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Supreme Court Case No.: 1044283
Court of Appeals Case No.: 598078

In The Supreme Court of The State of Washington

BARBARA SHULTZ, a single individual,
Petitioner,

v.

PEACE HEALTH/SOUTHWEST WASHINGTON
REGIONAL SURGERY CENTER, a Washington company,
and DR. ALLEN GABRIEL, a single individual,
Respondents.

On Petition for Review From the Court of Appeals of
The State of Washington, Division II
Honorable Judges Glasgow, Maxa, and Lee

Appeal relating to Clark County Superior Court Orders
dated June 17, 2024 and June 21, 2024
Case No. 23-2-00265-06
Honorable Emily A. Sheldrick

**RESPONDENTS' ANSWER TO
PETITION FOR REVIEW**

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I. IDENTITY OF RESPONDENTS

This answer to the Petition for Review is filed by the Defendants-Respondents Peace Health/Southwest Washington Regional Surgery Center and Dr. Allen Gabriel (“Respondents”).

II. COUNTER STATEMENT OF THE ISSUES

Properly stated, the issues before this Court are as follows:

1. Did the Court of Appeals err in affirming the trial court’s order granting summary judgment dismissing Petitioner’s First Amended Complaint (“FAC”) when Petitioner failed to offer any expert testimony in support of her single pleaded claim for medical negligence claim?

2. Did the Court of Appeals err in affirming the trial court’s denial of Petitioner’s motion for a continuance under CR 56(f) to obtain a signed declaration from her treating physician, H. Jae Chun, M.D., when Petitioner failed to provide a “good reason” for not obtaining a signed declaration prior to

the summary judgment hearing, and Dr. Chun's declaration did not raise any genuine issues of material fact precluding summary judgment on her pleaded claim for medical negligence or her unpleaded claim for "medical battery"?

III. COUNTER STATEMENT OF THE CASE

Respondent rejects the Statement of the Case in the Petition for Review because it is based on documents appended to the Petition that are not part of the record on appeal and as further set forth in Respondents' Motion to Strike.

The facts of this case are limited to the allegations in the FAC and the declaration of Respondents' counsel, Kaitie Eichner, submitted in support of Respondents' motion for summary judgment (CP 74), the declarations of Petitioner's counsel, David A. Williams, and the declaration of Petitioner, Barbara Shultz, submitted in opposition to defendants' motion for summary judgment. CP 39, 48.

In brief, this is a medical negligence action arising out of an elective breast implant removal surgery. In the FAC,

Respondent describes that her bilateral textured implants were placed in 1995. CP 12. Respondent's breast implants were recalled by 2018, and by that time, she had developed complications including bilateral contractures and persistent pain. *Id.* Respondent alleges she was "educated" that an "en block" procedure to remove her implants was the "only way to properly recover and completely heal." *Id.*

Petitioner alleges that on March 26, 2018, she consulted with Dr. Allen Gabriel to remove her implants using the "en bloc" procedure. *Id.* This involves removing the scar tissue that forms around the implants, known as "capsules." *Id.* Petitioner signed an informed consent statement agreeing to "removal of bilateral breast implants with "en block" capsulectomy." CP 76. Dr. Gabriel's operative note indicated that "the total capsulectomy was performed with a textured silicone implant in near Enbloc fashion. This was then removed." CP 28. Petitioner alleges that she had subsequent surgery on May 25,

2021, where the surgeon, H. Jae Chun, M.D., discovered residual capsular tissue which was removed. CP 12.

The FAC alleged a single claim for medical negligence based on defendants' failure to fully remove the capsules from Petitioner's breasts. *Id.* This allegedly caused Petitioner pain, disfigurement, allergies, discomfort, and an infection. *Id.* Petitioner alleged that since the remaining capsules were removed, her pain, infection, and allergic reaction has "gradually improved" but that she is continuing to "seek guidance on eradicating the toxins from her body, as the capsules that were left inside are extremely toxic." *Id.*; CP 38.

Respondent moved for summary judgment because Petitioner failed to produce expert testimony that defendants were negligent in any way alleged in the FAC. CP 20-24. Petitioner responded to the motion by asserting a new and unpleaded claim for "medical battery" based on her claim that she consented to "en block capsulectomies" and not "near en block" capsulectomies or the removal of less than all her

capsular tissue. CP 31. She filed an unsigned declaration of her subsequent treating physician, Dr. Chun, which she argued created a genuine issue of material fact precluding summary judgment *on her medical battery claim*. RP 5. Petitioner also moved the trial court pursuant to CR 56(f) for a continuance to obtain a signed declaration from Dr. Chun (CP 32), or in the alternative, a deposition of Dr. Chun to “confirm what is in the [unsigned] declaration.”. RP 13.

The trial court granted summary judgment dismissing Petitioner’s medical negligence claim but did not expressly rule on the CR 56(f) motion. CP 62. The Court of Appeals affirmed the summary judgment in an unwritten opinion dated July 8, 2025. App. 1.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. This Case Does Not Fall Within the Narrow Criteria Required for this Court to Accept Review.

Under RAP 13.4(b), the Supreme Court may accept a petition for review in limited circumstances. These include:

- (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)(1)-(4).

Petitioner seeks review on “two grounds: (1) “the case presents a significant legal question regarding the right to continuance to obtain expert testimony in a medical malpractice case,” and (2) “the matter involves a substantial public interest in ensuring access to justice for victims of medical harm.” Petition at p. 13. Neither ground has merit, but more importantly, neither ground aligns with the criteria for granting review set forth in RAP 13.4.

First, RAP 13.4(b)(3) provides that this Court may accept review when an appeal presents a “significant question of law *under the Constitution of the State of Washington or the United States* (emphasis added).” The appeal in this case certainly does not present any constitutional issues, significant or otherwise. Petitioner sought review of two routine trial court rulings, one granting summary judgment based on her failure to produce expert testimony to support her medical malpractice claim, and the other implicitly denying her CR 56(f) motion for continuance because, as the Court of Appeals concluded, “the desired evidence would not create the genuine issue of material fact necessary for [Petitioner] to survive summary judgment.” App. 1 at p. 4. Petitioner raised no constitutional arguments below, and the challenged trial court rulings clearly do not amount to “manifest error affecting a constitutional right” which may be raised for the first time on Supreme Court review. RAP 2.5(a). *See, e.g., State v. O’Hara*, 167 Wn.2d 91,

98, 217 P.3d 756 (2009) (describing defendant’s burden of proving manifest error affecting a constitutional right).

Second, RAP 13.4(b)(4) provides that this Court may accept review when a petition “involves an issue of substantial public interest that should be determined by the Supreme Court.” In determining whether a technically moot case presents a question of “substantial public interest” justifying further consideration by the court, the courts evaluate: “(1) whether [the dispute] is of a public or private nature; (2) whether it is desirable for an authoritative determination to provide future guidance for public officials; and (3) whether the issue is likely to recur.” *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012). None of these considerations weighs in favor granting review in this case.

Again, this was an ordinary medical malpractice action – a private dispute between a patient and a physician that was dismissed because Petitioner failed to produce sufficient expert testimony to avoid summary judgment on the issues of

negligence and causation. There is no rule of law that could be announced by this Court to provide future “guidance for public officials,” the bench or bar – except, perhaps, to caution attorneys and their clients against filing medical malpractice actions without expert support. Although the “issue is likely to reoccur,” that is true only because parties sometimes fail to prove their cases – and not because the law is “confused” or unsettled. *See State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (“A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue.”)

As Petitioner concedes in her Petition: “Petitioner’s second attorney [] failed to amend her original complaint, raised new claims for the first time in response to a dispositive motion, and did not secure a timely expert affidavit.” Petition at p. 14. Those alleged failings are not issues of “substantial public interest” that should be somehow remedied by this

Court. To the extent that Petitioner has complaints regarding her attorneys, she can pursue those in the appropriate forum.

B. Petitioner has failed to identify any reversible error.

Petitioner concedes that she failed to produce sufficient evidence in the trial court to preclude summary judgment on her medical negligence claim and her unpleaded “medical battery” claim, but she argues that the failure to produce evidence was due to “deficiencies attributable to her counsel” (Petition at p. 14) and that the trial court should have allowed her to “depone her treating physician, Dr. Chun, who was on medical leave and therefore unavailable to sign an affidavit.” *Id.* Petitioner asserts that she should “not have been penalized for her attorney’s inaction and the circumstances surround Dr. Chen’s availability,” and that this Court should grant review to “remedy the injustice caused by ineffective counsel and premature dismissal.” *Id.* at 20.

In *civil appeals*, this Court reviews for errors of law and not errors of attorneys, and the claimed incompetency of one's own lawyer is not grounds for reversal. See *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004) (under the sixth amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings); *Nicholson v. Rushen*, 767 F.2d 1426 (9th Cir. 1985) (generally, a plaintiff in a civil case has no right to effective assistance of counsel). There is no basis for granting review simply to correct alleged attorney incompetence.

Moreover, Petitioner does not argue that the trial court erred in granting summary judgment based on the record before it but rather argues that the trial court erred in denying her CR 56(f) motion. She fails to explain, however, how the denial of her motion was in any way prejudicial. See *In re Pers. Restraint of Davis*, 152 Wn.2d at 671-72 ("To actually obtain relief on

collateral review based on a constitutional error the petitioner must demonstrate by a preponderance of the evidence that petitioner was actually and substantially prejudiced by the error.”); *Adkins v. Aluminum Co. of Am.*, 110 Wn. 2d 128, 142, 750 P.2d 1257 (1988) (reversal is required only where the error was prejudicial).

In this case, Petitioner filed a *two sentence* CR 56 (f) motion seeking a continuance of the summary judgment hearing to “obtain signatures” on the declaration of Dr. Chen. CP 36. At hearing, Petitioner’s expanded her motion, requesting a continuance to take the deposition of Dr. Chen to “confirm what is in the [unsigned] declaration.” RP 13. The “offer of proof” in this case amounts to a statement from counsel that *if* a continuance had been granted, Petitioner would have obtained a signed declaration or deposition testimony from Dr. Chen establishing the facts set forth in her unsigned declaration. *Id.* As explained by the Court of Appeals (App. 1, pp. 5-6), the information contained in Dr. Chen’s declaration

failed to raise a genuine issue of material fact precluding summary judgment on Petitioner's medical negligence claim or her unpleaded claim for "medical battery." There is no proof in the record that the claimed error in failing to grant Petitioner's CR 56(f) was prejudicial. Plaintiff has failed to identify any facts *in the record* which were not considered by the trial court or the Court of Appeals which would have affected the outcome in this case.

V. CONCLUSION

As set forth above, this case does not raise a significant question of law under the Constitution of the State of Washington or of the United States or an issue of substantial public importance. Moreover, Petitioner has failed to identify any reversible error by the Court of Appeals. For these reasons, Respondents respectfully requests that this Court decline review of the Court of Appeals.

This document contains 2,068 words, excluding the parts
of the document exempted from the word count by RAP 18.17.

Dated this 25th day of August, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2025 I caused to be served a copy of **RESPONDENTS' RESPONSE TO PETITION FOR REVIEW** on the following persons(s) in the manner indicated below at the following address(es):

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Respondents' Answer to Petition for Review

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