

FILED
SUPREME COURT
STATE OF WASHINGTON
10/8/2021 10:36 AM
BY ERIN L. LENNON
CLERK

NO. 100219-0

SUPREME COURT OF THE STATE OF WASHINGTON

PIL CHIN YUN,
Petitioner,

v.

ST. FRANCIS HOSPITAL ER, PCU,
Respondent,

ERIC NUSSBAUM,
Defendant.

**RESPONDENT'S ANSWER TO PETITION FOR
REVIEW**

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I. IDENTITY OF RESPONDING PARTY

Respondent St. Francis Hospital submits this answer to Petitioner Pil Chin Yun's Petition for Review.

II. COURT OF APPEALS DECISION

In an unpublished August 16, 2021 opinion, Division I of the Court of Appeals affirmed the trial court's order dismissing Mr. Yun's medical malpractice lawsuit against St. Francis Hospital because Mr. Yun failed to produce expert medical testimony to support his claims on standard of care or causation as the law required. Slip Op. at 1.

At St. Francis Hospital in August 2016, Mr. Yun's 93-year-old mother, Wol R. Yun, succumbed to progression of an untreated, severely infected gallstone coupled with gastric cancer. Shortly before the third anniversary of Mrs. Yun's death, Mr. Yun, one of Mrs. Yun's several adult children, sued St. Francis, alleging wrongful death and survival action claims based on allegedly negligent health care that he asserted caused his mother's death. When faced with St. Francis Hospital's

summary judgment motion, Mr. Yun failed to produce any expert medical testimony to support his claims. The trial court correctly granted St. Francis Hospital's summary judgment motion, and Division I properly affirmed. This decision is not in conflict with any decision of this Court or the Courts of Appeals, nor does it involve a constitutional question or issue of substantial public importance so as to warrant this Court accepting review.

III. COUNTERSTATEMENT OF ISSUES

Did the trial court correctly grant summary judgment dismissing Mr. Yun's medical malpractice lawsuit when Mr. Yun failed to produce the expert medical testimony needed to support his medical malpractice claims?

IV. COUNTERSTATEMENT OF THE CASE

A. Factual Background.

When Wol Yun arrived by ambulance at the St. Francis Emergency Department on August 9, 2016, she was a 93-year-old, confused, 74-lb. patient who was critically ill. CP 114, 123, 144, 215. Her blood pressure was low at 94/48, and her heart

rate was elevated at 108 beats per minute. CP 120, 215. Her family reported that she had a history of gallbladder problems, requiring multiple surgeries in the past, and that she had diffuse abdominal pain with nausea, vomiting, and lethargy for at least the past several days. CP 112, 215. Mrs. Yun's condition deteriorated rapidly shortly after she arrived in the emergency department, necessitating intubation to protect her airway in anticipation of a potential Code Blue, and placement of a central line for rapid medication and fluid administration. CP 114-15, 117-18, 132, 215. The emergency medicine physician ordered further evaluations of Mrs. Yun's symptoms, including imaging, additional blood work, and cardiac tests. CP 116-216.

The emergency medicine physician also requested inpatient hospitalization and consultations from multiple specialists, including a hospitalist, gastroenterologist, cardiologist, and general surgeon. CP 116, 120, 216. The gastroenterologist who examined Mrs. Yun in the emergency department suspected that the gallstone had been present for

some time, and had caused sepsis. CP 122-23, 216. He agreed with the emergency medicine physician's plan to continue empiric antibiotics and supportive care. CP 123.

As Mrs. Yun's preliminary test results came back, her doctors admitted her to the Progressive Care Unit with diagnoses of septic shock, acute metabolic encephalopathy (brain malfunction), acute renal (kidney) failure, elevated troponin (an enzyme indicating potential cardiac injury), malnutrition, anemia, and suspected acute ascending cholangitis with a large stone in the bile duct. CP 130-31, 216. Given the gravity of Mrs. Yun's condition, gastroenterology and surgery concluded that she was too unstable for any kind of surgical procedure. *Id.* Also, imaging revealed a gastric malignancy (cancer), further making surgical intervention on her gallstone contraindicated. CP 154, 156-57. Her doctors planned to follow a sepsis protocol, including IV fluids, vasopressors, and IV antibiotics, to treat her emergent conditions. CP 131.

Despite this treatment, Mrs. Yun continued to decompensate, requiring transfer to the Intensive Care Unit. CP 140-41, 217. A critical care specialist who evaluated Mrs. Yun in the ICU described Mrs. Yun as very fragile and in critical condition with a poor prognosis due to sepsis from ascending cholangitis with a stone in the common bile duct. *Id.* Mrs. Yun's sepsis had caused acute respiratory failure, confirming that her intubation and mechanical ventilation were necessary. CP 140, 217. The critical care specialist had a long conversation with Mrs. Yun's children, explaining that she was at very high risk of dying whether treated medically or surgically. CP 141, 217.

Critical care supported Mrs. Yun with fluids, medications, and mechanical ventilation. CP 155-57, 217. Notwithstanding these efforts, Mrs. Yun still continued to deteriorate. *Id.* Her physicians believed that she had been slowly declining within the past year, culminating in septic shock and multi-organ system failure. CP 150, 156-57, 217. After Mrs. Yun's doctors explained her grave condition, her family elected to pursue

comfort care and forgo further futile medical intervention. CP 157. She was placed on “do not resuscitate” status, and passed away on August 12, 2016. CP 157, 213, 217.

B. Procedural History.

On August 9, 2019, Mrs. Yun’s adult son, Pil Chin Yun, filed this wrongful death and survival action, alleging that negligent health care at St. Francis Hospital caused his mother’s death. CP 3-11. St. Francis denied these allegations. CP 26-30.

After Mr. Yun failed to identify any experts in discovery, *see* CP 165, 175, 178-79, 187, 199-200, St. Francis moved for summary judgment, CP 88-103. While not required to do so, St. Francis supported its motion with the declaration of critical care specialist Dr. Curtis Veal, who attested that none of the St. Francis providers breached the standard of care or caused Mrs. Yun’s death. *Id.*; CP 214-18. St. Francis noted its motion for hearing on April 3, 2020, well beyond CR 56’s 28-day response period, to give Mr. Yun additional time to respond. CP 86-87.

Neither his response nor his sur-response included an expert declaration. *See* CP 243-329, 432-39. Instead, Mr. Yun contended that expert testimony may not be necessary in his case. CP 254-55, 437-38. At the summary judgment hearing, Mr. Yun produced no experts. *See* RP. The trial court accordingly granted St. Francis's summary judgment motion because Mr. Yun had failed to produce an expert declaration supporting his medical malpractice claims, RP 27-29. Mr. Yun moved for reconsideration, again reiterating his position that an expert "may not be necessary," CP 558-59. The trial court denied Mr. Yun's motion for reconsideration, CP 562-64, and Mr. Yun appealed, CP 565-66.

Division I affirmed, holding that Mr. Yun was required, but failed, to produce expert testimony to support his medical malpractice lawsuit on both standard of care and causation. Slip Op. at 3-4.

Mr. Yun subsequently petitioned this Court for review.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. This Court should decline review because Mr. Yun has failed to cite appropriate authority.

RAP 13.4(b) allows this Court to accept 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 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.

This Court need not consider arguments that are not supported by pertinent authority or meaningful analysis. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by authority); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (insufficiently argued claims); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345,

779 P.2d 249 (1989) (arguments not supported by adequate argument and authority).

Here, Mr. Yun has not even cited RAP 13.4(b), let alone provided pertinent authority or meaningful analysis establishing that Division I's decision meets any RAP 13.4(b) criteria so as to warrant this Court accepting review. Based on that failure alone, this Court should decline to accept discretionary review.¹

B. This Court should decline to accept review because no RAP 13.4(b) consideration applies.

Division I correctly concluded that Mr. Yun's medical malpractice lawsuit, like the vast majority of medical malpractice cases, required expert medical testimony on both standard of care and causation, and correctly affirmed dismissal based on Mr. Yun's failure to produce an expert in response to St. Francis Hospital's summary judgment motion. Slip Op. at 3-4. Division

¹ Although Mr. Yun now appears to be unrepresented, pro se litigants in Washington are held to the same standards as attorneys and subject to the same "procedural and substantive laws." *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993).

I's decision is not in conflict with any decision of this Court or of the Courts of Appeals so as to warrant this Court's review under RAP 13.4(b)(1) or (2), nor does Mr. Yun's petition involve a significant question of law under the Constitution or an issue of substantial public interest so as to warrant this Court's review under RAP 13.4(b)(3) or (4).

1. All Washington authorities confirm that Mr. Yun was required to support his medical malpractice lawsuit with expert testimony.

It is undisputed that Mr. Yun never produced any expert testimony in opposition to St. Francis Hospital's summary judgment motion and, despite his contrary position below, *see* CP 254-55, 437-38, 558-59, he conceded on appeal, *App. Br. at 16*, that the law required expert support for his medical malpractice claims. He now appears to revert back to his original position, contending, *Pet. at 2-3*, that he did not need an expert after all. He is incorrect. It is well-established that in a medical negligence lawsuit like Mr. Yun's, where the medical facts are not observable by laypersons and describable without medical

training, the plaintiff is required to produce an expert to establish standard of care, breach thereof, and causation. Both the trial court and Division I reached this correct conclusion.

In a medical malpractice action, a plaintiff must prove that “[t]he 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 or she belongs, in the state of Washington, acting in the same or similar circumstances.” *Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 86, 419 P.3d 819 (2018) (citing *Miller v. Jacoby*, 145 Wn.2d 65, 71-72, 33 P.3d 68 (2001)).

“In general, expert testimony is required when an essential element in the case is best established by an opinion which is beyond the expertise of a layperson.” *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). In medical malpractice actions, “[u]sually the standard of care must be established by expert testimony.” *McLaughlin v. Cooke*, 112 Wn.2d 829, 837, 774 P.2d 117 (1989) (citing *Harris*, 99 Wn.2d at 449). “Absent

exceptional circumstances..., expert testimony will be necessary to show whether or not a particular practice is reasonably prudent. It will also usually be necessary to prove causation.” *Harris*, 99 Wn.2d at 451; *see also Berger v. Sonneland*, 144 Wn.2d 91, 110-11, 26 P.3d 257 (2001) (“[m]edical testimony on proximate cause is required in medical malpractice cases”).

Rare cases where expert testimony is unnecessary exist only when the medical facts are “observable by laypersons and describable without medical training.” *Berger*, 144 Wn.2d at 111. “For example, technical medical expertise is not required in cases where a physician amputates the wrong limb or pokes a patient in the eye while stitching a wound on the face.” *Id.*; *see also McLaughlin*, 112 Wn.2d at 837 (expert testimony required to prove doctor violated standard of care in performing vasectomy and that the procedure caused injuries). Beyond the obvious, a layperson generally cannot observe or describe whether a particular medical practice is reasonably prudent. *See Harris*, 99 Wn.2d at 449.

Here, consistent with decisions of this Court and the Courts of Appeals, Division I correctly determined that evaluating whether Mrs. Yun's providers violated their standards of care and caused harm is beyond the understanding of a layperson and thus requires expert testimony. Slip Op. at 4. Mr. Yun alleges that staff at St. Francis committed medication errors, *Pet. at 4*, provided untimely medical care, *Pet. at 5*, failed to adequately intubate and place an endotracheal tube, *Pet. at 6*, inappropriately treated hypotension, *Pet. at 7*, and failed to diagnose and properly treat gastric malignancy, *Pet. at 8-9*, and thereby caused his elderly mother's death, *Pet. at 9-10*. These allegations in and of themselves demonstrate the need for expert medical testimony on both standard of care and causation. The appropriateness of the complex, multispecialty medical care that was rendered to Mrs. Yun, an ill 93-year-old with multiple comorbidities including advanced cancer, and whether any of that care proximately caused her death, are beyond the understanding of laypersons and require expert testimony to explain.

St. Francis Hospital's own expert medical testimony further underscores why Mr. Yun needed expert medical testimony to support his medical malpractice claims here. Dr. Curtis Veal, an experienced internal medicine, pulmonary disease, and critical care specialist, fully supported the care that Mrs. Yun received at St. Francis Hospital. CP 217.²

Dr. Veal's opinions confirmed that the care Mrs. Yun received in the days preceding her death was complex, involving multiple medical specialists who were treating multifaceted conditions, and was therefore well beyond the type observable

² Dr. Veal addressed Mr. Yun's specific concerns as follows: "I saw no evidence of any medication errors, route of administration errors, or negligently placed endotracheal tube or central line." CP 217. Dr. Veal similarly dismantled Mr. Yun's argument that the St. Francis staff failed to adequately work up his mother's gastric malignancy, opining that "because Ms. Yun was critically ill and unstable vis-à-vis respiratory failure and septic shock, further investigation as to what was almost certainly incurable gastric cancer would not have been indicated or appropriate and was absolutely not required by the standard of care." CP 217-18. Thus, "all of her providers competently evaluated her condition by ordering appropriate tests and arrived at a reasonable plan of care, which included support with medications, fluids, and mechanical ventilation." CP 217.

by laypersons and describable without medical training. Mrs. Yun had numerous serious diagnoses when she arrived at the hospital, including “septic shock, acute metabolic encephalopathy, acute renal failure, elevated troponin, malnutrition, anemia, and suspected ascending cholangitis with a large stone in the bile duct.” CP 215-16. Mrs. Yun saw an ER physician³, a gastroenterologist, a general surgeon, a pulmonologist, hospitalists, critical care physicians, nurses, and

³ Although he named St. Francis and ER physician Dr. Eric Nussbaum as defendants, Mr. Yun never served Dr. Nussbaum despite St. Francis informing him that Dr. Nussbaum was not its employee and that counsel for St. Francis did not represent him. CP 207. At no point in the trial court did Mr. Yun assert that the lack of an answer from an unserved defendant somehow precluded the trial court from dismissing his lawsuit on summary judgment. Additionally, even if Mr. Yun intended to simply claim that St. Francis was liable either vicariously for Dr. Nussbaum or directly based the failure to intervene in a case of supposed “obvious negligence,” *see Pet. at 16-18*—another issue never raised below—he would still need to produce a medical expert to define the standard of care applicable to an ER physician, opine that Dr. Nussbaum breached it, and that this breach caused Mrs. Yun’s injuries. He would also need a medical expert to define the standard of care for a hospital like St. Francis if he intended to pursue a claim for corporate negligence. Mr. Yun did neither.

others. *See id.* These specialists assessed Mrs. Yun and instituted treatments based on their education, experience, and medical decision-making. *See id.* Mr. Yun alleges without expert medical support that these providers were negligent in exercising this medical judgment. Dr. Veal, however, who has years of experience treating patients like Mrs. Yun and who reviewed all of her records, disagreed. Whether these providers complied with their standards of care in treating this complex patient was accordingly well beyond a layperson's understanding.

The causation issues here, like standard of care, were anything but straightforward and likewise required expert medical testimony. When she presented to St. Francis, Mrs. Yun was in her 90s and already seriously ill with gastric cancer, sepsis, and multi-organ failure. Without expert testimony, a layperson could not determine that a causal connection existed between any alleged negligence and Mrs. Yun's death. Rather, the more readily observable cause was that Mrs. Yun died from

natural causes. Indeed, Dr. Veal opined that Mrs. Yun died from an infected gallstone and cancer, not negligence:

In addition to the care being entirely appropriate, it did not cause Ms. Yun's death or any other injuries that Mr. Yun appears to assert. Ms. Yun was already in septic shock before she came into the St. Francis Hospital emergency department on August 9, 2016, and the healthcare providers there did everything they could to try to save her in light of her rapid deterioration, but she was simply too sick. In addition to being critically ill from a gallstone, the imaging and other tests revealed that Ms. Yun also had a gastrointestinal malignancy, i.e. cancer, from which she had been declining for a year according to her healthcare providers. Along with her advanced age, these maladies caused the death of this 93-year-old woman.

CP 218. Mr. Yun produced no expert declaration to contradict this, as Division I correctly concluded the law required him to do in response to St. Francis's summary judgment motion. Division I's decision is not in conflict with any decision of this Court or the Courts of Appeals.

2. Disclosure of Mrs. Yun's medical records does not warrant this Court's review under RAP 13.4(b).

Similarly, Mr. Yun's argument, *Pet. at 14-15*, that this Court should accept review because he believes St. Francis improperly disclosed his mother's medical records is without legal or factual merit.

First, there was no wrongful disclosure in this case. It is unclear what Mr. Yun believes St. Francis did wrong, but all of St. Francis's disclosures have complied with federal and state law, including both HIPAA's and Washington Uniform Health Care Information Act's health care operations exception for legal services because Mr. Yun named St. Francis in a medical malpractice lawsuit. *See, e.g.,* 45 CFR §§ 164.501(4), 164.502(a)(1)(ii); RCW 70.02.010(18)(d), 70.02.050(1)(b).

Second, Mr. Yun has not supported his assertion with any authority, reasoned argument, or factual support, nor did he raise it with Division I. This Court need not consider it.

Finally, whatever unsupported assertions Mr. Yun makes regarding his mother's records do not change the fact that he still needed an expert to support this medical malpractice lawsuit. He did not have an expert, and that was why the trial court dismissed his medical malpractice lawsuit and why Division I affirmed. This Court should decline review.

VI. CONCLUSION

For the foregoing reasons, this Court should deny Mr. Yun's petition for review under RAP 13.4.

I declare that this document contains 3,177 words.

RESPECTFULLY SUBMITTED this 8th day of October,
2021.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the date below I caused a true and correct copy of the foregoing document, to be delivered in the manner indicated below to the following:

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DATED this 8th day of October, 2021, at Tacoma, Washington.

s/ Deidre M. Turnbull
Deidre M. Turnbull, Legal Assistant

FAVROS LAW

October 08, 2021 - 10:36 AM

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