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71123-7

NO. 71123-7-I

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**COURT OF APPEALS FOR DIVISION I  
STATE OF WASHINGTON**

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JOHN DOE, a single man; and JANE DOE, a single woman,

Appellants,

v.

PHILIP J. ZYLSTRA, M.D. and BARBARA ZYLSTRA, husband  
and wife, and the marital community composed thereof; MARK  
SPENCER, M.D. and CYNTHIA SPENCER, husband and wife and the  
marital community composed thereof; VERNON HALL, M.D., a single  
man; ANN DOE; TANYA DOE; SHERRI DOE; CORRIN DOE; KIM  
DOE; and SHAYNI DOE,

Respondents,

and

GLEN ISHAM,

Defendant.

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STATE OF WASHINGTON  
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**RESPONDENTS' BRIEF**

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**ORIGINAL**

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## I. INTRODUCTION

Appellants—then a married couple—were patients at Cascade Family Medical Group (“the Clinic”),<sup>1</sup> where respondents were employed as physicians or support staff. After Jane Doe<sup>2</sup> began a consensual affair with defendant Glen Isham—also employed at the Clinic as a medical assistant—John left her and filed for divorce. Jane later married Glen Isham. When that marriage went bad, but while she was still married to Mr. Isham, Jane, joined by John, sued respondents and Isham for damages, claiming that respondents are liable for failure to prevent the affair and the resulting alleged damages.

Appellants appeal from an order granting respondents’ summary judgment motion, asserting that the superior court overlooked disputed issues of material fact and that they established a claim for medical negligence. Their brief does not identify a single issue of disputed material fact, nor does it explain why the superior court erred in rejecting their medical negligence claim. Instead, their argument consists of

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<sup>1</sup> The Cascade Family Medical Group was subsequently acquired by Skagit Valley Medical Center. The name of the clinic changed to Skagit Regional Clinics – Arlington/Smokey Point, and it is currently known as Cascade Skagit Health Alliance.

<sup>2</sup> Plaintiffs filed their action using “Doe” to protect themselves against embarrassment, but never obtained court-approval to do so. *Pelland v. State*, 919 A.2d 373 (R.I. 2007); and *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 71 Fed. R. Serv. 3d 467 (2d Cir. 2008) *cited with approval* by Karl B. Tegland & Douglas J. Ende, WASHINGTON HANDBOOK ON CIVIL PROCEDURE § 30.2 (2013-2014 ed. 2013) .

nothing more than boilerplate recitals of legal principles, with no attempt to apply those principles to the facts set forth in the record.<sup>3</sup> For this reason alone, the Court is entitled to disregard appellants' arguments entirely.<sup>4</sup> When the evidence in the record is considered in light of the applicable law, however, it is apparent that the superior court did not err. As explained below, under each of appellants' theories, respondents had no actionable duty to prevent the affair, and evidence of causation was lacking.

## II. COUNTERSTATEMENT OF ISSUES

1. Did the appellants owe an actionable duty to the Does?
2. Did the Does produce admissible evidence sufficient to permit a reasonable trier of fact to find that respondents had breached any duty owed?
3. Did the Does produce admissible evidence sufficient to permit a reasonable trier of fact to find that any breach of duty by respondents was a proximate cause of their alleged injuries and damages?

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<sup>3</sup> Appellants' Brf. at 20-23.

<sup>4</sup> RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992) (appellate court will not consider arguments not supported by authority or citations to the record).

4. Are the Does' claims actionable under Ch. 7.70 RCW and, if so, did appellants produce sufficient admissible expert testimony to avoid summary judgment on such a claim?

5. Is John Doe's claim otherwise barred because it is effectively a claim for alienation of affection?

### III. STATEMENT OF THE CASE

#### A. **Factual Background**

This case arises out of a consensual relationship between two mature adults, Jane Doe and Glen Isham, which apparently began as an extra-marital affair in February 2009 and culminated in their marriage in September 2010.<sup>5</sup> CP 441-461, CP 463. Jane Doe and her ex-husband, John Doe, seek damages because, at the time the affair started, Isham was employed by the Clinic as a certified health care assistant. CP 441-461; CP 588-89; CP 12 at ¶ 3. By engaging in the affair, Isham violated a Department of Health rule.<sup>6</sup>

Respondent Phillip Zylstra is a physician affiliated with the Clinic, and was Isham's primary supervisor. CP 240 at pp. 14:25 - 15:2. Dr. Zylstra also provided care to Jane Doe. CP 448 at ¶ 3.20. Respondent

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<sup>5</sup> As discussed further *infra*, the amended complaint omits the critical fact that Ms. Doe and Mr. Isham were married as of the time of filing, and remained so until Mr. Isham filed for divorce in early 2013. CP 567; 579-83.

<sup>6</sup> WAC 246-16-100(1).

Mark Spencer also is a physician affiliated with the Clinic, who periodically provided care to John Doe. CP 476-77. Respondent Vernon Hall is another physician affiliated with the Clinic, who provided care to John Doe and, occasionally, to Jane Doe. CP 448 at ¶ 3.20.

Respondent Anne Herbert is a physician's assistant who worked at the Clinic and provided care to Jane Doe in 2009. CP 481. Respondent Shayni Burnett is a medical assistant who started working at the Clinic in 2009; she assisted Jane Doe during visits in October 2009 and January 2010. CP 484. Respondent Sherri Jacobsen is a registered nurse who worked at the Clinic.

Respondent Corrin Chatterton was the office manager of the Clinic; she is not a medical care provider. CP 489; CP 588. Respondent Tonya Wilkins was a referral coordinator and an as-needed float medical assistant at the Clinic, but she did not provide medical care to Mr. or Ms. Doe. CP 484-87; CP 496-500. Respondent Kimberley Pederson was the Clinic's receptionist. CP 489-90.

Following completion of a training program at Everett Community College, Glen Isham began working at the Clinic as a health care assistant. CP 588. Prior to hire, he was interviewed, and the clinic checked his references. CP 588-89 at ¶ 3. All of Mr. Isham's references, which

included some of his instructors at his medical assistant program, were positive. *Id.*

At the time, state law and rules provided that for a facility employing a health care assistant to certify to the Department of Health (“DOH”) that the person met the minimum requirements for the position. RCW 18.135.050. Mr. Isham’s certification application was submitted in July 2007. CP 503-19. The certificate application plainly states that the DOH conducts criminal background checks on all applicants. CP 509. On his application, Mr. Isham denied ever being convicted or entering a plea of guilty in connection with any crimes, or of being found in any civil proceeding of committing an act of moral turpitude, dishonesty, or corruption. *Id.* The DOH materials further reflect that Mr. Isham’s criminal background was checked, and no criminal history was found. CP 503-04.

After the DOH completed its assessment of Mr. Isham’s qualifications, it approved his application and issued a health care assistant certification to him on or about August 20, 2007. CP 503. Without this certification and the clean criminal history check required to obtain it, the Clinic would have terminated Mr. Isham. CP 588-89.

The Does nevertheless allege that the Clinic should not have hired Mr. Isham because the court files concerning domestic relations cases in

which he was involved contain allegations of moral turpitude, dishonesty or corruption. CP 689-90. They neglect to mention, however, that there was never a judicial finding as to the truth of these allegations, nor is there evidence that respondents were aware of this information.

Mr. Isham primarily worked as Dr. Zylstra's medical assistant. CP 468 at p. 11:11-14; CP 243 p. 26:10-13. On occasion, as part of his job duties, Mr. Isham would escort Jane Doe into an examination room, take her vital signs, and document her medical complaints. CP 448-49 at ¶ 3.22. Ms. Doe never reported any allegedly inappropriate behavior by Mr. Isham during these interactions. CP 449 at ¶ 3.24. In this lawsuit, however, the Does allege that in February 2009 Mr. Isham asked Ms. Doe out for a date. CP 450 at ¶ 3.29. Ms. Doe agreed, and met Mr. Isham and his friend at a bar. Within days thereafter, Ms. Doe and Mr. Isham began a sexual relationship. CP 450 at ¶ 3.30, 3.31.

Ms. Doe's husband, John Doe, learned of the affair within weeks after it started, and quickly moved out of their home. CP 451 at ¶ 3.34. In November 2009, John Doe filed for dissolution, although he had executed the pleadings months before. CP 523-26. In the dissolution petition, Mr. Doe indicated that he separated from his wife on or about March 16, 2009. CP 524 at § 1.6.

During a June 2009 visit with Dr. Hall, John Doe reported to Dr. Hall that he was divorcing his wife due to her infidelity. CP 528. Mr. Doe also told Dr. Hall that his wife was seeing Mr. Isham. CP 531 at p. 4:10-11. Dr. Hall asked Mr. Doe if there was anything he could do to help with the situation, and Mr. Doe did not respond. CP 531 at p. 4:12-19. At some point thereafter and without learning whether the allegation was true, Dr. Hall advised Dr. Spencer of his conversation with Mr. Doe. CP 531 at p. 4:22-25; CP 532 at p. 19:20-23.

Mr. Isham left employment with the Clinic voluntarily on or about September 4, 2009, to take a health care assistant position with another practice. CP 521. Ms. Doe joined in Mr. Doe's dissolution petition on September 14, 2009, and their divorce was finalized on or about February 18, 2010. CP 526; CP 535-40. Ms. Doe married Glen Isham in Lakeview, Oregon, on or about September 12, 2010. CP 463.

Ms. Doe alleges that Dr. Zylstra learned of the affair in May, 2009. This allegation is based on her hearsay claim that Mr. Isham told her that Dr. Zylstra knew about their affair in 2009. CP 554-55 at ¶ 41-42. She claims that, sometime in 2010, but after Isham had left the Clinic, Dr. Zylstra asked her about her relationship with him. CP 560 at ¶ 59. Dr. Zylstra, on the other hand, testified that he did not learn that Mr. Isham and Ms. Doe were having a relationship until Mr. Isham accompanied her

to an office visit in 2010, long after Mr. Isham resigned from his position at the Clinic. CP 466-67 at p. 3:21 – 4:1-5. Regardless who is correct, Dr. Zylstra did not learn about the affair until months after it began and Mr. Doe had already moved out of the family home intending to divorce Jane.

Jane Doe signed an affidavit regarding her allegations against Mr. Isham and the Clinic staff on April 5, 2011. CP 542-64.<sup>7</sup> Notably, although Ms. Doe goes into graphic detail regarding her allegations against Mr. Isham and the Clinic, she entirely omitted mention of the fact she was married to Mr. Isham, both at the time that she signed this document and at the time her lawsuit was filed. *Id.*; and CP 463; CP 567. Mr. Isham filed for divorce from Ms. Doe in January 2013. CP 567. In the divorce materials, Mr. Isham asserted that he and Ms. Doe separated on November 4, 2012. CP 569-79. Ms. Doe received a copy of the Oregon Petition and Summons via certified mail; on the certified mail return receipt card signed in April 2013, she used the last name of “Isham.” CP 582-83.

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<sup>7</sup> Although the beginning of this affidavit includes language reflecting that it is only to be read by persons evaluating various claims Ms. Doe is making against the Clinic and its employees, Mr. Doe’s counsel filed this document with the trial court. CP 278; CP 280-303.

**B. Procedure**

The Does filed a complaint, which they later amended, alleging claims for negligent hiring, negligent supervision, gross deviations from the standard of care by their health care providers, failure to intervene and stop sexual misconduct, conversion, negligent violation of privacy, negligent infliction of emotional distress, gender discrimination, and outrage. CP 674-94. After completion of discovery, respondents moved for summary judgment, arguing that plaintiffs could not establish the essential elements of any of their claims or an issue of material fact to preclude entry of summary judgment on any claim. CP 596-617.

The superior court heard argument and issued an oral decision granting the motion, in which it found that many of the Does' claims were baseless. CP 39. As to the potentially viable claims, the court reasoned that there could be no causal link between the respondents' actions and the breakup of the Does' marriage where the respondents did not learn about Jane Doe's affair with Isham until months after it began and Mr. Doe had already left Jane. CP 44-45. Appellants moved for reconsideration, which was denied, and timely appealed. CP 61-67; CP 50-55; CP 18-30; CP 5-6; CP 2-4.

#### IV. STANDARD OF REVIEW

Appellate courts review trial court decisions on motions for summary judgment de novo. *Smith v. Sacred Heart Medical Center*, 144 Wn. App. 537, 184 P.3d 646 (2008). On appeal, the reviewing court conducts the same inquiry as the trial court. *Id.* A motion for summary judgment shall be granted when the record, taken as a whole, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears the initial burden of demonstrating either the non-existence of any genuine issue of material fact, or, the failure of proof of an essential element of plaintiff's claim. *Young v. Key Pharmaceutical*, 112 Wn.2d 216, 770 P.2d 182 (1989). To defeat the motion, the non-moving party must submit evidence sufficient to establish an essential element of their case for which they bear the burden of proof at trial. *Id.*

The Does appeal from an order granting respondents' summary judgment motion, but fail to meet their burden on appeal. Contrary to the requirements of the applicable rules, they fail to identify how the trial court erred in granting the respondents' motion for summary judgment, fail to identify a single issue of material fact, and do not analyze the applicable law to the facts of this case. RAP 10.3(a)(6). The deficiencies

of their brief underscore the factual and legal insufficiencies of their claims.

## V. ARGUMENT

### A. **Summary of Argument**

The Does seek to hold the respondents liable for the demise of their marriage under a myriad of legal theories, none of which are viable under Washington law. Although standards of professional conduct barred Isham from engaging in a sexual relationship with Ms. Doe, those standards do not impose a duty for other licensed professionals to prevent or report their affair. Except in very limited situations not present here, no one owes a duty to prevent another from engaging in a sexual relationship with a third party. The fact that the Does had a physician/patient relationships with some of the respondents does not alter this rule. Even if Ms. Doe's affair with Isham was a valid basis for a medical negligence claim (the respondents assert that it is not), they do not have the necessary evidence to establish the elements of their claim.

The fact that Isham worked with the respondents does not create a basis for recovery either. The sexual acts of an agent or employee are outside the scope of their agency or employment, precluding claims for vicarious liability against a principal or employer. Claims for negligent hiring or supervision cannot lie against the respondents because they did

not employ Isham. The Does also assert claims for privacy violations, negligent infliction of emotional distress, and conversion, but as with their other claims, cannot and have not established the essential elements of those claims.<sup>8</sup>

**B. Respondents had no duty to prevent two competent and consenting adults from engaging in an extra-marital affair**

In general, a person has no legal duty to protect a third party from harming another. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997). There are only two recognized exceptions to this general rule: (1) when a special relationship exists between the defendant and the third party that imposes a duty on the defendant to control the third party's conduct, and (2) when a special relationship exists between the defendant and the plaintiff that gives the plaintiff a right to protection. *Id.*

The Supreme Court found a special relationship in *Niece*. There, a profoundly disabled woman living in a private home brought an action for damages when she was sexually assaulted by a staff member. *Id.* at 41. The Court held that the special relationship between a group home and its vulnerable residents created a duty of care to protect them from all foreseeable harms. *Id.* at 51. Because the group home was entrusted with the well-being of the plaintiff, who was completely vulnerable, the group

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<sup>8</sup> The Does did not oppose entry of summary judgment on their outrage and gender discrimination claims.

home owed her a duty of complete protection, limited only by the foreseeability of the danger. *Id.* at 46.

Conversely, in cases involving non-vulnerable plaintiffs – for example, those like Ms. Doe, who are not impaired, and who voluntarily engage in sexual relations with an employee – courts are reluctant to hold that the employer had a duty to intervene. *See, e.g., Kaltreider v. Lake Chelan Community Hosp.*, 153 Wn. App. 762, 224 P.3d 762 (2009) Elizabeth Kaltreider voluntarily admitted herself to Lake Chelan Community Hospital for inpatient treatment of alcohol dependency. *Kaltreider*, 153 Wn. App. at 763. During her stay, she voluntarily engaged in sexual acts with a hospital-employed nurse. *Id.* Kaltreider later sued the hospital alleging that it owed her a duty to protect her, a hospital resident, from the sexual advances of a hospital employee. *Id.* at 764. The trial court dismissed Kaltreider’s claims against the hospital and was affirmed on appeal. *Id.* at 764-65. The appellate court found that because Kaltreider was not a vulnerable adult, the hospital did not owe her a duty to protect her from the sexual advances of its nurse. *Id.* at 811. Similarly, in *Smith v. Sacred Heart Medical Center*, the court of appeals affirmed the trial court’s dismissal of claims against Sacred Heart Medical Center, finding that the hospital did not owe a duty to protect its non-

vulnerable psychiatric patients from the unforeseeable sexual misconduct of its nurse. 144 Wn. App. 537, 184 P.3d 646 (2008).

*Smith* is particularly instructive, as it involves claims pursued by plaintiffs who, like Ms. Doe, had no physical or mental disability, and involved sexual conduct that occurred off hospital property. *Id.* at 546-47. The court found that there was no special duty owed, that plaintiffs made no showing regarding what the hospital could or should have done to eliminate the contact, and that the conduct at issue was not foreseeable. *Id.* at 545-46.

There is no dispute that Jane Doe was a competent, non-vulnerable adult under the standards applied in *Smith*. She also does not dispute that her relationship (and ultimate marriage to Mr. Isham) was wholly consensual. Additionally, as referenced in the amended complaint, their initial intimate contact and all of their sexual contact occurred off clinic property. CP 450 at ¶ 3.30, 3.31. There is simply no legal basis for alleging that respondents had a duty to either Jane Doe or John Doe to prevent Ms. Doe and Mr. Isham's relationship.<sup>9</sup>

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<sup>9</sup> The Does also are silent on how exactly these defendants could have prevented two consensual adults from engaging in a relationship.

**C. Respondents are not vicariously liable for Jane Doe's and Glen Isham's intentional actions**

It is undisputed that Glen Isham was employed by the Clinic. CP 676 at ¶ 1.12. For some unknown reason, the Does did not sue the Clinic. Instead, they sued respondents, who were employees of the Clinic. Their failure to name Isham's employer added an insurmountable hurdle to an already near-impossible claim.

Washington courts have consistently refused to hold employers vicariously liable for sexual acts of agents or employees because such acts are not within the scope of their agency or employment. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 59 P.3d 611 (2002); *Thompson v. Everett Clinic*, 71 Wn. App. 548, 860 P.2d 1054 (1993) (clinic not vicariously liable for physician's sexual assault of patient, as there was "no reason the assaultive act can be considered to have been done in furtherance of the Clinic's business, or cloaked with some apparent authority"). If an agent commits an assault to effectuate a purpose of his own, the principal is not liable. *Thompson*, 71 Wn. App. at 551. Further, if an agent's intentional torts or criminal acts are not in furtherance of the principal's business, the principal is not liable, as a matter of law, even if the agency situation provided the opportunity and means for the agent's wrongful actions. *Snyder v. Medical Service Corp. of Eastern WA.*, 145 Wn.2d 233, 35 P.3d 1158 (2001). Mr. Isham's actions in pursuing and engaging in a romantic

and sexual relationship with Ms. Doe were for his own gratification and benefit, not the Clinic's, and, therefore, outside the course and scope of his employment as a matter of law.

Appellants not only were unable to show why their claims should not be dismissed on this basis, but also unable to point to a single case where these principles were applied to hold a person who was not the employer of the wrongdoer liable.

**D. Appellant's negligent hiring and supervision claims fail**

**1. Negligent hiring and supervision claims lie against employers, not employees.**

Negligent hiring and supervision claims allow liability to attach to an employer for an employee's intentional acts committed outside the scope of employment. *Niece*, 131 Wn.2d at 48; *LaPlant v. Snohomish County*, 162 Wn. App. 476, 271 P.3d 254 (2011). Under these theories, the employer is liable if the employer knew, or in the exercise of reasonable care should have known, that the employee presented a risk of harm to others. *Niece*, 131 Wn.2d at 48. Regardless of whether such claims can be established against the Clinic—and they cannot—the Does have not sued the Clinic, they sued the Clinic's employees. No Washington authority permits a person to bring a negligent hiring or negligent supervision claim against individuals who were not the employers of the intentional tortfeasor.

Analogous protections exist under the Worker's Compensation statutes. Pursuant to RCW chapter 51.04, employees are barred from suing their employer for injuries they sustain on the job.<sup>10</sup> RCW 51.04.010. The injured worker's remedy is industrial insurance. Although the statute is silent as to whether the injured worker can sue his co-workers, Washington courts have repeatedly dismissed claims filed by an injured worker against their co-workers for an on-the-job injury. *Wilson v. Boots*, 57 Wn. App. 734, 790 P.2d 192 (1990); *Brown v. Labor Ready Northwest, Inc.*, 113 Wn. App. 643, 54 P.3d 166 (2002). Washington law does not permit claims to be brought against persons in their roles as employees. Such claims should not be permitted here.

**2. The Does did not meet their burden to establish claims for negligent hiring or supervision.**

Even assuming that respondents could be held individually liable for negligent hiring or supervision, the Does did not produce evidence sufficient to go forward on that claim. Specifically, while they allege that if the Clinic conducted a search of court records beforehand, Mr. Isham would not have been hired, they provided no authority for the imposition of such a duty on employers. The record shows that Isham met the requirements for certification as a health care assistant, the Clinic

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<sup>10</sup> A very limited exception applies to this rule, but that exception has no bearing here. *Birklid v. Boeing*, 127 Wn.2d 853, 904 P.2d 278 (1995).

interviewed him and checked his references, and the DOH reported a negative criminal history check on Mr. Isham. CP 503-19; CP 588-89. No authority supports the proposition that, particularly absent any red flags, an employer is required to take the additional steps appellants say were required, including searches of civil court documents, which is what it would have taken to find allegedly disqualifying material regarding Mr. Isham. CP 592-93.<sup>11</sup>

In this regard, it also is important to note that the information appellants say should have disqualified Isham from employment does not suggest that he was inclined to engage in a consensual sexual relationship with a patient. Nor is there any evidence that Mr. Isham engaged in similar acts with other Clinics.

Regarding the negligent supervision claim, the scanty information Mr. Doe mentioned to Dr. Hall in June 2009 regarding his wife's relationship with Mr. Isham is an insufficient basis for such a claim. Mr. Doe stated that he and his wife were seeking a divorce. He did not request that Dr. Hall intervene in the situation. Additionally, there is no causal connection between the alleged failure to properly supervise following the June 2009 disclosure and the alleged harm. The Does had separated in

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<sup>11</sup> The trial court was not persuaded by plaintiffs' allegations and found that the Clinic took reasonable steps when it evaluated Mr. Isham prior to hire. CP 43.

March 2009, and John intended to obtain a divorce. CP 528. There is no evidence that any action taken by respondents following the June 2009 disclosure by John Doe would have prevented the alleged injuries and damage to the Does. *See Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 147 P.3d 600 (2006) (in legal malpractice action, summary judgment affirmed because cause-in-fact not established). In this regard, it is important to say that speculation and conjecture about what might have happened in the event of an after-the-fact report is not sufficient to establish causation. *Id.*

The Does attempt to avoid this conclusion by making the blanket assertion that the Clinic staff was aware of Jane Doe's and Glen Isham's relationship.<sup>12</sup> This assertion, unsupported by citation to record, fails to establish a negligent supervision claim. As described above, Jane and John Doe separated as of mid-March 2009, approximately one month after Ms. Doe began her sexual relationship with Mr. Isham. There is no evidence that any respondent was aware of this relationship prior to the Does' separation. Additionally, there is no evidence that Ms. Doe reported to anyone at the Clinic that Mr. Isham was engaged in inappropriate or unwanted conduct toward her. To the contrary, Ms.

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<sup>12</sup> Appellants' Brf. at 8.

Doe's decision to separate from her husband, move in with Mr. Isham, divorce her husband, and then to marry Mr. Isham reflects that she was a willing participant in their relationship.

**E. Failure to report Mr. Isham's relationship with Ms. Doe to the Department of Health does not afford appellants a basis for relief**

The Does claimed that Dr. Hall, Dr. Zylstra, and Dr. Spencer are liable to them because they failed to report Mr. Isham's sexual relationship with Ms. Doe to the DOH. CP 692 at ¶ 4.11. Their theory was that WAC 246-16-235 required the physician-respondents to report Jane's affair with Isham, that failure to report the affair breached a duty owed to them, and that the failure to report was a proximate cause of cognizable harm. This theory is incorrect on all counts.

First, the rule in question requires a license-holder to report another license-holder to the DOH "when he or she has actual knowledge of: (a) any conviction, determination, or finding that another license-holder has committed an act that constitutes unprofessional conduct." WAC 246-16-235(1)(a). A "conviction" is defined as a court determination that a person was guilty of a gross misdemeanor or felony. WAC 246-16-210(2). "Determination" or "finding" is defined as a "final decision by an entity required or requested to report" under the WAC. WAC 246-16-210(3). There was never a conviction, determination, or

finding, regarding Mr. Isham that required a report to the DOH. The duty of the licensed defendants to report Mr. Isham to the DOH was never triggered.

Second, the Does cite no authority for the proposition that this rule created a duty owed to them, and that they can recover damages if the duty is breached. RCW 5.40.050 states that, except in circumstances not present here, breach of a duty imposed by an administrative rule shall not be considered negligence *per se*. Under this statute, an administrative rule does not establish an actionable duty, and a rule violation alone is insufficient to establish a breach. *Pinckney v. Smith*, 484 F. Supp. 2d 1177 (W.D. Wash. 2007). At most, a rule violation is evidence of a breach; it does not establish the existence of an actionable duty. *Estate of Bruce Templeton ex rel. Templeton v. Daffern*, 98 Wn. App. 677, 990 P.2d 968, 972 (2000).

Third, it is undisputed that the affair between Jane Doe and Mr. Isham began months before the earliest notice to the physicians. CP 533; CP 554-55; CP 528; CP 531. By that time, the two were living together, and John Doe had moved out of the Doe family home with the intent of dissolving his marriage. CP 556; CP 524 at § 1.6; CP 528. Mr. Doe executed his dissolution petition on July 13, 2009, which Ms. Doe joined in September. CP 523-26. Accordingly, even if the DOH rule read

differently, and even it established an actionable duty to the Does, a causal connection between the alleged breach and the alleged harm cannot be established because the “harm,” if there was any, had already occurred. For this reason as well, summary judgment was appropriate.

**F. The Does’ medical negligence claims fail for additional reasons**

The Does argued in the lower court that RCW chapter 7.70 did not apply to their claims against the licensed providers, Dr. Hall, Dr. Zylstra, and Dr. Spencer, because their claims did not involve “damages for injury occurring as a result of health care, as RCW 7.70.010 requires. CP 230. The Does have abandoned that position on appeal. They now allege that the trial court erred when it granted the Cascade Defendants’ motion because the licensed providers failed to prove that their actions conformed to the standard of care. *See* App. Brief p. 5 issue 3. In framing the issue in this way, the Does improperly shift the burden of proof to the licensed providers. Washington law is quite clear that plaintiffs bear the burden to prove a violation of the standard of care under RCW chapter 7.70. As is set forth below, the Does cannot satisfy their burden of proof. Any claims arising out of RCW chapter 7.70 *et seq* must be dismissed.

- 1. Any claims for medical negligence against defendants Corrin Chatterton and Kimberlee Pederson must be dismissed as they are not medical care providers.**

Corrin Chatterton and Kimberlee Pederson are not medical care providers. They did not provide medical care to plaintiffs. They cannot be liable for medical negligence. As a matter of law, this claim must be dismissed as to them.

- 2. There is no evidence that the Does' damages were caused by the licensed providers' failure to follow the standard of care.**

Whenever an injury occurs as a result of health care, the action for damages for that injury is governed exclusively by RCW 7.70 *et seq.* *Branom v. State*, 94 Wn. App. 964, 974 P.2d 335 (1999), review denied, 138 Wn.2d 1023, 989 P.2d 1136 (1999). The legislature's declaration of policy, RCW 7.70.010, sweeps broadly and requires plaintiffs to proceed under RCW chapter 7.70 if seeking damages for "injuries resulting from healthcare," regardless of whether the cause of action is based in "tort, contract, or otherwise."

Jane and John Doe now admit that they are asserting a claim for medical negligence. To prevail in this purported "medical malpractice" lawsuit, plaintiffs have the burden of establishing one or more of the following propositions:

- (1) That injury resulted from the failure of a health care provider to follow the accepted standard of care;
- (2) That a health care provider promised the patient or his representative that the injury suffered would not occur;
- (3) That injury resulted from health care to which the patient or his representative did not consent.

RCW 7.70.030. Such violations, if proven, must proximately cause the injuries claimed. RCW 7.70.040.

The Does failed to establish any of these propositions. Instead, they merely asserted that their claims, unlike most claims against health care providers, are grounded in “the willful betrayal of the fiduciary and ethical duties owed by a health care provider to a patient,” but offer no authority to suggest that such actions or omissions can constitute medical malpractice under RCW chapter 7.70. Argumentative assertions cannot defeat a motion for summary judgment.

The Does claims also fail due to a lack of any competent expert medical testimony to establish that the licensed respondents violated the standard of care and that such violations caused the demise of their marriage. An expert medical opinion is required to “establish the standard of care and most aspects of causation in medical negligence cases.” *Young*, 112 Wn.2d at 227 quoting *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). Courts must disregard opinions offered by experts

that do not have the requisite education, training, and knowledge of the medical issues in dispute. *Young*, 112 Wn.2d at 227. The Does submitted no credible expert testimony regarding the standard of care applicable to the respondent physicians or nurses. Instead, they rely upon declarations from a pharmacy law professor and a medical assistant program instructor. CP 380-97; CP 399-420. Neither expert has the necessary education, training, or experience that permits them to comment on the care or treatment provided by a physician or nurse. The trial court was correct when it disregarded plaintiffs' experts' opinions. CP 40-45.

**G. Washington law does not recognize a cause of action for alienation of affection**

John Doe's claims amount to nothing more than "alienation of affection," *i.e.*, a tort brought by a deserted spouse against a third party alleged to be responsible for the failure of that marriage. Regardless of how these allegations are pleaded, John Doe is not entitled to recover against respondents for the breakup of his marriage because the Washington Supreme Court abolished alienation of affection claims in 1980. *Wyman v. Wallace*, 94 Wn.2d 99, 615 P.2d 452 (1980).

Subsequent cases hold that any claim involving alleged interference with a marital relationship based on sexual relationships between a third party and a plaintiff's spouse is also abolished, regardless of how the action is denominated by the plaintiff. *Lund v. Caple*, 100

Wn.2d 739, 675 P.2d 226 (1984) (denying recovery based upon theories of outrage and negligent impairment of consortium against third party who had an illicit affair with the plaintiff's wife.) As the court in *Wyman* concluded:

The Court of Appeals was furthermore correct in concluding that actions for alienation of a spouse's affections should be abolished by this state. The Court of Appeals explained that the action should be eliminated for the following reasons: (1) The underlying assumption of preserving marital harmony is erroneous; (2) The judicial process is not sufficiently capable of policing the often vicious out-of-court settlements; (3) The opportunity for blackmail is great since the mere bringing of an action could ruin a defendant's reputation; (4) There are no helpful standards for assessing damages; and (5) The successful plaintiff succeeds in compelling what appears to be a forced sale of the spouse's affections. **We agree that these considerations are valid and call for the abolition of the action for alienation of a spouse's affections.**

94 Wn.2d at 105 (emphasis added).

Respondents breached no legally recognized duty to John Doe. *Lund*, 100 Wn.2d at 747. As pleaded, all of his claims are meritless because the only damage he sustained is non-compensable.

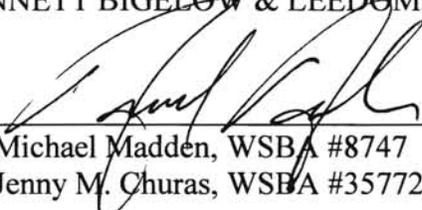
## VI. CONCLUSION

For the reasons stated, the Court should affirm the superior court.

Respectfully submitted this 5<sup>th</sup> day of May, 2014.

BENNETT BIGELOW & LEEDOM, P.S.

By:

  
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Attorneys for Respondents

**CERTIFICATE OF SERVICE**

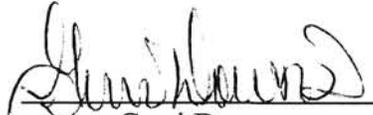
The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of RESPONDENTS ZYLSTRA, SPENCER, HALL, AND ANN, TANYA, SHERRI, CORRIN, KIM, AND SHAYNI DOES' BRIEF to be mailed, via postage prepaid First Class Mail, to Appellant at the following address of record:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington this 9<sup>th</sup> day of May, 2014.

  
Gerri Downs