NO. 332012

IN THE
COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

SHERRIE LENNOX, as Personal Representative of the
ESTATE OF VIOLA WILLIAMS,

Appellant,

v.

LOURDES HEALTH NETWORK, ET AL.,

Respondents.

BRIEF OF RESPONDENTS BENTON COUNTY AND FRANKLIN COUNTY

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I. INTRODUCTION:

Ruling from the bench on March 13, 2015, after review of extensive briefing and hearing oral argument of all counsel, the Honorable Robert G. Swisher granted Defendants Benton-Franklin Counties' and Lourdes Health Network's motions to dismiss all claims of gross negligence with prejudice. (Verbatim Report of Proceedings at 50.)

In their Complaint for Injuries and Damages, Plaintiff Sherrie Lennox, as personal representative of the Estate of Viola Williams, brought personal injury and wrongful death claims against Defendants Lourdes Health Network and the Benton-Franklin Counties (for the work performed by Designated Mental Health Professionals at the Benton and Franklin County Crisis Response Unit), pursuant to RCW 4.20.020, 4.20.046, and 4.20.060. The statutory beneficiaries of the Estate of Viola Williams are Plaintiff, Sherrie Lennox, and her brother, Steve Williams, the aunt and father of Adam Williams, respectively. Adam Williams is the perpetrator who caused the death of Viola Williams. Adam Williams was subject to the conditions of a Least Restrictive Alternative (LRA) at the time of the killing.

The authorities and arguments with regard to the motions to dismiss through summary judgment are stated simply: Plaintiff failed to present evidence of gross negligence; the evidence supports that Defendants Benton-Franklin Counties and Lourdes Health Network acted with more than slight care. Therefore, Defendants were and are entitled to dismissal of all claims. The Trial Court properly granted dismissal, and the Court of Appeals is asked to affirm.

According to state statute, Plaintiff-Appellant must present evidence that Defendants' acts or omissions constituted "gross negligence". With regard to Defendants Benton-Franklin Counties, this meant that Plaintiff had to present sufficient evidence to create a material issue of fact as to whether or not the acts or omissions of the Designated Mental Health Professionals (DMHPs) of the Benton and Franklin County Crisis Response Unit (BFCCRU) failed to rise to the level of "slight care."

The Trial Court was correct in finding Plaintiff failed to present evidentiary support for the allegation of gross negligence asserted against Benton and Franklin Counties, and in ruling that summary judgment of dismissal was granted.

II. ISSUES PRESENTED FOR REVIEW:

1. The Trial Court properly granted summary judgment dismissing all claims of gross negligence asserted against Benton and Franklin Counties. Defendants Benton-Franklin Counties respectfully request the Court of Appeal affirm Judge Swisher's ruling.

Appellant-Plaintiff failed to present evidence sufficient to create a material issue of fact that rose to the level of presenting a *prima facie* case that the acts or omissions of DMHPs at the BFCCRU constituted "gross negligence", and therefore summary judgment of dismissal was properly granted.

2. The Trial Court properly struck portions of the declaration of Plaintiff's expert, Matthew Layton, M.D.

III. COUNTER-STATEMENT OF FACTS:

Adam Williams is 32-years-old and a former resident of Benton County, Washington, with a longstanding history of mental illness, criminal behavior, and drug abuse.

In 2006, Adam Williams pled not guilty by reason of insanity to a charge of assault in Franklin County and was sentenced to Eastern State Hospital for five years of treatment and therapy. (CP 203-204.)

In March 2011, having completed his sentence, Adam Williams was released from Eastern State Hospital. However, recognizing his need for continued treatment and oversight for his mental health issues, he was released on a 90-day Less Restrictive Alternative (LRA), pursuant to an Order by Spokane County Superior Court and RCW 71.05.300. Concurrently, he was under community supervision by the Washington State Department of Corrections, however, it is undisputed that the community supervision expired in October 2011. (CP 4.)

Adam Williams returned to the Tri-Cities in the spring of 2011. He was subject to the terms and conditions of the 90-day LRA, and Lourdes Health Network PACT Team accepted him as a patient/client for ongoing treatment for his mental health issues, drug abuse, and to assist with reintegration into the community. The Lourdes PACT Team oversaw Adam Williams' compliance with the LRA. (CP 221-225.)

Adam Williams' initial 90-day LRA expired in June 2011. Pursuant to RCW 71.05.300, Lourdes PACT Team and BFCCRU, as co-petitioners, sought extension of the terms and conditions of the LRA for an additional 180 days. Adam Williams was given proper

notice. He waived his right to an attorney and jury trial, and was advised of his loss of firearm rights. He waived his right for the court to appoint a mental health professional to examine and testify in his behalf. And, he stipulated to the extension of the LRA. Benton County Superior Court entered the Order extending the LRA on June 9, 2011. (CP 235-238.)

The terms and conditions of the six-month extension of Adam Williams' LRA entered on June 9, 2011, included that he shall:

(1) Take all medications as prescribed;
(2) Attend and participate in all mental health appointments;
(3) Do not threaten or attempt to harm self or others;
(4) Abstain from consuming alcohol and illegal drugs;
(5) Reside in a place approved by the treatment team; and
(6) Follow all recommendations of the treatment team.

(CP 238.) Medication prescription and management, psychological counseling and treatment, community support, and vocational rehabilitation were provided to Adam Williams by the Lourdes PACT Team, which, again, oversaw Mr. Williams' compliance with the LRA. (CP 242-244.)

Between entry of the LRA in June 2011, and July 31, 2011, BFCCRU had no clinical contact with Adam Williams or the Lourdes

PACT Team. Then, on the night of July 31, 2011, BFCCRU received a call from Kadlec Medical Center (not Lourdes PACT Team) that Adam Williams had been brought to the Emergency Room in a psychotic state, under the influence of drugs and possibly alcohol, and severely dehydrated with a dangerously low potassium level. (CP 40.)

He was admitted to Kadlec Medical Center overnight and the following morning deemed "medically stable" and ready for discharge. A mental health evaluation was requested by Kadlec Medical Center to determine if he needed to be involuntarily detained and/or his LRA revoked. On August 1, 2011, in the company of his father, Steve Williams, Adam Williams was evaluated by BFCCRU employee Cameron Fordmeir, DMHP.

DMHP Fordmeir's evaluation included reviewing the BFCCRU chart for Adam Williams, the available Kadlec records as well as interviewing physicians and nurses, attempting to contact the Lourdes PACT Team, as well as interviewing Adam Williams and his father. Through the process of this evaluation, Adam Williams acknowledged the need to take medications as prescribed. Specifically, DMHP Fordmeir determined that Mr. Williams was:

> . . .[C]ooperative, calm, alert and oriented times three. Client reports being off his medications for over a week and has been using meth per client report. Client denies any SI (suicidal ideology) or HI (homicidal ideology) and contracts for safety. Client denies any hallucinations, delusions or paranoia."

(CP 367.)

Using his clinical judgment, DMHP Fordmeir determined that Mr. Williams did not pose a likelihood of serious harm to himself and others, confirmed a reasoned plan of safety, and based upon his evaluation and judgment released Mr. Williams into the care of his father, Steve Williams, and Steve Williams' wife, under the continuing terms of the LRA dated June 9, 2011. For a period of time thereafter, Adam Williams did well.

The next contact BFCCRU had with Adam Williams was over four months later, in December 2011, when his LRA Order of June 9, 2011, was due to expire. Again, Lourdes PACT Team and BFCCRU, as co-petitioners, sought a second 180-day extension of the LRA.

In advance of the hearing, Adam Williams was brought to the BFCCRU office by his case manager. He waived his right for the court to appoint a mental health professional to examine and testify in his behalf, waived other rights, and stipulated to a 180-day extension

of his LRA. The Order was entered by Benton County Superior Court on December 6, 2011, extending the terms and conditions stated in the June 9, 2011 LRA for an additional six months. (CP 248-249.)

BFCCRU had no further contact with Adam Williams' case managers and/or treaters at Lourdes PACT Team until January 18, 2012. On that date, BFCCRU received a call from Lourdes PACT Team Nurse Michelle Aronow, who advised Adam Williams had an appointment that afternoon that Nurse Aronow would be unable to keep due to inclement weather and the PACT Team office closing early.

Neither Adam Williams nor his family ever contacted BFCCRU at any time during the entirety of Adam Williams' time in the Tri-Cities, and/or while under treatment with Lourdes Health Network. (CP 459.)

On January 25, 2012, Kyle Sullivan, Program Director at BFCCRU, received a telephone call from the Lourdes PACT Team, requesting a DMHP come to the Lourdes PACT Team office to evaluate a Lourdes client (a different client, not Adam Williams). Kathleen Laws, DMHP, was available and agreed to go to Lourdes. While DMHP Laws was in route, Nurse Aronow with the PACT

Team called Kyle Sullivan to advise that Adam Williams was in her office for an unscheduled visit, and Nurse Aronow requested a DMHP speak with Adam Williams. It was decided that DMHP Laws would meet with Mr. Williams to remind him that he was on an LRA and needed to comply with its terms and conditions. (CP 350.)

After evaluating the first Lourdes client, DMHP Laws and Nurse Aronow jointly met with Adam Williams, and at least one other individual. Because the call from Nurse Aronow came while DMHP Laws was in route to Lourdes, DMHP Laws did not have an opportunity to review the BFCCRU file before her meeting with Adam Williams. DMHP Laws obtained a verbal history from Nurse Aronow about Mr. Williams. In that history, Nurse Aronow did not express that Adam Williams' condition had substantially deteriorated or that there existed an increased likelihood that Adam Williams would harm himself or others from observations of his behaviors or comments he had made. DMHP Laws then interviewed Mr. Williams at the PACT Team office in the presence of Nurse Aronow.

From her meeting with Adam Williams, DMHP Laws noted that he was polite and cooperative, his stream of thought was

relatively clear, but there was an underlying paranoia, and some tangential thinking was noted. Adam Williams agreed not to use street drugs and to take his medications as prescribed. He was oriented times three, his mood was euthymic with congruous affect, and he agreed he could be safe to both self and others. (CP 474-476.)

The plan decided on that date was for the Lourdes PACT Team to follow-up with Mr. Williams in the succeeding days. He was also given the BFCCRU contact information, which he could use as needed.

Based on DMHP Laws' clinical judgment, Adam Williams was not a danger to himself or others, he did not meet the criteria for mandatory revocation of his LRA, and with the plan in place he could continue living in the community under the terms and conditions of the LRA.

Reassuringly, later that day, Adam Williams called the PACT Team office and relayed his appreciation to the staff for working with him, and expressed his understanding of his need to abide by the terms and conditions of the LRA. (CP 476.)

Also reassuring, on the morning of January 26, 2012, Adam Williams returned to the PACT Team office as required by the terms of the LRA to have his medications refilled.

On January 27, 2012, Adam Williams killed his grandmother, Viola Williams.

IV. AUTHORITIES AND ARGUMENT ON THE TRIAL COURT PROPERLY GRANTING DEFENDANTS BENTON AND FRANKLIN COUNTIES' MOTION FOR SUMMARY JUDGMENT OF DISMISSAL, FINDING NO MATERIAL ISSUE OF FACT AS TO GROSS NEGLIGENCE ON THE PART OF THE DMHPS OF BFCCRU:

Appellate Courts review summary judgment de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

A. DEFENDANTS BENTON AND FRANKLIN COUNTIES' AND THE DMHPS AT BFCCRU ARE IMMUNE BY STATE STATUTE, RCW 71.05.120, FROM CLAIMS OF NEGLIGENCE.

RCW 71.05.120 (emphasis added) provides:

> (1) No officer of a public or private agency, nor the superintendent, professional person in charge, his or her professional designee, or attending staff of any such agency, nor any public official performing functions necessary to the administration of this chapter, nor peace officer responsible for detaining a person pursuant to this chapter, **nor any county designated mental health professional**, nor the state, a unit of local government, or an evaluation and

> treatment facility **shall be civilly or criminally liable for performing duties pursuant to this chapter with regard to the decision of whether to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment: PROVIDED, that such duties were performed in good faith without gross negligence.**

Pursuant to statute, a DMHP is immune from liability based on claims of negligence in the performance of his or her duties under the involuntary commitment law. Liability can only be based on evidence that a DMHP acted in bad faith or with gross negligence. *Estate of Davis v. State Department of Corrections*, 127 Wn. App. 833, 840, 113 P.3d 487 (2005).

A "Designated Mental Health Professional" is someone designated by the county and authorized to perform the duties of Chapter 71.05 relating to mental illness. In this case, all of the members of BFCCRU who interacted with Adam Williams between May 2011 and January 2012 are DMHPs, and are statutorily immune from liability unless Plaintiff-Appellant can prove that the DMHPs acted with gross negligence or in bad faith. Plaintiff-Appellant did not, and has not made a claim of bad faith. Therefore, the sole issue before this Court is whether Plaintiff-Appellant submitted sufficient

evidence to create a material issue of fact that the DMHPs were "grossly negligent", or, stated in the opposite, failed to exercise "even slight care" in their assessments of Adam Williams.

The plain language of the statute is broad in its application, i.e., it precludes all civil liability which flows from the decision of whether to admit, discharge, release or detain a person for evaluation and treatment under RCW 71.05. This statute is not qualified or limited with regard to the potential class of civil liability claimants. The statute clearly encompasses homicidal persons, as well as third-parties, and precludes liability, not only for wrongful discharge or release, but also for failure to admit or detain, i.e., "with regard to the decision of whether to admit, discharge, release or detain." The statute could not be any clearer and must be given such effect. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

BFCCRU had two clinical contacts with Adam Williams over the 10+ month period of time that he was in the Tri-Cities following his release from Eastern State Hospital. The first contact was through an emergency crisis intervention request made by Kadlec Medical Center on August 1, 2011. That contact was conducted in a reasonable and prudent fashion by Cameron Fordmeir, DMHP. Based on the

appropriate and reasonable evaluation performed by DMHP Fordmeir, a plan of care and management was implemented.

Plaintiff-Appellant admitted in briefing that this August 1, 2011 contact was effective because Adam Williams complied with terms and conditions of the LRA for at least two months. No evidence has been produced by an expert for Plaintiff that supports the claim that anything DMHP Fordmeir did or did not do was a proximate cause of Viola Williams' death, which occurred many months after DMHP Fordmeir's contact with Adam Williams.

With respect to the January 25, 2012 meeting between Adam Williams and DMHP Kathleen Laws, and the events leading up to that meeting, it is undisputed that Adam Williams was an unscheduled walk-in at Lourdes PACT Team on January 25, 2012. In response to Mr. Williams' appearance at the office, PACT Team Nurse Michelle Aronow initiated contacted with BFCCRU and requested a DMHP meet with Mr. Williams. BFCCRU had already dispatched DMHP Laws to the Lourdes PACT Team office to meet another client, and it was decided that DMHP Laws would remain after her meeting with the first client to speak with Mr. Williams.

On January 25, 2012, DMHP Laws and Nurse Aronow, together, met with Adam Williams. Prior to meeting with Mr. Williams, Ms. Aronow and Ms. Laws conferred in regard to Adam Williams' care and condition. Together, they then met with Mr. Williams, and DMHP Laws explained to him the need to take his medications, attend his doctor's counseling sessions, avoid drugs and alcohol, and stressed that he needed to comply with the terms and conditions of his LRA or it would be revoked.

The evidence supports, and is undisputed, that Adam Williams understood what was being asked of him, and the consequences if he failed to follow the conditions of the LRA. This was demonstrated by the telephone call Mr. Williams made later in the afternoon on January 25, 2012 to Nurse Aronow, in which he acknowledged the conversation with DMHP Laws and the impact that conversation had on him. And is further evidenced by his return on January 26, 2012 to the Lourdes PACT Team office to have his medications refilled. Mr. Williams stated that he understood his LRA would be revoked if he failed to follow the terms and conditions, and that he did not wish to return to the hospital. These acts all constitute reassuring behavior.

This is a tragic case, but evidence of gross negligence on behalf of DMHP Fordmeir and/or DMHP Laws has not been presented by Plaintiff-Appellant. Defendants Benton and Franklin Counties are therefore availed of the statutory immunity created by RCW 71.05.120.

In this case, Plaintiff-Appellant presented testimony of a medical expert who does not work, and has never worked as a DMHP. That medical expert exercised 20/20 hindsight to criticize the providers who did in fact meet the standard of care at the time they treated and evaluated, and/or met with Adam Williams. Washington courts, trial courts and appellate courts, continue to uphold the principle that a health care provider is not to be judged in the light of any after acquired knowledge. *See, Meeks v. Marx*, 15 Wn. App. 571, 550 P.2d 1158 (1976), in which the Court of Appeals approved the following jury instruction:

> A physician or surgeon is not to be judged in the light of any after acquired knowledge in relation to the case and the question of whether or not he exercised reasonable care and skill as defined in these instructions, is to be determined by reference to what is known in relation to the case at the time of treatment or examination, and must be determined by reference to the pertinent facts then in existence of which he knew, or in the exercise of ordinary care should have known.

Meeks, at 579. *See also, Vasquez v. Markin*, 46 Wn. App. 480, 731 P.2d 510, *rev. denied*, 108 Wn.2d 1021 (1986) (holding that in Washington negligence is not a matter to be judged after the occurrence; thus, "[f]oresight, not retrospect, is the standard of diligence," *citing, Winsor v. Smart's Auto Freight Co.*, 25 Wn.2d 376, 388, 165 P.2d 95 (1946)).

Certainly, in light of the chronology of events, it cannot be successfully argued that the evaluation performed by DMHP Fordmeir rose to the level of gross negligence. His actions represent more than slight care (Defendants Benton-Franklin Counties assert that DMHP Fordmeir fully met the standard of care). DMHP Fordmeir's acts or omissions are subject to statutory immunity and any allegations related to gross negligence are properly dismissed.

With regard to the meeting DMHP Laws conducted with Adam Williams, at most, it could be alleged that DMHP Laws committed an "error in judgment." Making an error in judgment does not subject Defendant Benton and Franklin Counties to liability, however. The Washington State Supreme Court continues to uphold the jury instruction on "error in judgment", also known as the "reasonable

exercise of judgment" instruction, as a legal principle guiding analysis of decisions made by health care professionals when encountering different options for diagnosis and/or treatment. *See, Miller v. Kennedy*, 91 Wn.2d 155, 588 P.2d 734 (1978). The accepted instruction states:

> A physician is not liable for selecting one of two or more alternative (courses of treatment) (diagnosis) if, in arriving at the judgment to (follow the particular course of treatment) (make the particular diagnosis) the physician exercised reasonable care and skill within the standard of care the physician was obliged to follow.

WPI 105.08, as modified.

The Legislature decided through RCW 71.05.120 to provide mental health professionals acting under the exact type of circumstance presented in this case with statutory immunity from all but the most grievous of acts or omissions. Evidence of gross negligence has not been produced by Plaintiff-Appellant. Respondents have credible expert witness testimony that supports the management of Adam Williams and the conclusion that no "gross negligence" occurred. Defendants Benton and Franklin Counties are entitled to statutory immunity under RCW 71.05.120 because a *prima*

facie case supporting an allegation of gross negligence has not been presented.

This is precisely the type of case that RCW 71.05.120 was intended to prevent by the immunity bar. Evaluating persons with mental illnesses is difficult and prone to accusations of error in hindsight analysis. But, the Legislature has mandated that if slight care is exercised, no liability shall be found, and summary judgment of dismissal is appropriate. It was appropriate to dismiss this case, and the ruling of the Trial Court should be affirmed.

B. APPELLANT FAILS TO CREATE A MATERIAL ISSUE OF FACT TO ESTABLISH GROSS NEGLIGENCE ON THE PART OF BENTON-FRANKLIN COUNTY CRISIS RESPONSE UNIT:

Our Supreme Court defined "gross negligence" as:

> Gross or great negligence, that is, negligence substantially and appreciably greater than ordinary negligence. It's correlative, failure to exercise slight care, means not the total absence of care, but care substantially or appreciably less than the quantum of care in ordinary negligence.

Nist v. Tutor, 67 Wn.2d 322, 331, 407 P.2d 798 (1965); *accord, O'Connell v. Scott Paper*, 77 Wn.2d 186, 189, 460 P.2d 282 (1969); *Jones v. Widing*, 7 Wn. App. 390, 393, 499 P.2d 209 (1972).

Therefore, "gross negligence" is the failure to exercise slight care. Slight care "means not the total absence of care, but care substantially or appreciably less than the quantum of care inhering in ordinary negligence." *Nist v. Tudor,* 67 Wn. App. 2d, 332, 407 P.2d 798 (1965). Gross negligence is negligence substantially and appreciably greater than ordinary negligence; ordinary negligence is "the act or omission which a person of ordinary prudence would do or fail to do under the circumstances or conditions...." There is no issue of gross negligence without "substantial evidence of serious negligence." *Kelly v. Department of Corrections,* 104 Wn. App. 328, 333, 17 P.3d 1189 (2000); *citing, Nist v. Tuder*, 67 Wn.2d 332, 330-32, 407 P.2d 798 (1965).

There are numerous cases in which claims were dismissed at summary judgment due to a plaintiff's failure to meet the standard of providing evidence of gross negligence. In *Boyce v. West*, 71 Wn. App. 657, 862 P.2d 592 (1993), plaintiff attempted to void a pre-injury waiver and release on the grounds that the acts or omissions of defendants constituted "gross negligence," and this was rejected by this Court, holding:

> Evidence of negligence is not evidence of gross negligence; to raise an issue of gross negligence, there must be substantiated evidence of serious negligence. . . .

Boyce at 665; *citing Nist v. Tuder,* 67 Wn.2d 332, 332, 407 P.2d 798 (1965); *see also, Estate of Davis v. State Department of Corrections, supra.*

In this matter, Appellant's expert, Matthew Layton, M.D., opined that the acts of BFCCRU's DMHPs, Cameron Fordmeir and Kathleen Laws, were "substandard." This is not unlike the allegations made by the plaintiff in *Boyce*, who presented expert testimony that the defendant's employee was "negligent".

In *Boyce*, the Trial Court found the expert's testimony failed to support the assertion that the defendant was grossly negligent. The Court of Appeals, Division III affirmed, holding:

> However, as the trial court found, nothing in Mr. Lewis' testimony supports Mrs. Boyce's assertion that Mr. West was grossly negligent. Mrs. Boyce's allegation, supported by nothing more substantial than argument is insufficient to defeat a motion for summary judgment.

Boyce at 666 (citations omitted).

"Gross negligence" has been analyzed in the *Estate of Davis v. Department of Corrections*, 127 Wn. App. 833, 113 P.3d 487 (2005). Gross negligence was defined as negligence that is substantially and appreciably greater than ordinary negligence. *Id*, at 840. Like ordinary negligence, gross negligence must arise from foreseeability and the hazards out of which the injury arises. *Bader v. State*, 43 Wn. App. 223, 228, 716 P.2d 925 (1986).

Estate of Davis is strikingly similar to this matter. In *Estate of Davis*, the decedent estate and parents brought an action against Stevens County and the State of Washington for decedent's wrongful death. The decedent was killed by a convicted offender who was under community supervision.

In *Estate of Davis*, the offender was arrested for violating the terms of his community custody. While detained, he advised his community correction officer that he was going to commit suicide. The offender was ordered to undergo a psychological anger control evaluation and comply with resulting treatment recommendations and/or requirements. The offender met with a licensed mental health counselor at the Stevens County Counseling Service for purposes of an initial assessment to determine if he would benefit from further

counseling. The initial assessment was that the offender suffered from depression and other non-specific disorders. The counselor was concerned he might be a danger to himself, which the client denied. Along with denying that he was violent or intended harm to anyone, the counselor determined he should be referred to a clinical service program for individual therapy.

Twelve days later, the offender and two other youths, after drinking and smoking marijuana, killed another young man in their company. The offender was convicted of murder and the decedent's estate brought suit alleging, amongst other causes of action, that Stevens County was grossly negligent and acted in bad faith in its mental health screening of the offender, and that this was a proximate cause of decedent Davis' death.

Stevens County moved for summary judgment, arguing it was immune from negligence liability under RCW 71.05.120. The Trial Court granted summary judgment and the Court of Appeals, Division III affirmed.

The plaintiff in *Estate of Davis* presented the opinion of an expert clinical psychologist, who opined to the effect the mental health professional should have contacted the probation officer

directly after the assessment, and that therefore the assessment was incomplete and unreasonable. The expert expressed the opinion that the evaluation was so substandard as to constitute gross negligence. The *Estate of Davis* Court reviewed the evidence and held:

> ...[B]ut this conduct does not rise to the level of gross negligence. As to the estate's claim that the county was negligent for failing to detain Mr. Erickson, the provisions of RCW 71.05.120 apply and bar this claim.

Id. at 841. It was held that the allegation that Stevens County was liable because Mr. Erickson was not detained was barred because the county was immune under RCW 71.05.120.

Here, Appellant claimed that BFCCRU was liable for failing to detain Adam Williams on August 1, 2011 when DMHP Cameron Fordmier evaluated Mr. Williams, and/or is liable for failing to detain Adam Williams on January 25, 2012 when DMHP Kathleen Laws met with Adam Williams. Appellant claimed that the evaluations by DMHP Fordmeir and DMHP Laws were "substandard". These are exactly the same theories and allegations set forth by the plaintiff in *Estate of Davis,* which were determined to be barred by statutory immunity.

Appellant's evidence against BFCCRU was, at best, that their evaluation and management of Adam Williams was "substandard" or negligent (Defendants Benton-Franklin Counties deny any negligence or substandard care). Appellant seeks to create a material issue of fact as to gross negligence essentially by arguing: negligence plus negligence equals gross negligence. But, Plaintiff-Appellant does not submit actual evidence and/or facts that create a material issue of fact that BFCCRU failed to exercise even "slight care." Appellant cannot argue "the Defendant was grossly negligent" without evidentiary support and survive summary judgment of dismissal.

In this case, Appellant's criticisms related to the depth and breadth of the evaluations and the manner in which the recordkeeping was performed. However, this is not a case where the DMHPs failed to conduct an evaluation, failed to respond to the requests of Kadlec Medical Center or Lourdes PACT Team, failed to document the presentation of Mr. Williams when evaluated, or ignored requests made of them. In each BFCCRU contact with Adam Williams, the DMHPs responded to the request that he be seen, interviewed Mr. Williams (in August with his family members, in January his case manager), and arrived at a determination based on their professional

judgment that he was not a danger to himself or others, gravely disabled, or needed the revocation of his LRA for detention purposes that were warranted rather than punitive.

Appellant failed to present evidence that the acts or omissions in this case constituted a level of negligence substantially greater than that of ordinary negligence or a failure to comply with the appropriate standard of care. Again, "gross negligence" is "the failure to exercise slight care." *See,* 6 Washington Practice: Washington Pattern Jury Instructions: Civil 10.07 (6th Ed. 2012). A plaintiff seeking to prove gross negligence must supply "substantial evidence" that the defendant's act or omission represented care reasonably less than the care inherent in ordinary negligence. *Boyce v. West,* 71 Wn. App. 657, 665, 862 P.2d 592 (1993). To meet this burden of proof on summary judgment, the plaintiff must offer something more substantial than mere argument that defendant's breach of care rises to the level of gross negligence. CR 56(e); *Boyce,* 71 Wn. App. at 666. Appellant has failed to offer that evidence.

While experts reviewing the case three years later and retrospectively may offer the opinion that these acts or omissions were "substandard", this opinion is undoubtedly impacted by the horror of

the events that occurred in the killing of Viola Williams. Regardless, no material issue of fact was created in this record that supports the contention that the DMHPs of BFCCRU failed to exercise slight care. *See,* WPI 10.07 (6th Ed. 2012).

In both clinical contacts with Adam Williams, the DMHPs reviewed the available records, interviewed the clinicians involved at Kadlec Hospital and Lourdes PACT Team, interviewed and assessed Adam Williams, and concluded he was not a danger to self or others, confirmed he understood the need to comply with the terms of his LRA, and exercised their clinical judgment not to involuntarily detain him. The Court should not do as Appellant requests, which is to substitute their judgment for that of the licensed professionals involved in the case.

C. EVALUATIONS OF ADAM WILLIAMS BY DMHP CAMERON FORDMEIR ON AUGUST 1, 2011 AND DMHP KATHLEEN LAWS ON JANUARY 25, 2012 MET THE STANDARD OF CARE:

1. AUGUST 1, 2011 EVALUATION BY DMHP CAMERON FORDMEIR

There are numerous inaccuracies in the allegations and contentions of Plaintiff-Appellant in the Declaration of Matthew Layton, M.D., with regard to the criteria DMHP Cameron Fordmeir

utilized in evaluating Adam Williams on August 1, 2011. First, Appellant asserts that DMHP Fordmeir did not contact the PACT Team, and did not review the PACT treatment records. Whether or not DMHP Fordmeir contacted the PACT Team is disputed, but it is undisputed by his deposition testimony that he attempted to contact the PACT Team by telephone. (CP 598-599.)

Secondly, DMHP Fordmeir evaluated Adam Williams at Kadlec Medical Center, not at the Lourdes PACT Team offices or the BFCCRU offices. It is undisputed that DMHP Fordmeir reviewed the available history, inclusive of the medical records at Kadlec for Adam Williams' hospitalization on July 30 and 31, 2011; and on August 1, 2011, that DMHP Fordmeir conferred with the attending providers at Kadlec about Adam Williams. (CP 599.) In fact, it was Kadlec that called BFCCRU to request an evaluation of Adam Williams, as he had been deemed "medically stable", but needed an evaluation by a DMHP to determine if further detainment was indicated pursuant to the criteria in the Involuntary Treatment Act. (CP 593.) Therefore, it is not accurate to claim that DMHP Fordmeir failed to review the medical records prior to visiting with Adam Williams, or that DMHP Fordmeir failed to contact or interview family members, when the evaluation was

conducted in the presence of Adam Williams' father, Steven Williams and was released into the care and supervision of Steven Williams and his wife. (CP 594, 596-597.)

It is undisputed that DMHP Fordmeir reviewed the medical records and contacted the providers at Kadlec Medical Center, attempted to contact the Lourdes PACT Team, interviewed Adam Williams at length, interviewed Steve Williams, father of Adam Williams, and upon completion of these clinical tasks, made the determination not to revoke the LRA, and released Adam Williams to the care of his family with the instruction and understanding that he could be safe, there was a safety net in place, and he would resume treatment with the Lourdes PACT Team.

Moreover, other that the conclusory statement that if "Adam had been revoked, hospitalized and stabilized, his entire course of deterioration would have been altered," Plaintiff-Appellant has not offered one scintilla of evidence that DMHP Fordmeir's failure to revoke Adam Williams' LRA on August 1, 2011, was a proximate cause of Viola Williams' death. (CP 544 at 8c, Appellant's Brief, p. 44.)

Appellant contends that DMHP Fordmeir should have revoked Adam Williams' LRA on August 1, 2011, and returned Mr. Williams to inpatient treatment for an indeterminate period of time, and that miraculously this would have altered the ultimate outcome some six months later. Appellant acknowledges that "Adam's compliance with medication initially improved after his release from Kadlec on August 1, 2011. In mid to late September, however, he began to miss doses again and had missed several doses by October 3, 2011." (CP 159.)

Even assuming, arguendo, that Appellant created a material issue of fact with respect to the allegation of gross negligence on the part of DMHP Fordmeir, Appellant cannot sustain her burden of showing that DMHP Fordmeir's alleged negligence was "a proximate cause" of Viola Williams' death.

It is undisputed that DMHP Fordmeir's contact with Adam Williams was limited to August 1, 2011. It is also undisputed that it was not until January 2012 that Adam Williams' acts resulted in the death of Viola Williams.

To establish "cause in fact" in a negligence suit, there must be substantial evidence that some act or omission of the defendant produced the injury to the plaintiff in a direct, unbroken sequence under

circumstances in which the injury would not have occurred but for the defendant's act or omission. *See, Tiner v. State,* 92 Wn. App. 504, 514, 963 P.2d 215 (1998), *rev. granted,* 137 Wn.2d 1020, 980 P.2d 1282 (1999).

Appellant's own expert, Dr. Layton, in his deposition, testified with respect to the issue of whether or not the failure of DMHP Fordmeir to revoke Adam Williams' LRA on August 31, 2011, was a proximate cause of Viola Williams' death. Dr. Layton testified:

> Q: Okay. He's evaluated and seen in August of 2011 by Cameron Fordmeir. And he doesn't revoke him.
> A: Yes.
> Q: He doesn't – He does not harm himself or others in the ensuing several months; correct?
> A: In the ensuing five months.
> Q: Well, okay.
> A: He was out less than a year.
> Q: What sort of – What would the revocation have been? Would it have been a seven-day hospitalization to stabilize and detoxify him? Would you send him back to DSHS (*sic.*) forever? What are you going to do with him?
> A: Seven days would be fine. You could send him to Lourdes. Because he's probably not taking the Clozaril at that point. So I would have done a short stay stabilization revocation.
> . . .
> Q: Okay. So your criticism – I just want to make sure I understand – of August 1st is that the assessment is sloppy. And you believe at that point Cameron Fordmeir should have revoked Adam Williams' LRA.

A: Yes.
Q: And you can't tell me – And if you can, if I'm misstating, tell me. **You can't tell me what the next – if he had been revoked, what difference it would have made.**
A: **Correct.** (Emphasis added.)

(CP 603.)

Appellant has the burden of proving that DMHP Fordmeir's alleged gross negligence was a proximate cause of Appellant's injuries. As a general rule, expert medical testimony is required on the issue of proximate causation. *McLaughlin v. Cook,* 112 Wn.2d 829, 774 P.2d 1171 (1989). In *McLaughlin*, the court held:

> Further, in a case where medical testimony is required to establish a causal relationship between the liability producing situation and the claimed physical disability resulting from it, the evidence will be considered insufficient to support the trial verdict if it can be said that considering all the medical testimony presented at trial, the jury must resort to speculation or conjecture in determining the causal relationship.

Here, the only expert testimony and evidence Appellant proffered to criticize the evaluation and decision of DMHP Fordmeir with regard to the claimed error of failing to revoke the LRA and hospitalize Adam Williams on August 1, 2011, testified that even if revocation had occurred, the expert could not state what difference that

would have played in the ultimate outcome. Accordingly, Appellant lacked expert medical testimony with respect to the causal relationship between DMHP Fordmeir's acts or omissions and Viola Williams' death. Therefore, the trier of fact would have to resort to guess, speculation, and conjecture to support a claim of a causal relationship. Appellant failed to present any evidence on the issue of causation with respect to the August 1, 2011 evaluation of Adam Williams, and Respondents Benton County and Franklin County were properly granted summary judgment of dismissal as a matter of law on the basis of proximate cause as well.

2. ASSESSMENT BY KATHLEEN LAWS OF ADAM WILLIAMS ON JANUARY 25, 2012:

There is a difference in the perceived purpose and chronology that led Kathleen Laws, DMHP, to contact Adam Williams on January 25, 2012. What is not in dispute, is that initially BFCCRU was contacted by the Lourdes PACT Team to evaluate a Lourdes PACT Team client other than Adam Williams, and a second call was made to BFCCRU requesting a DMHP meet with Adam Williams.

On January 25, 2012, Nurse Aronow saw Adam Williams during an unscheduled medication management appointment. Nurse Aronow

then contacted Kyle Sullivan at BFCCRU requesting someone from BFCCRU talk to Adam Williams about his LRA.

With regard to Adam Williams, DMHP Laws documented in her note:

> The C [client] is a tall 27-yr cauc male who was polite and cooperative. Stream of thought was relatively calm, but underlying paranoia was present. Some tangentiality also noted. The C agreed to not use street drugs anymore and to take meds as prescribed. Ox3. Mood was euthymic/congruent effect. The C agreed he could be safe to both self and others.

(CP 475.) As to Adam Williams' mental status, DMHP Law documented:

> The C is a 27-yr-old cauc male who was in ESH for five years after assaulting a health care worker. He is currently in outpatient services with LCC-PACT Team. The C has reportedly not been taking meds as prescribed and using street drugs, violating LRA conditions. PACT Team's Michelle Aronow requested an eval. The C was cooperative with this writer. Ox3. The C's stream of thought was mostly clear – some tangentiality noted. The C agreed not to use street drugs anymore and to take meds as prescribed. Mood was euthymic with a congruent mood. The C understood that if he violates LRA conditions – he could have LRA revoked. The C said he does not want to return to ESH. Encouraged C to take meds as prescribed and call CRU – prn. The C does not meet ITA criteria at this time. He will follow-up with PACT Team a.m.

(CP 476.)

It is undisputed that on January 25, 2012, DMHP Laws met with Adam Williams' clinical provider, Nurse Aronow, and reviewed and obtained the history of his behavior. Together, Nurse Aronow and Ms. Laws met with Adam Williams, interviewed him, assessed his condition, including mood, affect and presentation, and came to the clinical judgment that, at that point in time, he did not require revocation of his LRA and hospitalization. Further, the acts of Adam Williams in the 24 hours following his visit with DMHP Laws, strongly supported the conclusion that the "leverage" exerted by the Lourdes PACT Team and BFCCRU was effective.

Nurse Aronow summarized her January 25, 2012 encounter with Adam Williams, and at the end stated:

> The patient did call back interestingly enough later today and thanked me for calling "that lady" and having her talk to him, as he knows that we are just trying to help him. I will more than likely see the patient within the next week and continue to monitor him closely in regard to his medications. He needs to come back and get his medication box filled today, and he is aware of this and understands that.

(CP 472.)

On the morning of January 26, 2012, Adam Williams returned to the PACT office, and brought his medication boxes to be filled, which

was done by Nurse Marne Jorgensen. Following that contact, Nurse Aronow contacted DMHP Laws by telephone to tell DMHP Laws that she had spoken with Mr. Williams the prior day after their encounter with Mr. Williams, and that this was a positive conversation. Nurse Aronow documented that female staff continued to be fearful of Adam Williams, and that she did not want Mr. Williams to be alone with female staff. DMHP Laws agreed that was a good plan to have only males be alone with Mr. Williams. Nurse Aronow documented: "I said I would take male staff out with me Monday a.m. and see if he had been taking his medications. She agreed. She said – then if he has not been and you want him revoked – we will revoke him as he has been explained what is in the LRA –." (CP 656.)

Taken in its totality, the Lourdes PACT Team was increasing pressure on Adam Williams to comply with the terms and conditions of his LRA. One of those steps included asking DMHP Laws to meet with Adam Williams on January 25, 2012, when he presented for the unscheduled medication management appointment, to remind him that he had to stay in compliance with the LRA. DMHP Laws did as she was asked, and reminded Mr. Williams of the terms and conditions of his LRA, and documented that Mr. Williams clearly expressed an

understanding of the need to comply. He further evidenced an understanding of the need to comply by calling Nurse Aronow back later on January 25, 2012, and returning the following day, January 26, 2012, to have his medication box refilled.

Lourdes PACT Team never suggested, requested, or demanded that BFCCRU revoke Adam Williams' LRA. Had that request been made, Adam Williams' LRA would have been revoked and he would have been taken into custody. (Appellant's Brief, p. 10; CP 365.) The circumstances of the January 25, 2012 encounter strongly supports DMHP Laws' testimony that she was only asked to "remind" Adam Williams of the need to comply with the terms and conditions of his LRA.

The plan in place between Lourdes PACT Team and BFCCRU was that Adam Williams was reminded of the need to follow the terms and conditions of his LRA, and if he did not comply with medication management over the ensuing 72 hours, then he would be revoked, which Nurse Ms. Aronow clearly documented in her note of January 26, 2012.

The fact that the providers from Lourdes PACT Team were seeing Adam Williams on a regular basis, that DMHP Laws interviewed

Mr. Williams and documented her interview with him, inclusive of his symptoms, mood, condition, and presentation, and that both the Lourdes PACT Team and BFCCRU agreed to a plan of increased monitoring, which may include revocation of the LRA, indicated that the necessary and appropriate steps were followed. Where there is ongoing therapeutic and medical management in place, patient contact on a regular basis, and a plan implemented to address Adam Williams' condition and circumstances up to and including revocation of his LRA, if warranted, there cannot be an issue of fact that all of these acts constituted a failure to exercise "slight" care.

D. DMHP FORDMEIR DID NOT APPLY AN INCORRECT STANDARD IN HIS EVALUATION OF ADAM WILLIAMS:

Appellants assert in their brief that DMHP Cameron Fordmeir in his evaluation of Adam Williams on August 1, 2011 utilized the incorrect statutory criteria in making his determination not to revoke his LRA. Appellants offer no authority that mandates a DMHP utilize or proceed under one statutory criteria versus another.

The Legislature has enacted three statutes that specifically address the detention of persons with mental disorders. RCW 71.05.150 sets forth a criteria for "initial detention" and while

the factors that should be considered by a DMHP are virtually identical to those of RCW 71.05.153 and .340, this statute is self-limiting in its terms and applications, and Respondents submit it does not apply in this case.

However, it bears noting that RCW 71.05.150, like 71.05.153, which Respondents submit is applicable in this case, by its own wording and the use of the phrase "the mental health professional may seek detention" affirms that the statute is discretionary and whether the DMHP seeks detention of a patient lies entirely within his or her clinical and professional judgment.

RCW 71.05.153, (Emergent) (Emergency) Detention of Persons with Mental Disorders – Procedure, provides a virtually identical criteria for detaining an individual. That statute provides, in pertinent part:

> (1) When a Designated Mental Health Professional receives information alleging that a person, as a result of a mental disorder; presents an imminent likelihood of serious harm or is in imminent danger of being gravely disabled, the Designated Mental Health Professional may, after investigation and evaluation of the specific facts alleged and the reliability and credibility of the person or persons providing the information, if any, the Designated Mental Health Professional may take such person, or cause by oral or written

> order such person to be taken into custody in an evaluation and treatment facility for not more than 72 hours as described in RCW 71.05.180.

This statute provides the criteria for emergency detention and mandates that the DMHP investigate and evaluate the specific facts alleged and the reliability and credibility of the person or persons providing, and only then may the DMHP take the person into custody. In DMHP Fordmeir's contact with Adam Williams, he received information regarding Mr. Williams' condition and behavior, he reviewed the available records, he obtained histories from and interviewed care providers and family members, when available, and he personally met with Adam Williams utilizing his clinical expertise to assess Mr. Williams' mood, affect, cognitive state, and orientation. Then, in the exercise of his clinical judgment determined Mr. Williams was not in imminent danger of serious harm to self or others, or gravely disabled. Adam Williams was alert, oriented, understood and acknowledged his circumstances, and agreed to abide by the plan in place for his care and treatment.

DMHP Fordmeir complied with the dictates of RCW 71.05.153, which, by its terms, gives him broad discretion in arriving at a determination whether or not a client needs to be

subjected to emergency detention. Based upon the record before this Court, Appellants have failed to create a material issue of fact as to negligence with respect to this issue, much less that the acts of the DMHP constituted gross negligence or a failure to exercise "slight" care.

Appellant argues the standard that should have been used by DMHP Fordmeir was RCW 71.05.340(3)(b), which provides:

> The hospital or facility designated to provide out-patient treatment shall notify the secretary or Designated Mental Health Professional when a conditionally released person fails to adhere to terms and conditions of his or her conditional release or experiences substantial deterioration in his or her condition and, as a result, presents an increased likelihood of serious harm. The Designated Mental Health Professional or secretary shall order the person apprehended and temporarily detained in an evaluation and treatment facility in or near the county in which he or she is receiving out-patient treatment.

In this case, DMHP Fordmeir's contact with Adam Williams did not involve the hospital or facility designated to provide out-patient treatment requesting that he be detained or that the LRA be revoked. Rather, he was contacted by Kadlec Medical Center in the course of their provision of emergency medical care.

When DMHP Fordmeir evaluated Adam Williams on August 1, 2011 while he had failed to adhere to the terms and conditions of his release, it was the clinical assessment and determination of DMHP Fordmeir that he failed to pose a likelihood of serious harm at the time he was seen.

Respondents Benton County and Franklin County respectfully argue that regardless of which criteria DMHP Fordmeir utilized in arriving at his conclusion on August 1, 2011, Adam Williams could be reasonably released into the care of his father upon the completion of a mental health evaluation.

What Appellants argue in its simplest form is that Adam Williams should have been revoked for violating the terms and conditions of his LRA. As the record clearly reflects in the uncontroverted testimony of DMHP Fordmeir, "it would be rare to revoke somebody if they did not fit the criteria to be in a psychiatric hospital or benefit from being in a psychiatric hospital." (CP 593.)

Clearly, this statement highlights that DMHP Fordmeir was aware of the standards for revocation and after a thorough evaluation, exercised his statutory authority of discretion and chose not to do so.

Our Legislature, courts and mental health advocates have dictated that the goal of the mental health care system in this state is to impose a "Less Restrictive Alternative" on patients to keep them in the general population while receiving appropriate care. Blessed with the benefit of 20/20 hindsight and a result-oriented analysis, Appellants ask this Court to find that there is no discretion under the statutes provided to the DMHPs, and the failure to detain someone on a simply punitive basis for missing a doctor's visit, or willing failing to take medication, or any single violation of the LRA, mandates revocation of the LRA and detention on a purely punitive basis, and that to exercise one's professional judgment and decline to revoke and detain constitutes "gross negligence." This is not the intention of the statutory scheme. The Legislature has seen fit to allow broad discretion with DMHPs before they utilize their authority to limit an individual's personal freedom. RCW 71.05.340(3)(a).

RCW 71.05.340(b) imposes the affirmative duty upon the mental health provider to take certain steps to affirmatively notify the DMHP of the failure of the person to adhere to the terms of their conditional release or LRA, to notify them of substantial deterioration in his or her condition, and/or that the individual presents an increased

likelihood of serious harm. This statute is mandatory in its wording, but only after the initial predicate requirements of notice have been met by the mental health provider "shall" the DMHP order a person apprehended and detained. In short, this statute, in essence, requires that if the mental health provider, in this case Lourdes PACT Team, who had all of the information regarding Adam Williams' condition, requested that a DMHP revoke the LRA, then revocation would have occurred. It is uncontroverted in this case, that if Lourdes PACT Team had made a request for revocation, BFCCRU would have acted upon this request. (CP 354, 362 and 365.)

DMHP Fordmeir acted within the scope of his authority, exercised his clinical and professional judgment in the discretionary manner provided for by RCW 71.05.340(3)(a). The exercise of professional judgment based upon the facts of this case, and the manner in which DMHP Fordmeir evaluated Adam Williams and exercised his judgment, fails to create a material issue of fact as to "gross negligence" or the failure to exercise slight care. Therefore, Benton-Franklin County Crisis Response Unit and its Designated Mental Health Professionals are entitled to immunity under Washington law.

The Trial Court properly found that in fact all Respondents exercised far more than slight care in their management of Adam Williams, and were therefore entitled to the immunity provided by law. This Court should affirm the Trial Court's decision.

V. AUTHORITIES AND ARGUMENT ON THE TRIAL COURT PROPERLY GRANTING, IN PART, DEFENDANTS BENTON AND FRANKLIN COUNTIES' MOTION TO STRIKE PORTIONS OF DR. LAYTON'S DECLARATION:

In this case, pursuant to RCW 71.05.120(1), a DMHP acting in circumstances in which Cameron Fordmeir and Kathleen Laws interacted with Adam Williams is provided statutory immunity from common negligence claims and can only be liable for acts or omissions that constitute bad faith or "gross negligence."

The Declaration of Dr. Layton was properly stricken, as he was offering a legal opinion regarding the application of the law to a factual question: whether or not the alleged acts or omissions constituted gross negligence. It is well established that legal opinions expressed in a witness' affidavit or declaration will normally be disregarded. *Molsness v. City of Walla Walla,* 84 Wn. App. 393, 928 P.2d 1108 (Div. III 1996); *King County Fire Protection Districts*

No. 16, No. 36 and No. 40 v. Housing Authority of King County, 123 Wn.2d 819, 872 P.2d 516 (1994).

Further, the Trial Court in this case properly disregarded opinions on pure questions of law, as well as opinions that simply amount to a legal conclusion that follows from the facts presented.

In *Tortes v. King County*, 119 Wn. App. 1, 84 P.3d 252 (Div. I 2003), which was a personal injury action arising out of a bus accident, the trial court properly refused to consider an affidavit from an expert, stating that under Principles of Tort Law, the bus company failed to take sufficient steps to protect the safety of passengers, including the plaintiff. The Court of Appeals stated the expert's statements:

> ... are conclusions of law, which offer legal opinions on the ultimate legal issue, and therefore are not proper testimony under ER 702 and 704. Although testimony by an expert embracing the ultimate issue may be allowed, an affidavit must be disregarded to the extent that it contains pure legal conclusions.

Tortes at 13. Further, an affidavit addressing an issue of law, such as an affidavit describing the legal effect of a rule or regulation, or simply telling the court that a party was negligent, will not preclude summary judgment.

Issues of law are resolved by the court, and not the trier of fact. *King County Fire Protection Districts No. 16, No. 36 and No. 40, supra; see also, Brown v. Crescent Stores, Inc.*, 54 Wn. App. 861, 776 P.2d 705 (Div. III 1989).

Appellants here attempted to defeat summary judgment by presenting new and different testimony than that given under oath by Dr. Layton on August 29, 2014. A party cannot create an issue of fact and prevent summary judgment simply by offering two different versions of the story by the same person. *McCormick v. Lake Washington School District*, 99 Wn. App. 107, 992 P.2d 511, 141 Ed. Law Rep. 352 (Div. I 1999); *Selvig v. Caryl*, 97 Wn. App. 220, 983 P.2d 1141 (Div. I 1999).

The Trial Court properly struck and disregarded the attending portions of Dr. Layton's deposition, and the Defendants respectfully request that the Court of Appeals affirm this ruling.

VI. CONCLUSION:

Plaintiff/Appellant claims that Benton-Franklin County Crisis Response Unit and their Designated Mental Health Professionals were grossly negligent, but failed to raise material issues of fact sufficient

to sustain their burden of proof that these Defendants-Respondents failed to exercise even "slight care" in their limited contact with Adam Williams.

For the reasons cited above, the Trial Court properly granted dismissal of all claims of gross negligence asserted against Benton-Franklin Counties via the Benton and Franklin County Crisis Response Unit. Therefore, the ruling of the Trial Court should be affirmed.

RESPECTFULLY SUBMITTED this 16th day of October, 2015.

THORNER, KENNEDY & GANO P.S.

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CERTIFICATE OF SERVICE

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

On October 16, 2015, I sent via UPS Overnight Mail delivery a properly completed and addressed package the original and one copy of the foregoing document to the following:

Ms. Renee S. Townsley
Clerk/Administrator
The Court of Appeals, Division III
500 North Cedar Street
Spokane, WA 99201-1905

On October 16, 2015, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

Ms. Rebecca J. Roe Ms. Anne Kysar Schroeter, Goldmark & Bender 810 Third Avenue, Suite 500 Seattle, WA 98104	☒ First Class U.S. Mail ☒ E-Mail □ Hand Delivery/AMS □ UPS Next Day Air
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DATED at Yakima, Washington, this 16th day of October, 2015.

Lori J. Sauvé

LORI J. SAUVÉ, Legal Assistant
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