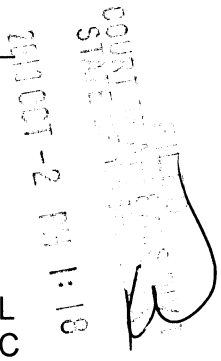
69643-2

69643-2

No. 69643-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON



PATRICIA A. GRANT,

Appellant,

vs.

CLAUDIO GABRIEL ALPEROVICH, M.D.; ST. FRANCIS HOSPITAL-FRANCISCAN HEALTH SYSTEM; VALLEY MEDICAL CENTER; TRIENT M. NGUYEN, DO; MICHAEL K. HORI; PACIFIC MEDICAL CENTER, INC.; LISA OSWALD, M.D.; SHOBA KRISHNAMURTHY, M.D.; MICHELE PULLING, M.D.; WM. RICHARD LUDWIG; U.S. FAMILY HEALTH PLAN AT PACIFIC MEDICAL CENTER, INC.; VIRGINIA MASON HEALTH SYSTEM; AND RICHARD C. THIRLBY, M.D.,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JAY WHITE

BRIEF OF RESPONDENT MICHELE PULLING

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

OGDEN MURPHY WALLACE, PLLC

By: D.K. Yoshida
WSBA No. 17365

901 5th Ave Ste 3500
Seattle WA 98164
(206) 447-7000

Special Assistant Attorneys General
for Respondent Michele Pulling

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

CASES

STATUTES

RULES AND REGULATIONS

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

I. INTRODUCTION

The trial court dismissed appellant Patricia A. Grant's complaint against all defendants, including her claims against respondent Michele Pulling, M.D., a University of Washington medical resident. Ms. Grant failed to personally serve Dr. Pulling with the summons and complaint. Ms. Grant also failed to file a tort claim with the Risk Management Division of the Office of Financial Management, as required by RCW 4.92.100, prior to filing her complaint against Dr. Pulling. This court should affirm the trial court's order dismissing Ms. Grant's claims against Dr. Pulling.

II. RESTATEMENT OF THE ISSUES

A. Should this court review the trial court's order dismissing Dr. Pulling in the absence of any argument or citation to legal authority challenging Dr. Pulling's dismissal on jurisdictional grounds?

B. Did the trial court properly dismiss Ms. Grant's claims against Dr. Pulling under CR 12(b)(2) for lack of personal jurisdiction, when Ms. Grant did not personally serve Dr. Pulling with the summons and complaint or leave a copy at her residence?

C. Did the trial court properly dismiss Ms. Grant's claims against Dr. Pulling, a resident employed by the University of

Washington, for failure to provide any notice of her claim to the State of Washington under RCW 4.92.100 before filing her lawsuit?

III. RESTATEMENT OF THE CASE

Appellant Patricia Grant's statement of the case does not address the undisputed evidence presented to the trial court and acknowledged by Ms. Grant in her response to Dr. Pulling's motion to dismiss for lack of jurisdiction. That Ms. Grant is without counsel does not modify the standard to which she is held. "A pro se litigant is held to the same rules of procedural and substantive law as an attorney." ***In re Martin***, 154 Wn. App. 252, 265, 223 P.3d 1221 (2009), *rev. denied,* 169 Wn.2d 1002 (2010).

The following restatement of facts properly considers the undisputed procedural facts before the trial court on the motion to dismiss:

A. Dr. Pulling, A University of Washington Resident, Was Sued By Ms. Grant Along With Twelve Other Health Care Providers.

In 2009, Dr. Michele Pulling was a resident physician participating in the University of Washington School of Medicine's Gastroenterology Fellowship program. (CP 76) On June 15, 2012, Ms. Grant filed a summons and complaint in King County Superior Court alleging damages arising from health care against a dozen

health care providers, insurers, and institutions, including Dr. Pulling. (CP 1-60) Ms. Grant filed an amended complaint on July 15, 2012. (CP 67-74)

Ms. Grant's amended complaint alleged that Dr. Pulling met with Ms. Grant at Pac Med for medical treatment on one occasion in 2009, during which Dr. Pulling, "[i]n agreement with Defendant Oswald, [and] Defendants [sic] Krishnamurthy ... purposely misrepresented a prescription for Nortriptyline (a Tricyclic antidepressant) as a smooth throat muscle relaxant medication." (CP 69) Ms. Grant alleged that Dr. Pulling's actions tortiously "extended Plaintiff's suffering, upon which Plaintiff's medical insurances [sic] were billed;" and that Dr. Pulling and Dr. Krishnamurthy "intentionally and knowingly discriminated against [Ms. Grant], based on [Ms. Grant's] disability, while defrauding the federal government by billing for fraudulent services." (CP 70)

B. Ms. Grant Never Served Dr. Pulling And Did Not File A Complaint With The Washington State Office Of Risk Management Before Filing Her Lawsuit.

Dr. Pulling was never served with a summons or complaint. (*Compare* CP 76-77 *with* CP 87-91) Ms. Grant filed a certificate of service of her amended complaint stating only that she sent

notification of the amended complaint via certified mail in care of "Gina Marble, Risk Mgt, Pacific Medical Center, 1200 12th Avenue S. Qtr 6/7, Seattle, WA 98144." (CP 73)

C. The Trial Court Granted Dr. Pulling's Motion To Dismiss.

Dr. Pulling appeared through counsel, reserving her objections to the exercise of jurisdiction. (CP 765) On October 8, 2012, Dr. Pulling filed a motion to dismiss Ms. Grant's claims against her, arguing both (1) that the court lacked personal jurisdiction because Ms. Grant failed to serve Dr. Pulling; and (2) that Ms. Grant failed to file a tort claim with the Risk Management Division of the Office of Financial Management, as required under RCW ch. 4.92. (CP 75-86) Dr. Pulling originally noted her motion for October 19, 2012, but renoted the hearing to October 29, 2012, when Ms. Grant claimed she did not receive adequate notice. (CP 87, 519-20, 533-34)

In her response to Dr. Pulling's motion, Ms. Grant conceded that she had not personally served Dr. Pulling, arguing that she obtained personal jurisdiction by serving co-defendant Pacific Medical Center where Dr. Pulling had been on "rotation" and by listing Dr. Pulling along with the twelve co-defendants in her

lawsuit. (CP 89-90) Ms. Grant argued that service on Pac Med was sufficient "since plaintiff has used reasonable diligence to pursue her claim." (CP 90) Ms. Grant did not dispute that Dr. Pulling was a resident employed by the University of Washington.

On October 29, 2012, the Honorable Judge Jay White ("the trial court") dismissed Ms. Grant's claims against Dr. Pulling for lack of jurisdiction. (CP 495-96)

IV. ARGUMENT

Ms. Grant presents no argument in support of her assignments of error to the order dismissing Dr. Pulling. The trial court properly dismissed Ms. Grant's claims against Dr. Pulling for lack of personal jurisdiction and for failure to file a claim with State Office of Risk Management under RCW 4.92.100.

A. Ms. Grant's Failure To Make Any Argument Supporting Her Assignments Of Error To The Trial Court's Dismissal of Dr. Pulling Precludes Appellate Review.

Ms. Grant fails to support her assignment of error to the trial court's dismissal of Dr. Pulling with any argument or any legal authority. This court should affirm the trial court's dismissal of her claims against Dr. Pulling for this reason alone.

An appellant's brief must contain "argument in support of the issues presented for review, together with citations to legal

authority and references to relevant parts of the record." RAP 10.3(6). "If a party fails to support assignments of error with legal arguments, they will not be considered on appeal." ***Howell v. Spokane & Inland Empire Blood Bank***, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991). *See also* ***Collins v. Clark County Fire Dist. No.5***, 155 Wn. App. 48, 96, 231 P.3d 1211 (2010) ("Without supporting argument or authority 'an appellant waives an assignment of error.'") (*quoting* ***Bercier v. Kiga***, 127 Wn. App. 809, 824, 103 P.3d 232 (2004), *rev. denied*, 155 Wn.2d 1015 (2005)).

Ms. Grant's brief contains seven assignments of error (Nos. 3, 4, 5, 6, 9, 10, and 11) to the trial court's October, 29, 2012, order dismissing the claims against Dr. Pulling. (App. Br. at 8-9) However, Ms. Grant makes only passing references to that order in the argument section of her appellate brief, and provides no legal argument or citation to authority. *See* App. Br. at 20 (the "Trial Court Judge created an environment of perceived biasness" and in a subsequent hearing, "allowed an Attorney whose case was dismissed on October 29, 2012, [sic] to give argument"); App. Br. at 23 (trial court "[shook] his head in agreement on at least two occasions to a particular attorney who had his non-oral hearing,

October 29"); App. Br. at 24 (the October 29, 2012, order "raises serious question regarding abuse of power").[1] Pursuant to RAP 10.1(g), Dr. Pulling joins in the arguments of her co-respondents that the trial court did not violate the appearance of fairness in any respect. *See* Resp. Alperovich and Franciscan Health Systems Br.17-18.

Ms. Grant's failure to make any argument challenging Dr. Pulling's dismissal precludes appellate review. This court should affirm for this reason alone.

B. The Trial Court Properly Granted Dr. Pulling's Motion to Dismiss When Ms. Grant Failed To Serve The Summons and Complaint Upon Dr. Pulling.

Should this court review the order dismissing Dr. Pulling, it should hold, as did the trial court, that the court lacked personal jurisdiction over her. As a matter of both constitutional law and by statute, personal service of a complaint on a defendant is the predicate to the power to compel a party to appear and answer in court. ***Goettemoeller v. Twist***, 161 Wn. App. 103, 253 P.3d 405

[1] Ms. Grant cites ***Puckett v. Cox***, 456 F.2d 233, 236 (6th Cir. 1972), and ***Conley v. Gibson***, 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) App. Br. at 20. Those authorities address the sufficiency of a complaint under Fed.R. Civ. P. 8, and are not relevant to the order dismissing claims against Dr. Pulling for lack of jurisdiction or her allegation of bias.

(2011). *See* ***Salts v. Estes,*** 133 Wn.2d 160, 165, 943 P.2d 275 (1997) ("the legislative intent behind the substituted service statute was to provide due process, i.e., notice and the opportunity to be heard.") Where, as here, the facts are undisputed this court reviews de novo a trial court's dismissal for lack of personal jurisdiction. ***Subcontractors and Suppliers Collection Services v. McConnachie***, 106 Wn. App. 738. 741, 24 P.3d 1112 (2001), *citing* ***Lewis v. Bours***, 119 Wn. 2d 667, 669, 835 P.2d 221 (1992).

The superior court obtains jurisdiction over a Washington resident either by serving the defendant personally or by substitute service. RCW 4.28.080(15). *See* ***Lepeska v. Farley***, 67 Wn. App. 548, 551, 833 P.2d 437 (1992). RCW 4.28.080(15) specifically requires service "to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode...." Failure to strictly comply with this statutory requirement of service of process deprives the court of personal jurisdiction over a defendant. ***Weiss v. Glemp***, 127 Wn.2d 726, 731-32, 903 P.2d 455 (1995); ***Goettemoeller***, 161 Wn. App. at 107. The "plaintiff has the initial burden to produce an affidavit of service that on its face shows that service was properly carried out." ***American Exp.***

128 (2012); *see also* Tegland, 14 WASHINGTON PRACTICE, §4.40 (2nd Ed., 2009).

Dr. Pulling was never served. Ms. Grant filed no affidavit alleging that she personally served Dr. Pulling or left a copy of the summons and complaint at Dr. Pulling's residence. (*See* CP 87-103) Ms. Grant instead alleged that she served co-defendant Pac Med with "lawsuit action notifications" and exercised "reasonable diligence in pursuing her complaints against defendant Pulling in 2009 and 2012." (CP 89-90)

Service on a co-defendant is insufficient to establish personal jurisdiction over a defendant who has never been personally served. *See* ***Dolby v. Worthy***, 141 Wn. App. 813, 817, 173 P.3d 946 (2007). In ***Salts v. Estes***, the Supreme Court held that substitute service on a person temporarily in the defendant's home to care for the defendant's dogs did not comply with RCW 4.28.080(15)'s requirement of substitute service on a "resident." 133 Wn.2d at 169-70.

Similarly, here, Ms. Grant argued that her service upon Pac Med was sufficient, because she used "reasonable diligence" by serving Pac Med with the summons and complaint and then with

serving Pac Med with the summons and complaint and then with the amended complaint, naming Dr. Pulling as a defendant. (CP 90, 99-102) But "reasonable diligence," standing alone, does not satisfy the statutory requirement for substitute service under RCW 4.28.080(15). *See* ***Goettmoeller***, 161 Wn. App. at 107 (when personal service cannot be achieved through reasonable diligence "the question becomes whether the service amounts to valid substitute service…").

Dr. Pulling was not an employee of Pac Med at the time of the alleged tortious conduct, but an employee of the University of Washington; Pac Med did not accept service for Dr. Pulling; and Pac Med's counsel did not appear on behalf of Dr. Pulling. Even had Dr. Pulling been an employee of Pac Med at the time of the alleged incident, service upon Pac Med would not have been sufficient to obtain jurisdiction over Dr. Pulling. ***Dolby***, 141 Wn. App. at 817 ("An individual defendant cannot be served by serving an employee at his or her place of business."), *rev. denied*, 164 Wash.2d 1004 (2008). Lastly, Dr. Pulling was "under no obligation to arrange a time and place for service or to otherwise accommodate the process server." ***Weiss***, 127 Wn.2d at 734

(*quoting* ***Thayer v. Edmonds***, 8 Wn. App. 36, 42, 503 P.2d 1110 (1972)).

Without proper service of process, the trial court lacked personal jurisdiction and properly dismissed the claims against Dr. Pulling. This court should affirm.

C. The Trial Court Properly Dismissed This Action Against Dr. Pulling For Failure To File A Tort Claim With The Risk Management Division Of The Office Of Financial Management.

The trial court's order of dismissal should be affirmed on the alternative ground that Ms. Grant failed to file a tort claim as mandated by RCW 4.92.100. Because Dr. Pulling's treatment of Ms. Grant was within the scope of her employment as a resident at the University of Washington, Ms. Grant's claims against her were subject to the State's sovereign immunity unless she complied with the procedural requirements of RCW 4.92.100

Under Wash. Const. Art. 2, § 26's limited waiver of sovereign immunity, the Washington Legislature has "directed by law and in what manner" suits may be brought against the State of Washington, its officers and employees:

> All claims against the state, or against the state's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct,

> *must* be presented to the office of risk management. A claim is deemed presented when the claim form is delivered in person or by regular mail, registered mail, or certified mail, with return receipt requested, or as an attachment to electronic mail or by fax, to the office of risk management.

RCW 4.92.100 (emphasis added).[2]

Before any action for damages arising out of tortious conduct can be commenced against any state employee, a claim must first be presented to and filed with the Risk Management Division of the Office of Financial Management:

> No action subject to the claim filing requirements of RCW 4.92.100 shall be commenced against the state, or against any state officer, employee, or volunteer, acting in such capacity, for damages arising out of tortious conduct until sixty calendar days have elapsed after the claim is presented to the risk management division.

RCW 4.92.110. The purpose of this requirement is to allow the State to expeditiously resolve tort claims without the necessity of defending a lawsuit. *See* ***Medina v. Pub. Util. Dist. No. 1 of Benton Cnty.,*** 147 Wn.2d 303, 310, 53 P.3d 993 (2002) ("one of

---

[2] The legislature amended RCW ch. 4.92.100 effective July 28, 2013. Laws 2013, ch. 188 § 1. The quoted provisions of current RCW 4.92.100 are identical to those in effect at the time Ms. Grant filed her action on June 15, 2012. *See* Laws 2012, ch. 250 § 1 (effective June 7, 2012).

the purposes of the claim filing provisions is to allow government entities time to investigate, evaluate, and settle claims.").

A lawsuit against a University of Washington physician is an action against an employee of the state of Washington and therefore subject to the conditional waiver of immunity in RCW 4.92.110. *See* ***Hardesty v. Stenchever***, 82 Wn. App. 253, 259-61, 917 P.2d 577 (1996) (plaintiff suing a University of Washington physician for medical negligence must first file a verified tort claim with state office of risk management), *rev. denied*, 130 Wn.2d 1005 (1996).

Dr. Pulling, as a resident physician participating in the Gastroenterology Fellowship program at the University of Washington School of Medicine, was a state employee at the time of the conduct alleged in Ms. Grant's complaint. (CP 76, 87-103) It is undisputed that Ms. Grant failed to file any claim with the Risk Management Division of the Office of Financial Management. (CP 89) The trial court's dismissal for failure to comply with RCW 4.92.100 should be affirmed. *See* ***Hardesty***, 82 Wn. App. at 258-59 (failure to file claim at State Risk Management Office compels dismissal); ***Andrews v. State***, 65 Wn. App. 734, 829 P.2d 250

(1992) (same); ***Woods v. Bailet***, 116 Wn. App. 658, 666, 67 P.3d 511 (2003) (failure to file notice of claim with local government before filing complaint compels dismissal); ***Lewis v. City of Mercer Island***, 63 Wn. App. 29, 817 P.2d 408 (same), *rev. denied,* 117 Wn2d 1024 (1991).

Ms. Grant argued below that she "had no knowledge or reason to inquiry [sic] about the UW State employment status of defendant Pulling." (CP 90) However, Ms. Grant's assertion of ignorance is substantially undermined by her April 2012 letter to US Family Health Plan, states that "Pullman [sic] was still a medical (not psychological) student on clinic rotation." (CP 95)

In any event, the claim filing procedures required before suing the State do not turn on whether the plaintiff knows, or reasonably should know, about the defendant's employment status. *See* ***Hardesty***, 82 Wn. App. at 261. By its terms, RCW 4.92.100 applies to "[a]ll claims against the state, or against the state's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct" and requires that they "*must* be presented to the office of risk management" (emphasis added). While the Legislature has recently relaxed the requirement

of strict compliance with RCW 4.92.100, by directing courts to "liberally construe[] [the procedural requirements of Chapter 4.92 RCW] so that substantial compliance will be deemed satisfactory," it has refused to change the threshold requirement that a claimant provide notice of a claim prior to suing the state or a state employee.

There is no issue of substantial compliance here, where Ms. Grant failed to provide the State with *any* pre-suit notice whatsoever. This court should affirm the dismissal of Ms. Grant's claims against Dr. Pulling because they are barred by the state of Washington's sovereign immunity.

V. CONCLUSION

Ms. Grant failed to support her assignments of error concerning the October 29, 2012 order dismissing Dr. Pulling with argument or citation to legal authority. Even were her assignments of error not waived, Ms. Grant's failure to serve Dr. Pulling with a summons and complaint or to file a tort claim with the Risk Management Division of the Office of Financial Management as required by RCW 4.92.100 bars her lawsuit against Dr. Pulling as a

matter of law. This court should affirm the trial court's order dismissing Ms. Grant's claim against Dr. Pulling.

Dated this 30th day of September, 2013.

OGDEN MURPHY WALLACE, PLLC

By:_____
D.K. Yoshida
WSBA No. 17365

SMITH GOODFRIEND, P.S.

By:_____
Howard M. Goodfriend
WSBA No. 14355

Special Assistant Attorneys General for
Respondent Michele Pulling

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 30, 2013, I arranged for service of the foregoing Respondent Michele Pulling, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger ✓ U.S. Mail ___ E-Mail
Patricia Grant 1001 Cooper Point Rd. N.W., Ste # 140-231 Olympia, WA 98502	___ Facsimile ___ Messenger ✓ U.S. Mail ✓ E-Mail
D.K. Yoshida Ogden Murphy Wallace PLLC 901 5th Ave., Suite 3500 Seattle, WA 98164	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail
Philip J. VanDerhoef Susan Wassell Fain Anderson VanDerhoef PLLC 701 5th Ave., Suite 4650 Seattle, WA 98104-7030	___ Facsimile ___ Messenger ✓ U.S. Mail ✓ E-Mail
Scott M. O'Halloran Michelle M. Garzon Timothy L. Ashcraft Williams Kastner & Gibbs PLLC 1301 A St., Ste #900 Tacoma, WA 98402-4299	___ Facsimile ___ Messenger ✓ U.S. Mail ✓ E-Mail
Donna M. Moniz Johnson Graffe Keay Moniz & Wick LLP 925 4th Ave., Suite 2300 Seattle, WA 98104-1145	___ Facsimile ___ Messenger ✓ U.S. Mail ✓ E-Mail

Nancy Elliott Merrick, Hofstedt & Lindsey, PS 3101 Western Ave., Suite 200 Seattle, WA 98121-3017	___ Facsimile ___ Messenger _✓_ U.S. Mail _✓_ E-Mail
David J. Corey Amber L. Pearce Floyd, Pflueger & Ringer P.S. 200 West Thomas Street, Suite 500 Seattle, WA 98119-4296	___ Facsimile ___ Messenger _✓_ U.S. Mail _✓_ E-Mail
Tim E. Allen Bennett Bigelow & Leedom, P.S. 601 Union St., Ste # 1500 Seattle, WA 98101-1363	___ Facsimile ___ Messenger _✓_ U.S. Mail _✓_ E-Mail

DATED at Seattle, Washington this 30th day of September, 2013.

Tara D. Friesen