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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 336972-III

**COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON**

**Judith Margarita Reyes, on her own behalf and on behalf of the Estate of Jose
Luis Reyes, Deceased, and on behalf of her minor children, Erik (n/m/n)
Reyes (dob:3/12/98) and Leslie Maria Reyes(dob:6/23/99);**

PLAINTIFF-APPELLANT

vs.

**Yakima Health District, a public entity in the State of Washington;
Christopher Spitters, M.D.;
John Does Nos. 1 – 20;**

DEFENDANTS-APPELLEES

PLAINTIFF-APPELLANT'S OPENING BRIEF

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I. Assignments of Error:

(a) The trial court committed reversible error by granting the defendants-appellees' CR 56 motions to dismiss.

II. Issues:

(1) Should this Court revisit the anomaly created by the health care statute provision for mediation¹ that extends the medical negligence statute of limitations for an additional twelve months, but if the medical negligence victim dies, the adopted wrongful death statute of limitations cuts off medical negligence claims after three years, even if there has been a timely demand for mediation?²

(2) Should the trial court have stricken the expert witness testimony, by declaration, of Rosa Martinez, M.D., finding her testimony was insufficient to conclude medical negligence had occurred?³

(3) Because the provable injuries and other damages were as a result of the defendants' medical malpractice, should the wrongful death claims and

¹ R.C.W. 7.70.110

² *Fast v. Kennewick Public Hospital District*, 188 Wn.App. 43, 354 P.3d 858 (Wash.App. Div. 3 2015)

³ CP 108-116; CP 229-231

tort of outrage claims be asserted as derivative claims arising from medical malpractice?

III. Statement of the Case:

Decedent Jose Luis Reyes came under the care of the defendants in about December, 2009. He received medical treatment from the defendants, including from all defendants' apparent agents.⁴

In December 2009 one of defendants' physicians examined Mr. Reyes and determined that his liver levels were a little bit low but still within normal limits.⁵

In April, 2010 Mr. Reyes started taking the medicine prescribed by the Yakima Health District, but this medicine was for the treatment of tuberculosis. Mr. Reyes did not have tuberculosis. He was never found to be suffering from tuberculosis.⁶

The medicine defendants negligently prescribed was INH, RIFAMPIN, PZA, EMB and vitamin B-6 (there is no objection to the prescription for vitamin B-6). However, the most seriously contraindicated

⁴ CP 7:3-6

⁵ CP 7:7-8

⁶ CP 7:9-12; CP 61:1-6; CP 109:13-25; CP 110:1-25; CP 111:1-17

prescription was INH, as it clearly should not be administered to a patient with liver problems, such as the problems suffered by the decedent in this case.⁷

Mr. Reyes had liver problems. A month after he started the anti-tuberculosis drug regimen he suffered from the side effects, exacerbated by his liver problems. Those side effects included nausea, vomiting, dizziness, lack of energy and loss of appetite. His skin color changed to a reddish-yellow tinge, and it was a significant change of skin tone.⁸

In June, 2010 Mr. Reyes was experiencing strong discomfort due to the anti-tuberculosis drug regimen, and he expressed a desire to discontinue the medication. However, officials at the Yakima Health District insisted Mr. Reyes sign a contract to continue the anti-tuberculosis drug regimen, including the very dangerous drugs that would eventually kill Mr. Reyes because of his liver problems. The prescribed medicine regimen was toxic to Jose Reyes, acting as a poison to destroy his liver.⁹

⁷ CP 7:13-17; CP 109:13-25; CP 110:1-25; CP 111:1-24; CP 112:1-8

⁸ CP 7:18-22; CP 109-113

⁹ CP 7:23-2; CP 8:1-3

In an outrageous display of governmental oppression, officials at Yakima Health District threatened Mr. Reyes with arrest and incarceration if he refused or failed to take the prescribed anti-tuberculosis drugs. Upon pain of incarceration and isolation from his family, Mr. Reyes was forced to ingest these dangerous drugs, and his physical health deteriorated.¹⁰

Jose Luis Reyes suffered great emotional and physical stress. He experienced great pain and discomfort. His abdomen became extremely swollen, and his eyes and skin began to change color (the whites of his eyes were yellow, and his skin became egg-yolk colored).¹¹

In July, 2010 Mr. Reyes was unable to walk, drive or eat. He complained of these maladies to the defendants, and he complained of hunger pangs but he was incapable of food consumption, because of the deterioration of his esophagus (he could not swallow food). His body would shake, his hands tremored, he became confused, and he obviously was having systemic problems not associated with tuberculosis. Mr. Reyes was a

¹⁰ CP 7:4-8; CP 61:12-23

¹¹ CP 8:9-12

man who was in dire need of medical attention, but he was not suffering from tuberculosis.¹²

Eventually Mr. Reyes could no longer bear the pain and severe symptoms he suffered from these dangerous anti-tuberculosis drugs that he had been forced to ingest by the defendants. Mr. Reyes presented himself at the defendants' offices, and at about the same time the defendants discovered the errors they had committed in this case. It took serious laboratory deviations to get the physicians' attention, however. This, despite the clinical presentation that was available for a correct diagnosis, if only the defendants had taken appropriate medical action.¹³

The following matrix profoundly illustrates the severe liver deterioration, and no indication of secondary symptoms associated with tuberculosis. These findings were available to the defendants, and no timely action was taken to prevent the death of Jose Luis Reyes. Merely observing the patient, without any laboratory confirmation, would clearly have proved

¹² CP 8:13-19; CP 109-113

¹³ CP 8:20-25; CP 9:1-2; CP 112:9-25; CP 113:1-7

severe liver toxicity. The defendants failed Mr. Reyes, and they failed the plaintiffs.¹⁴

Below is the summary of liver toxicity lab results for Mr. Reyes:¹⁵

	5/25/10	7/13/10	7/16/10	8/2/10
Albumin		3.4		2.9
Globulin				
Bilirubin	1.6	13.1	35.6	37.6
Alk. P		124	117	119
AST		1380	1815	128
ALT		1990	1412	163
INR			2.23	3.3
K			3.4	
Ammonia				57
Viral Hep		(-)		(-)
GFR				17
PTT				96

Defendant Christopher Spitters met with Ms. Judith Reyes after Mr. Reyes died on August 6, 2010. Defendant Spitters was aware Mr. Reyes suffered a painful, agonizing death. Mr. Reyes suffered a great deal, and it

¹⁴ CP 9:3-8; CP 112:9-25; CP 113:1-7

¹⁵ CP 9:9-2; CP 112:9-25; CP 113:1-7

was because of the negligence visited upon Mr. Reyes by the defendants. Dr. Spitters told Ms. Judith Reyes that Yakima Health District should have stopped administering the anti-tuberculosis drugs in May, 2010. Dr. Spitters also said that the clinic should have been testing Mr. Reyes' liver periodically. Dr. Spitters stated to Ms. Reyes that Yakima Health District accepted responsibility, on behalf of the clinic, and even said "unfortunately I don't have a magic button to push it and turn back time and rectify things. I do accept that the prescribed medication damaged his [Mr. Reyes'] liver and kidneys." Finally, Dr. Spitters expressed his concern about the level of negligence by Yakima Health District, and apologized on behalf of the Yakima Health District¹⁶.

Plaintiff relied upon two declarations by her expert, Rosa Martinez, M.D., of Yakima, Washington. Her résumé was attached to her declaration and authenticated by Dr. Martinez.¹⁷ It is the plaintiff-appellant's contention that as a Washington physician with internal medicine training, with a good knowledge of tuberculosis and liver failure treatment, Dr. Martinez was

¹⁶ CP 10:1-13

¹⁷ CP 108-116: CP 229-231

qualified to provide expert witness testimony concerning the Washington standard of care and that in this instance medical negligence occurred. The defendant-appellees attacked the declarations of Dr. Martinez, and successfully argued they should be stricken from the record as insufficient¹⁸.

Finally, the trial judge ruled that because the patient died, the twelve-month extension of time to resolve the medical negligence claims did not extend the wrongful death filing period, even though the wrongful death occurred due to the claims of medical negligence.¹⁹

The plaintiff-appellant requests this court to reverse the trial court's decisions dismissing the medical negligence claim and the wrongful death claim, and to reinstate the tort of outrage. The evidence is clear Mr. Reyes died because of drug-induced liver failure.

IV. Argument:

¹⁸ A second declaration from Dr. Martinez was filed that also concluded medical negligence had occurred, in defense against dismissal of the tort of outrage, but the trial judge compartmentalized her analysis and refused to consider Dr. Martinez's testimony to address medical negligence, after the interlocutory order had been entered dismissing medical negligence claims. The plaintiff-appellant urges reversal because all of the evidence before the trial judge should have been considered before dismissal of medical negligence claims was finalized. CP 108-116; CP 229-231

¹⁹ CP 348-357

The testimony by declaration of Rosa Martinez, M.D., should not have been stricken by the trial judge.

Expert testimony is admissible if the expert is qualified and relies on generally accepted theories and the testimony would be helpful to the trier of fact. *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 355, 333 P.3d 388 (2014). The opinion of an expert must pertain to the facts of the particular case. *Tortes v. King County*, 119 Wn. App. 1, 12, 84 P.3d 252 (2003). An expert may not testify about information outside her area of expertise. *In re Marriage of Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012). Dr. Martinez had the training, experience, and knowledge to testify about drug-induced liver failure, liver disease, and tuberculosis. She met the criteria to testify in this case and explicitly stated there was medical malpractice here.

This court should review the decision to exclude an expert witness's testimony for abuse of discretion. *Winkler v. Giddings*, 146 Wn.App. 387, 392, 190 P.3d 117 (2008). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007). A decision is based on untenable grounds or made for untenable reasons if it was reached by applying the wrong legal standard. *Mitchell v. Wash. State Inst. of Pub.*

Policy, 153 Wn.App. 803, 821-22, 225 P.3d 280 (2009). A trial court that misunderstands or misapplies the law bases its decision on untenable grounds. *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007). In reviewing a ruling for abuse of discretion, this court may separate questions of fact from the conclusions of law that they support and should refuse to defer to the trial court on conclusions of law. *Bartlett v. Betlach*, 136 Wn.App. 8, 18, 146 P.3d 1235 (2006).

In a medical malpractice claim, a plaintiff must show that the health care provider violated the relevant standard of care. A plaintiff must prove the relevant standard of care through the presentation of expert testimony, unless a limited exception applies. *Volk v. Demeerleer*, 184 Wn.App. 389, 430-31, 337 P.3d 372 (2014), review granted, 183 Wn.2d 1007 (2015). In turn, the trial judge must make a preliminary finding of fact under ER 104(a) as to whether an expert is qualified to express an opinion on the standard of care in Washington. *Winkler v. Giddings*, 146 Wn.App. at 392 (2008).

By Washington statute, the standard of care is the degree of "care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances." RCW 7.70.040 (emphasis added).

Generally, expert medical testimony on the issue of proximate cause is required in medical malpractice cases. *McLaughlin v. Cooke*, 112 Wn.2d 829, 837-38, 774 P.2d 1171 (1989); *Hill v. Sacred Heart Med. Ctr.*, 143 Wn.App. at 448 (2008). Evidence establishing proximate cause in medical malpractice cases must rise above speculation, conjecture, or mere possibility. *Reese v. Stroh*, 128 Wn.2d 300, 309, 907 P.2d 282 (1995). Instead, medical expert testimony must be based on a "reasonable degree of medical certainty." *Reese v. Stroh*, 128 Wn.2d at 305-06. Despite the use of the term "certainty" in some opinions, "probability" is sufficient. Reasonable medical probability and reasonable medical certainty are used interchangeably. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 607, 260 P.3d 857 (2011).

Whereas the plaintiff must present testimony that the defending health care provider's breach of the standard of care resulted in injury, the law does not require the uttering of any talismanic words. The court does not require experts to testify in a particular format but instead looks at the substance of the allegations and the substance of what the expert brings to the discussion. *Leaverton v. Cascade Surgical Partners, PLLC*, 160 Wn.App. 512, 520, 248 P.3d 136 (2011). To require

experts to testify in a particular format would elevate form over substance. *White v. Kent Med. Ctr. Inc.*, 61 Wn. App. 163, 172, 810 P.2d 4 (1991).

From the sum of the testimony, this court should conclude that Dr. Martinez's testimony of causation was based on reasonable medical probability. Conversely, Dr. Martinez rendered no speculative or conjectural opinions.

The tort of outrage, as applied in this case, was triggered by failure to observe the standard of care, in violation of the health care statute, and should be actionable.

Was the defendants-appellees' conduct "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in the civilized community?" *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). The trial court did not reach that question, but found that negligent or intentional infliction of emotional distress cannot be the basis for a medical malpractice claim. However, the record is clear that the defendants-appellees' decisions were all based upon medical treatment of Jose Reyes, and that no one sought to visit further violence upon him for anything other than the medical negligence in his care and treatment. However, in this case the tort of outrage should be actionable. Here, it is a derivative form of the extreme

misconduct in providing medical treatment to Mr. Reyes. Medical negligence should overlap into outrageous misconduct. This case is an example of the overlap, i.e., *knowingly forcing a patient to ingest medicine that is guaranteed to kill the patient is one instance of outrageous conduct involving health care, and should be derivative of the health care statute.* These defendants should have known the medicine would kill Mr. Reyes, but they took no action until it was too late.

This court should revisit its rule found in *Fast v. Kennewick Public Hospital District*, 188 Wn.App. 43, 354 P.3d 858 (Wash.App. Div. 3 2015), and conclude that wrongful death as a result of medical negligence should extend the statute of limitations for twelve months if a demand for mediation is timely served upon the health care providers.

It makes sense to equally apply the twelve-month extension for filing an action for the wrongful death of a patient victimized by medical negligence. Otherwise, those victims of medical malpractice resulting in the ultimate insult of death are treated disparately from those victims of medical malpractice who survive medical malpractice. All victims of medical malpractice should be treated equally, concerning the application of a statute of limitations. This court followed Division II in concluding that all wrongful death actions must be brought within

three years of the wrongful death, despite the fact that the wrongful death occurred due to medical negligence:

“While the *Fasts* ask us to reject the reasoning of Division Two in *Wills*, we find it to be sound. A wrongful death claim, whether under RCW 4.20.010, the wrongful death provision applicable in *Wills* or RCW 4.24.010, the provision that applies here, is not one to recover for physical injury to a plaintiff but to recover for a different type of loss. While it is true that "injury" can have a broader meaning of "harm" or "damage," it is noteworthy that RCW 4.16.350 and RCW 7.70.010 both speak of "civil actions ... for damages for injury occurring as a result of health care." RCW 7.70.010 (emphasis added). The broad concept of injury is captured by the word "damages," leaving the word "injury" to describe the particular type of damage-injury suffered by the patient-to which the provisions apply. We agree with Division Two's interpretation of the 1976 legislation as more narrowly focused.” *Fast v. Kennewick Public Hospital District*, 188 Wn.App. 43, 52-53, 354 P.3d 858 (Wash.App. Div. 3 2015).

However, this does not satisfy the legislative intent to confer upon medical malpractice victims an extra twelve months to file their claims if they have timely served demand for mediation. It is undisputed the Reyes’ claims arise from health care negligence. If Mr. Reyes had survived the poisoning of his liver by these defendants-appellees, all of his claims would have been subject to the extended statute of limitations, so where is the equity in limiting the time for filing his wrongful death claims to three years even though he died from the negligent health care treatment? This is a health care claim, resulting in the death of the patient. Thus, when this court referred in *Fast* to “a different type of loss” in a wrongful

death claim, this court ignored that there would not have been “a different type of loss” *but for the medical malpractice resulting in the victim’s death*.

Equal Protection. Federal equal protection standards require that “persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” *Guardianship Estate of Keffeler v. Dep’t of Soc. & Health Servs.*, 151 Wn.2d 331, 339-40, 88 P.3d 949 (2004) (quoting *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987)). In order to show that a three-year statute of limitations for the wrongful death statute, RCW 4.20.010 et seq., *as applied* to the deceased, Jose Reyes, violates these equal protection standards, the plaintiff-appellant Judith Reyes urges this court to conclude that the statute “treats unequally two similarly situated classes of people.” *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 635, 911 P.2d 1319 (1996) (quoting *Cosro, Inc. v. Liquor Control Bd.*, 107 Wn.2d 754, 760, 733 P.2d 539 (1987)). Here, this court, and the trial court, have embraced a three year statute of limitations for wrongful death when the death is a result of medical malpractice, *even though wrongful death statutes do not identify a specific statute of limitations*, and case law must be cited to conclude three years is the appropriate limitation:

“Washington's wrongful death statutes do not contain an express statute of limitation. *White v. Johns-Manville Corp.*, 103 Wn.2d 344,348,693 P.2d 687 (1985) (citing S. Speiser, *Recovery for Wrongful Death* § 11:8 (2d ed. 1975)). Instead, actions for wrongful death have long been held to be subject to the three-year limitations period provided by RCW 4.16.080(2) for "injury to the person or rights of another, not hereinafter enumerated." *Atchison v. Great W. Malting Co.*, 161 Wn.2d 372,377, 166 P.3d 662 (2007) ("The statute of limitations for a wrongful death action in Washington is three years.") (citing RCW 4.16.080(2); *Beal v. City of Seattle*, 134 Wn.2d 769, 776, 954 P.2d 237 (1998); *Bader v. State*, 43 Wn. App. 223,227, 716 P.2d 925 (1986); *Dodson v. Cont'l Can Co.*, 159 Wash. 589, 294 P. 265 (1930)).” *Fast*, at p. 50.

The trouble with this narrow approach is that it ignores the purpose of the mediation provision of the medical malpractice statutory scheme—a newly adopted statute²⁰ that should modify the treatment of wrongful death claims *arising from medical malpractice*. The result: there are two groups of medical malpractice victims, those who survive the malpractice, even though they may be severely and permanently injured, and those who are killed by the medical malpractice. Here, Jose Reyes was killed because he was forced to ingest anti-tuberculosis medicines that caused his liver to fail. He was never conclusively found to have tuberculosis. There is disparate treatment of these two groups, and there is no reasonable basis for the disparate treatment. The modification of the medical malpractice statute of

²⁰ In *Fast*, this court cited case law that pre-existed the amended RCW 7.70.110, but now a demand for mediation extends the medical malpractice statute of limitations for another year.

limitations when mediation is demanded should equally apply to wrongful death due to medical malpractice.

Where the acts of public officers are arbitrary, tyrannical, or predicated upon a fundamentally wrong basis, then courts may interfere to protect the rights of individuals. *Moore v. Spokane*, 88 Wash. 203, 152 P. 999; *State ex rel. Yeargin v. Maschke*, 90 Wash. 249, 155 P. 1064; *In re Grandview Local Improvement Assessments*, 118 Wash. 464, 203 P. 988; *State ex rel. York v. Board of County Commissioners*, 28 Wash.2d 891, 184 P.2d 577, 172 A.L.R. 1001; *In re California Avenue Local Improvement Dist.*, 30 Wash.2d 144, 190 P.2d 738. In this case the plaintiff-appellant respectfully requests this court revisit its “narrow approach” to the treatment of the wrongful death statute of limitations when the tort victim’s death is a result of medical malpractice. These wrongful death claims should track the same pathway as the specific statute of limitations found in the medical malpractice statutes. Otherwise, the Legislature’s intent to encourage mediation of medical malpractice claims is frustrated, and of no consequence to a suspect class of medical malpractice victims: the patients who are killed.

V. Conclusion:

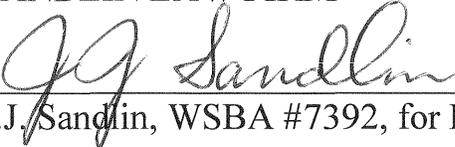
This court reviews summary judgment decisions de novo, concerning questions of law. In a summary judgment motion, the burden is on the moving party to demonstrate that there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper. *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). CR 56 requires all inferences to be in favor of the nonmoving party, the plaintiff in this case. The movants cannot succeed if there are contested material questions of fact, which Doctor Martinez and Judith Reyes provided by declaration testimony, and the fact-pleaded verified complaint. The action should not have been dismissed under CR 56.

This court should distinguish *Fast* from the instant case, and apply equal protection principles to find that in this case RCW 7.70.110, the medical malpractice mediation statute, has legislatively extended the wrongful death statute of limitations by twelve months for those medical malpractice claims where good faith mediation was timely demanded. Otherwise, the disparity between medical malpractice victims' remedies is discriminatory, with no reasonable basis for the disparate treatment of these classes of tort victims. Likewise, in this case the tort of outrage is derivative from the claims of medical malpractice, and should be included in the extended statute of limitations pursuant to RCW 7.70.110.

The plaintiff-appellant requests this court reverse the trial court and remand this action for jury trial.

Respectfully submitted this 2nd day of May, 2016.

SANDLIN LAW FIRM



J.J. Sandlin, WSBA #7392, for Plaintiff-Appellant Reyes

CERTIFICATE OF SERVICE

J.J. SANDLIN declares under penalty of perjury of the laws of the State of Washington as follows:

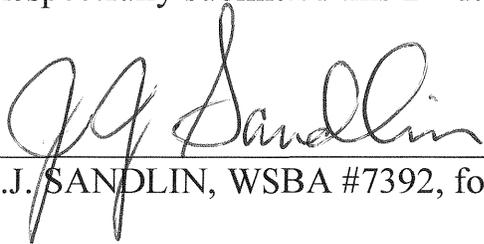
1. I mailed the appellant's Opening Brief to the Clerk of the Court, Washington State Court of Appeals, Division III, 500 N Cedar St., Spokane, WA 99201 on May 2, 2016, to fax numbers (509) 625-5544; (509) 456-4288;
2. On May 2, 2016 I mailed, and emailed a copy of the above Opening Brief to opposing counsel as listed below:

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Respectfully submitted this 2nd day of May, 2016.

A handwritten signature in black ink, appearing to read "J.J. Sandlin". The signature is written in a cursive, flowing style. It is positioned above a horizontal line that spans the width of the signature.

J.J. SANDLIN, WSBA #7392, for Plaintiff-Appellant Reyes