abuse of discretion." (Op. at 6-7.) That is a true and correct statement of current Washington law. However, while the Opinion includes this correct statement of law, the Court of Appeals did not apply an "abuse of discretion" standard in affirming summary judgment dismissal. The Court of Appeals merely referenced this statement of law in the larger context of its *de novo* review of the entire record before it. The analysis section of the Opinion makes clear that the appellate court conducted its own *de novo* review of the evidence – the trial court decision is not even mentioned.

Accordingly, there is no conflict between the appellate Opinion here and any decision of the Supreme Court or Court of Appeals. The decision articulated the applicable Washington law and then proceeded to explain its decision in accordance with the same. Mr. Pinto's

disagreement with the correctly decided legal outcome of his case does not mean the learned appellate court's decision conflicts with controlling law.

2. In Accordance with Well-Settled Medical Malpractice Law, the Court of Appeals Ruled That Plaintiff's Case Required Expert Testimony.

While not noted in his issues for review, in the midst of Petitioner's jumbled argument section, he slips in the suggestion that the Court of Appeals was wrong in ruling that expert support was required to sustain his medical and dental malpractice claims. Petitioner claims that expert testimony was not necessary because he, a lay person, documented after surgery that "he did not feel right." (Pet. at 8.)

This argument fails. Well-settled Washington law has long dictated that expert testimony is needed in medical malpractice cases. The plaintiff in a medical negligence case must, almost always (and certainly here), provide expert medical testimony to show that the injury he or she complains of proximately resulted from the failure of the defendant to comply with the applicable standard of medical care. RCW 7.70.040; *Harris v. Robert C. Groth*, M.D., Inc., P.S., 99 Wn.2d 438, 663 P.2d 113 (1983); *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001); *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 706–07, 782 P.2d 1045 (1989). That standard of care is statutory in Washington: "The health care provider failed to exercise that degree of care, skill, and learning

expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances." RCW 7.70.040(1); *Elber v. Larson*, 142 Wn. App. 243, 247, 173 P.3d 990, 992 (2007). Except in unusual circumstances, none of which apply here, medical testimony is required to establish the standard of care and proximate cause issues in medical negligence actions. *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983); *Morinaga v. Vue*, 85 Wn. App. 822, 831-32, 935 P.2d 637, *rev. denied*, 133 Wn.2d 1012, 946 P.2d 401 (1997); *Douglas v. Bussabarger*, 73 Wn.2d 476, 479, 438 P.2d 829 (1968); *Bennett*, 95 Wn.2d at 533, 627 P.2d 104 (1981); *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968).

Here, it is undisputed that the malpractice allegations and alleged injuries concerned maxillary and mandibular orthognathic surgery, orthodontics, wilkodontics, and sleep apnea, which all entail specialized medical/dental training that is beyond the experience of a layperson. Petitioner's "contention" that he "did not feel right" after surgery (Pet. at 8.) does not equate to the presence of a foreign body or cutting off the wrong limb. Mr. Pinto's "feelings" do not erase the necessity of expert testimony to establish the standard of care, violation thereof, materiality of risks, and causation. This is not even a close call. If Petitioner's argument

were to be accepted, Washington statutes and case law would be upended and courts would be flooded with so-called professional malpractice cases. Nonsense.

The Court of Appeals correctly determined that expert testimony was necessary here. The court noted that there are exceptions to this rule and then explained why those exceptions do not apply in this case. In other words, the Court of Appeals explained and then followed applicable case law. Again, because Mr. Pinto disagrees with the outcome does not mean that both the trial court and Court of Appeals deviated from controlling case law. There is no conflict here that warrants review by the Supreme Court.

3. The Court of Appeals' Ruling Regarding Dr. Grossman Does Not Conflict With Controlling Washington Law.

In another departure from the Petition's stated issues for review, the Petition devotes pages 9 to 11 discussing his expert Dr. Grossman's supposed qualifications.

As a threshold matter, this argument seemingly does not apply to the respondent Orthodontists because Dr. Grossman (and Dr. Rockwell) were never identified to be used as experts against the respondent Orthodontists (Op. at 5) and Mr. Pinto has not assigned error in this regard. Therefore, this issue has been waived as to the Orthodontists and

cannot constitute a valid grounds for discretionary review. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549, 553 (1992), citing *Nearing v. Golden State Foods Corp.*, 114 Wn.2d 817, 818, 792 P.2d 500 (1990).

To the extent any of Petitioner's arguments as to Dr. Grossman's qualifications apply to the respondent Orthodontists, these arguments should be rejected. First, the Petition does not articulate how the appellate court supposedly deviated from binding case law, let alone provide argument supported by authority as to any alleged error. It appears that Petitioner is arguing that (1) the standard of care for an oral and maxillofacial surgeon is a national one and therefore Dr. Grossman's lack of Washington licensure and experience did not matter; and (2) it also does not matter that Dr. Grossman is not a maxillofacial surgeon like Dr. Trimble, because expertise is not necessarily defined by the specific practice specialty. The Appellate Court addressed these arguments and noted that Dr. Grossman was deficient as an expert not because of his geographic location or his stated specialty but because Dr. Grossman was deficient because, inter alia, he (1) "failed to identify education, medical training, or supervisory experience that demonstrated his familiarity with the standard of care for an oral surgeon"; (2) failed to set forth the applicable standard of care in that "the few references by Dr. Grossman to

the standard of care were vague and conclusory," and, (3) "offer[ed] no authority supporting [the] generous inference" regarding standard of care offered in his declaration. (Op. at 8-9.)

In short, the Court of Appeals determined that Dr. Grossman was deficient as an expert for a litany of reasons, all unrelated to his geographic location and his purported medical specialty. There was no deviation from applicable case law -- the Court of Appeals cited to and followed *Davies v. Holy Family v. Holy Family Hosp.*, 144 Wn. App. 483, 183 P.3d 283 (2008), in analogizing the two cases: "[s]imilar to the radiologist in Davies, Dr. Grossman failed to identify education, medical training, or supervisory experience that demonstrated his familiarity with the standard of care for an oral surgeon." (Op. at 8.)

Contrary to Petitioner's contention, the Court of Appeals' opinion does not conflict with *Elber v. Larson*, 142 Wn. App. 243, 173 P.3d 990 (2007). In *Elber*, the out of state expert's testimony was determined to be acceptable because he affirmatively set forth that he was familiar with the standard of care of a neurosurgeon on Washington and that he was familiar with the medical procedure at issue. Here, Dr. Grossman did neither. Review should be denied, as there is no "conflict" with existing law for the Supreme Court to review.

4. There is no *Burnet* Issue for the Supreme Court to Review. Petitioner Has Not Previously Assigned Error to the Trial Court's *Burnet* Analysis, and the Trial Court Adhered to *Burnet.*

Four pages of the Petition (Pet. at 11-15) are devoted arguing that the Court of Appeals decision to uphold the striking of (plaintiff's expert) Dr. Panomitros does not comply with the *Burnet* decision.[1] This section is a waste of word salad because as the Court of Appeals correctly noted, "Pinto does not assign error to the trial court's analysis of the *Burnet* factors." (Op. at 10, n.32). The *Burnet* case is not even cited in Mr. Pinto's Appellant's Brief. Accordingly, Petitioner cannot now rely on an alleged conflict of either the trial or the appellate court's decisions with *Burnet* as a basis for further review.

Even if Mr. Pinto had not waived this issue long ago, there is no conflict for the Supreme Court to review. While not central to its decision because plaintiff had waived the issue, the Appellate Court noted that the trial court had adhered to *Burnet,* in that it had "considered the *Burnet* factors on the record in its analysis." (Op. at 10, n.32.) In addition, the Court of Appeals recognized that "[a]s part of its findings and conclusions, the trial court submitted a detailed analysis addressing the standards in *Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013), *as*

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[1] *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

corrected (Feb. 5, 2014), and *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). *See* CP at 922." (Op. at 4, n.8.) Indeed, the *Burnet* factors were discussed on the record at the hearing, after which the trial court issued a seven-page order that included findings of fact and conclusions of law where the court explained, "[i]n reaching the decisions herein, this Court recognizes the requirements and processes set forth in *Jones* and *Burnet*, and the Court has conducted a *Burnet* analysis." (CP 945.) The order contains a detailed, multi-page, analysis explaining the court's consideration of each *Burnet* factor, including willfulness, prejudice and lesser sanctions. (CP 945-947.)

Overall, the trial court order is a fine example of a deliberate and methodical *Burnet* analysis. Given both the trial court's and Court of Appeals' explicit references to adhering to *Burnet*, Mr. Pinto's contention is unfounded. There is no conflict for the Supreme Court to review.

B. There Is No "Issue of Substantial Public Interest" Here and Nothing for the Court to Determine Under RAP 13.4(b)(4).

The Petition concludes with a Hail Mary argument that suggests there is an issue of substantial public interest here for the Supreme Court to determine. The argument falls short. Mr. Pinto asserts that Washington law is unclear as to whether the medical standard of care should be evaluated on state or national level. Not true.

Petitioner's attempt to reframe the Dr. Panomitros issue as one of public interest should be discounted. Mr. Pinto's contention that his expert Dr. Panomitros was found inadequate because he practices in Illinois and not Washington (Pet. at 15) is factually false. Like Dr. Grossman, Dr. Panomitros was deficient as an expert not because of his practice location but because Petitioner failed to set forth that affirmatively that Dr. Panomitros was qualified to render opinions in this case. Like Dr. Grossman, Dr. Panomitros's declarations were deemed inadequate by both the trial court and the Court of Appeals not because he practices in Illinois but because his reports were deficient for a long list of reasons. At issue here is the orthodontic care and treatment provided by the respondent Orthodontists, yet Petitioner's expert's declaration did "not identify any education from Dr. Panomitros related to the orthodontia. It does not refer to any medical training related to orthodontia. It does not refer to any supervisory experience related to orthodontia --- anything that would demonstrate his familiarity, his expertise, his exposure to the standard of care for the specialty." (Op. at 5.) Further, Dr. Panomitros' declaration was deficient in establishing materiality of risks associated with the orthodontic procedures rendered, and with regard to causation issues. His expert declaration was filled with "conclusory opinions"; did not contain "any recitation of the salient facts, or documents" to support

his opinions, failed to articulate the standard of care for orthodontists, and failed to articulate how each defendant individually violated the standard of care and/or failed to obtain informed consent." (Op. at 5.) Overall, Dr. Panomitros was not disqualified based on geography; he was disqualified because his submissions failed to "affirmatively show that the affiant is competent to testify to the matters therein" as required under Washington law. *See Lilly v. Lynch*, 88 Wn. App. 306, 320, 945 P.2d 727 (1997). Dr. Panomitros never articulated the appropriate standard of care for orthodontists; and overall, his report was largely a "mishmash" of "conclusory opinions" unsupported by references to any records. (RP 9/17/15, p. 56).

Simply put, there is no "state vs. national" issue of substantial public policy here to resolve. The state vs. national distinction was not germane in the decisions of the trial court or the Court of Appeals. Moreover, Washington law is settled on this issue. Review under RAP 13.4(b)(4) should be denied.

VI. CONCLUSION

Plaintiff had the responsibility to prove all elements of a claim under RCW 7.70.040. Despite having years to secure the requisite expert testimony, he failed. The trial court and Court of Appeals each had the

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responsibility to apply the law, not to save a claim that fell short legally and as a matter of proof. Both courts applied the law correctly. Review of the unpublished Opinion is not warranted under RAP 13.4(b).

RESPECTFULLY SUBMITTED this 24th day of March, 2017.

BETTS, PATTERSON & MINES, P.S.

By _____

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CERTIFICATE OF SERVICE

I, Sally Phillips, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on March 24, 2017, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Answer to Petition for Review by Respondents Gregory Vaughn; Paola Leone, and Leone & Vaughn, DDS, P.S.;**
- **Certificate of Service.**

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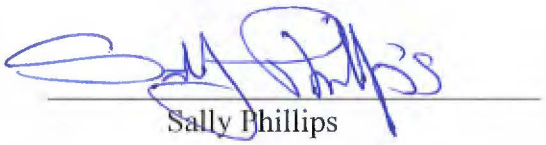
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of March, 2017.



Sally Phillips