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NO. 89866-9

SUPREME COURT OF THE STATE OF WASHINGTON

PHYLLIS PAETSCH,

Appellant,

v.

SPOKANE DERMATOLOGY CLINIC, P.S., a Washington corporation; and WILLIAM P. WERSCHLER, M.D., individually,

Respondents.

RESPONDENTS' ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

Mary H. Spillane, WSBA #11981
WILLIAMS, KASTNER & GIBBS PLLC
Attorney for Respondents

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

ORIGINAL

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I. INTRODUCTION

Citing *Daly v. United States*, 946 F.2d 1467 (9th Cir. 1991); *Eelbode v. v. Chec Med. Ctrs., Inc.*, 97 Wn. App. 462, 984 P.2d 436 (1999); and *Judy v. Hanford Envtl. Health Found.*, 106 Wn. App. 26, 22 P.3d 810, *rev. denied*, 144 Wn.2d 1020 (2001), Washington State Association of Justice Foundation ("WSAJF") erroneously claims that the parties and the courts below have "overlooked relevant precedent," and have assumed that proof of a physician-patient relationship is a prerequisite to imposing a duty on a health care provider under chapter 7.70 RCW. *WSAJF Br. at 2, 3 n.1, 9-13.* WSAJF asserts that this Court's review "should encompass the issue of whether a physician-patient relationship is necessary between Werschler and Paetsch, in order to give rise to a duty under Ch. 7.70 RCW." *WSAJF Br. at 3, n.1.* While acknowledging that this Court granted review "on all issues except the issues of informed consent," WSAJF also claims that the analysis of that issue "requires consideration of both the medical negligence and informed consent contexts." *Id.*

Then, in rather circular and confusing fashion, WSAJF argues that proof of the existence of physician-patient relationship is not a prerequisite to imposition on a health care provider of the duties to follow the standard of care under RCW 7.70.040 or to obtain the patient's informed consent

under RCW 7.70.050. Rather, according to WSAJF, it is the provision of health care – "'the process in which [a physician is] utilizing the skills which [the physician] had been taught in examining, diagnosing, treating or caring for the plaintiff as [the physician's] patient,'" *WSAJF Br. at 7* (quoting *Berger v. Sonneland*, 144 Wn.2d 91, 109, 26 P.3d 257 (2001)) – from which it acknowledges "[t]he existence of physician-patient relationship follows by operation of law," *WSAJF Br. at 15*, that gives rise to the duties imposed by RCW 7.70.040 and RCW 7.70.050. *WSAJF Br. at 3-4, 7, 9, 14-15.*

WSAJF's argument is tangential at best, finds no grounding in the facts or arguments preserved below, and effectively asks this Court to draw a distinction without a difference and opine on matters that would be mere dicta in this case. Although WSAJF exhorts this Court to resolve the issues on review in accordance with its argument, *WSAJF Br. at 15*, it never attempts to explain how its argument applies in this case, much less how it would require reversal of the trial court's or the Court of Appeals' decisions concerning the dismissal of Ms. Paetsch's liability claims against Dr. Werschler.

Indeed, even if WSAJF is correct that it is the provision of health care that is required to impose on a health care provider one or more of the duties set forth in chapter 7.70 RCW, the fact remains that Dr. Werschler

personally did not provide any health care to Ms. Paetsch. Under WSAJF's argument, because Dr. Werschler did not personally provide any health care to Ms. Paetsch, he personally owed her no duty under chapter 7.70 RCW (and had no physician-patient relationship with her). The dismissals of her claims that he was individually (personally) liable for her claimed injuries were proper and should be affirmed.

II. FACTS RELEVANT TO DISMISSAL OF CLAIMS AGAINST DR. WERSCHLER

Wanting Botox injections to smooth out some facial wrinkles, Ms. Paetsch called her dermatologist's office and was told that they did not do Botox injections, but that Spokane Dermatology Clinic did. RP 729-30, 732, 891. Ms. Paetsch had never heard of Spokane Dermatology Clinic, but looked it up in the phone book, and called to make an appointment. RP 732. When asked if she knew who she would like to see, Ms. Paetsch did not ask to see anyone in particular, but stated that she had not been there before and had no preference. RP 738, 894-95. An appointment was made for February 26, 2007, and she was told it would be with Dan Rhoads. RP 747, 750, 894-95. Dan Rhoads, PA-C was a physician assistant employed by Spokane Dermatology Clinic and had extensive experience performing cosmetic injections. RP 1101, 1105-10, 1142-45,

1148-51, 1390-93, 1446-47, 1525.[1]

Ms. Paetsch did no research on Spokane Dermatology Clinic or its providers before calling the Clinic or keeping her appointment with Mr. Rhoads. She admits that she had never heard of Dr. Werschler and had no expectation of seeing him or having him perform her injections. RP 895, 898. She never sought any care specifically from Dr. Werschler and he never provided treatment to her. RP 939. Even though Dr. Werschler's name appears on some intake or consent forms she signed before Dan Rhoads performed her cosmetic injections, Ms. Paetsch never testified that she relied on Dr. Werschler's name appearing on any of those forms, but instead admitted that she had not heard of, and had no expectation of seeing, Dr. Werschler. RP 895-96. The first time Ms. Paetsch heard of Dr. Werschler, was on March 4, 2007, when a nurse in the emergency room told her that Dr. Werschler was the owner of Spokane Dermatology Clinic. RP 802, 919.

On the three occasions when Ms. Paetsch saw Dan Rhoads at Spokane Dermatology Clinic, Dr. Smith, not Dr. Werschler, was Mr. Rhoads' supervisor, as is apparent from the fact that Mr. Rhoads' chart

[1] In February 2007, Spokane Dermatology Clinic had two dermatologists, Dr. Werschler and Dr. Scott Smith. RP 1100, 1157; CP 39-41, 96-97. Dr. Smith was Mr. Rhoads' WAC 246-918 supervising physician. RP 1157; CP 40-41, 96-97. Dr. Werschler was Mr. Rhoads' alternate supervisor, responsible for reviewing Mr. Rhoads' work only in Dr. Smith's absence. RP 1157-58; WAC 246-918-140(4).

entries for those three visits bear Dr. Smith's, not Dr. Werschler's, initials. RP 1189-90; CP 136, 152, 155, 158. Indeed, when Ms. Paetsch developed her post-injection complications and called to speak with Mr. Rhoads on February 28, and kept appointments with him on March 2, and March 6, 2007, Dr. Werschler was not at the Clinic. RP 1130; *see also* RP 1134-38, 1185-87, 1325. Dr. Werschler thus had no opportunity, and was not asked, to become involved in Ms. Paetsch's care when she presented with her post-injection complications. RP 1136-38; *see also* RP 1428-29, 1520-22, 1524-25.

III. ARGUMENT

As to Dr. Werschler, contrary to WSAJF's assertions, the issue in this case is not whether the existence of a physician-patient relationship is always a prerequisite to the imposition on a health care provider of a duty to follow the accepted standard of care under chapter RCW 7.70. The issue is whether the courts below correctly determined that, under the undisputed facts adduced on motion for summary judgment and at trial, Dr Werschler could have no individual liability to Ms. Paetsch in connection with the performance of her cosmetic injections or her follow-up care. Because Ms. Paetsch claimed in the courts below that Dr. Werschler, who never saw or cared for Ms. Paetsch, could have individual liability based on her arguments that he allegedly had a physician-patient relationship

with her or that she had allegedly contracted with him to personally perform her cosmetic injections or her follow-up care, the courts below addressed, but rejected, those arguments. Neither court below held that no duty under chapter RCW 7.70 can ever exist in the absence of a physician-patient relationship. This Court should reject WSAJF's attempt to turn this case into something it is not, to get issues addressed that the parties have not raised and that do not matter in this case, or to expand the scope of review granted by this Court.[2]

A. Contrary to WSAJF's Assertion, *Daly*, *Eelbode*, and *Judy* Are Not Relevant, Much Less Controlling, Authorities that the Parties or the Courts Below Overlooked.

Daly, *Eelbode*, and *Judy* all dealt with the issue of whether an employee has a cause of action for failure to follow the accepted standard of care under chapter 7.70 RCW against a health care provider who performs an employment evaluation on behalf of the employer, even though no physician-patient (or health care provider-patient) relationship with the employee exists in that setting. In *Daly*, *Eelbode*, and *Judy*, the courts noted that, under chapter 7.70 RCW, a physician-patient

[2] As WSAJF acknowledges, *WSAJF Br. at 3, n.1*, this Court granted Ms. Paetsch's petition for review "on all issues except the issues of informed consent." Yet, WSAJF seeks to have this Court make an unnecessary foray into determining whether statements made in *Daly* and *Eelbode*, that the injured person must be a patient (and thus a physician-patient relationship must exist) for purposes of an informed consent claim under RCW 7.70.050 are correct. *See WSAJF Br. at 3 n.1, 12-15, and 13 n.6 and n.7.* Such a foray would exceed the scope of this Court's grant of review and is unnecessary as it would have no bearing on the issues in this case.

relationship with the injured party was not required to create liability for failure to follow the standard of care. *See Daly*, 946 F.2d at 1469-71 (radiologist conducting pre-employment screening x-ray could be held liable for failure to follow the accepted standard of care when he failed to correctly diagnose, or at least notify the employee of, an abnormal finding on x-ray which several years later was determined to be sarcoidosis); *Eelbode*, 97 Wn. App. at 467-69 (physical therapist, who undertook to administer a pre-employment test owed a duty to comply with the accepted standard of care in performing the test, and thus could be held liable for injury sustained by the employee as a result of negligent administration of the test); *Judy*, 106 Wn. App. at 37 (court recognized that "[i]n Washington, the medical malpractice act, chapter 7.70 RCW, extends malpractice liability beyond traditional physician-patient relationships," but found no basis to impose liability on physician who had no contact with the employee and who competently fulfilled employer's request to compare the employee's physical capacity – as determined by testing done by another health care provider – with the requirements of her job and report those results back to employer). Those courts also acknowledged that the extent of the duty imposed in such cases was not boundless.

Neither the *Daly* nor the *Eelbode* court attempted to establish the full scope or extent of the physician's duty to the employee in the employment examination context. Rather the *Daly* court stated that it need not determine "the exact contours" of the physician's duty in the setting of pre-employment examinations, but, consistent with the expert testimony adduced at trial, concluded that at a minimum the examining radiologist should have informed the employee of the abnormality. *Daly*, 946 F.2d at 1470. Similarly, the *Eelbode* court did not feel that it was required to set "the outer limits of the duty owed," but concluded that it did encompass a duty on the part of the physical therapist to perform the test at issue according to the accepted standard of care. *Eelbode*, 97 Wn. App. at 468. Nonetheless, both the *Daly* and *Judy* courts made clear that the duty of the examining physician (or other examining health care provider) in the context of employment examinations "should be less extensive" than the duty of a treating physician (or other treating health care provider) who does have a physician-patient relationship with his or her patient. *Daly*, 946 F.2d at 1470; *Judy*, 106 Wn. App. at 38(citations omitted).

This is not a case arising out of an employment examination. This case has nothing to do with the duties health care providers performing employment examinations at the behest of employers owe to the

employees being examined. In this case, the parties have not argued, and the courts below did not hold, that no duty to comply with the applicable standard of care under chapter RCW 7.70 can be imposed for injury occurring as a result of health care absent the existence of a physician-patient relationship between the injured plaintiff and the defendant physician. Thus, the factual scenarios in *Daly*, *Eelbode*, and *Judy* and the issues those cases addressed are far removed from the facts and issues in this case.

To the extent that any of those decisions may have any bearing on this case, however, it would seem to be *Judy*, where the court made clear that, even in the employment examination context:

> 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.

Judy, 106 Wn. App. at 39. Here, Dr. Werschler personally had no physician-patient relationship with Ms. Paetsch, personally provided no care to her, and personally had no contact with her. Nor did Ms. Paetsch have any expectation that Dr. Werschler would be involved in her care. Thus, there is no basis for imposing individual malpractice liability on Dr. Werschler.

B. This Court Should Reject WSAJF's Invitation to Engage in an Abstract Discussion of Issues that Make No Difference in this Case.

WSAJF urges this Court to hold that it is not the existence of a physician-patient relationship, but rather the provision of health care (from which it says "[t]he existence of the physician-patient relationship follows by operation of law," WSAJF Br. at 15), that imposes on a health care provider the duties set forth in chapter 7.70 RCW – whether it be the duty to follow the standard of care, or the duty to obtain informed consent. Given that, even according to WSAJF, the provision of health care necessarily creates a physician-patient relationship, it is unclear what distinction WSAJF seeks to draw, or what difference the distinction makes. Further, since WSAJF proffers no analysis of how the distinction it seeks to draw aids in resolving the issues presented in this case, it is difficult to discern why this Court needs to draw any such distinction.

In this case, the fact remains that Dr. Werschler personally did not provide any care to Ms. Paetsch, nor did she have any expectation that he personally would do so. Thus, even under WSAJF's argument, because he personally did not provide any health care to Ms. Paetsch, he personally owed her no duty under chapter 7.70 RCW, and thus could not be held individually liable for her claimed injuries.

Ultimately, it appears that what WSAJF really desires is to have this Court issue a pronouncement that the courts in *Daly* and *Eelbode* incorrectly stated that, while no physician-patient relationship was required for a claim of failure to follow the accepted standard of care under RCW 7.70.030(1), the injured person must be a patient (and thus there must be a physician-patient relationship) for a cause of action for failure to obtain informed consent under RCW 7.70.030(2). *See WSAJF Br. at 12-15*; *Daly*, 946 F.2d at 1469, 1471; *Eelbode*, 97 Wn. App. at 467. Yet, WSAJF at least tacitly, if not explicitly, recognizes that such a pronouncement is beyond the scope of the review that this Court granted, as this Court granted review "on all issues except the issue of informed consent." *WSAJF Br. at 3 n.1, 13 n.6* (citing the "limited grant of review"). Moreover, deciding whether a physician-patient relationship is required for an informed consent claim under chapter 7.70 RCW is not necessary to decide any issue raised in this case. And, in any event the courts' statements in *Daly* and *Eelbode* concerning the need for the injured person to be the patient for purposes of an informed consent claim are correct, *see Crawford v. Wojnas*, 51 Wn. App. 781, 785, 754 P.2d 1302, *rev. denied*, 111 Wn.2d 1027 (1988) (holding that duty to obtain informed consent did not extend to mother, who contracted polio from vaccine given to her daughter, as mother "was not a patient, and thus was not a

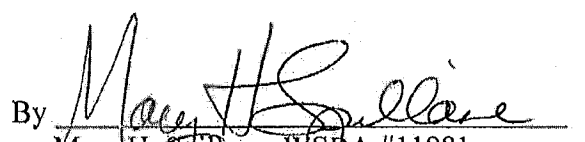
person whose interests are protected by the doctrine of informed consent"); RCW 7.70.050(1) (setting forth the elements of an informed consent including the elements that "the health care provider failed to inform the patient ..." and that "the treatment in question proximately caused injury to the patient.").

IV. CONCLUSION

For the foregoing reasons and those set forth in the Brief of Respondent, the Answer to Petition for Review, and the Supplemental Brief of Respondents, this Court should affirm the decision of the Court of Appeals and the trial court's entry of judgment on the jury's defense verdict and denial of Ms. Paetsch's motion for new trial.

RESPECTFULLY SUBMITTED this 27th day of August, 2014.

WILLIAMS, KASTNER & GIBBS PLLC

By 
Mary H. Spillane, WSBA #11981
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 27th day of August, 2014, I caused a true and correct copy of the foregoing document, "Respondent's Answer to Brief of Amicus Curiae Washington State Association for Justice Foundation," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Appellant: Mary E. Schultz, WSBA #14198 MARY SCHULTZ LAW PS 2111 E. Red Barn Lane Spangle, WA 99031 Ph: (509) 245-3522 Fx: (509) 245-3308 Email: Mary@mschultz.com	SENT VIA: ☐ Fax ☐ ABC Legal Services ☐ Express Mail ☑ Regular U.S. Mail ☑ E-file / E-mail
Counsel for Respondents: William F. Etter, WSBA #09158 Ronald A. Van Wert, WSBA #32050 ETTER, MCMAHON, LAMBERSON, CLARY & ORESKOVICH, P. C. 618 West Riverside Avenue, Suite 210 Spokane WA 99201-0602 Ph: (509) 747-9100 Fx: (509) 623-1439 Email: mblaine@ettermcmahon.com rvw@ettermcmahon.com	SENT VIA: ☐ Fax ☐ ABC Legal Services ☐ Express Mail ☑ Regular U.S. Mail ☑ E-file / E-mail
Counsel for Amicus Curiae WSAJF: Bryan P. Harnetiaux, WSBA #05169 ATTORNEY AT LAW 517 E 17th Ave Spokane WA 99203-2210 Ph: (509) 624-3890 Email: bryanpharnetiauxwsba@gmail.com	SENT VIA: ☐ Fax ☐ ABC Legal Services ☐ Express Mail ☐ Regular U.S. Mail ☑ E-file / E-mail

Counsel for Amicus Curiae WSAJF:
George M. Ahrend, WSBA #25160
AHREND ALBRECHT PLLC
16 Basin St SW
Ephrata WA 98823-1865
Ph: (509) 764-9000
Email: gahrend@trialappeallaw.com

SENT VIA:
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DATED this 27th day of August, 2014, at Seattle, Washington.

Carrie A. Custer

Carrie A. Custer, Legal Assistant

OFFICE RECEPTIONIST, CLERK

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From: Custer, Carrie [mailto:CCuster@williamskastner.com]
Sent: Wednesday, August 27, 2014 12:45 PM
To: OFFICE RECEPTIONIST, CLERK
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Dear Clerk of Court,

Attached for filing in .pdf format is Respondents' Answer to Brief of Amicus Curiae Washington State Association for Justice Foundation in *Paetsch v. Spokane Dermatology Clinic, P.S. and Dr. Werschler,* Supreme Court Cause No. 89866-9. The attorney filing this answer is Mary Spillane, WSBA No. 11981, (206) 628-6656, e-mail: mspillane@williamskastner.com.

Respectfully submitted,

Carrie A. Custer
Legal Assistant to Mary H. Spillane and Jake Winfrey
Williams Kastner
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Main: 206.628.6600
Direct 206.628.2766
Fax: 206.628.6611
ccuster@williamskastner.com
www.williamskastner.com

WILLIAMS KASTNER™

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