No. 94679-5

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 336972

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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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),

Appellant,

v.

YAKIMA HEALTH DISTRICT, a public entity in the State of Washington; CHRISTOPHER SPITTERS, M.D.; JOHN DOES NOS. 1-20,

Respondents.

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**BRIEF OF RESPONDENT YAKIMA HEALTH DISTRICT**

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# I. STATEMENT OF CASE

## A. General Nature of Case, Identity of Parties and Summary of Claims

This is a medical negligence case. It arises from the August 6, 2010, death of Jose Reyes from medication-induced liver toxicity. Mr. Reyes had been diagnosed with active tuberculosis, and in May, June and part of July 2010, underwent treatment at the Yakima Health District.

The Appellant (and Plaintiff below) is Judith Reyes, Mr. Reyes' surviving spouse, on behalf of herself, Mr. Reyes' estate, and her and Mr. Reyes' minor children. The Respondents (and Defendants below) are the Yakima Health District (YHD) and Christopher Spitters M.D., the YHD Health Officer.

Against both YHD and Dr. Spitters, Reyes alleged violation of the standard of care, lack of informed consent and outrage. Against YHD only, Reyes alleged negligent hiring, retention and supervision.

Reyes appeals a series of summary judgment orders that dismissed all claims against all defendants. Reyes has not appealed dismissal of the negligent hiring, retention and suspension claim.

## B. Pertinent Medical Treatment

In 2009 Mr. Reyes was seen at the Yakima Chest Clinic for complaints of intermittent chest pain. CP 149. A chest x-ray and CT scan

showed infiltrates in Mr. Reyes' lungs, resulting in a differential diagnosis of pneumonia. CP 149.

When Mr. Reyes' symptoms did not abate, a Chest Clinic physician ordered a bronchoscopy to take samples from Mr. Reyes' lungs. CP 149. The bronchoscopy was conducted on April 20, 2010, CP 153, and a sputum sample obtained during the bronchoscopy tested positive for tuberculosis. CP 144; 146. On May 18, 2010, the positive tuberculosis results were reported to the Washington Department of Health and Yakima Health District by the Yakima Valley Memorial Hospital microbiology lab. CP 144, 146.

On May 25, 2010, Mr. Reyes began tuberculosis treatment at YHD with a standard four-drug combination of isoniazid, rifampin, ethambutol and pyrazinamide. CP 7, 159, 213. The four-drug therapy was given in weight-standardized doses by daily directly observed therapy ("DOT"), Monday through Friday. CP 164. At the commencement of therapy, baseline liver function testing was done, which was essentially normal. *Id.* Additional sputum samples analyzed by the Washington State Department of Health's Public Health Laboratory also cultured positive for tuberculosis. CP 155-158, 216.

In mid-June, after two weeks of daily DOT therapy, Mr. Reyes' treatment was temporarily changed to twice weekly as a trial of a more

mutually convenient regimen. CP 164. However, Mr. Reyes reported gastrointestinal complaints, which resulted in treatment reverting to daily dosing. *Id.*

In late June and early July, Mr. Reyes missed a string of DOT days. CP 165. He was also delinquent in submitting blood for interim liver function testing. CP 165. After multiple efforts by YHD's staff to prompt Mr. Reyes to submit a blood sample, a specimen was finally collected on July 8 and submitted to the lab. CP 165. This testing demonstrated abnormal liver values. *Id.* As a consequence, Mr. Reyes' tuberculosis medications were held and efforts were made to motivate Mr. Reyes to report to an emergency room for inpatient evaluation. *Id.*

YHD contacted Dr. Spitters, the Health Officer for YHD, and told him about Mr. Reyes. CP 211. Dr. Spitters spoke to Mr. Reyes by phone on July 15, 2010. Mr. Reyes admitted he had been experiencing fatigue and nausea for several weeks and that he had also been consuming alcohol while taking his tuberculosis medications. CP 213. Mr. Reyes had been warned that drinking alcohol while taking the tuberculosis medications could increase his risk of a drug-induced liver injury. CP 211. Dr. Spitters directed Mr. Reyes to go to the emergency room, but he declined. CP 213.

Dr. Spitters diagnosed Mr. Reyes with a drug-induced liver injury, instructed YHD staff to continue to hold Mr. Reyes' tuberculosis

medications and refer him to the emergency room so he could undergo additional liver tests and be referred for transplant review. CP 213-214.

Mr. Reyes visited YHD for additional testing on July 16, 2010, and Dr. Spitters saw him in the clinic on July 22, 2010. CP 215-219. Dr. Spitters consulted with Mr. Reyes' internal medicine specialist, Gilbert Ong, G.M.D., and helped facilitate Mr. Reyes' contact with the hepatology department at the University of Washington. CP 221, 224-225. Despite this, Mr. Reyes' condition declined over the next several weeks and he passed away from liver failure at the University of Washington on August 6, 2010, while waiting for a liver transplant. CP 226.

### C. Pertinent Trial Court Procedure

On October 3, 2014, Ms. Reyes filed suit individually and on behalf of her two minor children as well as Mr. Reyes' estate. CP 4. On October 27, 2014, Dr. Spitters sent Interrogatories and Requests for Production to Reyes, requesting, among other things, identification of her medical expert(s). CP 411-412. Dr. Spitters made multiple attempts to obtain Ms. Reyes' responses to this discovery, which efforts included CR 26(i) conferences, a motion to compel, and an agreed order between the parties indicating Reyes would respond by a specific date. CP 398-410, 460-462.

When Reyes violated the agreed order by failing to respond to the discovery by the stipulated deadline, Dr. Spitters filed a motion to dismiss

for failure to comply with discovery and a motion for summary judgment for lack of experts. CP 398-410, 460-462. On April 3, 2015, YHD filed a companion motion for summary judgment on plaintiff's standard of care claim(s). CP 366.

On April 27, 2015, in response to the pending motions for summary judgment, Reyes filed a declaration from Dr. Martinez (first declaration). CP 108-113. The declaration included a copy of Dr. Martinez' curriculum vitae. CP 114-116. Dr. Spitters and YHD objected, arguing that the declaration was insufficient to establish a prima facie case of medical negligence for several reasons, including that the declaration failed to establish Dr. Martinez' qualifications to testify on the standard of care for the treatment of active tuberculosis in the state of Washington, failed to identify the standard of care, failed to establish Dr. Martinez' familiarity with the standard of care, consisted largely of a regurgitation of Reyes' Complaint, and lacked evidentiary support for her conclusory statements. CP 117-133; CP 128-140.

At the May 5, 2015, hearing on Dr. Spitters and YHD's summary judgment motions, the trial court agreed with Dr. Spitters and YHD, explaining:

> Look, I take this very seriously because this is the nail in the coffin and it sounds like Mr. Reyes suffered a horrible death, but at this point we don't have any facts to establish what the

> causation is, what the standard of care is, whether Dr. Martinez is qualified to reach these conclusory statements that she makes. And I agree with Mr. Kerley. You don't need a whole lot, but you need more than is here.

The trial court refused Reyes' oral CR 56(f) request to submit a supplemental declaration from Dr. Martinez. The court based its ruling largely on the admission by Reyes' counsel that he had been working with Dr. Martinez on Reyes' case for over a year and that supplemental opinions from Dr. Martinez would not constitute newly discovered evidence. 5/5 RP 38:17-22; 43:14-44:10.

On May 11, 2015, YHD filed a motion for summary judgment on Reyes' claims of negligent hiring, retention and supervision and the tort of outrage. CP 191-194. YHD also filed a motion for summary judgment dismissal of Reyes' wrongful death claims based on expiration of the statute of limitations. CP 261-266.

On May 18, 2015, Reyes filed a motion for reconsideration of the trial court's May 5, 2015, decision to dismiss her medical negligence claims. CP 228. Reyes attached a second declaration from Dr. Martinez to the Motion for Reconsideration. CP 229-231.

YHD and Dr. Spitters argued that the motion for reconsideration was untimely and deficient under CR 59 because it failed to state that facts and law upon which it was based, was filed in direct violation of the trial

court's May 5, 2015, decision, failed to meet any of the requirements for reconsideration set forth in CR 59, and that, even if the trial court were to consider it, the declaration still failed to support a medical negligence claim because it did not sufficiently articulate the standard of care as applied to the defendants and how the defendants violated that standard. CP 232-242; CP 261-267.

At a hearing on July 15, 2015, the trial court agreed with Dr. Spitters and YHD and declined to consider Ms. Reyes' untimely motion for reconsideration or Dr. Martinez' second declaration. 7/15 RP 21:20-22:7. The trial court remarked that even if it had considered Dr. Martinez' second declaration, it would be insufficient to support a claim of medical negligence. 7/15 RP 23:16-19. The trial court determined that Dr. Martinez' conclusory statement that Dr. Spitters and YHD violated the standard of care was insufficient to explain what the standard of care required of the defendants and how they failed to follow it. 7/15 RP 39:6-16.

The trial court also granted YHD and Dr. Spitters' Motion for Summary Judgment on the outrage claim and the negligent hiring, retention, supervision claim against YHD. 7/15 RP 40:22-41:5. Finally, the trial court dismissed Reyes' wrongful death claims, brought individually on behalf of her two children, on the independent basis that they were barred by the governing three year statute of limitations. 7/15 RP 11:8-18.

## II. ARGUMENT AND AUTHORITIES

### A. The Trial Court Properly Dismissed Reyes' Standard of Care Claims Because Reyes Failed To Establish a Prima Facie Case With Competent Expert Testimony

In a medical negligence case, when a defendant moves for summary judgment, the burden shifts, and where the plaintiff files medical expert affidavits or declarations opposing summary judgment, those affidavits or declarations must set forth specific facts supporting the expert's opinions, not conclusory statements without adequate factual support. *Keck v. Collins*, 181 Wn. App. 67, 91, 325 P.3d 306, (2014); *Guile v. Ballard Community Hospital*, 70 Wn. App 18, 25, 851 P.2d 689 (1993). *See also*, *Thompson v. Everett Clinic*, 71 Wn. App 548, 555-56, 860 P.2d 1054 (1993); *Ruffer v. St. Francis Cabrini Hospital*, 56 Wn. App 65, 784 P.2d 1288 (1990). "Broad generalizations and vague conclusions are insufficient to resist a motion for summary judgment...." *Thompson*, *supra* at 555-56.[1]

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[1] In *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (Sept. 2015), the Washington Supreme Court held that, in a medical negligence case, the testimony of a plaintiff's expert in a declaration or affidavit is sufficient to defeat a motion for summary judgment if the testimony would be sufficient to support a verdict in favor of the plaintiff at trial. 357 P.3d at 1086. But that does not mean an expert declaration in opposition to a motion for summary judgment can be speculative or conclusory or fail to establish the experts' qualifications. Indeed, expert testimony that is speculative and conclusory is not enough to sustain a verdict in favor of the plaintiff. *See*, e.g., *Donoghue v. Riggs*, 73 Wn.2d 814, 440 P.2d 823 (1968). Thus, whether analyzed under the rubric of materiality, as in *Keck*, or the requirement that expert declarations/affidavits not be speculative or conclusory, as in *Guille*, the standard of proof is the same. Significantly, in *Keck* the qualifications of the plaintiff's expert were not at issue.

For purposes of CR 56(e), the competency of an affiant to testify to a matter either supporting or opposing summary judgment must be demonstrated by the contents of the affidavit itself. *Bernal v. American Honda Motor Company*, 87 Wn.2d 406, 553 P.2d 107 (1976). Affidavits in support of, or in opposition to, a motion for summary judgment must be based on personal knowledge, set forth admissible evidentiary facts, and affirmatively show that the affiant is competent to testify to the matters therein. *Davies v. Holy Family Hospital*, 144 Wn. App. 483, 183 P.3d 283 (2008). A bare allegation of fact by affidavit without any showing of evidence is insufficient to raise a genuine issue of fact for purposes of a motion for summary judgment. *Meissner v. Simpson Timber Company*, 69 Wn. App. 949, 421 P.2d 674 (1966).

In Washington, the applicable standard of care in a medical negligence case is that the healthcare provider "failed to exercise that degree of care, skill, and learning expected of a reasonably prudent healthcare provider at that time in the profession or class at which he belongs, in the state of Washington, acting in the same or similar circumstances." RCW 7.70.040(1). In *Harris v. Groth*, 99 Wn.2d 438, 663 P.2d 113 (1983), the Washington Supreme Court emphasized that RCW 7.70.040 sets a state standard of care:

> The legislative history does, however, indicate an intent to alter existing law in one respect-by limiting those who set the standard of care to health care provider within the state of Washington. (Citation omitted). Thus, in attributing to reasonably that prudent health care provider the skills and training possessed by members of the same class or profession (Citations omitted) the trier of fact must consider only those providers within the state of Washington. (Citation omitted).

99 Wn.2d at 447, fn. 4.

See also *Winkler v. Giddings*, 1146 Wn. App. 387, 190 P.3d 117 (2008).

In the instant case, Dr. Martinez, in her declaration, failed to identify the standard of care for the treatment of active tuberculosis in the State of Washington. Likewise, she failed to establish that she was familiar with that standard of care.

Also, although Dr. Martinez, in her declaration, stated she had reviewed the medical records and the coroner's report, she did not identify, beyond those conclusory references, the source of any of the facts regarding Mr. Reyes' medical condition, and his care and treatment by the defendants, with the exception of her reference to the "Death Certificate," which, according to Dr. Martinez, "clearly shows Mr. Jose Reyes was not suffering from tuberculosis and he expired as a result of complications to chronic liver disease." CP 109.

A corollary to the requirement that an expert witness declaration in a medical negligence case identify the standard of care, describe the witnesses' familiarity with the standard of care, and set forth how the defendant violated the standard of care, is the principle that a mere mistake in diagnosis, standing alone, does not establish a violation of the standard of care. *Fergen v. Sestero*, 182 Wn.2d 794, 809, 346 P.3d 708, 716 (March 2015). *See also, Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 229, 770 P.2d 182 (1989). The cornerstone of Dr. Martinez' opinions was the factual assumption that Mr. Reyes did not have tuberculosis. Dr. Martinez repeated that assertion a number of times in her declaration, without explaining or indicating in any way her basis for that assumption. More specifically, she did not explain why the diagnosis of active TB by any of the defendants, if made, was a violation of the standard of care.

Misdiagnosis and the inexactness of medicine is not the basis for liability without a deviation from the proper standard of care. *Fergen v. Sestero*, 182 Wn. 2d 794, 809, 346 P.3d 708 (2015); *Miller v. Kennedy*, 85 Wn. 2d 151, 151-52, 530 P.2d 334 (1975); *Ezell v. Hutson*, 105 Wn. App. 485, 488, 20 P.3d 975 (2001).

A related deficiency in Dr. Martinez' declaration was that she failed to identify what specific health care provider violated the standard of care, and how. The blanket conclusory statement that the defendants were

negligent, or that the defendants violated the standard of care, was conclusory and insufficient.

For the most part, Dr. Martinez' declaration was simply a restatement of the allegations contained in the plaintiff's Complaint with the added conclusory contention that the defendants were negligent, or violated the standard of care. That is insufficient. *See*, *Guile*, *supra*. Indeed, one purpose of summary judgment is to pierce the bare allegations in the Complaint and require the non-moving party to support his/her claim with competent evidence. *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1963).

In addition and perhaps most significantly, Dr. Martinez' first declaration did not establish that she was qualified to express an opinion on the standard of care in the state of Washington for the pharmacological treatment of active TB. A physician with a medical degree is potentially qualified to express an opinion on any medical question, including questions in areas in which the physician is not a specialist. The physician, however, must still demonstrate that he/she has sufficient familiarity with the procedure or medical problem at issue. *See*, *Hill v. Sacred Heart Medical Center*, 143 Wn. App. 438, 177 P.3d 1152 (2008). *See also*, *Davies v. Holy Family Hospital*, 144 Wn. App. 483, 494-96, 183 P.3d 283 (2008). In the instant case, nowhere in her declaration did Dr. Martinez demonstrate

her familiarity with the treatment method/protocols for active tuberculosis. This deficiency was particularly glaring because in Washington TB is a recognized public health issue and accordingly the diagnosis and treatment of the disease is heavily regulated with the standard for diagnosis and treatment addressed by regulation. *See*, RCW 70.28.005; WAC 246-170-002, 011, 031.

**B. <u>The Trial Court Properly Denied Reyes' Oral Request For A CR 56(f) Continuance</u>**

Whether to grant a CR 56(f) motion for continuance is a matter of trial court discretion. *Turner v. Kohler*, 54 Wn. App. 688, 775 P.2d 474 (1989). The court may deny a motion for continuance when the requesting party does not offer a good reason for the delay in obtaining the desired evidence, the requesting party does not state what evidence would be established through additional discovery, or the desired evidence will not raise a genuine issue of material fact. *Turner*, 54 Wn. App. at 693.

In the instant case, Reyes did not give a good reason for the submission of a deficient expert declaration in opposition to YHD and Dr. Spitters' motions for summary judgment and, under the circumstances, query what reason Reyes could have offered. Reyes had been represented by counsel since at least June of 2013, when Reyes served Defendants with a request for mediation under RCW 7.70.100. CP 26-27. YHD and

Dr. Spitters' motions for summary judgment were filed on April 3, 2015, putting Reyes on notice of a need to respond to the motions with a legally sufficient declaration from a qualified expert. And, at the summary judgment hearing, Reyes' counsel admitted that he had been working with Dr. Martinez on the case for over a year. 5/5 RP 38:17-22; 43:14-44:10.

Under these circumstances, the trial court properly exercised its discretion in denying Reyes' CR 56(f) request for continuance.

### C. The Trial Court Properly Denied Reyes' Motion For Reconsideration

#### 1. Plaintiff's Motion Was Not Timely

Under CR 59(a) a motion for reconsideration must be filed no later than ten days after the entry of the judgment, order, or decision to which the motion is directed. The rule also requires that the motion be noted at the time it is filed. The opposing party then has ten days to file its opposition. CR 56(c). A motion for reconsideration under CR 59 is a matter of trial court discretion. *Martini v. Post*, 178 Wn. App. 153, 161, 313 P.3d 473 (2013).

The time requirements of CR 59 are strict, and may not be extended. *Metz v. Sarandos*, 91 Wn. App. 357, 360, 957 P.2d 795 (1998). See also *Schaefco v. The Columbia River Gorge Commission*, 121 Wn.2d 366, 367, 849 P.2d 1225 (1993) (recognizing that "a motion for reconsideration is timely only where a party both files and serves a motion within ten days").

In the instant case, the court granted YHD and Dr. Spitters' motions for summary judgment on plaintiff's standard of care/medical negligence claim(s) on Tuesday, May 5, 2015, and the Court Clerk entered the order that day. CP 188. Under CR 59(b) the ten day deadline for Reyes to file, note and serve her motion for reconsideration was Friday, May 15, 2015. She failed to file, note or serve the motion on or before that date. Instead, she filed and served the motion on Monday, May 18, 2015, three days after the deadline. Reyes also failed to note their motion with the court at all, further violating CR 59(b).

### 2. The Tardy Submission of Dr. Martinez' Second Declaration Was Not Justification for Reconsideration Under CR 59

CR 59 sets forth the grounds for a new trial or reconsideration. They are:

> (1) Irregularity in the proceedings of the court ...;
>
> (2) Misconduct of the prevailing party or jury...;
>
> (3) Accident or/surprise which ordinary prudence could not have guarded against;
>
> (4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at trial;
>
> (5) Damages so excessive or inadequate..;
>
> (6) Error in the assessment of the amount of recovery...;

(7) That there was no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial...; or

(9) That substantial justice has not been done.

CR 59(a).

A motion for reconsideration based on alleged newly discovered evidence is properly denied where the untimely proffered evidence is from a source to which the moving party had access, and the moving party could have produced the evidence during pre-trial discovery with minimal diligence. *See*, *Isla Verde International Holdings Inc. v. The City of Camas*, 99 Wn. App. 127, 990 P.2d 429 (1990) affirmed on other grounds 146 Wn.2d 740, 79 P.3d 867.

A motion for reconsideration of a summary judgment order based on alleged newly discovered evidence is properly denied where the evidence existed or was available at the time the summary judgment motions were filed. *See also*, *West v. Thurston County*, 144 Wn. App. 573, 183 P.3d 346 (2008) (County resident not entitled to reconsideration on the ground of newly discovered evidence in absence of showing the evidence could not have been obtained earlier); *Go 2 Net Inc. v. CI Host Inc.*, 115 Wn. App. 173, 60 P.3d 1245 (2003); *Wagner Development Inc. v. Fidelity Deposit Company of Maryland*, 95 Wn. App. 896, 977 P.2d 639

(1999) (On summary judgment, if evidence was available but not offered until after the court ruled, parties are not entitled to another opportunity to submit that evidence). *Adams v. W. Host, Inc.*, 55 Wn. App. 61, 779 P.2d 281 (1989) (realization that expert's first declaration was insufficient does not qualify the second declaration as newly discovered evidence).

In the instant case, the second declaration of Dr. Martinez was not newly discovered evidence within the meaning of CR 59(a)(4) and the cases construing it. The medical treatment at issue in this case occurred April through July of 2010. CP 1-16. Mr. Reyes passed away in August 2010. *Id.* Reyes' counsel submitted a request for mediation to Dr. Spitters on June 5, 2013. CP 26-27. Counsel sent the Yakima City Clerk a Notice of Claim on September 6, 2013 (*Id.*) and counsel sent a Notice of Claim to the Yakima Health District on August 1, 2014. *Id.*

Reyes filed her Complaint on October 3, 2014. CP 1-16. On or about April 4, 2015, Dr. Spitters served and filed his Motion for Summary Judgment, asking that Reyes' case be dismissed for lack of supporting expert testimony, noting the motion for May 5, 2015. CP 460-462. The Yakima Health District filed its Motion for Summary Judgment at the same time noting the hearing for the same date. CP 366-369.

At the summary judgment hearing on May 5, 2015, Reyes' counsel stated, on the record, that he "misread the pleadings" and was unaware of

defendants' pending motions for summary judgment, and the requirement that he support Reyes' case with competent expert testimony, until Dr. Spitters' counsel pointed that out during a telephone conversation regarding Reyes' overdue responses to Dr. Spitters' written discovery. 5/5 RP 30-33. At the May 5, 2015, hearing, Reyes' counsel also stated he had been working with Dr. Martinez on the plaintiff's case for over a year. 5/5 RP 38:17-22, 43:24-44:10.

Under these circumstances, Dr. Martinez' second declaration simply did not qualify as newly discovered evidence under CR 59, and the trial court acted well within its discretion in denying the motion.

**D. <u>The Trial Court Properly Dismissed Reyes' Outrage Claim</u>**

"The tort of outrage is synonymous with a cause of action for intentional infliction of emotional distress," *Christian v. Tohmeh*, 191 Wn. App. 709, 735, 366 P.3d 16 (2016), citing, *Kloepfel v. Bokor*, 149 Wn.2d 192, 194, 66 P.3d 630 (2003).

A cause of action for "outrage" exists only where conduct is "so extreme 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. Sampson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). Mere insults, indignities, embarrassment or humiliation will not support a claim of outrage. *Id.*

On summary judgment, "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." *Christian*, *supra* at 736, *citing*, *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 869, 324 P.3d 763 (2014). "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." *Christian*, *supra*, at 736, *citing*, *Benoy v. Simons*, 66 Wn. App. 56, 63, 831 P.2d 167 (1992). "The requirement of outrageousness is not an easy one to meet" and "[t]he level of outrageousness required is extremely high." *Id.*

The facts of *Benoy v. Simons*, 66 Wn. App. 56, 831 P.2d 167 (1992) provide an example of the high threshold for an outrage claim in the context of medical care. There, the defendant, Dr. Simon, provided care to a newborn, premature and severely disabled child. After the child's condition worsened, Dr. Simon transferred him to a hospital in Seattle, where the child later died. Benoy alleged that Dr. Simon inappropriately pressured her family to create a guardianship, maintain the infant needlessly on life support, led her to believe that her son was getting better when in fact he was getting worse, told her to bring her son's body home on a bus, and billed

her for needless care. On those facts, the Court of Appeals affirmed summary judgment in favor of Dr. Simon.

In the instant case, in support of their outrage claim, Reyes alleged YHD treated Mr. Reyes for active tuberculosis when he did not, in fact, have the disease and that YHD's treatment was inappropriate because Mr. Reyes had a pre-existing liver problem. But there was no competent factual support in the record for those allegations. Moreover, all of the acts/omissions alleged by Reyes in support of her outrage claim occurred in the course of YHD's diagnosis and treatment of Mr. Reyes. Thus, Reyes could not assert an outrage claim in addition to a medical negligence/standard of care claim under RCW 7.70.010. *See*, *Reed v. ANM Health Care*, 148 Wn. App. 264, 225 P.3d 1012 (2008). And again, a mere mistake in diagnosis, standing alone, does not mean there has been a violation of the standard of care, let alone outrage. *See*, *Fergen*, 182 Wn.2d at 809 ("misdiagnosis and the inexactness of medicine is not the basis for liability without a deviation from the proper standard of care").

Reyes' outrage claim was also based on the allegation that employees/officials of YHD threatened Mr. Reyes with incarceration if he did not comply with the prescribed tuberculosis treatment regimen. YHD denies any of its agents or representatives threatened Mr. Reyes with incarceration. But even if that happened, under Washington's statutory

scheme for the diagnosis and treatment of tuberculosis, a local Health Officer, working with the county prosecuting attorney and superior court, can seek to have a noncompliant tuberculosis patient quarantined and treated against his/her will. *See*, RCW 70.28.005, 70.28.030, 70.28.031. Accordingly, a health officer/district describing these statutory powers/options to a noncompliant patient cannot be "outrageous" conduct.

### E. The Trial Court Properly Dismissed the Wrongful Death Claim Based on Expiration of the Statute of Limitations

The statute of limitations for wrongful death allegedly resulting from medical negligence is three years. *Fast v. Kennewick Public Hospital District*, 188 Wn. App. 43, 354 P.3d 858 (2015).[2] A good faith request for mediation under RCW 7.70.110 does not toll the three-year statute. *Id.*

In the instant case, the three-year statute of limitations on Reyes' wrongful death claim ran on August 6, 2013. Reyes' Complaint was not filed until October 3, 2014, over four years later. And any good faith request for mediation did not toll the three-year statute. Thus, Reyes' wrongful death claim was appropriately dismissed based on the expiration of the statute of limitations.

Reyes argues that *Fast* frustrates legislative intent with respect to the statute of limitations for medical negligence actions. But the *Fast* court

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[2] YHD recognizes that the Washington Supreme Court has accepted review of *Fast*, 185 Wn.2d 1001 (March 02, 2016).

based its decision on *Wills v. Kirkpatrick*, 56 Wn. App. 757, 785 P.2d 834 (1990) *rev. denied*, 114 Wn.2d 1024 (1990). The Legislature has amended RCW 4.16.350 and RCW 7.70.010 four separate times since *Wills* was decided in 1990. *See*, Laws of 2006, Chapter 8, Section 302 and Laws of 2011, Chapter 336, Section 88 (amending RCW 4.16.350); Laws of 1993, Chapter 492, Section 420 and Laws of 1996, Chapter 270, Section 1 (amending RCW 7.70.010). Yet the Legislature has done nothing to counter the *Wills* decision or its result. "[W]hen a legislature enacts a law, it is presumed to be familiar with its prior enactments and judicial decisions." *Leonard v. City of Bothell*, 87 Wn.2d 847, 853, 557 P.2d 1306 (1976). Appellate courts presume that the Legislature is aware of judicial interpretation of its enactments and, accordingly, appellate courts take the Legislature's failure to amend a statute following a judicial decision interpreting that statute as an indication of legislative agreement with that decision. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327, 921 P.2d 500 (1999); *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009).

Reyes also argues that *Fast* and *Wills* violate the equal protection clause. "[T]o show a violation of the equal protection clause, a party must first establish that the challenged act treats unequally two similarly situated classes of people." *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 635,

911 P.2d 1319 (1996). Where persons of different classes are treated differently, there is no equal protection violation. *Forbes v. City of Seattle*, 113 Wn.2d 929, 943, 785 P.2d 431 (1990).

Here, *Fast* and *Wills* recognition of the separate statutes of limitation for wrongful death claims, RCW 4.20.010, and health care claims under RCW 7.70 et seq. do not treat unequally two similarly situated classes of people. Indeed, both *Fast* and *Wills* are based on the fact that the wrongful death statute and the medical malpractice statute address different injuries. More specifically, the medical malpractice statute addresses injuries suffered by patients, while a wrongful death claim is a new cause of action vested in a decedent's survivors.

Next, Reyes argues that the trial court's reliance on *Fast* was incorrect, and that "[w]here the acts of public officers are arbitrary, tyrannical, or predicated upon a fundamentally wrong basis, the court may interfere to protect the rights of individuals." Reyes' Brief, page 17. But the cases Reyes cites in support of this proposition were either writ of mandamus cases or challenges to a legislative body's decision, where the standard of review was arbitrary and capricious, or improper interpretation of the law. Here, there was no order issued by a legislative body. Thus, this argument, and the cases cited in its support, are inapposite.

## III. CONCLUSION

For the reasons set forth above, YHD respectfully requests that the trial court's summary judgment orders in its favor be affirmed in all respects.

Dated this 27th day of June, 2016.

EVANS, CRAVEN & LACKIE, P.S.

By _____
CHRISTOPHER J. KERLEY, #16489
Attorney for Respondent Yakima Health District

## CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 27 day of June, 2016, a copy of the BRIEF OF RESPONDENT YAKIMA HEALTH DISTRICT was delivered to the following persons in the manner indicated:

| | |
|---|---|
| J.J. Sandlin<br>Attorney at Law<br>PO Box 1707<br>Prosser, WA 99350<br>Sandlinlaw@lawyer.com<br>Jimenezconsult.law@gmail.com | VIA REGULAR MAIL [X]<br>VIA CERTIFIED MAIL [ ]<br>VIA FACSIMILE [ ]<br>HAND DELIVERED [ ]<br>VIA EMAIL [X] |
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6-27-16 /Spokane, WA

(Date/Place) Benjamin T. Yesland