Washington Supreme Court No. 1037813
Washington State Court of Appeals, Div. III No. 397441

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

MARY ELLEN SMITH,

Petitioner,

v.

SPOKANE TRANSIT AUTHORITY, a Political Subdivision of the State of Washington, and John Doe

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Defendant-Respondent Spokane Transit Authority files this Answer to Smith's Petition for Review.

II. COURT OF APPEALS' DECISION

Smith seeks review of *Smith v. Spokane Transit Authority (STA)*, No. 39744-1-III, 2024 WL 5055215 (Wash. Ct. App. Dec. 10, 2024), an unpublished opinion out of the Court of Appeals, Division III.

III. STATEMENT OF THE CASE

On February 22, 2018, a passenger in a wheelchair, Cody Roller, fell over while traveling on a paratransit van operated by Spokane Transit Authority ("STA"). The STA van operator stopped the van and began helping Roller. Roller's Direct Support Professional, Mary Smith, voluntarily assisted with the lifting of the wheelchair. Smith allegedly sustained an injury in the process and sued STA in Spokane County Superior Court.

One month before trial, Smith filed a motion for partial summary judgment, seeking an order establishing liability against STA and dismissing STA's contributory negligence and failure to mitigate affirmative defenses. The trial court denied Smith's motion.

The case was tried to a jury between December 12, 2022, and December 22, 2022. After both parties rested, Smith renewed her motion for summary judgment with respect to STA's contributory negligence and assumption of risk defenses. Smith argued that a "legal, moral and ethical obligation to act" had compelled her to assist the STA van operator, and that these obligations precluded STA from asserting either an assumption of risk or a contributory negligence defense. The trial court denied Smith's motion, finding that issues of material fact existed to Smith's knowledge of the risk she undertook by assisting the van operator and as to the existence of a moral duty.

STA stipulated that its driver was negligent, but denied that this negligence was a proximate cause of Plaintiff's injuries. The jury did not accept the denial and found that STA's negligence was a proximate cause of Smith's damages. However, the jury also found Smith contributorily negligent and 90% at fault for her own injuries; the jury found STA 10% at fault. The jury found Smith's damages amounted to $100,000. When the verdict was reduced based on Smith's comparative fault, Smith's award was $10,000.

After the December 2022 trial, Smith filed a motion for a new trial or increased award. In support of her motion, Smith argued that the trial court had erroneously instructed the jury on contributory negligence and failure to mitigate because those defenses were not supported by the evidence, and because permitting such defenses violated public policy. Smith further argued that her $10,000 recovery was inadequate and had likely resulted from juror confusion. The trial court denied Smith's motion for new trial.

Smith then sought review by the Court of Appeals. Smith raised four arguments on appeal regarding (1) contributory negligence, (2) failure to mitigate, (3) the verdict form, and (4) the trial court's denial for a new trial or increased award.

The Court of Appeals disagreed with Smith's contentions and affirmed the trial court's rulings and the jury's verdict. With respect to contributory fault and assumption of risk arguments, the Court of Appeals first concluded Smith failed to sufficiently raise to the trial court the issue of whether the "Good Samaritan" and "rescue" doctrines prohibited the application of contributory negligence. *Smith v. STA*, 2024 WL 5055215 at *2 (Wash. Ct. App. Dec. 10, 2024). Further, the Court of Appeals found that Smith failed to propose a jury instruction regarding such public policies. *Id*. As Smith failed to preserve the arguments for appeal, the Court of Appeals dismissed those arguments. *Id.*

The next error claimed by Smith on appeal related to STA's failure to mitigate defense. The Court of Appeals

concluded the defense did not affect the jury's verdict – the jury did not reduce Smith's recovery because of her failure to mitigate. *Id.* at *3.

Third, on appeal, Smith challenged the form given to the jury to use to reach its verdict. The Court of Appeals concluded, however, that because Smith did not propose her own verdict form, the form itself was not reviewable on appeal. *Id*.

In further reviewing Smith's juror confusion argument, the Court of Appeals concluded that, even if the verdict form confused the jury, the trial court adequately dispelled any confusion, and, importantly, double deduction of Smith's award did not occur. *Id.* at *4.

Ultimately, the Court of Appeals concluded that, based on the evidence presented at trial, a reasonable jury could have found that Smith knew she would injure herself by helping the STA van operator lift a 250 – 270 pound man in his motorized wheel chair. *Id.*

For a more detailed recitation of the facts and analysis of Smith's arguments on appeal, please see the Court of Appeals' December 10, 2024 Opinion (attached to Smith's Petition for Review).

IV. ARGUMENT

The Supreme Court will accept a petition for 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.

RAP 13.4(b). Smith's Petition for Review cites only to the fourth ground upon which the Court may grant review. This Court should decline to accept review of this case because Smith fails to demonstrate a substantial public interest under RAP 13.4(b)(4).

A. The issue presented for review was not preserved for appeal.

Preliminarily, Smith's Petition for Review should be dismissed because the issue on which she seeks review is an issue that she did not raise with the trial court. Smith asks this Court to render a new rule that a Good Samaritan cannot be contributorily negligent for injuries sustained while helping a person in need. However, as recognized by the Court of Appeals, Smith did not make this argument to the trial court. *Smith*, 2024 WL 5055215 at *2-3.

It is well established that parties may not assert a claim on appeal that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 748-49, 293 P.3d 1177 (2013). One of the purposes of RAP 2.5(a) is to afford the trial court the opportunity to rule correctly on a matter before it can be presented on appeal. A party may only raise a claimed error for the first time on appeal if it is a manifest error affecting a constitutional right, and that

exception does not apply here. RAP 2.5(a)(3); *see also State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

Smith claims that she raised a Good Samaritan theory in additional jury instructions filed December 6, 2022, and December 21, 2022. The record does not support this contention. In fact, the Court of Appeals acknowledged Smith's failure to propose such an instruction, and deemed the argument waived. *Smith*, 2024 WL 5055215 at *2.

In addition to seeking review of arguments that she failed to preserve for appeal, Smith inappropriately seeks review of the trial court's denial of her summary judgment motions. *See Johnson v. Rothstein*, 52 Wn. App. 303, 304, 759 P.2d 471 (1988) (holding that "a denial of summary judgment cannot be appealed following a trial if the denial was based upon a determination that material facts are in dispute and must be resolved by the trier of fact"); *see also* RAP 2.2. Here, the trial court denied summary judgment twice, finding in both instances that there existed genuine issues of material fact for

the jury to decide. Tellingly, Smith's Petition continues to emphasize facts such as whether Roller was "panicking" at the time of the incident. This is evidence (including video evidence) that the jury was allowed to weigh, and which the jury resolved against Smith.

Smith's Petition for Review makes no attempt to dispute or disclaim the procedural deficiencies identified by the Court of Appeals. The issues remain procedurally barred.

B. This case does not involve an issue of substantial public interest.

This Court will accept review of a Court of Appeals decision if the decision involves a question of "substantial public interest." RAP 13.4(b)(4). To determine whether an issue is of substantial public interest, the Court considers:

> (1) whether the case is a matter of public concern or simply a private dispute, (2) the need for an authoritative determination to guide public officials in the future, (3) the likelihood of reoccurrence, and (4) the quality of the advocacy.

Gonzalez v. Inslee, 2 Wn.3d 280, 289, 535 P.3d 864 (2023) (citation omitted); *see also Hart v. Dep't of Soc. and Health Servs.*, 111 Wn.2d 445, 449, 759 P.2d 1206 (1988) (emphasizing that "rigorous examination and application" of these factors "is necessary to ensure [] an actual benefit to the public interest").

Each of these factors weigh in favor of declining review.

i. <u>This case does not involve an issue of public concern.</u>

First, a matter of public concern if it "immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture [of the state]." *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419 (2004). *See also State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (referring to a Drug Offender Sentencing Alternative case as "a prime example of an issue of substantial public interest" because it had "the potential to affect every sentencing proceeding . . .

where a DOSA sentence was or is at issue"); *Matter of Arnold*, 189 Wn.2d 1023, 408 P.3d 1091 (Table) (2017) (accepting review of an issue that would "affect public safety by removing an entire class of sex offenders from the registration requirements"); *In re Flippo*, 185 Wn.2d 1032, 380 P.3d 413 (2016) (accepted review because numerous similar claims were pending at the Court of Appeals at the time of petition); *In re Adoption of T.A.W.*, 184 Wn.2d 1040, 387 P.3d 636 (2016) (a statutory amendment drastically and inadvertently altered the Indian Child Welfare Act on its face). Conversely, "cases that are limited to their specific facts" do not raise an issue of substantial public interest. *State v. Beaver*, 184 Wn.2d 321, 331, 358 P.3d 385 (2015).

Here, Smith fails to establish that her case—a personal injury case that was tried to a jury and affirmed by the Court of Appeals—has any immediate, ongoing, or sweeping implications. This case is unlike the cases cited above where the issue presented would have an instant and widespread impact

on, e.g., all criminal sentencings. *Watson*, *supra*. Nor (to STA's knowledge) are there multiple cases pending in the Court of Appeals concerning this issue. *Flippo, supra*. On the contrary, this case is "simply a private dispute." *Beaver*, *supra.*

Smith conflates public interest/public concern with public policy generally. *See*, *e.g.*, Pet. for Rev. at 4-10. Public policy "simply means that policy recognized by the state in determining what acts are unlawful or undesirable, as being injurious to the public or contrary to the public good." *Pierce v. Yakima Mem'l Hosp. Ass'n,* 43 Wn.2d 162, 166, 260 P.2d 765 (1953) (citation omitted). The courts recognize that "[p]ublic policy arguments 'are more properly addressed to the Legislature, not to the courts.'" *McCaulley v. Dep't of Labor and Indus.,* 5 Wn. App. 2d 304, 316, 424 P.3d 221 (2018) (quoting *Blomster v. Nordstrom, Inc.,* 10 Wn. App. 252, 258, 11 P.3d 883 (2000)). For example, in codifying the Good Samaritan statute, the Legislature specifically excluded anyone who is "rendering emergency care during the course of regular

employment." RCW 4.24.300(1). Therefore, as Roller's professional caregiver and Direct Support Professional, Smith was not acting in the capacity of a Good Samaritan as a matter of law.

In sum, Smith's recitation of a public policy that she believes favors her position does not mean that she has raised an issue of substantial public interest/public concern.

ii. This case does not involve the need for authoritative determination to guide public officials.

The second factor of the substantial public interest criteria, i.e., whether the issue presented is an issue on which public officials require guidance, is often a determinative factor. *Randy Reynolds & Assocs., Inc. v. Harmon*, 193 Wn.2d 143, 153, 437 P.3d 677 (2019). *See also, e.g., In re Dependency of A.K.*, 162 Wn.2d 632, 644, 174 P.3d 11 (2007) (finding a substantial public interest in "the workings of the foster care system" where a "determination of how the courts' inherent power interacts with the statutory contempt scheme will

provide useful guidance to judges"); *Arnold,* 189 Wn.2d 1023 (where it was a substantial public interest to correct the Court of Appeals' "adoption of a horizontal stare decisis rule" which "risk[ed] perpetuating incorrect decisions of law"); *Watson,* 155 Wn.2d at 577 (where "the court's treatment of communications as ex parte in *later* proceedings ha[d] the potential to chill policy actions taken by both attorneys and judges") (alteration in original); *In re Disciplinary Proceedings Against Bonet*, 144 Wn.2d 502, 29 P.3d 1242 (2001) (answering a question of substantial public interest: "may a prosecuting attorney offer an inducement to a defense witness to not testify at a criminal proceeding?").

Smith's Petition for Review does not implicate this crucial second factor. There are no public officials in need of guidance, nor are there erroneous interpretations of statutory law that require correction. Smith does not allege otherwise.

iii. The likelihood of recurrence is low and the quality of advocacy does not support review.

Finally, the third and fourth factors, like the first two, weigh in favor of declining review. This was a straightforward personal injury case based on a unique set of facts; although this exact situation could conceivably happen again, there is no indication that it is *likely* to recur.

Finally, in determining whether to grant a Petition for Review, the Court looks for strong advocacy. *In re Marriage of Horner*, 151 Wn.2d 884, 893, 93 P.3d 124 (2004) (accepting review, noting that the "quality of the advocacy [was] good because the parties' briefing addresse[d] the vital issue of the case . . . and the genuinely adverse parties fully litigated the merits of this case on numerous occasions"). Here, although Smith is represented by able counsel, there are deficiencies in the advocacy. Specifically, Smith pursues arguments that were not preserved for appeal, and which the Court of Appeals has already deemed waived. Further, Smith continues to rely on the

same inapplicable case law rejected by the Court of Appeals. *See Smith*, 2024 WL 5055215 at *2-3.

In sum, Smith's Petition for Review does not raise an issue of substantial public interest, and the factors do not support one. Without establishing a substantial public interest, there is no basis for this Court's review.

V. CONCLUSION

For the foregoing reasons, STA respectfully requests that Smith's Petition for Review be denied.

VII. CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.7(b), the undersigned certified that this Answer contains 2,491 words. *See* RAP 18.17(c)(10) (Petitions for Review and Answers must contain 5,000 words or less).

RESPECTFULLY SUBMITTED this 4th day of March, 2025.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that a true and accurate copy of the document to which this declaration is affixed was sent via email and regular mail, postage prepaid, on this day, to:

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Dated this 4th day of March, 2025, at Spokane, Washington.

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