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NO. 94679-5

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,

Petitioners,

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  
CHRISTOPHER SPITTERS, M.D.

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Respondent Christopher Spitters, M.D., submits this supplemental brief to further elucidate why the Court of Appeal's decision in *Reyes v. Yakima Health Dist.*, 2017 Wash. App. LEXIS 355 (Wash. Ct. App. Feb. 14, 2017), affirming the trial court's summary judgment dismissal of Mrs. Reyes' claims against him for lack of expert testimony was proper and should be affirmed.

## I. INTRODUCTION

Dr. Spitters did not become involved in the care and treatment of the decedent, Jose Reyes, until July 9, 2010, when Dr. Singh and Nurse Hansen, the Yakima Health District (YHD) health care providers who had been treating Mr. Reyes, made Dr. Spitters aware of Mr. Reyes' case and their receipt of his abnormal hepatic (liver) function panel test results. At that time, Dr. Singh had already directed Nurse Hansen to hold Mr. Reyes' tuberculosis medications and have Mr. Reyes report to the local emergency room for further testing and examination.

Based on the abnormal hepatic function panel, Dr. Spitters continued to hold on Mr. Reyes' tuberculosis medications and directed YHD staff to contact Mr. Reyes to refer him for emergency care and treatment of his potential drug induced liver injury. Dr. Spitters provided care to Mr. Reyes both by phone and by office visits for the rest of July, repeatedly discussing with Mr. Reyes the seriousness of his condition,

referring him to the ER for evaluation and treatment of his drug induced liver injury, and attempting to refer him for a potential liver transplant.

Thus, before Dr. Spitters became involved in Mr. Reyes' care, Mr. Reyes already had been diagnosed and received treatment for tuberculosis, already had sustained his drug induced liver injury, and already had had his tuberculosis medications held. Dr. Spitters did not re-institute Mr. Reyes' tuberculosis treatment, but continued the hold on his tuberculosis medications in light of Mr. Reyes' liver injury and took steps to get Mr. Reyes to treatment for his drug-induced liver injury.

Because the declaration of Dr. Rosa Martinez, CP 108-16, that Mrs. Reyes submitted in response to Dr. Spitters' motion for summary judgment failed to set forth what, if anything, Dr. Spitters did or failed to do that violated the standard of care or proximately caused Mr. Reyes' liver injury and death, the trial court properly granted summary judgment. To the extent one "might be able to guess" from Dr. Martinez's conclusory declaration that she considered the standard of care violated "by failing to quickly diagnose liver disease or by prescribing tuberculosis medications," as the Court of Appeals suggested, 2017 Wash. App. LEXIS 355 at \*13, a conclusory declaration that leaves one to guess is insufficient to defeat summary judgment.

Moreover, to survive summary judgment, an expert's opinion must

be based on fact; it cannot be based on assumptions or simply be a conclusion. Here, nothing in the record factually supports any conclusion that Dr. Spitters failed to quickly diagnose liver disease or that he prescribed, or continued to prescribe, tuberculosis medications for Mr. Reyes.

Even if one were to consider the supplemental declaration of Dr. Martinez, CP 229-31, that Mrs. Reyes submitted with her untimely motion for reconsideration, the record is devoid of factual support for Dr. Martinez's averments that Dr. Spitters "committed medical malpractice by failing to immediately terminate the tuberculosis medication of INH when Mr. Reyes first presented" to him, CP 230, ¶3, or that Dr. Spitters decided "to continue the INH prescription during the fatal weeks in July, 2010," CP 231, ¶3. The medical records upon which Dr. Martinez purportedly relies show that Dr. Singh had already ordered a hold of Mr. Reyes' tuberculosis medications before Dr. Spitters became involved in the care and that, when Dr. Spitters became involved, he ordered that the medications continue to be held.

Where as here, the expert fails to ground her opinions on facts in the record, the expert's testimony is overly speculative, inadmissible, and insufficient to defeat summary judgment.

## II. STATEMENT OF THE CASE

### A. Factual Background.

Dr. Christopher Spitters is an infectious disease physician specializing in part in the prevention and treatment of tuberculosis. CP 29. As part of his practice, he acts as a consultant and contracts with local public health districts, such as Yakima Health District (YHD) where he serves as a Local Health Officer and helps evaluate and treat tuberculosis patients several days per month, CP 29. That is where he became involved in the care of the decedent, Jose Luis Reyes, in July and August 2010.

#### 1. Mr. Reyes' diagnosis and treatment of tuberculosis occurred before Dr. Spitters became involved in his care.

In 2009, Mr. Reyes presented to the Yakima Chest Clinic with intermittent chest pain, and saw pulmonologist Dr. Rizwana Kahn. CP 149. Neither Yakima Chest Clinic nor Dr. Kahn is a party to this lawsuit. A 2009 chest x-ray and a CT scan in late 2009 showed infiltrates in Mr. Reyes' lungs, leading to a presumptive pneumonia diagnosis. CP 149. When Mr. Reyes' symptoms did not subside, Dr. Kahn recommended a bronchoscopy to take sputum samples from Mr. Reyes' lungs. CP 149, 164-167.

Sputum samples from the bronchoscopy done on April 20, 2010, were sent to the microbiology laboratory at Yakima Valley Memorial Hospital (YVMH). CP 144, 153. YVMH is not a party to this lawsuit. A

smear test was positive for tuberculosis, as were cultures of the samples. CP 144, 146. YVMH reported the positive smear test and culture results to the Department of Health (DOH) and to YHD on May 18, 2010. CP 144, 146. Subsequent sputum samples analyzed by DOH's Public Health Laboratory also cultured positive for tuberculosis. CP 155-158, 216.

On May 25, 2010, Mr. Reyes began tuberculosis treatment at YHD where he was prescribed the standard four drug combination of isoniazid, rifampin, ethambutol, and pyrazinamide. CP 164-167. His baseline hepatic (liver) function was essentially normal. CP 164. YHD tried to monitor his liver function via hepatic function blood testing, but Mr. Reyes failed to come in for testing. CP 164-165, 211, 222. Nurse Lela Hansen urged Mr. Reyes to return for testing, and he finally did on July 8, 2010, about six weeks after starting treatment. CP 159, 164-165, 211.

The next day, Dr. Devika Singh at YHD reviewed the results of testing which showed reduced liver function. CP 159, 211. Dr. Singh instructed Nurse Hansen to hold Mr. Reyes' tuberculosis medications immediately and have him report to the local emergency room for STAT repeat testing, physician review of medications and other substances, and clinical examination. CP 159, 211. Nurse Hansen contacted Mr. Reyes, who refused to go to the ER. CP 159, 211.

2. Dr. Spitters' involvement in Mr. Reyes' care began after Mr. Reyes' liver injury had occurred.

Dr. Singh and Nurse Hansen also contacted Dr. Spitters and made him aware of Mr. Reyes' case and test results. CP 159, 211. They reported that Mr. Reyes denied symptoms of drug induced liver injury (DILI). CP 211. Nurse Hansen reported that Mr. Reyes would not go to the ER and may have been continuing to drink alcohol during treatment despite warnings that doing so could increase his DILI risk. CP 159, 211.

Dr. Spitters reviewed Mr. Reyes' medical records and called him, leaving a message in English and Spanish and asking for Mr. Reyes to call back immediately. CP 159, 211. Dr. Spitters instructed Nurse Hansen to continue to hold Mr. Reyes' medication and to send Mr. Reyes to the ER. CP 160, 212. She contacted Mr. Reyes, who promised, but then failed, to come in for blood testing on July 12, 2010. CP 161, 213. She contacted him again on June 13, 2010, at which time he denied any other complaints. CP 161, 213.

Dr. Spitters, with Nurse Hansen participating in the call, finally reached Mr. Reyes by phone on July 15, 2010. CP 161, 213. Mr. Reyes admitted he had been experiencing fatigue and nausea for several weeks and had been drinking alcohol while taking his tuberculosis medications. CP 161, 213. Dr. Spitters told Mr. Reyes that there was no matter more

important than going to the ER, but Mr. Reyes again refused to do so. CP 161, 213. Based on Mr. Reyes' reported symptoms and test results, Dr. Spitters diagnosed a drug-induced liver injury. He instructed Nurse Hansen to continue holding Mr. Reyes' tuberculosis medications and to keep trying to get Mr. Reyes to the ER. CP 161-62, 213-14.

On July 16, 2010, Mr. Reyes presented to the YVMH ER for additional liver function testing, which was somewhat improved. CP 163, 215. He remained at YVMH overnight, was monitored by YVMH hospitalists, and was then discharged home on July 17, 2010. CP 163, 215. When Dr. Spitters called him that evening, Mr. Reyes indicated that he was to return to YVMH for more blood tests the following Friday, and Dr. Spitters instructed him to return to the ER if he had any worsening symptoms over the weekend. CP 163, 215. Dr. Spitters also spoke with Dr. Ong, Mr. Reyes' gastroenterologist, who agreed with Dr. Spitters' diagnosis of a drug induced liver injury and continuing to hold off on tuberculosis treatment for at least a few weeks. CP 163, 215.

Dr. Spitters examined Mr. Reyes in the YHD clinic on July 21, 2010, recommended monitoring of Mr. Reyes' tuberculosis, and continued to defer his tuberculosis medication regimen until Mr. Reyes' drug induced liver injury was stabilized. CP 164-67, 216-19. Dr. Spitters expressed hope for Mr. Reyes' clinical improvement but warned that Mr.

Reyes was still in danger of liver failure and/or requiring a liver transplant. CP 167, 219. Dr. Spitters instructed Mr. Reyes to remain alcohol free, rest, and follow up with Dr. Ong. CP 167, 219. Dr. Spitters also helped Mr. Reyes connect with the Hepatology Department at University of Washington. CP 169, 172-73, 221, 224-225. Mr. Reyes' condition declined, and he passed away from liver failure at UW on August 6, 2010. CP 174, 226.

B. Procedural Background.

Mrs. Reyes sued YHD and Dr. Spitters, alleging medical malpractice, wrongful death and outrage claims. CP 10-13. She also alleged a negligent hiring, training, and supervision claim against YHD, CP 12-13, which was dismissed, CP 354-56, and is not at issue on appeal, *see Reyes*, 2017 Wash. App. LEXIS 355 at \*9.

Dr. Spitters moved for summary judgment on grounds that Mrs. Reyes lacked expert testimony to establish the standard of care, causation, and damages. CP 398-410. In response, Mrs. Reyes' filed a declaration from internal medicine physician Dr. Rosa Martinez. CP 108-13. The trial court considered Dr. Martinez's declaration and determined that Mrs. Reyes' medical negligence claims against Dr. Spitters should be dismissed because Dr. Martinez' declaration did not sufficiently articulate the

specific standard of care applicable to Dr. Spitters, or how the care Dr. Spitters provided caused Mr. Reyes death, stating:

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..."

5/5/15 RP 44; *see also* CP 188-90, 348-50.

Thirteen days later, Mrs. Reyes filed an untimely Motion for Reconsideration, CP 228, and a supplemental declaration of Dr. Martinez, CP 229-31. Dr. Spitters opposed the motion on grounds that it was untimely and that Dr. Martinez's supplemental declaration was insufficient to support the motion. CP 232-41. Dr. Spitters also moved for summary judgment dismissal of Mrs. Reyes' outrage claim. CP 195-205, 232-241. At the hearing on those motions, Mrs. Reyes' counsel conceded that the motion for reconsideration was untimely, stating:

MR. SANDLIN: I think that, as I recall the reconsideration, I think it was one day untimely. It was mailed but it wasn't ...

THE COURT: It wasn't filed till the 18th.

MR. SANDLIN: It wasn't filed ...

THE COURT: Nope.

MR. SANDLIN: ... till later. And under the Civil Rules and our local rules, it's untimely.

THE COURT: It is.

MR. SANDLIN: And so, therefore, that's the end of that issue about reconsideration.

7/15/15 RP 5:8-18. The trial court denied the motion for reconsideration on that basis, CP 332-335, but also recognized that Dr. Martinez's supplemental declaration was still deficient because Dr. Spitters' legal conclusion that Dr. Spitters and YHD violated the standard of care was insufficient to explain what the standard of care of Dr. Spitters was or how he failed to follow it, 7/15/15 RP 38:20-39:16. The trial court also dismissed the outrage claim on grounds that public health institutions and their physicians are permitted by statute to compel patients to undergo tuberculosis treatment for public safety purposes and that Mrs. Reyes' allegations were insufficient to support a claim for outrage. 7/15/15 RP 40:22-41:5; *see also* CP 200-04, 351-52.

Mrs. Reyes appealed and Division III affirmed the trial court's summary judgment rulings, finding that: (1) Dr. Martinez's declaration was insufficient to raise an issue of fact; (2) the alleged conduct upon which the tort of outrage claim was based was not outrageous in light of tuberculosis law; and (3) there could be no claim for wrongful death when Mrs. Reyes had failed to create an issue of fact as to any negligence. *See Reyes*, 2017, Wash. App. LEXIS 355 at \*9-19.

### III. ARGUMENT

Except in limited circumstances, a medical malpractice plaintiff must prove the applicable standard of care and causation through expert medical testimony. *Keck v. Collins*, 184 Wn.2d 358, 361, 357 P.3d 1080 (2015); *Grove v. PeaceHealth, St. Joseph Hosp.*, 182 Wn.2d 136, 144, 341 P.3d 261 (2014). When a medical malpractice plaintiff is confronted with a motion for summary judgment based on lack of such expert testimony, the plaintiff must come forward with an affidavit (or declaration) from a qualified medical expert that sets forth specific facts supporting the experts' opinions as to standard of care and causation. *Harris v. Robert C. Groth, M.D., P.S.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983); CR 56(e). As the Court of Appeals correctly noted, *Reyes*, 2017 Wash. App. LEXIS 355 at \*12, the expert must link his or her opinions to specific facts, as “[a]ffidavits containing conclusory statements without adequate factual support are insufficient to defeat a summary judgment motion.” *See also*, *Keck*, 184 Wn.2d at 373; *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 27, 851 P.2d 689 (1993).

Indeed, as this Court has observed:

When an expert fails to ground his or her opinions on facts in the record, courts have consistently found that the testimony is overly speculative and inadmissible. *See, e.g.*, *Moore v. Hagge*, 158 Wn. App. 137, 241 P.3d 787 (2010); *State v. Johnson*, 150 Wn. App. 663, 208 P.3d 1265 (2009);

*State v. Lewis*, 141 Wn. App. 367, 166 P.3d 786 (2007);  
*Doyle v. Nor-W. Pac. Co.*, 23 Wn. App. 1, 5-6, 594 P.2d  
938 (1979).

*Volk v. DeMeerleer*, 187 Wn.2d 241, 277, 386 P.3d 254 (2016).

The expert's opinion must be based on fact and cannot simply be a conclusion or based on an assumption if it is to survive summary judgment. *Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990). Unreliable testimony is not considered helpful to the trier of fact and should be excluded. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013) (citing *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600, 260 P.3d 857 (2011)). Importantly, speculation and conclusory statements will not preclude summary judgment. *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 169, 273 P.3d 965 (2012)(citing *Greenhalgh v. Dep't of Corr.*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011)).

*Volk*, 187 Wn.2d at 277.

A. Dr. Martinez's First Declaration Was Insufficient to Defeat Summary Judgment on the Medical Negligence and Wrongful Death Claims against Dr. Spitters.

The declaration of Dr. Martinez, CP 108-16, that Mrs. Reyes submitted in response to Dr. Spitters' summary judgment motion was insufficient to defeat summary judgment. The declaration contained an almost verbatim regurgitation of Mrs. Reyes' complaint, *compare* CP 108-13 with CP 7-9, and failed to articulate the standard of care that applied to Dr. Spitters, or how he violated the standard of care or proximately caused Mr. Reyes' injury or death. An expert declaration that contains factually unsupported conclusions and does "little more than reiterate the claims

made in [the] complaint” is insufficient to defeat summary judgment. *See Guile*, 70 Wn. App. at 26-27.

Although Dr. Martinez stated that her opinions were based on her review of the medical records, she did not accurately refer or cite to the medical records to support her opinions. For example, she asserted, CP 110, ¶4(f), that “Mr. Reyes did not have tuberculosis” and “was never found to be suffering from tuberculosis,” notwithstanding the multiple chest x-rays, CT scans, positive sputum smear test and positive sputum cultures that led those involved in Mr. Reyes’ care before Dr. Spitters became involved, including Dr. Kahn, the YVMH microbiology lab, and DOH’s Public Health Laboratory, all to conclude that Mr. Reyes had tuberculosis. CP 144, 146, 149, 156-58.

Ignoring that Dr. Spitters was not the physician who diagnosed Mr. Reyes as having tuberculosis or who prescribed tuberculosis medications for him, but only became involved in Mr. Reyes’ care after his abnormal hepatic function panel indicated DILI and his tuberculosis medications had been held, Dr. Martinez proffered her factually unsubstantiated conclusion, CP 110, ¶4(d), that:

The failure of ... 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, stated with reasonable medical certainty.

Then, without articulating what more she believed Dr. Spitters should have done at the time he became involved in Mr. Reyes' care, Dr. Martinez offered her conclusory opinion that "Jose Reyes expired due to the failures of Dr. Spitters ... to observe the standard of care for ... physicians acting in the same or similar circumstances in the State of Washington." CP 113, ¶5. Not only did Dr. Martinez fail to articulate the specific standard of care applicable to infectious disease specialists like Dr. Spitters, but she also failed to explain how the care Dr. Spitters provided in Mr. Reyes' case – which did not begin until after Mr. Reyes already had developed DILI, and which included instructing Nurse Hansen to continue to hold his tuberculosis medication, urging Mr. Reyes to obtain more testing and treatment of his DILI, coordinating with other providers regarding that treatment, and referring Mr. Reyes to the University of Washington – fell below the standard of care. Nothing in Dr. Martinez's declaration articulated how Dr. Spitters' care purportedly violated the standard of care.

Even if one "might be able to guess" from Dr. Martinez's conclusory declaration that she considered the standard of care violated "by failing to quickly diagnose liver disease or by prescribing tuberculosis medications," as the Court of Appeals suggested, 2017 Wash. App. LEXIS 355 at \*13, a conclusory declaration that leaves one to guess is insufficient

to defeat summary judgment. To survive summary judgment, an expert's opinion must be based on fact; it cannot be based on assumptions or simply be a conclusion. *E.g.*, *Volk*, 187 Wn.2d at 277 (citations omitted).

Dr. Martinez's declaration also failed to articulate how Dr. Spitters' care proximately caused Mr. Reyes' DILI or death.<sup>1</sup> Although Dr. Martinez offered the conclusory opinion that Dr. Spitters' care was a direct and proximate cause of Mr. Reyes' liver failure and death, CP 110, ¶4(d), she did not explain how Dr. Spitters could possibly have caused or contributed to Mr. Reyes' injury given the undisputed facts in the medical records that, by the time Dr. Spitters began treating Mr. Reyes, Mr. Reyes had (1) already been diagnosed with tuberculosis by Dr. Kahn; (2) already been prescribed the four drug treatment for his tuberculosis at YHD; (3) already sustained his liver injury, which was discovered via the results of the July 8, 2010 blood test; and (4) already had his medications held by YHD staff. By the time Dr. Spitters became involved in Mr. Reyes' case, Mr. Reyes' liver injury indisputably had already occurred.

As the Court of Appeals correctly noted, *Reyes*, 2017 Wash. App. LEXIS 355 at \*12, "[a]ffidavits containing conclusory statements without adequate factual support are insufficient to defeat a summary judgment

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<sup>1</sup> Although the Court of Appeals' decision did not address the sufficiency of the declaration on the issue of causation, the issue was raised in the courts below and the trial court found the declaration insufficient on the issues of both standard of care and causation.

motion.” “When an expert fails to ground his or her opinions on facts in the record, courts have consistently found that the testimony is overly speculative and inadmissible.” *Volk*, 187 Wn.2d at 277 (citations omitted).

B. Dr. Martinez’s Supplemental Declaration, if Considered Despite the Untimeliness of Mrs. Reyes’ Motion for Reconsideration, Was Also Insufficient to Defeat Summary Judgment.

In support of a motion for reconsideration that her counsel conceded was untimely and told the trial court that its untimeliness was “the end of that issue about reconsideration” 7/15/15 RP 5:8-18, Mrs. Reyes submitted a supplemental declaration of Dr. Martinez, CP 229-31. Even if that declaration were to be considered despite its untimeliness, Dr. Martinez’s supplemental declaration fares no better than her first. Indeed, it only serves to confirm the degree to which her conclusory opinions concerning Dr. Spitters’ care are not grounded in the facts in the record.

In her supplemental declaration, Dr. Martinez repeated her assertion that “there never was a definitive diagnosis of tuberculosis,” again ignoring the tuberculosis positive cultures in the medical records, CP 144, 146, 149, 156-58. Moreover, in her supplemental declaration, Dr. Martinez averred that Dr. Spitters “committed medical malpractice by failing to immediately terminate the tuberculosis medication of INH when Mr. Reyes first presented” to him, CP 230, ¶3, and that Dr. Spitters decided “to continue the INH prescription during the fatal weeks in July,

2010,” CP 231, ¶3. Yet, the medical records upon which Dr. Martinez purports to rely are devoid of factual support for such averments. The medical records show that Dr. Singh had already ordered a hold of Mr. Reyes’ tuberculosis medications before Dr. Spitters became involved in the care and that, when Dr. Spitters became involved, he ordered that the medications continue to be held. *See, e.g.*, CP 159-63, 211-15.

Whether one considers Dr. Martinez’s first declaration or her supplemental declaration, she never set forth anything that Dr. Spitters should have done, but failed to do, once he became involved in Mr. Reyes’ care in July 2010. Basically all she says in her supplemental declaration was that Dr. Spitters should not have continued Mr. Reyes’ INH medication, which the medical records make clear is something Dr. Spitters did not do. The records show that, by the time Dr. Spitters was apprised of Mr. Reyes’ case in July 2010, the tuberculosis medications had already been held, and Dr. Spitters ordered that they continue to be held.

Where as here, the expert fails to ground her opinions on facts in the record, the expert’s testimony is overly speculative, inadmissible, and insufficient to defeat summary judgment. *E.g., Volk*, 187 Wn.2d at 277.

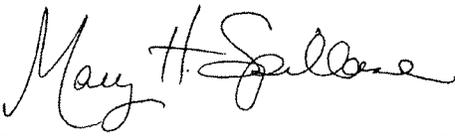
#### IV. CONCLUSION

For all these reasons, and those set forth in the Brief of Respondent Christopher Spitters, M.D., and Respondents Christopher Spitters, M.D.’s

and Yakima Health District's Joint Answer to Petitioner's Motion for Discretionary Review, the trial court's grant of summary judgment on Mrs. Reyes' claims against Dr. Spitters should be affirmed.

RESPECTFULLY SUBMITTED this 3rd day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 3rd day of November, 2017, I caused a true and correct copy of the foregoing document, "Supplemental Brief of Respondent Christopher Spitters M.D.," to be delivered in the manner indicated below to the following counsel of record:

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