No. 94679-5

SUPREME COURT OF THE STATE OF WASHINGTON

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

ON APPEAL FROM YAKIMA COUNTY SUPERIOR COURT

BRIEF OF *AMICI CURIAE* WASHINGTON STATE MEDICAL ASSOCIATION, WASHINGTON CHAPTER—AMERICAN COLLEGE OF EMERGENCY PHYSICIANS, AND THE AMERICAN MEDICAL ASSOCIATION

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici Curiae ("Medical Amici") are the Washington State Medical Association, the Washington Chapter—American College of Emergency Physicians, and the American Medical Association, on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. Medical Amici are non-profit organizations that represent Washington and national medical, osteopathic, and emergency physicians, as described in the motion to file this brief. They regularly participate as *amici curiae* in cases involving core issues of medical practice and their legal responsibility to insure the Court understands the full health care context of the case and the potential consequences of how the Court's ultimate decision is written. Medical Amici do not appear as advocates for a party.[1]

Petitioners present a conclusory declaration and, belatedly, a non-record death certificate as allegedly sufficient proof of a medical negligence claim for what is, in essence, a claim of alleged misdiagnosis for tuberculosis by the Respondents after receipt of positive TB test results. Medical Amici want the Court to clearly hold and reaffirm its recent unanimous decisions that, in an alleged misdiagnosis case, a conclusory expert statement cannot eliminate

[1] *See, e.g., Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015) (requiring a *Burnet* analysis to exclude untimely summary judgment affidavits, which analysis was raised and suggested by *amicus curiae* Washington State Medical Association even though its adoption would mean in that case that the summary judgment in favor of that physician would have to be reversed).

the settled requirement of proving, with specific facts, the applicable standard of care and breach, especially in the context of public health districts when combatting communicable diseases. Should the death certificate be addressed, Medical Amici ask the Court to affirm that this settled law obtains even if the conclusory opinion is coupled with a death certificate. Otherwise, the result sought by Petitioners would change settled Washington malpractice law by unnecessarily eliminating proof in such cases based on specific facts of the standard of care and its breach.

Allowing conclusory expert opinions would conflict with the rejection of such opinions in *Keck v. Collins,* 184 Wn.2d 358, 371, 357 P.3d 1080 (2015). It is also settled that an alleged misdiagnosis or incorrect course of treatment alone does not constitute medical malpractice. *Fergen v. Sestero,* 182 Wn. 2d 794, 346 P.3d 708 (2015) and *Paetsch v. Spokane Dermatology Clinic*, 182 Wn. 2d 842, 346 P.3d 389 (2015). This rule strikes the proper balance between defining the duty of care of medical providers and ensuring that plaintiffs have a remedy where the provider has violated the applicable standard of care. There is no need to change these rules.

It is also the collective experience of Medical Amici, and the policy of the State, that the authority for county public health officials to control and prevent the spread of tuberculosis is a critical and necessary responsibility. In Washington, counties and local governments have specific duties under the law to prevent and

control tuberculosis. The result requested by the Petitioners here would have a chilling effect on public health departments' public mission to combat tuberculosis. Medical Amici are concerned about the potential public health ramifications of such a ruling.

Finally, Medical Amici are concerned with Petitioners' late effort to use a death certificate far beyond its intended purpose. If it is addressed, Amici ask the Court to recognize the inherent limitations of those documents and that that they cannot substitute for the proper proof of an alleged medical malpractice claim.

II. ISSUES OF CONCERN TO MEDICAL AMICI

The Court's posted issue statement is phrased in terms of whether "the plaintiff raised a material question of fact as to the relevant standard of care where the plaintiff's expert testified that the medication prescribed by treating physicians was contraindicated but did not specify what treatment the standard of care required."[2] Given the briefing, Medical Amici will address the following issues:

> Should the settled proof requirements for medical negligence cases continue to require that plaintiffs prove with specific facts both the applicable standard of care for making a diagnosis and choosing treatment, and breach of that standard of care, or may settled law be ignored to let a case proceed based on a conclusory expert statement that a course of treatment was "contraindicated" without stating the standard of care or how it was breached?

[2] http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/casesNotSetAndCurrentTerm.pdf (visited 12/23/17).

If the death certificate is addressed, do the limited purposes of a death certificate preclude it from nullifying a plaintiff's normal statutory obligation in a medical malpractice case of proving the applicable standard of care and breach of that standard?

III. STATEMENT OF FACTS

Medical Amici accept the facts as stated by Division III and by the Respondents. They emphasize the undisputed facts that Mr. Reyes tested positive for tuberculosis both at Respondent Yakima Health District's clinic and by the Washington State Department of Health Public Health Laboratory, and that Respondents' expert nowhere acknowledges or addresses those facts.[3] Medical Amici also emphasize the undisputed facts that Health District personnel requested and directed Mr. Reyes to report to the Health District Clinic for additional examinations which he failed to do for over five weeks, and that he failed to abstain from alcoholic beverages as advised by Health District personnel following the initial positive testing for tuberculosis. *See* YHD-SB at 3-4.

IV. LEGAL DISCUSSION

A. Tuberculosis and Washington's Public Health Laws.

Tuberculosis, formerly known as "consumption," "is an infectious disease usually caused by the bacterium Mycobacterium tuberculosis" which usually affects the lungs, but also can affect

[3] *E.g.*, Slip Op., p. 2; Respondent Yakima Health District Supplemental Brief ("YHD-SB") at 3, 12; CP 144-146 (positive TB test results).

other parts of the body.[4] While most TB infections are latent, about 10 per cent progress to active disease "which, if left untreated, kills about half of those infected."[5] TB is spread through the air by those with active TB in their lungs who "cough, spit, speak, or sneeze," and active infections occur "most often in people with HIV/AIDS and in those who smoke."[6] It is estimated that one third of the world's population is infected with TB, and in 2016 there were over 10 million active cases and about 1.3 million deaths, making TB the number one cause of death from an infectious disease.[7] According to a 2007 pathology text, 5-10% of people in the United States population tests positive by the tuberculin test.[8]

According to the Center for Disease Control ("CDC"), TB can be treated by taking several drugs for 6 to 9 months.[9] It is very important that people who have TB disease are treated, finish the medicine, and take the drugs exactly as prescribed. *Id.* If they stop taking the drugs too soon, they can become sick again; if they do not

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[4] https://en.wikipedia.org/wiki/Tuberculosis#History , citing the World Health Organization Fact Sheet from 2012 (last visited 12/23/17).

[5] *Id.*

[6] *Id.*, also citing the Center for Disease Control's 2012 "Basic TB Facts".

[7] *Id.*, citing the WHO Fact Sheet and the WHO "Global Tuberculosis Report" for the recent figures, as retrieved from WHO on November 9, 2017.

[8] *Id.*, citing Kumar V, Abbas AK, Fausto N, Mitchell RN, ROBBINS BASIC PATHOLOGY, pp. 516–522 (8th ed., 2007).

[9] "TB Treatment," https://www.cdc.gov/tb/topic/treatment/tbdisease.htm (last visited 12/27/2017). Of the several drugs approved by the U.S. Food and Drug Administration (FDA), the first-line anti-TB agents that form the core of treatment regimens are: isoniazid (INH), rifampin (RIF), ethambutol (EMB), and pyrazinamide (PZA). *Id.*

take the drugs correctly, the TB bacteria that are still alive may become resistant to those drugs. *Id.*

Washington has a comprehensive program to prevent, detect, and treat TB coordinated by the Department of Health in collaboration with local health departments.[10] *See* Slip Op., p. 14 (stating details of Washington's program); YHD-SB at 13-14 (same). Medical Amici believe there is no public policy reason why the malpractice standard for injuries due to health care for public health departments and county health organizations to perform these functions should be any less than for other health care providers; they should be the same. Increased legal exposure will only hinder the public health effort to control and prevent tuberculosis.

B. Medical Malpractice Claims Are Predicated on Proof by Specific Facts of Both the Applicable Standard of Care and Breach of That Standard.

1. Petitioners' argument ignores the long-standing rule that the plaintiff has to establish a breach of the applicable standard of care in medical negligence actions and that an alleged misdiagnosis does not, in itself, give rise to liability.

This Court reaffirmed in 2015 that "Washington has a substantial interest in ensuring the quality of its physicians, maintaining a quality of care for its patients, and protecting health care providers from frivolous claims." *Paetsch v. Spokane*

[10] *See* DOH list of comprehensive laws and guidelines that apply in the state: https://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/Tuberculosis/LawsGuidelines (visited 12/23/17).

Dermatology, *supra*, 182 Wn.2d at 849–50. To balance those aims, Washington courts recognize an evolving common law doctrine of the duties owed by physicians, and the legislature has crafted a robust statutory scheme that carefully controls the practice of medicine by physicians, physician's assistants, and other health care providers, and defines liability for medical malpractice. *Id*. Central to this balance is the physician's exercise of his or her medical judgment under the applicable standard of care.

Thus, under RCW 7.70.030(1), the elements of a medical negligence claim are duty, breach, causation, and harm. Of these, "the most critical element of most medical malpractice claims based on negligence ... is the standard of care owed by the doctor to his or her patient." *Fergen v. Sestero*, 182 Wn.2d 794, 798, 346 P.3d 708, 710 (2015) (citing *Watson v. Hockett*, 107 Wn.2d 158, 162, 727 P.2d 669 (1986)). *Accord*, *Paetsch v. Spokane Dermatology*, 182 Wn.2d at 852 (affirming 9-0 an exercise of judgment instruction where the physician has a "choice among competing therapeutic techniques or among medical diagnoses"); *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 232, 393 P.3d 776 (2017) ("[t]o establish causation, the plaintiff must show that the alleged breach of the standard of care "was a proximate cause of the injury complained of.").

The standard of care and its breach must be established by an expert declaration that first identifies the standard of care, *and then states the specific facts* – not a mere conclusion – that show breach

of that standard: "To sustain a verdict, [the plaintiff] needs an expert to say what a reasonable doctor would or would not have done, that the doctors failed to act in that manner, and that this failure caused her injuries." *Keck v. Collins*, 184 Wn.2d at 371. *Keck* specifically rejected the proposal, similar to the effort here, to "allow a qualified expert to only state that 'the defendant breached the standard of care and caused the plaintiff's injuries,' without providing more, to defeat summary judgment. *We reject Keck's invitation to adopt a less stringent summary judgment standard for experts.*" *Id.*, 184 Wn.2d at 372, n. 10 (emphasis added). This part of *Keck v. Collins* was unanimous. Judge Fearing's decision follows these principles. *See* Slip Op. at 9-10.[11] There is no reason to change the law.

Fergen v. Sestero reaffirmed the "exercise of judgment" jury instruction in appropriate medical malpractice cases and, in doing so, reiterated the well-settled rule that "[m]isdiagnosis and the inexactness of medicine is not the basis for liability absent a deviation from the proper standard of care." *Id*. at 809, consistent with the Court's prior decisions.[12]

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[11] "Dr. Martinez failed to identify the discrete conduct of Dr. Spitters or the health district that violated the standard of care. She also failed to declare the applicable standard . . . . A conclusory affidavit does not defeat a summary judgment motion." Slip Op. at 10.

[12] *See, e.g., Watson v. Hockett*, 107 Wn.2d 158, 162, 727 P.2d 669 (1986) ("these doctrines provide useful watchwords to remind judge and jury that medicine is an inexact science where the desired results cannot be guaranteed, and where professional judgment may reasonably differ as to what constitutes proper treatment."); *Miller v. Kennedy*, 91 Wn.2d 155, 160, 588 P.2d 734 (1978) (unanimously holding that "the exercise of professional judgment is an inherent part of the care and skill involved in the practice of medicine.").

These settled principles all stand for the proposition that a plaintiff does not demonstrate medical negligence by simply pointing to a "bad result." Yet that is what Petitioners ask the Court to do in this case, contrary to the well-established law, and without offering any logical or policy reason why such a drastic change has to be made. In fact, there is no reason to make such a change.

Under the Petitioners' approach, the ultimate question—was the diagnosis of tuberculosis and the initiation of treatment for that disease on receipt of positive TB test results a breach of the applicable standard of care—is eliminated from the analysis. This is especially concerning where undisputed evidence in the record speaks directly to that question and needed to be addressed by the Petitioners' expert – but was not. As noted *supra*, lab results and imaging reports indicated positive tuberculosis cultures from Mr. Reyes' septum sample, and additional samples that were analyzed by the Washington State Department of Health's Public Health Laboratory also tested positive for the infectious disease. In addition, although the Yakima Health District sought to monitor Mr. Reyes' liver function, as noted *supra,* the undisputed facts are that he failed to show for testing. These facts are critical in analyzing the standard of care and purported breach thereof, which is "the most critical element" of Petitioners' medical malpractice claim. *Fergen v. Sestero*, 182 Wn.2d at 798.

Ultimately, "a doctor does not guarantee a good medical result. A poor medical result is not, in itself, evidence of any wrongdoing by the doctor." *Watson v. Hockett*,107 Wn.2d 158, 163-64, 727 P.2d 669 (1986).[13] Accepting Petitioners' position would mean that defendant physicians would no longer be held accountable for *fault-based* liability as established by the Legislature in Ch. 7.70 RCW, but would be faced with liability for "the mere fact that an injury was therapy produced or that there was an unfavorable or 'bad' result from the therapy. *Watson*, 107 Wn.2d at 162. But as explained, the well-established, current state of the law is premised upon an application and analysis of the proper standard of care. This is deeply rooted in the structure of Ch. 7.70 RCW itself and the nature of medical malpractice claims. There is no reason to deviate from well-established precedent, and Petitioners have not set forth any compelling reason to do so. *See Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (to abandon established precedent, there must be "a clear showing that an established rule is incorrect and harmful.").

[13] *Accord, Paetsch; Vasquez v. Markin*, 46 Wn. App. 480, 487, 731 P.2d 510 (1986) (affirming use of a jury instruction which stated, in part, "the fact in a particular case that complications result is not in itself any evidence that the treatment was improper or that the physician failed to exercise the professional knowledge and skill necessary to proper professional practice, nor is it any evidence that the doctor failed to exercise his skill with reasonable care.").

C. The Cause of Death Stated on a Death Certificate Does Not Relieve Plaintiffs of the Burden of Establishing a Breach of the Applicable Standard of Care to Prove Medical Malpractice. Allowing That Would Avoid the Settled Rules Governing Medical Negligence Actions.

1. Petitioners' proposed use of the death certificate would undercut settled law on medical negligence cases.

Dr. Rosa Martinez, Petitioners' expert, submitted deficient declarations, as noted *supra*.[14] Petitioners seek to cure those defects with the Reyes death certificate which was not part of the trial court or appellate record, but was only appended to their reconsideration motion to Division III and now in papers in this Court. Medical Amici address the certificate in case the Court considers it to demonstrate that it does not and cannot cure the defective conclusory declarations, and that any use of death certificates in this or future medical negligence cases is necessarily limited due to their nature.

Petitioners rely on the death certificate to assert Mr. Reyes did not have TB at all, so that the allegedly unnecessary treatment for TB caused his liver failure. Their position would create a strict liability standard in cases where the ultimate cause of death specified on a death certificate does not match what the physician diagnosed or treated the patient for. This would be contrary to the legislature's

[14] Medical Amici reviewed the declarations and believe they are deficient for the reasons stated by Judge Fearing. Of greater moment is the proffer of the Reyes death certificate on reconsideration at the Court of Appeals and to this Court, though not part of the record. Whatever may be the propriety of considering the certificate, it cannot cure defective conclusory expert testimony.

statutory scheme controlling the practice of medicine by health care providers and their liability, and to our courts' consistent application of duties owed by physicians that is premised on the applicable standard of care. It would allow disregard of the facts that each unique medical malpractice claim presents.

Given the deficient expert testimony, Petitioners essentially must argue that the cause of death indicated on Mr. Reyes' death certificate is sufficient to impose medical negligence liability. Since the expert declarations do not specify a standard of care, Petitioners also must argue that the certificate establishes the appropriate standard of care and a breach of that standard to meet the legal requirement. But the limited information in the death certificate (the nominal cause of Mr. Reyes' death), states death was from acute liver failure while in treatment for TB. It does not state Mr. Reyes did not have TB, nor the applicable standard of care, nor its breach.

Petitioners' effort to, in essence, allow the Reyes death certificate to establish medical negligence directly conflicts with the medical malpractice law just discussed. It would drastically remove a plaintiff's burden of proof, opening the door for what amounts to strict liability for a bad result: that merely because the physician chose a wrong or a less efficacious diagnosis, or chose less efficacious treatment, she still is necessarily negligent, without any regard for the standard of care. This is not the law. Nor are death certificates intended or suited for establishing strict liability and

creating an end run around the settled law of medical negligence, which is predicated on proving a violation of the applicable standard of care.

2. Vital records, including death certificates, can only establish *prima facie* evidence of the facts stated therein, but not a definitive determination of the ultimate cause or causes of death.

The law about death records and other vital records is spare. But it is clear that simply knowing the listed cause of death, such as was stated on Mr. Reyes' certificate, has limited if any application in the medical negligence context. Knowing the nominal or actual cause of death, alone, does not establish that a medical provider's conduct constituted malpractice given the longstanding Washington rule that alleged misdiagnosis – the essence of Petitioners' claim – does not in itself give rise to liability for medical negligence.

Vital records, such as a death or birth certificate, can be used to establish certain facts in a legal proceeding. *See* RCW 70.58.104(1) and ER 803(a)(9).[15] Based on analogous rules, the Court of Appeals affirmed a finding of paternity supported by a delayed registration of a birth certificate. *In re Estate of Cook*, 40 Wn. App. 326, 327, 698 P.2d 1076 (1985) (certificate is prima facie

[15] For example, RCW 70.58.104(1) states that reproductions of, amongst other things, records of death, when certified by the state registrar, "shall be considered for all purposes the same as the original and shall be *prima facie* evidence of the facts stated herein." In addition, ER 803(a)(9), "Records of Vital Statistics", establishes a hearsay exception for "records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law."

evidence of the facts stated under RCW 70.58.130 and admissible as a vital record under ER 803(a)(9)).

The limited value of such vital records is illustrated by *Cook* in which the sole question related to the ultimate status listed on the certificate, there paternity status. Here the question of malpractice does not turn solely on the ultimate status listed on the certificate – Mr. Reyes's unfortunate death – nor on the stated *prima facie* information on the cause of death found on the certificate. As discussed *supra*, it turns on whether there was a violation of the applicable standard of care. The certificate does not address that.

3. A death certificate only specifies a cause of death for state-mandated statistical purposes but does not definitively address, nor purport to address, what actions or inactions of either Mr. Reyes, or his healthcare providers, caused Mr. Reyes' death.

Under RCW 70.58.160, each death of a person in the state must be attested to by a death certificate as part of the State's accounting for all persons within its borders. The Washington State Department of Health Center for Health Statistics adopted guidelines in 2016 for all medical certifiers to follow when completing death certificates.[16] In February of 2017, the Medical Quality Assurance Commission rescinded its old guideline, and urged all physicians and physician assistants to follow the guideline issued by the Health

[16] *See* Guideline CHS D-10 "Completion of Death Certificates," at https://www.doh.wa.gov/ForPublicHealthandHealthcareProviders/HealthcareProfessionsandFacilities/DataReportingandRetrieval/ReportCauseofDeath.

Department. Although these now more detailed guidelines were adopted long after Mr. Reyes' death in 2010, Medical Amici believe it is still instructive for the Court to be aware that even death certificates completed under these more detailed guidelines cannot substitute for proof of the applicable standard of care and its breach in medical negligence cases.

When completed properly under these guidelines, a death certificate should specify the primary medical diagnoses contributing to the death. Physicians are instructed not to list mechanisms of death, be they from the deceased (such as cardiopulmonary arrest or respiratory arrest) or from the actions or inactions of others, on a death certificate. So in this case, assuming a cause of death of acute liver failure associated with isoniazid therapy for tuberculosis, Mr. Reyes' death certificate does not go sufficiently behind the medical conditions related to the death to address what actions or inactions of either Mr. Reyes, or his healthcare providers caused Mr. Reyes to have an adverse reaction to medications used to treat his underlying tuberculosis.[17]

The formal determination on the certificate thus is not the complete or definitive word. Consider a person in hospital with

[17] For instance, the certificate does not address any failure by Mr. Reyes to report for follow-up exams so his full condition could be assessed and the most efficacious treatment determined – a failure that plays a role in determining contributory fault or ultimate liability. *See Dunnington v. Virginia Mason Medical Center*, 187 Wn.2d 629, 638-639 & fn. 3, 389 P.3d 498 (2017) (describing patients' obligation to follow physicians' orders to determine proper treatment and that the patient can be liable for his or her own negligence).

multiple organ failures and underlying cancer pathology. The cause of death may well be listed as a heart attack when an underlying, potentially preventable cause of death was proper treatment for a respiratory infection which, left untreated, so taxed the patient that a heart attack ensued. A properly completed death certificate in this example would show the heart attack as the immediate cause of death and concurrent diagnoses of respiratory infection and cancer.

Or consider a cardiac patient in recovery from a critical surgery or severe heart attack who is kept in hospital for a longer period than should be necessary due to improper surgical care, and who, due to the extended stay but not the underlying surgical or medical care, develops pneumonia or MRSA and dies; and who then has one of those causes (pneumonia or MRSA) listed on the death certificate as immediate and contributory causes of death. Does that listing on the certificate overcome the underlying facts of lack of treatment below the applicable standard of care which caused the exposure to the certified cause of death?

The death certificate serves an important function for the State in documenting the number and dates of deaths, collecting this data for state-wide statistical purposes.[18] For those statistical purposes it collects what caused the death: Accident, suicide, murder? Medical issue or bodily failure, *i.e.*, Alzheimer's, cancer

[18] https://www.doh.wa.gov/ForPublicHealthandHealthcareProviders/HealthcareProfessionsandFacilities/DataReportingandRetrieval/ReportCauseofDeath.

(what kind and where, *i.e.*, lung, breast, etc.), childbirth, lung failure or emphysema (black lung disease), pneumonia, heart failure, or "natural causes"? As "*prima facie*" evidence, it is not conclusive, just a starting point. It is not intended to, and does not, establish a breach of the standard of care in a medical malpractice suit, in part because it does not adequately portray the totality of circumstances leading to the medical diagnoses and treatment that caused or contributed to death.

4. Petitioners' proposed use of the death certificate would relieve plaintiffs of their burden of producing adequate expert testimony to support a *prima facie* medical negligence claim.

Petitioners' efforts to rely on a death certificate to establish negligence in the face of the inadequate expert affidavits evades the settled rule that expert testimony is necessary to establish the standard of care in a medical malpractice action. *Harris v. Groth.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). Absent a limited exception, which does not exist, a plaintiff must prove the relevant standard of care through expert testimony. *Id.*; *Grove v. PeaceHealth St. Joseph Hospital*, 182 Wn.2d 136, 144, 341 P.3d 26 (2014).

For example, when medical facts are "observable by [a layperson's] senses and describable without medical training," a plaintiff can establish the standard of care for a health care provider without expert testimony. *Harris v. Groth*, 99 Wn.2d at 449. Here, no such exception exists. Where an issue is not within the common

understanding or experience of a layperson, the plaintiff must present expert medical testimony.[19]

Though Dr. Martinez stated that Dr. Spitters and the Yakima Health District committed medical negligence by breaching the standard of care, Dr. Martinez never identified the applicable standard. Neither did she identify what particular conduct of either defendant violated that undefined standard of care. As Judge Fearing held, "a conclusory affidavit does not defeat a summary judgment motion." Slip Op. at 10 (citing *Van Leven v. Kretzler*, 56 Wn. App. 349, 356, 783 P.2d 611 (1989) and *Guile v. Ballard Comm. Hosp.*, 70 Wn. App. 18, 26, 851 P.2d 689 (1993)).

Petitioners seek to restore their case by raising a new argument, essentially that the Reyes death certificate substitutes for competent expert testimony on standard of care and breach. Petitioners thus propose a new scheme which would dramatically lower a medical malpractice plaintiff's burden of proof and subject health care providers to liability not based on a breach of the applicable standard of care. But the Reyes death certificate's cause of death cannot be the basis for liability in a medical malpractice case. It cannot fill in a missing analysis in the expert's affidavit. The

[19] *E.g.*, *Miller v. Jacoby*, 145 Wn.2d 65, 72–73, 33 P.3d 68 (2001) ("In the case before us, the proper use, purpose, and insertion of a Penrose drain are not within the common understanding or experience of a layperson. Therefore, Miller must present expert medical testimony to show that Ireton acted negligently. Such testimony must be presented to establish the standard of care under the circumstances").

expert must identify and define the specific standard of care and state with specific facts how that standard was breached.

V. CONCLUSION

This Court should hold that an expert's conclusory statement that a course of treatment is "contraindicated" is insufficient to establish a medical malpractice claim in an alleged misdiagnosis case. The expert must state what the applicable standard of care is and must also state the specific facts that show how that standard was breached. If reached, the Court should affirm that a death certificate is insufficient to support a medical malpractice claim and does not cure deficient, conclusory expert testimony.

The current state of the law provides ample basis for relief for those plaintiffs who can show, by specific facts, that they were injured by a violation of the applicable standard of care. There is no need or basis to change the law or the Court's recent unanimous decisions affirming those settled proof requirements.

Respectfully submitted this 29th day of December, 2017.

CARNEY BADLEY SPELLMAN, P.S.

By _____

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. I electronically filed a true and accurate copy of the *Brief of Amici Curiae Washington State Medical Association, Washington Academy of Family Physicians, Washington Chapter—American College of Emergency Physicians, and The American Medical Association* with the Washington Supreme Court and that I caused to be served a true and correct copy of the foregoing document on the below-listed attorneys of record by the methods noted below:

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DATED this 29th day of December 2017.

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