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State of Washington  
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**Court of Appeals, Div. II,  
of the State of Washington**

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Michelle Dalen,

Appellant,

v.

St. Johns Medical Center, et al,

Respondents.

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**Brief of Appellant**

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## **1. Introduction**

Michelle Dalen slipped on some ice and hit her head on the pavement, suffering a mild traumatic brain injury. Over the next two days, she experienced headache, fatigue, confusion, and odd emotional reactions and speech patterns. She went to the hospital with her father and sister to obtain treatment for her head injury.

Despite being told multiple times that Dalen had fallen and hit her head, the medical care providers insisted on treating Dalen for mental illness. Against Dalen's will, nurses and hospital staff carried Dalen into a treatment room where they subjected her to numerous indignities and unconsented treatments, under the guise of involuntary commitment under Chapter 71.05 RCW.

Dalen sued, and did her best to represent herself pro se. Ultimately, the trial court dismissed all of Dalen's claims on summary judgment. Because defendants failed to meet their burden of establishing their affirmative defenses and because Dalen presented testimony raising material issues of fact for trial, the trial court erred in dismissing Dalen's claims. This Court should reverse.

## **2. Assignments of Error**

### **Assignments of Error**

1. The trial court erred in granting Defendants' motion for summary judgment in its entirety.
2. The trial court erred in dismissing Dalen's 3<sup>rd</sup> cause of action for negligent infliction of emotional distress.
3. The trial court erred in dismissing Dalen's 4<sup>th</sup> cause of action for intentional infliction of emotional distress.
4. The trial court erred in dismissing Dalen's 5<sup>th</sup> cause of action for outrage.
5. The trial court erred in dismissing Dalen's 7<sup>th</sup> cause of action for violation of Chapter 71.05 RCW.
6. The trial court erred in dismissing Dalen's 9<sup>th</sup> cause of action for medical malpractice.
7. The trial court erred in dismissing Dalen's 10<sup>th</sup> cause of action for failure to obtain informed consent.
8. The trial court erred in disregarding the testimony of Dalen's medical experts.
9. The trial court erred in dismissing Dr. Kranz and Cascade Emergency Associates as parties.

### **Issues Pertaining to Assignments of Error**

1. In an emergency, an individual's consent to health care is implied if the person does not have capacity to consent and no proper surrogate is available to give consent for the individual. Dalen presented evidence that her family was available to give consent in her place. Did the trial court err in dismissing Dalen's lack of consent claim on summary judgment? (assignments of error 1 and 7)

2. Health care providers are granted immunity for actions taken pursuant to Chapter 71.05 RCW unless they were grossly negligent or acted in bad faith. Dalen presented evidence of bad faith and gross negligence. Did the trial court err in dismissing Dalen's claims on summary judgment on the basis of immunity? (assignments of error 1, 5, 6, and 7)
3. In a medical malpractice claim, the plaintiff must provide expert testimony to establish the standard of care, breach, and proximate cause. Dalen presented qualifying expert testimony. Did the trial court err in disregarding the testimony and dismissing Dalen's malpractice claim on summary judgment? (assignments of error 1, 5, 6, and 8)
4. Defendants argued that Dr. Kranz and Cascade Emergency Associates were not properly served with the summons and complaint. Dalen notified the court that service had been accepted on behalf of all defendants and that defendants refused to allow her to depose two witnesses who could have testified to the same. Did the trial court err in dismissing Dr. Kranz and Cascade Emergency Associates on summary judgment? (assignments of error 1 and 9)
5. RCW 7.70.030 limits the available causes of action for injury resulting from health care. Dalen's claims for emotional distress arose from the defendants' conduct after she was released from the hospital, not from the care provided while she was there. Did the trial court err in dismissing these claims? (assignments of error 1, 2, 3, and 4)

### **3. Statement of the Case**

#### **3.1 Michelle Dalen went to the emergency room for treatment of a head injury, and defendants instead forcibly restrained her as a mental health patient, subjecting her to numerous indignities that caused severe emotional distress.**

In February 2011, Michelle Dalen slipped on some ice while scraping off her car. CP 5, 45. She fell to the ground and struck her head on the pavement. CP 5, 45. She completed her work day with a bad headache. CP 46. The next day, she experienced odd emotional reactions, unusual fatigue, delayed responses and confusion. CP 46. Her speech patterns were unusual. CP 46. Dalen's father, stepmother, and sister accompanied her to St. John's Medical Center to have her head injury checked. CP 46.

Both Dalen and her sister told the emergency room receptionist that Dalen had fallen and hit her head. CP 46, 120. Dalen and her sister met with the triage nurse (Tamara Wheeldon, R.N.). CP 46, 64-65. The triage nurse noted the patient's complaint as "delusions," and noted that Dalen was disoriented and confused, admitted to having hallucinations, and was able to obey commands. CP 64-65. Dalen denies having any delusions or hallucinations. RP, Dec. 14, 2016, at 31. The medical notes make no mention of head injury, even though Dalen and her sister told the triage nurse and other medical

personnel that Dalen's head injury was the reason for their visit. CP 46, 64-66, 120.

The triage nurse presented Dalen with consent forms for treatment. *See* RP, Dec. 14, 2016, at 31. When Dalen realized the nurse was talking about treatment for delusions and hallucinations, she stood up, took her wrist bracelet off, and attempted to leave the room. RP, Dec. 14, 2016, at 31. As Dalen attempted to leave, she was grabbed by two guards and taken back to a treatment room while screaming for her father (who was outside in the waiting room). RP, Dec. 14, 2016, at 31-32; CP 46, 65, 114.

In the treatment room, Dalen was forcibly disrobed and put in a hospital gown. CP 47. The treating nurse (Sara Reid, R.N.) observed that Dalen was anxious and confused, exhibiting "paranoid behaviors" and "apparent auditory hallucinations." CP 65. Dr. Marc Kranz met with Dalen and then spoke with Dalen's sister, who told him about the head injury. CP 65, 120. Dalen was left isolated in the treatment room. CP 65.

The nurse returned and attempted to take Dalen to the bathroom to urinate. CP 66. Dalen refused because she was shocked and confused by what was going on and felt violated by the hospital staff's use of force. CP 47. She did not understand that she was being asked to provide a sample for routine lab tests. CP 47-48.

Dalen was forcibly restrained by four male staff members. CP 48. Dalen's blood was drawn. CP 48. Dalen was then forcibly catheterized for purposes of obtaining a urine sample. CP 48, 66. While the four men held her down, her legs were spread apart and her gown lifted up, exposing most of her body to view. CP 48, 66.

Dalen begged the nurse to stop, not wanting the male staff to see her naked. CP 48. She asked to be allowed to urinate on her own, but to no avail. CP 49. The urine drug screen came back negative, and her blood showed no metabolic abnormalities. CP 64.

Dalen was involuntarily detained for 72 hours and admitted into the hospital's psychiatric unit for mental health treatment. CP 49-50, 66-67. Dalen was evaluated without an attorney or family member present. CP 49-50. Dalen was forced to take antipsychotic drugs without her consent. CP 49-50. The next morning, Dalen requested to be released but was refused. CP 50.

Dalen was discharged on the third day. CP 67. One week later, Dalen's regular doctor diagnosed her with a concussion. RP, Dec. 14, 2016, at 30; *accord*, CP 108-11 (declarations from two doctors who diagnosed and treated Dalen in January and October 2013).

When the hospital attempted to collect its bill for the unconsented treatment, Dalen was outraged and took her story to the press. CP 95-96. The local newspaper published an article relating Dalen's story of going to the emergency room for treatment of head trauma and instead being wrongly committed to the psych ward. CP 95-96. Dr. Kranz posted a response to the online article:

I have over 20 years of experience with taking care of people with head injuries and have never seen a head injury cause delusions or hallucinations. I have seen mental illness and street drugs cause these symptoms. She was taken care of and kept safe and should be thankful.

CP 92.<sup>1</sup>

### **3.2 Dalen sued defendants, pro se, under multiple causes of action for their unlawful mistreatment of her.**

Dalen filed a summons and complaint, pro se, on Feb 26, 2014, just short of three years after the incident. CP 1, 3. Dalen named as defendants Saint John Medical Center, PeaceHealth, Sisters of St. Joseph of Peace, Cascade Emergency Associates, Marc Kranz, Ramona Sherman, and Lower Columbia Mental Health. CP 4. Dalen pled ten causes of action: 1) assault and battery; 2) false imprisonment; 3) negligent infliction of

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<sup>1</sup> Dr. Kranz posted as "DarwinFighter," which is also the name of his Twitter account. CP 91.

emotional distress; 4) intentional infliction of emotional distress; 5) outrage; 6) violation of civil rights; 7) violation of Chapter 71.05 RCW; 8) violation of HIPAA; 9) medical malpractice; and 10) failure to obtain informed consent. CP 6-11.

Lower Columbia Mental Health was dismissed as a party early in the case. *See* CP 14. All other defendants appeared and answered the complaint in January 2016. CP 13.

### **3.3 The trial court dismissed all of Dalen's claims on summary judgment.**

Defendants moved for summary judgment dismissal of all of Dalen's claims. CP 21-41. Defendants argued 1) that all claims against Dr. Kranz and Cascade Emergency Associates should be dismissed for insufficient service of process; 2) that Dalen's assault (#1) and false imprisonment (#2) claims should be dismissed as untimely under the statute of limitations; 3) that Dalen's claims for negligent or intentional infliction of emotional distress and outrage (#3-5) should be dismissed under RCW 7.70.010; 4) that Dalen's claims for violation of civil rights (#6) and HIPAA (#8) are not legally cognizable claims; 5) that Dalen's claim for violation of Chapter 71.05 RCW (#7) should be dismissed because of immunity under RCW 71.05.120; 6) that Dalen's medical malpractice claim (#9) should be dismissed for failure to present expert testimony on standard of care, breach,

and causation; and 7) that Dalen's claim for failure to obtain informed consent (#10) should be dismissed because of implied consent in an emergency. *E.g.*, CP 22-23.

Dalen responded with a declaration setting forth the facts of the incident, as restated in Part 3.1, above.<sup>2</sup> CP 45-56. She submitted declarations of family members, who testified that they were never asked to consent to any treatment. CP 114-120.

Dalen submitted a declaration from Lisa Taylor, a registered nurse with experience in mental health treatment. CP 57-58. Taylor testified that mental health providers would never forcibly hold down a patient to catheterize to obtain a urine sample. CP 57. She testified that the providers should have ruled out head trauma first, especially given the fact they had been told about Dalen's head injury. CP 58. She testified that there was no need to obtain a urine sample from a head trauma patient and that the forced catheterization "likely further traumatized" Dalen. CP 58.

Dalen submitted a declaration from Janet Mott, a PhD brain injury rehabilitation counselor and case manager. CP 120-21. Mott testified that Dalen presented at the hospital with

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<sup>2</sup> At the initial hearing on the motion, the trial court permitted a continuance, subject to terms, and gave Dalen the opportunity to file a supplemental response. RP, Oct 26, 2016, at 7-10. For purposes of this appeal, it should not be necessary to distinguish between Dalen's initial and supplemental responses.

symptoms of brain injury, but the health care providers failed to take any action to accurately diagnose brain injury. CP 121. She testified that this was a breach of the standard of care. CP 122. Dr. Mott's declaration included a scholarly paper on how to manage traumatic brain injuries in the emergency room, CP 124-47, and clinical guidelines for mild traumatic brain injury from the Centers for Disease Control, CP 148-49.

Dalen's written response conceded dismissal of the assault, false imprisonment, civil rights, and HIPAA claims, but she explained at the hearing that she only intended that they be temporarily set aside to focus on the remaining claims. CP 53; RP, Dec. 14, 2016, at 17; RP, Jan. 25, 2017, at 12-13. As to the remaining claims, Dalen argued, among other things, that Kranz and Cascade Emergency Associates had been properly served, CP 52; RP, Dec. 14, 2016, at 25-27; that immunity under RCW 71.05.120 did not apply because defendants acted in bad faith and with gross negligence, CP 53-54; RP, Dec. 14, 2016, at 23-24; that Taylor's declaration was sufficient to raise a material issue of fact, CP 54; and that defendants were not immune under the emergency/implied consent statutes because they did not seek surrogate consent from her family and they knew that she herself did not consent, CP 55; RP, Dec. 14, 2016, at 21.

The trial court granted defendants' motion and dismissed all of Dalen's claims. The trial court found that Dr. Kranz and

Cascade Emergency Associates had not been properly served. RP, Dec. 14, 2016, at 38. The trial court held that Dalen had conceded the assault, false imprisonment, civil rights, and HIPAA claims. *Id.* at 38, 39. The trial court held that Dalen's emotional distress claims were barred by statute. *Id.* at 38. The trial court held that Dalen's remaining claims should be dismissed because Dalen's experts were not qualified to opine on the standard of care. *Id.* at 38-39.

#### **4. Argument**

The trial court erred in dismissing Dalen's causes of action 7, 9, and 10 on summary judgment. Dalen presented evidence sufficient to raise material issues of fact on these claims. Dalen should have the opportunity to present these claims to a jury.

Defendants claimed immunity for providing care in an emergency situation, under a theory of implied consent. Dalen presented evidence that there was no emergency, that she affirmatively refused consent, and that even if she was incapable of consenting, her family was readily available but was never asked to consent on her behalf. This evidence created material issues of fact for trial. The trial court erred in dismissing Dalen's lack of consent claim.

Defendants also claimed immunity for providing care under the involuntary commitment statute, Chapter 71.05 RCW. But Defendants failed to provide evidence that they acted pursuant to or in conformity with the statutory procedures. Defendants failed to demonstrate they were entitled to this immunity as a matter of law. Dalen presented evidence that they acted in bad faith and with gross negligence. This evidence created material issues of fact for trial. The trial court erred in dismissing Dalen's claims on account of immunity.

Defendants argued that Dalen had no expert testimony regarding standard of care, breach, or proximate cause. Dalen presented declarations from multiple expert witnesses who were sufficiently qualified to offer their opinions. Taken together, these declarations provide evidence of the standard of care, breach, and proximate cause. This evidence created material issues of fact for trial. The trial court erred in dismissing Dalen's malpractice claim.

Defendants argued that Dr. Kranz and Cascade Emergency Associates had not been properly served. Dalen noted that the PeaceHealth risk management department had accepted service on behalf of all defendants and that defendants' counsel had refused to allow Dalen to depose the individuals who accepted service. This revealed a material issue of fact regarding the sufficiency of service. The trial court erred in

dismissing Dr. Kranz and Cascade Emergency Associates as parties.

Finally, the trial court erred in dismissing Dalen's emotional distress claims as claims for injury resulting from health care under RCW 7.70.030. These claims arose from conduct of the defendants after Dalen had been released from the hospital. Because the claims did not arise from health care, they were not barred. The trial court erred in dismissing Dalen's 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> causes of action.

#### **4.1 Summary judgment decisions are reviewed de novo.**

This court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014). This de novo review also applies to evidentiary rulings on admissibility. *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015) (citing *Folsom v. Burger King*, 135 Wn.2d 658, 662-63, 958 P.2d 301 (1998)).

Summary judgment is only proper 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). "A material fact is one that affects the outcome of the litigation." *Morgan v. Kingen*, 166 Wn.2d 526, 533, 210 P.3d 995 (2009). The court views the facts in a light favorable to the nonmoving party.

*Failla*, 181 Wn.2d at 649. “[A] court must deny summary judgment when a party raises a material factual dispute.” *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485-86, 78 P.3d 1274 (2003).

**4.2 The trial court erred in dismissing Dalen’s lack of consent claim because Dalen presented evidence that implied consent did not apply and that her family was readily available but was never asked to consent in her place.**

“Hospitals and other health care providers have a responsibility to patients to provide competent health care. Inherent in that responsibility is an obligation not to violate the substantial personal and property rights of the patient that might be affected by health care. Fundamental among these rights is the right of persons to decide what happens to their bodies.” Washington State Hospital Association, *Washington Health Law Manual*, ch. 2A.2 (4<sup>th</sup> ed. 2016).

One of the limited causes of action available for injuries resulting from health care is a claim for injury resulting from health care to which the patient or her representative did not consent. RCW 7.70.030. This is the claim Dalen made in her 10<sup>th</sup> cause of action. Under such a claim, a health care provider is liable even if the treatment otherwise meets the standard of care. *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 123, 170 P.3d 1151 (2007).

Defendants raised an affirmative defense of immunity or informed consent arising from an emergency situation. Because immunity is an affirmative defense, defendants had the initial burden on summary judgment of presenting facts that would show they were entitled to immunity as a matter of law. Defendants failed to do so. Additionally, Dalen presented evidence that showed she did not consent to the care that was forced upon her. The trial court erred in dismissing this claim on summary judgment.

Defendants' claim of immunity is based on two statutes relating to emergency health care. The hospital licensing statutes provide limited immunity for emergencies:

No physician or hospital licensed in this state shall be subject to civil liability, based solely upon failure to obtain consent in rendering emergency medical, surgical, hospital, or health services to any individual regardless of age where its patient is unable to give his or her consent for any reason **and there is no other person reasonably available who is legally authorized to consent** to the providing of such care: **PROVIDED, That such physician or hospital has acted in good faith and without knowledge of facts negating consent.**

RCW 18.71.220 (emphasis added). Similarly, the health care liability statutes provide,

If a recognized health care emergency exists and the patient is not legally competent to give an informed consent **and/or a person legally**

**authorized to consent on behalf of the patient is not readily available**, his or her consent to required treatment will be implied.

RCW 7.70.050(4) (emphasis added).

These statutes set up a scheme in which a health care provider must first determine whether the patient is capable of giving consent. “If a clinician determines that a patient lacks decision-making capacity, the clinician **must** then turn to a surrogate decision-maker, most often a family member, for informed consent.” *Wash. Health Law Manual* at 2C.2.1 (emphasis added); *Grannum v. Berard*, 70 Wn.2d 304, 306, 422 P.2d 812 (1967) (“The rule is well established” that consent must be obtained from either the patient or from a near relative capable of giving consent).

Additionally, there is no emergency immunity under RCW 18.71.220 if the health care providers have knowledge of facts negating consent. “Consistent with a patient’s right to determine what will happen to his or her body, a patient not only has the right to consent to treatment, but also the right to refuse treatment and the right to withdraw consent to treatment. ... **A competent adult may refuse treatment, for any reason, no matter how unreasonable this may appear to others.** Health care providers have an obligation to respect the refusal of consent and/or the withdrawal of consent.” *Wash. Health Law Manual* at 2A.8.1 (citing 42 CFR § 482.13(b)(2)).

Dalen affirmatively refused consent when she attempted to leave the hospital when she realized they were attempting to treat her for hallucinations due to mental illness or drugs rather than treating her head injury. Dalen's resistance to the defendants' use of force to carry her to the treatment room and restrain her while they invaded her body was a fact negating consent. Dalen's attempts to get defendants to stop the forced catheterization was a fact negating consent. Defendants are not entitled to emergency immunity or implied consent because Dalen affirmatively—by actions if not by words—refused consent.

It is not even clear that an emergency existed at all. Whether an emergency exists is a question of fact for the jury. *Stewart-Graves*, 162 Wn.2d at 124. The statutes do not define “emergency,” but, generally, an emergency exists when the absence of immediate treatment could reasonably be expected to result in serious impairment to bodily functions or place the person's health in serious jeopardy. *Wash. Health Law Manual* at 2A.9.1; see RCW 70.41.115(1)(a). There is no evidence that immediate mental health treatment was necessary to preserve Dalen's life or health or to prevent serious impairment to bodily functions. She needed treatment for her traumatic brain injury, but there was no mental health emergency for which consent could be implied.

Even assuming there was an emergency, the defendants had a statutory obligation to obtain consent from a legally authorized surrogate. The statutes set forth who is legally authorized to provide surrogate consent in an emergency when a patient is not competent to give consent. The list includes the patient's parents and the patient's siblings. RCW 7.70.065(1)(a). Dalen's father and her sister were both present at the hospital when Dalen was admitted. Neither was asked to consent to any health care services on Dalen's behalf. Even if there was a legitimate emergency, defendants failed to obtain the proper consent to treatment. This is a material fact barring summary judgment dismissal of Dalen's consent claim.

It is far from clear that Dalen was not competent to give or refuse consent herself. The statutes define when a patient is not legally competent to give informed consent. RCW 7.70.065(1)(a) (referring to RCW 11.88.010(1)(e)). A person cannot legally consent if the person is, "by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity," incapable of "managing his or her property or caring for himself or herself." RCW 11.88.010(1)(e).

The capacity to give consent is a question of fact to be determined from the circumstances of each individual case. *Grannum*, 70 Wn.2d at 307. The law presumes that an adult is

fully competent until clear, cogent, and convincing evidence to the contrary is presented. *Id.* There is no evidence at all—let alone clear, cogent, and convincing—that Dalen was incapable of managing her property or caring for herself.

Defendants failed to carry their initial burden of proof of showing they were entitled to the defense of immunity for providing emergency medical care. Dalen provided evidence that this immunity does not apply and that defendants failed to obtain her informed consent for the treatments they forced upon her. Dalen’s evidence presents a material issue of fact for trial. The trial court erred in dismissing Dalen’s lack of consent claim on summary judgment.

**4.3 The trial court erred in dismissing Dalen’s claims on account of immunity under Chapter 71.05 RCW because Dalen presented evidence that Defendants disregarded the statutory procedures and acted in bad faith and with gross negligence.**

Dalen’s 7<sup>th</sup> cause of action claimed that defendants violated the statutory requirements of Chapter 71.05 RCW when they involuntarily detained her for mental health treatment. Defendants claimed immunity under RCW 71.05.120. At the time of the incident, the statute provided that no person or agency “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 and without gross negligence.**” RCW 71.05.120 (2011) (emphasis added).<sup>3</sup>

Involuntary commitment for mental disorders constitutes a significant deprivation of liberty that requires due process protections. *In re C.W.*, 147 Wn.2d 259, 277, 53 P.3d 979 (2002). Procedural safeguards are required in order to protect affected persons against abuses. *Id.* The State cannot constitutionally confine “a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.” *In re LaBelle*, 107 Wn.2d 196, 201, 728 P.2d 138 (1986) (quoting *O’Connor v. Donaldson*, 422 U.S. 563, 576, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975)).

Dalen argued that defendants acted in bad faith and were grossly negligent. Utter disregard of the statutory procedures is bad faith and gross negligence. *See In re C.W.*, 147 Wn.2d at 283 (citing *In re Swanson*, 115 Wn.2d 21, 31, 804 P.2d 1 (1990) (allowing dismissal of commitment where providers “totally disregarded the requirements of the statute”)).

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<sup>3</sup> The mental health statutes have been amended since the time of the incident. Most of the changes are not relevant to this appeal, but for consistency Dalen will cite to the 2011 statutes.

Any person voluntarily admitted for mental health treatment must be released upon his or her request. RCW 71.05.050 (2011). However, when a person is brought to a hospital emergency room and refuses admission, the professional staff may detain the person for evaluation for up to six hours if the person presents, as a result of a mental disorder, an “imminent likelihood of serious harm” to self or others or an “imminent danger” to self because of “grave disability.” *Id.* The ability to detain the person does not arise until after professional staff has examined and evaluated the patient to determine whether the statutory requirements are met. *In re C.W.*, 147 Wn.2d 259, 272-73, 53 P.3d 979 (2002).

The terms used in the statute are all defined. They must be narrowly construed. *In re C.W.*, 147 Wn.2d at 277. The statute was designed “to prevent inappropriate, indefinite commitment.” RCW 71.05.010. The likelihood of danger that must be proven prior to commitment must be great enough to justify such a massive curtailment of liberty. *In re LaBelle*, 107 Wn.2d at 204. The risk of danger to self or others must be substantial and the harm must be serious. *Id.*

“Imminent” means “likely to occur at any moment or near at hand, rather than distant or remote.” RCW 71.05.020(20) (2011). “Likelihood of serious harm” is defined in terms of the evidence required to reach such a finding:

(a) A substantial risk that: (i) Physical harm will be inflicted by a person upon his or her own person, **as evidenced by threats or attempts to commit suicide or inflict physical harm on oneself**; (ii) physical harm will be inflicted by a person upon another, **as evidenced by behavior which has caused such harm** or which places another person or persons in reasonable fear of sustaining such harm; or (iii) physical harm will be inflicted by a person upon the property of others, **as evidenced by behavior which has caused substantial loss or damage to the property of others**; or (b) The person has threatened the physical safety of another **and has a history of one or more violent acts**.<sup>4</sup>

RCW 71.05.020(25) (2011) (renumbered as subsection 27 in the current code) (emphasis added). Under this definition, a likelihood of serious harm can only be found if the person has actually caused serious harm in the past. There is no evidence that Dalen had caused serious harm. She did not present an imminent danger of serious harm.

“Gravely disabled” is similarly defined in terms of the evidence required:

a condition in which a person, as a result of a mental disorder: (a) is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety; or

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<sup>4</sup> “Violent act” means behavior that resulted in homicide, attempted suicide, nonfatal injuries, or substantial damage to property. RCW 71.05.020(45) (2011) (renumbered as subsection 49 in the current code). There is no evidence that Dalen has ever committed a “violent act” under this definition.

(b) manifests severe deterioration in routine functioning **evidenced by repeated and escalating loss of cognitive or volitional control** over his or her actions **and is not receiving such care as is essential for his or her health or safety.**

RCW 71.05.020(17) (2011) (emphasis added). This definition requires a long-term disability for which the person is not receiving treatment, not a sudden, traumatic injury for which the person is attempting to obtain treatment. It requires evidence of severe deterioration over time, evidenced by “repeated and escalating” loss of control. There must be recent, tangible evidence of failure or inability to provide for such essential human needs as food, clothing, shelter, and medical treatment. *In re LaBelle*, 107 Wn.2d at 204-05. It must be shown that mental health treatment is essential, not just desirable. *Id.* The providers must be able to demonstrate the likely harmful consequences if the individual did not receive treatment. *Id.*

There is no evidence that Dalen suffered any repeated and escalating disability or that she was going without care essential for her health or safety. There is no evidence that she was failing to provide herself with food, clothing, shelter, or necessary medical treatment. In fact, she was actively seeking the only medical care she needed: treatment for her head injury. Dalen was not gravely disabled and should not have been involuntarily committed.

Defendants' forcible detention of Dalen when she did not meet the statutory requirements for involuntary commitment is evidence of their total disregard of the statutory procedures and definitions. Defendants disregarded the statute in other ways.

As noted above, the ability to detain a person does not arise until after professional staff has examined and evaluated the patient to determine whether the statutory requirements are met. *In re C.W.*, 147 Wn.2d at 272-73. Here, after Dalen refused to consent in the triage room to mental health treatment for her head injury, defendants forcibly carried her to the treatment room where they began conducting various procedures against her will before she was evaluated by Dr. Kranz. Defendants involuntarily detained Dalen before anyone had evaluated whether her condition met the statutory requirements.

When a person is evaluated for involuntary commitment, "the person shall be permitted to be accompanied by one or more of his or her relatives, friends, an attorney, a personal physician, or other professional or religious advisor to the place of evaluation." RCW 71.05.150 (2011). Dalen was not permitted to have an attorney or family member present for her evaluation.

Defendants utterly disregarded the statutorily required procedures and definitions. In doing so, they acted in bad faith and with gross negligence. Defendants were not entitled to

immunity. Dalen is entitled to have her claims heard by a jury. The trial court erred in dismissing Dalen's claims on summary judgment.

**4.4 The trial court erred in dismissing Dalen's medical malpractice claim because Dalen presented qualified expert testimony on the standard of care, breach, and proximate cause.**

The trial court dismissed Dalen's medical malpractice claim for failure of expert testimony. Defendants had argued that none of Dalen's experts was a physician and that Dalen's experts did not articulate the standard of care, breach, and causation in the form that courts and attorneys are accustomed to seeing.

Defendants sought to require testimony of a physician to establish the standard of care for a physician, Dr. Kranz. However, most of the actions of which Dalen complains were those of nurses and other hospital staff. A physician is not required to testify to the standard of care of a nurse or other staff. It is the expert's skill, experience, training, or education, not his or her professional title, that governs the question of admissibility of expert medical testimony. *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 234, 393 P.3d 776 (2017) (using ER 702 as the touchstone for admissibility of expert medical testimony from nurses). Dalen's primary expert, Lisa Taylor, is a registered nurse with 12 years' experience in mental health care.

She was qualified to testify to the standard of care, at the very least of other nurses and medical staff in this case. Dalen's second expert, Dr. Mott, is a PhD traumatic brain injury rehabilitation counselor and case manager with 52 years' experience. CP 120-21. She was also qualified to testify to the standard of care for treatment of traumatic brain injuries. Any deficiencies in the substance of Taylor and Mott's testimony goes to weight, not admissibility. The trial court erred in disregarding their testimony and dismissing Dalen's malpractice claim.

The law does not require the uttering of any talismanic words. Courts do not require experts to testify in a particular format or language, but instead look to the substance of what the expert brings to the discussion. *Leaverton v. Cascade Surgical Partners, P.L.L.C.*, 160 Wn.App. 512, 520, 248 P.3d 136 (2011). The substance of Lisa Taylor's testimony was that the standard of care required the defendants to rule out head trauma before proceeding with involuntary mental health treatment, including catheterization. CP 57-58. Defendants breached that standard by forcibly restraining Dalen and performing unconsented procedures such as the catheterization. CP 57-58. Defendants' breach proximately caused injury to Dalen on a more likely than not basis. CP 58.

The fact that Taylor did not use the terms "standard of care," "proximate cause," or "reasonable medical certainty" is

irrelevant to the determination of whether she had presented competent expert testimony. Taylor's declaration was sufficient to create a material issue of fact on the standard of care, breach, and causation. Any deficiencies in her testimony go to weight, not admissibility. The trial court erred in disregarding Taylor's testimony and dismissing Dalen's medical malpractice claim on summary judgment.

**4.5 The trial court erred in dismissing Dr. Kranz and Cascade Emergency Associates as parties because Dalen presented a material issue of fact on whether they had been properly served.**

Defendants testified that Dr. Kranz and Cascade Emergency Associates were never properly served with the summons and complaint. Dalen notified the trial court that PeaceHealth's risk management department had accepted service on behalf of all defendants. Dalen requested a deposition of two PeaceHealth employees who could have testified regarding the acceptance of service, but defendants refused to allow the depositions to take place.

The trial court should not have allowed defendants to benefit from their own refusal to permit legitimate discovery related to their affirmative defense. There is sufficient evidence in the record that a material issue of fact exists. Dalen only needed the opportunity to obtain the evidence. She requested the opportunity at the second summary judgment hearing, but

the trial court refused to continue the matter any further. This Court should reverse the dismissal of Dr. Kranz and Cascade Emergency Associates as parties and remand to allow the deposition to take place.

**4.6 The trial court erred in dismissing Dalen’s emotional distress claims because they arose from the defendants’ conduct *after* the incident and therefore are not barred by RCW 7.70.030.**

The trial court dismissed Dalen’s claims for negligent infliction of emotional distress, intentional infliction of emotional distress, and outrage under RCW 7.70.030. The statute limits the available causes of action “for injury occurring as the result of health care.” RCW 7.70.030.

Dalen’s emotional distress claims arose from the defendants’ conduct **after** the incident.<sup>5</sup> After forcing Dalen to undergo unconsented and unnecessary health care treatments, ignoring the head injury that was Dalen’s reason for going to the emergency room, defendants had the audacity to try to recover over \$3,000 in medical bills. *See* CP 95-96. During that process, many hateful things were said to Dalen, causing her extreme emotional distress. To add insult to injury, Dr. Kranz posted an

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<sup>5</sup> While Dalen’s claims for negligent infliction of emotional distress, intentional infliction of emotional distress, and outrage are not related to health care, Dalen does not waive her right to recover for emotional distress *as an element of damages* in her other, health-care-related claims.

online comment asserting that Dalen had been mentally ill or on drugs and that she should be grateful for the treatment she received. CP 92.

The emotional distress Dalen suffered as a result of defendants' post-incident conduct is not an "injury occurring as the result of health care." It is an entirely new injury occurring as the result of subsequent, non-health-care-related conduct by defendants. As such, these claims are not barred by RCW 7.70.030. The trial court erred in dismissing Dalen's emotional distress claims on summary judgment.

## **5. Conclusion**

Defendants were not entitled to immunity for providing emergency health care or for involuntary commitment. Dalen presented evidence supporting her claims for lack of consent, violation of Chapter 71.05 RCW, and medical malpractice. Dalen's expert witnesses were qualified to testify and presented material issues of fact on standard of care, breach, and causation. The trial court erred in dismissing Dalen's claims on summary judgment. This Court should reverse dismissal of Dalen's 7<sup>th</sup>, 9<sup>th</sup>, and 10<sup>th</sup> causes of action.

Additionally, defendants should not have been allowed to benefit from their refusal to allow depositions of witnesses who could have testified to service of process on Dr. Kranz and

Cascade Emergency Associates. This Court should reverse dismissal of Dr. Kranz and Cascade Emergency Associates as parties.

Finally, Dalen's emotional distress claims did not arise from health care and therefore were not barred by RCW 7.70.030. This Court should reverse dismissal of Dalen's 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> causes of action.

Respectfully submitted this 14<sup>th</sup> day of May, 2018.

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I certify, under penalty of perjury under the laws of the State of Washington, that on May 14, 2018 (after 5pm), I caused the foregoing document to be filed with the Court and served on Counsel listed below by way of the Washington State Appellate Courts' Portal.

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