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No. 97541-8

SUPREME COURT
OF THE STATE OF WASHINGTON

JOEL KELLY, individually and by and through
JACQUELINE KELLY, JAKE KELLY, and
JESSICA KELLY, JOSHUA KELLY, for themselves and
as the children of Joel Kelly,

Respondents,

v.

COUNTY OF SNOHOMISH, by and through NORTH SOUND
REGIONAL SUPPORT NETWORK d/b/a NORTH SOUND
MENTAL ADMINISTRATION, a Washington municipal
Corporation and regional support network,

Petitioners.

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

As a delaying tactic,[1] Snohomish County has filed this petition for review of Division I's unpublished opinion that faithfully applied this Court's well-developed precedents. To justify its petition, the County *repeats* blatant misstatements of the record rejected by the jury, the trial court, and Division I to justify its contention that the jury mistakenly found it grossly negligent in causing Joel Kelly's injuries.

After a nearly three-week trial, on proper instructions, the jury correctly found that the County was grossly negligent when its mental health professional ("CDMHP") failed to even evaluate Joel Kelly for a possible involuntary hold at a secure evaluation and treatment ("E&T") unit despite *repeated* requests from the staff at a voluntary rehabilitation unit at Providence Medical Center ("Providence") in Everett for such an evaluation because of his combative conduct arising out of his mental

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[1] That this petition is but a delaying tactic is evidenced by the fact that the County has employed every delaying device at its command – a blizzard of issues raised in unsuccessful post-trial motions, a baseless appeal, a motion for reconsideration quickly rejected by Division I as to its unpublished opinion, and now this petition repeating yet again its distortions of the trial court record.

What is telling, however, is that when the County filed its motion for reconsideration, it did not file a motion to publish the Division I opinion, a step that would have made Division I's decision precedential. GR 14.1(a). The County fully appreciated the fact that Division I's opinion applied settled law. It did not plow new ground. The County could not meet the criteria in RAP 12.3(b) for publication, criteria requiring it to show that the opinion addressed a new principle of law, modified or clarified an existing principle, or was of general public interest or importance. Its failure to move for publication on such criteria belie its present arguments to justify review under RAP 13.4(b).

disorder. Providence staff told intake staff at the Volunteers of America ("VOA") and the CDMHP that Kelly was delusional, believing he was in Mexico, he was a danger to himself or others, and he could not be controlled. When the CDMHP refused to even assess Kelly for treatment at a secure E&T facility under the Involuntary Treatment Act, RCW 71.05 ("ITA"), Kelly was not detained, left Providence's voluntary rehabilitation unit on his own, entered a construction site while in his delusional state, and fell, causing him to suffer massive injuries.

Division I properly applied the law of gross negligence and amendment of pleadings in a sound opinion. This Court should deny review. RAP 13.4(b).

B. RESPONSE TO COUNTY'S FACTUAL MISSTATEMENTS

The County insists on repeating misstatements of the record that respondents Kelly ("Kelly") previously highlighted in their answer to the County's motion for reconsideration below. The County here doubles down on those misstatements, and actually claims that Kelly does not dispute that Joel Kelly was medically ready for discharge at Providence. *E.g.*, pet. at 7. That assertion is plainly *false*, as the County well knows.[2]

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[2] The County claims this "concession" is based on the respondent brief at 21 n.12. That footnote states:

> The jury heard expert testimony that it appeared that Dr. Lee was imprecise in describing whether Kelly was ready for discharge, a term-

First, as this is a review from the County's CR 50 motion, such a motion cannot be granted unless "as a matter of law, that there is neither evidence nor reasonable inference therefrom sufficient to sustain the verdict." *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 529, 998 P.2d 856 (2000). A CR 50 motion admits the truth of Kelly's evidence and all inferences that can be reasonably drawn therefrom, and requires the evidence be interpreted most strongly against the County and in the light most favorable to Kelly. *Id*. That burden means that the trial court, and this Court, must assume that Joel Kelly was medically ready to be discharged.

Second, the County obstinately insisted in its motion for reconsideration that Joel Kelly was not medically ready to be discharged from Providence. Motion at 3, 4, 5, 6, 7.[3] It now continues to make that identical claim. Pet. at 5-7. But that assertion is *false*, as is the County's

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> of-art in the profession, and likely told Waldschmidt that Kelly was not cleared because Dr. Lee felt that Kelly met the definition for a 72-hour hold under the ITA. RP 900, 944-45. Other witnesses testified that Kelly was either clear for discharge or ready to discharge but was waiting for a place to go. *See, e.g.*, RP 606, 728-29, 2067. Waldschmidt had a duty to conduct a proper investigation and ask appropriate follow-up questions. RP 944-45. Had she done so, any alleged confusion would have easily been resolved.

It is obviously *not* a concession of anything, but merely an explanation of the argument in the brief at 21 that, in fact, both Dr. Lee and VOA's Garre told CDMHP Waldschmidt that Kelly was medically stable and cleared for discharge by his attending physician, Dr. Catherine Dalton. RP 680, 870-72.

[3] The pleadings pertinent to the County's baseless motion for reconsideration in the Court of Appeals are Exhibits B-D to its petition.

repeated misstatement that respondents "conceded" Joel Kelly was not medically ready to be discharged. Pet. at 6.

The record here clearly documents that the County's assertions are untrue. Dr. Dalton, Joel Kelly's treating physician, testified that he was medically ready for discharge from Providence's rehabilitation unit where he was a voluntary patient; he was scheduled for release on the Monday following the Thanksgiving holiday. CP 4575-76, 4587-89. Dr. Steven Lee, Providence's on-call physician, testified that Kelly was *medically* stable at the time he contacted CDMHP Andrea Waldschmidt for an evaluation of Joel Kelly. RP 680-81. Walter Garre, the VOA staffer who did Kelly's initial intake, reported to Waldschmidt that he was medically ready to discharge. Op. at 2; Ex. 61; RP 871-72.

In any event, the County's focus on whether Joel Kelly was medically ready for discharge is *irrelevant* where the jury heard from a well-qualified expert that he "clearly met the criteria for ITA commitment" under the statute, regardless of any alleged protocol regarding his discharge status. RP 955. The County's own alleged policy on ITA detention containing the putative requirement that a detainee must be medically ready for discharge is not hard and fast; exceptions on a case-by-case basis were contemplated. Ex. 15. Had Waldschmidt evaluated Joel Kelly, as she was asked, and was obligated by statute to do,

this exception would have controlled. *See, e.g.*, RP 960-64 (expert witness testifying that Joel Kelly's alleged discharge status was irrelevant to whether Waldschmidt should have evaluated and put a hold on him, given the circumstances of his case).

But Waldschmidt never evaluated Joel Kelly that day. The County ignores the fact that, despite pleas from Linda Albizu, the Providence nurse caring for him, RP 568-69, Providence charge nurse Megan Stefanich, RP 638-39, 647,[4] and Dr. Lee for an evaluation of Joel Kelly so that he could be treated at a safer, more appropriate secure facility,[5] RP 674-76, Waldschmidt *did nothing*. She wrongfully believed that she had no "jurisdiction" to evaluate patients with organic brain injuries, and she inextricably refused to investigate his condition because she believed HIPAA precluded her from asking follow-up medical questions. RP 676-77, 779, 906-07. The jury heard from an expert – and from Waldschmidt's own supervisor – that no reasonable CDMHP would have acted the way Waldschmidt did that day. RP 888-89, 944-45.

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[4] Waldschmidt did not even remember receiving a call from Stefanich. Op. at 4.

[5] Persons detained under the ITA must be taken to a certified E&T facility that is, by its nature, more secure than a voluntary rehabilitation unit as here. *Detention of D.W. v. Dep't of Soc. & Health Servs.*, 181 Wn.2d 201, 332 P.3d 423 (2014). Providence, or its separate rehabilitation unit, is not an ITA E&T facility as defined in RCW 71.05.020(21). RP 942-43.

Ultimately, the County made the argument to the jury in closing, for example, that Joel Kelly was "not medically ready to discharge." *E.g.*, RP 1844, 1850-01. The jury considered the County's argument and rejected it by rendering its verdict for Kelly.

Just as the County misrepresents whether there was evidence that Joel Kelly was medically ready for discharge when its CDMHP refused to evaluate him under the ITA, the County repeatedly contends that its motion to amend to assert a claim against the operators of the construction site was denied as a "sanction" susceptible to the protocol of *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). Motion at 7-10; Pet. at 3, 16-20. That assertion, too, is *false*.

The procedural history of the trial court's decision to deny the County's belated motion to amend its answer is recounted in detail in Kelly's brief at 39-42. The experienced trial judge here did not sanction the County. Rather, he denied a motion to amend the pleadings that the County failed to raise until *13 months into litigation*, on the eve of trial. After the trial was continued – through no fault of Kelly – the trial court refused to reward the County for its poor behavior and upheld its prior decision that the County waived the right to amend its pleadings to add a

non-party fault claim against the contractors.[6] That decision was well within the trial court's discretion to manage the case and to protect Kelly from significant prejudice.

Moreover, there was no evidence that the third-party contractors were negligent in any way, thus any attempt to add them as parties was futile. Contrary to the County's claim in its petition at 10, there were warning signs present at the construction site. CP 2486-87, 2500-04. Joel Kelly climbed over a barricade to access the stairwell down which he fell. CP 2487.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED[7]

(1) Division I Properly Addressed the Gross Negligence Issue Here

The focus throughout the County's petition is on its contention that it cannot be grossly negligent when it allegedly complied with "protocols" that Joel Kelly could not be involuntarily detained under RCW 71.05 because he was not "medically ready to discharge." This is a red herring designed to distract the Court from Waldschmidt's blatant negligence in

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[6] In a surplus of caution, Judge Erlick performed the requisite *Burnet* analysis. The County now carps about that analysis, pet. at 18-20, but the trial court's conclusion was within its discretion.

[7] Again evidencing the baseless nature of its petition, the County attempts to bootstrap review of "all issues that were before the appellate court" in a footnote, without specifying the issues or offering argument as to why such review is merited. This violates RAP 13.4(c)(5), RAP 13.7(b). This Court does not consider an issue not raised in a petitioner's RAP 13.4(c)(5) concise statement of the issues. *State v. Korum*, 157 Wn.2d 614, 624, 141 P.3d 13 (2006).

steadfastly refusing to perform her statutory duty to evaluate Joel Kelly, as the Providence staff pleaded with her to do. And, as noted *supra,* the County's assertion is unsupported on this record.

(a) <u>The "Baseline" to the Trial Court's Legal Analysis of the County's Gross Negligence Was the ITA</u>

RCW 71.05.153, as it existed when Joel Kelly was injured (*see* Appendix) directs a CDMHP to evaluate a patient. This is consistent with the legislative intent for the ITA:

> (1)(a) To protect the health and safety of persons suffering from mental disorders and to protect public safety through use of the parens patriae and police powers of the state;
>
> . . .
> (2)(c) To provide prompt evaluation and timely and appropriate treatment of persons with serious mental disorders;

RCW 71.05.010.

Nothing in RCW 71.05 or case law interpreting it alters a CDMHP's evaluation duty under RCW 71.05.153 because a person is allegedly not medically ready to be discharged from a hospital. As recently as *Matter of W.H.*, 2019 WL 3230871 (2019), for example, Division III sustained the commitment of an individual under RCW 71.05 as "gravely disabled" for conduct at a hospital emergency room where he sought medications for his back pain; his detention under the ITA was not foreclosed because he was not "medically ready for discharge." *See also*,

Dalen v. St. John Med. Ctr., 8 Wn. App. 2d 49, 436 P.3d 877 (2019) (a civil case where plaintiff was involuntarily detained for bizarre behavior in hospital ER after a fall on the ice, hitting her head).

The County has not pointed to a *single case* supporting the proposition that a person is disqualified from involuntary treatment under RCW 71.05 because they were not ready to be discharged from a medical facility. This Court may presume that the County's counsel, after diligent inquiry could fine non. *DeHeer v. Seattle Post Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).[8]

There is no limit on the County's statutory ITA duty based on "protocols."[9] *Shea v. City of Spokane*, 17 Wn. App. 236, 562 P.2d 264

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[8] And the public policy implications of the County's extreme interpretation of the ITA are truly troubling. Under its conception, no matter how egregious the person's mental condition resulting in danger to that person or others, or the person's grave disability, the person may not be evaluated and then held under the ITA in a secure E&T facility for needed mental health treatment, as the ITA contemplates, because some medical condition, no matter how minor, persists. That defeats the ITA's purpose, as expressed in RCW 71.05.010. The County claims that review is merited under RAP 13.4(b)(4) because to hold CDMHPs to their statutory duty under the ITA somehow "jeopardizes the entire system, and all the patients protected by it." Pet. at 15. That assertion is bizarre. In effect, the County is saying that this is an issue of public safety and serving the mentally ill, but the jury's verdict should be reversed thereby permitting CDMHPs to ignore their statutory duty to evaluate severely mentally ill persons, preventing them from obtaining needed mental health services. The County's argument sets RAP 13.4(b)(4) on its ear.

[9] In a footnote, the County references a 2018 statutory change that authorized DSHS to adopt implementing protocols for ITA cases. Pet. at 14 n.2. That statute gave the Washington Health Care Authority, the State's health care *purchasing entity*, RCW 71.05.020(6), the responsibility of establishing any protocols insofar as they affected the *purchasing of services*. RCW 41.05.018. *See generally*, Laws of 2018, ch. 201, § 1001. Such "protocols" do not address a standard of care for CDMHPs; they related to how the State would pay local governments for their work.

(1977), *aff'd*, 90 Wn.2d 43, 578 P.2d 42 (1978) does not help the County on that point. It has nothing to do with compliance with extra statutory protocols. Kelly's expert testified pointedly that policies or protocols may not contradict a CDMHP's ITA duty. RP 940. The jury evaluated this testimony and agreed. In any event, such "protocols" cannot trump the language of the ITA itself. *See Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 852-54, 153 P.3d 846, *cert. denied*, 552 U.S. 1040 (2007) (agency interpretation of statute in place for 15 years could not overcome statutory requirements).

Second, even if "medically ready for discharge" were an excuse for the County CDMHP's egregious misconduct, as noted *supra*, the facts here document that Joel Kelly was medically stable and ready to leave Providence's voluntary rehabilitation unit once the Thanksgiving weekend was over. The County argued this factual dispute at length to the jury. *E.g.*, RP 1844, 1850-01, 1856-58, 1877. The jury did not buy the County's position. The Supreme Court is not the proper venue to further litigate the facts.

(b) On Proper Instructions and Based on Ample Evidence, the Jury Concluded the County Was Grossly Negligent

The County contends that it was entitled to judgment as a matter of law on gross negligence based on this Court's opinion in *Harper v. Dep't*

of Corrections, 192 Wn.2d 328, 429 P.3d 1071 (2018) that allegedly changed the law on gross negligence. Pet. at 3. But *Harper* did no such thing; this Court merely refined the gross negligence analysis. Gross negligence remains a *question of fact* for the jury.

In *Harper*, a case that did not involve the ITA, this Court noted that a plaintiff must adduce substantial evidence that the defendant exercised substantially or appreciably less than that degree of care a reasonably prudent entity would have exercised in the same or similar circumstances for gross negligence to go to the jury. A court must have a "baseline" on which to assess gross negligence. 192 Wn.2d at 342-45. Once that baseline of potential gross negligence is established, the *Harper* court held that gross negligence is an issue of fact to be decided by the jury. *Id*. at 345-46 ("If reasonable minds could differ…the court should not grant summary judgment").

Harper did not change the law where Washington courts have *frequently* held that gross negligence is a *fact question* for the jury, specifically in the ITA setting, where the County's CDMHP had a clear-cut statutory duty to evaluate Joel Kelly.[10] *Nowhere* in its petition does

[10] *E.g.*, *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) (treating physician failed to commit patient who relapsed on drugs and injured a woman in a car crash five days after release from Western State Hospital); *Volk v. DeMeerleer*, 187 Wn.2d 241, 386 P.3d 254 (2016) (psychiatrist treating a patient in outpatient setting who expressed homicidal ideations and then acted on them). *See also*, *Bader v. State*, 43 Wn.

the County assert that the jury was erroneously instructed on gross negligence in Instruction 12 based on WPI 10.07. CP 4447. *See* Appendix. Division I's observation that it "will not substitute [its] judgment for that of a properly instructed jury" (op. at 1) is particularly apt.

The legal "baseline" required in *Harper* was unambiguously articulated by the Legislature itself in the ITA, as Division I impliedly noted in its opinion at 10. CDMHPs must conduct assessments of persons with qualifying mental disorders, conducting an "investigation," evaluating "the specific facts alleged and of the reliability and credibility of the person or persons providing the information if any." RCW 71.05.153(1).

The factual "baseline" for County action was that Joel Kelly suffered a serious brain injury after falling from a ladder. RP 559. He

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App. 223, 716 P.2d 925 (1986) (summary judgment in favor of treatment center reversed where there were fact questions as to whether it should have detained mental patient on community release who killed his neighbor); *Poletti v. Overlake Hosp. Medical Ctr.*, 175 Wn. App. 828, 303 P.3d 1079 (2013) (Division I reversed summary judgment in favor of hospital where the hospital discharged an ITA who was killed in a subsequent auto crash; fact issue as to hospital's gross negligence where hospital discharged patient in violation of its own policy on referring patient to CDMHP for evaluation); *Lennox v. Lourdes Health Network*, 195 Wn. App. 1003, 2016 WL 3854589 (2016), *review denied*, 187 Wn.2d 1013 (2017) (Division III reversed summary judgment in favor of outpatient treatment facility, despite RCW 71.05.120, concluding that there were fact questions as to whether it was grossly negligent in failing to take more aggressive steps to detain conditionally released patient); *Dalen*, *supra* (Division II reversed a summary judgment in favor of a hospital under RCW 71.05.120(1) where there were fact questions as to the hospital's gross negligence in initially detaining, and continuing to detain, a patient with an organic brain injury).

was initially treated at a critical care unit to treat his severe brain injury which caused significant cognitive impairments. RP 720. Once he stabilized, he was transferred to the inpatient rehabilitation unit at Providence. RP 450-51, 720. This unit only treats medically stable patients who voluntarily participate in rehabilitation programs like speech and occupational therapy. RP 446, 450.

After his family visited him on November 28, 2013, Thanksgiving Day, RP 638, Joel Kelly became agitated and violent, lashing out at staff and telling them that he planned to leave. RP 638-39. Staff members knew he was not safe to leave the facility – he was violent, confused, and disoriented, believing that he was in "Mexico." RP 642-43. The on-call physician, Dr. Lee, ordered that Joel Kelly be restrained and given medication to calm him down while the hospital contacted the CDMHP so that he could be assessed for an involuntary hold at an E&T facility. RP 673-74.

The County's departure from the "baseline" was also the subject of extensive testimony below. CDMHP Waldschmidt received *multiple* reports about Joel Kelly's condition, but refused to leave her family's Thanksgiving dinner at her home about 15 minutes away from Providence to perform an assessment of him. Ex. 61; RP 568-69, 757, 816, 871-72. She refused to meet with him in person, did not review his medical file,

and did not interview witnesses. RP 756-57, 942. She failed to grasp the ITA's basic definition of a "mental disorder," claiming that brain injuries were not within her "jurisdiction" or "service." RP 676-77. She had actual knowledge from multiple staff and medical professional reports that Joel Kelly was a danger to himself or others, and/or was gravely disabled, yet she failed to even evaluate him under RCW 71.05.153(1) for a 72-hour hold so that he could be held and receive mental health treatment at a secure E&T facility.

The jury heard from Waldschmidt herself, RP 746-48, and her supervisor Carola Schmid, an experienced CDMHP, who both recognized that had Waldschmidt asked more questions of Providence staff to understand that Joel Kelly was violent, further investigation and an in-person interview of him would have resulted. RP 1150-51. The jury also heard from former Pierce County CDMHP, David Stewart, who ultimately opined:[11]

> Q. Can you tell me whether or not Ms. Waldschmidt met her professional obligations in relation to the relation to Joel Kelly and the issues in this case?

[11] Stewart testified that Joel Kelly met the criteria for a 72-hour hold on November 28, 2013 and that Waldschmidt should have conducted an assessment, issued a 72-hour hold, and arranged for his transportation to an E&T facility or kept him at Providence using what is called a single-bed certification. RP 896 ("She should have interviewed all of the relevant witnesses on the phone at least and determined – and I believe that if she did that, she couldn't have made any other determination than that Mr. Kelly required further investigation for an involuntary commitment.").

> A. Unfortunately, I can only conclude that Ms. Waldschmidt utterly failed to exercise common practice that would be expected of any DMHP when presented with the situation that Mr. Kelly was facing.

RP 888-89. The County does not even mention Stewart's damning testimony anywhere in its petition.

Thus, ample facts noted by Division I in its opinion at 2-5, 8-9 documented the fact issues surrounding the County's gross negligence that were properly decided by the jury. Waldschmidt was derelict in her statutory duty by failing to make an *informed assessment* of Kelly's danger and to take appropriate action as a CDMHP under the ITA. Stewart, a former Pierce County CDMHP with an extensive background in CDMHP responsibilities and activities, CP 243, RP 884-86, testified that Waldschmidt's excuses for not assessing Kelly were baseless and that Waldschmidt's conduct fell *substantially* below the standard of care. RP 888-89.

This was not mere negligence. The County engaged in gross negligence, as the jury determined on proper instructions, when its CDMHP failed to execute her statutory duty under RCW 71.05.153(1) in the face of *repeated* requests for a face-to-face evaluation of Joel Kelly from Providence staff noting his combativeness. A rehab unit was no place for Kelly. The jury's verdict and Division I's opinion got it right.

(2) Division I's Opinion Properly Addressed the Trial Court's Decision to Deny the County's Motion to Amend

As noted *supra*, the County wants to transform the trial court's denial of its motion to amend into a sanction question. Pet. at 16-20. But Division I properly rejected the County's effort, ruling that the trial court did not abuse its discretion in declining to allow the County eleventh hour motion to amend its answer to belatedly raise an empty chair defense on the eve of trial, which the County failed to affirmatively plead as required by CR 12(i). Op. at 11-12.

A trial court's decision on the amendment of pleadings is within its discretion,[12] and amendment may be denied if the amendment causes undue delay, unfair surprise, or jury confusion, or amendment would be futile. *Cambridge Townhomes LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 484, 209 P.3d 863 (2009). More to the point, non-party fault must be *timely* pleaded and proven or the issue is waived. CR 8(c); *Adcox v. Children's Ortho. Hosp. & Med. Ctr.*, 123 Wn.2d 15, 24-25, 864 P.2d 921 (1993); *Estate of Dormaier ex rel. Dormaier v. Columbia Basin*

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[12] The decision to permit amendment of pleadings is entrusted to the trial court's discretion. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). A trial court acts well within its authority to deny an untimely motion to amend because a trial court "has the discretionary authority to manage its own affairs so as to achieve the orderly and expeditious disposition of cases." *Woodhead v. Disc. Waterbeds, Inc.*, 78 Wn. App. 125, 129, 896 P.2d 66 (1995), *review denied*, 128 Wn.2d 1008 (1996). "It may impose such sanctions as it deems appropriate for violation of its scheduling orders to effectively manage its caseload, minimize backlog, and conserve scarce judicial resources." *Id*.

Anesthesia, PLLC, 177 Wn. App. 828, 858, 313 P.3d 431 (2013); *In re Estate of Lowe*, 191 Wn. App. 216, 228, 361 P.3d 789 (2015), *review denied*, 185 Wn.2d 1019 (2016). Indeed, in *Dormaier*, Division III expressly noted that waiver occurs if counsel is dilatory in asserting the defense, as here. *Id*. at 859 (citing *Lybbert v. Grant Cty.*, 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000)).

The County played games in delaying raising the contractor liability issue. The County disclosed an expert witness to opine on non-party fault 13 months into the case, on the eve of trial, but it never identified the entities it alleged were at fault in its pleadings as required by CR 12(i). The only explanation the County offered for its late disclosure was that it retained new counsel after the parties' failed mediation who re-analyzed the case just before trial. CP 2340-41. The trial court correctly concluded that this explanation was unacceptable given the requirements of CR 12(i), and, if accepted, it would create perverse incentive for parties to delay trials by switching counsel at the last minute. CP 2342-43. The trial court exercised proper discretion by denying the County's last-minute attempt to assign non-party fault to the contractors.[13]

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[13] *Accord*, *Gunn v. Riely*, 185 Wn. App. 517, 530, 344 P.3d 1225, *review denied*, 183 Wn.2d 1004 (2015) (holding that trial court properly denied an untimely non-party fault claim raised on the eve of trial in a trial brief); *Lowe*, 191 Wn. App. at 228 ("Where, as here, parties engage in discovery for a prolonged period and a motion to amend and supplement is brought less than one month before trial, a trial court properly

Even after the trial was continued, through no fault of Kelly, the County failed to join in Providence's motion to amend its pleadings to identify the contractors as potential non-parties at fault. The trial court acted within its discretionary authority to hold the County accountable for its inexplicable undue delay in pleading non-party fault, as Division I properly determined. Op. at 13.

The County's reliance on *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (2015) is misplaced. Pet. at 16. There, the trial court excluded an untimely declaration submitted in connection with a response to a motion for summary judgment as equivalent to a sanction on discovery. *Id*. at 369-70. By contrast, a trial court decision to grant a motion to amend falls squarely within the *Cambridge Townhomes* analytical framework that specifically includes "undue delay." A decision on a CR 15 motion to amend stands apart from a *Burnet*-type sanctions analysis. Simply put, not every decision by a trial court to exclude evidence or deny a motion falls within *Burnet*.

In any event, the trial court conducted a *Burnet* analysis even though it did not need to do so. On February 11, 2016, the trial court struck the County's expert on contractor liability, Mark Lawless, because the County willfully failed to disclose him and waived its right to assert an

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exercises its discretion when it denies leave to amend and supplement with new theories that could have been raised months before.").

empty chair defense by waiting until the eve of trial to raise the issue. Out of caution, the trial court conducted a *Burnet* analysis contemporaneously with its decision to exclude Lawless. CP 1242-43, 2352-55. Contrary to the County's attempt to suggest that the trial court, an experienced trial judge, made a cursory analysis of the *Burnet* protocol, pet. at 19, the court's discussion was thoughtful and complete, and made with an intimate knowledge of the facts and procedural history of the case. Division I correctly analyzed this issue in its unpublished decision and found that the trial court acted within its discretion. Op. at 12.

That there was no prejudice to the County is fully established by the fact that its CR 15 motion was futile.[14] The non-party fault amendment was futile because the non-parties could not be liable for Joel Kelly's injuries, therefore any error in refusing to allow a non-party fault argument was harmless.

Joel Kelly was a trespasser under principles of premises liability law. The construction entities were not liable to a trespasser unless they exhibited willful or wanton misconduct.[15] "Whether the doctrine of

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[14] Any alleged error in failing to conduct a *Burnet* analysis may be harmless. *Jones v. City of Seattle*, 179 Wn.2d 322, 356, 314 P.3d 380, 397 (2013).

[15] *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 41, 846 P.2d 522 (1993); *Johnson v. Schafer*, 110 Wn.2d 546, 756 P.2d 134 (1988); *Winter v. Mackner*, 68 Wn.2d 943, 945, 416 P.2d 453, 454 (1966) ("One who enters upon the premises of another as a trespasser does so at his peril.").

wanton misconduct applies is initially a question of law for the court." *Johnson*, 110 Wn.2d at 548. "Wanton misconduct is not negligence" – it requires a positive showing that the landowner intentionally acted or failed to act in reckless disregard of the consequences. *Id.* at 549. There must be reason to know with "a high degree of probability" that substantial harm to another would occur. *Id*.

In *Johnson*, this Court ruled that summary judgment should be granted to a landowner where a trespassing motorcyclist struck a steel cable across the landowner's private road. *Id.* at 551. The landowner posted signs warning against the entry upon the property and had yellow ribbons marking the cable. *Id.* at 449. The Court found as a matter of law that the landowner was not liable. *Id.* at 551.[16]

Joel Kelly was a trespasser at a private construction site. The record shows that there were warning signs at the construction site and a barricade at the stairway where he fell. CP 2486-87, 2500-04. The contractors' employees on shift documented that Joel Kelly climbed over barricades before he fell. CP 2487. There is *nothing* in the record to show that any of the identified non-party contractors engaged in any form of

[16] *Accord*, *Estate of Wheat by Wheat v. Fairwood Park Homeowners Ass'n*, 3 Wn. App. 2d 1011, 2018 WL 1641017, *review denied*, 191 Wn.2d 1005 (2018) (on issue of attributing fault to empty chair defendants, Division III held that homeowners association owed no duty to a trespasser who drove his golf cart into a gate placed by the association across its private road).

willful or wanton misconduct towards Joel Kelly, a trespasser on their jobsite.

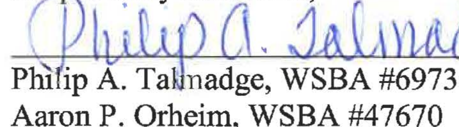
Any alleged error associated with the refusal to allow the County to raise non-party fault was harmless, further reinforcing the point that review of Division I's opinion here is not merited.

D. CONCLUSION

The County's petition for review of an unpublished opinion is baseless particularly where it continues to distort the record to fuel its contentions. The jury was properly instructed on gross negligence and causation and its verdict was amply supported. The trial court did not abuse its discretion in rejecting the County's unsupported, prejudicial motion to amend to submit a claim when it failed to comply with CR 12(i). The trial court properly entered its judgment on the jury's verdict and did not err in denying the County's post-trial motions. This Court should deny review. RAP 13.4(b).

DATED this 15th day of August, 2019.

Respectfully submitted,



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APPENDIX

Instruction 12

Gross negligence is the failure to exercise slight care. It is negligence that is substantially greater than ordinary negligence. Failure to exercise slight care does not mean the total absence of care but care substantially less than ordinary care.

CP 4447.

RCW 71.05.153(1):

(1) When a designated crisis responder receives information alleging that a person, as the result of a mental disorder, presents an imminent likelihood of serious harm, or is in imminent danger because of being gravely disabled, after investigation and evaluation of the specific facts alleged and of the reliability and credibility of the person or persons providing the information if any, the designated crisis responder may take such person, or cause by oral or written order such person to be taken into emergency custody in an evaluation and treatment facility for not more than seventy-two hours as described in RCW 71.05.180.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Answer to Petition for Review*** in Supreme Court Cause No. 97541-8 to the following:

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Original e-filed with:
Supreme Court Clerk's Office

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

DATED: August 15, 2019 at Seattle, Washington.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

August 15, 2019 - 10:23 AM

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