

73225-1

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No. 73225-1-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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Anna Chester,

Appellant,

v.

Deep Roots Alderwood, LLC, a Washington company; and  
Bonnie Gillson,

Respondents.

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REPLY BRIEF OF APPELLANT

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STATE OF WASHINGTON

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## I. REPLY STATEMENT OF THE CASE

Deep Roots and Gillson imply that the One ink was sterile. *See* Deep Roots' Br. 7-9; Gillson's Br. 4-5, 19. However, Gillson's own testimony confirms the One ink was not sterile or represented to be sterile. CP 213.

Deep Roots and Gillson also imply that sterile ink was not available to Gillson. Deep Roots' Br. 12-14; Gillson's Br. 9-11. However, sterile ink was available to Gillson. CP 353, 355, 357, 359, 368, 385. That some Intenze ink or other ink represented to be sterile, in fact, contained bacteria, does not absolve Gillson of responsibility for her choice to use non-sterile ink.<sup>1</sup>

Deep Roots and Gillson state there is no evidence that tattoo artists can verify that ink is sterile. Deep Roots' Br. 12; Gillson's Br. 9. However, she could have bought sterile ink. Additionally, it is an undisputed fact that, at the time of Gillson's acquiring of the One ink, laboratories were applying gamma irradiation to tattoo ink to eliminate

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<sup>1</sup> Gillson testified that she knew of and had used Intenze ink, stating: "I've used a couple of colors at some points earlier in my career, but was never super impressed with it." CP 215. Additionally, Gillson knew of and had used Eternal ink. CP 204. The authors of the European study cited by Dr. Dinges bought, via internet orders, 58 tattoo inks from 13 manufacturers in February 2010. The authors state that Eternal also claimed sterility as to five of the six acquired colors. CP 376-380; *see also infra* p. 11 n. 15.

harmful bacteria, and that gamma irradiation would have effectively eliminated the bacteria in the subject One ink. CP 368.<sup>2,3,4</sup>

## II. ARGUMENT

### A. Where the law requires that tattoo artists “Use sterile instruments and aseptic techniques at all times during a procedure”, Gillson’s undisputed use of non-sterile ink that was contaminated with harmful bacteria was negligent per se.

With respect to Chester’s claim under WAC 246-145-050(1), neither Deep Roots nor Gillson dispute the following:

- To apply Chester’s tattoo, Gillson used tattoo needles and instruments, including metal tubes.
- Gillson dipped the tattoo needles into non-sterile ink that was contaminated with harmful bacteria.
- The metal tubes held a small reservoir of the non-sterile, contaminated ink.
- WAC 246-145-050(1) applied to Gillson and required that she “Use sterile instruments and aseptic techniques at all times during a procedure.”

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<sup>2</sup> Chester’s citation to CP 368 refers to paragraph seven of Dr. Dinges’s Second Declaration. The superior court did not strike or limit consideration of this paragraph.

<sup>3</sup> Deep Roots’ owners and operators conducted weekly spore strip tests for bacteria in their autoclave. Ryan Wickersham, co-owner and operator of Deep Roots, testified: “A spore test is a biological strip that is ran through the autoclave chamber with a load of clean -- of tools to be cleaned to make sure that the chamber is free of microorganisms.” CP 228. Gillson and Deep Roots could have supplied a sample of ink to be used in the future, or a strip with that ink, to a lab for testing for bacteria. Gillson could have also sent the ink she used to a lab for gamma irradiation.

<sup>4</sup> Deep Roots and Gillson insinuate they should not be held responsible because Chester’s claims against the manufacturers, who may or may not be solvent, are ongoing in the superior court. Deep Roots’ Br. 14 n. 10; Gillson’s Br. 13. However, under RCW 4.22.070, tortfeasors can apportion fault among themselves, and may pursue contribution from other defendants.

Deep Roots and Gillson argue that WAC 246-145-050(1)'s requirement that tattoo artists "Use sterile instruments and aseptic techniques at all times during a procedure" does not apply to the tattoo ink chosen by the artist.

According to Deep Roots, WAC 246-145-050(1)'s requirement to "Use sterile instruments . . . at all times during a procedure" does not have any meaning other than to refer to other regulations. Deep Roots' Br. 33 ("The only reasonable meaning that can be attributed to the use of "sterile instruments" is the use of instruments in accordance with the sterilization requirements of WAC 246-145-060."). This interpretation renders the requirement to use sterile instruments at all times during the procedure duplicative, and is incompatible with rules of statutory interpretation. Courts "interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous." *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186, 190 (2010). As to "aseptic technique," Deep Roots refers to the definition of the term "aseptic technique,"<sup>5</sup> but provides no evidence, expert opinion or otherwise, that Gillson's undisputed failure to use sterile ink was in compliance with aseptic technique, defined as "a procedure that prevents contamination of any object or person." WAC

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<sup>5</sup> Deep Roots' Br. 27 n. 22.



246-145-010(2). As stated in Chester's brief and by Dr. Dinges<sup>6</sup>, a procedure is not "aseptic" and does not "prevent contamination" if it employs non-sterile ink.

At its core, Deep Roots' argument is that the Department of Health required that tattoo artists not use ink that is banned or restricted by the FDA, or mix ink with improper ingredients, and nothing more. Deep Roots' Br. 21. The implication of Deep Roots' argument is that Gillson could have bought ink she knew to be contaminated with harmful bacteria, inserted it into Chester's skin, and have harmed Chester, and still have used "sterile instruments and aseptic techniques at all times during [Chester's] procedure." This implication, and Deep Roots' interpretation of WAC 246-145-050(1), is inconsistent with the plain meaning of that regulation and legislative intent, and should be rejected.

In making similar arguments, Gillson makes a series of incorrect statements about the evidence. Gillson argues "there is no requirement that a tattooist sterilize the ink purchased from a reputable manufacturer and that presumably, was sterile in the sealed container it was delivered in." Gillson's Br. 18-19. Gillson does not cite the record for her contention that Kingpin is a "reputable manufacturer," and there is no

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<sup>6</sup> The superior court considered Dr. Dinges's statements at pages 4 and 5 of his Second Declaration that "aseptic technique" requires sterile ink as "legal opinions" and "only as medical opinion," respectively. CP 15-23.

evidence that Kingpin is a reputable “manufacturer.” On the contrary, Gillson acquired the One ink with the belief that Kingpin was *not* a manufacturer, but was “just a distributor.” CP 233. She did not know who manufactured the One ink. *Id.*

Gillson further argues she “clearly believed that One ink was sterile and safe for its intended use.” Gillson’s Br. 19. However, the opposite is true. Gillson testified there was nothing in her knowledge of One ink that would have allowed her to conclude it was sterile, and there was no way she could have known it was sterile. CP 213. If Gillson “presumed” the One ink to be sterile, she did not base her presumption on any reliable facts known to her. According to Gillson’s own testimony, Kingpin provided the One ink without affirmative assurances of sterility. *Id.* Gillson’s argument that she is not required to sterilize ink underscores the importance of the fact that she could have bought sterile ink. According to the plain meaning of WAC 246-145-050(1), an artist’s use of non-sterile ink cannot, under any circumstance, be compatible with the requirement to “Use sterile instruments and aseptic technique at all times during a procedure.” Gillson’s choice to use nonsterile ink when sterile ink was available makes irrelevant her argument that she has no duty to “sterilize” ink.

**B. Where the Legislature defined tattooing as the “insertion of nontoxic dyes or pigments”, Gillson’s undisputed use of non-sterile ink that was contaminated with harmful bacteria was negligent per se, or at a minimum, evidence of negligence.**

Deep Roots and Gillson argue that RCW 70.54.330(4)’s definition of tattooing as the insertion of “nontoxic” ink does not establish a legal duty. Deep Roots’ Br. 26; Gillson’s Br. 30. Deep Roots argues the phrase “nontoxic dyes or pigments” is descriptive only, as is the statutory definition of “grievous bodily harm” vis-a-vis the criminal offense first degree assault, considered in *State v. Laico*, 97 Wn. App. 759, 763-764, 987 P.2d 638 (1999).<sup>7</sup>

However, the determination in the criminal case *Laico* was based upon unrelated factors of adding elements to the State’s burden of proof, a concern of a myriad of jury instructions, and a redundancy caused by the insertion of the grievous bodily harm definition into the offense assault in the first degree. *Id.* As Chester contends that RCW 70.54.330(4)’s definition of tattooing is an independent duty that tattoo artists only use ink that is nontoxic, the factors in *Laico* are not implicated. *Id.*<sup>8</sup>

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<sup>7</sup> Deep Roots’ Br. 26 (citing *State v. Laico*, 97 Wn. App. 759, 763-764, 987 P.2d 638 (1999) (finding the definition of “grievous bodily harm” to be a description of the factual circumstances which support the offense assault in the first degree, and that the definition does not provide alternate means for committing the offense assault in the first degree)).

<sup>8</sup> The Legislature has, in other situations, imparted duties through statutory definitions. *See e.g.* RCW 49.60.040(7)(d) (establishing a duty that, to qualify for reasonable accommodation in employment, the “impairment must be known or shown through an interactive process”).

Deep Roots argues the term “nontoxic” is evidence the Legislature does not require sterile ink, or even ink that is free of harmful bacteria, only ink that is “nontoxic.” Deep Roots provides a dictionary definition of “nontoxic”: “not toxic; *often*: free from toxicity for an indicated organism [human beings in this case] . . . at concentrations normally employed.” Deep Roots’ Br. 25 (citing *Merriam-Webster Unabridged* (2015)). Deep Roots did not provide a dictionary or other definition of the word “toxic.” “Toxic” means “containing or being poisonous material especially when capable of causing death or serious debilitation.” *Merriam-Webster Online*, s.v. “toxic” (def. 1) (available at [www.m-w.com](http://www.m-w.com); viewed August 17, 2015). Under these definitions, the One ink was not, nontoxic, as the indicated organism was Chester and the ink was capable of causing “serious debilitation.”<sup>9, 10</sup>

Deep Roots argues Gillson cannot be negligent per se for using toxic ink because RCW 18.300.010(8) is the correct definition of tattooing, and that definition does not include the term “nontoxic.” Chester contends that RCW 70.54.330(4)’s standard of nontoxic ink

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<sup>9</sup> Gillson is incorrect to say that Chester had not presented the argument that Gillson violated the statutory requirement to use nontoxic ink to the trial court. Gillson’s Br. 29; compare CP 415-416.

<sup>10</sup> Gillson’s argument that her failure to use nontoxic ink actually inheres to her benefit, by rendering her not subject to rules regarding tattooing or RCW 5.40.050, is opposed to fundamental principles of tort law. Gillson’s Br. 30 n. 19; see *Mohr v. Grantham*, 172 Wn.2d 844, 852, 262 P.3d 490, 493 (2011) (regarding deterrence objectives of tort law).

qualifies for negligence per se as establishing a “precaution against the spread of disease.” RCW 5.40.050(3). However, even if RCW 70.54.330(4)’s definition does not establish a duty that qualifies for negligence per se, Gillson’s violation of that provision would be evidence of negligence.<sup>11</sup>

**C. Gillson’s violations of WAC 246-145-050(1) and RCW 70.54.330(4) are negligent per se under RCW 5.40.050.**

Gillson argues that RCW 5.40.050 does not even apply to Chester’s claims because according to her, “RCW 5.40.050, by the plain meaning of its terms, applies only to Gillson’s act in sterilizing the needle and her other instruments prior to use.” Gillson’s Br. 16. RCW 5.40.050 provides in full:

A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence; however, any breach of duty as provided by statute, ordinance, or administrative rule relating to: (1) Electrical fire safety, (2) the use of smoke alarms, (3) sterilization of needles and instruments used by persons engaged in the practice of body art, body piercing, tattooing, or electrology, or other precaution against the spread of disease, as required under RCW 70.54.350, or (4) driving while under the influence of intoxicating liquor or any drug, shall be considered negligence per se.

The relevant portions of RCW 5.40.050 are:

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<sup>11</sup> RCW 5.40.050; *Yurkovich v. Rose*, 68 Wn. App. 643, 654, 847 P.2d 925, 931 (1993); WPI 60.03.

[A]ny breach of duty as provided by statute, ordinance, or administrative rule relating to: (3) sterilization of needles and instruments used by persons engaged in the practice of . . . tattooing . . . or other precaution against the spread of disease, as required under RCW 70.54.350 . . . shall be considered negligence per se.<sup>12</sup>

RCW 5.40.050 (emphasis added). Gillson argues that Chester's claims of negligence per se cannot be within the scope of RCW 5.40.050 if Gillson used needles that were sterile before the tattoo procedure started, but not at the time that mattered most, just after Gillson dipped them in the ink prior to penetrating Chester's skin. However, RCW 5.40.050 is not so narrow. WAC 246-145-050(1)'s requirement that tattoo artists "Use sterile instruments and aseptic techniques at all times during a procedure" both "relates to" the sterilization of needles and instruments, and is a "precaution against the spread of disease as required under RCW 70.54.350." The undisputed evidence is that Gillson used needles and instruments during Chester's procedure that were non-sterile because they were contaminated with harmful bacteria. Gillson's Br. 1; Deep Roots' Br. 1.

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<sup>12</sup> Notably, Gillson's citation to RCW 5.40.050(3) utilizes an ellipsis in the place of the statutory language "or other precautions against the spread of disease . . ." Gillson's Br. 16.

**D. Gillson is negligent per se for her violations of WAC 246-145-050(1) and RCW 70.54.330(4), and her violations are not excused by any affirmative defense.**

Neither Gillson nor Deep Roots pleaded the affirmative defense of excuse or WPI 60.01.01. CP 71-73, 493-495.<sup>13</sup> “Generally, affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties.” *Henderson v. Tyrrell*, 80 Wn. App. 592, 624, 910 P.2d 522, 540 (1996), as amended on denial of reconsideration (Mar. 14, 1996); *see also* CR 8(c).<sup>14</sup> Gillson and Deep Roots did not move for summary judgment dismissal based upon any affirmative defense, nor did the court enter any dismissal order based upon any affirmative defense. CP 1-14. None of the exceptions to the waiver of affirmative defenses apply. Furthermore, as stated in Chester’s brief, neither RCW 5.40.050 nor the DOH rules provide for any affirmative defenses. On the contrary, RCW 70.54.340 directed the DOH to adopt rules “in accordance with nationally recognized professional standards, for precautions against the spread of disease . . . .” As the DOH regulations are themselves a statement of

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<sup>13</sup> Gillson and Deep Roots pleaded unavailability as an affirmative defense. CP 72, 494. Chester submits this affirmative defense does not apply to this case. In any event, unavailability is distinct from the affirmative defense of excuse under WPI 60.01.01.

<sup>14</sup> CR 8(c) (“In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitation, waiver, and any other matter constituting an avoidance or affirmative defense.”) (emphasis added).

“ordinary care” under RCW 5.40.050, an artist cannot both violate a DOH universal precaution and exercise ordinary care under WPI 60.01.01 at the same time. For these reasons this Court should reject the argument that Gillson’s statutory and regulatory violations are excused under WPI 60.01.01.

If the Court considers any affirmative defense, under *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989), Gillson and Deep Roots have the burden of establishing there are no genuine issues of material fact and they are entitled to judgment as a matter of law. The facts should be viewed in the light most favorable to Chester, as the non-moving party, and all reasonable inferences from the facts should be drawn in her favor. *Id.*

To establish the defense of excuse, Gillson must establish that before Chester’s tattoo she *could not* have learned of the existence of ink marketed as sterile. WPI 60.01.01. However, the undisputed fact is that sterile tattoo ink was available in the market, and Gillson was aware of at least one brand, Intenze, that was marketed as sterile. CP 215, 353, 359, 376-380.<sup>15</sup> Gillson’s statement of actions she claims to have taken is inadequate in light of the availability of sterile ink. Gillson’s Br. 31-32.

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<sup>15</sup> Chester’s citation of CP 376-380 refers to the following European study: T. Hagsberg., D.M. Saunte., N. Frimodt-Maller, J. Serupt, *Microbial status and product labelling of 58 original tattoo inks*, Journal of the European Academy of Dermatology and Venerology



**E. WAC 246-145-050 and RCW 70.54.330(4) are part of the standard of care for tattoo artists.**

Courts adopt a statute or regulation as the standard of conduct of a reasonable person if its purpose is “exclusively or in part”:

- (a) to protect a class of persons which includes the one whose interest is invaded, and
- (b) to protect the particular interest which is invaded, and
- (c) to protect that interest against the kind of harm which has resulted, and
- (d) to protect that interest against the particular hazard from which the harm results.<sup>16</sup>

WAC 246-145-050 is titled “Standard universal precautions for preventing the spread of disease in body art, body piercing, and tattooing.” As stated, WAC 246-145-050(1) requires that tattoo artists “Use sterile instruments and aseptic techniques at all times during a procedure.” The Legislature’s intent in directing the DOH to adopt “sterilization requirements” was to prevent the spread of disease through tattooing procedures. RCW 70.54.340. RCW 70.54.330(4) defines “tattooing” as “the indelible mark, figure, or decorative design introduced by insertion of nontoxic dyes or pigments into or under the subcutaneous portion of the

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(2011) (purchasing 58 tattoo inks from 13 manufacturers and finding that five of the 13 manufacturers claimed sterility; 3 of the 24 inks claiming sterility tested positive for bacteria).

<sup>16</sup> *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 269, 96 P.3d 386, 390-91 (2004); see also *Kness v. Truck Trailer Equip. Co.*, 81 Wn.2d 251, 258, 501 P.2d 285, 290 (1972) (pre-1986 case; trial court should have treated violation of administrative regulation as proper basis for negligence per se); WPI 60.01.01; 16 Wash. Prac., Tort Law And Practice § 2:42 (4th ed.).

skin upon the body of a live human being for cosmetic or figurative purposes.”

Gillson argues she cannot be negligent per se for violating WAC 246-145-050(1) or RCW 70.54.330(4) because she infected Chester with harmful bacteria and not a bloodborne pathogen. Gillson’s Br. 33-35; *see also* Deep Roots’ Br. 26. Gillson’s reasoning is based upon an incorrect reading of RCW 5.40.050. RCW 5.40.050 does not limit negligence per se claims to harm caused by bloodborne pathogens. RCW 5.40.050 explicitly provides for claims of negligence per se based upon a breach of a duty “relating to . . . : (3) sterilization of needles and instruments used by persons engaged in the practice of body art, body piercing, tattooing, or electrology, or other precaution against the spread of disease, as required under RCW 70.54.350 . . . .” RCW 5.40.050 (emphasis added). RCW 70.54.350 requires compliance with rules adopted by the DOH, including WAC 246-145-050. Additionally, RCW 70.54.330(4)’s requirement that tattooing must involve nontoxic ink “relates to” precautions against the spread of disease in tattooing.

The Restatement factors also support that WAC 246-145-050(1) and RCW 70.54.340(4) are part of a tattoo artist’s standard of care. Under the Restatement factors, the first inquiry is whether Chester is within the class of persons the Legislature and DOH intended to protect. There is no

question the Legislature and DOH were focused on the safety of tattoo customers. RCW 70.54.340. The second and third inquiries are whether WAC 246-145-050(1) and RCW 70.54.330(4) were intended to protect against the particular interest invaded and the kind of harm that resulted. Again, the Legislature and DOH were focused on the interest of the recipient's health and safety, and the risk of infection and disease through tattoo procedures. The fourth inquiry is whether, through the statute and regulation, the Legislature and DOH aimed to protect against the particular hazard from which Chester's harm resulted. As stated, the Legislature and DOH aimed to protect against harm caused by non-sterile instruments, breaches of aseptic technique, and toxic ink. Gillson's use of non-sterile, toxic ink that was contaminated with harmful bacteria rendered the tattoo procedure non-sterile, and is one of the particular hazards that the Legislature and DOH sought to protect against.

**F. Gillson's use of non-sterile ink that was contaminated with harmful bacteria was a proximate cause of Chester's injuries and damages.**

Gillson argues the One ink would have infected Chester whether or not the label said "sterile," and so her use of non-sterile, contaminated ink, not labeled to be sterile, cannot be a proximate cause of Chester's injuries. Gillson's Br. 35. However, the requirements to use "nontoxic" ink and to "Use sterile instruments and aseptic techniques at all times during a

procedure” do not depend on the label of the ink. Washington law requires tattoo artists to use sterile ink that is not contaminated with harmful bacteria, and tattoo artists are negligent per se if they use such ink. Gillson does not dispute that she infected Chester with harmful bacteria. The evidence establishes her use of non-sterile ink was a proximate cause of Chester’s injuries. *See* CP 253-255; 393-397.

**G. The Federal Food and Drug Administration has not approved any tattoo inks for injection through tattooing procedures.**

Gillson is correct that, under the Federal Food, Drug, and Cosmetic Act, tattoo inks are cosmetics and the pigments are color additives. 21 U.S.C. § 321(i); 21 C.F.R. 70.3(f). However, Gillson’s statement that the One ink was “FDA-approved” is incorrect. Gillson Br. 15. The FDA has not approved any tattoo pigments for injection into the skin.<sup>17</sup>

**H. Gillson’s use of non-sterile ink constitutes simple negligence.**

Neither Gillson nor Deep Roots responded to the risk-benefit analysis of Judge Learned Hand as adopted by the Washington Supreme Court in *Helling v. Carey*, 83 Wn.2d 514, 519 P.2d 981 (1974) (determining that ophthalmologists have a duty to administer glaucoma tests to patients under 40). The *Helling* court reasoned as follows:

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<sup>17</sup> U.S. Food and Drug Administration. *Think Before you Ink: Are Tattoos Safe?*, Feb. 23, 2009, <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm048919.htm> (“FDA has not approved any tattoo pigments for injection into the skin. This applies to all tattoo pigments, including those used for ultraviolet (UV) and glow-in-the-dark tattoos.”); *see* 20 C.F.R. 70.5(b).

Under the facts of this case reasonable prudence required the timely giving of the pressure test to this plaintiff. The precaution of giving this test to detect the incidence of glaucoma to patients under 40 years of age is so imperative that irrespective of its disregard by the standards of the ophthalmology profession, it is the duty of the courts to say what is required to protect patients under 40 from the damaging results of glaucoma.

We therefore hold, as a matter of law, that the reasonable standard that should have been followed under the undisputed facts of this case was the timely giving of this simple, harmless pressure test to this plaintiff and that, in failing to do so, the defendants were negligent, which proximately resulted in the blindness sustained by the plaintiff for which the defendants are liable.

*Id.* at 519. Similarly, all Gillson had to do to avoid infecting Chester was take the simple and available precaution of using sterile ink. Her failure to use sterile ink was unreasonable.

**I. Dr. Dinges’s testimony in his Second Declaration is admissible.**

**1. The portion of Dr. Dinges’s Second Declaration that the superior court considered “only as medical opinion.”**

Gillson and Deep Roots do not dispute the following:

- Under RCW 70.54.340<sup>18</sup>, the 2009 Legislature required the Secretary of Health to adopt rules for precautions against the spread of disease to be employed by tattoo artists.

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<sup>18</sup> RCW 70.54.340 provides: “The secretary of health shall adopt by rule requirements, in accordance with nationally recognized professional standards, for precautions against the spread of disease, including the sterilization of needles and other instruments, including sharps and jewelry, employed by electrologists, persons engaged in the practice of body art, body piercing, and tattoo artists. The secretary shall consider the standard precautions for infection control, as recommended by the United States centers for disease control, and guidelines for infection control, as recommended by national industry standards in the adoption of these sterilization requirements.”

- RCW 70.54.340 provides that the Secretary’s rules shall be “in accordance with nationally recognized professional standards . . . .”
- RCW 70.54.340 provides that the Secretary “shall consider the standard precautions for infection control, as recommended by the United States centers for disease control . . . .”
- The CDC’s standard precautions for infection control were written by medical doctors and scientists. CP 103-125.

Deep Roots and Gillson claim the following regarding RCW 70.54.340:

“In effect, the Legislature ordered the rules to conform to nationally recognized professional tattooing standards, with only consideration for infection control precautions and guidelines from the CDC.” Deep Roots’ Br. 30 (emphasis removed); *see also* Gillson’s Br. 41-42. Upon that claim, Deep Roots and Gillson argue that RCW 70.54.340 provides no support for Dr. Dinges’s qualifications to provide page 5, lines 7-12 of his testimony.<sup>19</sup>

The transitive verb “consider” means “to think about carefully: as a : to think of especially with regard to taking some action.” *Merriam-Webster Online*, *s.v.* “consider” (def. 1(a)) (available at [m-w.com](http://m-w.com); viewed August 6, 2015). Under RCW 70.54.340, the Legislature required the Secretary to think carefully about the CDC’s precautions for infection

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<sup>19</sup> CP 370 (“In my opinion the absolute minimum that is required for a tattoo artist (or any person intending to inject a substance into a person) to be able to claim the use of sterile instruments and aseptic technique at all times during the procedure is that the artist only use ink that is in fact sterile. In this case, the artist did not use ink that was in fact sterile because the black ink in Ms. Chester's tattoo was contaminated with bacteria. To ensure sterile instruments and aseptic technique throughout the procedure, the procedure has to start with sterile tattoo ink”).

control. The fact of the Secretary's careful thought about the CDC's precautions in adopting rules for tattooing itself provides a reasonable inference of a shared understanding of sterility by medical doctors, scientists, and the Secretary, as expressed in WAC 246-145. Furthermore, neither Deep Roots nor Gillson have offered a competing definition of the term "sterile," but have instead focused on limiting its scope, and the scope of the term "aseptic technique" as being applicable only to circumstances prior to the tattoo procedure, thus negating the language "at all times during a procedure." WAC 246-145-050(1).

As to the topic of Dr. Dinges's qualifications regarding sterility and aseptic technique, Deep Roots and Gillson find significance in WAC 246-145-010(4)'s provision "(4) . . . Body art does not include any health-related procedures performed by licensed health care practitioners under their scope of practice." *See* Deep Roots' Br. 30; Gillson's Br. 42. However, the question is not whether work performed by licensed health care practitioners is body art, but whether, under ER 702, Dr. Dinges's knowledge, skill, experience, training, or education, qualifies him to testify on the topics of sterility and aseptic technique. Dr. Dinges is well-qualified on those topics, and it is inherently implausible that a medical doctor is not qualified to testify about sterility.

**2. The portion of Dr. Dinges's Second Declaration that the superior court struck as "legal opinion."**

As stated, Dr. Dinges's testimony at page 4, lines 15-21 of his Second Declaration is as follows:

Regardless of the credentials of the person performing the injection, the requirement to "use sterile instruments . . . at all times during a procedure" seems unambiguous to me. The only meaning that I can attach to that rule is that, if a tattoo artist inserts into a customer, by way of an instrument, understood to be a needle used to penetrate the surface of the skin, ink that is contaminated with bacteria, then clearly "sterile instruments" were not used at all times during the procedure because the instrument, meaning the instrument used to penetrate the customer's skin, was contaminated with bacteria.

The opening portions of this paragraph quote and refer to WAC 246-145-050(1). However, Dr. Dinges's testimony that "'sterile instruments' were not used at all times during the procedure because the instrument, meaning the instrument used to penetrate the customer's skin, was contaminated with bacteria" is not a conclusion of law, but is instead Dr. Dinges's understanding of the facts concerning the standard of care and a breach of that standard. *See e.g., White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 171, 810 P.2d 4, 9 (1991) ("In the case of a claim for medical negligence, facts concerning the standard of care and a breach of that standard ordinarily must be shown by expert medical testimony.").



### III. CONCLUSION

Anna Chester respectfully asks this Court for the following relief:

1. Reverse the superior court's summary judgment order of dismissal of Bonnie Gillson;
2. Reverse the superior court's summary judgment order of dismissal of Deep Roots Alderwood, LLC;
3. Reverse the superior court's order granting in part Bonnie Gillson and Deep Roots Alderwood, LLC's Motion to Strike the Second Declaration of Warren Dinges, M.D., Ph.D.

Submitted this 27<sup>th</sup> day of August, 2015.



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## CERTIFICATE OF SERVICE

I, Bridget Donovan, declare as follows:

- 1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the Law Offices of James S. Sorrels, 23607 Highway 99, Suite 3-A, Edmonds, WA 98026.
- 2) Prior to the end of business day on August 27, 2015, I served upon counsel of record via hand delivery at the addresses described below, the following documents:
  - **Appellant's Reply Brief; and**
  - **Certificate of Service.**

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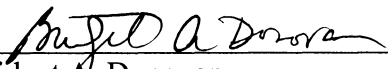
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27<sup>th</sup> day of August, 2015

  
\_\_\_\_\_  
Bridget A. Donovan