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SUPREME COURT OF THE STATE OF WASHINGTON

PATRICIA GRANT,

Petitioner,

vs.

CLAUDIO GABRIEL ALPEROVICH, ST. FRANCIS HOSPITAL-
FRANCISCAN HEALTH SYSTEM, VALLEY MEDICAL CENTER,
TRJET M. NGUYEN, MICHAEL K. HORI, PACIFIC MEDICAL
CENTER INC., LISA OSWALD, SHOBA KRISHNAMURTHY,
MICHELE PULLING, WM. RICHARD LUDWIG, U.S. FAMILY
HEALTH PLAN @PACIFIC MEDICAL CENTER INC., VIRGINIA
MASON HEALTH SYSTEM, RICHARD C. THIRLBY, AND
UNKNOWN JOHN AND JANE DOES,

Respondents.

RESPONDENT MICHAEL K. HORI, M.D.'S
ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTY

Respondent Michael K. Hori, M.D. (“Dr. Hori”) asks the Court to deny Ms. Grant’s Petition for Review.

II. COURT OF APPEALS DECISION

The Court of Appeals, in its April 28, 2014 unpublished decision, affirmed the trial court’s order dismissing with prejudice Ms. Grant’s medical malpractice claims against Dr. Hori and most of the other named defendants based on Ms. Grant’s failure to produce competent and admissible expert testimony establishing a breach of the standard of care and proximate cause of injury as required by RCW 7.70 *et seq.* and this Court’s related case law. The Court of Appeals concluded that the trial court appropriately exercised its discretion in striking an unsworn letter from one of Ms. Grant’s subsequent treating physicians that she had attempted to untimely introduce into evidence in opposition to Dr. Hori’s motion for summary judgment. The Court of Appeals also affirmed the trial court’s conclusion that even ignoring the timing and form of the letter, it was insufficient as a matter of law to satisfy Ms. Grant’s burden of production in resisting Dr. Hori’s motion for summary judgment. The Court of Appeals concluded:

“[i]n sum, the letter does not demonstrate that any of the physicians failed to exercise the degree of care of a

reasonably prudent health care provider, violated of (sic) Washington's standard of care, or that their actions proximately caused Grant's injuries. Because Grant failed to meet her burden to defeat summary judgment by producing competent medical evidence to support her malpractice claims, the trial court properly granted the defendants' motions for summary judgment.

Slip Op. at 7-8.

III. COUNTERSTATEMENT OF ISSUES
PRESENTED FOR REVIEW

1. Did the trial court properly exercise its discretion to strike from evidence an untimely, unsworn letter that does not affirmatively establish that the author is familiar with the standard of care applicable to a reasonably prudent health care provider in the same or similar circumstances as Dr. Hori, or that any breach of the applicable standard of care by Dr. Hori proximately caused injury to Ms. Grant?

2. Did the trial court properly dismiss Ms. Grant's medical malpractice case against Dr. Hori, where Ms. Grant failed to meet her burden to defeat summary judgment by producing competent medical evidence to support her medical malpractice claims?

IV. COUNTERSTATEMENT OF THE CASE

The Court of Appeals' unpublished decision adequately relates the facts. The salient facts are as follows.

Ms. Grant sued Dr. Hori, along with multiple other defendants, for alleged injuries resulting from medical care and treatment provided by the defendants following a gastric bypass surgery. As it relates to Dr. Hori, Ms. Grant's allegations stem from a single infectious disease consultation by Dr. Hori, which was done at the request of Dr. Claudio Gabriel Alperovich, Ms. Grant's bariatric surgeon. Dr. Hori's consultation consisted of a physical examination, an order for diagnostic testing, review of the test results, a follow-up physical examination, and a recommendation to Dr. Alperovich. In total, Dr. Hori's medical care and treatment of Ms. Grant occurred over the course of three days from August 3, 2009 through August 5, 2009.

Dr. Hori filed a motion for summary judgment in the trial court on October 9, 2012, asserting Ms. Grant's exclusive remedy was RCW 7.70 *et seq.* because her allegations arose from the provision of health care by Dr. Hori, and that she lacked the requisite expert testimony. CP 590-591; 594; 596-609.

Notably, on September 12, 2012, almost two months before the date for hearing Dr. Hori's Motion for Summary Judgment, Dr. Hori's

counsel sent Ms. Grant a letter, by first class mail, enclosing a note for Dr. Hori's Motion for Summary Judgment scheduled for November 9, 2012. CP 685. The letter also informed Ms. Grant she would receive the actual motion and supporting documents no later than October 12, 2012, that any opposition would be due October 29, 2012 and that, if granted, her case against Dr. Hori would be dismissed. CP 685. The letter also encouraged Ms. Grant to seek legal counsel. CP 685. Dr. Hori subsequently served his Motion for Summary Judgment and supporting documents on Ms. Grant via first class mail on October 9, 2012. CP 686. In sum, Ms. Grant was provided a full month's notice beyond that required by the Civil Rules that Dr. Hori would be filing his motion. CP 685-686.

Ms. Grant filed an opposition to Dr. Hori's motion, CP 643-656, along with a declaration under her own signature, CP 610-642, but failed to produce any expert testimony or other legal or evidentiary basis to support her claims against Dr. Hori. Therefore, Dr. Hori's motion went to hearing on November 9, 2012.

At that hearing, Ms. Grant attempted to support her opposition, for the very first time, with an untimely and unsworn letter from Dr. Elliot R. Goodman, a New York physician who had treated Ms. Grant. The trial court noted the letter was submitted at oral argument, was unsworn, and struck it from the record. CP 728-731. The trial court also noted that,

even if it were not stricken, the letter lacked foundation and failed to address the pertinent standard of care in Washington. CP 729. Thus, the Honorable Jay White of the Superior Court for the State of Washington for King County granted Dr. Hori's Motion for Summary Judgment and dismissed all claims against him. CP 687-688.

Ms. Grant appealed. The Court of Appeals affirmed the trial court's summary judgment dismissal in its April 28, 2014 unpublished decision. Specifically, the Court of Appeals held that Ms. Grant did not submit admissible evidence establishing that Dr. Hori violated the applicable standard of care or that such violation proximately caused her injury or damage; the trial court acted within its discretion in striking Dr. Goodman's letter; even if it had not been untimely, Dr. Goodman's letter was inadmissible because it did specifically identify how Dr. Goodman was familiar with the applicable standard of care, how that standard of care was violated, and/or how any such violation caused injury or damage; and Ms. Grant did not request, nor would she have been entitled to, a CR 56(f) continuance.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4(b) specifies the "considerations Governing Acceptance of Review." The rule states that a petition for review will be accepted by the Supreme Court 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 another 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.

Here, Ms. Grant has failed to satisfy any of the considerations identified in RAP 13.4(b). As such, her Petition for Review should be denied.

A. Ms. Grant Does Not Establish that the Court of Appeals Decision Conflicts with a Decision of This Court or Another Decision of the Court of Appeals.

Ms. Grant's Petition for Review fails to identify any Washington published decision in conflict with the unpublished decision of the Court of Appeals. This is no mere oversight, for the Court of Appeals correctly applied the applicable law. The Court of Appeals correctly held that expert testimony is required on both the issues of standard of care and causation in a medical malpractice action. *Slip Op.* at 5, citing *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 228, 770 P.2d 182 (1989). The

Court of Appeals correctly held that the trial court has the discretion whether to accept or reject affidavits untimely filed in response to a motion for summary judgment. *Slip Op.* at 6, citing *Southwick v. Seattle Police Officer John Doe Nos. 1-5*, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008). The Court of Appeals correctly held that even if it had not been untimely, an unsworn letter is insufficient to create a genuine issue of material fact for purposes of resisting summary judgment. *Slip Op.* at 6, citing *Young Soo Kim v. Choong-Hyun Lee*, 174 Wn. App. 319, 326-27, 300 P.3d 431 (2013). Finally, the Court of Appeals correctly held that Dr. Goodman's letter did not demonstrate the adequate foundation and specificity to successfully resist summary judgment. *Slip Op.* at 6-7.

Similarly, the Court of Appeals correctly held that Ms. Grant had not requested, nor would she have been entitled to, a CR 56(f) continuance under applicable law. *Slip Op.* at 8-9, citing *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989); *Gross v. Sunding*, 139 Wn. App. 54, 68, 161 P.3d 380 (2007). The Court of Appeals correctly held that a decision whether to grant a CR 56(f) continuance is left to the sound discretion of the trial court, and that the trial court here did not abuse its discretion.

Ms. Grant fails to identify a single published Washington decision in conflict with any of the authorities cited by the Court of Appeals. As

such, she fails to establish that this Court should grant her Petition for Review under either the first or second consideration identified in RAP 13.4(b).

B. Ms. Grant Does Not Establish that This Case Involves a Significant Question of Law Under the Constitution of the State of Washington or of the United States.

Ms. Grant does not identify any constitutional issue, either state or federal, that would satisfy the requirements of RAP 13.4(b)(3). While she seems to claim that she was denied equal protection and due process, she provides no details in support of that claim. Although constitutional issues may be raised for the first time on appeal, a party raising a constitutional issue must present considered arguments on the issue. As this Court has stressed, “ ‘naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion’.” *In re Request of Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir.1970), *cert. denied*, 401 U.S. 917, 91 S.Ct. 900, 27 L.Ed.2d 819 (1971)). Here, Ms. Grant’s allegations regarding any violations of equal protection and/or due process do not warrant consideration by this Court.

C. Ms. Grant Does Not Establish that the Petition Involves an Issue of Substantial Public Interest that Should be Determined by the Supreme Court.

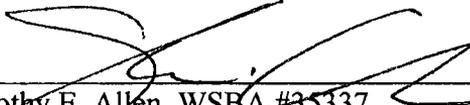
Ms. Grant does not establish that her Petition for Review should be accepted on the basis of RAP 13.4(b)(4). She offers no argument as to why review of this case would address an issue of substantial public interest. Rather, the issues involved in this appeal are important only to the parties to the underlying litigation. As such, the Court should decline review.

VI. CONCLUSION

Ms. Grant's Petition for Review does not merit consideration under any section of RAP 13.4(b). The Court of Appeals properly affirmed the rulings of the trial court, and based its affirmation on well-established case law. Under these circumstances, the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 30th day of July, 2014.

BENNETT BIGELOW & LEEDOM, P.S.



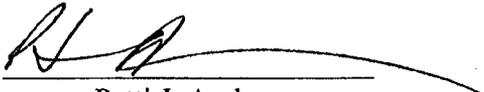
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CERTIFICATE OF SERVICE

I, certify under penalty of perjury under the laws of the State of Washington that on July 30, 2014, I caused the foregoing (1) **Respondent Michael K. Hori', M.D.'s Answer to Petition for Review**, and (2) **this Certificate of Service** to be delivered as follows:

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Doug Yoshida, WSBA #17365 Ogden Murphy Wallace, PLLC 1601 Fifth Avenue, Suite 2100 Seattle, WA 98101 dyoshida@omwlaw.com Attorneys for Defendant Michele Pulling, M.D.	<input checked="" type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	Hand Delivered Facsimile Email 1 st Class Mail Priority Mail Federal Express, Next Day
Michelle M. Garzon, WSBA #31558 Timothy L. Ashcraft, WSBA #26196 Williams Kastner & Gibbs PLLC 1301 A Street, Suite 900 Tacoma, WA 98402-1145 Attorneys for Defendant Claudio Alperovich, M.D.	<input checked="" type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	Hand Delivered Facsimile Email 1 st Class Mail Priority Mail Federal Express, Next Day


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Attached for filing is Dr. Michael Hori's Answer to Petition for Review in Grant v. Claudio Alperovich, M.D., et al., Cause No. 90429-4. The attorney filing this document is Timothy E. Allen, WSBA No. 35337, email address: tallen@bblaw.com.

PATTI ANDREWS

Legal Assistant to Tim Allen and Justin Steiner

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