

NO. 37167-7-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

CRAIG STOVER, APPELLANT

v.

**PIERCE COUNTYCORRECTIONS HEALTH
CLINIC, ET AL., RESPONDENTS**

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 05-2-11640-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly dismiss plaintiff's 42 USC §1983 claim where plaintiff failed to make a prima facie case of a Constitutional violation? (Pertains to Appellant's Assignment of Error #1.)
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B. STATEMENT OF THE CASE.

1. Procedure

On September 9, 2005, CRAIG STOVER ("plaintiff"), filed a complaint for damages against Pierce County Corrections Health Clinic and Pierce County ("defendants"). CP 1-6. Defendants filed their answer on October 12, 2005. CP 7-11.

After some discovery, plaintiff filed a motion for summary judgment, memorandum of authorities, and other supporting documentation on July 10, 2006. CP 71-72; 66-70; 73-77. On July 27, 2006, defendants filed their response to plaintiff's motion and filed their own cross-motion and memorandum for summary judgment, along with supporting documentation. CP 98-109; 80-97; 112-21.

The trial court heard oral argument on the motions on August 25, 2006. 1RP 1-43¹ The court denied plaintiff's motion for summary

¹ There were two summary judgment motions in this case. The verbatim report of proceedings consist of four volumes that are not numbered consecutively. They shall be

judgment and granted defendant's motion for summary judgment in part. 2RP 1-15; CP 903-04. In so doing, the court dismissed plaintiff's causes of action for (1) res ipsa loquitur, (2) Eighth Amendment Constitutional violation, and (3) outrage. *Id.*; 2RP 3-5, 14. The causes of action remaining after the first summary judgment motion were for negligence, medical malpractice, and failure to adequately and properly train employees. *Id.*; CP 3-5 (Complaint for Damages).

On November 9, 2007, after additional discovery, the trial court heard cross summary judgment motions for the second time. 3RP 3-35. The court granted defendants second summary judgment motion and dismissed plaintiff's medical malpractice claim and plaintiff's claim that defendants' failed to train/supervise its employees. 3RP 34; CP 809-10. The court requested further argument and briefing regarding any common law negligence claims which may have survived the prior rulings. CP 810.

On November 30, 2007, the court first heard the argument of counsel on plaintiff's motion for reconsideration, which the court denied. 4RP 5-15. The court then heard argument as to whether there remained a common law negligence claim in light of the prior rulings on summary

cited as follows: **1RP** is the argument of counsel on the motions for summary judgment from 8/25/06; **2RP** is the trial court's oral ruling on the 8/25/06 motions; **3RP** is the 11/9/07 summary judgment hearing; and **4RP** is the 11/30/07 follow-up on the second summary judgment hearing.

judgment. 4RP 15-36. Plaintiff was unable to support a common law negligence claim. After reviewing all the evidence and legal memoranda submitted in the case, the court dismissed all claims against defendants with prejudice. 4RP 37-38; CP 895-96.

Plaintiff filed a timely notice of appeal on December 26, 2007. CP 897-908.

2. Facts

On March 11, 2004, at approximately 1:53 PM, Puyallup police officers contacted plaintiff regarding outstanding warrants for his arrest for failure to appear on the charges of driving under the influence, and two counts of hit and run. CP 126-28; 874; 877. Puyallup police confirmed the warrants for plaintiff's arrest at 2:10 PM, and he was taken into custody. CP 875; 877. Tacoma police officers responded to the scene in Puyallup, arriving at 2:35 PM, and took custody of plaintiff for booking into the Pierce County Jail ("jail") on the warrants. CP 116-17; 164. The officer noted in his report that plaintiff "appeared to have been drinking heavily." CP 116. Tacoma officers arrived at the jail with plaintiff at approximately 2:53 PM. CP 164. Computer generated records from the jail show that plaintiff was booked at 15:19 hours (3:19 PM) that same day. CP 134.

During the booking process, plaintiff advised jail staff that he had a seizure condition. CP 142. Booking Nurse Becky Hay, RN, was called in and spoke to plaintiff at 3:00 PM. CP 142. Plaintiff stated he had a

prescription for medication and that his current pharmacy was at the Safeway store on Meridian in Puyallup. CP 142. Nurse Hay filled out the Verification of Medications form on March 11, 2004, but was not able to verify the medications at that time. CP 153. The actual verification was made the following day, March 12, 2004, by Nurse Amos. CP 154. According to jail records, Safeway verified that plaintiff had a prescription for Tegretol. *Id.* But that prescription had not been filled since February 23, 2003, more than a year prior to plaintiff's booking. CP 238-39 (Pl's decl.).

Nurse Hay had plaintiff sign a Consent for Release of Information. CP 145. She then faxed the release to plaintiff's physician, Dr. Brooks, and to St. Joseph Hospital on March 11, 2004, at 3:38 PM and 3:45 PM, respectively. CP 145, 147.

Inmates in the jail are not given medication without verification. CP 113 (Balderrama decl.). Tegretol², an anti-seizure medication, can have potential side effects and proper dosage is critical. *Id.* Plaintiff's own Dr. testified in his deposition that providing Tegretol or related medications without the correct dosage could be life-threatening. CP 549-50 (Brooks dep.); CP 157. Therefore, the Booking Nurse is to advise the physician of a recently booked inmate's medication needs so that they can be seen the next day or whenever medically appropriate. *Id.* This request

² Tegretol is a brand name for carbamazepine. CP 156.

to be seen, or “list” to be seen, by a physician or physician’s assistant does not become part of the patient/inmate’s file. CP 724 (Scott decl.).

If the Booking Nurse determines, in her sole discretion, that a prospective inmate is stable, she may accept him into the facility and place him in any housing area of the jail. CP 722-23 (Scott decl.). She need not consult with a physician. CP 708-09 (Balderrama dep.). Accordingly, plaintiff was booked into the jail at 3:19 PM. CP 134.

The next morning, March 12, 2004, jail staff escorted plaintiff and other inmates to Tacoma Municipal Court. CP 568 (Hernandez dep.). Plaintiff was in a room, which is used to hold male inmates, at the back of the courtroom. CP 569. The door to the room has glass, so that the corrections officers can see into the room to monitor the inmates. *Id.* On that particular day, Corrections Officer (“CO”) Hector Hernandez was assigned to the back of the courtroom to monitor the inmates. *Id.* At around 12:35 PM, CO Hernandez was sitting about five to seven feet from where plaintiff was held when he heard a thump. *Id.*; CP 77. He also heard inmates yelling, “Officer! Officer!” *Id.* CO Hernandez immediately looked in the room, and saw plaintiff lying on the floor. *Id.* Plaintiff had blood on his face. *Id.* CO Hernandez immediately called for emergency 9-1-1 response and for additional officers. *Id.* Plaintiff was shaking and attempting to stand up. *Id.* CO Hernandez then held plaintiff down to keep him from hurting himself further and tried to make him comfortable, which is what the CO’s are trained to do in the event of a

seizure. *Id.* Medics responded to the location and transported plaintiff to the emergency room at St. Joseph Hospital. *Id.*

During the deposition of CO Hernandez, plaintiff's counsel repeatedly asked him if plaintiff was handcuffed at the time of the seizure:

Q: Okay. Now, do you recall whether he was in handcuffs or is that just something that's –

A: No, he was not in handcuffs, to the best of my recollection, sir.

Q: But I take it he may have been?

A: I don't believe he was, sir. I don't – I don't think he was. I'm pretty sure that – I'm almost 100% sure he was not handcuffed on that day, sir.

...

Q: So as we sit here today, you're not able to say whether he was in handcuffs or not . . . at the time of the seizure?

A: I don't believe to the best of my recollection that he was in handcuffs whatsoever, sir.

Q: But you don't have a clear picture of that, I take it?

A: I can't say 100%, no, sir.

CP 569.³

The medical reports from plaintiff's emergency room treatment at

³ Dr. Balderrama testified in his declaration that based on his medical training and experience, a person having a grand mal seizure is not able to control their body making it nearly impossible for them to "break their fall" during the seizure. CP 113. Medical records show plaintiff experienced a loss of consciousness during his 3/12/04 seizure. CP 182.

St. Joseph's Hospital on March 12, 2004, contain the treating physician's impression: (1) seizure, (2) facial contusion, (3) one centimeter lip laceration. CP 180. The treating physician also noted that plaintiff had not taken his Dilantin for one month preceding his seizure and that he had not taken his Tegretol for three weeks preceding the seizure. *Id.*; CP 182. X-rays ruled out possibility that plaintiff sustained any fracture when he "fell out of [the] chair." RP 182, 191. His small laceration was sutured. CP 181.

The Emergency Physician Record noted that plaintiff lost consciousness, had generalized shaking all over, and urinary incontinence. CP 182. There was no bowel incontinence. *Id.* It was again noted that plaintiff had not taken his medication in three weeks. *Id.* The physician concluded that the "preceding symptoms / cause of seizure" was "missed recent doses of seizure meds." *Id.*

In order to be effective in controlling seizures, a patient must maintain a certain blood level of Tegretol at all times. CP 705-06; 798 (Balderrama dep.). But even if a patient fully complies with their medication regimen, it is still possible for them to have a seizure. *Id.* In this particular case, it is highly probable that plaintiff had no residual effects of the Tegretol due to the fact that he had not taken his medication for three weeks prior to his booking into the jail. CP 113 (Balderrama decl.). Even if jail staff had given plaintiff medication at booking, it would not have precluded the seizure. CP 599; 740-41 (Balderrama decl.).

Plaintiff filed declarations stating that he told jail staff he was having “petit mals” [petit mal seizures]. CP 78-79, 233-34, 238-42 (Pl.’s decls.). He asserts that jail staff therefore knew he was going to have a seizure. *Id.* However, Dr. Balderrama testified in his deposition that petit mal seizures never precede a grand mal seizure. CP 706. Dr. Balderrama and Dr. Brooks agreed that a seizure could be preceded by certain symptoms or signals, called “auras.” CP 715-18 (Brooks dep.); CP 598-99 (Balderrama dep.). It is extremely rare for a seizure to follow auras by hours or days. They normally have the auras quite close to the time of onset of the seizure. CP 58-59 (Balderrama dep.). Dr. Brooks’ experience dictates that auras occur pre-seizure within only minutes or seconds of the seizure. CP 716-17 (Brooks dep.). Seizures are not life-threatening. CP 717-18 (Brooks dep.); CP 797 (Balderrama dep.).

Dr. Brooks testified in his deposition that drinking alcohol can diminish the effectiveness of the anti-seizure medication and/or lower the seizure threshold. CP 547-48. On a couple of occasions, plaintiff went to Dr. Brooks office and reported he had not had alcohol for quite some time, but Dr. Brooks could smell alcohol on his breath. CP 546. In 2001, Dr. Brooks specifically told plaintiff he would no longer prescribe him medication if he did not stop drinking. CP 546-47. He again addressed the issue with plaintiff in 2003, and again in 2004: “Stop all alcohol.” CP 547.

Plaintiff testified in his deposition that he never missed a dosage of

his medication, with the exception of two weeks in 1998: "I've never missed it. . . . I always take it." CP 535-36 (Pl.'s dep.). He acknowledged that if he does not take it: "I have a seizure." CP 536.

As stated above, plaintiff's medical records from March 12, 2004, indicate that plaintiff had not taken his Dilantin for one month preceding his seizure at the jail and that he had not taken his Tegretol for three weeks preceding the seizure. CP 180; 182. Additionally, one of the arresting officers observed that plaintiff was "heavily intoxicated" on March 11, 2004. CP 115-16. Plaintiff admitted to having one drink that day. CP 537 (Pl.'s dep.).

Other medical records show various trips to the emergency room where plaintiff reports a recent seizure, usually accompanied by a fall and injuries: one of these occurred just two months before his incarceration, and another less than five months after his release from jail. In many of these instances, plaintiff admits to not taking his prescribed medication and/or drinking alcohol.

Medical records:

June 15, 1995: Plaintiff went to the Emergency Department at St. Joseph Medical Center complaining of a seizure the night before. CP 211-21. He reported he lost consciousness while watching TV and awoke on the floor. CP 213. He told the doctor he has had four other events beginning three months prior when he passed out without warning and awoke on the floor. *Id.* He admitted to drinking one beer the night before. *Id.* He also complained of pain in his right buttock radiating down to his right ankle. *Id.* He was diagnosed with a seizure

disorder, prescribed Dilantin, and told not to drive. CP 214. The doctor also prescribed Vicodin for his sciatica. *Id.*

January 28, 1998: Plaintiff went to the Emergency Department at St. Joseph's complaining of having a seizure at work. CP 194-210. Plaintiff admitted to drinking two to three beers a day. CP 196. When pressed, he admitted these were 22 ounce beers, which would be equivalent to **four to six regular sized beers**. *Id.* Plaintiff informed the attending physician about his 1995 seizure and that he had been on **Dilantin**, but that he **stopped taking it about 3 years ago**. *Id.* The physician's impression was: "Seizure, probably secondary to ethanol abuse." CP 197. Plaintiff was urged to stop drinking. *Id.*

August 20, 1998: Plaintiff was taken to the Emergency Department at Tacoma General Hospital. CP 553-56. Plaintiff was the unrestrained driver of a vehicle that totaled five other cars and flipped over. CP 553. Medical staff observed a strong odor of alcohol on plaintiff's breath. *Id.* Plaintiff reported that he was on Tegretol and blood tests revealed a therapeutic level of 8.4.⁴ CP 554. The blood work also showed plaintiff had a **.18 blood alcohol level**, over twice the legal limit. CP 554. A urine test was positive for cocaine, amphetamines, THC, opiates, and anti-depressants. *Id.*; CP 556. Out of nine drugs of abuse screened for, plaintiff was positive for six. CP 556. Plaintiff was given Demerol and Phenergan as he continued to complain about pain in his ribs. *Id.* The physician noted that plaintiff stated "that he allegedly had a seizure which prompted this motor vehicle accident." *Id.* Plaintiff was discharged from the hospital in the custody of Tacoma Police. CP 555.

April 21, 2001: Plaintiff went to the Emergency Room at Good Samaritan Hospital complaining of body

⁴ Dr. Brooks testified in his deposition that the therapeutic range for Tegretol is 4 to 10. CP 549.

aches from a seizure the day before. CP 758-74. Plaintiff reported he fell to the ground and had pain in wrist, knees, and shoulder. CP 759. His chemistry panel was normal. *Id.* His Tegretol level was 12.6, which is toxic. CP 760; 549. Plaintiff was given Percocet for his multiple contusions and discharged in stable condition. CP 759.

June 21, 2001: Plaintiff went to the Emergency Room at Good Samaritan Hospital stating that he had three seizures in the last three weeks. CP 557-58. Plaintiff reported he had a seizure at home that night at around 9:00 PM, during which he fell and broke his tooth and injured his knee. CP 557. He was requesting pain medication. *Id.* Plaintiff said his last alcohol was that morning. *Id.* The physician smelled alcohol on this breath. *Id.* The toxicology report showed a Tegretol level of 4.9. *Id.* The toxicology report also showed a **blood alcohol level of .15**. CP 558. Plaintiff kept complaining “bitterly” about pain to his tooth and requested a Demerol shot. *Id.* Instead, he was given Vicodin tablets. *Id.*

October 2, 2002: Plaintiff went to the Emergency Room at Good Samaritan Hospital complaining of vomiting and diarrhea for several days. CP 559-60. Plaintiff was taking Vicodin and Tegretol at the time. CP 559. The **physician noted alcohol on plaintiff’s breath**. *Id.* When confronted, plaintiff admitted to two beers the night before. *Id.* Plaintiff claimed he lost 30 pounds over the last week which the physician described as “unlikely.” *Id.* Plaintiff was diagnosed with acute gastritis. *Id.* **Lab tests were ordered and the results were consistent with alcohol use**. *Id.* Plaintiff was given Vicodin for stomach pain and discharged. *Id.*

March 24, 2003: Plaintiff went to the Emergency Room at Good Samaritan Hospital. CP 775-84. Plaintiff reported he had a “massive seizure” earlier that morning and he was afraid he broke his neck. CP 778. He said he hit his head on the coffee table and hurt his knees. *Id.* X-rays showed no evidence of fracture. *Id.* Plaintiff’s Tegretol level was 9.1, which is within the therapeutic

range. *Id.* No pain medications were prescribed for plaintiff per the attending physician's telephone conversation with Dr. Brooks who advised plaintiff is on a pain medication contract with him and is only allowed a certain amount of pain pills. *Id.*

January 11, 2004: Just two months before his arrest herein, plaintiff went to the Emergency Department at Good Samaritan Hospital complaining that he had a seizure the night before and fell onto coffee table and injured his shoulder. CP 785, 787. The nursing record reflects that **plaintiff had not taken his medication for seizures for two months.** CP 787. Plaintiff was given a sling for his shoulder and Percocet for the pain. CP 789.

May 16, 2004: Two months after his arrest herein, Puyallup Fire and Rescue transported plaintiff to St. Clare Hospital Emergency Room. CP 561-62. Plaintiff reported to Fire and Rescue personnel that he had had three seizures that day. CP 562. He also said **he had not taken his medication for two months.** *Id.*

August 16, 2004: Five months after his arrest herein, plaintiff went to Good Samaritan Hospital Emergency Department complaining of facial pain after a seizure (he hit his head on a door frame). CP 563-65. Plaintiff had a laceration on the right side of his forehead to his brow, which required sutures. *Id.* Plaintiff smelled of alcohol. *Id.* Lab tests revealed a **blood alcohol level of .20** (2 ½ times the legal limit) and a toxic Tegretol level of 16.6. *Id.*

Dr. Balderrama, the Medical Director of the jail, is a medical doctor, duly certified and licensed to practice medicine in the State of Washington. CP 740-41 (Balderrama decl.). He provided evidence in the form of a deposition and declarations. Per Dr. Balderrama, the jail clinic is operated according to accepted industry guidelines and policies. *Id.* At

the time of booking into the jail, the Booking Nurse makes the clinical assessment of the inmate. CP 708-09. If the nurse determines the clinical assessment is adequate and the patient is stable, the nurse need not contact the jail doctor. *Id.* The inmate may then be placed anywhere in the jail. *Id.*

Plaintiff did not retain a medical expert. He did retain a Mr. Ronald Hyland, a retired police chief from Sumner. CP 266-67 (Hyland decl.). In his handwritten declaration to the court, Mr. Hyland stated he was in charge of the ten-man Sumner jail for 27 years. *Id.* Mr. Hyland retired in 1995 and has not testified in court since. *Id.* Mr. Hyland has never testified in court as an expert witness in any capacity. CP 941 (Hyland dep.). In his deposition, he admitted he had not reviewed the manuals pertaining to the Pierce County Jail since before 1980. CP 940-41 (Hyland dep.) He further admitted he is not familiar with the manuals for the Pierce County Jail, the current classification of inmates, current statutory/administrative codes applicable to the jail, or even current industry standards. *Id.* He ultimately stated that he did not believe he was qualified to opine on the current requirements and circumstances of a correctional facility. CP 493. He further stated he could **not** render an opinion as to whether or not plaintiff's seizures had anything to do with the process used to book him in 2004. *Id.*

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DISMISSED

PLAINTIFF'S 42 U.S.C. §1983 CLAIM BECAUSE
PLAINTIFF FAILED TO MAKE A PRIMA FACIE CASE
OF A CONSTITUTIONAL VIOLATION.

Summary judgment should be granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." CR 56(c). The trial court properly granted summary judgment dismissal of plaintiff's 42 U.S.C. §1983 claim against the jail and Pierce County. An appellate court reviews a trial court's ruling on summary judgment de novo. *York v. Wahkiakum School District*, 163 Wn.2d 297, 302; 178 P.3d 995 (2008) (citing *Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000)). The appellate court construes the facts, and the inferences from the facts, in a light most favorable to the nonmoving party. *Id.* (citing *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998)).

The Federal Civil Rights Act, 42 U.S.C. § 1983, provides a remedy for violations of a person's constitutionally protected rights by any person acting under color of state law. *Crisman v. Pierce County Fire Prot. Dist. No. 21*, 115 Wn. App. 16, 25, 60 P.3d 652 (2002). While municipalities, such as Pierce County, are 'persons' subject to damages under §1983, a municipality cannot be held liable on a theory of respondeat superior. *Baldwin v. City of Seattle*, 55 Wn.App. 241, 248, 776 P.2d 1377 (1989).

Generally, to state a cause of action, a plaintiff must allege that (1) the defendant acted under color of state law, and; (2) the defendant's conduct deprived the plaintiff of rights protected by the Constitution or laws of the United States. *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 11, 829 P.2d 765 (1992).

To establish a §1983 claim against a municipality, a plaintiff must: (1) identify a specific policy or custom; (2) demonstrate that the policy was sanctioned by the official or officials responsible for making policy in that area of the municipality's business; (3) demonstrate a constitutional deprivation; and (4) establish a causal connection between the custom or policy and the constitutional deprivation. *Baldwin* at 248. Lack of proof on any of the above elements requires dismissal of the action. *Id.*

Deliberate indifference to serious medical needs of prisoners (element 3 above) constitutes the "unnecessary and wanton infliction of pain," which is proscribed by the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)(*citations omitted*). This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs, or by prison guards in intentionally denying or delaying access to medical, or intentionally interfering with the treatment once prescribed. *Id.* at 104-05. *See, e.g., Williams v. Vincent*, 508 F. 2d 541 (2nd Cir, 1974)(doctor's choosing the "easier and less

efficacious treatment" of throwing away the prisoner's ear and stitching the stump may be attributable to "deliberate indifference... rather than an exercise of professional judgment"); *Thomas v. Pate*, 493 F. 2d 151, 158 (7th Cir. 1974), *cert. denied sub nom.*; *Thomas v. Cannon*, 419 U.S. 879 (1974) (injection of penicillin with knowledge that prisoner was allergic, and refusal of doctor to treat allergic reaction); *Jones v. Lockhart*, 484 F. 2d 1192 (8th Cir. 1973) (refusal of paramedic to provide treatment); *Martinez v. Mancusi*, 443 F. 2d 921 (2nd Cir. 1970), *cert. denied*, 401 U.S. 983 (1971) (prison physician refuses to administer the prescribed pain killer and renders leg surgery unsuccessful by requiring prisoner to stand despite contrary instructions of surgeon). To constitute a violation of the cruel and unusual punishments clause, a prison official must have a "sufficiently culpable mind." *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L.Ed.2d 811, (1994) [citations omitted; emphasis added]. Inadvertent failure to provide adequate medical care does not amount to deliberate indifference. *Estelle v. Gamble*, 429 U.S. at 105-06.

Plaintiff fails to provide evidence that meets the elements of his claim. First, he does not point to a specific policy or custom. Second, he fails to show deliberate indifference by the jail, which is the basis for the constitutional deprivation. Third, he fails to show the causal connection between the county's policy and plaintiff's injury. At most, in his

appellate brief, plaintiff cites case law defining ‘deliberate indifference’ regarding the serious medical needs of prisoners, but fails to provide this Court with any analysis. Brief of Appellant (“BOA”) at 9. In fact, Dr. Brooks testified that a seizure condition is **not** life threatening and that “having a routine seizure ... doesn’t affect anyone.” CP 717-18 (Brooks dep.).

Plaintiff has not shown that he faced the risk of a sufficiently **serious** injury and that defendants **knew** of and were deliberately indifferent to that risk. The record indicates that jail staff made a good faith effort to investigate plaintiff’s concerns. They immediately attempted to verify his prescription for his medication, but did not get the actual verification until the following day. CP 153-54. They also immediately attempted to contact plaintiff’s own physician, Dr. Brooks, and St. Joseph Hospital regarding his medical condition. CP 145, 147. It was reasonable to seek this information prior to dispensing medication where the proper dosage is critical. CP 113 (Balderrama decl.); CP 549-50 (Brooks dep.); CP 157. Plaintiff cannot show deliberate indifference on this record.

Plaintiff relies on *Shea v. City of Spokane*, 17 Wn.App. 236, 562 P.2d 264 (1977), however *Shea* is inapposite. First, the action in *Shea* was brought on negligence and malpractice claims, not a 42 U.S.C. §1983

claim. *Id.* at 240, 245. Further, the issues involved the liability of an independent contractor and jury instructions, neither of which are issues in the case at bar. *Id.* at 237-38. The trial court properly dismissed plaintiff's Eighth Amendment cause of action. Plaintiff's claim on appeal must fail.

2. THIS COURT SHOULD NOT ADDRESS PLAINTIFF'S ASSIGNMENTS OF ERROR #3 AND #4 BECAUSE PLAINTIFF FAILS TO PROVIDE THIS COURT WITH CITATIONS TO LEGAL AUTHORITY. A REVIEW ON THE MERITS, IF WARRANTED, SHOWS THAT THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S NEGLIGENCE AND MEDICAL MALPRACTICE CLAIMS BECAUSE THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AND DEFENDANTS WERE ENTITLED TO DISMISSAL AS A MATTER OF LAW.

a. This Court should not address the merits of claims that are not supported by legal authority and analysis.

Plaintiff's treatment of this assignment of error is deficient because it is not supported by legal argument and authority. RAP 10.3. The Rules on Appeal provide:

RULE 10.3 CONTENT OF BRIEF

Argument. The **argument** in support of the issues presented for review, together with **citations to legal authority** and references to relevant parts of the record...

RAP 10.3(a)(6) [emphasis added].

If a party fails to support assignments of error with arguments and

authority specific to their legal challenge, they will not be considered on appeal. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 795 P.2d 1143 (1990); *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 46, 785 P.2d 815 (1990).

Similarly, this Court should not consider facts not supported by citations to the record. RAP 10.3 further provides:

(5) *Statement of the Case*. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record **must** be included for **each** factual statement.

RAP 10.3(a)(5) [emphasis added].

Although plaintiff designated over 900 pages of clerk's papers, he fails to provide citations to these documents in the majority of factual statements contained in his brief. BOA 3-24. For example, on page 4, of Appellant's Brief (Statement of the Case), there are 16 sentences containing various factual assertions. BOA at 4. Only 4 of those contain citations to the record. *Id.*

Additionally, some of the sparse references to the record in Appellant's Brief do not support the fact for which they are cited. For example, on page 4, plaintiff asserts: "One of the records of the Defendant clearly shows that this conversation with Safeway occurred. (CP 626)" BOA at 4 [emphasis added.]. Clerk's Paper 626 is a document from the

Pierce County Jail, which is attached to Plaintiff's Motion for Summary Judgment, filed on October 12, 2007. This document does not reflect that any conversation took place with Safeway. CP 626. The document has a blank for "Current Pharmacy," which is filled in with "Safeway PUYALLUP MERIDIAN." *Id.* There is no evidence of any conversation, let alone the contents of a conversation. *Id.* This is just one example of an inaccurate citation to the record.

This Court should not consider any factual statements in Appellant's Brief, whether in the Statement of the Case or Argument section, that do not contain an a reference to the record.

As demonstrated above, plaintiff merely recites facts, sometimes inaccurately, and provides no legal authority to support his position. BOA at 11-20. Therefore this Court should not consider this issue on appeal. In the unlikely event this Court decides to review these issues, defendants respond accordingly respond on the merits below.

- b. The trial court properly dismissed plaintiff's claims because there is no evidence to prove that defendants' actions (1) breached a duty, (2) breached a standard of care, or (3) are the proximate cause of plaintiff's injuries.

Civil Rule 56 provides that summary judgment shall be granted if the pleadings, declarations, depositions, interrogatories, and other documents on file show that there is no genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law.
CR 56(c).

On a motion for summary judgment, the moving party bears the initial burden of showing the absence of a material issue of fact. *Howell v. Spokane*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991)(citing *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989)). A defendant can meet this burden one of two ways. *Guile v. Ballard Community Hosp.*, 70 Wn.App.18, 21, 851 P.2d 689, rev denied, 122 Wn.2d 1010 (1993); *Hash v. Children's Orthopedic Hosp.*, 110 Wn.2d 912, 916, 757 P.2d 507 (1988). First, the defendant can set forth its version of the facts and allege that there is no material issue as to those facts. *Hash* at 916. In the alternative, the defendant can meet its burden by showing that there is an absence of evidence to support the plaintiff's case. *Guile* at 21; *Howell* at 624 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

Under the latter method, the defendant is not required to support its motion with affidavits or other materials disproving the plaintiff's case. *Guile* at 22. The defendant need only "identify those portions of the record, together with the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact." *Id.*

After the defendant makes its required showing, the burden then

shifts to the plaintiff:

If, at this point, the plaintiff [as nonmoving party] fails to make a showing sufficient to establish the existence of an element essential to [plaintiff's] case, and on which [plaintiff] will bear the burden of proof at trial, then the trial court should grant the motion. ... In such a situation, there can be no genuine issue of material fact, since **a complete failure of proof concerning an essential element of the [plaintiff's] case necessarily renders all other facts immaterial.**

Hiatt v. Walker Chevrolet, 120 Wn.2d 57, 66, 837 P.2d 618 (1992)

(quotations and citations omitted; emphasis added). Consequently, the plaintiff “must do more than express an opinion or make conclusory statements”; the plaintiff must set forth specific and material facts to support each element of his prima facie case. *Id.* Further, the plaintiff cannot rely on speculation. *Lynn v. Labor Ready, Inc.*, 136 Wn.App. 295, 306, 151 P.3d 201 (2006). Like the trial court, the appellate court will consider only admissible evidence in determining whether summary judgment was proper. *Id.* The appellate court reviews whether a statement was inadmissible hearsay de novo. *Id.*

To sustain a negligence claim, the plaintiff must prove the following elements:

- (1) The existence of a duty;
- (2) Breach of that duty;
- (3) Resulting injury; and
- (4) Proximate cause.

Lynn at 306 (citing *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999)).

To sustain a medical malpractice claim, the plaintiff must prove the following elements:

- (1) The defendant failed to exercise that degree of care, skill, and learning expected of a **reasonably prudent** health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances; and
- (2) This failure was a **proximate cause** of the plaintiff's injury.

RCW 7.70.040; RCW 7.70.030(1) [emphasis added].

Medical facts should most always be proven by expert testimony.

On this topic, the Washington Supreme Court has stated:

In general, expert testimony is required when an essential element in the case is best established by an opinion which is beyond the expertise of a layperson. Medical facts in particular must be proven by expert testimony unless they are "observable by [a layperson's] senses and describable without medical training". Thus, expert testimony will generally be necessary to establish the **standard of care** and most aspects of **causation**.

Harris v. Groth, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (citations and footnotes omitted; emphasis added).

Plaintiff argued below that defendants were negligent in two areas. First, for their failure to immediately provide plaintiff with medication for his seizure condition, and secondly for placing plaintiff in handcuffs the

following morning while awaiting a court appearance in Tacoma Municipal Court. 1RP 21-29; CP 2-3. Plaintiff's counsel stated:

...[W]e have two primary issues. One is the issue of the **medication** and the other the issue of the **restraints** used when he was transported to the Pierce County - - to the Tacoma Municipal Court holding tank.

1RP 21 [Emphasis added.]⁵

With regard to the medication issue⁶, plaintiff offered no opinion from its own expert, from Dr. Brooks, plaintiff's primary physician, or from Dr. Balderrama, that a reasonably prudent physician would have immediately prescribed Tegretol, a dosage sensitive medication, which can have very serious side effects without verifying a *current* prescription. Although plaintiff informed the jail he had a seizure condition that required medication, Dr. Balderrama testified that medications are not given to inmates without verification. CP 113 (Balderrama). Anti-seizure medication can have serious side-effects given an improper dosage. CP 113 (Balderrama decl.); CP 549-50 (Brooks dep.). But, the seizure itself is not life-threatening. CP 717-18 (Brooks dep.). According to plaintiff, he had a prescription for Tegretol at Safeway, but had not

⁵ Plaintiff has abandoned his claim alleging that defendants failed to properly train and supervise its employees 3RP 19. "Our case isn't based on a failure of training. Counsel keeps trying to define our issues. Our complaint and our issues are that this - - that these gentlemen were simply negligent, negligent and that's the reason." 3RP 19.

filled it there for over a year. CP 238 (Pl. decl.). This is not current information. Plaintiff's old jail records from 2001, showing he had used Tegretol at the time were similarly unhelpful.

Even if true, plaintiff's statement to jail staff that he was having "pet mals" indicating the onset of a seizure, he had no seizure while in the booking area, during the night, nor for half the following day. So even had staff been ready to restrain him at a moment's notice, the seizure was not forthcoming. This tends to prove that plaintiff was stable enough for acceptance into the jail. Placement in another unit or close to the nurses would not have prevented the seizure, nor would have precluded the fall.

Therefore, there is no evidence for the element of (1) breach of duty for a negligence cause of action or (2) lack of reasonable prudence for a medical malpractice cause of action.

Similarly, plaintiff has no evidence to prove proximate cause, which, as shown above, is an element of both negligence and medical malpractice. Proximate cause consists of two sub-elements: (a) cause in fact and (b) legal causation. *Lynn v. Labor Ready*, 136 Wn.App. at 307. "Cause in fact" refers to the actual cause of the injury, "[B]ut for the defendant's actions, the plaintiff would not be injured." *Schooley v. Pinch's Deli Market*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). Factual

⁶ The handcuff issue will be addressed in subsection (c) herein.

causation is based on the physical connection between an act and an injury. *Id.* Legal causation is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. *Id.*

Policy considerations determine how far to extend the consequences of a defendant's acts; i.e. legal causation. *Schooley*, 134 Wn.2d at 478. "The focus in the legal causation analysis is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." *Schooley*, 134 Wn.2d at 478-79.

Regarding cause in fact, plaintiff has not shown a physical connection between the delay in medication and his injury. He cannot prove that but for the denial of medication at booking, he would not have been injured in a fall during a seizure. This is because, even had the jail immediately given plaintiff Tegretol, there is no guarantee it would have prevented the seizure. CP 705-06; 798 (Balderrama dep.). Indeed, plaintiff's medical history shows several examples of verified levels of Tegretol in plaintiff's system, where plaintiff still had a seizure. *See* CP 553-56; 557-58; 563-65; 758-60; 775-84. This is not a situation where the jail was on notice of dangerous defect in flooring, did nothing about it, and plaintiff tripped, fell, and broke his leg. In the present case, the jail did not cause the seizure or seizure disorder. When they learned of the

situation, they immediately attempted to verify the prescription and medical condition in several ways. The booking nurse called the Safeway Pharmacy. CP 142, 153-54. Medical releases were immediately sent to St. Joseph Hospital and Dr. Brooks. CP 145-47.

Defendants actions did not cause the seizure. Cause in fact cannot be met.

Legal causation cannot be met either. Here, plaintiff sustained a one centimeter lip laceration and a facial bruise when he lost consciousness and fell out of his chair during a seizure. CP 179-80. The connection between plaintiff's rather minor injuries and the jail's actions of verifying prescriptions before administering potentially dangerous medications, is both remote and insubstantial. The injury was caused by loss of consciousness during the seizure. *Id.* Plaintiff had suffered from a seizure condition since at least 1995. CP 211-21.

The connection between the jail's actions and plaintiff's injuries becomes even more obscure and remote when considering plaintiff's medical history. The circumstances of the seizure on March 12, 2004, had transpired repeatedly in the past when plaintiff was not in jail. In 1995, plaintiff had a seizure and awoke on the floor. CP 213. In 2001, he broke his tooth in a fall during a seizure. CP 557-58. In another 2001 incident, plaintiff reported body aches from a seizure. CP 758-74. In 2003,

plaintiff hit his head on the coffee table during a seizure and hurt his neck and knees. CP 775-84. In 2004, plaintiff reported facial pain after he hit his head on a door frame during a seizure. CP 563-65. In another incident in 2004, plaintiff fell and injured his shoulder when having a seizure. CP 785-93.

The connection between the resulting injury and the booking procedure is insubstantial and remote. It was the seizure condition that caused plaintiff to have a seizure 21 hours after booking. The seizure caused his fall and injury. Looking at the evidence in the light most favorable to plaintiff, he is unable to meet his burden on the element of causation.

- c. Plaintiff's arguments are based on either speculation and/or facts not contained in the record below.

Plaintiff has consistently claimed that it was negligent for jail staff to handcuff plaintiff in the holding tank, a factual allegation which is in dispute. Corrections Officer Hernandez was all but 100% sure plaintiff was NOT handcuffed or in any restraints at the time of his seizure. CP 569 (Hernandez decl.). However, this factual dispute does not defeat summary judgment because it is neither a genuine issue, nor is it material. It is undisputed that plaintiff lost consciousness during the seizure. *See* CP 182. Plaintiff has presented no expert testimony contradicting Dr.

Balderrama's medical testimony that during a seizure, an individual is not able to control their body in order to break their fall. CP 113 (Balderrama decl.). The fact that plaintiff would not have been able to break his fall is further supported by plaintiff's own medical records which reveal repeated falls and resulting injuries during past seizures, which have been previously discussed at length herein. Further, if plaintiff were able to control his body during the seizure, as he seems to imply, he could lower himself to the floor and prevent the inevitable fall and injury. Thus, whether plaintiff was handcuffed is irrelevant and a non-issue in this case.

In his brief, plaintiff attempts to use Dr. Balderrama's testimony to show that defendant violated the standard of care. BOA at 16. First, nowhere does Dr. Balderrama testify that jail staff "failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the State of Washington, acting in the same or similar circumstances." *See RCW 7.70.040(1)*. Secondly, the question to Dr. Balderrama is hypothetical in nature when plaintiff's attorney asked about a patient reporting 'auras.' BOA at 13. Plaintiff did not use the word "aura". He consistently referred to "pet mals" in his declarations (quoted in BOA at 18-19). The only medical testimony on this issue is from Dr. Balderrama who testified that petit mal seizures never precede a grand mal seizure.

CP 706. Further, additional undisputed medical testimony reveals that any pre-seizure auras would result in a seizure within seconds or minutes, not 21 hours later, as happened here. *See* CP 716-17 (Brooks dep.).

Plaintiff points to Dr. Balderrama's testimony where he indicates that if a patient is reporting "auras" (which did not happen here) the booking nurse should then go through a series of questions to determine the cause. BOA 13. Dr. Balderrama then testified that he did "not recall" seeing any notes of questions in plaintiff's chart from nursing. BOA at 13. Plaintiff then jumps to the conclusion that therefore, no questions were asked by Nurse Hay at booking. BOA at 16. This is no more than speculation because the only fact proven by this statement is that Dr. Balderrama did not *recall* seeing *notes* about questioning. Even viewed in the light most favorable to plaintiff, this testimony does not prove that questions were not asked by Nurse Hay. Plaintiff did not testify he was not asked questions by Nurse Hay, in fact, his declaration states she was questioning him. BOA at 19. Plaintiff was dilatory and did not depose Nurse Hay prior to the discovery deadline. CP 657. He now attempts to testify for her by speculating and making self-serving assumptions.

There is no evidence that the term "aura" was used at booking. Therefore, any statements Dr. Balderrama made regarding what questions a treatment provider should ask a patient reporting auras, are not

applicable to the case at bar. *Weissman v. Depart. of Labor and Industries*, 52 Wn.2d 477, 483-84; 326 P.2d 743 (1958)(answer to hypothetical question admissible only when there is testimony in the record as to the hypothesis upon which the question is based; assumption of facts not established by the evidence destroys the probative value of the expert's opinion, the opinion is irrelevant). Further, there is no admissible evidence that the questioning by Nurse Hay, in this particular case, was lacking. The law does not allow plaintiff to rely on speculation, as he does here. *See Lynn v. Labor Ready*, 136 Wn.App. at 306.

Plaintiff also alleges a “violation of the standard of care.” BOA at 17. Plaintiff asserts that Dr. Balderrama testified that if a patient tells him that he is having auras, that as a physician he should be ready to restrain that person should a seizure come about. *Id.* Again, plaintiff did not use the word ‘aura,’ he said he was having “pet mals.” Counsel’s hypothetical to Dr. Balderrama does not match the facts of the case. As determined, petit mal seizures never precede a grand mal. CP 706 (Balderrama dep.). Lastly, even if plaintiff reported the “pet mals” as he claims, and even if Nurse Hay understood he meant it was a precursor to a seizure, she had the opportunity to talk with him for at least 20 minutes. Nurse Hay was called in at 3:00 PM. CP 142. Plaintiff was booked at 3:19. CP 134. During that 20 minutes plaintiff did not have a seizure. He was obviously

stable during that time. The seizure occurred at approximately 12:30 PM, some 21 hours after booking. CP 77.

Plaintiff also alleges a violation of the nursing guidelines. BOA at 17-18. Nurse Scott testified at her deposition that because plaintiff did not have a current prescription for Tegretol when he came into the jail, he would have to be put on a list to be seen by the practitioner. BOA at 15. Plaintiff's attorney asked her at the deposition if, as she sat there, she saw such a list with plaintiff's name on it. BOA at 16. She indicated that she did not see a list, and that if the Booking Nurse did not put him on the list, that would be a violation of the nursing guidelines. *Id.* Plaintiff stated in his brief that Nurse Scott testified that "Craig Stover was not placed on such a list..." BOA at 18. This is not accurate; she merely testified that the list was not included with the documents presented to her at the deposition. BOA at 15-16, quoting Scott dep.). In fact, Nurse Scott signed a Declaration, filed with the court on October 29, 2007, directly in response to plaintiff's reference to her deposition regarding placement of plaintiff on the list. CP 722-24. In that Declaration, Nurse Scott testified that the "list" inmates are placed on is not part of any individual inmate's medical file. CP 724. On appeal, plaintiff continues to assert that he was not on the list to be seen, even after being corrected in the trial court. BOA at 17-18.

Nurse Scott also testified that Nurse Hay followed proper procedures on March 11, 2004. *Id.* Plaintiff cannot prevail on this issue because it is based on facts not in the record.

Plaintiff's claim about any breach of duty or failure to follow the standard of care after his seizure on March 12, 2004, is vague and unsupported. Plaintiff presents no medical testimony that any injuries are permanent or that his treatment while in jail caused his seizures to become more frequent after his release. The cause of an increase in frequency of seizures is beyond the general understanding of a lay person and must be supported by expert testimony, of which there is none. *See Harris v. Goth*, 99 Wn.2d at 449; ER 703.

In short, a review of the elements of negligence and medical malpractice reveal no liability on the part of defendants. Plaintiff's attempt to rely on Dr. Balderrama to establish medical malpractice falls woefully short of the legal requirements. There is no proof of medical malpractice because plaintiff only generally refers to "a violation of the standard of care" without articulating the specific requirements of the statute. *See RCW 7.70.040, supra.* Plaintiff's reliance on facts not supported by the record, speculation, and unsupported conclusions fail to make a prima facie case that could be sent to a jury. Similarly, there is no proof of proximate cause. Simply put, there is no connection between

defendants' actions and plaintiff's injuries.

The complete failure of plaintiff (1) to show defendants breached their duty or failed to follow the accepted standard of care, OR (2) to establish proximate cause renders all other facts immaterial. *See Lynn v. Labor Ready*, 136 Wn.App. at 306; *RCW 7.70.040*. Any attempt by plaintiff to raise new arguments in its reply brief should not be considered by this Court. *Cowiche Canyon Conservatory v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)(appellate court will not consider argument raised and argued for first time in reply brief).

3. THE TRIAL COURT PROPERLY RULED THAT ALL CLAIMS AGAINST DEFENDANTS BE DISMISSED.

In what plaintiff labels "Argument on Issue No. 5," his briefing leaves some question as to the precise issue(s) being raised. BOA at 21-26. Without adequate, cogent argument and briefing, it is difficult to respond meaningfully. Without a clear understanding of the is being argued, defendants attempt to address some of these assertions:

Plaintiff first asserts that "[t]he remaining claim of common law negligence was not and never has been, addressed by the Court." BOA at 21. (This opening assertion is at odds with plaintiff's issue statement no. 5, wherein plaintiff seems to concede all common law negligence claims were dismissed. BOA at 3.) However, plaintiff concedes that this claim

was “part of Defendants Second Motion for Summary Judgment.” *Id.* At the second motion for summary judgment, the trial court set over, until November 30, 2007, the issue of common law negligence for additional briefing and argument. *Id.*; CP 810.

On November 30, 2007, the trial court entered its Order Granting Defendants Motion for Summary Judgment as to All Causes of Action. CP 895-96 [emphasis added]. The order from November 30, 2007, dismissed all of plaintiff’s claims “with prejudice in their entirety.” *Id.* Thus, plaintiff’s position on appeal that there remains a claim that was not ruled upon and dismissed is without merit.

Plaintiff attempts to construe CO Hernandez’s testimony in such a way to prove the breach of a duty. BOA at 23. In his brief, plaintiff refers to CO Hernandez as the “transport” officer and asserts that CO Hernandez took plaintiff to the “holding tank.” *Id.* There is no evidence that CO Hernandez transported plaintiff that morning. CO Hernandez specifically testified that he did not recall if he got plaintiff from his cell or not: “Like I say, sir, I don’t recall what cell they were at. I don’t even know if I was the officer that transported to court that morning.” CP 568 (Hernandez dep.). Plaintiff does not identify CO Hernandez as the transport officer in any of his declarations. CO Hernandez further testified that he did not recall having any conversation with plaintiff that day. *Id.* at 569. Plaintiff

also quotes to an answer to a hypothetical question asked of CO Hernandez in his deposition. The hypothetical involves handcuffing someone **if** they say they are about to have a seizure. BOA at 23. Again, there is no evidence plaintiff told CO Hernandez he was about to have a seizure. Answers to hypothetical questions are irrelevant and inadmissible unless they are fully based on facts contained in the record. *Weissman v. Dept. of Labor and Industries*, 52 Wn.2d at 483-84. Plaintiff concludes by stating that common law negligence is “doing exactly the opposite of what he, himself, felt should have been done, as a corrections officer.” BOA at 23. This entire argument misstates the facts contained in the record as well as the legal standard of negligence. It is unsupported by citations to legal authority and is without merit.

Plaintiff raises vague issues regarding his treatment in the jail after the seizure of March 12, 2004, i.e. not being placed in a medical unit after return from the hospital and medication issues on his last days of confinement. BOA at 22. There is insufficient evidence for the case to go a jury on these issues when there is no medical evidence whatsoever that plaintiff suffered any injury caused by defendant’s acts or omissions after March 12, 2004. Plaintiff baldly claims that he suffered permanent injuries and that his seizures became more frequent after his incarceration. However, the required medical evidence to prove these facts is

nonexistent. *See Harris v. Groth*, 99 Wn.2d at 449. Without that testimony, plaintiff cannot establish the elements of violation of the standard of care or proximate cause. *Id.*

Plaintiff attempts to claim he was actually arrested on March 10, 2004, which is one day prior to his actual arrest. BOA at 24. Plaintiff makes numerous gratuitous statements in this section of the brief which are unsupported by the record. BOA at 24. However, plaintiff fails to explain how any of this information is relevant or how it relates to his cause of action. *Id.* An explanation in a reply brief would deprive respondent of the opportunity to respond to the issue, which is not stated here. In any event, overwhelming evidence from Tacoma Police Department, (CP 115-16), Law Enforcement Support Agency, Computer Aided Dispatch (“CAD”)(CP 164), Puyallup Police Department (CP 874), CAD Incident Inquiry for Puyallup (CP 877), and the Pierce County Jail (CP 134) all reveal the arrest was on March 11, 2004. Based on these records, a reasonable jury could not conclude that plaintiff was arrested on March 10, 2004.

Finally, in his discussion regarding causation, plaintiff relies on *Stalter v. State*, 113 Wn.App. 1, 51 P.3d 837 (2002)(*aff'd in part and rev'd in part by Stalter v. State*, 151 Wn.2d 148, 158, 86 P.3d 1159(2004)). In *Stalter*, two cases were consolidated on appeal, *Stalter*

and *Brooks*. The Court of Appeals found that the trial courts erred when they dismissed the negligence claims for lack of proximate cause. *Stalter* at 14. Plaintiff seems to rely on this holding for his argument. BOA at 26. However, plaintiff fails to advise that that decision was reversed in part by the Supreme Court in 2004. *Stalter v. State*, 151 Wn.2d at 158. The Supreme Court held in the companion case that the trial court properly dismissed Brooks' claims because the facts did not justify a trial. *Id.* Nor do the facts in the present case justify a trial.

4. THIS COURT SHOULD NOT REVIEW THE TRIAL COURT'S RULING ON PLAINTIFF'S MOTION TO COMPEL WHERE (1) PLAINTIFF FAILED TO PRODUCE THE COURT'S ORAL AND WRITTEN RULING ON THE MOTION; AND (2) DID NOT PROVIDE THIS COURT WITH ANY AUTHORITY OR ANALYSIS.

An order denying a motion to compel discovery is reviewed by an appellate court for an abuse of discretion. *Hertog v. City of Seattle*, 88 Wn.App. 41, 47; 943 P.2d 1153 (1997) (citing *Barfield v. City of Seattle*, 100 Wn.2d 878, 886-87, 676 P.2d 438 (1984)). Abuse of discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Hertog* at 41 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

On this issue, plaintiff has failed to provide this Court with the order denying his motion. BOA at 10-11. He merely refers to a

Memorandum of Journal Entry which is not signed by the trial court judge or the parties. BOA at 10; CP 65. Plaintiff asserts that this memorandum is the manner in which the judge intended to make his ruling. BOA at 10. However, the memorandum itself belies plaintiff's assertion because it specifically provides that a written "[o]rder will be drafted/signed and presented." CP 65. Apparently, plaintiff did not present the order below and now attempts to rely on a memorandum of journal entry. BOA at 10. Additionally, plaintiff failed to make the transcript from the hearing a part of the record on review, so the trial court's analysis and reasoning is not available for this Court to review. As such, this Court is not able to make the critical determination as to whether the trial court abused its discretion. *See Hertog* at 41.

Even had plaintiff provided the proper record from the trial court, this Court would still be unable to appropriately review this assignment of error because plaintiff fails to provide any analysis or citations to controlling authority.⁷ Again, the Rules on Appeal provide:

Argument. The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record...

RAP 10.3(a)(6). Therefore, this Court should decline to address this

⁷ The lack of an order accompanied by lack of legal argument, analysis, and authority make it impossible for defendants to respond to this claim of error.

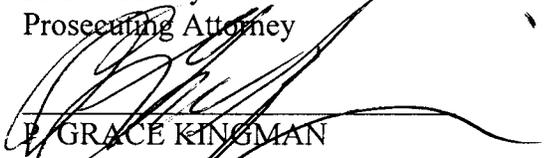
argument that is neither briefed nor supported by citations to legal authority. *In the Matter of the Marriage of Tostado*, 137 Wn.App. 136, 142-43, 151 P.3d 1060 (2007).

D. CONCLUSION.

For the foregoing reasons, defendants respectfully ask this Court to affirm the trial court's dismissal of all of plaintiff's claims.

DATED: July 18, 2008.

GERALD A. HORNE
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Deputy Prosecuting Attorney
WSB # 16717

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail or~~ ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/18/08 Cyji
Date Signature

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