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**SUPREME COURT OF THE STATE OF WASHINGTON**

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MICHAEL J. COLLINS,

Petitioner,

v.

STATE OF WASHINGTON & OFFICE OF THE GOVERNOR, OFFICE  
OF THE ATTORNEY GENERAL, DEPARTMENT OF LABOR &  
INDUSTRIES IN ITS/THEIR OFFICIAL CAPACITY,

Respondents.

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**ANSWER TO PETITION FOR REVIEW**

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**ORIGINAL**

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF ISSUES.....2

III. COUNTERSTATEMENT OF THE CASE.....2

IV. ARGUMENT AGAINST REVIEW .....5

    1. The Petition Raises No Significant Question of Law  
    Under the Constitution of The State of Washington .....6

    2. The Court of Appeals Opinion Does Not Conflict  
    With a Decision of the Supreme Court.....9

V. CONCLUSION .....11

**TABLE OF AUTHORITIES**

Cases

*Blinka v. Wash. State Bar Ass’n*,  
109 Wn. App. 575, 36 P.3d 1094 (2001)..... 7

*Collins v. Dep’t of Labor & Indus.*,  
No. 11-5594, U.S. Dist., 2012 WL 1033567, (W.D. Wash 2012),  
*affirmed*, 520 Fed. Appx. 577 (2013), *cert denied*, 134 S. Ct. 1500  
(2014)..... 4

*Collins v. Dep’t of Labor & Industries*,  
163 Wn.2d 1020 (2008)..... 1, 3, 8

*Collins v. State*,  
No. 47565-I-II, slip op at 6 (Wash. May 10, 2016)..... 8

*Grange Ins. Ass’n v. Roberts*,  
179 Wn. App. 739, 320 P.3d 77 (2013), *review denied*, 180  
Wn.2d 1026 (2014)..... 10

*Reid v. Pierce Cnty.*,  
136 Wn.2d 195, 961 P.2d 333 (1998)..... 7, 10

*Rothwell v. Nine Mile Falls School District*,  
173 Wn. App. 812, 295 P.3d 328 (2013)..... 9

Statutes

CR 12(b)(6)..... 10

RAP 13.4..... 10

RAP 13.4(b)..... 2, 5

RAP 13.4(c)..... 5

RAP 13.4(c)(7)..... 5, 6

## I. INTRODUCTION

Michael Collins seeks relief against the State of Washington, Office of the Governor, Office of the Attorney General, and the Department of Labor & Industries (Department) for allegedly failing to remedy the dismissal of his claim for an industrial injury that occurred in 1993. Mr. Collins' claim for this industrial injury was closed by the Department in 2007. Since that time, Mr. Collins has unsuccessfully appealed the decision to close his claim. *Collins v. Dep't of Labor & Indus.*, 163 Wn.2d 1020 (2008) (denying petition for review). He has also sued twice in federal court concerning the closure of his industrial injury claim, both of which cases have been dismissed. He filed a new request to reopen his claim in 2014, which was denied. He then brought this case, alleging that the Office of the Governor, the Office of the Attorney General, and the Department committed "constitutional torts" by refusing, in one way or another, to re-evaluate or investigate whether his industrial injury claim had been improperly closed. When those claims were dismissed for failure to state a claim, he asserted a claim for intentional infliction of emotional distress, which was likewise dismissed. The Court of Appeals affirmed these dismissals. Mr. Collins now seeks discretionary review by this Court.

## **II. COUNTERSTATEMENT OF ISSUES**

Mr. Collins does not raise an issue that meets the criteria set forth in RAP 13.4(b). But if discretionary review were granted, the issues would be:

1. Did the Court of Appeals properly determine that Mr. Collins failed to state a constitutional tort claim, since Washington does not recognize a cause of action in tort for constitutional violations?

2. Did the Court of Appeals properly interpret the trial court proceedings such that no significant question of law under the Constitution of the State of Washington is implicated?

3. Did the Court of Appeals properly apply precedent concerning Mr. Collins' claim for intentional infliction of emotional distress, such that there is no conflict with a decision of the Supreme Court?

## **III. COUNTERSTATEMENT OF THE CASE**

The long saga of the present case began in January 1993, when Michael Collins submitted a claim for an industrial injury. CP at 113, 133. In April 1993, the Department accepted that claim, which was later closed on April 19, 1995. CP at 113, 133. In 2006, Mr. Collins applied to reopen

his claim. CP at 113, 134. The Department reopened his claim, adjudicating it under the standard applicable to a claim that had been closed for more than seven years. Applying that standard, the Department determined that only medical benefits would be appropriate and that additional disability benefits would not be granted. CP at 113.

Mr. Collins appealed that determination to the Board of Industrial Insurance Appeals (BIIA). There he argued that he had never received the April 1995 order closing the claim. The BIIA determined that he had made a sufficient prima facie showing that he had not received the 1995 order to overcome the presumption of the mailings in due course reaching their intended recipient. CP at 112. In April 2007, the BIIA remanded the matter to the Department to further adjudicate Mr. Collins' claim as a protest of the April 1995 closure order, rather than a request to reopen a closed claim after seven years. CP at 112-13. The Department did just that then closed his claim effective August 3, 2007. CP at 128-29, 133-34.

Mr. Collins appealed the August 2007 closing of his industrial insurance claim to the Superior Court, CP at 134, to the Court of Appeals, and sought review from this Court, which was denied. *Collins v. Dep't of Labor & Indus.*, 163 Wn.2d 1020 (2008). He sued twice in United States District Court concerning alleged constitutional violations connected with the handling of his industrial injury claim. The first case was dismissed for

lack of subject matter jurisdiction. *Collins v. Dep't of Labor & Indus.*, No. 10-05247, U.S. Dist. (W.D. Wash.), *affirmed*, Ninth Circuit Ct. of App. Case No. 10-35572, *cert denied*, 562 U.S. 1115 (2010). Mr. Collins' second federal suit alleged that the denial of his workers compensation claim violated his Fourteenth Amendment right to due process, and was also dismissed. *Collins v. Dep't of Labor & Indus.*, No. 11-5594, U.S. Dist., 2012 WL 1033567, (W.D. Wash 2012), *affirmed*, 520 Fed. Appx. 577 (2013), *cert denied*, 134 S. Ct. 1500 (2014). Mr. Collins also sought to reopen his industrial insurance claim in 2010, which was denied. CP at 134. Mr. Collins voluntarily dismissed his appeal of that matter in 2011. CP at 134.

Having previously exhausted all avenues of appeal, and having failed to successfully show a deprivation of his due process rights, Mr. Collins now turns to claims against the Office of the Governor and the Office of the Attorney General. His latest theories can best be described as stating that these two offices, by virtue of the general powers granted to them under that Washington Constitution, had duties to reopen and correct Mr. Collins' prior industrial injury claim, or to launch an investigation into that failure to reopen his claim, and their failure to do so creates tort liability. CP 3-7, 215-22. This newest layer of claims continues to be based, as before, on Mr. Collins' belief that his claim should have been

processed in 2007 in a manner that he views to be in conformity with orders entered then by the BIIA. He asserts in various forms in his pleadings that the “life blood” of his claims are the orders entered by the BIIA in 2007, and that because of actions by the named individuals in his complaints, he “would never be allowed to have my Industrial injury claim corrected, as mandated by Board of Industrial Insurance Appeals April 18-June 11, 2007 Orders.” CP at 12, 27-29, 66-67, 85, 87. He cannot show that there is any legal basis to pursue these claims under a constitutional tort theory, or as claims based on a theory of intentional infliction of emotional distress.

#### **IV. ARGUMENT AGAINST REVIEW**

Mr. Collin’s Petition for Review fails to state why review should be accepted under one or more of the tests established in RAP 13.4(b), which provides for review of a Court of Appeals decision only when that decision conflicts with another Washington appellate decision, presents a significant question of law under the Constitution or involves an issue of substantial public interest.

RAP 13.4(c) requires that a petition for review contain “[a] direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument.” RAP 13.4(c)(7). The petition here does not contain a “direct and concise

statement” why review should be accepted under RAP 13.4(b). Mr. Collins makes only general references to RAP 13.4(b) criteria, but makes no new argument why this case involves a significant question of law under the Constitution of the State of Washington, or that the Court of Appeals’ decision conflicts with decisions from this Court or the Court of Appeals. Mr. Collins’ failure to comply with the minimum standards required by RAP 13.4(c)(7) is on its own a basis for this Court to deny his petition.

The arguments contained in Mr. Collins’ brief do not demonstrate that any criteria for acceptance of discretionary review can be met, and review should be denied. He cannot show that any constitutional issues are implicated by the Court of Appeals decision and he cannot identify a case decided by this Court or by the Court of Appeals that conflicts with the Court of Appeals decision dismissing his appeal.

**1. The Petition Raises No Significant Question of Law Under the Constitution of The State of Washington**

Mr. Collins re-argues his position concerning the alleged failure to provide him with due process in his industrial accident claim, and the effect of a 2007 order reopening that claim. These issues have been litigated to a conclusion in prior cases, and are not at issue here. The only issues that the court below determined were whether Mr. Collins stated a

viable claim for relief under a constitutional tort theory. The court properly found that there was no basis for claiming that the Department, the Office of the Attorney General, or the Office of the Governor committed constitutional torts in failing to investigate Mr. Collins' claims that his due process rights had been violated. Likewise, Mr. Collins stated no set of facts under which those alleged failures could be considered actionable under a theory of intentional infliction of emotional damage. The Court of Appeals correctly upheld dismissal of these claims, and its decision does not implicate any issue under the Constitution of the State of Washington.

First, the mere fact that Mr. Collins refers to his claims as constitutional torts does not, on its own, implicate a significant question of law under the Constitution of the State of Washington.<sup>1</sup> To the contrary, the Court of Appeals correctly analyzed the question of whether a constitutional tort could be recognized in this case, and followed clear precedent established in prior cases addressing this question. *See Reid v. Pierce Cnty.*, 136 Wn.2d 195, 213-14, 961 P.2d 333 (1998) (A private right of action under the Washington Constitution was not implied where an adequate common law tort remedy existed); *Blinka v. Wash. State Bar*

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<sup>1</sup> Because Mr. Collins does not argue that dismissal of his claim based on the tort of outrage implicates any constitutional question, no discussion of that claim is necessary in this section of Respondents' answer to the petition for review.

*Ass'n*, 109 Wn. App. 575, 591, 36 P.3d 1094 (2001) (Without explicit legislative guidance as to the contours of a remedy for a constitutional violation, “Washington courts have consistently rejected invitations to establish a cause of action for damages based upon constitutional violations . . .”). The Court of Appeals properly recognized the established principle of law that, without specific legislative guidance, constitutional tort actions are not recognized. *Collins v. State*, No. 47565-I-II, slip op. at 6, (Wash. May 10, 2016). The Court of Appeal’s decision does not implicate a significant question under the Constitution of the State of Washington, it simply follows the law as established in prior cases.

The second issue Mr. Collins identifies for review is that the Court of Appeals somehow misinterpreted the trial court proceedings in a manner that implicates a significant constitutional question. While stated as a separate reason for accepting review, he presents no separate argument to support this claim. Instead, his brief simply refers the Court back to a portion of his prior argument asserting an alleged special circumstance, relationship, or duty was created that compelled the respondents to investigate his claims and that he was denied due process. The lack of any new argument to support this supposed second issue for review strongly suggests that it is nothing more than a way to restate his

first argument, and it must fail for the same reasons, that he cannot state a basis for a claim, and the Court of Appeals was correct in identifying that no such claim exists.

**2. The Court of Appeals Opinion Does Not Conflict With a Decision of the Supreme Court**

The only case Mr. Collins appears to argue conflicts with the Court of Appeals decision is *Rothwell v. Nine Mile Falls School District*, 173 Wn. App. 812, 819, 295 P.3d 328 (2013). *Rothwell* was cited by the court below for the general proposition that the Industrial Insurance Act (IIA) precludes those tort claims that arise out of an injury compensable under the IIA. Slip op. at 4-5. In *Rothwell*, the plaintiff claimed intentional infliction of emotional distress by her employer for tasks she was required to perform while on the job. The court agreed that plaintiff's assertion that she was subjected to intentional infliction of emotional distress by being compelled to perform certain job-related tasks stated a claim for an industrial "injury" as defined in the IIA. Here, the Court of Appeals did not find that Mr. Collins' claim for intentional infliction of emotional distress was precluded by the IIA, it simply found that the record did not support a viable basis for asserting such a claim under any plausible set of facts. Slip op. at 7. Thus, the Court of Appeal's decision and *Rothwell* are not in conflict.

Nor is the decision of the Court of Appeals in conflict with any other decision by this Court or of the Court of Appeals. To the contrary, it properly applies the standard for dismissal of a claim under CR 12(b)(6) where the complaint fails to raise any legally sufficient hypothetical situation that would support the claim asserted. Here, Mr. Collins offered no evidence of even a hypothetical situation in which the respondents' conduct was so outrageous as to go beyond all bounds of decency and to be "utterly intolerable in a civilized community." *Grange Ins. Ass'n v. Roberts*, 179 Wn. App. 739, 753-54, 320 P.3d 77 (2013), *review denied*, 180 Wn.2d 1026 (2014) (quoting *Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998)). The Court of Appeals correctly determined that Mr. Collins had failed to allege any conduct that was so outrageous it could support an intentional infliction of emotional distress, and that no hypothetical situation presented by his complaint could potentially support such a claim. Slip op. at 7.

Again, the decision of the Court of Appeals is well within the bounds of prior case precedent. Mr. Collins cannot show that the decision conflicts with prior case law, and review by this Court is unnecessary.

**V. CONCLUSION**

Mr. Collins' petition does not meet the standards for review specified in RAP 13.4 and should be denied by this Court.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of August, 2016.

ROBERT W. FERGUSON  
Attorney General



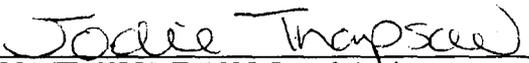
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**CERTIFICATE OF SERVICE**

I certify that I caused a copy of this document to be served on all parties or their counsel of record via US Mail as follows:

Mr. Michael J. Collins  
10101 43rd Street Court East  
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DATED this 1<sup>st</sup> day of August, 2016, at Tumwater, WA.

  
\_\_\_\_\_  
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## OFFICE RECEPTIONIST, CLERK

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Attached please find an Answer to Petition for Review regarding the above-referenced matter for filing.

Should you have any questions or concerns, please don't hesitate to contact me.

Sincerely,

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