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WASHINGTON STATE
SUPREME COURT

FILED

JUN 15 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

94679-5
No. 336972-III

**SUPREME COURT
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);**

PETITIONER

vs.

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

RESPONDENTS

PETITION FOR REVIEW

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1. Identity of Petitioner.

The petitioner is Judith Margarita Reyes, acting 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 and Leslie Maria Reyes. She is a widow, prosecuting this action to seek justice for her family.

2. Citation to Court of Appeals Decision.

The petitioner seeks review of the Court of Appeals, Division III decision dated February 14, 2017, finding insufficient facts to establish a cause of action, concluding that the petitioner provided no facts to support a claim of medical negligence. Upon timely motion for reconsideration, the Court of Appeals, Division III denied the motion on May 16, 2017, and this petition for review seeks reversal of both of these appellate court decisions.

3. Issues Presented for Review.

- (a) Did the Court of Appeals commit error when it ruled there were no facts provided by the petitioner's expert, Rosa Martinez, M.D., which supported her conclusion that there was a breach of the standard of care in this instance?
- (b) Did the Court of Appeals commit error when it concluded the respondents had a duty to the public to require petitioner's husband, Jose Reyes, to ingest tuberculosis medicine, even though the medicine was deadly to him, and contraindicated for Mr. Reyes because of his diseased liver?

4. Statement of the Case.

Decedent Jose Luis Reyes came under the care of the respondents in about December, 2009. He received medical treatment from the respondents, including from all respondents' apparent agents.¹

In December 2009 one of respondents' physicians examined Mr. Reyes and determined that his liver levels were a little bit low but still within normal limits.²

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.³

The medicine respondents 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 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.⁴

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

¹ CP 7:3-6

² CP 7:7-8

³ CP 7:9-12; CP 61:1-6; CP 109:13-25; CP 110:1-25; CP 111:1-17

⁴ CP 7:13-17; CP 109:13-25; CP 110:1-25; CP 111:1-24; CP 112:1-8

appetite. His skin color changed to a reddish-yellow tinge, and it was a significant change of skin tone.⁵

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.⁶

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.⁷

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).⁸

⁵ CP 7:18-22; CP 109-113

⁶ CP 7:23-2; CP 8:1-3

⁷ CP 7:4-8; CP 61:12-23

⁸ CP 8:9-12

In July, 2010 Mr. Reyes was unable to walk, drive or eat. He complained of these maladies to the respondents, 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 man who was in dire need of medical attention, but he was not suffering from tuberculosis.⁹

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 respondents. Mr. Reyes presented himself at the respondents' offices, and at about the same time the respondents 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 respondents had taken appropriate medical action.¹⁰

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

⁹ CP 8:13-19; CP 109-113

¹⁰ CP 8:20-25; CP 9:1-2; CP 112:9-25; CP 113:1-7

confirmation, would clearly have proved severe liver toxicity. The respondents failed Mr. Reyes, and they failed the petitioner.¹¹

Below is the summary of liver toxicity lab results for Mr. Reyes:¹²

	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

Respondent Christopher Spitters met with Ms. Judith Reyes after Mr. Reyes died on August 6, 2010. Respondent Spitters was aware Mr. Reyes suffered a painful, agonizing death. Mr. Reyes suffered a great deal, and it was because of the negligence visited upon Mr. Reyes by the respondents. Dr. Spitters told Ms. Judith Reyes that Yakima Health District should have stopped administering the anti-

¹¹ CP 9:3-8; CP 112:9-25; CP 113:1-7

¹² CP 9:9-2; CP 112:9-25; CP 113:1-7

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 District¹³.

Petitioner relied upon two declarations by her expert, Rosa Martinez, M.D., of Yakima, Washington. Doctor Martinez' résumé was attached to her declaration and authenticated by Dr. Martinez.¹⁴ It is the petitioner's contention that as a Washington physician with internal medicine training, with a good knowledge of tuberculosis and liver failure treatment, Dr. Martinez was qualified to provide expert witness testimony concerning the Washington standard of care and that in this instance medical negligence occurred. The respondents attacked the declarations of Dr. Martinez, and successfully argued they should be stricken from the record as insufficient¹⁵.

¹³ CP 10:1-13

¹⁴ CP 108-116: CP 229-231

¹⁵ 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

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.¹⁶

The petitioner requests this court to reverse the lower courts' 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, and that there was no evidence of tuberculosis¹⁷. The Court of Appeals analyzed the petitioner's claim for outrage "in the context of tuberculosis law," concluding the respondents had a duty to administer the deadly medicines to Mr. Reyes. *Feb. 14, 2017 Decision*, at pp. 14-15.

5. Argument.

The Court of Appeals and Superior Court decisions granted the respondents a license to kill Mr. Reyes, under color of law.

It is indisputable that Mr. Reyes suffered from severe liver disease. It is indisputable that the tuberculosis drug, INH, should not have been prescribed for a

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

¹⁶ CP 348-357

¹⁷ See Reyes Death Certificate, Appendix "A" in petitioner's Motion for Reconsideration.

patient suffering from liver disease. It is indisputable that the autopsy performed upon Mr. Reyes' corpse found there was no tuberculosis disease present, and that Mr. Reyes died from drug-induced liver failure. In these factual circumstances, how can the courts justify the Health District's decision to force Mr. Reyes to ingest the deadly tuberculosis medicine, INH, upon threat of incarceration and force feeding him the medication?

Mr. Reyes had a constitutional right to due process of law, which was taken from him, under color of law, all in violation of 42 U.S.C. §1983, Fourteenth Amendment to the U.S. Constitution, and Article I, §3 of the Washington Constitution.

However, the lower courts in this case deemed the respondents got a free pass, because the Health District's duty to protect the public from the spread of tuberculosis out-trumped Mr. Reyes' right to be protected from poisoning by the government. The decisions were couched in language designed to show the respondents were not on notice of their negligence and their outrageous behavior, because there was insufficient evidence to prove wrongful conduct. In this case exactly the opposite conclusion should have been found: there was insufficient evidence to prove Mr. Reyes ever suffered from tuberculosis, and these respondents never verified the accuracy of an earlier misdiagnosis (the record is devoid of any subsequent lab testing for tuberculosis). These respondents knew, or

should have known, that Mr. Reyes suffered from liver disease, and that prescribing INH for him was undeniably wrong. But that's not all: Mr. Reyes was threatened with going to jail and subjected to force feeding him the tuberculosis drug, INH. There was no due process here, and it cost Mr. Reyes his life. The lower courts erred in viewing the respondents' actions "in the context of tuberculosis law."

The doctrine of Res Ipsa Loquitur applies to petitioner's claims, and therefore petitioner was not required to supply expert medical testimony for these medical malpractice, wrongful death and outrage claims.

Res ipsa loquitur applies when:

"(1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff." *Pacheco v. Ames*, 149 Wash.2d 431, 436, 69 P.3d 324 (2003) (quoting *Zukowsky v. Brown*, 79 Wash.2d 586, 593, 488 P.2d 269 (1971)). Here, it is undisputed the respondents caused Mr. Reyes' death (see the death certificate, which included the report of autopsy), Mr. Reyes was under threat of jail and force-fed medicine if he did not comply, and

most assuredly this injury would not have happened but for the respondent's negligence. *Res ipsa loquitur* applies here.

"In such cases the jury is permitted to infer negligence." *Id.* "The doctrine permits the inference of negligence on the basis that the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person." *Id.* Specifically, the respondents' insistence that Mr. Reyes ingest a deadly drug which would kill his liver is the engine driving the petitioners' claims. The lower courts base their decisions on the suggestion that the public health medical providers were duty-bound to prescribe INH, and to fail to prescribe this deadly medication would be a violation of their public duty, a duty required by statute. This defense misses the point: Mr. Reyes did not suffer from tuberculosis, as proved by the autopsy findings, and therefore the respondents' defense is inapposite to the clear findings of medical malpractice here. One cannot argue that the INH did not kill Mr. Reyes. One cannot reasonably argue Mr. Reyes was suffering from tuberculosis, given the coroner's findings.

The declarations of Rosa Martinez, M.D. were sufficient to establish a breach of the standard of care.

Even if the lower courts were correct in requiring the petitioner to submit expert medical testimony, the two declarations of Rosa Martinez, M.D. are sufficiently based upon facts supporting a breach of the standard of care.

Specifically, it was wrong for the respondents to insist upon Mr. Reyes ingesting a drug, INH, that would clearly kill his liver—which is exactly what happened here. Dr. Martinez explained this in her declaration testimony. The lower courts opined that the respondents had no choice but to administer the killing drug, even if it would destroy Mr. Reyes' liver, based upon contested facts that should not have swayed the lower courts to dismiss these claims.

Reviewing courts must accept as verities the declarations of Dr. Martinez and the proof of the causes of death issued by the coroner in Mr. Reyes' death certificate, and must consider all facts submitted and all reasonable inferences therefrom in the light most favorable to the plaintiff. *Young*, 99 Wash.2d at 657, 663 P.2d 834. An inference is a "process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted." *Shelby*, 85 Wash.2d at 914-15, 541 P.2d 365 (citing Black's Law Dictionary 917 (4th ed. 1968)). It was not the lower courts' function to resolve existing factual disputes nor can the reviewing courts resolve a genuine issue of credibility such as is raised by reasonable contradictory or impeaching evidence. *Barrie v. Hosts of Am., Inc.*, 94 Wash.2d 640, 618 P.2d 96 (1980). The issues involving Mr. Reyes' alcoholism, the speculative nature of the tuberculosis evidence, are all factual issues that call for a jury trial. The undisputed facts are that Mr. Reyes died because of drug poisoning

of his liver, and there was no tuberculosis disease in his body. The respondents controlled the requirement that Mr. Reyes ingest this deadly drug, and there were ample clinical findings Mr. Reyes was suffering from a compromised liver. It is not a difficult step to infer the respondents' negligence killed Mr. Reyes. Dr. Martinez's declarations support these conclusions, based upon her review of the medical records, and the death certificate and autopsy findings. Those facts are sufficient to defeat summary judgment. This court is requested to accept review and reverse the dismissal of the petitioner's claims.

6. Conclusion.

The Court of Appeals fly-specked the declarations of Rosa Martinez, M.D. and concluded she failed to establish any facts that suggested there was a breach of the standard of care for a medical malpractice claim. Likewise, the court found the actions of the respondents were not outrageous, apparently because the court was not moved by the threat of incarceration and force-feeding the deadly drug, INH, to this doomed man, Mr. Reyes. Finally, the wrongful death claim was dismissed because the court¹⁸ could not find any negligent act by the respondents.

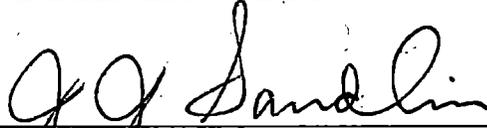
¹⁸ The trial court avoided the question of wrongful death, because it dismissed that claim because the trial court relied upon a statute of limitations defense, which this court has clarified by reversing *Fast v. Kennewick Public Hospital District*, 188 Wn.App. 43, 354 P.3d 858 (Wash.App. Div. 3 2015).

The petitioner asks this court to accept review because the lower courts have ignored or refused to honor the general principles involving summary judgment motions, by circumventing the clear facts that explained why Mr. Reyes died, by failing to find the inferences presented by the petitioner that support denial of summary judgment, and by giving credibility to the respondents' argument that Mr. Reyes suffered from tuberculosis and that the respondents' hands were tied—they had to give Mr. Reyes the poisonous drug, INH. Essentially, the lower courts granted the public health district a license to kill Mr. Reyes.

The petitioner respectfully asserts this petition for review is solidly based upon issues which are significant questions of law under the Constitution of the United States and the State of Washington, and that this case involves issues of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

Respectfully submitted this 15th day of June, 2017, at Zillah, Washington 98953.

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CERTIFICATE OF SERVICE

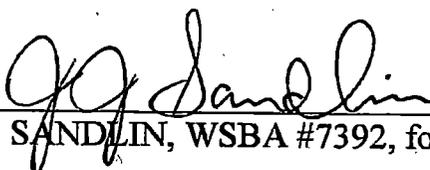
J.J. SANDLIN declares under penalty of perjury of the laws of the State of Washington as follows:

1. I faxed 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 June 15, 2017, to fax numbers (509) 625-5544; (509) 456-4288;
2. On June 15, 2017 I mailed, and emailed a copy of the above Opening Brief to opposing counsel as listed below:

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Respectfully submitted this 15th day of June, 2017 at Zillah, Washington 98953.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

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, E.R. and L.M.R.,)

No. 33697-2-III

Appellants,)

UNPUBLISHED OPINION

v.)

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

Respondents.)

FEARING, C.J. — We face again the question of whether a patient or patient’s survivor presented essential expert testimony to defeat her physician’s summary judgment motion in a medical malpractice case. Plaintiff Judith Reyes, who sues for the death of her husband, also asserts the tort of outrage. We affirm the trial court’s summary judgment dismissal of both causes of action.

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Reyes v Yakima Health Dist.

FACTS

We present the facts in a gloss favorable to Judith Reyes, since the trial court dismissed her claims on summary judgment.

Defendant Dr. Christopher Spitters is a physician who specializes, in part, in the prevention and treatment of tuberculosis. He acts as a consultant and contracts with defendant Yakima Health District.

Dr. Rizwana Khan, a physician independent of the Yakima Health District, treated Jose Reyes for chest pains in April 2010. According to the health district, Dr. Khan ordered testing and imaging reports, and laboratory results showed positive tuberculosis cultures from Reyes' sputum sample. Additional sputum samples, analyzed by the Washington State Department of Health's Public Health Laboratory, tested positive for tuberculosis. A Yakima Health District physician then prescribed for Jose Reyes medications for the treatment of tuberculosis, including Isoniazid, also known as isonicotinyldrazide (INH).

According to Judith Reyes and her expert, Jose Reyes did not suffer from tuberculosis. Reyes took the drugs nonetheless.

According to the Yakima Health District, the district sought to monitor Jose Reyes' liver function. Reyes failed to show for testing. After ingesting the prescribed drugs, Jose Reyes suffered from nausea, vomiting, dizziness, lack of energy, and a loss of appetite. Reyes' skin also changed to a reddish-yellow shade.

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In June 2010, Jose Reyes expressed a desire to discontinue taking the tuberculosis medications because of severe discomfort. One of the Yakima Health District practitioners insisted, however, that he continue taking the medications. The health district threatened to incarcerate Reyes if he failed to ingest the medications.

Dr. Christopher Spitters, on behalf of the Yakima Health District, provided medical care to Jose Reyes for the treatment of his tuberculosis in July and August 2010. In July 2010, Reyes' condition worsened. He became unable to walk, drive, or eat. He experienced body shakes, hand tremors, and confusion. His abdomen swelled. He complained to Yakima Health District care providers of his symptoms. Health district providers then discovered serious deviations in his laboratory results. On August 6, 2010, Jose Reyes died of liver failure.

According to Judith Reyes, after Jose Reyes' death, Dr. Christopher Spitters met with her and told her that the health district should have stopped prescribing the anti-tuberculosis drugs in May 2010. Dr. Spitters added that the clinic should have tested her husband's liver periodically. Spitters also told Judith Reyes that the Yakima Health District accepted responsibility. Dr. Spitters declared: "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." Clerk's Papers (CP) at 10 (alteration in original).

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Reyes v Yakima Health Dist.

PROCEDURE

Judith Reyes filed suit against the Yakima Health District and Dr. Christopher Spitters. Her complaint asserted causes of action for medical malpractice, the tort of outrage, and wrongful death against the health district and Dr. Spitters. The complaint also asserted, against the health district, the claim of negligent hiring, training and supervision.

Christopher Spitters and the Yakima Health District brought motions for summary judgment on the grounds that the statute of limitations bars Judith Reyes' claims, Reyes lacked standing to sue, and Reyes lacked expert medical testimony to support her claim of medical malpractice. In response to the summary judgment motions, Judith Reyes filed a declaration by expert witness Rosa Martinez, M.D. Dr. Martinez is a licensed physician in the State of Washington who owns an internal medical clinic in Yakima. She specializes in the areas of complex medical patients with chronic pain symptoms, geriatric patients, and internal medicine patients. Martinez declared:

I am well-qualified to identify liver disease problems, diagnosis of tuberculosis, and the proper care and treatment of these diseases, including the proper pharmaceutical protocol to avoid adverse side effects (such as occurred in the case of Jose Reyes, deceased).

CP at 109.

In her declaration, Dr. Rosa Martinez averred that she reviewed medical records concerning the care and treatment of Jose Reyes. Based on a review of Reyes' death

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certificate, Martinez opined that Jose Reyes never suffered from tuberculosis, but he died from complications due to chronic liver disease. The declaration further stated, based on reasonable medical certainty:

(b) Jose Reyes did suffer from chronic liver disease, and was at risk for catastrophic liver failure if he were treated with medicines contraindicated for liver disease. . . .

(c) Jose Reyes presented to Yakima Health District and Dr. Spitters with clinical symptoms of liver failure that should have been easily diagnosed by observation of the patient. . . .

(d) The failure of Yakima Health District and Dr. Spitters to accurately diagnose Jose Reyes' liver disease and liver deterioration due to prescribed medications to treat tuberculosis that were contraindicated for Jose Reyes were direct and proximate causes of Mr. Reyes' liver failure and death. . . .

(e) The actions of Yakima Health District and Dr. Spitters constitute medical negligence in the care and treatment of Jose Reyes. The Yakima Health District and Dr. Spitters have breached the standard of care for a health care facility and physician acting in the same or similar circumstances in the State of Washington. . . .

(f) In April, 2010 Mr. Reyes started taking the medicine prescribed by the Yakima Health District, and this medicine was for the treatment of tuberculosis. Mr. Reyes did not have tuberculosis. He was never found to be suffering from tuberculosis. The medicine which was 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 prescription was INH, as it clearly should not be administered to a patient with liver problems.

(g) Mr. Reyes had liver disease. 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.

(h) 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

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drug regimen, including the very dangerous drugs that could kill Mr. Reyes because of his liver problems.

.....
(k) Towards mid-July, 2010 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 Yakima Health District facilities, and at about the same time YHD discovered the errors the health care providers had committed in this case. It took serious laboratory deviations to get the physicians' attention, however. This, despite the clinical presentation that clearly called for a correct diagnosis.

(l) See the following matrix, which profoundly points to severe liver deterioration, and no indication of secondary symptoms associated with tuberculosis. Merely observing the patient, without any laboratory confirmation, would clearly have proved severe liver toxicity.

.....
[Matrix omitted.]

5. Jose Reyes expired due to the failures of Dr. Spitters and Yakima Health District to observe the standard of care for health care institutions and physicians acting in the same or similar circumstances in the State of Washington. He lost his opportunity to live an extended life due to the negligence of these defendants.

CP at 109-13.

The trial court granted the Yakima Health District's and Dr. Christopher Spitters' summary judgment motions to dismiss the medical malpractice claim because Judith Reyes failed to provide competent expert testimony on the issues of standard of care, causation, and damages. During the summary judgment hearing, the trial court questioned the sufficiency of the testimony regarding the standard of care in Dr. Rosa Martinez's declaration. The trial court commented:

In other words, what did Dr. Spitters do that violated the standard of care? She doesn't say that. There was a horrible result. There's sort of an

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Reyes v Yakima Health Dist.

ambiguous, and I want to say ambiguous as to whom. You know, they misdiagnosed. They gave him this toxic treatment for tuberculosis which, in her opinion, kills him because he doesn't have to be. He has a liver disease, but who does that? It's not in here.

Report of Proceedings (May 5, 2015) at 30-31.

The Yakima Health District later moved for summary judgment on Judith Reyes' claims for wrongful death, the tort of outrage, and negligent hiring, retention and supervision. Dr. Christopher Spitters moved for summary dismissal of the wrongful death and tort of outrage claims. The two argued, among other contentions, that the statute of limitations barred the wrongful death claim. The trial court granted summary dismissal of Reyes' claims against Dr. Spitters for the tort of outrage and wrongful death, and negligent hiring, retention, and supervision. Judith Reyes does not appeal the dismissal of the negligent hiring, retention and supervision claims.

LAW AND ANALYSIS

Issue 1: Whether the declaration of Rosa Martinez sufficed to raise an issue of fact with regard to negligence, causation, and damages for purposes of Judith Reyes' claim of medical malpractice?

Answer 1: No.

Judith Reyes appeals from a summary judgment dismissal of her suit. We review a trial court's order granting summary judgment de novo. *Briggs v. Nova Services*, 166 Wn.2d 794, 801, 213 P.3d 910 (2009). Summary judgment is appropriate if the

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pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). A material fact is one on which the outcome of the litigation depends in whole or in part. *Ranger Insurance Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 23, 851 P.2d 689 (1993). We conclude that Judith Reyes failed to provide any proof regarding one element of medical malpractice.

In her appeals brief, Judith Reyes contends that the trial court erred when striking the declaration of Dr. Rosa Martinez. We find nothing in the record confirming that the trial court struck the declaration of Dr. Martinez. The trial court probably concluded that Dr. Martinez held the qualifications to deliver opinions concerning the care for Jose Reyes. The trial court reviewed the declaration, but determined the declaration to be wanting in creating an issue of fact as to medical negligence, causation, and damages.

Judith Reyes does not contend that any concession of Dr. Christopher Spitters in a conversation with her creates a question of fact. We also hold that Rosa Martinez' declaration fails to create issues of fact.

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Dr. Christopher Spitters argues that Dr. Rosa Martinez's declaration failed to show she was qualified to testify on the standard of care regarding tuberculosis and liver disease, failed to reference specific facts, failed to articulate the standard of care as it applies to Spitters, and failed to establish a causal link between Spitters' conduct and Jose Reyes' injuries and death. The Yakima Health District argues Dr. Martinez's declaration was insufficient because she failed to establish she was familiar with the standard of care, identify the applicable standard of care, explain the basis of her opinions, or support her conclusions with facts. We conclude that Dr. Martinez's declaration was insufficient because it failed to specify the standard of care in the state of Washington that Dr. Christopher Spitters and the Yakima Health District purportedly violated and the manner in which the defendants ostensibly violated the standard. Therefore, we do not address the defense's other arguments.

In a medical malpractice suit, a plaintiff must prove the relevant standard of care through the presentation of expert testimony, unless a limited exception applies. *Grove v. PeaceHealth St. Joseph Hospital*, 182 Wn.2d 136, 144, 341 P.3d 261 (2014); *Douglas v. Bussabarger*, 73 Wn.2d 476, 478-79, 438 P.2d 829 (1968). 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. *Hill v. Sacred Heart Medical Center*, 143 Wn. App. 438, 446, 177 P.3d 1152 (2008).

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A defendant moving for summary judgment can meet its initial burden by showing that the plaintiff lacks competent expert testimony. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226-27, 770 P.2d 182 (1989). The burden then shifts to the plaintiff to produce an affidavit from a qualified expert witness that alleges specific facts establishing a cause of action. *Guile v. Ballard Community Hospital*, 70 Wn. App. at 25 (1993). An expert must link conclusions to a factual basis; bare opinions are not sufficient to survive summary judgment. *Keck v. Collins*, 184 Wn.2d 358, 373, 357 P.3d 1080 (2015); *Guile v. Ballard Community Hospital*, 70 Wn. App. at 25. Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a summary judgment motion. *Guile v. Ballard Community Hospital*, 70 Wn. App. at 25.

In her declaration, Dr. Rosa Martinez opined that the conduct of Dr. Christopher Spitters and the Yakima Health District constituted medical negligence and breached the standard of care. Nevertheless, Dr. Martinez failed to identify the discrete conduct of Dr. Spitters or the health district that violated the standard of care. She also failed to declare the applicable standard. We might be able to guess that she considered the defendants to breach the standard by failing to quickly diagnose liver disease and by prescribing tuberculosis medications. But we should not be left to guess. A conclusory affidavit does not defeat a summary judgment motion.

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Several Washington decisions support our holding. In *Vant Leven v. Kretzler*, 56 Wn. App. 349, 356, 783 P.2d 611 (1989), the plaintiff's expert witness submitted an affidavit stating that the defendant physician's conduct more probably than not fell below the applicable standard of care. Nevertheless, the affidavit failed to identify what facts supported the conclusion. This court affirmed a summary judgment dismissal on behalf of the physician.

In *Guile v. Ballard Community Hospital*, this court affirmed a summary judgment dismissal. The patient's evidence failed to identify specific facts that established a basis for negligence and merely consisted of unsupported conclusions that the patient's postsurgical complications were caused by the surgeon's "faulty technique." 70 Wn. App. at 26.

Issue 2: Whether the trial court erred in dismissing Judith Reyes' tort of outrage claim?

Answer 2: No.

Judith Reyes contends the trial court erred in dismissing her tort of outrage claim because the claim is a derivative of the extreme misconduct in providing medical treatment. Dr. Christopher Spitters responds that the tort of outrage claim is statutorily barred because chapter 7.70 RCW provides the exclusive remedies for medical negligence. Dr. Spitters further argues that, even if Reyes could bring the claim, the claim fails because Washington law specifically permits the allegedly outrageous

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conduct. The Yakima Health District presents similar arguments as forwarded by Dr. Spitters. We affirm the trial court's summary dismissal of Reyes' claim for outrage because the conduct of the health district and Dr. Spitters, as a matter of law, is not outrageous. We thus do not address whether a patient may recover for outrage despite the provisions of chapter 7.70 RCW.

The tort of outrage is synonymous with a cause of action for intentional infliction of emotional distress. *Kloepfel v. Bokor*, 149 Wn.2d 192, 194, 66 P.3d 630 (2003); *Snyder v. Medical Services Corp.*, 145 Wn.2d 233, 250, 35 P.3d 1158 (2001). In order to make a prima facie case of intentional infliction of emotional distress, a plaintiff seeking to survive summary judgment must produce evidence showing three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to the plaintiff of severe emotional distress. *Kloepfel v. Bokor*, 149 Wn.2d at 195; *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). This appeal focuses on element one of the tort.

Extreme and outrageous conduct must be conduct that the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim "Outrageous!" *Kloepfel v. Bokor*, 149 Wn.2d at 196; *Reid v. Pierce County*, 136 Wn.2d 195, 201-02, 961 P.2d 333 (1998). Liability exists only when the conduct has been so outrageous in character and extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a

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civilized community. *Grimsby v. Samson*, 85 Wn.2d at 59 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. LAW INST. 1965)).

Generally, the elements of a claim for intentional infliction of emotional distress are questions of fact. *Strong v. Terrell*, 147 Wn. App. 376, 385, 195 P.3d 977 (2008). On summary judgment, however, a trial court must make an initial determination as to whether the conduct may reasonably be regarded as so extreme and outrageous as to warrant a factual determination by the jury. *Sutton v. Tacoma School District No. 10*, 180 Wn. App. 859, 869, 324 P.3d 763 (2014); *Strong v. Terrell*, 147 Wn. App. at 385. No case suggests that the standard to defeat a summary judgment motion is harsher for plaintiffs asserting outrage claims than plaintiffs in other tort suits. *Christian v. Tohmeh*, 191 Wn. App. 709, 736, 366 P.3d 16 (2015), *review denied*, 185 Wn.2d 1035, 377 P.3d 744 (2016). Nevertheless, Washington courts, like other courts, have considered themselves gatekeepers for purposes of allowing a jury to decide claims of intentional infliction of emotional distress. *Christian v. Tohmeh*, 191 Wn. App. at 736. The trial court and, in turn, the appeals court, renders an initial screening to determine whether the defendant's conduct and mental state, together with the plaintiff's mental distress, rise to the level necessary to make out a prima facie case. *Benoy v. Simons*, 66 Wn. App. 56, 63, 831 P.2d 167 (1992); *Orwick v. Fox*, 65 Wn. App. 71, 87-88, 828 P.2d 12 (1992). The requirement of outrageousness is not an easy one to meet. *Ortberg v. Goldman Sachs*

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Grp., 64 A.3d 158, 163 (D.C. 2013). The level of outrageousness required is extremely high. *Reigel v. SavaSeniorCare LLC*, 292 P.3d 977, 990 (Colo. App. 2011).

We analyze Judith Reyes' claim for outrage in the context of tuberculosis law. Washington, like most states, considers tuberculosis a serious public health threat and thus the disease's diagnosis and treatment are regulated. RCW 70.28.005; WAC 246-170. Each health district holds responsibility for controlling tuberculosis within its jurisdiction. WAC 246-170-021. A health district must maintain a tuberculosis prevention program and provide services for the treatment and control of any tuberculosis cases. WAC 246-170-031. Treatment generally includes a long-term regimen of multiple drugs. WAC 246-170-002(d).

When a local health district suspects that a patient has tuberculosis, the health district must "isolate and treat or isolate, treat, and quarantine" whenever needed to protect the public health. RCW 70.28.031(a). The local health officer holds the authority to order a tuberculosis patient to submit to treatment, including quarantine. RCW 70.28.031(d)-(f), .032, .033, .035. Violation of the health officer's order constitutes a misdemeanor. RCW 70.28.033.

Judith Reyes denies that Jose Reyes suffered from tuberculosis. Nevertheless, some medical records support a diagnosis of tuberculosis. The undisputed facts show that Dr. Christopher Spitters and other Yakima Health District practitioners believed Jose Reyes to suffer from tuberculosis. In this light, the defendants held an obligation to treat

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Reyes for tuberculosis and to prevent the disease's spread to others. The defendants had authority to threaten quarantine and arrest Reyes if he did not cooperate.

In *Christian v. Tohmeh*, 191 Wn. App. 709 (2015), this court dismissed, on summary judgment, a tort of outrage claim against a physician. In so doing, we analyzed a number of foreign decisions, in which the courts also dismissed outrage claims against physicians. The conduct alleged against Dr. Christopher Spitters and other health district providers is no more egregious than the conduct alleged against the physicians in *Christian v. Tomeh* and the foreign decisions. Therefore, we conclude that Judith Reyes fails to establish an issue of fact as to her claims against Dr. Spitters and the Yakima Health District.

Issue 3: Whether the trial court erred in dismissing Judith Reyes' wrongful death claim?

Answer 3: No.

The trial court dismissed Judith Reyes' wrongful death action based on the statute of limitations. In so ruling, the trial court relied on this court's decision in *Fast v. Kennewick Public Hospital District*, 188 Wn. App. 43, 354 P.3d 858 (2015). The Supreme Court reversed this court's decision at 187 Wn.2d 27, 384 P.3d 232 (2016). The defendants now concede that, at least for purposes of this appeal, the statute of limitations does not bar Reyes' wrongful death action.

A reviewing court may affirm the trial court on any grounds established by the

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pleadings and supported by the record. *In re Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003); *Truck Insurance Exchange v. VanPort Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002). We affirm the trial court's dismissal of the wrongful death action on other grounds. Judith Reyes fails to raise an issue of fact as to any wrongful conduct of the Yakima Health District or Dr. Christopher Spitters.

Washington's wrongful death statute, RCW 4.20.010, declares:

When the death of a person is caused by the *wrongful act, neglect, or default* of another his or her personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.

A plaintiff has no cause of action against a defendant, under the wrongful death statute, in the abstract. Instead, the plaintiff must also establish an underlying claim. The plaintiff must show that the defendant breached a duty to the decedent. *In re Estate of Lee v. City of Spokane*, 101 Wn. App. 158, 174, 2 P.3d 979 (2000). In other words, the plaintiff must prove the death was wrongful. *In re Estate of Lee v. City of Spokane*, 101 Wn. App. at 174.

Judith Reyes fails to create an issue of fact as to any negligence on the part of the Yakima Health District or Christopher Spitters. Therefore, she has created no issue of fact as to any wrongful act or neglect leading to Jose Reyes' death.

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CONCLUSION

We affirm the dismissal of all claims against the defendants on summary judgment.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

Fearing, C.J.

WE CONCUR:

Korsmo, J.

Korsmo, J.

Lawrence-Berrey, J.

Lawrence-Berrey, J.

FILED
MAY 16, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

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, E.R. and L.M.R.,)

No. 33697-2-III

Appellants,)

ORDER DENYING MOTION
FOR RECONSIDERATION

v.)

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

Respondents.)

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of February 14, 2017 is hereby denied.

PANEL: Judges Fearing, Korsmo, Lawrence-Berrey

FOR THE COURT:

George B. Fearing

GEORGE B. FEARING, Chief Judge

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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
CERTIFIED COPY OF DEATH CERTIFICATE

Local File Number: **2687** Washington State Certificate of Death State File Number: _____

1. Legal Name (include MA or NY): **Jose Luis REYES** MIDDLE LAST Suffix P. Death Date: **8/6/2010**

3. Sex (M/F): **Male** 4a. Age - Last Birthday: **51** 4b. Under 1 Year: _____ 4c. Under 1 Day: _____ 5. Social Security Number: **534-06-0931** 6. County of Death: **King**

7. Birthdate: **Dec. 2, 1958** 8a. Birthplace (City, Town, or County): **Churintzio** 8b. (State or Foreign Country): **Michoacan, Mexico** 9. Decedent's Education: **6th Grade**

10. Was Decedent of Hispanic Origin? (Yes or No) If yes, specify: **Yes, Mexican** 11. Decedent's Race(s): **Hispanic/Mexican** 12. Was Decedent ever in U.S. Armed Forces? **No**

13a. Residence: Number and Street (e.g., 624 SE 6th St.) (include Apt. No.): **4208 W. Lincoln Avenue** 13b. City or Town: **Yakima**

13c. Residence: County: **Yakima** 13d. Tribal Reservation Name (if applicable): **N/A** 13e. State or Foreign Country: **Washington** 13f. Zip Code: **98908**

14. Estimated length of time at residence: **7 Years** 15. Marital Status at Time of Death: **Married** 16. Surviving Spouse's or Domestic Partner's Name: **Judith M. Garcia**

17. Usual Occupation (indicate type of work done during most of working life. Do not use profession): **Fruitbin Builder** 18. Kind of Business/Industry (Do not use Company Name): **Own Business**

19. Father's Name (First, Middle, Last, Suffix): **Jose Reyes** 20. Mother's Name Before First Marriage (First, Middle, Last): **Margarita Barboza**

21. Informant's Name: **Judith M. Reyes** 22. Relationship to Decedent: **Wife** 23. Mailing Address: Number and Street or RFD No. City or Town State Zip: **4208 W. Lincoln Avenue Yakima WA 98908**

24. Place of Death: # Death Occurred in a Hospital: **Hospital Inpatient** # Death Occurred Somewhere Other than a Hospital: _____

25. Facility Name (if not a facility, give number & street or location): **UW Medical Center** 26a. City, Town, or Location of Death: **Seattle** 26b. State: **WA** 27. Zip Code: **98195**

28. Method of Disposition: **Cremation** 29. Place of Final Disposition (Name of cemetery, crematory, other place): **Terrace Heights Crematory** 30. Location-City/Town, and State: **Yakima, Washington**

31. Name and Complete Address of Funeral Facility: **Langevin-Mussetter Funeral Home, 1010 W. Yakima Ave., Yakima, WA 98902** 32. Date of Disposition: **August 13, 2010**

33. Funeral Director Signature: *Michael Vink*

24. Enter the chain of events - diseases, injuries, or complications - that directly caused the death. DO NOT enter terminal events such as cardiac arrest, respiratory arrest, or ventricular fibrillation without showing the etiology. DO NOT ABBREVIATE. Add additional lines if necessary.

IMMEDIATE CAUSE (Final disease or condition resulting in death): **Acute liver failure** Interval between Onset & Death: _____

Sequitentially list conditions, if any, leading to the cause listed on line a. Enter the UNDERLYING CAUSE (disease or injury that initiated the events resulting in death) LAST: **associated with isoniazid therapy for tuberculosis** Interval between Onset & Death: _____

35. Other significant conditions contributing to death but not resulting in the underlying cause given above: **Micronodular cirrhosis of undetermined etiology, pulmonary interstitial fibrosis**

36. Autopsy? Yes No 37. Were autopsy findings available to complete the Cause of Death? Yes No

38. Manner of Death: Natural Homicide Undetermined Accident Suicide Pending

39. If female: Not pregnant within past year Not pregnant, but pregnant within 42 days before death Not pregnant, but pregnant 43 days to 1 year before death Unknown if pregnant within the past year

40. Did tobacco use contribute to death? Yes Probably No Unknown

41. Date of injury: _____ 42. Hour of injury (24hrs): _____ 43. Place of injury (e.g., Decedent's home, construction site, restaurant, wooded area): _____ 44. Injury at Work? Yes No Unk

45. Location of Injury: Number & Street: _____ City or Town: _____ State: _____ Zip Code: _____

46. Describe how injury occurred: _____

47. If transportation injury, specify: Driver/Operator Pedestrian Passenger Other (Specify): _____

48a. Certifying Physician - To the best of my knowledge, death occurred at the time, date, and place and due to the cause(s) and manner stated: _____

48b. Medical Examiner/Coroner - On the basis of examination, and/or investigation, in my opinion, death occurred at the time, date, and place, and due to the cause(s) and manner stated: *Richard C. Haruff*

49. Name and Address of Certifier - Physician, Medical Examiner or Coroner: **Richard C. Haruff, MD PhD 325 9th Avenue, Seattle, WA 98101**

50. Hour of Death (approx): **19:15**

51. Name and Title of Attending Physician if other than Certifier (Type): _____

52. Date Signed (mm/dd/yyyy): **8/9/2010**

53. Title of Certifier: **Chief Medical Examiner** 54. License Number: _____ 55. Was case referred to ME/Coroner? Yes No

57. Registrar Signature: _____ 58. Date Received (mm/dd/yyyy): **08-11-2010**

59. Amendments: _____



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42 U.S. Code § 1983 - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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ARTICLE I, WASHINGTON STATE CONSTITUTION

DECLARATION OF RIGHTS.

SECTION 3 PERSONAL RIGHTS.

No person shall be deprived of life, liberty, or property, without due process of law.

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Amendment XIV, UNITED STATES CONSTITUTION

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation

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incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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