FILED
SUPREME COURT
STATE OF WASHINGTON
6/6/2019 3:38 PM
BY SUSAN L. CARLSON
CLERK

No. 97132-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DENISE REAGAN,

Petitioner,

v.

ST. ELMO NEWTON III, M.D.,

Respondent,

RESPONDENT DR. NEWTON'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

Amber L. Pearce, WSBA No. 31626
FLOYD, PFLUEGER & RINGER, P.S.
200 West Thomas Street, Suite 500
Seattle, WA 98119
Telephone: (206) 441-4455
Facsimile: (206) 441-8484

Attorneys for Respondent Dr. Newton

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I. IDENTITY OF RESPONDENT

Respondent St. Elmo Newton, III, M.D. submits this Answer to Denise Reagan's Petition for Review.

II. COURT OF APPEALS DECISION

In its March 5, 2019 published decision, Division II affirmed the trial court's summary judgment dismissal of Denise Reagan's medical malpractice claim—the only issue for which Reagan seeks discretionary review.

Under *de novo* review, Division II held—based on the facts of this case—that "(1) a physical examination during an IME that causes injury to the person being examined constitutes 'health care' under RCW 7.70.010 and therefore Reagan was required to present expert testimony regarding breach of the standard of care, [and] (2) the trial court properly dismissed Reagan's medical malpractice claim against Dr. Newton because she did not present expert testimony addressing the applicable standard of care or whether Dr. Newton had breached that standard[.]" *Reagan v. Newton*, 7 Wn. App. 2d 781, 786, 436 P.3d 411 (2019).

III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

Should this Court deny the petition for review because, under well-established law, the Court of Appeals correctly determined that the trial court properly dismissed her medical malpractice claim because she failed to present evidence establishing a genuine issue of material fact that (1) Dr. Newton breached the standard of care during his independent medical exam of her; and (2) such breach proximately caused her alleged injuries under RCW 7.70.030(1)?

Alternatively, should the Court deny the petition for review because the Court of Appeals decision is harmonious with appellate precedent that Dr. Newton's IME involved "health care" and his limited relationship with Reagan included a duty not to injure her during the examination as contemplated by RCW 7.70.030(1)?

IV. COUNTERSTATEMENT OF THE CASE

A. Nature of the Case and the Appeal

This is a medical malpractice case arising from an injury that Petitioner Denise Reagan allegedly sustained during an Independent Medical Examination (IME) with Respondent Dr. Newton, an orthopedist. Clerk's Papers (CP) at 1-2. She alleged that during the

IME he “manipulated plaintiff’s hip in a manner that subsequently caused injury.” CP at 2:2-3.

Dr. Newton moved for summary judgment dismissal of this claim because she failed to secure expert testimony establishing that his orthopedic maneuver and testing of her hip during his physical examination breached the standard of care, and that such breach proximately caused her injuries. CP at 50-58. The trial court granted dismissal. CP at 215-16.

The Court of Appeals, relying on Supreme Court precedent, affirmed the dismissal of the medical malpractice claim. It held that that RCW 7.70 *et seq*. applied because Dr. Newton was utilizing the skills that he had been taught in examining and diagnosing Reagan, thus his IME examination constituted “health care.” *Reagan*, 7 Wn. App. 2d at 791-93. Division II, relying on harmonious and established appellate precedent, also held that the absence of a “traditional” physician-patient relationship between Reagan and Dr. Newton did not preclude application of RCW 7.70.030(1). *Id*. at 793. Instead, his IME examination and diagnosis of Reagan created a limited physician-patient relationship that imposed on Dr. Newton a duty to follow the accepted standard of care under RCW 7.70.030(1).

Id. at 794-97. Indeed, Division II's decision enhances the public's interest: "if the medical malpractice statute was inapplicable to IMEs, a person negligently injured by an IME physician's malpractice would have no remedy." *Id*. at 798.

Division II affirmed the trial court's dismissal of the medical malpractice claim because Reagan, in opposing summary judgment, did not present evidence sufficient to create a genuine issue of material fact that Dr. Newton failed to follow the accepted standard of care.

B. Relevant Factual and Procedural Background

On June 13, 2013, Denise Reagan was working as a cashier when she sustained on-the-job soft tissue injuries. CP at 11. She filed a worker's compensation claim. Eight months later, on February 21, 2014, she was discharged from physical therapy because "maximum benefit [was] achieved." CP at 17. Regan began light-duty work. CP at 108 (47:17-19).

On May 13, 2014, at L&I's request, Reagan underwent an IME with two doctors: Dennis K.H. Chong, M.D., a physiatrist, and St. Elmo Newton III, M.D., an orthopedist. CP at 13. Reagan states in her petition for review that "evidence in the record contains nothing

to suggest that Dr. Newton provided health care to Ms. Reagan." Pet. Review at 15. Not true.

L&I informed Dr. Newton that the purpose of the physical examination was to ascertain the following:

- What medical/physical restrictions, if any, prevent her from returning to work; which restrictions are related to her industrial claim versus non-industrial conditions; and whether those medical restrictions are permanent or temporary (CP at 162); and

- What is her ability to physically perform the jobs designated on the job analyses, based on The Medical Examiner's Handbook (*Id*.).

L&I requested Dr. Newton's treatment recommendations, including:

- Whether the medical treatment is considered curative or rehabilitative (*Id*.);

- Clearly stating the treatment goals (*Id*.);

- Estimating the length and prognosis of her medical condition (*Id*.); and

- Providing an impairment rating for the medical conditions of a thoracic sprain and cervical and thoracic nonallopathic lesion. (*Id*.)

Dr. Newton, as a medical examiner for L&I, was required to be currently licensed and certified (CP at 184); document a minimum of 768 hours of patient-related services (excluding independent

medical examinations) per calendar year (CP at 185); submit documentation showing fulfillment of continuing medical education hours that "focus on improving the provider's skills in completing IMEs" (*Id.*); and hold a current board certification in his specialty—here, orthopedics (*Id.*). Dr. Newton testified at his deposition that he had been practicing for 47-48 years. CP 203-04.

At the May 13, 2014 IME, Reagan reported pain in her mid-back, neck, left lateral pelvis, and lateral thigh, as well as her left foot. CP at 13. She was "asked at the time of the examination not to engage in any physical maneuvers beyond what she was able to tolerate or which she believed were beyond her limits or which could cause harm or injury." CP at 13; CP at 109 (51:24-52:5).

She told Dr. Newton about her prior 2008 hip injury. CP at 109 (52:15-22). When she arrived at the IME, she was experiencing moderate hip pain, CP at 109 (52:23-53:2), and completed a pain diagram indicating aching pain 7/10, on the left side of her back, hip, and thigh area. CP at 198. Reagan was advised that her medical evaluation "could be stopped at any time and not to allow the evaluation to continue if it caused pain." *Id.*

During Dr. Newton's medical examination, Reagan brought her leg up to 90 degrees of flexion at the hip. She reported discomfort during this maneuver, which was appropriately reflected in the IME report:

> Left hip abduction with reported discomfort to the gluteus medius region. Abduction of 40 degrees, adduction of 30 degrees, hip flexion to 90 degrees with report of discomfort to the left groin.
>
> FADIR stress was positive to the left hip.

CP at 19. Dr. Newton conducted Reagan's examination (CP at 18-19) and provided a diagnosis (CP at 20) utilizing the skills which he had been taught in medical school, his training, and his practice. CP at 203-12. His examination included the above-referenced FADIR test (Flexion, Adduction, and Internal Rotation). CP at 104:12 to 105:1. Reagan alleged that Dr. Newton's administration of the FADIR test negligently caused her injury.

Reagan stated at her deposition that Dr. Newton bent her left knee toward her chest "and took it as far as it would go." CP at 110 (55:5-10). She allegedly told him "I can't go any farther than that." CP at 110 (55:12) According to Reagan, Dr. Newton continued to push, and she "screamed." CP at 110 (55:13) And he allegedly responded: "[t]hat was the reaction I was looking for." CP at 110 (55:14-15).

A few weeks later, Reagan complained of back and left groin/hip pain when she met with her primary care physician, Dr. Bagares. CP at 36. An MRI in September 2014 revealed that she did not suffer from any traumatic injury, and instead had degenerative arthritis in her left hip. CP at 38. Nevertheless, she filed a lawsuit against Dr. Newton, alleging that his negligence in maneuvering her hip during the IME caused her injury. CP at 1-2.

Dr. Newton moved for summary judgment on liability because Reagan failed to present expert testimony generally required to support a claim under RCW 7.70.030(1) that he had breached the applicable standard of care during his examination of Reagan, and that such breach was a proximate cause of her injuries. CP at 50-58.

In response, Reagan did not submit an expert declaration that identified the appropriate standard of care and that Dr. Newton breached that standard of care. Instead, she argued that RCW 7.70 *et seq*. did not apply because Dr. Newton was not providing "health care" during the IME. CP at 71-78. And she submitted declarations from a subsequent IME doctor and her hip surgeon who both opined that her was hip pain was attributable to the IME, "but neither physician offered any opinion regarding the appropriate standard of

care or whether Dr. Newton followed that standard of care during the IME." *Reagan*, 7 Wn. App. 2d at 788.

She also submitted other arguments to the trial court to which she did not assign error on appeal. *See Reagan*, 7 Wn. App. 2d at 807 n.2; CP at 78-79. Because Reagan failed to create a genuine issue of material fact, the trial court properly dismissed her negligence claim as a matter of law, which Division II affirmed.

V. Argument Why Review Should Be Denied

A. None of the Tests in RAP 13.4(b) Is Satisfied.

Under RAP 13.4(b), a petition for review will be accepted *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 published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Here, Reagan contends that the Court should accept review under RAP 13.4(b)(1), (2), and (4). Pet. Review at 10. But nothing in her petition suggests that review would be appropriate under any of these four limited grounds.

For example, Reagan states that Division II's interpretation of "health care" is "contrary to the testimony of Dr. Newton." Pet. Review at 9. But doctors are not lawyers and his testimony—unlike appellate decisions—is not binding law. Further, Reagan concludes, without any cogent analysis, that Division II's decision that "conflicts with every Supreme Court and Court of Appeals' decision that has analyzed the issue" of whether an IME constitutes "health care." Pet. Review at 16. And yet, Division II harmoniously relied on virtually every case Reagan inexplicably cites as a "conflict." *Id*. In sum, Division II rendered a thoughtful, well-reasoned, and sound decision that carefully interpreted Supreme Court and Court of Appeals cases, and advanced the public's interest. Discretionary review should be denied because Reagan's conclusory recitation of RAP 13.4(b)(1), (2), and (4) is unsupported by the arguments in her petition.

B. Division II's Decision Is Harmonious with Supreme Court and Other Court of Appeals Decisions.

To determine "the primary question" of "whether a physical examination during an IME that causes injury to the person being examined constitutes 'health care'" governed by RCW 7.70 *et seq.*

(*Reagan*, 7 Wn. App. 2d at 786), Division II relied on congruent Supreme Court and Court of Appeals precedent.

In defining "health care" Division II aptly noted that the Supreme Court and several Court of Appeals decisions had already adopted a definition for purposes of medical malpractice: ""[T]he process in which [the physician] was utilizing the skills which he had been taught in examining, diagnosing, treating or caring for the plaintiff as his patient."" *Id*. at 792 (quoting *Beggs v. Dep't of Soc. & Health Servs*., 171 Wn.2d 69, 79, 247 P.3d 421 (2011) (second alteration in original) (internal quotation marks omitted) (quoting *Estate of Sly v. Linville*, 75 Wn. App. 431, 439, 878 P.2d 1241 (1994)); *see also Berger v. Sonneland*, 144 Wn.2d 91, 109, 26 P.3d 257 (2001) (same definition); *Branom v. State*, 94 Wn. App. 964, 969-70, 974 P.2d 335 (1999), *review denied*, 138 Wn.2d 1023 (1999) (same definition). Circuitously, Reagan argues that the foregoing cases upon which Division II relied nevertheless conflict with Division II's decision. *See* Pet. Review at 16.

Likewise, Division II, relying on established precedent, noted that "Courts have interpreted 'injuries arising from health care' under RCW 7.70.010 to encompass scenarios *not involving traditional*

patient care." *Reagan*, 7 Wn. App. 2d at 792 (emphasis added), citing examples from *Berger*, 144 Wn.2d at 110 (a physician's unauthorized disclosure of confidential patient information to the patient's ex-husband); *Branom*, 94 Wn. App. at 970-71 (financial and emotional distress injuries to parents arising from a physician's alleged failure to inform them of their infant's medical condition even though the physician did not treat the parents). These cases fall under the umbrella of RCW 7.70 *et seq*. because they are one of three statutorily prescribed causes of action pertaining to health care: negligence, contract or lack of informed consent.

Because Dr. Newton was utilizing the skills which he had been taught in examining and diagnosing Reagan during the IME, his physical exam "falls squarely within the first part of the 'health care' definition." *Reagan*, 7 Wn. App. 2d at 792. Division II's holding is entirely consistent with Supreme Court and Court of Appeals precedent; discretionary review should be denied.

Division II thoughtfully and carefully parsed through the second part of the common law definition of "health care," which "requires that the physician's skillful services be provided to the plaintiff 'as [the physician's] patient."' *Id.* at 793 (quoting *Beggs*, 171

Wn.2d at 79). Division II—relying on *Eelbode v. Chec Med. Ctrs., Inc.*, 97 Wn. App. 462, 984 P.2d 436 (1999) and *Daly v. United States*, 946 F.2d 1467 (9th Cir. 1991) a Ninth Circuit decision applying Washington law—held that a "full" physician-patient relationship is not necessary to pursue a cause of action under RCW 7.70.030(1). *Reagan*, 7 Wn. App. 2d at 794.

In *Eelbode*, a physical therapist allegedly injured a plaintiff while conducting a pre-employment physical examination. *Eelbode*, 97 Wn. App. at 464-65. The *Eelbode* Court held that a claim of failure to follow the accepted standard of care under RCW 7.70.030(1) does not require a physician-patient relationship. *Id*. at 468. Nevertheless, the physical therapist owed a duty to administer a strength test according to accepted standards and to not harm Eelbode. The *Eelbode* Court stated that "the weight of authority from other jurisdictions supports our conclusion that no physician-patient relationship is needed to create liability for a claimed failure to follow the accepted standard of care." *Id*. at 468-69 & n.4.

In *Daly*, which also involved a pre-employment examination, the Ninth Circuit noted that RCW 7.70.030(2) (informed consent) and RCW 7.70.030(3) (promise that injury would not occur)

expressly require a physician-patient relationship. *Daly*, 946 F.2d at 1469. However, RCW 7.70.030(1), the general negligence provision upon which Reagan relies, contains no such requirement. The Ninth Circuit was also persuaded by the "broad definition of potential defendants" as "further evidence of the legislator's intent to impose liability *beyond the context of a physician-patient relationship*." *Id*. (emphasis added). Like the Ninth Circuit, Reagan also embraces this "broad definition." *See* Pet. Review at 13.

The *Daly* Court reasoned that RCW 7.70.030(1) "specifies that any 'health care provider' may be held liable for failing to follow the accepted standard of care," and 'health care providers' is defined in RCW 7.70.020 to broadly "include, among others, opticians, pharmacists, midwives, paramedics, and osteopathic physician's assistants." *Id*. The Ninth Circuit noted that "[n]one of these providers can form a physician-patient relationship, yet all may be held liable under the statute." *Id*.

Finally, Division II's analysis of the definition of "health care" in this case is harmonious with *Judy v. Hanford Envtl. Health Found*., 106 Wn. App. 26, 22 P.3d 810 (2001), *review denied*, 144 Wn.2d 1020 (2001). In *Judy*, Division III agreed with both *Eelbode* and *Daly*,

and stated that RCW 7.70.030 “extends medical malpractice liability beyond the traditional physician-patient relationships.” *Id*. at 37. For example, “[a]ny person acting as an agent of a physician (RCW 7.70.020(2)) and any entity employing a physician or physical therapist (RCW 7.70.020(3)) are also subject to the malpractice statute. The duty to follow the accepted standard of care applies with full force to these health care workers.” *Id*., citing RCW 7.70.030(1) and *Eelbode*, 97 Wn. App. at 497.

In the case at bar, Division II stated that “*Judy* demonstrates that there must be *some* type of direct connection between a physician and an injured person for RCW 7.70.030(1) liability to attach.” *Reagan*, 7 Wn. App. 2d at 795. In *Judy*, however, Division III refused to impose medical malpractice liability because “the factual scenario here is two steps removed from both *Daly* and *Eelbode*.” *Judy*, 106 Wn. App. at 39. In *Judy*, the doctor did not conduct an examination or have any contact with the plaintiff. *Id*. at 37-39.

Here, the *Reagan* Court emphasized the following statement from *Judy*:

> There can be no malpractice when there is not only no doctor-patient relationship, but no contact, no intent to

> diagnose, treat or otherwise benefit the patient, *no injury directly caused by the examination*, no failure to diagnose or notify the patient of an illness disclosed by the examination, and no dispute as to the accuracy of the reported results.

Reagan, 7 Wn. App. 2d at 795 (quoting *Judy*, 106 Wn. App. at 39). Based on the foregoing, Division II explained that Dr. Newton's IME was similar to the pre-employment examinations in *Eelbode* and *Daly*, thus the absence of a traditional physician-patient relationship between Reagan and Dr. Newton did not preclude the application of RCW 7.70.030(1). *Reagan*, 7 Wn. App. 2d at 795. "And unlike in *Judy*, Dr. Newton did have a connection with Reagan—he allegedly injured her during his examination." *Id*.

Division II not only decided this case harmoniously with the foregoing Supreme Court and Court of Appeals precedent, it also surveyed cases from other jurisdictions that an IME doctor owes a duty not to injure an examinee and is subject to medical malpractice liability for such injury. *Id*. at 795.

In the trial court, Reagan advanced the argument that IME doctors and examinees have a "limited physician-patient relationship." CP at 76-78. She cited, explained and attached the Michigan decision of *Dyer v. Trachtman*, 470 Mich. 45, 679 N.W.2d

311 (Mich. 2004) in support of her position. CP at 77. Division II found *Dyer* persuasive and agreed with the characterization that the relationship between an IME physician and examinee is "not a traditional one," but a "limited one," which acknowledges an IME doctor's duty to perform the examination in a manner not to cause harm to the examinee. *Reagan*, 7 Wn. App. 2d at 796, citing *Dyer*, 679 N.W.2d at 315-16.

Reagan now contradicts herself and takes the contrary position in her petition for review that *Dyer* "is not helpful to an analysis of a forensic examiner's liability under Washington's medical malpractice statute." Pet. Review at 18. Further, she inexplicably contends that the "holding of *Dyer* that a limited relationship exists between examiner and examinee is of little help in this case" (*Id*. at 19) and that the Court of Appeals reliance on it was "erroneous." *Id*. at 20.

But it is well established that "this court will not consider matters not presented to the trial court, nor will this court review a case on a theory different from that in which it was presented at the trial level." *Matthias v. Lehn & Fink Prods. Corp.*, 70 Wn.2d 541, 543, 424 P.2d 284 (1967); *see also Mueller v. Garske*, 1 Wn. App.

406,409, 461 P.2d 886 (1969) ("A party is not permitted to take inconsistent positions in judicial proceedings. It is not as strictly a question of estoppel as it is a rule of procedure based on manifest justice and on a consideration of orderliness, regularity and expedition in litigation.") Accordingly, because Reagan's position in the Supreme Court is inconsistent with her position in the trial court, it is impermissible and unjust. The Court should disregard her arguments that are now contrary to *Dyer v. Trachtman*.

Reagan asserts that there can be no doctor-patient relationship because "the relationship between examiner and examinee is often adversarial." Pet. Review at 11. But she submits no factual or legal authority to support this short-sighted conclusion other than a Michigan case that she now contends does not apply.

Her assertion is belied by the record. "The purpose of an IME is to gather information, not to conduct an adversarial proceeding." CP at 192. "The purpose of the IME is to provide information to assist in the determination of the level of any permanent impairment not to conduct an adversarial procedure." *Id.* Claims managers at L&I rely on IME doctors for their "unbiased, objective examinations and

ratings" to help them administer claims "effectively and fairly." CP at 173.

Notwithstanding L&I's policy of a non-adversarial process and medical examination, Reagan ignores the fact that even "traditional" doctor-patient relationships are subject to adversity under RCW 7.70 *et seq.* when the patient files a lawsuit against the doctor.

Finally, Reagan engages in a lengthy statutory analysis of the definition of "health care" (Pet. Review at 12-13), but as Division II explained "the Supreme Court and several Court of Appeals decisions have adopted the following definition of health care for purposes of the medical malpractice statute[.]" *Reagan*, 7 Wn. App. 2d at 791. Thus, there is no need to engage in a statutory interpretation. Nor does Reagan explain why the long-adopted definition of "health care" is untenable under RAP 13.4(b).

VI. CONCLUSION

Division II rendered a thoughtful, well-reasoned, and sound decision that carefully interpreted Supreme Court and Court of Appeals cases, and advanced the public's interest. There is no valid basis for the Supreme Court to accept review under RAP 13.4(b)(1),

(2), or (4). Accordingly, Reagan's petition for review should be denied.

Respectfully submitted this 6th day of June, 2019.

FLOYD, PFLUEGER & RINGER, P.S.

/s/ Amber L. Pearce
Amber L. Pearce, WSBA No. 31626
apearce@floyd-ringer.com
200 West Thomas Street, Suite 500
Seattle, WA 98119
Telephone: 206-441-4455
Attorneys for Respondent
St. Elmo Newton III, M.D.

CERTIFICATE OF SERVICE

The undersigned certifies that on June 6, 2019, I caused to be served via email and first class mail a true and correct copy of the foregoing Brief of Respondent to:

Bruce Colven Caron, Colven, Robinson & Shafton, P.S. 900 Washington, Suite 1000 Vancouver, WA 98660	☒ VIA WASHINGTON STATE APPELLATE COURTS' E-FILING PORTAL ☐ VIA FACSIMILE: ☐ VIA MESSESNGER ☒ VIA U.S. MAIL

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

DATED at Seattle, Washington on the 6th day of June, 2019.

/s/ Susan L. Klotz
Susan L. Klotz
Legal Assistant

FLOYD PFLUEGER & RINGER PS

June 06, 2019 - 3:38 PM

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Filed with Court:	Supreme Court
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Appellate Court Case Title:	Denise Reagan v. St. Elmo Newton III, MD
Superior Court Case Number:	15-2-03322-4

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Sender Name: Susan Klotz - Email: sklotz@floyd-ringer.com
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