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No. 94679-5  
Court of Appeals No. 33697-III

SUPREME COURT  
OF THE STATE OF WASHINGTON

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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),

Appellants,

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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SUPPLEMENTAL BRIEF OF RESPONDENT YAKIMA HEALTH DISTRICT PURSUANT TO RAP 13.7(d)

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## I. INTRODUCTION

Defendant/Respondent Yakima Health District (“YHD”) files this supplemental brief pursuant to RAP 13.7(d) and the Court’s Order dated October 4, 2017 granting the Petition for Review of the decision in *Reyes v. Yakima Health District, et al.*, 197 Wn. App. 1072 (Div. 3, 2017), No. 33697-III. In its unpublished decision the Court of Appeals affirmed the trial court’s dismissal of Reyes’ claims on summary judgment because they lacked sufficient expert witness testimony to prove the requisite elements of a medical negligence claim as required by RCW 7.70.030.

Reyes also presents an argument (*res ipsa loquitur*) and a legal claim (due process), which were neither pled nor presented to the trial court or the Court of Appeals. Reyes should not be permitted to assert new arguments and causes of action for the first time before the Supreme Court.

## II. STATEMENT OF ISSUES

1. Whether the elements of RCW 7.70.030 were established by competent medical testimony.
2. Whether the doctrine of *res ipsa loquitur* applies to the facts of this case.
3. Whether a due process claim has been adequately articulated on appeal.
4. Whether the Court of Appeals properly affirmed dismissal of the wrongful death claim.

### III. COUNTER STATEMENT OF THE 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 are the Yakima Health District (YHD) and Christopher Spitters M.D., the YHD Health Officer.

Against both YHD and Dr. Spitters, Reyes alleged violations 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 did not appeal dismissal of the negligent hiring, retention and supervision 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 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 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 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 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 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 as it did not sufficiently articulate the standard of care as applied to the defendants or how the defendants violated the same. 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 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.

#### IV. 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.<sup>1</sup>

In this case, Reyes submitted an expert witness declaration in response to Defendant YHD's summary judgment motion. The declaration was deficient. After the trial court entered summary judgment in YHD's favor, Reyes moved for reconsideration and filed a second expert witness declaration. The Motion for Reconsideration was untimely. The trial court denied the Motion for Reconsideration because it was (1) untimely, and (2)

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<sup>1</sup> In *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (2015), this 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 *Guile*, the standard of proof is the same. Significantly, in *Keck* the qualifications of the plaintiff's expert were not at issue.

even if it would have been timely filed, the second affidavit was likewise deficient in establishing the required RCW 7.70 elements.

**1. The First Declaration of Dr. Martinez Failed to Generate a Genuine Issue of Material Fact.**

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).

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

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

Also, although Dr. Martinez stated she had reviewed the medical records and the coroner's report, she did not identify, beyond conclusory references, the source of any of the facts regarding Mr. Reyes' medical condition, or 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 (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).

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 conclusory statement that the defendants were negligent, or that the defendants violated the standard of care, was conclusory and

insufficient. Rejecting such a declaration or conclusory statements comports with the focus of CR 56: to determine whether a **genuine** issue of material fact exists.

For the most part, Dr. Martinez' declaration was simply a restatement of the allegations contained in the plaintiff's Complaint with the added conclusion 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.

**2. The Trial Court Properly Denied Plaintiff's Motion for Reconsideration and the Second Martinez Declaration.**

After the trial court granted YHD's Motion for Summary Judgment, Reyes filed a Motion for Reconsideration under CR 59. A CR 59(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, *Schaefer v. The Columbia River Gorge Commission*, 121 Wn.2d 366, 367, 849 P.2d 1225 (1993).

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).

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 (2002).

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); *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); *Adams v. W. Host, Inc.*, 55 Wn. App. 61, 779 P.2d 281 (1989).

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, 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 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.

**B. Arguments Concerning Res Ipsa Loquitur Should Be Rejected.**

The Supreme Court has determined that it will not review questions raised for the first time on appeal. *Ledgering v. State*, 63 Wn.2d 94, 97, 385 P.2d 522 (1963). Plaintiffs' *res ipsa loquitur* contention was not raised in the Complaint. CP 1-16. Plaintiffs did not raise a *res ipsa loquitur* argument at any point before the trial court. YHD respectfully asks that this Court decline to entertain an argument made for the first time on appeal.

*Res Ipsa Loquitur* allows a plaintiff to sustain his or her burden of proof without producing evidence. However, the doctrine is rarely applied only in exceptional cases:

With reference to the application of the doctrine, this court, in common with many others, has held that while the maxim, when properly applied, is of value in the administration of justice, its scope is nevertheless limited, and ordinarily it is to be sparingly applied, in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.

*Morner v. Union Pac. R. Co.*, 31 Wn.2d 282, 293, 196 P.2d 744 (1948),  
citing, *Anderson v. McCarthy Dry Goods Co.*, 49 Wash. 398, 95 P. 325  
(1908).

Perhaps the most complete examination of the doctrine is contained  
in *Pacheco v. Ames*, 149 Wn.2d 431, 69 P.3d 324 (2003):

The doctrine of *res ipsa loquitur* spares the plaintiff the requirement of proving specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant were not negligent. In such cases the jury is permitted to infer negligence. 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.

149 Wn.2d at 436 (internal citations omitted).

The doctrine is plainly inapplicable in this case where: (1) the defendants did not have complete control of Mr. Reyes, (2) there is no evidence that a liver injury cannot occur in the absence of negligence.

Reyes argues that Mr. Reyes did not have tuberculosis at all, because of the contents of an autopsy report. However, Mr. Reyes passed away after he had been given drug therapy to treat the existence of tuberculosis. In addition, Mr. Reyes' diagnosis of tuberculosis was confirmed after testing.  
CP 144, 146, 149, 153.

In sum, Reyes' arguments highlight the inapplicability and inappropriateness of *res ipsa loquitur* in this case. It is only by way of expert testimony that the cause of death, the existence of tuberculosis, and appropriate treatment could be determined. Reyes failed to produce such evidence, which required the trial court to grant summary judgment in favor of the defendants.

**C. Ms. Reyes' Due Process Arguments Fail As a Matter of Law.**

As set forth above, arguments submitted for the first time before this Court should not be entertained. In addition, Reyes' due process arguments fail for the following reasons: (1) they were neither raised nor pled before the trial court, (2) Reyes did not identify the right which was violated or the nature of the due process violation. The nature of the deficiencies are outlined at greater length in *Respondents Christopher Spitters M.D.'s and Yakima Health District's Joint Answer to Petitioner's Motion for Discretionary Review*, pgs. 14-20, which is incorporated by reference.

**D. The Court of Appeals Properly Affirmed Dismissal of the Wrongful Death Claim.**

The trial court dismissed Ms. Reyes' wrongful death claim as it determined the claim was barred by the statute of limitations. In doing so, the trial court relied upon *Fast v. Kennewick Public Hosp. Dist.*, 188 Wn. App. 43, 354 P.3d 858 (Div. 3, 2015). The Court of Appeals decision in *Fast* was reversed after the trial court's decision. *See*, 187 Wn.2d 27, 384

P.3d 232 (2016). The Court of Appeals recognized that the *Fast* decision was reversed, but nevertheless affirmed the dismissal of Ms. Reyes' wrongful death claim in this case because it suffered from the same deficiencies as her medical negligence claim:

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.

*Reyes*, 197 Wn. App. at 6-7.

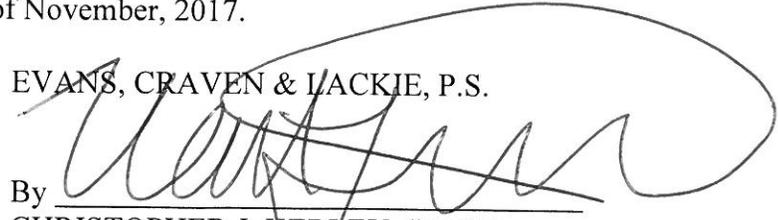
The Court of Appeals' decision concerning Ms. Reyes' wrongful death claim was supported by the record and should be affirmed.

## V. CONCLUSION

For the reasons set forth above, YHD respectfully requests that the trial court and Court of Appeals' decisions be affirmed.

Dated this 2nd day of November, 2017.

EVANS, CRAVEN & LACKIE, P.S.

A large, stylized handwritten signature in black ink, which appears to be "Christopher J. Kerley". The signature is written over a horizontal line and is enclosed within a large, hand-drawn oval.

By  
CHRISTOPHER J. KERLEY, #16489  
MARKUS W. LOUVIER, #39319  
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 3<sup>rd</sup> day of November, 2017, a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT YAKIMA HEALTH DISTRICT was delivered to the following persons in the manner indicated:

<p>J.J. Sandlin          Attorney at Law          PO Box 1707          Prosser, WA 99350  <a href="mailto:Sandlinlaw@lawyer.com">Sandlinlaw@lawyer.com</a>  <a href="mailto:Jimenezconsult.law@gmail.com">Jimenezconsult.law@gmail.com</a></p>	<p>VIA REGULAR MAIL <input checked="" type="checkbox"/>          VIA CERTIFIED MAIL <input type="checkbox"/>          VIA FACSIMILE <input type="checkbox"/>          HAND DELIVERED <input type="checkbox"/>          VIA EMAIL <input checked="" type="checkbox"/></p>
<p>John C. Graffe          Johnson, Graffe, Keay, Moniz &amp;          Wick, LLP          925 Fourth Avenue, Suite 2300          Seattle, WA 98104-1157  <a href="mailto:JohnG@jgkmw.com">JohnG@jgkmw.com</a>  <a href="mailto:Liz@jgkmw.com">Liz@jgkmw.com</a></p>	<p>VIA REGULAR MAIL <input checked="" type="checkbox"/>          VIA CERTIFIED MAIL <input type="checkbox"/>          VIA FACSIMILE <input type="checkbox"/>          HAND DELIVERED <input type="checkbox"/>          VIA EMAIL <input checked="" type="checkbox"/></p>
<p>Mary H. Spillane          Fain Anderson Vanderhoef,          Rosendahl, O'Halloran Spillane          PLLC          701 Fifth Avenue, Suite 4750          Seattle, WA 98104  <a href="mailto:mary@favros.com">mary@favros.com</a></p>	<p>VIA REGULAR MAIL <input checked="" type="checkbox"/>          VIA CERTIFIED MAIL <input type="checkbox"/>          VIA FACSIMILE <input type="checkbox"/>          HAND DELIVERED <input type="checkbox"/>          VIA EMAIL <input checked="" type="checkbox"/></p>

11/3/17 /Spokane, WA  
 (Date/Place)

Donna DeVore  
 Donna DeVore

**EVANS, CRAVEN & LACKIE, P.S.**

**November 03, 2017 - 2:32 PM**

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