No. 1033885

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

HEIDI COLLINS and DARYL COLLINS,

Appellants,

v.

SWEDISH MEDICAL CENTER,

Respondent.

SWEDISH MEDICAL CENTER'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In this medical malpractice case, the Court of Appeals, Division I, properly affirmed in an unpublished decision the trial court's summary judgment dismissal of Heidi and Daryl Collins' (Collins) lawsuit. Based on well-settled law, the appellate court first held that neither of the Collins' nursing experts "established a familiarity with the standard of care in Washington state" because "they both fail to disclose how they knew that our state incorporates the national standard or provide any underlying support for that opinion." Collins v. Swedish Medical Center, No. 85836-0, slip op. at 9 (Wa Ct. Appeals July 22, 2024). The Court of Appeals stated that this "is plainly insufficient to establish the necessary familiarity with the standard of care in Washinton so as to provide an admissible expert opinion on the issue." *Id*. (citing *Boyer v. Morimoto*, 10 Wn. App. 2d 506, 524, 449 P.3d 285 (2019), *review denied* 194 Wn.2d 1022 (2020)).

Second, even if either expert had created a foundation for familiarity with Washington's standard of care, "both of the

expert witnesses' opinions regarding Swedish's purported breach of the Washington state standard of care are conclusory and fail to provide specific facts showing how it was violated here." *Collins*, slip op. at 9.

It is well-settled that experts '"must state specific facts showing what the applicable standard of care was and how the defendants violated it."' *Id*. (quoting *Reyes v. Yakima Health Dist*., 191 Wn.2d 79, 89, 419 P.3d 819 (2018)). The *Reyes* Court explained that "the expert must link [their] conclusions to a factual basis." *Id*. Further—as here—unsigned declarations do not constitute competent evidence in ruling on summary judgment motions. *Our Lady of Lourdes Hosp. v. Franklin Cnty*., 120 Wn.2d 439, 452, 842 P.2d 956 (1993).

In sum, the Court of Appeals followed well-established law in affirming dismissal of the Collins' medical malpractice lawsuit. The Court should deny review.

Additionally, review should be denied because the Collins wholly fails to address or apply RAP 13.4(b) considerations

under which the Supreme Court will "only" accept review. Nevertheless, the lower court's opinion affirming dismissal conflicts with no decision of this Court; conflicts with no published decision of the Court of Appeals; involves no constitutional questions; and involves no issue of substantial public interest that this Court has not already resolved. RAP 13.4(b)(1)-(4). Based on the foregoing, this Court should deny review.

II. RESTATEMENT OF THE CASE

The Collins' skeletal complaint alleges that on "October 10, 2018 Plaintiff Heid Collins was injured through the negligence of Swedish agents/employees." CP 1. Their complaint contains no additional allegations about what occurred on October 10, nor specifies the nature of the alleged injury. CP 1-2.

A. The Collins' delayed answering discovery for three months.

Because their complaint was devoid of any further description or explanation, Swedish propounded interrogatories

and requests for production. After a three-month delay in responding to Swedish's discovery requests, the Collins appear to claim that on October 10 a nurse negligently failed to provide appropriate care in the immediate aftermath of her colonoscopy procedure, and that as a result, she suffered alleged injuries. CP 18, 38-50, CP 102. The Collins failed to produce any supportive documents, including medical records, in their delayed response to Swedish's discovery requests. CP 9.

The Collins never served any discovery requests on Swedish nor requested any depositions in this case. CP 68.

B. The Collins failed to timely identify expert opinions.

The Collins also failed to timely comply with the case schedule to (1) identify medical experts; and (2) disclose expert opinions; (3) nor did they supplement discovery answers with the requested expert opinions. CP 19.

C. Swedish moved for summary judgment as a matter of law.

Swedish moved for summary judgment dismissal as a matter of law because the Collins failed to produce the required competent expert testimony establishing that employees or agents of Swedish breached the applicable standard of care on October 10, and that such breach was a proximate cause of their alleged injuries. CP 9-14, CP 19.

The Collins failed to calendar their summary judgment response deadline. CP 93, 102. Thus, they neither timely responded to Swedish's motion for summary judgment nor produced a declaration, letter or report from any expert, nor disclosed any expert witness opinions. CP 62, CP 64-65. Instead, on August 15, 2023, they disclosed the *names* of two nursing experts, but, again, no opinions. CP 53.

Swedish filed a reply in support of summary judgment dismissal on August 21, 2023. CP 61-62. The following morning, August 22, Swedish filed a supplemental reply requesting that the trial court exercise its discretion and deny any potential request for a continuance of the summary judgment hearing

because the Collins were on notice of the hearing date *two months before the summary judgment motion was filed*. CP 67-69, 74.

Later on August 22, the Collins requested that the trial court impose the "least severe sanction" under the *Burnett* factors for their delayed response, but to not dismiss the case. CP 93-94. They sought to submit a late expert opinion via declaration, while simultaneously questioning whether an expert opinion was actually necessary to establish the elements of their medical malpractice claims. *Id*. They separately moved that same afternoon for a three-week CR 56(f) continuance to "consult" with their "already-identified witnesses." CP 102-04. The trial court heard oral argument on Swedish's motion for summary judgment, as originally scheduled, on August 25, 2023. CP 105.

D. After oral argument, the Collins submitted a medical record, an unsigned and legally deficient expert declaration, and a second legally flawed expert declaration.

On September 1, 2023, the Collins submitted to the trial court a medical record, dated October 10, 2018, which states, in part, as follows:

> The etiology of her pain has not yet been determined. Today, she had an outpatient colonoscopy, which was without any acute findings. She states that she went home and was feeling well, then started to develop pain "all over," worse within the last hour.

CP 109 (emphasis added). The nine-page record references no falls or injuries; no beds or chairs; and no nurses. It does references right abdominal pain and anxiety. CP 109. It also states that the Collins were in the emergency room on October 8 "for similar right lower quadrant pain." Her own treating doctor was unable to "determine the etiology of her pain." CP 105.

Additionally, the Collins submitted an *unsigned* nursing expert's declaration. CP 118-19. Nurse Kim Lewis from Jonesborough, Tennessee, premised her threadbare opinion not on medical records, but on Collins' interrogatory answer "outlining Plaintiff's version of the event in question." CP 118.

Lewis only offered the conclusory statement that "[a]ssuming that the plaintiff's version of events is correct, the recovery nurse fell below the standard of care by failing to be in a position to help her off the bed without falling and in failing to be in a position to prevent her fall." CP 119.

That same day, the Collins submitted an expert declaration of nurse Latonya Brumfield, from Baton Rouge, Louisiana. CP 120-21, 123. Brumfield's opinion was not based on medical records, but "upon Plaintiff's interrogatory description of the incident in question." CP 120. Brumfield summarily concluded that "[b]ased upon the Plaintiff's versions of events, the care she received fell below the standard." CP 121. Both experts relied upon an undefined "national" standard of care untethered to Washington's standard. CP 118, 120.

Neither expert (1) established that she was competent to testify based on personal knowledge; (2) offered opinions on a more probable-than-not basis or based on a reasonable degree of medical certainty; (3) established that she had sufficient

expertise; (4) discussed the applicable standard of care and the specific facts demonstrating how Swedish allegedly violated it; (5) discussed how the national standard of care is specifically tied to Washington's standard of care; (6) identified what type of health care professional allegedly violated the standard of care (*i.e.*, whether it was a nurse or some other type of health care professional); or (7) discussed proximate causation connected to an injury. CP 129-33. Swedish submitted a reply to both declarations, identifying the foregoing legal deficiencies. *Id*.

E. The trial court granted Swedish's motion for summary judgment dismissal as a matter of law.

The trial court granted the Collins' CR 56(f) continuance; declined to impose sanctions because it found that the Collins' delayed response was not willful; and granted Swedish' summary judgment motion because the expert opinions lacked foundation; were conclusory; speculative; and failed to address proximate causation. CP 138-39.

F. The Court of Appeals affirmed dismissal based on well-established Supreme Court principles.

Division I of the Court of Appeals affirmed dismissal based on this Court's well-established principles that expert testimony is generally necessary to ascertain the standard of care. *Collins*, slip op. at 7 (citing *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 231-32, 393 P.3d 776 (2017)). Further, Collins failed to explain how the circumstances in this case somehow rendered expert testimony unnecessary to establish the standard of care or causation. *Collins*, slip op. 8 (citing *Harris v. Robert C. Groth, MD, Inc*., 99 Wn.2d 438, 449, 663 P.2d 113 (1983)).

Further, it is well-established that experts '"must state specific facts showing what the applicable standard of care was and how defendant violated it."' *Collins*, slip op. at 9 (quoting *Reyes*, 191 Wn.2d at 89). Additionally, '"the expert must link [their] conclusions to a factual basis."' *Collins*, slip op. at 9 (quoting *id*. at 87). Finally, unsigned declarations do not constitute competent evidence in ruling on summary judgment

motions. *Collins*, slip op. at 10 (citing *Our Lady of Lourdes Hosp*., 120 Wn.2d at 452).

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Collins address no RAP 13.4 considerations governing acceptance of review; their petition does not merit this Court's attention.

As a preliminary matter, a "petition for review will be accepted by the Supreme Court *only*" if one of four factors are considered. RAP 13.4(b)(1)-(4) (emphasis added). Here, the Collins address no factor, thus present no compelling argument that an appellate court's unpublished decision conflicts with a decision of the Supreme Court or conflicts with a published decision of the Court of Appeals. RAP 13.4(b)(1)-(2). Further, the Collins raise no constitutional question, nor explain how their petition involves an issue of substantial public interest. RAP 13.4(b)(3)-(4).

In sum, the Collins' petition does not merit this Court's attention because the Court of Appeals correctly followed Supreme Court precedent in applying well-established law

governing expert declarations in a medical malpractice case. Justice was served in the trial and appellate court. There is no point of law to be decided or clarified here. The Court should deny discretionary review.

B. Review should be denied because the Court of Appeals correctly followed Supreme Court precedent in determining that the Collins' expert declarations were legally deficient.

Here, the Court of Appeals correctly affirmed summary judgment dismissal because the Collins' two nursing expert declarations contain conclusory statements without adequate factual support; fail to establish proximate causation; and fail to opine based a medical degree of certainty, among other significant deficiencies. CP 138-40; *see also Collins*, slip op. at 9-10 (referencing two expert declarations (at CP 118-21) and stating that the nursing experts failed to opine how Washington's standard of care was breached, and failed to provide specific facts showing how the standard was violated; "neither expert identifies the specific facts that support their respective opinions as to the standard of care or breach thereof").

In reaching its decision affirming dismissal, the Court of Appeals relied on and correctly applied well-known and well-settled law. There is no basis to accept discretionary review.

C. The Court of Appeals correctly applied well-recognized law in concluding that out-of-state experts must establish familiarity with Washington's standard of care.

The Collins continue to ignore the foregoing significant deficiencies of their experts' declarations that, alone, function as a basis for dismissal. Instead, the Collins focus on what they characterize as an "arcane requirement" in Washington that an out-of-state expert must disclose an adequate foundation that Washington's applicable standard of care is national in scope. Pet. at 2, 10.

Inexplicably, the Collins contend that an out-of-state expert need not establish that he/she is "familiar with the 'actual' standard of care" because "all standards of care are 'national.'" Pet. at 13-14. But this is not the law in Washington. Washington follows a state statutory standard. RCW 7.70.040(1)(a), (b).

The Collins cryptically cite *Elber v. Larson*, 142 Wn. App. 243, 173 P.3d 990 (2007) for the proposition that an expert—as here—can simply parrot that the Washington standard of care is the same as the national standard. Pet. at 12-13. Such a simplistic interpretation belies the *Elber* decision and the entire jurisprudential landscape of this issue.

Unfortunately, the Collins omit critical context in their one-dimensional analysis of *Elber*. In *Elber*, the expert's *first* declaration in response to summary judgment dismissal "did not recite that he was familiar with the standard of care in the state of Washington." *Id*. at 254. The trial court dismissed plaintiff's medical malpractice lawsuit. However, the plaintiff moved for reconsideration and submitted a *supplemental* expert declaration wherein the expert explained he had "contacted medical colleagues in the State of Washington to confirm that the practices of that state are not different from the national standards of the American Board of Neurological Surgery." *Id*. at 246. Further, he explained *how* the national standard of care for

neurosurgeons performing spine surgery—the anatomy, instrumentation, risks and benefits—are the same in Washington. *Id*.

Despite the submission of the supplemental declaration, the trial court in *Elber* denied reconsideration. However, the Court of Appeal correctly reversed the trial court because the *supplemental* declaration established the foundation for his familiarity with Washington's standard of care. *Id*. at 250.

Here, as in *Elber*, neither of Collins' nursing experts established a foundation for their purported familiarity with Washington's standard of care, and how it is consistent with the national standard. And unlike *Elbers*, the Collins submitted no supplemental expert declaration that laid a foundation to support their opinion that the state and national standards of care are identical.

In the seminal case, *Boyer v. Morimoto*, the appellate court analyzed prior cases and explained *in detail* how and why an expert "must provide some underlying support for his opinion

that the state standard follows the national standard." 10 Wn. App. 2d at 524. The Supreme Court denied review in 2020. The Collins failure to address and purport to distinguish *Boyer* is a critical misstep.

Far from being an "arcane requirement," the *Boyer* court held that an expert's "qualification to render medical opinions on the standard of care in Washington State is as important an element in a medical malpractice case as the factual basis on which the expert supports his opinion. For this reason, we hold that the testifying expert must disclose the factual basis on which the expert purports to know the standard of care in Washington." *Id*. at 526.

Here, the Court of Appeals relied on *Boyer*, among other cases, to reach the same conclusion. The Court of Appeals held that neither of Collins' experts "established a familiarity with the standard of care in Washington state." *Collins*, slip op. at 9. In affirming dismissal on this basis, among many other bases ignored by the Collins here, the Court of Appeals decision is

squarely consistent with Washington law. The Court should deny discretionary review.

IV. CONCLUSION

Swedish respectfully requests that the Court deny discretionary review because this case merits no attention under RAP 13.4(b)(1)-(4). Further, the Court of Appeals properly applied well-established law in affirming summary judgment dismissal of the Collins' negligence claim as a matter of law.

Certificate of Compliance: The number of words contained in this document (exclusive of words referenced in RAP 18.17(b)), based on the word count calculation of Microsoft is 2611.

Respectfully submitted this 21st day of October, 2024.

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 21, 2024, I caused to be served via email and appellate e-service a true and correct copy of the foregoing Brief of Respondent to:

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DATED at Seattle, Washington on October 21, 2024.

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